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Questions of "Religion and . . ." are prone to generate controversy. Consider, for example, the so-called "science and religion" debate, focusing on whether science and religion are compatible with each other.[1] Juxtaposing religion with something else immediately tends to summon up a hermeneutic of opposition which, rather than facilitating an exploration of the relationship at hand, often has the effect of calling into the question the legitimacy of there being a relationship at all. Nowhere does this seem to be truer than in the context of religion and human rights, where the relationship is so often assumed to be one of contradiction, if not of outright conflict.[2]

From the very outset of its being recognized as a part of the canon of international human rights law, the freedom of religion has been the subject of a double pressure, both from within and from without. From within, it has been under pressure to be aligned with freedoms pertaining to non-religious forms of belief.[3] The idea that

* Professor of International Law, University of Bristol, UK. This is a lightly reworked text of an address given at the Brigham Young University Law & Religion Symposium on October 6, 2013, and is based in part on a chapter by the author in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS (Scott Sheeran & Nigel Rodley eds., 2014).

1. For perhaps the most prominent example of this controversy in popular writing, see RICHARD DAWKINS, THE GOD DELUSION (2006), which prompted a series of debates and responses, including works by ALISTER MCGRATH & JOANNA COLLICUT MCGRATH, THE DAWKINS DELUSION?: ATHEIST FUNDAMENTALISM AND THE DENIAL OF THE DIVINE (2007); KEITH WARD, WHY THERE IS ALMOST CERTAINLY A GOD: DOUBTING DAWKINS (2008); and ALISTER MCGRATH, WHY GOD WON'T GO AWAY: ENGAGING WITH THE NEW ATHEISM (2011).

2. A tendency not limited to those who speak from a position antithetical to religion: see, for example, the intriguingly titled collection of essays, DOES GOD BELIEVE IN HUMAN RIGHTS? (Nazila Ghanea, Alan Stephens, & Raphael Walden, eds., 2007).

3. This is reflected in the freedom being cast as the freedom of "thought, conscience and religion" and that there be protection of manifestations of "religion and belief." The European Court of Human Rights has frequently held that article 9 of the ECHR includes non-religious patterns of belief, commenting that "it is a precious asset for . . . ." Kokkinakis v. Greece, App. No.14307/88, 260-A Eur. Ct. H.R. (ser. A) 18, ¶ 31 (1993); *see also* U.N. Human Rights Comm., 48th session, Gen. Comment No. 22, Art. 18, U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 1 (1993).

religious belief *per se* should be the subject of particular protections as a human right has never gained particular traction, and as a result, the freedom of religion is "internally moderated" by this parallelism with other forms of "conscience-freedoms." This tends to mean that, rather than focusing on freedom of religion itself, attention is more often focused on the manner in which other human rights ideals—such as thought, expression, association, equality, and non-discrimination—find their outworking in the context of religious belief and belief systems.

The external constraint—the "constraint from without"—is the view that there is a question mark over the legitimacy of freedom of religion being protected as a human right at all. It is quite remarkable that many of those who fervently support it, let alone those who fervently oppose it, embrace the idea that there is not only a right *to* the freedom of religion but also the mirror-image right (nowhere formally articulated) to the "anti-right": the right to be free *from* religion.[4] It is difficult to think of any other "freedom-right" that has an "anti-right" of this nature associated with it in quite this fashion. For example, the freedom of expression is not said to imply a right to freedom from expression, or the freedom of association a freedom from association, etc.[5]

To the extent that this means no one ought to be forced into accepting forms of religion or religious practices, this is (or ought to be) entirely unexceptional and completely welcome. However, it has been taken to mean a great deal more than this and reflects the distinctly cool—and sometimes downright hostile—attitudes which some (many?) within the human rights community have towards religion as a human right. Arguably, this has been of relatively little consequence until quite recently, due to the relative lack of engagement with freedom of religion by those working within the

4. *See, e.g.*, U.N. Human Rights Comm., Gen. Comment No. 18 (n. 2) ¶ 2: "[A]rticle 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief." This is also found in the case law of the European Court of Human Rights. *See, e.g.*, Lautsi v. Italy, App. No. 30814/06, 2011 Eur. Ct. H.R. (Grand Chamber), ¶ 60 ("[A]rticle 9 of the Convention . . . guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion.").

5. It is, of course, the case that one cannot be forced to express views one does not wish to express or associate with people one does not wish to associate with. But this is not the same as saying that one has the right to be "free" from "expression" or from "association" in the sense of not being "exposed" to expression or association, and this is the claim that is indeed sometimes made as regards the freedom "from" religion.

field of human rights at all. Following 9/11, however, religion has become a more prominent—and increasingly dominant—feature in international relations, resulting in a greater politicization of religion within the human rights field. Some have responded to this by arguing that in order to return to a "safer" and more secure world, it is necessary to depoliticize the freedom of religion by returning it to the obscurity from whence it came. In short, if, in international affairs and in the human rights sphere, "religion is trouble," then "no-religion" is trouble averted.

There is much that could be said against this approach, but perhaps the most telling objection concerns its underlying premise, which is that religion is a marginal concept which has attained too great a prominence within human rights thinking. From a purely historical perspective, this is quite wrong and it is the opposite which is the case. Although human rights thinking has become an increasingly prominent discourse in international affairs over the last sixty years, it is only in the last ten years—twenty at the most—that it has taken so central a stage.[6] Across this time, the influence of religion as an ordering worldview has remained a dominant force, and perhaps increasingly so. It is the rise of human rights thinking and its implications for religious thinking, rather than the rise of religion as a challenge to human rights thinking, that has accentuated the debate. In short, it is human rights thinking, not religious thinking, that is the "new kid on the block"—something that human rights theorists are apt to forget.

Once again, however, perceiving the relationship in this manner smacks of dualism and clashes of right and wrong, which are not only unhelpful, but can also become downright dangerous. For example, I have been party to many serious discussions in which evidence of egregious violations of basic religious rights of believers have been countered with examples of situations in which *other* religious believers (of either the same or of other faiths) have not been particularly accommodating of the rights of others—perhaps of women or of LGBTIs—or have sought to restrict the right of others to express themselves through the use of blasphemy laws, etc. It is as if it were acceptable to say: "Yes, we know that group X is being persecuted for their beliefs. But if we protect group X in the

6. For a perceptive study of why this might be so, see SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

enjoyment of their religious beliefs, we will be failing to properly protect the human rights of others because religious believers do not always respect human rights." Such logical non-sequiturs and unproven consequentialism would quickly be rejected in other areas of human rights thinking: a State is not generally accused of endorsing criminal conduct or of prejudicing the rights of victims of crime because of its insistence that those charged with criminal offences receive a fair trial. It is all the more strange that there should be such a reluctance to protect the rights of religious believers lest it be thought that in doing so one is supporting and encouraging their beliefs.[7] A victim should be seen as a victim—not as a potential perpetrator.

Be that as it may, mutual doubt and hesitation permeate the relationship between religion and human rights, and a sense of dualism pervades the arena. As a result, for many, human rights must be compatible with their faith, whilst for others it is faith that must be rendered compatible with human rights. Much of the doctrinal work in this area—particularly as regards Islam and human rights—has focused on how religious belief and human rights can be "reconciled" through the reinterpretation of one's faith, or by adhering to strands within one's faith tradition that accord with contemporary human rights standards.[8] Yet this process has not only involved Islam. I would argue that—although it takes a different form and reflects different historical, political, social, and theological factors—a similar process is occurring in Europe, focusing on what might be called the secularizing of the public space.[9] Given the

7. Nevertheless, this is a trap into which courts also fall from time to time. See, for example, the judgment of the Chamber of the European Court of Human Rights in *Mouvement Raelien Suisse v. Switzerland*, where it said that "[t]he Court shares the Government's view that acceptance of a poster advertising campaign could suggest that they are endorsing, or at least tolerating, the opinions and conduct in question." Mouvement Raelien Suisse v. Switzerland, App. No. 16354/06, ¶ 52 (Jan. 13, 2011), *aff'd* 2012-IV Eur. Ct. H.R. 373.

8. Of the many works exploring such approaches from a legal perspective see in particular the work of ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A (2008) and ISLAM AND HUMAN RIGHTS: SELECTED ESSAYS OF ADBULLAHI AN-NA'IM (Mashood A. Baderin & Abd Allah Ahmad Naim eds., 2010). *See also* MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW (2003).

9. Of the ever-growing literature on this, see, for example, ROGER TRIGG, RELIGION IN PUBLIC LIFE: MUST FAITH BE PRIVATIZED? (2007); RELIGION IN A LIBERAL STATE (Gavin D'Costa, Malcolm Evans, Tariq Modood, & Julian Rivers eds., 2013); ISLAM AND ENGLISH

nature of western Christian doctrine, the so-called debate about the role of religion in public life seems to fulfill a function very similar to the debate concerning schools of interpretation within Islamic thinking. In both, the central issue is not about secularity, neutrality, or theological inquiry; it is about forging an approach capable of resolving the tensions between religion and human rights.

Once again, however, we find ourselves drawn back to the "religion and . . ." question, which is why both these lines of inquiry, and others like them, are ultimately so unsatisfactory. This is not to say that they are unhelpful. Such discussions can be profoundly helpful in clarifying lines of thinking and the issues that underlie them. Yet, they can only assist in addressing the "tension" to the extent that those engaged in the discussions concerning, say, the role of religion in public life or the acceptability of principles of theological interpretation continue to share a sufficiency of common space. One has to have agreement on what constitutes the "public" as opposed to the "private" sphere; on what falls within the scope of public life and what does not;[10] on what religious texts are to be subject to interpretation of whatever nature; and so on, if these processes are to yield fruit. The real problem, then, lies in the assumption that ultimately there are limits to the common space within which shared discourse can generate positive outcomes. If all one is doing is redefining the parameters of the "problem," one is merely relocating the source of future tension, rather than identifying a means of addressing it.

Need it be this way? It is often overlooked that the originators of contemporary international human rights thinking—as with so many other aspects of international humanitarianism—did not only derive inspiration or motivation from their religious beliefs, but also that the protection of religious believers originally lay at the heart of the enterprise.[11] It has also been argued that there is something of the

LAW: RIGHTS RESPONSIBILITIES AND THE PLACE OF SHARI'A (Robin Griffith-Jones ed., 2013).

10. For example, is buying a postage stamp in a state-run post office to be understood as a public event? If so, then does the religious clothing worn by the person buying the stamp become a matter of legitimate public concern?

11. *See generally* MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE (1997). For the interplay between religion and international law more generally, see MARK W. JANIS & CAROLYN EVANS, RELIGION AND INTERNATIONAL LAW (2d ed. 2004). For an earlier work predating the "human rights" era on this, see NORMAN BENTWICH, THE

"religious" about the espousal of human rights,[12] which perhaps finds some reflection in the contemporary trend towards grounding both religion and human rights in the concept of dignity.[13] Whatever one's view on this, it does offer a different approach to understanding the relationship between religion and human rights.

Rather than an approach based on identifying a means of accommodation that is mutually acceptable to the various camps concerned (which also reinforces the sense of there being a separation between them, a gulf to cross, a bridge to build), it points to an approach founded upon their commonalities. This is not to suggest that religion and human rights are, in some sense, the same. They are not. But they do share an overlapping function, a shared concern with how people are to relate to each other within a governed community. The starting point, then, for a useful exploration of the relationship between religion and human rights begins not with religion, nor with human rights, but with recognition of the contribution each makes to that underlying common enterprise. That each may seek to do more than that is neither here nor there.

This is not without implications, the most troublesome of which might be that it accords legitimacy upon both religion and human rights and seeks to understand them as operating within a shared space. It has already been mentioned that this is a claim that many in religious circles have long denied, and which is still contested by some religious believers.[14] It is also deeply controversial for many of

RELIGIOUS FOUNDATIONS OF INTERNATIONALISM: A STUDY IN INTERNATIONAL RELATIONS THROUGH THE AGES (2d ed. 1959).

12. *See, e.g.*, MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11–42 (1998).

13. For a penetrating analysis of this trend, see Christopher McCrudden, *Human Dignity and the Judicial Interpretation of Human Rights,* 19 EUR. J. INT'L L. 655 (2008).

14. This debate finds reflection in the more general question of "religious autonomy," and in particular, the autonomy of religious organizations from the application of general legal provisions that they consider to be inimical to their religious mission or ethos. Employment law has proven to be a particular flashpoint, particularly the application of general employment law frameworks to ministers of religion. Approaches to this continue to oscillate, with the current trend appearing to be pointing towards enhanced autonomy. See, for example, in the United States, the Supreme Court judgment in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012); in the United Kingdom, the judgment of the Supreme Court in *President of the Methodist Conference v. Preston,* [2013] UKSC 29; and before the European Court of Human Rights, the case of *Sindicatul "Păstorul Cel Bun" v. Romania*, App. No. 2330/09, (GC July 9, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122763. *See generally* Ian Leigh, *Balancing*

a non-religious persuasion who find it difficult to accept the rationality or reality of religious belief, and who are not inclined to accept any implications of religious legitimacy that might have a material bearing upon them. Yet religion and human rights demonstrably exist as forces within the shared space of human governance. The future lies not in trying to understand *the one* in terms of *the other*, but in trying to understand *each* in terms of *each* other: not as forces *pulling in opposite directions*, but as forces directed *at a common endeavor* (albeit not necessarily always doing so in a mutually supportive fashion and neither of which is immune to misunderstanding, misapplication or mistake). To borrow and adapt a phrase, it involves taking religion and taking (human) rights seriously.

I. WHAT DOES THIS MEAN IN PRACTICE?

In recent times there has been considerable focus on a number of issues in which there is perceived to be a straightforward "clash" between the freedom of religion and belief and other rights within the human rights framework. I want to briefly introduce a number of headline issues that have caused considerable debate and which remain ongoing sources of controversy. This will be followed by an outline of what might be regarded as baseline issues that, whilst arguably more foundational to the experience of rights holders, do not seem to be able to gain such traction in the overall debate upon the subject as the headline issues.

A. The Headline Issues

1. Religion and expression

The interplay between the freedom of religion and belief and the freedom of expression is a matter of enduring contention. Ever since the Salman Rushdie affair there has been a tendency to view religion as a potential gag on expression, an idea reinforced by some of the responses to the infamous "Danish cartoons."[15] On the other hand, some religious believers see the freedom of expression as a vehicle for

Religious Autonomy and other Human Rights under the European Convention, 1 OXFORD J.L. & RELIGION 109 (2012).

15. For a discussion of the Danish cartoons, see Paul Sturges, *Limits to Freedom? Considerations Arising from the Danish Cartoons Affair*, 32 IFLA J. 181, 18–82 (2006).

pedalling distressingly hurtful comments or attitudes. So under the European Convention on Human Rights, it has become entirely an uncontroversial proposition that the exercise of the freedom of expression might legitimately embrace imparting "'information' or 'ideas' . . . that offend, shock, or disturb the State or any sector of the population,"[16] whilst "[t]hose who choose to exercise the freedom to manifest their religion . . . must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."[17]

As interesting as it is that the balance has been struck in this way, the more important point is that, thus put, it is not difficult to see why the freedom of religion and/or expression are so often seen as "rights in collision," attracting all the attention that attends such clashes of fundamentals. It is perhaps inevitable that matters concerning the freedom of expression will attract considerable publicity. What is not inevitable, but appears to be commonplace, is for these rights to be portrayed as being at odds with each other. The European Court of Human Rights has stressed the extent to which both rights are foundational to the good of democratic societies;[18] yet rather than engage with each other on this basis when issues arise, the tendency is to seek to resolve them by attempting to assert the primacy of one right over the other. This again makes for a perfect "religion and . . ." question, with the built-in propensity for controversy which it brings.

2. Religion and symbols

There can be little doubt that one of the most contentious issues to have been raised before the European Court of Human Rights in recent times has concerned the presence of religious clothing or symbols in the educational arena, with key cases dealing with the

16. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A), ¶ 49 (1976).

17. Otto-Preminger-Institut v. Austria, App. No. 13470/87, 295-A Eur. Ct. H.R. (ser. A), ¶ 47 (1994).

18. *See, e.g.*, *Handyside*, 24 Eur. Ct. H.R. (ser. A) at ¶ 49 ("Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every[one]."); *See also* Kokkinakis v. Greece, App. No. 14307/88, 260-A Eur. Ct. H.R. (ser. A), ¶ 31 (1993) ("[F]reedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention.").

wearing of headscarves by students[19] and the presence of religious symbols in classrooms.[20] The Court's approach currently oscillates between focusing upon the potential impact the presence of such clothing or religious symbols in state institutions might have upon perceptions of the impartiality of the State in matters of religion or belief in general, and focusing on the actual impact that the wearing or presence of such symbols actually has upon the rights of others. In other words, is it their symbolic significance or their practical impact that is at the heart of the matter? Put in such terms, it becomes clearer that the underlying issue runs even deeper and concerns the place of religion in the public life of the society concerned.

The most significant decision of the European Court on this question is without doubt *Lautsi* v. *Italy*, in which the Grand Chamber unpicked one of its most serious errors of recent times. In a string of cases, the Court articulated the proposition that the State, when exercising its regulatory powers in respect to religious bodies, was to do so in a neutral and impartial fashion.[21] This became misunderstood to mean that the state was to be neutral in matters concerning religion, and thus it was argued that the State ought not to be seen lending credence to any particular religion by permitting it to be visible within the State. Such reasoning, taken to its limits, can lead to bans on members of the public wearing religious clothing in public buildings—and possibly in the streets—and is difficult to reconcile with the idea that individuals have the right to manifest their beliefs in public through observance. The Grand Chamber decision in *Lautsi* pointed to a different approach that could conceivably lead in a different direction when it suggested that the

19. The leading cases remain *Dahlab* v. *Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447, and *Sahin v. Turkey,* App. No. 44774/98, 44 Eur. H.R. Rep. 5 (Grand Chamber 2005), which though not entirely *ad idem*, have both been routinely applied by the Court in subsequent cases such as *Dogru* v. *France*, App. No. 31645/04, 49 Eur. H.R. Rep. 8 (2008), and *Kervanci* v. *France*, App. No. 31645/04 (Eur. Ct. H.R. 2008).

20. Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. (Grand Chamber 2011). For a series of short explorations of *Lausti* from a variety of perspectives, see 6 *Religion and Human Rights* 203–285 (2011). See also the collection of essays in THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM (Jeroen Temperman ed., 2013).

21. The leading case on this remains *Metro. Church of Bessarabia* v. *Moldova*, App. No. 45701/99, 2001-XII Eur. Ct. H.R. ¶ 123 (2001). For an examination of this approach see Malcolm Evans & Peter Petkoff, *A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights*, 36 RELIGION, STATE & SOC'Y 205 (2008).

obligation upon States to be neutral and impartial does not necessarily require the public realm—in this case, a public school room—to be "free" of religion.[22] It remains to be seen whether this does or does not result in a recalibration of the symbols debate. But once again, this illustrates the propensity for the issues concerning the relationship between "religion and . . ." (in this case, in the final analysis, public life) to achieve prominence in public and in rights-based discourse.

Since *Lautsi* there has also been *Eweida* v. *United Kingdom*,[23] which may or may not yet again have altered the parameters within which balances may be struck. This is not a question that needs to be pursued here. What is important is that this remains the basic approach—working out what lies with the State and what lies with the European Court when determining where the balance is to be struck, couched in terms of neutrality (however understood).

B. The Baseline Issues

Some issues relating to the freedom of religion, however, do not seem to attract the same degree of attention as issues concerning films, books, clothes, and symbols. Recent influential studies have pointed to a clear correlation between those countries in which there are significant governmental and social restrictions upon the freedom of religion and high levels of religious persecution and conflict.[24] As reflected in the title of the well-known book by Brian Grim and Roger Finke, there is a price to pay for denying religious freedom.[25] If one looks at the subject matter of the case law of the European Court, one of the recurring issues concerns the denial of legal registration to many religious communities that are then unable to

22. This flows both from its reasoning in *Lausti*, App. No. 30814/06 Euro. Ct. H.R. at ¶¶ 60, 69, and from the more general result, which was to see the presence of such symbols as falling within the margin of appreciation of the state.

23. Eweida v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10, & 36516/10, 2013 Eur. Ct. H.R. (Grand Chamber) (joining four extremely contentious UK domestic decisions). For comment on *Eweida*, see Megan Pearson, *Article 9 at a Crossroads: Interface Before and After* Eweida, 13 HUM. RTS. L. REV. 580 (2013); Mark Hill, *Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in* Eweida and Others v. United Kingdom, 15 ECCLESIASTICAL L.J. 191 (2013).

24. *See* Brian J. Grim, *Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research*, 1 OXFORD J.L. & RELIGION 249 (2012).

25. BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2011).

own property or assert their rights as a community.[26] Others find their meetings disrupted and their members intimidated or arrested.[27] In other words, some of the most fundamental aspects of the freedom of religion are violated on a routine basis. Yet the presence of international human rights law does not appear to be a particularly powerful counter foil to this. Although there have now been many judgments by the European Court of Human Rights on matters concerning registration of religious communities and the need to respect the internal autonomy and property of religious institutions, recent trends in legislation within numerous Council of Europe member States have been towards imposing further restrictions upon religious communities and religious believers rather than lifting them.[28] The force of human rights thinking is not noticeably blunting the edge of violence in the sphere of religion or belief.

We need not pursue this thought further here. All that needs to be noted is that all these violations—and very serious violations—are not about the "freedom of religion and . . ." anything else at all. There is no juxtaposition or clash of rights. There may be multiple breaches—such as violations of the freedom of association, expression, family life, torture or inhuman or degrading treatment, or the right to life—but no "clashes." In any realistic scale of categorization these are, in fact, just about the enjoyment of the freedom of religion or belief. Yet, perhaps this alone is just not enough to attract attention, or protection of the right itself?

26. *See,* e.g., Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, 2001-XII Eur. Ct. H.R.; *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01, 2006-XI Eur. Ct. H.R.; Church of Scientology Moscow v. Russia, App. No. 18147/02, 2007 Eur. Ct. H.R.; Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, App. No. 40825/98, 2008 Eur. Ct. H.R.; Kimlya and Others v. Russia, App. Nos. 76836/01 and 32782/03, 2009-IV Eur. Ct. H.R.; Lang v. Austria, App. No. 28648/03, 2009 Eur. Ct. H.R.

27. *See, e.g.*, 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, App. No. 71156/01, 2007-V Eur. Ct. H.R.; Öllinger v. Austria, App. No. 76900/01, 2006-IX Eur. Ct. H.R.; Sergey Kuznetsov v. Russia, App. No. 10877/04, 2008 Eur. Ct. H.R.; Milanovic v. Serbia, App. No. 44614/07, 2010 Eur. Ct. H.R.

28. See, for example, the critical reaction to the new Hungarian Constitution, which entered into force in January 2012. According to an editorial in *The Times* entitled *Back to Autocracy,* the Constitution "attempts to reimpose state regulation of religion by reducing the number of acknowledged faiths and sects from 300 to 14 while denying any official place in society for Muslim, Buddhist or Hindu congregations unless they have operated in Hungary for at least 20 years." Sam Coates & Roland Watson, *Back to Autocracy*, THE TIMES, Jan. 2, 2012, at 2.

In the face of a rising tide of concern, the relative failure of the machinery of international human rights protection to effectively engage with the problems revealed has resulted in increased pressure to address issues through political channels. There has been a notable increase in the interest shown to freedom of religion issues by the European Parliament and other organs of the EU[29] and by the Parliamentary Council of Europe.[30] Likewise, there is increased mobilization at the national level—the United States has long been in the vanguard here, with the USCIRF, recently joined by Canada, the Netherlands, Norway, and the United Kingdom.[31] If some of the most fundamental problems concerning the enjoyment of the freedom of religion are not more energetically engaged in by the machinery of the international human rights networks, there is every likelihood that there may be a further politicization of a relationship that is already highly—some might say dangerously—politicized. The "solution" to these baseline problems is rapidly slipping through the fingers of the organs of the international human rights community who continue to obsess with minutiae: Will Rome burn while Strasburg fiddles?

C. A Unifying Role of Respect?

Against this background, is there really a positive contribution that can be made by viewing the interrelationship between religion and human rights in a more holistic, mutually reflexive fashion, as was suggested earlier? Certainly, a positive contribution is unlikely to flow from a continuation of the ultimately sterile debates concerning the primacy of one body of thinking, whether it be religious or human rights, over the other. Nor is it likely to come from seeking to identify a series of lowest common denominators on which both

29. *See generally* RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION (2010).

30. *See*, *e.g.,* Parliamentary Assembly Recommendation 1987, ¶ 1.4 (2011) on "Combating all forms of discrimination based on religion" (adopted November 25, 2011), which evidences some dissatisfaction in the efficacy of the legal approaches, by asking that the committee of ministers, "when supervising the execution of judgments of the European Court of Human Rights concerning freedom of religion, notably those concerning registration of religious communities and acts of violence based on religion, strive to ensure their speedy execution."

31. For an overview, see *An Orphaned Right: A Report of the All Party Parliamentary Group on International Religious Freedom*, (2013), [hereinafter *An Orphaned Right*], *available at* https://freedomdeclared.org/media/Article-18-An-Orphaned-Right.pdf.

religious adherents and/or human rights advocates can agree. Nor, indeed, is it going to come from the endless discussion of the meaning of neutrality and—I am afraid to say—models of Church-State relations (important though all these are in their own way).

It is, then, not a question of choosing, negotiating, or deciding upon the nature of the relationship between religion and human rights. Understandings and approaches change within religious and within human rights thinking, and there is never going to be a fixed and stable answer to the question of the relationship between them. To seek to do so is to be aiming at an ever-moving target. Rather, one needs to step back and seek to better understand the key components of religion as a human right and then, bearing this in mind, seek out the principles that should govern religion's interaction with other rights. This will not indicate what those outcomes will be, and will certainly not ensure that there is a consensus for those outcomes when they are decided upon. But it should make it possible to find an approach to the protection of religion as a human right, which coheres with human rights thinking and that transcends the "either/or," or "the religion and . . ." questions that have become so dominant and so damaging. Such an approach will not remove all tensions—it cannot—but it can address many of the tensions that are the artificial product of the inappropriate manner in which they are currently addressed.

This may not be as difficult as is seems. It remains instructive that in the first cases to be determined by the European Court of Human Rights concerning the interplay between religion and expression, the Court swiftly identified a value that is not mentioned in either article 9 or in article 10, but which it thought offered a lens through which to consider the question: the lens of mutual "respect." As the Court put it, "a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others."[32] The key points emerging from the Court's approach to the intersection of the freedom of religion and the freedom of expression are that both rights are of value and should be enjoyed to

32. Kokkinakis v. Greece, App. No. 14307/88, 260-A Eur. Ct. H.R. (ser. A) 18, ¶ 48 (1993); *see also* Otto-Preminger-Institut v. Austria, App. No. 13470/87, 295-A Eur. Ct. H.R. (ser. A), ¶ 47 (1994).

the fullest extent possible without negatively impacting the enjoyment of the rights of others. Mutual respect for the rights of others regarding what is said and how it is said might suggest that restraint would be welcome; but it is not for the State to be the instrument of restraint unless there is a pressing social need to do so. The value of this approach has recently been affirmed by the U.N. Human Rights Committee in its latest General Comment No. 34 on the freedom of expression.[33]

There are lessons to be learned from the approaches adopted by the European Court in this body of jurisprudence that are relevant to other questions concerning the enjoyment of the freedom of religion or belief as a part of the canon of human rights law: does the subject matter of the contestation and of the outcomes the parties are seeking to achieve evidence a mutuality of respect rather than an assertion of right? Or—in simple language—just because you *can* does not mean that you *should*? And is this not what balancing is, ultimately, all about? It should be made clear that respect, in this context, does not imply endorsement of, let alone agreement with, the beliefs in question. Indeed, it may well be that a respectful consideration will nevertheless result in the rejection of some viewpoints as being simply unworthy of respect within the human rights framework.[34] It will certainly mean that some views will be responded to (and respected) in a way others might find unwelcome. Nevertheless, a respect-based approach to rights has already emerged in the jurisprudence of the European Court of Human Rights and may well be worth exploring further as a means of meeting the challenges we face.

The only thing I would insist upon is that we really have to do something. It is both instructive and salutary to re-read the history of the founding moments of the current human rights regime in the

33. *See* U.N. Human Rights Committee, 102d Sess., Gen. Comment No. 34 at 12, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) ("Prohibitions of displays of *lack of respect for* a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.") (emphasis added).

34. See, for example, the decision of the Court in *Norwood* v. *The United Kingdom*, App. No. 23131/03, 2004-XI Eur. Ct. H.R., and the Chamber judgment in *Mouvement Raelien Suisse v. Switzerland*, App. No. 16354/06, ¶ 61 (Jan. 13, 2011), *aff'd* 2012-IV Eur. Ct. H.R. 373, in which the Court went out of its way to hold open (though not decide) the question of whether Raelian beliefs were to be considered within the scope of article 9 (though the grounds for its hesitation are kept opaque). The Grand Chamber too avoided passing comment on this issue (2012-IV Eur. Ct. H.R. 373, ¶ 80).

1940s. What shines through that history is the keen understanding of the need to ensure adequate protection for religious freedoms if the world were to be made a better, safer place.[35] Yet, to use the words of the recent report by UK parliamentarians, it has become the "orphaned right"[36] within that system—or at best a "residual right"—its content determined by what is left when other rights have been realized. Tragically, we are seeing the consequences—and I would indeed suggest that respect might be able to assist us in making sense of the human rights approach to the freedom of religion today, and assist in making the human rights approach more relevant to the problems that it needs to address.

35. See, for example, the illuminating narrative based on the work of Eleanor Roosevelt in MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION ON HUMAN RIGHTS (2001), in which the significance of the freedom of religion or belief is highlighted in a manner lacking in some of the more textually oriented analyses, *e.g.*, JOHANNES MORSINK, 'THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT (1999).

36. *An Orphaned Right*, *supra* note 31.