

**Institutional Change in the World Polity –  
International Human Rights and the Construction of Collective Identities**

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**Preface: Genesis and Justification of Human Rights in Sociological Perspective**

The following paper, which many of the participants already know, presents a sociological analysis of institutional dynamics of human rights at the world polity level. In my preliminary remarks, I briefly wish to relate this analysis, which focuses on changing conceptions of human rights in the post-war period, to the question of how to blend genesis and justification of human rights.

*First* of all, I should stress that in my view normative questions of justification are strictly beyond the scope of sociological analysis. As I have argued elsewhere, the disciplinary foundation of sociology has been characterized by consciously bracketing the validity claims of moral and legal norms, including human rights; while it is true that the conceptual apparatus of sociology has remained strongly impregnated by notions of individual autonomy as inherited from the Enlightenment's tradition of political philosophy, its epistemic project has been to put such notions to empirical scrutiny and thus to emphasize their historical contingency (Koenig 2002; Wagner 1998). In that sense, sociologists are methodologically *agnostic* towards claims about the universal validity of human rights. The sociological analysis of human rights is neither aimed at their justification nor at their critique, but rather, to use the terminology of recent French pragmatist sociology (Bénatouil 1999; Boltanski/Thévenot 1991), at reconstructing the repertoires of critique and justification available to actors, understanding their conditions of plausibility (typically experiences of repression), and explaining their situational *mise-en-oeuvre* in social practice. In this perspective, the question of how to blend genesis and justification of human rights has to be analyzed from the actors' point of view. It is precisely by this methodological move that sociology may, if at all, eventually contribute to normative debates about human rights.

As a *second* preliminary remark, I would like to recall the inherently *relational* character of the concept of human rights and, indeed, of rights in general (Gewirth 1982: 2; Tilly 2002; Koenig 2005: 12). Human rights are claims to autonomy (*content/object of rights*) of actors (*bearer/subject of rights*) against other, typically more powerful, actors (*addressee of rights*), legitimated by virtue of the subjects' humanity and enforceable by reference to a third party, the sanctioning authority. The well-known ambiguity of the concept of human rights results from the indeterminacy of the sanctioning authority, which may refer to either public moral discourse or to the force of law. In sociological perspective, this indeterminacy can be reformulated as a distinction of degrees of formality in the institutionalization of human rights; whereas public moral discourse is an example of informal institutions, legal rights are highly formalized. Both types of institutionalizing social relations equally lend themselves to sociological analysis in terms of the available repertoires of justification, their conditions of plausibility, carrier groups, and situational applications. Of

particular interest in that context are unintended consequences of formal institutionalizations of human rights, since they may significantly alter the very content of human rights or even paradoxically undermine individual autonomy and freedom. Max Weber advanced this argument with respect to the human right to property, thus showing that human rights partake in the fundamental ambivalence of modernity (for related arguments see Asad 2003: 135f.; Kennedy 2004; Mirsky 2005).

*Thirdly*, I wish to emphasize that *global* institutional dynamics of human rights are of particular salience to contemporary normative debates, as they challenge Western vocabularies of human rights and their repertoires of justification. Not only that the global institutionalization of human rights has been characterized by a particularly complex mixture of informal and formal elements, as evinced by international (human rights) law. The global institutionalization of human rights has also, and more importantly, resulted in new constellations of rights bearers, addressees, and sanctioning authorities in which the classical relation of national state and individual is re-embedded in a larger field of states, international organizations, and transnational movements. And finally, narrative accounts of the genesis of human rights have significantly multiplied due to the multiplication of experiences of repression in the 20<sup>th</sup> century, such as, most notably, the holocaust (Morsink 1999), but also colonialism, thus contributing to a proliferation of new human rights. By shedding light on these global institutional dynamics, sociology may eventually advance the reflection about the justification of human rights.

It is against the background of these preliminary remarks that the following paper, although originally written as a contribution to theoretical discussions about neo-institutionalism in sociology, may be read as a contribution to the workshop's debate on genesis and justification of human rights. It particularly highlights how changing actor constellations in the global institutionalization of human rights have, in the post-war period, altered the conceptual articulation of human rights with collective identities, thus calling into question the classical European model of the nation-state.

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**Introduction**

Sociology has shown reluctance in analyzing human rights. So firmly are its foundational concepts entrenched in modern political philosophy that it proves difficult to subject the idea and institution of individual rights to rigorous empirical scrutiny (but see Koenig 2002 and Joas 2003). It has only been recently that sociology has engaged in more thorough analyses of the discourse and politics of human rights. In that respect and in fruitful exchange with the international relations literature, institutional theories of the world-wide diffusion and domestic impact of human rights are of particular prominence (see e.g. Soysal, 1994; Risse et al., 1999; Sikkink, 2004; Hafner-Burton/Tsutsui 2005). Building on this strand of research, notably on John W. Meyer's neo-institutionalist world polity approach, the present article deals with a problem not sufficiently addressed in the existing literature: the changing cultural content of human rights, and more specifically the shift from national to sub-national collective identity frames within global human rights discourse.

Since the French Revolution, human rights had been closely connected to the classical model of the nation-state. This model was characterized by a structural coupling of politics, law, and collective identity. National citizenship, linking political participation, individual rights, and national identity, was perhaps the most prominent institutional manifestation of that model (see Arendt, 1951; Brubaker 1992). In the second half of the 20<sup>th</sup> century, however, this model has successively lost plausibility. Identity politics, carried by regional movements, indigenous peoples, national minorities or transnational migrant networks, called into question the assumed congruence of state membership, individual rights and national identity by making claims for full political and legal inclusion, while at the same time demanding the public recognition of their distinctive collective identities. In reaction, nation-states world wide have, if to varying degrees and with considerable drawbacks, adopted new policies of incorporation amounting to a “multi-cultural” model of citizenship (Joppke, 1999, 2004). To account for this transformation of national citizenship, neo-institutionalists have paid attention to changes in expectancy structures at the global level. And indeed, although evidence remains preliminary, case-studies have shown that the decoupling of membership, rights and national identity is at least partially determined by exogenous, world-level processes, notably by transnational human rights discourses (cf. Soysal, 1994; Gurowitz, 1999; Münch 2001). In this article I wish to problematize what seems to be taken for granted in these institutional explanations, namely the changing cultural content of human rights in the post-war period. My main thesis is that, seen in long-term perspective, it was the world-societal institutionalization of the classical nation-state model *itself* which paradoxically

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\* This article has been presented at several workshops, including the Ernst Cassirer Summer School on Human Rights in Helsinki, 2006. It is currently under review with *International Sociology*. A German version has been published in *Zeitschrift für Soziologie – Sonderheft Weltgesellschaft* (2005), pp. 274-293. I am particularly grateful to Julian Dierkes, Hans Joas, Richard Münch, Nikola Tietze, Kiyoteru Tsutsui, Hartmann Tyrell, and Björn Wittrock for their comments and remarks on previous drafts of this paper.

contributed to the shift of emphasis in international human rights discourse from national to sub-national collectivities.

To substantiate my argument, I analyze changing historical semantics in international human rights law, drawing on a wide range of documentary sources and secondary literature between 1945 and 2001.<sup>1</sup> While my general analysis pertains to the elaboration of principles of equality, non-discrimination, and minority rights, my particular focus is on religious human rights. The major reason for this focus is that religion has recently become a particularly salient category of collective identity in struggles for cultural recognition, notably in Western European countries where discursive categorizations of “religion” and “secularity” were of focal importance in the construction of the classical nation-state (cf. Asad, 2003:181; Koenig, 2005). Furthermore, religious human rights have been among the major topics around which transnational human rights networks have crystallized and thus merit closer attention (Thomas, 2004).

In a first section, I briefly discuss, and further elaborate, the neo-institutionalist concept of “world polity”. The second section recapitulates the general institutionalization process of human rights in the post-war period, to provide the broader context for my semantic analysis. The third section deals with the semantic shift from national to sub-national, notably religious, collective identities as frames for individual human rights in international law.

## 1. Theoretical background

The neo-institutional world polity approach considers modern nation-states to be embedded in an encompassing cultural and social order that is seen as more fundamental than both Wallerstein’s economic “world system” and the “international society” as theorized in conventional theories of international relations (Meyer, 1980; Meyer et al., 1997). Whereas these latter theories regard states as sovereign actors and explain global economic or political relations by their strategic actions, the Stanford school accounts for both state actorhood and inter-state relations by referring, in a classical anti-utilitarian argument, to expectancy structures institutionalized at the world level. This “phenomenological macro-institutionalism” (Meyer et al., 1997:146-148) is based on a decidedly cognitive concept of institutions (Scott 1995). This distinguishes it perhaps most clearly from “liberal institutionalism” in international relations; liberal institutionalists, contrary to neo-realists, do concede that international cooperation may eventually result in the emergence of institutions that constrain states’ actions, yet they by and large follow a normative or even instrumentalist concept of institutions. By contrast, phenomenological macro-institutionalists, not unlike constructivists in international relations (Checkel, 1998), go one step further in emphasizing the cognitive or cultural character of institutions (Boli/Thomas, 1999:15-17). Institutions not only regulate social interaction, they also constitute actor identities in the first place. “World *culture*”, then, not only consists in *regulative* rules, but it also comprises *constitutive* rules – frames, scripts, and models through which modern rational actors, most notably states, organizations, and individuals, are given ontological status. “World *society*” consists of the

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<sup>1</sup> Selecting the adoption of the UN Charter (1945) as the *terminus a quo* for the global institutionalization should be uncontroversial. The *terminus ad quem* is less clear-cut, but it seems obvious that the events of 9/11/2001 did significantly alter the course of international politics and international law.

broad set of associational processes that carry those cognitive and normative expectancy structures. International organizations, international non-governmental organizations, professions and epistemic communities are “significant others” for modern actors, thus contributing to the latter’s profound isomorphism (Meyer et al., 1997:144).

The neo-institutional world polity approach can be criticized on several accounts. First of all, the *mediating mechanisms* through which global expectancy structures are transmitted to the domestic or local level are not sufficiently specified. Beyond the general distinction of coercive, normative and mimetic isomorphism (Powell/DiMaggio, 1991), there is little elaboration of social processes that actually cause the standardization of the form and function of modern actors. Some progress towards “process-tracing” has been achieved by constructivists in international relations, where actor-theoretical and network-analytical tools have been included in institutional research agendas (e.g. Finnamore, 1996; Risse et al., 1999). Closely linked is a second point of criticism that concerns the mechanisms of *localizing* globally institutionalized expectancy structures. Borrowing from organizational sociology, neo-institutionalists typically argue that the global embedding of actors gives rise to a strong de-coupling of formal structure and activity structure (Meyer/Rowan, 1977), although repertoires of contention available in the world polity can sometimes be mobilized by local movements to legitimate their claims (Meyer et al., 1997:160). However, to explain the selective reception, partial implementation, and context-specific interpretation of world cultural frames at the local level, it seems necessary to introduce arguments of historical path-dependency as developed in comparative historical institutionalism (cf. Ebbinghaus, 1998; Acharya, 2004:244). Thirdly, the *generation* and *change* of cognitive and normative patterns institutionalized at the world level still remain unclear. Modifying the general theoretical framework by introducing agency can be seen as one option for further progress in that respect. Thus, Finnamore and Sikkink (1998:895, 898) have underlined that at different stages of institutionalization processes – “norm emergency”, “norm cascade” and “norm internalization” – distinctive logics of action prevail. Of these, so they claim, the stage of norm emergence was not so much characterized by dramaturgical action but by value-rational or communicative action of institutional entrepreneurs. Another option is to further elaborate neo-institutionalism by paying more attention to unintended consequences, feed-back mechanisms, and paradoxical long-term implications of institutionalization.

All three points of criticism underline that in spite of its uncontested merits, the neo-institutional world polity approach requires further theoretical elaboration and modification. In the sections of this article, I deal with the third point of criticism in greater detail. While I concur with Finnamore and Sikkink (1998) in emphasizing the relevance of institutional entrepreneurs and their activities to account for *short-term* institutional change at the world-polity level, I also focus on more structural, *long-term* consequences of institutionalization processes, notably those that potentially lead to institutional change.

## **2. Human rights in world society**

In my analysis, I analyze institutional change in the world polity by looking at international human rights law. Law in general, given its inherent formalism and universalism, is particularly well suited for constructing cultural frames of rationality (Boyle/Meyer, 1998:215). Through law, both individual and corporative actors (“legal subjects”) are constituted and their relationships are regulated. International law, moreover, encompasses highly elaborated and reflexive visions of world social order from which more specific constitutive and regulative ground rules of interaction are deduced (Lechner, 1991:266-269).

In this sense, international human rights law may be understood as a particularly salient world-cultural frame for structuring citizenship, i.e. the relationship between the state and the individual (Soysal, 1994; McNeely, 1998; Berkovitch, 1999). In *cognitive* terms, human rights are constitutive rules that first of all define bearers of legitimate actorhood, notably the state and the individual. In *normative* terms, they are regulative rules with universal applicability which determine the relationships between those actors. And finally, in *expressive* terms, human rights operate as polysemic signs open to multiple interpretations that symbolize the imagined community of “humankind” (Bonacker, 2003:131).

In the course of the institutionalization of human rights in the world polity, the individual has been considerably strengthened as legitimate actor to the detriment of state authority in the post-war period. In light of the experience of fascism, genocide, and two world wars, universal values of peace and human dignity were conceived as restrictions of state sovereignty. To protect the individual from state interference more firmly, institutional entrepreneurs sought to make the recognition of state sovereignty conditional on the acceptance of value-rational expectancy structures, and the institutionalization of human rights was a primary aspect of this breakthrough to a “post-Westphalian” international order (see e.g. Vincent, 1986; Henkin, 1990; Sohn, 1995).

Their global institutionalization has changed the classical form of human rights, above all by their incorporation into the body of international law since 1945. The international juridification of human rights occurred in three stages (cf. Buergenthal, 1997), which by and large correspond to Finnamore/Sikkink’s norm cycle. In a first stage (1945–1966), and starting from the *Charter of the United Nations* (1945) and the *Universal Declaration of Human Rights* (UDHR, 1948), general and specialized human rights norms were formulated. The UDHR encompasses civil and political rights, social, economic and cultural rights as well as the right to a just international order, thus prefiguring what later were called first, second and third dimension rights. In this stage of “norm emergence”, communicative action of institutional entrepreneurs was particularly decisive. Alongside several INGOs based in North America, it was above all a coalition of Latin America states and political elites in the still existing colonies, which urged for the international codification of human rights against the initial resistance of the USA, the USSR and the colonial powers, Great Britain and France (Opitz, 2002:51). Contrary to what neo-realists would have to expect (Krasner, 1999:105-127), these entrepreneurs successfully lobbied more powerful states to create new standards of universal human rights protection.

The second stage (1966-1989) was characterized by the adoption of major binding conventions specifying individual human rights norms and establishing implementation procedures and monitoring bodies, most notably the International Convention on the Elimination of All Forms of Racial Discrimination

(ICERD, 1965), the International Covenant of Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). This “norm cascade” resulted in promotional, if not implementational human rights regimes (cf. Donnelly, 1989:206f). Among the monitoring procedures set up by these treaties, individual complaint procedures are of particular importance as they establish transnational public arenas to resolve conflicts between individuals and states; moreover, they provide opportunities for monitoring bodies, such as the Human Rights Committee (HRC), to develop their own jurisprudence and thus to re-interpret institutionalized human rights. Apart from these treaty-based procedures, ECOSOC Resolutions 1235 (1967) and 1503 (1970) have similarly established new channels of communication under the auspices of the Commission for Human Rights (CHR) and its sub-commission.<sup>2</sup> Moreover, consultation procedures with non-governmental organizations were strengthened, thus creating new opportunity structures for the mobilization of transnational human rights networks which, through their strategies of naming and shaming, have strengthened normative pressure on non-compliant states (cf. Sikkink, 1993; Smith, 1995:191f.).

Alongside the further diversification and specification of human rights, the third stage (1989-2001) was marked by increasing concerns for the implementation and enforcement of human rights. This is evinced by the practice of “humanitarian interventions” and the establishment of the International Criminal Court (ICC). That coercive elements of implementing human rights standards were now put on the agenda, is not least due to the demise of the Soviet Union and the end of the Cold War which until then had structured international politics in the field of human rights (cf. Falk, 1998:49-108). Given the growing robustness of the international human rights regime, it is not astonishing to find an increasing commitment of states to internationally codified human rights in this stage, as shown by the increasing ratification of major human rights conventions. Ratification rates are particularly high in this stage of “norm internalization” (Tsutsui/Wotipka 2004). The global human rights culture hence contributes to a successive standardization of formal structures of statehood (cf. also Risse et al., 1999:19-22 and 264-267).

In sum, the institutionalization of human rights in the world polity has structurally changed the relationship between states and individuals. Of course it is true that the enforceability of internationally codified human rights is highly limited. Individual complaint procedures are optional and only rarely used in practice. Lacking sanctions, the impact of monitoring procedures is restricted to regular communication between social carriers of world cultural expectancy and states as major addressees of human rights. The effective guarantee of subjective rights thus remains ultimately linked to the state as organizational form of political and legal inclusion, and to a certain extent, human rights even strengthen state authority as they provide governments with new repertoires of legitimization (Hafner-Burton/Tsutsui, 2005). However, the institutionalization of human rights in the post-war period has entailed a far-reaching devolution of authority – and charisma – from the state to the individual. It is not only as citizens, but also as members of the imagined community of humankind that individuals enjoy rights. Even if human rights do not amount to the formation of a world-state accountable to the “people”, they do represent a highly solidified cultural system

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<sup>2</sup> The so-called 1235-procedure authorizes the Commission for Human Rights to appoint country- and issue-specific rapporteurs, to set up special working groups and to carry out *in situ* investigations. The 1503-procedure is a rather complicated individual petition mechanism in cases of systematic gross violations of human rights.

which changes domestic political dynamics and contributes to a transformation of national citizenship. Rights are no longer born out of struggles between governments and social movements, but emerge as a result of the contentious claims of protest groups capable of mobilizing transnational human rights networks (Risse et al., 1999) or a result of political elites' ritual enactment of globally diffused models of social order. The elements of formal state membership and individual rights, which were structurally coupled in the classic model of the nation-state, thus seem to have become gradually loosened.

Yet, the sanctification of the individual person was not the only change in the content of human rights altering the relationship of state and individual; perhaps even more significantly, the elements of state membership and national identity were also re-configured in a new model of citizenship. To account for that transformation, it is necessary to better understand how human rights contribute to the construction of collective identities mediating between state and individual. Firstly, human rights define the collectivities which are conceived as pertinent for the relationship between states and individuals. And secondly human rights provide frames which legitimate primordial, traditional, or universalistic identity codes of such collectivities.<sup>3</sup> In the post-war period, there has been a substantial shift of emphasis in international human rights discourse from national to sub-national collectivities, constructed through primordial or traditional codes of collective identity. It is this shift to which I now turn in greater detail.

### **3. Constructing collective identities – semantic changes in human rights discourse**

In my introductory remarks, I have already highlighted the close link between human rights and national self-determination in the classical model of modern political order. In the following section I shall develop the argument that, seen in long-term perspective, this link has been severed in the course of the global institutionalization of human rights in the 20<sup>th</sup> century.

At first, national self-determination and human rights were indeed strongly aligned in global legal culture and, along with the long-standing legal principle of state sovereignty, legitimated the world-wide diffusion of the nation-state model (Strang, 1990:857; Mayall, 1999). As early as in the 19<sup>th</sup> century, independence movements in Latin America and Europe drew on the anti-imperial discourse of human rights, which since the French Revolution had been strongly linked to the idea of national sovereignty (cf. Arendt 1951; Hall, 1999:133f.). The principle of national self-determination was partially institutionalized in the League of Nations, where it legitimated the formation of nation-states on the Central, Eastern and South-Eastern European territories of the former Ottoman, Austrian and Russian empires. However, the populations of the colonies were still denied the right to self-determination on the grounds that they had not yet reached political “maturity” (cf. Strang, 1996:31f.); they therefore remained subjected to the rule of the colonial powers or were submitted to a mandate administration under the “sacred trust of civilization”. Nevertheless, the right to self-determination was increasingly referred to by independence movements in Africa, Asia and the Middle East as a symbol of legitimacy (Emerson, 1960; Anderson, 1991:114-140). To support the claim to national self-determination against the racism of the colonial powers, principles of equality and non-

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<sup>3</sup> Here, I build on the typology of codes of collective identity developed by Eisenstadt and Giesen (1995).

discrimination were now emphasized in human rights vocabulary. After 1945, the principle of self-determination was generally recognized and accelerated the almost inevitable decay of colonial and other imperial structures. Initiated and supported by the new post-colonial states, it was codified in formal international law by the UN General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960). It was then included as the first and most fundamental human right in the two major human rights conventions of 1966 (see Art 1 ICCPR and ICESCR, respectively). Irrespective of their "race", all "peoples" or "nations" were thus constituted as legitimate collectivities, and states were obliged to represent them accordingly. This mutual reinforcing of national self-determination and human rights principles has provided a backbone for the world wide diffusion of the nation-state as practically unchallenged form of political organization.

Yet, the worldwide diffusion of the nation-state in the wake of decolonization not only changed the composition of the United Nations,<sup>4</sup> it also implied that new social situations and actor constellations entered the horizon of international human rights discourse. According to the *uti possidetis* principle, post-colonial state formation largely reproduced the territorial borders of colonial or mandate administrations that hardly ever coincided with settlement patterns of the population. The new post-colonial political elites, legitimated by the United Nations' fear of cascades of secessionism, prevented any sub-national groups to claim their right to external self-determination. Instead, these were granted a right to internal self-determination. As a consequence, the governance of "plural societies" became increasingly relevant in human rights discourse, and it was in response to this structural problem that a whole series of new human rights were institutionalized in the world polity, which gradually contributed to the de-legitimization of the classical nation-state model and the institutionalization of "multicultural" citizenship.

This paradoxical long-term development can be reconstructed in detail by an analysis of changing semantics of international human rights law as promoted by institutional entrepreneurs in the post-war period. The example of religious rights shows that the relationship between state and individual, originally mediated by the national collectivity, was complicated by the re-categorization of religion as a variant of sub-national collectivities.

### 3.1. Individual rights

The first stage of the institutionalization of human rights in the world polity (1945-1966) is marked by a strong focus on individual rights. Due to negative experiences with the League of Nations' minority system, group rights were excluded from the codification of human rights in the UN Charter and the UDHR.<sup>5</sup> Debates about minority protection, such as those eventually resulting in Article 27 of the ICCPR, were strictly framed in the language of individual rights (cf. Sohn, 1981:274-5).

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<sup>4</sup> While the United Nations Organization was founded by 51 states in 1945, the number of member states more than doubled by 1966; until 1989 it climbed to 159, reaching its current level of 191 in 2002.

<sup>5</sup> One of the draft articles proposed in the *travaux préparatoires* for the UDHR did contain a minority clause; it was supported by representatives from the Soviet Union, Yugoslavia, Lebanon, and – at the beginning – even France! Due to resistance from the USA and some Latin American states, claiming that no minorities existed on their territory, the article was however not adopted; see Morsink, 1999:274.

Individual rights were, however, premised on constructions of national collectivities as bearers of the fundamental right to self-determination. The controversy over the principles of equality and non-discrimination, whose inclusion in the UDHR was notably promoted by the communist states, is quite revealing in this respect. Although both principles are formulated in the idiom of individual human rights, they had a decidedly anti-colonial impetus (Morsink, 1999:93-96; Opitz, 2002:50, 53); in fact their primary aim was to establish the equality of “peoples” or “races” in the legitimate exercise of sovereignty. At a fundamental level, then, national self-determination was conceived as a premise for the enjoyment of individual human rights.

This focus on individual human rights as conceived within the classical model of the nation-state is reflected in the right to freedom of religion.<sup>6</sup> Freedom of religion had already been on the international agenda during the negotiations that led to the founding of the League of Nations, in spite of the eventual failure of Woodrow Wilson’s call to codify it in international law (Dickson, 1995:330). Roosevelt also had included religious freedom in his “list of four freedoms”, and a number of newly established INGOs specialized on the protection of (private) religion.<sup>7</sup> In this climate, it was evident that religious freedom was included in the list of internationally recognized rights in Article 18 UDHR. However, the further specification of this right was accompanied by various intense conflicts. A first line of conflict quickly emerged between the USA and the Soviet Union with regard to the very definition of the term “religion”. Whereas the communist states demanded to treat religious and atheist belief equally, the US representatives insisted on a particular protection of “religion” in a more narrow sense. The second conflict referred to the right to change one’s religion, a notion rejected by conservative Islamic theologians who saw it as a right to apostasy (cf. Morsink, 1999:24f.; Lerner, 2000:22). Both conflicts are reflected in the final text of Article 18 on religious freedom in the ICCPR. As a compromise between Western and communist states, the drafters chose the formulation “religion or belief”; and as a concession to Muslim states, the explicit mention of a right to change one’s religion was avoided, even though it continued to be seen as an implication of religious freedom by most international legal scholars. Article 18 thus acknowledges the right to freedom of religion, followed by the right to exercise one’s religion in the four manifestations of worship, observance, practice, and teaching; only the right to manifest one’s religion, but not the fundamental freedom of religious convictions may be restricted by law. The latter is in fact considered as a fundamental, non-derogable right in the sense of Article 4(2) ICCPR (Dickson, 1995:341; Lerner, 2000:15).

Interpreted as a constitutive rule, the right to freedom of religion implies a reciprocal definition of religion and individual personality. Religion, as the Lebanese delegate Malik stated during the *travaux préparatoires* of the UDHR, is understood as a “fundamental point of view of ultimate matters” (cf. Morsink, 1999:260), and the individual is seen as a rational actor autonomous in his or her choice of religious world-

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<sup>6</sup> Note that the respect for individual religious freedom was part of the “standard of civilization” in international customary law as early as at the times of high imperialism, Donnelly, 1998:5.

<sup>7</sup> Noteworthy in that respect are the International Religious Liberty Association, founded by Adventists in 1946, the International Association for the Defense of Religious Liberty (1946) and the Commission of the Churches on International Affairs of the World Council of Churches (1948). The Catholic Church at that time was still critical of religious freedom and, for that matter, of human rights in general, embracing these world cultural principles at the Second Vatican Council (1962-65).

views (cf. Dickson, 1995:327; Lerner, 2000:5). While it is admitted that religion can be practiced “in community with others”, only the individual is legally considered as subject of the right to religious freedom. Semantics in international human rights law therefore confirm to the Western, voluntaristic definition of “religion”. Seen as a regulative rule, the right to religious freedom did restrict states’ discretion in their political practice vis-à-vis religious communities. Yet, as states were merely obliged to tolerate individual religious convictions and their collective manifestation, not to publicly recognize or even promote religious collective *identities*, institutional arrangements of church-state-relations which had emerged in the course of state-formation and nation-building remained untouched (Lerner, 2000:132).

### 3.2. *Primordial and traditional identities*

In further specification of the principles of equality and non-discrimination, during the second stage (1966-1989), states were increasingly obliged to actively promote the equality of groups. As the prevalence of the category of “race” in international human rights discourse shows, groups or collectivities were constructed in primordial terms. It is true that the UN General Assembly, under the impression of anti-semitic assaults at the end of the 1950s, first considered adopting a declaration and a convention on the prevention of religious discrimination, to be passed along with separate instruments on racial discrimination.<sup>8</sup> However, it was the convention against racial discrimination that quickly became a primary concern. Apart from the diplomatic sensitiveness of the topic of religion in the conflict between Israel and the Arab states, this was due to the active lobbying of newly independent states which wanted to put an end to all colonial practices of segregation.<sup>9</sup> The critique of racism, originally articulated by the elites of independence movements against Western colonialism, was now transposed to the field of domestic politics. The rules of racial anti-discrimination as set forth in the ICERD – today acknowledged as *ius cogens* – have both regulative and constitutive aspects. Article 2(2), for instance, obliges the states to take “special and concrete measures” to grant equal status to ethnic groups or persons. The Commission on the Elimination of Racial Discrimination as monitoring body of the ICERD increasingly interpreted this norm as obligation of the state to adopt “affirmative action” policies, to ensure not only *de jure* but also *de facto* legal equality; formal equal treatment was thus considered as discriminatory to the extent that it perpetuated existing inequalities.<sup>10</sup> That the ICERD also implied constitutive rules, is evinced by the fact that its monitoring body regularly

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<sup>8</sup> The UN Commission on Human Rights had commissioned an expert study on religious discrimination in the 1950s. The “Study of Discrimination in the Matter of Religious Rights and Practices”, prepared by Arcot Krishnaswami (India) and providing a survey of the legal situation in 82 countries, became a crucial reference point in all subsequent discussions on the problem. It included “Draft Principles on Freedom and Non-Discrimination in the Matter of Religious Rights and Practices”, which were adopted by the Sub-commission for the Prevention of Discrimination and the Protection of Minorities; UN Doc. E/CN.4/Sub.2/200/Rev.1 and also Lerner 2000:11-14.

<sup>9</sup> The preamble to the respective declaration plainly criticizes colonialism and South African apartheid; cf. UN Doc.A/Res/1904 (XVIII) (10 November 1963). For further details on the negotiations of the declaration and the convention against racism see Lerner, 1991:77f.; Banton, 1996:51-62; Lerner 2000:21.

<sup>10</sup> On “equality in law and in fact” and the obligations of the state to adopt an active anti-discrimination policy, see Meron, 1986:36-44, and Lerner, 1991:27.

recommended states to include categorizations of ethnic groups in their demographic statistics.<sup>11</sup> The relationship between state and individual was thus mediated by highly reified sub-national collectivities. The discourse of racial discrimination was promulgated in a variety of international decades, world conferences and action programs of the United Nations. In that context, new rights were formulated drawing on the semantics of “cultural identity”, a notion referring less to primordially than to traditionally coded collective identity frames. The *UNESCO Declaration on Race and Racial Prejudice* (1978), although soft law, is most revealing in that respect; here, both individuals and groups are granted a “right to difference” and a “right to cultural identity”.<sup>12</sup>

The semantics of racial discrimination and cultural identity considerably affected the perception of religion in international human rights discourse. Although the question of defining “racial” or “ethnic” groups was controversial, religion, along with language, was included in the catalogue of features characterizing ethnic groups under the ICERD. For instance, with reference to a legal dispute in Norway, where the discriminating representation of Islamic immigrants in flyers was judged illegal, the ICERD’s monitoring body debated in 1984, whether the Article 4 (prohibition of racist statements) of the convention could be extended so as to cover religious discrimination. Provided that discriminatory statements expressly referred to the religious group or its members and not to the religious belief system, such an extension was indeed deemed appropriate (Meron 1986:35). Thus, religion was categorized as element of a primordial group identity.

That the individual right to religious freedom was also re-interpreted in the light of the right to cultural identity, is shown by the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, which was passed in 1981 after lengthy negotiations.<sup>13</sup> The declaration confirms the general right to freedom of religion (Article 1) and the ban on religious discrimination (Art. 2), and then specifies both these principles. On the one hand, several rules are laid out which conform to the classical individualist conception of religious freedom based on the implicit definition of religion as “one of the fundamental elements of (one's) conception of life”. On the other hand, the declaration clearly goes beyond this conception by calling on states to pro-actively engage in the elimination of religious discrimination.<sup>14</sup> To implement the principles of this declaration, the Human Rights Commission and its Sub-commission, assisted by the Special Rapporteur on Freedom of Religion and Belief and in a dialogue with various religious INGOs, engaged in a wide range of activities (cf. Lerner, 2000:29-32). Critical themes were the inequalities resulting from historical state-church relationships, and the field of

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<sup>11</sup> Cf. UN Doc. CERD/General recom 4 (25 August 1973). Comments of the monitoring body on state reports have regularly repeated this point.

<sup>12</sup> “All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such”, Art. 1(2). The “right of all groups to their own cultural identity” is established in Art. 5(1); see also Lerner, 1991:35.

<sup>13</sup> Cf. UN Doc. A/Res/36/55 (25 November 1981). On the background of this declaration, see Lerner 2000:20f.

<sup>14</sup> Thus Article 4 states: “(1) All states shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. (2) All states shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.” Even though anti-discrimination rules were specified in less detail here than in the ICERD, this article slightly alters the notion of religious neutrality of the state; cf. Dickson, 1995:344f.

public educational policy. To the extent that the religious non-discrimination is framed in the idiom “cultural identity” and “difference”, religion was thus re-categorized as an element of traditional collective identities.

In sum, the construction of new sub-national collectivities in international human rights discourse meant that religion was either primordialized within the semantic field of “race” or traditionalized within the semantic field of “culture”. In both dimensions, religion is categorized as a collective “identity” to be actively protected by the state. In other words, the state should no longer merely tolerate, but actively promote religious diversity. National identities with strong religious or secular components are thus delegitimated. Characteristically, states with secularist conceptions of religious freedom, such as France, have been increasingly criticized by international human rights bodies.<sup>15</sup>

### 3.3. *Minority rights*

The third stage of the international juridification of human rights (1989-2001) was marked by the increasing specification of minority rights. Although Article 27 ICCPR had been framed in terms of individual human rights, changing definitions of the very concept of “minorities” successively introduced collectivist dimensions. Thus, it was argued already in the 1970s that the existence or non-existence of minorities on a given territory was not in the respective state’s discretion, but had to be determined on the basis of “objective” features in combination with the “subjective” will of a group to maintain its own “identity”.<sup>16</sup> After the breakdown of the Soviet empire and the emergence of new minorities in its national successor states, questions of minority protections moved up on the agenda of international organizations, both regionally (CSCE/OSCE, European Council, EU) and globally (UN, UNESCO, ILO). The HRC, in its interpretation of Article 27 ICCPR, increasingly emphasized collective dimensions of the rights of persons belonging to minorities.<sup>17</sup> The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, adopted by the UN General Assembly in 1992 points in a similar direction. In Articles 2(1) and 2(5), it repeats the principles of equality and non-discrimination, yet it clearly goes a step further in its programmatic article 1(1) by obliging states to protect the identity of minorities and

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<sup>15</sup> Thus, although France had declared the non-applicability of Article 27 when ratifying the ICCPR (1980), the HRC repeatedly requested the French government to acknowledge the existence of ethnic and religious minorities on its territory; cf. UN Doc.A/38/40 (1983), para. 318 and UN Doc.A/43/40 (1988), para. 410.

<sup>16</sup> Francesco Capotorti, author of a standard-setting study on the protection of minorities commissioned by the Subcommission of the HRC, defines: “A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1977), para. 568. By excluding immigrants from the definition of minorities, Capotorti took into account worries expressed frequently by Western governments, namely that the codification of minority rights might challenge their policies of assimilation.

<sup>17</sup> “Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the *minority group* to maintain its culture, language or religion. Accordingly, positive measures by states may also be necessary to *protect the identity* of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group”, UN Doc. CCPR General Comment 23: The rights of minorities (8 April 1994), para. 6.2; author’s emphasis.

to actively promote the conditions for its maintenance.<sup>18</sup> Article 4(2) explicates the underlying assumption, that equality and non-discrimination of members of minorities can only be guaranteed by the active promotion of their collective identity. Interestingly, migrant communities were included in the catalogue of sub-national collectivities, as the concept of “minority” was no longer restricted to citizens, but primarily defined by the subjective perception of a situation of discrimination.<sup>19</sup> Furthermore, migrant workers received particular attention under a separate human rights instrument, adopted upon the initiative of sending countries by the UN General Assembly in 1990; alongside with civil, political and social rights, migrants are also granted respect for their “cultural identity” (article 17(1)).<sup>20</sup>

Along with equality, anti-discrimination, and minority protection, religion has also become a more prominent concern in the post-Cold War era. In a series of resolutions, the UN General Assembly, the Commission for Human Rights and its Subcommission requested member-states to implement the normative standards set forth in the Declaration of 1981. The Human Rights Committee submitted a detailed interpretation of Article 19 ICCPR on the right to religious freedom, in which it stresses, amongst other things, that the state’s privileging of a particular religion must not imply discrimination of any other religion. In this way, national historical church-state relationships have become increasingly challenged.<sup>21</sup> Assuming a broad definition of religion<sup>22</sup>, the trend towards a traditionalization of religion has continued. Religion is now often categorized as “cultural human heritage” and – as demonstrated by the UNESCO *Declaration on the Role of Religion in the Promotion of a Culture of Peace* (1994) – has become one of the central factors of “cultural diversity”.<sup>23</sup>

### 3.4. Towards “multicultural citizenship”

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<sup>18</sup> “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity,” Art. 1(1) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities; cf. UN Doc. A/Res/47/135 (18 December 1992); cf. also Thornberry, 1995.

<sup>19</sup> In the report “Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities”, written by Asbjørn Eide (UN Doc. E/CN.4/Sub.2/1993/34 (10 August 1993), it is stated at para. 41: “It (the working definition of minorities, author) includes not only settled groups but also recent immigrants, although those who have arrived after the independence of the state may have somewhat lesser rights than those who were already settled there before the state emerged or re-emerged as an independent state.” The HRC’s comment on Article 27 ICCPR also emphasizes that the status of citizenship was irrelevant for the term of minorities; cf. UN doc. CCPR General Comment 23: The rights of minorities (8 April 1994), para. 5.2.

<sup>20</sup> UN Doc. A/Res/45/158 (18 December 1990). The Convention on the Rights of Migrant Workers and Their Families (MWC) had been prefigured by several ILO declarations and conventions. The MWC entered into force in 2003 after a lengthy ratification process, in which so far not single receiving country participated.

<sup>21</sup> “The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant (...) nor in any discrimination against adherents to other religions or non-believers”, UN Doc. CCPR General Comment 22 (30 July 1993), para 9.

<sup>22</sup> UN Doc. CCPR/General Comment 22 (30 July 1993), para. 2.

<sup>23</sup> Cf. UNESCO Doc. SHS-98/WS/2: 25f.; cf. also the *UNESCO Declaration on Cultural Diversity*, UNESCO Doc. 31C/Res/25 (2 November 2001). For further details, see Koenig 2003.

In sum, the changing content of human rights in international law suggests that the classical model of national citizenship has become de-institutionalized.<sup>24</sup> Of course, as state-formation and nation-building in post-communist states has shown, the classical model of the nation-state still continues to legitimate political mobilization (Brubaker, 1997). Yet, sub-national collectivities have also become highly legitimated through international human rights discourse. Thus, the institutionalization of human rights has contributed to the proliferation of ethnic and other identity-based movements (Tsutsui, 2004). The institutionalization of this model of “multicultural citizenship” (Kymlicka, 1995), amounting to a decoupling of state membership and national identity, increases tensions between individual and collective rights and intensifies controversies over the proper interpretation of human rights in domestic politics. Religious rights are particularly amenable to such conflicting interpretations.<sup>25</sup> The classical European conception of individual religious freedom within a secular nation-state is subjected to far-reaching transformations as a consequence of the institutional re-arrangement of state membership, rights, and identity. The separation of state and Nation – in other words: the secularization of the nation – may potentially lead to a renewed politicization of religion, understood as an expressive dimension of primordially or traditionally coded collective identity; at the same time, this inclusion of religion in the public sphere implies the latter’s increasing control by the bureaucratic state.

#### **4. Discussion and Conclusion**

In this article, I have dealt with the changing content of human rights. Building on previous neo-institutional research, it has been assumed that the contemporary transformation of the classical model of the nation-state, as evinced by various struggles for cultural recognition, is partly due to the global institutionalization of human rights in the second half of the 20<sup>th</sup> century. My main research interest has been to describe and explain the underlying processes of institutional change in the world polity.

In general terms, I have argued that the global institutionalization of human rights has significantly altered the relationship between state and individual. While it is true that the state remains the primary structural form of political inclusion, the sanctity of the person has been considerably strengthened through international human rights law. More specifically, I have shown that a new model of social order has been institutionalized in the world polity in the post-war period in which the state is defined as the framework for a plurality of collective identities. The state is no longer expected to represent a homogenous national community, but rather has to recognize a variety of collective identities in the public sphere. As the example of the right to freedom of religion demonstrates, the content of international human rights goes beyond the classical Western tradition of political philosophy; the close connection of human rights and popular

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<sup>24</sup> In how far the consequences of 9/11 had not only motivated a renewed strengthening of state authority, but also a return to assimilation policies, cannot be discussed here in more detail; cf. Joppke 2004.

<sup>25</sup> For an analysis of the social carrier groups for individualist, “voluntaristic”, and more collectivistic, “expressive” conceptions of religious freedom see Thomas 2004, above all 243.

sovereignty has been superseded by the emergence of sub-national collectivities mediating the relationship of individual and state.

To explain this institutional change, I have paid attention to the influence of institutional entrepreneurs on short-time institutional change at different stages. Moreover, I have situated these short-term changes in larger structural developments by arguing that the very institutionalization of the classical nation-state model has, paradoxically, led to its transformation. The world-wide diffusion of the nation-state model, legitimated by the link of national self-determination and human rights, led to the appearance of new local problems in international human rights discourse which eventually required a further specification and differentiation of collective human rights.

In theoretical terms, this argument has required to modify the neo-institutional framework by paying attention to multi-level dynamics of institutionalization. Further research has to show how such multi-level processes result in varying patterns of local adaptation of world cultural expectancy structures. For instance, one may expect that the diversification of internationally codified human rights gives rise to more intensive contestations over their proper interpretation at the local level. Human rights are actually far from constituting a coherent system, but rather comprise conflicting expectations which may be exploited by actors to legitimate the various claims in national public spheres, according to local or national institutional trajectories. As a consequence, for instance, the concrete patterns of politics of religious recognition in Western Europe, although influenced by world level processes, are highly dependent on historical relationships between state and churches and religious dimensions of national identities (cf. Koenig, 2005). To understand such processes, the neo-institutional research agenda needs to be integrated within an analytical framework of multi-level processes of institutionalization.

The “cultural significance” of human rights, to recall a Weberian criterion for selecting research problems in sociology, is beyond question. What I hope to have shown in this article is that a refined institutional approach provides conceptual and analytical tools to advance our sociological understanding of contemporary dynamics of human rights.

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