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*Understanding Religion:
A Portal to the Past or the Key
to the Future?*

VICTORIA ENKVIST

I. INTRODUCTION

IN MOST EUROPEAN countries, the state has had a long relationship with religion in one way or another. The status of this relationship has not been the same in all European countries, but in most states there has been a long and lasting relationship between the *Church*¹ and the state.² This means that different forms of Christianity have enjoyed a strong position in European countries.

The relationship between European states and religions other than Christianity and even Christian minority groups has, throughout history, been strained to say the least. This is partly due to the belief that a strong state presupposed unity in religion.³ ‘The others’ were often seen as enemies of the state or at least a problem in society. This view was in some countries, like in Sweden for example, reflected in different forms of legislation during the nineteenth century.⁴ This way of thinking is familiar today, although it is not as explicit concerning certain religious groups, and it still has an impact on legislation. It is especially evident in discussions concerning immigrants.

The relationship between religion and European states is, in other words, to a great extent embodied in the relationship between the state and the Christian majority Church that was legitimised by the state and not by religion as a whole.

¹ Different forms of the Christian Church such as, for example, the Roman Catholic and Orthodox Churches.

² T Rasmussen and E Thomassen, *En historisk introduktion* (trans P Beskow, Skellefteå, Artos, 2007).

³ In the eighteenth and nineteenth Century this was the prevailing belief in, for example, Sweden.

⁴ I Montgomery, *Enhetskyrkans tid* (Stockholm, Verbum, 2002) 38–40.

Over time, the relationship between the state and the Church, ie religion, has changed, and many European states have adopted a more secular form of governance. The development has not been the same in all European countries. In some European countries, religion still has a great deal of influence in society, while in others a strictly secular view has become the prevailing form of government.⁵ However, even in strictly secular states⁶ like the Nordic states, you can find traces in contemporary legislation that stem from Lutheran heritage. The research focus of a multidisciplinary project covering the Nordic states and Germany, the ProNoLa project, has been to study the kind of traces that can be found.⁷ The impact of religion on society has been studied in the research programme The Impact of Religion – Challenges for Society, Law and Democracy.⁸

The ProNoLa project focuses on the traces of Protestantism in secular law while the Impact of Religion programme studies the impact of religions and non-religions from several perspectives. In both projects, research has been conducted on religious values that are explicitly and implicitly expressed and taken for granted. One important conclusion in both projects is the acknowledgement of religion as a companion to both those in power and to those who are not in power.

As regards the interpretation and application of human rights instruments that regulate freedom of religion, the lack of unity regarding the role of religion in society, has, for example, affected the interpretation and application of Article 9 European Convention on Human Rights (ECHR) and resulted in a wide margin of appreciation.⁹ The consequences of the wide margin of appreciation have been thoroughly discussed and heavily debated in jurisprudence by legal scholars.¹⁰ From a human rights perspective, it is important to highlight the fact that the wide margin of appreciation has a negative impact on the protection of minorities. Great consideration is taken concerning the culture and tradition of the majority.¹¹ From a democratic and majority ruling perspective this is self-evident. In that sense, democracy and human rights clash due to the

⁵ Compare, for example, Italy and France.

⁶ The definition of secularity is debated and the concept has several different meanings.

⁷ Protestant Legacies in Nordic Law: Uses of the past in the construction of secularity of law. ProNoLa aims to provide a nuanced and critical genealogy of the negotiations of law and religion in the Northern parts of Europe from the Reformations and up to the present. This project is funded by Humanities in the European Research Area (HERA).

⁸ The research programme The Impact of Religion: Challenges for Society, Law and Democracy (IMPACT) is a multidisciplinary research programme at Uppsala University. IMPACT ran over a 10 year period 2008–18 funded by the Swedish Research Council and Uppsala University.

⁹ See case law concerning headscarves and religious symbols. For example *Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) para 108 and *Eweida and others v the United Kingdom* App nos 48420/1, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

¹⁰ See for example I Cameron, *An Introduction to the European Convention on Human Rights* 5th rev edn (Uppsala, Iustus, 2006).

¹¹ See for example *Lautsi v Italy* App no 30814/06 (ECtHR, 18 March 2011).

wide margin of appreciation. The majority opinion almost always prevails in Article 9 cases.¹²

Closely linked to the margin of appreciation is the principle of neutrality that is firmly established in many western societies.¹³ Religion, secularism and neutrality are all concepts that have a great impact on the understanding and application of freedom of religion.

It has been called into question whether the neutrality of the state is compatible with multicultural societies. Another challenge to neutrality is that some people are always going to be treated more favourably than others, due to culture, language, tradition and history. The alleged neutrality can be called into question on grounds of bias. And the overarching question is, of course: neutrality in relation to what?

Are secular values neutral and is it necessary to be neutral? Conflicts may arise when the dominant religious orientation and the liberal state attempt to attract the same audience because neither of them is founded on rational principles and both of them are expressions of traditions, non-neutral traditions.¹⁴ But what is neutrality? What do we mean when we speak of neutrality – a neutrality of facts or a neutrality of reasoning? In the *Lautsi* case from Grand Chamber of the European Court of Human Rights Judge Bonello states in a concurring opinion that

seen in the light of the historical roots of the presence of the crucifix in Italian schools, removing it from where it has quietly and passively been for centuries, would hardly have been a manifestation of neutrality by the State. Its removal would have been a positive and aggressive espousal of agnosticism or of secularism – and consequently anything but neutral. Keeping a symbol where it has always been is no act of intolerance by believers or cultural traditionalists. Dislodging it would be an act of intolerance by agnostics and secularists.¹⁵

Secularism is another concept that is often brought up when religion and freedom of religion are discussed. Are secularity and neutrality the same thing? Countries like France and the Nordic states see themselves as secular countries but in different ways. The relationship between secularism or the secularity of the law and/or neutrality leads to questions concerning the rule of law. Even if a piece of legislation/a law is universal some groups may be targeted by certain legislation. An example of that is the Swedish law prohibiting the slaughter of animals without the animals first being stunned.¹⁶ This prohibition has a huge impact on Jews and Muslims and their possibility to manifest their religion.

¹² *Sahin v Turkey* (n 9) para 108 and *Lautsi v Italy*, *ibid*.

¹³ R Fahlbeck, *Bed och arbete* (Malmö, Liber, 2011) 54.

¹⁴ V Enkvist, *Religionsfrihetens rättsliga ramar* (Uppsala, Iustus, 2013) 252.

¹⁵ *Lautsi v Italy* (n 11).

¹⁶ See for example the animal welfare legislation in, for example, Sweden.

Moreover, are secular societies more open to pluralism than religious ones? This cannot be taken for granted.

II. OPPORTUNITIES OR CHALLENGES – A WAY OF THINKING

Over the last decade, migration has been one of the greatest challenges for politicians in Europe to solve. When migration is debated in the media and in politics, religion is often set in relation to migration and integration. The religion of the migrants is often portrayed as a problem or at least as a challenge. One reason for this is that most of the immigrants have roots in different parts of the world where Christianity is not necessarily the dominant religion. New manifestations of religions challenge societal and old religious norms. The immigrants and their beliefs are often described as a problem, a challenge for those in power to solve. ‘The others’ are seen as a threat to the European way of life. But is the question of immigration really connected to religion to the extent that some tend to believe? What is the underlying notion? In all probability, the old view that there is a unity in religion, or unity in conviction, is one explanation. ‘The others’ challenge the norms and the values that are taken for granted and regarded as the truth.

In the media and political discourse, we often hear opinions linking religion, security and terrorism to each other. This puts another important question on the agenda – how do we use power, how do we use legislation? Do we use them to protect us from harm or to guide us? Are they used as a way of prohibiting or of allowing? And how do we draw up new legislation? Do we introduce legislation that is detailed or legislation that is open to almost unlimited possibilities of interpretation? Are pragmatic solutions a threat to freedom of religion?

There has been a huge influx of Islamic immigrants arriving in Europe and in some cases demands for religious manifestations clash with the values that have prevailed in European societies for hundreds of years. New and perhaps different views concerning what religious manifestations entail challenge the old notions of our western democracies. One of the most important questions many European societies must find an answer to is which path they shall choose. Shall they go down the path of inclusion or the path of exclusion? In addition, why do we choose one way over the other?

During the past 10 years, politicians that advocate an ‘us and them’ mindset have gained influence, and the gaps between different groups in society are growing. At the same time, we can see grassroots movements fighting for a more inclusive society and the future is wide open for new interpretations and a more inclusive way of thinking. Maybe gaining an understanding of ‘the other’ is the solution instead of forcing these ‘others’ into a norm that has been unchallenged for hundreds of years.

III. THE FREEDOM OF RELIGION – A TIGER WITHOUT TEETH

When the ECHR was established in the 1950s, one of the aims was to shape a dynamic human rights convention, a human rights instrument that could evolve at the same pace as society at large. Article 9 on the freedom of religion has proved not to be as dynamic as, for example, Article 10, the freedom of expression. The wide margin of appreciation is interesting in many ways but one major consequence is that the protection of minority groups is not as strong as it might be. Therefore, even though freedom of religion is often promoted as a fundamental right in a democracy, the impact of that right is quite small compared to other rights. Freedom of religion seems to be defined as a right to have a religion, no more, no less.

But is freedom of religion, as well as all human rights, relative, dynamic and open to interpretation? If freedom of religion can be interpreted differently in different contexts – what does the freedom protect? What is the core of the right? Moreover, the current development of the right – is it a positive development or is the relativisation of the right a path to destruction?

Another important question concerning the freedom of religion is the question about representation – who may represent whom? May a religious umbrella organisation, such as in the *Cha'are Shalom Ve Tsedek v France*,¹⁷ decide to speak out on behalf of smaller groups within the same religion? This may sometimes give rise to conflicts between representatives of minority religions and representatives of the majority society, but also between members within smaller religious groups.

The way forward is perhaps testing uncharted waters and maybe it demands that we leave some traditions and notions behind and start a new quest, in order to find new traditions and to create new common denominators. The opposite way is also an alternative – to recognise the fact that maybe Europe is not united in its attitude concerning the role of religion in European states and to acknowledge that the margin of appreciation gives us the opportunity to find different solutions.

Pluralism, tolerance and broadmindedness are hallmarks of a democratic society. Although individual interest must on occasion be subordination to those of a group, democracy does not simply mean that the views of a majority must prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.¹⁸

¹⁷ *Cha'are Shalom Ve Tsedek v France* App no 27417/95 (ECtHR, 27 June 2000).

¹⁸ *Sahin v Turkey* (n 9) para 108.

IV. INTERPRETATION IS A HIGHLY IMPORTANT TASK –
BUT BY WHOM AND FOR WHOM?

In the early days of the ECHR, the Commission handled the cases about freedom of religion. Since the re-organisation in 1998, the Court has been the sole decision-maker concerning these cases.¹⁹ When the Commission held that responsibility, the definition of religion, belief and faith were considered to be important questions to answer.²⁰ Were these concepts defined and labelled with different names, or was there an important distinction between the concepts? And more importantly, who decided the definitions? The legislators, the judges, agency officials or the religious individuals that were affected by the legislation?

These questions do not seem to be as important to the Court as they were to the Commission. The case law of the Court shows an acceptance of the opinion of the applicants concerning which manifestations originate from religion and which have their roots in culture or tradition.²¹ This is a path that can be chosen when freedom of religion is constructed as a relative right. In the Swedish case, freedom of religion is constructed as an absolute right in the Constitution. One of the most important consequences of this construction is that the definition and interpretation of religion and the word manifestation are very important. Manifestations that fall within the protection of the freedom of religion are absolute and therefore impossible to restrict. In the Swedish preparatory works of different pieces of legislation on religious matters, it is possible to discern a tendency to debate whether a manifestation has its roots in religion, tradition or culture.²² Is it even possible to define a difference between religion, tradition and culture?

From a judicial perspective it is quite important to understand how religion and manifestation are understood and applied as this might be a decisive reason for protecting a manifestation. These are highly complex questions but a simple answer as stated above is that there are different answers depending on the context. When approaching the matter of religion, it is important to understand that the answer will probably differ depending on the question you raise. The horizon of understanding and the possible outcomes that we expect are actually as important as the questions themselves.

In all forms of judicial work, interpretation is essential. How do those who apply legislation and judicial rules, interpret the words in the regulations and why do we understand the words the way we do? Prejudices cannot be ignored in the process of interpretation. The way we understand religion is affected by the society in which we grow up and live.

¹⁹ Cameron (n 10) 39–43.

²⁰ See *X v Germany* App no 8741/79 (Commission Decision, 10 March 1981).

²¹ Case of *Cha'are Shalom Ve Tsedek v France* (n 17).

²² Government bill 2000/01:81 p 18 (preparatory works for the law concerning religious motivated circumcision). See also Enkvist (n 14) 244–45.

In a post-Christian society like Sweden, it is more likely that the way we understand religion is based on Christian (Lutheran) values. This presupposes that religions or convictions that are similar to the Christian faith are more likely to be protected than completely different religions and the manifestations of minority religions. Manifestations of other religions are sometimes defined as manifestations of culture and tradition.²³ The way we understand different words and concepts changes over time, and the context and the way we experience daily life have an impact on the way we perceive the reality around us, and also the way we interpret legislation.

V. DEFINING DEMOCRACY – A SERENDIPITY MOMENT

A concept frequently used by politicians both in their speeches but also in legislation is *democratic values*. All citizens are expected to adhere to democratic values and all citizens are expected to know how these values are defined. This is quite interesting; it is a kind of assimilation process that we all indirectly accept without really knowing what we are accepting. The preamble to the legislation concerning the Swedish education system (the Swedish Education Act, SFS 2010:800), for example, states that the aim of the education system is to educate the pupils in democratic values. The question is how far the state is prepared to go in its quest to mould democratic individuals and exactly what democratic values we are talking about. Are they a well-kept secret or are they perhaps obvious to a true democrat? Or is this a guessing game and a serendipity moment when an agreement is made concerning a definition of democratic values? In this context it is important to recognise that democratic values in a state like Sweden are affected by Christian values. This is not a problem, just a mere fact but one consequence of this is that other religions may not be fully respected or treated equally or in the same way as the majority religion. These values are seemingly democratic values but beneath the surface ‘the same’ values are called Christian values.

Each era of time has its own conditions or fundamental base that are seen as self-evident prerequisites for interpretation. When older values that are taken for granted are replaced there has been a change at a deeper level.²⁴

²³ See the discussion about religious slaughter of animals in Sweden. See also the case law from European Court of Human Rights concerning headscarves. The political debate about prohibition of headscarves in several European states is another example.

²⁴ K Tuori, *Critical legal positivism* (London, Routledge, 2002) and CA Aurelius, *Luther i Sverige – Den svenska Lutherbilden under fyra sekler* 2nd edn (Skellefteå, Artos och Norma, 2015) 11.

