Freedom of thought, conscience, and religion supporting peaceful plural living together

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Religious Freedom in Global Context

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This article examines the concept of universalism as it relates to the right to freedom of thought, conscience and religion (FoRB). To this end it explores the extent to which the refinement of the jurisprudence surrounding FoRB in Western Liberal democracies may threaten the conceptualisation of religious freedom as a universal right, when compared to the understanding of the concept outside Western contexts. Having identified a gap between Western and other contexts, it questions whether FoRB can still be considered, aspirationally at least, as a universal fundamental right. It considers whether the more recent international religious freedom accords stemming from the Muslim world provide the tools to bolster a core understanding of FoRB such that its claim to universalism might be supported on an ongoing basis.

Introduction

The right to freedom of thought, conscience and religion (FoRB or religious freedom) in its modern form was written into international human rights documents after the horrors of World War II, to provide a mechanism to protect individual's right to adhere to a religion or system of conscience of their choice and to manifest (practice) that belief. It was included within an indivisible spectrum of first generation civil and political rights aimed at facilitating a plural liberal democracy in the face of totalitarian ideals that had resulted in so much destruction.

As a legal concept FoRB is far from a modern phenomena. According to Witte, since the fourth century, various attempts had been made to create societies where there was at least some form of protection for religious minorities (Witte 2007)[1]. Since the 1990s, however, there has been

1. Witte traces this right back to the Edict of Milan in 313. Although Bielefeldt et al. (2016) argue that while religious tolerance has been present in constitutional structures and public living together for some time, religious

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a rapid expansion of jurisprudence in this field within Western liberal democratic legal traditions[2]. The more modern desire to litigate religious freedom as a fundamental right has created a rich seam of jurisprudence with which to understand the operation of the right in a Western Liberal Democratic context. Issues arising in this jurisprudence, when compared to public debate and issues arising in relation to religion and religious freedom elsewhere in the world, highlight that there has been a pulling away from what might be regarded as a core understanding or agreement underpinning the concept of religious freedom. This core understanding, if it ever existed, was likely to have been established when Article 18 of the International Covenant on Civil and Political Rights (ICCPR) on FoRB was first promulgated.[3]

freedom as a concept supporting public plural living together has only been recognised more recently

2. This is perhaps symptomatic on the one hand of a general increase in rights claims resulting from the incorporation of rights frameworks within national constitutional structures (for example the United Kingdom's Human Rights Act 1998) and strengthening of rights frameworks within regional structures (for example the signing of Protocol 11 to the European Convention on Human Rights which made the right of individual petition compulsory. This entered into force on the 1 November 1998). In addition, the incorporation of the Charter of Fundamental Rights of the European Union within the EU constitutional structure, proclaimed by the European Union institutions on the 7 December 2000. Statistics from the European Court of Human Rights indicate that only 4% of rulings finding a violation of the Convention between 1959 and 2017 were given in the period between 1959 and 1998. The remaining 96% were given after that date. Articles 2, 3, 5, 6, 8, 13 and Protocol 1-1 made up the bulk of the violations during the entire period (93.36%) with the court finding violations of article 9 in 71 cases (.3% of all violations between 1958 and 2017) (European Court of Human Rights 2017). While statistics indicate article 9 has not give rise to the highest number of findings of a violation, it has nevertheless followed the pattern of seeing an exponential increase in claims in recent years:

   On the other hand, it may also, in so far as religious freedom claims are concerned, reflect first, the increasingly diverse multi-cultural nature of Western societies resulting from the shifts in population arising due to the influx of refugees and asylum seekers, as well as the flow of economic migrants. Second, it may reflect the pull of Western societies away from traditional Judeo-Christian values as a rationale for informing law creation and public living together, such that religious groups and individuals are experiencing increased hostility and/or restrictions on their ability to manifest their religious beliefs. This necessitates recourse to legal mechanisms to protect the enjoyment of those beliefs

3. For a discussion on the formulation of the right in international law see Bielefeldt et al 2016.

Events within and beyond Western liberal democratic traditions playing out on the wider field of geopolitics have more recently necessitated a fresh look at this right and concepts interlinking with it, in particular equality rights and the concepts of universalism and indivisibility of rights regimes.[4] The need for the re-examination of FoRB as a universal right is particularly evident when considered in the light of the need for effective implementation of FoRB in constitutional structures where religious freedom and equality rights do not always sit easily together with understandings of public living together based on forms of exclusive faith-based principles[5]: For example, in majority Muslim states, which might adopt forms of theocracy or a system of Islamic sharia requiring an approach to rights frameworks which struggles to intersect with plural understandings of communal living together and the common good. This challenge to a universal understanding of FoRB also exists within Western traditions, in particular within strongly secular regimes implementing policies of neutrality that exclude religious expression from public life. Some secular democracies seek to restrict religious freedom in the interests of other rights, such as the freedom to run a business,[6] or in the interests of equality, in particular in relation to same-sex rights.[7]

4. Examples of these events are set out, for example, in the Marrakech Declaration 2016, an international declaration calling on civil society leaders and governments to act to protect religious minorities and counter violence and hate speech: "WHEREAS, conditions in various parts of the Muslim World have deteriorated dangerously due to the use of violence and armed struggle as a tool for settling conflicts and imposing one's point of view; Whereas, this situation has also weakened the authority of legitimate governments and enabled criminal groups to issue edicts attributed to Islam, but which, in fact alarmingly distort its fundamental principles and goals in ways that have seriously harmed the population as a whole." This was followed by a call for "Faith for Rights" in The Beirut Declaration seeking to enable faith leaders and groups globally, but in particular in Muslim nations, to gain fresh insight and impetus for the implementation of rights
5. This is discussed in more depth in the writings of authors such as Stopler 2003; Lerner 2011; Bali and Lerner 2017; Qureshi 2018; Bakhshizadeh 2018.
6. *Achbita and Another v G4S Secure Solutions NV* Case C-157/15: Court of Justice of the European Union (Grand Chamber): 2017 OJLR 6(3) 622. Note: given the extent of case notes (reports) referred to throughout this article, where the case note is reported in the Oxford Journal of Law and Religion the abbreviation "OJLR" is used for that journal, for other references in that journal the official citation Ox J Law and Religion is used.
7. For example: *Preddy v Bull (Liberty intervening), Hall v Same (Same intervening)* [2013] UKSC 73: Supreme Court of the United Kingdom: (2014) OJLR 3(2)

In addition, the interests of national security can be used as a rationale to both deny religious freedom or to protect it.[8] There thus appears to be the potential for a polarisation of understandings of public living together potentially driving out or hindering the capacity for plural society in some parts of the world, both in Western and non-Western contexts. This pressure from both sides necessitates a fresh look at notions of universalism and indivisibility of FoRB.

In the light of these developments, this article takes a doctrinal and comparative approach (Watkins and Burton (2018)) in order to review recent religious freedom jurisprudence and law. This review will involve considering how far issues that arise reflect a distinctly Western approach to religious freedom, symptomatic of a widening gap in a global understanding of the concept. This enables an assessment of the extent of the jurisprudential gap and the problems that it might pose for the conceptualisation of religious freedom as a universal right.

The comparative approach here involves considering jurisprudence at multiple levels including the international, regional and national. A detailed exploration of the rationale underlying the comparative approach is beyond the scope of this article, but the decision to analyse FoRB as a universal concept using a comparative approach has taken note Valcke's theory (Valcke (2018)). This theory advocates comparing like with like when addressing comparative legal issues. For the purposes of the issues discussed in this article the very nature of the debate around universalism necessitates a comparison across levels of law, rather than restricting the comparison to national or international jurisprudence. This is because the nature of the task in hands involves establishing whether or not there can be said to be a future for FoRB as a universal right. If the right is universal, it will tolerate a core self-definition across levels of law – at national, regional and international level.

After examining the law and jurisprudence, the article then goes on to consider whether the recent religious freedom accords coming from the Muslim world might provide hope and a mechanism to at least prevent that gap growing any wider.

Legal protection of FoRB

A range of legal and policy instruments are used to support FoRB at an international, regional and national level (Bielefeldt *et al* 2016; Ahdar

362 and *Elane Photography, LLC v Willock* (Docket No 30,203): Court of Appeals of the State of New Mexico: (2012) OJLR 1(2) 538

8. For an example of religious freedom in national security strategy see: US Government Helsinki Commission Report 2018

and Leigh 2005). Enforcement takes a variety of forms from a soft law approach engaging states on a diplomatic level, to incorporation of religious freedom into national constitutional law as an entrenched human right which individuals can rely on to support claims in national courts. These mechanisms have enjoyed varying levels of success (Robbers n.d.)

Within nation states FoRB protection sits across a spectrum of enforceability. Protection can take the form of entrenched law (rights can be written into a formal constitution) or written into an ordinary statute or, for monist states, will be effective as a result of ratification of an international treaty. Generally, the right will be vertically enforceable enabling the individual to bring a claim against the state in a national court for infringement of their right to religious freedom.[9] In some states, the right will have horizontal application so that an individual[10] can bring a claim against another individual for infringement of their right.[11] In other states the right may be more aspirational than real. In these cases, either it will be written into the law of the land but it will not be applied and enforced, or it will be absent as a core right from the national constitutional structure.

Regional mechanisms for the protection of fundamental rights incorporating FoRB exist across the globe, although enforcement mechanisms vary. These include frameworks within the Council of Europe (CoE),[12] the European Union (EU)[13]; the Organization of Co-operation and Security in Europe (OCSE); the Organisation of American states and the Inter-American Human Rights System[14]; the African Human Rights System created under the auspices of the African Union[15]; the ASEAN

9. This is based on the rationale that rights are a legal tool to protect human dignity and act as a buffer between the individual and oppression by the state
10. The individual here includes a corporate entity as well as a private individual ctizen
11. In England and Wales, for example, the Human Rights Act 1998 places a duty on the Court pursuant to section 6, to ensure litigants' human rights are upheld. This has enabled the Court to permit human rights claims to piggy back onto any claim brought before it, even where that claim is between private parties
12. The CoE adopted the European Convention on Human Rights in 1950 incorporating FoRB in article 9
13. The European Union adopted the Charter of Fundamental Rights of the European Union which was ratified in 2000, incorporating FoRB in article 10
14. The American Convention on Human Rights adopted 1969, incorporating freedom of conscience and religion in article 12
15. The African Charter on Human and Peoples' Rights (the Banjul Charter) adopted in 1981 by the Organisation of African Unity, incorporating FoRB in article 8

Intergovernmental Commission on Human Rights[16] and; the Organization of Islamic Co-operation (OIC)[17] which established the Independent Permanent Human Rights Commission (Bielefeldt *et al*. 2016, 48–51).

At an international level 91% of states have signed up to the International Covenant on Civil and Political rights with only three reservations indicating its acceptance as a universal human right (Bielefeldt *et al* 2016). With regional and national legal systems in some parts of the world incorporating FoRB in a manner that reflects the protection set out in international law, there has been considerable success, certainly in some parts of the world, in avoiding a recurrence of the horrific abuses of religious freedom rights occurring during WWII. On the other hand, for some states adherence to international agreements has been and still is a matter of form rather than substance.[18]

Despite this lack of full global engagement with FoRB at a national or even regional level, what can potentially still be said is that it continues to be accepted as an aspirational universal right. While this is legally quite distinct from its implementation as a core constitutional right, what appears to be acknowledged by many nation states and international organisations is that FoRB, nevertheless, has a purpose. It currently acts as a tool for facilitating dialogue and creating soft legal instruments leading towards improving the situation of minorities, refugees and asylum seekers, and for assisting countries towards greater understanding of plural living together. It is used as a tool in foreign policy and international development and is supported by soft law instruments: United Nations Human Rights Office of the High Commissioner 2016. It engages religious leaders and religious groups as well as national and international governance structures, NGOs and corporations to foster its development.[19]

16. The ASEAN Charter was adopted in 2007. For an exploration of the different values underlying Asian approaches to rights see Inoguchi and Newman (1997) Khong (1997) Sen (1997)

17. The Charter of the OIC incorporates at Article 1.12 the objective "to protect and defend the true image of Islam to combat defamation of Islam and encourage dialogue among civilisations and religions."

18. The US Department of State's Annual Report on International Religious Freedom documents the extent to which religious freedom is infringed, despite states' ratifications of international treaties and incorporation of a form of FoRB into national law: see Bureau of Democracy, Human Rights and Labor 2017.

19. For a comprehensive overview of human rights instruments and their operation see Bielefeldt *et al*. (2016).

Given its ongoing aspirational nature and use as a foreign policy and international development tool, an examination of the substance of FoRB, that is what we mean when we identify the need to create a right to freedom of religion and belief in a given legal context, is of importance. A universal aspirational right would need core content even if it might be contextualised within various constitutional structures.

The next section will explore FoRB as a legal right within a Western liberal democratic contexts, followed by a consideration of non-Western contexts. This will establish the extent of any gap. This will then provide the context to examine whether the religious freedom accords coming out of the Muslim world contain the tools for addressing this gap and so hold together an understanding of FoRB as a universal aspirational right, despite the divergence in substantive understanding of the concept.

FoRB jurisprudence in Western liberal democratic contexts

Ahdar and Leigh 2005, Doe 2011, Sandberg 2012, D'Costa et al 2013, Durham and Scharffs 2018, Robbers n.d.,[20] in their examination of religious freedom provide an outline of the right to religious freedom in Western liberal democratic contexts, identifying it as including: the right to hold (or not hold) a religious belief, and the right to manifest that belief and change that belief. It includes the right of the state to limit the manifestation of belief in specific limited circumstances prescribed by law and necessary in a democratic society and only to the extent that any given manifestation interferes with the enjoyment by others of their fundamental rights. In practice this can often involve a balancing of interests and some argue restrictions on the right ought to involve an accommodation of religious beliefs in so far as is practicable. The right includes that of public worship and the expression of religious (and conscience based) opinions. It encompasses individual and collective rights to practice religion. States are prohibited from penalising apostacy and from obstructing free religious affiliation. No individual can be compelled to adopt a religion or belief, or to declare a religion or belief, nor can they be compelled to take part in practices which involve them acting against their conscience or religious beliefs. In many states the right incorporates the freedom to proselytize. Religion and belief are defined to incorporate a wide range of beliefs, but these must attain a certain level of cogency, seriousness, cohesion and importance to enjoy the protection of article 9. The right to believe is absolute, the right to manifest belief can be lim-

20. See also the European Court of Human Rights Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion: European Court of Human Rights 2018.

ited by the state in accordance with law in circumstances where there are grounds for doing so including to protect public safety, order, health, or morals or the fundamental rights and freedom of others. Any restriction must be proportionate to the aim it seeks to achieve.

The free exercise of religious belief comes up against the exercise of the rights of others in various contexts and most notably for the current discussion in the context of employment and within the framework of the European Union. While there is established jurisprudence under the European Convention on Human Rights that a state can restrict the wearing of religious symbols in public and in public employment, the European Court of Human Rights has held that an employee is entitled to wear their religious symbol to work: *Eweida, Chaplin, Ladele and McFarlane v United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10, 36516/10: European Court of Human Rights [Fourth Section]: [2013] *Ox J Law Religion* 2(1): 218 and Garahan (2016).

When this issue came up under the auspices of the Charter of Fundamental Rights of the European Union within the EU framework, however, the balance between the right to run a business[21] and the right to FoRB did not result in a balancing in favour of FoRB: see *Achbita and Another v G4S Secure Solutions NV* Case C-157/15: Court of Justice of the European Union (Grand Chamber): Ox J Law Religion 2017 6(3): 622; also, Weiler 2017 and Giles 2018a. This is important in the context of the current discussion since it is symptomatic of the move in certain European societies to drive religion out of public life altogether whether this is in public or employment contexts. It is argued below that this exclusive ideology can be as damaging as hegemonic theology which similarly seeks to impose a single ideology on society to the exclusion of attempts at peaceful plural living together.

Within and going beyond the borders of Europe, FoRB in a Western context, operates as part of a complex web, interconnecting with many other areas of law. A glance through case lists in the texts of authors referred to above reflects a highly developed Western jurisprudence around FoRB. More recently the Western liberal democratic tradition has seen the right to manifest religious freedom intersect with multiple fields including advertising[22],

21. A right which only exists within the EU fundamental rights framework and is not considered on a par with fundamental civil and political rights in other legal frameworks, international and regional, except in so far as FoRB might be balanced against the right to property.

22. *R (Core Issues Trust Ltd) v Transport for London* [2014] EWHC 2628 (Admin): (2015) OJLR 4(1) 163–164.

arbitration[23], broadcasting[24], charity[25], children (including litigation concerning the rights of parents to share their religion with their child and care proceedings in respect of children at risk of being taken to Syria to join Isis),[26] civil and political rights (including the right to a fair trial, the application of religious intestacy law and religious attire for passport photographs),[27] company law,[28] conflict of laws on adoption,[29] constitutional law and rights[30],

23. *Hashwani v Jivraj: London Court of International Arbitration and others intervening* [2011] UKSC 40: (2012) OJLR 1(1) 298–299.
24. *R (on the application of London Christian Radio Ltd) v Radio Advertising Clearance Centre* [2013] EWCA Civ 1495: (2014) OJLR 3(2) 368.
25. Power to appoint trustees of religious charity: *Shergill and others v Khaira and others* [2014] UKSC 33: (2014) OJLR3(3) 525.
26. For example, *S L v Commission scolaire des Chênes*: 2012 SCC 7; 2013 OJLR 2(1): 233; *(Care proceedings where mother taking children to join Islamic state) Leicester City Council v T* [2016] EWFC 20: 2016 OJLR 5(3) 621; *(Care proceedings, FGM) B and G (Children) (No 2)* [2015] EWFC 3: Family Court (England and Wales) 2016 OJLR 5(3) 622.
27. Whether French Sikh citizen required to remove turban for passport photograph *Mann Singh v France* (Communication No 128/2010): United Nations Human Rights Committee: (2014) OJLR 3(1) 178; *R v NS* 012 SCC 72, [2012] 3 SCR 726): (2014) OJLR 3(1) 175.
28. Whether the nightclub name "Club Vatican" was contrary to good morals The Catholic Church in Finland v Restindil & Co Oy *Case no S 13/1432: Helsinki Court of Appeal:* (2015) OJLR 4(1) 161–163.
29. Whether adoption or Kafalah in the best interests of the child *In the case of X (No 9-10439)*: Cour de Cassation (Court of Cassation, France), (2012) OJLR 1(1) 302.
30. For example: *Loyola High School v Quebec (Attorney General)* 2015 SCC 12: Supreme Court of Canada: (2015) OJLR 4(2) 319-320; *Mouvement laïque québécois v Saguenay (City)* 2015 SCC 16: Supreme Court of Canada: (2015) OJLR 4(3) 536; *Stormans Inc and others v Wiesman and others* (Docket nos 12–35221, 12–35223): United States Court of Appeals for the Ninth Circuit OJLR 2016 5(3) 630; *Obergefell v Hodges* (Docket no 14-556): Supreme Court of the United States: (2015) OJLR 4(3) 537; *Constitutional complaint by C* Case no 2 BvR 661/12: German Federal Constitutional Court (Second Chamber): (2015) OJLR 4(3) 538.

criminal law;[31] damages,[32] discrimination,[33] education,[34]employment,[35] EU law,[36] freedom from religious intolerance and discrimination,[37] freedom from inhuman and degrading treatment,[38] freedom of assembly and association,[39]

31. Including: *Regina v John-Lewis (Caleb Charles)* [2013] EWCA Crim 2085: *(2014) OJLR 3(2) 355*; *Corte di Cassazione – _Sez. I Penale 51059/2013* Court of Cassation – Criminal section, Italy: (2014) OJLR 3(2) 354; *Tribunale, Prima Sezione Civile, Como Decision no 34/2016: No 34/2016*: First Instance Tribunal, Civil Division, Como, Italy: OJLR 2018 7(1) 174.
32. *Sossamon v Texas* (Docket No 08-1438): Supreme Court of the United States: (2012) OJLR 1(1) 299
33. For example: *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* (Case C-81/12): Court of Justice of the European Union (Third Chamber): (2013) OJLR 2(2) 478; *J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4: High Court of Justice (Family Division): OJLR 2017 6(2) 415; *Jason Camp on behalf of Charlotte Camp v Director General, Department of Education* [2017] WASAT 79: State Administrative Tribunal of Western Australia: OJLR 2018 7(1) 162.
34. *R (Fox and ors) v Secretary of State for Education* [2015] EWHC 3404 (Admin): (2016) OJLR 5(2) 369; *The Academy Trust for Hasmonean High School* (2016) OJLR 5(1) 179; *Williams v Commonwealth of Australia* [2012] HCA 23: High Court of Australia: (2012) OJLR 1(2) 535; *Lautsi v Italy* (Application no 30814/06): European Court of Human Rights (Grand Chamber): (2012) OJLR 1(1) 289.
35. Including *Tribunal Superior de Justicia de Murcia, Sala de lo Social, Sección 1, Sentencia* (rec 564/2015) 2016 OJLR 5(3) 637; *Bougnaoui and Another v Micropole SA* Case C-188/15 Court of Justice of the European Union (Grand Chamber): OJLR 2017 6(3) 620; *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (Docket no 10-553): Supreme Court of the United States: (2012) OJLR 1(2) 526.
36. *Mesopotamia Broadcast A/S METV v Bundesrepublik Deutschland; Roj TV A/S v Bundesrepublik Deutschland* (Joined Cases C-244/10 and C-245/10): Court of Justice of the European Union (Third Chamber): (2012) OJLR 1(1) 293; *EKA v Italian Ministry of International Affairs* (No 4868): Corte Suprema di Cassazione (Supreme Court of Cassation, Italy) Sezione Unite Civile: (2012) OJLR 1(1) 301; *Brüstle v Greenpeace eV* (Case C-34/10): Court of Justice of the European Union (Grand Chamber): (2012) OJLR 1(2) 528.
37. *Izzettin Doğan and others v Turkey* Application no 62649/10: European Court of Human Rights (Grand Chamber): (2016) OJLR 5(3) 618.
38. *FG v Sweden* Application no 43611/11: European Court of Human Rights, Grand Chamber: (2016) OJLR 5(3) 619.
39. *City of London v Samede and others* [2012] EWCA Civ 160: (2012) OJLR 1(2) 533; *Sindicatul 'Păstorul cel Bun' v Romania* (Application No 2330/09):

freedom of expression,[40]respect for private life,[41] the right to private and family life and marriage,[42] the right of parents to freedom of religion or belief,[43] the right to judicial protection against acts of public administration,[44]

ECtHR (Grand Chamber): (2014) OJLR 3(1) 182.

40. *Snyder v Phelps* (Docket No 09-751): Supreme Court of the United States: (2012) OJLR 1(1) 294; *In re Kirk Session of Sandown Free Presbyterian Church* [2011] NIQB: 26 High Court in Northern Ireland: (2012) OJLR 1(1) 295; *Mouvement raëlien suisse v Switzerland* (Application no 16354/06): European Court of Human Rights (Grand Chamber): (2013) OJLR 2(1) 224; *Gough v United Kingdom* Application no 49327/11: European Court of Human Rights (Fourth Section): (2015) OJLR 4(2) 326; *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34: (2014) OJLR 3(2) 366.
41. *Application by the Northern Ireland Human Rights Commission for Judicial Review (Compatibilty of the Adoption (Northern Ireland) Order 1987 with the European Convention for the Protection of Human Rights and Fundamental Freedoms)* [2012] NIQB 77: High Court of Justice (Northern Ireland), (2013) OJLR 2(2) 473; *Association Diocésaine de Coutances* (No RG/1103427): Cour d'appel de Caen (Court of Appeal of Caen), France, (2014) OJLR 3(1) 186; *Gross v Switzerland* Application no 67810/10: European Court of Human Rights (Grand Chamber)*:* (2015) OJLR 4(1) 152–153; *Fernández Martínez v Spain* Application no 56030/07: European Court of Human Rights, Grand Chamber: (2014) OJLR 3(3) 522.
42. *Vallianatos and others v Greece* (Application nos 29381/09, 32684/09): European Court of Human Rights (Grand Chamber): (2014) OJLR 3(1) 183; *Costa and Pavan v Italy* (Application no 54270/10): European Court of Human Rights (Second section): (2013) OJLR 2(1) 237; *Gas and Dubois v France* (Application no 25951/07): European Court of Human Rights (Former Fifth Section): (2013) OJLR 2(1) 235; *Hämäläinen v Finland* Application no 37359/09: European Court of Human Rights, Grand Chamber: (2015) OJLR 4(1) 149–150; *Parrillo v Italy* Application no 46470/11: European Court of Human Rights (Grand Chamber): (2016) OJLR 5(1) 171; *Oliari and Others v Italy* Application nos 18766/11 and 36030/11: European Court of Human Rights (Fourth Section): (2016) OJLR 5(1) 176; *Charles Gard and Others v the United Kingdom* Application No 39793/17: European Court of Human Rights (First Section): OJLR 2017 6(2) 619.
43. Amtsgericht Köln (County Court of Cologne) Judgment no 528 Ds 30/11 and Landgericht Köln (District Court of Cologne) Judgment no 151 Ns 169/11 (Docket no 528 Ds 30/11): Amtsgericht Cologne: 21 September 2011. (Docket no 151 Ns 169/11): Landgericht Cologne judgment dismissing the prosecution appeal against the judgment of the Amtsgericht Cologne of 21 September 2011: (2013) OJLR 2(1) 217.
44. *Consiglio di Stato 6083/2011 Council of State, Italy*: (2013) OJLR 2(1) 226.

the right to peaceful enjoyment of possessions,[45] immigration[46], judicial review,[47] local government law[48], mental health,[49] ministers of religion[50], practice,[51] intellectual property,[52]personal rights of the citizen,[53] places of religious worship,[54] prisoners' rights,[55] professional qualifications,[56] religious symbols,[57]

45. *Affaire Sociedad Anónimis del Ucieza c Espagne* Application no 38963/08: European Court of Human Rights (Third Section): (2016) OJLR 5(1) 180.
46. *AAN (Afghanistan) v Secretary of State for the Home Department* Appeal No: DA/01324/2013: Upper Tribunal (Immigration and Asylum Chamber): (2014) OJLR 3(2) 365; *Lagmannsrett LB-2011-86996* [2102] LB-2011-86996: Court of Appeal (Oslo, Norway): (2013) OJLR 2(1) 227; *RT (Zimbabwe) v Secretary for State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2012] UKSC 38: (2013) OJLR 2(1) 228.
47. *Raymond B v Monseigneur C évêque de Metz* (No 352742): Conseil d'Etat (Council of State, France) (2013) OJLR 2(1) 229; *R (on the application of The Association of Independent Meat Suppliers) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 1961 (Administrative Court): OJLR 2018 7(1) 179; *R (on the application of Mr and Mrs M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611: 2016 OJLR 5(3) 634.
48. *Town of Greece, New York v Galloway et al* Docket no 12-696: Supreme Court of the United States: (2014) OJLR 3(3) 524.
49. *A County Council v MS and another* [2014] COP Case no 11413486: Court of Protection (England and Wales): (2014) OJLR 3(3) 528.
50. *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29: (2013) OJLR 2(2) 474.
51. *Arizona Christian School Tuition Organization v Winn* (Docket No 09-987): Supreme Court of the United States: (2012) OJLR 1(2) 300.
52. *Eli Lilly & Co v Human Genome Sciences Inc* [2011] UKSC 51: (2012) OJLR 1(2) 529.
53. *Lambert and Others v France* Application no 46043/14: European Court of Human Rights (Grand Chamber): (2016) OJLR 5(1) 174.
54. *Tribunale Amministrativo Regionale, Emilia Romagna* Decision no 166/2016: No 166/2016: Regional Administrative Tribunal of Emilia Romagna, Italy: OJLR 2018 7(1) 16.
55. *R (Bashir) v Independent Adjudicator* [2011] EWHC 1108: (2012) OJLR 1(2) 539; *Holt v Hobbs* Docket no 13-6827: Supreme Court of the United States: (2015) OJLR 4(2) 331.
56. *The Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36: New Zealand Human Rights Review Tribunal: (2014) OJLR 3(1) 173.
57. *Case no A.209.352/IX-8049Judgment no 228.751, Case no A.209.352/IX-8049*

revenue,[58] the right to health,[59] secularism,[60] separation of church and state,[61] state constitutional rights,[62] supply of services,[63] vicarious liability,[64] and voluntary associations.[65] Freedom of religion or belief has also been litigated in its own right at a national and regional level[66] as

Raad van State, Afdeling Bestuursrechtspraak IXe Kamer (Council of State of Belgium, Administrative Law Division, 9th Chamber): 2016 OJLR 5(3) 625; *Case no A.209.364/IX-8089Judgment no 228.752, Case no A.209.364/IX-8089* Raad van State, Afdeling Bestuursrechtspraak IXe Kamer (Council of State of Belgium, Administrative Law Division, 9th Chamber): 2016 OJLR 5(3) 624.

58. *Exmoor Coast Boat Cruises Ltd v HM Revenue and Customs Commissioners* [2014] UKFTT 1103 (TC): (2015) 4(2): 332–333.

59. *Consiglio di Stato 4460/2014* Sentenza no 4460: Council of State, Italy: (2015) OJLR 4(1) 153–155

60. *Dr Subrahmanian Swamy, A-77 v State of Kerala, India & Ors* Appeal of WP(C) no 35180 of 2009(S) & 10662/2010: High Court of Kerala: (2014) OJLR 3(3) 519.

61. *OEuvre d'Assistance aux Bêtes d'Abattoirs* (No 361441): Conseil d'Etat (Council of State), France (3rd and 8th subsections joined): (2014) OJLR 3(1) 179.

62. *Morris and others v Brandenberg* (No D-202-CV 2012-02909): State of New Mexico, County of Bernalillo, Second Judicial District Court: (2014) OJLR 3(2) 360.

63. *Elane Photography, LLC v Willock* (Docket No 30,203): Court of Appeals of the State of New Mexico: (2012) OJLR 1(2) 538.

64. *Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56: (2013) OJLR 2(1) 231; *Tribunale di Lecce: Ordinanza 08/10/2012* Court of Lecce, Sezione I Penale, Italy (2013) OJLR 2(2) 475.

65. *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (726/13) [2014] ZASCA 151: The Supreme Court of Appeal of South Africa: (2015) OJLR 4(2) 320–322.

66. Including: *Zubik and others v Burwell and others* (Docket nos 14-1418 and others): Supreme Court of the United States: OJLR 2016 5(3) 629; *Dimitrova v Bulgaria* Application no 15452/07: European Court of Human Rights (Fourth Section); (2015) OJLR 4(3) 542; *BVerfG 471/10 and 1181/10* Cases 471/10 and 1181/10: Bundesverfassungsgericht (German Federal Constitutional Court): (2016) OJLR 5(2) 368; *Eweida, Chaplin, Ladele and McFarlane v United Kingdom* (Application nos 48420/10, 59842/10, 51671/10, 36516/10): European Court of Human Rights (Fourth Section): (2013) OJLR 2(1) 218; *Decision No 140/PUU-VII/2009* Constitutional Court, Republic of Indonesia: (2012) OJLR 1(2) 527; *Doogan and another v Greater Glasgow and Clyde Health Board* [2014] UKSC 68; (2015) 4(2): 328-329; *Church of Scientology of St Petersburg & Others v Russia* Application no 47191/06: European Court of Human Rights (First Section); Application no 47191/06: European Court of

well as within the international rights framework: Robbers n.d.; Bielefeldt *et al* 2016; Durham and Scharffs 2018.[67] Although statistically by comparison with other rights Article 9 of the European Convention on Human Rights is not one of the most litigated of Western rights incorporated within the the European Convention on Human Rights (European Court of Human Rights 2018) it does have a sufficient body of case law at national, regional and international level to provide what could arguably be described as a highly refined Western liberal democratic concept of FoRB. When European jurisprudence is considered together with the jurisprudence of the USA, Canada, Australia, New Zealand and Indonesia (Robbers n.d.), this establishes a strong body of principles to undergird the substantive core of the right and what might be described as a base line of protection of FoRB which sits for the most part amidst an expectation of plural living together.

FoRB outside the Western context

The United States Department of State in its annual report on religious freedom draws data gathered from its embassies across the globe to provide information on the constitutional frameworks within which religious freedom is (or is not) protected. It also identifies the extent to which countries are or are not protecting religious freedom within their borders. Countries designated as of particular concern (CPCs) currently include: Saudi Arabia, Sudan, Tajikistan, Turkmenistan and Uzbekistan (Bureau of Democracy, Human Rights, and Labor. n.d.).

In its most recent annual International Religious Freedom Report (Bureau of Democracy, Human Rights and Labor 2017)[68] the State Department documented that despite constitutional provisions allowing those within a state to practice a religion other than the state religion, in practice religious freedom was severely restricted and, in a number of countries, apostacy (from Islam) carried the death penalty (Bureau of Democracy, Human Rights and Labor 2017).

Human Rights (First Section); (2015) OJLR 4(1) 155–156; *Mansur Yalçin and others v Turkey* Application no 21163/11: European Court of Human Rights: (2015) OJLR 4(1) 151–152; *S L v Commission scolaire des Chênes* 2012 SCC 7: Supreme Court of Canada: (2013) OJLR 2(1) 233; *Sessa v Italy* (Application no 28790/08): European Court of Human Rights (Second Section): (2012) OJLR 1(2) 530

67. Further cases are reported in the Oxford Journal of Law and Religion 2012-2018.

68. The right to freedom of thought conscience and religion is also protected within national constitutional frameworks in most constitutions in the world (Human Rights Resource Centre 2015). A report commissioned by the Norwegian Embassy, Djakarta.

Restrictions on religious freedom were also documented in the 2018 Annual Report of the United States Commission on International Religious Freedom (USCIRF).[69] This explains that:

> Religious freedom conditions continued to deteriorate in countries across the globe in 2017. This ongoing downward trend often intersected with authoritarian practices characterized by hostility toward dissent, pluralism, independent media, and active civil society, or took place under the guise of protecting national security or countering terrorism.
>
> In the twenty-eight nations addressed in this report, governments and nonstate actors targeted religious minorities, dissenting members of majority communities, and nonreligious persons. The most severe abuses included genocide and other mass atrocities, killings, enslavement, rape, imprisonment, forced displacement, forced conversions, intimidation, harassment, property destruction, the marginalization of women, and bans on children participating in religious activities or education. (2018,1)

The Commission prioritized a number of thematic issues as giving rise to concern, including the need for advocacy for specific prisoners; blasphemy laws (Fiss and Getgen Kestenbaum 2017) and; women and religious freedom (Ghanea 2017). It recommended sixteen countries for CPC designation to the State Department and identified high levels of FoRB infringement in a further twelve countries.

Additional research undertaken by the Pew Research Centre identified that restrictions on religion increased around the world in 2016 (Pew Research Centre 2018) including the persecution in particular of Muslims. This was supported by the work of NGOs such as Open Doors (Open Doors 2019) and Aid to the Church in Need (Aid to the church in Need 2018) which similarly reported on increased restrictions on religious freedom and persecution of Christians.

The dialogue relating to religious freedom raises a set of very different issues when considered outside the Western liberal democratic context. The very absence of any jurisprudence informing the substance of the right to religious freedom is telling in itself. Bielefeldt *et al* (2016), taking a global view from an international law perspective and in particular in relation to the work of the UN, nevertheless, are able to identify specific themes relating to the exercise of FoRB, including in non-Western contexts. This provides a most useful framework for comparison in the present study because by identifying thematic areas of law, it brings into focus the gap between Western and non-Western contexts. These themes

69. The Commission is independent from but works closely with the US Department of State on religious freedom issues.

are the freedom to adopt, change or renounce religion or belief; freedom from coercion; the right to manifest religion; discrimination; vulnerable groups, including women, persons deprived of their liberty, children; minorities; migrants (economic, refugees, asylum seekers and displaced persons). Bielefeldt *et al*. (2016) consider the intersection of FoRB with other rights, in particular freedom of expression, the right to life and liberty and, freedom from torture and inhuman and degrading treatment. In a final section they consider cross-cutting issues including derogation by the state from FoRB, state-imposed limitations on the right, legislative issues and defenders of FoRB together with the role of NGOs.

These themes are reflected, in part, in the themes that arise in Western liberal democracies, with the notable exceptions of debates surrounding coercion and freedom to change religion. Once, however, the content of the debates within these themes are examined, the extent of the gap becomes apparent.

Analysing the gap

The refined and complex debates that occur in both political and legal contexts in the West surrounding the extend of the right to religious freedom are based on the fundamental assumption that fostering pluralism within society is of benefit for the common good. The debates sit around the scope of that freedom and the extent to which other individuals or the state can place limits upon it. Although the West has seen limits placed on the extent that religious freedom can take precedence over secular or neutral ideology both in education,[70] public service[71] and more recently in private business (The *Achbita* case), the level of restriction even where there are laic models of plural living together in place, exists above a basic level of FoRB protection (Vanoni and Ragone 2018; Doe 2011).

Outside the Western liberal democratic context and, despite its inclusion in constitutional structures, the basic questions around FoRB concern whether there should be plural living together in the first place, even before mechanisms for implementation can be put forward. The distant debates over the refinement of religious freedom rights and balance between secular ideals or policies of state neutrality supported by economic models based on individualism and capitalism are far removed from questions of how to protect hegemonic religiously based moral

70. *Trinity Western University v The Law Society of Upper Canada*: 2018 SCC 33: see Bussey (2018).

71. *Ebrahimian v France* Application no 64846/11: European Court of Human Rights, Fifth Section: (2016) OJLR 5(2) 365.

frameworks informing the ethics of public living together. In these contexts, the recognition of minorities as having rights, let alone equal rights, by those of a majority faith, can prove a challenge.

To those in non-Western contexts legal reasoning undergirding the development of the right to religious freedom can appear to be devoid of a religious voice and hence, for onlookers from outside the West, might also lack a moral plumb line or compass. Consequently, even where plural living together might be either mandated by or found within religious traditions or scripture informing public living together outside the West: the public justification for creating law to this effect cannot necessarily find common ground with the Western legal tradition.

The question that arises is whether in the light of this gap in understanding of FoRB, Western legal traditions might have litigated or are likely to litigate FoRB out of existence as a universal concept. Is it now the case that it is difficult to find a common rationale which justifies its inclusion, not just within a national legal framework, but also which supports effective implementation and enforcement? This links to the question of whether there will be a disconnect between domestic policy and foreign and international development policy of Western states (Annicchino 2014; Giles 2017). Where substantive understandings of FoRB are so different, tying aid to demands that developing states recognise a Westernised concept of FoRB may set an unachievable goal for developing nations.

Perhaps, on the other hand, we see more recently in some cases a coming round in full circle. This is as a result of moves towards neutrality in some Western states, creating a strongly intolerant society - in the same way that hegemonic theocracy tends to incapacitate individuals' plural living together.

Whether the dominant view is that society must exclude religion altogether from public life or must incorporate one religion completely, the effect is to create a society based on a single ideology where plural living together becomes difficult or even impossible. While levels of violence and oppression create a strong differentiation between these two extreme models of public living together, nevertheless the dangers of imposing a single ideology excluding plural living together are apparent in both.

To this extent the UN, an in particular the EU, as well as other international organisations may well identify the need to turn their attention as much to the West as to elsewhere to ensure the ongoing protection of FoRB. The over-refinement of FoRB and the preferring of economic interest over and above a basic civil and political right, as well as the exclusion of plural living together on the basis of security interests, is

likely to undermine plural living together in the West. Consequently it may also put pressure on the understanding of FoRB as a universal right and as an effective tool in foreign and development policy.

Despite the fact that there are some links between themes arising in the jurisprudence and law around FoRB in both Western and non-Western contexts, there exists a considerable gap in understandings of FoRB. On the one hand FoRB is a strong, enforceable constitutional right. On the other it is at best an aspirational right often devoid of content, or at least practical application. Arguably FoRB, as it has been refined by Western courts, cannot be transplanted into very different economic and social contexts. Nor can it necessarily be enjoyed without basic and fundamental changes to certain constitutional frameworks backed by the political and societal will to adopt plural living together. The question is whether the Western understanding of FoRB needs to be transplanted in its current form at all in order for peaceful plural living together to flourish, or whether a fresh international consensus needs to be built in order to support FoRB as a universal right. A reinterpretation of FoRB, or at least the rationale underlying FoRB, could create a conceptual base line for the fundamental right. This could permit refinement of the right by states according to societal need, but would need to ensure it was not contextualised out of existence.

In order to begin a fresh understanding of the universal nature of FoRB, it would be necessary to pursue a multivalent approach to FoRB. One that encompassed the self-understanding of the Muslim world and other religions and cultures, in order to discover whether such consensus is possible without undermining the very nature of the right itself.

The international religious freedom accords

In 1990 the Organization of Islamic Cooperation addressed what it regarded as the Westernised understanding of fundamental rights, promulgating a declaration based on an Islamic understanding of rights. The Cairo Declaration on Human Rights affirmed Islamic sharia as its source and provided "guidance for Member States in the field of human rights." It was criticised for failing, amongst other things, to guarantee religious freedom. In an attempt to further address the gap between Western and non-Western understandings of FoRB protection, and to address growing restrictions on FoRB and the deterioration in peaceful living together, in particular in those states overwhelmed by forms of violent fundamental extremism, the international community through the UN, together with the Muslim community developed a further series of plans of action and Declarations.

The Office of the High Commissioner of Human Rights first promoted

a process leading to the Rabat Plan of Action (2013) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This recommended national anti-discrimination legislation with enforcement mechanisms, emphasising the need to protect minorities and vulnerable groups. It was proposed that there should be collective responsibility held by public officials, religious and community leaders, the media and individuals. A focus on social consciousness, tolerance, mutual respect and intercultural dialogue was proposed. The plan also contains a six-part threshold test for forms of speech prohibited under criminal law. This was followed by the Istanbul Process, a series of inter-governmental meetings to promote and guide implementation and work towards countering religion or belief-based intolerance. It was commended to the international community as a key normative framework by Heiner Bielefeldt, the UN Special Rapporteur on freedom of religion or belief, in his final report (United Nations Human Rights Office of the High Commissioner 2015).

In March 2015 the UN Office on Genocide Prevention and the Responsibility to Protect launched the Fez Process leading to the Fez Plan of Action (United Nations Office on Genocide prevention and the Responsibility to Protect 2015). This aimed to engage faith leaders in countering hate speech and incitement to violence. It was linked to the Rabat Plan of Action and recognized the importance not only of religious leaders but also of the media.

This was followed in 2016 by action taken by the Muslim community led by His Highness, King Muhammad VI of Morocco, in Marrakech in the Kingdom of Morocco. The Ministry of Endowments and Islamic Affairs of the Kingdom of Morocco and the Forum for Promoting Peace in Muslim Societies, based in the U.A.E., jointly organized the conference. It focussed on the following areas:

1. Grounding the discussion surrounding religious minorities in Muslim lands in Sacred Law utilizing its general principles, objectives, and adjudicative methodology
2. exploring the historical dimensions and contexts related to the issue
3. examining the impact of domestic and international rights. (Marrakech Declaration 2016)

Its aims were further stated as:

> To begin the historic revival of the objectives and aims of the Charter of Medina, taking into account global and international treaties and utilizing enlightening, innovative case studies that are good examples of working

> towards pluralism. The conference also aims to contribute to the broader legal discourse surrounding contractual citizenship and the protection of minorities, to awaken the dynamism of Muslim societies and encourage the creation [of] a broad-based movement of protecting religious minorities in Muslim lands.

The conference drew up the Marrakech Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities. By this declaration the Muslim community gathered at Marrakech declared its:

> firm commitment to the principles articulated in the Charter of Medina, whose provisions contained a number of the principles of constitutional contractual citizenship, such as freedom of movement, property ownership, mutual solidarity and defense, as well as principles of justice and equality before the law;

and most notably that:

> The objectives of the Charter of Medina provide a suitable framework for national constitutions in countries with Muslim majorities, and the United Nations Charter and related documents, such as the Universal Declaration of Human Rights, are in harmony with the Charter of Medina, including consideration for public order.

And further that:

> NOTING FURTHER that deep reflection upon the various crises afflicting humanity underscores the inevitable and urgent need for cooperation among all religious groups, we AFFIRM HEREBY that such cooperation must be based on a "Common Word," requiring that such cooperation must go beyond mutual tolerance and respect, to providing full protection for the rights and liberties to all religious groups in a civilized manner that eschews coercion, bias, and arrogance.

The Declaration called upon Muslim scholars and intellectuals to establish a jurisprudence around the concept of "citizenship" to include diverse groups. In addition, it called for a review of educational curricula that instigates aggression and extremism and that which is destructive of civil society. This was bolstered by the support for initiatives to strengthen relations and understanding among various religious groups in the Muslim World and a call for individuals and civil society groups to establish a broad movement for the just treatment of minorities. In particular, to engage in remembering the historical trust and shared living together that existed before acts of terror and aggression tore societies apart. Finally to:

> Call upon representatives of the various religions, sects and denominations to confront all forms of religious bigotry, villification, and degeneration of what people hold sacred, as well as all speech that promote[s] hatred and bigotry; AND FINALLY, AFFIRM that it is unconscionable to employ religion for the purpose of aggressing upon the rights of religious minorities in Muslim countries.

This was followed in 2017 by the Beirut Declaration on "Faith for Rights." This built on the Rabat Plan of action, galvanising religious leaders and groups to support an expansion of the plan of action to the spectrum of fundamental rights. It contains eighteen Faith for Rights Commitments including the avoidance of using state religion to discriminate against minorities. The declaration starts with the following statement:

> We, faith-based and civil society actors working in the field of human rights and gathered in Beirut on 28–29 March 2017, express the deep conviction that our respective religions and beliefs share a common commitment to upholding the dignity and the equal worth of all human beings. Shared human values and equal dignity are therefore common roots of our cultures. Faith and rights should be mutually reinforcing spheres. Individual and communal expression of religions or beliefs thrive and flourish in environments where human rights, based on the equal worth of all individuals, are protected. Similarly, human rights can benefit from deeply rooted ethical and spiritual foundations provided by religions or beliefs.

The first of the eighteen commitments include illustrative but not exhaustive quotations from the texts of various religions:

> Our most fundamental responsibility is to stand up and act for everyone's right to free choices and particularly for everyone's freedom of thought, conscience, religion or belief. We affirm our commitment to the universal norms […] and standards […], including Article 18 of the International Covenant on Civil and Political Rights which does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms, unconditionally protected by universal norms, are also sacred and inalienable entitlements according to religious teachings.

- "There shall be no compulsion in religion." (Qu'ran 2:256)
- "The Truth is from your Lord; so let he or she who please believe and let he or she who please disbelieve." (Qu'ran 18:29)
- "But if serving the Lord seems undesirable to you, then choose for yourselves this day whom you will serve." (Joshua 24:15)
-

- "No one shall coerce another; no one shall exploit another. Everyone, each individual, has the inalienable birth right to seek and pursue happiness and self-fulfilment. Love and persuasion is the only law of social coherence." (Guru Granth Sahib, 74)
- "When freedom of conscience, liberty of thought and right of speech prevail—that is to say, when every man according to his own idealization may give expression to his beliefs—development and growth are inevitable." ('Abdu'l-Bahá)
- "People should aim to treat each other as they would like to be treated themselves – with tolerance, consideration and compassion." (Golden Rule)

The OHCHR Faith for Rights framework:

> Provides space for a cross-disciplinary reflection on the deep, and mutually enriching, connections between religions and human rights. The objective is to foster the development of peaceful societies, which uphold human dignity and equality for all and where diversity is not just tolerated but fully respected and celebrated. (Beirut Declaration 2017, 4)

The aim is to identify how and support leaders in engaging "Faith" to support "Rights" so that they are mutually enhancing:

> The Beirut declaration considers that all believers – whether theistic, non-theistic, atheistic or other – should join hands and hearts in articulating ways in which 'Faith' can stand up for 'Rights' more effectively so that both enhance each other.

These international accords demonstrate a global impetus to engage members of the international and national communities, as well as religious actors and civil society leaders, to facilitate the implementation of rights frameworks to combat hate speech and violence aimed at religious minorities. There is specific reference and commitment to FoRB from within the Muslim community there is, in addition, an impetus, pursuant to the Marrakech Declaration, to address the issue of citizenship and engage religious actors in creating interfaith dialogue to facilitate a better understanding of public living together.

The approach taken in these accords can be summarised as focusing on certain core approaches to address religious hatred and intolerance and the situation of minorities in Muslim majority states. These include first, a policy to build on an expanded concept of citizenship. Second, to engage faith leaders and civil society leaders and groups to address hate speech and intolerance within society. Third, to identify and develop scriptural reasoning within various traditions to support the concept of

rights and plural living together. The following section will explore the extent to which these approaches might support a universal understanding of FoRB on an ongoing basis.

Can the international freedom accords fill or address the gap?

The approach taken in the religious freedom accords has the advantage that it engages with those embedded within civil society to change attitudes towards plural peaceful living together, an approach explored by Philippe 2017. At the same time, it addresses the legal status of individuals within society by seeking to use the tool of citizenship and the rights linked to it in order to improve the situation of minorities. This dual dialogical and legal approach provides a stronger approach to bringing about change than a pure legal approach, which might not win the hearts and minds of citizens, even where governments chose to adopt it.

Since the approach of the international freedom accords speaks into predominantly religious cultures, engaging in scriptural reasoning is likely to at least create a platform whereby a common, albeit multivalent, rationale can be established as the basis for the orientation of law creation and adjudication. This scriptural approach to public and legal dialogue is more likely to succeed than a secular rights dialogue. This is because, regardless of one's ultimate view on soteriology and realised and future eschatology, it is likely to be easier for one religious individual to understand the commitment of another religious individual to an underlying faith-based ethic guiding their lives, than it is for them to understand public living together in a faith vacuum. In addition, a scriptural approach avoids the potentially massive gap that arises if governing authorities ignore the fact that over eighty percent of the globe adheres to a religion (Pew Research Centre 2016) and will orientate their lives in accordance with that religion in preference to obedience to the law, where they are forced to choose. Using a scriptural approach therefore has a chance of establishing conditions conducive to the acceptance of the rule of law and representative government.

The religious freedom accords, however, still leave some gaps which could give rise to potential problems for the exercise of FoRB and the conditions of peaceful plural living together. It is important to recall the sixtyeight and a half million refugees and displaced persons across the globe. A concept of inclusiveness, even if it does not accord full national citizenship, needs to account for the most vulnerable in any society. Over reliance on the concept of Citizenship as a tool for plural living together may reinforce existing hierarchies and disenfranchisement rather than assist in decreasing them.[72]

72. For further discussion on the topic of citizenship as it relates to the Marrakech

As the Swiss Federal Constitution 1999 in its preamble states: "The strength of a people is measured by the well-being of its weakest members." While this points to the responsibility of the state to take care of the most vulnerable within its borders, it falls to states as an international community as a whole to take on the responsibility for mobile refugee communities, eighty-five percent of whom live in developing countries (United Nations High Commissioner for Refugees UK 2018). The impact on faith communities they have left and those they engage with in their host states is an important consideration for understanding FoRB as a universal right. It necessarily needs to encompass these disenfranchised faith groups. This is because it is often faith that will be the one constant in the lives of these individuals. Protecting their freedom to believe and understanding the contexts in which they manifest that belief as displace, temporary and mobile communities, is therefore of paramount importance to establishing a stable environment for these communities. The concept of FoRB consequently would come to mean more than the protection of individual identity and rights attaching to citizenship. It would need in addition to relate to tradition and heritage that a mobile faith community, driven out of their land and places of worship, carries with them.

A further issue arising under the religious freedom accords is that they put religious groups and religious leaders in a quasi-state role by requiring that they act to foster or protect rights. At the same time, they will be concerned to enjoy FoRB protection themselves in order to find their own niche in society as normative intermediate institutions, acting as a buffer between central government and the individual.

On the one hand using religious groups and religious leaders to facilitate the engagement with rights and foster plural living together could have a positive impact. It has potential for breaking down the binary understanding encouraged by rights frameworks, whereby rights can become the moral framework by which states orientate themselves. This binary understanding whereby the state becomes the moral compass for its citizens, undermining independent moral reasoning is identified and criticised by Hauerwas (2015). In this binary view public living together comes to be regarded as a relationship between the state and individuals. This leaves intermediate institutions out of the equation, at least in so far as ethical reasoning undergirding law creation and adjudication is concerned. It is this potentially dangerous trend that the religious freedom accords avoid by engaging religious leaders and religious groups in rights

Declaration see Decimo 2016. For a sophisticated exploration of the topic of religion, national identities the concept of universalism see Pin 2014.

protection. This role is important because these groups can act as a buffer between oppression by the state and the risks of individualism and/or the powerlessness of individuals.

On the other hand, however, the use of religious leaders and faith groups to facilitate peaceful plural living together carries the danger that these individuals and organisations can become or remain tools of the governing authorities. Their capacity to undertake a role independent of the state and foster the type of plural living together envisaged by FoRB may be undermined by the very nature of the role they are being required to undertake in seeking to bring this about. Religious leaders are called to speak scriptural truths into society and this may well engage them in opposition to government policies or indeed international institutions. The very nature of pluralisms requires a safe space for dissenting voices. Furthermore, where religious leaders or institutions are perceived of as promulgating state policy, this may well water down the message they speak to their followers and create deeper divisions in society, driving members towards extremism.

Research has demonstrated that the introduction of religious freedom into societies unused to it needs careful handling if it is to bring about the goal it seeks to achieve (Lerner 2011; Bali and Lerner 2017); Künkler *et al*. 2016). Leaving to faith leaders and faith organisations the task of developing a society where freedom of speech as well as FoRB is supported, may well be demanding too much of them. If such a role is to be allocated to these leaders and groups, then additional support to facilitate this role at various levels within society would be required. Embedding this approach in wider civil society discourse and joining together with civil society organisations is likely to provide a stronger platform for dialogue. It is the interlinking operation of intermediate civil society groups that acts as a buffer in Western societies between the over-weaning centralising tendencies of the state and the individualism of its citizens.[73]

73. Putnam and Campbell explain that faith in American society is increasingly based on interpersonal ties, noting that as long as these interpersonal ties remain strong then faith will also continue to flourish (Putnam and Campbell 2010). The problem here is that individuals are a weak form of resistence against trends in society which might tend to override religious belief. In particular where there is strong central political power. The voice of the individual is unlikely to impact and where individuals are not gathering in groups to voice concerns or present a public rationale representative of faith groups in opposition to state policies, the effectiveness of the religious voice is lost. In his examination and restatement of the work of the theological political philosopher Herman Dooyeweerd, Chaplin (2011) explores the importance of the doctrine of subsidiarity and the need for strong intermediate civil society

The third issue to consider in respect of the religious freedom accords is that in order to build a platform for multi-faith dialogue and address potential gaps in understanding of the grounding of rights it will be necessary to develop scriptural reasoning within various faith traditions to enable them to present their own religious reasoning to dialogue with Quranic reasoning. This multivalent dialogue can incorporate secular legal philosophy as one voice in the dialogical platform, but necessarily cannot permit it an exclusive place. Academics have more recently supported the re-emergence of faith-based reasoning relating to the law, exploring the intersection of religion and law (George 1999; Marshall 2002; Witte 2007; McIlroy 2009; Finnis 2011; Reed 2013; Hauerwas 2015; McCrudden 2015; Cochran and Calo 2017).

It is in this multi-faith-based dialogue that we are likely to see an ability to create a base line for FoRB that will enable the ongoing understanding of FoRB as a universal right. Based not on bivalent reasoning, where one religion claims exclusively to have the right approach and others are pushed to one side, but where multivalent reasoning allows faiths to find their own route to a justification for FoRB in public living together. The aim would ultimately be to build a consensus around the core elements of FoRB without denying the integrity of each groups' faith position or understanding of plural living together and without necessarily having to buy into the economic model of Western societies to support the embedding of rights into constitutional structures and societal living together.

Even once a stronger universal underlying rationale for FoRB exists in a form palatable to various cultures, its implementation will still require a broad base of support in societies at various levels. This goes beyond engaging religious leaders alone to address power structures mitigating against secure and stable plural living together. It involves creating platforms for dialogue which protect religious identity of both minority and majority groups and engage across various sectors in society. At the same time, it will need to provide a mechanism for contextualisation of those groups within global society at an international, regional and national level to ensure peaceful transitions and the protection of FoRB globally[74].

institutions. This philosophy supports not only strong faith groups but a variety of intermediate institutions to act as a buffer and representative voice between the state and the individual.

74. Proposals for such a platform have been put forward in Giles (2018b).

Conclusion

This article has provided an overview of current jurisprudence relating to FoRB in Western liberal democratic contexts and compared this to moves towards FoRB protection in other parts of the globe. In doing so it identified an increasing gap between the refined application of FoRB as an entrenched constitutional legally enforceable right in the West and FoRB as at best an aspirational norm elsewhere. It also identified that in some instances the gap at either end of the spectrum of public living together may not be as wide as first envisaged since both extreme forms of neutrality in the West and strong forms of hegemonic theocracy elsewhere can result in intolerant societies. The article then considered the religious freedom accords as a mechanism to underpin FoRB and prevent the gap between Western and non-Western understanding and application of this right widening. It analysed whether the religious freedom accords could be effective in this regard, concluding that there is potential for reversing of the trend away from increasing restrictions on religious freedom. It proposed that the power of religious leaders and religious groups to bring about that change, although vital, was on its own limited. Support needed to be provided from a broader base of civil society institutions. It identified that change needed to occur at all levels of society, not only at the level of intermediate religious institutions. Supporting this with a multivalent approach to creating a rationale for FoRB which sat within various faith traditions could provide the tools for various groups and individuals, civil society institutions and those responsible for governance, to persuade individuals of the importance of FoRB as a universal fundamental right. While there is still a considerable gap in the understanding and application of FoRB globally the tools for working together towards a redeveloped universal understanding of FoRB exist so that, aspirationally at least, it can continue to claim its place within the framework of universal fundamental rights.

References

Ahdar, R. and Leigh I. 2005. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press.

Aid to the Church in Need. 2018. Global Religious Freedom in the World Report: https://acninternational.org/special-reports/acns-global-religious-freedom-in-the-world-report/

Annicchino, P. 2014. "Coherence (and Constistency) or Organised Hypocrisy? Religious Freedom in the Law of the European Union", in Foblets, M-C; Alidadi, Katayoun; Nielsen, Jørgen S and; Yanasmayan, Zeynep (eds). 2014. *Belief, Law and Politics, What Future for a Secular Europe?* Farnham: Ashgate. https://doi.org/10.1017/s0956618x17000102

Bakhshizadeh M. 2018. "An Analysis of the Possibility of Fulfilling Gender Equality Within the Legal System of the Islamic Republic of Iran." In *Law, Religion and Tradition*, edited by J. Giles, A. Pin, and F. S. Ravitch. Berlin: Springer. https://doi.org/10.1007/978-3-319-96749-3_3

Bali, A. U. and Lerner, H. eds. 2017. *Constitution Writing, Religion and Democracy*. Cambridge: Cambridge University Press.

Beirut Declaration. 2017. "Faith for Rights." 28–29 March. Beirut, Lebanon. https://www.ohchr.org/Documents/Press/21451/BeirutDeclarationonFaithforRights.pdf

Bielefeldt, H., Ghanea N. and Wiener, M. 2016. *Freedom of Religion or Belief. An International Law Commentary*. Oxford: Oxford University Press.

Bureau of Democracy, Human Rights, and Labor. n.d. *IRF Report and Countries of Particular Concern*. https://www.state.gov/j/drl/irf/c13003.htm

———. 2017. International Religious Freedom Report. https://www.state.gov-/j/drl/rls/irf/religiousfreedom/index.htm#wrapper

Bussey, B. 2018. "Trinity Western University *v.* The Law Society of Upper Canada: 2018 SCC 33." *Oxford Journal of Law and Religion* 7(3): 570–571. https://doi.org/10.1093/ojlr/rwy048

Cairo Declaration on Human Rights. 1990. 5 August. https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf

Chaplin, J. 2011. *Herman Dooyeweerd. Christian Philosopher of State and Civil Society.* Notre Dame, Indiana: University of Notre Dame Press. https://doi.org/10.1163/22116117-90000533

Cochran, R. and Calo, Z. 2017. *Agape, Justice and Law: How might Christian love shape law?* Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316796931

D'Costa, G. Evans, M. Modood, T. and Rivers, J. 2013. *Religion in a Liberal State*. Cambridge: Cambridge University Press.

Decimo, L. 2016. "'Inclusive Citizenship': the necessity to establish an interfaith dialogue in modern Islamic Society." In *The Marrackech Declaration. A Bridge to Religious Freedom in Muslim Countries?* edited by Fuccillo, Antonio, 73–88. Napoli, Italy: Scientifica.

Doe, N. 2011. *Law and Religion in Europe*. Oxford: Oxford University Press.

Durham, W. C. Jr. and Scharffs, B. 2018. *Law and Religion. National, International and Comparative Perspectives*. Second Edition. Aspen Case book series. New York: Wolters Kluwer Legal Education.

Durham, W. C. Jr. and Thayer, D., eds. 2019. *Religion, Pluralism and Reconciling Difference.* Abingdon: Routledge.

European Court of Human Rights. 2017. *ECHR Overview 1959–2017* . https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf

———. 2018. Guide to Article 9 of the European Convention on Human Rights. Freedom of thought conscience and religion. https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf

Fiss J. and Getgen Kestenbaum J. 2017. "Respecting Rights? Measuring the World's Blasphemy Laws" https://www.uscirf.gov/news-room/press-releases/uscirf-releases-report-measuring-blasphemy-laws-compliance-human-rights

Finnis, J. 2011. *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Ghanea, N. *Women and Religious Freedom: Synergies and Opportunities*. https://www.uscirf.gov/reports-briefs/special-reports/women-and-religious-freedom-synergies-and-opportunities

Garahan, S. 2016. "A right to Discrinimate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*". *Oxford Journal of Law and Religion* 5(2): 352–358. https://doi.org/10.1093/ojlr/rww009

George, R. P. 1999. *In Defense of Natural Law*. Oxford: Oxford University Press.

Giles, J. 2017. "A Hoped-for Coherent and Permissive Religious Freedom Policy: the *Bougnaoui* and *Achbita* Cases" PILARs CC 1: http://law-school.open.ac.uk/research/research-clusters/law-and-religion/case-comments

Giles, J. 2018a. "Neutrality in the Business Sphere – An Encroachment on Rights Protection and State Sovereignty". *Ox J Law Religion* 7(2): 339–346. https://doi.org/10.1093/ojlr/rwy026

———. 2018b. "Tradition as a Peacebuilding Tool." In *Law, Religion and Tradition*, edited by J. Giles, A. Pin, and F. S. Ravtich, 153–191. Berlin: Springer.

Glenn, P. H. 2014. *Legal Traditions of the World, Sustainable Diversity in Law*. Fifth Edition. Oxford: Oxford University Press.

Government of the United States of America. 2018. Helsinki Commission Report. 2018. 6 February. https://www.csce.gov/sites/helsinkicommission.house.gov/files/Religious%20Freedom%20in%20the%20NSS%20Design%20Final_0.pdf

Hauerwas, S. 2015 "How to Think Theologically about Rights," *Journal of Law and Religion* 30(3): 402–413. https://doi.org/10.1017/jlr.2015.28

Human Rights Report Centre. 2015. Keeping the Faith. A Study of Freedom of Thought, Conscience, and Religion in ASEAN. http://hrrca.org/wp-content/uploads/2015/11/Book-of-Keeping-the-Faith_web.pdf

Inoguchi, T. and Newman, E. 1997. "'Asian values' and democracy in Asia." First Shizuoka Asia-Pacfici Forum. Jamamatsu, Shizuoka, Japan. http://www.unu.edu/unupress/asian-values.html

Khong, C.O. 1997. "Asian values: the debate revisited." First Shizuoka Asia-Pacfici Forum. Jamamatsu, Shizuoka, Japan. http://www.unu.edu/unupress/asian-values.html

Künkler, M., Lerner, H. and Shankar, S. 2016. "Constitutionalism in Rough Seas. Balancing Religious Accommodation and Human Rights in, through, and despite, the Law." *American Behavioral Scientist* 60(8): 911–918. https://doi.org/10.1177/0002764216643806

Lerner, H. 2011. *Making Constitutions in Deeply Divided Societies*. Cambridge: Cambridge University Press. https://doi.org/10.1111/j.1469-8129.2012.00557_7.x

Marrakech Declaration. 2016. "The Rights of Religious Miniroties in Predominantly Muslim Communities: Legal Framework and a Call to Action." 25–27 January. Marrakech, Morocco. http://www.marrakeshdeclaration.org/marrakesh-declaration.html

McIlroy, D. 2009. *A Trinitarian Theology of Law: in conversation with Jürgen Moltmann, O'Donovan and Thomas Aquinas*. Eugene, Oregon. Wipf & Stock. https://doi.org/10.1111/j.1467-9418.2009.00523.x

McCrudden, C. 2015. "Benedict's Legacy: Human Rights, Human Dignity and the Possibility of Dialogue." In *Pope Benedict IV's Legal Thought: A Dialogue on the Foundation of Law*, edited by M. Cartabia and A. Simoncini, 165–184. Cambridge: Cambridge University Press. https://doi.org/10.1017/cbo9781316106303.012

Marshall, P. 2002. *God and the Constitution*. Christianity and American Politics. Lanham, MD: Rowman & Littlefield.

Open doors. 2019. "Paying the Price Twice: How Religious Persecution Exacerbates the Vulnerabilities of Marginalised Groups." World Watch List Report. https://www.opendoorsuk.org/persecution/resources/wwl-advocacy-report-2019.pdf

Pew Research Centre. 2016. Pew-Templeton Global Religious Future Project: Explore the Data. http://www.globalreligiousfutures.org/explorer#/?subtopic=15&chartType=pie&year=2010&data_type=number&religious_affiliation=all&destination=to&countries=Worldwide&age_group=all&gender=all&pdfMode=false

———. 2018. *Key Findings on the Global Rise in Religious Restrictions*. Factank News in Numbers. 21 June. https://www.pewresearch.org/fact-tank/2018/06/21/key-findings-on-the-global-rise-in-religious-restrictions/

Philippe, P. 2017. *Religion and the EU's External Policies*. Increasing Engagement: In-depth Analysis. European Parliamentary Research Service. http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282017%29614612

Pin, A. 2014. "Religion, National Identities, and the Universality of Human Rights". *Oxford Journal of Law and Religion* 3(3): 419–439. https://doi.org/10.1093/ojlr/rwu038

Putnam, R. D. and D. E. Campbell. 2010. *American Grace. How Religion Divides and Unites Us*. New York: Simon & Schuster. https://doi.org/10.1017/s0022381612000771

Qureshi, M.A. 2018. "The Blasphemy Laws of Pakistan: Experimenting with History and Tradition." In *Law, Religion and Tradition*, edited by J. Giles, A. Pin, and F. S. Ravitch, 29–42. Berlin: Springer. https://doi.org/10.1007/978-3-319-96749-3_2

Reed, E. 2013. *Theology for International Law*. London and New York: Bloomsbury and T&T Clark.

Robbers, G. ed. 2019. *Encyclopedia of Law and Religion Online*. Leiden: Brill. https://referenceworks.brillonline.com/browse/encyclopedia-of-law-and-religion

Sandberg, R. 2012. *Law and Religion*. Cambridge: Cambridge University Press.

Sen, A. 1997. "Human rights and Asian values". *The New Republic*. 14–21 July. https://www.scribd.com/document/245530276/Human-Rights-and-Asian-Values-pdf

Stopler, G. 2003. "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women." *Columbia Journal of Gender and Law* 12(154): 154–221.

Swiss Federal Constitution. 2000. Bern: The Swiss Parliament. https://www.parlament.ch/en/über-das-parlament/how-does-the-swiss-parliament-work/Rules-governing-parliamentary-procedures/federal-constitution

United Nations. 2015. Report of the Special Rapporteur on Freedom of Religion or Belief. Human Rights Council. Thirty-First Session. Agenda item 3. http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/18

United Nations. 2016. Religion and Religious Freedom in International Diplomacy Workshop. Summary Brief 22. https://www.ohchr.org/Documents/Issues/Religion/WorkshopReligion.pdf

United Nations High Commissioner for Refugees UK. 2018. Figures at a Glance. 19 June. http://www.unhcr.org/uk/figures-at-a-glance.html

United Nations Human Rights Office of the High Commissioner. 2013. Between Free Speech and Hate Speech: The Rabat Plan of Action, A Practical Tool to Combat Incitement of Hatred. 21 February. https://www.ohchr.org/EN/NewsEvents/Pages/TheRabatPlanofAction.aspx

United Nations Office on Genocide Prevention and the Responsibility to Protect. 2017 [2015]. The Fez Process and the Fez Plan of Action on the Role of Religious Leaders in Preventing Incitement to Violence that Could Lead to Atrocity Crimes. http://www.un.org/en/genocideprevention/documents/Plan%20of%20Action%20Advanced%20Copy.pdf

United States Commission on International Religious Freedom. 2018. Annual Report Key findings and Recommendations. https://www.uscirf.gov/sites/default/files/USCIRF2018AnnualReport_abb_wlinks.pdf

Valcke, C. 2018. *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108555852

Vanoni, L. P. and Ragone, G. 2018. "From the Secularisation Theory to the Pluralistic Approach: Reconciling Religious Traditions and Modernity in Italian Case-Law." In *Law, Religion and Tradition*, edited by J. Giles, A. Pin, and F. S. Ravtich. Berlin: Springer. https://doi.org/10.1007/978-3-319-96749-3_1

Watkins, D. and M. Burton, eds. 2018. *Research Methods in Law*. Second Edition. Routledge: Abingdon.

Witte, J. 2007. *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism*. Cambridge: Cambridge University Press. https://doi.org/10.1017/cbo9780511819377

Weiler, J. 2017. "Je Suis Achbita". *European Journal of International Law* 28(4): 989–1018.