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Must the Infringement of Women's Rights within Religions be Tolerated? A Swiss Perspective

Adrian Loretan¹

Introduction

Religious beliefs are a cornerstone of many people's lives. However, it is a sad fact that infringement of women's rights is frequently tolerated or even encouraged by many religious communities.

In a world where the confluence of people and cultures presents itself as a plural environment with an "understandable urge to return to old conventions, traditional cultures (...) and the familiar, seemingly secure, sense of one's identity",² questions are being constantly and increasingly asked on the universal character of human rights. The debate is clearly not new: on one side, cultural relativists argue that human rights vary according to the different cultural perspectives. They equip cultural relativity, thus, with a questionable prescriptive force. On the other hand, universalists claim the established universal character of human rights, as reflected in international law and most indicatively in the Universal Declaration of Human Rights. In Charles Norchi's words, the Universal Declaration "represents a broader consensus on human dignity than does any single culture or tradition".³

The essence of this universality implies that every human being is entitled to human rights without discrimination of any kind, including of gender and/or religion. While this principle of non-discrimination does not allow denial of rights on the basis of cultural distinction, it does not ipso facto exclude the overall flexibility of human rights so as to become tolerant to diverse cultures. This flexibility is available because human rights establish minimum standards and as importantly include and incorporate cultural rights.

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² Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, UN Background Note, <http://www.un.org/rights/dpi1627e.htm> [accessed on 15.01.2015]

³ Ibid at 2. See also the Preamble of the UDHR that declares the Declaration to be a „common standard of achievement for all peoples and all nations.“

Gender equality is a topic debated within the human rights community where universalism and cultural relativism often collide. The collision is due many times to the confusion in this discourse between values (such as justice, equity, humanity) and actual rights as entitlements, that give a special force to claims, vested in social practice.⁴ The critique of cultural relativism, affecting also the gender dimension of the equality principle in religious communities, includes inter alia the essentialist and reductionist perception of “right” as “traditional”, of the “obligatory” as “habitual”, the assertion of the infallibility of culture, the assumed superiority of one’s culture over others, the idealized representation of reality that culture is seen to reflect or the understanding of culture as static and homogenous.⁵

In a radio broadcast⁶ on the subject “How universal are Human Rights?” Swiss international law expert, Walter Kälin, suggested that human rights be theologically established within different religions so that fundamental freedoms may find their proper place. This chapter explores this concept of whether the State should promote human rights within religious groups. First, the chapter explains how the human dignity of individuals is protected by law, then the chapter describes in detail how religious group rights might conflict with other individual human rights. Next, the chapter shows how collective rights create legal pluralism, which can be a threat to individual rights. It then explains how there are divergent opinions within religious groups as to the importance of protecting individual rights in religious frameworks.⁷ Finally, several approaches for resolving this conflict are explored in society.

1. Human dignity and the rule of law

The legal existence of the individual⁸ as such emerged towards the end of the Middle Ages, in the Reformation, in humanism and in late Spanish scholasticism. It broke out from the community ties established by the civic republics of the time. It was the Enlightenment that connected individualism with universalism. The human being was no longer defined by means of external attributes (role, gender, race etc.). Value was equally accorded to each human being

⁴ Jack Donnelly, ‘The Relative Universality of Human Rights’, *Human Rights Quarterly*, Vol.28, Number 2, May 2007, 281-306, at 284.

⁵ Donnelly (2007) at 295-6.

⁶ Radio DRS 2, broadcast « Kontext », Whit Monday, 24 May 2010.

⁷ Cp. Joachim Güntner, Mehr als nur ein Stückchen Haut. Das Verbot der religiös motivierten Beschneidung von Kindern durch Kölns Landgericht hat eine Debatte ausgelöst, in: NZZ vom 13. Juli 2012, Nr. 161, 41;

⁸ Cp. Neclek Kelek, Über die Freiheit im Islam. Schriftenreihe Vontobel-Stiftung 2010.

considered as an individual on the grounds of the dignity to which he or she was entitled.⁹

Human dignity, as a value, is prominently recognized in national international human rights law. Article 1 of the Universal Declaration of Human Rights reflects this recognition ('All human beings are born free and equal in dignity and rights.'¹⁰) The recognition of human dignity as a universal value reflects precisely the understanding that each human being has inherent dignity that is the direct consequence of his nature and also the basis for his entitlement to a basic series of rights, awarded equally among humans.

Included in this construct is the notion of respect for the autonomy of each individual, in other words, his/her right to choose and control their life. In turn, this signifies that the protection of human dignity will involve two components: first, the respect for everyone's humanity and second, the corresponding duty towards the creation of conditions for everyone's self-realization.¹¹ Whether we consider human dignity as Hannah Arendt's "right to have rights" or as an overarching principle that aims to protect the necessary conditions to live life as a human being, it does not solve the instances where competing human rights claim precedence in a given socio-legal context.¹²

The dignity of each individual can only be considered effective in as far as it is universal. For this reason, human rights are not only a question of ethics, but also a question of human dignity and its implementation in legal norms. In the words of Gret Haller: "If human dignity counts as a religious category, it is then particularised and loses its universal character. Such exactly happens when a religion, a nation, a cultural or an ethnic group claim to have understood human rights better than other religions, nations, cultural or ethnic groups, and when they go about forcing human rights, as they understand them, upon others."¹³ However,

⁹ Cp. Kurt Seelmann, Kurt Seelmann, *Recht auf Achtung und Schutz der Menschenwürde - leere Floskel oder Grundlage der Rechtsordnung?* in: Adrian Loretan (ed.), *Religionsfreiheit im Kontext der Grundrechte. Religionsrechtliche Studien vol. 2*, Zürich 2011, 101-120.

¹⁰ The widespread character of the value has even reached the work of international organizations that have a primarily economic character (Cf. Article 2 of the Treaty of the EU that states: the EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.')

¹¹ Andrew Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993, at 148-9.

¹² There is intense discussion on the various understandings of human dignity (liberal versus conservative, as a legal or as a moral concept, as a norm, a right or a principle of law, etc). The approach to the concept determines also its use in concrete situations of clashes of rights. On this point, cf. Roger Brownsword, 'Human dignity from a legal perspective', and Marcus Düwell, 'Human Dignity: Concepts, discussions, philosophical perspectives', both in M. Düwell et al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, Cambridge University Press, 2014 at 1-22 and 23-49 respectively.

¹³ Gret Haller, *Politik der Götter. Europa und der neue Fundamentalismus*, Hamburg 2005, 189, translated by Ch.

if “dignity is no longer ascribed to the individual but to a group of humans collectively, then human rights are threatened, since the universality of human dignity is lost.

This is the case, for example (...) when dignity is ascribed not to the individual but to a religious group or only to those persons who belong to that group.”¹⁴

Affiliation to a particular group may therefore lead to inequality. Universal affiliation through the link of human dignity will lead inevitably to equality. Precisely for that reason, Gret Haller sees the constitutional State as the guarantor of rights and freedoms, that is, of human rights.¹⁵ Internally, these rights can come into conflict with each other. Therefore a balance of legally protected interests becomes necessary, as shown in the following section. However, in striking a balance, should one set of rights prevail?

2. Two basic rights in conflict: religious freedom versus equality

In the context of the deliberations of the Federal Commission against Racism, a female Muslim participant disclosed a new perspective on the clash of rights between religious freedom and equality: She was of the view that gender equality in Switzerland was not guaranteed. The obvious response to her claim was to refer her to Article 8 BV of the Constitution of Switzerland on equal rights under the law.

She persisted in her statement on the grounds that religious freedom (Art 15 BV) is given precedence over the non-discrimination rule (Art 8 §2BV) and that it therefore very heavily restricted other basic rights. My subsequent advice to her was to abandon her religious community if she found it above all to be discriminatory. I myself was merely following the injunctions given by most of the commentaries on basic law. The Muslim participant replied that were she to abandon her religious and cultural community, it would seem to her as if she were removing all her clothes and try to continue life naked.

The conversation made it clear to me that most commentaries on basic law do not equitably address the issue of the actual problem of discrimination within religious communities under the aspect of personal needs, since commentaries always start with the *de iure* possibility of

Gallo.

¹⁴ Ibid. 65-66.

¹⁵ Cp. *ibid.* 70-72.

withdrawal from the community, thereby overlooking the fact that for many a *de facto* retirement from a religious group is a complete impossibility, especially for the more vulnerable sections of believers, such as women.

Women, such as the Zurich-based political scientist Elham Manea, openly refer to **violations of human rights even within their own religion**.¹⁶ Similar research applied the same line of argument to the Roman Catholic Church¹⁷ and this despite the fact that after 1945, equality of women has become a fixed component of universal European and national law. Various religious communities position themselves against the right to equality. Considering this, can the state on its own territory, in the name of religious freedom, allow communities to support equality-free zones? Will national and international courts of law share this stance? Furthermore, what will be the repercussions for the legal empowerment of individuals and groups directly affected by these significant limitations of rights?

Women who experience their religious community as discriminating against them must have the right to leave that community. However, they must also have the right **to offer their own new interpretation to their religious tradition**. Manea has opted for this latter.¹⁸ The constitutional State provides women with a means of pressure to be able to modify religious concepts by guaranteeing the right of withdrawal. In the absence of such a right, religious communities become **social prisons** from which escape is impossible. This stands in contradiction to the secular concept of religious freedom.

The basic rights of collective religious freedom and of gender equality can thus get into an irresolvable tangle.¹⁹ Resolution of such conflicts becomes almost impossible: for example, 'genital mutilation' cannot be euphemistically paraphrased as and levelled down to the equivalent of 'female circumcision'.²⁰ After all, genital mutilation is not a part of any religious

¹⁶ See for example, Elham Manea *"I shall keep silent no longer. Islam, the West and Human Rights"* (Freiburg in Breisgau 2009).

¹⁷ Stella Ahlers, *"Equality of Women in Church and State – a problematic relationship of conflict"* (Münster 2006).

¹⁸ Cp. Elham Manea, Elham Manea, *Ich will nicht mehr schweigen. Der Islam, der Westen und die Menschenrechte*, Freiburg im Breisgau 2009, second part: Für einen humanistischen Islam, 15-187.

¹⁹ Cp. Judith Wyttenbach, *Kooperation von Staat und Religionsgemeinschaften in der Schweiz im Kontext der Grundrechte*, in: Adrian Loretan (ed.), *Religionsfreiheit im Kontext der Grundrechte. Religionsrechtliche Studien*, Teil 2, Zürich 2011, 377-413, 387-390.

²⁰ Timothy Garton Ash, *Der Islam in Europa*, in: Thierry Chervel/Anja Seeliger (ed.), *Islam in Europa. Eine internationale Debatte*, Frankfurt am Main 2007, 30-54, 45.

dogma, but in places where women have few rights, as Manea²¹ stresses, it tends to be tolerated. There must be a clear differentiation made here with the circumcision of boys of Muslim or Jewish descent.²²

2.1 The Right to Exit, Consent and the State's Duty

Religion is being increasingly recognized as a legitimate (and legal) source for exemption from the principle of non-discrimination.²³ The interpretation of these exemptions suggests that religious identity takes precedence over general equality norms. The threat for the position and rights of women is obvious: religious protection could undermine the rights of more vulnerable (and marginalized) segments of religious communities. Martha Nussbaum nicely sets the background of the complex debate on the discrimination against women in religious contexts, when she acknowledges that women's ability to exercise their full capabilities is often hindered by 'traditional religious cultures.'²⁴ The 'reification of group identities' begs also the question as to whether claims based on religion are (and should be) considered different from any other equality claims so as to justify exemption.²⁵ Nussbaum continues by prioritizing the rights (and the position) of women in religious contexts by granting them individual rights of exit as a guarantee and a safeguard against discrimination, within the religious communities to which they belong. Is this option realistic? When the religious community includes family, friends and other strong social ties, the option becomes less likely for women wishing to escape discriminating religious practices.²⁶ Discrimination then gradually leads to subordination.²⁷

²¹ See Elham Manea, *Ich will nicht mehr schweigen. Der Islam, der Westen und die Menschenrechte*, Freiburg i. Br. 2009, 31-32.

²² Cp. Joachim Güntner, *Mehr als nur ein Stückchen Haut. Das Verbot der religiös motivierten Beschneidung von Kindern durch Kölns Landgericht hat eine Debatte ausgelöst*, in: *NZZ* vom 13. Juli 2012, Nr. 161, 41;

²³ Indicatively, for the British case cf. Moira Dustin, 'Deference of Interrogation? Contrasting Models for Reconciling Religion, Gender and Equality', *Religion and Gender*, Vol.2, No.1, (2012), 9-35; For the US, cf. Gila Stopler, 'The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality', *William and Mary Journal of Women and Law*, Vol.10, Issue 3, 2004, 459- , at 463, who goes as far as to claim that a right to "free exercise of discrimination" has been created (Ibid, at 470); at European Union level, see the European Employment Equality Directive 2000/78/EC, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> , that permits Member States to maintain laws and practices that allow religious organizations to treat differently individuals on the basis of religion (e.g. when there is a genuine occupational requirement for employment purposes), without this treatment constituting discrimination.

²⁴ Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, CUP, 2000, at 188.

²⁵ Term in brackets borrowed by Nancy Fraser, 'Rethinking Recognition', *New Left Review*, 3, May/June 2000.

²⁶ Dustin (2012), at 19; Stopler (2004), at 468.

²⁷ According to Sunstein, "The remedy of `exit` - the right of women to leave a religious order- is crucial but it will not be sufficient when girls have been taught in such a way as to be unable to scrutinize the practices with which they have grown up." (Cass Sunstein, 'Should Sex Equality Apply to Religious Institutions?', in J.

The right to exit a religious community that applies discriminatory practices is not a sufficient guarantee against the withdrawal of the state in requiring the same standards of equality to be applied within these groups. This option raises the question of voluntary membership: the centrality of religion and its hierarchical structure, coupled with the fact that individuals remain faithful to the denomination in which they were raised, suggest a strong social dynamic from the group towards the individual, alienating free choice of the latter. Mary Becker takes a further step in this direction when she adds that children are not born with religious commitments, they are socialized in them by their families and social network.²⁸ This process is clearly not in line with a liberal definition of the individual as a free and autonomous entity. It also does not correspond to the reality of women's experiences in such communities.²⁹

A second level of justification of discriminatory practices within religious communities against women relies on the concept of consent. This is also not clear: framing women's preferences against a background of limited opportunities with their (apparent) acceptance, does not satisfy an argument against the combat of discrimination.³⁰ At the same time, the role of the state that grants the exemption is merely contributing towards the perpetuation of women inequalities, far from its neutral protector of religious freedoms role. Madhavi Sunder resonates well this reality when she finds:

“Individuals in the modern world increasingly demand change within their religious communities in order to bring their faith in line with democratic norms and practices. Call this New Enlightenment: Today, individuals seek reason, equality and liberty not just in the public sphere, but also in the private spheres of religion, culture and family.”³¹

The reconciliation or re-alignment between religious norms and international human rights principles is nevertheless not impossible: it presupposes the acceptance by legal decision-

Cohen, M. Howard and M. Nussbaum (eds.), *Is Multiculturalism Bad for Women? By Susan Moller Okin*, Princeton University Press, 1999, at 88.

²⁸ Mary Becker, *The Politics of Women's Wrongs*, at 477.

²⁹ Stopler (2004) at 516.

³⁰ *Ibid*, at 518.

³¹ Madhavi Sunder, 'Piercing the Veil', in *Yale Law Journal*, 112 (2003), 1399-1472, at 1403.

makers that religion is fluid, evolving and ‘an ever-shifting, subjective construct.’³² It also involves reflection on what is and what is not a fundamental requirement for each religion.³³ This latter process is of course connected inherently with the recognition of the diversity of religious views within each faith, otherwise religious ‘orthodoxy’ will inevitably claim religious authority for each rule and practice it abides to. This acceptance will ultimately empower women to bring religious norms in line with their needs and their rights.

2.2 The Swiss dimension of the debate

Switzerland is not a religiously homogeneous country: it includes the major Christian confessions, Jewish communities, the Muslim communities, the free churches but also religious groups such as the Seventh Day Adventist Church, the Salvation Army, Jehovah’s Witnesses and atheists as well.³⁴ The conflict between religious discriminatory practices and gender equality is not therefore new.

One of the recurring issues remains strict role stereotyping within the conservative faith communities which results in sex discrimination. Whether it concerns employment (e.g. appointment of priests) or education (e.g. dispensation from swimming classes), the question of the role of the state is posed. It is clear that all discriminatory practices do not carry the same weight: a distinction can be made between grave violations of human rights such as child marriage, force marriage or acts of violence (FGM, ‘honour’ killings) with moral customs (e.g. wearing of headscarves, chadors or wigs).³⁵ The latter constitute a case where the state is called to balance the individual’s right with society’s interests.

The constitutional role of the state, however, is broadly the same: to protect women from practices that are irreconcilable with the basic values of the Swiss constitution. On the ground, for instance, Swiss cantons tend to take a tolerant and pragmatic line with regard to religious clothing and symbols in education, which is more restricted for teachers that are bound to confessional neutrality. In the opposite direction, the position in Switzerland on class dispensations is harder in that the dispensations at issue are not considered conducive to

³² Ibid, at 1424.

³³ Dustin (2012) at 30.

³⁴ Swiss Confederation, Federal Commission for Women’s Issues (FCWI), Gender Equality and Cultural/Religious Practices – A position paper, June 2010, at 3.

³⁵ Ibid, at 4-5

integration efforts.³⁶ More ambiguous remains the role of the state as soon as religion becomes 'privatized' and enters the realm of one's private sphere, with the obvious exception applying to serious human rights violations mentioned previously.

3. Collective religious freedom leads to legal pluralism.

Legal pluralism is a situation whereby several systems of regulation exist side by side. Whereto a strong collective religious freedom may lead to religious rules serving the function of law, even in States that have robust separation of church and state regimes. This can be seen in the following examples that Elham Manea recalls in her book cited above: a German female judge that dismissed an accelerated divorce case of a German female of Moroccan descent from her violent Moroccan husband, on the following grounds: the woman should be aware "that her husband who grew up in a country influenced by Islamic tradition would exercise the right 'to use corporal punishment' which his religion concedes. In other words, if her religion is Muslim then it is perfectly in order for her husband to beat her."³⁷

The second example refers to a similar view that was upheld by the legal authority of St. Gall in Switzerland who refused an extension of a residence permit. The female applicant had, after brief matrimony, divorced her validly resident Muslim husband. She argued that she had been treated as a housemaid or a slave within the marriage. It was countered that the adverse effects she had suffered corresponded to the social norm in a marriage conducted on traditional Muslim principles.³⁸

The Swiss Federal Supreme Court sanctioned her appeal. It returned the case to the administrative tribunal of St. Gall for reappraisal. According to the Federal Supreme Court, it was necessary to clarify with greater precision whether the failure of the marriage was due to the aggrieved party being forced into the role of a 'slave', constantly against her will, under a

³⁶ The Swiss Federal Supreme Court has also ruled in this direction in 2008. (BGE 135/ 79). These decisions should be read in conjunction with Article 8 of the Swiss Federal Constitution that places the responsibility for promoting equality in education and training in the hands of the state.

³⁷ Elham Manea, *Ich will nicht mehr schweigen. Der Islam, der Westen und die Menschenrechte*, Freiburg 2009, 19.

³⁸ Cp. *Recht auf Aufenthalt trotz Trennung. Häusliche psychische Gewalt begründet einen Härtefall*, in *NZZ* 13 July 2012, number 161, 10. (cp. Urteil 2C_821/2111 vom 22.6.2012 – Bundesgerichtsentscheid – Publikation.), translated by Ch. Gallo.

patriarchal behavioural role which she refuted.³⁹

Does collective religious freedom authorise a female member of a religious community to be beaten by her husband? Are there no universal legal values? Or does collective religious freedom open up areas of absence of equal footing? This effectively exempts some religious groups from adhering to human rights laws that the State has obliged itself to ensure. In the second example, above, the Swiss Federal Court did not accept the arguments of the St. Gall legal authority. Therefore, the Court rejected any suggestion of parallel legal normativities precisely because they represented an attempt to reduce the right to equality that would lead a result in a woman being forced to be a virtual slave.

By means of collective religious freedom, legal pluralism can and is systematically advocated. At the solemn opening in Emmenbrücke of the largest mosque in German-speaking Switzerland, in my capacity as a religious-constitutional lawyer, I was invited by an Imam to deliver a word of introduction. After the first meeting, representatives of Islam in Switzerland demanded that special religious courts be set up even in Switzerland in the name of collective religious freedom. What would this legal pluralism here signify?

By allowing religious groups to enforce their own rules that might conflict with State law, legal pluralism could allow religious communities, to a large degree, to supersede State law. This can lead to considerable injustice, for example in the law of inter-religious marriages and in the law of succession. Ultimately, it leads to the practical abolition of individual religious freedom, which is reduced to the practice of *forum internum*.⁴⁰

How aspects of this internal community system of justice might be actually realized, even in liberal Switzerland, was the subject of a debate at the University of Zurich.⁴¹ All of the women who opposed such discrimination at the debate, dissidents of Islam such as Ayaan Hirsi Ali, Taslima Nasrin, Irshad Manji, Necla Kelek or Seyran Ates, did so in the name of

³⁹ Cp. *ibid.*, translated by Ch. Gallo.

⁴⁰ Cp. Marcel Stüssi, *Models of Religious Freedom. Switzerland, the United States, and Syria* in *Analytical Methodological, an Eclectic Representation*, 2012, 337-380.

⁴¹ How aspects of this internal community system could be played out, even in liberal Switzerland, was the subject of a debate at the University of Zurich. (*Religiös-kulturelle Varianz des Familien- und Erbrechts? Tagung für Juristinnen und Juristen, für Vertreterinnen und Vertreter von Behörden und Religionsgemeinschaften und für interessierte Privatpersonen*, veranstaltet von: University of Zurich, Center for Islamic and Middle Eastern Legal Studies; Schweizer Institut für Rechtsvergleichung und Institut für Religionsrecht der Universität Freiburg, 21 May 2011.).

multiculturalism: “Their passionate defence of self-determining lifestyle [of women], of the freedom of the individual as against a religious domesticated collective, demands [...] our support. [...] or else, by whom should self-reflection and reform in Islam be activated other than by these courageous dissidents?”⁴² This argument can also apply to other religious communities.

The approach of Elham Manea refutes all forms of cultural relativism that limit the human rights of Muslim women. For example, she mentions the legal request of the former Canadian Attorney General, Marion Boyd, to set up voluntary religious arbitration instances for Muslim women on the grounds of the Arbitration Act.⁴³ It took the outcry of the Canadian Council of Muslim Women to impede this. At a time “when the supporters for women's rights in Arabic countries are starting campaigns to alter [religious] family laws, [...] the Canadian government enacted of its own free will to endorse a religiously biased jurisdiction.”⁴⁴ In addition to the actions of the Canadian Council of Muslim Women, international protest forced the Canadian government to retract its proposal limiting human rights.

4. Pluralism in Society

The philosophy of the Enlightenment developed concepts of tolerance and religious freedom in face of “civil strife provoked by beliefs” during the wars of religion.⁴⁵ It formulated concepts of a multi-religious society with the same civil rights for adherents to a minority religion.⁴⁶ The Jewish philosopher Mendelssohn abandoned the concept of “Church and State”⁴⁷ or rather “State and Religion”⁴⁸ by asking “To whom should we consign the problems and concerns of eternal life? To the Church or to the State?”⁴⁹ Mendelssohn, the proponent of

⁴² Ulrike Ackermann, Lob der Dissidenz, in: Thierry Chervel/Anja Seeliger (ed.), Islam in Europa. Eine internationale Debatte, Frankfurt a. M. 2007, 140-146, 145.

⁴³ The wider debate concerned proposals for possible modifications of the Ontario Arbitration Act 1991 on alternative dispute resolution. In her report *Protecting Choice Promoting Inclusion*, released in December 2004, Marion Boyd, former attorney-general of Ontario, included the maintenance of the possibility for the Muslim community to use religious arbitrators and apply sharia law to solve disputes (section 32(1) of the Act). In September 2009, the Ontario government announced that it did not plan to follow Boyd's recommendations.

⁴⁴ Elham Manea, Ich will nicht mehr schweigen. Der Islam, der Westen und die Menschenrechte, Freiburg i. Br. 2009, 35; translated by Ch. Gallo.

⁴⁵ Hermann Lübke, Politik und Religion nach der Aufklärung, in: Politik der Aufklärung. Philosophische Ausätze, München 2001, 40.

⁴⁶ Moses Mendelssohn, Jerusalem oder über die religiöse Macht und Judentum, Berlin 1973/ Hamburg 2005.

⁴⁷ *ibid.*, 29.

⁴⁸ *ibid.*, 33.

⁴⁹ *Ibid.*, 38.

Enlightenment, rejected both and developed a third instance, seeing that both Church and State “seldom tolerate each other in a different way to a third moral entity, the freedom of conscience, which knows how to draw several advantages from their disunity”.⁵⁰

Among all the early colonies of the United States of America, it was Maryland alone that established no official church.⁵¹ The proposers wished to declare Christianity as the “established religion” of the State.⁵² Christianity was thereby projected to become the State religion of the United States. At the beginning of US constitutional history, James Madison⁵³, Thomas Jefferson⁵⁴ and the Berlin philosopher Moses Mendelssohn,⁵⁵ however, had opted not to recognise any State religion, but only the conscience of the individual - that is to say, religious freedom for all. With the first amendment of 1797⁵⁶ barring any form of State religion, a new epoch of religious constitutional law in the United States. Religious freedom of the individual, as Mendelssohn had demanded, found its place in a constitution. It was in fact constitutional texts of the State that paved the way for religious tolerance - and not the ecumenical discussions among Christian denominations which begun faint-heartedly only in the 20th century.

Since then, religious citizens in a liberal democracy have had to come to terms with the secular principles of a constitutional State, also including those basic principles which prescribe a separation of State and religion, or religious freedom as the case may be. Therefore, individuals must integrate these principles within the understandings of their faith.

In Western societies that arise from the basic idea of individual self-determination as widely as possible, the consequence of freedom leads to a multiplicity of religious opinions. From the point of view of the liberal state, according to John Rawls, only those religious communities

⁵⁰ Ibid. 33,

⁵¹ cp. Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* 21 (Oxford University Press 2003)

⁵² cp. Marcel Stüssi, *Models of Religious Freedom. Switzerland, The United States, and Syria. By Analytical, Methodological, and Eclectic Representation. A study in comparative constitutional law*, Münster 2011, 79-93.

⁵³ Madison believed this approach was required in order to protect the church from the state. Cp. Marcel Stüssi, *Models of Religious Freedom. Switzerland, the United States, and Syria by Analytical, Methodological, and Eclectic Representation*, 2012, 88-96.

⁵⁴ To Jefferson’s mind, religious tolerance was best achieved by ‘building a wall of separation between Church and State’, *ibid.*

⁵⁵ Samuel Feiner, *Moses Mendelssohn. Ein jüdischer Denker in der Zeit der Aufklärung*, Göttingen 2009, 167.

⁵⁶ “Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof”, Marcel Stüssi, *Models of Religious Freedom. Switzerland, the United States, and Syria by Analytical, Methodological, and Eclectic Representation*, 2012, 92.

merit the title „equitable“ which, from their own insight, reject any assertion of their religious truths by force, as well as any militant moral constraint exercised over their own members.⁵⁷ Without the stimulus of reflection, religious communities in modern societies unfold destructive capacities. The terminological difference between „equitable“ and „non-equitable“ pluralism must be applied to the question of withdrawal of membership. As far as the Swiss legal order, the *ordre public*, is concerned, legal adjudication and legislation which do not protect an individual's right to membership withdrawal, for example Muslim women, even within the framework of “equitable pluralism”, can no longer be accepted.⁵⁸

If we stay with Rawls' terminology, we must also address the question of the cohesion of a Swiss multi-religious society, to which the response ran for centuries in terms of “*cuius regio, eius religio*”.⁵⁹ “How can a stable and just society, consisting of free and equal citizens, permanently exist if the latter are drastically separated from each other by their ‘equitable’ religious, philosophical and moral teachings? [...] The question should be put more specifically as follows: how can those who advocate teachings based on religious authority, for instance, the Church or the Bible or the Koran, hold an equitable political conception destined to sustain a lawful democratic order as well?”⁶⁰

That Muslims, Protestants, Catholics, non-religious persons and religious fundamentalists all living peacefully together in a pluralistic society is a challenge. Believers of different faiths and branches of atheism in a pluralistic society must adapt to the premises of the constitutional State founded on a morality which is secular.⁶¹ In this, the creative transformation of basic rights in religious societies becomes an important theme for discussion.⁶² In 1975, the World Council of Churches in Nairobi declared “Religious freedom is and remains a primary concern of the members of the WCC. [...] This right cannot be separated from other basic rights of

⁵⁷Cp. John Rawls, *Political Liberalism*, New York, 1998, 132-141 (Original *Political Liberalism*, New York 1993)

⁵⁸ Cp. Georg Kohler, *Vernünftiger Pluralismus – Der liberale Staat als Hüter der Religionsfreiheit*, in: Bernhard Ehrenzeller et al. (ed.), *Religionsfreiheit im Verfassungsstaat. Zweites Kolloquium der „Peter Häberle-Stiftung“ an der Universität St. Gallen*, Zürich 2011, 69–88 und Diskussion 89–100, 99.

⁵⁹ Martin Heckel, *Der Augsburger Religionsfriede*, in: Joachim Gaertner, Erika Godel (ed.), *Religionsfreiheit und Frieden. Vom Augsburger Religionsfrieden zum europäischen Verfassungsvertrag*, Frankfurt a. M. 2007, 13-33, 14.

⁶⁰ John Rawls, *Political Liberalism*, New York 1991, German Version: *Politischer Liberalismus* Frankfurt a. M. 1998, 35.

⁶¹ Cp. Jürgen Habermas, *Glauben und Wissen*, Friedenspreis des Deutschen Buchhandels 2001, Frankfurt 2001, 14.

⁶² Cp. Adrian Loretan, *Religionen im Kontext der Menschenrechte. Religionsrechtliche Studien, Teil 1*, Zürich 2010.

freedom of human beings. No religious community may claim religious freedom for itself without respecting and protecting the religious convictions and basic human rights of others.”⁶³ The basic rights of religious freedoms require that religious and ideological conflicts do not disrupt societies, which have in the meanwhile become pluralistic. These rights provide the religious communities within the constitutional state with an institutional framework for the solution of their own conflicts.

5. Conflict within the Religious Community and its Theoretical Interpretations

From the analysis so far, the following principle question arises: How can conflicts between a member and his or her religious community be solved? For as far as the constitutional State is concerned the propagation of heretical teaching⁶⁴ leads to no infringement of the law.

In part, religious communities form great worldwide organisations and are employers within large educational establishments. In addition, for believers, they represent an emotional and cultural homeland that cannot easily be abandoned without severing ties of family and friendship. Thus the question stands: how can conflicts between the individual and the religious community be solved within the community itself? What role does the State play? Does the collective freedom of religion, guaranteed by the state, partially override other basic rights of a constitution in the field of religion? Do human rights also apply to religious groups?⁶⁵ What is the relationship between collective religious freedom and the other basic rights of a constitution?⁶⁶ How does the State, for example, react to “the many faces of Islam”⁶⁷ and to those representatives who repudiate a secular constitutional State?⁶⁸ What is the relationship between religious freedom and equality of treatment?

5.1. The Communitarian Approach

⁶³ Krüger, Hanfried/ Müller-Römheld, Walter (ed.), Bericht aus Nairobi 1975. Ergebnisse – Erlebnisse – Ereignisse. Offizieller Bericht aus der Fünften Vollversammlung des Ökumenischen Rates der Kirchen, 23.11–10.12.1975 in Nairobi/Kenia, Frankfurt a. M. 1976, 80, translated by Ch. Gallo.

⁶⁴ A basic definition of heresy is adherence to a religious opinion contrary to church dogma.

⁶⁵ Cp. Adrian Loretan, Religionen im Kontext der Menschenrechte, Zürich 2010.

⁶⁶ Cp. Adrian Loretan (ed.), Religionsfreiheit im Kontext der Grundrechte, Zürich 2011.

⁶⁷ Elham Manea, Ich will nicht schweigen. Der Islam, der Westen und die Menschenrechte, Freiburg im Breisgau 2009, 80-95.

⁶⁸ Cp. Beat Stauffer, Kräfteressen oder Kollusion? Das undurchsichtige Verhältnis zwischen gemäßigten und radikalen Islamisten in Tunesien, in: NZZ vom 20. Juli 2012, number 166, 41;

Communitarianism advocates the wish to justify collective rights as being independent from the rights of individual members of the group. The importance of the group for the individual allows basic rights of the members concerned to be curtailed. This results in “a potential for suppression within the group”⁶⁹, as shown by texts of Charles Taylor⁷⁰ and Michael Walzer. Walzer is prepared to tolerate internal suppression as long as the choice to be affiliated with the religious group remains free of constraint. In the case of encroachment, as for example in forms of discrimination based on gender, except in the case of women subjected to certain practices, he argues for letting tolerance prevail.⁷¹ In this approach, the barring of women from offices in various churches, or the inequality between men and women in the understanding of marriage within certain religious communities, can be justified. In the private sphere, the full enforcement of effective equality between man and woman, according to Walzer, proves to be a problematic instrument leading to the disintegration of traditional and pre-modern cultures. State and social majorities therefore must forego the implementation of gender equality as far as members of a religious group are concerned, resulting in the abolition of basic rights.

It is recognised that, up to a certain point, intolerant attitudes are accepted, because cultural traditions and religious groups that subsist on such attitudes have an intrinsic and collective cultural value worthy of legal protection. Such an approach, according to Walter Kälin, is “more equitable to the peace-promoting role of state neutrality, since state intervention within the internal structures of closed groups and communities fosters conflict.”⁷² This attitude, according to Kälin, is more realistic and more easily reconciled with the precepts of traditional basic law than with the liberal and feminist approaches that are portrayed below. In other words, it is completely acceptable in jurisprudence to overrule gender equality in order to ensure favour religious freedom. Whoever demands true equality should apparently have no religious adherences: for he or she would either have to quit his or her religious community or face discrimination. For some jurists, to associate gender equality with religious freedom is either difficult or impossible.

⁶⁹ Jürgen Habermas, Kulturelle Gleichbehandlung - und die Grenzen des postmodernen Liberalismus, in: Deutsche Zeitschrift für Philosophie 51 (2003) 367-394, 388, translated by Ch. Gallo.

⁷⁰ Cp. Charles Taylor, Multikulturalismus und die Politik der Anerkennung, Frankfurt a.M. 1993, 52.

⁷¹ Cp. Michael Walzer, On Toleration, New Haven/London 1997, 62 ff.

⁷² Walter Kälin, Grundrechte im Kulturkonflikt. Freiheit und Gleichheit in der Einwanderungsgesellschaft, Zürich 2000, 47, translated by Ch. Gallo.

5.2. The Feminist Approach

Women judge discriminating cultural and religious groups differently.⁷³ They assert that the reticence of the State towards group-internal discrimination denotes, in fact, partiality towards the discriminating party. Reticence on the part of the State and on the part of the society of the majority towards group-internal discrimination can result in the surrender of women to social pressures and intrinsic repression. The State may not remain neutral simply because traditional pre-modern privileges and discrimination cannot otherwise be put aside. The State must intervene in the private sphere if it genuinely aims to implement basic rights.⁷⁴ In that respect, it is worth questioning the role played by the courts of law with regard to the enforcement and implementation of the principle of equality. However, in relation to religious freedom, some jurists resist the fact that within religious communities, collective religious freedom should overrule other basic rights such as gender equality - or at least severely reduce such rights.⁷⁵

5.3. The Liberal Approach

In the liberal interpretation of the question on how to resolve the clash of rights between freedom of rights and equality is posed in different terms: which interest is to take preference the protection of group autonomy or the protection of its members' freedom towards self-determination?

Will Kymlicka takes up the communitarian criticism of liberalism. He associates individual autonomy with the protection of cultural group identity. To understand the teachings of one's own religion and culture (the study of texts) is a prerequisite for being able to take expedient decisions for leading our lives. Cultures are not valuable in themselves, but only because it is

⁷³ Cp Denise Buser und Adrian Loretan (ed.), Gleichstellung der Geschlechter und die Kirchen. Ein Beitrag zur menschenrechtlichen und ökumenischen Diskussion, Freiburg Schweiz 1999; Stella Ahlers, Gleichstellung der Frau in Staat und Kirche. Ein problematisches Spannungsverhältnis, Münster 2005

⁷⁴ Cp. Susan Moller Onkin, Justice, Gender and Family, New York 1989, 116f.

⁷⁵ Cp. Felix Hafner/Denise Buser, Frauenordination via Gleichstellungsgesetz? Die Anwendbarkeit des Gleichstellungsgesetzes auf die Dienstverhältnisse in der römisch-katholischen Kirche, in: Aktuelle juristische Praxis 10 (1996) 1207-1214, 1207.

through cultural experience that human beings have access to different options. According to Kymlicka, cultures need to be protected in the interest of individual autonomy; and because of this, Kymlicka differentiates between justifiable and unjustifiable group rights. Armed with the former, a religious organisation can defend its social environment against outside pressures. On the other hand, such group rights become problematic when attempts are made within a religious community, on the basis of these rights, to clamp down on discriminated members who have suggested changes to the established community way of life.

5.4. Group Rights as Derivative Rights

Jürgen Habermas sees acknowledging rigid cultural group rights as a threat to democracy.⁷⁶ What seems above all to be dangerous for democracy is the acknowledgement of groups with strong fundamentalist tendencies. Group rights are only justifiable, in accordance with the liberal tradition, if they are understood to be derivative rights in the sense of a deflection from the cultural rights of individual group members. In pluralistic societies, religious groups can only transmit their heritage from one generation to the next if their members agree to. It is not through the State's granting of group rights that the survival of churches and religious communities can be guaranteed. The transmission of heritage should be envisaged in such a way that the members of a society protected by law also be convinced that the tradition is worth carrying on. It is possible that the question becomes whether the right to self-determination is the proper means for protecting diversity and non-culturisation and transformation of a culture of human rights within religions frameworks. Is it also a question of a State-imposed, "religious National Trust" for which the State, neutral in religious affairs, has no legal mandate? In other words, ought the State, neutral in religious affairs, protect religious communities from the demands of their members?

6. Conclusion

It seems at present that ***either religious freedom or gender equality*** are the alternatives in the minds of certain supporters of the communitarian idea and of certain courts of law. Those

⁷⁶ Cp. Jürgen Habermas, Kulturelle Gleichbehandlung - und die Grenzen des Postmodernen Liberalismus, in: deutsche Zeitschrift für Philosophie 51 (2003) 3, 367-394, 390: „Staat im Staate“.

who wish to combine **religious freedom together with gender equality** have set themselves a very high goal to be attained. They have in front of them a challenging task to perform. One possibility is for the State to intervene in promoting human rights within religious groups.

Human dignity, as a value, is prominently recognized in national international human rights law. Article 1 of the Universal Declaration of Human Rights reflects this recognition ('All human beings are born free and equal in dignity and rights.'⁷⁷) The recognition of human dignity as a universal value reflects the understanding that each human being has inherent dignity that is the direct consequence of his nature and also the basis for his entitlement to a basic series of rights, awarded equally among humans. Included in this construct is the notion of respect for the autonomy of each individual, in other words, his/her right to choose and control their life. In turn, this signifies that the protection of human dignity will involve two components: first, the respect for everyone's humanity and second, the corresponding duty towards the creation of conditions for everyone's self-realization.⁷⁸ Whether we consider human dignity as Hannah Arendt's "right to have rights" or as an overarching principle that aims to protect the necessary conditions to live life as a human being, it does not solve the instances where competing human rights claim precedence in a given socio-legal context.⁷⁹

⁷⁷ The widespread character of the value has even reached the work of international organizations that have a primarily economic character (Cf. Article 2 of the Treaty of the EU that states: the EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.')

⁷⁸ Andrew Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993, at 148-9.

⁷⁹ There is intense discussion on the various understandings of human dignity (liberal versus conservative, as a legal or as a moral concept, as a norm, a right or a principle of law, etc). The approach to the concept determines also its use in concrete situations of clashes of rights. On this point, cf. Roger Brownsword, 'Human dignity from a legal perspective', and Marcus Düwell, 'Human Dignity: Concepts, discussions, philosophical perspectives', both in M. Düwell et al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, Cambridge University Press, 2014 at 1-22 and 23-49 respectively.