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**Test Case Freedom of Religion or Belief**

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*Abstract*

*The human right to religious freedom carries provocative potential. While freedom and equality with regard to matters of religious orientation and practice was – and is still being – campaigned against by religious traditionalists, the right to religious freedom is met with ever growing suspicion by liberal circles, too. This is a surprising phenomenon. Indeed, freedom of religion or belief may well be the only classical-liberal human right that arouses mixed feelings in some groups of the liberal scene, including even in the human rights community itself. This contribution describes irritations and misunderstandings with reference to recent examples from the United Nations. After that, I am going to deal with the question of the challenges for education and teaching – especially in the field of religious education – that arise from this finding.*

**1. Objections from different sides**

No doubt about it: Building bridges between religious traditions and human rights is possible; even more: it is sometimes impressive reality. This is seen in the involvement of individuals who clearly embody the successful linking of religious concerns and human rights commitment in their biography, in their actions and in their organizations.[[1]](#footnote-1) It is, however, equally evident that there are barriers to overcome and misunderstandings to clear up in the process. Religious normative traditions and human rights standards of equal freedom can not only provide reciprocal inspiration and empowerment, but frequently their relationship is kind of intricate. Again and again it happens that incompatible views clash with each other. In any case, to postulate an easy reconciliation between religious traditions and modern human rights would hardly do justice to the challenges that emerge here.

In two “test fields” the problems and tasks of critical mediation are revealed in a particularly striking manner. The first topic area can largely be circumscribed with the concept of “*gender.*” Here it is a matter of equality between men and women, the equitable acceptance of diverse sexual orientations and gender identities and similar postulates with which many religious communities (not all) still have difficulties. Ziba Mir-Hosseini clearly delineates in her contribution how reforms advocated from the perspective of the UN Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) can be successfully reinforced and advanced by a critical *relecture* of religious texts or sources from religious law.[[2]](#footnote-2)

The second test case is freedom of religion or belief. This may be astonishing, as freedom of religion or belief is, after all, about vested interests of religious communities: the religious socialization of children, the possibilities of the public presence of religious symbols and motifs, the expansion of religious infrastructure and much more. However, the specific mode in which such themes often are addressed in human rights discourse imply many a challenge for traditional religious self-understandings, since freedom of religion or belief has the structure of a universal right to freedom to which individuals of diverse orientation can lay equal claim, among them competitors, critics of religion, dissidents, schismatics, converts or adherents of feminist re-interpretations of religious sources.

That the relationship of humans to God should become a matter for legally protected personal freedom was, and is, for many believers a strange, possibly even a monstrous idea. Wouldn’t this mean that man was exalting himself over his Creator? Wouldn’t freedom of religion end in relativism and instability? Wouldn’t this threaten to undermine the religious foundation of every moral commitment?

Because of such fears the Catholic Church fiercely opposed the right to freedom of religion or belief on principle for a long time. In his notorious “Syllabus Errorum” (1864) Pope Pius IX attacked it as a false path, which would inevitably lead to the modern “pestilence of indifferentism.” Not before the Second Vatican Council did the Catholic Church completely revise its oppositional stance and produce the conciliar declaration “Dignitatis Humanae” (1965), a theologically based acknowledgement of the right to religious freedom. But traditionalist skepticism and rejection continue to exist even today. It can be found in practically all religious traditions, in Islamic or Islamist perspectives no less than in some currents of Buddhism, in Hindu fundamentalism just as in ultraconservative Christian denominations.

Nowadays, conservative or traditionalist resistance toward freedom of religion or belief hardly expresses itself in confrontative language of the kind seen in the “Syllabus Errorum”. The idea and semantics of human rights have become so internationally pervasive that a direct attack would lead to total isolation. Instead there are multiple tendencies to dilute the human right to freedom of religion and belief through the comingling with a vague rhetoric of “tolerance”, thereby weakening its potential for critically challenging existing religious or politico-religious hegemonies. This is done both on the part of some religious communities as also on the part of some governments. The latter often reduce freedom of religion from the start to a preset catalogue of permitted religious options by recognizing only “normal religious practice” (thus the diction of the People’s Republic of China), only the “divinely revealed religions” (so the wording in many Arabic countries) or only the “known religions” (a formulation from Greece). Other states grant privileges to those religions that have made “constructive contributions” to the national history and culture of their country. Conservative lobby groups from the respective hegemonic religious communities often do their part to maintain the politico-religious status quo.

Most recently, freedom of religion or belief is becoming more clearly a matter of dispute within “liberal” circles, as well. This is the real surprise. Here we probably have a unique case in which a classic liberal human right encounters skepticism, which in turn regards itself as liberal.[[3]](#footnote-3) Even within human rights organizations one occasionally encounters ambivalent feelings as soon as talk turns to freedom of religion.

Apparently, many regard religion as a haven for obscurantism, bigotry and fundamentalism and consequently as a danger for the achievements of freedom. This results in demands for the reduction of the public importance and social influence of religion. Religion, so they say, should henceforth become a strictly private matter and be systematically banned from public schools and other public institutions. A human right that expressly includes the freedom to public manifestation of religious beliefs – individual as well as communal – has no place in such an agenda. In addition it is occasionally assumed that freedom of religion and belief constitutes a “special right” for the religiously interested. Instead of equal freedom for all, it is – according to this opinion – rather a matter of clientelism and privileges.

The objections sometimes culminate in the claim that the right to freedom of religion and belief does not legitimately belong in the canon of human rights at all. During the debate on the religiously motivated circumcision of boys, which was partially conducted quite aggressively in Germany during the summer and fall of 2012 (see Bielefeldt, 2012, pp. 63-71), the author of this contribution was confronted again and again with the question of what should take priority, human rights or freedom of religion and belief. When someone formulates the question in such a manner, they have, in their own mind, already excluded freedom of religion and belief from the canon of legitimate human rights.

More and more in most recent times the question is being posed: isn’t it sufficient if all persons are respected in their private lives and they have the rights to freedom of expression, assembly and association? Shouldn’t it then be time to recall the French Revolution, which knew no special right to freedom of religion in its “Declaration of Human and Citizens’ Rights” in 1789 and instead confined itself to the clarification that in the framework of freedom of speech all views, “even those of religious kinds” may be freely expressed?[[4]](#footnote-4)

Freedom of religion, to put it pointedly as a textbook case, is thus subjected to pressure from two sides: from the side of some religious or politico-religious traditionalists who fear a culture of freedom, but also from the side of some liberals who have difficulties with the topic of religion in general. The complementary fears reinforce each other mutually. In view of the current expansion of politico-religious authoritarianism, particularly in large parts of the Islamic world, liberal (or less liberal) secularists critical of religion are finding arguments for a restrictive agenda which leaves little room in general for the viewpoints of religious freedom. Precisely through this they aggravate the suspicions of many traditionalists that western modernism will ultimately result in no less than the destruction of religious identities and the erosion of all religious loyalties. In societies which are still struggling with the heritage of postcolonial humiliation such fears can easily coalesce with ideas of conspiracy and even develop into – not seldom consciously fostered – political paranoia.

The purpose of the present contribution is to defend freedom of religion or belief, which is bindingly guaranteed as a human right in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights and other international documents.[[5]](#footnote-5) At the same time the purpose is not a mere theoretical clarification of misconceptions, which in fact abound in matters of freedom of religion, but rather the development of a consistent human rights *practice* in the implementation of the freedom of religion or belief.

An orientation is provided by the principles that support a human rights approach in general. These include: 1) normative universalism, according to which human rights apply to *all human beings* on the basis of their dignity; 2) the orientation of all human rights toward *freedom*; and finally 3) the postulate of *equality* already inherent in universalism, practically formulated in prohibitions of discrimination (see Bielefeldt, 1998). A cogent formulation of this structure is to be found in Article 1 of the Universal Declaration of Human Rights, whose much cited initial sentence reads: “All human beings are born free and equal in dignity and rights.”

**2. Privileging the “homo religious”?**

The suspicion that religiously active individuals are privileged is almost obvious in the concept of freedom of religion. For this reason, it is important to always remember that this is a shorthand formulation for a human right that is conceived far wider in scope and the full title of which is “freedom of thought, conscience, religion and belief.” The entire title is probably too long to have been preserved in daily language usage. In English it has become customary to speak of “freedom of religion or belief.” In German even formulation “Religions- und Weltanschauungsfreiheit” [freedom of religion and belief] seems too awkward to have a chance of replacing the brief “Religionsfreiheit” [freedom of religion]”, which is still commonly used.[[6]](#footnote-6) All the more reason then for clarifying explanations.

As a human right inherent in all human beings, freedom of religion or belief cannot be confined to a particular circle of religiously motivated individuals. In other words, the term is not only meant for the “homo religiosus” in the more limited sense, but is rather relevant *for all human beings*, in so far as it protects their profound, existential convictions and the accompanying ethical or ritual practices. The UN Committee in charge of monitoring the *International Covenant on Civil and Political Rights* pointed this out with desirable clarity in 1993. In a “General Comment” on Article 18 (that is on freedom of religion and belief) the Committee emphasized: “Article 18 protects theistic, non-theistic and atheist beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”[[7]](#footnote-7)

The line defining the scope of the freedom of religion and belief, then, does not run between religious and non-religious positions, but rather between the *existential convictions* that basically determinethe identity of a human being (or a group of human beings) and less existential positions. The Preamble to the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* from 1981 states that religion or belief is, for a human being, “one of the fundamental elements in his conception of life.” In the words of Paul Tillich: Religion – and the same thing can be said of belief – is what “ultimately concerns” a person (this conception is referred to by Durham & Scharffs, 2010, p. 45).

What this means in detail naturally has to be worked out again and again in dealing with concrete cases. The European Court of Human Rights in a judgment of 1982 demanded that beliefs which enjoy the protection of the human right to freedom of religion and belief must have “a certain level of cogency, seriousness, cohesion and importance”.[[8]](#footnote-8) In so doing the Court established a list of formal criteria in order to avoid a degeneration of applications of this field of human rights into triviality or arbitrariness, and at the same time to remain open for a broad variety of positions, which might claim recognition under freedom of religion or belief.

For example, a few years ago the Strasbourg Court of Human Rights vindicated the inmate of a prison in Poland, who as a vegetarian demanded meatless food and who successfully claimed this right on the basis of his conscience.[[9]](#footnote-9) Similarly, the Court recently handed down a decision that substantiated the human rights status of conscientious objectors to military service on the basis of their conscience with reference to freedom of thought, conscience, religion and beliefs.[[10]](#footnote-10) In the practice of the UN Committee in charge of monitoring the International Covenant on Political and Civil Rights, by the way, cases of conscientious objectors on the basis of conscience make up the majority of individual complaints (which are not particularly numerous) to which the Committee has declared its position with reference to Article 18.

The objection that the freedom of religion and belief ultimately means privileging religiously engaged persons can be countered for sound reasons. However, the fact remains that this human right actually does result, in the practice of many countries, in a sort of canon of predetermined religions. In Egypt these amount to three religions (Judaism, Christianity and Islam), in Indonesia, six (Islam, Hinduism, Buddhism, Catholicism, Protestantism and Confucianism), and in the People’s Republic of China, five besides Atheism (Buddhism, Taoism, Catholicism, Protestantism and Islam).[[11]](#footnote-11) The examples listed show that particularistic narrowing of the understanding and practice of the freedom of religion and beliefs continue to be widespread. Word that atheists and agnostics could claim this right has by no means gotten around everywhere, even in Europe, and finds insufficient acceptance in the legal practice of many countries. In this regard, the universalism of human rights is important insofar as it remains a critical thorn in the side of narrowed viewpoints.

**3. A “less liberal” right?**

One would think that the liberal character lies at the core of the human right to freedom of religion and belief, and indeed this finds recognition and further differentiation in the relevant international treaties. Article 18 of the *International Covenant on Civil and Political Rights* clearly states that a human being cannot be legitimately restricted in the inner realm of freedom of thought, conscience, religion and beliefs. With reference to this “forum internum” the right to freedom is thus protected absolutely. This includes the freedom of conversion.[[12]](#footnote-12) External manifestations of religion or belief (in the “forum externum”) are also protected – albeit not fully free from possible restrictions[[13]](#footnote-13) – including the practices of individuals and communities which can take place in private or public.

The human right to freedom of religion and belief thus means a *comprehensive human lright to freedom*, the right of each individual to find his or her own way in questions of religion or worldviews, to stand up for one’s own position, to join or leave a religious community, to form new associations, to practice religious rituals alone or together with others, to formulate religious criticism or to defend one’s own beliefs against such criticism, to raise children in the convictions of the family, to acquire books on religion or beliefs (also to import them from abroad) and to distribute them in society, to live life according to one’s own religious or non-religious convictions alone or together with others and to make this in publicly known (see Taylor, 2005, pp. 203ff.). Since rights to freedom are defined by leaving it up to the human individuals when and how they actually make use of their freedom, this means that in addition to the “positive” right to freedom of religion or belief, there is necessarily also “negative” flipside of that freedom. This includes the right to refrain from engaging in religion or beliefs, *not* to become involved, *not* to be religious, *not* to join a religious community, etc. Both aspects belong together, like the two sides of a coin.

At the same time the idea stubbornly persists that freedom of religion is somehow a “less liberal” right. In a major way the debates and positionings in regard to the topic of prohibition of blasphemy probably have contributed to this; in this context the right to freedom of religion or belief has repeatedly been functionalized as an alleged counter-right to the right to freedom of expression, which itself is often appreciated as the epitome of a liberal right. Even in some judgments of the European Court of Human Rights such antagonism was constructed. The notorious example is the judgment of the Otto Preminger Institute versus Austria. At stake was the film “Das Liebeskonzil” [The Council of Love], which the Austrian authorities had removed from circulation because they saw it as an attack against the sentiment of the Christian population. In its judgment of September 20, 1994 the Strasbourg Court absolved Austria from the accusation of violating freedom of expression, because it viewed the protection of religious sentiment as a valid reason for the restriction of this freedom.[[14]](#footnote-14) As background of their judgment, the majority of the judges assumed a basic conflict between freedom of expression and freedom of religion or belief, whereby the latter allegedly also entailed the protection of religious sentiment. Precisely this, however, was criticized by three of the Strasbourg judges. In their dissenting opinion they emphasized that the European Convention for Human Rights did not contain a right to protection of religious sentiments and that such a right could principally not be derived from the freedom of religion or belief.[[15]](#footnote-15)

Over a period of more than ten years there was a similar constellation of conflicts in the United Nations, namely in the fierce debates over “combating defamation of religions”, which took place in the UN Human Rights Council (respectively, in the predecessor institution until 2006, the Commission on Human Rights) as well as in the UN General Assembly. Resolutions on this very topic were regularly proposed by the Organization of Islamic Cooperation (OIC), an organization of states with 57 member countries, and always found a majority[[16]](#footnote-16) (see the criticism in Blitt, 2011, pp. 121-211). At the same time, these initatives met with strong criticism and usually invoked unanimous rejection by western countries. The peak of this confrontation was the clash over the Danish caricatures of Mohammed in the years 2005 and 2006, which triggered sensitive reactions of many Muslims around the world. The outrage, which partially continues even today, may be understandable given the provocative and insulting character of some of the caricatures. At the same time, the resolutions on “combating defamation of religions”, on a closer look, prove to be highly problematical. For they convey the impression that religions *per se* can claim legal protection against any infringements on their reputation – an idea completely at odds with concept of human rights. In addition, the resolutions, with their call for restrictive measures, carry authoritarian overtones that can hardly be ignored. Opponents rightly fear that the ultimate consequences could be that an anti-blasphemy legislation of the type in Pakistan, where vaguely defined infringements can even incur the death penalty (see Freedom House, 2010, pp. 69-87) might be superficially “justified” within the semantics of human rights, which would be utterly absurd.

In fact, in the resolutions on combating defamation of religions, the human rights approach is systematically replaced by a kind of “protection of the honor” of religions – more precisely, for certain religions and in particular for Islam. From the viewpoint of human rights this is a false path (see Temperman, 2008, pp. 485-516). To invoke freedom of religion or belief for the purpose of the authoritarian combat of so-called defamation of religions ultimately means denying its very character as a human right to freedom. Among the achievements of Asma Jahangir, UN Special Rapporteur on freedom of religion or belief from 2004 to 2010, was the systematic objection to such attempts at an anti-liberal reinterpretation of religious freedom.[[17]](#footnote-17) At the peak of the clash over the Danish Mohammed caricatures she made it clear that freedom of religion or belief does not include the right to be spared religious criticism. Instead of acting as a brake against the use of the freedom of expression, the freedom of religion or belief, with its protection of the components of intellectual and communicative freedom actually, reveals a positive proximity to the freedom of expression, as pointed out by Jahangir. Whosoever attempts to establish the freedom of religion or belief as a systematic counter-authority against the freedom of expression, she argued, not only creates an ideological support for excessive restriction of it, but above all obscures the very human rights significance of the right to freedom of religion or belief itself. Jahangir thus took a strong stance for a consistent interpretation of the freedom of religion or belief as a universal right to freedom.

In March 2011, the Organization of Islamic Cooperation (OIC) declined, for the first time in a long while, to table a draft resolution on “combating defamation of religions.” Several players – among them the UN High Commissioner for Human Rights, Navi Pillay, the General Secretary of the OIC, Ekmeleddin Ihsanoglu, as well as US Foreign Secretary Hilary Clinton – had endeavored in advance to overcome the old confrontation, which had hardened into an empty ritual, and to get the debate moving again.[[18]](#footnote-18) For this purpose a new and more productive topic wording was introduced, namely: combating religiously based intolerance and stigmatization. The resolution submitted by the OIC in March 2011 to the UN Human Rights Council bears the complicated title: “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons based on religion or belief.” It was approved by consensus.[[19]](#footnote-19) This Resolution 16/18 of the Human Rights Council has since functioned as a reference document for relevant debates in the United Nations. While the earlier resolutions on defamation of religions created the impression that religions as such (or at least some of them) needed to be placed under legal protection, Resolution 16/18 refers to human beings as having rights against stigmatization, discrimination and massive forms of hate speech. The title of the resolution hence lists “persons” as the subject of protection. This is a crucial difference.

In spite of all proximity between freedom of expression and freedom of religion, this does not, from the outset, exclude collisions between human rights concerns in the realm of both rights. When polemic attacks against certain religions or beliefs and their followers arise in the name of freedom of expression and reach such a furor that they threaten to poison social relations or even to create an atmosphere of intimidation in which people no longer dare to bear public witness to their convictions or to practice their faith visibly, then this can lead to infringements on freedom of religion and belief. In such cases, to combat this and take remedial action is a human rights imperative. For this reason, the UN Office of High Commissioner for Human Rights has been conducting debates over the last years about what measures should be taken against incitement to ethnic and religious hate. The central outcome of several workshops on this topic conducted on all the continents and resulting in a detailed plan of action in October 2012 (the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”[[20]](#footnote-20)) consists of the insight that religiously based forms of “hate speech” are best countered by “*more speech*” rather than restrictions. Above all, media-related and civil-social counter-initiatives are called for, especially rectifications and wide-reaching public solidarity action, while legal penalties such as sanctions or other restrictive measures can only be justified in extreme cases and must always be connected with high and clearly defined thresholds.

Even in acute cases of collision between freedom of religion and freedom of expression the most important form of remediation is again the targeted use of the freedom of expression and other rights to communicative freedom. Alone for this reason it would be pointless to set up an abstract contradiction between freedom of religion and freedom of expression. On the contrary, both rights can mutually support each other: Just as freedom of religion or belief can only flourish where people have the option of speaking publically about their grievances, so also in return freedom of speech presupposes respect for everyone’s freedom to hold and develop identity-shaping convictions, as individuals and in community with others. In this interrelatedness, however, it is apparent that freedom of religion or belief, when understood correctly, is just as genuinely “liberal” as freedom of expression.

**4. Ambivalence in the concept of secularity**

Just how strong skeptical reservations against freedom of religion have become even in our latitudes lately was shown by the recent discussion over ritual circumcision of boys triggered by the ruling of the Cologne District Court on May 7, 2012.[[21]](#footnote-21) No doubt it was a difficult topic which involved reconciling differing perspectives. The main opponents of circumcision generally left little room for freedom of religion and belief. Not rarely they even gave the impression that they regarded this human right as a relict of pre-modern times that has no right to further existence in a “secular” modern legal system. The circumcision debate is a good example for the ambivalence attached to the concept of secularity and its derivatives from the very beginning and continuing to the present day.

The idea that freedom of religion and belief stands in a tense relationship to the secular legal order of the state, however, proves after a closer look to be a misunderstanding. On the contrary, the secularity of the state and jurisprudence finds a normative foundation in this human right. If the state takes its obligation to freedom of religion and belief seriously, including its inherent claims to equality, then the state cannot identify with one certain tradition of religion or belief at the cost of the followers of another religion or belief. The resulting “*non-identification”* thus is a consequence of the human rights structural principle of “*non-discrimination*” (see similarly: Oebecke, 2000, pp. 287-327, here p. 292). It is at the same time an expression of respect for the human freedom to orient oneself in questions of religion and belief. Thus, in a human rights perspective, the meaning of the neutrality principle can be more precisely qualified through the formula of “*respectful non-identification*.”

The basic principle of “*respectful non-identification*” forms the deep grammar of the secular constitutional state, which from this foundation proves to be both modest and yet demanding. The modesty manifests itself in the deliberated self-restriction concerning the aspirations of the state: The state is neither instrument of salvation nor the authority for a comprehensive orientation of meaning. As a secular, “purely worldly” state it is not at the service of the “truth” of a worldview, a religious belief or a religious law. Rather it leaves the search for meaning and for comprehensive truth to human beings, who are responsible for finding their own path in life in freedom, either as individuals or in community with others. At the same time, it is precisely in this option for human freedom that the positive normative demand can be found, which the secular constitutional state formulates and for which it stands. Because enabling equal freedom for everyone, is the *fundamental political-legal responsibility* of the state bound by human rights. This responsibility ultimately points to the due respect for the dignity of every human being as the basic foundation of any legal order. Respectful non-identification can well coexist with formal cooperation between the state and religious communities. It is not a matter of an abstract and ultimately even completely unrealistic lack of relationship between state and religious or worldview communities, as has occasionally be proposed, but rather a matter of *fairness* in such cooperative relationships, which should be arranged in a way that the state does not take sides unilaterally, but rather engages the plurality of our society in an affirmative way.

As a matter of fact, however, by no means are all countries that call themselves “secular” guided by the normative principle of respectful non-identification as understood above. On the contrary, the wide semantic field of secularity manifests a deep ambiguity, which often gives rise to confusion and misunderstanding (see Lübbe, 1965).[[22]](#footnote-22) Both the past and present offer all kinds of examples of confessional communities with comprehensive worldview claims that partly use the notion of secular for describing their identity. A classical example was the “Secular Society”, for which its founder, George Hollyoake, in the mid-19th century devised the semi-religious slogan “Science is the available providence of man” (see Holyoake, 1896, p. 35). In Germany, as well, secular communities of belief arose at the end of the 19th century, among them the “Deutsche Gesellschaft für Ethische Kultur” [the German Society for Ethical Culture] founded by Friedrich Jodl and Ferdinand Tönnies (see Lübbe, 1965, p. 42). The extent to which a secular worldview can take on religious language can be illustrated by the “Monistic Sunday Sermons” published by the Monist League connected with Ernst Haeckel (see Lübbe, 1965, p. 51).

If ideological secularism should try to take over state power, this could lead to new varieties of “confessional states”. One example for such aspirations is offered by the mid-nineteenth century scientific religion designed by Auguste Comtes, who called it the “religion de l’humanité”. Its “sociocratic” claim is constructed in complete analogy to the theocratic ideas of Joseph de Maistres and other philosophers of the Catholic counter-revolution, a position which Comte opposed, but for which he also felt open admiration (see Comte, 1967, Vol. 3, p. 605). In his vision of progress, scientifically educated sociologists were to take the place of the traditional Christian clergy. As “priests of humanity” in alliance with the emerging powers of the economy and industry they were to shape public life and to bind the state with their confession based on “love, order and progress” (see Comte, 1967, Vol. 1, p. 321ff.). The nature of Comte’s vision was the concept of a secularist confessional state which uses all the means at its disposal in order to help the belief in science and progress achieve hegemonial validity.

It is not surprising, in view of this, that “secular” positioning up to the present day often sounds ambiguous, whereby the task arises to listen exactly and urge explanations. However, the prerequisite for this to succeed is a clear categorical differentiation between doctrinal secularism on the one hand, as it is often found today,[[23]](#footnote-23) and constitutional secularity. Constitutional secularity is a matter of the fairness principle that stands *in the service* of equal implementation of freedom of religion or belief for all. It is not an end in itself or value *per se*, but rather has the status of a second order principle that only derives its significance from the normative human right to freedom of religion and belief which takes precedence over it. Similarly, Martha Nussbaum has argued: “The idea that there should be a separation of church and state is mentioned a lot, but I argue that it should be seen as posterior to the ideas of equality and liberty.” (Nussbaum 2008, p. 20). From this standpoint, the difference between constitutional secularity and a “secularist” confessional state (in the doctrinal understanding of secularism) is not just a gradual one, but rather one of principle; we can even see it as its systematic opposite.

This clarification is, not least, important for the criticism of state religions. In the Islamic world the model of state religion – typically in connection with a constitutionally based special status for the Islamic Sharia – is still widespread and is the rule among Arab countries (see Stahnke & Blitt, 2005, pp. 947-1077). But also in Europe and South Asia there are a number of countries with official religions (see Robbers, 2003, pp. 139-163). Moreover, in addition to formal state religions there are different varieties of state privileging for certain religions that can take the form of quasi state religions, for instance justified by their impact on the historical and cultural identity of the country. That this might create problems – of varying nature in detail – for guaranteeing freedom of religion and belief without discrimination to all, is an assumption confirmed by a number of concrete cases. Although state religions and other varieties of official status of certain religions are not prohibited by international law, those countries which maintain such constructs are at least under a heavier burden of proving that this does not lead to a *de facto* or even *de jure* discrimination and unequal treatment of the followers of other religions or beliefs.[[24]](#footnote-24)

Now, apologists for state religions and other official privileging like to counter-argue that the prohibition of discrimination in the form of unequal treatment is from the outset illusionary. Every country, as we hear the allegation again and again, is unavoidably based on a leading belief: in secular countries this is then “secularism”, which in itself allegedly represents a post-religious comprehensive worldview. The difference between a state that is officially religious – for instance an Islamic state – and a secular state rests alone on the fact that the former is frank about its affiliation, whereas the latter is more covert about it. However, this motif – that has already been used by Carl Schmitt and his disciples (see Schmitt, 1990) – is nothing more than a dialectical sleight of hand trick: the conscious *non-identification* with religion is tacitly turned into a state *identification with non-religion* (or doctrinal secularism). Every secular state appears accordingly as a quasi- or post-religious variant of a confessional state in which atheists or agnostics set the political tone, while those religiously engaged in such a state are allegedly bound to suffer discrimination.

A way out of this supposed dilemma is only possible on the basis of a categorical differentiation between constitutional secularity based on freedom of religion or belief on the one hand, and the different varieties of doctrinal secularism – which possibly aim for political influence or even the occupation of state power – on the other. One must admit that it is not easy to relate this conceptual differentiation empirically to a complex reality, in which religious, philosophical, cultural and political factors occur in a practically indissoluble commixture. Yet, whoever draws the consequence of such phenomenal ambiguity by forgoing a categorical defense of the secular rule of law state altogether, entirely gives up the opportunity to present a fundamental alternative to state discrimination on the basis of religion or belief at all.

**5. Advocacy for a consistent human rights perspective**

That freedom of religion and belief should evoke skeptical queries is hardly a new experience. What is relatively new, however, is that critical questions are being put forward not only from the side of conservatives, but increasingly from liberal or secularist perspectives. This leads to challenges in communicating with different target groups (more details in: Bielefeldt, 2013, pp. 36-69).

Religious conservatives, who have a hard time with consistent freedom of religion and belief, can be assumed to realize that living together in our irreversibly pluralistic societies can only succeed when the state guarantees all persons their liberty rights. The names of God are multiple and in some religious traditions God is even absent. Prophetic religions that have fought about the rank of the prophets among one another for centuries exist next to religions that know nothing of prophets, and what is sacred to one is possibly blasphemous or completely incomprehensible to another. To place certain religious traditions, identities, practices, laws and institutions as such under the guardianship of the state and possibly protect them against questioning and competition would inevitably be misguided. The consequences would be discrimination, marginalization, societal division and all the accompanying turmoil. For this reason, the subjects of legal rights in the field of religions and belief can only be *human beings* in their dignity, freedom and equality. Human rights protection does not apply to the truth of religion, but solely to the free search of humankind for truth, not in the sacredness of divine law, but rather in the personal and communal freedom to live a religious life, not in the pre-eminence of one true church, but in the opportunity for public manifestation of a multitude of beliefs by the believers themselves. The view can no longer be taken for granted that for many people religious orientations and practices have existential significance, and that a free society should make room for them, not just in the private sphere, but also in the public one (see Habermas, 2005, pp. 119-154). The pragmatic anthropocentrism of state upheld secular jurisprudence must not be mistaken for an doctrinal orientation of the law towards an exclusively anthropocentric worldview, which at the utmost manages to *tolerate* religious convictions, rituals and expression. In the debate over the circumcision of boys in Germany there was a partial outbreak of sarcastic, contemptuous tones aimed at persons with basic religious beliefs that was difficult to bear. This made it clear how important it is to continue to validate the liberality of a pluralistic society, to which the human right of freedom of religion contributes, and to counter the doctrinal rigidity found in certain forms of liberalism or secularism.

In the end it must be a matter of aligning the understanding and practice of freedom of religion and belief consistently with the structural principles of universalism, freedom and equality. For clientelistic narrowings, such as anti-liberal and even more, anti-egalitarian re-interpretations of religious and philosophical views are to be found in many varieties. The character of religious freedom as part a universalist human rights agenda is being undermined or even distorted into authoritarianism by projects to combat “defamation of religions”, by politically motivated demands for the exclusive recognition of a certain religion or by projects to banish religions from public life. Also, the demand for an equitable fulfillment of this human right through a secular rule of law state that is neutral towards religion and belief continually meets with principal resistance or is rejected from the outset as meaningless. There are many good reasons, in this respect, for concrete criticism of misunderstandings and an often inconsistent practice of the freedom of religion and belief. However, this criticism should be aimed at *reinforcing* the importance of this human right. Because freedom of religion and belief not only still forms an indispensable element in human rights; without respect for the religious and philosophical beliefs of human beings and the individual and communal practices which they engender, the overall claim of human rights would collapse.

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1. Among the best-known examples are Desmond Tutu and Shirin Ebadin. [↑](#footnote-ref-1)
2. See the contribution by Ziba Mir-Hosseini in this volume. [↑](#footnote-ref-2)
3. This points to the fact that quite different tendencies and movements are behind the label “liberal.” This is similarly true of the concepts “conservative” and “traditionalist.” The present article does not aim to analyze these differences. [↑](#footnote-ref-3)
4. Article 10 of the Declaration of Human and Civil Rights from August 1789 states, “No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.” [↑](#footnote-ref-4)
5. Freedom of religion is found on a global dimension in Article 18 of the *Universal Declaration of* *Human Rights* of 1948, as well as in Article 18 of the *International Covenant on Civil and Political Rights* of 1966. In November of 1981 the United Nations additionally adopted the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.* This is supplemented by regional civil guarantees, such as Article 9 of the *European Convention on Human Rights* of 1950, as well as guarantees in individual state constitutions. [↑](#footnote-ref-5)
6. In the following comments I will occasionally use the shorter formula and occasionally the longer designation. [↑](#footnote-ref-6)
7. UN Human Rights Committee, General Comment Nr. 22, Section 2. [↑](#footnote-ref-7)
8. EGMR to Campbell & Cosans vs. the United Kingdom (appl. 7511/76 & 7743/76) from February 25, 1982. [↑](#footnote-ref-8)
9. See EGMR on Jakobski vs. Poland (appl. 18429/06) from December 7, 2010. [↑](#footnote-ref-9)
10. See EGMR on Bayatyan vs. Armenia (appl. 23459/03) of July 7, 2011. [↑](#footnote-ref-10)
11. The listed examples were taken from: U.S. Department of State, 2013 Annual Report on International Religious Freedom, accessed at [www.state/gov./g/drl/rls/irf](http://www.state/gov./g/drl/rls/irf). [↑](#footnote-ref-11)
12. UN Human Rights Committee, General Comment No. 22, Section 5: “The Committee observes that the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.” See also the Annual Report of the General Assembly from September 9, 2012, which, in my function as Special Rapporteur for freedom of religion or belief, I treated under the topic “the right to conversion as part of freedom of religion or belief.” [↑](#footnote-ref-12)
13. The limits of legitimate restrictions of freedom of religion in the *forum externum* are to be found, for example, in Article 18, paragraph 3 of the International Convention for Civil and Political Rights. [↑](#footnote-ref-13)
14. The decisive passage reads: “The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognizance of such view, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.” EGMR Otto Preminger Institut vs. Austria (appl. 1347/87) from September 20, 1994, Section 55. [↑](#footnote-ref-14)
15. See EGMR, Otto Preminger Institut vs. Austria, Joint Dissenting Opinion of the Judges Palm, Pekkanen and Makardzyk, Section 6: “The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.” [↑](#footnote-ref-15)
16. See Commission on Human Rights resolutions 1999/82, 2000/84, 2001/4, 2002/9, 2003/4, 2004/6, 2005/3; General Assembly resolutions 60/150, 61/164, 62/154, 63/171, 64/156, 65/224; Human Rights Council resolutions 4/9, 7/19, 10/22, 13/16. [↑](#footnote-ref-16)
17. See Report of the Special Rapporteur on freedom of religion and belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, Implementation of General Assembly Resolution 60/251 of March 15, 2006 entitled “Human Rights Council”, A/HRC/2/1., p. 10. [↑](#footnote-ref-17)
18. In addition Clinton and Isanoglu initiated a series of conferences which ran under the heading “Istanbul Process”. [↑](#footnote-ref-18)
19. See Human Rights Council resolution 16/18 from March 24, 2011. [↑](#footnote-ref-19)
20. See A/HRC/22/17/Add.4 appendix. [↑](#footnote-ref-20)
21. See Landgericht Köln, Aktenzeichen 151 Ns 169/11. The decision from Mai 7, 2012 did not become known in the wider public until the end of June. [↑](#footnote-ref-21)
22. Similarly ambiguous is the word field ‘laicism’. On this, see Jocelyn Maclure & Charles Taylor (2011), Secularism and Freedom of Conscience. Cambridge, MA: Harvard University Press. Maclure and Taylor in this book argue for an “open secularism”, which they sharply distinguish from ‘culture war’ or ideological variants of secularism. [↑](#footnote-ref-22)
23. Characteristic components of an ideological secularism can be detected in this country in the environment of the Giordano-Bruno-Stiftung. [↑](#footnote-ref-23)
24. See UN Human Rights Committee, General Comment No. 22, Section 9: “The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.” [↑](#footnote-ref-24)