

FREEDOM OF RELIGION & THE SECULAR STATE



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FREEDOM OF RELIGION AND THE SECULAR STATE

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*Dedicated to freedom, reason, and tolerance . . . and to
all who labor on their behalf*

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Introduction

Religious freedom is not just one liberal freedom among others. As Rex Ahdar and Ian Leigh remind us, it is the prototypical liberal freedom, a cornerstone of modern political rights.¹ At the same time, however, its nature is disputed. Exactly when should we say that people possess religious freedom? When should we say that the freedom has been denied? Importantly, how does it relate to modern notions of secularism – and to other key freedoms such as freedom of speech?

Each day, we see passionate struggles over the concept. Patients refuse life-saving medical care – for themselves or their children – and invoke religious freedom in their defense. If a sick child dies after her parents deny her standard treatment, should the parents be criminally liable? Rival litigants strive to keep evolutionary biology out of the high-school science curriculum, or try to make sure it is taught. Strangely enough, *both* sides to this dispute invoke freedom of religion. Heated debates take place over concepts of blasphemy, over female dress, over religious displays on public land, over laws that enforce religious moralities. Churches seek exemptions from urban planning codes, claiming a freedom that others construe as religious privilege. Indeed, the very same churches and communities that claim to be marginalized can be seen by others as powerful and oppressive.

If religious teachings encounter severe criticism, or religious leaders receive scorn or mockery from their opponents, is that an *exercise* or a *violation* of religious freedom? What if a government tries to disarm a violence-prone apocalyptic sect? Is this a legitimate activity to protect citizens from harm, or an illegitimate encroachment on religious exercise?

2 *Motivation and Overview*

What if a government agency or a private corporation prevents its employees from wearing turbans on the job – or burqas, or yarmulkes, or conspicuous crosses? In all these situations, both sides of the debate may claim that they favor “true” religious freedom. Neither side will admit to being opposed to freedom of religion, but surely both cannot be right. Religious freedom can’t be all things to everybody, yet quite opposed policies are often pursued in its name.

In what follows, I consider religious freedom in historical and philosophical perspective. Somewhere at the core of the concept lies the fear of overweening government power, used to impose a favored understanding of the world – or another, transcendent, world – or to persecute those with a different understanding. As John Locke complained in the seventeenth century, the secular sword of government has been wielded to destroy unwanted doctrines, faiths, and sects. As Locke knew well, many heretics have been imprisoned, tortured, and often burned at the stake.

Historically, disagreement with the state’s preferred religion has often been met with ruthless force. As we look back, we see that this was sometimes successful; other times, it proved to be futile. Inevitably, it brought human costs, and in many times and places these were on a grand scale, as with the thirteenth-century Albigensian Crusade, in which hundreds of thousands of people died, many of them openly massacred. Even this was dwarfed by the European wars of religion in the sixteenth and seventeenth centuries. For the sake of one or another religious orthodoxy, men (and sometimes women) have been driven to terrible acts of destruction and cruelty.

Finally, around the seventeenth century, Western governments began a long process in which they slowly stepped away from religious impositions and persecutions. Here, then, is the beginning of religious freedom – in essence a freedom from persecution or the imposition of another’s religion. From this process grew the modern secular state and the turn toward liberalism.

Liberal Democracies

The process continues, and the outcomes to date have been patchy. The concept of religious freedom is still fiercely contested, even in the relatively secular nations of Europe, North America, and the developed world in general. Many citizens of those countries argue, on various grounds, that their freedom of religion is endangered or incomplete. In others, such as prominent nations in the Middle East, Western ideas of religious freedom, including the freedom to change religions or reject religion entirely, are not even given lip service.

I do not aim, in this study, to investigate freedom of religion on a global scale. That is a huge topic, and I can do no more than touch on some aspects here and there, where relevant. Perhaps another occasion will arise. Instead, I shall focus on the intersection of religion, law, and politics in contemporary liberal democracies. In particular, I will explicate a concept of the secular state, revising and updating John Locke's views from the seventeenth century. Even this limited task has endless ramifications, and it's not helpful that the concept of liberal democracy is itself a blurred and contested one.

On some strong conceptions there may be no pure liberal democracies. A conception like that will be far too narrow for my needs, but we can identify some necessary features. The concept includes at least some system of popular elections, together with various protections from the arbitrary or oppressive exercise of government power. Though governments are elected and responsive to the views of the people governed, that does not entail that they exercise a tyranny of the majority. Rather, there are limits to what governments may legitimately do, even with majority support: limits that offer a zone of protection for minority interests. These limits or protections may include written constitutional provisions, but the strongest may be rather less formal. They may involve widely understood political principles that guard the liberty of citizens. For example, there is a principle in modern Western societies that punishments should not be inflicted arbitrarily, but solely in accordance with generally applicable laws that are enforced through procedurally fair processes.

Again, whether by constitutional provisions, political principles, or a mix of both, the reach of government power may be limited in various respects. In particular, it may be established or understood that only certain kinds of justifications ought to be offered for coercive laws. At one extreme, it might be thought that no society is truly a liberal democracy unless it enacts coercive laws only in compliance with John Stuart Mill's harm principle. This is essentially the idea that an individual's liberty may rightly be abridged, through the exercise of social or political power, only in response to acts that cause certain kinds of harm to others.² At a later point, I'll elaborate and defend the harm principle, or at least a version of it that seems faithful in spirit to Mill's account. However, no country in the world would be a liberal democracy if this required rigorous adherence to the harm principle. All jurisdictions enact at least some coercive laws that are justified to the public on other grounds – even if those laws and grounds are controversial within the jurisdictions concerned.

Strict application of the harm principle would be too purist as a necessary condition for liberal democracy. Nonetheless, the latter idea involves at least some acceptance of reasonable social pluralism by those with the power to enact or enforce coercive laws. The “liberal” part of “liberal

democracy” implies a degree of restraint by the apparatus of the state. It will be reluctant to impose any template, or narrow set of templates, for the good life. Instead, the assumption is made that many ways of life are at least tolerable, and perhaps even valuable. No attempt should be made to suppress them by means of fire and sword, as Locke would have put it: that is, by the state’s coercive power. While the governmental apparatus of a liberal democratic society will be used for a variety of ends, including the deterrence of certain behavior, most ways of life are accommodated to the extent that social peace allows.

Thus, even though no modern society adheres strictly to the harm principle, not just any society qualifies as a liberal democracy. To do so, it must combine a democratic process for choosing the government of the day with significant reluctance to restrict the liberty of citizens (and others legitimately resident in the jurisdiction) to act as they wish with the resources available to them. Moreover, where individuals’ personal lives and life plans are at stake, including their ability to express themselves freely, have consenting sexual relations, and make reproductive decisions, the state apparatus of a liberal democracy is particularly solicitous of freedom of choice, unless a compelling reason can be found to do otherwise.³ Whereas many other political arrangements involve the coercive imposition of a comprehensive view of reality favored by the state, liberal democracies aim to provide a framework in which people with many differing views can live in harmony, or at least with mutual forbearance.

It seems to follow that no political formation meeting the minimal requirements to qualify as a liberal democracy would be motivated to persecute citizens (and relevant others) on the ground of religion. But as I’ll explore in the following chapters, life is not so simple.

What is Religion, Anyway?

To this point, I have been using the words “religion” and “religious” as if they are unproblematic, but that is not so. We may question whether what we know as religion is a unitary phenomenon: is Christianity really the same sort of thing as Buddhism, for example, and are non-literalist forms of Christianity the same sort of thing as those which treat the Bible as historically and scientifically accurate? Are any of the well-known modern religions really the same kind of thing as ancient polytheism, or even more ancient forms of spirit worship? Do theistic religions and non-theistic ones really belong in the one category?

Many scholars and courts of law have struggled with the concept of religion, and there is no perfect definition either for the purposes of the law or for those of scholarly fields such as anthropology. In Lecture II of the

series that constitutes *The Varieties of Religious Experience*, William James doubted that an exact definition was possible,⁴ while Frieder Otto Wolf has recently suggested that the concept of religion is “most deeply imbued and tainted by Euro-centrism and naïve assumptions derived from an often unilaterally simplified Christian tradition.” He adds:

It is, indeed, doubtful that there is any meaningful common denominator between the “everyday magical practices” of an indigenous tribe, Judaic obeisance to the commandments of God to be found in the Tora, the practice of Sunni Islam based on the Qur’an, of Sufi mysticism, of Jainism, of Shintoism, or of Buddhism.⁵

Robert Wright indicates that there is (arguably) no specific concept of religion in hunter-gatherer societies, since their various spirits and gods are seamlessly continuous with the observed phenomena of nature. Such societies’ “religious” beliefs and rituals are tightly interwoven into everyday thought and action, and are not clearly distinguished from a non-religious sphere of activity.⁶ Charles Taylor makes essentially the same point: in the oldest societies, religion was so ubiquitous that it was not even noticeable as a separate sphere.⁷

Does this mean that “freedom of religion” is a meaningless expression (along with such expressions as “secularism,” which seem to contrast with religion in some way)? If so, what were the historical disputes about – the struggles between monotheistic religions and pagan polytheism, for example, or those within Christianity? Untold millions of people have fought, killed, or died, tortured or been tortured, in the name of religious correctness. Or so it appears. Was there nothing that these events had in common? More generally, should we confess that that we don’t know what we’re talking about when we use such words as “religion” or such expressions as “religious persecution,” “religious freedom,” and even “comparative religion”? Surely that can’t be right.

No matter what definition is adopted, there will probably be marginal cases. Still, the concept is not so vague as to be useless for the practical purposes of social and legal policy in contemporary liberal democracies. James’s efforts in *Varieties of Religious Experience* provide one good starting point, and a more modern one can be found in Taylor’s monumental study, *A Secular Age*.

With considerable misgivings, James settled on a loose definition, for his purposes, referring to the feelings, acts, and experiences of individuals in solitude “so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”⁸ As he acknowledged, this definition then raises a question about what is meant by the word “divine.” “The divine,” he concluded, “shall mean for us only such a primal reality as the