Defaming the freedom of religion or belief: a historical and conceptual analysis of the United Nations

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1 The History of Religious Freedom and Its Legal Framework

1.1 Introduction

There has always been, and always will be, a variety of beliefs and convictions about the meaning of life, man's destiny, the good life, and the hereafter. Whether Christian, Jewish, Islamic, Buddhist, or atheist, all these different religious and philosophical convictions, which attest to a pluralism of worldviews, are, presumably, protected by the freedom of religion or belief at present. However, this has not always been the case.

In this chapter, the history of the freedom of religion or belief and how it is codified in human rights treaties is assessed. Although a legal history of religion is beyond the scope of this research, a brief acquaintance with its foremost developments is essential to a fuller understanding of the contemporary legal system and its normative implications.

In the first sections, the history of the concept and how it was developed in an international setting are discussed. The starting point for this is the first semi-international entrenchment. In the following sections, the development of the legal establishment of the concept of religious liberty is analysed. To this end, the theoretical framework of Francesco Ruffini is discussed. His assertion that freedom of religion is a concept with a legal nature is leading in the present study. In the subsequent sections, some elements of religious freedom are addressed, *viz.*, tolerance; liberty of thought and conscience; believers and belief; the relationships between the individual, the collective, and religious liberty; and finally the institutional separation of church and state.

In this chapter, a division is made between the pre-twentieth century evolution of religious liberty and the legal provisions following that period, which is marked as the contemporary legal framework. In the second part of the chapter, the focus is on the latter, and the development of religious freedom on an international level and within the context of human rights is addressed. What is regarded as the normative core of freedom of religion or belief is discussed. To this extent, the legal framework of the religious freedom provisions within the UN and EU is explained. In addition, other aspects are discussed, such as how religion or belief is to be defined, and concerns are raised, for instance that defining religion or belief too narrowly will be problematic in understanding this fundamental right. In this context, it is argued that understanding the freedom of religion or belief as a universal human right means understanding it as a right to follow one's conviction in matters of morality, irrespective of those convictions having a religious basis.

1.2 The Pre-Twentieth Century Evolution of Religious Liberty

The freedom of religion or belief has the longest history of all internationally recognised human freedoms; it is the freedom with which the global community has had the most experience.[28] The idea for an (international) protection of freedom of religion arose during the Reformation in the 16th century. Religious differences within the Catholic Church escalated into violence and persecution, resulting in various schisms. In order to settle these differences, or rather to end the

[28] J.P. Humphrey, 'Political and Related Rights', in T. Meron (ed.) *Human Rights in International Law. Legal and Policy Issues*, Clarendon Press, Oxford, 2012 [1984], p. 176.

violence, the call for international regulations came to the fore.[29] These religious wars were not fought in the name of freedom, but in the name of the doctrines involved.[30]

The Peace of Augsburg, also called the Augsburg Settlement, was one of the first treaties to settle these religious disputes. It was signed on 25 September, 1555, and was agreed between Charles V and the Schmalkaldic League, a Lutheran alliance. The treaty brought about the harmonious co-existence of the Catholics and Protestants (Lutherans)—they tolerated each other—and established the legal separation of the two within Christianity.[31] The form of religious freedom that was established with this settlement had a limited scope, as it was only granted to the Lutherans, not to the Calvinists and the Zwinglians. In addition, the principle of *cuius regio, eius religio*, which literally means 'whose realm, his religion', was applied. This principle—which was, in fact, a legal provision—entailed that the lord of the land decided whether the Catholic or Lutheran religion prevailed on his territory; or rather, he defined the religious jurisdiction. The principle was therefore also called 'religion belongs to the ruler'. The lord's subjects had the right to withdraw from the assigned religion, but this resulted in having to leave the lord's territory and lose their property.[32]

The Union of Utrecht, a treaty that was signed on 23 January, 1579 by several Dutch provinces, not only codified the decisions to unify the northern provinces and strive for independence from the Spanish, but settled some political matters as well, including those in the religious field. The focal point shifted towards the individual.[33] Article XIII of the treaty read:

> As for the matter of religion, the States of Holland and Zeeland shall act according to their own pleasure, and the other Provinces of this Union shall […] establish such general or special regulations in this matter as they shall find good and most fitting for […] the preservation of the property and rights of each individual, whether churchman or layman, and no other Province shall be permitted to interfere or make difficulties, provided that each person shall remain free in his religion and that no one shall be investigated or persecuted because of his religion […][34]

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[29] T.C. Van Boven, *De volkenrechtelijke bescherming van de godsdienstvrijheid*, Assen, Van Gorcum, 1967, p. 5. See also A. Gill, 'Religious Pluralism, Political Incentives, and the Origins of Religious Liberty', in A.D. Hertzke (ed.) *The Future of Religious Freedom. Global Challanges* New York, Oxford University Press, 2013, pp. 107-127.

[30] Bury, 1932 [1913], p. 78.

[31] 'Encyclopædia Britannica, 'Peace of Augsburg', *Encyclopædia Britannica,* retrieved 4 January, 2018, *britannica.com*; F. Ruffini, *Religious Liberty*, New York, G.P. Putnam's Sons 1912, pp. 209-213.

[32] M.D. Evans, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict', in T. Lindholm, W.C. Durham Jr. & B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff, Leiden, 2004, pp. 4-5; Van Boven, 1967, pp. 5-6; Ruffini, 1912, pp. 209-213; D. Little, 'Religion, Peace, and the Origins of Nationalism', in D. Little (ed.) *Essays on Religion and Human Rights*, Cambridge, Cambridge University Press, 2015, p. 214. In the next chapters it will be pointed out that this principle is still detectible in various countries where the freedom of religion or belief is not, or not fully, realised.

[33] Ruffini, 1912, pp. 91-94; Encyclopædia Britannica, 'Netherlands. The Union of Utrecht', *Encyclopædia Britannica,* retrieved 4 January, 2018, *britannica.com*.

[34] The text is translated from the French and Dutch by Herbert H. Rowen and is published in H.H. Rowen, *The Low Countries in Early Modern Times: A Documentary History*, New York, Harper & Row, 1972, pp. 69-74.

This quote demonstrates that, in the provinces of Zeeland and Holland, a 'personal' religious freedom, or rather a freedom of conscience, was established. Other cities and provinces were granted the freedom to pursue their policies in the domain of religion. The treaty thus provided that provinces that wished to remain Catholic were not excluded from the Union, and their citizens could not be persecuted on religious grounds. Hence, even though the freedom of conscience was constitutionally entrenched in some provinces, various provinces still had the authority to solve religious matters at their discretion.[35] This reveals that there was a form of religious tolerance, but it does not attest to the existence of religious freedom. However, the seed was planted, allowing this primitive form of religious freedom to sprout to its full potential in Western Europe.

Another significant development in the concept of religious freedom was the Edict of Nantes. This Edict, which was issued by French King Henry IV on 13 April, 1598, granted to the Huguenots (Calvinists Protestants) the freedom of conscience and a limited right to hold religious services in an overwhelmingly Catholic country. With this edict, King Henry tried to create a civil unity focussed on religious toleration.[36] In 1685, Louis XIV, echoing the ideas of Cardinal Richelieu, who was the Chief Minister of his predecessor (King Louis XIII), revoked the Edict of Nantes and issued the Edict of Fontainebleau. This edict ended the policy of religious tolerance and declared Protestantism illegal.[37]

These briefly discussed edicts and treaties only applied to the national systems. This changed with the Peace of Westphalia of 1648, which, among other things, ended the Thirty Years War. It consisted of several treaties that were signed by Spain, France, Sweden, the Dutch Republic, and the free imperial city of the Holy Roman Empire. The Westphalia treaty broadened the scope of religious freedom, consisting of the liberty of conscience and worship for the Catholic, Lutheran, and Calvinist religions, which received the same recognition and legal rights.[38] This was not the case for other confessions, such as the Mennonites, Anabaptists, and Unitarians.[39] And although the principle of *cuius regio, eius religio* was eased, it was still the lord of the land's decision to what extent the enshrined rights would be put into practice. The Treaty of Westphalia did not grant every individual the freedom to profess religion in public; nevertheless, it is often argued that it did lay the foundation for a minimum guarantee of semi-international religious freedom.[40]

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[35] Ruffini, 1912, pp. 92-94. An interesting book about the historical development of religious freedom in the Netherlands is E. Bos, *Soevereiniteit en religie: Godsdienstvrijheid onder de eerste Oranjevorsten*, Hilversum, Verloren, 2009.

[36] The French Wars of Religion constituted a series of conflicts between Catholics and Huguenots in France from 1562 until the proclamation of the Edict of Nantes in 1598. During the night of 23 August, 1572, the Bartholomew's Night took place, in which thousands of Protestants were murdered at the orders of Charles IX. For a detailed analysis, see J.W. Sap, *Wegbereiders der revolutie: Calvinisme en de strijd om de democratische rechtsstaat*, Groningen, Wolters-Noordhoff, 1993, pp. 29-30, 107-110.

[37] Ruffini, 1912, pp. 332-336; V.L. Tapié & R. Ritter, 'Henry IV', *Encyclopædia Britannica,* retrieved 4 January, 2018, *britannica.com*.

[38] Bury, 1932 [1913], pp. 118, 13-15, 94, 211-213. According to Ruffini, they were placed in 'a condition of absolute paritat'.

[39] Van Boven writes that they did receive certain rights, such as the right to profess religion indoors, and were tolerated in general, but Ruffini's position differs in this respect.

[40] Evans, 2004, pp. 6-8; Van Boven, 1967. There are authors who assume that the Peace of Westphalia was the starting point for an international protection of religious liberty, such as W.C. Durham Jr., 'Perspectives on Religious Liberty: A Comparative Framework for Analyzing Religious Liberty', in J.D. Van Der Vyver & J. Witte (eds.),

Thus, during the Reformation, the freedom of conscience and respect for individual decisions came to the fore, which progressed and developed during the French Revolution.[41] In the *Declaration des droits de l'homme et du citoyen* (1789), the idea was expressed that the individual has inalienable rights, and the freedom of thought and conscience was proclaimed.[42] The same appeared in the United States' *Declaration of Independence* (1776). Both documents were influenced by the doctrine of 'natural law', in which the rights of the individual are held to be universal: valid at all times and everywhere, pertaining to human nature itself. The idea of universalism developed into the foundation for a nation of free individuals protected equally by the law. With the Final Act of the Congress of Vienna, concluded on 9 June, 1815, these thoughts received an international legal basis for the first time, mainly with the merger of the Northern and Southern Netherlands. The merger of Calvinist Holland and Roman Catholic Belgium was reason to adopt a law in which an equal position was given to the members of both denominations, and equal protection of worship was granted.[43]

In Article 73 of the Final Act of the Congress of Vienna, it was concluded that the Eight Articles of London, also known as the London Protocol of 21 June, 1814, would come into effect.[44] In Article 2 of the London Protocol, it was stated that: 'There shall be no change in the articles of this Fundamental Law, which assure to all religions equal protection and privileges, and guarantee the admissibility of all citizens, whatever be their religious creed, to public offices and dignities'.[45] According to this provision, all religions received equal protection and privileges, and the

Religious Human Rights in Global Perspective, The Hague, Martinus Nijhoff Publishers, 1996, p. 1.

[41] In this context it is important to note that this elucidation does not do justice to the complex history of the concept. Something Bury says in his important book *A History of Freedom of thought* is indicative of this. He points out that '[i]t is an elementary error […] that the Reformation established religious liberty and the right to private judgement. What it did was to bring about a new set of political and social conditions, under which religious liberty could ultimately be secured and, by virtues of its inherent consistencies, to lead to results at which its leaders would have shuddered. But nothing was further from the minds of the leading Reformers than the toleration of doctrines differing from their own. They replaced one authority by another'. Bury, p. 77. However, Bury does acknowledge that '[t]he Reformation involuntarily helped the cause of Liberty', p, 80.

[42] This declaration was based on the ideas about tolerance and natural law of Enlightenment philosopher John Locke (1632–1704) in his *Two treaties of Government* (1689), the thoughts of Jean-Jacques Rousseau (1712–1778) about the equality of individuals in his *Du contrat social ou principes du droit politique* (1762), and the separation of power as described by Charles de Montesquieu (1689–1755) in his *De l'Esprit des Lois* (1748).

[43] On 9 June, 1815, the Act of the Congress of Vienna was signed by Austria, France, Great Britain, Portugal, Prussia, Russia, and Sweden. In contrast to the treaty of Westphalia, this legal attribution tried to make the dissident believers full-fledged citizens. It was thus ensured that all citizens received equal protection, regardless of their religious conviction. Van Boven, 1967, p. 14; See chapter 2 of M.D. Evans, *Religious liberty and international law in Europe*, Cambridge, Cambridge University Press, 1997.

[44] 'S.M. le Roi des Pays-Bas ayant reconnu et sanctionné, sous la date du 21 juillet 1814, comme bases de la réunion des Provinces Belgique avec les Provinces-Unies, les huit articles renfermés dans la pièce annexée au présent Traité, lesdits articles auront la même force et valeur comme s'ils étaient insérés de mot à mot dans la transaction actuelle'.

[45] The original text reads: 'Il ne sera rien innové aux Articles de cette Constitution qui assurent à tous les Cultes une protection et une faveur égales, et garantissent l'admission de tous les Citoyens, quelle que soit leur croyance religieuse, aux emplois et offices publics'. In E.G. Lagemans, *Recueil des traités et conventions conclus par le royaume des Pays-Bas avec les puissance*, La Haye, Belinfante frères, 1858, p. 33. The London Protocol was created by the Great Powers of the time: Britain, Prussia, Austria, and Russia. It was a secret agreement to grant the territory of Belgium and the Netherlands to William I of the Netherlands. He accepted it on 21 July, 1814. The Treaty of Paris (30 May, 1814) precedes this.

admissibility of all citizens to public offices and dignities was guaranteed, irrespective of their religious creeds. The underlying thought was to make all dissident believers full-fledged citizens (including the Jews and protestant dissenters) within the new territory. This was a (first) international recognition of the general obligation of states not to discriminate against their subjects on the basis of religious belief. It cautiously introduced the idea that a prerequisite for equal citizenship was the attribution of equal civil and political rights.[46]

After the First World War (1914–1918), the League of Nations introduced a form of religious liberty in Article 22 of its covenant.[47] In this article, a conception of protection of group rights, in particular *specific religious group rights*, was adopted.[48] After the Second World War, this changed, as the focus shifted to the conception of *universal individual rights*, including religious freedom. The international legal entrenchment of the individual freedom of religion or belief culminated in the adoption of the United Nations Universal Declaration of Human Rights (UDHR) in 1948.[49] In addition to the Universal Declaration, numerous other significant international documents were established in the twentieth century with the purpose of (promoting) the protection of the freedom of religion or belief. The significant ones, which constitute the contemporary framework, are addressed in the upcoming sections.[50] However, it is essential first to examine the historical development of the *de jure* situation of religious freedom on a more fundamental basis.

1.3 Ruffini's Historical Analysis

For an overview of the legal-historical development of the freedom of religion or belief, it is interesting to start with the historical analysis of Italian scholar Francesco Ruffini (1863–1934). Ruffini was an erudite man and professor who described how the theory of religious freedom, in conjunction with the concept of tolerance, originated and developed. In his inquiries, Ruffini

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[46] See chapter 2 of Evans, 1997. Van Boven, 1967, pp. 12-15.

[47] Article 22 of The Covenant of the League of Nations states: '[…] Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League'.

[48] This becomes relevant later on, when the efforts to establish such group rights on the level of UN treaties are discussed by the OIC.

[49] A. Scolnicov, *The Right to Religious Freedom in International Law. Between group rights and individual rights*, New York, Routledge, 2011, p. 10; K. Murphy, *State Security regimes and the Right to Freedom of Religion and Belief. Changes is Europe since 2001*, London, Routledge 2013, p. 17; Van Boven, 1967, pp. 46-62. One of the motivations to establish the UN was a call to create an organisation that would not fail to intervene when necessary, as the League of Nations had failed when Germany had invaded the Rhineland and Italy had marched to Ethiopia. J. Morsink, *The Universal Declaration of Human Rights, Origins, Drafting, and Intent*, Philadelphia, University of Pennsylvania Press, 1999, p. 12.

[50] There are also regional human rights treaties in which the freedom of religion or belief is codified. Examples are the African Charter on Human and People's Rights, the American Convention on Human Rights, and the European Convention on Human Rights. Some authors might add the Revised Arab Charter on Human Rights. However, because the freedom of religion or belief is not, or not fully, recognised in this charter, it will not be included in this thesis as a regional human rights treaty. More on this point in Chapter 3.

investigated the development of the concepts, and the periods of religious persecution are briefly discussed. His work has received little or no attention in the current academic debate. This, combined with the fact that his theory about the history of the legalisation on freedom of religion is well-argued and insightful, merits an inquiry; accordingly, it is the focal point for the following sections.

Ruffini, born in Lessolo Canavese, Italy, was a historian, lawyer, and politician. He was a professor of Ecclesiastical Law at the University of Turin, and focussed his teachings on the subject of religious freedom in particular and, more generally, on the gradual emergence of individual freedom rights over the centuries. Ruffini was appointed senator and a member of several academic forums, including the Lincei and the Lombard Institute of Science and Letters. From 1918 to 1922, he was president of the Academy of Sciences of Turin.[51] At that time, it was generally known that Ruffini was a staunch secularist and, along with Benedetto Croce (1866–1952), in favour of a regime of separation of church and state.[52] He openly criticised the Lateran Treaty (1929), wherein the Concordat between Church and State was established, and agitated against the ideas of fascism.[53] It is commendable that in 1931 Ruffini refused the oath of allegiance imposed on university professors by the fascist regime. Of the 1225 professors, there were only ten others who shared his views. When asked to take the oath, he said he was not able to do so in good conscience. Ruffini was eventually forced to leave the university and died two years later.[54]

1.3.1 Juridical Religious Liberty

In 1912, Ruffini publishes his major work, *Religious Liberty*, which centres around the development of religions liberty from the ancient Greeks to the 1900s. [55] The basis for his method was history and legal systems. He starts by describing the fundamental ideas of liberty of thought, ecclesiastical liberty, and religious liberty.

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[51] Treccani Institute, Enciclopedia on line, Ruffini, Francesco, http://www.treccani.it/istituto/chi-siamo/

[52] Benedetto Croce was an Italian philosopher, historian, humanist, and politician. He participated in public and political discourse and was Minister of Education twice. He was one of the most prominent Italian thinkers who acted against fascism prior and during the Second World War and is known for his politically liberal vision. He is described as a philosophical pantheist and, from a religious point of view, as an agnostic. G. Kemp, 'Croce's Aesthetics', in E.N. Zalta (ed.) *plato.stanford.edu*, The Stanford Encyclopedia of Philosophy, 2014; Encyclopædia Britannica, 'Benedetto Croce', *Encyclopædia Britannica,* retrieved 28 April, 2016, *britannica.com*.

[53] In the parliamentary session of 24 May, 1929. The Lateran Treaty is also called the Lateran Pact of 1929. It was effective from 7 June, 1929, until 3 June, 1985. It was compiled by Pope Pius XI and the Fascist leader Benito Mussolini and consisted of three parts: In the first part the independence and sovereignty of the Holy See was recognised and the Vatican became an official state. The second part arranged for a concordat in which certain privileges between the Catholic Church and Italy were arranged, resulting in Roman Catholicism becoming the state religion in Italy. The third part consisted of the financial component: inter alia, the Italian state had to reimburse the Vatican financially because the state had seized many Vatican possessions in 1870. For more information see A. Géraud, 'The Lateran Treaties: A Step in Vatican Policy', *Foreign Affair*, Vol. 7, No. 4, 1929, pp. 571-584.

[54] P. Guariso, 'Francesco Ruffini il coraggio di un "NO"', 28 July 2014, *torinoxl.com*.

[55] Ruffini, Francesco, *Religious Liberty,* translated by J. Paker Heyes with a preface by J.B. Bury, Williams & Norgate, London, G.P. Putnam's Sons, New York 1912. Francesco Ruffini, La Libertà religiosa. Storia dellídea. Introduzione di Arturo Carlo Jemolo, Milano: Feltrinelli Campi del sapere 1991. Prima edizione dell'opera 'Fratelli Bocca' Torino, 1901.

According to Ruffini, in discourse and literature, many different meanings are ascribed to religious liberty; the academic meaning has been lost over the years. The concept is often too broadly explained and understood, and equated with the liberty of thought.[56] The term is then used to refer to the fact that the human mind has been stripped of, or rather freed itself from dogmatic prejudices, and has cast off the limits that religion had imposed on it. Heretics, sceptics, and freethinkers adhere to this thought.[57]

In this respect, Ruffini's freedom of religion does, however, have limits: he excludes freethinkers, including atheists.[58] According to Ruffini, atheists belong to a group for whom freedom of religion is meaningless, for they would not advocate religious freedom for others. He argues that, as soon as the opportunity arose, atheists would overthrow the existing regime and abolish religious freedom. Their goal is not for 'thought to be left free' and opinion to not be coerced, but merely to demonstrate their anti-religious views and undermine religion as such.[59] For all his merits, it seems that Ruffini had a restricted view with regard to freethinkers and religious freedom.

Ruffini continues his argument by explaining that the concept is also too narrowly construed when it is defined and equated with *ecclesiastical liberty*. With this definition, the privilege is recognised that believers' religious acts, following the adhered-to religious principles, dominate both the private and public sphere in such a way religious tenets will become dominant in the state. He distinguishes this privilege (not a right), which is used in the context of unlimited freedom of conscience and worship for a particular religious group, from the 'true idea of freedom'. Ruffini argues that these privileges are granted merely at the request of zealous defenders of religion. In this setting, he refers to the Catholic Church, with its religious precepts, foundations, and principles.

It is evident for Ruffini that this alleged liberty conflicts with what is claimed to be 'true' religious freedom. He states that religious freedom 'can only exist where identical concessions are made to all religions, and where the free exercise of one finds a restraint and regulation in the equally free exercise of the others'.[60] Ruffini makes this point quite eloquently:

> Religious liberty takes sides neither with faith nor with disbelief; but in that ceaseless struggle which has been waged between them since man first existed, and which will be continued, perhaps, as long as man exists, it stands absolutely apart. I do not say it stands above the conflict, since its aim is not so high; its object is not, as with faith, eternal salvation, nor, as with freethought, scientific truth. Its purpose is subordinate to these, and it is much more modest and far more practical. [I]t consists in creating and maintaining a society such a condition of things that each individual may be able to pursue and in time to

[56] It is important to note that he classifies the freedom of conscience (also known as the freedom of thought) as the progenitor of—and therefore connected to—other liberties, including freedom of religion, freedom of speech, and freedom of expression.

[57] Ruffini, 1912, p. 1.

[58] Locke adopted a similar stance with regard to tolerating atheists and Catholics, but more on this in section 1.6.

[59] Ruffini, 1912, p. 1.

[60] Ruffini, 1912, p. 2.

> reach those two supreme ends, without other men, either separately or grouped in associations, or even personified in that supreme collectivity known as the State, being able to offer him the least impediment in pursuing those ends, or cause him the least damage on their account.[61]

Ruffini continues and argues that '[…] religious liberty is not, like freethought, *a philosophical* idea or principle, that it is not, like ecclesiastical liberty, a *theological*; but that it is an idea and a principle essentially *juridical*'.[62] From Ruffini's thoughts, some essential points concerning religious freedom can be discerned. More aptly put, these quotations contain several characteristics, or rather values, which can be regarded as the core of religious freedom. To wit: 1. All religions (and beliefs) have to be considered equal;[63] 2. Religious freedom is an individual right, and every individual is free to exercise this right, with due consideration of the rights of others; 3. The individual is protected in the choice of religion; 4. Religious freedom as such has to be differentiated from its substantive application; 5. Religious freedom may be exercised individually or in groups; 6. The state must guarantee religious freedom with as few restrictions as possible; 7. The exercise of power by both the state and the church are restricted; 8. Religious freedom has a practical purpose, meaning that it is essentially a juridical principle.

Ruffini thus maintained a very liberal attitude.[64] He described a society in which the individual's freedom of religion would be as extensive as possible, its limit merely lying in respect for the freedom of others. The individual's religious choice is to be guaranteed, and the influence of both the state and the church should be limited. As will be demonstrated in the second part of this chapter, the enumerated elements correspond with the normative core of the freedom of religion or belief as it is adopted in the contemporary legal framework.

Ruffini's assumption that religious liberty is, in essence, a juridical liberty is essential for this chapter and the following research. Some of the elements of religious freedom just listed need some elucidation, which is the task in the following sections, starting with the principle of religious toleration, which is interrelated with religious freedom.

1.4 Religious Toleration

From the mid-nineteenth century onward, after centuries of religious conflict, the focus was on the idea of toleration rather than on religious liberty.[65] The term 'toleration' comes from the Latin *tolerare*, which means 'to bear' or 'to put up with'. In general, toleration is described as a permissive attitude toward those whose opinions, beliefs, practices, or racial or ethnic origins differ from one's

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[61] Ruffini, 1912, p. 4.

[62] Ruffini, 1912, pp. 4-5.

[63] I am aware that Ruffini's conception of religion is not so broad as to include (in his terms) atheistic views or, in more general terms, freethinking as such. Naturally, I am including these views in the core of freedom of religion or belief, which will be discussed section 1.10.

[64] For American readers, the term 'liberal' may have a leftist connotation. However, in this research the term is not used in that context.

[65] The terms 'toleration' and 'tolerance' are considered to be synonymous and are often used interchangeably. However, the term 'religious toleration' has a long history in writing on religion, which is why the term toleration is used wherever possible.

own.[66] From this definition, some constituents of toleration can be derived, and some which are commonly mentioned in philosophical analyses of the concept of toleration are discussed in this section.[67]

First of all, the act of toleration encompasses a willingness or a *permissive attitude* towards other views and behaviours. It is therefore more than 'mere restraint', as philosopher David Heyd points out.[68] Secondly, this permissive attitude is required towards views with which one *disagrees*. Philosopher Susan Mendus writes: 'we cannot […] tolerate things which we welcome, or endorse, or find attractive'.[69] Toleration also means that an *active choice* is made to endure these unpalatable views and their attendant behaviour. For this reason, it is more than being 'indifferent', as philosopher Brian Leiter (b. 1963) argues.[70] Moreover, it implies that there must be a form of ascendance or power present. One can only tolerate certain opinions and their attendant behaviour if one has the actual power or control to do so.[71]

In addition, philosopher Paul Cliteur argues that the notion of tolerance must be reserved for views and individual behaviour insofar as it expresses an *opinion*.[72] Opinions are expressed and held by human beings. Therefore, strictly speaking, only human beings, or rather *individuals*, can be the object of toleration.[73] In this definition, toleration is seen as a virtue, meaning that it is morally right to be tolerant. As scholar Peter Nicholson states: 'toleration is good in itself'.[74] This form of toleration is coined by Leiter as a *principled tolerance*.[75] This is tolerance in the Voltairian sense: 'I disapprove of what you say, but I will defend to the death your right to say it'. This maxim provides an overall view of the ideas of the French Enlightenment philosopher Voltaire (1694–1778).[76]

When this principled or Voltairian tolerance is specified to actual religious toleration, it can be said that the individual who tolerates another individual's belief is motivated by his respect for or recognition of that individual's belief, however contrary it may be to his own. To a certain extent, the individual will probably believe in some absolute, fundamental truths. Still, the basis for this does not have to be religious, and other beliefs do not have to be untrue per se, as the justification

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[66] In the Cambridge dictionary, 'tolerance' is defined as the 'willingness to accept behaviour and beliefs that are different from your own, although you might not agree with or approve of them'. Cambridge Dictionaries, 'Tolerance', *Cambridge Dictionaries,* retrieved 11 November, 2017, *dictionary.cambridge.org*.

[67] The constituents discussed here are not exhaustive.

[68] Heyd, David, 'Introduction', in: Heyd, David, *Toleration: An Elusive Virtue*. Princeton: Princeton University Press, eBook Collection 2001 (EBSCOhost), retrieved 28 April, 2018, p. 14.

[69] S. Mendus, 'Introduction', in *Justifying Toleration Conceptual and Historical Perspectives*, Cambridge, Cambridge University Press, 2009 [1988], p. 3.

[70] B. Leiter, *Why Tolerate Religion*, Princeton, Princeton University Press, 2013, p. 8.

[71] A.J. Cohen, 'What Toleration Is', *Ethics* Vol. 115, No. 1, 2004, pp. 93-94.

[72] P.B. Cliteur, *Moderne Papoea's: Dilemma's Van Een Multiculturele Samenleving*, Amsterdam, De Arbeiderspers, 2002, p. 138.

[73] D. Heyd, 'Introduction', in D. Heyd (ed.) *Toleration: An Elusive Virtue*, Princeton, Princeton University Press, 2001, p. 14.

[74] P.P. Nicholson, 'Toleration as a moral ideal', in J. Horton & S. Mendus (eds.), *Aspects of Toleration: Philosophical Studies,* , New York, Methuen & Co., 1985, pp. 160-166.

[75] Leiter, 2013, pp. 7-8.

[76] Although often assumed, the statement does not come from Voltaire, but from Evelyn Beatrice Hall, who wrote it under the pseudonym of Stephen G. Tallentyre in *The Friends of Voltaire* (1906). E.B. Hall, *The Friends of Voltaire*, London, Smith 1906, p. 199.

for his own belief lies within himself. Therefore, the question of toleration is not a religious one and does not come from some fear of ill-treatment or persecution, but it has its foundation in the individual's reason and intellect.

In order to come to a definition of *religious toleration*, the aforementioned characteristics can be used. Cliteur's perspective on the issue is not merely reserved for opinions but expanded to religion-related *actions*. Religious toleration would be permitting views or actions in which an opinion regarding religious or belief matters is expressed that one rejects and has the power to forbid.[77]

This principled or Voltairian religious toleration must be distinguished from a form which is more pragmatic in nature. The individuals who endorse this pragmatic (in the sense of not principled) form of toleration, tolerate under the assumption that they hold the complete and only insight regarding religious truth. Their creeds also prescribe how they should give moral meaning to their lives and describe how the universe is designed. It is often assumed that every individual has to adhere to these normative principles. Accordingly, their ideas regarding toleration are prejudiced by their religious convictions. In this pragmatic conception, toleration is not an end or good in itself; it is a means to the 'good life'.

For this reason, pragmatic toleration is not some ideal adhered to, but merely a *stance* to avoid hostility and ill-treatment because of certain religious beliefs. As Leiter writes: it is '[…] we might say, [a] "Hobbesian" compromise: one group would gladly stamp out the others' beliefs and practices, but has reconciled itself to the practical reality that it can't get away with it—at least not without the intolerable cost of the proverbial "war of all against all"'.[78]

1.4.1 Tolerating Religious Differences

The previous sections have provided some interesting and useful insights into what religious toleration should include. However, to come to a clear understanding of what to do with the legal embedding of the concept, some insight into how the concept was understood in history and how it developed is relevant.

In the history of religious freedom, various pleas have been made for religious toleration. One of the most vocal arguments was made by John Locke (1632–1704). In his famous *Letter Concerning Toleration* (1689), written in Latin and published anonymously, he lays the foundation for his thesis. Locke's main argument is that a clear distinction must be made between the actions of civil government and religion. Locke argues that faith cannot be enforced by any government and falls outside the authority of the legislature. Actions of civil government must pertain to the civil

[77] Cliteur, 2002, p. 137.

[78] Leiter, 2013, p. 9. Leiter calls this pragmatic form of tolerance the practice of toleration, which he derived from philosopher, Bernard Williams (1929–2003). See B. Williams, 'Toleration: An impossible Virtue', in D. Heyd (ed.) *Toleration: an Exclusive Virtue* Princeton, Princeton University Press, 1996. For a very interesting and in-depth analysis of the concept from various perspectives see S. Mendus, *Justifying Toleration Conceptual and Historical Perspectives*, Cambridge, Cambridge University Press, 2009 [1988]. See also T. Lyon, *The theory of Religious Liberty in England: 1603-1639*, Cambridge University Press, 1937, pp. 1-4. Bury 1912, pp. 92-127.

interests of its members, concerning 'life, liberty, health, indolency of the body, and property'.[79] This leads to the theoretical foundation for the principle of the separation of church and state.

Besides this plea for an institutional separation of church and state, Locke is also well known within academic circles as one of the greatest proponents of religious toleration. Compared to his contemporaries, his arguments were quite ground-breaking. However, although it may seem that he comes to his support for toleration and religious freedom on principled grounds, this is not the case.[80] Locke encourages toleration towards other believers but excludes Catholics and atheists. He argues that the former should not be tolerated since their popish views are destructive to all governments and that atheistic views should not be tolerated as they are inherently dangerous to the public interest. As was described in the previous section, this stance was also adopted by Ruffini. Locke writes that

> […] those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oats, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration.[81]

It is clear that, in the Lockean view, there is a distinct and inseparable connection between religion and morality. Better yet, *morals are learned through religion*, which atheists believe is at least contestable.[82] Even though Locke's work is of the utmost importance for understanding and conceptualising an institutional separation of church and state, his concept of religious toleration is not sufficient to come to equal consideration of beliefs and religions.

French philosopher Voltaire (1694–1778) is also an illustrious defender of religious toleration. He is often mentioned as one of the pioneers of the French Enlightenment. Although his notion of religious toleration is not as elaborate as Locke's, since in Voltaire's view dignities and public offices should only be occupied by adherents to the state religion, his thoughts are worth addressing, because he was not just a serious scholar but also a man of action. He was constantly

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[79] J. Locke, *A Letter Concerning Toleration, digireads.com*, 2005 [1689]. This letter was originally written in Latin and was addressed to 'Honoured Sir'; it is believed that this was actually his friend Philipp van Limborch. Locke argues: '[T]he whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting things; and that it neither can nor ought in any manner to be extended to the salvation of souls [.]', p. 152. And 'nobody, therefore, in fine, either single persons nor churches nay, nor even commonwealths, have any just title to invade the civil rights and worldly goods of each other upon pretense of religion.', p. 158.

[80] See in this matter Jeremy Waldron's reading of Locke, which is very interesting, since he meticulously points out that Locke does not sufficiently prove the immorality of intolerance, meaning that Locke adheres to a more practical form of tolerance. See J. Waldron, 'Locke: Toleration and the Rationality of Persecution', in S. Mendus (ed.) *Justifying Toleration Conceptual and Historical Perspectives*, Cambridge, Cambridge University Press, 2009 [1988], pp. 61-86.

[81] Locke, 2005 [1689], p. 172.

[82] This in contrast to Spinoza, who was actually inspired by Locke and did allocate the freedom of thought to the individual. See for an extensive analysis on this point J.I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750*, Oxford, New York, Oxford University Press, 2006, pp. 135-163; M. Galenkamp, 'Locke and Bayle on Religious Toleration', *Erasmus Law Review*, Vol. 5, No. 1, 2012, pp. 79-92.

campaigning for causes and sometimes tried to have people who had suffered miscarriages of justice rehabilitated. He campaigned openly against religious intolerance by exposing intolerant religious practices. He even earned the moniker 'the defender of Calas and the Sirvens', which were both cases of legal prosecutions.[83]

The case of Jean Calas (1762) involved a merchant from Toulouse who was religiously persecuted. He and his family were accused of killing their son for being a Protestant. Voltaire, who was acquainted with this case, committed himself to proving Calas' innocence, and successfully worked to have the verdict reversed. Unfortunately, Calas had already suffered a tragic death, but, owing to Voltaire's actions, his wife received compensation. The case of Sirven again involved a father who was accused of killing his child: this time a daughter who was found drowned in a well, allegedly murdered by her father to prevent her from converting to Catholicism. Voltaire was convinced of Sirven's innocence and was again successful in proving this, which resulted in a reversal of the verdict, which did not come too late for the accused this time. The cases of Calas and Sirven would later become symbols for the religious intolerance and persecution in France at the time.[84]

In this context of addressing the contrast between religious toleration and the right of religious liberty, it is interesting to also point out the thoughts of the French revolutionary Mirabeau (1749–1791), who extended the scope of toleration. He argued against the existence of a state religion and reasoned that the freedom of religion should have no boundaries except for the protection of the public order. Mirabeau wrote:

> I do not come here to preach toleration. In my view the utmost freedom of religion is a right so sacred that the word toleration, by which it is sought to describe it, seems itself to smack of tyranny. For the existence of an authority which has the power to tolerate is a menace to freedom of thought from the very fact that, having power to tolerate, it has also the power to not do so.[85]

Mirabeau's argument is compelling for the reason that he treats the freedom of religion as a *natural right* and not as a *concession*. Mirabeau emphasised the core difference between the concepts of toleration and religious liberty, and critically approached the politics of toleration and the concept as such.

This approach is in line with the thought-provoking argument of Thomas Paine (1737–1809), an English-born American philosopher whose ideas are even more explicit. Paine wrote: 'Toleration is not the opposite of Intolerance, but is the counterfeit of it. Both are despotisms. The one assumes itself the right of withholding liberty of conscience, and the other of granting it'.[86] The

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[83] Voltaire, *Treatise on Tolerance on the Occasion of the Death of Jean Calas from the Judgment Rendered in Toulouse*, Cambridge University Press Cambridge, 2000 [1763].

[84] Voltaire, 2000 [1763], pp. 107-136.

[85] Quoted from L. Barthou, *Mirabeau*, London, William Heinemann, 1913, pp. 195-196.

[86] 'But toleration may be viewed in a much stronger light. Man worships not himself, but his Maker: and the liberty of conscience which he claims, is not for the service of himself, but of his God. In this case, therefore, we must necessarily have the associated idea of two beings; the mortal who renders the worship, and the immortal being who is worshipped'. And 'Toleration therefore, places itself not between man and man, nor between church and church,

fact that Paine presents his message in just a few lines does not derogate from the accuracy of what he conveys.

This quotation uncovers the core problem of religious toleration. Even the most broadly adopted version of religious toleration effectuates an *unequal basis* for the adherents of minority religions, or rather to every individual except to the adherents of the state religion. Thus, regardless of what form or interpretation of the concept of toleration is adopted, it always has an unequal starting point and provides the adherents of the state religion an advantage.

Like Mirabeau, Paine distinguishes between the two concepts, which can be interpreted in the sense that there is a *right* to freedom of religion and that religious toleration is a *principle* underlying this right, a principle which encompasses the *attitude* for tolerating religious differences. This dichotomy is not only of theoretical importance but also of legal importance, *to wit*, only religious liberty should be legally entrenched in state constitutions.

This is also in line with the views of Ruffini, who addressed this point in a descriptive manner in his historical analysis. Ruffini also did not identify religious toleration with religious freedom but qualified it merely as a prelude in de development to a juridical form of religious freedom. In addition, in Ruffini's view, ideas with a religious connotation, which were still apparent in Mirabeau and Paine's views, are abandoned.

In sum, to fully understand the relationship between religious toleration, or rather tolerating religious differences, and the right of religious liberty, a Lockean view of a strict separation of state and religion is necessary. As Mirabeau and Paine explained, it must be understood that the two concepts—religious tolerance and religious freedom—differ from each other, and when discussing them they must be clearly distinguished. They are not *mutually interchangeable*. This is not only of theoretical or conceptual importance: when Ruffini's thoughts are taken into account, it also appears to be of juridical importance.

In fact, only one of these concepts ought to be legally entrenched, namely the former. Thus, when taking an active approach and defending religious freedom, religious tolerance should be understood as a virtue of the (modern) state rather than as part of the juridical idea of religious freedom.

And although this (libertarian) view may in some sense seem to be the historical outcome in most if not all constitutional democracies, as is discussed in the upcoming chapters, the adoption of this stance is no longer a given today. Besides the worldwide violations of the freedom of religion or belief, on a conceptual level some developments seem to compromise its very nature as a human right, such as ideas advocated in the name of tolerating religious beliefs and respecting religious feelings. Conceptual clarity is essential to maintaining the normative basis of the freedom of religion or belief.

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nor between one denomination of religion and another, but between God and man; between the being who worships, and the being who is worshipped; and by the same act of assumed authority by which it tolerates man to pay his worship, it presumptuously and blasphemously sets up itself to tolerate the Almighty to receive it'. Amendment I (Religion), Document 57 in W.M. Van Der Weyde (ed.), *The Life and Works of Thomas Paine: Patriots' Edition. Vol. 5*, New Rochelle, Thomas Paine National Historical Association, 1925.

1.5 Believers and Beliefs

The next issue that requires examination is the notion of religious liberty and its relation to the individual and the collective. Meant by this, among other things, is the question: from which perspective should the freedom of religion or belief be approached?

The phrasing of the legal provisions—which often conveys that everyone shall have 'freedom of religion or belief', or words of similar purport—seems to suggest that religions, beliefs, their related practises, and sometimes even identities are protected.[87] However, is this assumption correct? Even though often misunderstood and misinterpreted, as is demonstrated in Chapters 4 and 5, the provision of freedom of religion or belief always applies to the individual, or more accurately, it protects *human beings*.[88]

The individual is the primary holder and beneficiary of the freedom, and the state is the primary holder of the corresponding obligations.[89] The individual is the actual right holder, and he or she is able to invoke the fundamental right within the human rights framework. To put it succinctly: the freedom of religion or belief protects *believers* rather than *beliefs*. This means that, for example, while the individual adhering to Christianity is protected, it is not necessarily the case that the same protection is afforded to religious symbols such as crucifixes or statues of mother Mary, or Christianity as a belief system. Surely, the individual and his religion or belief are so interrelated that, within this context, it is difficult to comprehend the religious individual separate from the professed religion or belief.

Nevertheless, it is still the individual who invokes the right, and religion or belief as such is only *indirectly* at issue within the human rights framework. Human rights, therefore, do not only belong to the individual but also need to be addressed from the *perspective* of the individual. It is the individual who makes them legally applicable, or rather makes them come to life in his endeavour to have the religion or belief in question—including its truth claims, scriptures, rituals, ceremonies, and normative rules—acknowledged. It must be born in mind that there is an indirectness by which the individual relates to religion and belief and its encompassing facets.[90] The assumption that religions, beliefs, the related practises, and sometimes even identities are protected is therefore incorrect.[91]

In this context, a related aspect, which was also briefly addressed in the previous sections, is to be distinguished: the notion of religious liberty and its relation to the collective, or in other words, the communitarian aspect. This is the element that concerns individual as well as collective manifestations of religious belief, including being part of a religious community. Religion is often qualified as the domain in which the social character of the individual may be expressed.[92] This is also incorporated in legal provisions.

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[87] The contemporary legal provisions are discussed in the following sections.

[88] H. Bielefeldt, N. Ghana & M. Wiener, *Freedom of Religion or Belief. An International Law Commentary*, Oxford, Oxford University Press, 2016, p. 11.

[89] N. Ghanea, 'Introduction', in T. Lindholm, W.C. Durham Jr. & B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden, Martinus Nijhoff, 2004, p. xxxvii.

[90] Bielefeldt, Ghana & Wiener, 2016, p. 11.

[91] This issue will be further discussed throughout the following chapters.

[92] See for an interesting perspective H.M. ten Napel, *Constitutionalism, Democracy and Religious Freedom: To Be Fully Human*, New York, Routledge, 2017.

The legal implementation of this communitarian aspect is encompassed by the phrase that the right may be exercised in 'community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'. For that reason, the freedom of religion or belief also implies that religious communities have institutional rights to defend their interests as a religious community and represent them outwardly. Or rather, religious communities also seem to have the freedom of religion or belief granted and an autonomous position to arrange their affairs. Religious autonomy is thus legally guaranteed. It follows that collectives—legal and non-legal persons—can also rely on the legal provisions.[93] Similarly, churches and other organisations with a philosophical basis are (implicitly) recognised in Strasbourg case law as bearers of freedom of religion or belief as guaranteed in Article 9 ECHR.[94] However, a critical remark is in order: the fact that an individual is part of a religious community does not mean that the individual's freedom of religion or belief translates into a religious group right, or that the individual transfers their right to the religious organisation.[95]

1.6 The Freedom of Thought and Conscience

In this context, it is important to note that the right of freedom of religion or belief is a liberty which is closely intertwined with, and which depends on, the freedom of thought and conscience. In practice, the liberties are often interdependent.[96] Freedom of thought is lauded in liberal political theory, often occupying a central role when liberties are discussed. Most illustrative is John Stuart Mill (1806–1873) in his *On Liberty*. From the start of his description of human freedom, Mill relies on the freedoms of thought and conscience. According to Mill, the 'appropriate region of human liberty' encompasses '[…] the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological'.[97]

As Mill's assertion makes clear, freedom of thought is distinguishable from freedom of conscience. Moreover, freedom of thought does not encapsulate freedom of conscience; they are not identical freedoms. American philosopher John Rawls (1921–2002) specifies freedom of thought as a basic liberty and adds that freedom of thought is essential to the foundation of a just

[93] Ghanea, 2004, p. xxxvii., footnote 22 In the literature there is a difference of opinion on whether groups, institutions, or other bodies can be bearers of rights. It is argued that international fundamental human rights were created for the individual and therefore cannot be conferred on the community. When religious groups represent the rights of a religious community, they only do so in a derivative form. However, this seems to be a mere theoretical disagreement, because in practice the rights of religious communities, institutions, and bodies have been consistently recognised and protected. See for example principle 16.4 of the Vienna Concluding Document, in which rights for religious communities are explicitly adopted. Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, adopted in Vienna on 17 January, 1989.

[94] See for example EHRM 27 June, 2000, Jewish liturgical association Cha'are Shalom Ve Tsedek v. France (Application no. 27417/95), 27 June, 2000, para. 72.

[95] See, for an interesting analysis of this topic Scolnicov, 2011.

[96] L. Swaine, 'Freedom of Thought as a Basic Liberty', *Political Theory*, Vol. 46, No. 3, 2018, p. 417. This is also the case for the freedoms of expression, association, and press.

[97] Mill, 1977 [1859], p. 225.

society.[98] Ruffini classifies freedom of conscience as the progenitor of—and therefore connected to—other liberties, including freedom of religion and freedom of expression.[99]

The freedom of thought can be described as the 'freedom of thinking', which demonstrates its significance to human life. The value lies in being able to form one's thoughts without influence from others. Lucas Swaine has defined thought as a 'mental activity', which includes a broad scope of mental actions: 'deliberation, imagination, belief, reflection, reasoning, cogitation, remembering, wishing, sensing, questioning, and desiring'.[100] Swaine purposefully formulates a broad definition, and it can therefore be applied to a broad range of objects of a rational or imaginative nature. Moreover, it provides room to encompass social, political, and religious phenomena. His definition seems rather simple, but it is suitable for a philosophical and legal analysis of the freedom of thought.[101]

The essence of the freedom of thought is that an individual is free to have and form thoughts without expressing them. In this sense, it differs from the freedom of expression. The individual is free not to reveal thoughts to others, or rather, not to take any actions regarding these thoughts.

Freedom of thought also has to be regarded separately from freedom of conscience. Freedom of conscience encompasses the ability to connect with notions of what is right or wrong.[102] Or rather, freedom of conscience includes the freedom to follow one's thoughts and convictions in matters of morality. In this sense, freedom of thought is broader than freedom of conscience, since the former encompasses a broader spectrum of mental activity. In addition, changing an individual's conscience is different from changing his thoughts, since not all modifications of thoughts are necessarily alterations of conscience. But more importantly, the freedom of conscience implies action, or the possibility to refrain from action in response to conscientious considerations.[103]

From the previous explanation, it appears that the freedoms of thought, conscience, and religion or belief are to be conceptualised separately. However, closer analysis may demonstrate that authors have sometimes mixed up these freedoms or used them interchangeably. J.B. Bury does this in his *A History of Freedom of Thought*. Notwithstanding the merits of his work, Bury uses the freedom of thought interchangeably with related freedoms such as religion, conscience, and expression.[104] Ruffini makes a more apparent distinction but does use the freedom of conscience

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[98] J. Rawls, *Political Liberalism*, New York, Columbia University Press, 2005, pp. 292, 334-335. Rawls presents different lists in various places, but the freedom of thought is apparent right beside the freedom of conscience on p. 291 in his Political Liberalism. P. De Marneffe, 'Basic liberties', in J. Mandle & D.A. Reidy (eds.), *The Cambridge Rawls Lexicon*, Cambridge University Press Cambridge 2014, pp. 47-49.

[99] Religious freedom is often defended along conscientious lines. Rawls also did this is in his *Political Liberalism*. See for an extensive discussion of this topic, A. Dorfman, 'Freedom of Religion', *Canadian Journal of Law and Jurisprudence*, Vol. 21, No. 2, 2008, pp. 279-319; S.D. Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse', *University of Pennsylvania Law Review* Vol. 140, No. 1, 1991, pp. 149-240; A. Ellis, 'What Is Special about Religion', *Law and Philosophy*, Vol. 25, No. 2, 2006, pp. 219-241.

[100] Swaine, 2018, p. 411.

[101] Swaine, 2018, p. 411.

[102] Swaine, 2018, p. 415.

[103] Swaine, 2018, pp. 415-416.

[104] Bury, 1932 [1913], pp. 232-251.

interchangeably with the freedom of worship or faith. Additionally, Ruffini argues that the freedom of conscience only enters the legal domain when an individual has acted upon conscientious judgements, thus resulting in what one may call external manifestations. Insofar as it stays within the limits of the individual's consciousness, he qualifies it as an 'essential internal privilege'.[105]

Ruffini seems right when he notes that it is merely *manifestations* of conscientious considerations which enter the legal domain, but appears to overlook the fact that (external) influences can impact someone's thoughts or conscience mainly when pressure is exerted before these considerations are acted upon. The fact that the influenced thoughts are not expressed or acted upon does not mean that they cannot or will not be influenced.

Clearly, various forms of influence or interference can be discerned, from moral persuasion to verbal threats or physical violence. However, the question for Ruffini remains: how is it possible for an individual to come to their thoughts freely and unboundedly when the use of conscience is a mere privilege and outward pressure is exerted? This contradiction may be remedied by qualifying the freedom of conscience, both the internal considerations and their external manifestation, as a *legal liberty* and not merely as an internal privilege of a psychological or philosophical inquiry.

Moreover, a privilege is rather to be understood as an exclusive right that allows the individual to do or say something that other individuals are not allowed to do; it is like granting permission. However, granting permission to the individual to form thoughts or conscientious judgements sounds somewhat contradictory, for the capacity of thought is, inter alia, what defines a human being. Being human without the freedom to form one's thoughts about what is morally right or wrong and reflect upon these thoughts seems like an empty human existence. The capacity to form conscientious judgments and act in accordance with them is what differentiates us from animals.

Besides being lauded in political theory, the freedoms of thought and conscience also have an essential position within human rights discourse. Both freedoms are placed within proximity to, or rather are interwoven with, the freedom of religion or belief. As the following sections demonstrate, in Article 18 of the Universal Declaration and in Article 18 ICCPR, these freedoms are meaningfully listed separately.

In both provisions, a distinction is made between two dimensions of the right to freedom of religion, thought and conscience: the *forum internum* and the *forum externum*. The *forum internum* is what is described at the beginning of the provisions: everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change one's religion or belief—more will be said about this in Chapter 3—and includes the freedom to determine, preserve, and change one's own conscience and conviction.[106] It is about the unrestricted individual choice in religious, belief, and philosophical matters. The *forum externum* is what is regarded as the external

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[105] Ruffini, 1912, p. 11. In Ruffini's words: '[I]t may be the object of pure psychological and philosophical inquiry, and therefore it would be just as superfluous and ridiculous to sanction it in the laws of liberty, as, adopting the illustration of a French writer, to proclaim the liberty of the circulation of the blood. It comes within the juridical field only in so far as it gives rise to external, and therefore legally important, demonstrations'. It is interesting that Ruffini unwittingly makes the distinction here between an internal and external demonstration of religion, which is (later) described in literature and case law as the forum internum and forum externum respectively. I will elaborate on this subject in section 2.13.

[106] See for an extensive elaboration on this topic chapters 2 and 3 by P.M. Taylor, *Freedom of Religion. UN and European Human Rights Law and Practices*, Cambridge, Cambridge University Press, 2005.

manifestations of these religious, belief, or philosophical convictions (more is said on this topic in section 1.13).

1.7 Institutional Separation between Church and State

The last element that is to be discerned within the context of religious liberty is the equality of religions and beliefs. Religious organisations have different relationships with a state. On the one hand, it is the state that guarantees their religious freedom, while on the other, religious organisations are subject to the state, as they are regulated and organised by the law, just like non-religious organisations. In this context, Ruffini raises an interesting question. Somewhat rephrased, he wonders: when religious freedom is fully realised in a state, and every individual is treated equally in this regard, must the state then also treat all religious groups or associations equally?[107] In other words: Ruffini aims to establish absolute equal treatment regarding the recognition of religious liberty. In this case, equality means non-discrimination in the interpretation and application of the freedom of religion or belief in all areas of society.

He addresses this question by arguing that, given the old ecclesiastical interference in the state and vice versa, theoretically this seems to be impossible. However, this 'absolute equality of treatment' can and will exist if the state no longer interferes in church or religious affairs and grants them complete self-control. In this way, the state 'ignores' all religious associations and declares its 'incompetence' regarding their religious affairs. From this, it follows that the state sets itself apart and separates itself from all religious associations.[108] In this way, Ruffini writes, the state can realise 'complete and true religious liberty'.[109]

This is an important point, from which it can be inferred that Ruffini, like Locke, strives for two separate domains. The principle Ruffini applies is in itself no more than an *institutional separation* between church and state, which implicates no reciprocal control.[110] It specifically implies that churches do not have a formal position in public decision-making, and religious criteria cannot be applied to governmental actions. This also means that churches are free from governmental influence in their creeds and have the freedom to shape their own church organisations and appoint their own officials. The point that Ruffini seems to overlook, however, is that when the state declares itself incompetent and ignores religion, it assumes a form of *indifference* towards religion, which may imply that the state still adopts a stance towards it. A different and perhaps less conflicting approach to take is that the state should *not adopt a stance* towards religion at all. The state should remain 'religiously neutral'. One may also say 'the state should be secular', but experience teaches that it is always necessary to specify what is meant by that phrase, because people tend to misinterpret the concepts 'secular' and 'secularism'.[111] As was noted in the Introduction, in this study 'secular' is used as identical with 'religiously neutral'. The state does not favour a specific religious denomination, but neither does the state disfavour any religious position. The state does not advocate theism or atheism; it has no judgement regarding the truth of citizens'

[107] Ruffini, 1912, p. 15.
[108] Ruffini, 1912, p. 15.
[109] Ruffini, 1912, p. 15.
[110] Church is used here in a broad sense, encompassing all religious institutions, not Christian ones per se.
[111] Cliteur, 2010, pp. 1-13.

religious worldviews. The state leaves religious decisions, as much as possible, to the free choice of individuals in society.[112]

It must be emphasised that this institutional separation between church and state does not apply to society. In society, citizens have religious freedom and are allowed to choose a religion of their preference, practise this religion, and live according to its creed (within the boundaries of the legal system). Religious elements may, therefore, be *visible* in society. Religion and belief do influence society, and there is always an exchange between philosophies and fundamental legal values. For religious freedom to fully flourish, meaning that all religions and convictions are on equal footing, an institutional separation between church and state is constituted as a principle within the legal system. Naturally, the content and religious or philosophical creed cannot be in conflict with the overall legal framework.

Now that the history of freedom of religion or belief and its juridical development have been discussed, the current legal framework and what is regarded as its normative core will be examined. In the subsequent part, the twentieth-century international documents, which are the primary contemporary sources of law regarding religious freedom, is explicated in order of emergence.

1.8 Freedom of Religion or Belief in UN Documents

As previously indicated, the individual freedom of religion was internationally enshrined for the first time by the United Nations in their Charter in 1945.[113] In Article 1 of the Charter, where the purposes and principles are set down, it is stated that it is the purpose of the UN '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' The last phrase 'without distinction as to race, sex, language, or religion' is crucial, for it reflects that the chosen conceptions are based on the principle of non-discrimination.[114] This view was repeated in Article 2 of the Universal Declaration, which was adopted on 10 December, 1948.[115] In Article 18, the primary source of freedom of religion in the Universal Declaration, it is stated that

> [e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

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[112] R. Blackford, *Freedom of Religion and the Secular State*, Malden, Wiley-Blackwell, 2012; Cliteur, 2010.

[113] For a complete survey of UN documents regarding the freedom of religion, see Taylor, 2005.
For a clear and brief overview see N. Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief', in T. Lindholm, W.C. Durham Jr. & B.G. Tahzib-Lie (eds.), *Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict*, Leiden, Martinus Nijhoff, 2004.

[114] Scolnicov, 2011, p. 11.

[115] A/RES/217 A (III), U.N. Doc A/810, p. 71 (1948).

As is demonstrated in the next chapter, the provision was not drafted and adopted without resistance. The insertion that an individual has the right to change religion or belief was criticised, and the choice of a secular basis led to intensive debate. It is important to note that the Universal Declaration does not have any direct legal force. This was introduced with the adoption of the UN Human Rights Covenants in 1966.

After the adoption of the Universal Declaration, the drafting of these Covenants was immediately put into motion.[116] Until 1952 it was not the intention to draft separate documents, but it was then decided that two documents concerning human rights would be created as part of the International Bill of Rights.[117] One consisted of civil and political rights, the other of economic, social, and cultural rights. In 1954 the Commission on Human Rights finalised the drafts of the covenants, resulting in the draft Covenant on Civil and Political Rights and a draft Covenant on Economic, Social and Cultural Rights.[118] They were sent the Economic and Social Council and the General Assembly, and during the following twelve years, every article was discussed and amended, mainly in the Third Committee. On 16 December, 1966, the International Covenant on Civil and Political Rights (ICCPR), including its Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were finally adopted by the General Assembly.[119]

The ICCPR consists of a preamble and 53 articles, and Articles 2, 4, 8, 18, 20, 24, 26, and 27 include religious-freedom-related matters. Article 2 comprises the fundamental principle that no discrimination is allowed based on religion. In Article 4, this non-discrimination ground is repeated, and it is stated that no discrimination, or rather no derogation from Article 18 is allowed during a state of public emergency.[120] The same applies to Article 20 paragraph 2, in which it is stated that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. This non-discrimination clause is repeated in Article 24 concerning children's rights, in Article 26 regarding the equal protection clause, and in Article 27, which concerns minority religions and the adherents of minority religions. Article 8 encompasses conscientious objections in military service. Article 18 is the main provision of religious freedom.

As mentioned, Article 18 is legally binding and is monitored by the Human Rights Committee. The Human Rights Committee is a body of independent experts who observe and monitor the implementation of the ICCPR by the State parties.[121] Article 18 ICCPR reads:

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[116] A/RES/217 E (III) of 10 Dec. 1948, UN. Official Records of the General Assembly, 3rd session, point 1, 183 plenary meeting at 79, UN. Doc. A/810 (1948).

[117] A/RES/543(VI) of 5 February, 1952, para. 1 UN Official Records of the General Assembly, 6th session, sup. No. 20, 375th plenary meeting at 36, UN Doc. A/2119 (1952).

[118] Official Records of the Economic and Social Council, 18th session, Supplement, no. 7, UN docs. E/2573, E/CN.4/705 (1954).

[119] The ICCPR was adopted by 106 votes in favour, none against, and no abstentions. The optional protocol to the ICCPR was adopted by 66 votes in favour, 2 against, and 38 abstentions. The ICESCR was adopted by 105 votes in favour, none against, and no abstentions.

[120] See General Comment 29 on Article 4 of the ICCPR from 24 July, 2001, and more specifically paragraph 7: 'Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in Article 18, paragraph 3'. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. ICCPR/C/21/Rev.1/Add.11 (2001).

[121] All states are obliged to submit reports (upon joining the covenant and usually every four years thereafter) on the

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[122]

It is noteworthy that several freedoms in the ICCPR were later further elaborated on and expanded in international conventions. For example, international codifications have been established regarding the prohibition against torture, discrimination based on race, and discrimination against women. This was, however, not the case for the freedom of religion or belief, since no specific international covenant followed. However, after fifteen years, in 1981, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration) was adopted.[123]

This declaration is the latest codification of the freedom of religion or belief, for no new international rules have been drafted. Note, however, that this document is not enforceable, since its content is not legally binding. It is an extra-conventional instrument and does not, therefore, have a treaty-based mechanism.[124] A solution for the problem of state compliance was found in the appointment of the Special Rapporteur on Religious Intolerance. This independent expert, who is appointed by the Commission on Human Rights, needs to 'identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles'.[125] In 2000 the office's mandate title was changed to

status of their implementation of the rights. The Human Rights Committee reviews these reports and voices its concerns and recommendations in the form of 'concluding observations'.

[122] The status of ratification of the ICCPR is as follows: State Party 173, Signatory 6, No Action 18, retrieved 19 June, 2020.

[123] A/RES/36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).A/RES/36/55, 25 November 1981. See for an interesting analysis D.H. Davis, 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', *Brigham Young University Law Review*, Vol. 2002, No. 2, 2002, pp. 217-236.

[124] Office of the United Nations High Commissioner for Human Rights, 'Human Rights in the Adminstration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers', *Professional Training Series 9*, New York/Geneva, 2003, pp. 68-70.

[125] E/CN.4/RES/1986/20 Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 10 March, 1986.

the 'Special Rapporteur on freedom of religion or belief'.[126] The current mandate holder is Ahmed Shaheed (b. 1964).

The main idea of the 1981 Declaration is, as its title suggests, to eliminate all forms of intolerance and discrimination based on religion or belief. It is the most detailed account internationally of what the freedom of religion or belief entails. The 1981 Declaration consists of eight articles; Articles 1, 5, and 6 contain substantive rights, and the remaining rights are supportive in nature and set out the necessary measures for eliminating intolerance and discrimination. The three substantive rights are:

> Article 1 Legal definition
> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may subject only to such limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
>
> Article 5 Parents, guardians, children
> 1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
> 2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
> 3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
> 4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
> 5. Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account Article 1, paragraph 3, of the present Declaration.

[126] The Commission on Human Rights changed the mandate title, which was subsequently supported by ECOSOC (E/DEC/2000/261) and the General Assembly (A/RES/55/97).

Article 6 Manifestation of religion or belief

In accordance with Article 1 of the present Declaration, and subject to the provisions of Article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

(a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;

(b) To establish and maintain appropriate charitable or humanitarian institutions;

(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

(d) To write, issue and disseminate relevant publication in these areas;

(e) To teach a religion or belief in places suitable for these purposes;

(f) To solicit and receive voluntary financial and other from individuals and institutions;

(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

From this legal overview, it can be inferred that the components of non-coercion; non-discrimination; non-derogation; and the rights of communities, parents, and guardians in religion-related matters, have an essential place within the freedom of religion or belief and are regarded as (part of) its normative core.[127]

1.9 Freedom of Religion or Belief in European Union Documents

In addition to these international documents, necessary legal instruments were also realised with regard to the freedom of religion or belief at the European level. On 4 November, 1950, the Council of Europe drafted the European Convention on Human Rights (ECHR).[128] In Article 9 ECHR, the freedom of thought, conscience and religion is enshrined. It reads:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[127] As was previously discussed, the legal provisions not only guarantee freedom of religion and belief for people individually, and in communion with others, but also for groups and organisations. For this reason the right of religious freedom for (religious) communities is qualified as part of the freedom's normative core.

[128] Rome, 4.XI.1950.

This article should be read in conjunction with the non-discrimination clause, which is established in Article 14 EHCR. In this provision, discrimination based on, inter alia, religion and other opinions is prohibited. In Article 10 of the EU Charter of Fundamental Rights, the freedom of thought, conscience and religion is protected in Article 9 EHCR in like manner.
Article 10 EU Charter of Fundamental Rights reads:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

In Article 2 of a protocol to the Convention, the right to education is enshrined, more specifically, '[…] In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.[129] These briefly mentioned European and international documents comprise the legal framework for the freedom of religion, thought, and belief.[130] In this research, the focal point is on the international order and its normative framework.

1.10 Defining Religion and Belief

In order for the legal provisions to be applicable, all concepts must be adequately defined. However, it is difficult to define the concept of religion.[131] In academia, various definitions have been suggested, but none of these is universally accepted.[132] As sociologist Milton J. Yinger (1916–2011) wrote, '[…] it is a truism to say that any definition of religion is likely to be satisfactory only to its author and often not to him'.[133] Yinger, who has written extensively on religion and related matters, was one of the first academics who coined an inclusive 'functional definition' of religion.[134] With this sort of definition, religion is defined as what it does and how it functions in society; the definition does not, however, focus on what religion is.

The question of what religion is surfaces more when an 'essentialist' or 'substantial' definition of religion is used. This definition tries to define religion by attempting to find what constitutes religion, or in other words, what is essential for a religion to be qualified as such. Several scholars have thought about this definition, such as theologian and philosopher Friedrich

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[129] For more on this topic: S. Parker, R. Freathy & L.J. Francis, *Religious Education and Freedom of Religion and Belief (Religion, Education and Values, Book 2)*, Oxford, Peter Lang AG, 2012.
[130] For more on this topic see: N. Doe, *Law and Religion in Europe: A Comparative Introduction*, Oxford, Oxford University Press, 2011.
[131] See for an interesting view on this topic, Y. Sherwood, 'The Problem of 'Belief'', in A. Carling (ed.) *The Social Equality of Religion or Belief: A New View of Religion's Place in Society*, London, Palgrave Macmillan, 2016.
[132] It is not my intention to analyse the literature on this topic and come to a definition of my own, but it is important to highlight that there is, in fact, extensive study on this topic.
[133] J.M. Yinger, 'Pluralism, Religion, and Secularism', *Journal for the Scientific Study of Religion*, Vol. 6, No. 1, 1967, p. 18.
[134] W.H. Swatos & P. Kivisto, *Encyclopedia of Religion and Society*, Lanham, AltaMira Press, 1998, p. 565.

Schleiermacher (1768–1834), who described the religious feeling as 'das Gefühl schlechthinniger Abhängigkeit', which means 'the feeling of absolute dependence'.[135] Theologian and philosopher Rudolf Otto (1869–1937), who derived his thoughts from his mentor Schleiermacher, argued that the religious feeling can be described as the 'numinous' or 'wholly other'. This cannot be understood in rational or linguistic terms but is of a more transcendental nature.[136] Philosopher Ronald Dworkin (1931–2013) formulated a definition of the religious attitude in his last work *Religion without God*. According to Dworkin, the religious attitude consists of 'life's intrinsic meaning and nature's intrinsic beauty'.[137] Within the field of legal theory and legal philosophy, reference is often made to philosopher Paul Tillich's (1886–1965) concept of the 'ultimate concern' or varieties thereof. The ultimate concern is understood as the religious attitude of the individual. [138]

It is evident that in order to realise the universal aspirations of freedom of religion or belief, it must have a wide application. However, its scope is not limitless. Not every opinion or worldview can claim the status of 'belief' and change every gathering into a religious community; this would result in the freedom of religion or belief losing its importance and applicability. So where should the line be drawn with regard to the protection of religion or belief? In other words: how should religion be defined in order for it to receive legal protection?

This is unquestionably a complicated question, and a certain degree of caution must be exercised when answering it. It seems that some criteria, such as comprehensiveness and earnestness regarding people's most profound and existential convictions and related individual or communitarian rituals or practice may be discerned in order for religion or belief to claim protection. Simultaneously, it is essential that these criteria continue to have an open and broad character and can include the widest variety of utterances of essential beliefs and their practices.[139]

1.10.1 A Legal Definition of Religion and Belief

The Human Rights Committee and the European Court of Human Rights (ECtHR) have also been confronted with these questions and have provided some interesting perspectives and judgements on how freedom of religion or belief is to be understood.

Besides the task of monitoring the implementation of the ICCPR by State parties, the Human Rights Committee is tasked with interpreting the content of the various human rights provisions and publishing its findings in thematic papers, which are called general comments.

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135 T. Vial, 'Friederich Schleiermacher', in G. Oppy & N.N. Trakakis (eds.), *Nineteenth-Century Philosophy of Religion: The History of Western Philosophy of Religion, vol. 4*, Hoboken, Taylor and Francis, 2014, pp. 31-48; D.P. Veldsman, 'To feel with and for Friedrich Schleiermacher: On religious experience', *HTS Teologiese Studies*, Vol. 75, No. 4, 2019, pp. 1-5.

136 R. Otto, *The Idea of the Holy: an Inquiry into the Non-Rational Factor in the Idea of the Divine and its Relation to the Rational*, London, Oxford University Press, 1932, pp. 8-11, 25-30; B.E. Meland, 'Rudolf Otto', *Encyclopædia Britannica,* retrieved 3 March 2018, *britannica.com*. See B.C. Labuschagne, 'Het sacrale domein: aanzetten tot een nieuwe verhouding tussen het private, het publieke en het sacrale', *Nederlands Theologisch Tijdschrift*, Vol. 64, No. 2, 2010, pp. 124-125.

137 R. Dworkin, *Religion without God*, Cambridge, Harvard University Press, 2013, p. 11.

138 P. Tillich, *Dynamics of Faith*, New York, Harper Torchbooks, 1957; J. Mcbride, 'Paul Tillich and the Supreme Court: Tillich's Ultimate Concern as a Standard in Judicial Interpretation', *Journal of Church and State*, Vol. 30, No. 2, 1988, pp. 245-272. See for criticism of Tillich's concept of the 'ultimate concern': P. Cliteur, *The Secular Outlook: In Defense of Moral and Political Secularism*, Chichester, Wiley-Blackwell, 2010, pp. 18-20.

139 H. Bielefeldt, 'Freedom of Religion or Belief—A Human Right under Pressure', *Oxford Journal of Law and Religion*, Vol. 1, No. 1, 2012, pp. 21-22.

In 1993, the Human Rights Committee addressed the issue of freedom of religion or belief. General Comment 22 clarifies Article 18 ICCPR and elaborates broadly on the right in eleven paragraphs.[140] General Comment 22 entails that Article 18 ICCPR '[…] protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'. The Committee also clarified that the concepts of 'belief' and 'religion' are to be *broadly* construed and that Article 18 ICCPR does not only apply to 'traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions'.[141] Moreover, the Committee proclaimed that 'the right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others'.[142] From this, it can be inferred that, besides religions, this wide interpretation also covers ethical and philosophical convictions.

In this case, it is also necessary to understand that the right to religion or belief in Article 18 ICCPR encompasses both a negative and a positive freedom. The positive freedom of religion implies what is described in Article 18 of the Universal Declaration and the ICCPR: the freedom to hold and practice belief, etcetera. The negative freedom of religion implies that the individual is free to do as he pleases with this freedom, even if this means not invoking the right. It indicates that the individual has the right not to believe, not to adhere to a particular religion or conviction, including the right not to profess this in public. This implies that the individual is not obliged to participate in religious practices, such as state-mandated religious worship: the individual thus has the right to refrain from doing so. It seems that the interests of non-religious individuals are most directly served by this form of religious freedom. In other words, the freedom of religion or belief comes down to 'freedom to' and 'freedom from'.[143]

The ECtHR adopted a similar stance as the Human Rights Committee, and also uses a wide scope for Article 9 ECHR, but it is more elaborate and specific in its judgements.[144] As expressed in various judgements, the article covers the traditional religions and their traditions, such as Judaism,[145] Christianity, Islam,[146] Hinduism,[147] Sikhism,[148] and Buddhism.[149] Various non-religious belief systems are also approved by the Court, like atheism,[150] the Krishna Consciousness,[151]

[140] Human Rights Committee, General Comment 22 (48), Article 18, ICCPR/C/21/Rev.1/Add.4.
[141] Human Rights Committee, General Comment 22 (48), Article 18, ICCPR/C/21/Rev.1/Add.4, para. 2.
[142] Human Rights Committee, General Comment 22 (48), Article 18, ICCPR/C/21/Rev.1/Add.4, para. 1.
[143] Bielefeldt, 2012, pp. 15-35.
[144] However, it is not up to the claimant but up to the Convention organs to determine what falls under the definition of belief. *M'Feeley v. United Kingdom*, EHRR 161, 1980.
[145] *D v. France*, no. 10180/82, 35 DR 199, December 1983.
[146] *Ahmad v. United Kingdom* 4 EHRR 126, 1982.
[147] *Chauhan v. UK*, no. 11518/85, 65 DR 41, 1990.
[148] *E.g. X v. UK*, no. 8160/78, 22 DR 27, December 1981.
[149] *E.g. X v. UK*, no. 6886/75, 5 DR 100, December 1976.
[150] *Angeleni v. Sweden*, no. 10491/83, 51 EHRR 41, 3 December 1986.
[151] *ISKCON v. United Kingdom*, no. 20490/92, 76A DR 90, 1994.

Jehovah's Witnesses,[152] the Divine Light Zentrum,[153] and the Church of Scientology.[154] From these verdicts, it can be inferred that, for the ECtHR, constitutional protection does not depend on a commitment to theism. It is also interesting to note that it is unnecessary for a belief system to have a *metaphysical component* in order for it to fall under the scope of the article, as the Court decided that ethical and or philosophical convictions such as pacifism,[155] veganism,[156] and communism[157] are also within its range.

More generally, a religion can enjoy protection when it worships a supreme being or several gods and, by extension, concerns fundamental questions of life. For relatively unknown religions, the Court examines whether what is presented as a religion is comparable to a religion that is already protected. When asked whether a particular belief is protected based on Article 9 of the ECHR, the Court often examines whether the belief in question is comparable to a known religious belief.[158]

In this regard, the Campbell and Cosans vs. the United Kingdom case is essential. In this case, the ECtHR decided that beliefs and philosophical convictions need to 'attain a certain level of cogency, seriousness, cohesion and importance' in order to receive protection under Article 9 of the Convention.[159] The ECtHR also noted that 'the expression "philosophical convictions" denotes […] such convictions as are worthy of respect in a democratic society […] and are not incompatible with human dignity'.[160]

The ECtHR thus offers certain criteria it can use to test if a conviction falls within the scope of the provision and can enjoy protection. This is also the case for the Human Rights Committee's elucidation in General Comment 22, in which a wide scope of protection for multiple convictions was provided. Apart from the fact that the UN does not offer explicit criteria, an important similarity can be observed, namely that within both the UN and EU legal systems, the protection of religion or belief does not merely depend on its content and is not restricted to a predefined list of recognised religions and beliefs.

On the basis of the perspectives as developed by the UN and EU, the freedom of religion or belief may be understood as providing the opportunity to decide how to live according to one's own thoughts and convictions. It offers the freedom to follow one's conviction in matters of morality; to search for the ultimate meaning in life, either on an individual basis or in a community;

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[152] *Kokkinakis v. Greece*, no. 14307/88, 17 EHRR 397, 1994.

[153] *Omkarananda and the Divine Light Zentrum v. Sweden* no. 8118/77, 25 DR 105, 1981.

[154] *X and Church of Scientology v. Sweden* 16 DR 68, 1976.

[155] *Arrowsmith v. United Kingdom*, no. 7050/75, 3 EHRR 218, 12 October, 1978.

[156] *H v. United Kingdom*, no. 18187/91, 16 EHRR 44, 10 February, 1993.

[157] *Hazar, Hazar and Acik v. Turkey*, no. 16311/90,16312/90 and 16313/90 (joined), 72 EHRR 200, December 1991.

[158] Taylor, 2005, pp. 204-210.

[159] *Campbell and Cosans v. the United Kingdom*, no. 7511/76 and 7743/76, § 36, 4 EHRR 293, 1982. In this case the ECtHR also noted that, as regards the term 'philosophical convictions', the word 'convictions' is more akin to the word 'beliefs'.

[160] *Campbell and Cosans v. the United Kingdom*, no. 7511/76 and 7743/76, § 36, 4 EHRR 293, 1982. See for a more detailed overview P.W. Edge, *Religion and Law: An Introduction*, Oxford, Oxford Brookes University, 2006. Chapter 11 of Evans, 1997. In academia the meaning of 'religion' and 'belief' in article 9 ECHR has also been a topic of debate. According to Evans, with regard to article 9 ECHR, a distinction must be made between patterns of 'thought and conscience' and 'religion and belief'. This distinction is important to determine which form of belief actually gives rise to freedom of religious manifestation. Evans 1997, p. 289.

and to practise and communicate this to others. This search is not solely fixed on a commitment to theism, and it is unnecessary for a conviction to have a metaphysical component or to be religiously based. In this freedom to act in accordance with what one deems vital, the focus is on a value that may be shared from different convictions. The added value of understanding freedom of religion or belief in this way is that it not only demonstrates the broad scope this freedom encompasses, but it has also dissociated itself from 'religion' as such, which eliminates a presupposed bias towards religious believers.

However, it is essential to emphasise that in understanding the freedom of religion or belief this way, no attempt is made to actually legally rephrase the freedom. It is merely described this way to understand the scope of the freedom of religion or belief, and it thus provides an approach for dealing with different convictions and related individual or collective ethical or ritualistic practices in a pluralistic society. This also means that that the freedom of religion or belief does not lose its communal aspect: the individual is free to choose and be part of a religious community with its religious affiliations and experiences. Naturally, the freedom of religion or belief does not offer unlimited freedom, since the exercise of the freedom of religion or belief has to fit into the overall human rights framework. Some restrictions are addressed in the subsequent sections.

1.10.2 Concerns with Respect to Defining Religion or Belief

The broad understanding of religion and belief, especially as interpreted by the Human Rights Committee, leaves some caveats that have to be addressed. For instance, there is the fact that Article 18 ICCPR may seem *too broadly* construed, resulting in the idea that every religious or philosophical practice can fall under the heading of religion or belief. Especially the fear of detrimental religious practices and rites and harmful religious body mutilations are reservations that are mentioned.[161] In these cases, an element of harmful behaviour is present. *Balancing human rights*, however, is a delicate matter: an appeal to religious freedom must always be exercised with respect for the overall framework of human rights, and thus the rights of others. It is the task of the state to govern and guarantee all fundamental freedoms, even if this results in limitations to some of them.[162]

The second concern that is raised is the fact that a broad understanding of the concept of religion will lead to a hodgepodge in which every so-called 'parody religion' falls within the legal scope of religious or philosophical convictions. The conviction of Pastafarianism, in which the deity that is worshipped is the 'Flying Spaghetti Monster', provides an example. Pastafarianism is a movement that arose out of a protest against the intention to teach intelligent design in high schools in addition to the theory of evolution in the American state of Kansas. Pastafarianism is now legally recognised in various countries, and its adherents can claim various Pastafarian rites as religious exceptions, including Pastafarian weddings and permission to wear their religious headgear, namely pasta strainers, in official documents.[163] Another example is Jediism, which is also known as the

[161] Bielefeldt, Ghana & Wiener, 2016, p. 19.

[162] Bielefeldt, Ghana & Wiener, 2016, p. 19.

[163] G.D. Chryssides, *Historical Dictionary of New Religious Movements*, Lanham, Scarecrow Press, 2012, pp. 66-67. K. Gilsinan, 'The Church of the Flying Spaghetti Monster', *The Atlantic*, Vol. 318, No. 4, 2016, p. 23; K. Mangu-Ward, 'Pastafarians win! Freedom from religion', *Reason*, Vol. 43, No. 6, 2011, p. 17; J. Zauzmer, 'New Zealand couple weds

Temple of the Jedi Order. Adherents of this conviction, called Jedi, believe in 'The Force' and several other principles. It is clear that this conviction is derived from the Star Wars media.[164] There is also Kopimism, in which the adherents, Kopimists, consider the search for knowledge, copying information and sharing it, a sacred goal. It was legally recognised in Sweden in 2012.[165]

The rise of these parody religions is often viewed as a trend, and the overall argument by the opponents of these new religions is that they are merely parodies of existent religions and were established to mock and demonstrate the flaws in traditional religions. Another argument is that these religions are used to function as a pretext for particular actions which would otherwise conflict with national law but are then permitted as *religious exemptions*. Moreover, critics argue that these convictions do not *deserve* to be protected.

Whatever the motivations are for the newly established religion, it is not up to the 'believer' to legally reject the 'other believer's' belief system. In other words: it is not up to the individual and not up to a group of individuals to decide if something qualifies, or rather deserves to qualify, as a legitimate legal belief system. Moreover, from a believer's perspective, it must be questioned if the existence of various religions side by side is sustainable at all. After all, is not every religion by its nature the exclusion of other religions, since most religions claim to be the true one?

In fact, believers' protests are irrelevant. In this domain, it is up to the state and its judiciary to decide if these newly established religions attain cogency, seriousness, cohesion, and importance to be protected under Article 9 ECHR, or if they fall within the wide scope of Article 18 ICCPR. These criteria offer guidance in deciding whether or not a newly established conviction should gain the status of religion or belief. And, as I argued in the previous section, the criteria that have to be met to qualify as a protected belief system are strictly formal and thereby independent of the content of the conviction. This allows 'existing' religions and beliefs to develop and give rise to the opportunity for every individual to find or establish a belief and live according to its truth claims, scriptures, rituals, hierarchies, and rules.

1.11 The Forum Internum and the Forum Externum

As previously indicated, freedom of religion or belief is not unlimited and does not come without necessary restrictions. The legal restrictions in international law are closely associated with the dichotomy that is acknowledged in both literature and case law as the *forum internum* and the *forum externum*. Both fora are vital components of the normative core of religious freedom.

The *forum internum* is the freedom of thought, conscience, religion, and belief, and is an absolute right. Scholars Manfred Nowak and Tanja Vospernik have described it as a 'private freedom'.[166] According to Article 18 under 2 ICCPR, it encompasses the freedom to change religion

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in first legal Flying Spaghetti Monster ceremony', *The Washington Post*, 19 April 2016. On 15 august 2018, the Administrative Jurisdiction Division of the Dutch Council of State ruled that Pastafarianism cannot be qualified as a religion or belief system. Raad Van State, 15 August 2018, ECLI:NL:RVS:2018:2715 (*Pastafarisme*).

164 Chryssides, 2012, p. 113; M.A. Davidsen, E. Van Den Hemel & A. Szafraniec, *From Star Wars to Jediism: The Emergence of Fiction-based Religion*, New York, Fordham University Press, 2016.

165 A. George, 'Kopimism: The world's newest religion explained', *New Scientist*, Vol. 213, 2012, p. 25; S.M. Walker, *Culture and Religion*, Vol. 19, No. 3, 2018, pp. 329-344.

166 M. Nowak & T. Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief', in T. Lindholm, W.C. Durham Jr. & B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden, Martinua Nijhoff

(more will be said on this topic in Chapter 3) and may not be subject to any limitations. The *forum externum* is the freedom to manifest one's religion or belief, and according to Article 18 under 3 ICCPR, it may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. In the ECHR, the same limitations are used regarding religious freedom, but Article 9 under 2 ECHR adds that it may be restricted if necessary in a democratic society.[167]

Some clarifications were made in General Comment 22: Again, it is emphasised that limitations are only permitted if established by law, and they may only be applied if the other rights in Article 18 continue to be guaranteed. Furthermore, it is stressed that Article 18, paragraph 3 must be 'strictly interpreted', and restrictions that are not listed in Article 18 are not permitted. They also need to meet the requirements of proportionality.[168] Article 18 ICCPR was drafted to protect the liberating substance of freedom of religion or belief, even when there is a clash with other rights or public interests.[169]

It is clear that legally justified restrictions are a delicate matter. Unfortunately, however, the possibility of restriction is often abused. As is argued in the following chapters, overly broad and ambiguous legal concepts such as 'public safety', 'public order', and 'morality' are appealed to in various instances in order to control, for example, religious criticism and opposing religious or philosophical views.

1.12 The Holistic Understanding

Lastly, in discussing the normative framework of the freedom of religion or belief, the holistic understanding of the human rights framework must be addressed. In 1993, during the Vienna World Conference on Human Rights, it was underlined that human rights are 'universal, indivisible and interdependent and interrelated'.[170] Moreover, it was stressed that '[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[171] A holistic understanding requires that, in the conceptualisation of human rights, all fundamental freedoms should be taken into account for the framework to

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Publishers, 2004, pp. 148-149.

[167] See for more on this article, and more specifically the interpretation of 'necessary in a democratic society' Guide to Article 9. Freedom of Thought, Conscience and Religion. European Court of Human Rights, 2015 via ww.echr.coe.int (Case-law – Case-law analysis – Case-law guide).

[168] UN Human Rights Committee (HRC), ICCPR *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, ICCPR/C/21/Rev.1/Add.4, para. 8, Evans, 1997, pp. 221-226; Nowak & Vospernik, 2004, pp. 147-172.

[169] Bielefeldt, Ghana & Wiener, 2016, p. 22; Evans, 1997, pp. 221-226.

[170] UN General Assembly, Vienna Declaration and Programme of Action, 12 July, 1993, A/CONF.157/23, para. 1, *refworld.org*, retrieved 17 February, 2018. On the occasion of the 20th anniversary of the Vienna Declaration on international expert conference, the Vienna World Conference on Human Rights, was organised in cooperation with the Office of the UN High Commissioner for Human Rights. It was titled 'Vienna+20: Advancing the Protection of Human Rights'. In the concluding document the holistic understanding was again emphasised, as was the extraterritorial nature of human rights obligations. See Conference report, *Vienna+20: Advancing The Protection of Human Rights Achievements, Challenges and Perspectives 20 Years after the World Conference*, International Expert Conference Vienna Hofburg, 27-28 June, 2013, p. 8.

[171] UN General Assembly, Vienna Declaration and Programme of Action, 12 July, 1993, A/CONF.157/23, para. 1, *refworld.org,* retrieved 17 February, 2018.

function. When a freedom is excluded, it creates a gap, resulting in consequences for the overall human rights framework.[172] This also means that these fundamental freedoms presuppose and mutually strengthen each other.[173] In fact, all human rights relate to one another. It is thus important to underline that all human rights have an essential role in the human rights framework and must always be holistically understood.

The undermining or derogation of one human right will result in the disintegration of the whole framework. Of course, this does not guarantee that a collision of human rights will not occur, for this is often the case in practice.[174] For example: The Hindus in South Africa are a cultural group who live according to their religious customs and practices. Due to their religious freedom, their religious traditions and their attendant values can prevail within these Hindu communities. However, their customs may be discriminative against women.[175] Here, a clear collision of gender equality and freedom of religion or belief may be noticed. Another collision is observable in the public criticism of cultural and religious traditions and customs, or in the multicultural society as such. When denouncing these traditions and customs, the freedom of speech is invoked. The individuals that feel affected or criticised, however, sometimes think that they are being stigmatised, insulted, or discriminated against. An appeal to the right not to be discriminated against on the basis of their religion may then offer them protection.[176]

1.13 Conclusion

In this chapter, the history of freedom of religion and its codification in human rights treaties was analysed. From a historical perspective, some international developments were discussed, with a special focus on the work of Ruffini. His idea that religious freedom is a concept of a legal nature was leading in these sections. In the subsequent sections, some aspects of religious freedom were addressed.

With regard to religious toleration, I argued that even the most broadly adopted version of religious toleration effectuates an unequal basis for the adherents of minority religions, or rather to every individual except the adherents of the state religion. Religious toleration must be understood merely as a virtue in the legal order, rather than as a legally entrenched right. It must be qualified separately from religious freedom, and no legal implications should be attached to it.

Furthermore, I emphasised that freedom of religion protects believers rather than beliefs. It was argued that, even though it is sometimes challenging to view the religious individual as

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[172] Bielefeldt, Ghana & Wiener, 2016, p. 29. H. Bielefeldt, 'Freedom of Religion or Belief: Anachronistic in Europe?', in M.-C. Foblets, K. Alidadi & Z. Yanasmayan (eds.), *Belief, Law and Politics: What Future for a Secular Europe?*, London, Routledge, 2014, p. 64.

[173] In this regard, Evans rightly addresses the holistic understanding as mentioned in General Comment 22. See for more Evans, 1997, p. 211.

[174] See for more on this topic, J.D. Van Der Vyver, 'The Relationship of Freedom of Religion or Belief Norms to Other Human Rights', in T. Lindholm, W.C. Durham Jr. & B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden, Martinus Nijhoff Publishers, 2004, pp. 85-123; Humphrey, 2012 [1984].

[175] C. Rautenbach, 'Gender Equality, Constitutional Values and Religious Family Laws in South Africa', *International Journal of Discrimination and the Law*, Vol. 5, No. 2-3, 2001. For an interesting take on this subject matter, see S. Schröter, *Gender and Islam in Southeast Asia: Women's Rights Movements, Religious Resurgence and Local Traditions*, Leiden, Brill, 2013.

[176] It must be remarked that sometimes it is, in fact, not freedoms that collide, but merely the values or feelings that people have, which would be the case in the last two examples. I will elaborate on this topic in Chapters 4 and 5.

separate from their creed in this context, it is still the individual who invokes the right. Religion or belief as such is only indirectly at issue within the human rights framework. This indirectness is of fundamental importance. In addition, it was claimed that human rights not only belong to the individual but also (primarily) need to be addressed from the perspective of the individual.

Subsequently, I argued that the freedom of thought and conscience are to be defined separately from the freedoms of religion or belief. And the internal aspects of the freedom of thought and conscience are not to be understood as mere privileges. Another element that was addressed is that, in order for the freedom of religion to come to its full development, it is essential that an institutional separation between church and state is adopted as a principle within the rule of law in a state. This entails that the state should not adopt a stance towards religion at all. This non-intervention is reciprocal, with the consequence that religious organisations should remain free from state influence.

In the second part of this chapter, the contemporary international legal framework with its normative core and implications was discussed. This included an explication of the legal framework of the religious freedom provisions within the EU and UN. In addition, I indicated that defining religion or belief too narrowly is problematic in understanding this fundamental right. Freedom of religion or belief is to be broadly construed, meaning that ethical and philosophical convictions are also within its scope.

At the UN and EU juridical levels, the protection of religion or belief is, fortunately, not dependent on its content and does not consist of a predefined list of recognised religions or beliefs. Some criteria have to be met, but these should be independent of the content of the conviction. This interpretation allows pre-modern religions and beliefs to develop and to give rise to the opportunity for every individual to find or create their convictions in matters of morality.

In this context, I argued that understanding the freedom of religion or belief as a universal human right means understanding it as a right to follow one's conviction in matters of morality, irrespective of those convictions having a religious foundation. It was described this way in order to understand the scope of this right, and it thus provides an approach to deal with different convictions and related individual or communitarian ethical or ritualistic practices in a pluralistic society. This was discussed within the context of the holistic understanding of human rights.