

Freedom of Religion as the Foundation of Freedom and as the Basis of Human Rights: *Response to Roger Trigg*

ELISABETH GRÄB-SCHMIDT
Universität Tübingen

ABSTRACT

Religious Freedom is meant to refer to the systematic relation of freedom, tolerance and truth that shapes and qualifies all three concepts and has pluralism as a logical and systematic consequence of a religious freedom based on tolerance and truth. Two factors, which also prove both concepts to be compatible to the modern era, are crucial to qualifying freedom through religious freedom: (1) Their specific definition (by qualifying it as freedom of conscience) leads to change in perspective from the sphere of the general to the moment of individuality and thus to tolerance; (2) Their relation to truth leads to change of perspective from an absolute to a perspective understanding of truth und with this to the appropriateness of a pluralism of definitions of truth.

KEYWORDS

freedom of religion, freedom of conscience, natural law, pluralism, tolerance

'Ist die Toleranz, diese Errungenschaft der Aufklärung, für uns etwa ein Problem, das wieder oder immer noch der Aufklärung bedarf? der Umstand [gibt] zu denken, dass die so genannte Neuzeit, die mit dem Pathos der Tole-

ranz einsetzte, mehr und mehr von einer Flut der Intoleranz überschwemmt wird.¹

This is not a twenty-first century diagnosis, but one that was already made by Gerhard Ebeling almost 30 years ago.

Freedom, and in particular freedom of religion and the pluralism and tolerance associated with it, are the principles of the modern era. These principles, however, must be defined in relation to each other. This does not seem to pose any problems, at least as long as the concept of the pretension to truth on the part of religions is set aside. However, it is precisely this pretension to truth on the part of religions that is always raised with the right to a positive freedom of religion. Roger Trigg is thus correct to first pose the fundamental question of the role of religion in human life. It is only when this is resolved that the peculiarity and importance of religious freedom can be determined. If it is true what even evolutionary biologists now suppose – Roger Trigg refers to Scott Atran – namely ‘that religion is deeply rooted in human nature’, then it is obvious that religious freedom must belong to the ‘basic human rights [...] springing from our basic needs’.² Consequently, research in evolutionary biology seems to have demonstrated that the alternative between two forms of understanding of religion – that of John Locke on the one hand and that of the materialists on the other –, which was evolved in the modern era, has been decided in Locke’s favour. For John Locke ‘freedom and reason were regarded as inseparable’; as Roger Trigg emphasises, ‘without a freedom to believe...the latter would appear meaningless’.³ According to this view, the secularization thesis can no longer be sustained. In this case, however, freedom of religion is one of the first human rights from the implementation of which can be deduced whether or not human dignity is taken into consideration. This opinion – advanced as well as examined from a historical point of view by Roger Trigg – was initially incorporated into the Virginia Bill of Right and then into the US Constitution in particular. I would like to adopt and enhance this idea by demonstrating that the concept of religious free-

¹ ‘Is tolerance, this achievement of the Enlightenment, a problem for us that again or still needs elucidation? [...]It merits consideration that the so-called modern era, which arose with the pathos of tolerance, is increasingly flooded by intolerance.’ (G. Ebeling, ‘Die Toleranz Gottes und die Toleranz der Vernunft,’ in: T. Rendtorff (ed.), *Glaube und Toleranz. Das theologische Erbe der Aufklärung* (Gütersloh: Gütersloher Verlagshaus G. Mohn 1982), 54-73, esp. 54.

² Roger Trigg, ‘Freedom of Religion,’ in this volume, p. 114.

³ Ibid., p. 108-9.

dom is fundamental to the understanding of freedom and therefore a ‘basic human right’.

‘Freedom matters’⁴: this is how Roger Trigg summarizes the Christian legacy of the liberal foundation of our society. He does so by attempting to deduce the concept of freedom from basic Christian principles. The idea of understanding freedom based on Christian principles may not be convincing for those who want to understand the concept of autonomy as the legacy of the Enlightenment, that is, for those who have just liberated themselves from the chains of a divine authority. In contrast to this, however, the fact that freedom of religion is embedded in the Constitution asserts that freedom can only be realized with religious freedom and not by opposing it. In contrast to this, though, the fact that freedom of religion is embedded in the Constitution asserts an important insight – not only concerning the significance of religion for the *conditio humana* but also concerning the inner nature of human freedom as such. However, this requires that freedom is understood as positive religious freedom. Roger Trigg emphasizes: Only if freedom of worship is granted, freedom of religion can be guaranteed. Therefore, Trigg correctly notes that the problematic aspect of the Lisbon Treaty is the fact that the right to religious freedom is not acknowledged in its appropriate significance for the Constitution as ‘one of the most basic rights’.⁵ I would enhance this argument by adding: religious freedom is a fundamental right, because it represents the core of human freedom. It is the inner core of religious freedom from which can be deduced what characterizes freedom as freedom.

My explanations are intended to enhance this insight, particularly by referring to the Jellinek Thesis, which – quite apart from its historical significance and without discussing its correctness – proceeds from the fundamental systematic relevance of religious freedom for human freedoms and rights as such.

Being confronted with diverse pretensions to truth and absoluteness on the part of religions presents theology as well as philosophy of religion with a welcome occasion to reconsider as well as determine the significance and function of religious freedom for any constitution in general, and thus for politics and society in particular. Evidently, this is nowadays also supported by the interest on the part of science and society, since, in January 2010, the German Council of Science and the Humanities has demanded that theology

⁴ Trigg, ‘Freedom of Religion’, in this volume, p. 122.

⁵ Ibid.

and those sciences related to religion should be more strongly supported at universities.

My paper poses the question whether, in light of this historic task, the validity of Georg Jellinek's thesis, though once dismissed, is now proven in full clarity. In the following, the status of religious freedom as a fundamental human right is to be examined, namely by assuming a positive freedom of religion. It are these cornerstones that then raise the question of how – given the different forms of and views on religious beliefs – the expression of these beliefs could and should be both freely tolerated and legally bounded. My explanations should be understood as a basis for taking a specific position on this question at a later point.

Accordingly, part I will, first of all, deal with the relation between religious freedom and law. In a next step, Georg Jellinek's controversial theory of religious freedom being a fundamental human right shall be considered. This thesis will be examined with reference to its critics, distinguishing between a historical dimension and one related to its reception and influence.⁶ For this purpose, part II will emphasize the significance and importance of the Reformation for the concept of religious freedom. Doing so will confirm Jellinek's insight that, in the modern era, religious and secular definitions of society run parallel to each other – as can be seen most clearly in the historical impact of Protestantism. In part III, this insight will be illustrated in detail with reference to the modern changes in the understanding of natural law. It seems to me, that the modern understanding of natural law is influenced by Luther's doctrine of the two regiments, which, in any case, is already based on a secularised understanding of natural law. With Luther's discovery, the concept of freedom as such is defined anew in a way that determines the beginning of the modern era from an *inter alia* anti-metaphysical perspective. Part IV will then clarify how freedom is qualified by its redefinition as freedom of conscience. Part V takes a closer look at the understanding of reli-

⁶ It has to be noted here that, although no direct line can be traced from the Reformation to the declarations of human rights in the USA and France, we can nevertheless demonstrate – and should thus take into account – an influence concerning the perception and influence of Reformation thought. In addition, however, more recent investigations have shown that an historical influence of society can certainly be demonstrated. It is thus necessary to distinguish between the legal relations on the one hand and the relations this pertains to anthropology and the development of mentality on the other hand. See LeRoy Moore, 'Religionsfreiheit; Roger Williams und die revolutionäre Ära,' in *Zur Geschichte der Toleranz und Religionsfreiheit, Wege der Forschung*, H. Lutz (ed.), (Darmstadt: Wissenschaftliche Buchgesellschaft 1977), p. 276-307.

gious freedom, tolerance, and pluralism, which is rooted in this freedom of conscience and may offer a workable basis for a pluralistic society.

I. THE RELATION BETWEEN RELIGIOUS FREEDOM AND LAW

What does the understanding of religious freedom mean for contemporary references in law and the public sphere, specifically with regard to a pluralism that demands tolerance, but does not want to give up truth?

Jellinek maintains the daring thesis that freedom of religion is the original or basic form of all individual rights and the foundation of all rights of freedom of the person. In the final analysis, this is the same as the legal notion that underlies the Constitution of the German Federal Republic. Consequently, religious freedom may be regarded as the presupposed basis of Articles 1 to 19 of the Basic Law. With this being the case, it can definitely serve as a reminder for the fact that religious freedom can draw our attention to two aspects that have to be taken into consideration in order to be able to appropriately acknowledge religious freedom with regard to its role in the public sphere:

- 1) to delineate religious freedom as the basis of freedom and
- 2) to continue to liberally organize the community while acknowledging the uniqueness of each individual and of the individual religious or ideological groups.

Through its specific formulation of the fundamental rights, embedded in the Preamble of the inviolability of human dignity, the Basic Law already takes a pluralistic understanding of religion and freedom into account. Art. 4 GG⁷ demands the unrestricted right to a strong, and non-relativized belief. This also applies to human rights (Art. 18 GG).

- (1) The freedom of faith, the freedom of conscience, and the freedom to profess a religious or ideological creed shall be inviolable.
- (2) The undisturbed practise of religion shall be guaranteed.

⁷ Artikel 4 GG:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.
- (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

In fact, the state even has to protect each individual in his or her belief (Art. 1, Paragraph 1 Basic Law), because being able to have such a belief determines the dignity of the individual. As Ernst-Wolfgang Böckenförde formulates it: ‘Der Staat kann nicht Grund menschlicher Gewissens- und Religionsfreiheit sein, er *gewährleistet* sie. Sie ist als eine *Dimension der Freiheit* des Menschen angesehen.’⁸ Thus, in the history of the German Constitution ‘Gewissensfreiheit [ist] das erste Grundrecht in dem präzisen Sinne eines säkularen individuellen Freiheitsrechts, das dem Individuum um seiner selbst willen zu kommt, es rechtlich aus bestimmten Bindungen emanzipiert und den gewährten Freiheitsbereich gegen hoheitliche Eingriffe sichert.’⁹ Also in this case, tolerance is understood as the indispensable duty of the state to guarantee freedom by acknowledging the full and independent right to freely profess one’s religious creed. Consequently, Art. 4 (Basic Law) belongs – in contrast to Art. 5 (Basic Law) (freedom of expression) – to those fundamental rights that are valid prior to the reservations of individual laws. It is a right that cannot be forfeited: ‘Die Überzeugung und das Bekenntnis sind heute ohne jede Einschränkung geschützt. Dem Staat steht deshalb kein Mittel zur Verfügung, Einfluss zu nehmen auf einander unversöhnlich gegenüberstehenden Anschauungen und etwa friedlichen Wetteifer zu fordern.’¹⁰ All the more, this raises the question of how, in light of the spread of a plurality of religions, can be dealt with the fundamental right to religious freedom in its pretensions to absoluteness – which, however, means asking how this can be upheld without a reservation clause. At any rate, religious freedom clearly cannot be played off against other rights. However, it is religious freedom in particular that challenges tolerance and consequently the ability of a society to be pluralistic. Thus, a petition for the extension of Article 4 Paragraph 2 of the Basic Law has demanded that, as a consequence and an expression of the

⁸ ‘The state cannot be the reason for human freedom of conscience and of religion: it *guarantees* it. Both are regarded as a *dimension of the freedom of mankind*.’ (E.-W. Böckenförde, ‘Bemerkungen zum Verhältnis von Staat und Religion bei Hegel,’ in: *Der Staat* 21 (1982), p. 481).

⁹ ‘Freedom of conscience [is] the first basic right in the specific sense of a secular individual right to freedom that accrues to the individual for his or her own sake, which legally emancipates him or her from specific bonds and secures the granted area of freedom from interventions by the sovereign.’ (E.-W. Böckenförde, ‘Bemerkungen zum Verhältnis von Staat und Religion bei Hegel,’ *Der Staat* 21 (1982), 481).

¹⁰ ‘Today, belief and creed are protected without any restriction. Therefore, the state has no means to influence convictions that are opposed to and irreconcilable with one another and, for example, to demand a peaceful competitiveness between them.’ (See G. Püttner, *Toleranz als Verfassungsprinzip. Prolegomena zu einer rechtlichen Theorie des pluralistischen Staates* (Berlin: Duncker & Humblot 1977), 25).

fear that freedom and tolerance have to be given up due to varying religious pretensions to absoluteness, Article 4 of the Basic Law must be made stricter.¹¹

However, the principle of religious freedom, as it is understood in the Basic Law, cannot be interpreted as an imperative of indifference towards ideological groups. This can also be derived from the unreserved protection of the classical denominations, which were known to assume the exclusive correctness of their core ideas. The principle of religious freedom thus applies without reservation. Therefore, it must also be granted to followers of non-Christian religions if their human dignity is not to be disregarded, because otherwise Article 4 (Basic Law) is – at least in this state of being without reservations – a consequence of Article 1 (Basic Law).¹²

Thus, freedom of religion is central to the right of freedom. This becomes clear by the fact that the organizing principle of religious freedom is what enables us to posit a constructive relation between freedom and law. Consequently, religious freedom is not merely a right – and most certainly not one right among many – but rather the precondition and the hermeneutic guideline of a right that understands itself as liberal, and thus as one that protects human dignity and the public welfare of the state.

The formal understanding of the right to religious freedom proves itself, in its very formality, to be characterized by a strong and highly significant content – regarding the understanding of freedom as well as the understanding of religion. For this reason, religious freedom is crucial to a modern understanding of law. One could say: religious freedom is the hermeneutic fulcrum of modern secular law, a form of law that does not want to give up a strong concept of freedom, and is nevertheless capable of connecting the pre-

¹¹ The demand for the legal acknowledgement of the religious practices of the Islam in Germany is made with reference to the constitutionally guaranteed religious freedom according to Art. 4 of the Basic Law. A petition has now demanded that the German Parliament extends the article with a remarkable amendment. According to this, the practice of religion, i.e. freedom of worship, is to be guaranteed, but only to the extent that it does not infringe on the rights of others, and does not violate the constitutional order. The relevant passage reads as follows: ‘The petition aims to achieve the extension of Article 7 Paragraph 2 of the Basic Law in the following way: The undisturbed practice of religion shall be guaranteed, insofar as it does not infringe on the rights of others and does not violate the constitutional order.’ (<http://www.pi-news.net/2008/01/online-petition-zu-artikel-4-gg-religionsfreiheit/> last retrieved October 2010, the official, and unfortunately no longer valid, link of the online-petition was http://itc.napier.ac.uk/ePetition/bundestag/view_petition.asp?PetitionID=592).

¹² The highest principle of law is the establishing of peace. This was the reason for the growth in the awareness of the necessity of religious freedom in order to enable the development of the person under conditions of dignity.

tensions to truth, as they are associated with religion, to the freedom to be tolerant. Consequently, religious freedom would act as a hinge for societies that are oriented towards and capable of pluralism.

It is this importance of religious freedom as a fundamental human right, which points directly to the systematic essence of Georg Jellinek's thesis.

II. FREEDOM OF RELIGION AS A BASIC HUMAN FIGHT: JELLINEK'S ARGUMENT

According to F.W. Graf, religious freedom is an indicator of the degree of freedom in a political community.¹³ It therefore makes sense to investigate the systematic essence of religious freedom, as it is enshrined in legislation, beyond its historical origins in the confessional era, if we are to reflect on freedom in the context of religion, tolerance, and truth.¹⁴ At any rate, the tension-filled conceptual connection of religion and freedom already suggests that religion itself stands in a relation to freedom that demands a legal framework. It is, in particular, this relation of law and freedom, of liberal law, that points to religious freedom as the basis of this legal framework. This is exactly what Georg Jellinek had in mind when he referred to religious freedom as the original or basic form of all personal rights. His thesis is as follows: 'Die Idee, unveräußerliche, angeborene, geheiligte Rechte des Individuums gesetzlich festzustellen, ist nicht politischen, sondern religiösen Ursprungs.'¹⁵ He then continues: 'Was man bisher für ein Werk der Revolution gehalten hat, ist in Wahrheit eine Frucht der Reformation und ihrer Kämpfe.'¹⁶

He supports the claim to regard the American Constitution as the model for the French Revolution as well as for the human rights formulated there on the one hand, and to regard religious freedom as the source of all civil rights and liberties on the other hand. This – above all in historical terms –

¹³ See F.W. Graf, 'Puritanische Sektenfreiheit versus lutherische Volkskirche. Zum Einfluss Georg Jellineks auf religionsdiagnostische Deutungsmuster Max Webers und Ernst Troeltschs,' in: *ZNThG/JHMTh*, Berlin 9, Vol. 2002, 49–69, esp. 55.

¹⁴ It is not without good reason that the concept of religious freedom already suggests an internal tension in the relations of religion and freedom addressed by this content on the one hand, and their respective and typical content and pretensions on the other hand.

¹⁵ 'The idea of legally establishing inalienable, inherent, sacred rights of the individual has its origin not in politics, but in religion.' (G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (Leipzig: Duncker & Humblot 1895; new edition: Schutterwald /Baden: Wiss. Verlag 1996), 74 ff.)

¹⁶ 'What had up to now been considered to be a work of revolution is in truth a fruit of the Reformation and its struggles.' (G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte*, 74 ff.)

not uncontroversial twofold claim does not see the Enlightenment tradition of contract law and reason as the instigator of the Declaration of Human Rights as it was formulated during the French Revolution. Instead it sees this as emerging from the American Constitution, which rests on the Puritan intellectual legacy, which made the rights of the individual into the positive law of the state (the codification of human rights).

In light of this fact, the systematic essence of religious freedom has significance for the self-understanding of man and society that can hardly be overestimated.

Nevertheless, Jellenik's position on the question concerning the basis and origin of the American Declaration of Independence did give rise to extensive controversies in which it was mainly pointed to the influence of modern, rational natural law. It seems to me, however, that this connection between freedom of religion and modern natural law in fact underlines Jellinek's thesis – if not historically, then at least systematically. In my opinion, the critique of his thesis, which cannot be elaborated here, overlooks the fact that the specifically modern definitions of natural law could ultimately be inspired by a Protestant understanding of freedom – if not historically, then at least in intellectual and systematic terms. It could be inspired by the Reformation understanding of freedom as freedom of conscience, which specifically ties freedom and truth to the individual. Due to the significance of the individual in his or her relation to truth and freedom, freedom of conscience already had to render problematic a traditional justification of freedom and truth by natural law that fixed the latter in a horizon of generality. Apart from this fact, the problematization of the metaphysical thinking of freedom and truth is also in historical terms generally indebted to the emergence of diverse denominations, and with this to the breaking up of the unitary culture of the Middle Ages (viewed this way, the historical development is in fact running parallel). Because of the rift in the unitary culture of the Middle Ages which was evoked by the confessional age, the question concerning the guarantors of freedom, and with this the question concerning the relationship of the individual to the whole, could now be posed anew.

This fragmenting of the medieval unitary mode of thought also made necessary the modern definition of natural law.¹⁷ In my view, it is particularly

¹⁷ If in Ancient Greece and the Middle Ages the realisation of the individual took place in the local community and through his inclusion in the latter, this had now become problematic. The *bonum commune* was no longer regarded as given, but as a from now on self-posed order, one that thus was not to be ascribed to God, but which was instead considered to be a worldly legal order. This under-

due to this modern definition of natural law that religious freedom gains legal significance. In order to shed further light on this, I will now take a closer look at the modern understanding of natural law.

III. HISTORICAL-SYSTEMATIC SUPPORT FOR THE JELLINEK THESIS IN THE MODERN UNDERSTANDING OF NATURAL LAW

My thesis is as follows:

If religious freedom is understood as a fundamental human right, it serves, in place of natural law, as a guarantor of all civil rights and of the modern understanding of law and basic law. Provided that this is the case, it is also clear why the connection of religious freedom to truth is not only possible, but also necessary. It is this connection that is capable of leading (a society) to tolerance and pluralism. I will elaborate on this in part V.

Furthermore, but still connected to this, I will consider modern natural law, because it is first and foremost in its modern constellation that the significance of religion for the adequate comprehension of freedom becomes clear. It is this adequate comprehension of freedom that then makes a plausible understanding of the right to religious freedom possible.¹⁸

Two lines of argumentation can be traced in modern natural law, both of which proceed dichotomously – first concerning the differentiation of nature or the empirical realm and freedom, and second regarding the differentiation of nature and reason. This double dichotomy, which has to be weighed differently in each case, can be linked to two of its outstanding advocates: Thomas Hobbes and Samuel von Pufendorf. Outlining this briefly seems important to me, because only one of these lines of argumentation – the reason-oriented one – became dominant. It is, however, the other one that may be able to give reasons for the particular position of religious freedom in law. Hobbes¹⁹ bases law on the nature of man, to which also belongs the human ability to reason, – that is, on his condition in the state of nature,

standing of the law is very close to that of Luther, who formulated an – so to speak – secularized concept of natural law, and can consequently, concerning the ontological question of natural law, also be considered as a forerunner of a modern reinterpretation of natural law.

¹⁸ In addition to this, the modern relationship between freedom and reason – which may reveal a possible intrinsic relation of religious freedom to truth and tolerance – can also be taken into account.

¹⁹ See Thomas Hobbes, *Leviathan*, (1st ed. 1651; Hamburg 1996), see especially ‘Part One, On Man’, p. 9–139.

which is marked by the necessity of the empirical realm. Pufendorf establishes it in the sphere of the will, of the mind, and of morality.²⁰ Hobbes develops a concept of law that links law to positive law. Pufendorf bases his argumentation on positive law as well, but he still explains law by natural law. In addition to the *ens naturae*, he establishes the genuine sphere of the *ens moralia*, which, according to him, constitutes the actual human nature. This sphere of the *ens moralia*, however, is rooted in natural law and thus, according to his definition of the term, already orientated to freedom.

It is this orientation towards freedom that makes a modern interpretation of natural law possible. In my opinion, this orientation towards freedom incorporates a Reformation aspect (namely with regard to freedom) that, compared to the other modern concept (namely the reason-oriented model of law, which ultimately only takes positive law into account, is setting a new, complementary course within the modern era. Pufendorf does, like Hobbes, employ the natural-scientific methods of observation and analysis, but he differentiates between the physical and moral nature of man.²¹ It is therefore his morality that enables man to relate to his physical preconditions not only by contemplating it rationally, but also morally – that is to say, freely.

For Pufendorf, man is able to develop a normative order *qua his nature*, that is, in other words, to posit positive law in such a way that positive law can, on good grounds, still originate in natural law – namely, in the free nature of man. It is precisely this, however, that introduces a dimension that makes a strictly rational understanding of human freedom possible.

This establishes natural law as an entity that includes human freedom as innate characteristic of all human beings, and which, in doing so, posits nature and freedom in a primordial, authentic relation. The crucial point is this: such an original form of freedom can point to the fact that it does not only take religious freedom into account, but that – because of this primordiality of freedom – it also bases its definition of freedom on religious freedom. It is this primordiality of freedom that represents a religious dimension and that can be considered as taking over the function of natural law – because of its religious foundation. This religious foundation, however, finds its justification not in the former horizon of the general; it merely reminds us of the fact that human freedom is irreducibly given. This is, by the way, also particularly

²⁰ See S. v. Pufendorf, *De iure naturae et gentium dt. Acht Bücher vom Natur und Völkerrecht* (Frankfurt a. M. 1711; reprint Hildesheim: George Olms 2001).

²¹ Pufendorf, *De iure naturae*, I,1,2f.

of significance with regard to the contemporary discussions of freedom and the challenges brought to it by the natural sciences.

Accordingly, Pufendorf, like Martin Luther before him, drew a distinction not between a natural and a rational order, but rather between a natural/rational and a *free* order²². In making this distinction, he at the same time drew a distinction between social, that is, *empirical or de facto existence* – to which also belongs reason – and *existence as free action*.

With this model, which applies equally to Luther and Pufendorf, the systematic content of the foundation of law – which had previously been guaranteed by the metaphysical natural law – is not given up by the fact, for example, that man becomes the agent that defines natural law so that it no longer reflects the general divine order. On the contrary, for Pufendorf, it is natural law in particular, which is, so to speak, qualified secularly by emphasising man as a free moral being, whose freedom as *ens morale* distinguishes itself from the *ens naturae* despite being the very ‘nature’ of man. Such an understanding of natural law shares the anti-metaphysical tendency of the modern era, but can, with reference to the primordiality and intangibility of freedom, nevertheless take up the metaphysical cause – now, however, in a broken manner, namely by means of the religious dimensions of freedom.

It is the existence of these religious dimensions of freedom that establishes the inviolability of human dignity. Considered from its systematic core, Pufendorf's understanding of natural law²³ is one that, in the given understanding of nature and freedom itself, contains definitions of dignity and of freedom, which can be understood by reason but not established. The reason for this is that they lie in the domain of the given facts²⁴ that refers to the inaccessible as the basis of freedom²⁵. This reference to the inaccessible con-

²² Pufendorf does this by distinguishing between *ens naturae* and *ens moralia* – just as Luther did by distinguishing between God's two forms of rule: divine law and worldly law, or reason and faith. (Pufendorf, *De iure naturae*, I,1,2; 2; I,1,4) See H. Welzel, *Die Naturrechtslehre Samuel Pufendorfs* (Berlin: Walter de Gruyter 1958), 97 ff.

²³ It can be understood as a further development of Luther's secular understanding, especially concerning the focus of natural law on the description of human nature. (See Part IV.3.b; also see F. Loos/ H.L. Schreiber, Art. 'Recht/Gerechtigkeit,' in *Geschichtliche Grundbegriffe*, Bd. 5, O. Brunner et al. (ed.), (Stuttgart: Klett-Cotta 2004), 265.)

²⁴ These given facts should be regarded as a pre-legal authority which paves the way to law, as well as an irreducible determinacy of the basic orientation of human nature.

²⁵ This idea is central to the Protestant doctrine of the differentiation between divine law and human law – between divine tolerance and human tolerance, etc. It was developed by Luther in his distinction between the two forms of rule, and made into the centre of his theology by means of his doctrine of justification; and has as such found, in line with Luther's differentiation, its way into the Virginia Declaration of Rights and the American Declaration of Independence in Pufendorf's under-

stitutes a crucial benchmark for the religious definition of freedom, and thus also for the formulation of human dignity and human rights as the basis of law.²⁶

This establishes a change in legal thinking: law is no longer derived from a pre-given, quasi-sacred, religiously justified order; instead, law is understood as an element of the rational positing by society, but a law that understands itself as an instrument for the safeguarding of the pre-legal sphere, that is, of pre-legal freedom. As such, positive law can then, to a certain extent, be considered as a replacement of natural law. Especially because the concepts of human dignity, human rights, and freedom involve pre-legal dimensions, they demonstrate that they share the recourse to the basic content of the former metaphysical level – though not the manner of explaining.

And it is precisely in this constellation of relating the pre-legal and legal facts that the relevance of religious freedom to the legal system becomes evident. This indicates the completely systematic relevance of the religious basis of law. With the concept of the pre-given facts, the pre-legal sphere, it is thus capable of confirming, from a systematic point of view, the Jellinek thesis of the Protestant-religious premises of the codification of religious freedom as the basis of law and freedom. In this respect – and this seems to me to be a great achievement (and one which also applies to natural law) – it does not simply ignore the modern critique of metaphysics, but is in fact able to support it, albeit without having to abandon the threatened questions of its binding nature and validity. I will now take a closer look at the understanding of freedom this line of argumentation (being anti-metaphysical but nevertheless able to ensure its binding nature) offers.

IV. THE SHAPING OF RELIGIOUS FREEDOM THROUGH THE PROTESTANT UNDERSTANDING OF NATURAL LAW AND OF FREEDOM AS FREEDOM OF CONSCIENCE

How, then, does the Protestant premise of the idea of freedom – as it is claimed by Jellinek's thesis – relate to the modern understanding of religious freedom? It will depend on how this relation is defined whether it can give the legal and societal understanding of religious freedom a clear profile,

standing of *civilitas* and his definition of human rights in pre-legal conditions and legal implementation.

²⁶ This constellation can be seen in the American Constitution, in the French Revolution, and in the German Federal Basic Law.

namely by shaping the modern requirements of society that accompany religious freedom, that is pluralism and tolerance. Explaining this will require two steps: (1) the specifically Protestant understanding of freedom as freedom of conscience has to be set out in detail and its relation to religious freedom has to be emphasised; (2) it has to be determined to which extent this understanding of freedom of conscience can shape the tolerance and pluralism that religious freedom demands (see Part V).

In order to adequately grasp the significance of the Protestant understanding of freedom for the conceptual definition of religious freedom – and above all its legal significance – we must first consider Luther's relation to the idea of natural law. Luther distinguishes between divine law '*lex divina*' and worldly natural law.²⁷ For Luther, natural law is not to be assigned to the domain of the cosmic-stoical or created order; it does not represent the cosmos but rather is, like positive law, a clear part of the order of the fallen world.²⁸ With this, however, Luther does not imply (as his doctrine of the two regiments indicates) the separation of human law from the divine sphere, but the latter can only be linked to the human sphere indirectly – and no longer directly. It is this indirectly mediated level that defines human freedom in a way that is emphasized pointedly in its most acute and strongest form as freedom of conscience.²⁹

²⁷ See Martin Luther, *Sermon of 1529, No. 67. Sermon on Tuesday 5 October in Marburg, German 1530*, WA 29 (1904), 564 ff. The divine law is the unfathomable free will of God, the order of divine love. It acknowledges no external power, it takes hold of the person justified by faith in Christ and fills him with a conviction from which correct action takes place by itself. Worldly law, by contrast, only concerns temporal welfare and also applies to the heathens who do not know the will of God. That is to say, for Luther natural law and positive law represent an order of preservation that keeps the egoism of the fallen person in check by means of coercion and punishment. (See Johannes Heckel, *Naturrecht und christliche Verantwortung im öffentlichen Leben nach der Lehre Martin Luthers* (Hannover 1952), 45.)

²⁸ Thus, natural law, according to Luther and already Gregor of Rimini, gives rise to a bracketing of God. (Martin Luther, *The 127th Psalm Interpreted for the Christians of Riga in Latvia, 1524*, WA 15 (1899), 327 ff.) However, due to reasons that stem from his theology of sin, he does not, as Gregor of Rimini, arrive at a hypothetical bracketing of God, rather, he assigns natural law strictly to worldly law. (See J. Heckel, 'Naturrecht und christliche Verantwortung im öffentlichen Leben nach der Lehre Martin Luthers,' in: *Zur Politischen Predigt* (München: Evang.-Luth. Dekanat 1952), 45.)

These approaches that are essential for the later secularised modern natural law can already be seen here. In this respect, Luther already prepares the ground for the notion of the relativization of the human sphere of law, and, due to his anthropology, also of natural law. See Karl-Heinz Ilting, Art. 'Naturrecht,' in *Geschichtliche Grundbegriffe Vol. 4*, O. Brunner et al (eds.), (Stuttgart: Klett-Cotta 2004), 245-313, esp. p. 275.

²⁹ This understanding of freedom as freedom of conscience is rooted in the anthropological insight into the modes of experience of faith through which individuality – or in other words, the legal subjectivity in its unmistakable, inaccessible, and irreducible sense is given its characteristic signature.

It was Luther's discovery that tied freedom – understood as a freedom, which is opened and enabled by faith – directly to the judgemental authority of the conscience. The reason for this is that freedom is experienced in faith and is made possible by faith alone. With this dependency on conscience, an irreducible individual moment in the understanding of truth and freedom comes to light: truth and freedom now systematically pose the question of religious freedom. This is in two ways: on the one hand, the sphere of the experience of truth is assigned to the conscience, where it operates as the place of truth in the sense of individual certainty and thus, on the other hand, demands tolerance. By founding truth and freedom on the dimension of experience, truth and freedom are relativized. In its very irreducibility, the individual irreducible dependency of experience exhibits religious traits, which find expression in the dependency on the conscience and which must be made available to the experience of everyone.

Thus, Luther's insight into freedom by faith established a freedom to follow each particular and distinct faith, namely due to the dependence of all experience of faith on the authority of the conscience. Conscience here functions as the horizon which sees being human as being integrated in relations that cannot be created by man himself, relations that place man in a space of experience not under his control. From this space of experience, conscience gains understanding of its always specific constitution, and of the determinant, above all, of the always specific freedom.

However, the following is also clear here: In this constellation of always being integrated – in a particular manner – in inaccessible and pre-given horizons by experience, both, the traditional concept of a general truth as well as that of an absolute freedom, become fragile. With this, it becomes clear that Luther already proceeded from the fragility of metaphysical-ontological statements, which is what makes him especially now relevant to modernity and its issue of pluralism and tolerance.

The reason for this is that, according to Protestantism, faith and freedom are intimately connected to each other. Thus, freedom is not a datum given by nature. This point was already made by Pufendorf against Hobbes (see Pufendorf, *De iure naturae*, II,3 1-13).

V. RELIGIOUS FREEDOM AS A DEMAND FOR TOLERANCE AND TRUTH: TOWARDS A PLURALISTIC SOCIETY

This modern interpretation of the freedom of the human being who is set back to itself, is already present in Luther's thoughts. Religion is no longer associated with God, but with freedom, which could only be ultimately explained in a self-contradictory manner. The more freedom man considers himself to have, the more irrevocably comes the inaccessible and thus religious foundation into focus; especially because freedom is not a naturally given datum, and because it cannot be explained in its contingently encountered quality of experience.

The term 'freedom of conscience' is thus well chosen, because it contains in its concept the dialectic of freedom in spontaneity and receptivity. The reason for this is that freedom of conscience means the freedom to follow the convictions of one's conscience, but it does not mean the freedom to adopt various religious beliefs or ideologies without further ado. It is not a freedom of random choice – it is not indifference – but rather a freedom to follow one's beliefs – those to which one is bound by the decision of the conscience, by experience. It is in this respect that freedom as dependent freedom, and thus – in Reformation terms – real freedom, since finite human freedom is always dependent. Freedom of conscience very effectively expresses this dialectical understanding of the modern interpretation of freedom.

Freedom of conscience itself is religious freedom, but one that is not identical to the legal notion of religious freedom; it does however entail the latter as a logical consequence, namely as positive religious freedom.

Through this concept of the freedom of conscience, religious freedom is clearly confronted with substantial facts that have pretensions to truth. A tolerance, which simply evens out pretensions to truth, is not sufficient here; what is needed instead is an understanding of freedom as freedom of conscience which then, however, enables a qualitative understanding of tolerance that does not even out pretensions to truth, because pluralism becomes the demand of freedom of conscience itself. Religious freedom understood in this way is tolerance to grant individual religious beliefs. The reason for this is that religious freedom demands the moment of individuality – of subjectivity –, without which truth cannot be experienced. If this moment of individuality becomes a necessary condition, an essential constituent of truth, then truth must itself be given a pluralistic face. Precisely for this reason, it cannot

persist in mere indifference, because it has to be able to relate itself to the truth that is qualified in this way. Thus, Luther's freedom as freedom of conscience demonstrates how religious freedom is possible under the conditions posed by the substantial orientations to truth of the respective religions, that is: tolerance including pretensions to truth.

This, in my view, confirms the Jellinek thesis from a systematic point of view. It does so because a systematic understanding of religious freedom rests on the Protestant conception of freedom of conscience, which understands freedom of conscience as the basis and precondition of freedom and truth.³⁰

With his belief in the dependency of conscience, Luther laid the theoretical foundation of religious freedom, that is, for political freedom of religion as well as for the irreducible religious dimension of freedom as freedom of conscience. Both dimensions of freedom are connected to each other, but are nevertheless diametrically different: political freedom of religion, on the one hand, seems to express tolerance, the capability to support pluralism, as well as a harmonizing toleration that simply lets everything be the way it is; the religious dimension of freedom, on the other hand, primarily seems to express the inviolable validity of personal convictions of conscience and the pretensions to truth attached to them – and thus in fact seems to express intolerance, absoluteness and antipathy to pluralism. It is in this apparent contradiction, however, that Luther's modernity comes to light – a modernity that finds expression above all in a secularized understanding of natural law. This secularized understanding of natural law does not give up an interest in the truth and in the freedom of reality and does not have to do so³¹ – namely, because of the modern subjectivist and individualist formulation of freedom of conscience. This, when thought through to its ultimate consequences, leads to the demand that this lived dependency of freedom has to be made possible for others as well, thus leading not to the mere toleration of religious

³⁰ What also speaks in favour of the understanding of freedom of conscience as the basis of freedom is the fact that it can be anthropologically explained or made plausible: freedom understood as something that eludes all biological explanation – but also, in the final analysis, all philosophical explanations in the sense of an ultimate foundation and consequently any explanation based on the critique of substance-metaphysics – and which only manifests itself, shows itself, reveals itself in the encounter as experience/revelation with the self, the world, and God.

³¹ The reason for this lies in his understanding of freedom, i.e. his understanding of justification, which develops a specific and complex understanding of human freedom. This turns out to be religiously dependent and thus leads to the postulation for freedom of conscience with its intolerance concerning external demands.

freedom, but rather to a demand for it. That is, the individual moment of conviction within the experience of conscience must be taken into account and must also be extended to others in its theoretical extrapolation.

It is thus the subjectivist version of freedom of conscience ensuing from Protestantism that, due to its insight into the irreducibility of individual convictions of conscience, demands their universal acknowledgement – and thus also demands pluralism – and in this way justifies tolerance. Through this relation of the individual convictions and tolerance it also becomes clear that the understanding of tolerance as harmonizing toleration cannot, in fact, cover the intention of granting freedom of conscience.³² This is the point at which pluralism achieves not a chaotic, indifferent, and thus sceptical result, but rather a methodical quality regarding truth. This is the point which turns pluralism into an essential part of the consistent definition of truth. Consequently, the demand for religious freedom establishes a programme that, although it asserts human dignity and human freedom, does not abandon truth and that nevertheless makes tolerance possible, particularly because the latter is not only a part of the definition of freedom but also of truth. Freedom, truth, religion, and pluralism have in this way entered into a harmonious relation that, on the part of Christianity, first arose within Protestantism and its original demand for freedom of conscience; this was subsequently able, within philosophy and philosophy of religion, to develop into a theory of religion, truth, and freedom that is able to support pluralism and that should be able to prove itself in a pluralistic society. The demand for religious freedom is thus not only a demand for tolerance meant for the political purpose of securing peace, but rather something which is based on a qualified concept of freedom and truth: a concept that does not merely permit tolerance and thus does not mean tolerance in the sense of a harmonizing toleration, but which instead demands tolerance as tolerance.

³² With this it becomes clear from the other point of view – the theological point of view – that religious freedom is, at the one hand, owed to the historically necessary order of the various emerging confessions, but at the other hand also more deeply rooted in the Reformation understanding of faith. It has to be taken into account here that, although freedom of religion and freedom of faith in the Reformation sense mean different things, they nevertheless refer to each other and, so to speak, belong to one another organically. Freedom of faith, which considers freedom as a gift of faith – and can only face freedom in the sphere of faith –, results, caused by the character of faith as a gift, in the demand to open to everyone, to make possible to everyone, the always specific scope of the encounter with this freedom, i.e. the freedom to stand by and accept one's own state of being positional.

This understanding of religious freedom leads to a ‘Pluralismus im Prinzip’.³³ From this point of view, tolerance and pluralism are not ‘problems’ that have to be overcome, but rather expressions of the free, autonomous mind which can no longer claim to possess absoluteness, but rather one that must relate itself to the latter. This act of relating is clearly formulated in pluralistic terms. But with this, it is also implied that freedom itself is tied to religion or ideology. In this dialectic of its definition, freedom itself – as the other that reveals itself to the nature of man – is thus also turned into an irreducibly religious phenomenon. And exactly this dialectic of freedom can also be seen in – or, more accurately, has been discovered by – those very definitions that are inscribed in the understanding of freedom by Reformation thought: namely the idea that dependency and freedom have always been inseparable, as it is developed in the Reformation doctrine of justification and explicitly so in Luther’s understanding of free or ‘unfree’ will in *‘De servo arbitrio’*. It is this inseparability of dependency and freedom, postulated in the definition of freedom, in particular that points to the fundamental significance of religious freedom for freedom and law.³⁴ And this is ultimately the authentic and precise shaping of the understanding of freedom that was established by Protestantism. Religion and freedom are unwaveringly related to each other. If one of them is denied, then it will not be long before the other will have to be denied as well.

Religious freedom as the basis of freedom must thus be distinguished once again from codified religious freedom and freedom of conscience. It has a categorial function for the understanding of freedom. That is to say, it is the irreducibility of the dependency in the primordial preconditions of freedom that constitutes the dependency of freedom, which ultimately is always a religious dependency. However, a dependency of this kind does not eliminate freedom. Rather, the recognition of this dependency of freedom brings freedom into effect. As such it is finite freedom, but in this finiteness it is defined as freedom. Religious freedom would have to be defined as the concluded phenomenological description of freedom as the crucial constituent of the *conditio humana*. Religious freedom is nothing else than freedom considered and defined in the horizon of its transcendent cause.

³³ ‘Pluralism in principle’, see the article of the same name: E. Herms, ‘Pluralismus als Prinzip’, in: idem., *Kirche für die Welt* (Tübingen: Mohr 1995), 457–485. This can also be described as a pluralism through freedom in the plurality of the one truth and of the freedom that is always bound to its respective insight.

³⁴ Martin Luther, WA 18, 600-785.

And it is exactly in this specific definition of freedom as religious freedom that the codified freedom of religion must be regarded as a basic right – indeed, that it must be regarded as an absolute right. Freedom as the basic datum of human existence in the world has its original beginning in the act of being born. Religious freedom is an *absolute right*, because it is rooted in the primordiality of existence, which is itself defined as freedom. It is the primordiality that points to the non-justifiable character of freedom and which, as primordiality, characterizes the nature of man, the experience and overcoming of which must be characterised as religion. The reason for this is that freedom as a primordial datum points to this inviolable interdependency of spontaneity and receptivity as well as to the fact that spontaneity in its various possibilities to be carried out is always directed to the receptivity of its origin, that freedom is dependent, but that it is in this very dependency that it gains its force and orientation. It is the ethos of the convictions of conscience that determines all human thought and action; in the era of the plurality of beliefs, however, (but even before this in a nuanced manner) this always appears in various forms. In the face of this insight into the necessarily given plurality of such beliefs, we need to acknowledge these various forms. This, however, can ultimately be achieved only through the legal notion of religious freedom, which is a demand for freedom of conscience itself. As a consequence, Freedom as freedom of conscience also points to the significance of ‘religious freedom’, that is, the freedom to follow the religion which corresponds to one’s own convictions, from which one’s own beliefs have emerged. Consequently, it is first and foremost with freedom of religion that we account for the freedom and dignity of man. This requires taking into account the primordiality that lies in the constitution of a person, that is, in his or her natality – a primordiality that manifests itself as dependent freedom. Religious freedom is the core of freedom because it protects the conscience, the core of the free development of the person. And it is this that constitutes the essence of man; this guarantees his ‘claim for respect’³⁵ for which no reasons can be given, and which instead can only be accepted.

³⁵ For this, see also W. Härle, ‘Menschenwürde – konkret und grundsätzlich,’ in: ibid., *Menschsein in Beziehungen* (Tübingen: Mohr Siebeck 2005), 379-410.