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**Law as a Precondition  
for Religious Freedom**

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## Abstract

Throughout history, people have suffered for the sake of their religion. Religious organisations have been forbidden or governments have tightly controlled them. The constitutional protection of freedom of religion is a necessity. In a religiously pluralistic world, granting the guarantee is also in the state's best interest. Yet religions have been hesitant to embrace the guarantee. It implies secularism. Religious freedom is balanced against other freedoms, and against legitimate state interests. Government is faced with social forces that are grounded in eternity and that cannot be proven to be wrong. Seemingly the constitutional protection is a threatening for religions and the state as it is beneficial. Yet the essentially pragmatic nature of law overcomes the tragic dilemma – albeit only at the price of acknowledging that jurisprudence is policy-making.

*Keywords:* religions freedom, neutrality principle, human rights, pragmatism, proportionality principle, balancing, margin of appreciation, regulability

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## I. The Issue

Religion is universal. Everywhere in the world, people believe that there exist forces they cannot see with their eyes, and that even science cannot make visible for them. They believe that these forces matter for their lives, be it today or after their physical existence will have come to an end. Usually they even believe that these unintelligible forces command goods or evils that have higher value than anything money can buy, political power can impose, or attachment can bestow. Yet this universal human trait has played itself out very differently across time and space. Some religions believe there is one God. Others believe there are many gods. Yet others do not personify the supreme forces at all. For some religions, life after death is the supreme goal. In others, not being forced into reincarnation is bliss. Some religions care about saving the souls of those who have not had the privilege of meeting God. Others do not feel the urge to spread their mission. The list of differences is at least as long as the number of religions. And there are sceptics. While of course nobody is able to prove that religion is superstition, the existence of religion, or the correctness of the beliefs on which a specific religion is grounded, cannot be proven either. By its very nature, religion defies human epistemic abilities. Sceptics go on: and therefore I ignore it; or even: and therefore it should be ignored.

Since from the perspective of a religious person being in line with the commands of one's religion is of the utmost importance, throughout history religious leaders have sided with worldly powers. In the name of religion, wars have been declared, countries have been depopulated, those holding a different belief have been prosecuted, freedom of expression has been stifled. It has taken religious leaders centuries to adopt a more tolerant attitude. Instead of combating competing religions, and of forcing pagans to join them, some now aim at organising peaceful coexistence. While historically, the main driving force behind this shift in attitude has been the experience of all too many cruelties, globalisation has added a new facet. The world's economy remunerates physical by social mobility. Those who move to the thriving centres stand a much better chance to secure a prosperous life for themselves and their families. Yet the ensuing migration engenders religious pluralism in many societies that used to be religiously homogeneous.

Peaceful coexistence implies freedom of religion (Huster 2002; Grimm 2009:2371). While one religion may well deeply believe all or some other religions to be fatally wrong, it still accepts that other religions think differently. It may try to persuade the adherents of different religions to convert. But it will not force them to give in to what this one religion, from an internal perspective, of course believes to be the truth. This attitude of tolerance could follow from insight. It might even be backed up by religious doctrine. Yet insight is elusive, and different religions are very differently prepared to build tolerance into their set of doctrines. It was a horrendous religious war that prompted Thomas Hobbes to proclaim absolute state power (Hobbes 1651). The state is able to guarantee religious freedom precisely because it musters the power to coerce. It may not only oblige but even effectively force reluctant religious leaders and fanatic followers to play by the rules of peaceful coexistence. This is not only important with respect to what the literature tends to call "strong religions" (see e.g. Sajó 2009:2403 and 2421). If the state credibly commits to combating aggression between religions, it also creates a level playing field. Reli-

gions that would not intrinsically be aggressive have no longer reason to nonetheless act aggressively, just because they are afraid otherwise their theological competitors will invade their spheres.

For Thomas Hobbes, containing the war of all against all was so important that he postulated the moral obligation to absolutely transfer original individual liberty to a worldly ruler. Unsurprisingly, the ensuing historical experiments amply extolled the downside of the solution. Heads of state abused their powers lavishly. Quite a few of them were not enlightened, but stupid or reckless. Even religious wars did not disappear. Religious divergence served as a pretext for countries invading each other, in the interest of enlarging their territories. It once more took centuries before sovereignty was constitutionalised. Constitutional states rest on the idea of sovereignty. Yet the exercise of sovereign powers is bounded by a rich institutional arrangement, the law. The law sets substantive and procedural limits. Those in power may not overstep these limits. When they exercise sovereign powers, they have to obey the constitutional rules for making and for applying rules.

The constitutional state is not only in a position to enforce religious tolerance without the risk of itself deteriorating into tyranny. Once all governance is constitutionally embedded, the state also disposes of much more elegant technologies for managing a religiously pluralistic society. These subtle tools make the state sensitive to historic context. Interventions may keep the balance between determination and predictability on the one hand, and the maximum respect for the individual religion to which they are targeted on the other hand. The state may use the same technologies for solving an equally pressing, related problem: the peaceful coexistence between state and religion(s).

In the title of this paper, the term religious freedom is used to describe social reality. It characterises a society in which everyone is in principle free to hold the religious beliefs of their choosing, and to live their worldly lives in line with the commands of their religions. To make this possible, despite a plurality of religions, and in deference to the legitimate needs of the state, the state uses its sovereign powers to manage this plurality. Once the relationship between competing religions, and the relationship between religion and the state, are governed by law, religious freedom has a second meaning. This second meaning is doctrinal. The Constitution obliges government to act in a way that makes peaceful coexistence practical. To that end the Constitution guarantees freedom of religion as a fundamental right. Consequently, a more complete version of the title of this paper would read: "The Constitutional Protection of Freedom of Religion as a Precondition for Making Religious Freedom Practical".

In the following, I speak of religious freedom when I mean social reality, and of freedom of religion when I mean the constitutional guarantee. I then read the constitutional guarantee broadly. I mean it to encompass any constitutional protection of religiously motivated action, and against any religiously motivated exercise of sovereign powers, even if concrete legal orders rather bring the respective action under the rubric of freedom of life and limb, of property, of immigration

and emigration, of profession, or whichever constitutionally protected aspect of life may be affected.

My way of presenting the issue implicitly votes against two alternatives. The constitution of a country may more or less intensely side with one specific religion. This is of course the historically widespread model of a state religion. In its extreme form, as in the peace of Augsburg, it is built on the principle *cuius regio, eius religio*. Under that principle, freedom of religion is only granted to heads of state. If the Prince has chosen to be Protestant, his Catholic subjects must choose between leaving the country and converting. Today, some Islamic countries come close to this radical version of a state religion. Milder versions survive in Western democracies. A well-known example is England where one has to be Anglican to be Prime Minister. By contrast, this paper starts from the assumption that the Constitution does not privilege any religion. Doctrinally, this is the state of affairs in most democracies, and under human rights treaties. And practically, constitutional neutrality is a precondition for managing a religiously diverse society.

This paper also votes against a more recent competing concept. This concept accuses the "enlightenment project" of being hidden ideology (Ladeur 2009; Rosenfeld 2009) (but see Raday 2009). This claim is based on post-modern philosophy. It maintains that the distinction between faith and reason itself requires a leap of faith. In the name of "the religion of secularism", constitutional law unnecessarily tramps on the exercise of religious freedom. I have two counterarguments, one conceptual and one pragmatic. While I am willing to grant that our understanding of reality is bound to be constructed (Berger and Luckmann 1967; Thompson, Ellis et al. 1990), this does not mute objectivity as a regulative idea. Even if we know that we will never completely achieve it, it makes a difference whether we strive for intersubjectivity or not. My more important reason is, however, pragmatic. We need the neutral, disinterested, and at least purportedly objective vantage point of constitutionalised law to make a religiously plural society viable.

Religion is as old as humanity. There has never been just one religion. Individual religions have sided with worldly forces to combat competing religions. And worldly authorities have fought religions as competing sources of power. Centuries ago, treaties and constitutions have guaranteed freedom of religion. I can therefore certainly not claim my research question to be new. I am also self-consciously confessing that I am very likely to have missed some earlier voices. I try to make two contributions. I first aim at finding a concise conceptual language for explaining why freedom of religion poses a dilemma: safeguarding this freedom is a necessity: for religions, and for the state (II). Yet at the same time, freedom of religion also is a threat: again for religions, and for the state (III). While theory helps understand the character of the dilemma, I try to show that theory cannot offer a closed solution. Against this backdrop, my second contribution is to show why only legal pragmatism is able to mitigate the dilemma, and how law becomes a precondition for religious freedom (IV).

## **II. Freedom of Religion as a Necessity**

### **1. Necessity for Religions**

Freedom of religion, in its doctrinal meaning, i.e. the constitutional protection of holding and exercising one's freely chosen religion, first and foremost protects the individual believer. They invoke the constitutional guarantee when the state prevents them from some course of action which they claim is religiously mandated (more from Robbers 2005; Classen 2006; Grimm 2009; von Campenhausen 2009). Such prohibition may result from the state's desire to contain religious conflict. An example would be the interdiction for a procession to pass through a residential area mainly populated by militant members of a competing church. Or the prohibition may be grounded in a regulatory purpose that, at least at face value, has nothing to do with religion. An example would be the obligation for Sikhs to wear a helmet when riding a motorcycle.

The believer may also invoke freedom of religion since she feels discriminated against due to her religion (more from Robbers 2005; Classen 2006; Grimm 2009; von Campenhausen 2009). Again, discrimination may result from the state directly privileging one religion. In modern constitutional states, the privilege is frequently couched in the statement that the privilege is not granted to a religion, but to national "culture" (Roellecke 2007). Yet discrimination may also result from the application of rules that do not directly target religion. For instance, Native Americans complain that they are prosecuted for the sacramental use of peyote, while the ritual use of wine was allowed for Catholics and Jews during Prohibition (Rosenfeld 2009:2353).

All of this certainly matters. Yet these are rather minor conflicts. Bringing them under the purview of the Constitution is certainly conducive to making religious freedom practical. But one could hardly claim that such protection is a necessity. Happily enough, these days in civilised democracies, those conflicts that originally made the constitutional protection paramount are not real. But one need not go far back in history to find vital conflicts. Sadly enough, they can even be found in these days if only one broadens geographical scope. Most often, conflicts become vital once the state uses its sovereign powers to combat religion, be that in the interest of a state religion, or in the interest of atheism, as in the former communist countries. Consequently, conflicts have been particularly acute when the majority religion has sided with the state in its fight against religious minorities.

Let me recall a few of the ominous examples from my own country. During the Nazi regime, the Jews were almost extinguished, purportedly because of their race, but also because of their religion. Lamberti Church in Münster to these days still boasts three iron cages where the corpses of the leaders of the Anabaptist movement had been displayed after public execution. The Archbishop of Salzburg forced thousands of his subjects who had clandestinely remained Protestants to leave the country within a couple of days. Many of them were permanently separated from their children. In the GDR, those who confessed their membership in a church stood little chance to receive university education, and many of them went to jail.

Why were so many prepared to endure so much for the sake of their religions? Why does religion make so vulnerable? Certainly, the general utilitarian argument may be featured in: people seem to have a preference for a religious lifestyle. Everything else held constant, people holding this preference are better off if neither the state nor a competing religion prevent them from living in line with the commands of their respective religions (Leiter 2008:7). Moreover, religions offer side benefits, like social solidarity, psychological comfort, and a better way of coping with the unknown and death (Raday 2009:2776). Yet none of this would suffice to explain martyrdom, or the willingness to sacrifice all professional aspirations.

Such observations point to the fact that religious freedom is not an ordinary good. There are three reasons for this. For a believer, leading a religious life has extreme value. Believers know that they do not know. They must take faith for knowledge. Once they have made the leap of faith, they become tied to their choice. Finally, many religions threaten heretics with worldly sanctions.

The first of the three reasons carries most weight. To understand how religious freedom is special, it is helpful to use the utilitarian language of economics. Economic theory starts from preferences. In the standard model, all is relative. The model assumes desires to be infinite. If I can have another piece of cake, another house, another education for free, I want it. The problem to be understood is how I choose if I cannot have everything, for instance since my wealth is limited. My preferences tell me how many units of one good I am willing to trade for a unit of another. Apparently, for many believers the freedom to live a religious life does not fit this model. They are not willing to make tradeoffs. They do what their religion asks them to do, whatever the cost.

There are several ways of capturing this behaviour within the economic model. One stays closest to the standard framework if one assumes standard preferences, but for the fact that the utility derived from a religious life is infinite. One may also model being in line with one's religion on the one hand and worldly goods on the other as strict complements. For religious individuals, worldly goods only have value conjointly with leading a religious life. Another modelling alternative is lexicographic preferences. Actors holding such preferences in principle engage in the same tradeoffs between ordinary goods as do standard agents. Yet they consider these trade-offs only if they first meet the minimum standard of a religious life their religion has set for them.

One may also use non-economic language. Religions issue categorical demands on action, demands that must be satisfied, no matter what the believer desires otherwise, and no matter what incentives or disincentives the world offers (Leiter 2008:15). Due to this, religious conflicts become "intractable" (Rosenfeld 2009:2354). Religion not only provides the individual with well-being, it provides her with an identity (Witte 2000). Identity is a precondition for the ability to choose (Ladeur 2009:2463).

Why are religious values so important? Because they are transcendental. For a religious person, eternity is at stake. One may also say: for a religious person, obeying the commands of her reli-



gion is a precondition for dignity (Mahlmann 2009:2474). To this, religious doctrine frequently adds transcendental incentives. Those who live a religious life will be rewarded in Paradise. Those who commit sins at least have to endure the purgatory, if they do not directly go to hell. Not so rarely, religious doctrine even holds those living today responsible for the transcendental fate of their ancestors. If only they pray enough, the ancestors can be saved, the Mormons teach. Yet other religions even expect their members to simply save the world (Sajó 2009:2421).

*Credo quia absurdum*, as Tertullian is said to have taught. A religious person may recognise God in any sunbeam. But those adhering to a different religion, or not religious at all, will not accept this as proof. From the very fact that religion is transcendental it follows that the superiority of one religion over another cannot be proven by scientific means. For the same reason, no religious person can prove that a command of her religion is vital. Religion requires faith (more from Macklem 2000). This increases vulnerability for two reasons. The first reason is a corollary of the fact that eternity is at stake. Therefore potentially mistakes are fatal (cf. Leiter 2008:15). The believer has to navigate uncertainty where certainty would be of the utmost importance. All the more she will stick to her conviction once she has made the leap of faith. Moreover since proof is out of the question, government stands no chance to convince the believer that the risk of compromising on a command of her religion is minor.

Religions do not only threaten with transcendental sanctions. They also inflict tangible punishment. They do not longer accept a believer to religious services, they prevent her from holding religious offices, or they even expel her. Religions also exploit private and public law for the purpose. They for instance fire an employee if she has aborted her child. Some religions even sanction believers for the mere fact that they have been soft on the violation of religious commands by others (cf. Arce and Sandler 2003).

Not all religions are organised in churches. But all religions are supra-individual. Religions are social, not individual phenomena. This is not only an empirical fact. It also follows from the impossibility of proving religious convictions to be true. Believers therefore feel the urge of relieving the burden of uncertainty by entrusting the formulation of religious commands, and the interpretation of the signs that gods are sending them, to those holding an office, having better education, or otherwise having superior access to the transcendental (cf. Grimm 2009:2373 and 2376).

Organisations are much better regulatory targets than individuals. Government frequently exploits this fact. It for instance obliges a dozen of car producers to fit catalytic converters, rather than obliging millions of car owners to adopt a more environmentally friendly driving style. By the same token, a few tightly organised churches are much easier to monitor than millions of individual church members. Organisations are also more vulnerable. Ultimately, government can only break the individual's will by killing her. Even in jail she can go on proselyting. History provides ample proof of individuals who have indeed been willing to risk their lives for the sake of eternity. By contrast, for an organisation to function smoothly, people must meet, and resources must be available. It is relatively easy for government to prevent people from meeting, and resources from being used.

## 2. Necessity for the State

"Religion is opium for the people" (Marx 1844:71). Karl Marx had not meant this as a piece of advice to government. Yet the explanation he gave is utilitarian. "Religion is the sigh of the oppressed creature, the heart of a heartless world and the soul of the soulless conditions" (Marx 1844:71). If there is the promise of a better life after death, people are willing to endure and to risk more. This may help government if it is unable to alleviate the burden, or if it even wants to knowingly impose hardship, for instance if it declares war.

Among German lawyers, a more civilised, and a deeper version of the dictum is famous. "The liberal, secular state is built on conditions it cannot guarantee itself" (Böckenförde 1991:112). Constitutional lawyers have built a whole doctrine of "the preconditions of the Constitution" (*Verfassungsvoraussetzungen*) on this one sentence (see only *Veröffentlichungen der Vereinigung der Staatsrechtslehrer* 2009). Religion generates the culture of mutual respect that is a precondition for democratic government. Critically, the constitutional state lacks the mandate to create this culture itself. The state may intervene if words or actions can be shown to be dangerous. But the state is not entitled to educate the electorate (Lüdemann 2004).

Freedom of religion also complements governmental assistance to the needy. Religious organisations are not only cheaper, and willing to help when public officials refuse to become active. More importantly, religious assistance is not just a service. For the recipients it matters that help has a soul (Seligman 2009:2881). Freedom of religion further complements freedom of expression. Religiously motivated speech enriches the marketplace of ideas (Mill 1859). Religious people are less easily tempted by worldly perks and therefore less vulnerable to corruption. Their faith even empowers them to resist fatal threat (Leiter 2008:16). This explains why deeply religious people were among the few who resisted totalitarian government, be that the Nazi state (the *Bekennende Kirche*) or the communist state in the GDR.

Eventually the reverse side of this medal is even more compelling. Since for believers eternity is at stake, religious organisations may credibly threaten government with vigorous resistance against interventions that curtail what the religion considers to be essential. Sadly the US have seen devoutly religious persons bombing abortion clinics and flying airplanes into highrisers (Leiter 2008:16). In the technical language of economics: religions command high nuisance value. It is in the best interest of the state to accommodate, and to establish a regime of peaceful coexistence: among each religion and the state, and between religions.

## III. Freedom of Religion as a Threat

### 1. Threat for Religions

The attitude of most religions towards freedom of religion as a constitutional guarantee is ambivalent at best. Over centuries, even the Christian churches have seen religious freedom as a

threat, rather than a benefit (von Campenhausen 2009). In the Catholic church, this has only changed with the second Vatican Council (*Dignitatis Humanae*, 1966). In the Protestant churches, change was more gradual but also basically not before the middle of the 20th century (more from von Campenhausen 2009:517). In Israel, the religious lobby has seen to it that freedom of religion is not constitutionally recognised to these days (Raday 2009:2771).

This hesitance has a reason. If the constitution guarantees freedom of religion, this implies secularism. State action may not be grounded in the commands of any one religion (Krüger 1964:178 ff.). Through the very guarantee, government is obliged to stay neutral between religions. The law starts from the assumption that there are different interpretations of the transcendental. For the purposes of law, no religion is unique or absolute. The law does not even assume that the set of religions is finite. If a new movement originates and claims to be a religion, this claim is to be assessed against an abstract definition of religiosity. Once freedom of religion is constitutionally protected, believers are not only legally obliged to accept a plurality of eternities as a matter of fact. Government is also prevented from openly siding with one religion. This has for instance led to the prohibition of prayer in US schools (*Engel v. Vitale*, 370 U.S. 421 (1962)) and to the prohibition of hanging the crucifix in German classrooms (*Crucifix*, BVerfGE 95,1 (1995)).

The doctrine of constitutional guarantees is not the same in all legal orders. In the German and in the European traditions, no fundamental right is absolute. Even if the provision does not explicitly have limitations, these limitations result from the fact that the Constitution protects a whole set of freedoms, and that fundamental freedoms have to be harmonised with competing value judgements of the Constitution (this concept of "practical concordance" goes back to Hesse 1995). Therefore other normative goals may be pitted against freedom of religion. The legislator may be prevented from turning religious belief into legal command, even if a large majority deems this desirable. A current case in point is the legalisation of homosexuality (Brown 2010; Gilreath 2010; Klein 2010).

## **2. Threat for the State**

Protecting freedom of religion is not without risk for the state either. In so doing, the constitutional state faces the paradox of tolerance (Mahlmann 2009:2475). It grants a protected sphere to individuals and organisations that may not be inclined to reward the protection by being tolerant themselves with competing religions or with the state. Potentially religious freedom threatens the authority of the law (Mestmäcker 2010). The problem is particularly acute with what has been called "strong religions" (Rosenfeld 2009:2347; Sajó 2009:2403) like fundamentalist movements and sects (Richardson 2004). Devoutly religious individuals have not only resisted the Nazi regime, they have also brought terrorism to Western democracies (Leiter 2008:16). The European Court of Human Rights has acknowledged the problem and allowed Turkey to dissolve a political party since it aimed at abolishing the constitutional protection of secularism (*Refah Partisi v. Turkey*, 37 Eur.H.R.Rep 1, 33 (2003)) and it has allowed the German government to issue warnings against the brainwashing methods applied by the Osho sect (*Leela Förderkreis v. Germany*,

app. 58911/00 (2008)). By contrast, if a religion itself acknowledges a plurality of transcendental powers, like the religions prevalent in ancient Rome, the conflict is particularly mild.

Freedom of religion is a threat for the state for the very same reasons that make this freedom valuable, and even necessary, for religion and the state itself. Religious goods are transcendental. The correctness of religious beliefs and commands defies proof. Many religions expect believers to bring faith to pagans and to save the souls of those who are not feeling the urge themselves.

Again the transcendental character of religions carries most weight. For the individual believer, eternity is at stake. Living in line with the commands of her religion has infinite value. Worldly goods are only considered once the threshold of a life without sin has been passed. Worldly goods are worth nothing if religious commands are violated. From the internal perspective of religious belief systems, the individual believer is not entitled to compromise, whatever non-religious reasons the state brings forward for limiting the exercise of religious freedom. The state lacks jurisdiction for the modification of religious doctrine. Religions systematically blur a line that is essential for the constitutional state. Religions are not content with legality. They ask for morality. From the perspective of her faith, if she gives in to governmental pressure, a religious person ventures transcendental sanctions. Her religious identity is in peril. Not so rarely, religious organisations may also inflict earthly harm.

The state is not only likely to provoke religious resistance if it prevents believers and religious organisations from specific courses of action. By the very fact of protecting freedom of religion, the constitution adopts an external perspective on religion (cf. for the parallel question for law Hart 1961). It inevitably treats religions as historically contingent social phenomena. For a true believer, this very thought is heretical.

For the constitutional state, the threat is exacerbated by the fact that religious beliefs and commands defy scientific proof (Leiter 2008:15 and 25). Therefore the state cannot assuage anxieties of religious addressees by showing that the legal expectation is not at variance with religious commands, or that the sacrifice is minor.

Many religions are missionary. Believers have the duty, or they are at least encouraged and rewarded, if they bring faith to those who have not had the privilege of awakening. Many religions are also not content with enunciating ethical precepts. They want to effectively ban unethical behaviour, in their members, but also in non-members. The unborn life shall be protected, the human genome shall not be manipulated, marriages shall not be dissolved. On all of these issues, in most modern democracies substantial fractions of the population think differently. If constitutional protection gives religions room for thriving, this is likely to also heat religiously motivated conflict. The constitutional guarantee potentially makes it more difficult for government to hold society together.

In one way or other, all religions are social. The individual believer's insight in and access to the supreme transcendental forces is facilitated, moderated or even mediated by more or less formalised organisations. These organisations provide believers with the authoritative reading of holy

texts, with rules and ceremonies for membership, with a religious community that generates or heightens their sense of identity, and with a host of more mundane services. From the perspective of state constitutions, the most important feature of religious organisation is governance. These organisations do not only give individual believers assistance. They aim at governing their lives. From the outside perspective of law, this is an exercise of power. Fundamental freedoms do not require that they be exercised in a power free vacuum. In this respect, the constitution even limits internal sovereignty. Yet the right to govern others is necessarily in conflict with the constitutionally protected freedom of addressees. The freedom of religious organisations to guide their members inevitably conflicts with the freedom of these same members to live the religious life they have been choosing themselves. It may also conflict with the desire of democratically elected government to govern these same lives. For both reasons, for a constitutional state granting autonomy is a greater risk than just granting individual freedom (more from Engel 2004).

Finally, religious freedom is not only a precondition for a viable democracy (see again Böckenförde 1991:112). It at the same time is also a risk for democracy (Möllers 2009:84: “Gefährdungen der demokratischen Gemeinschaftsbildung”). In their internal doctrines, religions need not be, and indeed often are not, individualistic. The supreme goal of religions is not the individual's autonomy but her fate in eternity, maybe also the victory of this religion over erroneous competitors. Religions may adhere to a concept of human dignity. But for them dignity is indirectly defined, by the individual's relationship with the transcendental, not directly by attaining self-selected goals and aims. Religions may not value liberty at all. If they do, they do not define liberty the same way as democracies. For them, liberty is not deference to the individual's wishes whatever they happen to be. Rather they define liberty as liberating individuals from obstacles that prevent them from recognising what truly matters for them (for a similar secular concept see Habermas 1973).

To the extent that religions are missionary, and that they care about state legislation being in line with religious ethics, granting freedom of religion creates a further problem for democratic governance. Religion will be used as a conversation stopper (Rorty 1994). Religion instils “divisiveness” into politics (Breyer 2006:122, 124; Feldman 2006). Religious argument will be used to disempower the free marketplace of ideas. Much as those dominating a market of goods are tempted to turn regulation into a barrier to market entry (Holcombe and Holcombe 1986), religions are tempted to have the legislator help them combat their actual or potential competitors in the “free marketplace of religions” guaranteed by freedom of religion.

#### **IV. Mitigating the Dilemma by Legal Pragmatism**

Seemingly, we have spotted a tragic dilemma. The power of the state to coerce saves religious freedom and the viability of democratic government. Yet at the same time freedom of religion is a threat for religions and the state. Seemingly we cannot make a definite recommendation. We must leave it to historical accident whether a constitution guarantees freedom of religion and, if

so, how this freedom is interpreted. On grounds of principle, a narrow reading seems as justifiable as a broad reading.

Yet law is neither science nor philosophy. For good reason, the discipline is called jurisprudence. The adoption of a new rule, and a new interpretation of an existing one, are not predicated on deriving the rule from first principles, nor on grounding it in scientific evidence. For sure, the law should not be blind to science and philosophy. Over the last decades, the law as an academic discipline has become more and more scientific. Yet ultimately the law as a social technology is about dissolving conflict (more from Engel 2003a) and about governing peoples lives (more from Engel 2007a). The gold standard is neither consistency (more from Engel 2006b) nor objectivity (cf. Daston 1999). Law is as good as its effects. The task of lawyers is not advancing knowledge, but making decisions. Ultimately, a decision is a good one because the professional legal decision maker is able and willing to take on responsibility for it (more from Engel 2009).

In safeguarding religious freedom, the pragmatic nature of law is not only helpful. Given the otherwise tragic dilemma between necessity and threat, a pragmatic approach is the only feasible one. Pragmatism is of course never perfect (Barak-Erez 2009). Pragmatic solutions are “conventions” (Sajó 2009:2411 f.), which gives them a dose of historical contingency, and traces of power play. Pragmatism risks to hiddenly privilege the religion of the majority (Sajó 2009:2417) and to perpetuate its historical dominance (cf. Ladeur and Augsberg 2007). Pragmatic interventions are bound to be imperfect. They cannot dissolve the dilemma, but they may help mitigate its obnoxious effects. Pragmatism may take a long time to overcome religiously motivated resistance. These days, the Bible is not proffered as a justification for slavery, although one may find passages in it that take slavery for granted (e.g. Exodus 21:2-6). But the Bible is used to justify the differential treatment of men and women (Solomon 2007). Pragmatic law does not stand outside the battles between competing religions, and between religion and the state. Pragmatic law is policy-making in the guise of legislation and adjudication.

Yet pragmatic law is policy-making of a very special kind, and under very special conditions (more from Engel 2003b). The interpreter of the Constitution is not entitled to policy-making from scratch. While responsibility brings in a grain of subjectivism, the legal decision maker may not simply impose her individual will on the law's addressees. She is bound by the text of the Constitution and, much more importantly, by the judicial tradition of interpreting it. Any political argument must be couched in doctrinal terms. Legal power is not invested in individuals, but in complex institutional arrangements. The right of initiative is with the parties, not with those deciding. If the parties do not bring the right case, decision-makers must wait. Conversely, those directly interested in one solution, i.e. the parties, have no direct influence on the outcome. All they may do is exploit the opportunities of procedure, and make their case as compelling as they can. Usually, and in particular when it comes to constitutional scrutiny, legal decision-makers are not individuals, but benches. They must give explicit reasons (more from Engel 2007b), and they know that the reasons of today will be held against them tomorrow. If they change doctrine for one fundamental freedom, the change risks spreading over to other freedoms, where its effects might be less welcome. Even more fundamentally: judges know that the power

of the judiciary will be curtailed if they more than very rarely fail to convince the population that their rulings are at least acceptable, if not desirable.

Specifically, the pragmatic nature of law is able to address the three reasons why religious freedom is at the same time a necessity and a threat. Law is aware of the fact that all normative argument is fundamentally relative (more from Engel 2001). One can, for instance, not prove that the growth of the economy is more important than improving the dire fate of the needy. Nonetheless, constitutional law does not content itself with creating a procedure for policymakers to fight this out. For instance, the German Basic Law simultaneously guarantees freedom of commerce and property, and it obliges government to make sure that everybody has at least enough to lead a humane life. In principle, it is for the legislator to exactly draw the borderline. But the Constitutional Court sees at it that the legislator does not overstep the constitutional limits. If necessary, as just a couple of months ago, the court even spells out that the law as it stands is no longer within these limits (BVerfG 9 Feb 2010, 1 BvL 1/09).

The same techniques may be used to balance the freedom of one religion against the freedom of another, the freedom of religion against the freedom to choose not to be religious, the freedom of a believer against the autonomy of her religious organisation, and the freedom of religion against competing freedoms that are also constitutionally protected, or against objective goals that have constitutional status. Balancing is not calculable, but controlled. The conceptual steps are worked out in the principle of proportionality (Robbers 2005; Grimm 2009:2375). The way how they are used and filled is predetermined by the existing body of constitutional jurisprudence.

The law is also prepared to alleviate the epistemic challenge. Courts may not refuse to decide cases. Yet in court, the scientific standards of evidence can hardly ever be met. The legal order has reacted by rules on the standard of proof and on the burden of proof. The standard depends on the relevance of the decision to be taken. But even the most stringent standard is content with silencing "reasonable doubt". And this high standard is not regarded as appropriate in all cases. Different legal orders have different techniques for alleviating the standard. American law may then be content with "preponderance of the evidence". Continental law would rather redistribute the burden of proof. It would for instance accept "prima facie" evidence, and leave it to the opponent to cast doubt on its applicability in the case at hand. Of course, none of this makes it possible to prove the existence of God. Yet the legal order may accept a proxy. It may accept the consistency of theological doctrine, or a long-standing practice of a confession.

Finally the law may also respond to the additional conflicts resulting from religions becoming missionary, or trying to influence general politics. Neither of this is prohibited. The former squarely comes under freedom of religion. The latter at least is protected by the general political freedoms. One may even discuss whether this too is an exercise of freedom of religion. Yet then religions try to impose their will on others who, themselves, are also protected by freedom of religion, including the freedom to decide against any religion at all. Therefore, constitutional freedom is pitted against constitutional freedom. If they try to introduce a religiously motivated argument into general politics, furthermore freedom of religion is pitted against the guarantees of

democratic process. Using the principle of proportionality, the competing freedoms have to be balanced out. From the very fact that two constitutional protections are in conflict it follows that, in such cases, freedom of religion may be more intensely limited.

Pragmatic law is sensitive to local conditions. If a conceptual divide does not affect the case at hand, pragmatic law sets it aside. It is content with "incompletely theorised agreement" (Sunstein 1995). If a theoretical conflict is not practical in the concrete instance, pragmatic law grants more freedom to those present (Rosenfeld 2009:2343). As long as the demand for tolerance is marginal, as in the case of the Amish, pragmatic law is more open-minded than with respect to similar wishes from less contained religions (critical on this Sajó 2009:2422). If being strict on legal principles risks causing revolt, the judiciary may act more cautiously. It may start by establishing a principle, and granting exceptions for a while, announcing that it will become gradually stricter. If a community is already more advanced on the road towards tolerance, the judiciary may impose closer scrutiny on one and the same case here. Under the European Convention on Human Rights, this is brought about by the doctrine of "margin of appreciation" (Engel 1986; Martínez-Torrón 2005).

Where the law cannot slight the conflict, it can try to transform it. The practically most important shift is from freedom to equality (Huster 2002; Grimm 2009). Instead of dissolving an intractable conflict between religions, religious and nonreligious people, or religion and the state, on grounds of first principles, the law approaches a solution from the premise that it may not discriminate on transcendental grounds (see for the European Convention of Human Rights Tulkens 2009:2582). One and the same action may not be treated differently only because in one case it is mandated or at least justified by religious doctrine (Eisgruber and Sager 2008). Translation requirements may also be brought under this rubric. The neutrality of the law between religions does not require that the law bans any religiously motivated act and any religious speech from the public sphere. It suffices that the legal decision can be translated into a criterion that does not condition on religious doctrine, or on religiosity (Huster 2002; Sajó 2009:2401) (this is missing in Rosenfeld 2009).

Finally, the law may offer religions a deal. If they are willing to organise themselves in a way that makes conflicts with other religions, with the nonreligious, or with the state less likely or more manageable, they are granted the privilege. To my reading, this is the essence of what in German law is often referred to as the choice between *Staatskirchenrecht* and *Religionsrecht* (Magen 2003; Classen 2006; Heinig and Walter 2007). Of course, giving churches the right to collect taxes through public administration, to send their teachers to public schools, to grant university degrees, to be remunerated by government for running hospitals privileges them in competition with other religions. Yet using the translation principle, this does not violate religious neutrality as long as the offer is good for any religion. It may be justified by the very reason why freedom of religion is a necessity. All these privileges not only help religions attracting believers. They also bring these religions into a permanent relationship with the state. Religions who accept these privileges have something to lose if they frustrate the legitimate expectations of the state. As part of the quid pro quo they have made themselves more "regulable" (the term has



been coined by Lessig 1999) (for an application see Engel 2006a). Given religious conflicts are theoretically not tractable and have all too often proven atrocious for those suffering from them, I am convinced this technology for making these conflicts negotiable is justified. I think so, even if one acknowledges that the promise of these privileges puts religions under pressure to organise such that they become credible negotiation partners for the state. In Germany, this is currently an issue with Islam, since the Islamic religion is intrinsically less prepared to organisation than in particular the Catholic church.

## **V. Conclusion**

Arbiters sometimes say with tongue in cheek: if both parties complain, the award can't be that bad. With my presentation of the issue I have certainly fulfilled the condition. I must have disappointed believers, non-believers, religious organisations, government officials, and my legal colleagues. Believers will surely dislike the areligious perspective. Throughout this paper, I adopt an external perspective on religion. I see it as a social phenomenon. I insist that religions are historically contingent. I accept a religiously pluralistic society as a fact. I regard religion inasmuch as a threat as I regard it as a necessity for governing this world. I say that the signs of God's presence in this world, of which believers think dearly, do not count as proof. By contrast, non-believers will dislike how much room I am willing to grant religion. I do not oblige government to combat what they see as superstition. I am not holding the absence of scientific evidence against religion. Through the many facets of pragmatism I effectively give government some room for supporting religiosity. I even allow for outright deals between the state and organised religions. Religious organisations will dislike that I allow for privilege only to the extent that it makes them vulnerable to regulatory intervention. They will also dislike that I am accepting their historically gained dominant positions in specific jurisdictions only to the extent that they can be translated into religion-neutral criteria, and that I insist on the constitutional right of competing religions to erode these dominant positions. Government officials will dislike that I am calling for tolerance even with religions that seem alien if not hostile to the culture on which this government's power is built. They may also find it restrictive that I limit the proper scope of government to the management of religious plurality. Finally my legal colleagues may dislike the external view on our discipline. I am not talking about the constitution because it is in force, but because it might be instrumental. It is key for my argument that legal doctrine is neither a mere exercise of logic, nor of tradition. For my solution to work the law in action must be only partly determined by the legislator. In my perspective, judges are not just legal professionals. They are policymakers, only of a different kind and under different constraints. Yet I deeply believe that partly disappointing all involved is the only possibility to overcome the otherwise tragic dilemma. The constitutional protection of freedom of religion is indeed a precondition for religious freedom being a social fact.

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