

THE SCOPE AND LIMITS OF THE FREEDOM OF RELIGION IN INTERNATIONAL HUMAN RIGHTS LAW*

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Abstract. *The article examines the practice of the applicability of the Article 18 of the International Covenant on Civil and Political Rights (hereinafter—ICCPR) and Article 9 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter—ECHR). Through the case—law of the European Court on Human Rights (hereinafter—ECtHR) and insights of the Human Rights Committee the author is investigating the content and limits of the freedom of religion. The article examines in detail the limiting clauses to the freedom of belief (national security, public order, public health, public morals) and the possibility to apply derogation clause. The author comes to the conclusion that due to the complexity of this right it is difficult to forecast the future developments of this right. The jurisprudence of the ECtHR is numerous as well as the decisions of the Court are often accompanied by dissenting opinions. Moreover, some potential cases related to the freedom of religion are not considered by the ECtHR as the admissibility criteria are not met. Therefore the author looks forward to the forthcoming jurisprudence of both—regional and universal human rights bodies.*

Keywords: *freedom, religion, public order, democratic society.*

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Introduction

On July 2011, the ECtHR has declared two applications¹ against Switzerland inadmissible in the case related to ban of building minarets in Switzerland. The issue was invoked because of a popular initiative “against the building of minarets,” supported by the signatures of 113,540 Swiss citizens, was submitted on 8 July 2008 to the Federal Chancellery (Swiss Government). The initiative sought a partial amendment of the Swiss Constitution to prohibit the building of minarets. On 28 July 2008 the Federal Chancellery noted that the initiative was valid. On 12 June 2009 the Federal Assembly (Federal Parliament) passed a decree confirming the validity of the popular initiative and deciding to submit it to the vote of the people and the cantons. The referendum was held on 29 November 2009. 57.5% of those voting supported the initiative. Since the results were positive in 17 cantons and five half-cantons, the constitutional amendment was approved. The new Article 72, paragraph 3, of the Constitution reads as follows: “The building of minarets is prohibited.”² The application of the presumable violation of the Article 9 was sent to the European Court on Human Rights (hereinafter—ECtHR).

Example of Uzbekistan discloses other aspects of the fragility of this right: “*On March 2002, the police allegedly interrupted three Jehovah’s Witness meetings, because the congregations were not registered, and some of the participants were fined. On 21 April 2002 the police allegedly accused 13 Jehovah’s Witnesses who had gathered in an apartment in Tashkent of holding an illegal religious meeting. One of the participants was later summoned by the authorities to sign confession and a pledge to stop holding such meeting. When he refused to sign, a court reportedly sentenced him to 15 days in prison.*”³ Reading similar reports from different countries and related to different practices the principal question on the scope of this freedom arises. What is the content of this freedom and what are limitations to exercise this freedom?

These and other examples illustrate that no topic generates more controversy—or indeed more complex ideas—than relationships between 1) institutionalization of religion in the state or religious belief or practice and 2) human rights norms. From one perspective, religious beliefs and human rights are complementary expressions of similar ideas, even though religious texts invoke the language of duties rather than rights. Important aspects of the major religious traditions—canonical text, scholarly exegesis, ministries—provide the foundation for, or reinforce, many basic human rights. Evident examples include rights to bodily security, or to economic and social provision for the needy. From another perspective, religious traditions may impinge on human rights and religious leaders may assert the primacy of those traditions over rights. The banner of cultural relativism may here be held high. If notions of state sovereignty represent

1 *Ouardiri v. Switzerland*, no. 65840/09, ECHR; *Ligue des Musulmans de Suisse and Others v. Switzerland*, no. 66274/09, ECHR.

2 Press release ECHR 101 (2011), 08/07/2011.

3 Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, Report, 19 August 2003. UN Doc.A/58/296.

one powerful concept and a force that challenges and seeks to limit the reach of the international human rights movement, religion can then represent another.⁴

There are a number of examples or situations which could be attributed to the complexity of this right. The principal question arises concerning the implementation of this right – can one put the frames on the execution of this right? The purpose of this article is to disclose the content of the freedom of religion and to identify the grounds for limitations of this freedom.

1. The Scope of the Freedom of Religion

Article 18 of the ICCPR guarantees the freedom of thought, conscience and religion. The ICCPR explicitly lists the elements covered by this right: “freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” In trying to identify the roots of this freedom and its embedment in international documents it must be noted that Paragraph 1 of Article 18 of the ICCPR follows very closely the corresponding article of the Universal Declaration. The wording of the Article 18 of the ICCPR is not identical to the Article 9 of the ECHR⁵. Seemingly the Article 18 has a wider scope than the Article 9. The Article 18 includes two supplementary paragraphs which were not added to the ECHR. These are paragraph 2⁶ and paragraph 4.⁷ The later paragraphs of Article 18 have no direct counterpart, except that the limitation clause in paragraph 3 derives from the general limitation clause in the Declaration. The idea of paragraph 4—parental control of the religious and moral education of their children—was implied in the general statement in Article 26 (3) of the Declaration.

This basic formula of the paragraph 1 met no opposition. Substantial debate during the drafting process of the ICCPR arose when the effort was made to define the content of that right in a second sentence. The Universal Declaration states that “this right includes freedom to change his religion or belief.” The efforts to delete this sentence from the ICCPR Article 18 failed, it being argued that this freedom is too important to leave to the uncertainties of interpretation by sometimes unsympathetic governments and that deletion “would be tantamount to denial of the right to change one’s religion.”

4 Steiner, H. J.; Alston, P. *International Human Rights in Context: Law, Politics, Morals*. 2nd edition. Oxford, New York: Oxford University Press, 2000.

5 Article 9 of the ECHR states the following: “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 worship, teaching, practice and observance.”

6 Article 18 Paragraph 2 of the ICCPR states: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

7 Article 18 Paragraph 4 of the ICCPR indicates “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

In a spirit of compromise, however, the language was changed to make explicit the right to maintain one's religion as well as to change it. The final wording recognizes the individual's right to have or to adopt a religion to which one adhered previously as well as the right to adopt a different religion.⁸ It is acknowledged that to have freedom of religion and belief protects the individual in his or her spiritual and transcendental relationships. It has both a negative and a positive component. Negatively, this freedom provides protection against being coerced into joining a particular belief or a particular religious community, changing one's religious belief, or carrying out particular rituals or other religious acts. This prohibition is absolute.

In a positive sense, the freedom of religion or belief provides human beings with the possibility of having or adopting a religion or belief of their choice, and the freedom—either individually or in community with others and in public or private—to manifest one's religion or belief in worship, observance, practice and teaching. This includes the right to erect and visit places of worship, to impart religious teachings and participate in religious education, to profess one's faith in public, and to create and publish religious writings.

In its General Comment no. 22, the Human Rights Committee (hereinafter—HRC) pointed out that Article 18 of the ICCPR protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 guarantees very fundamental rights. The general guarantee contained in the first sentence of paragraph 1 is far-reaching. Although no definition of “thought” or conscience” is provided, taken together with “religion” they include all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it divinity, some superior being or just reason and rationalism, or chance. “Religion or belief” is not limited to a theistic belief but comprised equally nontheistic and even atheistic beliefs. The same guarantees of freedom apply to all these, and no limitation whatsoever is admitted as far as the realm of personal conscience is concerned. Such absolute freedom, moreover, applies not only to freedom to have such convictions but also to change them and to adopt new ones. The process of maintaining such convictions as well as the freedom of individual choice are protected against all forms of direct coercion and also against indirect encroachments.⁹ Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions... 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 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

8 Partsch, K. J. Freedom of Conscience and Expression, political Freedoms. In: Henkin, L. (ed.). *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press, 1981, p. 209–245.

9 *Ibid.*

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 head coverings, 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 includes acts integral to the conduct by religious groups of their basic affairs, such as 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. The Committee also added that the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection. The ECtHR considering if the exposition of the religious symbols in Italian schools is compatible with the provisions of the ECHR came to the conclusion that negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice. The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought. The Court considered that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education.¹⁰ Similar position was taken also by Human Rights Committee. In its General Comment the Human Rights Committee denoted that Article 18 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in Article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in Article 18(1). Therefore the public education that includes instruction in a particular religion or belief is inconsistent with Article 18(4) unless provision is

¹⁰ *Lautsi v. Italy*, no. 30814/06, ECHR 2009. The Case, however, was referred to Grand Chamber.

made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.¹¹ This position of the Human Rights Committee was supported by the Federal Court of Switzerland. In support of the parents' claims not to attend swimming lessons of their child on religious grounds, the Court ruled: "The dispensation requested by the applicants would not give rise to any substantial addition costs for the school. Nor would it greatly offend the religious feelings of the other pupils. Moreover, such a request is in all respects comparable to the dispensation granted... to the children of Orthodox Jews or Adventists, who are exempted from manual work or physical exercise or from attending school on the Sabbath. At worst, insurmountable problems might arise if a relatively large proportion of a school's pupils were to request special rules and regulations. To a certain extent it is reasonable to ask teaching staff and the school administration to accede to serious requests by religious minorities, as they do when pupils are absent for other reasons... Nationals from other countries and cultures residing in Switzerland must, of course, abide by the same rules and regulations as Swiss nationals. There is, however, no legal duty which obliges them to adapt their customs and life-style. The principle of integration does not impose a legal obligation on foreign nationals to restrict their religious or philosophical beliefs to a disproportionate extent."¹²

2. The Limits of the Freedom of Religion

2.1. Limitations and Derogations to the Freedom of Religion

The freedom to manifest one's religion or beliefs may be restricted only to the extent that such limitations are permitted by law and are necessary to protect public safety, order, health or morals, or fundamental rights and freedoms of others.¹³ It is important to distinguish between derogation from rights in time of public emergency and the permissible limitations on rights. Although the circumstance permitting derogations, "*public emergency which threatens the life of the nation*," resembles to the grounds for possible limitations, "*national security*," derogations and limitations differ in character and scope, in the circumstances in which they may be imposed, and in the methods by which they may be affected. Derogations in time of emergency are clearly intended to have only a temporary character; limitations, in contrast, may be permanent.¹⁴ Article 4 of the ICCPR permits states parties to avail themselves of the right of derogation to cope with "officially proclaimed" public emergencies that threaten the life of the nation. The

11 General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 1993.07.30. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments).

12 Federal Court of Switzerland, 119 Ia 178, 18 June 1993.

13 Kälin, W.; Müller, L.; Wyttenbach, J. (eds.). *The Face of Human Rights*. Baden: Lars Mueller Publishers, 2004, p. 404–410.

14 Kiss, A. C. Permissible Limitations on Rights. In: Henkin, L. (ed.). *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press, 1981, p. 291.

measures taken by a state party in the exercise of its right of derogation have to meet the following tests: (a) they must be strictly required by the exigencies of the situation; (b) they must not be in conflict with other international obligations that the state party has assumed; and (c) they must not involve discrimination based “solely” on race, colour, sex, language, religion, or social origin. Similar derogation clauses can be found in the ECHR.¹⁵ However in both human rights documents the freedom of belief is listed as non-derogable right, therefore derogation clauses are exempted for the scope of the Article 4 of the ICCPR and relevant provisions in the ECHR.

The limitation clauses of the Covenant developed out of Article 29 (2) of the Universal Declaration on Human Rights: “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.” The Universal Declaration of Human Rights is the only international instrument aimed at the global protection of human rights which concentrates limitations upon rights and freedoms in a single provision. In the ICCPR as in all human rights conventions the limitations are scattered with specific provisions—generally identical, but with some variations—applicable to particular freedoms or rights. Alexandre Charles Kiss claims that the fact that there is no general limitation clause in the ICCPR has an important consequence: limitations are permitted only where a specific limitation clause is provided and only to the extent it permits.¹⁶ Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.¹⁷

Seeking to avoid unnecessary limitations and infringement of rights the provisions of the ICCPR (as well as ECHR) includes the legal safeguards. The supplementary condition to the limitation provisions (which will be explicitly dealt with below) foresees the inclusion into the ICCPR supplementary condition —“provided by law” or “prescribed by law” which seem to have the same meaning. The condition that a restriction must be provided by law is essentially a formal one: any restriction on recognized rights and freedoms in a state must be by general rule, normally imposed by the legislature; measures taken by the executive authority, such as the police or local administration, are excluded unless authorized by general legislation.¹⁸ Some articles of ICCPR lay down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3;

15 Buergenthal, T. To Respect and to Ensure: State Obligations and Permissible Derogations. In: Henkin, L. (ed.). *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press, 1981, p. 78.

16 Kiss, A. C., *supra* note 14, p. 291.

17 General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 1993.07.30. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments).

18 Kiss, A. C., *supra* note 14, p. 304.

and they must conform to the strict tests of necessity and proportionality.¹⁹ Restrictions are not allowed on grounds mentioned above, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.²⁰ Moreover, restrictions must be provided by law. “Law” in this regard may include statutory law [and, where appropriate, case law].²¹ It may include the law of parliamentary privilege²² and the law of contempt of court. Since any restriction on certain freedom constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in customary law.²³ For purposes of paragraph 3, a norm, to be characterised as a “law,” must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly²⁴ and it must be made public. A law may not confer unfettered discretion for the restriction of certain freedom on those charged with its execution. It must be noted that this supplementary safeguard is necessary to the possible application of the limitation clauses which will be dealt explicitly below.

2.2. The Limitation Clauses

The terms which appear in the limitation clauses of the Covenant on Civil and Political rights are: national security, public safety (18 (3), public order (19 (3), public health (19 (3), public morals (19 (3)). It means that limitations clause applicable to the freedom of religion according to the ICCPR are applicable may be limited to all aforementioned grounds but national security. In General Comment No. 27 the Committee observed that restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.²⁵ The principle of proportionality must also take account of the form of expression at issue. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.²⁶

19 *Velichkin v. Belarus*, CCPR/C/85/D/1022/2001.

20 Draft General Comment No. 34 on Article 19 after the first reading by the Human Rights Committee, CCPR/C/GC/34/CRP.6.

21 *Coleman v. Australia*, CCPR/C/87/D/1157/2003.

22 *Dissanayake v. Sri Lanka*, CCPR/C/93/D/1373/2005.

23 General Comment No. 32: The Right to equality before courts and tribunals and to a fair trial. CCPR/C/GC/32.

24 *Leonardus J.M. de Groot v. The Netherlands*, CCPR/C/54/D/578/1994.

25 *Marques de Morais v. Angola*, no. 1128/2002.

26 *Bodrozic v. Serbia and Montenegro*, CCPR/C/85/D/1180/2003.

2.2.1. Public Safety

The term “*public safety*” figures in the limitation clauses of Article 18. Failure to mention national security in that Article 18 of the ICCPR justifies the conclusion that the omission was intentional and that exigencies of national security do not justify limitations on freedom to manifest one’s religion or belief.²⁷ Also the similar term is used in the ECHR Article 9 (2). In two provisions of the ECHR (one of them is Article 9) is accompanied by the term “*public order*”. Similarly to the Article 18 of the ICCPR, the Article 9 of the ECHR does not speak of “national security” but rather of “public safety”, and one must conclude that concern for national security is not a permissible ground for limitations on freedom of thought, conscience and religion.²⁸ The interpretation of the term “*public safety*” author Kiss states, is particularly difficult. It cannot be assimilated to “public order,” which is certainly a broader concept, but the two are apparently linked. “Public safety” apparently also includes but is broader than “*the prevention of disorder of crime.*”²⁹ The need to protect public safety could justify restrictions resulting from police rules and security regulations tending to the protection of the safety of individuals in transportation and vehicular traffic; for consumer protection, for ameliorating labor conditions, etc.

Therefore to speak of *public safety* as one of the limitation grounds in the context of the freedom of religion is rather complicated if possible at all. Notably, the limitation clause “*public order*” usually invoked instead. The content of the *public order* is examined below.

2.2.2. Public Order

A limitation on the grounds of “public order” has a central place in the limitation clauses of the Covenant. Most discussions of the limitation clauses have focused upon the same meaning in different legal systems, and may not have any meaning at all in some legal systems. The Article 18 (3) providing for limitations on freedom to manifest one’s religion or beliefs, however, essentially the same discussion resulted only in a reference to “*order*” without public and without the corresponding to French term.³⁰

Both articles list the necessity to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Limitations permitted by Article 18 of the ICCPR apply exclusively to the freedom to manifest one’s religion or beliefs. No

27 Kiss, A. C., *supra* note 14, p. 296.

28 *Ibid.*

29 *Ibid.*, p. 298.

30 The text drafted by the Commission on Human Rights for Article 14 (1) contained the term “public order” as one of the reasons for which the press and the public might be excluded from all or part of a trial. In later discussions it was argued unsuccessfully that the words “public order” in English do not have the same meaning as the French order public and should be replaced by “the prevention of disorder” which would represent what was actually intended. A similar discussion led to the same solution for Articles 19(3) and 21. In Article 18 (3), providing for limitations on freedom to manifest one’s religion or beliefs, however, essentially the same discussion resulted only in a reference to “order” without “public” and without the corresponding French term (See Kiss, A. C., *supra* note 14, p. 300).

limitations are permitted on the freedom of thought, conscience and religion declared in Article 18 (1), nor on the freedom “to have or to adopt a religion or belief of his choice” in Article 18 (2) of the ICCPR. It is nonetheless astonishing that very ample and broad limitations were admitted with respect to the right to manifest one’s religion.³¹ Article 18 (3) permits limitations to protect public safety but not “national security.” Limitations may be imposed if necessary to protect the *fundamental* freedoms of others but not merely any rights and freedoms of others (see Article 12 (3), 21 (1), 22 (2)). It is surely significant too, that Article 18 (3) permits limitation only to protect “public safety, order, health or morals.” Presumably “public” modifies “order” as well as “safety,” but here it is used without the interpretative addition of the French term *ordre public*. Indeed, here even the French text does not speak of “*ordre public*” but of a *la protection de l’ordre*. That clearly suggests that limitations on freedom to manifest one’s religion cannot be imposed to protect *ordre public* with its general connotations of national public policy, but only where necessary to protect public order narrowly construed, i.e., to prevent public disorder. A state whose public policy is atheism, for example, cannot invoke Article 18 (3) to suppress manifestations of religion or beliefs.³²

2.2.3. Democratic Society

Interestingly both articles (ICCPR Article 18 and ECHR Article 9) indicate the limitation of this right, however the Article 18 of the ICCPR omits the term „*democratic society*“ as did „*public*“ before „*order*“. The notion of the “*democratic society*”, however, is not omitted in other articles contained in the ICCPR. During drafting process of the ICCPR the words “*in a democratic society*” were regarded as a salutary safeguard; opposition to the phrase on the grounds that it was ambiguous and subject to different interpretation was unsuccessful. In follow-up discussions the answer to the objection that the word “*democracy*” might be interpreted differently in various countries was that a democratic society might be distinguished by its respect for the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the both covenants. The reference to democracy was not included in Article 18, even though during the discussion of Article 18 in the Commission of Human Rights, a proposal to add the modifying clause “*in a democratic society*” did not succeed.³³

In European context to include similar provision seemed to be more flexible due to the fact that the members of the Council of Europe are considered like minded countries. Nonetheless, the provision was interpreted in the case-law of the ECtHR in *Handyside*³⁴ case. The Court made attempts to determine some elements of a “*democratic society*.” In trying evaluating the freedom of expression the Court found pluralism, tolerance, and broadmindedness to be the essential element of the concept. This concept was

31 Partsch, K., *supra* note 8, p. 212.

32 *Ibid.*, p. 213.

33 Kiss, A. C., *supra* note 14, p. 306.

34 *Handyside v. the United Kingdom*, no. 5493/72, ECHR.

repeated in the case of *Leyla Sahin*.³⁵ The Judge Tulken stressed that the first is that these ideals and values of a democratic society must also be based on dialogue and a spirit of compromise, which necessarily entails mutual concessions on the part of individuals. The second is that the role of the authorities in such circumstances is not to remove the cause of the tensions by eliminating pluralism, but, as the Court again reiterated only recently, to ensure that the competing groups tolerate each other. Once the majority had accepted that the ban on wearing the Islamic headscarf on university premises constituted interference with the applicant's right under Article 9 of the Convention to manifest her religion, and that the ban was prescribed by law and pursued a legitimate aim—in this case the protection of the rights and freedom of others and of public order—the main issue became whether such interference was “necessary in a democratic society.” The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a “democratic society.” Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.” This means, amongst other things, that every “formality,” “condition,” “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.³⁶ Judge Tunken in his dissenting opinion in the case of *Leyla Sahin* denoted that owing to its nature, the Court's review must be conducted *in concreto*, in principle by reference to three criteria: firstly, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; secondly, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing interests.³⁷ In finding no violation in the case of *Leyla Sahin*, the Court based its decision on the fact that the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the nature of educational institutions. Consequently, the reasons which led the Court to conclude that there has been no violation of Article 9 of the Convention.³⁸

Following the different opinions of the Court and judges themselves it must be understood, that in European regional framework it remains difficult to define parameters of the notion of democratic society, even though it seems to share common heritage of political traditions and freedoms. This difficulty is even greater in universal context and in ICCPR.³⁹

35 *Leyla Sahin v. Turkey*, no. 44774/98, ECHR 2005.

36 *Handyside v. the United Kingdom*, no. 5493/72, ECHR.

37 Dissenting opinion of judge Tunken. *Leyla Sahin v. Turkey*, no. 44774/98, ECHR 2005.

38 *Leyla Sahin v. Turkey*, no. 44774/98, ECHR 2005.

39 Kiss, A. C., *supra* note 14.

2.2.4. Public Health

Historically, during the drafting process of ICCPR there was a discussion on this term. Some concrete problems which were explicitly raised—such as prevention of epidemics—fall clearly within the scope of this limitation, while others, such as the control of prostitution, might come within others, such as “public morals.” Similar provisions appear in the ECHR. However, differently from ICCPR and HRC, the European Commission of Human Rights has interpreted the term broadly: for example, “public health” was held to include measures taken for the prevention of disease among cattle.⁴⁰ Even though this provision is not a subject of the controversy, the supplementary support of the definition on what the term “public health” means may be found in the Article 12 of the ICESR:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The possible example of the invoking the limitations of the freedom of religion may be the case of massive religious sects which attract the followers. In some cases the participation in the religious activities ends by the massive suicide. Indeed, it is hard to measure how many cases ends up with this life threatening experience. Even more difficult is to evaluate and prove the threat to public order or national security the cases when previously involved in activities of the sect followers and decided are persecuted by members of their own sect after their decision to quit the sect. Taking into consideration that the investigation and burden of proof in such cases lays the on the shoulders of victim and the State. Since there were no cases invoking similar practices and /or limitation grounds, it may only be assumption that the limitation of such sects would be justified.

2.2.5. Public Morals

The last of the limitation clause is the public morals. The jurisprudence of ECtHR indicates that it is impossible to find a uniform European concept of morals, thus necessitating a margin of appreciation left to the states. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions;

40 Kiss, A. C., *supra* note 14, p. 302.

consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Concerning public morals, it has to be observed that the content of the term may differ widely from society to society – there is no universally applicable common standard.⁴¹ However, as the Committee observed in General Comment No. 22, “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”

Author Kiss denoted that the term “public morals” in the ICCPR alludes to principles which are not always legally enforceable but which are accepted by a great majority of the citizens as a general guideline for their individual and collective behaviour. Whether they include acts done in private, alone, or between consenting adults, has been debated. According to Kiss, any interpretation of the term “*public morals*” in the International Covenant would doubtless take into consideration the elements stressed by the European Court i.e., the primary responsibility of the state to secure the rights and liberties recognized in that Convention and the relativity and changing conception and content of morals.⁴²

To sum up the limitation clauses to the freedom of religion, it must be noted that the most commonly the term “democratic society” and “public order” are challenged. However, the jurisprudence of the HRC and ECtHR on the aforementioned grounds (particularly public order and national safety) is not numerous. Most states in practice mostly refer to the limitation clause “democratic society”. Also, the complexity of interpretation of both the terms covers the different cultural and legal backgrounds which are the subject of interpretation by judicial or quasi-judicial body.

3. The Unanswered Questions

Seeking to explore and evaluate the content of religious freedom, the author of the article selected some cases which could have had an interesting turn in developing the jurisprudence of the ECtHR and interpretation of the limits to the freedom of religion. However the cases never went through the admissibility barrier.

The first case brought up by the applicants in the ECtHR was the case of Muhammad caricatures in the Danish magazine. The applicants claimed that as Muslims, they had been discriminated against by Denmark. They further complained under Articles 10 and 17 that Denmark had permitted the publication of what the applicants considered to be offensive caricatures of the Prophet Muhammad, in particular one caricature showing him as a terrorist with a bomb in his turban. The Court has recognized the petition as inadmissible and ruled that the established case-law in this area indicates that the concept

41 *Hetzberg et al. v. Finland*, No. 61/79.

42 Kiss, A. C., *supra* note 14, p. 304.

of “jurisdiction” for the purposes of Article 1 must be considered to reflect the term’s meaning in public international law. Thus, from the standpoint of public international law, the words “within their jurisdiction” in Article 1 must be understood to mean that a State’s jurisdictional competence is primarily territorial and also that jurisdiction is presumed to be exercised normally throughout the State’s territory. Such exceptions are not in issue in the present case. Here the applicants are a Moroccan national resident in Morocco and two Moroccan associations which are based in Morocco and operate in that country. The Court considered that there was no jurisdictional link between any of the applicants and the relevant member State, namely Denmark, or that they could come within the jurisdiction of Denmark on account of any extraterritorial act. Accordingly, the Court had no competence to examine the applicants’ substantive complaints under the Articles of the Convention relied upon.⁴³

Another case was briefly mentioned in the beginning of the Article and related to the ban of building minarets in Switzerland. Similarly, as to previous case, the ECtHR ruled that the plaintiffs—three Muslim organisations and a private citizen—were not victims of an alleged human rights violation. The Strasbourg-based court announced that the complaints by the applicants were not admissible. “The main complaint was that a disputed constitutional provision offended their religious beliefs. However, they did not allege that it had had any practical effect on them,” the statement said.⁴⁴

The cartoon case did not have any outcome except political implications against Danish Embassies in Islamic countries. It rather demonstrated the sensitivity of the freedom of religion and the democratic society and freedom of expression. Meanwhile the Minaret case is still stands a chance if the ECtHR will find other petitions admissible. Looking back at the jurisprudence of the ECtHR it is hard to predict the possible reasoning of the Court if any. Therefore the author of the article is looking forward to the decision on the admissibility concerning the Minaret case.

Conclusions

Formulation of the freedom of belief imbedded in the international human rights documents vary. The Article 18 of the ICCPR is broadly construed, the scope of the Article 9 of the ECHR, in the opposite, is construed in more narrow sense. The differences of both articles may be explained watching at the originated source of the provision. Article 18 of the ICCPR finds its origin in the text of the Universal Declaration of Human Rights, which sets forth the possibility to change his religion or belief. The

43 *Ben el Mahi and Others v. Denmark*, no. 5853/06 ECHR

44 The applicants could not prove either that they were indirect victims because none of them was planning on building a mosque with a minaret in Switzerland in the near future. The appeals were lodged in December 2009 following approval of a controversial rightwing initiative in a nationwide vote. A total of six complaints were filed—three of which are still pending [interactive]. [accessed 12-06-2011]. <http://www.swissinfo.ch/eng/politics/Legal_move_against_minaret_ban_thrown_out.html?cid=30640398>.

content of the freedom of religion is not limited to a theistic belief but comprised equally nontheistic and even atheistic beliefs. Therefore the jurisprudence of international human rights bodies covers the right not only to exercise freely this freedom but also sets forth the limits to this right.

Freedom of religion is listed among non-derogable rights. It does not mean, however, that this freedom may not be limited. The freedom of belief maybe limited on the following grounds: national security, public safety, public order or public health/morals under the strict condition that the limitation must be provided by law. Public safety loses its relevance in the context of the Article 18 of the ICCPR. Instead the public order gains its importance as one of the main limitation grounds. The limitation clause must fit the strict principle of proportionality which covers protective function and proportionate to the interest to be protected. Only then the possibility to apply limitation clauses is open.

The practice of international human rights bodies confirm the complexity of this right in its jurisprudence. One of the questions on the spot is the exposure of the religious symbols in the public entities. The discussions disclosed sensitive nature of the freedom of religion and its complex implementation in international human rights law.

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RELIGIJOS LAISVĖS TAIKYMO APIMTIS IR RIBOS TARPTAUTINĖJE ŽMOGAUS TEISIŲ TEISĖJE*

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Santrauka. Straipsnyje nagrinėjama Tarptautinio pilietinių ir politinių teisių pakto 18 ir Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos 9 straipsnio taikymo praktika. Pasitelkdama Europos Žmogaus Teisių Teismo praktiką ir Žmogaus teisių komiteto jurisprudenciją autorė analizuoja religijos laisvės turinį ir ribas. Doktrinoje ir jurisprudencijoje pripažįstama, kad religijos laisvė universaliuose ir regioniniuose žmogaus teisių dokumentuose yra formuluojama skirtingai. Tarptautinio pilietinių ir politinių teisių pakto nuostatos, susijusios su religijos laisve, formuluojamos plačiau nei Tarptautinio pilietinių ir politinių teisių pakto ir Europos žmogaus teisių konvencijos nuostatos. Tam įtakos turėjo pirminiai dokumentai, mat minėtos Pilietinių ir politinių teisių pakto nuostatos yra formuluojamos atsižvelgiant į Visuotinę žmogaus teisių deklaraciją ir joje įtvirtintą straipsnį dėl religijos laisvės. Dėl tos pačios priežasties universaliajame žmogaus teisių dokumente papildomai yra įtrauktos nuostatos dėl asmens teisės turėti arba pasirinkti religiją ar tikėjimą savo nuožiūra bei reikalavimas gerbti tėvų ir – atitinkamais atvejais – teisėtų globėjų laisvę rūpintis savo vaikų religiniu ir doroviniu auklėjimu pagal savo pačių įsitikinimus. Tokių nuostatų Europos žmogaus teisių konvencijoje nėra.

Religijos laisvė priskiriama prie nenukrypstamų teisių, tačiau tai nereiškia, kad ši teisė jokiais pagrindais negali būti ribojama. Straipsnyje išsamiai nagrinėjami saugumo, tvarkos, sveikatos, dorovės arba kitų asmenų pagrindinių teisių bei laisvių apsaugos pagrindai, kuriais remiantis religijos laisvė gali būti ribojama. Daroma išvada, kad ribojimas nacionalinio saugumo pagrindais nėra aktualus religijos laisvei, todėl, esant būtinybei, tikslinga ribojimus taikyti visuomenės tvarkos pagrindu.

Gausi tarptautinių žmogaus teisių gynimo institucijų praktika atskleidžia religijos laisvės turinio sudėtingumą ir riboja galimybę prognozuoti tolesnį šios laisvės turinio formavimą,

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todėl tolesnė Europos Žmogaus Teisių Teismo jurisprudencija bylose, susijusiose su 9 straipsniu, gali neabejotinai keisti besiformuojantį religijos laisvės turinį ir daryti jam įtaką.

Reikšminiai žodžiai: *laivė, religija, viešoji tvarka, demokratinė visuomenė.*

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