

The internal crisis of religious freedom

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Abstract

Today, unlike in the past, religious freedom is often interpreted in a narrow way. Yet, three deeper issues also influence the position of religion in current legal thinking. Firstly, human rights are interpreted less formally than they used to be in the past. Secondly, the notion of freedom finds itself more restricted than in previous times. Finally, religion is often rejected by society, which affects its protection. Indeed what about religious freedom in an environment hostile to religion?

Keywords Religious freedom, limitations, definition, human rights, freedom, hostility towards religion.

A remarkable moment in my life as a scholar of law and religion took place in the fall of 2002 when I participated in a closed conference, organised in Washington DC, on security and religious freedom. One year after 9/11 I suddenly realised that the world had changed. A fundamental paradigm shift occurred. Religious freedom as a human right no longer found itself unanimously supported by decision makers and legal scholars. For the first time in many decades security, as a legitimate concern of mankind, overruled fundamental rights, the latter having been the cornerstone of Western democracy ever since World War II and the moral disaster it entailed.

The paradigm shift in the long run also leads to a reinterpretation of a classic chapter of religious freedom studies, namely the analysis of its limitations. For a long time limitations to religious freedom were carefully described starting from a generally accepted positive prejudice with regard to the principle of religious freedom. That approach colours traditional international human rights catalogues, including article 18 of the Universal Declaration of Human Rights (UDHR)² as well

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² Article 18 UDHR goes as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in

as article 9 of the European Convention on Human Rights (ECHR).³ The structure underlying both articles is clear. The first paragraph focuses on the principle of freedom, whereas the exceptions are described in a limitative way in the second one. This approach includes the idea that there is no serious doubt about the principle of religious freedom as such. At first glance, this remark looks redundant. Why on earth would there be a problem with regard to the legitimacy of religious freedom? Isn't it after all one of the cornerstones of the human rights system? Indeed, in many countries human rights were given shape starting from the idea of religious freedom as an answer to various forms of persecution new immigrants were confronted with in their country of origin.

Today many authors refer to new limits of religious freedom emerging in various countries around the world.⁴ They do so with genuine concern, as it cannot be ignored that political leaders as well as administrative authorities are focusing less on solid protection of religious freedom than they used to do in the past, perhaps because freedom is less of a target in an anxious and economically declining society. But let us tackle the key question: what are the limitations of religious freedom we have found ourselves confronted with in recent years?

A first trend concerns a more narrow definition of religion which seems to emerge. This leads to a weaker protection of religious freedom, without suppressing or even questioning the principle of protection as such. A good example is the reduction of the wearing of Islamic headscarves to a mere dress code issue. In many European countries the trend goes, in line with the French law of 2004,⁵ into the direction of prohibiting headscarves at school or in public service. Instead of qualifying such norms as limitations to religious freedom having to comply with article 18 UDHR or article 9 ECHR, some observers identify the wearing of headscarves as similar to the wearing of nose piercings or sports shoes. To put it in

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

³ Article 9 ECHR goes as follows: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

⁴ See Gerhard Robbers (ed.), *Church autonomy. A comparative survey*, Frankfurt am Main, Peter Lang, 2001, 716 p.; Hildegard Warnink (ed.), *The legal position of churches and church autonomy*, Leuven, Peeters, 2001, XIV + 269p.

⁵ The law has been completed by the "Circulaire du 18 mai 2004 relative à la mise en œuvre de la loi N° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics."

another way: if the wearing of a headscarf is not a religious issue, its prohibition cannot be a violation of a fundamental right.

A second strategy narrowing religious freedom is the inclination shown by some to tell religious people what their faith is about. Again the headscarf issue can be used as an example of the latter. I remember a discussion between the Belgian atheist philosopher Etienne Vermeersch, and a young female Muslim teacher wearing a headscarf. Vermeersch argued that the Quran itself did not impose such behaviour. According to Vermeersch, his interlocutor did not follow her own religious tradition. In his eyes the prohibition of wearing headscarves cannot be seen as a restriction to religious freedom, as Muslim religious teaching itself does not require this. It goes without saying that this interpretation leads to an unacceptable limitation of religious freedom, as the latter protects not only orthodoxy within religious tradition, but also heresy and erroneous ideas.

A third problem regards the ongoing trend of reducing religious freedom to its individual component. Certainly, the basis of all religious freedom is every individual's liberty to choose his or her own religion, to believe what he or she wants to believe. Yet, today, it is accepted that apart from individual religious freedom, both collective and organisational freedom enjoy the protection of international human rights catalogues as well. Reducing religious freedom to its individual aspect, as advocated amongst others by the Dutch legal philosopher, Paul Cliteur,⁶ leads to dismantling all religious organisations, and denies the collective aspect of religion.

All three examples quoted above bear witness of a narrow vision of religious freedom. By combining them, only individual belief and practice completely in line with internal orthodoxy, and not open to any other (dress code) qualification, find themselves protected.

Yet, other limitations are conceivable this time not on the level of principles, but on the level of legal technique and practice are thinkable.

Firstly, one cannot deny that the European Court of Human Rights⁷ tends to enlarge the margin of appreciation enjoyed by member states of the Council of Europe when it comes to motives invoked for restricting religious freedom.

Secondly, whatever the scope of the law may be, its application by local administrative authorities remains pretty delicate. How can central authorities in Moscow

⁶ Paul Cliteur, *The secular outlook. In defense of moral and political secularism*, Chichester: Wiley-Blackwell, 2010, 317p.

⁷ See for example the Leyla Sahin versus Turkey case, application no. 47774/98, Fourth Section ECHR, 21 June 2004, Grand Chamber, 10 November 2005. For comments see Talvikki Hoopes, "The *Leyla Şahin v. Turkey* Case before the European Court of Human Rights", *Chinese Journal of International Law*, 2006, 719-722.

or Bucharest guarantee that religious freedom norms will be adequately implemented somewhere deep in Siberia or in Transylvania?

However, it is not my intention to focus on these classical limitations. I prefer going one step further by asking this question: why did limiting religious freedom become a real issue over the last years? Is it just a matter of finding a new equilibrium between freedom and security, between the safety of people and the free exercise of religion? In my opinion, there is more at stake than just a paradigm shift replacing the supremacy of religious freedom by the dominance of safety and security. The problem lies deeper. In order to know what really plays a part in today's debate, we need an in-depth analysis of "the right to religious freedom". Three issues ask for an answer. 1. There is a problem concerning rights; 2. There is a problem related to freedom and 3. There is a problem regarding religion.

1. Rights and law

Especially in the years following World War II, the idea prevailed that formulating rights adequately and enforcing them with respect to the rule of law was the most efficient working method. Clearly, the concrete rights protected by independent impartial judges are necessary in democracy. Yet, the opposite is not true. Formulating rights does not automatically entail their protection. This became clear after the promulgation of the UDHR in 1948. Countries belonging to the Soviet empire were theoretically complying with the newly accepted texts, yet in reality freedom of expression, freedom of association, and freedom of religion were cynically ignored.⁸ There is a gap between the acceptance of a text and its implementation. Moreover, accepting a text does not mean accepting its commonly shared significance. For instance, the interpretation that the European Court in Strasbourg gives today to the norms of the ECHR is certainly not implicitly implied in the latter. Open norms, including fundamental rights, have positive as well as negative characteristics. A positive characteristic is flexibility: new issues can be tackled. A negative one is also flexibility. Urgently emerging issues can be ignored by judges. In other words, a legal norm without including the underlying mentality will not protect anybody.

How can traditional optimism with regard to legal norms protecting rights be explained? In my opinion, the success of the legal norm lies in its humility. It is not driven by high expectations. And although fundamental rights cannot be understood without the heritage of Christianity, enlightenment and liberalism, the technical norm itself remains far away from any ideological triumphalism. A norm is just a norm. And yet, because it is only that, it is more than that. One can argue that following the implosion

⁸ See Marie Samatan, *Droits de l'homme et répression en URSS. L'appareil et les victimes*, Paris, Seuil, 1980, 342p.

of ideology during and after World War II, formal norms and formal systems became the heroes of the moment. This explains the view shared by many that the existence of religious freedom is more important than the way in which it has been given shape. A similar idea can be found in the thinking of Richard Rorty. The author advocated the priority of democracy to philosophy.⁹ This idea reflects a key thought of the second half of last century: the possibility of having ideas is more important than their content. The right prevails on how it is exercised. One needs the right of course, but one has no obligation to make use of it. To some extent making use of right diminishes the latter. Concrete choice destroys abstract beauty. The same is true for the superiority of democracy to ideology. How the choice is made is more important than the choice itself. Beauty is extrinsic, not intrinsic.

The preference of the norm guaranteeing freedom over its content presupposes an ironic state of mind. It requires a high mental equilibrium. In other words, people highly convinced of the value of their opinion do not easily stick to the beauty of what is right. They urgently want to do something with it.

This idea is clearly present in the famous speech Rowan Williams gave on 8 February 2008.¹⁰ The archbishop of Canterbury rightly claimed that fundamental rights are too easily seen as a framework, as a formal system. Yet, when people make use of it in an unexpected and culturally atypical way, traditional human rights advocates no longer feel at ease. That's why a truly Islamic implementation of religious freedom tends to be at odds with broadly shared expectations in society. What if two Muslims want to proceed to arbitration based upon sharia? The word sharia scares many people, yet the problem lies elsewhere. The true issue is whether people opting for arbitration do so freely, without any implicit or explicit pressure exercised by parents, friends or religious leaders, and without any form of *metus reverentialis*.¹¹ When this condition is fulfilled, and as far as sharia does not oppose public order, nothing prohibits its use in arbitration cases. Can it also fit in family law, in line with the Millet tradition of the Ottoman Empire?¹² Here the answer is negative.

⁹ See Richard Rorty, The priority of democracy to philosophy, in: Alan R. Malachowski, Jo Burrows (eds.): *Reading Rorty. Critical responses to philosophy and the mirror of nature*. Oxford: Oxford University Press, 1990, 279-302.

¹⁰ For the speech by Archbishop Rowan Williams on 8 February 2008 in London, see <http://www.guardian.co.uk/uk/2008/feb/07/religion.world2>.

¹¹ "By 'reverential fear' one is to understand a contracting party's feeling of deference or submission to a person to whom he owes respect or obedience due to some special personal relationship." "In many civil law systems, mostly of the Romanic legal tradition, the civil codes expressly provide that a contracting party's 'reverential fear' does not render a contract violable for duress". K. Zweigert, U. Drobnig (eds.), *International Encyclopedia of Comparative Law*. Vol. VII. Chapter 11. Defects in the Contracting Process, Tübingen, Mohr Siebeck, 1981, 209.

¹² "Official Ottoman correspondence dealing with the non-Muslims of the empire in the early nineteenth century consistently affirmed that non-Muslims were organized into three officially sanctioned *millets*:

Such an approach would neglect the equality principle among citizens, which is more than ever before an integral part of religious freedom.

To sum up, the beauty of fundamental rights has somewhat evaporated. In the twenty-first century people tend to look at the content of ideas. Only in the second stage, they investigate their compliance with fundamental rights catalogues. Previously the opposite approach was followed as the catalogue of rights determined their practice.

2. The notion of freedom

There is a problem with religious freedom. Most religions do not like freedom. This is not necessarily a weakness, although it may lead to intolerance, which of course is no gift. Religions rejected freedom because they fostered the truth. This leads to the following question: if you live in the truth, why should you have the right to abandon it? Indeed, freedom leads to error. An underlying matter is whether error is a gift or an insult to mankind. What attitude is the better one? Granting someone the right to live in error? Or guaranteeing the same person a peaceful death in the truth? Human rights advocates prefer the first solution. Freedom is more important than truth. Voltaire shared that opinion, although his choice was scant. Indeed, he believed in freedom. The opposite is true for most religious leaders. They believe they possess the truth. That is why they want to eliminate error, certainly morally and if possible legally. Obviously Voltaire and religious leaders have something in common. They both protect the value they believe in, and reject the other one.

With regard to religious freedom, we lived the painful degradation of the right to change religion in the UDHR (1948) and the ECHR (1950) to the right to have and adopt religion in the International Covenant on Civil and Political Rights (ICCPR, 1966).¹³ The right to have or adopt religion does not include the right to leave the

Greek Orthodox, Armenians, and Jews. (...) The *millet*s as constituted in the nineteenth century were hierarchically organized religious bodies with a decidedly political function. Each was headed by a cleric (...) who was appointed by the sultan and resident in Istanbul but who was largely free to order the affairs of his community as long as he remained loyal to the sultan.”. Bruce Masters, *Christians and Jews in the Ottoman Arab World. The Roots of Sectarianism*, Cambridge, Cambridge University Press, 2001, 61.

¹³ See art. 18 ICCPR: Article 18: “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The State’s Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

truth. Once one knows, one can no longer escape. To some extent, the formula of the ICCPR throws a bridge between religious freedom and truth. But it is an imaginary bridge. Truth prevails. One has the right to strive, not to abandon.

From a philosophical perspective, this analysis is debatable. It starts from the presupposition that adopting a religion always brings people closer to the truth, whereas abandoning religion, in technical terms called apostasy, is the victory of freedom over truth, the priority of democracy over philosophy. Yet, why would a position people recently adopted be superior to the one they left? Isn't it possible to leave truth in favour of error by adopting a religion? Moreover, is it possible to live in error and to increase the error by adopting a religion? The formula of the ICCPR implicitly starts from an existing truth. The Swiss author Max Frisch¹⁴ tells the story of his meeting with a writer rejecting his earlier work and only feeling happy with his latest production. Frisch is uneasy about it, as he loved the early work by far the most and suddenly felt no longer allowed to say so. People always think their wisdom increases, while the opposite may be true. Perhaps we were right when we were young and enthusiastic, and start being wrong when we mix up opinions and wisdom. The linear thinking about the truth is an error.

And there is one more issue. In current secular society, freedom for freedom's sake is less cherished than it was in the aftermath of the sixties. Instead, people advocate norms and values, forgetting at times that freedom can also be a norm and a value. In canon law an important principle says that when there is no need to make a law, there is a need not to make one. In a more cumbersome economic climate, freedom is distrusted, whereas norms, creating a virtual feeling of security, are seen as a remedy against decline. We are far away from the glory of freedom for freedom's sake. The way important European Court decisions, including *Sunday Times*¹⁵ and *Handyside*,¹⁶ set the very open standard for the interpretation of freedom of expression would be less obvious today than it was in the late sixties and early seventies.

In an unexpected way, the ideas of religious groups join those of modern society. Religious groups give way to the truth, even at the expense of freedom. And modern society promotes security, also if freedom is curtailed. To put it in yet another way, the interaction of truth and security tends to limit freedom.

3. Religion in turmoil

Freedom of religion becomes a problem because religion is. In earlier years, there was a continuous attempt to broaden the concept of religion. Majority groups often

¹⁴ Max Frisch, *Tagebuch 1946-1949*, Frankfurt am Main, Suhrkamp, 1965, 463p.

¹⁵ *The Sunday Times v United Kingdom* (Series A No 30), European Court of Human Rights (1979-1980) 2 EHRR 245, 26 April 1979.

¹⁶ *Handyside v. the United Kingdom*, (5493/72) [1976] ECHR 5 (7 December 1976).

had the inclination to reserve the notion of religion to themselves, whereas minority groups were easily defined as sects or cults. The notion of *sect* used to be neutral in the days of Montaigne. Those days are over. In the view of many, religion was linked up with majorities and mass movement, sects and cults were seen in a minority perspective. Gradually, minorities were not only recognized as religions, they also obtained advantages similar to the ones enjoyed by large groups.¹⁷ This definitely was a problem in Europe, where the separation system is less elaborate than in the US. The key question in a European context was whether or not financial or other advantages granted to majority churches should be extended to smaller groups as well. The alternative solution was the suppression of any form of subsidy whatsoever, bringing large and small groups to the same level. Most countries including Belgium, Spain and Italy, choose the first solution by granting advantages to minority religions as well.

Once minority groups obtained a better position, another issue emerged. What about atheist groups? Should they also be recognized as religions? Atheists themselves were very much in favour of this idea. Their underlying motive was not their deepest conviction of being a religion. They were aiming at material advantages. Moreover, by being qualified as a religious group, they enjoyed fundamental rights dealing with religious freedom. This protection went beyond the advantages offered by freedom of association. All together, atheist groups were rather successful in doing so. They obtained state financing in countries such as Iceland, Norway and Belgium. They even gained their place in the European Union, starting with article 11 to the final act of the Amsterdam treaty of 1997. Both religions and non-confessional organisations were defined as national matters not falling under the competency of the European Union. This idea was also implemented in the Lisbon treaty, article 17.¹⁸

I remember a conference in New York in the fall of 2007 at the headquarters of the UN during which representatives of non-believers did everything they could to argue that they were protected by article 18 UDHR. This approach is interesting. Indeed, as long as atheist groups try to qualify as religions, they do so because they believe in the adequate legal protection of the latter. But then again, the opposite is also true. When non-believers as organised groups leave aside any

¹⁷ See Rik Torfs, *The present state of religious minorities in Europe*, in R. Bonney and David Trim (ed.) *The development of pluralism in modern Britain and France*, Bern: Peter Lang, 2007, 277-295.

¹⁸ Article 17: "1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2. The Union equally respects the status under national law of philosophical and non-confessional organisations. 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."

connotation with religion and focus on freedom of association, there is a problem with the protection of religious freedom. Today, that may be the case in some Western countries. Here, we are confronted with a new phenomenon: freedom of religion is discussed in an environment increasingly hostile towards religion. In my view, this is an absolute novelty. Of course, some authoritarian regimes including communism were opposed to religion and saw it as a barrier against their own power and policy. Stalin did everything he could to destroy churches and cathedrals as long as he did not need the support of the patriarchate of Moscow.¹⁹ Only when war as well as economic problems urged him to do so, Stalin established a better relationship with religious leaders. Yet, the bottom line remained unchanged: religion is wrong and primitive. It is slowly dying. Yet, the population did not follow its leader. The communist system was non-religious, but the people were not. In other words, the negative attitude of leaders is less dangerous for churches than the hostility of the people.

Today, in several Western countries suffering from a high degree of secularisation, the mere idea of being religious is perceived to be both stupid and dangerous. Stupid, because science does not demonstrate the existence of God, which can only lead to the conclusion that the latter is an illusion. Dangerous, because in the eyes of many, religious ideas are the origin of a multitude of conflicts all over the world. Here a new problem emerges. What is the strength of religious freedom in an environment that is basically non-religious? The question is less innocent than one thinks. Indeed, it touches the essence of fundamental rights. The key question goes as follows: how far does the protection of rights reach, if the underlying value is received negatively by a majority of the population? Is freedom of religion still protected in a context that is maybe not negative to freedom, yet in any case negative towards religion? In my opinion, formal rules are not strong enough to survive in their entirety in a climate fundamentally hostile towards the values they protect. When most people are not religious, freedom of religion will be curtailed, either directly or indirectly, through measures stimulating other values at the expense of religious thinking. Norms are not stronger than the people working with them. This point can be underpinned by a parallel reasoning. Suppose for a moment that most people are opposed to free speech in a system that still protects freedom of expression. Or suppose the majority of the population rejects associations as intruding into personal lives of people, whereas freedom of association still remains protected by both the constitution and international documents. In both situations freedom may evaporate because

¹⁹ Steven Merritt Miner, *Stalin's Holy War. Religion, nationalism and alliance politics 1941-1945*, Chapel Hill (N.C.): University of North Carolina Press, 2003, XIX + 407p.

the value protected by that freedom is not held in high esteem within broader circles in society. In other words, freedom of speech will be less protected in a society where everybody thinks that free speech is useless.

4. The broader context

The analysis made above is not harmless. It illustrates a paradigm shift. When I started studying law and religion, somewhere around 1980, the bottom line was that new problems emerged within a framework that itself seemed to be eternal. Remember the big issues of the nineties: conscientious objection, new religious movements. At the same time, or perhaps slightly later, Islam and its position within a Western human rights pattern became the central question. Yet, in all these cases, there was no discussion about the framework, the context, the global picture in which the evolution took place. Religious freedom and its strong protection were the absolute cornerstones of any system. In a way, religion and law experts were living a comfortable life. Not everything changed. All upcoming changes were projected in a mirror of stability.

Guided by this idea scholars also tackled the key problem of the first decade of this century: limitations to religious freedom. The starting point of the analysis remained the stability of religious freedom. Changes and limitations had to stick to unchanging principles, including freedom being the norm and exceptions being only possible if they were established by law, necessary in a democratic society and meeting with the requirements formulated by paragraph 2 of both the UDHR and ICHR.

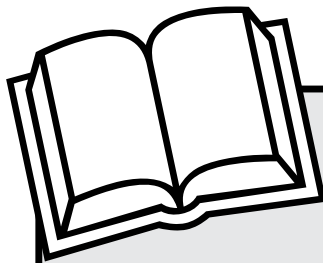
Experts realised too late that the framework itself was in danger. Slowly, the main question no longer was how new trends including unusual religious movements, strange consciences and exotic world religions could fit into the existing pattern. Religious freedom became a problem on its own. Indeed, the more exceptions are formulated or accepted with regard to religious freedom, the more questions arise concerning the basic model.

For that reason, one should examine more clearly the underlying motives inspiring governments and legislators to curtail religious freedom. At a first superficial level, pragmatic reasons can be invoked. In that regard, security plays an important part, along with public order and even harmony in society. The latter involves French and European policy with regard to the prohibition of headscarves at school. However, it would be a mistake to limit exceptions to a pragmatic level, the level of facilitating living together and making life a happier experience.

At the same time, a second level affects the mere notion of religious freedom and reduces it. Rights are still rights, yet they lost their religious aura as ultimate protectors of human liberty. Freedom is still freedom, yet it is no longer the pervasive, daring freedom focussing more on the feeling of being free than on how freedom

is used. Freedom was never trusted by religions. And today, in modern society, it is also disqualified by so-called common sense which defines freedom again, as in a remote past, yet this time implicitly, as the right to become who one is.

And finally, religion is still religion, but instead of being a positive notion, a dream to accomplish, it became in the eyes of many a symbol of deficient scientific thinking and abuse of power. Rights weaken, freedom weakens. Religion is regarded as a bad thing. In that context, the right to religious freedom remains a right. In that context, a slow decline and a deep internal crisis of religious freedom is inevitable. And that is bad news.



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