



COMMENT

What Does the Future Hold for Freedom of Religion and Belief?

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Let me begin with a methodological remark. What I can offer is a European perspective of religious freedom in an intercultural world. The horizon of this ‘Comment’ piece will be global, but the point of view is inevitably European. Only God, if he exists, can have a regard from above: our regard is always from within.

I will start with the war in Ukraine, not because it is being fought in Europe, or because it is in itself an event of extraordinary importance, but because it has the potential to accelerate the confrontation between East and West to which the history of recent decades seems to be leading us. Our future could be dominated by a showdown between a part of Asia on the one hand and the United States and Europe on the other, with Africa as the battleground. Russia is now politically aligned with Asia:² sooner or later it will be back with us, because Russia culturally is European, but preventing it from falling into the arms of China has been a goal that unfortunately the European Union was unable to achieve.

If this confrontation happens, its outcome will have important consequences for the right to religious freedom.

The modern origin of this right is traced back to two revolutions, the French and American ones. The first nationalised the right of religious freedom,

1 This Comment piece is based substantially on a paper delivered by the author at the sixth ICLARS conference, which was convened in Córdoba between 19 and 21 September 2022.

2 See D Lewis, ‘Strategic Culture and Russia’s ‘Pivot to the East:’ Russia, China, and “Greater Eurasia”’, *Marshall Center Security Insight*, no. 34, July 2019, available at: <<https://www.marshallcenter.org/en/publications/security-insights/strategic-culture-and-russias-pivot-east-russia-china-and-greater-eurasia-o>>, accessed 25 January 2023.

affirming that it is the national state's duty to guarantee it to all on an equal footing and irrespective of their religion or belief; the second, with the free exercise clause, emphasised that each individual can assert this right against other citizens, the state, and the Churches themselves. Taken together, these two revolutions connoted religious freedom as a secular and primarily individual right, setting the stage for a conception that was largely incorporated into the international conventions signed after World War II.³

Africa and Asia have not known these two revolutions, or, to be more precise, have known them as a product of foreign import, linked largely to the experience of colonisation by European powers. This explains why the latter found it difficult to establish the Western concept of religious freedom. The experience of the long British domination of India is paradigmatic: in more than three centuries, Great Britain failed to introduce the Western notion of religious freedom in India, and when it realised the futility of persisting in this attempt, it wisely preferred to give up. All this is not to say that the contemporary constitutional charters of these countries do not affirm the right to religious freedom in similar terms to the constitutions of Western countries. But the social fabric and legal traditions of these States remain different. One only has to look at many African countries to see that both the idea of nation-state and the idea of rights of the individual as independent from those of the community, i.e., the two cornerstones on which the notion of religious freedom in the West is founded, are recent and in some cases not fully accepted and established.⁴

At this point it is necessary to introduce another element, the religious tradition of each country. Generally speaking, non-Western countries where Christianity prevails have had less resistance to embracing the Western conception of religious freedom than those with Islamic or Hindu traditions. This is probably because the secular state was born on Christian soil and Christianity provides a more favourable humus for it than other religions.⁵ That discussion is beyond the scope of this Comment, but I simply point out, for these purposes, its importance.

Instead, my focus here is to identify what the elements of the Western model of religious freedom are that, while rooted in a specific historical, cultural and religious context, may have a significance that transcends the boundaries of that context, and thus play a role in an intercultural society.⁶

3 On the two revolutions that lie at the origin of the modern conception of religious freedom, see H Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (New York, 2014).

4 About the 'exportation' of the Western notion of freedom of religion to African and Asia countries, see S Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, 2016).

5 See further S Ferrari, 'The Christian Roots of the Secular State', in R Provost (ed), *Mapping the Legal Boundaries of Belonging. Religion and Multiculturalism from Israel to Canada* (Oxford, 2014), 25–40.

6 P Costas, *The Post-Secular City* (Paderborn, 2022), provides interesting insights on the contribution that the West can offer to intercultural dialogue.

The first contribution that the West could offer in this intercultural dialogue is the primacy of the individual conscience, which implies the right to adopt and change a religion or to have no religion at all.⁷ I am aware that for many religions apostasy is a crime, but I am deeply convinced that nobody should be placed in the alternative of abandoning his or her religion or being killed, of converting to the religion of the conqueror or having to emigrate, of educating the children in a particular faith or running the risk that they will be taken away, of worshipping a God when one believes that no God exists. Unfortunately, we have tragically seen, not so many years ago, that this principle is far from being fulfilled.

The second contribution that the West can make in this dialogue with other regions of the world concerns the notion of citizenship and, more precisely, the idea that a core of civil and political rights is due to all citizens in equal measure regardless of the religion they profess. The deepest root of this idea goes back to the Christian distinction between God and Caesar, the closest to the liberal tradition from Locke onwards. These two roots join in the assertion that the fact of professing or not professing a religion does not, and must not, have any influence on the exercise of other rights, that of marrying and creating a family for example, or that of taking part in the political life of a country. This is not the case in all parts of the world and on this point the cultural and religious tradition of the West has something to say.

The third contribution concerns the notion of secular State. The role of the secular State today is to guarantee the inclusion in the political and social fabric of a country and again on an equal footing, of people who profess different religions or no religion at all. This implies, on the one hand, recognising the significance and value of religious diversity in the public sphere and, on the other, guaranteeing the existence of non-religious forms of participation in public life. An example clarifies what I mean: the secular character of the State is betrayed both if only a religious marriage can be valid for the State legal order, as is the case in some non-Western countries, and if, as it happens in some Western countries, only a civil marriage has legal value and religious marriages are not recognised even when they do not conflict with the State legal order. In a system of sustainable legal pluralism, it goes without saying that this principle has a general scope and should be applied in other fields as well, that of education, for example, or health care.

7 See, for example, Article 9§1 of the European Convention on Human Rights, which provides that '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.' [emphasis added].

By contrast, the strategy prevailing in Western countries appears less convincing when it comes to managing diversity.⁸ Here it is helpful to widen our horizon and consider the models existing in other parts of the world. In the West we have been very careful to guarantee the right to be equal through effective anti-discrimination legislation; we have been less good at guaranteeing the right to be different through measures aimed at promoting diverse religious identities, especially those of minorities. In this area, the right to religious freedom has revealed some weaknesses and has been too easily restricted not only because of the recent health or security crises but also because of over-extensive interpretations of the notion of discrimination. A suggestion about how to address these shortcomings comes from the field of minority rights studies. When it comes to ensuring the rights of religious minorities, minority rights scholars emphasise the need to protect and promote their identity and not just their freedom.⁹ Promoting identity is a broader and more engaging concept than ensuring freedom as it implies that the existence of different identities is an asset to society as a whole, because democracy is not possible without pluralism. I believe it is possible to combine both, the protection of religious freedom, which is the ‘mission’ of law and religion scholars, with the promotion of religious identities, which is the focus of minority rights scholars. These two notions complement and reinforce each other. One and the other – religious freedom and the promotion of religious identities – would have nothing but to gain in their dialogue.

These are the strong and weak points of the Western approach to freedom of religion or belief, what the West could bring to an intercultural dialogue and what the West could learn from it. Nobody knows what the outcome of this dialogue will be, but at the end of it we shall not be the same. Being aware of this is the best way to arrive prepared for our future.

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8 See R Cover, ‘Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4.

9 See N Ghanea, ‘Are Religious Minorities Really Minorities?’ (2012) 1 *Oxford Journal of Law and Religion* 57–79.