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Summary

Freedom of Religion in Secular and in Non-Secular States: Elements of an integrative international law on religion

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1. Religion is formative not only for individual live styles but also for social structures and collective identities. Thus, freedom of religion, both in its individual and in its corporative dimension, has turned out to be *the* legal instrument for dealing with social conflicts in religiously and culturally diverse societies.

2. Distinguishing "secular" and "non-secular" states creates problems in legal analysis. First, the distinction is binary-coded and thus unable to shed light on intermediate stages between the "secular" and the "non-secular". Second, and more importantly, there is a lack of reliable criteria for distinction. A clear line could be drawn in cases of complete subordination of the secular legal order to religious requirements. Such a line would, however, only be crossed by few states. Hence, according to such a distinction, the majority of states would have to be qualified as "secular" – a consequence which strips the distinction between "secular" and "non-secular" of its analytical potential.

3. International practice as evidenced in decisions and reports by competent international bodies permits to discern certain situations of endangerment or compromise. These situations underline that religious freedom is endangered when the legal order of a given state is largely dictated by the necessities of a majority religion. The same applies in situations where the a-religious or the antireligious are privileged as opposed to religiously dominated life styles. Such situations of endangerment or compromise exist where states require registration for the free exercise of religion, where public functions – like the laws concerning marital status – are left to religious institutions or where the secular legal order places strict limits on change of religion and missionary activities.

a) Requiring registration is problematic. Under certain conditions registration may be justified on grounds of public order. However, strict requirements of necessity must be respected and the registration procedures need to be organized in a neutral and speedy manner. The individual free exercise of religion should under no circumstances be made dependent on prior registration of the religious community concerned.

b) Where public functions are left to religious institutions, the state is required to provide for a secular substitute when the religious institutions necessarily require a certain religious conduct. This is, for instance the case with Jewish family law and the role of the rabbinical courts in that area.

c) A system in which the entire legal order of the state is subordinated to an interpretation according to religious requirements (e.g. Article 4 of the Iranian Constitution), is structurally unable to guarantee freedom of religion and the prohibition of discrimination on religious grounds.

4. The rise of extremist movements in many areas of the world places stronger emphasis on positive obligations derived from freedom of religion and on the duty of states to provide for religious peace among their citizens. In recent years, many states have adopted measures to combat extremist expression. A positive obligation in the sense of

individual right to protection should be limited to cases where free exercise of religion of individuals is directly limited by other individuals. The protection of mere feelings – even if religious – should, by contrast, be left with the objective duty of the state to provide for religious peace among its citizens. Against this background the current debate on the interpretation and application of Article 20, para. 2 ICCPR is moving into the right direction. Nevertheless, striking the correct balance between freedom of expression on the one side and the appropriate degree of protection of religious feelings on the other will remain a difficult task. The debate in the UK concerning the Racial and Religious Hatred Act 2006 illustrates the issue.

5. With the establishment of international human rights catalogues, the protection of freedom of religion has been disengaged from the earlier context of minority protection. However, this development has not rendered minority protection completely ineffective as far as freedom of religion is concerned. Article 18 ICCPR and und Article 27 ICCPR largely overlap. However, each of the two provisions keeps its own area of protection.

6. The concept of an "integrative" international law on religion, i.e. a concept which aims at the integration of different religions requires as a basic premise the distinction between the power of the state and the power of religion. Furthermore, an integrative international law on religion needs to define a core area with certain minimum guarantees. The *forum internum* and the freedom from coercion to religious acts should be included into the core area. The free public exercise of religion, by contrast, is subject to possible restrictions under the conditions set out in the limitation clauses of the international human rights catalogues. It is preferable to follow an approach which relies on a wide definition of the area of protection and which refrains from abstract definitions. As many national and international legal authorities do, one should rather rely on a self-perception of the respective religion which must be made plausible. On the level of possible limitations the "margin of appreciation"-doctrine serves as an important instrument for regulating the scope of judicial review by international monitoring bodies.

7. Accepting a corporate dimension of freedom of religion which protects the collective life of religious communities is a corner-stone in the construction of an "integrative international law on religions". The European Court of Human Rights has convincingly derived in its jurisprudence the principle of neutrality from freedom of religion. It furthermore established a close link of the corporate dimension of religious freedom with the principle of democracy and the organisational conditions of pluralistic societies. This allows not only for integration of religions, but also for integration through religion.

8. Obligatory judicial mechanisms of human rights enforcement are put under specific restraint with respect to issues which are controversial within society. This is where the doctrine of "margin of appreciation" has its place. Against this background the advantage of "soft" monitoring bodies such as the "UN Special Rapporteur on Freedom of Religion and Belief" becomes apparent: The Special Rapporteur on Freedom of Religion and Belief proved to be an important addition to the existing bodies because he cumulates specific knowledge in the area of religion and may lead a critical dialogue with Member States not only with respect to specific individual complaints but also concerning the general situation of freedom of religion and religious non-discrimination.