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What should freedom of religion become?

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Chapter 1

What Should Freedom of Religion Become?[1]

Nehal Bhuta

I.

'Secularism', 'secularization' and 'freedom of religion' (and or of conscience) are concepts that are today not only polemical – shaped and deployed in the context of concrete disputations and dueling political projects[2] – but also essentially contested in Gallie's well-known definition.[3] As historical phenomena, secularism and freedom of religion were not co-original, but stood in a dialectical historical relationship. The secularization of the state in the first instance entailed the substitution of a theological judgment with a political one: that the unity presupposed by a political order was now to be found in the unity of public law under an earthly sovereign power pursuing this-worldly peace and prosperity, not in the unity of a religious truth guaranteeing salvation in the next world. As Dumont points out, this is a transformed and transvalued theological structure: the modern state was a 'transformed Church' in so far as the medieval Church after Gregory insisted not on distinct-yet-dependent spiritual and temporal realities, but on a hierarchical spiritual *unity* in which the spiritual took precedence over temporal *functions*.[4] The Gregorian Church, with its doctrine of the Pope's infallibility and *plenitudo potestatis*, '*was* the State [in the Middle Ages]; … the civil authority was merely the police department of the Church. …'[5]

Unity as the *sine qua non* of omnipotence was the *modus* of political authority inherited by the civil state,[6] and for this reason among others the Reformation at first inaugurated a thorough-going *confessionalization* and forcible *homogenization* of religion within sovereign territories, not the pluralization and toleration of confessional belief: *cuius regio, cuius religio* (declared by the 1555 Peace of Augsburg) ratified the seizure of Church property by Protestant princes (the first true instance of 'secularization' – the transfer to earthly power of something previously in the domain of

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[2] Grasping such concepts as polemical is to think of them as 'focused on a specific conflict and are bound to a concrete situation … Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state [and I would add secularism and religious freedom – NB] and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted or negated by such a term.' C. Schmitt, *The Concept of the Political* (2nd ed., 2007), at 30-31. See also Quentin Skinner's reflections on the impulse driving his methods in the history of political thought: 'Our concepts form part of what we bring to the world in our efforts to make sense of it. The shifting conceptualizations to which this process gives rise constitute the very stuff of ideological debate … [I] … assume that we need to treat our normative concepts less as statements about the world than as tools and weapons of ideological debate.' Skinner, 'Retrospect: Studying Rhetoric and Conceptual Change' in Q. Skinner, *Visions of Politics: Volume 1, Regarding Method*, (2002) 175, at 176-177.
[3] Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society, New Series* (1955-1956), 167, at 167.
[4] A. Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* (1986), at 50-51. Böckenförde of course makes a cognate observation in his famous 1964 essay on 'The Rise of the State as a Process of Secularization,' where he argues the Investiture Controversy resulted in the construction of the Church as 'an autonomous, legally self-constituting, and sacramentally hierarchical institution' to which the emperor – like any other layman – was supposedly subject. But the new *ordo* had as its unintentional by-product the establishment of politics 'as a separate, self-contained realm,' 'set free to pursue its own development as a secular concern.' (New translation of Böckeförde 'Rise of the State as a Process of Secularization', in T. Stein and M. Künkler (eds) in E. W. Böckenförde, *Law, Religion and Democracy: Selected Writings*, (Forthcoming, 2018), chapter V (no pagination).
[5] J. N. Figgis, *Studies of Political Thought from Gerson to Grotius 1414-1625* (1907), at 4.
[6] As Dumont puts it compactly: 'The Reformation picks the fruit matured in the Church's lap.' Dumont, *supra* note 4, at 59.

religious authority) and the persecution of non-conforming religious belief.[7] The idea that religious uniformity was necessary for political order and stability remained, in the first decades after the Schism, a point on which 'Roman Catholics, Lutherans, and members of the Reformed Church were in fundamental agreement.'[8] The religious duty of the temporal power was to expel or eliminate seditious heretics and punish non-seditious heretics.[9] At stake in such mutual heretication and persecution were the souls and freedom from sin and death of the religious communities themselves: 'Whether in the form of popular pogroms and riots, the formation of armed religious leagues and militias, or the punishment of heresy in ecclesial or civil courts, confessional violence arose from the fact that the formation of morally regenerated identities through the sacral rites of religious communities was inseparable from the stigmatization and demonization of those polluting identities and communities that threatened these saving rites.'[10]

Early modern European secularity, which implies a realm of the political and of rationality distinguishable from the theological,[11] did not emerge upon a foundation of the freedom of the individual or his conscience, or any other philosophical history conjured much later in the name of Enlightenment.[12] Rather, its initial moment of formation rested upon an outgrowth of fanatical religiosity – the heretication of non-conforming beliefs and behaviours, the consequence of which was the intensification of power over community and territory. The paradox (or irony) that the Reformation 'retarded the secularizing tendency, and made politics more, not less, theological'[13] is inexplicable for those who understand secularity as the consequence of a progressive liberation of reason and conscience from the stifling orthodoxy of Catholicism commencing with the Lutheran and Calvinist appeal to this-worldly faith and action as the only possible source of salvation – as the progenitor, in other words, of freedom of conscience.

Neither the Catholic Church nor the original Protestant confessions recognized freedom of conscience for others, because as Weber appreciated with his characteristic lack of sentimentality, 'a fully developed church – advancing universalist claims – cannot concede freedom of conscience [unless] … it finds itself in a minority position and demands something which it cannot grant to others.'[14] The 'genuine early Protestantism'[15] of Lutheranism and Calvinism understood its mission not as relativizing a universal Church under the protection of secular rule, but of re-founding it according to true principles. Troeltsch reminds us that original Protestantism 'never surrendered the thought of the Church itself as the supernatural organ of Salvation,' and that it did not see Church and State as 'two distinct organisations, any more than did Catholicism.' The application of uniform religious standards to the whole community, the exclusion of unbelievers and heretics, the principle of intolerance and infallibility, were 'self-evident necessities,' and thus, there was 'no direct road leading from Protestant Church-civilization to the modern civilization independent of the church.'[16]

Nonetheless, the intensified domination and homogenization of belief and subjectivity set in motion by confessionalization were essential preconditions for the gradual emergence of a unified realm of public power which was not so much *indifferent* in relation to religion, but unevenly *differentiated* from religious authority even as it inherited and rested upon many of its modes of

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[7] Reinhard, 'Reformation, Counter-reformation and the Early Modern State: A Reassessment', 75 *The Catholic Historical Review* (July 1989) 383, at 391ff.

[8] Böckenförde, *supra* note 4. See also Figgis, who observes that we 'cannot overestimate the change in men's minds required to produce the ideal of heterogeneity in religion within one state.' Figgis, *supra* note 5, at 18.

[9] Hunter, 'Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry', 113 *South Atlantic Quarterly*, (2014), 37, at 37.

[10] *Ibid*., at 43 (inline references omitted).

[11] Troper, 'Sovereignty and Laïcité' in S. Mancini and M. Rosenfeld (eds), *Constitutional Secularism in an Age of Religious Revival* (2014) 146.

[12] See Hunter, 'Secularization: The Birth of a Modern Combat Concept', 12 *Modern Intellectual History* (2015) 1.

[13] Figgis, *supra* note 5, at 18-19.

[14] M. Weber, 2 *Economy and Society* (1922/1978), 1209.

[15] E. Troeltsch, *Protestantism and Progress: The Significance of Protestantism and the Rise of the Modern World* (1912/1958), at 35.

[16] *Ibid*., at 41.

legitimation and social power.[17] Confessionalization and state-making were closely intertwined, precisely in order to re-establish the foundations for political-theological order in the aftermath of Schism:

> Without doubt, in the long run the [Catholic, Lutheran and Calvinist] churches succeeded in 'confessionalizing' their members to a remarkable extent …
>
> … 'Confessionalization' made an important contribution to the growth of the modern state in Europe. Not that churches intended to do so … However, they all needed the help of secular authorities … Early modern state-builders, on the other hand, knew very well that joining the processes of 'Confessionalization' would provide them with three decisive competitive advantages: enforcement of political identity, extension of a monopoly of power, and the disciplining of their subjects. Therefore, it was obvious that a policy of religious toleration would not pay at that stage of state-building. Indeed, *tolerant states were powerless states during the first centuries of modern history!* … 'Confessionalization' meant gains of power for the State, because the Church became a part of the State in theory as well as in practice. And if not in theory, as in the Catholic case, then at least in practice! …
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> … This alliance of Church and State during the process of 'Confessionalization' reached its culmination in the field of ideas and emotions, where it secured the consent of the subjects to their own subjugation. This had been noticed as early as 1589 by Giovanni Botero: 'No law is more favorable to princes than the Christian one, because it submits to them not only the bodies and means of the subjects, but their souls and consciences, too, and it binds not only the hands, but also the feelings and thoughts.' [18]

Under the banner of *religio vincula societatis* (religion binds society together), confessional church-building enhanced state power by 'establishing new mechanisms of moral regulation and social control.'[19] The peculiar cunning of unreason that characterizes modern European state-formation and secularization is that the intensification of religious discipline and religious conflict laid the foundations for the emergence of public power as representing and materializing the unity essential to the concept of political and social order. The constitution of this unity nonetheless remained deeply entangled with religious authority,[20] which continued as an indispensable (and, at the time, unrivalled) modality for the instauration and imagination of collective being.[21]

The retraction of religion as the primary normative source for the binding of wills in submission to public power would require an alternative *archê* and *telos* for emotional and ideational investment: the this-worldly flourishing of human beings, made *in imago dei*. Whether as a qualified (Catholicism) or an unqualified (Protestantism) *societas perfecta*, the state was consecrated by all confessions as the medium through which human flourishing could be achieved,

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[17] Creppell, 'Secularization: Religion and the Roots of Innovation in the Political Sphere,' in I. Katznelson and G. S. Jones (eds), *Religion and the Political Imagination* (2010) 23. As Figgis notes: 'Until towards the close of the seventeenth century, the atmosphere of the supporters of popular rights is as theological as that of the upholders of the Divine Right of Kings.' J. N. Figgis, *The Divine Right of King* (2nd ed., 1914), at 11.

[18] Reinhard, *supra* note 7, at 397, 398, 403 (my emphasis). Footnote to Botero omitted.

[19] P. S. Gorski, *The Disciplinary Revolution and the Rise of the State in Early Modern Europe* (2003), at 18. See also D. MacCulloch, *Reformation: Europe's House Divided 1490 – 1700* (2003), at part III.

[20] As Gorski observes, 'In all these areas - poor-relief, education, and the regulation of sexuality and marriage – cooperation between religious and civil authorities was generally tight. In fact, in most early modern polities, it would have been difficult to draw a clear line between church and state … such a distinction would be purely anachronistic.' Gorski, *supra* note 19, at 19.

[21] M. Gauchet, *The Disenchantment of the World: A Political History of Religion* (1999). The Jesuit counter-reformation theologian de Mariana, for example, asked, how with the loss of religious unity, 'contracts, alliances and covenants among men can be guaranteed?' H. E. Braun, *Juan de Mariana and Early Modern Spanish Political Thought* (2007), at 136-39.

first and foremost through its achievement of this-worldly civil peace – the practical and effective unity of a people, government and territory under sovereign power.[22] In the wake of confessionalization came begrudging and reluctant toleration: the sovereign without doubt remained Christian, but *raison d'état* did not require that the sovereign decide matters of religious truth and instead should determine which beliefs and kinds of worship were incompatible with loyalty to the sovereign and his public order.[23] His courts might also examine which theological tenets touching upon the maintenance of public order could be deemed *adiaphoric* (indifferent to salvation) and so possibly proscribed as public order necessitated.[24]

This *formal* power and authority to decide upon the content of civil peace and public order as ultimate limits to any substantive system of religious truth, is the essential kernel of the secular as an historical phenomenon.[25]

It presupposes *neither* Enlightenment nor liberalism, both of which remained more than a century away, but Absolutism: the consolidation of a sphere of autonomous political power and judgment, released from allegiance to theological truths and indirect spiritual and earthly powers and propelled relentlessly forwards by exigencies of reason of state. The secularization of the state in this sense went hand-in-hand with the destruction of the medieval 'lawful state' of limited jurisdictions and feudal- and estate-based privileges and competences: answering *quis judicabit* in favor of the sovereign entailed not only the power of decision over the boundaries of the effectiveness of theological judgment, but equally the 'abridging, destroying or absorbing [of] rights previously lodged in other political units: manors, communities, provinces, estates.'[26] The precursor to modern democratic equal citizenship was equal subjecthood *before* the sovereign, the unbounded competence of which permitted the dissolution or relativization of any intermediate power in the name of reason of state; before subjects could aspire to be *free* and equal, the hierarchical structures of representation and mediation essential to the medieval world-view had to be decisively swept away.[27]

The homogenization and homologation of population, territory and rule begun under confessionalization – so indispensable to the logic of modern law and state[28] –accelerated and

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[22] As Troeltsch points out, the intensification of conflict after the period of confessionalization accelerated the acceptance of a foundation for absolute state power differentiated from religious unification: 'Three infallible 'Churches,' unchurching and anathematizing one another, discredited the idea of the Church, for which there is no plural … Thus Protestantism disintegrates the Christian Church-system and its supernatural foundation, wholly against its will, but by its actual and ever more clearly apparent influence. The plurality of the Churches and their embittered struggle did more than anything else to multiply the 'Libertinists and Neutralists,' while in France the policy of the Chancellor L'Hôpital, and in the Netherlands that of the Orange Party, and the Pacification of Ghent, tended to the same result.' Troeltsch, *supra* note 15, at 54.

[23] Dunn, 'The claim to freedom of conscience: freedom of speech, freedom of thought, freedom of worship?' in J. Dunn, *The History of Political Theory and other essays* (1996) 100.

[24] See Hunter, 'Religious Freedom in Early Modern Germany', *supra* note 9, and Hunter, 'English Blasphemy', 4 *Humanity* (2013) 403.

[25] Schmitt, 'Die Vollendete Reformation: Bemerkungen und Hinweise Zu Neuen Leviathan-Interpretationen' ('The Reformation Completed') in 4 *Der Staat* (1965) 51-69, translation by Dr. Benjamin Schupmann on file with author. Böckenförde, *supra* note 4.

[26] Tilly, 'Reflections on the History of European State-Making,' in C. Tilly (ed.), *The Formation of National States in Western Europe* (1975) 3, at 37.

[27] See for example Guido de Ruggiero's observation that 'without the levelling effected by royal absolutism, the regime of privilege … would never have bridged the gulf that divides privilege from liberty.' G. de Ruggiero, *The History of European Liberalism* (1927/1959), at 3-4. In this short sketch for theoretical purposes, I of course do not discuss the sometimes fierce resistance to centralization undertaken by both the aristocratic and clerical estates, which found intellectual expression in various resistance theories concerned with justifying opposition to tyranny. The mitigated success of this resistance is reflected in the highly uneven and varied extent to which *actual* absolutist states succeeded in diminishing the political and economic power of the aristocracy and the estates. See T. Ertman, *Birth of the Leviathan: Building States and Regimes in Early Modern Europe* (1997).

[28] For variations on this theme, see: N. Elias, *The Civilizing Process* (1939/1978-82), at 257-344; Oakeshott, 'The Character of the Modern European State,' in M. Oakeshott, *On Human Conduct* (1975) 279; P. Bourdieu, *On the State:*

intensified under the absolutist *polizeistaat*.[29] The governance of souls to the end of the good order and flourishing of the population and territory, becomes an essential part of the purpose of the Christian prince's *ratio status*; in this sense, as Troeltsch noted, the *civilizational* function of the Church ('education, moral order, oversight of food supply, and spiritual and ethical well-being')[30] had been taken up by the state even in Catholic territories, and the pastoral power over the direction and care of souls became a means of the art of government itself.[31] To this end, the state's domain extended to the *subjectification* of the subject himself, not in order to save his soul but to conduce to his 'felicity' as means to the strengthening of the state's utility.[32] Far from becoming a *domaine réservé* in the wake of secularization, the subject's relation to itself – the constitution of its interiority – was intensively problematized as an object and a set of forces to be rationally disciplined and reformed in the furtherance of the political order's stability and prosperity.[33] Early modern natural law theory after Pufendorf and Lipsian neo-stoicism would provide an essential intellectual bridge between theology, reason of state and *polizeiwissenschaft* for reforming princes:

> It's aim was to increase the power and efficiency of the state by an acceptance of the central role of force and of the army. At the same time […] [it] also demanded self-discipline and the extension of the duties of the ruler and the moral education of the army, the officials, and indeed the whole people, to a life of work, frugality, dutifulness and obedience. The result was a general enhancement of social discipline in all spheres of life, and this enhancement produced, in its turn, a change in the ethos of the individual and his self-perception. This change was to play a crucial role in the later development of both modern industrialism and democracy …[34]

To define the secular abstractly as the 'neutrality' towards religion, or the institutional separation of church and state, or what remains when religion is 'subtracted' from public life, is thus to mistakenly identify specific historical possibilities, deriving from a deeper structuring logic, with the grammar of the language itself; to borrow from Saussure, it is to take a variety of *parole* and believe them to be *langue*. At its most basic, the secular is co-original with the emergence of the political as sphere of autonomous decision over the constitution and maintenance of a concrete public order in respect of a people and territory; as such it is a constituent element of the process of modern European state formation, with its particularly intrusive types of domination and correlate processes of individualization. As such, secularism is an 'attitude' or 'posture' towards religion maintained by civil authorities which need not be neutral[35] but necessarily implying a vantage point of decision 'above' or 'beyond' the obligations of any religious *nomos*.[36] This authoritative power of decision is the *presupposition* of liberal neutrality towards religion – a political philosophical

Lectures at the College de France, 1989-1992 (2014); M. Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (2004).

[29] M. Raeff, *The Well-Ordered Police State: Social and Institutional Change Through Law in the Germanies and Russia, 1600-1800* (1983); A. Small, *The Cameralists: Pioneers of German Social Polity* (1909).

[30] Troeltsch, *supra* note 15, at 62.

[31] Foucault, *supra* note 28, at 154-155, 165.

[32] *Ibid*., at 326.

[33] On this, see C. Taylor, *A Secular Age* (2007), chapter 2; also, Foucault, *supra* note 28.

[34] G. Oestereich, *Neostoicism and the Early Modern State* (1982), at 7.

[35] Urbinati, 'The Context of Secularism: A Critical Appraisal of the Post-Secular Argument' in S. Mancini and M. Rosenfeld (eds), *Constitutional Secularism in an Age of Religious Revival* (2014) 14.

[36] Bilgrami's formal formulation is helpful here: 'One should be able to characterize secularism (S) independently of whether a polity is authoritarian or liberal in its fundamental orientation … The point is not to lay down very specific ideals that form a definite list. The point rather is to stress the role of the *priority* of such ideals (whatever they may be) will have in *the lexical ordering that forms the heart of the characterization of secularism*. … All the opposition to religion that the characterization in (S) demands is in the notion of lexical ordering that follows the initial starting point in these ideals.' Bilgrami, 'Secularism: Its Content and Context' in A. Stepan and C. Taylor (eds) *Boundaries of Toleration* (2014) 79, at 97.

desideratum of the state's posture towards religion that would come much later – but rests in fact on processes of the homogenization of the political (confessionalization, polizeiwissenschaft etc) that cannot itself be justified by the dictum of neutrality. As Laborde puts it in her trenchant criticism of the Rawlsian prescription of state neutrality towards the Good (epitomized by religion in contemporary liberal thought, and in contrast with the Just, which states may decide upon):

> No theory of neutral justification can justify *this* prerogative – that of adjudicating the boundary problem [between Good and Just, between ethical and moral] in the first place. The prerogative consists in being authorized to define … *where* the boundary between the right and the good lies. Theorists of liberal neutrality tend to assume that the right and the good are self-evident categories of moral reasoning; yet clearly they have evolved historically and are themselves the sites of foundational political disagreement. … The prior identification of which areas of social life are justice-apt [and so amenable to state control] … cannot be made without judgments of substantive, metaphysical, and ontological questions.[37]

To say that the state has the authority to police the line between the Just and the Good is in effect to admit that through a panoply of instances and decisions and prescriptions, the state determines and comes to represent *that substance* which rests *as a condition of intelligibility and condition of possibility for the idea of the state as a unity*. This substance is of course historically variable, and as a matter of historical reality has been the carrier of a wide variety of metaphysical and ontological possibilities; but the intelligibility of the prerogative to decide what is essential to the unity of the legal and political order, and what is inessential to it, inevitably has recourse to some operative concept of the substance on which the unity of the state rests.[38] For centuries, as I have labored to show in the foregoing, this operative concept of substance was religious even as the secular power of decision emerged. Indeed, the secular power of decision could not have emerged without the religious, and the distinctive processes and conflicted trajectories (religious settlements and consociations, revolution, counter-revolution and restoration, colonization, to name but a few) through which the secular power of decision completely or partially differentiated itself from this religious substance, were productive of the diverse formations of state-church or state-religion legal and political relationships that characterize Europe. This point of view on the secular also helps us to appreciate the historical specificity and contextual determinacy of the valences and constellations of religious and anti-religious polemics in a given time and place.

Importantly, understanding the secular from this vantage point of state formation and the problem of the non-theological foundations of political unity, allows us to grasp what is shared and what is different in non-Western historical trajectories of secularity and secularization, without rendering such trajectories merely as the incomplete realizations of the liberation of reason from religion or of a failure of political and economic modernization. As Troper points out in his reflection on the 1980 Egyptian constitution's reference to shari'a as a source of legislation, what is at stake is not a 'separation of church and state' but who decides (*quis judicabit*) the meaning and limits of a religious law:[39] precisely the problematic of the constitution of the political and its differentiation from and priority over the religious. What is also made visible in this perspective, is the extent to the which historical trajectory of non-Western formations of the secular are indelibly marked by the experience of state formation under colonial rule and decolonization. In the context of the Middle East, Mahmood observes that colonial state formation 'subjected [religious difference] to a new grid of intelligibility and a form of stratification that is compatible with the rationality of modern political rule. … The colonial state secularized native religious life by

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[37] C. Laborde, *Liberalism's Religion* (2017), at 109. See also *ibid.*, at 160-163.
[38] I take this to be the implication of the famous Böckenförde dictum that, 'the liberal, secularized state draws its life from preconditions it cannot itself guarantee.' (Böckenförde, *supra* note 4, no pagination).
[39] Troper, *supra* note 11, at 146ff.

instituting the legal division between public and private'[40] but also rendered religion a means through which diverse populations could be governed directly and indirectly by a central territorial authority.[41] In the case of India, colonial administrators notoriously reified and abstracted from the social relationships entailed in the lived practices of religion in order to render the population better enumerated, more legible and more governable: Hindu/Muslim became categories meaningful in terms of majority/minority, and also became abstract communities 'viewed as giant collective actors, such that an act of an individual or a group of Muslims became to be regarded as an 'act of Muslims' as a putative group …'[42] The result was that in colonial, proto-nationalist and post-colonial politics, religious identity became a political identity pregnant with potential for conflict in the struggle with the colonial power over the control of the state and the constitution of the post-colonial political order. The basic premise of Partition – cynically abetted by the British – was that relative religious uniformity was the most secure foundation for the political unity presupposed by any post-colonial nation-state.[43]

III.

In a 1970 essay on Freedom of Conscience, Böckenförde noted the difficulty of isolating any singular genealogy or identity of this concept.[44] In its early modern usage in Germany, it 'related exclusively to questions of belief and religion,' and the Treaties of Westphalia guaranteed a 'restricted and qualified' freedom under which anyone 'may profess the Evangelical Lutheran or Reformed religion or the Roman Catholic religion and nothing may be demanded of such a person that is contrary to the principles of his religion.'[45] The German religious settlement's reluctant acceptance of parity in public law between the three Christian religions and the attendant repudiation of an unlimited *jus reformandi*, gave rise to a constitutional guarantee of 'freedom of belief and conscience' in so far as it entailed a prohibition on compulsion as between the choice of one of the three established religions, and provided it did not manifest itself in modes of worship or kinds of belief that threatened the public peace between believers or the fundamental creedal foundations of the public order.[46] As Troeltsch never tires of pointing out, toleration of religious beliefs beyond these three creeds was never a necessary consequence of the idea of non-compulsion in religion; each creed strongly maintained the necessity of the unity of truth, to be compulsorily protected by the state.[47] Freedom of belief in this sense, leading to toleration as a negative principle, forbade compulsion in religious matters but left no room

> at all for the positive existence of different religious communions alongside one another. …
> In England, the Long Parliament only granted toleration to the various groups within Calvinistic Protestantism; in order to secure the Christian nature of the State it maintained the Elizabethan legislation which made attendance at public worship compulsory; the only

[40] S. Mahmood, *Religious Difference in A Secular Age: A Minority Report* (2016), at 62-63.

[41] B. White, *The Emergence of Minorities in the Middle East: The Politics of Community in French Mandate Syria* (2012).

[42] Kaviraj, 'On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory' in I. Katznelson and G. S. Jones (eds) *Religion and the Political Imagination* (2010) 336, at 336, 350-352.

[43] This premise of religious identity as a necessary foundation for political unity and thus sovereign power, was similarly visible in the discussions surrounding the drafting of the Malaysian constitution of 1957: Stilt, 'Contextualizing Constitutional Islam: The Malayan Experience', 13 *International Journal of Constitutional Law* (2015) 407: The clause establishing Islam as a national religion was 'part of a package that connected religion to privilege, language and citizenship. And these four issues were ultimately about loyalty and belonging.' *Ibid.,* at 430.

[44] Ernst-Wolfgang Böckenförde, 'The Basic Right of Freedom of Conscience' in E. W. Böckenförde, *Law, Religion and Democracy: Selected Writings*, (Forthcoming, 2018), chapter V (no pagination), at chapter VI (no pagination).

[45] J. J. Moser, *Von der Teutschen Religionsverfassung* (1773/1967), cited in Böckenförde, *supra* note 44.

[46] Hunter, 'Religious Freedom in Early Modern Germany', *supra* note 9. Ian Hunter, 'Public Law and the Limits of Philosophy: German Idealism and the Religious Constitution' 44 *Critical Inquiry* (2018) 528.

[47] E. Troeltsch, *The Social Teachings of the Christian Churches*, Volume II (1912/1931/1992), at chapters 1-3, but especially at 491-494,660-661.

difference was that individuals were now at liberty to choose the religious group with which they desired to worship.[48]

Geuss points out that it was not until the end of the 18th century that toleration 'no longer came to be construed as something inherently negative, as a … failure to attack with all one's force something which it would in principle be good to be without, but which it was perhaps too costly fully to suppress.'[49] The Protestant insistence on inner freedom permitted a great deal of compulsion to produce external uniformity on the premise (as somewhat stylized by Geuss) that 'people would be more likely to come freely to accept God in the right way if they were living in a religious coherent, homogeneous social world (even if that cohesion was politically produced by coercive means)…'[50]

Nonetheless, both Troeltsch and Dumont – following Jellinek – conclude that the early Protestant ideas contained within them the seeds of a more radical but no less theological ideal of freedom of belief and conscience. The principle of a pure religion based on faith and personal conviction alone '*logically* implied the voluntary principle of Church membership.'[51] But the realization of this logical possibility required some real historical actor to articulate and maintain it, in the face of bitter persecution and an overwhelming atmosphere favoring as much religious homogeneity as possible. This historical actor was not a philosopher of secularizing reason, but a fundamentally (and fundamentalist) religious force: the Protestant sectaries. The 'sect-type' of religious movement in Christianity pre-dated the Reformation, characterized by their aspiration to 'personal inward perfection … [and] direct personal fellowship between members of each group.'[52] The theology of the sect-type emphasizes the original ideals of Christianity, a 'direct continuation of the idea of the Gospel … [W]ithin [the sect] there is a full recognition of the value of radical individualism and the idea of love; it is the sect alone which instinctively builds upon its ideal of fellowship and … attains such a strong subjective and inward unity … [T]he sect also maintains the original radicalism of the Christian ideal and its hostility towards the world, and it retains the fundamental demand for personal service. …'[53] The individualism of the sect – inclined towards asceticism and mysticism – 'urges towards the direct intercourse of the individual and God; … it replaces the ecclesiastical doctrine of the sacraments by the Primitive Christian doctrine of the Spirit and by 'enthusiasm'.'[54]

Unsurprisingly, the Protestant movement in its emphasis on the direct Scriptural sources of God's law and its lack of a universal central hierarchy, provided a rich soil for sect-type movements. These sects sprang forth almost immediately with the beginning of the Reform movement, and – despite vigorous attempts at persecution by territorial Protestant Churches – emphatically rejected any form of compulsion in religious matters not because of a lack of certainty about the absoluteness of Truth but because such Truth could be attained exclusively through an inner spiritual certainty that could never be guaranteed or brought about by an earthly institution. Thus, these sects and movements – Pietism, Puritanism, Congregationalism, Anabaptism and Baptism, Quakers, Presbyterians and Methodists, to name a few – denied (at least at their origins)

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[48] *Ibid.,* at 671.

[49] R. Geuss, *History and Illusion in Politics* (2001), at 80.

[50] *Ibid.,* at 74. Troeltsch's account of the early Protestant Church (Lutheran and Calvinist) strongly accords with Geuss stylized version of the discourse. Troeltsch writes that despite Luther's early spiritualism and mysticism, which led him to champion toleration initially, the authorities of Wittenberg became increasingly severe towards to dissenting Protestant sects (such as Anabaptists) on the grounds that an association based on absolute Truth needs compulsion in order to prevent the undermining of its ability to make men wise unto salvation. Compulsion was not to force inner conviction but to bring about the social and ecclesiastical unity conducive to making this truth accessible to all. *Social Teaching of the Christian Churches*, *supra* note 47, at 492-3.

[51] Troeltsch, *supra* note 47, at 491.

[52] *Ibid.*, at 331.

[53] *Ibid.,* at 341.

[54] *Ibid.,* at 342.

any authority of the state over their holy communities of belief on the basis of an untouchable and imprescriptible freedom of conscience. The unity of these communities was the unity of their Christian fellowship, and underlying that, the unity of each individual conscience with the Holy Spirit.[55] The Being of God did not require the mediation of earthly institutions, but rather strict practical devotion to the discernment of his Law, which is found within the human conscience and in Nature itself: '[C]reation places mankind immediately before the task of the realization of its ideal; and this ideal is here presented shorn of the quality of a mystical supernature, which elevates man's nature above itself … In the theology of the sects the idea of law is substituted for the idea of the Church as the Organ of Grace and Redemption, and this conception becomes its essential feature. It is this conception of law which constitutes the essential truth and the objective point of reference for these groups…'[56]

The 'Pilgrim' communities who would cross the Atlantic to New England were outgrowths of English Congregationalism, carrying with them the ideals that had forced their emigration from England under threat of forfeiture of life and property: the freedom to form independent religious communities, the abolition of State compulsion in religious matters, and the 'exclusion of all forms of heretical religion from the state.'[57] Even here, freedom of conscience and of the church did not mean freedom of any belief whatsoever: they compelled 'no-one to join the Church; but they declined to tolerate the existence of any other Church, and they gave important civic rights to the members of the Church.'[58] As Weber noted tersely, only 'pure sects' such as the Quakers could be advocates of freedom of conscience 'not only for himself but for others' because of their rigorous commitment to the idea that 'no official power can dispense grace to unqualified persons and, hence, all use of political force in religious matters must appear senseless or outright diabolical … [and] because … the [pure] sect just cannot be anything but an absolutely voluntary association if it wants to retain its true religious identity …'[59]

Jellinek's famous and highly influential argument was that it was in the politico-religious communities of the New World, that something approximating a 'human right' to freedom of conscience first appeared in recognizable constitutional form.[60] The foundations of this right derived from the premise that every political association was established on the same basis as the prior religious community: freedom of conscience was the pre-requisite of 'spiritual administration and government in itself and over itself by the common and free consent of the people, independently and immediately under Christ.'[61] The charters of Rhode Island and of Maryland expressly recognized liberty of conscience 'in matters of religion' (Rhode Island, 1647) and to everyone who acknowledged Jesus Christ (Maryland, 1649). The North Carolinian constitution drafted by Locke in 1669 provided for toleration of Dissenters, Jews and heathens.[62] Freedom of belief and religious conscience was not in these charters an inheritance or a grant from a superior authority, but 'inherent in man, that acts of conscience and expressions of religious conviction stand inviolable over against the state as the exercise of a higher right. … The idea of legally establishing inalienable, inherent and sacred rights of the individual is not of political but religious origin.'[63]

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[55] See the lengthy and detailed account in Troeltsch, *supra* note 47, at 656-725.

[56] *Ibid.*, at 346-7.

[57] *Ibid.,* at 671.

[58] *Ibid.,* at 671.

[59] Weber, *supra* note 14, at 1208.

[60] G. Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (1901).

[61] *Ibid., at* 60, citing the petition of Congregationlists to James I, in 1616.

[62] Jellinek notes sarcastically that 'And so with Locke also liberty of conscience was brought forward as the first and most sacred right, overshadowing all others. This philosopher, who held freedom to be man's inalienable gift from nature, established servitude and slavery under the government he organized without hesitation, but religious toleration he carried through with great energy in this new feudal state.' *Ibid., at* 72.

[63] *Ibid., at* 77.

The presupposition of this theologically-derived individualism was a two-fold underlying unity of Nature. The first dimension was a unity of the subject in the Truth of Christ's spirit, which through man's conscience would lay hold of and mold the personality towards perfection. This metaphysic of 'absolute Personality … gives to the thought of freedom, of personality, of the autonomous self, a metaphysical background, which has its influence even when it is contested or denied.'[64] The second dimension was a unity of immanent laws governing creation, the Law of God and of Nature; this conception of law as the expression of the Being of God within nature and realized through the intentional application human will and reason – would permit a particular elective affinity between sectarian Protestantism and new economic, social and political forces.[65] For Charles Taylor, this affinity is at the heart of the historical process driving the emergence of the possibility of a thorough-going secularization of self and society, which he calls the 'buffered self' of modern humanism: 'It is no longer a matter of admiring a normative order, in which God has revealed himself through [supernatural] signs and symbols. We rather have to inhabit it as agents of instrumental reason, working the system effectively in order to bring about God's purposes …we have to disenchant to universe … on the high cultural level of science, and [replace] a universe of ordered signs, in which everything has meaning, [with] a silent but beneficent machine.'[66] This 'providential Deism' of the 17th and 18th centuries becomes an epoch-making phenomenon which eclipsed the earlier emphasis on Grace and supernatural redemption, and instead became a search for God 'in one's own feeling, experience, thought and will,'[67] closely connected with an inquiry into the laws upholding the natural order of creation.

> God's relation to us comes to be seen as mediated by an impersonal, immanent order … On one level, we have the natural order, the universe, purged of enchantment … operating by universal, unrespondent causal laws. On another level, we have a social order, designed for us, which have to come to discern by reason and establish by constructive activity and discipline. … The Law which defines this order, whether as political/constitutional law, or ethical norms, can be expressed in rational codes, which can be grasped quite independent of any special relationship we may establish with God … The human relationships which matter are those prescribed in the codes (e.g. Natural Law, the Utilitarian Principle, the Categorical Imperative.)
> … Such a purified religion …doesn't need revelation. … The truth is available to calm, dispassionate reason. So the royal road to true religion is right belief. We cannot access it by some relation of devotion which can supposedly yield more intimate insights into the will of God … Rid the world of [superstitions such as cult and sacrifice] and humans will find peace, concord and mutual help.[68]

The explicitly theological ladder on which this structure of thought was built, would ultimately be kicked away, giving rise to a revised 18th century self-understanding of Protestantism as having organically gestated a natural religion of reason that now stood on its own as the necessary maturation of Reformation's rejection of superstition and ritual. Troeltsch comments that on this view, looking backwards from the middle of the 19th century, 'the theology of the Enlightenment was [perceived as] indistinguishable from Socinianism and Arminianism. Kant, Fichte, and Hegel could hold that they were only reformulating philosophically the fundamental idea of the

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[64] Troeltsch, *supra* note 15, at 30.
[65] Troeltsch, *supra* note 47, at 676.
[66] Taylor, *supra* note 33, at 98.
[67] Troeltsch, *supra* note 15, at 98.
[68] Taylor, *supra* note 33, at 290, 293. Taylor's argument here concords with Weber's short remarks on deism, which he describes a 'charismatic glorification of Reason' founded in the 'belief of the Enlightenment in the workings of individual reason which, if unimpeded, would result in the at least relatively best of all worlds, by virtue of Divine providence and because the individual is best qualified to know his own interests.' Weber, *supra* note 14, at 1209.

Reformation. Goethe at the Reformation Festival [of 1817] could suppose that he was at one with Luther in protesting against all obscurantism and clericalism.'

This is 'the heartland and origin' of the modern trans-valuation of freedom of conscience from a religious ideal bound to a theological subjectivity ascending to Grace and Redemption, to a secularizing and subjectivistic ideal of self-legislating reason: 'a more general freedom of the individual to act and be permitted to conduct himself in accordance with his own law as laid down for his own conscience…. In this sense, freedom of conscience was chiefly actualized by ideological liberalism and particular tendencies of political liberalism and the democratic left.'[69] The nineteenth century was one of intensifying polarization and conflict over the diverse institutionalized religious settlements that had persisted in Europe since 1648, and the nascent forces of liberal nationalism and socialism. At stake in these conflicts was the legacy of the French Revolution and Napoleonic Empire's radical attempt to secularize state and society, and the reaction against it by restorationist alliances of throne and altar. When the papal encyclical *Mirari Vos* of 1832 declared liberty of conscience an 'absurd and erroneous proposition' stemming from the 'shameful font of indifferentism' that led only to 'ruin in sacred and civil affairs,'[70] it was drawing a battle line that would be joined across European states in the 19th century. The restoration only temporarily suspended the conflicts over the deconfessionalization of the state inaugurated by the Revolution and its aftermath. The instability, and latent and patent religious political conflict, 'involved processes of mass mobilization and societal polarization. [The conflicts] embraced virtually every sphere of social life - schools, universities, press, marriage, gender relations, burial rites, associational culture, control of public space, folk memory, and symbols of nationhood … [T]he mobilization of clerical (and liberal anti-clerical) allegiances became interwoven with … the expansion of political participation that occurred within the European states in the middle and later decades of the century.'[71] On the one side, Catholic discourse projected a 'Manichean vision of the forces of Christ versus Satan,' while on the other, ideas of 'nation, science and rationality' coalesced to form the common-sense of a 'self-confident European bourgeoisie that regarded itself … as the embodiment of modernity.'[72]

'Freedom of conscience' achieved a special polemical quality which refracted these conflicts, castigated on the one hand as a 'font of indifferentism' and civilizational collapse because of its dissolution of the objective unity of moral and political authority, and; on the other, as the very source of the unity of reason and freedom itself, unencumbering state and society from irrational ritual and superstition and establishing a foundation for religious belief within the limits of reason alone. Nineteenth century freedom of conscience was in this sense 'a modern combat concept,' tied to its deployment in various philosophical histories that 'prophesied that Protestant [and Catholic] confessional religion was … about to be superseded or secularized, supposedly by a rational religion or moral philosophy in which man's capacity for rational self-consciousness and self-governance would be fully realized.'[73] In the real political conflicts over the German constitutional reform of 1848, Hunter notes, 'rival philosophical-political factions proposed to transcend the [Westphalian] constitutional meaning of the secular as the political and juridical maintenance of a plurality of revealed confessional religions, in favor of an all-embracing secularity grounded in the nature of human reason and its historical realization … This was the context that permitted the factions to first use the term 'secularization' to refer to the epochal transformation of a Christian into a rational society …'[74]

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[69] Böckenförde, *supra* note 44, at note 18.

[70] Gregory XVI, 'Mirari Vos – On Liberalism and Religious Indifferentism' (1832)

[71] Clark, 'From 1848 to Christian Democracy,' in I. Katznelson and G. S. Jones (eds) *Religion and the Political Imagination* (2010) 190, at 190-213, 196.

[72] *Ibid., at* 200.

[73] Hunter, *supra* note 12, at 15.

[74] *Ibid., at* 29-30.

The inner voice of conscience, deeply indebted to the sectarian Protestant metaphysic and ethic, became the load-bearing keystone of the rationalist critique of a certain kind of religious subjectivity; the latter entails not only internal beliefs and ideas *about* transcendent realities, but rituals, practices and bodily habitus that perform lived relationships *with* and connectedness *to* a nomos not of human origin: the sharp line between *foro interno* and *foro externo* rested itself on an archetype of religion and religious belief.[75] In this ideal of rationalizable religious belief, both Catholicism and Judaism were suspect not only because of the former's apparent divided loyalties between nation and Church,[76] but also because (in the case of the latter), the refusal of religious Jews to accept their assimilation to a more a rational ideal of religious belief. Thus Bruno Bauer's *Jewish Question* – written in the throes of the turmoil over the demand for German constitutional change leading up to the failed revolution of 1848 – epitomizes the stigmatization of alien religion as not only backward but incapable of assimilation to national democratic citizenship. In his famous critique of Bauer, Marx radicalizes the Hegelian logic by insisting that what is necessary is not the repudiation by Jews of *their* religion, but of the overcoming of the alienation that gives rise to the irrational need for *all* religion.[77]

The Catholic Church's rapprochement with freedom of conscience, and with subjective constitutional rights more generally, would await the end of Catholic doctrine's Manichean self-understanding of its role as a restrainer against the forces of nihilism and civilizational decay – and the tragic consequences of its flirtation with corporatism, authoritarianism and fascism. This rapprochement would be an important source for another, distinct, moment in the history of freedom of religion and freedom of conscience. Recent historical work on the drafting of the guarantees of freedom of conscience in the Universal Declaration of Human Rights (Article 18) and the European Convention on Human Rights (Article 9) highlights two important contextual influences on how the concept was shaped in its drafting: Catholic Christian personalism,[78] and ecumenical missionary movements.[79] The latter emphasized the right to change religion in light of longstanding efforts to proselytize in the former lands of the Ottoman empire, and under the shadow of inter-and-post war attempt to protect Christian interests ('shrines and souls') in the looming national territorial conflict developing in Mandatory Palestine.[80] The former transformed European Catholic Christian social thought from a rejection of bourgeois individualism to an embrace of the

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[75] Asad, 'Thinking about religion, belief and politics,' in R. A. Orsi, *The Cambridge Companion to Religious Studies* (2012) 36.

[76] For the actual intellectual struggle of Catholic intellectuals to reconcile with nineteenth century nationalism, see Perreau-Saussine, 'French Catholic political thought from the deconfessionalization of the state to the recognition of religious freedom,' in I. Katznelson and G. S. Jones (eds), *Religion and the Political Imagination* (2010) 150.

[77] Farris, 'From the Jewish Question to the Muslim Question: Republican Rigorism, Culturalist Differentialism and Antinomies of Enforced Emancipation', 21 *Constellations* (2014) 296.

[78] S. Moyn, *Christian Human Rights* (2015); M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017). See also the potted history in Invernizzi-Accetti, 'Is the European Union Secular? Christian Democracy in the European treaties and jurisprudence' *Comparative European Politics* (2017), available at: https://link.springer.com/article/10.1057/s41295-017-0091-0 (last visited 13 June 2018).

[79] For further argument, see Bhuta, 'Two Concepts of Religious Freedom in the European Court of Human Rights', 113 *South Atlantic Quarterly* (2014) 9.

[80] L. Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (2017), at chapter 2. Lindkvist sets out the attenuated Christian theological underpinning of this position as articulated by O. Frederick Nolde, Director of the New York office of the influential ecumenical body, the Commission of the Churches on International Affairs (Nolde, through his links with Charles Malik and also Eleanor Roosevelt, had some influence during the drafting of the Universal Declaration):

> The ecumenical movement's efforts, Nolde argued, were not only rooted in the responsibility of Christians to contribute to the making of a just and peaceful political order. They also rested on the conviction that human rights would benefit what remained the primary mission of the Church and of every individual Christian, namely the promotion of the Gospel of Christ … 'Because we believe that all men should have the opportunity to hear and accept the Gospel, we seek to promote religious liberty.' *Ibid., at* 84.

'absolute value of the human person.'[81] Early twentieth century Christian political thought largely dismissed rights as individualist and materialist, accoutrements of an enfeebled liberal parliamentarism that was unable to stem the moral pathologies of modern politics. But the Catholic Church's anti-totalitarian turn after 1937, and the exile of prominent inter-war Catholic activists such as Luigi Sturzo and Jacques Maritain, led to a pivotal change in orientation: 'Catholic political refugees came back from Britain and the United States with a changed normative hierarchy in which individual liberty was … more important before, thus pointing the way towards the more liberal Christian democracy of postwar western Europe.'[82] Moyn shows how Maritain's embrace of rights was part of an attempt to provide a 'plausible alternative to secularism east and west.'[83] The concept of the person meant not the liberal solipsism of the rational subject but emphasized the primacy of the spiritual essence of human life, implied and protected by natural right: 'In either the stroke of a master, or a sleight of hand, or both, Maritain – as if the Thomistic movement had not long and unanimously rejected modern [subjective] right – claimed … [above all that] only the Christian vision placing the personal entitlements in the framework of the common good could afford a persuasive theory of rights.'[84] Freedom of (religious) conscience was understood to play a critical role in this limitation of secularizing modern politics, protecting the innermost spiritual core of the person, against the excessive claims of the State and of materialist ideologies such as Communism. What distinguished the 'human person' from the (liberal) 'individual' was 'the capacity to transcend the finitude of this world by the right use of mind and conscience …[T]his liberty originated in the intrinsic purpose of human existence … the freedom realized in the act of responding to God's call to partnership.'[85]

IV.

This essay has presented two distinct but interrelated thought-formations – secularity and freedom of conscience – and I have tried in broad strokes to paint a picture of their intertwining histories. Secularity and freedom of conscience emerge neither as necessary implications of each other, nor as inherently complementary concepts, but as constituent threads of a seam-line that runs along the unity presupposed by the modern state. The secular is a stance or posture towards the religious, from a vantage point of a political unity (however constructed or imagined); freedom of conscience is a carrier for historically and sociologically specific kinds of religious subjectivity (or, in the case of the ideal-type of individualist rationalism, a seat of 'ultimate, independently formulated, individual convictions about life, released from its religious role').[86] In the case of the subjectivities of conscience, I have suggested that they have also rested on a kind of inner unity of the subject with, inter alia, God's Being, His Law, the Holy Spirit, or even self-legislating reason. It is in the casuistic negotiation of the boundaries of these out-worldly and in-worldly unities, that we might locate the problematics, tensions and dilemmas of freedom of religion in the modern state. These problematics are always particular to the political and constitutional histories of any given state, but nonetheless evince common logics that in my argument correspond to a deeper structural relationship revolving around the constant problem of the foundation of the unity of the political order - that 'operative concept of the substance' to which I refer above, on which the intelligibility of any claim of the unity of the state rests. On my account, both the political unity presupposed by

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[81] Moyn, *supra* note 78, *at* chapter 2.

[82] W. Kaiser, *Christian Hegemony and the Origins of the European Union* (2007), at 150.

[83] S. Moyn, *Jacques Maritain, Christian New Order and the Birth of Human Rights* (2008), available online at https://dx.doi.org/10.2139/ssrn.1134345, at 5 (last visited 13 June 2018).

[84] Moyn, *supra* note 78*, at* 83. Lindkvist adds: 'Maritain's main contribution to these [Christian personalist movements] was probably to provide an exemplary revision reading of the history of human rights where the Enlightenment and the Atlantic revolutions were pushed aside by stoicism, scholasticism, and ultimately, the Gospel. With roots stretching back to the birth of Western civilization, human rights arose as a potential rallying cry for a united religious front against the ills of secular modernity.' Lindkvist, *supra* note 80, at 42.

[85] Lindkvist, *supra* note 80, at 43.

[86] Böckenförde, *supra* note 44, (no pagination).

the secular, and the theological subjectivity presupposed by various iterations of freedom of conscience, make claims to be a final bearer of the authority to decide the extent of the application of a theological Truth in this-worldly affairs. Thus, in both inheres a possibility of profound intolerance, and one way of understanding the tangled history of the interrelationship between secularity and freedom of conscience is a continuous (and sometimes violent) struggle over the *organization and management of intolerance*:[87] of what, by whom, for what ends, and under what conditions or limits.

From this point of view, one gains a new appreciation of Böckenförde's observation in the context of German constitutional jurisprudence that so long as the German state 'still saw itself in Christian terms and because of the consensus among the Christian denominations with regard to social morality […] the possibilities of conflict between law and conscience remained slight[.]'[88] But where the religious substance presupposed by the state and within society itself had irreversibly dissipated, freedom of conscience was a right 'whose substance was hardly understood at all.'[89] One way of giving content to the right would be through the pure self-legislating subjectivity posited by 19th century rationalism,[90] but Böckenförde's rejection of this possibility tellingly dramatizes it as threatening the unity of the legal and political order of the state itself:

> Surely absolute, unconditional freedom of conscience will logically entail surrendering the validity of the entire legal system to private judgment – in conscience – of citizens and thus in practice nullifying it. It will take the *quis judicabit* so indispensable to the peaceful organization of the state away from the state and from the nation as whole represented therein and give it back to individuals, thus incapacitating and undermining the authority of the organs of the state and eventually dissolving the state itself.[91]

Böckenförde proposes a resolution to this dilemma which is specific to the liberal democratic constitution of post-war Germany.[92] But the theoretical premises of the particular solution may yield a more generalizable logic for working through, somewhat casuistically, the relationship between the secular and freedom of religious conscience. Böckenförde declines to define conscience by recourse to 'theological or philosophical notions or interpretations of conscience'[93] on the grounds that these are already partisan in their posture towards the state order. Rather, he reaches for Luhmann's sociological description of conscience as essentially a mediator of a subject's relationship with its environment, 'ensuring … that what starts out as an infinite number of possible ways of behaving is reduced … to an internally coherent representation of self and style of conduct.'[94] The implication of this account of conscience is to grasp it as an active and passive producer of subjectivity, inevitably produced pre-reflexively by state, society, family, religious authority and other objective social relationships, but also self-producing during certain junctures of possibility, crisis or in reaction to the social environment. 'Conscience' in this sense is an essential site for the reproduction of social integration and political unity, as well as necessarily a critical source of challenges to them. What becomes a question of conscience cannot be delimited as a matter of substance, because under contemporary conditions 'any kind of behavior critically affecting the integrity and identity of the personality may become a matter of conscience … [C]onscientious convictions may express themselves not only in general principles but equally in

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[87] I'm indebted to my colleague Peter Drahos for this marvellous formulation.

[88] Böckenförde, *supra* note 44, (no pagination).

[89] *Ibid.,* (no pagination).

[90] Although as Troeltsch noted, 'this rationalistic Individualism passed more and more into a Relativism' and led to a crisis of subjectivism. Troeltsch, *supra* note 15, at 25.

[91] Böckenförde, *supra* note 44 (no pagination).

[92] *Ibid.* (no pagination).

[93] *Ibid.* (no pagination).

[94] *Ibid.* (no pagination).

concrete imperatives tied to given situations...'[95] Thus, questions of conscience (including religious conscience) tend to be defensive and reactive: not arising on a daily basis but in response to an environmental pressure that challenges the integration of the personality in some basic way – 'I cannot be the sort of person who does that.' This need not be limited to reflexively articulated beliefs and ideas, but can extend to a variety of collective and individual practices and behaviours that evince a fundamental relationship with a religious *nomos*.

Viewed from the standpoint of the management and organization of intolerance within any given state and society, the function of religious conscience is always somewhat paradoxical: it both holds out the promise of integration and threatens it; in any given context it might serve to reinforce historical domination and homogenization of belief and culture, or it might act as an irritant against the thick background of a dominant religious *or secular* belief and release new possibilities for practical freedom and reduced intolerance.[96] In an example from Indian political history, Bilgrami remarks:

> In the aftermath of Indian independence, Muslims in India, after much fascinating discussion during the Constituent Assembly debates, were allowed by constitutional provision to live by their own personal and family laws [and Hindus were not granted a similar concession].
>
> [The motivation for this was] not that the Muslim community is being granted its demand for living by its own personal and family laws on the grounds that their standpoint … has the truth on their side. Rather the thinking was this: in the aftermath of independence, the Muslims who remained in India and did not migrate to Pakistan lost a great deal – they lost their count in numbers [due to migration and pogroms], they lost jobs, they lost land, … they even lost their language Urdu [in the sense of its wide availability for instruction in schools and colleges]. In the face of these losses and the demoralization it generated, depriving them of the cultural aspects of their lives that are centered in their family and personal laws would be an inhumane blow for a state to deliver to a minority community.[97]

By contrast, the personal laws and rituals of the Hindu majority (among them dowry, and untouchability) were not granted a legal status and were instead reformed by the state in name of the constitutional commitment to equality. The underlying presumption seems to have been that the constitutional state's promise of equality between religious communities, and within them, are to be approached differently – one could say, *casuistically* – in light of their relative social, cultural and economic power, and in order to minimize the much greater risk of the stigmatization and demoralization faced by the minority in the name of equality of citizenship. From a categorical point of view, the results are unsatisfactory; but Bilgrami points out that another, dialectical kind of thinking was involved in this strategy:

> Since citizens are historical subjects, history and the incoming states of information that it provides to those subjects in its course may well introduce … tensions and dissonance in the relations between their value commitments … The point then, is that even if at a given time, a value economy seems relatively unreachable by internal reasons because it is relatively coherent and unconflicted, so long as we think of moral-psychological economies as necessarily being *in history*, internal conflicts may be injected by historical developments into moral-psychological economies…

[95] *Ibid.,* (no pagination).
[96] See for example, Urbinati's observation that religious reasons can be public political reasons where there is a long history of religious uniformity (itself, the product of historical repression of alternative beliefs). Under these circumstances, the pre-reflexive integrative force of religious uniformity sets boundary conditions for the articulation and expression of political argument, without explicitly being theological arguments. Urbinati, supra note 35.
[97] Bilgrami, *supra* note 36, at 120.

> … [What the Indian Constituent Assembly did was] to wait for history to bring into Muslim thinking the sorts of internal conflict that might give them reasons to … put aside their family and personal laws.[98]

There can be no simple guarantees that attempting to manage this potential tension between religious conscience and political unity in the furtherance of a general reduction of intolerance – intolerance towards religious belief, and intolerance towards non-belief – is, on balance, the most likely way to engender civil peace and civil equality. But in the end, these foundational goods that form the 'basic legitimation demand'[99] for the modern state form cannot be understood as categorical and abstract achievements of principle, to be dogmatically and inflexibly asserted in the name of an ideal of practical freedom. Such an understanding seems to me unnecessarily beholden to a Kantian vision of the state (and of freedom). Rather, what freedom of religion should become is a self-consciously casuistic concept, along with its counterpart, secularity. The possibility of dialectical progress towards greater tolerance, and with a reduction in intolerance, requires a forbearance from categorical perspectives that all too readily become routes towards a friend-enemy perception of irreducible antagonism between rival Truths or values. This forbearance of course presupposes self-confidence, both on the part of the legal-political order, and on the part of group invoking a claim of conscience but in respect of whom some limitation of the demands of Truth is being required by the political order.[100] Where conditions of polarization and latent enmity are advanced, such self-assurance and forbearance may well be the first things to vanish. Nonetheless, for all its uncertainties, contingencies and possible pathologies, I would maintain that this mode of becoming of religious freedom and of the secular might hold out some hope of realizing the possibilities of practical freedom for concrete human personalities *in* history.

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[98] *Ibid., at* 112, 120.

[99] Bernard Williams, 'Realism and Moralism in Political Theory' in B. Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (2009) 18.

[100] Bilgrami, *supra* note 36, at 121: 'That Muslims could be reasonably expected to reform their personal laws by internal reasoning in the face of such harassment would be to utterly fail to understand the psychological preconditions for how internal reasons usually work in a historical context. A group's capacity to change via internal reasoning requires a great deal of psychological security and self-confidence, precisely what is undermined by the demoralization caused by such harassment.'