# Die Rechtsstellung des Menschen im Völkerrecht

Herausgegeben von
THILO MARAUHN

Mohr Siebeck

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## Entwicklungen und Perspektiven

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Thilo Marauhn

Mohr Siebeck

*Thilo Marauhn,* geboren 1963; Studium der Rechtswissenschaft und der internationalen Beziehungen an den Universitäten Mannheim, Wales (Aberystwyth), Bonn und Heidelberg; 1994 Promotion; 1995 Master of Philosophy an der University of Wales; 2000 Habilitation; Professor für Öffentliches Recht an der Universität Gießen.

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# Vorwort

Die Auseinandersetzung um die Rechtsstellung des Menschen im Völkerrecht scheint heute in festen Bahnen zu verlaufen. Zahlreiche völkerrechtliche Menschenrechtsinstrumente machen ebenso wie neuere Entwicklungen im Völkerstrafrecht deutlich, dass das Individuum im Völkerrecht nicht mehr vollständig durch die Staaten mediatisiert ist. Zwar ist die Rechtsstellung des Einzelnen völkerrechtlich weit von derjenigen der Staaten, den originären Völkerrechtssubjekten, entfernt. Jedoch ist er Träger ganz bestimmter, ihm von den Staaten zugeordneter Rechte und Pflichten und genießt insoweit partielle Völkerrechtssubjektivität.

Genügt es aber, unter Bezugnahme auf die oben genannten Entwicklungen, dem Einzelnen Völkerrechtssubjektivität zu attestieren? Muss nicht vielmehr danach gefragt werden, wie sich diese „Statusveränderungen" konkret auswirken? Was ändert sich durch die schlichte Anerkennung einer Rechtspersönlichkeit des Individuums für den Menschen in grenzüberschreitenden Sachhalten?

Der vorliegende Band nimmt die Diskussion um die Rechtsstellung des Menschen im Völkerrecht auf. Die bekannten Erkenntnisse bilden aber nur den Ausgangspunkt der hier vorgestellten Überlegungen. Auf der Grundlage neuer Entwicklungen möchten die einzelnen Beiträge Perspektiven aufzeigen, die sich für den Einzelnen aus Statusveränderungen ergeben können. Um ein möglichst facttenreiches Bild zu zeichnen, greifen die Beiträge unterschiedliche Konstellationen auf, die bislang nur zum Teil Bestandteil der aufgezeigten Diskussion sind.

So gehört die Diskussion über die Gewährleistung der Religionsfreiheit in der Europäischen Menschenrechtskonvention sicherlich eher zu den klassischen Fragestellungen, die aber aufgrund neuerer demographischer und religionssoziologischer Entwicklungen an Aktualität gewonnen hat. Auch das Verhältnis zwischen dem „Straßburger" und dem „Luxemburger" Grund- und Menschenrechtsschutz ist Gegenstand zahlreicher Erörterungen gewesen, hat aber durch die Europäische Grundrechte-Charta eine neue Dimension gewonnen. Völkerrechtlich gilt es, die Entscheidung des IGH im LaGrand-Fall zu bewerten und der Frage nachzugehen, ob und inwieweit die Ausführungen des IGH tatsächlich zu einer Verbesserung der Situation Betroffener führen können.

Neben die genannten klassischen Fragestellungen treten drei Beiträge, die eine eher ungewöhnliche Perspektive einnehmen. Dies gilt sowohl für die Frage nach der Menschenwürde (insbesondere nach dem 11. September 2001) als auch für die Entschädigung von Zwangsarbeitern. Beide Beiträge liegen gleichsam „quer" zur völkerrechtlichen Diskussion. Sie nehmen ihren Ausgangspunkt in internationalen Sachverhalten und hinterfragen theoretisch wie praktisch die rechtliche Verarbeitung dieser Sachverhalte. Dass die praktische Relevanz völkerrechtlicher Gewährleistungen sowohl auf der Ebene des Menschenrechtsschutzes als auch im Kontext des humanitären Völkerrechts wesentlich von den Durchsetzungsmechanismen abhängt ist unschwer nachvollziehbar. Der letzte Beitrag dieses Bandes geht der Frage nach, ob sich die Durchsetzungsmöglichkeiten und die dabei verfolgten Strategien in einer Art und Weise verändert haben, dass hier von einem Paradigmenwechsel gesprochen werden kann.

Sämtliche Beiträge beruhen auf der im Wintersemester 2001/2002 erstmals durchgeführten Ringvorlesung "Forum Juris Internationalis" des Fachbereichs Rechtswissenschaft der Justus-Liebig-Universität Gießen. Dank gebührt in erster Linie den Autorinnen und Autoren. Darüber hinaus danke ich den Mitarbeiterinnen und Mitarbeitern der Professur für Öffentliches Recht, Völkerrecht und Europarecht, die in vielfältiger Weise und mit großartigem Engagement zum Gelingen dieses Unternehmens beigetragen. Zu danken ist darüber hinaus der Gießener Hochschulgesellschaft für die finanzielle Unterstützung der Vortragsreihe. Besonders danken möchte ich schließlich dem Verlag und dem verantwortlichen Lektor, Herrn Dr. Franz-Peter Gillig, für die Möglichkeit der Veröffentlichung und für die dabei erfahrene Unterstützung.

Gießen, im März 2003 Thilo Marauhn

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EVA BREMS

## I. Introduction

Freedom of religion is protected by Article 9 of the European Convention on Human Rights in the following terms:

"1. 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.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Several Articles[1] of the Convention are framed along the same lines: first, a paragraph defining the scope of the individual right, and second, a limitation clause specifying the conditions under which the exercise of the right can be limited. Most rights protected under the Convention are not absolute. This means that an interference with such a right does not automatically amount to a violation thereof. According to the limitation clause of Article 9, para. 2, an interference is justified if three conditions are met: it must be prescribed by law, it must have a legitimate purpose – which means that it either serves a common good (public safety, public order, public health, morals) or protects the rights of other persons –, and the restriction must be "necessary in a democratic society" to serve that purpose. The latter, in essence, is a test of proportionality.

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[1] Articles 8 (protection of private life, family life, home and correspondence), 9 (freedom of conscience and religion), 10 (freedom of expression) and 11(freedom of assembly and association) of the Convention have similar limitation clauses in their second paragraphs. In Article 2 of the Fourth Additional Protocol to the Convention (freedom of movement) it is included in the third paragraph.

Looking at the case law of the European Court of Human Rights (ECHR) on freedom of religion, a tentative finding is that there are remarkably few cases. I counted thirteen[2], including two cases on discrimination on the basis of religion[3], and the first judgement is as recent as of 1993. Yet, an accurate picture of the approach of the ECHR to religion can not be restricted to these thirteen judgements.

First, religion is often indirectly addressed on the basis of other provisions of the European Convention[4]. We will discuss cases addressing religion while dealing with freedom of expression, freedom of association, and the right to a fair trial[5].

Second, many complaints about violations of the freedom of religion are not examined on the merits, being found inadmissible as "manifestly ill-founded". The decision that a case is manifestly ill-founded is taken on the basis of a summary examination of the merits. Up until 1998 such decisions were taken by the European Commission of Human Rights. As the Commission was dissolved with the procedural reform brought about

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[2] ECHR, *Kokkinakis v. Greece,* 25 May 1993, Series A, no. 260-A; ECHR, *Manoussakis v. Greece,* 26 September 1996, Reports of Judgments and Decisions, 1996-IV; ECHR, *Efstratiou v. Greece,* 18 December 1996, Reports of Judgments and Decisions, 1996-VI; ECHR, *Valsamis v. Greece,* 18 December 1996, Reports of Judgments and Decisions, 1996-VI; ECHR, *Kalaç v. Turkey,* 1 July 1997, Reports of Judgments and Decisions, 1997-IV; ECHR, *Larissis v. Greece,* 24 February 1998, Reports of Judgments and Decisions, 1998-I; ECHR, *Buscarini v. San Marino,* 18 February 1999, Reports of Judgments and Decisions, 1999-I; ECHR, *Serif v. Greece*, 14 December 1999, not yet published (see www.echr.coe.int); ECHR, *Thlimmenos v. Greece,* 6 April 2000, *ibid.*; ECHR, *Cha'are Shalom ve Tsedek v. France,* 27 June 2000, *ibid.*; ECHR, *Hasan and Chaush v. Bulgaria,* 26 October 2000, *ibid.*; ECHR, *Cyprus v. Turkey,* 10 May 2001, *ibid.*; ECHR, *Metropolitan Church of Bessarabia and others v. Moldova,* 13 December 2001, *ibid.*

[3] ECHR, *Thlimmenos v. Greece, supra* note 2, and ECHR, *Cha'are Shalom ve Tsedek v. France, supra* note 2.

[4] E.g. ECHR, *Darby v. Sweden,* 23 October 1990, Series A, no. 187; in this case the Court ruled that differential treatment of residents and non-residents with regard to Church tax exemptions constitutes discrimination in respect of the right to property (Article 1 First Additional Protocol to the Convention). See also ECHR, *Tsirlis and Koloumpas v. Greece,* 29 May 1997, Reports of Judgments and Decisions, 1997-III; the Court ruled that detention of ministers of Jehovah's witnesses during procedure for exemption from military service violates Article 5 of the Convention. Reference may further be made to ECHR, *Canea Catholic Church v. Greece,* 16 December 1997, Reports of Judgments and Decisions 1997-VIII, where denial of legal personality to a religious community was considered a violation of Article 6 of the Convention. Finally, in ECHR, *Riera Blume and others v. Spain*, 14 October 1999, not yet published (see www.echr.coe.int), detention of suspected members of a sect in a hotel against their will to undergo 'deprogramming' was held to violate Article 5 of the Convention.

[5] See *infra*.

by Protocol No. 11, it is now the Court itself ruling on issues of admissibility.

In order to get a comprehensive view of the Court's approach to religion it is also important to know which cases never made it to the Court – and why. For this reason, the paper includes a number of decisions of the European Commission on Human Rights.

In its first judgment on freedom of religion, the Court underlined the particular importance of this guarantee:

"As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it"[6].

This was repeated in other cases[7]. Yet, in practice, the commitment of the Court to protecting religious freedom is not always as strong as might be expected on the basis of this statement.

Within the scope of this paper, it is not possible to review the entire body of case law of the European Court of Human Rights and the European Commission of Human Rights on freedom of religion[8]. Instead, I will focus on three critical elements. Further, I will address a fairly new problem with regard to the Court's case law.

First, it will be argued that the Strasbourg case law does not protect *religious practices* to a sufficient degree. This will be contrasted with the extensive protection offered to *religious feelings*. It will be argued that the case law of the Strasbourg bodies is overprotective of such feelings. Third, it will be demonstrated that the European Court of Human Rights is *somewhat hostile to Islam*. Finally, the question will be addressed whether the European Court of Human Rights can help promote human rights *within religious communities*.

## II. Insufficient Protection of Religious Practices

As far as religious practices are concerned, the impression arises that the European Court of Human Rights and the European Commission of Human Rights do not protect such practices adequately.

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6 ECHR, *Kokkinakis v. Greece, supra* note 2, § 31.

7 ECHR, *Buscarini v. San Marino, supra* note 2, § 34; ECHR, *Serif v. Greece, supra* note 2, § 49, ECHR, *Hasan and Chaush v. Bulgaria, supra* note 2, § 60.

8 For an excellent overview, see *C. Evans,* Freedom of religion under the European Convention on Human Rights, 2001.

*1. Internal and External Elements of Religion*

Religion includes internal and external elements. The internal aspect, the *forum internum*, refers to the belief itself. The external one relates to the manifestation of belief. What is considered as manifestation of belief is a difficult issue in the case law of the Commission and the Court. The Commission and the Court repeatedly stated that Article 9 does not protect every single act motivated or inspired by religious motives or belief[9]. As a result, complaints have often been dismissed on the basis that the situation allegedly violating religious freedom does not even interfere with that freedom. Situations which at first sight seem to concern freedom of religion are thus kept outside the scope of Article 9 of the Convention. Under those Articles of the Convention with limitation clauses, it is standard practice to first analyse whether a situation falls within the scope of the individual right concerned, which is circumscribed in the first paragraph. Only after an interference with that right has been established, the triple criterion of the limitation clause is applied. The number of cases under Article 9, turned down in the first phase of this test, i.e., without any examination under the limitation clause, is considerable. In the sphere of other rights, *inter alia*, freedom of expression (Article 10) or the right to privacy (Article 8), this is much more exceptional.

Moreover, even when a particular practice falls within the scope of protected manifestations of religious belief, the Court and the Commission easily accept restrictions of such a practice under the limitation clause of the second paragraph.

This seems to be somewhat at odds with the above-quoted statement of the Court on the particular importance of freedom of religion. However, read together with the sentence following our quotation, the Court's approach becomes much clearer:

"While religious freedom is *primarily* a matter of individual conscience, it also implies, inter alia, freedom to 'manifest one's religion'"[10].

In other words, the internal aspect of religion is the main element for the Court. The external aspect, i.e., the right to manifest one's religion, is "also" protected, but is considered to be less important. The Court does not explain this further, even though it is not really self-evident.

The question must be asked whether this attitude of the Court manifests a bias towards Christianity[11]. On the one hand, Christian religions are more

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[9] E.g. ECHR, *Kalaç v. Turkey, supra* note 2, § 27; ECHR, *Larissis v. Greece, supra* note 2, § 45.

[10] ECHR, *Kokkinakis v. Greece, supra* note 2, § 31.

[11] Cf. *Evans, supra* note 8, 76: "(...) many definitions of religion note the importance of developing and living by an ethical code, adhering to communal patterns of behaviour

confined to the inner realm than others: they do not really impose rules with regard to food, dress codes, etc. On the other hand, as far as such rules exist within Christian denominations, they have already been accommodated within the legislation and the practices of European societies: the best example of this is the fact that most jobs do not entail work on Sundays or on the main Christian holidays. Hence, the Court's attitude towards religious practices mainly affects adherents of others, primarily minority religions.

### *2. The European Court of Human Rights and Religious Practices: Religious Slaughter*

On religious practices, there is a recent case that was decided on the merits by the Court. As to the facts of the case, it concerned ultra-orthodox Jews in France, a minority within a religious minority; the practice at issue was that of religious slaughter. French legislation accommodates the needs of the Jewish community by authorising religious slaughter as an exception to the ordinary rules on slaughter. The system works on the basis of licences granted by religious bodies authorised for that purpose by the French authorities. Within the Jewish community, there is only one such recognized organisation, representing the majority of Jews in France. The organisation issues licences required to slaughter animals for kosher meat. Some orthodox Jews, however, do not consider it sufficient that meat is kosher, it also has to be "glatt", which means that the animal must not show any trace of a previous illness, especially in its lungs. The meat certified by the recognized religious body is guaranteed kosher, but not guaranteed glatt.

The applicant in this case was an association of orthodox Jews running butcher's shops, caterers and the like, providing glatt meat. They got hold of their resources from illegal slaughter and from Belgian imports. However, the applicant wanted to be able to legally perform glatt slaughter. For that purpose, they asked the French authorities to recognise them as a religious body entitled to authorise religious slaughter. The government refused[12].

When the association brought the case before the European Court of Human Rights, the Court did not find a violation. It ruled that there was no interference with the exercise of freedom of religion. This comes as a

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and involvement in ritual. Only very narrow definitions of religion restrict it to the primarily intellectual sphere of developing a system of ideas/beliefs in one's own mind. More sophisticated definitions take note of how religion may play an important role in the way in which people live their whole lives."

[12] The argument was advanced that the association was not sufficiently representative within the Jewish community and that it was not a liturgical association in the sense of French law (ECHR, *Cha'are Shalom ve Tsedek, supra* note 2, § 38).

surprise since the Court recognized that ritual slaughter, in general, is covered by the right to manifest one's religion[13]. Also, the Court accepted that, in order to comply with the community's interpretation of pertinent dietary laws, it was essential for the applicant that meat is "glatt"[14]. Yet the Court argued:

"In the Court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable"[15].

In the eyes of the Court, there was no interference with freedom of religion because, in practice, French ultra-orthodox Jews were able to get hold of glatt meat from imports and from illegal slaughter.

This is not convincing. Either religious slaughter is a manifestation of religion or it is not. If it is, glatt slaughter is a manifestation of ultra-orthodox Jewish belief, just like 'mere' kosher slaughter is a manifestation of mainstream Jewish belief. Arguing first that religious slaughter is protected under Article 9, but then not extending this to the right to perform a particular type of religious slaughter, the Court seems to apply double standards. For the ultra-orthodox, only the right to *eat* glatt meat seems to be protected, whereas for the other Jews, the slaughter of the animals is also considered as a religious practice. In my opinion this is not coherent, and the Court fails to take serious religious obligations as they are experienced by this minority group.

### *3. Admissibility Cases on Religious Practices*

Among the Commission's decisions of inadmissibility, several examples can be found of practices which were perceived to fall outside the scope of Article 9. Other cases have been discussed under the second paragraph of Article 9, but still the restrictions imposed on a particular religious practice have not been considered to violate religious freedom.

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[13] ECHR, *Cha'are Shalom ve Tsedek, supra* note 2, § 74: "[T]he applicant association can rely on Article 9 of the Convention with regard to the French authorities' refusal to approve it, since ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9".

[14] *Ibid.*, § 79: "It is essential for the applicant association to be able to certify meat not only as kosher but also as 'glatt' in order to comply with its interpretation of the dietary laws, whereas the great majority of practicing Jews accept the kosher certification made under the aegis of the ACIP."

[15] *Ibid.*, § 80.

### *a) No Interference*

#### *aa) Photograph in Religious Dress*

The cases of Karaduman v. Turkey[16] and Bulut v. Turkey[17] concerned female students who, having completed their studies, asked for a diploma certificate from their university. For that purpose they presented a photograph as proof of identity, wearing a Muslim headscarf. This did not comply with university regulations, which required photographs in accordance with the official university dress codes, including a provision stipulating that students should not wear anything on their heads. The female students complained that this violated their freedom of religion.

The Commission dismissed the complaint. According to the Commission's view, there was no interference with freedom of religion. Its reasoning is based on a variety of arguments. As a general starting point, the Commission stated that

"Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a way which is dictated by (religious) belief. In particular, the term 'practice' as employed in Article 9 para. 1 does not cover each act which is motivated or influenced by religion or belief"[18].

Applying this to the photograph, the Commission argued that

"[t]he purpose of a photograph affixed to a degree certificate is to identify the person concerned. It cannot be used by that person to manifest his religious beliefs"[19].

Moreover, the Commission took up the idea of a contract: as the women voluntarily entered university, they implicitly accepted restrictions on the manifestation of their religion.

"By choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs"[20].

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[16] ECmHR, *Senay Karaduman v. Turkey,* 3 May 1993, Decisions and Reports 74, 93-110.

[17] ECmHR, *Lamiye Bulut v. Turkey,* 3 May 1993, not yet published (see www.echr.coe.int).

[18] ECmHR, *Karaduman v. Turkey, supra* note 16, 108; ECmHR, *Bulut v. Turkey, supra* note 17.

[19] ECmHR, *Karaduman v. Turkey, supra* note 16, 109; ECmHR, *Bulut v. Turkey, supra* note 17.

[20] ECmHR, *Karaduman v. Turkey, supra* note 16, 108; ECmHR, *Bulut v. Turkey, supra* note 17.

*bb) Observance of Religious Holidays in the Workplace*

The same reasoning has been applied in respect of religious practices in labour relations. A good example is a complaint submitted by a member of the Seventh-day Adventist Church in Finland. Adventists must refrain from working on "their" Sabbath, which is Saturday, starting on Friday at sunset. The applicant performed shift work. One week in five he had to do an evening shift ending after sunset. He did not get authorisation to leave work earlier, so he left without authorisation, which resulted in his dismissal. He complained that this violated his freedom to manifest his religion. The Commission's reasoning in this case points out that

"[t]he applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by article 9 para. 1. (...) having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion"[21].

Similarly, the application of a British woman, having been dismissed for refusal to sign a new contract including regular Sunday work, was struck out[22].

In the eyes of the Commission, the fact that these people could not observe particular rules of their religion was the result of their own choice of employment, just as the Turkish women had freely chosen to pursue studies at a public university.

*cc) Promoting an "Insider Approach"*

Within a broader concept of freedom of religion, individuals would be protected against the need to make such difficult choices between their profession or their professional qualification on the one hand and their religious practice on the other.

In general, it would be preferable if the Court and the Commission did not restrict the scope of Article 9 as they do. True respect for religion, according to my view, requires an "insider approach" for delimiting the scope of religious freedom. An "insider approach" is based on the perspective of the believers themselves of what is required by their religion[23].

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[21] ECmHR, *Tuomo Konttinen v. Finland,* 3 December 1996, not yet published (see www.echr.coe.int).

[22] ECmHR, *Louise Stedman v. the United Kingdom,* 9 April 1997, not yet published (see www.echr.coe.int).

[23] Cf. *Evans, supra* note 8, 205. She adds that concerns about abuse of this criterion can be limited by making reference "to United Nations documents and other reputable,

The question whether a particular practice is to be accommodated or not should not depend on the scope of Article 9, para. 1, but on the application of the limitation clause of paragraph 2, where the individual right to manifest one's religion would be balanced against public interests and the individual rights of others.

*b) Interference, but no Violation*

Some cases have been dealt with along these lines. However, until today, the Commission and the Court have all too easily accepted that restrictions of religious practices are proportionate in light of a legitimate purpose.

One of these cases concerned a male Sikh living in the United Kingdom who had been fined twenty times for failing to wear a crash helmet when riding his motor cycle. He did not wear the helmet because, according to his religion, it is mandatory to wear a turban. The Commission took the view that the interference with the applicant's freedom of religion was justified for the protection of health in accordance with Article 9, para. 2[24].

In a more recent case[25], Seventh-day Adventists in Luxembourg complained about the refusal of the authorities to grant their son a general exemption from Saturday School. The Court held that the interference was justified for protecting the son's right to education.

Likewise, the prohibition for a Swiss school teacher to wear a Muslim headscarf was considered to be proportionate in relation to the legitimate purpose of protecting the neutrality of public education[26].

*c) Positive Obligations*

The accommodation of religious practices often requires the authorities to take positive steps, such as introducing an exception to a general rule. Therefore, it is meaningful to discuss this as part of the concept of positive obligations imposed upon the state. The European Convention does not only protect individuals against governmental violations of their rights and freedoms, but also against omissions on the part of the state which result in insufficient protection of their rights.

In theory the idea of positive obligations arising out of Article 9 is accepted:

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scholarly studies that discuss religious practices world-wide to illustrate the types of actions that are accepted as religious practices".

[24] ECmHR, *X v. the United Kingdom,* 12 July 1978, Decisions and Reports 14, 234.

[25] ECmHR, *Martins Casimiro and Cerveira Ferreira v. Luxemburg,* 27 April 1999, not published (see www.echr.coe.int).

[26] ECHR, *Lucia Dahlab v. Switzerland,* 15 February 2001, not published (see www.echr.coe.int).

"[T]he object of Article 9 is essentially that of protecting the individual against unjustified interference by the state, but (...) there may also be positive obligations inherent in an effective 'respect' for the individual's freedom of religion"[27].

In practice, however, the Commission and the Court have been very reluctant to finding a breach of such an obligation. The above quote is from a case concerning a Muslim school teacher who was refused permission to leave school on Friday afternoon in order to attend prayer in a mosque. This would have caused him to miss 45 minutes of class work. As he was a supernumerary teacher, re-arrangement of his timetable was possible, but it was refused. To dismiss this case, the Commission used more or less the same reasoning as in other cases concerning employment conditions: the man was free to resign or to take on a part-time job.

## III. An Overprotective Attitude towards Religious Feelings

As already mentioned, the Strasbourg organs consider Article 9 to primarily protect the internal elements of religion. In protecting the *forum internum* and the religious feelings of individuals, the Commission and the Court have gone relatively far.

### *1. Restricting Free Speech to Protect Religious Feelings: the Blasphemy Cases*

In two famous and controversial cases, the ECHR accepted far-reaching restrictions of the freedom of expression in order to protect religious feelings.

#### *a) Otto Preminger-Institut v. Austria*[28]

Operating a cinema in Innsbruck, the *Otto Preminger*-Institut, in 1985, announced a series of six showings of the film "Das Liebeskonzil" by Werner Schroeter. The film is based on a play written in 1894 by Oskar Panizza which led to this author's conviction for blasphemy. The film begins and ends with scenes from Panizza's trial; in the middle it shows a performance of the play. The film includes a number of scenes making ridicule of Catholic religion: it portrays God as a senile old man kissing the devil and calling the devil his friend. Jesus is portrayed as mentally defective. And his mother Mary is shown as permitting an obscene story to be read to her and as experiencing a certain erotic tension with the devil[29].

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[27] ECmHR, *X v. the United Kingdom,* 12 March 1981, Decisions and Reports 22, § 3.

[28] ECHR, *Otto Preminger-Institut v. Austria,* 20 September 1994, Series A, no. 295-A.

[29] ECHR, *Otto Preminger-Institut v. Austria, supra* note 28, § 22.