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Religious Diversity, Minorities and Human Rights: Gaps and Overlaps in Legal Protection

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Abstract: The legal protection of religious diversity is strewn with difficulties and uncertainties. The re-emergence of religiously motivated demands points to the need to better define the relationship between the legal protection of human rights and religious diversity. The current applicable laws and regulations come from different historical or national contexts, which presents a confusing landscape that calls for a better definition of the protection afforded by the different rights at stake. This article uses a general normative analysis to propose extending the scope of religious minorities to any religious affiliation that does not represent the majority of the population of a given state. This involves shifting from a paradigm of specific protection for certain minorities to one in which all minorities are protected through the universally recognized rights of freedom of religion and nondiscrimination.

Keywords: religious diversity; human rights; religious minorities; minority rights; cultural diversity; nondiscrimination; freedom of religion

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1. Introduction

This article aims to discuss and clarify the ways in which current laws protect religious diversity. In particular, the thesis argued in this paper is that the combination of freedom of religion and the right to nondiscrimination is sufficient to ensure that the management of religious diversity is based on democratic principles, without the need to recognize differentiated rights for religious minorities. Following from this thesis, it is argued that the concept of religious minority today cannot be restricted to specific groups but encompasses all nonmajority or nondominant religious denominations in a society.

In order to demonstrate the existing confusion regarding the relationship between human rights and religious diversity, both a diachronic and a synchronic analysis of the legal instruments for the protection of religious expression will be undertaken. The relationship between the main legal concepts for protection will then be discussed, which will include noting the existing confusion and proposing a paradigm shift in its interpretation that will enable an inclusive and pluralistic management of religious diversity in democratic societies.

2. Basis for the Current Approach: Religion and Human Rights

Religion is one of the most pervasive phenomena in human history. Religion is understood here in a very broad sense, going far beyond the classical interpretation. There is no single concept of religion in our societies today, and the impact of its external expression changes over time and from setting to setting. We are currently witnessing a complex landscape of relations between religion and identity, which is exacerbated by social phenomena such as secularization. This, in turn, gives rise to what has been called 'believing without belonging' (Davie 2000), which is a looser way of identifying with some beliefs without sharing an organizational affiliation. At the same time, it can be observed today that there is a strong identification with religious traditions, whether through the growing proliferation of spiritually based groups or entities or through the expression of what has

been named 'belonging without believing' (Hervieu-Léger 1993). These processes reflect collective identities with deep historical and cultural roots.

Managing religious diversity is a core unresolved issue facing democratic societies. The models that preceded our time, including those based on human rights, have yet to satisfy all the needs or demands that arise from religious identities today (Foblets 2017, p. 130). Indeed, the relationship between religion and human rights is the relationship between two of humanity's most controversial ideas. Moreover, it is interesting to note that religion by definition consists in transcendent visions and that a large proportion of human rights advocates have developed a quasi-transcendental approach to their calling that is at least partly reminiscent of a religious or revelatory dynamic (Evans 2007, p. 1).

Human rights and religion share a commitment to human dignity (Gearty 2007, p. 208) and a normative function. Both want to promote order in how we see the world, in relationships between people, and in criteria for distinguishing between good and evil (Harhoff 2007, p. 260). Both human rights and religion make universal claims, showing a kind of 'slightly universalist triumphalism' (Gearty 2007, p. 207). Religions are sets of beliefs based on national, cultural, emotional, spiritual, and moral sources. Human rights, in contrast, are a set of normative ideals based on spiritual, emotional, rational, cultural, and national sources. Both are capable of evolving, being constantly reinterpreted by representative bodies, and responding to different historical and geographical contexts; this means that an interpretation that is appropriate for a particular place and time may not be valid for others (Sherr 2007, pp. 107–9).

Much literature has been devoted to assessing how different religious traditions are related to human rights (Witte and Green 2011, pp. 27–135; Ghanea et al. 2007, pp. 19–146; Little et al. 2010, pp. 57–83; Gearon 2002, pp. 73–242). Both human rights and religions have had a conflicted relationship with postmodernism, the issue of difference being their greatest challenge (Gearty 2007, p. 208). This conflict is more difficult to overcome for religions because of the power that certain traditional dogmas possess or the sacralized nature of these dogmas. However, there is also a truth that underlies human rights which governs the most important aspects of our lives, not only the public sphere. Diversity means that several truths coexist within a society, and we somewhat implicitly renounce the idea that there is only one truth, one universal truth, or one way of accessing the truth (Mahajan 2017, pp. 87–92).

The relationship between human rights and religions is multidimensional and can be studied from different perspectives. The complexity of this relationship for scientific analysis lies in that neither concept is self-evident or straightforward (Weller 2007, p. 147). Thus, the gaps that exist in the protection of religious diversity through human rights can be studied from the point of view of each religion or from the analysis of current legal instruments, as is carried out in this paper.

3. A Normative Analysis from a Historical or Diachronic Perspective

Religious diversity, including freedom from religion(s), is at the historical origin of human rights. There is a wide range of ideological and contextual sources for human rights, of which rationalism is but one. The notion of human rights was not fully secular at its inception. From an exclusively Western perspective, both the American and French Declarations of Human Rights allude to God or show evidence of a kind of religious inspiration (Harries 2007, p. 19). The idea of dignity, which underpins the philosophical and historical development of human rights, was previously found in several major religious traditions. The idea that human beings are made in the image and likeness of God is not so much an ancient one as a development that dates back to the Renaissance through three streams of thought: the German Protestant Reformation, late Spanish Scholasticism, and the humanism of the Italian Renaissance (Huber 2015, p. 11).

The role played by the Protestant Reformation is particularly relevant in historical terms. Luther and early Protestantism turned moral duties and commandments into reciprocal rights (Witte 2013a, pp. 23–24). Meanwhile, the Calvinist tradition developed

proto-ideas of human rights in relation to the right of resistance, which began to shape the rights that would eventually be included in the declarations of the late eighteenth century (Witte 2013b, pp. 26–53). The Reformation was a decisive new experience of otherness. Its expansion into countries where it was in the minority or subject to secular Catholic power (Scotland, United Provinces, Hungary, and France) led to the development of theories that justified resistance. Although religious dissent was usually met with repression and assimilation, the impossibility of suppressing or eliminating minorities in some quarters resulted in the adoption of religious tolerance and the protection of the freedom of conscience of some religious minorities.

It was more necessity than conviction that allowed the idea of tolerance to take shape, as was the case in France at the end of the 16th century with the Edicts of Nantes, for example (Wanegffelen 1998, p. 53). But religious tolerance eventually gave rise to the recognition of the individual sphere of personal freedom and to a drive to limit the other's power. Thus, it can be argued that freedom of religion is one of the oldest and best-known human rights (Ballin 2015, p. 92), opening the door to the recognition of natural rights prior to the establishment of any political power (Ruiz Vieytez 2003).

In turn, the progressive recognition of religious freedom would give way to international legal protection for religious minorities (Danchin 2002, p. 131). From the 17th century onwards, states began to accept a mandate to respect the beliefs and worship of certain minority religious communities. This trend was recorded in various treaties between European powers, in which clauses were introduced to safeguard the religious freedom of groups or territories subject to a transfer of sovereignty (Rehman 2000, p. 142). This was the case, for example, in the Treaties of Oliva (1660), Nijmegen (1678), Ryswick (1697), Carlowitz (1699), Breslau (1742), and Kütschük-Kainardschi (1774), among others (Ruiz Vieytez 1999, pp. 17–19). Thus, the international protection of religious minorities predates the protection of modern human rights and other minority rights by 300 years (Ghanea 2008, p. 303; 2012, p. 58).

In parallel, from other traditions such as Confucianism, Shintoism, Hinduism, Buddhism, animism, and the diverse indigenous perspectives, different and complementary ideas of religious minorities may arise. In particular, the Islamic tradition was prone to the protection of certain minorities in political spaces dominated by Muslim communities (Rehman 2000, p. 162). This tradition led to the establishment of the Millet system in the Ottoman Empire, under which the various religious communities enjoyed considerable religious, social, and civil autonomy (Rehman 2000, p. 151), including the maintenance of separate religious institutions with considerable power (Ghanea 2008, p. 314). The few surviving remnants of this system are now withering away in the Treaty of Lausanne, a legal instrument that conveys the legacy of the old Ottoman system of minority protection which is currently 100 years old.

4. A Normative Analysis from a Current or Synchronic Perspective

4.1. The Political Principles Underlying the Management of Religious Diversity in Democratic Societies

Political communities today are defined by a state-based rationale in which representative democracy operates. However, representative democracy does not grant absolute power to the decision-making majority but incorporates some limits to this power in order to guarantee respect for human rights through a normative system of protection that grants the state a monopoly on coercion.

Western democratic states have in turn distanced themselves from the once dominant religious structures. The separation of church and state is understood as a precondition for guaranteeing religious freedom and, at the same time, the independence of religious denominations themselves (Ballin 2015, p. 93). Separation is linked to the need to maintain state neutrality and impartiality regarding the phenomenon of religious diversity. This neutrality has been proposed as an 'emerging right to religiously neutral governance'

(Temperman 2010, pp. 339–49). In reality, the patterns of state–religion relations remain wide-ranging (Adhar and Leigh 2010, pp. 199–233; Temperman 2010, pp. 11–146).

The relevance of religion cannot be overlooked when it comes to organizing today's political communities around the idea of respect for human rights. It should also be remembered that religious diversity and a certain degree of division in society are healthy and consistent with the very idea of a democratic society. This makes it necessary to recognize the existence of religious communities or organizations as a consequence of the right to freedom of religion itself. It must also be assumed that the minority status of a particular faith cannot be an excuse for prohibiting its expression, which means that the majority does not have the right to shape access to public space on an exclusive basis.

It is also important to bear in mind the role played by religions in mobilizing and identifying individuals, even today. Faith-based identities, characterized by their developmental, participatory, associational, voluntary, and controvertible natures (Ipgrave 2007, pp. 53–63), continue to generate demands and different views that will affect the diverse societies of tomorrow.

De Jong proposed five principles for developing policies to avoid conflicts between religions and human rights: 'recognition of the importance of religion or belief for meeting the needs of people in matters relating to spirituality, brotherhood and charity; Adoption of a nondiscriminatory and open approach by States vis-à-vis religions and beliefs; Maintaining a right balance between the rights of adherents of clashing beliefs; Promotion of dialogue among adherents of different and opposing beliefs; Promotion of debates on interpretation of religious precepts' (De Jong 2007, pp. 194–204).

In a narrower sense, the current relationship between human rights and religious diversity obliges democratic states to adopt some elementary substantive and operational principles. The former includes the active protection of religious freedom (both of and from religion) as a fundamental right and the equality of all individuals and groups in the exercise of that right. The more operational level encompasses the separation of religion and state, state neutrality towards religion (and irreligion), and the positive management of religious diversity. These operational principles also entail that democratic states are not called upon to define religious facts or assess the legitimacy of religious beliefs; rather, their role is to recognize the social importance of the phenomenon and provide a framework to ensure the effective exercise of the above-mentioned substantive principles.

4.2. The Current Regulatory Framework in the International Sphere

Human rights have shifted from being an idea to a legal concept, at both the domestic and interstate levels. The latter has developed, especially since the second half of the 20th century, through two simultaneous processes: normativization and institutionalization. Normativization involves the translation of rights into legal rules, whereas institutionalization entails the creation of bodies responsible for supervising or promoting these rules.

The international protection of the religious freedom of certain religious minorities dates back almost four centuries and is the most influential precursor of modern international human rights law—together with the system of minority protection established after the end of the First World War. Moreover, freedom of religion is also one of the most widely recognized rights in international legal documents. Virtually all international laws relating to the protection of human rights include it, starting with Article 18 of the Universal Declaration of Human Rights (UDHR). The UDHR contains references to religion in two other articles: Article 2, as one of the grounds on which no distinction shall be made in recognizing entitlement to the enjoyment of the remaining rights, and Article 16, which makes similar provisions with regard to the right to marry and found a family.

Freedom of religion and the prohibition of discrimination on the basis of religion are repeated in virtually all national and international legal instruments for the protection of human rights. This is the case of the International Covenant on Civil and Political Rights (hereinafter ICCPR), which covers freedom of religion more extensively than the UDHR. A

new development in this covenant was that it also referred to the rights of people belonging to religious minorities to profess their own religion 'in those States in which ethnic, religious or linguistic minorities exist' (Article 27). This provision, which was repeated in Article 30 of the Convention on the Rights of the Child (hereinafter CRC), added a new layer of complexity to the relationship between human rights and religious diversity, which is discussed in the next section.

The International Covenant on Economic, Social and Cultural Rights, in addition to the usual antidiscrimination clause, also contains a provision regarding religion by safeguarding the right to education in Article 13, which includes the freedom of parents or guardians to choose for their children a religious or moral education that is aligned with their convictions, in accordance with such minimum standards laid down by the state concerned. The 1990 UN Convention on the Protection of the Rights of Migrant Workers and Their Families also includes some clauses that guarantee the religious rights of migrants, but the rate of ratification of this instrument has been extremely low.

Regarding declarations, the 1981 Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief is particularly relevant, although its content has been criticized for being excessively timid and for failing to include a definition of religion (Rehman 2000, pp. 145–49). Other relevant declarations reiterated these rights, in particular, the Declaration on the Human Rights of Individuals who are not nationals of the country in which they live and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (hereinafter DRPM). The latter also explicitly stated that states have an obligation to take appropriate measures to ensure that minorities may fully exercise their rights and preserve their language, religion, and other elements of their identity. The DRPM also includes the obligation of states to protect and encourage the promotion of the 'religious identity' of minorities (Article 1) and the right of minority group members to participate in cultural and religious life (Article 2). In addition, the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP) recognizes the right of indigenous peoples to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies (Article 12).

Finally, the General Comments of the United Nations Committee of Human Rights (hereinafter, HRC) are particularly useful for the interpretation of this normative framework, in particular those relating to the Freedom of Thought, Conscience or Religion, Non-Discrimination, and Rights of Minorities.

At the European institutional level, freedom of religion and the prohibition of discrimination based on religious differences are also enshrined in the European Convention on Human Rights of 1950. The Framework Convention for the Protection of National Minorities (hereinafter FCNM) is also relevant to religious diversity and has been ratified by most European States. The freedom of religion of persons belonging to minorities is preserved by Article 7 of the FCNM, while Article 8 explicitly recognizes the right of persons belonging to religious minorities to manifest their religion or belief and to establish religious institutions, organizations, and associations. Article 12 of the FCNM states that states should, where necessary, take measures to foster knowledge of the religions of their minorities.

Also important are some declarations of the Parliamentary Assembly of the Council of Europe, such as Recommendation 1086 (1988), on the situation of the church and freedom of religion in Eastern Europe, which contains a list of powers that derive from freedom of religion. Recommendation 1202 (1993) on religious tolerance in a democratic society advises states to be flexible in accommodating different religious practices in order to build a truly democratic society. Recommendation 1396 (1999) on religion and democracy urges the need to ensure equal conditions of development for all religions in society. Finally, in the area of soft law, it is also relevant to refer to the Ljubljana Guidelines on Integration, adopted by the OSCE High Commissioner on National Minorities.

As far as institutionalization is concerned, in addition to the general bodies for the protection of human rights, it is worth noting the appointment of a UN Special Rapporteur on freedom of religion or belief, initially established by the United Nations Commission

on Human Rights as 'Special Rapporteur on religious intolerance' in 1986. Its current denomination was adopted by the Commission in 2000. Also important is the Special Rapporteur on minority issues, established in 2005 by the Commission on Human Rights, with the mandate to promote the implementation of the DRPM. Additionally, it is worth noting the Faith for Rights initiative, launched by the Office of the UN High Commissioner for Human Rights in 2017 to foster thought about the connections between religions and human rights. Finally, an important permanent institution focused on these matters is the UN Forum on Minority Issues, established in 2007 to promote dialogue and cooperation around the situation of national or ethnic, religious, and linguistic minorities.

In short, there are essentially three rights protected by international law in this area: freedom of religion, the prohibition of discrimination on religious grounds, and the right of members of religious minorities to profess their religion. At first sight, it seems a rather asymmetrical legal system in which the relationship between these three protective legal concepts is not sufficiently clear.

4.3. The Current Regulatory Framework at the State Level

The protection afforded by international law can only be effectively guaranteed by state authorities. International law itself is derived from treaties, which require ratification by states to give rise to obligations. It is therefore necessary to look at how these rights are translated into domestic laws under the respective constitutional legal systems.

A comparative analysis of constitutional law shows that there is a clear interaction between different national and international legal systems. By analyzing constitutional provisions, it can be seen that religion plays different roles in them, which can be systematized as follows:

(A) In some cases, religion is presented as a legitimizing or justifying element of the political community or its organization. This usually takes the form of references to a supreme being or a religious reference in the preamble of a constitution or in another of its more symbolic or declarative clauses. This can be found, for example, in the European constitutions of Georgia, Germany, Greece, Ireland, Liechtenstein, Poland, and Switzerland.

(B) In other cases, constitutional provisions govern the relations between religious entities and the state or some aspects of the internal organization of these entities. In most cases, these relations are limited to a single religious entity within the majority or dominant tradition in the society of a given state. On the European continent, this is the case with the constitutions of Malta (Article 2), Monaco (9), Denmark (4), Iceland (62), Norway (2 and 16), and Greece (3). Other constitutions, without mentioning official religions or churches, include references to the special prominence of one or more religious confessions. This is the case in constitutions such as those of Andorra (Article 11), Bulgaria (13.3), Spain (16), Georgia (9), Italy (7), North Macedonia (19), Poland (25), and Lithuania (43). However, some constitutions contain an explicit clause on the separation of church and state. These include the constitutions of Azerbaijan (Article 18), Portugal (41), Italy (7), Belgium (21), Poland (25), Slovakia (24), Slovenia (7), Albania (10), Bulgaria (13.2), Romania (29), Moldova (31), Ukraine (35), and Russia (14).

(C) In almost all constitutions, religion is included in a list of legitimate options or interests to be protected, which usually translates into the explicit recognition of certain rights. Four main protected areas can be identified:

   a. Freedom of religion, which includes the freedom not to profess any religion. The provisions related to this right are worded in a similar way to that found in international treaties and are part of an overwhelming majority of constitutions.
   b. Prohibition of discrimination on grounds of religion or belief. This clause is also found in most national constitutions and is consistent with the clause generally contained in international law.

c. The right of members of minorities to profess their own religion. Unlike the previous ones, this right, presented in different forms and applied to different groups (usually cited as religious communities or groups), only appears explicitly in a small number of constitutions, such as those of Croatia (Article 41), Serbia (44), North Macedonia (19.1), Albania (10), and Kosovo (59).
d. Other rights that allude to religious elements in some constitutions. The most frequently protected areas linked to religion are those related to the right to education (constitutions of Andorra, Article 20.3; Ireland, 42; Netherlands, 23.3; Belgium, 24; Switzerland, 15; Finland, 15–16; Lithuania, 26; Poland, Article 53; Slovenia, 41; and Romania, 32), freedom of association (constitutions of Poland, Article 53; Liechtenstein, 39; Denmark, 67; Slovakia, 24; Croatia, 41; and Serbia, 44), and the right to marry (constitutions of Andorra, Article 13.1 and Lithuania, 38). However, this set of explicit references to religion is neither systematic nor widespread, nor does it have a direct correlation with international law (unlike the previous three).

From the foregoing, it can be concluded that, regarding the subject at stake, legal protection is mainly organized around three rights, two of which are almost universal in formally democratic systems, while the third is only explicitly provided for in some legal systems.

5. Legal Instruments of Protection and Their Inconsistencies

As has been seen in the previous sections, international law and comparative constitutional law are basically aligned regarding the forms of protection afforded to religious diversity. Many fundamental rights are potentially affected by religion, ranging from freedom of conscience and expression or association to the rights of the child, the right to self-determination, and the right to peace (Witte and Green 2011, pp. 155–360). However, a systematic analysis of the existing legal systems leads to the conclusion that the specifically protected rights are freedom of religion, the right not to be discriminated against on the grounds of religion and, in some cases, the right of members of religious minorities to profess their religion.

The diachronic and the synchronic analyses conducted in the previous sections also help to understand that the origins of the rights that converge over this issue are diverse and that historical and cultural contexts may have diverging influences. Freedom of religion is interpreted and applied differently according to national traditions or contexts or even depending on the international human rights protection body concerned. Thus, the European Court of Human Rights has been criticized for recognizing too narrow a scope of protection for the freedom of religion provided for in Article 9 of the European Convention on Human Rights (Evans 2001, pp. 33 and 200), or for reducing it to freedom from religion, rather than freedom of religion (Berry 2012, p. 11). In contrast, the protection offered by UN treaty bodies from the same right tends to be much broader (Taylor 2005, pp. 343–46; Danchin 2002, pp. 145–61). These differences are replicated when domestic laws are compared. This shows that merely having provisions in place to safeguard the same rights does not guarantee that these rights will be consistently interpreted or implemented in different societies, which can lead to gaps or loopholes in the protection that religious diversity needs.

In addition, there is asymmetry in how often the three relevant rights are in fact covered by the relevant provisions. Freedom of religion and the right to freedom from discrimination on grounds of religion are found in virtually all legal systems, both domestic and international. In contrast, the right of members of religious minorities to profess their religion is only explicitly mentioned in some legal systems. Similarly, there is abundant legislation and case law on the first two rights but not on the third.

This asymmetry is partly due to the diversity of national contexts and the different origins and development of these rights in each of them. This results in an unclear relationship between these three rights, leading to ambiguity or lack of definition regarding the

scope of protection of each right. This failure to give systematic and consistent treatment to these rights in different regulatory frameworks leads to gaps and overlaps in the current protection of religious diversity, which makes it less effective, to the detriment of minority or particularly vulnerable groups.

5.1. Freedom of Religion as a Basic Right for the Protection of Religious Diversity

Freedom of religion is deployed on two fronts, one internal and one external. At the domestic level, freedom of religion includes the right to hold either theistic or nontheistic or atheistic beliefs, as well as the right to change one's beliefs or to have no beliefs. It is a subjective right that protects the personal beliefs that make up the conscience of each individual. In this regard, freedom of religion protects, first and foremost, an internal, inviolable, and absolute right to privacy. In a positive sense, it guarantees that individuals can make a free choice and uphold it; in a negative sense, it guarantees total immunity from coercion, both by the state and by third parties or social groups. While some authors have pointed out that freedom of religion does not include freedom from religion (Sapir and Statman 2010, pp. 268–99), this is not the position of the vast majority of the doctrine. The duality of freedom of belief/from religion reflects the dichotomy of positive and negative perspectives alluded to above, which includes the right not to be coerced into accepting religious norms or behavior (Lerner 2006, p. 8).

As regards the external scope of the right to freedom of religion, it protects the freedom to express or manifest one's religious beliefs in a variety of ways. Protection encompasses public acts and religious ceremonies but also very different practices, such as the observance of religious dietary practices, acceptance of a certain dress code, life cycle rituals, the construction of places of worship, the teaching of religion, or the use of a certain language associated with beliefs or religious organizations.

In this area, what is relevant to the interpretation of religious freedom is the scope of the measures of restriction or limitation that can be applied to these external manifestations of religious freedom, whether individually or collectively. The protection of religious diversity is directly related to the way in which each legal system interprets and applies these restrictions, which tend to affect minority or nontraditional religious traditions or expressions in each society to a greater extent. In this regard, the HRC has expressed that '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'. The dominant tradition, whether religious or secular, cannot therefore be the parameter of reference for generally determining the external content of religious freedom, especially in today's societies, which are characterized by growing religious diversity. The grounds that may justify restrictions on external manifestations of religion are generally related to security, health, order, or morality, all of which are difficult to define and link to cultural and national contexts and are therefore open to interpretation by the dominant majority. However, it may also be necessary to impose restrictions on the freedom to manifest religion precisely to ensure that the expressions of some groups do not prevent those of others and to ensure respect for the beliefs of all and thus greater religious diversity.

Nevertheless, freedom of religion is not just a matter of the public authorities intervening in a limited or restrictive way. It also involves the obligation to adopt the positive measures or actions needed to guarantee the exercise of this freedom. The scope of this positive intervention in religious freedom by public authorities is even more difficult to define than the limits of noninterference. This is because of the national context and the relationship between the majority and minorities in access to public spaces or resources. It is the responsibility of the public authorities to facilitate the exercise of fundamental rights as far as possible and to ensure formal and material equality in the enjoyment of these rights. This requires more active intervention on behalf of members of minority groups, although the dominant or most common interpretations in practice tend not to be consistent with this principle.

5.2. The Prohibition of Discrimination as a Protective Complement to Freedom of Religion

Freedom of religion is protected not only by its positive formulation as a fundamental right but also by the prohibition of discrimination based on certain personal characteristics, including religion, worship, or belief. Religion is consistently and explicitly included among the grounds for prohibiting discrimination in international and constitutional legal texts of democratic countries.

The prohibition of discrimination does not oblige states to maintain strict religious neutrality or separation in all cases. The adoption of an official religion by a state, or the recognition by a state of a majority religion, are not in and of themselves contrary to the freedom of religion of its citizens, provided that it does not lead to discrimination in the exercise of this right.

The prohibition of discrimination also affects the way in which public authorities protect freedom of religion. Thus, positive measures to guarantee religious freedom cannot be adopted on a discriminatory basis regarding groups that have equal status, and historical arguments must not prevail over this consideration. When certain public measures or resources are implemented or allocated in favor of a particular religious community, there can be no discrimination in relation to those offered to other communities, unless such distinctions are demonstrably objective and reasonable and cannot be reduced exclusively to the size of the religious group or to its greater or lesser historical roots.

The concept of indirect discrimination is important for the protection of cultural diversity, as sometimes allegedly neutral norms or practices ultimately have a particularly harmful effect on a particular group defined by religion. Conversely, the failure to treat groups differently in relevantly different situations (either in the rule itself or in its application) may lead to indirect discrimination, which has been referred to as 'discrimination through nondifferentiation' or 'discrimination through equal treatment'. This has been used by the European Court of Human Rights since 2000, precisely in relation to a religious difference. However, discrimination through equal treatment has not been widely used in European or comparative jurisprudence.

Another instrument to combat indirect discrimination is reasonable accommodation, which has seen significant use in Canada (Bouchard and Taylor 2008) and the United States in relation to religious differences. Reasonable accommodation is the legal obligation arising from the right to nondiscrimination to take reasonable steps to make an act or omission compatible with a particular demand to exercise a right, unless doing so would impose an undue burden. It does not derive from a legislative formulation but from a jurisprudential formulation of the right to equality (Bosset 2007, p. 10). A reasonable accommodation is implemented by revoking or making an exception to a particular rule, adapting it, or making a special arrangement in terms of time, space, or a given activity. Since the 1980s, the Supreme Court of Canada has recognized that where a law has a valid secular objective but also has a restrictive effect on the religious freedom of some people, those people are entitled to an accommodation, usually in the form of an exemption from the application of the law, provided that such a solution is consistent with public interest and does not impose an excessive penalty.

Reasonable accommodation has not been extended directly to other legal systems, at least in the field of religious diversity (Foblets et al. 2014, pp. 131–82). This is without prejudice to the prohibition of direct and indirect discrimination on the basis of religion, not only for individuals but also for groups. The principle of nondiscrimination complements the protection offered by freedom of religion and extends to any positive and negative actions that the public authorities may take to guarantee it.

However, the content of the protection of freedom of religion and the right not to be discriminated against on grounds of religion are still sometimes confused (Khaitan and Norton 2020, p. 112; 2019). Freedom of religion, like all fundamental rights, includes an equality dimension (Fokas 2018, p. 28), but the full protection of this comes through the right to equality and nondiscrimination. This does not imply that all religious groups have the same degree of access to public resources or actions, but it does imply that

there is no discrimination in such access. Some authors have opted to emphasize that freedom of religion protects the interest of religious adherence or nonadherence as an individual's autonomous choice vis-à-vis the state, while the right not to be discriminated against protects the interest of belonging to a group, combating differences between groups in terms of material, political, or sociocultural development vis-à-vis all kinds of actors (Khaitan and Norton 2020, pp. 112–18). It is important to understand that the relationship between the right to nondiscrimination and religious freedom is parallel to that between the antidiscrimination clause and the other fundamental rights enshrined in constitutions or human rights treaties.

5.3. The Alleged Right of Members of Religious Minorities and Their Differential Value

Article 27 of the ICCPR states that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. This clause is repeated in Article 30 of the CRC and in the DRPM. At the European level, article 7 of the FCNM recognizes 'the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion', whereas article 8 of the same convention states that 'the Parties undertake to recognize that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organizations and associations'. Similar clauses are also included in some constitutions, such as the ones of Poland, Serbia, or Northern Macedonia.

The fundamental problem with the existence of this third right in the protection of religious diversity is the lack of clarity about its content and how it relates to the two rights discussed above. A preliminary approach to international and comparative law clearly suggests that if the rights of religious minorities are explicitly and separately recognized, they must have different content from the provisions referred to freedom of religion and nondiscrimination, or at least a protective complement to freedom of religion when the right to nondiscrimination is not sufficient (Ghanea 2008, p. 308; 2012, p. 59). However, several serious difficulties arise in terms of determining what this different content is. Some authors hold that this content is based on the need for positive action by states (Eide 2008, pp. 9–11), but as has been noted above, the obligation to take positive action derives from the implementation of freedom of religion, as is the case with any other fundamental right. Others argue that the difference lies in the allegedly collective nature of the minority's right as opposed to the individual nature of freedom of religion. However, the fact that this right includes collective entitlements is proven in Article 12 of the UNDRIP (Ghanea 2008, p. 307), and the very wording of Article 27 ICCPR and Article 30 CRC does not suggest a collective status. The distinction between individual and collective entitlement does not, therefore, provide a basis for the existence of differentiated rights. In fact, there is little doctrinal consensus or clarity on the articulation between freedom of religion and the rights of members of religious minorities (Rehman 2000, p. 140).

This imprecision is not only seen in the position of academics or rights theorists but also in the use of these legal concepts by institutions. Although religious minorities are entitled to these rights (according to the applicable legal instruments), in reality, they have rarely been protected in this way (Ghanea 2008, p. 308). It suffices to recall the jurisprudence of the HRC on Article 27 ICCPR or that of other UN treaty bodies, and even the scant consideration given by the UN Independent Expert on minority issues to the specific protection of religious minorities (Ghanea 2012, pp. 61–66). The HRC's protection of religious diversity is not implemented through Article 27 of the ICCPR but by referring the cases to violations of other covenant rights, including nondiscrimination (Ghanea 2012, pp. 66–74).

This confusing situation begs two fundamental questions. The first concerns the content of the rights of members of religious minorities in comparison with the content already

protected by freedom of religion and nondiscrimination. That is, to determine whether there is indeed added or differentiated value in protecting diversity through minority rights. The second concerns eligibility for these rights, in other words, to determine which individuals or groups are covered by the concept of religious minorities, and therefore, are entitled to the alleged additional rights, as opposed to the rest of the people who are not eligible. The same questions were asked by Kurban when analyzing the FCNM: 'the personal scope of application of the FCNM and the substantive scope of freedom of religion protected under articles 7 and 8 of the FCNM. In other words, which groups should be deemed religious minorities in this context and what kind of rights should they be granted to be able to meaningfully exercise their freedom of religion?' (Kurban 2008, p. 119).

5.3.1. The Additional Content of the Right of Members of Religious Minorities to Profess Their Own Religion

Given that minority rights 'shall not be denied' according to ICCPR, 'then those rights must exist separately from the Covenant and be part of Customary international Law' (Gilbert 1997, p. 117). If this is so, and minority rights involve something else, this 'else' should be defined or, at least, be capable of being defined on a case-by-case basis. However, practice is unclear in this respect, as there is no appreciable case law on these rights at the international level. It should be clarified whether there is an actual difference in content between the generally recognized right to freedom of religion and the right of minorities to profess their religion which is recognized in international legal instruments.

The author who has most attempted to clarify this issue is Ghanea, who proposed a number of differences between freedom of religion and the rights of religious minorities (Ghanea 2012, pp. 62–65). She pointed out that minority rights are lex specialis with respect to religious freedom and emphasized the community-based nature of minorities, the objective and inclusive definition of minorities, and the obligation to adopt positive measures and to ensure their effective participation (Ghanea 2008, pp. 310–13). Nevertheless, none of these elements appear to be excluded from the protection afforded by freedom of religion or freedom of religion combined with the right to material equality and nondiscrimination. As has already been noted, the collective nature of right holders and the obligation to take positive measures are not criteria for separating the content of the two rights.

There may be other operational elements that differentiate the rights at stake. For example, whereas freedom of religion under Article 18 ICCPR has a fundamental nature and cannot be derogated under the covenant, the rights of minorities in Article 27 may be derogated. This seems to point to the fact that the content of both covenant articles must be different, but this logic does not in and of itself demonstrate a differentiated content that does not cause an overlap. The fact that minority law grants legal personality to these groups (Gilbert 1997, p. 111) is also questionable, since it is widely accepted that religious freedom can be enjoyed by individuals as well as collectives. Finally, Ghanea has pointed out that freedom of religion is 'far-reaching and profound' and is not limited to traditional religions but also includes atheistic views, while minority rights can only be enjoyed by religious minorities in the strict sense (Ghanea 2008, p. 304). Yet, this is a questionable interpretation that is not supported by other explicit legal arguments.

In short, no normative text or shared interpretation has shown what additional content minority rights add to the protection of religious diversity compared with the protection offered by freedom of religion and nondiscrimination. In specific cases where certain religious minorities enjoy explicit recognition of certain powers that are not available to other groups, it is questionable whether this does not amount to a violation of the freedom of religion of others or a violation of the principle of nondiscrimination. This brings us to the second issue, that of eligibility for the right. If there are distinct religious groups that merit specific rights, it can be stated that there is additional content. On the contrary, if this additional content is not clear, it will be difficult to clearly identify which groups could benefit from this supposedly autonomous right.

5.3.2. The Entitlement to the Right of Members of Religious Minorities to Profess Their Own Religion

There is no generally accepted definition of what constitutes a religious minority (Lerner 2006, p. 43). In addition, the core meaning of the very words that make up the concept has been called into question. Thus, for some authors, minority status is not only determined by a numerical measure but is a matter of domination (Ghanea 2012, pp. 74–77). It has also been argued that today, most religious minorities cannot be categorized solely on the basis of their religious status (Gilbert 1997, p. 106).

The existence of a minority in a given state does not depend upon a decision by that state but is established by objective criteria. The HRC has also indicated that immigrant groups or foreign populations may be entitled to the rights recognized in Article 27 of the ICCPR, which dramatically expands their personal scope of application. European countries, in contrast, tend to use the concept of 'national minority' to limit the application of so-called minority rights to 'traditional' groups or those composed only of nationals, thus relegating minority treatment to new or recent minorities which consist mainly of non-nationals. This criterion, however, is not applicable in practice, since the communities of religious minorities are always composed of both nationals and non-nationals. The European trend points in the direction of including new minorities, and specifically migrants, in the protection provided to minorities in general, which is specifically the case in relation to freedom of religion (Berry 2012, pp. 13–18; Hofmann 2005, p. 17).

In light of the above, and given that the HRC has included non-nationals and immigrants within this concept, the question arises of whether the category of religious minority should be extended to all nonmajority religious communities. However, if all groups whose beliefs or religious organization differs from that of the majority of the population are considered religious minorities, this renders the concept ineffective, since the mere application of freedom of religion and nondiscrimination, in its individual and collective aspects, would be sufficient to cover the protection of religious diversity.

In the past, international treaties and some examples of constitutional recognition have sought to provide specific protection for particular minority groups living in the territory of a state with a different religious majority. The treaties signed in the interwar period, as was the case for the current Treaty of Lausanne of 1923 and the Minorities Treaty between the Principal Allied and Associated Powers and Poland of 1919, among others, remain within this paradigm. Nevertheless, given the recent new interpretations made by international bodies, the distinction between traditional and new religious minorities no longer has a basis. This has resulted in the broadening of the definition of religious minority to include any nonmajority denomination. In this way, the content difference between the right to freedom of religion and the right of members of a religious minority to profess their own religion is reduced to such an extent that the distinction between the two becomes almost unrecognizable. This would also explain why hardly any international jurisprudence can be found that is based on applying Article 27 of the ICCPR to religious minorities.

In plural societies, there are no objective or reasonable criteria to delimit which religions constitute religious minorities and which do not. Any differentiating criteria are likely to be arbitrary and could lead to differential treatment without reasonable or objective—thus discriminatory—justification. At the same time, differential treatment of nonmajority religions in a pluralistic society may be discriminatory, even if it is based on constitutional or historical grounds. However, if all existing religious groups are included in the category of religious minorities, this effectively negates any substantial difference between that which is protected by the right to religious freedom and what is protected by the right of persons belonging to minorities to profess their own religion. In other words, all persons with beliefs different from the majority or dominant beliefs of a society would to some degree be members of religious minorities. At the same time, individual or collective freedom of religion must include the right to express this externally, to do so collectively, to demand positive measures from the public administration, and for these manifestations or measures not to be discriminated against vis-à-vis other groups.

The thesis presented here, therefore, is that there is no different additional content for the religious minorities' rights, nor can a subject of the religious minorities' right be identified that is not already covered by a suitable interpretation of freedom of religion and the right to nondiscrimination. This does not mean that the public treatment of all religious expressions in a democratic society must be the same but simply that no discrimination may be established between them that is not based on objective and reasonable criteria. Additionally, any positive measures adopted to facilitate or ensure the exercise of citizens' freedom of religion must respect the same principle of nondiscrimination. In short, this normative analysis leads us away from the paradigm of specific protection of (certain) minorities to move towards a paradigm of protection of (religious) diversity within a framework of human rights for all. For this new paradigm, an appropriate, inclusive, and pluralistic application of religious freedom and the principle of nondiscrimination is sufficient for all individuals and the religious groups in which they are embedded.

6. Conclusions

Managing human differences is challenging for both religions and human rights (Gearty 2007, p. 208). The organization of the world into sovereign and legally separate states raises the need to address the coexistence between the majority or dominant identity of each of these states and the other identities within them. Given that identity is an essential part of human dignity and that religion plays an important role in the formation of identities, the protection of religious diversity is one of the most important challenges in today's democratic societies.

The development of the main international legal instruments and constitutions has led to a system for the protection of religious identities that is based on three fundamental rights. However, the rights of individuals belonging to religious minorities are less recognized and extended than freedom of religion or the right to nondiscrimination on the grounds of religion.

Simultaneously, religious minorities remain insufficiently protected. The use of specific clauses is very rare at the international level. And where specific clauses do not exist, as in the case of the European Convention on Human Rights, jurisprudence has reduced the ability to protect religious freedom through the overuse of the margin of appreciation concept, where the moral views of the majority are used as a reference point (Berry 2012, p. 15). Ultimately, the tendency remains to reinforce the privileged place of each society's religious (or, in very few cases, nonreligious) tradition as part of its cultural and national identity (Fokas 2018, p. 29), which amounts to the moral preferences of the majority prevailing over those of minorities (Berry 2012, pp. 37–38).

It has been shown that the existence of a specific right for religious minorities does not guarantee that they will receive more or better protection. It has also been noted that there are no solid arguments today to create separate and different content for the protection of minorities, nor to differentiate some religious minorities from others. There is therefore no need for an explicit separate right for religious minorities. On the contrary, there is now a need to extend the protection granted by generic fundamental rights, such as freedom of religion itself. In short, the traditional paradigm that protects (some) religious minorities needs to be replaced by a new paradigm that focuses on the protection of diversity as such and recognizes religion as an essential part of human dignity embedded in the fundamental rights of all persons.

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