Introduction: religious appropriation and rejection of human rights

Religion entertains a complex relation with human rights, the core of which can be theorized as a twofold dynamic of religious appropriation and rejection of human rights.

Religious leaders and scholars appropriate human rights by setting their religious doctrinal and normative tradition as the antecedent, source and condition of modern human rights. They endeavour to bridge human rights-friendly recent theological developments to the pre-existence of human rights in the relevant tradition under a different language and set of categories. David Daube makes the point for Jewish sources: ‘There is no rubric human rights in rabbinic literature or in Philo, yet the documentation bearing on the topic constitutes a veritable embarras de richesses’ (Daube 1979: 234). Religious leaders and scholars translate the apparently universal and neutral language of modern human rights into the specific categories of the relevant tradition, denomination and community; they thus elaborate a version of human rights, which not only supports and consolidates the principles and order of the relevant group, but also speaks to the outsiders and has the potential to convert them to the truth, or at least to gain their respect. Thus religiously appropriated human rights fulfil a threefold task: (1) they secure an ordained religious community; (2) they shelter the religious community from the external threat; (3) they spread the religious message.

In order for this to be possible, rejection of human rights is necessary, whenever the relevant tradition, denomination or community is faced with ‘wrong’ human rights, such as for many believers the right of same-sex couples to marry, or with ‘right’ human rights with a ‘wrong’ scope of application, such as the right to religious freedom, if applied to dissenters, apostates or ‘sects’ that would be deemed unacceptable and dangerous from the relevant religious perspective.

Appropriation and rejection are not clear-cut, separate phases. They are intertwined. It is often impossible to isolate one dimension from the other. Appropriation needs rejection. Rejection is instrumental to appropriation.

The encounter of religion with human rights is usually discussed as one between two distinct and separate entities. Seemingly, the struggle of religion with human rights takes place outside the religious sphere, and concerns the relation of religion to an external object, human rights.
Instead, if the twofold dynamic of appropriation and rejection is acknowledged, the reality emerges of a relation of religion to human rights, which is also, if not mainly internal to the religious sphere. Appropriation and rejection establish a circular process along which religion shapes human rights while being simultaneously shaped by human rights. To the discomfort of those actors who sever human rights from religion, or vice-versa, human rights are not an external, separated reality. They belong to religion. As a consequence the challenge of human rights to religion is also, if not mainly, a challenge within religion.

This chapter investigates the twofold pattern of appropriation and rejection, and the resulting challenge within religion, in three steps. In the first step, the internal complexity of the categories of ‘human rights’ and ‘religion’ will be studied and the interaction of religion and human rights will be highlighted. In the second step the challenge of human rights to religion will be investigated first in its external dimension, with (1) religion requiring laws of general applicability to conform to a given human rights standard; and (2) laws of general applicability requiring religious communities to conform to a given human rights standard; and second in its internal dimension, with intra-religious tensions resulting from the individuals’ and groups’ effort to reform the community through human rights. As a development of the second step, the third step will observe the impact of human rights on religious laws, with the twofold pattern of appropriation and rejection driving a twofold movement of reform and preservation of religious laws.

In the face of the subject’s complexity, this chapter has a very limited goal. This is neither an in-depth analysis nor a comprehensive review of the literature. This is just a tentative outline of the mutual influence of human rights and religious laws, resulting in the appropriation and rejection of human rights within religions.

The internal complexity of human rights and religion

Since the end of the Cold War, human rights and religion have emerged as the most powerful response to the collapse of traditional State-based sovereignty and to the declining project of secular modernity.¹

Many people around the world experience human rights and/or religion as a set of deeply held beliefs and practices. Moreover, human rights and religion share four extremely appealing and successful features. First, human rights and religion fit into the global world through their claim of universality and their ambition to encompass cultural, national and communitarian differences. Second, they are easy to identify with, thanks to their polymorphic doctrines and practices: while providing a belief to stand for, an identity, and a sense of righteousness and justice, human rights and religion leave a lot of room for negotiation and adjustments. Third, they are post-secular: they are in conversation with the secular, but are not trapped in the secular dogma of separation of the civil and the religious, the temporal and the spiritual. Fourth, their normativity is compatible with State law, while being independent from it: religious laws and human rights law are able to transcend the law of the land and to survive the crisis of traditional State-based sovereignty.

¹ See Rosati and Stoeckl 2012: 3–6. The authors point at five dimensions of post-secular societies: the complementary learning between religious and secular worldviews and practices; the co-existence of secular and religious worldviews and practices; the de-privatization of religions; religious pluralism as opposed to religious monopoly; and the concept of ‘the sacred’ understood not only as an immanent and civic force, but also as a heteronomous transcendent force.
A formidable source of mobilization and an effective agent of transformation, human rights and religion tend to be understood according to a binary paradigm. Human rights and religion are compatible or incompatible, friends or foes. The paradigm rests on the assumption that each of the two categories of human rights and religion corresponds to a clear and distinct set of concepts. Abdullahi Ahmed An-Na’im contests such approach when he looks at the relationship between human rights and Islam:

Framing the question of whether Islam is inherently compatible or incompatible with human rights is problematic. The question assumes that there is a verifiably identifiable monolithic ‘Islam’ to be contrasted with a definitively settled preconceived notion of ‘human rights’. But who can definitively and exhaustively know what Islam is and what human rights are? No human being, whether self-identifying as a Muslim or not, can definitely and exhaustively ‘know’ Islam, and no proposed human rights norms can qualify as universal standards unless and until they are accepted as such by their human subjects. The most anyone can legitimately speak of is his or her view of Islam, never Islam as such, and of human rights as they are already accepted by people around the world, including Muslims.

(An-Na’im 2012: 56)

An-Na’im’s claim can be extended to other religions and cultures. Werner Menski understands Hinduism and human rights as two terms that ‘have many meanings and are internally plural concepts’ (Menski 2012: 71). Awareness that human rights and religion are each an extremely rich and dynamic universe is widespread among scholars. Equally shared is the consequent awareness that precisely because of their inherent plurality, human rights and religion cannot be separated, that they overlap and interact, and that the categories of compatibility and incompatibility betray a complex reality. Still, the assumption that human rights and religion are two monoliths, each bearing a clear identity based on an internally uniform system of norms and values, dominates the language of the media and the mind of many actors alike. The scholarly rejection of a simplistic understanding of human rights and religion as two wholesale, independent systems coexists with the actors’ eagerness on clear-cut definitions.

Many actors feel that the internal uniformity and clear-cut identity of human rights and religion is vital to the possibility of believing in human rights and/or in religion, while being indispensable to the enterprise of advancing human rights and/or religion. The understanding and study of human rights and religion as internally complex systems, variably interacting and combining, cannot but challenge the authority of those who hold the power to define and administer the orthodoxy and functioning of human rights on the one hand and of religion on the other. In particular, it is embarrassing for those who identify with human rights as an internally solid universe, not necessarily related to religion or to one specific religion or denomination, to realize how complex human rights are, and how deeply they depend on religion. By analogy, the internal complexity of religion as an effect of human rights challenges those who understand religious traditions, denominations and communities as internally uniform entities, having the priority on, and often the paternity of, human rights.

The interaction between religion and human rights is essential to the forging of each of the two categories as an internally complex and diverse world. If the internal complexity of human rights is largely dependent on the religious factor, which shaped and still shapes different concepts of human rights, the internal complexity of religion is by and large the effect of the debate triggered within religious traditions, denominations and communities by the emergence of modern human rights.
Religious variations of human rights

Beliefs on which human rights are built make the seemingly compact category of human rights a constellation of internally diverse systems of human rights. A certain set of beliefs is necessary to the foundation of any system of human rights, from Christian natural law to Jewish noachid principles, from dharma driven human rights to ubuntu driven human rights, and from the UN Universal Declaration of Human Rights of 1948 to the African Charter on Human and Peoples’ Rights of 1986. Foundational beliefs also define the establishment and operation of systems of protection of human rights. The negotiation of ideals and reality, the role of the State and of State-independent agencies, and the degree of rules’ enforcement, which define the true identity of any given system of human rights, are indeed dependent on a set of underlying beliefs.

The relation to beliefs is crucial to the ambition of human rights to bridge non-religious and religious worldviews as well as alternative religious worldviews. Such ambition can be fulfilled in two alternative ways.

According to the first way, one can argue for the possibility to agree on human rights without agreeing on the fundamentals of life in general and on God(s) in particular. Many advocates of the international law of human rights would defend its universality as intrinsically dependent on its neutrality towards beliefs (as the slogan would go ‘human rights are not a religion’). They would argue that the values underlying universal human rights do not qualify as beliefs, and therefore are accessible to all, believers and non-believers, this being indeed the key to the superiority of human rights on religion, and to the need for religions to embrace human rights, for the sake of a pacified, religiously and ideologically diverse global world.

According to the second way, human rights can be held permeable to any religious or non-religious belief, based on the conviction that all religious or non-religious doctrines share some fundamentals about human dignity and rights. Human rights themselves would be the distillation of those principles of morality that are shared across the various beliefs (see Küng 1985). In this vein Kevin Boyle argues that ‘human rights law is not placing itself at some higher level or plane above religion or non-religious beliefs. Rather it is accommodating to the plurality of such beliefs in the world while drawing its inspiration from the principles of justice and ethics shared by all religions and humanist beliefs’ (Boyle 2007: 28).

In the face of claims that it is possible to conceive ‘universal foundations [of human rights], religious or nonreligious’, that should hold good ‘for all groups and communities of every nation’, Johannes van der Ven contends that the ‘manifest plurality of worldviews worldwide’ makes universal foundations impossible (2010: 167). Taking into account the reality of multiple beliefs underlying multiple versions of human rights, van der Ven rather argues in favour of ‘particular foundations’, responding to ‘the right of individual (religious or nonreligious) communities, including global ones, to endeavour – as in fact they do – to ground human rights in a view or concept that, from that community’s perspective, grounds and substantiate them’ (2010: 167).

If beliefs in general are a crucial factor for the internal differentiation of human rights, for the competition between concurring systems of human rights, and for the legal arbitration of the competition thereof, beliefs that qualify as religious are decisive in the process of differentiation.
Human rights within religions

of systems of human rights, their impact resulting in a set of religious variations of human rights, heavily dependent on cultures, times and places.\(^4\)

Religious variations of human rights can go as far as to challenge the very structure of rights. With regard to the understanding of human rights in Judaism, Asher Maoz explains that ‘Judaism does not propound a concept of rights but adheres to a concept of duties, not only in the relationship between man and God, but also in the relationship between man and man’ (Maoz 2004: 680). The author concludes that in the halachic tradition ‘because of the emphasis put on the performance of a duty, the complainant enjoys a far better chance of her “right” being honoured, than in a rights-oriented jurisprudence’ (ibid.: 686).

Religious variations of human rights emerge in four areas. They can determine the foundation of human rights (e.g. Bible-based human rights, Islamic human rights or secular/neutral human rights), the catalogue of human rights (e.g. in the case of the exclusion of LGBT rights or of the right to change one’s own religion), the internal hierarchy of human rights (e.g. the precedence of religious freedom as ‘the first liberty’\(^5\)), the universality of human rights, and the cultural dimension of human rights (e.g. the debate on Asian values based human rights\(^6\)).

Transversal to the four areas, the Western connotation of human rights, the ‘conviction that only the West, for reasons of history and tradition, has a solid and coherent bond with the culture of human rights’,\(^7\) is a strong ingredient in the debate on religious variations of human rights. Two patterns emerge. First, the Western paternity and/or monopoly of human rights can be rejected. Amartya Sen resorts to emphasizing the religious benignity of Indian emperor Ashoka in order to contest the Western dominance on human rights.\(^8\) Second, the Western paternity

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\(^4\) As Irene Bloom underlines: ‘In some parts of the world, including India and much of the Islamic world, human rights ideas have been understood by many as a challenge to traditional values on the part of Western observers whose appreciation of indigenous cultural dispositions and religious beliefs or of social and economical realities may be found wanting. In other parts of the world, including Latin America and much of Eastern Europe, the problems have had to do less with the perceived ‘foreignness’ of human rights norms than with the confrontation between religious institutions and authoritarian political regimes or, more recently, with conflict among ethnic and religious groups who perceive their interests to be at odds’ (Bloom 1996: 8).

\(^5\) Georg Jellinek famously held this principle in Jellinek 1974. For the understanding of the principle see DeGirolami 2013: 232, fn. 44. Jean-Philippe Schreiber sees the prioritization of religious freedom as a negative trend in contemporary law and politics. He deprecates the ‘subordination of certain fundamental rights to a sacralised religious freedom’ as well as the ‘prevalence of a sovereign religious freedom for reasons of politics or ideology on the one hand and of identity on the other’ (Schreiber 2012: 28) [Author’s translation: ‘soumettre certains droits fondamentaux à une liberté religieuse sacrée ... prévale une liberté religieuse considérée comme souveraine, aux yeux des uns pour des motifs politiques ou idéologiques, aux yeux des autres pour des raisons identitaires.’]

\(^6\) Referring to the debate on Asian values and human rights, Leena Avonius and Damien Kingsbury underline that ‘at the center of the culturalist arguments against human rights in the debate have been authoritarianism and communitarianism’, both somehow linked with the inextricable mix of culture and religion in Asia. Yet, the authors challenge the assumption, stressing that ‘all religious and cultural traditions have both communitarian and individualistic and hierarchical and equalitarian tendencies’ (Avonius and Kingsbury 2008: 7–8).

\(^7\) Flores 2008: 294. [Author’s translation: ‘la convinzione che solo l’Occidente, per storia e tradizione, abbia un legame solido e coerente con la cultura dei diritti umani.’] Here Flores is simply presenting the theory, and not endorsing it.

\(^8\) Amartya Sen celebrates ‘Ashoka’s dedicated championing of religious and other kinds of tolerance’ (Sen 2006: 50). Federico Squarcini contests Sen’s simplistic reading of Ashoka’s religious politics. See Squarcini 2011. Amartya Sen further articulates his critique of an ‘immaculate Western conception’ of rights: ‘The presumption that all this is the result of the flowering of an entirely
of human rights can be advocated for the sake of either a pro-Western or an anti-Western discourse. The two patterns have a serious impact on religious variations of human rights. In the Western media and public, human rights are often taken as a secular and modern construct, inevitably colliding with those pre-modern religious traditions that could not conceive of rights, equality, rule of law and civil liberties as they are understood in liberal democracies. Human rights can also be seen as a secularized form of Christianity conflicting with non-Christian religions and cultures; hence the non-Western critique of self-appointed culture-free and religion-free human rights as Western Christian neo-imperialism in disguise. Analogously, a certain version of human rights can be seen as grounded on Protestant Christianity or liberal Christianity, incompatible as such not just with non-Christian religions, but also with non-Protestant or non-liberal Christianity. Hybrid versions, combining secular and religious human rights, intra-Christian ecumenical human rights, inter-religious (e.g. Judeo-Christian) human rights and a pro- and anti-Western stance are also possible, as in the case of Marxist Christian advocacy of human rights. 

The combination of Marxist and Christian elements in the advocacy of human rights was the reason why the Roman Catholic Church condemned theologians associated to the so-called liberation theology. See Congregation for the doctrine of the faith, 'Instruction on certain aspects of the 'theology of liberation', 6 August 1984. Available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html. The Instruction accused some Roman Catholic theologians to borrow Marxist theories and stated that 'concepts uncritically borrowed from Marxist ideology and recourse to theses of a biblical hermeneutic marked by rationalism are at the basis of the new interpretation which is corrupting whatever was authentic in the generous initial commitment on behalf of the poor' (VI, n. 10). The Instruction also condemned atheistic and Marxist’s denial of rights in the following terms: 'Let us recall the fact that atheism and the denial of the human person, his liberty and rights, are at the core of the Marxist theory. This theory, then, contains errors which directly threaten the truths of the faith regarding the eternal destiny of individual persons’ (VII, n. 9).

The understanding of subsystems within religions, by reference to conflicting human rights claims, can benefit from the reflection on ‘minorities within minorities’. See Eisenberg and Spinner–Halev 2005.

These are very general and superficial attempts to grasp the internal complexity of human rights, and the role of religion in its making. Every attempt to go beyond labels risks getting trapped into the forging of new labels and definitions, just more specific, but no less inaccurate. Jewish orthodox human rights, or Roman Catholic human rights might seem a step forward in the understanding of religious variations of indistinctively Jewish or Christian human rights, but they are likely to turn into yet another ossification and oversimplification of a much richer universe, including internal variations of Jewish or Christian human rights.

For a more accurate picture to emerge, religious variations of human rights have to be understood in the light of human rights’ variations of religion.

Human rights’ variations of religion

If religion redefines human rights through the twofold movement of appropriation and rejection, thus producing religious variations of human rights, in turn human rights redefine and differentiate religion. Since their modern invention in the eighteenth century, human rights
have prompted variations of religion, which have increased and reshaped the internal diversity of religious traditions, denominations and communities.

Roman Catholic Popes opposed liberal rights in the nineteenth century, but changed their position after World War II, in particular at the Second Vatican Council, and rose as the champions of human rights worldwide, to the extent that the Holy See featured among the signatories of the Helsinki Final Act of 1975, the seventh principle of which prescribed respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. The change in the Catholic doctrine and the activism of the Holy See in favour of international human rights law engendered internal dissent. One of the main reasons for the tension between Rome and the Society Pius X, culminating in the excommunication by Pope John Paul II of the leaders of the Society in 1988, was the latter's rejection of the doctrine of the Second Vatican Council on freedom of conscience and religion, on the grounds that the Council's teaching was inconsistent with the Catholic tradition.

Human rights variations of Roman Catholicism are just one of the many possible examples showing how religious leaders and communities react in different ways to human rights, and thus produce the internal difference of religion in general, and of religious traditions, denominations and communities in particular. The relevant religious understanding of human rights has grown so important that it often poses as an identity marker, making a given religious tradition, denomination and community what it is in the eyes of both members and outsiders. Many Christians would see the Christian paternity and endorsement of international human rights as an essential expression of what Christianity is about. Analogously, many non-Christians would see certain human rights, if not the whole fabric of human rights as such, as a tool for Christian neo-imperialism. Also, many religious communities would see the rejection of certain rights, such as those related to sexual orientation, as a key feature of their religious identity.

If the Catholic example is blatant, human rights' variations of religion can be observed in different times and places, across religious lines. Endorsing a project of human rights based modernity, reform of family law in India and in Tunisia in the 1950s has changed, and diversified, Hindu law and Islamic law. Half a century later, constitutional reforms in Iraq, Tunisia and Egypt, combining a reference to Islam, and sometimes to Islamic law, with recognition of fundamental rights, have also reshaped, and diversified, the Muslim landscape. The debate within the Anglican Communion and the Mormon Church of Jesus Christ and the Latter Day Saints on gender equality and LGBT rights in the access to ordained ministry is but a further example of the human rights’ impact on religion, that is of human rights variations of religion.

These examples show that although religious variations of human rights and human rights’ variations of religion are multi-dimensional, and mobilize the social, the theological and the political element, the legal dimension plays a crucial role in the circular process establishing a continuum between the religion-based differentiation of human rights and the human rights-based differentiation of religion. The next chapter will investigate this legal dimension and its twofold external and internal character.

11 In 1832 Gregory XVI condemned modern freedoms, explaining that ‘[e]xperience shows, even from earliest times, that cities renowned for wealth, dominion, and glory perished as a result of this single evil, namely immoderate freedom of opinion, license of free speech, and desire for novelty.’ Gregory XVI, ‘Encyclical Mirari Vos on Liberalism and religious indifferentism’, 1832. Available at http://www.papalencyclicals.net/Greg16/g16mirar.htm

12 Declaration Dignitatis humanae upheld fundamental rights and in particular religious freedom. For the background of the declaration, see Scatena 2003.
The external and internal laws of religion and human rights

Both human rights and religion being highly normative, the legal dimension has a special salience in the encounter and interaction of the two. From this perspective, religious variations of human rights and human rights' variations of religion translate into, respectively, an external and an internal law of religion and human rights.

The external law of religion and human rights describes how religious traditions, denominations and communities affect the definition and protection of human rights for the general public, thus posing as the legal ingredient of religious variations of human rights. On the other hand, the internal law of religion and human rights rather describes how human rights affect religious laws and organized religion in relation to their members, this being the legal component of human rights' variations of religion.

The following two sections briefly highlight the external and the internal laws of religion and human rights.

External law of religion and human rights

The external law of religion and human rights is the result of the religious influence on those laws, such as the law of the land, supranational laws or international law, that apply not just to the members of one specific religious tradition, denomination or community, but to the general public, including members of other religions, denominations and communities, unaffiliated believers, ‘atheists, agnostics, sceptics and the unconcerned’. In such an external dimension, the law of religion and human rights is bi-dimensional.

First, religion determines the quality and degree of the legal protection of human rights in a given society. Religious variations of human rights can coincide with the religiously inspired legal struggles for human rights of leaders like Gandhi, Martin Luther King, Dag Hammarskjöld and Desmond Tutu. But they can also coincide with the religious foundation and endorsement, in different times and places, of dictatorial governments, rejection of freedom of conscience, equality and rule of law, and denial of individual and collective rights. In this first modality, religion shapes the legal action of local, national, or supranational governments in favour or to the detriment of human rights, or, more nuanced, towards a given interpretation of human rights.

Second, religion sets limits to the action of the government, for the sake of society at large and of religious organizations in particular. This can play in favour of human rights, whenever the government is likely to threaten them, and the civil society, and religious organizations, support human rights. But this can also prove harmful, if the initiative of the government in favour of human rights is hindered to the advantage of human rights unfriendly social and religious actors.

The religious influence on laws of general applicability in order for these to conform to a given religious human rights standard is the first dimension of the external law of religion and human rights. The second dimension is the pressure of laws of general applicability on religious communities, that are required to conform to a given human rights standard.

Due to the second dimension’s threat on the self-rule of religious communities, a key concept for the development of the external law of religion and human rights is the principle

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of religious autonomy, protecting the ‘competence of religious communities to decide upon and administer their own affairs without governmental interference’, as well as the ‘right of self-determination for religious groups’ (Durham 2013: 6). Autonomy shields religious actors against governmental interference. In so doing, autonomy enables religious actors to display their twofold dynamic of appropriation and rejection of human rights, ultimately resulting in the interplay of religion with the whole society, members and non-members alike, by means of the external law of religion and human rights.

**Internal law of religion and human rights**

The internal law of religion and human rights describes the definition and protection of human rights within a specific religious tradition, denomination or community, that is within religious laws. Religious laws can be either entirely in the hands of religious authorities and institutions (e.g. justice according to Jewish law, as adjudicated by a rabbinical court with no State interference), as Russell Sandberg would understand them, or can be defined and administered – entirely or partially – by State bodies (e.g. personal religious laws in India (see Ventura 2014: 11–2) or the ecclesiastical law of the Church of England (see Hill 2007)). Also, religious laws can have a limited reach (this is most typically the case of Christian canon laws, which would have no ambition to regulate matters pertaining to, for example, land law or criminal law), or can be an all-encompassing legal system, such as in the case of Islamic or Jewish law.

The internal law of religion and human rights depends on what in theory and in practice organized religion provides for in sensitive areas such as the right to choose and change one’s religion, the prerogatives of religious authorities like bishops, rabbis and muftis, operation of religious courts, distinctive treatment of women, children, unbelievers and other categories such as tribes or castes, individual and collective property rights, employment, education in general (e.g. religious schools) and in particular the authorization to teachers such as the Catholic ‘missio canonica’, the Vokations of the Protestant Church, the Orthodox canonical mandate, the Jewish teaching certificate, the certificate delivered by the Islamic community, censorship, organization of monastic communities, and family and marriage.

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14 The European Court of Human Rights has recognized the principle of religious autonomy in Fernandez Martinez v. Spain, 15 May 2012, para. 80.

15 The category of ‘religious laws’ is used here, with the awareness that no all-encompassing definition does justice to its fundamental complexity, as warranted by Vanderlinden 2002: 170–1.

16 According to the author, religious laws comprise ‘the internal spiritual laws made by religious groups themselves’, and more precisely ‘both the rules found in sacred texts and also the more practical rules developed by religious groups themselves’ (Sandberg 2011: 169–70). The author further suggests that a fourfold definition is possible, based on the purpose, source, subject and knowledge (‘pedagogy’) of religious laws (2011: 172–80).

17 In his comparison of Jewish law and Christian canon law, Asher Maoz underlines this difference: ‘Rene David and John E.C. Brierly define Judaism as ‘essentially a religion of the law’. ‘[T]he Catholic Church,’ on the other hand, ‘. . . did . . . feel it unnecessary to develop a Christian law to take the place of Roman law . . . . Canon law was not a complete legal system designed to replace Roman law. It complemented Roman law or other ‘private’ laws, never anything more, and regulated subjects not covered by these laws such as Church organization, the sacraments, and canonical procedure.’ The separation between spiritual and temporal matters, which is at the foundation of Christianity, is alien to Judaism for Judaism encompasses all aspects of society and of an individual’s life’ (Maoz 2004: 678).

In the current debate on the interaction between human rights and religion, organized religions, and religious laws in particular, have grown decisive. As conflicts of interpretation around Shari’a and human rights attest, the incompatibility between human rights and a specific religion is often vindicated in the name of the impossibility to reconcile the relevant religious law with human rights law.

Religious laws lay at the core of the four reasons offered by John Witte and M. Christian Green to explain why ‘human rights ultimately need religious ideas, institutions, and rights claims to survive and thrive’ (Witte and Green 2012: 15). First, without the right to live according to one’s own religious precepts, which is the right to religion, ‘many rights are cut from their roots’. Second, religious laws are essential in that they tie together rights and duties, thus preventing the regime of human rights from becoming ‘infinitely expanding’ (Witte and Green 2012: 15). Third, religious laws resist the risk that human rights grow as ‘a system of rights that excludes, deprecates, or privatizes religion’ and therefore as a system that cannot be ‘respected and adopted’ (Witte and Green 2012: 15). Fourth, religious laws oppose the temptation to entrust human rights solely on the State, which would confer upon the government ‘an exaggerated role to play as the guarantor of human rights’ (Witte and Green 2012: 16).

Religious laws are thus indispensable for the quality of the internal law of religion and human rights. Their impact, however, is not confined to the relevant religious community. Witte and Green explain that ‘each [religious] tradition has developed its own internal system of legal procedures and structures for the protection of rights, which historically have [served] and still can serve as both prototypes and complements for secular legal systems’ (Witte and Green 2012: 16). Those religious laws that have developed before the Western modern State offer an alternative approach to rights, which is neither necessarily nor irredeemably an approach against human rights. This is true, in particular, for models of religious laws radically different from the rule of law model. In his study of the Mishpatim, the earliest collection of Biblical laws, Bernard Jackson underlines the intrinsic diversity of a model based on the interdependence of teaching and normative behaviour. ‘Wisdom-Laws,’ as Jackson categorizes the Mishpatim, challenge ‘the applicability of the “Rule of Law” conception in the following respects: (i) where linguistic rules are used in dispute settlement, their application is not to be identified with the notion of “literal meaning”, but rather with their narrative, contextual sense; (ii) dispute settlement is conceived as an essentially private rather than a public matter, and judicial dispute resolution is to be avoided for both practical and social reasons: the earliest form of judicial dispute resolution rely upon intuitions of justice against a background of custom, rather than analysis of linguistically formulated rules’ (Jackson 2006: 24). Religious laws are also likely to convey a completely different approach to the source of law, and in particular to the articulation of civil society and the political elites. Wael Hallaq argues that ‘Islamic law did not emerge out of the machinery of the body-politic, but rather arose as a private enterprise initiated and developed by pious men who embarked on the study and elaboration of law as a religious activity’ (Hallaq 2005: 204). Hence the consequence that ‘never could the Islamic ruling elite, the body politic, determine what the law was’ (Hallaq 2005: 204).

19 Mashood Baderin discusses the idea that ‘Islamic law is incompatible with the ideals of international human rights and that human rights are not realizable within the dispensation of Islamic law’ (Baderin 2003: 3).

20 Witte and Green 2012: 15. The authors argue that ‘to ignore religious rights is to overlook the conceptual, if not historical, source of any other individual and associational right’.
If in the past religious laws were ‘prototypes and complements for secular legal systems’, as Witte and Green argue, in a time when the transnational reshaping of sovereignty and the rule of law decisively impacts on human rights, religious laws can offer valuable resources for the relevant community and for society at large. In this perspective, religious laws have a role to play that place them at the very heart of the interaction between the internal and the external law of religion and human rights. For better or worse, their influence is not limited to the members of the relevant religion, denomination or community. It extends to society at large.

If looked at through the perspective of religious laws, the external and internal spheres are conceptually distinct, but in practice they are interlocked. Indeed, the role of religious laws is as decisive when human rights are at stake in the conversation between members of the same religious tradition, denomination and community, as they are when human rights challenge the ability of religion to contribute to the advancement of a plural and diverse society.

The development of religious laws through human rights

Since World War II, the interaction with human rights has proved a crucial factor for the development of religious laws. In keeping with Marc DeGirolami’s scheme of variations of religious liberty, religious laws develop through human rights according to a threefold typology of variations.

First, ‘there is interreligious variation’ (DeGirolami 2013: 60) depending on how Protestant, Sikh, Jewish laws or other religious laws appropriate or reject human rights.

Second, ‘intrareligious variation’ is relevant, which comprises ‘(1) variation within traditions about the scope of acceptable dissent’ on how the relevant religious law should understand human rights, and ‘(2) variation within traditions about the scope of freedom from state intrusion’ through human rights (DeGirolami 2013: 61).

Third, ‘temporal variation’ implies that ‘even among members of the same religious community’ the relation of the relevant religious law to human rights ‘may change over time’ (DeGirolami 2013: 61).

At the junction between the internal and the external law of religion and human rights, the combination of religious laws and civil, constitutional and international human rights law results in four possible scenarios.

First, human rights-oriented reform in civil law and in religious law coincides. Repeal of sodomy laws in England and Wales has coincided with a substantial shift in the Churches of England and Wales on rights of homosexuals, including ordained people. In a different area, the Mormon principle that human law does not have the right ‘to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public or private devotion’21 has pushed the Church of Jesus Christ and the Latter Day Saints to fight for religious freedom and State non-interference, thus contributing significantly to US constitutional law.22

In the second scenario, both civil and religious laws are preserved from undesired human rights. This is the case with the upholding of capital punishment in both civil law and religious law, for instance in the States of Nigeria that incorporated Shari’a law as criminal law in 2000, but also in the United States, to the extent that popular support of capital punishment is largely grounded on references to Biblical law.

Third, human rights are endorsed in civil law, but not in religious laws. This is the case, for example, with the Roman Catholic Church’s support to provisions prohibiting discrimination of women and LGBT people in civil labour law, in the face of the Church’s religious freedom claim of the right to select candidates to ministries, also based on gender and sex orientation.

Fourth, the same right is endorsed in civil law and in religious law, but with two distinct meanings and scopes: in principle, freedom of association is enshrined both in Roman Catholic canon law and in the constitutional law of countries under strong Catholic influence, but the understanding of freedom of association within the church, as provided for by Roman Catholic canon law, is definitely different from its interpretation in the constitutional law of Malta, Poland or Portugal.

The four scenarios do not always come in a well-defined way. The boundary between civil human rights and human rights in religious laws is particularly difficult to draw when civil courts are drained into religious disputes.

British civil courts have given application to procedures before religious courts while claiming they protected the rights of the parties under civil law. Also they have ruled on Jewish membership or on the leadership of the Sikh community, while rejecting the claim that by doing so they interfere with the religious doctrine of the relevant community.

In controversies within the Muslim community in Bulgaria or within the Jewish community in France, the European Court of Human Rights has found in favour or against the State, based

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23 Justice Baker for the High Court of Justice, Family Division, deferred a family case to the Beth Din of New York and then guided the procedure, finally ordering the application of the Rabbinic Court’s decision. The judge so explained his choice: ‘at a time when there is much comment about the antagonism between the religious and secular elements of society, it was notable that the court was able not only to accommodate the parties’ wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages – by adjourning the case for arbitration; by using wardship as a protective mechanism for the children pending the outcome of the arbitration; by making the “safe harbour” orders that enabled the mother to travel to New York with M for the purpose of taking part in the process; by holding an emergency interim contact hearing; and by giving provisional approval of the draft final order to facilitate the granting of the Get.’ Para. 35. The judge further commented: ‘The parties’ devout beliefs had been respected. The outcome was in keeping with English law while achieved by a process rooted in the Jewish culture to which the families belong.’ Para. 37. Case of Rai and Mi, decided on 30 January 2013, 2013 EWHC 100 (Fam).


25 UK Supreme Court, Shergill and others v. Khaira and others, decided on 11 June 2014, [2014] UKSC 33. Lords Neuberger, Sumption and Hodge wrote: ‘[T]he courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust’ (Para. 45).

26 European Court of Human Rights, Hasan and Chaush v. Bulgaria, 26 October 2000. The Court acknowledged religious laws by recalling ‘that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community’ (Para. 62).

27 European Court of Human Rights, Cha’are Shalom Ve Tsedek v. France, 27 June 2000.
on the government’s interference with the self-determination of the relevant community. 28

The same European court witnessed the overlapping of civil and religious jurisdictions in the development of religious laws, when confronted with ecclesiastical authorities applying their laws in order to dismiss a Roman Catholic church organist, 29 a Roman Catholic child-minder in a Protestant church school, 30 and a public relations manager for the Mormon Church of Jesus Christ and the Latter Day Saints. 31

In yet another example of conflicting principles in the application of human rights to religious laws, touching upon the scope of religious laws, the United Nations Committee for the Rights of the Child has called for an amendment of Roman Catholic canon law, in the interest of a better protection of minors, such a call being held the legitimate implication of the international obligations of the Holy See. 32 Catholic authorities have rebutted that the mandate of the United Nations in the field of human rights does not confer upon the Committee any competence on Roman Catholic canon law. 33

28 Deciding that Bulgaria had violated the religious freedom of the applicants, the Court considered that ‘facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers’ freedom to manifest their religion’. The Court further noted that ‘but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership’ (European Court of Human Rights, Hasan and Chaush v. Bulgaria, 26 October 2000, para. 78).

29 European Court of Human Rights, Schüth v. Germany, 23 September 2010.

30 European Court of Human Rights, Siebenhaar v. Germany, 3 February 2011.

31 European Court of Human Rights, Obst v. Germany, 23 September 2010.

32 In the concluding observations of 25 February 2014, the UN Committee affirmed: ‘Committee is aware of the dual nature of the Holy See’s ratification of the Convention on the Rights of the Child as the Government of the Vatican City State and also as a sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction. While fully aware that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee notes that subordinates in Catholic religious orders are bound by obedience to the Pope, in accordance with Canons 331 and 590 of the Code of canon Law. The Committee therefore reminds the Holy See that in ratifying the Convention, it made a commitment to implement it not only within the territory of Vatican City State, but also, as the supreme power of the Catholic Church, worldwide through individuals and institutions under its authority’ N. 8.

33 When the UN Committee argued that the legal personality of the Holy See, as a signatory to the UN Convention, made the Holy See liable under canon law, the Holy See’s spokesperson replied that the Holy See, Vatican City, the Roman Catholic Church and its law (canon law) should not be confused. Father Lombardi explained ‘the peculiar nature of the Holy See in its quality of international law subject which adheres to the Convention, with a particular focus in the distinction from, and relationship with, the Vatican City State … and in relation with the Catholic Church, as a worldwide community of devoted people living all around the world … the members of which are subject to the law of the States in which they live and operate.’ Father Lombardi also explained the ‘peculiar and specific nature of canon law, solely pertaining to the Catholic Church and well – distinct from the civil laws of the other States’ (Lombardi 2014). [Author’s translation: ‘spiegare e precisare la natura particolare della Santa Sede come soggetto di diritto internazionale che aderisce alla Convenzione, in particolare nella sua distinzione e nel suo rapporto con lo Stato della Città del Vaticano … e in rapporto alla Chiesa cattolica, come comunità dei fedeli cattolici sparsi nel mondo … i cui membri vivono sottomessi alle leggi degli Stati dove vivono ed operano … la natura particolare e specifica della legge canonica, propria della Chiesa cattolica e ben distinta dalle leggi civils degli Stati.’]
Beyond the incident between the United Nations and the Holy See, the scandal of sex abuses on minors by clerics has triggered debate and reform within the Roman Catholic Church on how to best protect the rights of both the victims and the accused, this challenging the Roman Catholic distinctive and differentiated approach to rights outside and inside the Church (see Coughlin 2010, in particular Chapters 2 and 3). With Protestant and Orthodox Churches also struggling with negotiating a fair balance between their laws and human rights, the issue concerns Christian churches as a whole.

Norman Doe lists among his 50 principles of law common to Christian Churches, at n. 48, ‘Human rights and religious freedom’. The principle is articulated as follows:

(1) All humans are created in the image of God; (2) All humans share an equality of dignity and fundamental human rights; (3) The State should recognize, respect and promote basic human rights; (4) The church should protect and defend human rights in society for all people, and, like the church, the State and society should not discriminate against individuals on grounds of race, gender and colour; (5) The State should recognize, promote and protect the religious freedom of churches corporately and of the faithful individually, as well as their freedom of conscience.

(Doe 2013: 397)

Interestingly enough, Doe does not consider respect of human rights within the churches as a principle of law common to Christian Churches, or at least he does not make this principle explicit, although he includes in his list due process and other similar principles.

Islamic documents such as the Universal Islamic Declaration of Human Rights of 1981 or the Declaration on Human Rights in Islam adopted by the Organization of Islamic Conference in Cairo on 5 August 1990 (Baderin 2003: 237–42) offer another example of overlapping civil and religious definitions of human rights.

Witte and Green observe that a new ‘human rights hermeneutic’ is ‘slowly beginning to emerge among modern religions’ (2012: 19). This is a fourfold hermeneutic ‘of confession’, ‘of suspicion’, ‘of history’ and ‘of law and religion’.

First, ‘confession and restitution’ are essential steps for ‘any religious community to engage with human rights fully’ (Witte and Green 2012: 19): religious communities have to carry on confessing that ‘their theologian and jurists have resisted the importation of human rights as much as they have helped in their cultivation’ and that ‘their internal policies and external advocacy have helped to perpetuate bigotry, chauvinism and violence, as much as they have served to propagate equality, liberty, and fraternity’ (Witte and Green 2012: 19–20).

Second, a ‘hermeneutic of suspicion’ is needed, in the name of which religious laws would challenge the temptation to ‘idolize or idealize’ recent formulations of human rights, while contributing to the development of ‘a more pluralistic model of interpretation’ (Witte and Green 2012: 20).

Third, a ‘hermeneutic of history’ would challenge religious laws to free religious sources from ‘the casuistic accretions of generations of jurists’ as well as from ‘the cultural trappings of the communities in which these traditions were born’. 35

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34 This is a very sensitive area for European churches. For an attempt to design an approach to human rights consistent with the theology and law of Protestant and Orthodox Churches, see Kitanovic 2012.

35 Witte and Green 2012: 20. The authors suggest that such a ‘hermeneutic of history’ would demand a return to ‘slender streams of theological jurisprudence that have not been part of the mainstream of the
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Finally, a ‘hermeneutic of law and religion’ would require religious laws to challenge the assumption that ‘law is an autonomous discipline, free from the influence of religion and belief’ and that ‘law and politics must be hermetically and hermeneutically sealed from the corrosive influences of religious believers and bodies’ (Witte and Green 2012: 20).

Based on Witte and Green’s vision of the challenge of human rights to religious laws, it is possible to read the twofold movement of religious appropriation and rejection of human rights as entailing a twofold effort of, respectively, reform and preservation of religious laws, such effort being crucial for the development of religious laws.

Reform of religious laws

In its more visible legal incarnation, religious appropriation of human rights operates through religious claims and influence in civil, constitutional and international law. However, the internal struggle for human rights oriented improvement of religious rules and procedures among those who share the same faith and belong to the same community is as decisive. Three factors make reform of religious laws a crucial area for the advancement of human rights.

The first factor is change. Religious rules are often powerful justifications for the perpetuation of patterns incompatible with human dignity and rights. No true social change is possible without a change in those laws to which people feel attached out of deeply held religious beliefs. As Mohamed Charfi pointed out in his advocacy of reform of Islamic law, ‘religious laws are often taken as immutable laws. Well, the very notion of immutability runs against the nature of things. Even in the field of ibadat, which covers the relation of man to God (prayer, fasting . . .), only a very few rules can be held as valid for all the times and places, as Shari’a has it.’ By engaging with reform of their laws, religious communities are urged to experience innovative ways of approaching the interpretation of sacred texts, decision-making procedures, the resolution of disputes, judicial or otherwise, and the structure of powers. Such an effort of innovation is vital for the advancement of religion, of law and society, and of human rights themselves.

The second factor is stability. Reform of religious laws entails a systematic discernment of what has to stay and what has to go. By validating the basics, and by adapting to new circumstances, religious communities achieve stability within, and contribute to stability in society at large. This is particularly true for human rights, the stability of which is increased as a result of their assessment through the building of a plurality of religious laws of human rights, complementary to the plurality of human rights systems in civil, constitutional and international law. In this perspective reform of religious laws assesses the very foundation of systems of human rights, and the possibility of a multi-level, pluralistic global convergence on human rights. In fact, appropriation of human rights through reform of religious laws implies a conversation between the identity and specificity of a given religious tradition, denomination or community, and the many systems of human rights, this often meaning a negotiation of the cultural and the intercultural, and of the local and the global.

religious traditions, or have become diluted by too great a commingling with it’ as well as to ‘prophetic voices of dissent, long purged from traditional religious canons, but, in retrospect, prescient of’ the beneficial role that tradition might play today.

Charfi 2000: 149. [Author’s translation: ‘Les lois religieuses sont souvent prises pour des lois immuables. Or la notion d’immutabilité est contraire à la nature des choses. Même pour les ibadat, c’est à dire tout ce qui concerne les rapports de l’homme avec Dieu (prière, jeûne . . .), rares sont les règles qui pourraient être valables pour tous les temps et tous les lieux comme le veut la charia.’]
The third factor is diversity. Reform of religious laws encourages diversity within religious communities, through debate and differentiation, and diversity in human rights. Of course diversity in and through religious laws can be highly divisive, and challenging for those who claim that the wholeness and universalism of human rights should be protected, just as the identity of religious community should be preserved. The complexity and ambiguity of the argument of diversity and specificity is well illustrated by the debate on human rights among Islamic law scholars.

While pointing at the importance of reform of religious laws, the three factors also illustrate the importance of preservation of religious laws. In fact, mirroring the tight interconnection of religious appropriation and rejection of human rights, reform and preservation of religious laws prove two indivisible sides of the same coin.

Preservation of religious laws

It is very commonly held that human rights should change religious laws from outside, as a standard imposed top down by supranational or national governments. In the face of such a claim, preservation of religious laws becomes a crucial implication of the religious rejection of human rights.

Preservation of religious laws can be appreciated through the same three-factors test administered to reform of religious laws.

First, preservation of religious laws is about a kind of change desirable to all those who would feel for religion in terms of custom and tradition, as opposed to disruptive, violent and revolutionary change. Marc DeGirolami advocates this kind of change when praising ‘changes that resemble growth rather than the grafting of new shoots, changes that imitate what is already existing rather than replacing it, changes that respond to some local or particular defect rather than those with more general and comprehensive aims, changes that proceed gradually with the possibility of readjustment, changes whose consequences can be reasonably anticipated.’

Second, preservation of religious laws secures stability. The allegiance of religious communities to their laws is based on the fact that those laws are totally or partially God-given and validated through tradition and custom. Hastily carried changes, especially when imposed from outside in the name of an alien legal order might result in a serious threat to social cohesion and to the perpetuation of cherished values and habits.

Portraying the debate on human rights in Roman Catholic canon law, Rik Torfs writes: ‘We must get away from the tendency to employ fundamental rights as a means of securing particular rights, though this tendency is understandable in an institution, such as the church, which is, in the technical sense of the term, undemocratic. Seen from this perspective, fundamental rights serve as a dam against the discretionary power of the authorities, a power which is not always sufficiently restrained in practice. However, basic rights are much more than an instrument for defence; to force them into this role betrays a nineteenth-century liberal mentality. Basic rights gain in moral authority, in the Church as well, whenever it is clear from their concrete coloration that they are not simply hollow demands made by the Me-generation but, on the contrary, that they raise the quality of life in the Church to a higher level’ (Torfs 1995: 89). Further background in Coriden and Örsy 1969.

In this regard, Charfi exposed that ‘it is clear what the notion of specificity invoked by fundamentalists to counter the universality of human rights is about. It is nothing else than a means to legitimise coercion, oppression and attacks on the freedom and the equality of human beings’ (Charfi 2000: 101). [Author’s translation: ‘La notion de spécificité invoquée par les intégristes pour contrecarrer l’universalité des droits de l’homme apparaît sous son vrai jour. Ce n’est qu’un moyen de légitimer la contrainte, l’oppression, les atteintes qu’on veut continuer à porter à la liberté de l’homme et à l’égalité entre les êtres humains.’]

Third, preservation of religious laws strengthens diversity. The various doctrinal schools within Sunni Islamic law, the Latin and the Eastern codes of canon law within Roman Catholicism and the multiple churches within the Calvinist tradition exemplify a preservation of religious laws, which is essential for a plural legal environment. Faced with the risk that the defence of religious laws be synonymous of a reluctant compliance to international standards of human rights, and thus that the value of diversity be hijacked for the unacceptable purpose of avoiding a serious assessment of religious laws in the light of human rights law, religious traditions, denominations and communities share the responsibility to demonstrate that diversity is not a foe, but an ally of human rights.

Conclusions

Reflecting on law and religion, Winnifred Fallers Sullivan, Robert A. Yelle and Mateo Taussig-Rubbo emphasize that ‘while, for the most part, the very expression “law and religion” reflects an assumption that law is different and separate from religion – that they are discrete kinds of things, separate species if not members of different kingdoms altogether – in fact, regarded more closely, their overlapping functions define a range of possible relationships that law has to religion, as complement and mutual support, as competitor, or as successor’ (Sullivan, Yelle and Taussig-Rubbo 2011: 3). The authors argue that developments in the interaction of law and religion will define legal issues such as ‘evolving trial processes, the law of evidence, the defining and redefining of citizenship, state security systems, family law, the law of property, new practices of sacrifice on the part of the military and the citizenry, new formations of sacral sovereignty, the transformation of geographically located religious traditions into more portable modernist ideas and practices, the consequences of transnational migration, and changes to electoral politics’ (ibid.: 4). This chapter argues that the same is true for human rights and religion, the interaction of which should be observed and understood as taking place not outside, but within religion.

Advancement in the study and advocacy of human rights is intimately dependent on the relation of human rights to religion. The rise of modern human rights has triggered a twofold movement of religious appropriation and rejection of human rights, a crucial legal translation of which is the twofold movement of reform and preservation of religious laws. As described above, based on the combination of religious variations of human rights and human rights’ variations of religion, developments of religious laws encapsulate the external and the internal law of religion and human rights. Within this conceptual framework, in its blurred practical manifestations, the actors will make their decisions. The resulting struggle with human rights ‘within’ religion will be decisive for the future of both human rights, and religious traditions, denominations and communities.

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