



Universiteit
Leiden
The Netherlands

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

Schaik, B. van

Citation

Schaik, B. van. (2022, April 5). *Defaming the freedom of religion or belief: a historical and conceptual analysis of the United Nations*. Retrieved from <https://hdl.handle.net/1887/3281796>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3281796>

Note: To cite this publication please use the final published version (if applicable).

Conclusion

This research revolved around the question to what extent the current interpretations of the freedom of religion or belief demonstrate a detraction from its content, equal implementation (non-discriminatory), and universality as a human right, and on what levels this development is perceptible. In order to explore this issue, I addressed various situations in which these elements—so the content, equal application, and universal status as allocated in the human rights provisions on freedom of religion or belief—have implicitly or explicitly diminished. As was demonstrated throughout the various chapters, these developments are noticeable on national and international levels and within legal and more political settings.

In the first chapter, the history of the freedom of religion and its codification in human rights treaties was analysed. Several international developments were discussed from a historical perspective. The effort for tolerating religious differences was placed in the context of the development of religious freedom. I argued that even the most broadly adopted version of religious toleration effectuates an *unequal* basis for the adherents of minority religions, or rather for 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 attributed to it. This is both of theoretical and juridical significance.

Furthermore, I emphasised that it is essential that clarity is provided when discussing the scope of freedom of religion or belief. As I demonstrated in this research, various concepts seem to be interpreted differently and are often diluted with different conceptions during debates. It is relevant therefore to recall that freedom of religion or belief protects *believers* rather than *beliefs*. Although it is sometimes challenging in this context to view the religious individual as separate from his creed, 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, I claimed that human rights not only belong to the individual but also (primarily) need to be addressed from the perspective of the individual. A different but also important aspect when understanding freedom of religion or belief is that the freedoms of conscience and thought are to be understood as rights, rather than as mere privileges, which sometimes seems to be the case.

Another element I addressed is the fact that, in order for the freedom of religion or belief to come to its full development, it is essential that an institutional separation between church and state is adopted as a principle within the legal framework of a state. This entails that the state should not adopt a stance towards religion at all. The state should be ‘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’. In this study, ‘secular’ was used as identical with ‘religiously neutral’: The state does not choose in favour of a specific religious denomination, but neither does the state choose to the detriment of a religious position. The state does not advocate theism, but neither does it advocate atheism. Within the framework of the law, the state leaves religious decisions to the free choice of individuals in society. This non-intervention is reciprocal, with the consequence that religious organisations should not influence the state either.

In the second part of this chapter, the contemporary international legal framework of freedom of religion or belief, with the freedom's normative core and its 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 ought to be *broadly* construed, meaning that ethical and philosophical convictions should also fall within its scope.

At the UN and EU juridical level, 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 in theory these should be regarded as independent of the content of the conviction. This interpretation allows pre-modern religions and beliefs to develop and creates the opportunity for every individual to find or devise her own 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 to understand the scope of the 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. Moreover, the added value of understanding freedom of religion or belief this way is that it demonstrates the broad scope this freedom encompasses; in addition, it has dissociated itself from 'religion' as such, which presupposes a certain religious bias towards believers. This was discussed within the context of the holistic understanding of human rights.

In order to answer the main question—and thus prove that (to some extent) the current interpretations of the freedom of religion or belief demonstrate a diminishment of its universal status—I first had to determine that freedom of religion or belief can be interpreted as a universal human right. To this end, in Chapter 2, I examined the cultural-relativist claim of ethnocentrism within the Universal Declaration. I argued that the accusation that the Universal Declaration is rife with ethnocentrism was partially initiated by the fact that the intellectuals who make this accusation do not have a clear insight into what was discussed during the drafting process. This has resulted in inaccuracies in their idea of how the Universal Declaration was drafted and what the delegates' intentions and goals were for this document. In order to come to this conclusion, a legal-historical analysis was made of the drafting history and the cultural-relativist stance was examined.

I have extensively described which representative contributed to the text and what the representatives' motivations were in discussing the freedom of religion or belief and related matters, such as a possible religious underpinning of the Universal Declaration. Given their role and influence in drafting the Universal Declaration, the members of the drafting committee in particular were an authoritative source for the meaning and correct interpretation of Article 18 Universal Declaration.

From the analysis it can also be inferred how the delegates understood the philosophical and theoretical underpinnings of the provision, and, in particular, what definitions of 'religious' and 'secular', or 'universal' and 'relative' they thought it should embody. It appears that the representatives evaluated the suggested content of Article 18 UDHR from their own preconceptions, originating in the standards and customs of their state doctrines and cultures. However, after elaborate discussion, there was an awareness that this approach made it difficult to arrive at common principles.

Although pursued from various angles, there was insufficient support to establish the Universal Declaration and the freedom of religion or belief provision on a *religious* foundation. The delegates strove for a consensus approach in which universalism and idealism were essential principles that were endorsed by (a significant number of) delegates during the drafting process. Various principled arguments were brought to the fore not to include a reference to a deity, but there were also numerous arguments focussed on the practical impossibility to reach consensus on this matter. There were too many different views regarding a concept of a theological or philosophical nature, and arguments of a religious nature (mainly focused on Christianity) were outvoted. The representatives therefore came up with practical, neutral principles with regard to Article 18 UDHR: principles that could be filled in by the individual himself, whether or not he was religiously motivated. Thus, when the religion-related matter was discussed, a pragmatic attitude was adopted to overcome the doctrinal and religious divides between the participating parties.

This attitude also makes it apparent that the pursuit of moral universalism continued to prevail. The aim of the Universal Declaration was to draft a document that all people over the world could understand and relate to. A language had to be adopted that could be understood by all participants; it had to encompass an *autonomous* humanitarian morality. The representatives legitimately avoided inserting metaphysical concepts that were of a distinctive character—meaning individuals differed in their beliefs about them—into the provision in order to reach the goals set. This led to the insight that a universal basis for religious freedom was to be found in a secular version. This was a freedom that was based on *moral* autonomy, a freedom which would not include a reference to a deity, and which could be exercised by both believers and non-believers. The Universal Declaration is therefore neutral on the subject of religion, and Article 18 UDHR is phrased in such a way that there is an openness to different perspectives and ways of life. It means pluralism of belief without state interference. The way the provision is formulated, so starting from a neutral position, implies that the state recognises the equality of all this diversity.

This analysis of the drafting history demonstrated that, while the drafting process was far from flawless, in the end it articulated a clear vision on the core meaning of the freedom of religion or belief and opposed policies in which individuals would be excluded.

Following the ideas of Churchill, the members of the UN tried to establish a world order in which fundamental rights could be guaranteed for all. It was perhaps an idealistic thought, but the delegates made it work, using a (pragmatic) consensus approach for realising a universalistic moral code in 1948. Moreover, it is captivating to see that the drafters perhaps did not realise what kind of impact the Universal Declaration would have in the following years.

In addition, I challenged the accusation that the Universal Declaration represents a purely Western vision of human rights and that only Western intellectuals took part in the preparations. My analysis demonstrated that the drafting committee was aware from the outset that there could be a biased view regarding human rights. On Roosevelt's authority, the drafting committee was therefore expanded to include delegates with a variety of nationalities and identities who adhered to different doctrines and religions, ranging from Western liberalism to Eastern socialism.

Moreover, the proposals as drawn up by the drafting committee were discussed by the eighteen representatives of the Commission on Human Rights and subsequently in the Third Committee, where all states were represented, resulting in a plenary adoption procedure in the

General Assembly. As a result, during the complete drafting process, all representatives of all states were able to express their opinions, introduce amendments, and vote on the paragraphs of the provisions; this certainly was the case for Article 18 UDHR. It is precisely the consensus reached by this *plurality of voices* that makes the Universal Declaration a universal, transnational normative standard. It was my aim to give a clear and thorough overview of the drafting process in order to demonstrate that it was not merely a Western ideal or the adoption of Western values that created the Universal Declaration.

Lastly, the critique that was expressed by (cultural) relativists, who oppose the universal aspirations of the Universal Declaration, was discussed. I argued that, upon first inspection, the theory of cultural relativism seems plausible, but closer analyses of its arguments uncovered some flaws, resulting in questioning their theory. This was done within the context of the consensus approach to human rights.

In Chapter 3, a particular facet of freedom of religion or belief that is not adequately interpreted and implemented within actual state practices was addressed, *viz.*, the freedom to change religion or belief, or rather the right to *apostasy*. This assumption was analysed from three perspectives, and its implications for the universal status and content of the right were discussed.

First, a textual analysis of the legal documents was made, and I examined what a literal interpretation of the rights would yield. This led to an analysis of the legal contours of Article 18 ICCPR within the context of Article 18 Universal Declaration and the 1981 Declaration. I argued that the various textual alterations demonstrate that there is a change in phrasing from ‘change religion or belief’ to ‘have or to adopt a religion or belief of choice’ to ‘religion or whatever belief of choice’. These textual changes indicate that the 1948 formula was *not* repeated in 1966 and 1981.

I argued that the consequences of these textual changes are that there is a decline from an *explicit* recognition of the right to change religion or belief to an *implicit* recognition. However, it seems that, for the discussed UN rapporteurs, textual alteration of concepts and definitions does not mean a difference in the legal implementation. Within UN circles, it is the general view that Article 18 ICCPR and the later accepted 1981 Declaration both include the right to change religion. However, to substantiate this stance, the legal provision has to be extensively interpreted to have a broad enough scope. It is thus assumed that Article 18 ICCPR includes the right to apostasy, even though the evidence for this stance is not completely convincing.

Agreement as to the meaning of the clauses ‘to have or adopt a religion or belief of choice’ and ‘to change religion and belief’ is critical for a productive progression of the discussion in this research. Therefore, I studied the drafting history. The *travaux préparatoires* proved to be useful in clarifying the intentions and insights of the drafters of the ICCPR and in assessing the complex debates on the freedom to change religion or belief. This was the second perspective from which the freedom to change religion or belief was analysed, resulting in various conclusions.

One of the conclusions was that the drafters had a difficult time reaching consensus on the scope and various concepts in the freedom of religion or belief provision. The freedom to change religion or belief particularly was interpreted in various ways. There were numerous debates about the question whether or not this freedom should be explicitly mentioned, and about the phrasing of the provision, ranging from ‘to maintain and change religion’ to ‘to have or to adopt a religion or belief of choice’.

In these sections, the political strategies of the state representatives were also taken into consideration. The analyses demonstrated that the debates were fierce and that the Saudi Arabian delegation, under the direction of representative Baroody, continually objected to the chosen language of ‘to change religion or belief’, just like during the drafting of the Universal Declaration. Apparently seeking to make the text more palatable for his constituency, Baroody dominated the discussions with his objections. His stance triggered fierce responses from the other delegates, whose arguments varied from emotional, theological, and legal to more analytical. However, in a conciliatory spirit and willing to reach a consensus, the representatives proved willing to alter the phrasing of the text.

After the deliberations, Brazil and the Philippines suggested a new approach, and with an addendum of the United Kingdom, the ‘solution’ was in sight. Treaty consensus-seeking is unquestionably a complicated exercise, but it has come at the expense of the language of the Universal Declaration, as no references were made to ‘to change religion’. As a substitute, the phrasing of ‘to have or to adopt a religion or belief of choice’ was introduced. One may even say that Saudi Arabia regained what it had ‘lost’ in 1948. The results of the compromises therefore seem somewhat paradoxical, in that they amount to keeping control at the price of losing control.

The third analysis contained the views on this topic within academia. Several renowned authors have adopted the view that the freedom to change religion or belief is clearly anchored within the current phrasing of the provision: a view I called the *inclusive stance*. These scholars did not consider the omission of the explicit freedom to change religion or belief to be substantial. To them, it is merely a shift in verbiage, a point of view my study tried to challenge. Fortunately, in academia, there are scholars who have adopted what I called the *exclusive stance*: the freedom to change one’s religion does not naturally follow from the current wording. The alteration of the provision is not merely a matter of semantic adjustment. Especially the argument that the actual attribution of the right to change religion can now come down to the discretion of the individual state is relevant.

In line with this stance, I argued that the consequence of the various compromises was conceptual ambiguity: the text is open to various interpretations. This seems to undermine the direct legal obligation for states that was meant to be imposed with the adoption of the covenant. By altering the concepts and allowing various interpretations, it provides the opportunity for states to use a restrictive interpretation of the freedom of religion or belief, resulting in a narrow conception of the right. The scope of the provision is therefore dependent on the intention of the state, which means that the freedom of religion or belief may be applied in a variety of ways, resulting in legal inequality between the states. This does not only detract from the non-discriminatory content and the universality of the provision, but it has resulted in a weakening of its normative force. By changing the wording in the provision, different normative contours have been asserted regarding the freedom of religion or belief, with the result that the explicit right to apostasy is disregarded.

A reassertion, or reconceptualisation, of the right to apostasy as part of the general right to freedom of religion or belief would seem necessary for an establishment (or re-establishment) of the normative contours of this right: a suggestion hereto was made. Although this suggestion can be used for future normative theoretical references, it may seem unrealistic considering the

development of the freedom of religion or belief and the current political climate, which I described in the next chapter.

In Chapter 4, I focused on an issue of great contemporary concern. I addressed situations in which the universality and content (and equal application) of the freedom of religion or belief was *politically* undercut by the OIC, resulting in serious consequences for the normative force of the right. Examples of the OIC amalgamating the right to freedom of religion or belief with political strategies and policies of protecting the reputation of religions against defamation were discussed. To demonstrate these instances, various resolutions, founding documents, and reports of the UN Special Rapporteurs were analysed and discussed. These reports revealed numerous violations of the freedom of religion or belief perpetrated or condoned by member states of the OIC.

Close analyses demonstrated that, since its establishment, the OIC has issued incoherent and self-contradictory statements and documents on human rights law. There is a continuous back-and-forth movement between so-called recognition and endorsement of human rights in general and the *supremacy* of Islamic law over universal human rights. While the OIC has given the impression that international law and human rights have obtained a more prominent place on the agenda over the years, closer analysis proved the opposite. By referring to the Cairo Declaration in its Ten-Year Programme of Action and the lack of reference to UN fundamental human rights in its later 2008 charter, the OIC continues to approach human rights from an Islamic perspective.

Moreover, from 1999 to 2011, the OIC had a firm grip on the adoption of defamation of religion resolutions in the Human Rights Council and the General Assembly. In these resolutions, the OIC gave different interpretations of the right to freedom of religion or belief, *undermined* its non-discriminatory application (by explicitly focusing on Islam), and argued vehemently against its universality. It also considered the freedom of expression to be subject to limitations. With the shift in the resolutions to combatting religious intolerance in 2011, the OIC made it appear as if it had turned the tide with the adoption of this new compromise resolution. However, there are indications that this was more a strategic move than an actual reconsideration of its stance. At this moment, the OIC is still defending this stance within UN circles. Despite the fact that the resolutions are non-binding, and the OIC cannot enforce any legal actions with them, they do express the political will of the member states of the UN and are therefore of significant influence.

In the previous chapters, the importance of decriminalizing blasphemy for the universality and equal implementation of the freedom of religion or belief was discussed. In the last chapter, I examined how this discussion was conducted in the Netherlands and demonstrated how the freedom of religion or belief was realised equally in this liberal-democratic state. The focus was on the evolution and abolition of blasphemy law in the Netherlands, a country with, according to research conducted by the International Humanist and Ethical Union, one of the highest ratings in realising the freedom of religion or belief.

I argued that the Dutch blasphemy legislation led to a discriminatory application of the freedom of religion or belief, resulting in tension with the universal status of this right. I argued that, despite the fact that the Dutch state system was *de facto* committed to the freedom of religion or belief, it was *de jure* not adequately equipped to ensure a full exercise of the right. The criminalisation of blasphemy has contributed to this.

In the Dutch discussion about blasphemy, various—religious and non-religious—interests were at stake. I argued that it is essential to take these into consideration as much as possible;

however, it should be recognised that it is inevitable that some choices must be made. I advocated that the emphasis should be on a more neutral government with regard to religion, as well as on the freedoms of religion and expression, and not on protecting religions or religious feelings.

An important consideration is that it is difficult, or even impossible, to define religion in such a way that it would be clear why religious beliefs, or what they refer to, should *not* be ridiculed and other, non-religious views should or can be. Moreover, I have emphasised that blasphemy bans as such are as an encroachment on the freedom of religion or belief. Since instances of blasphemy may amount to *conflicts* between two different religions or within one religion, it is challenging to justify blasphemy bans on the basis of freedom of religion or belief, for the reason that one individual's freedom of religion can violate another individual's freedom merely because he has a religious belief that contradicts or conflicts with the other's. There is such great diversity in the representation of a deity (or deities) that there will always be a group of people who feel hurt by what others say. What is more, one individual's belief could be someone else's blasphemy. This is the capriciousness of blasphemy.

I demonstrated that the decision to abolish Article 147 Criminal Code has intensified the discussion. The request from Senator Schrijver *cum suis* to adapt Article 137c Criminal Code so that believers would be protected against 'insults perceived as serious' would again have led to an undesirable *status aparte* for religion, which would have not only jeopardised the neutrality of the state but would also have infringed on the freedom of religion or belief. Fortunately, the outcome of the report following the motion Schrijver was clear.

Additionally, repealing the ban on blasphemy does not affect the existence of other provisions in the criminal code: the *direct* discriminatory insult is punishable under Article 137c Criminal Code, and believers will be able to continue to rely on it. Hurting religious sentiment by criticising a religion, however, falls outside its scope.

This chapter did not only describe and analyse the Dutch discussion and the justification for the abolition, but it also tried to broaden it in order to ascertain how the legislative change was desirable in light of the international discussion. I argued that the Dutch 'case' can function as an exemplar. By abolishing the ban on blasphemy and recognising the freedom of religion or belief to its full extent, the Dutch government has demonstrated a strong commitment to recognising this right equally. Globally, there is still much work to do in the international promotion of the freedom of religion or belief; the Netherlands should take a strong international stance and act as an exemplar.

Within the European order, the situation is, unfortunately, less unequivocal. In several European states, blasphemy is banned, and the ECtHR has not adopted a firm position against the adoption of blasphemy laws, even though the protection of religious feelings is *not* part of the freedom of religion or belief provision.

This study demonstrated that the universality, content, and non-discriminatory implementation of the freedom of religion or belief has been questioned since its drafting process, not only on a theoretical level by postmodern views but also from a legal and political perspective throughout the years within the UN. From various angles, these actors seem to 'defame' the freedom of religion or belief—hence the title of this study—and have succeeded in changing the provision by interpreting it differently than its original 1948 objectives. These developments have

continued and will most likely continue to lead to a diminishment of the normative force of the legal provisions regarding the freedom of religion or belief.

Important in this regard is that there is an ongoing *dialogue* with all involved parties within the UN, although sometimes these sound like mere appeasement. However, as the analyses of the discussions demonstrated, the discussions are fortunately still conducted in terms of ‘freedom rights’. It is now vital that this is done with conceptual clarity and without ambiguity.