



General Introduction

The origins of this Manual lie in the increasing interest and importance of questions concerning the manner in which the freedom of religion and belief is to be enjoyed in Europe today. Issues concerning religion and belief have arisen in different ways at different times, reacting to the overall social and political context and the responses to this have differed greatly from one country to another. It is, then, not surprising that as social and political contexts evolve, new questions concerning the enjoyment of the freedom of thought, conscience and religion come to the fore and call for reflection and response. European history is closely intertwined with evolving patterns of religious and non-religious belief.¹ Indeed, the system of sovereign states which characterises the composition of modern Europe owes its origins to the struggle to separate political governance from religious governance and affiliations. Tragically, European history is punctuated by many instances of conflict between followers of various religious beliefs, and of persecution by both the religious and by the non-religious of those who either did not share or who rejected the belief systems of the dominant groups within the societies of which they formed a part.

There have been a variety of responses to instances of this nature over time. An early response was to seek to ‘solve’ the problem by working towards a situation in which each political community was religiously heterogeneous – an approach reflected in the Latin maxim ‘cuius regio, eius religio’, perhaps more easily understood as the proposition that the religious beliefs of the people should be the same as the religious beliefs of their rulers. In fact, such an approach negated the very idea of belief for most of the people, since

¹ For an overview see Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997, reprinted 2008).

it meant that their beliefs depended on the beliefs of others: if their rulers were to change their beliefs, the people would have to change theirs as well. Naturally, for those who took their beliefs seriously this was an impossible state of affairs and inevitably gave rise to conflict. In order to reduce tensions, a further development came about with states recognising the legitimacy of a limited number of beliefs which they would allow to be practised within their territories. However, for as long as the governance of a state was premised upon the primacy of a particular pattern of religious belief, this always carried with it the risk of persecution should minority beliefs cease to be tolerated. Moreover, for as long as religious affiliation was seen as a marker of 'belonging' to the state itself, those who chose not to adhere to the dominant religious tradition(s) would inevitably be seen as presenting a potential threat to the political elites, and even when they presented no threat at all, were capable of being portrayed as posing a potential threat when it suited the interests of those in authority to do so, rendering them permanently vulnerable.

As long ago as the early seventeenth century, however, powerful voices called for a different approach. The influential international jurist, Alberico Gentili, writing shortly before the onset of the 30 Years War that tore apart central Europe and, through the Peace of Westphalia in 1648 gave birth to the modern system of European statehood, argued that:

'Religion is a matter of the mind and of the will, which is always accompanied by freedom... Religion ought to be free. (I)f truly the profession of a different form of religious belief by their subjects does not harm princes, we are... unjust... if we persecute those who profess another religion than our own.'²

This is a plea that still resonates today and which is yet to be fully realised. Ever since the triumph of the Enlightenment as reflected in the writings of Locke and in its realisation in the Revolutions of the late Eighteenth century, the idea that individuals should exercise the freedom of thought and of conscience in matters of religion and of belief has become increasingly well established and is now universally acknowledged. The more pressing difficulty became how this

2 Alberico Gentili, *De Iure Belli Libri Tres*, book I, Chapter IX.

might be realised in an age which recognised the right of states to regulate their own affairs free from pressure from others.

Once again, a variety of approaches were drawn upon. Some states continued the old tradition of entering into treaty relations which permitted them to exercise a degree of oversight and even intervention of the manner in which particular forms of believers were treated. Others insisted that the rights of believers continue to be respected when territory was transferred from sovereignty of one state to that of another. These practices came together in the mid to late nineteenth century when it became increasingly common to require newly constituted states to make commitments regarding their treatment of potentially vulnerable groups at the time of their recognition as members of the international community. But how to enforce such commitments without embroiling states in strife remained an unsolved challenge. The beginnings of a solution emerged after the First World War when many of the newly created or territorially reconfigured states in central and eastern Europe entered into a series of undertakings concerning minority populations – including commitments regarding their freedom of religion and beliefs – which were to be overseen and guaranteed not by other states but by the international community in the guise of the League of Nations. Tragically, these measures proved inadequate to prevent the horrors that culminated in the Second World War but they did lay the foundations for the emergence of the modern system of human rights protection which now provides the means and mechanisms for the protection of the rights not just of certain minorities in some countries within Europe, but of all those within the jurisdiction of member states of the Council of Europe. Moreover, whilst historically the focus has been very much on questions concerning religion and religious believers, the human rights framework adopts a different approach.

Human rights look to the person as a whole and at their place in the society of which they form a part. They do not seek to differentiate one person from another, or to value one group – or any one set of beliefs (religious or otherwise) – more than others. They seek to provide a means by which to reconcile the various conflicting interests which inevitably exist within any democratic state in which different understandings and different points of view co-exist

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side by side. They seek to protect the individual from overly intrusive state activities, whilst at the same time requiring that the state provides a balanced framework that permits everyone to enjoy their rights to the fullest extent that is compatible with the rights and freedoms of others. Whilst recognising that this is, first and foremost, a responsibility of the state itself, human rights are nevertheless a product of an international understanding of the basic rights and obligations of persons within a democratic political community and are properly subject to international scrutiny and, in contested cases, determination. The European Convention on Human Rights provides the premier means through which these aims are to be achieved within the community of European states as formed by the Council of Europe.

The need to find a means of accommodating religious diversity has played a significant role in the shaping of not only modern Europe but of the international legal system itself. In addition, the manner in which such accommodations have been achieved has varied over time, and has left its own historical legacy which still has reverberations today. Thus some still may hanker for the religiously homogenous state, in which a single belief system holds sway. Some may seek to manage religious life through the recognition of a limited number of authorised religions with whom they have a working relationship, denying legitimacy to those not officially approved. Others may seek to adopt an approach which insulates the apparatus of the state from matters of religion and belief, separating the spheres of the religious and spiritual from that of the political governance of society altogether. All of these – and other – approaches to the question have their roots in historical experiences and practices which reflected the dominant conceptual understandings of their times. Although these may still echo down the ages, the legitimacy of such approaches must today be assessed in the light of the requirements of the human rights framework to which they must either conform, or yield. This is the situation which is found in Europe today and forms the background to this Manual.

Different approaches to accommodating religious diversity have their roots in historical experiences. The legitimacy of such approaches must today be assessed in the light of the requirements of international human rights law.

The framework of the Convention in general, and the manner in which it relates to the freedom of thought, conscience and religion in particular, will be considered in detail in Section II of this Manual. Section III will identify the key concepts which have been identified in the juris-

prudence of the Court and Sections IV and V will consider the role and responsibilities of the state and of individuals. These Sections are essential to properly understand the central issues which this Manual seeks to address – the wearing of religious symbols in public areas. Section VI will then look at a number of key definitional issues which need to be addressed. Section VII then sets out in summary fashion the essential questions which policy makers need to ask when addressing issues concerning the wearing of religious symbols. The final section of the Manual, Section VIII, seeks to apply these principles and approaches to a number of key areas and issues. For readers with limited time, Sections VII and VIII might be read separately. For the reader with very little time, Section VII (b) offers a succinct statement of the essential issues which need to be considered.