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Sincerely believing in freedom: a reconstruction and comparison of the interpretation of the freedom of religion and belief on the Canadian Supreme Court, the South African Constitutional Court and the European Court of Human Rights

Theissen, F.H.K.

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Sincerely believing in freedom

Sincerely believing in freedom

A reconstruction and comparison of the interpretation of the freedom of religion and belief on the Canadian Supreme Court, the South African Constitutional Court and the European Court of Human Rights

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Florian Hubertus Karim Theissen

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Promotoren: prof. dr. R.A Lawson
dr. H.M.Th. D ten Napel

Promotiecommissie: prof. dr. S.C. van Bijsterveld (Radboud Universiteit
Nijmegen)
prof. dr E. Brems (Universiteit Gent, België)
prof. dr. H. Duffy
prof. dr. M.L.P. Loenen
prof. dr. C. O'Reagan (University of Oxford, UK)
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*For my father Hubert Ernst Theissen, the teacher;
my wife Sandra L. Brugman, the healer; and
my daughter Kailani Nurdina Kartini Theissen, the dream come true.*

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Preface

“Religion is of dominating importance particularly in this part of the world. There are perhaps more religions here than in other regions of this globe. But, again, our countries were the birthplaces of religions. Must we be divided by the multiformity of our religious life? It is true, each religion has its own history, its own individuality, its own ‘raison d’être’, its special pride in its own beliefs, its own mission, its special truths which it desires to propagate. But unless we realize that all great religions are one in their message of tolerance and in their insistence on the observance of the principle of ‘Live and let live’, unless the followers of each religion are prepared to give the same consideration to the rights of others everywhere, unless every State does its duty to ensure that the same rights are given to the followers of all faiths – unless these things are done, religion is debased, and its true purpose perverted.”

President ir. Soekarno in his address to the Asia-Africa Conference in Bandung, 18 April 1955.

Bismillah ir-rahman ir-rahim; in the name of God, the most Gracious, the most Merciful. Uncountable of my co-religionists have begun their scripts with these words. To some today, the phrase may imply that the author is somehow claiming authority, to be uttering something which is pleasing to God. But traditionally, the phrase expresses quite the opposite. The writer begins his thoughts in a deep humility, and awareness that while they have given their best and considered all things relevant, they are constrained by their human existence in a certain context, time, and place. The Truth is only God’s prerogative. All we can ever hope to achieve is a sincere and honest strive for some truth in what we do. It is in this tradition in which I feel at home and so I that I begin this dissertation: *Bismillah ir-rahman ir-rahim*.

Having finished this dissertation truly feels like a milestone in my life. I believe in life as a journey, without destinations. But from time to time, by the Grace of God we reach a milestone, some intended, some necessary, some because they are part of our path. I might say that the path I began to walk towards this milestone started in 2007. That year, I started working on the texts, which have somehow evolved into this dissertation. I also started working as a consultant for my day job, meaning that I had to use scarce free time to work on my research. In the meantime, I have done many interesting cooperative governance projects, been co-founder of a consultancy firm, and

found out that I am a generalist with a law degree, instead of a jurist in a narrow sense.

After having erred in my first choice of topic and tutelage for my dissertation, the choice of the freedom of religion and belief and a combination of positive law and legal theory represents the continuation of a path that I started walking much earlier in life. I have been a believer, since I can remember, making the discovery between the age of 14 and 16, that my faith was different from the one I was brought up in. And ever since I have developed a political and historical perspective, I have also been a sincere believer in human rights. No words, could more eloquently explain what I mean by this, than these lines from Bruce Springsteen's 'Ballad of Tom Joad':

"Mom, wherever there's a cop beating a guy,
Wherever a hungry newborn baby cries,
Where there's a fight against the blood and hatred in the air,
Look for me Mom I'll be there,
Wherever there's somebody fighting for a place to stand,
Or decent job or a helping hand,
Wherever somebody's struggling to be free,
Look in their eyes Mom, you'll see me."

In today's world, as in previous eras, there are religious believers who reject human rights, as there are believers in human rights who reject religion. To some religious believers, human rights represent a surrogate secular religion, which is replacing religion as a source of societal values. To some believers in human rights, religion represents a value system, which is undermining that of human rights. But historically, there have always been those who felt at home in both their own religious beliefs and the notion that all human beings were given unalienable rights by their Creator.¹ To them, religious values were the very reason they supported human rights, as expressed in the quote above by President Soekarno at the Bandung Conference.

Personally, people belonging to this tradition, triggered my interest in human rights. They made me want to study law. I remember very well, how after I had moved to India as a child, my attention was always caught by the portraits of the bespectacled man, dressed in a simple *dothi*, displayed not only in official buildings but many offices, hotels, shops etc. Gandhiji's struggle for Indian independence became my gateway into a political outlook. I learned of the beginnings of his struggle in South Africa, where at the time the struggle against *apartheid* was in full swing. I learned about the inspiration the *Mahatma* had been for Dr. King in leading the American Civil Rights Movement. Later, when we moved from India to Indonesia, I learned about the Indonesian

1 See *The unanimous Declaration of the thirteen United States of America*, July 4, 1776.

struggle for independence and how the Indian and Indonesian national movements had influenced each other.

In each of these movements, people with a religious outlook on life, justice and humanity played a leading role. I have been committed to their thoughts, theories and aims which inspired the path I took in 2007 to do this research project. The Bandung Conference, mentioned before, symbolized the hope for a future free of colonialism, imperialism, racism, suppression, and exploitation. Most certainly, it has been an uphill struggle from there, but I continue to believe in Dr. King's words that "the arch of the moral universe is long, but it bends towards justice". In his words to the Bandung delegates the president of the Indonesian Republic urged for the "Golden Rule" which is required by all faiths and is the prerequisite for their shared true purpose. This thought is synonymous with Indonesia's state motto "*bhinneka tunggal ika*", unity in diversity.

Unity in diversity may be taken to be a normative appeal. And for a long time, I took it to mean just that. But having traveled my path with this dissertation and everything else taking place in my life since then, I have come to realize that it means much more, than just that. If we read closely in the above quote, we see that the president tells us, that diversity is the expression of true unity. Unity, pure and true, can only exist in diversity. Because the Creation in which we live is diverse, human beings, animals, vegetation, the natural order is diverse. Therein lies the unity, the oneness of everything. Wherever human beings have created homogeneity, based on false conceptions of unity, or by simply being ignorant of the existing diversity, bad things have happened. Not only in the form of abuse of human rights, but the (near) annihilation of species and the (near) destruction of our planet. I sincerely believe, that cherishing and protecting diversity is required by the long arch of the moral universe. And I sincerely believe, that to protect the diversity of religion, belief, thought and opinion, we must rely on the freedom of religion and belief. This was my motivation for this dissertation.

What I am trying to say is that the path towards this academic milestone has been deeply personal. And of course, it has been intertwined with many personal stations of my private and professional life. I've seen breathtakingly beautiful mountaintops and deep, dark, and foggy valleys along the way. Sometimes, experiences were related to my stations in the dissertation, sometimes they had a direct influence on the pace of my dissertation path. Through one of the cases I became reconnected to an old friend: reggae music and its spiritual messages, which provide so much comfort. My trips down memory lane also reintroduced me to another soulmate, *qawwali* music of the sub-continent, which in turn allowed me to become acquainted with *Sufi* writings and to experience the healing impact of the words of the great Maulana Jalaluddin Rumi. More generally, my exploration of Sufism has influenced my dissertation and *vice-versa*. This has merged with the rebellious spirit, best symbolized by some of my rock'n'roll heroes and favorite anthems. It may

only be rock'n'roll, but I like it. Indeed, many of the believers in the selected cases show a spiritual rebelliousness, following their conscience instead of institutions, mainstream society or even their own faith-based community. They have inspired me in my personal life as well.

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