

IS THERE A RIGHT TO FREEDOM *FROM* RELIGION?

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Is there - and if not should there be - a right to freedom from religion?²

If you lived in Saudi Arabia, Pakistan or Iran you might welcome such a right with open arms. It is sobering to think that England used to be like them: that the Church of England was born in an orgy of destruction such as ISIS has not come near to emulating, that there followed a long-lasting persecution of Roman Catholics and discrimination against other non-Anglicans, including any who dared not to be religious: all were compelled by law to attend Anglican worship, could not be married or buried except courtesy of the established church, and suffered curtailment of their civil rights well into the 19th century. We have come a distance since then - but we have done so without an explicit right to freedom from religion.

That said, the non-religious and religious non-conformists still have legitimate causes for complaint. Since people do not join clubs defined by what they are not, they lack organisations to stand up for their rights, and so they tend to be silent. Yet:

- They are the people who are not eligible for a wide range of teaching and public service jobs because the employer is a religious organisation.
- They are the doctors who are forbidden to carry out abortions by the religious hospital that employs them.
- They are the women who cannot get an abortion or have to go through hoops to do so for the same reason.
- They are the taxpayers whose tax is paid to a church to support a religion they do not believe in and its political campaigning that they oppose.
- They are the scientists who cannot get EU funding for their work because the EU, under pressure from the Vatican's agents, excludes research using human embryonic stem cells.
- They are the writers and artists who cannot get their work published or exhibited for fear of offending religious sensibilities.
- They are the gay couple who cannot get married or who risk being turned away at a hotel or registry office.
- They are the parents who find the only school available to them is a religious one, or

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² My paper is argued mainly from the legal position in Europe and particularly that in England (for the sake of simplicity I ignore here the other parts of the United Kingdom but they are usually similar). The situation in other parts of the world, including the USA, is of course often different.

who cannot get their children into the local school because it is religious, or who find that even in their non-religious local school their children are expected to pray and are given religious education that ignores non-religious beliefs.

- They are the painfully and terminally ill who cannot end their lives because the churches - in England specifically the bishops in the House of Lords - forbid it.

More generally, they are all the people who resent the easy assumption, still all too common, that religion is identical with virtue³ and that there is therefore something not respectable about opposing any demand made by the churches or about criticising anything labelled 'religion'. Is this not a case for a right to freedom from religion?

Natan Lerner, in the 2012 edition of his book *Religion, Secular Beliefs and Human Rights*,⁴ claims there should be such a right, referring to "the rather neglected right to freedom from religion" and proposing a "tentative list" of the freedoms. They include, for example, freedom not to be coerced to belong to a religious faith or to perform any ceremony or act of a religious nature, not to be obliged to take a religious oath, not to be exposed to mandatory religious instruction and not to have to reveal one's religion or belief in official documents. The last of his list is the right "not to be exposed to religious propaganda, indoctrination or proselytism when forming part of a captive audience [including] the right not to be exposed to emblematic religious symbols, in obligatory schools, state judicial chambers, public hospitals or other places where a person is part of such a captive audience".⁵

What is notable about most of these is that they are - or should be - guaranteed already by the right to freedom of religion and belief - including, of course, the freedom not just to reject religion but to hold non-religious beliefs such as Humanism. In some jurisdictions this may still be a work in progress, but given General Comment 22 of the UN Human Rights Committee on Article 18 of the International Covenant on Civil and Political Rights (which is

³ This must be the assumption underlying, for example, the BBC's unwillingness to allow Humanists to participate in its daily *Thought for the Day* slot although representatives of all the major religions do so: only the religious are held to have ethical insights of any value on current affairs.

⁴ Martinus Nijhoff Publishers, Boston, 2012.

⁵ The slightly odd complete list of relevant rights is as follows:

- a) To have or not to have a religion or a belief and not to be coerced to belong to a religious community, church, or faith;
- b) To opt out from any religious community, church, or faith with which one does not want to identify with or be a member of it (*sic*);
- c) To be excluded from any official register identifying persons by religion or belief;
- d) Not to be coerced to perform any ceremony or act of a religious nature;
- e) Not to be obliged to take an oath related to religion;
- f) Not to be exposed to religious indoctrination or mandatory religious instruction against one's will or the will of the parents or legal guardians of a minor;
- g) Not to be buried in a religious ceremony;
- h) Not to be coerced to reveal one's religion or belief in official documents;
- i) Not to be exposed to religious propaganda, indoctrination or proselytism when forming part of a captive audience. This includes the right not to be exposed to emblematic religious symbols, in obligatory schools, state judicial chambers, public hospitals or other places where a person is part of such a captive audience.

essentially similar to Article 9 of the European Convention)⁶ and case law under the European Convention on Human Rights (which in particular has in several cases established the right to privacy about one's beliefs⁷), all but the last of Lerner's list would appear to be secure - and that also might have been covered but for the very dubious Grand Chamber judgement in the *Lautsi* case⁸ and may yet emerge in other more deeply considered cases. (I revert later to Lerner's right not to be exposed to mandatory religious instruction.)

So what is there left that a right to freedom *from* religion could deliver that is not already provided by freedom *of* religion and belief ?

Lerner generalises:

Everyone is entitled to be exempted from any duty, obligation, restriction or taxation imposed by religious norms and enacted by the state at the national or local levels.

This, especially with its mentions of restrictions or taxation imposed by religious norms, goes beyond his own list. Moreover, it could also be asked whether an entitlement to exemption is enough if what one is potentially exempt from would otherwise be a contravention of human rights. This would seem to follow from the logic of a recent High Court case in England⁹ in which it was said in effect that a right to withdraw a child from religious education was not sufficient to render lawful a syllabus of religious education in state non-faith schools that would otherwise fail to meet the requirement under European Convention case law that such education be 'objective, critical and pluralistic'.

In the rest of this paper I will put forward a catalogue of *desiderata* that might follow from a right to freedom from religion and will consider whether such a right is needed for their achievement or whether they might not better be established by extensions of the existing right to freedom of religion or belief or by other means such as laws on equality and non-discrimination.

First let me note that there is something odd about religion and belief in contrast to the other accepted freedoms - of movement, of assembly, to marry and raise a family, own property, and so on. They are by and large freedoms to live without constraint by others,

⁶ "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions." - Human Rights Committee, 1993 (General Comment no 22(48) (Art. 18) adopted on July 20th 1993, CCPR/C/21/Rev.1/Add.4, September 27th 1993, p.1.)

⁷ For example, *Sinan Işık v. Turkey* [2010] (no. 21924/05) at §60; *Folgerø and Others v. Norway* [2007] (no. 15472/02) at §98; *Hasan and Eylem Zengin v. Turkey* [2007] (no. 1448/04) at §73.

⁸ *Lautsi and others v. Italy* [2011] (no.30814/06). For a devastating critique of the judgement see Lorenzo Zucca: *Lautsi: A Commentary on a decision by the ECtHR Grand Chamber* (International Journal of Constitutional Law (2013) 11 (1): 218-229); also my own analysis at <http://www.thinkingabouthumanism.org> under the tab Miscellany.

⁹ *Fox and others v. Secretary of State for Education* [2015] EWHC 3404 (Admin) at §79.

especially by government, but their exercise does not in any essential way infringe the rights of others. In the same way, people covered by the various 'strands' of equality legislation - race, gender, sexuality, disability, age and so on - do not as groups having those characteristics affect the rights or freedoms of those in other strands. But religion is different. It is not that religion can be changed at will - it cannot, though it is mutable. Rather, religions have intellectual content: they assert 'facts', make claims about values and issue commands about behaviour that potentially have seriously damaging effects on others.¹⁰ Thus:

- Different religions make mutually incompatible and controversial claims about the nature of life and the world.
- Religions deliberately influence their followers' attitudes and behaviour, often in ways which can be similarly controversial.
- Religions are in competition with each other: evangelists come to our front doors, set up television and radio stations and run crusades to make converts.
- Religions are expressed through organisations, some of which are wealthy and powerful. They exercise that power in the name of their faith far outside the realm of religion - in influencing social attitudes and national and international policies (e.g. on free speech and on sexual and reproductive health and rights).
- Religious believers often feel under a duty to react strongly to any criticism or insult offered to their beliefs, prophets or deities, however mild or reasonable.¹¹

No other human right, no other protected characteristic has any similar effect. My freedom of movement does not limit or denounce yours. Protecting you as a member of one ethnic minority has no deleterious effect on me as a member of another.

Religion in other words is *sui generis*. And its effects are real. Insofar as religion - in the shape of individuals, churches or religious lobby organisations - use their power and influence to shape society to conform with their norms and doctrines, they can make life truly uncomfortable for non- and other-believers. I shall return to this.

So how might a right to freedom from religion be the solution to these difficulties? What would it mean? What would it deliver that we do not have already in human rights law in theory if not in practice or in foreseeable developments of it? I want to answer this question by looking at, first, the constitution of the state; second, laws influenced by religion; and third, the side-effects of delivering freedom of religion and belief.

¹⁰ Even though freedom of expression, like freedom of religion, is a freedom to express thoughts that may offend, there are usually, perhaps always if you go back far enough, some shared premises that, after robust but reasonable argument, will provide a means of resolution.

¹¹ This list is adapted from a longer version in my evidence to the Woolf Institute's Commission on Religion and Belief in British Public Life, for which see <http://www.thinkingabouthumanism.org/religion/religion-and-belief-in-british-public-life/>

First, there is the question of the constitution of the State.

The Westphalian settlement put an end in Europe to attempts by states to impose a single religion across the civilised world, but it took a long development after that for individual states first to concede a reluctant tolerance of other beliefs and much more recently to harden that into a right to freedom of belief. But this progress has applied principally to individuals and the way they choose to live, not to the state itself and its laws and official institutions. These have generally remained formally or informally wedded to a particular religion or Christian denomination.¹² Indeed, in most states we still have a residual theocracy - what Max Wallace¹³ calls 'soft theocracy' - with established churches, state funding of religion and so on. This, despite its alienating effect on what in many cases is now a majority of the population,¹⁴ is still held to be compatible with the Universal Declaration of Human Rights and with the European Convention on Human Rights. However, the European Court of Human Rights in many judgements¹⁵ has been edging towards a requirement for the state to be secular - that is, not wedded to or favouring any particular religion or belief.

So, supposing human rights fully embraced the principle of secularism and the secular state (where secular means neutral in matters of religion or belief): what would that mean? It would free the non-religious and the other-religious citizen from implicit participation in and acknowledgement of a religion entrenched in the official laws and institutions of the state. It would demonstrate that the state accorded equal respect to all citizens, would guarantee equal treatment and reinforce equal access to official services. But - and this is vital - it would do so without infringing the freedom of belief of any follower of the previously favoured religion. All it would do is remove privileges inherited from centuries before human rights were established. Those privileges are often so encrusted with tradition that they seem untouchable, but they are typically enjoyed by shrinking minorities of the population¹⁶ to the increasing irritation or incomprehension of the growing non-religious and non-Christian population.

¹² Or just to religion as a category: for example, the English law on charities until the mid-c20th held that "As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none." - *Neville Estates v. Madden* [1962] Ch. 832 at §853).

¹³ Max Wallace: *The Purple Economy: Supernatural Charities, Tax and the State* (2007) Melbourne, Australian National Secular Association, p.72.

¹⁴ The EU's Eurobarometer survey found as long ago as 2005 that in its then 25 member states only 52% of people believed in God while 18% rejected outright even the idea of 'some sort of spirit or life force' - Eurobarometer special survey: Social values, Science and Technology (European Commission, June 2005) available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf.

¹⁵ For example, *Metropolitan Church of Bessarabia v. Moldova* [2001] ECtHR (no. 45701/99) at §§116-117; and *Supreme Holy Council of the Muslim Community v. Bulgaria* [2004] ECtHR (no.39023/97) at §93.

¹⁶ For example, the annual British Social Attitudes survey has for many years found under half the population saying they are Christian, with well under 1 in 5 acknowledging the Church of England. See the figures at <http://www.britisocat.com>.

Let me illustrate the effects by looking at England.¹⁷ It would mean first that the Church of England was no longer established - which would have surprisingly little effect in everyday life, establishment being, in the words of Walter Bagehot,¹⁸ part of the dignified rather than the efficient constitution. The 26 bishops who sit in Parliament as of right¹⁹ would lose their seats. Religious observance would be removed from official occasions²⁰: no prayers in Parliament or local councils; no religious observance on national occasions of celebration or mourning (the annual Remembrance Day ceremony at the Cenotaph was originally secular but quickly hi-jacked by the Church of England²¹). State schools would not be compelled but forbidden to have daily religious worship and the state would not finance religious schools. Official procedures would be secular - courts would not use religious oaths, marriages would be solemnised by civic authorities, not by churches. Official buildings would not display crosses or other religious symbols (though few do and exceptions would have to be made, for example to avoid damage to historic buildings). More relevantly, the state would cease contracting out to religious bodies the provision of core public services. Religions, especially Christianity, would also lose their privileged position in the provision of pastoral care in 'closed' environments such as universities, the armed services, hospitals and prisons - something that is beginning to happen in England with (for example) a new policy of welcoming humanist pastoral support workers in hospitals.

And of course there would be no official funding of religion as such. This is by and large already the current position in England, with the churches receiving financial support if at all only for secular purposes, principally for maintaining their historic buildings. Elsewhere in Europe, however, official funding is the norm, not the exception, with huge amounts of taxpayers' money providing a life support system for moribund churches.²²

¹⁷ Elsewhere the effects would include reform of situations such as marriage and divorce being available only through religious authorities (as in Israel); courts requiring religious oaths (as in Greece, despite at least three findings against the practice at the European Court of Human Rights - see <http://www.lawandreligionuk.com/2014/10/18/oaths-the-greek-judicial-system-and-article-9-again/>); court rooms displaying crucifixes (as in Italy - see <https://www.lifesitenews.com/news/italian-judge-who-refused-to-hear-cases-because-of-crucifixes-in-courtrooms>); and appointments of professors of philosophy, pedagogy, sociology and political science at seven universities being subject to the local Roman Catholic bishop's consent (as in Bavaria, Germany - see <http://www.concordatwatch.eu/topic-2891.834>).

¹⁸ In his *The English Constitution* (1867).

¹⁹ A right that long antedates and does not depend on the establishment of the Church of England.

²⁰ On occasion there might be some subordinate participation by all willing religion or belief groups.

²¹ See Norman Bonney: *The Cenotaph: A consensual and contested monument of remembrance* (2013) available at <http://www.secularism.org.uk/uploads/cenotaph-a-consensual-and-contested-monument-of-remembrance.pdf>

²² For example, in France churches built before 1905 are owned and maintained by the state; Greece pays for the training, salaries and pensions of Greek Orthodox clergy; in Italy 0.8% of income tax goes to registered religions or to the state as nominated by each individual taxpayer - the Roman Catholic Church receives 87% of the total; the Evangelical-Lutheran Church of Finland receives 1.63% of the proceeds of corporation tax; in Germany direct annual subsidies to churches from individual Lander total €460mn. (Der Spiegel 24/7/10); etc.

As to this first area of concern, therefore, it seems that adopting a secular constitution would avoid the need for a freestanding right to freedom from religion. This could be achieved by a gradual judicial and legislative extension of the obligation on the state by reason of freedom of religion and belief not to coopt its population willy nilly into religious observation or systematically to provide support, privileges or power to one or more churches or to religions as a category. The religious institutions involved would predictably offer fierce resistance but - and this is vital - the freedom of religion and belief of their members would not be touched.

My second focus is on laws that originate in religious doctrine and are still justified by it and by religious pressure.

This is another area where the inheritance from the Christian past still weighs heavily on the secular present. It is not straightforward in that, although such laws were plainly influenced or inspired by religion when they were enacted, plausible arguments in secular terms can usually be found in their defence. Their religious background, however, means that serious re-examination is justified to ensure that the secular case is convincing and not merely a disguised defence of residual theocracy.

The laws and public policies in question mainly relate to the predominant concerns of religion: the beginning and end of life, sex and gender, heresy and blasphemy. They thus involve public ethical issues such as contraception; abortion; *in vitro* fertilisation; genetic research; all sexual behaviour other than simple reproductive heterosexuality; marriage and divorce and illegitimacy; assisted dying and euthanasia, along with blasphemy and religious insult. Much progress has already been made with necessary reforms but in most countries more - sometimes a lot more - remains to be done. It would be easy to produce a catalogue of examples (relatively few, to be fair, from Britain) ranging from restrictions on abortion in Ireland and Poland that have been condemned by the Strasbourg court, to criminalisation of assisted dying for the incurably ill who wish to have the means to end painful, undignified and pointless lives; from restrictions on EU funding of research using human embryonic stem cells to laws against free speech about religion in Ireland, Poland, Greece and elsewhere - including two states in the USA!²³

Re-examination would not necessarily see these laws repealed and policies changed, but it would see them reviewed and possibly amended without regard to their religious roots. Members of faith groups have every right to live according to their own beliefs but they cannot be allowed to command the law to impose their beliefs on others. Sadly some of them show remarkably little awareness of the consciences of others. They are not being forced to have an abortion: but they are preventing others from doing so, even (recently in Ireland) at the cost of the mother's life. They are not being forced into a gay relationship: but they are stopping loving couples getting married, or even criminalising their love. They are not being forced to benefit from treatments based on stem cell research: but they are trying to prevent the research and discovery of vital treatments for life-threatening inherited conditions. They are not being forced to die before their time: but they are forbidding others

²³ Massachusetts & Michigan (Houston Chronicle 2.8.16) - <http://www.chron.com/news/houston-texas/article/Study-finds-laws-banning-blasphemy-and-apostasy-8987665.php>.

a merciful release from lives of intense and incurable suffering.

And too often religious lobbyists are powerful and effective in their attempts to impose their own notions of virtuous behaviour on everyone else. To be fair, it is probably not the majority of religious believers who seek to do so - assisted dying is supported by about 80% of the UK population almost regardless of religion²⁴ - but it is often their leaders and institutions, not to speak of religiously inspired lobbyists, who do so. A very few examples will suffice:

- Time and again at the United Nations a combination of Roman Catholic and Islamic states blocks moves to establish sexual and reproductive health and rights.²⁵ The Center for Family and Human Rights (previously more honestly the Catholic Family and Human Rights Institute) is ubiquitous and effective at the UN in New York, with sophisticated lobbying against family planning programmes and the like, meantime raising funds with disgusting and alarmist propaganda.²⁶
- In Europe, the European Centre for Law and Justice, founded and funded by the American televangelist Pat Robertson, lobbies hard at the Council of Europe and

²⁴ A 2015 Populus poll of 5,000 people showed 82% support overall, including 79% of religious people - see <http://www.populus.co.uk/wp-content/uploads/2015/12/DIGNITY-IN-DYING-Populus-poll-March-2015-data-tables-with-full-party-crossbreaks.compressed.pdf>

²⁵ The extent of such lobbying was described in a report commissioned and published by the Norwegian government: *Lobbying for Faith and Family: A Study of Religious NGOs at the United Nations* (Norwegian Agency for Development Cooperation, February 2013).

²⁶ A recent fundraising email started:

“Without a doubt they are coming for your daughter and your son and your grandchildren. They don't have any children of their own. They are deliberately barren. So, they have set their sights on yours, your innocent girls and boys.

“From among our children they want to build an army that will subvert our world and create even more victims. They must subvert the family and the Church because the family and the Church are our sole protectors. The state cannot be counted on to help us. We are alone.

“Who is coming for our children?

- UN Radicals
- UN Agencies
- International Planned Parenthood
- Human Rights Campaign
- Radical homosexuals

“They use international institutions to impose their view on countries but most especially on children. They want to spread their devilish gospel of UN-style contraception, population control, p*nography, abortion, gay rights, and all the other aspects of the sexual revolution that have caused untold sorrow in the United States and around the world.

“They have billions of dollars and the awful might of governments behind them. And the body count grows ever higher. How many dead babies? A hundred million? More? How many dead from sexually transmitted diseases? Hundreds of millions. How many infected? How many divorces? How many addicted to violent p*rn?

“There is really nothing to stop them . . . except C-Fam and a handful of others.

“C-Fam has been at this longer than most. At the UN, no other group has been there every day for twenty years like we have. Sure, lots of wonderful groups come to the UN, but then they all go home. We stay. We are there every day, seven of us, only seven that stand between the evil and your daughters and sons. . .”

The email ended: “Please pray for us right now by name”. - C-FAM circular, 5 August 2016.

- intervenes in support of religious ethics at the European Court of Human Rights. In Italy, where the low birthrate - the eighth lowest in the world²⁷ - attests to the population's vanishing subservience to the Catholic church, religious pressure has nevertheless led to a refusal on grounds of conscientious objection to take part in abortions by 70% of gynaecologists²⁸ and a similar proportion of anaesthetists, forcing numerous women to seek underground abortions or go abroad for a termination.

Their lobbying is clever: as Jay Michaelson²⁹ has demonstrated, they are “mainstreaming discrimination by rebranding it as religious liberty”. “Religious liberty is meant to be a shield against state action, not a sword against minorities”, but that is how it is being used: “Using the ‘religious liberty’ framework, the Christian Right now attacks access to contraception and abortion, same-sex marriage, and anti-discrimination laws - not on moral grounds (e.g., that contraception is morally wrong or that LGBTQ rights violate ‘family values’), but because they supposedly impinge on the religious freedoms of others (e.g., by forcing employers to violate their religion by providing contraception coverage [*viz, in employee health insurance policies*])”.

So with this second category of religious impositions on the non-religious and other-religious it seems that a right to freedom from religion is not the obvious way forward: rather, its victims need to fight against the unjustified extension of the religious freedom of a minority of zealots at the expense of religious oppression of others, and they can best do so by asserting their own rights and liberties, including their freedom of belief. A religious majority is not entitled, however convinced of its righteousness, to impose on the freedoms of others for religious reasons unless a good secular case can also be made out. Otherwise by analogy a non-religious majority might be entitled (for example) to forbid church attendance because, supposedly, it fosters delusions, wastes time and undermines rationality.

That leads me to the third and final aspect of freedom from religion that I wish to examine. This is that a right to freedom from religion would remove the burdens imposed on the non-religious (and often the other-religious) in the course of delivering freedom of religion for the “true believers”.

There is sometimes an assumption that freedom of religion and belief means that religious sensibilities must in every case be accommodated - that religion carries all before it. That of course is not what it means: under the European Convention on Human Rights there is absolute freedom of belief but only a qualified freedom to manifest it.

One of the qualifications serves to protect the rights and freedoms of others. Even legitimate delivery of freedom to manifest a religious belief can require some incidental

²⁷ WHO data for 2013 - see <http://apps.who.int/gho/data/view.main.CBDR2040>

²⁸ See <http://www.ippfen.org/news/council-europe-finds-italy-violating-womens-rights>

²⁹ Jay Michaelson: *Redefining Religious Liberty* (Political Research Associates, 2013) - http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA_Redefining-Religious-Liberty_March2013_PUBLISH.pdf

compromise of the rights or freedoms of other people. But too often in delivering freedom of religion to the devout, the interests of those others involved are in practice given insufficient weight, especially when they - fellow employees, employers, customers and service users - are non-religious. They may legitimately complain - and their objections will perhaps be particularly acute when it is not individual religious freedom but that of organisations that is being protected.

Such is the case when:

- religious employers are permitted to discriminate against job applicants or candidates for promotion because of their lack of the employer's religion. This is the case with a large minority of teaching posts in England and a proportion of some public service jobs in (for example) hospitals in many other countries;
- secular employers are obliged to make accommodations for religious employees that have deleterious effects for their other employees - e.g., if concessions over job duties or time worked are made without adequate compensating arrangements for those who have to fill the gap;
- women wanting emergency contraception are turned away by a pharmacist on grounds of religious exemption from professional duties;
- elderly gay couples are split up when the local authority's duty to house them is contracted out to a religious retirement home because it disapproves of their 'inherently disordered condition'.

So is this a case for a right to freedom from religion? I think not. The rights of non-religious people need to be defended on the basis of their own freedom of religion and belief. This is a question of the interpretation of freedom of religion and belief, not one of opposition to it. There is no easy solution by way of asserting a new right. Instead, tough arguments need to be had in multiple contexts with subtle distinctions of fact and circumstance over the boundaries between your and my and his & her rights.

This is where the distinction under the ECHR between manifestation of religion or belief and motivation by it is so valuable.³⁰ Not every act motivated by religion is a manifestation of it. Just as a pacifist cannot lawfully refuse to pay the proportion of taxes that goes to defence³¹ so Christian pharmacists should not be permitted lawfully to refuse to dispense contraceptives contrary to their professional obligations³² nor should a Christian proprietor of a business be allowed to refuse a commercial service on grounds of the would-be client's sexuality.³³

³⁰ "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief." - *Eweida and others v. United Kingdom* [2013] ECHR 37 at §82.

³¹ *Arrowsmith v. United Kingdom* (1981) 3 EHRR 218.

³² *Pichon and Sajous v. France (dec.)*, no 49853/99, ECHR 2001-X.

³³ *Bull and Bull v. Hall and Preddy* - UK Supreme Court: [2013] UKSC 73.

Some consciences are very tender but the law does not have to fall in with them - conscientious objection in war did not exempt objectors from alternative war work, and if they refused that they went to jail. But often the difficulty is created not by deep-felt conscientious objection but by obedience to a perceived religious duty - or by the opportunistic making of what is essentially a political point, sometimes in a clearly orchestrated campaign: for one of the factors that must be taken into account when we stand back from the individual case is the rise of litigation as propaganda aimed at building a false narrative of religious persecution. Campaigning Christian bodies often take on unlikely cases and are not worried about losing because losing only adds colour to the appearance of persecution. This is what was noted in the Jay Michaelson report already mentioned. It is part of the motivation of the European Centre for Law and Justice and other European bodies³⁴ and in the UK of the Christian Legal Centre which has brought many unsuccessful cases including two of those that recently attracted attention in the European Court of Human Rights.³⁵

I am not saying that these cases were altogether lacking merit. The court found for Eweida and I have no quarrel with that. But these are often not easy questions: the territory is contested, and compromises are necessary on all sides. The UK, with its Equality Acts extending the law on equality and non-discrimination from employment and occupation, where the EU mandates legislation, to the provision of services and premises, has had to face problems most other countries have not yet encountered. This is not the place for a detailed examination and I have written elsewhere on the matter³⁶ but legislators wishing to provide for conscientious objection and religious exemptions from laws of general application need to think carefully through the consequences and, for example, draw distinctions between individuals and institutions, and among the latter between those with a primary purpose of advancing or practising a religion (such as churches), those with a primary purpose of delivering a service, maybe to the general public, in a way based on religious principles (such as religious charities), and those with a primary purpose that is secular, albeit their owners or managers wish to act in a way consistent with their personal religious beliefs (such as businesses).

And among the latter two categories, another distinction is relevant: between those that are publicly funded to provide a public service, maybe under contract to a public authority, whose clients therefore have little or no choice but to come to them, and those that are independently offering a service to clients who choose to take it up.

A special case concerns the freedom - the human right - of parents to bring up their children according to their own beliefs. No one wishes to deny that right to parents, but theirs is not the only interest at stake. In Article 2 of the first protocol to the European Convention on

³⁴ Such as the Observatory on Intolerance and Discrimination Against Christians in Europe, the One of Us campaign, Citizen Go, etc.

³⁵ It directly supported two of the losing cases (*Chaplin* and *McFarlane*) out of the four heard as *Eweida and others v. UK* [2013] (nos. 48420/10, 59842/10, 51671/10 and 36516/10).

³⁶ See <http://www.thinkingabouthumanism.org/religion/the-limits-to-legal-accommodation-of-conscientious-objection/>

Human Rights, the primary right is education - a reminder that children have rights too and there is a public interest at stake. The right of parents to bring up their children in their own beliefs is not unlimited, nor is it a right to have the state do it for them. The state should not provide or fund the religious instruction of children,³⁷ whether in a single religion or in a variety at the option of parents, and should not therefore fund religious schools. (This is a policy for which there are many other good practical arguments, primarily the social and ethnic as well as religious divisiveness of separate schooling.) Any religious education it provides in non-faiths schools must be “objective, critical and pluralistic”.³⁸

Moreover, the state has a role in protecting the human rights of children even in privately funded schools: for example, in England recent concerns about extremist influence in some Muslim schools have led to overdue official awareness of gross abuses of children’s rights not only in madrassahs providing supplementary education to Muslim children but also in full-time ultra-orthodox Jewish yeshivas, many operating unlawfully. The UN Convention on the Rights of the Child guarantees children’s freedom of religion and belief which can sometimes require protection by the state from religious impositions by their parents.³⁹ All the more so should the state refrain from its own abuse of children’s freedom of religion and belief, yet as the latest report from the UN Committee on the Rights of the Child⁴⁰ says, the UK is guilty of imposing religious worship on children in all state schools with no right for them (as opposed to their parents) to opt out until they reach the sixth form (i.e., are aged 16+). Schools indeed are another example of that special set of cases already noted where in a closed environment there may be no escape from religion. Just as in prisons, hospitals and the armed services, so in schools a right to some freedom from religion is entirely necessary. But in every case the degree of freedom from religion that can be justified is best delivered by a proper balancing of the freedom of religion and belief of the religious, the other-religious and the non-religious.

So, freedom from religion can be delivered partly by achieving a secular state; partly by a stringent review of laws that in origin were at least in part justified as imposing religious ethics; and partly by weighing fairly the rights of everyone affected by any claim for freedom to manifest religion.

But is there a still wider right to freedom from religion? Should the public square be entirely free of religion - do we want to legislate for a secular society as against a secular state? Should religious arguments be barred in public debate rather than being answered and/or discounted to the extent that they are based only on religion? Should wearing religious dress

³⁷ This is not an objection to education about religions and beliefs, which on balance is desirable in all schools subject to its being ‘objective, critical & pluralistic’ as required by European human rights law, and there is no right not to have education of this kind - see *Lautsi & others v Italy* [2011] (no. 30814/06) at §61, quoting *Bulski v. Poland (dec.)* [2006] (nos. 46254/99 and 31888/02).

³⁸ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* [1976] 1 EHRR 711 at §53; *Folgero v. Norway* [2007] (no. 15472/02) at §84 and §89; *Zengin v. Turkey* [2008] (no. 1448/04) at §§54-55 and §63.

³⁹ *R v. Secretary of State for Education ex parte Williamson* [2005] UKHL 15.

⁴⁰ See advance version CRC/C/GBR/CO/5, published 3 June 2016, available at https://humanism.org.uk/wp-content/uploads/CRC_C_GBR_CO_5_24195_E.docx.

and symbols be banned as incompatible with ‘living together’⁴¹ in society? Should street preachers be prosecuted for nuisance to the passing crowd? Should churches be required to remove their irritating doomsday propaganda from noticeboards facing the public street? Should governments refuse to engage with religious groups simply because they are religious? Should intolerant religion not be tolerated in a liberal democracy - as proposed in a recent book⁴² by Yossi Nehushtan? Should governments curtail freedom of religion in the name of freedom from religion even in order to combat religious extremism, as suggested recently by Amos Guiora in a book⁴³ called “Freedom from Religion”?

To all these questions I would firmly say No, save (especially in the last two cases) for the limitations allowed under Article 9(2) of the European Convention on Human Rights and comparable provisions elsewhere. These proposals all go beyond those permitted limitations on religious manifestation - “limitations . . . prescribed by law and . . . necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. They would tend to deny equality and protection from discrimination to religious minorities. They would curtail the freedom of religion and belief and freedom of expression of people with whom indeed we might disagree but who are our neighbours and to whom the public space belongs as much as it does to us. We are all members of society together: it may not always be comfortable but the need to give and take is part of living in a community. Governments need to listen to all groups, including religious groups, not (*pace* Silvio Ferrari) because their ‘power to mobilise significant groups of followers [is] too important to be ignored’⁴⁴ but because they are part of the society they govern and so have a right to be heard like anyone else (which is not in the least to say that a communitarian organisation of society is desirable).

There is, however, an arguable case for a stronger form of secularism than suggested above - one that would deliver an extensive freedom *from* religion but only in the official arenas of the state.⁴⁵ Under it not only the organs of the state but every representative of it down to the most junior and even temporary or externally contracted employee⁴⁶ would be required in their official capacity to observe the strictest neutrality, in particular (in practice) by not wearing symbols, including items of dress, that are associated with a religion.

⁴¹ As sanctioned by the European Court of Human Rights in *S.A.S. v. France* [GC] [2014] (no. 43835/11).

⁴² *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing, 2016).

⁴³ *Freedom from Religion: Rights and National Security* (OUP, 2013).

⁴⁴ “State regulation of religion in the European democracies: the decline of the old pattern”, at p109 of *Religion & Democracy in Contemporary Europe*, edd. Motzkin & Fischer, (Alliance, London, 2008).

⁴⁵ I am indebted for most of the thoughts that follow to Ronan McCrea and his recent lucid and persuasive paper *Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights* (Modern Law Review (2016) 79(4), 678-705, while taking a more limited view (I believe) than him on the scope for this stronger form of secularism.

⁴⁶ As in *Ebrahimian v. France* (2015) ECHR 1041.

This is exemplified by French *laïcité* and it is based on the view that in official contexts religion is to be seen as an ideological statement rather than a personal characteristic or preference. Religion can set itself up as an alternative - indeed, it claims, superior - source of authority to the state, and the state may in some circumstances legitimately respond by deciding that it has good reason not to allow this challenge to its authority within its own official sphere. While state neutrality is normally justified on grounds of fair dealing - and the perception of fair dealing - with individuals from (especially) minority religious groups, this stronger form of neutrality is founded on a view of religion as a potentially divisive force that might threaten the stability, peace and good order of the state to the general detriment. This is patently not an argument open to states that have incorporated religion into their structures but in some countries a history of damaging division on religious lines has led to a strong constitutional secularism that, while it cannot easily be justified under article 9(2) of the European Convention, is potentially "in line with underlying Convention values".⁴⁷

However, few states have a history and demography that can justify this *laïcité*-style secularism, and in open democratic societies where secularism (if it exists) is based on guaranteeing fair dealing with citizens of all religions and beliefs, dissenting religious groups, just like opposing political voices, should be answered with counter-arguments and social mobilisation if they amount to a significant threat to one's values. Otherwise - as with street preachers - one may choose just to walk by. Freedom from religion when justified is usually an aspect of the non- or other- believer's own freedom of religion and belief. It must not infringe the justifiable freedom of religion of others, just as reciprocally theirs must not infringe the freedom of the non-believer. That is not a prescription for easy answers: rather, there is no alternative to careful and multi-faceted assessment of individual cases as they arise in the light of established human rights principles and precedents.

5 September 2016

⁴⁷ McCrea, *op cit.* p 704. As McCrea argues, *laïcité* nevertheless requires sharp delineation to ensure that it does not drift into unacceptable interference with individual rights to freedom of religion and belief.