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FINNIS AND RELIGION A CRITICAL VIEW OF RELIGION AS A BASIC GOOD: DOES IT HAVE A HIERARCHY?

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Introduction

*"Without religion there is no morality, and
without morality there is no law".*

-Lord Denning-

Throughout the history of time religion (though not precisely defined) has always played a central part in human life. Whether it was about worshipping the great mountains or the trees, people have always felt an inner belief or a spiritual bond for a thing undescribed which they in turn call a religion or a religious belief. Unlike many other aspects of life, at times even the life it -self, religion (or faith and belief) had a profound influence in almost all the activities in human life, from the birth to the marriage and death, all of these occurrences were in some way related to some kind of a religious or spiritual belief. Whether you believed in God or not, you do have a way of life, a way that is controlled by your inner self, which is governed by your beliefs, though you might not name it as a

religion. Out of most of the wars that occurred (like the holy war, which was fought for religious supremacy), are occurring and are going to occur is with regard to a religious issue (here again there is no satisfactory definition).

But this paper is not intended to be a philosophical analysis of "religion" nor a search for a "legal definition of religion" instead it focuses on how the governments are trying to achieve a proper balance between granting to the people or individuals, the right of religion and at the same time marking the boundaries which one cannot cross in the name of religion. This is discussed in-light with John Finnis finding of the religion as a basic good (basic goods are the basic aspect of one's well-being and the first principle of one's own practical reasoning).²

Now the question begs; why should law show any fidelity to religion, is there a need for law to recognize a right to religion (or religious value), as it does with other rights, such as the right to life. What is religious liberty? As

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¹"Lord Denning, OM". The Daily Telegraph
(London). 6 March 1999

² J Finnis, *Natural Law and Natural Right* (2nd, Oxford University Press, London 2011) 89

with all “What is?” questions about human matters, an adequate answer must depend (as Aristotle advises) on first answering the question “Why value religious liberty³?”

And according to Finnis him-self (who asks this question) who bases his thesis on the “Basic Goods” of which there are seven, and one of which is religion (Seventhly, and finally in this list, there is the value of what, since Cicero, we summarily and lamely call ‘religion’).

These basic goods are at the core of human flourishing; they are indemonstrable yet are self-evident and are incommensurable (here it means that one basic good is neither superior nor inferior to the other). If they are all required for human flourishing, then if the law is not going to show fidelity to it (religion), human beings may not be able to flourish according to Finnis.

Religion’s supreme relevance – or at least, an integral element in religion’s relevance – to human life and wellbeing is that it articulates, more or less adequately, the truth about truth (and thus about conscience and everything else)⁴. So when we speak of religious liberty we accompany that with the right of conscience, as one’s conscience will be the true guide of his religious beliefs, here both religion and conscience are taken together, as one cannot enjoy religious liberty

³ J Finnis, ‘WHY RELIGIOUS LIBERTY IS A SPECIAL, IMPORTANT AND LIMITED RIGHT’ [2008] Notre Dame Law School Legal Studies Research Paper No. 09-11 1, 1

⁴ J Finnis, ‘WHY RELIGIOUS LIBERTY IS A SPECIAL, IMPORTANT AND LIMITED RIGHT’

if his conscience (more or less if his conscience is being questioned with) is hindered with. The belief one manifests is individualistic, in a sense no one else apart from he needs to believe it. “[W]hat matters to me is not whether it's true or not but that I believe it to be true, or rather, not that I *believe* it, but that *I* believe it”⁵

Definition of “Religion”

Now if we are to move from a philosophical analysis to a strict legal sense in finding a proper definition for the term “religion”. Many statutes would normally have an interpretation section where a legal terminology is given to words that are used in the statute, regarding to what extent the word is going to be used (used in interpreting the sections). But nowhere is the term “religion” is properly defined. Though we all agree to the fact that there should be a right to religion or/and religious liberty, we do not seem to have a general consensus regarding its meaning. A method of defining religion is essential in order to ascertain whether the right to freedom of religion has been infringed⁶.

In general commentators have quite oppose to the idea of defining or giving a legal definition for “religion” as they fear that

[2008] Notre Dame Law School Legal Studies Research Paper No. 09-11 1, 9

⁵ *Ibid* 7. Citing St Thomas More *A Man for All Seasons* (Vintage Books, 1990), 91.

⁶ G Schyff, ‘The legal definition of religion and it's application’ [2002] SALJ 119 288, 289

defining it would restrict one's religious rights if they fail to come under the ambit of the definition. They advance three main arguments for not defining the term.

Firstly, it avoids the technically very difficult task of drafting a definition which is flexible enough to satisfy a broad cross-section of world religions while precise enough for practical application to specific cases. Secondly, the absence of a definition means that those bound by a guarantee of religious rights cannot give a restrictive definition to religion, a particular danger for minority religions whose characteristics may not match any general definition. Thirdly, the variety of conscientious, religious, and spiritual beliefs would present problems to a definition based on traditional, Western, views of religion⁷.

One commentator⁸ has suggested for a functional approach which should be adopted regarding the concept of religion in a legal context. He argues that theological or pure philosophical approaches should be avoided in favor of a practical method that would enable courts and practitioners alike swiftly and effectively to deal with religious matters. He advances two tests to be conducted with regards to finding out whether any religious rights have been violated.

- The objective inquiry - does the belief or doctrine relied upon qualify as a religion?

- The subjective inquiry – does the bearer sincerely believe in the religion?

The South African Court in *Christian Education South Africa v Minister of Education*⁹ gave a pronouncement with regards to the definition of religion. There Sachs J held that "Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture"

But if we are to evaluate one's conscience and beliefs it may be problematic, as we are quite incapable of finding the proper measurements. Even according to Finnis these basic goods are incommensurable, so if we are to evaluate someone else's consciences or beliefs it would be arbitrary. This was emphasized by the United States Supreme Court in *Us v, Ballard*¹⁰ where it ruled that, although Respondent's religion seems incredible to most, it is not the role of a jury to determine its veracity. If this religion were subject to such a trial, then all organized religions would need to be treated similarly. This kind of a ruling would be quite contrary to a subjective test, which focuses on the authenticity of the believer, which we are not allowed to question. So we might as well agree with the fact of leaving the definition of religion may serve to protect the interest of the individuals with regards to the freedom or right of religion. This is true with regards to

⁷ P W Edge, *Religion and Law An Introduction* (1st, Ashgate Publishing Company, Hampshire England 2006) 28

⁸ G Schyff, 'The legal definition of religion and it's application' [2002] SALJ 119 288, 289

⁹ 2000 (4) SA 757 (CC)

¹⁰ 322 US 78 (1943)

the HRC (human rights committee) which has wisely decided not to define religion in the context of the ICCPR Art 18. Therefore, it has not grappled with the relevance to that definition of such factors as: number of adherents, truth or falsity of the relevant belief, and historical foundation of the relevant movement¹¹.

International Recognition of Right to Religion

Though we were quite unable to find a proper definition of religion, there are so many international instruments that have recognized the right of religious liberty. The foremost would be the United Nations Declaration on Human Rights (UDHR) which recognizes this right in Article 18. The Article is as follows.

Article 18

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 teaching, practice, worship and observance.

The UDHR is set forth in the positive form and it gives a host or a wide variety of rights that are included in the right to religion. Here however no limitations are given to the exercise of these rights in the Article 18 itself, instead Article 29(2) stipulates general restrictions on one's exercise of all the rights and liberties given under the charter.

Article 29(2)

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The UDHR which came about in 1948 was closely followed by the European Convention on Human Rights (ECHR) which was drafted in 1950 and adopted in 1953. In Article 9 it set-forth both the rights and limitations on the right to religion.

Article 9

(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.

Here it is a combination of Articles 18 and 29(2) of the UDHR in verbatim, where the rights and limitations are set-forth in the same Article. Apart from bringing the two clauses together there are no major differences between the two.

¹¹ S Joseph and M Castan, *ICCPR Cases, Materials, and Commentary* (3rd, Oxford University Press, Oxford 2013) 653

One of the more comprehensive documents regarding the right to religion would be the ICCPR (International Covenant on Civil and Political Rights) which was adopted in 1966, setting-forth a comprehensive explanation of right to religion in Article 18.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The CRC (Convention on the Rights of the Child) which is primarily based on protecting the rights of children stipulates in Article 14(1) that, states Parties shall respect the right of the child to freedom of thought, conscience and religion.

There are so many international instruments that recognize the right of religion, and more so that restricts discrimination based on

religion. All of these are secular, in that they don't prefer a specific religion over the other. But the Cairo Declaration of Human Rights and Islam which was adopted in 1990 is a one non-secular instrument where Islam is favored. Where in Article 10 it prohibits the use of coercion in which ever form to make a person change his religion or belief, which is a very narrow right granted as a right to religion, the Article 24 stipulates that all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah and Article 25 stipules that the Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the Articles of this Declaration.

In all of these instruments we can see a general nature of the rights granted and the general nature of the restrictions that are imposed on individuals in the exercise of the rights so granted. They could be thus summarized as follows which is shown in the box below.

Rights granted	Restrictions Applied
<ul style="list-style-type: none"> • Right to freedom of thought, conscience and religion 	<ul style="list-style-type: none"> • Restrictions that are prescribed by law and are necessary
<ul style="list-style-type: none"> • Freedom to have or to adopt a religion or belief 	<ul style="list-style-type: none"> • National Security • Public health

<ul style="list-style-type: none"> • Freedom to change his religion or belief • Freedom to manifest his religion or belief in worship • Parents and Guardians to have the rights of teaching religion to their children according to their convictions 	<ul style="list-style-type: none"> • Public Morale • Protection of freedoms and rights of the others
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The Constitutional recognition of Right to Religion: An International Perspective.

Most the countries have recognized the right of religion and have made it a fundamental right, meaning that the right is justiciable. Apart from Islamic States (like that of Saudi Arabia), most of the countries have what you would call a secular constitution, meaning that no particular religion is favored. A classic example would be the Article 25 of the Indian Constitution of 1950, which follows as below.

Article 25

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

This provision is drafted in a slightly different manner, as the rights are enjoyed subject to the restrictions mentioned first. The special mention regarding the Hindus would have to be said as a compromise for making the constitution a secular one.

The *first amendment* with regards to the *American Constitution* stipulates that, *Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. This may be said to be a very strong point for the secular nature of the constitution, and with regards to the granting of rights.

The South African Constitution of 1996 in Article 15(1) stipulates the right of religion which follows as below,

Article 15

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

In Addition, Article 15 also have made room for government intervention with regards to aiding religious observances under Article 15(2). And under Article 15(3) other kinds of marriages, meaning religious or traditional marriages are given recognition if they are consistent with the other provisions of the constitution. Like in the UDHR the limitations are set in Article 36 which is to be applicable to all the rights given under the bill of rights and the application of it is given in a more detailed list¹².

The Sri Lankan Constitutional Recognition of Right to Religion

Under the 1978 constitution of Sri Lanka the right to religion is recognized as a fundamental right under Article 10, which stipulates that “every person is entitled to freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief of choice”.

All the persons are entitled to freedom of thought and conscience and to the right to profess any religion. The freedom of religion is not guaranteed in respect of one religion only, but covers all religions alike, meaning that Sri Lanka is a secular State. The freedom to practice or exercise religion is guaranteed

by Article 14(1) (e), which stipulates that “every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching”.

Here instead of the word “person” the word citizen is used, meaning that though all persons have the right of religion, only citizens are allowed the right to exercise religion, meaning only their claims will be heard, if we are to interpret it literally. Since the freedom to practice or exercise religion is guaranteed by Article 14(1) (e) it is subject to the lawful restrictions and limitations mentioned in Article 15(7) which stipulates criteria’s such as national security, public health and morality, and freedom of others as such situations where these rights could be curtailed¹³.

The rights granted under Article 10 are absolute, meaning you can have whatever beliefs you may want, but when it comes to the exercise of those beliefs which is granted under Article 14 (1) (e) it can be restricted to the amount allowed by Article 15(7). Freedom of belief can be absolute but the state cannot allow that belief to be followed by freedom to act according to such belief if the State has to protect public order, public morality and health¹⁴. Freedom of belief must be distinguished from the freedom to manifest the belief. Restrictions imposed on the exercise of religious freedom must be necessary for the smooth functioning of the state.

¹² Article 36. Limitation of rights.-(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. (2) Except as provided in subsection

(1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹³ S Sharvananda, 'Art 10 - Freedom of thought conscience and religion' in *Fundamental Rights in Sri Lanka- a commentary* (1st, Author Publication, Sri Lanka 1993).

¹⁴ Ibid

Though we stated earlier that Sri Lanka is a secular State, a closer inspection at Article 9 of the constitution would say otherwise. According to the Article 9, state is given the responsibility of fostering the Buddha *Sasana*, while assuring to all religions the rights granted by articles 10 and 14(1)(e). This may lead to some contradictions when one is trying to give equality to all the religions.

The Conflicting Issues: Can or Has Finnis's Theory worked, or can it Work?

Now we come to the business end of the article, here we are going to see and discuss whether or not Finnis's theory of natural law has worked or can work with regards to the proper balancing of religious rights and limitations.

As we mentioned earlier Finnis recognized seven basic values or goods that were necessary for human flourishing which obviously included religion. But the goods themselves don't give much, meaning that they alone cannot help us to take right or accurate decisions. For this particular purpose Finnis introduces the concept of "Practical Reasonableness" Finnis states that, for amongst the basic forms of good that we have no good reason to leave out of account is the good of practical reasonableness, which is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out¹⁵.

With regards to the practical reasonable Finnis finds nine basic guidelines in order for an individual to avert at the right option, they could be thus summarized as follows.

Finnis's nine principles of practical reasonableness

- (1) Having "a coherent plan of life,"
- (2) Not having an arbitrary preference amongst the basic goods,
- (3) Not having an arbitrary preference amongst persons,
- (4) Having a sense of detachment from all the specific and limited projects one undertakes,
- (5) Not abandoning general commitments lightly,
- (6) Acting to bring about good with efficiency,
- (7) Respecting every basic value in every act by never choosing against a basic good,
- (8) Favoring and fostering the common good of one's communities, and
- (9) Following one's conscience.

According to Finnis himself, all the principles may not be taken in to account or paly a similar role in a single decision making process. He states that "not every one of the nine requirements has a direct role in every moral judgment, but some moral judgments do sum up the bearing of each and all of the nine on the questions in hand, and every

¹⁵ J Finnis, *Natural Law and Natural Right* (2nd, Oxford University Press, London 2011) 100

moral judgment sums up the bearing of one or more of the requirements"¹⁶

It would be better to begin the analysis with a Sri Lankan case. The issue in "*A Bill titled 'Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)*"¹⁷." Which came before the Supreme Court was with regard to the incorporation of the above mention religious institution. The question arose with regard to the corporation's preamble and clause 3 of the Bill. It is as follows,

Preamble

".....for the propagation of Religion by establishing and maintaining catholic schools and other schools assisted or maintained by the State and engaged in educational and vocational training in several parts of Sri Lanka and in establishing and maintaining orphanages and homes for children and for the aged....."

Clause 3

"3. (1) The general objects for which the Corporation is constituted are hereby declared to be- (a) to spread knowledge of Catholic religion; (b) to impart religious, educational and vocational training to youth; (c) to teach in Pre-Schools, Schools, Colleges and Educational Institutions; (d) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions; (e) to establish and maintain Crèche's, Day Care Centers, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics and care for the infants, aged, orphans, destitutes and the sick; (f) to bring about society based on love and respect for one and all; and(g) to

undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation."

The petitioner's main argument was that when read with the preamble, the clause 3 would enable the religious organization to allure people from other religions to become Christians. Here it was strenuously argued on behalf of the petitioner that allowing for the incorporation of the above religious institution would result in a breach of Article 10. They argued that the vulnerability of, the young and poor will be exploited since the above activities will create such relationships as, teacher-student, nurse/doctor-patient, and guardian-minor. Therefore the young and poor would be precluded from exercising their conscience and they will be allured to becoming Christian faiths.

Surprisingly though, the Supreme Court agreed with this argument and went even further. The Court held that, unlike in India, where under Article 25 of its constitution, a right to propagate one's religion is recognized, our provisions namely Article 10 and 14 (1) (e) knows nothing of that kind and therefor it is restrictive. Here the Supreme Court instead of trying to give full effects to the Fundamental Rights which are recognized by the constitution gave a very narrow interpretation with regards to the rights of religion.

All the case law they referred to was cited in their favor, without thoroughly scrutinizing the whole scenario. They just looked at phrases and places to justify their decision, without going to the full details of the case. This was especially true with regards to the European case law, as in *Larissis v Greece*¹⁸ where the court only took notice of the part

¹⁶ J Finnis, *Natural Law and Natural Right* (2nd, Oxford University Press, London 2011) 126

¹⁷ S.C. Special Determination No. 19/2003

¹⁸ (140/1996/759/958-960)

that, due to the relationship between Greek superior ranked officers and the Armenian inferior officers that there was coercion with regards to the fact, on the Armenians changing their religion and ignored the fact that the HRC went on to hold that no such thing occurred with regards to the civilians that changed their religions.

However the most damaging part of the judgment was the courts upholding of the petitioner's acquisition that, allowing for the incorporation will result in threatening the very existence of Buddha Sasana, which is under Article 9 of the Constitution, the State is required to give the foremost respect and prosper. The petitioner claimed that, the person of other religion could exercise the rights granted under Articles 10 and 14 (1) (e), as long as it does not affect Buddha Sasana. To this the court agreed, though no such evidence was shown that such incorporation could pose a threat to Buddha Sasana. However the evidence brought by the petitioners showing that other such institutions having similar characteristics were given the opportunity of incorporation, the Court did not take much fact of this.

Now if we are to analyse the above decision in light with Finnis theory of natural law, it would straightaway said to be irrational. As Finnis stated, when one takes a particular rationale (or morale) decision all of the nine principles may not come into play. Still that decision can not contradict any one of the nine principles.

Here giving primacy to Buddhism would amount to an arbitrary preference amongst persons as it would give the preference over the others with regards to religious rights, Finnis puts this succinctly in the following terms that, what I see as good and needs

pursuing would inevitably be true with others.

“Other persons’ survival, their coming to know, their creativity, their all-round flourishing, may not interest me, may not concern me, may in any event be beyond my power to affect. But have I any reason to deny that that survival, knowledge, creativity, and flourishing are really good, and are fit matters of interest, concern, and favor by those persons and by all who have to do with them?”¹⁹

Here the judiciary may have a legitimate aim of protecting and fostering the Buddha Sasana, as required by Article 9 (which gives this duty to the State, the judiciary being an organ thereof) still that end cannot be justified by the means that the Supreme Court has employed. Finnis neatly puts that “*the end does not justify the means*”

So then could there ever be *a chance of self-preference according to Finnis*, or what are the reasonable bounds? Finnis answers as follows. “In the Greek, Roman, and Christian traditions of reflection, this question was approached via the heuristic device of adopting the viewpoint, the standards, the principles of justice, of one who sees the whole arena of human affairs and who has the interests of each participant in those affairs equally at heart and equally in mind—the ‘ideal observer’. Such an impartially benevolent ‘spectator’ would condemn some but not all forms of self-preference, and some but not all forms of competition: The heuristic device helps one to attain impartiality as between the possible subjects of human well-being (persons) and to

¹⁹ J Finnis, *Natural Law and Natural Right* (2nd, Oxford University Press, London 2011) 126

over the other, like for that of life over all the others.

In the recent case of *S.A.S. v. France*³¹ epitomizes the above fact. In this case, the complainant, a French Muslim, stated that, she wore the burqa and niqab in accordance with her religious faith, culture and personal convictions. As she explained, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face veil leaving an opening only for the eyes. But the laws introduced by the French government in 2011, prohibited the concealment of one's face in public places (Law no. 2010-1192 of 11 October 2010), in this case amongst other issues, the right of religion granted under the ECHR was discussed. The court in making its decision, first stated that the limitation adopted was not necessary in a democratic society, though it emphasized the matter relating to the public safety, when one is allowed to cover the whole body in clothing the court went on to hold that, the measure taken was disproportionate to the aim that was sought after. However, the court went on to uphold the government decision with regards to another issue, the only issue which the court found that it was able to uphold the decision, which was, respect for the minimum requirements of life in society (or of "living together").

The court ruled that, the barrier raised against others by a veil concealing the face in public could undermine the notion of "living together". In that connection, it indicated that it took into account the State's submission

that the face played a significant role in social interaction.

It further stated that, individuals might not wish to see, in places open to all, practices or attitudes which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, formed an indispensable element of community life within the society in question. While the Court was aware that the disputed ban mainly affected certain Muslim women, it nevertheless noted that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face and that the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face.

It concluded that, the ban complained of could therefore be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together". The Court held that there had not been a violation of either Article 8 or Article 9 of the Convention. (The court made the decision on the premises that France had a greater margin of appreciation with regards to the particular situation)

This would clearly suggest that at times it would be very difficult to reconcile with Finnis. He makes the following remarks "There is no human right that will not be overridden if feelings (whether generous and unselfish, or mean and self-centered) are allowed to govern choice, or if cost-benefit considerations are taken outside their

³¹ (application no. 43835/11)

appropriate technical sphere and allowed to govern one's direct engagement (whether at the level of commitment, project, or individual act) with basic goods"³².

But the decision taken by the courts can't be said to be outside the appropriate technical sphere of cost-benefit analysis, as with each individual circumstances, the margin of appreciation would vary, for me the main flow in Finnis theory is that he doesn't provide for an hierarchy of values, when courts or decision makers have always taken such measures to weigh the one over the other, for an example, if we are to agree to a general consensus, most would not value the value of life to the value of aesthetic values.

Another flow in Finnis theory is that he assert that one may adhere to a law though unjust in nature yet if it results in common good *"It may be the case, for example, that if I am seen by fellow citizens to be disobeying or disregarding this 'law', the effectiveness of other laws, and/or the general respect of citizens for the authority of a generally desirable ruler or constitution, will probably be weakened, with probable bad consequences for the common good"*³³.

Though he asserts that there is no moral obligation to obey the particular unjust law, but there is a requirement to obey it to the extent that it does not put the whole legal system to contempt. This seems puzzling, as if I'm to conceive a law as unjust, but to obey it to the extent that it will not affect the

functioning of the common good, if the common good is perceived, by giving priority to some of the goods over the other how could it me arbitrary. Finnis therefore places an individual attempting to be a morally right actor in quite the bind-the actor will try to do as Finnis suggests, but he will never be able to achieve the desired result³⁴.

Conclusion

"In the sky, there is no distinction of east and west; people create distinctions out of their own minds and then believe them to be true."

-Lord Buddha-

When we speak of a religion or a belief, we speak of harmony, peace, coordination and joy of living, when law grants religious liberties they are granted to all the citizens alike, irrespective of their religion or belief, and this is at the heart of the foundation of a secular state, as with any particular Right, there must be boundaries that one should not be allowed to cross, same is true with religion. You may believe whatever you want but when you try to exercise them there should be limitations.

To take for an example the Halal incident, which took place in last year in Sri Lanka, where the Sinhalese Buddhist community was trying to ban the use of Halal foods, which erupted a major controversy in the island. If we take this instance interests of the

³² J Finnis, *Natural Law and Natural Right* (2nd, Oxford University Press, London 2011) 110

³³ Ibid 361

³⁴ AE Wallin, 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods' [2012] 35 Campbell L. Rev. 59, 80

both the parties came to collide, on the one hand, The Muslims may want to eat according to their religious beliefs and the Sinhalese Buddhist may not want to eat according to another religion (that are prepared according to Islamic beliefs). When these kinds of interest collide, what the decision makers must think of is the fairness of the claim. Not be arbitrary unnecessarily, meaning not to impose restrictions as the issue arises, or to take the majorities view and take one side and be irrational. Have a good look at the issue and try to harmonies the conflict as much as possible. When we closely look at this issue, it resembles more of a political agenda, than a religious right, as Halal foods having being here before, and having being here for a very long time and, if no issue was raised back then, it would be unethical to raise one in the name of a religion now.

Most of the religious issues that arise generally arise out of collateral political issues, motivated by politics than by religion. So when the law makers and decision makers takes decisions they should keep the political aspect out and focus on the religious part alone.

As to the Finnis theory of natural right with regards to the balancing of competing interest of the stakeholder with regards to the religious rights, we can safely say that thou at times it may work, but at most times it would not. As lord denning mentioned if there is no religion there is no morality and if there is no morality there is no law. All of these facts are interrelated to one another. But when it

comes to making rational decisions, at times we may have to give priority to morality/law over religion as was seen in the case of *Mab, Wat and J-Ayt v Canada*³⁵ where the HRC ruled that though smoking of marijuana may be a part of the religious beliefs, but as it contravened both the Narcotic Act and the Public Morality I could not be allowed. So there would be a preference of choice at particular circumstances where rights would be balanced and scaled quite contrary to the view taken by Finnis.

In the final analysis I would like to conclude that the primacy must be given to the law instead of either morality or religion when we are to make a rational decision, and I opposed to the view that rights are natural, even if they are if no legal recognition is given, then no protection will be granted. So when we take things for considerations some things will be inevitably given preference over the others, which are self-evident, as you can see with national security, which is given preference over religious rights. Here I would like to advance the fact that, to argue about laws validity is a one thing but to look at its morale aspects would be another, and I would most definitely agree with H.L.A Harts's Remarks.

³⁵ (570/93)