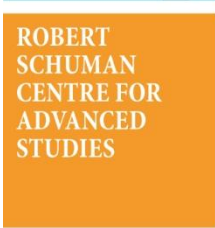




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RELIGIOWEST

Prince or Pariah? The Place of Freedom of Religion in a  
System of International Human Rights

Lorenzo Zucca



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## **Abstract**

The human right to freedom of religion (HRFR) at the international level is a deeply contested concept and is interpreted in radically different ways in the respective historical constitutional instruments of the US and Europe. It is, for example, embedded in the First Amendment of the American Constitution, but finds no explicit recognition in the French Declaration of Rights. The question that emerges from this simple starting point is: what is the place of freedom of religion in a system of protection of international human rights? Is there a single answer to this question, or is it a deeply contingent matter that depends on discrete constitutional histories? This paper attempts to unravel this deeply contentious issue, which goes to the very core of disagreement about the nature of the human rights to freedom of religion. Lacking agreement as to what constitutes freedom of religion, international intervention should limit itself to the bare minimum in this area. This renders freedom of religion a pariah at the international level.

## **Keywords**

Human rights/freedom/ religion





## 1. Introduction

On February 313, exactly 1700 years ago, the Emperor Constantine signed the edict of Milan, which put an end to the persecution of Christians in the Empire. It was the first official proclamation of freedom of religion. To be more precise, since Constantine was himself a Christian, and since he actively promoted the respect of the Christian religion in the Empire, it came to be regarded as the union between power and religion. Religion, that is, Christian religion, has not only been free in the empire, but came to dominate the whole moral and political space. One paradoxical effect was the denial of religious freedom for dissenters. This paved the way for religious schisms, and in fact promoted brutal confrontations between Christians. Many Christians persecuted by their fellow brothers left Europe to establish a polity with a greater freedom for differing religious views. Those who remained decided to gradually distance themselves from an understanding of religion too deeply intertwined with politics. The modern secular state was born out of the necessity of creating a distance between power and religion. The obvious risk that religious people ran was to be persecuted again, in this instance, by the secular state. The right to freedom of religion is a local response against the possibility of new persecution.

The human right to freedom of religion is interpreted in radically different ways in the West. Some insist that religious people should be protected from external interferences, while others insist that non-religious people should be protected from the interference of religion in public affairs. Perhaps the problem is that it is impossible to accurately define the human right to freedom of religion (HRFR). The human right to freedom of religion features in most international human rights documents. The Universal Declaration on Human Rights, for example, encapsulates it in Article 18. The question here is not whether the HRFR is recognized as such, but rather what its status is in an international system of human rights.

The HRFR, more importantly, is not univocally recognized in western secular states. Some constitutions accord a prominent place to it (e.g. the US), others a very limited position: the French Declaration of the Rights of the Man and the Citizen (DRMC), for example, contains a very limited recognition.<sup>1</sup> The first amendment of the American Constitution gives a much more generous place to freedom of religion and attaches to it a clearly articulated protection.<sup>2</sup> While the American Bill of Rights carves out a clear place for religion in the constitution, the French Declaration laconically acknowledges that opinions, even religious ones, benefit from protection against prosecution. Further, it is only by way of analogy that we can infer that freedom of expression of thought and opinions also cover religious people. It is important to stress that this freedom of opinion is very important, but that it in no way amounts to an independent HRFR.

How is it possible – or, indeed, is it possible – to distill from those disparate understandings of freedom of religion one that is common for everyone at the international level? The question is not merely theoretical, but it is of great practical significance, since a common understanding of the HRFR could be the basis for intervention in domestic affairs of national sovereign states in case of major violations. However, I find it difficult to pin down a precise enough meaning of the HRFR at the international level. Local understandings of freedom of religion depend on highly contingent factors

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<sup>1</sup> Article X: No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

Article XI: The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

<sup>2</sup> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

that cannot be made to cohere in one general notion, as they are too disparate. As a consequence, my suggestion is that the HRFr has a very limited role to play at the international level, while it may play an important role at the domestic level.

There are several reasons for this. To begin with, the nature of freedom of religion depends heavily upon historical contingencies at the domestic level (Section 2). Moreover, the practice of freedom of religion shows that the scope and strength of the right can only be determined in relation to the local understanding of religion and what it means to be free for a religion. As a result, supranational institutions adjudicate on these issues by displaying a great deference to national institutions that are better positioned to evaluate local practices (Section 3). One must add to that that at the international level, lacking an institutional system that can resolve disputes, the role of human rights in general and that of the HRFr more specifically, is limited and must take respect for national sovereignty into account, which is very important in practice and as a matter of principle. The way in which national sovereignty is limited depends upon the way religious freedom is conceived, but it might be impossible to conceive of it at the international level without imposing a unilateral understanding of what amounts to religion (Section 4). It is concluded that even if the HRFr is emphatically declared at the international level, it has a very limited status in practice.

## 2. The Nature of Freedom of Religion

Freedom of religion is different from any other constitutional freedom because of its object, namely religion. Few dispute the status of freedom of speech, and everyone can see why it is important to allow everyone express him or herself in a democracy, even if we may not know exactly where the protection of free speech ends. With religion, things are different because people disagree as to whether religion deserves special protection, and there is no single specification of freedom of religion that commands widespread agreement as to the desirability of its protection. In other words, the questions ‘*why that freedom?*’ and ‘*what kind of freedom?*’ remain unanswered at the international level. To these questions, one can add ‘*freedom for whom?*’ Is it freedom for religious people in general, or is it freedom of religion for neglected minorities?

Theories of freedom of religion attempt to answer all of these questions. Such theories attempt to offer an account of the status of freedom of religion in a state.<sup>3</sup> The answers to these questions depend on highly contingent factors such as the outlook of the society and the precise constitutional history of a country. It is difficult to distil from local experiences a theory of freedom of religion that could suit the international community at large. Philosophical sophistication and abstraction do not cut much ice in this area, since freedom of religion poses fundamental questions that are fraught with contingent cultural assumptions concerning the nature of religion and the cognitive realm of theology. In this section, I will explore to what extent freedom of religion is dependent upon contingent factors which call into doubt the possibility of a human right to freedom of religion at the international level.

### *a. Society*

The status of freedom of religion in a state closely depends upon the way in which religion is perceived and practiced in the society. Theories that attempt to give a full account of the status of freedom of religion cannot abstract from local experiences at the national level. For example, the American and French movements of Human Rights emanated from deeply different societies from a religious viewpoint. American pilgrims were fleeing Europe with the intention of establishing a pluralistic religious society. France was trying to break from the ties of the *Ancien Régime*, which had entrenched one religion as part of its own aristocracy. Thus, in a religious society, the special status of

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<sup>3</sup> Cecile Laborde, ‘Equal Liberty, Non-establishment and Religious Freedom,’ paper available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2160896](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160896)

freedom of religion is simply assumed, whereas it is deeply contested in a society that wants to break free from the domination of one religion. In the US, freedom of religion is paramount, while, at best, it is secondary in France. The reason for this is simple: in a religious society, everyone has a potential interest in protecting his own conception of religion, whereas in a widely secularized society only a very small minority of people have an interest in religion being protected.

One thing is clear, though. Freedom of religion is not a central preoccupation of theocratic regimes. It was not a central preoccupation for absolutist France, nor was it for Britain in the XVII century. When the state supports one religion, it also tries to demote other religions; at best, other religions will be tolerated, at worst they will be banned. Further, it is not a central preoccupation of modern theocracies such as Iran. So, for example, the Iranian Constitution entrenches the immutable establishment of Islam (Art. 12),<sup>4</sup> and only recognizes a handful of other religions as official minorities who have a qualified freedom to perform their rites and ceremonies (Art. 13).<sup>5</sup> Interestingly, the Iranian Constitution recognizes that other non-Muslims are owed respect for their human rights (Art. 14).<sup>6</sup> However, if one reads Art. 13 and 14 together, one can conclude that only a few official religious minorities have a qualified freedom of religion. Other non-Muslims may see their human rights respected, but amongst those human rights, we have to infer that the HRFR has at best a very limited place.

Freedom of religion is mainly a Euro-Atlantic preoccupation; there is, however, a crucial difference between Europe and the US: in Europe, the presence of religion in a society has traditionally been organized along the lines drawn by the treaty of Westphalia, which engineered religiously homogeneous societies with a dominant religion. Where one religion was dominant, all others were at best tolerated. This artificial device led to a slow but progressive secularization of societies, which became disaffected from the one dominant religion. Freedom of religion was merely a dormant concern from the past, which was only very recently rekindled because of the presence of new religious minorities. In the US, society is, from the beginning, religiously plural, albeit not perfectly so. The point of religious freedom is to protect and promote a plurality of religious faiths in the society, while keeping the state free from the interference of any one religion in particular.

It is only recently that Europe had to reconsider the status of freedom of religion, precisely because of major social changes due to massive immigration. Thus, each European state has had to grapple with various claims from diverse minorities from North Africa, South America, the Middle East, and Asia. When minorities do not integrate into the mainstream society, they are highly motivated to use religious identity as an explanation of cultural diversity. Freedom of religion thus becomes the individual right through which religious minorities claim autonomy from what they perceive as a highly secularized mainstream society.

Despite the differences between the American and European models, what is clear is that freedom of religion is relevant when the society displays great religious plurality. In these societies, the status of freedom of religion is assumed to be important in the constitutional framework, but legal and constitutional theories do not provide full answers to the three questions I sketched above (what kind

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<sup>4</sup> Art. 12: The official religion of Iran is Islam and the Twelver Ja'fari school [in usul al-Din and fiqh], and this principle will remain eternally immutable. [...]

<sup>5</sup> Article 13: Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

<sup>6</sup> Article 14: In accordance with the sacred verse; ("God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes" [60:8]), the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.

of freedom/why that freedom/freedom for whom), since answers to those questions depend upon contingent societal factors and upon constitutional practice.

***b. Religious freedom and constitutional assumptions***

The American Constitutional experiment is the first attempt to separate religion from politics, not with the intent of removing religion from society, but on the contrary with the intent of protecting freedom of conscience for every individual.<sup>7</sup> In contrast with that project, France attempted to separate religion from politics in order to free the whole of society from religious influence in the public sphere.<sup>8</sup> Thus, we have two different models of separation: one is bilateral separation with the intent of preserving religion from the corruption of politics (US). The other is unilateral, with the intent of preserving the state from the corruption of religion (France). Within the first model, freedom of religion is dominant. Within the second model, freedom of religion is residual. The way in which freedom of religion is conceived depends on the complex relationships between societies and politics on one hand, and church and state on the other.

The separation between state and church is a historical doctrine and has major consequences. First of all, the idea of separation implies the existence of two separate domains working independently from one another. To recognize the existence of an independent domain is tantamount to acknowledging that that domain is important and worthy of special consideration. Moreover, the religious domain is the last arbiter of its dignity. Thus we may perceive a paradoxical consequence of any form of separation: the state does not know the reasons for religion, but respect them as such, refraining from interference.<sup>9</sup>

Constitutional theories of freedom of religion do not address our four questions directly, but only do so implicitly.<sup>10</sup> To begin with, the mere fact of mentioning freedom of religion in a constitutional text assumes that freedom of religion is special and important – in US constitutional history, not only is freedom of religion mentioned, but it is mentioned in the First Amendment leading to the belief that is amongst the most important freedoms. Unfortunately, the text does not explain why religion deserves special protection by comparison with other human activities. Moreover, the text does not explain what amounts to religion, so the only way of working this out is by looking at constitutional practice, in particular adjudication. This point corroborates the idea that freedom of religion is highly dependent upon contingent factors, and is quite difficult to export. Finally, the way in which constitutional practice works is coherentist rather than critical. This means that constitutional actors and theorists try to make sense of past decisions with an eye on preserving and explaining the values that constitute society from the beginning and that are typically declared in constitutions. So, the mere fact that freedom of religion features in the constitutional text is a reason strong enough to consider it as special and important from the constitutional viewpoint.

Thus, in practice, judges often treat freedom of religion in a special way without knowing what religion is about and without asking why it is special.<sup>11</sup> If you show that your claim is religious, then you have a *pro-tanto* reason to have your claim protected. The main way to establish what amounts to a religious claim as opposed to any other claim is by way of analogy with mainstream conceptions of religion within a society. Freedom of religion is especially important but its nature cannot be investigated.

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<sup>7</sup> M. Nussbaum, *Liberty of Conscience- In Defense of America's tradition of religious equality*, Basic Books, 2008.

<sup>8</sup> Cecile Laborde, *Critical Republicanism- The Hijab controversy and Political Philosophy*, OUP, 2008.

<sup>9</sup> See R. Audi, *Democratic Authority and the Separation of Church and State*, OUP, 2011.

<sup>10</sup> Eisgruber & Sager, *Religious Freedom and the Constitution*, HUP, 2007.

<sup>11</sup> Cecile Laborde, *supra* n. 3

Some constitutional theories of freedom of religion attempt to challenge the paradigm of freedom of religion as an individual human right that provide *pro tanto* reasons to defeat governmental policies.<sup>12</sup> They argue instead that freedom of religion should be understood as an equal liberty of conscience, that is to say that whoever has a strong enough claim of conscience – be it religious or non-religious people – should have a defense against discrimination on the basis of their beliefs. In this case, one needs not show that one’s claim is religious, but rather that the claim is deep enough or is vulnerable.<sup>13</sup> The problem with these constitutional theories is that they merely displace the burden of assumptions concerning the nature and role of religion.<sup>14</sup> Indeed, practice demonstrates that there is an assumption that religious people have deep and vulnerable claims, whereas non-religious people will have to show why this is the case.

Constitutional theories deal, implicitly or explicitly, with two separate and inescapable queries: firstly, is religion special? Secondly, what kind of treatment does it merit? There is no answer to the first question; it is simply assumed that freedom of religion is in some way special, since it is mentioned in most constitutions. This, of course informs, its treatment, which amounts at times to qualified privilege, and at others, to a qualified burden. The two issues heavily depend on local assumptions, and this creates an obvious problem for those who wish to distil an international human right to freedom of religion, as such a right would have to be based on universally shared premises.

### ***c. The ontology and epistemology of religion***

Philosophical explanations of freedom of religion seem to suffer from the same problem as constitutional theories. They are not capable of distilling one definition of religion that explains in non-religious terms the special importance of religion for the sake of its protection. Indeed, many believe that we should not fall into the trap of defining religion, since a definition could always be under-or over-inclusive. Many attempts have been made, but with very limited success: it is in fact a frequent contention to suggest that no definition is possible.<sup>15</sup> In fact, most lawyers and philosophers agree that a definition of religion is a thankless exercise. Instead they propose criteria or paradigmatic cases to use in analogical fashion. By doing so, they also implicitly accept that religion should be apprehended on a case-by-case basis, and with an eye to the local contingencies that shape practice.

Brian Leiter is nearly unique in his effort to provide a simple straightforward definition of religion that aims to capture any possible religious phenomena. The ambition is to provide a universally valid, and simple, definition of religion.<sup>16</sup> Leiter offers two elements, which he regards as central: categoricity of belief and insulation from evidence.<sup>17</sup> Categoricity refers to the stringency of beliefs in guiding behavior. Insulation from evidence addresses the way in which religion relates to the knowledge of the world that we have on the basis of common sense or science. Religion, being based on faith, is not responsive to reason, Leiter argues, and this insulates religion from the requirement of evidential proofs.

There is no space here to address this view critically, but a few comments are in order. Leiter assesses religion from the viewpoint of an exclusive naturalistic worldview, which presupposes a conflict between science and religion. To assess the cogency of this conflict, one would have to

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<sup>12</sup> Eisgruber & Sager, *supra* n. 10

<sup>13</sup> The claim is deep when it is part of a worldview that the individual follows in a consistent way. It is vulnerable when it is held by minorities that do not an easy access to mainstream society.

<sup>14</sup> Cecile Laborde, *supra* n. 3

<sup>15</sup> W.F. Sullivan, *The Impossibility of Religious Freedom*, PUP, 2007.

<sup>16</sup> B. Leiter, *Why Tolerate Religion?* PUP, 2012. This begun as a reply to Martha Nussbaum’s avowedly local, *Liberty of conscience*, *supra* n. 7

<sup>17</sup> *ibid.*, p.

provide an accurate account of the naturalistic worldview, that is a view according to which the world described by scientific laws is all there is to know, but in Leiter's account that view is just assumed.<sup>18</sup> This assumption creates a fundamental problem for Leiter's definition as it presents faith as necessarily at odds with science as if there was scientific evidence to prove that claim. In Leiter's account, faith is the source of unwarranted beliefs, as they cannot be supported by scientific evidence, indeed they are insulated from it. But this assumes too much, namely that all the beliefs we hold on the basis of faith are incompatible with scientific evidence. This cannot be true, in particular in relation to moral beliefs that are inherited from religious convictions. It also wrongly assumes that those religious beliefs that are incompatible with scientific evidence cannot be revised or put aside. However, again, people of faith and religious institutions are prepared, albeit sometimes reluctantly, to change their beliefs on the strength of contrary scientific evidence.

I also note that Leiter's definition is consistent with the idea of a separation between theology and other domains of knowledge. In other words, Leiter's definition preserves an epistemic integrity to the domain of religion by isolating faith as the source of religious knowledge. Epistemic integrity postulates a distinction between public reason and religious reason.<sup>19</sup> Integrity thus conceived cuts both ways. On one hand, it excludes religion from participation in the discussion of public policies. On the other, it recognizes the dignity of religious reasons as being different in nature from public reasons.

Since religious reasons are sovereign in their domain according to this perspective, it follows that philosophy has a very limited role to play in providing a definition of a practice that defines itself. Moreover, the question: 'what is religion?' is an altogether different question from 'what is speech?' Secular institutions are notoriously ill equipped to answer the former question. This is partially because secular institutions do not have the theological training required to examine the problem. It is also partially because secular law encapsulates an understanding of evidence that is not compatible with the proofs that religious people may put forward in order to establish the genuine nature of their beliefs. On top of all of this, the question: 'what is religion?' can be broken down into many difficult quandaries. The broadest underlying problem concerns the kind of object that religion is, that is its nature, or ontology, so to speak.

However, even assuming that domestic secular institutions can come up with a working definition of religion so as to guarantee the respect of freedom of religion, this definition is based on local contingencies that militate against the possibility of a universal definition of religion. These brief considerations highlight the puzzles that one necessarily faces when trying to pin down the meaning of the HRFR in Western states. This is not to mention the difficulties related to non-Western states, which are even greater.

When a policy maker has to grapple with problems of religious freedom, she is bound to face two extraordinarily complicated problems:

1. what is the nature of the right to freedom of religion?
2. how does one know what counts as religion across the world if one begins from the starting point of one's own local conception of religion?

The practice of the human right to freedom of religion highlights that each legal political system has in-built assumptions that depend on cultural and historical contingencies. Moreover, as will be seen in the next section, this also constitutes a reason for supranational and international institutions to display a great degree of caution in matters concerning the domestic treatment of freedom of religion.

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<sup>18</sup> A. Plantinga, *Where the conflict really lies- Science, Religion & Naturalism*, OUP, 2012. Plantinga, for example, shows that the conflict as presented by holders of a naturalistic worldview is only apparent, but it is not real after careful examination.

<sup>19</sup> Cecile Laborde, *supra* n. 3

### **3. The Practice of Freedom of Religion**

What emerges thus far is that freedom of religion is characterized by a very strong local contingency. This is a central consideration when we attempt to pin down the meaning of the international human right to freedom of religion. The practice of freedom of religion also shows that domestic institutions are reluctant to enter into theological debates as to the nature of religion, for obvious reasons. They instead prefer to use sociological and anthropological criteria to deal with the question.<sup>20</sup> The practice of freedom of religion also clearly shows that supranational and international judges adopt a very deferential stance towards domestic religious litigations.

Freedom of religion has limited strength and scope right, even when it has pride of place, as is the case in the US Constitution. Even so, its treatment in practice displays a number of legal problems with which policy makers and the judiciary are confronted. In general, the legal treatment of freedom of religion presents three distinct puzzles that contribute to its limitation in practice. One must determine the scope, the strength and the way to deal with conflicts between freedom of religion and other rights.

#### ***a. Scope***

To determine the scope of protection afforded by a human right, one must engage in several different steps. Firstly, one must translate the broad statement of principle into deontic modalities (prohibitions/permissions/obligations).<sup>21</sup> So, for example, the US Constitution prohibits, on the one hand, the making of laws that establish religions, while on the other prohibiting the making of laws prohibiting the free exercise of one's own religion (here the prohibition of a prohibition must be read as a broad permission).

Secondly, one must establish the correlative duty imposed upon other people by virtue of the existence of a right.<sup>22</sup> At the constitutional level, generally speaking, a liberty-right is correlated with the absence of the right on the part of other persons. This means very blandly that if I have a right to exercise my religion in the private sphere, nobody has a right to curtail my right by violating my private space. Surely the HRFR also implies a more general immunity on the part of the right-holder which corresponds with a disability on the part of the state. For example, the American legislator is the prime duty-bearer of the HRFR, and this entails a constitutional disability to make laws that prohibit the free exercise of religion.

Thirdly, and much more controversially, in order to decide upon the actual scope of prohibitions and the extent to which the legislator is disabled, one must work out what kind of beliefs and behaviours are to be classified as religious. Looking at both the US and French texts, we can readily see that there is great difference as to the religiously-inspired behavior that is covered by constitutional articles. In the US, free exercise forms the core of the protection, while in France what is protected is religious belief. If we compare the two, there is a striking difference between the protection of religious thought and the protection of acts based on religious belief. So, the distinction between speech and acts is an important dividing line between the regimes of protection in America and in France.

Another possible dividing line, perhaps even more important, falls between freedom of religion understood as an individual or as a collective – group – right. The idea of free exercise has been interpreted as leaning towards the protection of individual conscience rather than toward the protection of religious groups. In fact, on this point it is clear that the American state attempts to avoid supporting

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<sup>20</sup> R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS.

<sup>21</sup> G.H. von Wright, *Deontic Logic*, *Mind*, New Series, Vol. 60, No. 237. (Jan. 1951) 1-15.

<sup>22</sup> W.N. Hohfeld, *Fundamental Legal Conceptions*, Dartmouth, Aldershot, 2001.

any religious group as far as is possible, even if they obviously possess the freedom to gather together to celebrate religious rituals. However, the basis of religious assembly can still be found in the individual act of conscience, rather than being derived from the special status of religious organizations. Thus, in the US, religious conscience is the basic element for the recognition and protection of some religious beliefs and acts.

In revolutionary France, the text only mentions religious opinions. In both cases, there seems to be an accent on the individual experience, but we have to draw an important distinction between conscience on the one side, and thought and opinion on the other. Conscience clearly covers both beliefs and actions, while opinions can hardly be stretched to cover actions. There is a big practical difference between conscience and thought: once the existence of a religious claim of conscience can be established, it seems as if an exemption from ordinary law might be requested. In the case of religious thought, the only concern seems to create a private space shielded from the interference of ordinary law, but in no way does religious opinion seem to be entitled to claim an exemption from ordinary law.

It is only with more recent human rights treaties that the scope of the right to freedom of religion covers a collective aspect. In particular, the European Convention of Human Rights, Article 9, states:

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.

The European formulation goes well beyond conscience and thought, and spans from that individual dimension to a much more collective one. It also moves beyond the private sphere to cover the public aspect of religion.

### ***b. Strength***

In determining the strength of the HRF, one must compare the strength of other rights in *abstracto*; it is also necessary to single out the importance of religious practices within a society; and finally one must compare the freedom of different religious groups between themselves.

Some American commentators see a paradoxical treatment of religion.<sup>23</sup> Free exercise receives special protection, and thus religious conscience has special force in comparison to other claims of conscience, whereas establishment is the object of special burdens, and therefore religion as a collective enterprise has less strength than other collective activities. In France, according to the DRMC, religious opinions are protected at the same level as other opinions, but certainly not in a more favorable manner. So, in this sense, religious opinions receive equal treatment. As far as religious groups are concerned, France allows itself the possibility to interfere with them whenever it deems it suitable. In both cases, we talk about the separation between church and state, but in fact in America, it is a bilateral separation while in France it is unilateral separation. Separation is bilateral when the state cannot interfere with the church and vice versa. It is unilateral when the state can interfere with the church, but the church cannot interfere with politics.

The ECHR admits systems of separation and establishment, so the strength of the interest protected by freedom of religion should be evaluated **in different contexts**. However, it is important to note one thing at the outset, namely that if one religion is established *de jure*, then it goes without saying that there is a presumption of more favorable treatment of that religion over others. Establishment does not promote equality between religions, and can easily undermine the freedom of all other religions.

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<sup>23</sup> Eisgruber and Sager, *Religion and the Constitution*, Harvard Univ. Press, 2007.



So, another interesting problem is the following: when a state establishes one religion, it may very well undermine the freedom of other religions. *Kokkinakis*, the first case to reach the Strasbourg court, is precisely about asserting the freedom of religion of Jehovah's Witnesses in Greece, where the Orthodox Church is constitutionally established and, in this specific case, one side effect of that establishment is a prohibition on proselytism resulting in a criminal offence.<sup>24</sup>

*De jure* establishment, however, does not automatically mean that only one religion enjoys the benefit of constitutional protection. In the UK, *de jure* establishment goes hand in hand with a constant concern regarding the offering of equal benefits to a vast array of other religions.<sup>25</sup> Conversely, *de jure* separation does not prevent altogether the possibility of *de facto* establishment or at least of a strict collaboration between the state and one church, as is the case in Italy between the state and the Vatican. This means that one religion enjoys very special benefits, while others may be treated comparatively much worse. For example, freedom of religion for Muslims in Italy does not meet with great legal protection, nor with much public enthusiasm, which results in a series of administrative burdens to prevent them from building religious places of worship.<sup>26</sup>

An important concern that one faces when determining the strength of the interest protected by religious freedom is the issue of whether or not we are talking about equal freedom for all religions, or whether one religion is treated better than others.<sup>27</sup> The main concern, though, is about the strength of the interest of religious freedom within a system of plural rights. Religious freedom in the US seems, at first glance, to represent a central concern of the Constitution, since it is placed at the very beginning of the Bill of Rights, and is the object of an elaborated set of norms. In the French DRMC, there is no article devoted to religious freedom, and religion is only mentioned *en passant*, so it is clear that its status, and the strength of the interest resulting from it, is much less important.

In the ECHR, freedom of religion has an independent place amongst derogable rights. So we know that other rights, such as freedom from torture, have a greater strength at least insofar that they are to be considered non-derogable, that is to say there is no interest that can prevail over them. *A contrario*, it is clear that there may be a number of interests that can prevail over the interest protected by freedom of religion and paragraph 2 of Art. 9 ECHR confirms this position.

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.

Freedom of religion as embedded in the ECHR has a very broad scope, since it covers thought, conscience and religion. Thus, it covers both individual and collective beliefs and behavior based on those beliefs. However, the strength of the right is limited and limitable on the ground of paragraph 2 of the same Article 9. The strength of the interest protected by freedom of religion can be limited on the basis of interests of public safety, for the protection of public order, health or morals, and finally – last but not least – for the protection of the rights and freedoms of others. Also, it is important to note at this stage, that scope and strength are linked in a relationship of inverse proportionality: the wider the scope of protection, the lesser the strength, and vice-versa. If the scope were very narrow, then one could always argue that it was a matter of preserving the very core of the right.

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<sup>24</sup> *Kokkinakis v. Greece*, Application No. 14307/88, Judgement of 25 May 1993.

<sup>25</sup> Julian Rivers, *The Law of Organized Religion. Between Establishment and Secularism*, Oxford, OUP, 2010.

<sup>26</sup> The ECtHR will soon hear the Swiss case on the administrative prohibition upon building minarets.

<sup>27</sup> Eisgruber and Sager, *Religion and the Constitution*, Harvard Univ. Press, 2007.

**Table 1: this table summarizes various possible combinations showing the protean nature of freedom of religion**

Strength/scope	Individual dimension	Collective dimension
High strength	Conscience (e.g. USA)	Group Rights (ECHR para.1)
Low strength	Thought (France DRMC)	Group Rights with limitations (ECHR para. 2)

**c. Conflicts**

The most difficult cases of limitations are those of conflicts between the right to freedom of religion and other rights. As pointed out above, and as a matter of law, freedom of religion can be limited in order to guarantee the promotion and protection of other rights. Examples of such conflicts are multiple, but we cannot discuss them all. Here, we can only sketch the contours of the problem.

Freedom of religion can conflict with other freedoms, such as for example freedom of expression. It may be argued that in plural democratic societies, people are free to express negative judgments about religious practices, including judgments that are offensive. After all, if protected expression was only positive expression, then there wouldn't be any need to proclaim such freedom. However, it can also be argued that offensive opinions concerning religious minorities can undermine the respect of the whole community for religious minorities as well as undermining the status of the affected minority within a wider society. In other words, offensive speech can easily polarize societies and create huge social tension within and outside the national territory. A common example of this scenario is the Mohammed cartoon saga.

This issue is, I feel, exacerbated all the more if we look at the case law of the ECtHR that limited artistic expression of a motion picture director in the *Otto Preminger* case on the grounds that the film in question could offend the religious majority in the Tyrol region.<sup>28</sup> The court reasoned that the interference with the applicant association's freedom of expression was prescribed by law but the seizure and forfeiture of the film were aimed at 'the protection of the rights of others', namely the right to respect for one's religious feelings, and at ensuring religious peace. The Court assessed the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, and concluded that the Austrian authorities did not overstep their margin of appreciation.<sup>29</sup> It is not clear whether the same protection would be afforded to the religious feelings of a minority, as in the case of the Mohammed cartoons.

In any event, what matters here is to highlight that we have two specific problems: first, one must determine whether the right to respect for one's religious feelings is within the scope of freedom of religion. Secondly, one must decide whether that right is strong enough to prevail over freedom of expression. Both questions are determined by the judge who can only rely on her own cultural assumptions about the nature and value of religion.

Another set of conflicts more closely concerns the very nature of freedom of religion. It is a matter of knowing whether religion as an established societal practice of institutions can discriminate against some categories of people that are normally protected against discrimination. The abstract conflict is between equality and liberty.

This conflict is particularly difficult to resolve as it may place great pressure on religions to adapt to societal standards that religion is desperately trying to resist. The conflict takes place in different settings; however, the workplace is a perfect example of a domain where the fight against

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<sup>28</sup> *Otto-Preminger-Institut v. Austria*, (13470/87) [1994] ECHR 26 (20 September 1994).

<sup>29</sup> See the next section for a definition of Margin of Appreciation.

discrimination has recently been strongly pursued, at least in Europe.<sup>30</sup> So, if religion enters the workplace, the tension between non-discrimination and liberty of religion is more visible.

There are, in fact, various tensions here. The employer may be secular, and employees may ask for the possibility to wear religious symbols;<sup>31</sup> in this case the discrimination is against religious people. The employer may also be the state or a public authority, and the employee may be in a situation in which she refuses to carry out basic public functions that are at odds with some religious precepts which are discriminatory.<sup>32</sup> Or, the employer may be religious and dismiss the employee who does not meet some religious standards.<sup>33</sup> Assuming that churches can employ whomsoever they wish, is it possible to fire people who no longer meet some religious precepts that would normally be seen as discriminatory?

In other words, when religion engages in secular employment contracts, does that render the religious workplace free from the constraints applicable to the non-religious workplace? Again, we have a problem of scope: to what extent does freedom of religion color the activities in which religion engages in? Further, there is a problem of strength: to what extent does the special protection of freedom of religion prevail over other constitutionally-entrenched interests such as non-discrimination? The answers to these questions are not written in stone, and depend heavily on very contingent and local understandings of the nature and value of religion in a discrete society. This simple fact must caution us against the temptation of acting abroad in the name of our own contingent and local convictions about the human right to freedom of religion and also explains the cautious attitude of supranational courts that display a great deference when it comes to freedom of religion.

#### ***d. Margin of appreciation***

The upshot of the previous discussion is that international institutions that adjudicate on matters of religious freedom face considerable problems deriving from the contingent and local nature of that freedom. It is clear that domestic institutions are seen as being better positioned to evaluate the attitude that the state should take vis-à-vis religion. Even when there is an established regional system of protection of human rights, the human right to freedom of religion seems to be one of the most controversial issues. European states accept interference only to a limited extent. The European Court of Human Rights began to make use of Article 9 only in 1993, that is, in the last two decades. All other rights have been adjudicated upon since the creation of the Court. It can be argued that the ECtHR is attempting to set up a marketplace of religions by countering obvious obstacles to religious pluralism, as might have been the case in *Kokkinakis* (1993) where the Greek Constitution prohibited any form of proselytism. Strasbourg intervened to lift the ban in order for other religions not to be restricted in their freedom.

The point of the marketplace of religion is to lessen the monopolistic hegemony of any one religion, especially when domination is exercised in a coercive way, i.e. through criminalization. However, it certainly does not involve the promotion of equal liberty in the sense of protecting all religions at the same level. To do so, it would have to engineer a profound change of society, which

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<sup>30</sup> In the USA, the doctrine of ministerial exception bars the possibility of applying anti-discrimination laws.

<sup>31</sup> The cases of *Eweida and Chaplin* (*Eweida and Others v. the United Kingdom* – application no. 59842/10, 15<sup>th</sup> of January 2013) deal with the restriction on wearing Christian crosses in the working environment.

<sup>32</sup> The case of *Ladele* (grouped with *Eweida and Others*) deals with the dismissal of *Ladele* following her refusal to register civil unions for homosexual people.

<sup>33</sup> Several cases have reached the ECtHR in the last 5 years. I cite here *Lombardi Vallauri*, Application No 39128/05 (20 October 2009), a professor of legal philosophy whose employment contract at the Catholic University of Milan was terminated on the grounds that the Congregation of Catholic Education refused its approval after 20 years of employment.

cannot possibly be done through law. The example of Turkey shows that even when the constitution attempts to engineer a secular change, a religious backlash is always possible.

A recent decision of the ECtHR seems to recognize a great freedom on the part of the state to decide to what extent its identity is dependent upon religious symbols.<sup>34</sup> If anything the ECtHR has taken a very deferential stance towards national sovereignty: the core principle as far as it can possibly be distilled, is that the national state is sovereign when it comes to the definition of its symbols of identity. The human right to freedom of religion is, in practice, very limited at the supranational level. Given this very clear stance, it is very hard to square this position with the idea of having a very aggressive foreign policy in the name of freedom of religion. If that were not the case, it would amount to another double standard according to which the European nations can see their sovereignty respected while non-European nations can be the object of intrusive interventions in the moralizing name of the human right to freedom of religion.

#### **4. The Status of the International Human Right to Freedom of Religion**

We have learned so far that: 1) the definition of the HRFR is deeply local and contingent 2) international judicial institutions display deference on matters of freedom of religion at best, and, at worst, there is no centralized institution that has the power to interpret this right so as to apply it in the international context. Moreover, any reason for intervention grounded on the HRFR must be weighed against the interest of any state in the respect of its national sovereignty. In light of this, we can try to make sense of the fact that the HRFR is the object of many international declarations, but in practice makes a very little difference. In other words, its status amongst other human rights is very limited as a matter of practice.

##### ***a. Freedom of religion as an international human right***

Freedom of religion features prominently in international human rights instruments. The Universal Declaration of Human rights makes it one of the core rights in Art. 18: ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.’ The UDHR is followed by a myriad of international documents that deal with freedom of religion. The International Covenant on Civil and Political Rights of 1966 reiterates the same formula used in the UDHR and adds other dispositions that cover prohibitions against discrimination on religious grounds and the right of parents to control the religious education of their children. The Covenant also offers a catch-all definition of freedom of religion that includes theistic and non-theistic religions, and is obviously largely over-inclusive, since any form of conviction can pass muster under this formula.

Perhaps the most lavish text on freedom of religion is the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981. Articles 1 and 6 protect a great panoply of actions of worship and religious behavior that are too long to recount in detail.<sup>35</sup> Finally, the 1989 Concluding Document encapsulates recommendations from the UDHR, the 1966 Covenant and the 1981 Declaration. There is hardly another human right that receives more textual recognition.

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<sup>34</sup> Grand Chamber *Lautsi v Italy*, Application no. 30814/06.

<sup>35</sup> See for a useful guide D. Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,’ *BYULR*, 2002, 217-235.

However, it must be very clear that all those documents are not legally binding on states unless they are formally incorporated into domestic law. The US, for example, has not made them legally binding. These texts have, at best, force of persuasion, but they do not attach any legal sanction to this moral force. Moreover, it is hard to pin down the exact force of the moral argument since religion is defined very broadly in the 1966 Covenant and is not defined at all in the 1981 Declaration, which brings us back to square one: domestic states dispose of considerable freedom in managing the way in which they understand and treat religion. Indeed, practice demonstrates that religious people are still very much the object of all forms of discrimination in many countries.

We observed that, in some states, freedom of religion is central to the constitutional project, while it clearly is not so in other states. It is therefore impossible to claim that freedom of religion is universally recognized as a strong right at the national level; it follows that it is impossible to claim that the HRFR should be regarded as fundamental to the international project of human rights, and for this reason can hardly be regarded as a strong ground of intervention at the international level.

International Human Rights are a widely used currency, but they only apply in a limited way. When we try to make sense of the fast-developing practice of human rights, it is possible to distinguish between human rights that have an impact on national sovereignty and those that are only a matter of noble declaration without serious sanctions or precise moral pressure attached thereto. The HRFR falls into the second category: the panoply of texts and good intentions is not followed by a precise international regime of protection that is capable of identifying with precision instances in which the right should be protected and sanctions attached to its violation.

### ***b. Foundations***

The relationship between international human rights and religion is ambivalent, beginning with the grounding of human rights. There seem to be two broad families of theories that attempt to ground human rights – one is secular and the other religious. Both secular and religious theories explain human rights as those rights we all dispose of simply by virtue of being a human being – but often seem to fail in this respect.<sup>36</sup> In other words, they defend an ethical conception of human rights according to which it does not matter whether or not human rights already make a difference; what matters is that they ought to make a difference. However, in order to make a difference, they must provide reasons that are strong enough to outweigh arguments deriving from national sovereignty, and this implies that the ethical conception of human rights should provide a minimum threshold beyond which intervention is justified.<sup>37</sup> The problem with ethical conceptions is that they are not substantive enough to provide a clear, applicable, understanding of what that minimum threshold is. Ethical conceptions of human rights may point to what is impermissible to do to religious people, but they never give a full account of what kind of violations of the HRFR warrant the limitation of national sovereignty.

Religious theories of human rights start from similar premises and argue that we should be protected simply by virtue of being human, because we have been made in the image of God, for example. However, these theories fail to explain in which way human nature can provide a non-controversial account of what needs to be protected under the name of human rights.<sup>38</sup> Other candidates are offered: Religion claims to provide a universal ethical foundation to human rights in the name of the love of God. Others claim that an ethical religious foundation can coincide with a secular one, such as, for example, brotherhood.<sup>39</sup> However, the problem does not lie with the difference

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<sup>36</sup> J. Griffin, *On Human Rights*, OUP, 2008.

<sup>37</sup> J. Raz, 'Human Rights without foundations,' in S. Besson, J. Tasioulas, *Philosophy of International Law*, OUP, 2010.

<sup>38</sup> N. Wolterstorff, *Understanding Liberal Democracy- Essays in Political Philosophy*, Oxford: OUP, 2012.

<sup>39</sup> M. Perry, *The Moreality and Law of International Human Rights*, Routledge, forthcoming 2013

between secular and religious foundations; the problem lies with the very idea of there being an ethical foundation that is universal and that explains all human rights in a univocal way. As we pointed out above, ethical foundations are unlikely to explain the emerging practice of human rights and they also seem to lack a necessary critical ‘punch’ to help improve on the practice as it evolves.

Besides secular and religious foundational theories of human rights that attempt to ground human rights in a secular or religious argument, there are theories that deny the need of foundations, which I find more promising at the level of debate and practice of human rights.<sup>40</sup> These theories do not deny that there may be ethical foundations to human rights. Rather, they claim that given the present practice of human rights, it is not possible to spell out one precise ethical foundation that illuminates the practice or provide a helpful critical standard.<sup>41</sup> The practice of human rights is evolving at a fast pace, and does not point to any conclusive argument as to the moral status of human rights. Human Rights protect important interests that receive legal protection to the extent that they are not limited by other more important interests. Human Rights have two levels, one of which is domestic; the other international.

The HRFR is more stringent at the national level for all the reasons advanced above. To a large extent, the meaning of freedom of religion is deeply dependent on the social role of religion at the national level. It is therefore a deeply contingent relationship between a society and its state, and cannot be evaluated fairly from an external standpoint. In addition to this, I agree with Raz that human rights are themselves very much dependent ‘on the contingencies of the current system of international relations.’<sup>42</sup> It is in this sense that human rights lack a foundation, that is, their practice cannot be described as being grounded in a fundamental moral concern. If you put together the contingency with regard to the relationship between religion and society in every state, and the contingency due to the place of human rights in international relations, then one comes up with a very fragile picture of the human right to freedom of religion. To this, one must add that religion as an object can hardly be defined in a way that is universal in any meaningful way. Religion seems to escape any definition, but if it can be defined, that definition relies on very specific cultural assumptions.

### *c. Freedom of religion and foreign policy*

Western states often justify military intervention on the grounds of human rights breaches without acknowledging that the understanding of a human right may be very much dependent on contingent presuppositions. There is a difference between the human right against being tortured and the human right to freedom of religion. The former can be defined and nobody would object to the need for countering violations thereto. The latter is not objectively definable and not all violations are likely to constitute grounds strong enough for intervention. That is very much the view of international judicial bodies, which, as we saw, give a considerable margin of appreciation to national authorities.

Moreover, more serious violations such as persecution and killing are covered by less controversial human rights such as the right to life or the right to freedom of expression. The point is that, unless the HRFR is precisely defined in scope and strength, it cannot add very much either at the moral or at the legal level. In addition to this, a culturally biased conception of the HRFR has many risks, starting from the highly polarizing politicization of the role of religion in politics. The EU is hardly capable of managing religious diversity within its territory; it is really unthinkable that it would erect itself as a promoter of freedom of religion worldwide.

Regional and international systems of protection of human rights present differences as to the way in which national sovereignty is respected. The organized system of European human rights allows for

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<sup>40</sup> C. Beitz, *The Idea of Human Rights*, OUP, 2011.

<sup>41</sup> J. Raz, *supra* n. 35.

<sup>42</sup> J. Raz, *supra* n. 35, p.336.

the intervention of the ECtHR as a means of sanctioning member states. Human Rights more generally are those rights that can justify international intervention against violators.<sup>43</sup> However, what is fundamentally flawed is the attempt to launch a foreign policy that attempts to promote a very skewed understanding of freedom of religion. This is something that rides roughshod over local understanding and practices.

However, the US and Europe are often very keen to use freedom of religion as a ground for intervention in foreign policy. Since the Constantinian union between the church and state in 313, religion has been used for various political endeavors, and in particular, to give a moral cloak to the intervention of the Empire. Colonialist intervention has often been justified on these grounds, and examples are multiple: think of the military intervention in Mali to counter the religious extremists. Colonial powers have supported the worst dictators in the name of freedom of religion. The Assad family, Saddam Hussein, Mubarak and Gaddafi have all been supported by the West because they could guarantee more or less secular regimes that would fight against the alleged threat of religious extremists. The US has tried to play a strong role in the area of religious freedom as a matter of international policy. The most obvious problem is that action is guided not by an international – universal – understanding of the HRFR but rather by a very domestic one. The obvious result is that foreign policy and international relations based on a very local and contingent understanding of human rights is very likely to divide rather than to unite.

## **5. Conclusion**

The HRFR has a limited place within a system of international human rights for several reasons. Firstly, the meaning of religious freedom is deeply dependent upon contingent factors, such as constitutional history, the social outlook of the society and the presence of religious minorities. Secondly, judicial actors at the supra-national level are keen to show deference to national institutions when faced with complex issues regarding freedom of religion. Thirdly, any international actor will have to factor in a strong requirement of national sovereignty when deciding whether or not to intervene on the basis of the HRFR.

There is no easy way to understand the role of religion in other societies, and there is no steadfast definition of religion for that purpose. The way in which each state concocts a cocktail of these different factors is a matter of its own national sovereignty that can hardly be interfered with without suspicion of neo-imperialism. The HRFR is not a strong concern in the system of international human rights, even if some would like to present it as such. It is one human right amongst many others, and it must always be weighed against many other rights and considerations.

It may be that the practice of human rights will come to resemble something altogether different one day. For the moment, it is not possible to claim that human rights stand for a unified and coherent ethical view at the international level. They are rights against national sovereignty; and provide a benchmark against which states can be held accountable. However, they must be used with caution, in order to avoid the worst suspicions of a new form of imperialism. This is particularly the case for the human right to freedom of religion, which is for the moment a pariah in the system of international human rights.

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<sup>43</sup> I agree with Raz, *supra* n.35, that a violation of human rights justifies international intervention of various types and not necessarily armed intervention.

**Author contacts:**

**Lorenzo Zucca**

King's College London

Strand

London WC2R 2LS

UK

Email: [lorenzo.zucca@kcl.ac.uk](mailto:lorenzo.zucca@kcl.ac.uk)