

# O wolność wyznawania religii we współczesnym świecie

Przeciwdziałanie przyczynom dyskryminacji  
i pomoc prześladowanym na przykładzie chrześcijan

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## Religious freedom: an ambiguous and reversible notion

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## Introduction

Religious freedom is a very complex concept. Divergent interpretations of religious freedom can be observed in different times, countries and instances, not only at the superficial level of its prudential application, but also at the level of its philosophical foundations. The complexity of this notion is therefore both practical and philosophical; it is the source of many ambiguities (II). These did not pose any legal difficulties in the West as long as recourse to the right to religious freedom was reduced, that is to say, during most of the second half of the twentieth century. At present; religious freedom is increasingly used against the expression of religions (I).

### I. The Reversibility of Religious Freedom

In 1948, when the Universal Declaration of Human Rights (UDHR) was adopted, the countries of the “free world” had little need for religious freedom because their societies were culturally homogenous and traumatized by the Nazi experience. Religious freedom applied to socioreligious realities that were externally almost indifferent, because the culture had managed to synthesize Catholic, Protestant, Jewish and atheist ethics into a common and ordinary morality, social customs, and even the rule of politeness requiring the avoidance of public expression of religious differences. Although society was still imbued with religion, the “common decency”, the fruit of the civilized culture of that time, made it possible to regulate the religious dimension of social relations in a flexible and respectful manner. During the second half of the 20th century, religious freedom was used mainly by free countries, *ad extra*, first against communist regimes (in particular through the Conference on Security and Co-operation in Europe, future OSCE) and then, to a lesser extent, against Islamic regimes in a second phase. It was only in 1993, more than forty years after the adoption of the European Convention on Human Rights, that the European Court of Human Rights (ECHR), for the first time, condemned a State for violation of religious freedom; in other words, there was no real problem between 1948 and the early 1990's. This is no longer the case today, where we are witnessing an increasing number of cases.

### The impact of secularisation and immigration

Since the beginning of the twenty-first century, the religious situation in Western countries has been profoundly disrupted by secularisation and immigration, thus breaking the previous religious balances

and requiring new arbitrations. These are being achieved, as best they can, within the conceptual framework of religious freedom, leading to its application *ad intra*, in the European society.

*Secularization* leads to a growing misunderstanding of the religious phenomenon among the population and facilitates the manifestation of radically anti-religious expressions, motivated by competing beliefs, and directed against morals, beliefs, symbols, traditions and religious beliefs.

*Immigration* has massively introduced a new religion, Islam, which is distinguished not only by its beliefs and customs, but also by its relationship to social life in that it refuses the separation between the religious and civil spheres, and thus the very possibility of religious freedom itself. Islam has also introduced into social life the practice of new and visible religious prescriptions, particularly in regard to clothing and food, which runs counter to local customs, particularly the social custom of keeping a low profile on one's religion in order to value what is common to citizens rather than what separates them.

Secularisation and immigration are distinct phenomena. However, it may be thought that the latter served, for a time, the former, in that immigration destroyed the Christian monopoly exercised over European society and introduced religious pluralism, which requires the exercise of a supra-religious public regulation. The latter is spontaneously conceived as having to be nonreligious, and therefore secular. Two models of society are then open to those in power: the secular model, which seeks to extend secularisation to the whole society, or the multicultural model, which seeks to respect various cultures and religions and ensure their coexistence. Thus, the pluralism caused by immigration generates either secularization or multiculturalism and requires a nonreligious public authority. Whether one opts for one or the other model, in both cases one must renounce the social monopoly of the Christian religion and culture and legally organise pluralism. The choice between one and the other model depends on the meta-political tradition of the countries, depending on whether they adhere to secularism or retain Christianity as the official religion. In the latter case, like in the United-Kingdom, respect for the various religions is more spontaneous, and maintaining the primacy of the official religion ensures the stability of the symbolic social order. In the first case, on the other hand, the various religions should be subject to the single secular ratio.

## Social Antagonism

Secularization and the identity and religious affirmation of Muslim immigration have increased the antagonism of society in religious matters.

Partly as a result of Islam, religions are increasingly negatively perceived by the secularized majority in Western societies, who are increasingly intolerant of them. They are seen as an irrational, and therefore dangerous vestige of the theological age (as August Comte put it). Fidelity to religious beliefs is perceived as a distrust of modernity, a refusal of progress, and a rejection of society, even a threat to freedoms. This perception is as paradoxical as it is unjust in that, in fact, the rupture denounced is more the result of modernity than of religions. The moderns, or post-moderns, blame religions for being opposed to them, whereas it is they who have detached themselves from the traditional and religious mindset.

As for religious people, many of them reject secularized modern culture, in that it is unworthy of man and incompatible with a life conforming to religion.

## The Overthrow

From 1945 to 1989, religion was perceived as a phenomenon of great value. It had been the cause of the persecution and extermination of entire peoples by atheist governments, but also the source from which the spirit of those peoples survived and resisted materialistic enslavement. In other words, religion was an excellent reality: an expression and guarantor of human dignity, while the State was a cold, ever-threatening monster that had to be tamed and controlled.

Today, the situation has been reversed. In the West, religions are once again perceived as a negative, destructive phenomenon that must be controlled, while the State once again becomes, in the eyes of the people, a protective power: a form of Providence that guarantees justice, peace and national unity, threatened in particular by religions. This social overthrow has resulted in particular in the use of freedom of religion not only in defence of religions, but also against them. This is made possible by the reversibility of religious freedom, which makes it a genuine freedom-Janus.

## A freedom-Janus

Religious freedom is used today not only to guarantee the freedom of believers, but also – more and more – to defend society against religions. It is the only “freedom-Janus”, serving as much to protect as to combat its object. The ambivalence of religious freedom is ancient: it is already observable in the history of this notion, and in particular in its double filiation, both in the liberal American tradition, and in the secular French one.

This ambivalence can also be observed in the content and scope of this right. Indeed, religious freedom guarantees one thing and its opposite: to believe and not to believe; to practice and not to practice. It applies as much to those who profess a religion as to those whose religion is not to have one. Freedom of religion differs from other freedoms in that its negative aspect (guaranteeing the freedom not to believe or manifest one's religion) has essential implications for the individual, far more than “not speaking” or “not associating”. While “not speaking” is a lack of speech, “not believing” is not a lack of conviction, it is a conviction, as it is only conceivable against pre-existing positive convictions. (The characteristic of the negative is to define oneself in relation to the positive). The negative content (non-belief) of the right is as important as the positive content (belief); they are both radically opposed, except in that they each express a personal conviction. However, their contents are not symmetrical, since the freedom to believe includes the freedom to manifest one's religious convictions positively, in particular through the teaching and practice of rites, while the absence of belief does not prescribe positive manifestations. Its expression – however negative – may, on the contrary, consist in the demand for the suppression of public manifestations of religious expressions, such as the presence of religious symbols. The belief of the non-believer is spontaneously exercised against the believer; whereas the believer generally ignores the incredulous, or at most tries to convert him. This internal division of religious freedom is specific to him. While freedom of expression includes the negative right to remain silent, one cannot imagine a “supporter of silence” invoking the right to freedom of expression to impose silence on society. Similarly, a misanthropist cannot invoke freedom of assembly to ban public gatherings. But an atheist can invoke religious freedom not only to refuse to practice a religion, but also to ban public religious expression.



## Religious freedom as an instrument of secularization

It was only gradually, from the 1990s onwards, that freedom of religion was used to secularise the State, first against the Orthodox countries (Greece, Bulgaria<sup>1</sup>) and then against the more Catholic countries (Italy, Spain, Ireland). This can be seen in the case law of the ECtHR. At that time, the aim was to diminish the links between the State and a national church, to condemn compulsory religious education, the fact of taking an oath on the Bible<sup>2</sup>, and the mention of religion on identity documents. Religious freedom was then invoked against the religious dimension of society, with the effect of secularizing society. Neutrality of the State was increasingly seen as exclusive, and no more inclusive, towards religious.

At present, the dynamics of secularization extend to the persons themselves, preventing them from externalizing their faith. Religion is being rejected outside a public space whose boundaries are becoming more and more extended: it is no longer only the public institutions that are emptied of religious expression, but also the street, shops and businesses. By extending in this way, the secular space gradually covers society in its whole reality.

Prohibitions on the construction of Islamic minarets<sup>3</sup> or the wearing of the Islamic veil<sup>4</sup> are, in theory, clear violations of the right to respect for religious freedom. Nevertheless, they are considered legitimate in order to preserve the historical culture of the society. This social rejection is aimed at the externalization of religion and morality, which is deemed offensive, and forces people to lock their convictions into the relativism of their subjectivity. Religious freedom would no longer guarantee the right to visibly wear a religious sign. Democratic values justify, according to the Court, the secularization of individuals. In all the Islamic veil cases before it, the Court has consistently upheld their prohibition, since the mere sight of them could be offensive to “those who do not wear them”<sup>5</sup> and could be detrimental to “living together”. In the same vein, it is now accepted that private companies can also prohibit the wearing of religious symbols by their employees<sup>6</sup>.

But this movement of secularization does not stop outside of people, it extends to their conscience and challenges the right to act in accordance with one's convictions when these are in opposition to the dominant values. The Court thus validated the dismissal for serious misconduct of a marriage counsellor and a municipal employee after they had declared themselves incapable of counselling same-sex couples and registering their civil partnership<sup>7</sup>. While acknowledging that the moral rejection of homosexuality is a religious belief, the Court held that the principle of non-discrimination justified the dismissals, without considering whether reasonable accommodation could have been found. It also refused to guarantee the freedom of conscience of a French pharmacist who had been convicted for refusing to sell an abortifacient product, considering it sufficient that he be able to express his beliefs outside his work<sup>8</sup>.

[<sup>1</sup>] See for example *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99.

[<sup>2</sup>] *Buscarini et autres c. San Marino*, n° 24645/94, 18 février 1999.

[<sup>3</sup>] *Ligue des musulmans et autres v. Switzerland*, n° 66274/09, 28/06/2011.

[<sup>4</sup>] *S.A.S. v France*, GC, n° 43835/11, 1/07/2014.

[<sup>5</sup>] *Leyla Şahin v. Turkey* [GC], 10 November 2005, § 115.

[<sup>6</sup>] CJCE, C-157/15 *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding c/ G4S Secure Solutions* et C-188/15 *Bouganoui et Association de défense des droits de l'homme (ADDH) c/ Micropole Univers*, 14 mars 2017.

[<sup>7</sup>] *Eweida et autres c. Royaume-Uni*, 15 Januar 2013, (nos 48420/10, ...).

[<sup>8</sup>] *Pichon et Sajous c. France*, n° 49853/99, 2 October 2001.

## From religious freedom to freedom of worship

The contours of the religious public sphere, i.e. of a secular sphere, are thus becoming more and more extended: it is no longer only public institutions that are emptied of religious expression, but also the street and the major media. By extending to the street, the secular sphere gradually covers the public space and, in fact, society in its entirety. Thus, the inability of the modern conception of religious freedom to grasp the social dimension of religion and the religious dimension of society in a non-negative way finds a response here in the progressive extension of secularism to the whole of social reality. This extension is contrary to the original intention of religious freedom. This concept, proclaimed in the twentieth century to protect society from State atheism, has become an instrument of social de-legitimization and privatization of religion, *i.e.* secularization. Religious freedom leads to the paradox of claiming to protect religious freedom by socially suppressing religion. It thus turns against religion by justifying – and sometimes even demanding – the obliteration of the collective religiosity that is natural to any society. The social domination of a specific religion, even when justified on historical grounds, is increasingly felt to be abusive and illegitimate in the ethereal world of pure individual conscience, which is supposedly necessary for the full exercise of religious freedom. This explains why the (social) freedom of religion is increasingly being reduced to the (intimate) freedom of faith, i.e. the freedom to have or not to have a belief in intimacy. But limiting the freedom of religion to protect the freedom of faith alone necessarily leads to the suppression of the social and cultural conditions conducive to the performance of the act of faith.

The privatization of religion, which deprives it of its social and moral dimensions, tends to reduce freedom of religion to worship alone. This limitation is accompanied by a change in the basis of this right, which is seen less as a natural right, deriving directly from respect for man's openness to transcendence, than as a secondary right, deriving from the ideal of a pluralist democratic society towards which we should strive. This is a conceptual reversal: freedom of conscience and religion no longer finds its source in the individual conscience to be exercised against the State, but is conceded by the State as tolerance on the condition that the convictions in question are themselves tolerant. This new conception ignores transcendence in favour of social cohesion.

Religion, reduced to faith and spirituality, is a form of religiosity adapted to contemporary individualistic culture because it consists of an inner movement of individual fulfilment. In religion, there is adherence and ordination of the person beyond himself; in spirituality, there is nothing of the kind: no subordination, no worship, but the expression of the interiority of the individual. But if spirituality takes the place of religion, then freedom of conscience and religion is no longer useful.

## The atheistic denial of the legitimacy of religious freedom

If religion is totally privatized, then it is no longer necessary to guarantee its free collective and public manifestation. The other existing rights would be sufficient. The right to private life, which protects the individual autonomy, along with the freedoms of opinion, expression and association would be sufficient to ensure an individual "spiritual freedom". The principle of non-discrimination would furthermore guarantee the equality of persons irrespective of their religious or philosophical beliefs<sup>9</sup>.

It is understandable that in our society, marked by secularization and relativism, freedom of conscience and religion may seem absurd and pointless: absurd because freedom would protect one's enemies, and pointless because any relationship with God would only be an illusion. More seriously, religious freedom would be unjust; it would confer privileges on religious persons that would allow

[<sup>9</sup>] See Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, Princeton University Press, 2007.

them to escape the common rules of democratic society, to refuse certain practices, to have certain days off, to persecute their fellow man, to make women feel guilty, to discriminate against homosexuals or divorced persons, etc. This criticism is ancient; it has been made by all those who wanted to fight the Church in the name of the Enlightenment of the century. However, the right to religious freedom is the only one that is openly fought against. Most of the experts in freedom of religion are, in fact, opposed to religions.

The reversibility of religious freedom finds its causes within its many ambiguities.

## II. The Ambiguities of Religious Freedom

The reversible character of religious freedom results from its fundamental ambiguity. The ambiguity concerns even the very concepts making up religious freedom, but also its foundation, and purpose. Here is an overview of those ambiguities.

### 1. Ambiguity of the concepts making up religious freedom

#### Ambiguity as to the nature of freedom

What kind of freedom is guaranteed by the right to religious freedom? Is it *freedom of indifference*, defined in relation to its subject, or *freedom of quality*, defined in relation to its object? Freedom of quality is dependent on justice and truth. This is how the Catholic Church accepts religious freedom, which “should be understood, then, not merely as immunity from coercion, but even more fundamentally as an ability to order one’s own choices in accordance with truth”<sup>10</sup>. It consists in doing what one must do. Freedom of indifference, on the other hand, is indifferent to the truth; it consists in pretending to do what one wants.

#### Ambiguity about religion

Religious freedom refers to all religions and beliefs in a single notion of “religion”, as if all religions could be reduced to a single and equal notion of religion. However, there is no legal definition of religion; the very idea of such a definition runs counter to religious freedom in that it presupposes the radical incompetence of the State in religious matters.

This notion of “religion” is difficult to use in law, as it covers a wide variety of opposing realities in terms of beliefs and practices. Equality of religions is wrongly inferred from the equal dignity of persons. Rights apply to people, not religions. People have equal rights, but “religions” do not. However, in order to treat the person equally, all religions should be treated equally as well. This is possible concerning the private dimension of religious beliefs and practices, as the State must ignore them. But it is much more difficult concerning their public manifestations. The indifferentist character of religious freedom becomes problematic when it requires equal treatment of different practices and realities. Religious freedom can then be the cause of injustices, consisting, for example, in France in prohibiting the ringing of bells in the same way as the muezzin’s call.

[<sup>10</sup>] Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2011, “Religious freedom, the path to peace”.



Even the meaning of the term religion is equivocal. In the modern tradition, religion is understood by opposition to the secular. We do not have a definition *in se* of religion, but only a negative one: is religious what is not secular. Therefore, any belief can pretend to be religious. Therefore, we can wonder if “religion” means something in itself in the secular culture.

Moreover, this opposition between religious and secular exists only in Christianity. Other religions do not distinguish between religious and secular. The notion of religion refers, from the Muslim point of view, to a set of legal norms, not a set of beliefs, and covers all aspects of the private and public life.

Maybe, it could be preferable to dispense with the notion of religion in the singular, and to prefer speaking of *religions*. The expression “freedom of religions” would then be preferable to “freedom of religion”.

### How is the phrase religious freedom articulated?

What is the primary purpose of religious freedom: is it the practice of religion, or the practice of freedom? Several combinations are possible, depending on the bias of each. It is the personal relationship to the truth that determines the understanding of religious freedom. He who believes that his religion is the truth orders his freedom in it, and vice versa. In 1948, religious freedom was based on the “liberal wager”, placing freedom first, according to which man, unconstrained, would use his freedom to identify the truth and adhere to it, whether religious or not. But is freedom enough to allow the truth to be known?

### Ambiguity in the very name of this freedom

Even the name of this freedom is not consensual and varies according to philosophical preferences and perspectives. It is sometimes called “freedom of religion”, or “religious freedom”, or “freedom of opinion”, “conscience and religion”, or “freedom of belief and religion”, or “freedom of worship”. This variation is even more pronounced in the English language than in French, as it allows the opposition between “freedom of religion” and “freedom from religion”. Similarly, the term “religious intolerance” is used to refer to both intolerance arising from religions and intolerance directed against them. There is also the difference between “religious liberty” and “religious freedom”. Liberty implies responsibility (freedom of quality); whereas freedom is closer to freedom of indifference (in the 1776 US Declaration, reference is made to liberty). Some authors have introduced the notion of “freedom within religion”, as individual freedom exercised within and against religious organizations. Each appellation for religious freedom expresses a different understanding of this right.

## 2. Ambiguities about the basis and purpose of religious freedom

This ambiguity concerns the first and final cause of religious freedom.

### Ambiguities as to the primary cause of religious liberty

Why should religion be given special protection? Is there something special about religion that justifies special protection? How does religious freedom differ from the freedom to smoke, or from sexual freedom?

It is difficult to find within religions the primary cause of the recognition of religious freedom. Religious freedom is not a religious concept, and the major religions are traditionally opposed to the idea of religious freedom. This was the case with Catholicism, which believes that man has a duty to seek the truth and to adhere to it. Islam still refuses fully this right. What does religious freedom mean for a Jew, who by birth is part of the “chosen people”? Even if he rejects God and his Covenant, he remains Jewish. What does religious freedom mean from the Muslim point of view that every person is naturally born a Muslim? What does religious freedom mean to the multitude of believers who have been converted by special grace, like St. Paul on the road to Damascus?

Perhaps it is precisely because belonging to a religion is not completely freely chosen that society must respect the link between the person and his religion, because the person is bound to it by a bond that goes beyond him.

Very often religious freedom is justified by reference to human dignity, or “transcendence” without indicating what these consist of. What is transcendent: is it the transcendence of God, of truth, of freedom, of conscience, of the soul? Is it the virtue of *pietas*, understood as the duty to respect one’s father and worship God, which is transcendent? This virtue would express the naturally religious character of man and would escape the individual will; it would be of the same nature, whatever the religion practised. For some, it is the expression of the transcendence of the human soul, for others it is an archaism and a superstitious alienation that is not worth protecting.

It is this “transcendence” that would make the civil authorities radically incompetent in religious matters, according to most authors. The civil authorities would be competent only on the material, temporal, and not the spiritual level. Religious freedom would therefore be a consequence of this transcendence and of the incompetence of civil authorities in spiritual matters.

The reference to “transcendence” is also often applied to the individual conscience as a basis for religious freedom. The individual conscience would be transcendent; it would go beyond the material and temporal order, in an ascending movement of the individual in search of truth and of its Creator. Put more simply, religious freedom would then be based on respect for the individual’s “quest” for truth. This approach presupposes that the Creator has not revealed Himself to men, that He has not made the opposite movement, downward, to bring truth to men. This approach is agnostic; it presupposes that the truth is not known, that it has not made itself known to men, or even that it would not be knowable.

Then a new paradox appears: the individual conscience should be absolutely free even though it is without object, since the truth would be unknown, even unknowable. This freedom would therefore not be ordered to truth, nor even to respect for convictions, but only to that of “research”, as a good in itself. This freedom, which is subjective, then proves to be very fragile in the face of the objective demands made by the civil authorities in the name of general interests. It only remains to hope that these objective requirements are those of “just public order”, as stated in the Declaration “*Dignitatis Humanae*” of the Second Vatican Council. If religious freedom protects a “subjective right to religion”, and not “an objective duty of religion”, it appears hence weak in the face of the objective demands of the civil authorities.

All ideas of religious common good and objective truth have disappeared.

### Ambiguity as to the ultimate cause (purpose) of religious freedom

Is “social peace” the purpose of religious freedom? Religious freedom can be seen as a compromise resulting from the experience of past religious persecutions since the wars of religion to the Second World War. It would then be a purely pragmatic freedom based on a practical agreement starting from the observation that religious persons will be religious in any case and will be ready to suffer punishment rather than not respecting their religious obligations. The difficulty with this approach

lies in the fact that justice would no longer be the criterion of this right, but the absence of conflict. This approach is not sufficient to guarantee religious freedom, because very often “peace” can only be achieved at the expense of freedom, especially freedom of expression in religious matters<sup>11</sup>. Thus, religious peace is assured in Turkey, or in Saudi Arabia, but not religious freedom. The reference to peace as the absence of conflict, and not as the tranquillity of the order as St Augustine defines it (*tranquillitas ordinis*), reinforces the power of the State, which arbitrates religious expressions according to its perception of threats to social peace. If social peace is chosen as the goal of religious freedom, it must be associated with respect for pluralism.

Is it respect for individual autonomy? Often, the protection of religious freedom is absorbed by the one of private life and individual autonomy. Such conception of religious freedom then protects the transcendence of the individual conscience. As a modality of autonomy, religious freedom is then similar to sexual freedom: it is a right to self-definition, and to the public expression of one’s personality. It consists in the freedom to seek one’s own identity. According to this approach, religion is a natural phenomenon of an intellectual nature reflecting psychological preferences. Religion is detached from truth to be only one aspect of subjectivity.

Is it freedom of opinion? This is a minimal approach, adopted by the French Declaration of the Rights of Man and of the Citizen of 1789. Such approach does not seen any specificity in the religious conviction, and in the faith, that are treated as a mere subjective opinion.

Is it equality? Religious freedom would then be aimed at avoiding the unnecessary suffering of people who, because of their religion, are at a disadvantage. This approach assumes that religion is determinism such as disability, gender or race. It is suitable for religions received naturally, by birth, such as Judaism or Islam, but not for Christianity, which implies a voluntary act of adherence. If religious freedom is aimed at ensuring the equality of persons regardless their religion from a civil point of view, then a person who has chosen a particular religion (implying special duties) should be treated as if he had not made that choice, and the consequences of his choice should be accepted by all. The irony of this approach lies in the fact that some religions do not believe in equality, but teaches that the persons not belonging to its faithful is inferior.

Is this the truth? The purpose of freedom of scientific research is to enable people to discover truth. Is it the same for religious freedom? The liberal axiom that freedom is a condition for truth is perfectly correct, without any doubt, for any truth that can be found by men’s intellectual efforts. But religion often deals with matters that are above, or outside men’s intellectual knowledge. Individual freedom is not sufficient to discover the truth about God, but only to choose between several beliefs. Moreover, there is not certainty that the majority of people will choose the “true religion”, therefore we cannot infer from religious freedom that it serve the knowledge of truth, but only the individual research. The idea that freedom leads to truth is diametrically opposed to the teaching of Christ: “Truth will set you free” (John, 8.32); freedom is a fruit of the truth, and not the inverse.

All these ambiguities make religious freedom a complex and flexible notion, which cannot be reduced to a single interpretation, and can be invoked for divergent purposes by groups with opposing conceptions of religion.

[11] *E. S. v. Austria*, N° 38450/12, 25 October 2018.

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