

Communal Dimension of the Right to Freedom of Religion

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Abstract

Right to freedom of religion is one of the fundamental human rights recognized in all general international human rights instruments. The basic standard which, with minor differences, is followed by subsequent instruments is embodied in Article 18 of the Universal Declaration of Human Rights. The Article speaks of the right as the right of everyone “to freedom of thought, conscience and religion”. It further states that “this right includes ... freedom, *either alone or in community with others* and in public or private, to manifest his religion or belief in teaching, practice, worship and observance” (emphasis added). Thus, the right is a complex right. This complexity arises not only from the fact that the right encompasses two internal and external elements (maintaining, adopting or changing a religion and manifesting it) but from the statement that it comprises both individual and communal or collective dimensions. The communal aspect of the right relates to freedom to manifest one’s religion or belief. While the content of the right to freedom of religion is far from being settled, the communal dimension of the right seems to be the most controversial. The law, doctrine and practice of international human rights do not shed much light on the content and extent of this dimension of the right. There are serious questions here. Does the communal aspect of the right give an entitlement to a community of a religion’s believers to establish a political authority to enact, execute and implement the teachings of their religion? Does this communal dimension validate a legal system based on the rules of a particular religion? Put it another way, does the right to freedom of religion support the claim of a community to establish a religious state in order to give effect to or manifest the tenets of their religion? The answer to this set of questions is not clear. When the issue is put in a broader context it does relate to the question of the (in)compatibility of a religious state with human rights.

This article is an attempt to put forward some reflections and remarks on the above series of questions. The author’s argument is that the communal dimension of the right to manifest one’s religion warrants the claim of the majority of a population to establish a religious legal system based on the teachings of their religion provided that the system does not come into conflict with other internationally recognized human rights.

1. The Normative Framework of the Right to Freedom of Religion

Freedom of religion is one of the oldest rights now recognized as human rights. Apart from its historical traces in various cultures of the world, teachings of religious leaders, orders of Kings and Emperors, thoughts of thinkers and philosophers, and national legislation¹, right to freedom of religion is now expressly recognized in international human rights instruments.²

The normative framework for the analysis of the content of the right to freedom of religion is built on these legal instruments plus the work of human rights bodies. The cornerstone provision is Article 18 of the UDHR. It declares that, “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Instruments subsequent to the UDHR use almost the same language in formulating the right to freedom of religion. The most expansive statement of the right in general international instruments is Article 18 of the International Covenant on Civil and Political Rights (ICCPR) of 1966. This Article contains 4 paragraphs. The first paragraph states the right almost in the same language as of the UDHR. The only significant difference between the two instruments is that the ICCPR does not contain “freedom to change” one’s religion. The significance of this omission is, however, diminished by the fact that “freedom to

1. For a brief historical study see, Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, UN Doc. E/CN4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2; See also, Brice Dickson, ‘The United Nations and Freedom of Religion’, 44 *International and Comparative Law Quarterly* 327 (1995); Danna J. Sullivan, ‘Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’, 82 *American Journal of International Law* 487 (1989).

2. Article 18 of the Universal Declaration of Human rights, Article 18 of the 1966 International Covenant of Civil and Political Rights, Article 9 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 12 of the 1969 American Convention on Human Rights and Article 8 of the 1980 African Charter on Human and Peoples’ Rights. For the reprinted text of these and other relevant international instruments see, *Human Rights and Religion: Basic Documents*, Center for the Study of Human Rights, Columbia University, 1998.

have or to adopt a religion or belief” of one’s choice implies that one ought to be free not to have or maintain his/her current religion. When it is said that a person is free to have something, its corollary is that he is free not to have that thing any more. This is why the UN Human Rights Committee, as the supervisory organ of the ICCPR, in its General Comment No. 22, “observes that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one’s current religion or belief with another”.¹

2. The Internal Aspect of the Right to Freedom of Religion

Freedom to “have”, “adopt”, “hold” or “maintain” and freedom to “change” or “replace” a religion or belief of “one’s choice” constitute the internal aspect of the right to freedom of religion. The internal dimension of the right refers to one’s freedom to believe in any religion in his/her mind, soul and heart. Religions start from the most intimate spiritual sphere of the individual. As such, religious belief is “an intensely personal matter, every individual being able to decide for him or herself which set of beliefs to adopt”.² In the words of the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,³ “religion ... is one of the fundamental elements of” one’s “conception of life”. This conception is one’s own world and is the innermost part of the individual where nobody can step in. No one may be ordered to believe or not to believe in a given religion. The

1. United Nations Human Rights Committee, General Comment No. 22 (Article 18), adopted on 20 July 1993. U.N. Doc. HRI/GEN/Rev.1/Add.4 (1993). Reprinted in *Human Rights and Religion: Basic Documents*, op. cit., pp. 92-95.

2. Brice Dickson, *op. cit.*, p. 327.

3. United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, proclaimed by United Nations General Assembly Resolution 36/55 on 25 November 1981, reprinted in *Religion and Human Rights: Basic Documents*, op. cit., pp. 102-104. For the drafting history of the declaration and an analysis of its content see, e.g., Derek H. Davis, The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 2002 *Brigham Young University Law Review* 217.

internal aspect of freedom of religion is a domain of absolute freedom. Thus paragraph 2 of Article 18 of the ICCPR says that, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”. The internal dimension of the right to freedom of religion is not, as may be said, immune of external pressures. It is quite possible that a person be subject to the use or threat of physical force or penal sanctions to be compelled to adhere to his/her religious beliefs and congregations, to recant his/her religion or belief or to convert.¹ It is also possible that a person be brought under what may be called mental bombardment or propangada to form a religious conviction or give up his/her current beliefs. Also one may be barred from access to alternative sources of information and materials in order to have an informed choice of religion. Be as it may, the internal aspect of freedom of religion is not shared by anyone else; it is an individual right.

3. The External Aspect of the Right to Freedom of Religion

But perhaps there is no religion that can be confined to a set of beliefs residing only in its believers’ heart and soul. In the words of the European Court of Human Rights, “Bearing witness in words and deeds is bound up with the existence of religious convictions”.² This brings us to the external dimension of the right to freedom of religion. All human rights instruments relevant to freedom of religion recognize everyone’s freedom to manifest his/her religion. These instruments do not, however, specify the protected manifestations of religion. It is true that all instruments protect the right to manifest one’s religion in “teaching, practice, worship and observance”. But these are not given any content.

Manifestations of religion may take various forms. It seems that these forms of manifesting one’s religion are not exhaustive. It can be said that freedom to manifest a religion may take any form depending

1. UN Human Rights Committee, General Comment No. 22, *op. cit.*, para. 5.

2. *Kokkinakis v. Greece* judgment, 25 May 1993, Series A No. 260-A, p. 17, para. 31, quoted in Gilles Dutertre, *Key Case-Law Extracts: European Court of Human Rights*, Council of Europe Publishing, 1993, p. 227.

on the circumstances and the requirements of the religion in question. There have been some attempts to clarify this aspect of freedom of religion. Here I mention two of such attempts.

The study by Arcot Krishnaswami is still the major source in this regard. Chapter III of the study explores the content of freedom to manifest religion or belief. The Chapter is divided into two sections: a) freedom to comply with what is prescribed or authorized by a religion or belief; b) freedom from performing acts incompatible with the prescriptions of a religion or belief. For our purposes, it is worthy to list the kinds of acts which are included in the two headings. Under the first heading come the following: i) worship; ii) processions; iii) pilgrimages; iv) equipments and symbols; v) arrangements for disposal of the dead; vi) observance of holidays and days of rest; vii) dietary practices; viii) celebration of marriage and its dissolution by divorce; ix) dissemination of religion or belief; x) training of personnel. Krishnaswami explains in detail the situation of each manifestation in different countries. He then mentions the following under the second heading: i) taking of an oath; ii) military service; iii) participation in religious or civic ceremonies; iv) secrecy of the confession; v) compulsory prevention or treatment of disease.¹ The unlucky Draft International Convention on Elimination of All Forms of Religious Intolerance which was produced by UN Human Rights Commission in 1965, though never became a convention, attempted to provide protection to manifestations of religion. The Draft Convention obliged, in its Article 3 (2), the States Parties to ensure the following to everyone within their jurisdiction:

a) Freedom to worship, to hold assemblies related to religion or belief and to establish and maintain places of worship or assembly for these purposes;

b) Freedom to teach, to disseminate and to learn his religion or belief and its sacred languages or traditions, to write, print and publish religious books and texts, and to train personnel intending to devote

1. Arcot Krishnaswami, *op. cit.*, pp. 25-39.

themselves to its practices or observances;

c) Freedom to practice his religion or belief by establishing and maintaining charitable and educational institutions and by expressing in public life the implications of religion or belief;

d) Freedom to observe the rituals, dietary and other practices of his religion or belief and to produce or if necessary import the objects, foods and other articles and facilities customarily used in its observances and practices;

e) Freedom to make pilgrimages and other journeys in connexion with his religion or belief, whether inside or outside his country;

f) Equal legal protection for the places of worship or assembly, ceremonies and activities and the places of disposal of the dead associated with his religion or belief;

g) Freedom to organize and maintain local, regional, national and international associations in connexion with his religion or belief, and to participate in the activities, and to communicate with his co-religionists and believers;

h) Freedom from compulsion to take an oath of religious nature.¹

The UN Human Rights Committee appears to be inspired by these two works when it declares in its General Comment that, “The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief

1. Report of the Economic and social Council on its Forty-Second Session, 22 U.N. GAOR Supp. (No. 3) 74, UN Doc. A/6703 (1967) quoted in Roger S. Clark, ‘The United Nations and Religious Freedom’, 11 *New York University Journal of International Law and Policy* 197 (1978-1979), at 211-12.

includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”¹

4. Limitations on Freedom of Religion

The right to freedom of religion in its internal aspect is an absolute right. But the external aspect of the right, that is the right to manifest a religion is not the domain of absolute freedom. Since the manifestation of a religion relates to the outer world of human relations, it may come into conflict with both the rights of other people and what is considered as public interests. This aspect of the religious freedom is thus subject to limitations. While the UDHR does not contain particular limitation clause specific to each right, it subjects all rights and freedoms enunciated in the Declaration to general limitations of Articles 29 and 30. Paragraph 1 of Article 29 recognizes that, “Everyone has duties to the community in which alone the free and full development of his personality is possible”. Therefore, right to manifest a religion as a means of one’s achievement of his/her personality and identity is only possible in a community in which everyone feels obliged to fulfil his/her duties. Thus limitations to rights and freedoms of individuals aim to maintain such a community. Paragraph 2 states that, “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. Another limitation to the rights and freedoms set out in the UDHR which runs through the whole system of international human rights is found in Paragraph 3 of Article 29: “These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations”. The ICCPR contains two set of limitations

1. UN Human Rights Committee, General Comment No. 22, *op. cit.*, para. 4.

to the rights enshrined in the Covenant. The first set is a general provision in Article 4 which permits the States Parties to derogate from their obligations “in time of public emergency which threatens the life of the nation”. But the same general provision excludes certain rights in the Covenant from the application of the derogatory clause. It is to be noted that the right in Article 18, that is the right to freedom of thought, conscience and religion is among the excluded rights. Therefore freedom of religion is only subject to the limitations that are specified in Paragraph 3 of Article 18 of the Covenant. This paragraph provides that, “Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. To synthesize, the only limitations on the external act of manifesting a religion are limitations that are a) prescribed by law; and b) necessary to protect public safety, order, health, or morals or the fundamental rights of others.¹

5. Right to a Religious Legal System

Religion has been defined in a wide variety of ways.² Religions, at least the ones known to this author, are far more than a set of private beliefs. It is understood that religion embraces not only beliefs or creeds but also cult and codes of conduct and confessional communities. Creeds refer to the “accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rites, rituals, and patterns of worship and devotion that give expression to those beliefs. A code of conduct defines the appropriate individual and social habits of those who profess the creed and practice the cult. A confessional community defines the group of individuals who embrace and live out this creed, cult, and code of conduct, both on their own and with fellow

1. See, Johan Van der Vyver, ‘Limitations of Freedom of Religion or Belief: International Law Perspectives’, 19 *Emory International Law review* 499 (2005). For a study in the case law of the European Convention on Human Rights see, Javier Martinez-Torron, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’, *ibid.* 587.

2. For some of these definitions see, <http://en.wikipedia.org/wiki/Religion>.

believers.” Therefore, “religion consists of both beliefs and the social articulation, implementation and elaboration of those beliefs”.¹ This social aspect of religion is the manifestations which the followers of a religion give to it in their relations with others in the society. Apart from the desire and feeling of religious people to translate their beliefs into actions, religions require the believers to perform certain acts and to forbear from certain others. The external aspect of the right to freedom of religion may be exercised either individually or in community with others. The elements of this aspect of the right, i.e. worship, practice, observance and teaching, are broad enough to give an entitlement to a community of believers to live according to the rules of their religion. Recognition of the communal manifestation of religion stems from the fact that religions are not merely a set of beliefs or doctrines; they are a way of life as well.² Viewed in this perspective, religions are normative orders, prescribing and proscribing certain acts in the relations between human beings. It may be true that not all religions contain a full-fledged set of rules for the conduct of all aspects of social life. But it is true at least of some religions known as “civil religions” in contrast to “personal religions”. These are religions that attempt to regulate the needs of a civil society such as a nation.³ The extent to which religions regulate the social affairs of the believers is different. Some religions offer practical rules in various fields ranging from the conduct of marriage to the conduct of armed conflicts, from economics to politics. Some are modest in their claim to guide the behavior of the human beings. Anyway, in theory, a group of adherents to a religion has the right to manifest their religion in their social life. Manifesting a religion in this way means to put into practice the teachings of that religion. The community of believers is thus entitled under the right to freedom of religion to

1. John Witte, Jr., ‘Law, Religion, and Human Rights’, 28 *Colum. Human Rights L. Rev.* 1, 1996, at 4-5.

2. See, T. Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’, 16 *Harvard Human Rights Journal* 189 (2003).

3. T. Patrick Burke, *The Major Religions: An Introduction with Texts*, Blackwell Publishers, 1996, p. 6.

conduct their affairs according to what they understand to be the rules of their religion. This community may be either in the majority or minority position in the society they live in. When in the minority position, the adherents to a religion have the right to have their own legal system. There are various international and regional instruments that recognize the right of minorities to practice their religion. Article 27 of the ICCPR provides that, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, *to profess and practice their own religion*, or to use their own language”. (Italic added) The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and linguistic Minorities¹ in its Article 2 uses the same phrase. Paragraph 1 of Article 5 of the Framework Convention for the Protection of National Minorities² also provides that, “The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage”. The Draft UN Declaration on the Rights of Indigenous Peoples specifically mentions in its Article 4 the right of indigenous peoples to maintain and strengthen their distinct political, economic, social and cultural characteristics, *as well as their legal systems*”. (Emphasis added) Now that the right of a religious minority to preserve and maintain their legal system is recognized, the right of a community of adherents of a religion who enjoys the majority status is *a fortiori* protected under the international human rights law. To establish and maintain a religious legal system is tantamount to establishing a religious state. The rise of religion in international relations which is witnessed nowadays highlights the importance of this proposition. Indeed, religion plays a

1. Adopted and Proclaimed by United Nations General Assembly Resolution 47/135 on 18 December 1992. For the text of the Declaration see *Human Rights and Religion: Basic Documents, op. cit.*, pp. 162-164.

2. Opened for Signature by the Council of Europe on 1 February 1995. European Treaty Series No. 157. For the text see *ibid.* pp. 165-171.

major role in many constitutions of the world. Speaking about the Muslim countries, one author reports that, “ Today 34 states with majority Muslim populations have written constitutions. Of these, 23 (to which should be added Oman and Saudi Arabia) have officially proclaimed Islam to be the principal source of law”.¹ This is an state practice that supports the right to a religious state. There is no international law rule that bars a nation to establish a religious state. On the contrary, the principle of self-determination of peoples and the right to freedom of religion do recognize and support the above conclusion. This is not the whole story, however. Not all manifestations of religion and not all practices exercised under the name of religion are permitted. As we saw, there are limitations to the exercise of the freedom of religion in its external dimension. Drawing upon these limitations, the right to freedom of religion warrants the establishment of a religious state only if the purposes and principles of the United Nations are not undermined and if the fundamental rights and freedoms of others are adequately protected. Thus, while there is certainly a right, in principle, for a community of believers to be run according to the principles and rules of their religion, there are limitations to the exercise of such a right. These limitations, based on the above, may be classified into two categories: a) limitations on the manner of establishing the religious state; and b) limitations on the legal and political authority of such a state. The first limitations include the right of everyone to “take part in the government of his country, directly or through freely chosen representatives”. In other words, a religious state is only legitimate if it is formed on the will of the peoples as the basis of the authority of government, a will which is expressed in “periodic and genuine elections” (Article 21 of the UDHR). The second set of limitations are imposed on a religious state to guarantee the rights of others which have no other meaning but their human rights. These limitations may be summarized as: equality between believers and non-believers in the enjoyment of human rights, which stems from

1. Donna E. Arzt, ‘Religious Human Rights in Muslim States of the Middle East and North Africa’, 10 *Emory International Law Review* 139 (1996), at 140.

the basic principle on non-discrimination; equality of men and women; equality in access to public offices and freedom of religion of minorities. Thus we came to the point that freedom of religion includes freedom to establish and maintain a religious legal system provided that the inception and conduct of the system do not conflict with the principles of international law as provided for in the United Nations Charter and the fundamental rights and freedoms of others.