
Religious Rights, Constitutions and Legislation in the New Europe:

Peter Petkoff

After the Second World War, for the first time an international legal system was designed on entirely secular principles, and this meant that defining religious freedom was a particularly difficult task. We are faced with questions. Is there something about the secular project, at least in the way it was articulated in the post-Second World War legal order, that makes it impossible to talk about religion? Is there something about religion that makes it very difficult to reflect on rights language the way it is phrased in international law?

Religious rights discourse under international law was formed within 'Cold War' dynamics. It has framed the current jurisprudence of the European Court of Human Rights (ECHR) as well as the approach of the UN and the OSCE. It is beset by three distinctive sets of problems.

First, on a conceptual level religious rights remain defined along the lines of dichotomies: liberal versus communitarian; subjective versus objective; private versus public. While such dichotomies have evolved and revealed their inner paradoxes within the context of legal and political philosophy over the last fifty years, international law continues to address questions of religious rights in the context of the post-Second World War world order – the old communitarian world versus the new free liberal and liberated world.

Second, on a political level religious rights discourse continues to be articulated within the 'Cold War' dynamics which shaped the international community and international law after the Second World War. It thus operates within a tension between good and evil, democracy and dictatorship, freedom and oppression. This Cold War dualism suggested a 'realist' 'game theory' based on a world view of perpetual tensions, and this has hijacked international law as a system to serve such a world view.

Third, religious rights discourse reveals a certain self-limitation in substantive legal terms through the very format in which these rights have been defined and interpreted.

Viewed through these three perspectives (conceptual, political and that of substantive legal discourse), religious rights under international law present an exaggerated, over-simplified and pessimistic secular world view which on the one hand does not represent thoughtfully the complex and changing dynamics of secular intellectual intuitions in legal and political philosophy and on the other presents a dualist world view based on the idea of perpetual tension, conflict, struggle between good and evil.

The overlap between international law and international relations and the preservation of the dualist world view of the Cold War had both direct and indirect impact on the ways questions of religious rights and religious freedom were addressed in new Europe.

Locked in a legal system unreformed since its foundation, religious rights under international law are seen not as good because religious freedom is fundamentally good but as an important means for the prevention of social and political tension. This has led to a situation in which ECHR jurisprudence related to religious freedom is patchy, inconsistent and confusing. One rather ironical result is that in various countries of the new postcommunist Europe which have been reshaping their laws on religion, 'national' churches and governments have become more protective, with issues such as registration, established churches and the protection of the cultural paradigms high on the agenda.

There is need for the creation of a new narrative for human rights discourse in international law. In the words of the contemporary political theologian Oliver O'Donovan,

No community should ever be allowed to think of itself as universal. All communities, including the largest, should have to serve the end of equal, reciprocal relations between their own members and the members of other communities. One could put it this way: it is essential to our humanity that there should always be foreigners, human beings from another community who have an alternative way of organizing the task and privilege of being human, so that our imaginations are refreshed and our sense of cultural possibilities renewed. The imperialist argument, that until foreigners are brought into relations of affinity within one cultural home they are enemies, is simply the creation of xenophobia. The act of recognition and welcome, which leaps across the divide between communities and finds on the other side another community, which offers the distinctive friendship of hospitality, is a fundamental form of human relating¹.

Is it already too late for such a shift from the over-deterministic approach of religious freedom within the human rights community? Perhaps it is time to seek a new narrative which cherishes the common intellectual heritage of the fifty years of human rights discourse as a continuity of several thousand years of collective religious experience and of interaction with legal orderings of societies and political communities: a continuity perceived as a gift rather than as a problem which has to be overcome.

Peter Petkoff is a Research Fellow at the School of Law of Bristol University. He has studied law and religion in Eastern Europe at Leeds University and theology and canon law at Balliol College, Oxford.

¹ Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge University Press, Cambridge/New York, NY, 1996), p. 268.