

The Right to Neutral Governance, Religion, the State & the Question of Human Rights Compliance

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Received: 22/11/2017 Accepted: 20/01/2018
DOI: 10.22096/HR.2018.32232

Abstract

Universal human rights suffer from a lack of consensus on the question: what kind of internal state organisation can actually take these fundamental rights adequately into account? The main intent of this article is to present a critical assessment of various modes of state–religion affiliation and their effects on the state’s scope for human rights compliance. A special focus will be on the right to freedom of religion or belief since this fundamental right is within this context most profoundly at stake. It will be contended that states which are organised in accordance with the principle of state neutrality can in principle fully comply with human rights norms; while states which identify themselves either positively with a single religious denomination or excessively negatively with religion have to be considered poorly equipped for both democratisation as well as optimal human rights compliance. The crucial issue of ‘multivocality’ of religions will be addressed as a contribution to the reform debate. Ultimately a case will be made for ‘the right to neutral governance’.

Keywords: Democracy; State-Religion Relationship; the Right to Neutrality; the Right to Freedom of Religion.

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1. Introduction

1.1. The Relevance of State–Religion Identification under International Law

World-wide state practice shows a huge variety of perceptions of the adequate relation between the state and religion. Some states are expressly secular, other countries are clear examples of religious states, and again others reflect one of the virtually endless conceivable alternatives in between these two extremes (one could claim that there are as many different systems in this respect as there are states).¹

International human rights law is fairly indifferent as to the different forms of state–religion identification. Human rights law does not identify a specific form of state–religion identification as a necessary institutional structure, *i.e.* as a prerequisite, to comply with human right norms.

The concept of separation of state and religion is not a legal notion of public international law since it is not demanded by any international agreement. It must be added that it could hardly be regarded as a principle of customary international law either, since no necessary unequivocal state practice is emerging, let alone a considerable *opinio iure sive necessitatis* (*i.e.* a global consensus on the necessity of legal recognition and implementation of the given principle).

International law, in short, does –for the time being– not prescribe a specific form of state–religion identification; moreover, the existence or preservation of a certain regime of state–religion identification *an sich*

1. If not more than that, given the fact that some states reflect within their jurisdiction multiple regimes of state–religion identification; *e.g.* states which are partly secular and partly not or states which provide for a separation of state and religion which only applies to a certain part of the country. One might in this respect think of the United Kingdom: England and Scotland both have established churches (the Anglican Church of England and the Presbyterian Church of Scotland respectively); whereas Northern Ireland and Wales have disestablished their state churches (in 1871 and 1920 respectively). Another good example is the Republic of the Sudan: the Interim National Constitution of the Republic of the Sudan (2005) does not contain a specific provision as to the secular or religious nature of the Sudan (as did the previous Constitution of the Republic of the Sudan (1998), which, in the first article, expressly considered Islam “the religion of the majority”); yet it can hardly be perceived as a secular state given the provision which declares *Shari’a* law as a source of legislation as far as the Northern states of the Sudan are concerned (art. 5). The Interim Constitution of Southern Sudan (2005) on the other hand, expressly provides for a separation of state and religion (article 8). Finally, another good example is Switzerland: two of the 26 Cantons (Geneva and Neuchatel) have expressly provided for a separation of state and religion; while the other cantons officially or *de facto* support Catholic or Protestant denominations.

does not qualify as a violation of international human rights law. Consequently, the mere existence of for instance a state religion or state church or other forms of state support to (a single) religion does not amount *ipso facto* to a violation of human rights law. In other words, the establishment or preservation of a form of official support to a single religion is not considered *per se* discriminatory, or *per se* infringing upon the right to freedom of religion.¹

This is not to say that there is a complete lack of guidance on this matter; some minimal benchmarks are provided by the UN Human Rights Committee.

1.2. Human Rights Committee: General Comment 22

The Human Rights Committee has not identified a specific form of state–religion identification as a prerequisite in relation to effective human rights compliance, nor does it condemn specific forms of state–religion identification. It is debatable to what extent this is the result of objective, critical research into the matter or the result rather of a sensitive political compromise.

A state of non-secularism, however, *does* raise some concern with respect to questions of human rights compliance in the eyes of the Human Rights Committee. The Committee, in its General Comment no. 22, on the right to freedom of thought, conscience and religion (*i.e.* article 18 of the UN International Covenant on Civil and Political Rights, ICCPR), states: “The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including ... [the right to freedom of thought, conscience, and religion and the rights of members of ethnic, religious and linguistic minorities], nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance

1. See for a good example: *DARBY v. SWEDEN*, European Court of Human Rights, 11581/85 [1990] ECHR 24 (23 October 1990). It should be emphasised that every time the phrase ‘freedom of religion’ is used in this article, freedom of non-theistic beliefs and faiths is referred to as well – as established in the international framing of this right (“the right to freedom of religion or belief”).

with the prohibition of discrimination based on religion or belief and the guarantee of equal protection [of the law without any discrimination]...”¹

The Human Rights Committee, moreover, in carrying out its crucial role of monitoring state parties to the ICCPR does occasionally seem determined to ascertain whether a state is secular or whether or not the state and religion are separated. The Human Rights Committee –on numerous occasions– asked state parties to the ICCPR critical questions concerning their relationship between the state and religion. Occasionally, the Committee outspokenly considers the existence of an official religion as jeopardising the right to freedom of religion or belief.²

2. A Spectrum of State–Religion Identification

2.1. Introduction

“State–religion identification” refers to the degree and type of interrelation between the state and religion.³ The state–religion spectrum encompasses different forms of state identification with religion and different forms of state identification with secularism as well as forms of identification that go beyond such bi-partite classification.

A secular state is a state which expressly –*i.e.* constitutionally or by other legislative or official means– declares itself secular.⁴ This means that the state considers itself officially as a non-religious state; thereby

1. See: International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (hereinafter also ICCPR); entered into force: 23 March 1976. Human Rights Committee, 1993, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)* (CCPR/C/21/Rev./Add.4), par. 9 (hereinafter also General Comment 22).

2. See: Tahzib, 1996: 260-261.

3. In order to do justice to important nuances Cole Durham sophisticated the state–religion spectrum by sharpening the extreme sides of the spectrum and adding new types of identification regimes to the spectrum. See: Durham, 1996. The spectrum as outlined here expands on his model. See for a more comprehensive outline of the spectrum: Temperman, 2007. Types/regimes of ‘identification’ and types/regimes of ‘affiliation’ will here be used interchangeably.

4. States that are declared secular or states which reflect a degree of secularity in their constitutional provisions pertaining to religion include: Angola; Benin; Burkina Faso; Burundi; Cameroon; Chad; Azerbaijan; Democratic Republic of the Congo; Republic of the Congo; Cote d’Ivoire; France; Gabon; The Gambia; Guinea; Guinea-Bissau; Guyana; Kazakhstan; Kyrgyzstan; Madagascar; Mali; Namibia; Sao Tome and Principe; Senegal; Serbia; Slovak Republic; Tajikistan; Turkey; and Turkmenistan. Many other states can be considered to have internalised a degree of secularity as they provide expressly for a separation of state and religion (see *infra* for a list of these countries).

indicating that the state does not wish to refer to a (single) religious doctrine to justify its authority. The precise legal and practical ramifications, particularly the extent to which the state in question does actively propagate or favour secularism, vary from state to state.

A religious state is a state which expressly positions itself as a religious state (e.g. as an Islamic, Christian, Hindu, Buddhist or Jewish state).¹ By doing so, the state propagates the fact that the religion in question should play a significant, determinative role within its jurisdiction. The exact role religion plays in religious states, however, may vary from state to state and can be determined by unveiling –among other indicators– the extent to which the state apparatus identifies itself with serving a –single– religious doctrine. In addition to this, religious states symptomatically (yet not necessarily) declare the religion in question the state religion (constitutionally or by other means).²

In order to do justice to important nuances in the course of addressing questions of human rights compliance, it is essential to go beyond the rigid bi-partite classification secular/religious. It will presently be argued that the state–religion identification spectrum encompasses at least the following discernible regimes of state–religion identification:

Complete Positive Identification	Virtual Coincidence	Preferential Treatment	Supported Church or Religion	Joint Ventures	Regimes of Tolerance	Regimes of Indifference	Regimes of Separation	Complete Negative Identification
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1. Religious states include: Christian states: the Vatican City and Zambia; Islamic states: Afghanistan, Bahrain, Brunei Darussalam, Iran, Maldives, Mauritania, Morocco, Oman, Pakistan, Saudi Arabia and Yemen; a Jewish state: Israel (although, arguably, semantically speaking, the polysemic adjective “Jewish”, as used in several constitutional documents, could also refer to the Jewish people rather than to the people adhering to the Judaist faith); and a Hindu state: Nepal (in May 2006 the Nepalese Parliament declared Nepal a secular state; constitutionally, Nepal is a Hindu State).
 2. Exceptions to this rule seem to be: (1) Israel: which is in constitutional documents often referred to as a “Jewish state” (NB see the *caveat* in the previous footnote), however, Judaism is not declared the state religion of Israel; (2) Nepal, which is constitutionally declared a “Hindu Kingdom” (art. 4 of the Constitution of the Kingdom of Nepal (1990); NB as to all constitutional references: as amended over time), however, the constitution does not contain a provision declaring Hinduism the state religion; (3) Zambia, which is declared a “Christian nation” (preamble to the Constitution of the Republic of Zambia (1991), however, Christianity (or a specific Christian denomination) is not proclaimed the state religion.

2.1. Forms of State–Religion Identification

A) Complete Positive Identification

Under a complete positive identification (of the state with religion), religious doctrine is the primary source for legislative, executive and judicial powers. In other words, laws are predominantly religious laws; or religious doctrine is at least considered the primary source for drafting state laws and regulations. Religious institutions *compose* the state apparatus; *i.e.* religious ministers are simultaneously state officials. Courts are (partly) religious courts; or religious laws and regulations are considered a primary source of justice in courts. The law will in many cases require ‘religious qualifications’ for holding public office or other positions (*e.g.* one has to adhere to a certain religious denomination in order to qualify for the post concerned; or a certain level of knowledge of a certain religion is required to be considered for the position in question).

B) Virtual Coincidence (Strong Positive Identification)

Slightly remote from such a tight union of the state and religion as under a regime of complete positive identification are regimes of a virtual coincidence, *i.e.* regimes of well-nigh absolutist political control by the dominant religion. In other words, under these regimes the state and the law are not to be equated with religion, although a strong positive identification of the state with a single religion is perceivable. Characteristic for these regimes is the (*de jure* or *de facto*) recognition of the existence of other, non-dominant faiths. Some states with a strong positive identification between state and religion do, nonetheless, not entirely subject the legislative power to the religious normative framework (religious laws).¹ Unlike the more theocratic states which are more inclined to a complete positive identification, certain religious states or states with a state religion provide for a fairly secular judicial system

C) Preferential Treatment (State Churches and Official Religions)

Quite a few states recognise –constitutionally or by other means– a particular religion as the state religion (or “official” religion) or a specific church as the state church (or “established” church).² This is particularly

1. For instance, even though Islam is the state religion, Islamic law is not the official, exclusive source of legislation in states such as Algeria, Morocco, Bangladesh, Tunisia, Brunei Darussalam and Mauritania.

2. The difference between the exact types of affiliation has legal consequences. For example, under a State Church, clergy are civil servants while this is not necessarily the case under a church ‘established by law’, as the English example shows.

characteristic for religious states.¹ Conversely, however, the fact that a religion is expressly considered the state religion does not necessarily imply that the state is a religious state. A state can declare a certain religion or faith to be the official religion, without going so far as to considering itself a religious state (and consequently also without necessarily being inclined towards a more theocratic, more extreme form of positive identification). The exact legal, financial or practical consequences of a religion being the state or official religion vary from state to state.²

D) Supported Churches or Religions

Some states (constitutionally) declare that a specific religion or church can count on special support from the state, without going as far as constitutionally declaring a certain religion or church the state religion or state church. What this support consists of in legal, pragmatic, financial, or other terms varies from state to state. Without express acknowledgment thereof, a state might also be *de facto* supportive towards a particular religion or church.³

E) Joint Ventures (Co-operative Regimes)

The state can co-operate closely with religious institutions without granting a particular denomination the status of official religion. No preferential

1. For a few exceptions see footnote 8.

2. States with state/official religions or state/established churches include: Armenia (Armenian Apostolic Holy Church), Brunei Darussalam (Shafi'i Islam; *i.e.* a Sunni branch), Cambodia (Buddhism), Algeria (Islam), Bahrain (Islam), Afghanistan (Islam), Bangladesh (Islam), Bhutan (Lamaistic Buddhism), Bolivia (Roman Catholic Church), Costa Rica (Roman Catholic Church), Denmark (Evangelical Lutheran Church), England (Anglican Church of England), Egypt (Islam), Finland (Evangelical Lutheran Church & Orthodox Church), Greece (Eastern Orthodox Church), Iceland (Evangelical Lutheran Church), Indonesia (unspecified monotheism), Iran (Twelver Ja'fari school of Islam; *i.e.* a Shi'a branch of Islam), Iraq (Islam), Jordan (Islam), Kuwait (Islam), Libya (Islam), Liechtenstein (Roman Catholic Church), Malaysia (Islam), Maldives (Islam), Malta (Roman Catholic Apostolic Religion), Mauritania (Islam), Monaco (Roman Catholicism), Morocco (Islam), Norway (Evangelical Lutheranism), Oman (Islam), Pakistan (Islam), Qatar (Islam), Saudi Arabia (Islam), Scotland (Presbyterian Church of Scotland), Tunisia (Islam), United Arab Emirates (Islam), the Vatican City (Roman Catholicism) and Yemen (Islam).

3. States that constitutionally –or through other means– provide for support to or special recognition of a specific religious denomination include: Andorra (Roman Catholic Church), Argentina (Roman Catholic Apostolic Faith), Guatemala (Catholic Church), Laos (Theravada Buddhism), Peru (Catholic Church), Spain (Roman Catholic Church), Sri Lanka (Buddhism) and Thailand (Buddhism).

treatment takes place under such a “joint venture” in as far as no particular religion is endorsed or predominantly or exclusively supported.

States might –without establishing religion *per se*– officially (*i.e.* constitutionally) acknowledge the state’s belief in the existence of ‘God’ (*i.e.* by referring to ‘God’ or a similar religious notion in the constitution).¹ Although forms of state acknowledgment of religious phenomena normally rule out a secular nature of the state, it does not make the state necessarily a genuine religious state either.

A fairly common constitutional practice is also the simple acknowledgment of the special (factual) position or role of a particular religion (*e.g.* by referring to the eminent role of a certain religion in the state’s history or by referring to current demographical figures so as to indicate that a certain religion is the predominant religion of a state purely percentage-wise).² This form of state acknowledgement does not necessarily rule out a secular nature of the state. It does not amount to preferential treatment or state support *per se*.

F) Regimes of Tolerance (Accommodative Regimes)

Under a tolerance regime the state is not expressly committed or involved with the maintenance of religion, but allows for an affirmative climate in which the individual believers are not thwarted in any way and in which institutionalised religion can make efforts to preserve itself and to carry out religious activities. Besides permission of religious education, and other religious activities, the admittance of representation of religious oriented motivations and ideals in the political discourse serves as a relevant example of religious forbearance (*e.g.* permission of formation of religious oriented associations, lobbies or political parties). This religious toleration can be perceived as *passive* accommodation of religious interests, since no financial or other incentives are adopted on a state level to actively promote and protect religious ideals and interests.

1. The list of states with constitutional references to God (in some cases only in the preamble; in other cases various times throughout the constitution) is too long to include here.

2. Examples of states which constitutionally acknowledge the historical role or predominance (percentage-wise) of a certain religion include: Armenia (Armenian Apostolic Holy Church); Bulgaria (Eastern Orthodoxy); East Timor (Catholic Church); Georgia (Georgian Orthodox Church); Panama (Catholicism); Papua New Guinea (Christianity); and Paraguay (Catholic Church).

G) Regimes of Indifference

If a state has not constitutionally declared itself religious or secular, nor has it constitutionally adopted a state religion or provided for a separation of state and religion or any other provision pertaining to the relation between the state and religion, it can be considered ‘indifferent’ towards the question of religion. *De facto* however, such states might be leaning more towards religious or more towards secular states (*i.e.* in the event that the state is *de jure* neither religious nor secular an assessment of state regulations and actual state practices pertaining to religion is necessary in order to ascertain whether a state is *de facto* more leaning towards a secular state or more to a religious state).¹

H) Separation of State and Religion

Quite a few states have expressly provided for a separation of the state and religion.² Such a provision can be considered a –constitutional– endeavour to establish and consistently preserve a regime in which the state apparatus and religion should not interfere with each other and should consequently

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1. Arguably, such an assessment is always crucial as even in the event that the state positions itself expressly as a secular state, an assessment of regulations and practices might lead to the conclusion that the state in question is not genuinely a secular one. See also *infra*, footnote 17, on constitutions which provide for a separation of state and religion and yet simultaneously contain (contradictory) religious references.
 2. States that provide for a clear-cut separation (or which have disestablished the official church/religion in the past by other legislative means), a non-establishment clause or for other provisions which approximate a formal separation include: Angola; Benin; Cameroon; Cape Verde; Chad; Albania; Armenia; Azerbaijan; Bulgaria; Brazil; Chile; Croatia; Cuba; Czech Republic; East Timor; Estonia; Ethiopia; Fiji; France; Gabon; The Gambia; Georgia; Germany; Ghana; Guinea; Guinea-Bissau; Hungary; Ireland; Italy; Japan; Republic of Korea; Kyrgyzstan; Latvia; Liberia; Lithuania; Macedonia; Mexico; Micronesia; Moldova; Mongolia; Montenegro; Nicaragua; Niger; Nigeria; Palau; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Sao Tome and Principe; Senegal; Serbia; Seychelles; Slovak Republic; Slovenia; Spain; Sweden; Tajikistan; Turkey; Turkmenistan; Uganda; Ukraine; United States of America; Uruguay; Uzbekistan; and Venezuela. It has to be acknowledged that some of the constitutions of states that are mentioned contain simultaneously provisions which seem contrary to the idea of separation of state and religion (e.g. constitutional references to God; provisions for religious oaths in relation to the acceptance of public offices (“I swear to God that ... So help me God”); but even provisions related to the possible establishment of religious courts (e.g. Nigeria). Some states provide for a separation but do not annul existing Concordats with the Vatican (e.g. Croatia, Peru, Poland, Spain and Venezuela). Article 44 of the Constitution of Ireland (1937) contains in one and the same article a non-establishment clause as well as a provision stating that “the homage of public worship is due to Almighty God” (the constitution, moreover, contains several other religious (Christian) references.

function independently from each other; in different arenas if it were. A state which has provided for such a separation will symptomatically be a secular state. However, the fact that a state is a secular one or the fact that a state has no state religion or state church does not necessarily mean that it went as far as expressly –*i.e.* constitutionally or by other official means– opting for a separation of state and religion.

First and foremost implication of a separation of state and religion is that no religion is established as state religion and, moreover, no religion can be adopted as a state religion (the latter, forward-looking provision can be referred to as a ‘non-establishment clause’). Holding public office may not be conditional upon belonging to a certain faith; or even stronger: religious ministers cannot hold public offices. Such ‘incompatibility rules’ are codified to prevent a merging of secular and religious authority (in other words, intended here is the exact opposite of a religious qualification for holding public office).¹ Public officers should not express their religious preferences. Religious symbolism in the public domain is taboo. Under a strict doctrine of separation, religious instruction in state schools and representation of religious interests in the political discourse (*i.e.* religious political parties) are forbidden. Such a strict notion of separation clearly leans towards a negative identification of the state with religion.

I) Complete Negative Identification

A regime of separation can refer both to internalised doctrines of separation of state and religion as inspired by late 18th century American or French revolutionary thinking as well as to notions of secularism characterised by ideological antagonism vis-à-vis religion as for instance inspired by Marxist–Leninist critique of religion.² This extreme side of the spectrum is characterised by the latter type of ideological anti-religious sentiments. Religion is rejected by the state and the state expressly favours a secular or atheist worldview. Such a hostile stance vis-à-vis religion

1. States which provide for such constitutional incompatibility rules include: Antigua and Barbuda; Argentina; Cyprus; Dominica; Guatemala; Guinea-Bissau; Honduras; Kyrgyzstan; Mexico; Panama; Paraguay; St. Kitts and Nevis; St. Lucia; and St. Vincent and the Grenadines. The Constitution of the Republic of Seychelles (1993) makes explicit that a person shall not be required to profess any religion as a qualification for holding public office (art. 21, par. 5). The Constitution of the United State of America (1787) contains a provision expressly demanding that no religious tests shall be required for taking any public office (art. VI).

2. See: Hallencreutz and Westerlund, 1996: 2-4.

manifests itself in policies of control over religion or state instigated or supported acts of elimination of religion. Conceivable practices imply the official prohibition of (a certain) religion, or politically instigated excommunicating of religious leaders and the actual persecution of believers of forbidden faiths.

3. The Emerging Right to Neutral Governance

3.1. Extreme Forms of State-Religion Identification & Correlating Problems of Human Rights Compliance and Democratization

The lack of a considerable degree of state neutrality has a detrimental effect on human rights compliance. Under states which identify themselves strongly with a single religious denomination as well as under states which identify themselves excessively negatively with religion, there is no scope for full human rights compliance. Marshall's global survey of religious freedom and persecution in 75 countries shows clear support for this thesis; and so do the annual human rights reports on the state of religious freedom world-wide: states that hold the worst records of compliance with fundamental religious rights reflect important features of regimes of either complete positive or complete negative identification.¹ The same most hard-line atheist states and most stringent theocratic regimes are repeatedly singled out by these annual reports on the basis of the observed instances of religious discrimination and infringements upon the right to freedom of religion or belief.² Acceptable standards of religious freedom are predominantly perceivable in regimes that are to be found on the more intermediate part of the identification spectrum. While analysing the possible rationale for this, the question what exact conditions should be in place when it comes to complying with everyone's right to freedom of religion or belief will presently be addressed.

If a state identifies strongly and exclusively with a single religious denomination, both the adherents to the dominant faith as well as non-believers or those who belong to dissimilar faiths (*i.e.* religious minorities) face serious restrictions of their possibility to freely have or adopt a religion or belief, to freely change their religion or belief and to freely manifest their religion or belief.

1. See: Marshall, 2000; See also: annual reports by: US Department of State and US Commission on International Religious freedom.

2. See: Temperman, 2007: 24-25.

This is most vividly the case if domestic legislation includes provisions of express or indirect religious discrimination (*e.g.* religious qualifications for holding public office; the possibility to vote; or the possibility to entertain other fundamental rights),¹ restrictions to the manifestation of non-dominant faiths, anti-apostasy or anti-conversion regulations, or all types of regulation that amount to coercion of any sort in religious affairs.

Religious restrictions, moreover, do not only affect the domestic scope and application of human rights norms but also the internationally recognised ones, which becomes evident by addressing the so-called 'religious reservations' to international human rights treaties. Religious reservations can be concrete and thereby leave room for compliance to other provisions. Religious reservations are sometimes of such general nature that the entire treaty is undermined, for the reservation turns the necessity of compliance into a matter of discretionary interpretation of the involved state.²

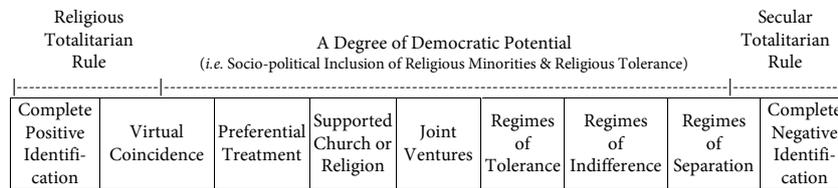
It is important to emphasise that maximising religious freedom is not simply a matter of moving towards the more secular side of the identification spectrum.³ Allowing for religious freedom does not come down to the avoidance of modes of positive identification, for too negative an identification with religion correlates with state instigated

1. In this respect one can for instance think of the following constitutional arrangements: the Constitution of the Republic of Maldives (1998) poses religious qualifications (see artt. 34, 56, 66, 107 and 113) to the function of President of the Republic (which has to be a Sunni Muslim), to Judges (which have to be Muslim), to several other positions and also to voters (Muslims); the Constitution of the Islamic Republic of Mauritania (1991), which demands the President of the Republic to be a Muslim (art. 23); the Constitution of the Islamic Republic of Pakistan (1973), which demands the President of the Republic to be a Muslim (art. 41); the Permanent Constitution of the State of Qatar (2003), which requires that the Heir Apparent is a Muslim; the Constitution of the Syrian Arab Republic (1973), which demands the President of the Republic to be a Muslim (art. 3); the Amended Constitution of the Tunisian Republic (1959), which demands the President of the Republic to be a Muslim (art. 38 and 40); the Constitution of the Republic of Yemen (1994), which speaks of the requirement of fulfilling "religious duties" or "Islamic duties" in relation to the posts of Member of Parliament and President of the Republic respectively (artt. 63 and 106).

2. See for instance the reservation to the UN Convention of the Elimination of All Forms of Discrimination against Women (CEDAW; G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force: 3 September 1981) made by Mauritania: "Having seen and examined the ... [CEDAW], have approved and do approve it in each and every one of its parts which are not contrary to Islamic Sharia and in accordance with our Constitution".

3. See: Durham, 1996: 16-17.

religious persecution or other forms of religious repression.¹ These concerns can be represented by drawing the following figure:



As the figure shows, an extreme negative identification of the state with religion is characterised by anti-democratic sentiments. This is most vividly the case when religious minorities are persecuted simply for being religious. One can think of regimes of state imposed atheism, usually inspired by Marxist-Leninist ideals of state organisation.

The denial of religious people to associate and participate in civil society and to compete for political power in order to advocate their interests, *i.e.* an express constitutional ban on religious political parties, is a fairly common constitutional arrangement – though very problematic indeed from a human rights perspective.² Interestingly, such provisions can be found throughout the state–religion identification spectrum but are clearly most commonly practised in relatively strict secular states which practise a rigid conception of separation of state and religion.³ Stepan rightly states in this context that democracy “implies that no group in civil society –including religious groups– can *a priori* be prohibited from forming a political party. Constraints on political parties may only be imposed *after* a party [is formed, if it], by its actions, violates democratic principles. The judgement as to whether or not a party has

1. Stepan convincingly demonstrated that an excessively positive or negative identification of the state with religious principles is incompatible with democratic potential. See: Stepan, 2000: 42–43, on varieties of democratic and non-democratic patterns of state–religion relationships.

2. States which constitutionally or by other means provide for a ban on religious political parties (or arrangements that approximate a prohibition, such as the prohibition of adopting a name for a political party which is exclusively associated with a single religious denomination; or the condition posed to political parties to respect the secular nature of the state, etc.) include: Bulgaria; Burkina Faso; Cape Verde; Republic of the Congo; Belarus; Equatorial Guinea; Ethiopia; Ethiopia (*de facto* ban); The Gambia; France (*de facto* taboo); Ghana; Guinea; Guinea-Bissau; Kyrgyzstan; Liberia; Mali; Mexico; Nepal; Niger; Philippines; Portugal; Senegal; Sierra Leone; Tunisia (*de facto* governmental ban); Turkey; Turkmenistan; and Uzbekistan.

3. One might not expect a constitutional ban on religious political parties in a religious (Hindu) state such as Nepal; see: art. 113 of the Constitution of the Kingdom of Nepal (1990).

violated democratic principles should be decided not by the parties in the government but by the courts”.¹

The constitutional ban on religious instruction in state schools or the somewhat weaker provision for compulsory secular education in public schools can be traced to the secular side of the identification spectrum as well.² Such provision comes down to the exact opposite of compulsory religious education.³

3.2. Establishment as *Ipsa Facto* Violation of Human Rights Law

Forms of domestic state organisation that are compatible with the core conditions of democracy allow for better higher human rights records. Yet, such a conclusion would be too rigid if we would not take into account the possibility of a state–religion regime being, though in theory democratic, intrinsically discriminatory and consequently amounting to *ipso facto* violations of human rights law.

It can be argued, contrary to Human Rights Committee’s General Comment 22, that forms of non-neutral governance always amount to *ipso facto* human rights violations. Positively formulated, the non-discrimination principle/equality principle in combination with the right to freedom of religion (*i.e.* art. 26 and art. 18 ICCPR) require a fair degree of state neutrality.⁴

The establishment of a church or the endorsement of a single religion runs counter to the very core principles of human rights law as such state practice always entails cases of religious discrimination and inequality and hence a violation of the underlying core principles of international human

1. See: Stepan, 2000; p. 40 (italics Stepan).

2. States that ban religious state education or states that constitutionally expressly require state education to be non-religious/non-denomination/secular/neutral/etc. include: Ethiopia; France; Japan; Mexico; Moldova; Nicaragua; Portugal; Turkmenistan; United States of America (*de facto* ban: religious instruction in public schools is on different occasions considered unconstitutional by the US Supreme Court). Art. 35 of the Constitution of Ukraine (1996) speaks of a separation of the Church/religious institutions and the school. It has to be acknowledged that such bans do not imply that religious instruction is not permitted in private schools.

3. Such is common practice in Islamic states; yet also in for instance: Panama; see art. 113 of the Constitution of the Republic of Panama (1972), which states: “The catholic religion shall be taught in public schools” (it is added, however, that “upon the requests of parents or guardians, certain students shall not be obliged to attend religion classes, nor to participate in religious services”).

4. For a similar argument with the European context (Council of Europe), see: Kyriazopoulos, 2001.

rights law, even if these practices amount only to ‘symbolic disparities’ and not to concrete infringements of specific human rights. As Paul Marshall states “a state church or its equivalent ... is always an instance of religious discrimination and, therefore, a limit on religious freedom”.¹ By returning to the earlier drawn state–religion affiliation spectrum this concern can best be understood by drawing the following figure:

Discriminatory Affiliations			Potentially Neutral Affiliations					Discriminatory Affiliation
Complete Positive Identification	Virtual Coincidence	Preferential Treatment	Supported Church or Religion	Joint Ventures	Regimes of Tolerance	Regimes of Indifference	Regimes of Separation	Complete Negative Identification

Crucial here is the fact that a state that constitutionally establishes a state church or endorses a religion ascribes a quality label to a single religious denomination, which quality stamp is not put on other religions and their adherents.² Even if such endorsement does not directly significantly affect anyone’s free choice and manifestation of religion (*i.e.* the classic ‘Western defence’ of forms of establishment), this practice amounts to an arbitrary promotion of ideals with which only a part of the population can identify itself (as no population can be expected to be 100% like-minded; religious minorities can be found everywhere). Some degree of segregation cannot be avoided. But, looking at some arbitrary practices and regulations –*e.g.* one-sided blasphemy laws or (explicit or *de facto*) religious requirements in relation to holding public office– one can doubt how innocent the preservation of most of the preferential regimes in Western states actually is.

3.3 Towards a Right to Neutral Governance

In all state–citizen relations, no one should be treated in a discriminatory fashion on ground of religion or belief (or on any other such grounds for that matter). Everyone has a right to neutral governance. Human rights scholarship should contribute to the progressive development of the concept of state neutrality as a state–religion identification regime under which *non-discriminatory accommodation of religious interests* defines state practice so as to guarantee that no religion is to be privileged over another, religious discrimination and intolerance are to be pro-actively combated, whilst simultaneously constitutional guarantees are in place through which it is ensured that the state does not degenerate into an antagonistic regime

1. See: Marshall, 2000: 15.
 2. See: Fautre, 2000: 28.

vis-à-vis religious incentives (e.g. religious education should be guaranteed as well as representation of religious interests in the political discourse).

4. The Way Forward

4.1. Internal State Organisation *Does Matter*

Universal human rights suffer from a lack of consensus on the question: what kind of internal state organisation can actually take these fundamental rights adequately into account?

States show their commitment to respect fundamental rights by signing up to international conventions. These conventions, however, do not make explicit what kind of internal, domestic political framework is necessary for the effective protection of human rights norms. This does not mean that there is a global consensus that any type of domestic political organisation will suffice.

High Contracting States have to comply with international human rights which are codified on established international fora, but these fora have no clear competence on the question how to organise –for that purpose– the state internally. To the contrary, a vital condition for the ultimate impact and preservation of these international normsetting institutions is a great deal of *subsidiarity*. States that ratify human rights conventions have a free hand in the means by which they achieve the set standards. Paradoxically, a ‘better’ human rights convention, in terms of a more intrusive one, will result in a relatively low rate of state consent, which will ultimately affect the legalistic universality of the convention in question. Any demand that regards the domestic state organisation is destined to be considered exceptionally intrusive, since internal state organisation is typically considered to belong to the untouchable spheres of state sovereignty. Conversely, a ‘worse’ convention (in the sense of a less interfering one) will plausibly result in a high rate of state consent and is therefore bound to be more universal. The question is what is the worth of a universal yet half-hearted human rights treaty; and what is the worth of a generous treaty which only results in few ratifications? Drafting human rights conventions therefore involves dangerously balancing on this thin line between drafting provisions with teeth and aiming at a maximum degree of universality in terms of world-wide applicability.

It is –given these considerations– almost ‘logical’ that the drafters of the ICCPR did not include any provision as to a preferred (let alone: required)

form of state–religion identification. The same holds true for the regional human rights treaties. It can be argued that the Council of Europe’s European Convention on Human Rights does not contain a prohibition of state–religion establishment simply because some of its most important supporters (such as the United Kingdom) would never have signed up to it if it did so.¹

As argued so far, this is not to say that there is no case for or against certain types of state–religion identification. An increase of religious freedom and religious tolerance is not to be expected if the root causes of such restrictions and limitations to freedom and tolerance are not addressed. The reform debate –therefore– should be focussed on the crucial issue of internal state organisation.

4.2. Is Reform Possible?

The answer should be: yes indeed. Reform is a most feasible and viable scenario. A vivid and recent example of the fact that specific expressions of state–religion identification are no fixed regimes, but open for democratic discussion is the disestablishment of the Church of Sweden (2000).² The Norwegian establishment is faced by increasing criticism; and so are virtually all of the remaining European forms of establishment.

The question of reform is certainly a very topical and major issue in the field of ‘Islamic states, democratisation and human rights compliance’. In this respect it can hardly be over-emphasized that *democratisation has not reached its limits* (irrespective of voices claiming the contrary), since not a single religious tradition can be regarded as univocally anti-democratic.

Both Huntington as well as Casanova made clear that particularly Catholicism fostered the so-called third wave of democratisation. Roughly two-thirds of the thirty states that since the 1970s successfully have undergone democratic transition processes have Catholic backgrounds; Catholic social movements played a crucial role in this respect.³ However, this does not imply that Christian and particularly Catholic doctrine has always and univocally embraced the conception of separation between the state and church or of a democratic and pluralistic nation state (to make a huge understatement).

1. See: Evans and Thomas, 2006: 706. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force: 3 September 1953.

2. Although it is argued that the former state church remains to be privileged in numerous ways by the state and that it remains to exercise arbitrary influences within the public sphere.

3. See: Huntington, 1991. See also: Casanova, 1996: 356–363.

The view that the more neutral approaches to state–religion identification are an exclusive achievement of Western civilisation is an arbitrary generalisation as actual state practices are far more blurred and ‘Western’ and ‘Eastern states’ can not easily be divided in secular and clear-cut non-secular states. Numerous Western states are to be placed on the more intermediate part of the state–religion affiliation spectrum as they do not reflect a clear-cut separatist model. A few Islamic states reflect features of a regime of complete positive identification yet others show lower degrees of positive identification. In fact, according to an estimation of the US Commission on International Religious Freedom, over 1.3 billion Muslims (more than half of the world’s Muslim population), live in secular states or at least in states that do not explicitly declare Islam the official religion.¹

One must also not forget that irrespective of Christian-inspired practices of supporting tolerance and democracy, history proves that, as Stepan notes, the Catholic doctrine:

“has been marshalled to oppose liberalism, the nation-state, tolerance and democracy. In the name of Catholicism, the Inquisition committed massive human rights violations. John Calvin’s Geneva had no space either for inclusive citizenship or for any form of representative democracy. For more than 300 years, Lutheranism ... accepted both theologically and politically what max Weber called ‘caesaropapist’ state control of religion ... [N]umerous articles and books were written on the inherent obstacles that Catholicism, Lutheranism, or Calvinism place in the way of democracy because of their antidemocratic doctrines and nondemocratic practices”.²

In short, it must be acknowledged that Christianity has not univocally fostered democracy. The Christian doctrine entails components though, which can be considered supportive to or at least compatible with liberal democracy. Islam should not be considered univocally hostile towards democracy, for it contains similar ‘multivocal’ components out of which particular elements can be considered compatible with democratic governance and human rights protection.³

Stepan calculated that about half of the world’s Muslims in fact live in states that reflect some degree of democratic transition.⁴ In short, democratisation

1. See: United States Commission on International Religious Freedom, 2005: 2.

2. See: Stepan, 2000: 44.

3. See: Stepan, 2000: 44 on the fallacy of “univocality” and the case for “multivocality”.

4. See: Stepan, 2000: 48–49. See also: Eickelman and Piscatori, 1996, who claim that there is enough reason to believe that certain Muslim states are effectively supporting democratic government and religious pluralism.

processes in Islamic states give enough grounds for having serious misgivings about the 'free-election-trap thesis' with respect to Islamic states.¹

Casanova emphasises in this context the successful democratic experiences in Indonesia, the largest majority Muslim country in the world, stating: "Indonesia is also undergoing its own democratic transition... The process certainly must count as an extension of the third wave of democratisation reaching East and Southeast shores in the last decade".² Hefner makes clear that historically two versions of political Islam are supported in Indonesia: a more regimist Islam, which favours Islamization of state and society, versus a more civil Islam, which advocates a plural, tolerant and democratic nation state.³ What distinguishes civil Islam from regimist Islam is, in the words of Casanova, "a conscious reflexive rejection of the modern 'mythology of the Islamic state' and of the Islamic project to conquer and use the administrative machinery of the modern state to impose a coercive regime of Islamic laws, regulative norms, and disciplinary practices upon society".⁴ The preferences of the electorate show clear democratic support for the civil version of Islam.

Democratisation of religious states should not be considered a capitulation on the part of religion, since religious principles are by no means *per se* or altogether surrendered in the course of democratisation. Under competitive politics, the desired impact of religious incentives is ultimately determined by the people. It is crucial though, that –whatever the exact outcome of such decision-making– the rights of religious minorities are protected at all times.

4.3. The Paradox of Separation

It can not be over-emphasized that this case for state neutrality does not come down to favouring a strict doctrine of separation of state and religion. The elimination of religious ideals from the public domain is, regardless of the question whether that would be desirable at all, in fact not realistic. Incorporating into the level of political organisation a strict doctrine of separation might be considered an unrealistic effort to the

1. A thesis that assumes that democracy in a polarised political setting (reformers vs. conservatives) will ultimately bring the extremists into power, who on their turn will make an end to democratic vote.

2. See: Casanova, 2001: 1070.

3. See: Hefner, 2000.

4. See: Casanova, 2001: 1070.

extent that the “intertwinement of state and ... [religion], and the inner cohesion of law and religion, constitute an undeniable and inescapable fact of actual reality”, as Van der Vyver claims.¹

“The state”, as Norman in this context argues, “should pursue as far as it can, a neutral course between competing moralisms ... There will of course be many ways in which the state will act in the light of moral considerations; these, however, will remain, as they now are, necessarily incoherent. The rhetoric of Human Rights will fill up the gaps”.²

Even if we could raise a strict wall of separation, we still have to address questions as to what is in fact ‘religion’ and what is not, what is covered by ‘religious affairs’ and what by ‘state affairs’, what falls under the category of ‘the public’ and what under ‘the private’, what is ‘politics’, what is a ‘religious incentive’, what is ‘religious politics’, and what can be regarded as ‘profane politics’ (how profane, for that matter, are ‘socialism’ and ‘liberalism’ actually)?³ These questions, in the one formulation or the other, will inevitably be encountered in the course of internalising the ideal of secularism. Incorporation of a doctrine of separation, if one disregards these questions, can paradoxically degenerate into *non*-neutral instances, for choices concerning religion affairs, are an inextricable –if not the very core– part of the matter.⁴

The paradox of separation is the exact reason why we should shift our attention from a strict and rigid liberal doctrine in which the main characteristic of the state is refraining from all actions in the field of promoting and enhancing certain values to the promotion of forms of state neutrality which are first and foremost characterised by a non-discriminatory attitude vis-à-vis religious affairs, a state of religious non-partisanship. It is crucial for human rights scholarship to further analyse and develop such a modus of state neutrality and its mutual reciprocal role towards democratisation and human rights compliance.

1. See: Vyver, 1996: xxvii.

2. See: Norman, 1992: 23.

3. In this respect, it is worth noting, that the Human Rights Committee, *supra* note 2, par. 10, underscores that also in case a set of beliefs is treated as “official ideology”, this should not result in any impairment of the right to religious freedom.

4. See also Baubérot, 2004: 441–453, on the fact that the ideal of separation can, when it comes to putting it in practice, pose problems to human rights compliance (with special reference to the French situation).

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