

Religious Freedom

Law and Rights of Religious Minorities

Christoffersen, Lisbet

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Religious Freedom – Law and Rights of Religious Minorities

Presentation 2nd May 2012 as one of the contributions 11.45-13.00

by Lisbet Christoffersen, Ph.D. of Law, Professor of Law, Religion and Society,

Department of Society and Globalisation, Roskilde University, Denmark

1. Religious Freedom

I will not here retrace the historical background for the concept of freedom of religion in the religious texts of the three book religions – you have already been mentioning them – and neither of the legal and political history of the Ottoman Empire, the Byzantine and the West-Roman areas with the different experiences of plural religious understandings, in some periods living peacefully together, in other periods going to war at least formally on basis of religion, you have also been mentioning these historical experiences already.

In the country, I come from total freedom of religion has been reality since 1849, based on the constitution. The only possible limits are towards religious practices against public order, understood narrowly as against the criminal code – and no cases have been raised in order to narrow the religious freedom of individuals or collectives on these grounds.¹

The UN Declaration from 1948 and later the International Convention of Civil and Political Rights (1966, in force 1976), art 18, understand freedom of religion as the right **either individually or in community with others and in public or private to manifest (their) religion or belief in worship, observance, practice and teaching.**

Freedom of religion is thus a protection of both the internal persuasion of the individual (forum internum) and the external manifestation, being that through worship, observance, practice and teaching. Narrowly speaking freedom of religion and belief thus protects the *vertical* right to a relation to God, performed through different sorts of practices, all related to a religious understanding of how to lead your life. Some of these practices are mostly performed individually;

¹ See further e.g. Christoffersen in Jørgen S. Nielsen (eds): *Islam in Denmark*, Ashgate 2011

others such as many sorts of worship and observance are most often done collectively.

Also here the possibilities of restriction from the side of the state are limited. Freedom of religion can only be limited by the State if the restriction is **legally prescribed** and **clearly needed to pursue a legitimate aim**, either of which can only be **protection of public safety, order, health, or morals or the fundamental rights and freedoms of others**. Any restriction must meet the requirements of **proportionality**; they must be limited to a **minimum of interference** and they must be **enacted in a strictly non-discriminatory manner**.

The European Convention on Human Rights (1953) finally underlines that the individual right to freedom of religion includes a right, not only to **have** and to **adapt**, but also to **change** religion or belief. That is: a right for the individual to leave his or her religious community without being target of any sort of offences is included and so is a right for individuals and groups to proclaim their religious belief in order to persuade others to be their followers, even though *proselytism* – a difficult concept, but meaning an unfair form of preaching religion in a manner comparable with enforcement – is not allowed.²

Finally is also a right for the individual not to have any religion – i.e.: *atheism* is also protected by these freedoms and rights.

It could be relevant for a dialogue oriented process on freedom of religion to underline these basic rights.

2. Who is a Religious Minority?

I am, on basis of the concept freedom of religion, asked to speak about ‘law and rights for religious minorities’, the first question however being: who can count as a religious minority – and is it at all a relevant concept or should we stick to the concept freedom of religion?

Let me explain this question: last year I had the pleasure to interview a group of religious and civil leaders in my country about religion and secularity in relation

² See Kokkinakis vs Greece, ECtHR appl 14307/88

to family laws, labour market legislation, the public space and state support to religious groups. The distinction between minorities and majorities was part of the scientific idea behind the questionnaire, as it is a fundamental part of the human rights thinking. One of our informants – he is actually present – was the catholic voice in our sample and I asked him about being a religious minority in Denmark, where the Catholics are only 1% of the population but was met with the question, I am also raising here: who is a minority? Catholics are half part of Christianity and actually Danes were Catholics half part of their Christian identity. We heard a voice along the same lines from one of you also yesterday: Christians in the Middle East should not be treated as minorities or foreigners, but as citizens of the Middle East with equal rights as Muslims and others in the Middle East.

The understanding has for a long time being that minorities deserve more protection than majorities, simply because the understanding could be that majorities have better possibilities already. An English court case (*British Airways*),³ shows the problem: a stewardess within BA was allowed to wear a Hijab, whereas a Christian stewardess was not allowed to wear a cross as jewellery. She felt, that minority protection gave members of one religion better rights in an unfair manner.

It could be relevant in a dialogue oriented process to discuss this basic concept of ‘minorities’ as a special ground for protection

3. Collective Religious (minority) Rights

As mentioned, many dimensions of the vertical relation to God, the religious practices or manifestations, are best performed collectively. There is thus no doubt, that religious groups have rights related to simply being religious. That is: they have rights to associate, to assemble, to organise and to perform certain practices, simply because these practices are religious and the limits for the state to intrude in these practices are narrower than into other associations and organisations.

That means that religious groups have rights as groups to organise according to their self understanding; to appoint leaders, to establish surroundings for worship

³ Eweida vs British Airways, pending for ECtHR

etc (private or public) and to lead the internal organisation of the group as a religious group – and of course a right to establish buildings useful for their religious practice.

Access to *legal status* in a non-discriminatory manner (that is: not only for well known religions, but also for what the French call sects or cults and the Americans call new religious movements) – and not only for minority religions, also for majority religions.

Also groups which a majority religion see as part of their tradition have a right to break the bond to the bigger society and establish a community of their own and be protected in doing so by state law.

And it is not allowed to require of individual believers that they testify their belonging to a specific religious group – it is however part of collective freedom of religion that the leadership of the group is held *accountable*, both internally and externally and the society could require *transparency* in regard to internal organisation, leadership, economical structure etc in order for the community to have *legitimacy* both internally and externally.

Finally, states have no rights, neither in regard to majority nor minority religions, to take control of religion by defining its *content and concepts*. I here refer to the Special Rapporteur on Freedom of Religion and Belief, Heiner Bielefeldt, who in a notice to the general assembly of UN in December 2011 made a remarkable report on recognition issues including the position of what he calls state religions.⁴

I do not know whether you see any problems in your countries regarding these basic, what I here call vertical rights for religious groups, being they minorities or majorities?

If we however broaden the concept *freedom of religion* also *horizontally* to cover e.g. taking religion into account when deciding on official functions in the state, appointment of judges, election of members of parliament etc – or the question of taking religion into account when hiring employees on the labour market, then the starting point in the Danish constitution is, that discrimination – or distinction – on basis of religion is prohibited. That has been the constitutional norm since 1849, however only set through over the next periods of years. When deciding the

⁴ A/HRC/19/60

constitution on this point, the members discussed that this rule would result in Jewish members of the Danish Supreme Court – and the answer was, that, yes of course, since in the court you are not Jew or Catholic or protestant, you are a judge, judging law of the land. It is thus part of the Danish tradition since the Lutheran Reformation, that law is law and law is secular – but also that this secular law has to protect and support religious groups in their rights and possibilities. Consequently for example marriages in our country can be performed either totally civilly, in the Lutheran majority church or in any of the religious minority groups, including of course evangelicals, catholics and muslims (just to mention those present here) as long as they have applied for recognition of the right to perform marriages with civil effect. Some however prefer not to apply for that position in order to advice young people to get married civilly at the city hall and then get a religious marriage within the group. Others do not want to establish a marriage with civil consequences and only perform the religious marriage for the imam, e.g. This situation is now called *limping marriages*, since the legal situation for the children and in case of divorce is – unclear.

In some of the countries here represented there are however other traditions. There, the concept ‘religion’ in relation to ‘religious groups’ and the concept ‘law and right for religious groups’ is *horizontally* much broader, also covering e.g. family law for members of the religious group which also was the tradition e.g. in the Ottoman empire.⁵ Before I discuss that position a little bit more, I want to turn to the position of the individual.

4. Rights for Individuals as (belonging to) Religious Minorities

In international law, freedom of religion is basically an individual right, a protection of the individual human being in his or her right to have, to adapt and to change his or her religion and to have that right to have, adapt and change religion protected by the state, also in relation the former religious group of which she was a member.

⁵ That was (said to be) the position of the Refah Partisi in the case against Turkey, which was decided 17:0 in a much debated judgment, ECtHR, appl no 41342/98, see e.g. Christoffersen in Mehdi et al (eds): Law and Religion in Multicultural Societies, Copenhagen: DJØF Publishing 2008.

That is: individuals have a right not only to believe and belong but also to leave. A right to exit which the states are obliged to protect – and so of course also the religious groups.

One could however ask whether an individual also has a right to stay within a given religious group, even though he or she e.g. speaks against the majority line of dogma? Is there a freedom of speech within religious communities? And what about other freedoms and rights – do individuals have a right to stay within the religion of her choice no matter which moral behaviour?⁶

These questions are especially relevant e.g. in regard to women in modernity. We of course all know that religions have very often been used to keep women at subordinated places in family and society. To which extend is the collective religious group – that is: the leadership – protected as part of freedom of religion in these ideas – and to which extend can religious women claim a right to be protected by other human rights also as part of still being religious persons?

5. Religious Rights and Citizenship

The two sets of questions, I have just raised – the question about family laws as part of freedom of religion and the question of other fundamental rights protection also within religious groups – are both questions related to the role of religious identities and religious groups in regard to citizenship and the society as such/the state.

In some societies citizenship seem to be affiliated with religious identification.

In other societies religious affiliation seem to have nothing to do with citizenship.

It seems to be a relevant part of an Arab-Danish Dialogue between Muslims and Christians to talk about relations between the vertical and the horizontal dimension of freedom of religion (that is: should 'religion' be broadened also to cover e.g. family laws and family courts); and also to talk about the role of citizenship and the state. And it seems especially relevant here to focus on the situation of women in our societies.

⁶ See the cases on Schytz and Obst vs Germany, ECtHR xxx, judgment 23 September 2010, appl 425/03 & 1620/03

6. Intertwined Identities

Both Christians and Muslims from both Denmark and the Arab world consider religion a *way to follow*, as already mentioned by several of the speakers yesterday.

That does not mean that different religions impose their own understanding of this way – Shari’a or religious ethics – on members of other religions.

The big question however is whether it in all religions is possible to distinguish between the religious dimensions of the way we are shown to follow and secular dimensions of life. Or, put another way around, whether it is possible to distinguish between religious norms and law, made by God – and which role religious dimensions in law might have between these two dimensions.⁷

This last question in my contribution to this conference could also be formulated differently: is it possible in our countries and belonging to religions we are here talking about to lead a life where religion and other identity dimensions are intertwined? Or does religion decide not only spiritual dimensions of life but also legal and citizenship dimensions?

⁷ That is also my question in my contribution to Nielsen & Christoffersen (eds): *Shari’a as Discourse*, Ashgate 2010