RELIGIOUS CRITIQUES OF LAW CONFERENCE
Pepperdine University School of Law

ABSTRACTION FROM THE RELIGIOUS DIMENSION

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ABSTRACT

The question as to what the legal definition of religion and religious freedom should be, has been subjected to an intense debate in society and among academicians. As to the latter group, legal scholars and philosophers have contributed to this debate over the past few years. The main aim of their contribution has been the introduction of a conceptual framework, which includes normative arguments that theorise a particular attitude towards religion and religious claims for exemptions. These liberal, non-sectarian theories of religious freedom could be classified as rejection; substitution; generalisation; equation and representation. This paper claims that the overall attitude towards religion and religious claims for exemptions is that of abstraction from the religious dimension. Abstraction stands for a moral attitude. That is to say, a religion-empty attitude towards religious freedom.

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I. Introduction

The recurring conflict between religious manifestations and existing legal norms has resulted in a principled debate in legal theory and philosophy about the normative foundations of toleration for and protection of religious beliefs and practices in liberal democracies. This conflict opens a discussion about accommodation, which in this context deals with the possibility, feasibility and thus desirability of creating exemptions for specific groups. In the non-sectarian, liberal theories of religious freedom, accommodation serves as a conceptual hub.[2] Essential to this concept are the following two intensely disputed questions: accommodation for whom and accommodation for what kind of reasons.[3] These are the two –although roughly formulated– questions scholars in legal philosophy and political theory reflect on to introduce an ideal attitude towards religious freedom.

We should look beyond the varieties of positions and develop a set of arguments that help us to reflect critically on the contemporary direction of the law and religion debate in legal theory and philosophy. This paper juxtaposes the normative arguments that aim to theorise the relationship between law and religion. This way of conceptualising the various positions is comparable to Cécile Laborde's discussion of the substitution and the proxy approaches.[4] Thus, the introduction below is an interpretation of the arguments present in the liberal theories of religious freedom. These normative positions are briefly introduced in part II of this paper. Part III claims that these positions have one main characteristic in common: abstraction from the religious dimension. This paper concludes in part IV that abstraction stands for a particular moral attitude towards religious toleration in liberal democracies.

II. Theoretical reflections on law and religion

What do current debates in legal theory and philosophy tell us about the way modern democracies interpret, value, protect and thus deal with religious freedom? To answer this question, we should focus on a broad set of religious freedom theories. We should make a distinction between *liberal* and *sectarian* theories of religious freedom.[5] Sectarian theories argue that religion should be tolerated qua religion, although

[2] The distinction between sectarian and liberal theories of religious freedom is based on Laborde, Cécile. (2015) 'Religion in the law: the disaggregation approach', *Law and Philosophy*, Vol. 34, pp. 581-600.
[3] See Novak, David. (2009). *In Defense of Religious Liberty*, Wilmington, Delware: ISI Books, 1st edition, at pp. 85-103.
[4] *Supra*, note 2.
[5] Cécile Laborde discusses some of the egalitarian and sectarian theories of religious freedom, *supra*, note 2.

this privilege is limited to a limited number of 'recognized' religions.[6] The focus of this paper is on the liberal theories of religious freedom and this part briefly introduces the theories of *rejection*, *substitution*, *generalisation*, *equation* and *representation*.

A. Rejection

The concept of rejection consists of two broader categories: principled rejection and non-principled rejection. Non-principled rejection rejects to qualify as religious a particular belief, speech or conduct.[7] However, it does not exclude the option to use the term religion to consider other practices as religious for reasons of consensus and tradition. Principled rejection draws primarily on the idea that there are no reasons, which could be considered principled, to tolerate religion qua religion.[8]

1. Principled rejection

The philosophical notion of pure toleration, or toleration on principled grounds concerns a situation in which a dominant group sees on moral or epistemic grounds a reason to allow another group to continue with their objectionable manifestations. The principled rejectionist position has adopted this concept of toleration. It is principled, as it claims that religion, as such, cannot pass the test of pure toleration. The yardstick

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[6] The Constitution of the Islamic Republic of Iran contains a sectarian explanation of 'religious freedom'. Articles 12 and 13 of this constitution exhaustively enumerates religions that are allowed, within the Iranian legal framework, to practice their faiths. See for the original text: http://www.divan-edalat.ir/show.php?page=base (consulted 10 February 2017). http://www.alaviandassociates.com/documents/constitution.pdf contains an appropriate translation (consulted 10 February 2017) for a translation. We can also identify sectarian theories of religious freedom outside theocracies. A Dutch orthodox Christian political party, the *SGP* has explicitly argued for a sectarian explanation of religious freedom: *Staatkundig Gereformeerde Partij* [Reformed Political Party]. (2017). *Islam in Nederland* [*Islam in the Netherlands*], at p. 4.

[7] The threefold typology of practicing religion is based on the distinction Amos N. Guiora makes. See Guiora, Amos N. (2009). *Freedom from Religion*. New York: Oxford University Press, at p. 19.

[8] This position is in a very clear and well thought way elaborated by Brian Leiter. See Leiter, Brian. (2013). *Why Tolerate Religion?* Oxford/Princeton: Princeton University Press, at p. 7, p. 55 and p. 67. Among other authors who have used a similar argument to defend their normative position: Eisgruber, Christopher L. & Sager, Lawrence G. (1994). 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct', *The University of Chicago Law Review*, Vol. 61, pp. 1245-1315, at p. 1248; Nickel, James. (2005). 'Who Needs Freedom of Religion?', *University of Colorado Law Review* 76 (2005) pp. 941-964, at p. 943; Sullivan, Winfred Fallers. (2005). *The Impossibility of Religious Freedom*. Princeton: Princeton University Press, at p. 138; Nussbaum, Matha C. (2008). *Liberty of Conscience*, New York: Basic Books, at p. 164; Dworkin, Ronald. (2014). *Religion without God*. Cambridge etc.: Harvard University Press, at p. 111 and 144; Laborde, Cécile, 'Conclusion: Is Religion Special?', in Jean Louise Cohen & Cécile Laborde (eds). (2016). *Religion, Secularism, and Constitutional Democracy*, New York: Columbia University Press, at p. 423.

to carry out this assessment is the principle of toleration that consists of two key features: toleration on moral, or on epistemic grounds.[9]

The relevant question is whether one can identify one or more principled reasons, i.e. reasons that find their origins in morality or epistemology, which can justify a toleration regime for religion qua religion. To answer this question, the principled rejectionist position makes a distinction between two potentially distinctive characteristics of religion: 'the categoricity of religious commands' and 'insulation of religious beliefs from evidence and reason'. [10] This latter characteristic is closely related to the idea that religious beliefs might be distinctive, because of their involvement in a 'metaphysics of ultimate reality'.[11]

1.1. No moral grounds to tolerate religion qua religion

The principled rejectionist position argues that the moral grounds for toleration, such as the Rawlsian argument that people in the 'original position' will choose for the equal liberty of conscience, do not single out religion and its categoricity of commands for special protection. Also, the emphasis on the need for the liberty of conscience does not make a distinction between the backgrounds of the commands. Leiter explains this argument as follows: **''**Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith**''**.[12] Similarly, the utilitarian moral arguments for toleration, which focus on the maximisation of human well-being that, among others, depends on the ability of people to live by their conscience, do not prescribe special protection of religion. Thus, toleration on moral grounds, does not single out religion for principled toleration.[13]

1.2. No epistemic grounds to tolerate religion qua religion

The other principled ground for toleration that has been based on the epistemic, Millian arguments, focuses on the relevance of toleration for knowledge expansion. This principled ground seems to be at odds with the second potentially distinctive feature of religion: insulation of religious beliefs from evidence and reason. As Leiter argues, it is far

[9] Leiter, Brian. (2013). *Why Tolerate Religion?* Oxford/Princeton: Princeton University Press, at pp. 7-13.
[10] *Id.*, at pp. 33-34.
[11] *Id.*, at p. 47. See also Nussbaum, Matha C. (2008). *Liberty of Conscience*, New York: Basic Books, at p. 168.
[12] *Supra*, note 9, at pp. 15-17. The citation comes from p. 55.
[13] *Id.*, at p. 55 and p. 61.

from obvious 'to think, after all, that tolerating the expression of beliefs that are *insulated* from evidence and reasons -that is, insulated from *epistemically relevant* considerations- will promote knowledge of the truth'.[14] Although this particular argument does not say anything about the relevance of *religious practices* for knowledge expansion, it is conceivable to say that principled rejection equally rejects the idea that religious conduct should be tolerated on epistemic grounds. There is, after all, no reason to deny that religious practices are, like religious beliefs, equally insulated from evidence.

1.3. Conclusion

According to the principled rejectionist positions, there are no reasons to tolerate religion qua religion. Principled toleration requires liberty of conscience that also covers the religious conscience. This position results in the conclusion that a distinct protection of religious claims of conscience is undesirable. Thus, there is no moral obligation to exempt only religious claims of conscience. Leiter says: **''**a selective application to the conscience of only religious believers is not morally defensible**''**.[15]

2. Non-principled rejection

Non-principled rejection lacks a philosophical foundation. It rejects the qualification of certain beliefs, speeches or conducts as religious. Non-principled rejection is predominantly present in the political and legal discourse. As such, one can refer to the political approach of the Dutch right-wing party, *Partij voor de Vrijheid,* the Party for Freedom, towards Islam. It has repeatedly argued that Islam is not a religion, but a totalitarian ideology that should not have access to the privileges of religious freedom. Consequently, it has proposed an immigration ban from Islamic countries, a legal ban on the Koran and the closure of all the mosques and Islamic schools in the Netherlands.[16] Non-principled rejection in the legal discourse is present in cases, where someone asks for permission to perform a practice that is presented as religious, but not apparently allowed. In some of these cases that thus deal with the legal admissibility of norm-deviant practices, the court, or other parties involved, reject to say that the practice at stake has, at least potentially, a religious dimension.

[14] *Id.*, at pp. 55-56.
[15] *Id.*, at p. 133.
[16] Appendage of the Proceedings of the Dutch *Tweede Kamer*, parliamentary year 2016/2017, at pp. 2-**6**-61 and 2-**6**-62.

As such, recently, the Dutch Nijmegen municipality did not allow a Pastafarianist female, a follower of the Church of the Flying Spaghetti Monster, to keep the pasta strainer on her driver's license photograph. According to the authorities, this church does not belong to a religion. It is rather a parody of religion, and its manifestations are expressions of the freedom of speech.[17] Among the other examples of Dutch court cases that contain arguments that fall under the scope of non-principled rejection, one can refer to male circumcision cases,[18] tax exemption cases of the Scientology Church,[19] and the Church of Satan case.[20]

B. Substitution

The substation position includes a number of arguments that advocate the protection of religion, though not necessarily by a universal right to religious freedom.[21] This position, as the rejectionist position, can be divided into principled substitution and non-principled substitution. Again, the difference between these two positions is marked by the presence or absence of a deeper philosophical foundation behind the presented arguments. Principled substitution draws on the moral idea that the exercise of religion and the admissibility of religious claims for exemptions from general laws, could be adequately ensured via freedom of conscience.[22] Non-principled substitution argues that basic liberties, such as the right to free speech and the freedom association, in conjunction with a number of security and non-discrimination rights are in practice enough to guarantee the free exercise of religion. Thus,

[17] The District Court of Groningen, 17 January 2017, ECLI:NL:RBGEL:2017:275, consideration 6, final paragraph.
[18] Recently the district court of Rotterdam held that infant male circumcision remains an unnecessary, drastic medial intervention, due to its irreversible character: 21 September 2016, ECLI:NL:RBROT:2016:7437, consideration 4.13.
[19] The Court of Appeal of The Hague has recently ruled in a case that the Scientology Church serves a commercial purpose and it is therefore not a charity that could profit from tax emptions: 21 October 2015, ECLI:NL:GHDHA:2015:2875, consideration 8.16.
[20] The case of the sisters of Sint-Walburga, who formed the Church of Satan, focused on the question whether a brothel could be considered a religious institute: Supreme Court of the Netherlands, 31 October 1986, ECLI:NL:HR:1986:AC9553.
[21] The concept of 'substitution' has been discussed by Cécile Laborde, *supra*, note 2 and previously discussed by Micah Schwartzman. See Schwartzman, Micah. (2014). 'Religion as a Legal Proxy', *San Diego Law Review*, Vol. 51, pp. 1085-1104, at p. 1099.
[22] The position of Nussbaum, Jocelyn Maclure and Charles Taylor. See Maclure, Joecely & Taylor, Charles. (2011). *Secularism and freedom of conscience*. Cambridge etc.: Harvard University Press, at pp. 89-91. This position has also been discussed by Micah Schwartzman: Schwartzman, Micah. (2012). 'What if Religion is not special?', *The University of Chicago Law Review* 2012, Vol. 79, pp. 1351-1427.

the question is indeed, 'who needs freedom of religion?', when this right turns out to be superfluous.[23]

1. Principled substitution

Principled substitution is based on two moral grounds. Firstly, on the principles that justify the protection of religious beliefs as a matter of respect for human dignity.[24] The main argument behind this ground for principled substitution is that religion enables people to think about the 'ultimate questions' of life, such as those concerning life and death.[25] Secondly, principled substitution is based on what the liberal toleration ideal considers worthy of protection. This ground concerns liberty of conscience.[26] Hence, no reason to single out religion, but a principled ground for the liberty of conscience. The reason as to why religious claims for exemptions are sometimes allowed is 'because they involve matters of *conscience*, not matters of religion'.[27]

With reference to the work of the English philosopher, Roger Williams, Nussbaum argues that **''**the faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well of badly. The faculty is identified in part by what it does –it reasons, searches, and experiences emotions of longing connected to that search –and in part by its subject matter– it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect and thus we can agree to respect the faculty without prejudicing the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person's conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required for any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the right of others or comes up against some compelling state interest**''**.[28]

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[23] Nickel, James. (2005). 'Who Needs Freedom of Religion?', *University of Colorado Law Review* 76 (2005) pp. 941-964, at p. 943.
[24] This position is in general defended by Nussbaum, see Nussbaum, Matha C. (2008). *Liberty of Conscience*, New York: Basic Books, at pp. 164-174. Nussbaum has elaborated on this position in *The New Religious Intolerance*. (2012). Cambridge etc.: The Belknap Press of the Harvard University Press, at pp. 61-66.
[25] Nussbaum, Matha C. (2008). *Liberty of Conscience*, New York: Basic Books, at p. 168.
[26] Basically, the position of Brian Leiter. See for fundamental criticism on expanding the significance of toleration Burg, Van der, Wibren. (1998). 'Beliefs, Persons and Practices: Beyond Tolerance', *Ethical Theory and Moral Practice*, Vol. 1, pp. 227-254.
[27] *Supra*, note 9, at p. 64.
[28] *Supra*, note 25, at pp. 168-169.

According to Nussbaum, this way of reasoning helps us 'to make sense of our feeling that there is something about religion or quasi-religion that calls for special protection and delicacy'.[29] And that 'something' is the human conscience, which is part of the inalienable dignity people possess, regardless of their educational background, the state of richness, health, religiosity, and so on.[30] More generally, the principled substitution argument says that as the exercise of religion covers a broad range of areas people are involved in, such as business, politics and association, religious freedom should be seen as a derivate of other basic liberties. Principled substitution understands religious freedom in light of the idea 'that the sorts of activities it involves are covered by the most important general liberties'.[31] The arguments that clarify why religious beliefs should be seen as a subset of the broader human conscience, could be understood as normative outcomes of the question as to how we should address religion in law and the claims for exemptions that are based thereon.

2. Non-principled substitution

The purport of non-principled substitution is that the right application of the existing framework of basic liberties, such as the freedom of speech and association in combination with non-discrimination rights and prohibition of violence makes a separate right to religious freedom completely unnecessary.[32] In other words: freedom of religion has, not to say many, but at least some very 'adequate substitute[s]'.[33] The non-principled arguments that favour the replacement of religious freedom assume that this right is 'dispensable',[34] as other fundamental liberties constitute this right. The idea that 'we can adequately enumerate the basic liberties without referring to religion',[35] and that this will ensure the free exercise of religion, has some consequences for the question as to how we should understand religious freedom.

As such, the idea that religious freedom has the same grounds as other essential liberties will gain ground. Thus, there is no reason to think religion is something unique that could justify the protection of

[29] *Id.*, at pp. 169.
[30] Nussbaum, Martha C. (2012). *The New Religious Intolerance*. (2012). Cambridge etc.: The Belknap Press of the Harvard University Press, at pp. 61-66.
[31] *Supra*, note 23, at p. 950.
[32] This position has been systematically developed by James W. Nickel, see *supra*, note 23. Mark Tushnet is another author who has come to the same conclusion. See *supra*, note 33 at pp. 73 and 94.
[33] Tushnet, Mark. (2001). 'Redundant of Free Exercise Clause?', *Loyola University Chicago Law Journal*, Vol. 33, pp. 71-94, at p. 94.
[34] *Supra*, note 23, at p. 941.
[35] *Id.*, at p. 943.

religion qua religion. Also, to see religious freedom as superfluous will expand our knowledge about the normative foundations of other basic liberties. Furthermore, understanding the need for the free exercise of religion in light of the existing set of basic freedoms, could be of help to eliminate the idea that religious beliefs are privileged in society. The exemptions granted are, in other words, the only right outcome of the right application basic liberties. Thus, not because of the moral quality of religious beliefs. Finally, the emphasis on the protection of religious beliefs via the application of basic liberties ensures that people have a real choice to engage in or disapprove certain convictions.[36]

C. Generalisation

The generalist school of thought argues that religious freedom should not be considered a *special right*, such as the free speech. Instead, it should be understood as a *general right* to ethical independence. As Dworkin explains: **''**Ethical independence, that is, stops government from restricting freedom only for certain reasons and not for others. Special rights, on the other hand, place much more powerful and general constraints on government. Free speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a *"compelling"* justification. Speakers may not be censored even when what they say may well have bad consequences for other people: because they campaign for forest despoliation or because it would be expensive to protect them from an outraged crowd. The right to free speech can be abridged only in emergencies**''**.[37]

Generalisation provides a philosophical notion of religion and aims to understand religious freedom in light of that normative notion. This positions aims to look for reasons of liberal neutrality beyond the narrow, theistic definition of religion. The argument is here that God-believers and non-believers could be seen religious as both could have the same deep feelings about fundamental questions.[38] The generalist position sees in the deep commitment that religious and non-religious believers share an 'intrinsic and inescapable ethical responsibility' to succeed in life.[39]

In the generalist tradition, religious freedom implies the right that gives one full access to ethical independence. Thus, the generalist

[36] *Id.*, at p. 943-951.
[37] Dworkin, Ronald. (2014). *Religion without God*. Cambridge etc.: Harvard University Press, at p. 131.
[38] *Id.*, at p. 5.
[39] *Id.*, at p. 114.

account of religious freedom emphasises the opportunities people have to make independently decisions about how to live their lives by their deeply held ethical commitments. This approach apparently extends the definition of religion. The justification for this extension is rooted in the idea that we need a deeper understanding of religious freedom since religion cannot be protected qua religion. The leading normative value behind this argument is ethical independence.[40]

Ethical independence is a normative value of political liberty. It restricts authorities' opportunities to disfavour a particular view on what deserves attention in life. As Dworkin says: **''**In a state that prizes freedom, it must be left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone. So government may not forbid drug use just because it deems drug use shameful, for example; it may not forbid logging just because it thinks that people who do not value great forests are despicable; it may not levy highly progressive taxes just because it thinks that materialism is evil. But of course ethical independence does not prevent government from interfering with people's chosen ways of life for other reasons: to protect other people from harm**''**.[41]

Thus, understanding religion in terms of ethical independence pursues an ideal of liberal neutrality,[42] towards what Nussbaum has called, the 'ultimate questions' of life.[43] The call for liberal neutrality towards human deep commitments has been strenghened by the claim that ethical independence in the core **''**requires that government not restrict citizens' freedom when its justification assumes that one conception of how to live, of what makes a successful life, is superior to others. It is often an interpretive question, and sometimes a difficult one, whether a policy does reflect that assumption**''**.[44]

To clarify why we should endorse liberal neutrality as a matter of principle, the generalist position divides basic liberties into *special* and *general* rights. The difference between these two variants is rooted in the threshold authorities have to step over to restrict a right. Special rights focus on the 'subject matter' and it is complicated to limit these rights legitimately, except cases of emergency. The focus of a general right is on the relation between authorities and people. General rights

[40] *Id.*, at p. 117 and p. 129 ff.
[41] *Id.*, at p. 130.
[42] Laborde, Cécile. (2014). 'Dworkin's freedom of religion without god', *Boston University Law Review*, Vol. 94, pp. 1255-1271, at p. 1258.
[43] *Supra*, note 25, at p. 168.
[44] *Supra*, note 37, at pp. 141-142.

restrict the scope of arguments authorities can provide to legitimately limit the exercise of a general right.[45]

Against the backdrop of the definition problem that according to the generalist position is intertwined with the freedom of religion, this position rejects to qualify this freedom as a special right. Here, the argument is that a special right would explicitly focus on the definition of religion and it will not be able to solve the definition problem of this right.[46] Also, a special right requires high demands on restrictions that aim to limit the exercise of such a right. Instead, the generalist position argues that approaching religious freedom as a general right to ethical independence will provide protection to the free exercise of religion. The generalist position explains that the right to ethical independence 'condemns any explicit discrimination (…) that assumes (…) that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or that atheism is father to immorality'.[47] It 'protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination'.[48]

Understanding religious freedom as a general right to ethical independence might force people to adjust their religious conduct in a way that fits the rationale of laws that are not *per se* directed to them. This has been acknowledged by the generalist position as an issue that needs serious attention for reasons of equal concern. Therefore, the generalist perspective argues that authorities should take into account whether the bans and other restrictions on a particular practice they propose or impose, are in fact targeting what one group might consider 'a sacred duty' to comply with.[49] If that is the case, 'then the legislature must consider whether equal concern (…) requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception'.[50]

However, the generalist says 'that in case a religious practice would put people at a serious risk that it is the purpose of the law to avoid, refusing an exemption does not deny equal concern. That priority of nondiscriminatory collective government over private

[45] *Id*., at pp. 132-133.
[46] *Id*. See on the definition problem of religion also Sullivan, Winfred Fallers. (2005). *The Impossibility of Religious Freedom*. Princeton: Princeton University Press, at pp. 1-4.
[47] *Supra*, note 37, at p. 133-134.
[48] *Id*., at p. 134.
[49] *Id*., at pp. 135-136. The citation comes from p. 136.
[50] *Id*., at p. 136.

religious exercise seems inevitable and right'.[51] Thus, no principled reason to exempt the followers of the Santo-Daime church who drink ayahuasca tea that contains DMT. The justification to deny exemption is rooted in public health grounds.[52] Nevertheless, a reason to provide equal financial grants to religious organisations that reject same-sex couples and organisations that accept them. The reason as to why we should finance these organisations equally is explained by Dworkin as follows. **''**Financing Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, might be justified in that way, provided that enough of the latter are available so that neither babies nor same- sex couples seeking a baby are injured**''**.[53]

D. Equation

The fourth normative position that aims to theorise the relationship between law and religion is equation, which is closely related to the previous position. Although there are two main differences: firstly, it is not indifference or neutrality that require principled equation. It is rather the ideal of equality.[54] Secondly, it does not generalise religious freedom to something like the general right to ethical independence. The equation position rather approaches religious freedom from the ideas of 'equal regard' and 'equal liberty'.[55] Therefore, the concept of equation is part of what has been called the egalitarian theories of religious freedom.[56] Again, the question is: equation of *what*, actually? This position opposes favouritism[57] and advocates a similar approach to all human beliefs that contain an intrinsic value.[58]

Recall the recent case of a Pastafarianist who was denied by a local municipality in the Netherlands to submit a photograph on which a pasta strainer covered her head. Another Pastafarianist who was

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[51] *Id*., at p. 136.
[52] *Id*., at pp. 136-137.
[53] *Id*., at p. 136.
[54] Berg, Thomas C. (2007). 'Can Religious Liberty Be Protected as Equality?', *Texas Law Review*, Vol. 85, pp. 1185-1215.
[55] Eisgruber, Christopher L. & Sager, Lawrence G. (2007). *Religious Freedom and the Constitution*, Cambridge etc.: Harvard University Press, at pp. 51-77; Eisgruber, Christopher L. & Sager, Lawrence G. (1994). 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct', *The University of Chicago Law Review*, Vol. 61, pp. 1245-1315.
[56] See on the egalitarian theories of religious freedom Laborde, Cécile, 'Liberal Neutrality, Religion and the Good?', in Jean Louise Cohen & Cécile Laborde (eds). (2016). *Religion, Secularism, and Constitutional Democracy*, New York: Columbia University Press, at p. 249.
[57] Sullivan, Winfred Fallers. (2005). *The Impossibility of Religious Freedom*. Princeton: Princeton University Press, at p 149.
[58] Eisgruber, Christopher L. & Sager, Lawrence G. (2007). *Religious Freedom and the Constitution*, Cambridge etc.: Harvard University Press, at pp. 51-77.

similarly rejected by the local authorities referred to the possibility of Muslims and Jews to submit photographs on which they have covered their heads.[59] This case reminds us of a theoretical example about two persons who do not share the same religion, but, they do have similar objections that give them a reason to ask for accommodation. A is a Jehovah's Witness and B is a pacifist. A and B have objections to manufacture tank components.[60] This example has been used by the proponents of the equation approach to argue that a legal regime that exempts A and not B is quite problematic.[61] This objection of improper distinction is present in the Pastafarianist case. The equation position will ask why some believers, such as Muslims and Jews are allowed to cover their heads on the driver's licence photograph they submit, while Pastafarianists are denied the same opportunity.

Another appropriate example in this context is the ongoing debate in legal theory and society about the legal acceptability of ritual male circumcision. As such, several European courts have ruled about the admissibility of this practice. In this regard, one could refer to the German and Finnish court judgements. In both cases, the infant ritual circumcision was followed by medical complications. And although the Finnish Supreme Court held that infant male circumcision is under particular circumstances an acceptable practice,[62] the German district court in Cologne held that the irreversible character of this practice violates boys' right to religious freedom, who are not able to give their consent. Next, the judges argued that the parental right to religious freedom and their right to raise up their children by their convictions, do not justify the practice of infant male circumcision.[63] The recurring question is: what is the principled justification to consider this practice permissible? The criticism is that all forms of female circumcision are prohibited. Even incision, which is less violable than ritual infant male circumcision. The difference in legal approaches has been criticised as discriminatory.[64] The equation position, which advocates for a similar approach to religious and non-religious arguments concerning the way

[59] The District Court of the Northern-Netherlands, 28 July 2016, ECLI:NL:RBNNE:2016:3626, consideration 5.1.
[60] Eisgruber, Christppher L., & Sager, Lawrence G., 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct', *The University of Chicago Law Review*, 1994 (61), 1245-1315, at p. 1292.
[61] *Id.*, at p. 1292.
[62] Askola, Heli. (2011). 'Cut–off point? Regulating male circumcision in Finland', *International Journal of Law, Policy and the Family*, Vol. 25, pp. 100-119, at p. 106 and ff.
[63] The District Court of Cologne, 7 May 2012, 151 Ns 169/11, consideration III.
[64] Wahedi, Sohail (2016). 'Het beoordelingskader van rituele jongenbesnijdenis [The assessment framework of ritual male circumcision], *Tijdschrift voor religie, recht en beleid [Journal for Religion, Law and Policy]*', Vol. 7, pp. 59-74.

people want to live their lives, theoretically strengthens the criticism of 'a double standard on the part of [those] who fail to challenge other unnecessary surgical interventions – such as male circumcision or cosmetic surgery'.[65]

The equation approach 'requires simply that *government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally*'.[66] Thus, no principled reason to differentiate between deep human commitments. The norm should be: an equal approach to non-religious and religious perspectives on the ultimate questions of life. This argument rests on a definition of religious freedom that does not provide religion a base for reproduction. Thus, the equation approach considers religious freedom as 'the right of the individual (…) to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made. Such a right may not be best realised through laws guaranteeing religious freedom but by laws guaranteeing equality'.[67]

Furthermore, religious toleration should be understood against the backdrop of human vulnerability to discrimination. Eisgruber and Sager argue that **''**[what] properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future**''**.[68] This position allows us to claim that the main difference between generalisation and equation is that the first focuses on how we should understand religious freedom as liberty, and the second approaches religious freedom from the ideal of equality.

E. Representation

Representation considers religion as a concept that stands for a set of values that are worthy of protection. In the literature, the position that this paper qualifies as the 'representation attitude' has been called the 'proxy', or 'disaggregation' approach.[69] I submit that both approaches

[65] Dustin, Moira, (2010). 'Female Genital Mutilation/Cutting in the UK', *European Journal of Women's Studies*, Vol. 17, pp. 1-31, at p. 1.
[66] *Supra*, note 60, at p. 1283.
[67] *Supra*, note 57, at p. 159.
[68] *Supra*, note 60, at p. 1248.
[69] *Supra*, note 2.

draw on the idea that religion represents certain irreplaceable values. These justify according to the representation position the codification of a special right to religious freedom. It has been argued that religion, like respect, stands for a 'hypergood': a particular category of higher goods. Koppelman argues that **''**[religion] (…) has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent to resolve religious questions, it is likewise incompetent to resolve this one**''**.[70]

Furthermore, it has been argued that balancing the interests, which is primarily at stake when religious norms are at odds with public rules, should be related to the specific context of a particular case. It is not possible to provide a balancing formula. Thus: fairness is an ideal, the representation position argues. The best we can do is to show that we have explicitly thought about the problem of justice. One potential way to do so is to introduce a system that is focused on the question of religious exemptions. The representation position argues that due to the impossibility to 'protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these'.[71]

This position is concerned with the appropriate interpretation of 'the notion of religion in law (regardless of whether the category of freedom of religion is upheld or not)'.[72] The representation position conceptualises the notion of religion by looking at relevant matches between the 'different parts of the law' and 'different dimensions of religion for the protection of different normative values'.[73] Examples of such matches are the presentation of religion 'as a conception of the good life'; 'as conscientious moral obligation'; 'as key feature of identity'; 'as mode of human association'; 'as vulnerability class'; 'as totalizing institution'; 'as inaccessible doctrine'.[74]

It has been argued by the representation position that some of these matches, such as the presentation of religion as a conception of the good life, a matter of conscience, identity and association, are more

[70] Koppelman, Andrew. (2006). 'Is it Fair to Give Religion Special Treatment?', *University of Illinois Law Review*, Vol. 2006, Issue 3, pp. 571-603, at p. 594.
[71] *Id.*, at pp. 602-603. The citation comes from p. 603.
[72] *Supra*, note 2, at p. 594.
[73] *Id.*
[74] *Id.*, at p. 594-595.

'relevant to the notion of freedom of religion' than other overlapping areas.[75] To consider whether religion is worthy of special protection, we should consider whether the normative values behind the identified matches are, as such, worthy of legal protection. Religious freedom is according to the representation position based on values that justify the application of a broad set of basic liberties to protect free expression of beliefs and opinions.[76]

Formulated in this way, a religious way of life, is just one way human beings could give moral substance to their lives. The normative argument behind this position is a classical liberal idea that authorities should refrain from dictating the right way of life. Citizens should find in freedom their desirable path to live their lives. This position is not unilaterally directed to spheres and spaces of privacy, where human beings are sometimes forced to take off their Jewish yarmulkes, or the Islamic hijab. Therefore, representation advocates 'strong evaluations' to examine whether believers could be exempted from the application of laws that are at odds with their convictions.[77] The normative reason behind understanding religion as a matter of conscience is 'the value of integrity', which stands for an ethical attitude that requires someone to behave in a way that is seen as the only right path to operate.[78]

The representation position claims that it provides the most comprehensive attitude to face the contemporary challenges of law and religion. As such, it says that the approach it proposes is not narrow in the sense of exclusively protecting one group. Neither, it is a sectarian theory. It is rooted 'in the ecumenical value of ethical integrity, and in the normative justifications for generic liberal rights such as speech and association'.[79] Therefore, this approach 'is religion-blind without being religion-insensitive, because it sees religion, not as a specialised and self-contained area of human belief and activity, but as a richly diverse expression of life itself'.[80]

III. Abstraction from the religious dimension

What is the legal definition of religion and religious freedom? Leading theories in legal theory and philosophy do not single out one particular answer, as the right answer. The normative positions rather indicate a spectrum of arguments that share one characteristic, which I will call *abstraction from the religion dimension*. Thus, in discussing the most

[75] *Id.*, at p. 595.
[76] *Id.*, at pp. 595-596.
[77] *Id.*, at p. 596.
[78] *Id.*, at p. 597.
[79] *Id.*, at p. 599.
[80] *Id.*, at p. 599.

appropriate approach towards law and religion, it is not the semantic definition of religion that prevails. That is to say focusing on all that is covered or could potentially be covered by the term religion. Instead, the normative positions adopt a 'religion-blind' approach. Recall the equation argument that says: 'We need to abandon the idea that it is the unique value of religious practices that sometimes entitles them to constitutional attention. What properly motivates [the protection of] religious practices is their distinct vulnerability to discrimination, not their distinct value'.[81] Other positions have defended similar attitudes. Thus, liberal theories of religious freedom *abstract* in their reasoning about religion and religious claims, beliefs, conducts, or practices, *from* what one might call *a distinct value of religion*, such as faith,[82] towards a broad set of non-religious values, goods and concepts.

The theory of abstraction from the religious dimension might sound 'reductionist' from a phenomenological perspective. However, it should not be understood as such. Abstraction is the 'religion-blind' focal point of the liberal, non-sectarian theories of religious freedom. Abstraction stands for a *moral attitude* that does not provide protection to religion, qua religion. The moral position entails a 'religion-blind', though not in all cases 'religion-insensitive',[83] approach. Thus, each form of protection provided to a group should be based on the correct application of a set of fundamental human liberties, not due to the specialness of religion.

IV. Conclusion

Liberal theories of religious freedom do not tolerate religion, qua religion in the semantic definition of that word. Leading theories in legal theory and philosophy indicate a set of normative arguments that together form the theory of abstraction from the religious dimension. Abstraction is a normative theory that could help liberal democracies to face the challenges of law and religion. It is not *per se* reductionist or exclusive in nature. Abstraction stands rather for a *principled moral attitude*, which is rooted in a non-sectarian ideal of religious toleration on the basis of strong normative reasons that are available to all human beings, regardless their moral, philosophical or religious background.

[81] *Supra*, note 60, at p. 1248.
[82] Mackelm defends the idea that religion is distinctive, as religious beliefs are embedded in fait and not in reason. Mackelm, Timothy. (2000). 'Faith as a Secular Value', Vol 45, *McGill Law Journal* 1, pp. 1-64.
[83] *Supra*, note 2, at p. 600.