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

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Chapter 3. A Theological Justification for Freedom of Religion and Belief as a Universal Right

A Theological Justification for Freedom of Religion and Belief as a Universal Right

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Abstract Globally there are high levels of restrictions on the fundamental right to freedom of thought, conscience and religion (FoRB). In the light of this evidence, this chapter explores the extent to which FoRB can still claim to be a universal right from a theoretical perspective. To address the gap between aspirational rights norms and practice this chapter then considers a theory grounded in reformed theology to support FoRB as a universal right. The theory presented proceeds on the assumption that plural living together, subject to certain safeguards, is the context in which humans can best flourish. Further that, as a legal tool, FoRB both requires and facilitates plural living together. The chapter analyses whether, in support of a plural approach, the claim to universalism for FoRB could be better supported by a multivalent dialogic approach to freedom of religion and belief. Bearing in mind that rights frameworks do not sit altogether easily in some non-Western constitutional frameworks the chapter works towards a proposal for the application of FoRB in both Western and non-Western contexts, arguing for universalism but against uniformity. To address the problem consequent upon FoRB, namely the clash between faith-based moral frameworks inter se and the clash between faith-based frameworks and non-faith based frameworks, the chapter considers the application of a theoretical basis for FoRB in conjunction with the political philosophical theological approach to normative pluralism put forward by Dooyeweerd, more recently refined by Chaplin. This provides a contextualized tool for resolving clashes between FoRB and other fundamental rights as well as a mechanism for situating FoRB in non-Western constitutional contexts. The overarching aim is to support the use of FoRB as a tool to facilitate peaceful plural relations in civil society.

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1 Introduction

As one of several first-generation civil and political rights written into post World War II rights frameworks, freedom of thought, conscience and religion (FoRB) is designated a universal right. As such it is a tool in the armoury of rights that has been used to protect against societal degeneration into the abusive and degrading conditions that were prevalent in Europe prior to and during WWII. Coupled with European economic integration through the legal mechanism of the European Union, rights frameworks have facilitated stability in Europe, at least between members of the EU, for over half a century. Witte, however, traces these recent claims to universalism of rights, in particular for the group of civil and political rights written into the post WWII international and regional rights frameworks, back to the European Reformation[1] and explores their influence in the framing of constitutional landscapes in Europe and America. Despite their long and distinguished history, increasingly the claim to universalism is being challenged both within Western and non-Western contexts, in particular in relation to FoRB.

FoRB as a universal right can be seen as problematic on various grounds. This is because the enjoyment of FoRB is dependent upon some form of pluralism as a condition of civil society[2] whereas in a somewhat contradictory fashion increasingly rights frameworks are becoming an exclusive political ideology in and of themselves.[3] They are supported, in some instances, by strong concepts of secularism manifesting as 'neutrality', whereby religion is excluded from all spheres of public life.[4] In addition, religious freedom is seen in Western and non-Western cultures to clash with equality rights. In Western cultures this can result in the preferancing of equality rights over and above religious freedom: in non-Western cultures this can lead to the refusal to accept rights frameworks as indivisible. This can result, in the later case, in only some fundamental rights finding acceptance. Furthermore, FoRB can be perceived in non-Western contexts as an attempt to impose forms of Western liberal democracy or ideology on cultures unsuited to or unready for this form of governance and public living together.

In order to argue that FoRB ought still to be regarded as a universal right and to propose its use as a tool to facilitate peaceful relations in civil society, this chapter first identifies FoRB in its national, international and supranational legal context.

[1] Witte (2007). Witte traces the development of rights themselves back even further to 313 and the Edict of Milan. According to Lorenzen (2000), p. 52, a similar argument was made by the German jurist Georg Jellinek (1851–1911). Lorenzen points out that for Jellinek the concept of human rights as a universal concept sprung from the struggle for religious freedom during the 16th and 17th centuries in England and was taken up in the colonies in America.

[2] For a discussion on the advantages of pluralism as a condition of civil society see Giles (2018a), pp. 154–160.

[3] See, for example, Hauerwas (2015). Hauerwas challenges the idea that rights frameworks provide a basis for moral reasoning in and of themselves and argues that it is necessary to acknowledge that there are prior claims to a common good.

[4] For example, see *Achbita and another v G4S Secure Solutions NV (Case C-157/15) OJLR 2017* 6(3), pp. 622–623 and discussions of that case in Weiler (2017) and Giles (2017, 2018b).

After exploring the historic and theoretical basis of its existence as a universal norm, the chapter then identifies the challenges to this claim both in academic literature and empirical research. The chapter then turns to a theoretical approach grounded in reformed theology to support the universalism of FoRB, taking a dialogic approach in order to engage in multivalent reasoning building towards consensus to establish grounds for using FoRB as a tool to facilitate peaceful living together. The aim is to enable various cultures and constitutional systems to retain their faith or secular integrity while still enabling those within their borders to profess and practice their own faith. It then proposes Dooyeweerd's theory of normative institutional pluralism as a mechanism for resolving rights clashes that arise as an inevitable consequence of the constitutional entrenchment of fundamental rights.

2 FoRB as a Universal Legal Right

FoRB has been established in international instruments as a universal fundamental right. The preamble to the UDHR recites at §1, 3 and 6[5]:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (…).
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law (…).
>
> Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms (…).

The declaration is then made that:

> Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 18 of the UDHR sets out freedom of thought conscience and religion as one of the universal fundamental rights. This is mirrored in article 18 of the International Covenant on Civil and Political Rights. That covenant includes in its preamble §4: 'Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'.

[5]See http://www.un.org/en/universal-declaration-human-rights/ (date accessed 12 May 2019). Adopted by the UN General Assembly 10 December 1948.

177 countries have acceded to the ICCPR.[6] This is 91% of all the countries in the world. Reservations to article 18 have been made by 3 countries including the Maldvies,[7] Mauritania[8] and Pakistan because of sensitivities towards the application of Sharia within their borders.

In 1981 the UN adopted the Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[9] By resolution 48/141 the UN General Assembly decided that the High Commissioner for Human Rights was to 'be guided by the recognition that all human rights (…) are universal, indivisible, interdependent and interrelated'. Subsequently on the fundamental right to freedom of thought, conscience and religion the Office of the High Commissioner of Human Rights promoted a process leading to the Rabat Plan of Action on the prohibition of

[6]See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#bottom (date accessed 25 July 2018).

[7]"The application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives." Although objections were made to this reservation by some countries: see http://www.bayefsky.com/html/maldives_t2_ccpr.php (date accessed 12 May 2019).

[8]"The Mauritanian Government, while accepting the provisions set out in article 18 concerning freedom of thought, conscience and religion, declares that their application shall be without prejudice to the Islamic Shariah". See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (date accessed 25 July 2018). Objections were raised by some countries to this reservation: see http://www.bayefsky.com/html/mauritania_t2_ccpr.php (date accessed 12 May 2019).

The Mexican government although it did not make a reservation, made an interpretative statement: "Article 18: Under the Political Constitution of the United Mexican States, every person is free to profess his preferred religious belief and to practice its ceremonies, rites and religious acts, with the limitation, with regard to public religious acts, that they must be performed in places of worship and, with regard to education, that studies carried out in establishments designed for the professional education of ministers of religion are not officially recognized. The Government of Mexico believes that these limitations are included among those established in paragraph 3 of this article." See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec (date accessed 12 May 2019).

Qatar, although it did not make a reservation, made the following statement:

"2. The State of Qatar shall interpret Article 18, paragraph 2, of the Covenant based on the understanding that it does not contravene the Islamic Sharia. The State of Qatar reserves the right to implement such paragraph in accordance with such understanding." See https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (date accessed 12 May 2019).

[9]For an explanation of the history and role of the Special Rapporteurs and other Charter-based human rights mechanisms by which the UN promotes respect for human rights see Bielefeldt et al. (2016), pp. 41–48. Additional instruments include the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); Principles of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes

advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[10] This recommended national anti-discrimination legislation with enforcement mechanisms and emphasised 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 Bielefeldt, the UN Special Rapporteur on freedom of religion or belief in his final report. [11]

This was followed in 2016 by action taken within the Muslim community led by His Highness, King Muhammad VI of Morocco, in Marrakesh 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 a conference. It focused on the following areas[12]:

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. and examining the impact of domestic and international rights.

The conference produced the Marrakech Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities.[13] By this declaration the Muslim community gathered at Marrakech declared its 'firm commitment to the principles articulated in the Charter of Medina' and most notably that:

(1994); UNESCO Declaration on Principles of Tolerance (1995); Final Document of the International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination (2001); Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools (2007); United Nations Declaration on the Rights of Indigenous Peoples (2007); The Hague Statement on "Faith in Human Rights" (2008); Camden Principles on Freedom of Expression and Equality (2009); Human Rights Council resolution 16/18 on Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief (and Istanbul Process, 2011); Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012); Framework of Analysis for Atrocity Crimes (2014); Secretary-General's Plan of Action to Prevent Violent Extremism (2015); as well as the Fez Declaration on preventing incitement to violence that could lead to atrocity crimes (2015).

[10]See https://www.ohchr.org/EN/NewsEvents/Pages/TheRabatPlanofAction.aspx 21 February 2013 (date accessed 25 July 2018).

[11]Bielefeldt (2015), paras 91–92. See http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/18 (date accessed 30 July 2018).

[12]See http://www.marrakeshdeclaration.org (date accessed 12 May 2019).

[13]25–27 January 2016: see http://www.marrakeshdeclaration.org/marrakesh-declaration.html (date accessed 12 May 2019).

> 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 and to:

> Call upon representatives of the various religions, sects and denominations to confront all forms of religious bigotry, vilification, and degeneration of what people hold sacred, as well as all speech that promote 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'.[14] 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 18 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 18 commitments reads as follows:

> 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.

FoRB is also protected as a universal fundamental right in conventions and standards adopted by regional bodies including the European Convention on Human

[14] See https://www.ohchr.org/Documents/Press/21451/BeirutDeclarationonFaithforRights.pdf (date accessed 25 July 2018).

Rights, the Charter of Fundamental Rights of the European Union and the Final Act of the Conference on Security and Co-operation in Europe (which contains a commitment to freedom of thought, conscience and religion). The Organisation on Security and Co-operation in Europe (OSCE)) and the Office for Democratic Institutions and Human Rights (ODIHR) have an Advisory Panel of Experts on Freedom of Religion or Belief to provide support and expert assistance to participating states. The inter-American convention, the American Convention on Human Rights, includes in article 12 the right to freedom of conscience and religion. This incorporates the right to change one's religion or belief. The African Charter on Human and Peoples Rights (Banjul Charter) by article 8 protects freedom of conscience and the profession and free practice of religion. It does not refer to the term 'belief' and does not specifically protect the freedom to change one's religion.

The Association of South East Asian Nations agreed by article 22 of the ASEAN Human Rights Declaration that ASEAN governments were committed to protect against 'all forms of intolerance, discrimination and incitement of hatred based on religion and beliefs'. They created the ASEAN Intergovernmental Commission on Human Rights to promote human rights within that region. In its Five-Year Work Plan 2016–2020 the Commission plans to initiate a thematic study on freedom of religion and belief. After consultation it will disseminate its findings as part of human rights education and raising awareness and to build AICHR's visibility.[15]

The right to freedom of thought conscience and religion is also protected within national constitutional frameworks in many constitutions in the world.[16] This does not prevent states preferancing one religion above others. According to the Pew Research Centre,[17] for example, nine countries in Europe have Christianity as an official state religion. In Europe, the Middle East and North Africa 42 countries have either official (26) or preferred (16) religions. Seven sub-Saharan countries favour a religion, while five have an official state religion (one Christianity, four Islam). In the Asia-Pacific region 10 countries have an official state religion and nine have a preferred or favoured religion. 8 countries in the Americas have a favoured religion and 2 have an official state religion.

There is thus overwhelming evidence in national, international and regional legal instruments that freedom of thought, conscience and religion is, aspirationally at least, a universal right. The evidence in terms of its application, enjoyment and enforcement paints a very different picture. The detrimental effects of this gap between aspirational right and its application in practice has been the subject of research. This demonstrates that where religious freedom is restricted, a general deterioration in the socio-economic well-being of a nation state tends to follow. This in turn

[15]Mandate 4.12, Five-Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2016–2020), p. 9: see https://aichr.org/key-documents/ (date accessed 12 May 2019).

[16]See Human Rights Resource Centre (2015). Over 120 countries protect individuals from unequal treatment on grounds of religion: see https://www.constituteproject.org/search?lang=en&key=equalgr6 (date accessed 25 July 2018). See also the US Department of State's International Religious Freedom Report 2017: see https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper (date accessed 25 July 2018).

[17]Pew Research Centre (2017b).

can affect the stability of civil society.[18] It is therefore arguably pressing that fresh impetus is provided to support the practical application of FoRB. Before doing so it is suggested here that establishing an acceptable rationale for FoRB will assist in ensuring its acceptance, particularly to those cultures most resistant to it.

3 Theoretical Underpinnings of FoRB

Universalism as an attribute of fundamental rights frameworks is often located in post-World War II theories of rights. Others locate the cradle of modern universal rights in the enlightenment. Witte, in his masterful account of the development of rights within the reformed tradition, describes this "Straussian' account of the Enlightenment origins of Western rights' as having 'persisted, with numerous variations, in many circles of discourse to this day'.[19]

For many FoRB is as much about freedom from religion (not to believe) as it is freedom of religion (to believe and manifest a religion or form of religion of one's choice). Hence the situating of FoRB's roots in enlightenment attempts sparked by Spinosa's attack on Roman Catholic tradition, seeking to free society from religion. Alternatively, it will be located in Luther's and Calvin's attempts to free society from confessionalism and oppressive church practices during the Reformation. Speaking of the development of human rights, Witte describes them as:

> Human rights, we often hear, were products of the Western Enlightenment – creations of Grotius and Pudendorf, Locke and Rousseau, Montesquieu and Voltaire, Hume and Smith, Jefferson and Madison. Human rights were the mighty new weapons forged by American and French revolutionaries who fought in the name of political democracy, personal autonomy and religious freedom against outmoded Christian conceptions of absolute monarchy, aristocratic privilege, and religious establishment. Human rights were the keys that Western liberals finally forged to unlock themselves from the shackles of a millennium of Christian oppression and Constantinian hegemony.[20]

Witte[21] himself locates the formation of a *universal* system of rights in the Reformation, in particular in Calvinism, as developed by Beza, Johannes Althusius, John Milton, Nathanial Ward, John Winthrop, John Cotton, Thomas Hooker, Samuel Willard, Richard, Increase and Cotton Mathers. Their theory of rights was grounded in natural law theory and Scripture. Witte explains that these ideas were built on by John Adams (1735–1826) in America and by Calvinist political theologians in Europe and South Africa. They took the basic rights to life, liberty and property, as well as opposition to absolute power in the monarch, established in Magna Carta (1215), and developed a theory of rights and governance. Freedom of religion in this

[18] Grim and Finke (2011).
[19] Witte (2007), p. 22.
[20] Witte (2007), p. 20.
[21] Witte (2007).

context arose from the struggle of Reformation theologians to free believers from the hegemony of state religion.

Witte explains how the Reformation was key in the struggle, in particular, for religious liberty, but also developed a broader public theology incorporating rights. He identifies that both the Reformation and the Enlightenment built in their turn on classical Roman thought and medieval Catholicism, citing the Edict of Milan (313) which protected the freedom of religion guaranteed to Christians and others. He writes:

> While medieval canonists grounded rights in natural law and ancient charters, and while Protestant Reformers grounded them in biblical texts and theological anthropology, Enlightenment writers in Europe and North America grounded rights in human nature and the social contract. Building in part on the ancient ideas of Cicero, Seneca, and other Stoics of a pre-political state of nature, as well as on Calvinist ideas of social, political, ecclesiastical and marital covenants, John Locke, Jean Jacques Rousseau, Thomas Jefferson, and others argued for a new contractarian theory of human rights and political order. Each individual person, they argued, was created equal in virtue and dignity, and vested with inherent and unalienable rights of life, liberty and property.[22]

Witte[23] identifies the modern concept of universal rights as grounded in human dignity and along with Glendon,[24] Hauerwas[25] and others explains that rights talk has become a 'dominant mode of political, legal, and moral discourse in the modern West and well beyond—sometimes too dominant when it drowns out other critical forms of moral and political discourse.'[26] As such it has been impoverished by the loss of its theoretical and importantly its theological roots. This leads to a potential for the expansion of rights at the will of either Courts or governing authorities. This expansion of rights can lead to conflicts between religious groups and various social institutions, including those providing goods and services or individuals representative of specific causes.[27] Witte,[28] McCrudden[29] and others anticipating the ideals

[22] Witte (2007), p. 29.

[23] Witte (2007), p. 33.

[24] Glendon (1991).

[25] Hauerwas (2015).

[26] Lorenzen (2000), pp. 55–56, argues that: 'unless a universally valid moral foundation for human rights is discovered and agreed upon, human rights will be increasingly emptied of their validity and authority, and they will continue to be functionalized to serve national, economic, and other ideological interests. Perhaps the dawning awareness that all of humankind is in the same boat and needs to face the challenge of a human and humane survival together will provide the necessary motivation to arrive at moral foundations that can provide both legitimacy and content to human rights'. He argues there is a suspicion that human rights have been functionalised to protect and advance the interests of the strong "rather than empowering those in need".

[27] For example, where pharmacists, bakers or photographers are asked to dispense drugs, ice cakes or take photos for events or causes which they claim would cause them to act contrary to their religious conscience or where religious individuals seek to manifest their religious belief by wearing symbols of their religion: see Hirschberg (2018, 2019), Sorkin (2018), Garahan (2016) and Giles (2016, 2018b).

[28] Witte (2007).

[29] McCrudden (2011).

propounded in the Marrakech and Beirut Declarations and the Rabat Plan of Action, call for human rights norms to be critically re-grounded in religious narratives. Witte writes:

> Religions must thus be seen as indispensable allies in the modern struggle for human rights. To exclude them from the struggle is impossible, indeed catastrophic. To include them, by enlisting their unique resources and protecting their unique rights, is vital to enhancing the regime of human rights.
>
> Conversely, religious narratives need human rights norms both to protect them and to challenge them.[30]

Thus, religion is seen by Witte as indispensable to rights frameworks and Calvinism, in particular, is regarded as supportive of FoRB as a foundational right. His view is that by the same token rights frameworks need to be taken more seriously by religions. It is they, as intermediate institutions and leaders within society, that play a vital role in facilitating understanding and encouraging compliance with fundamental rights frameworks. This mirrors the views of Bielefeldt[31] in his support of the Marrakech and Beirut Declarations.

Theoretical foundations for universal rights grounded in natural law and human dignity thus, according to Lorenzen,[32] Witte,[33] Vorster,[34] McCrudden,[35] Finnis,[36] Kipper,[37] Lenzerini,[38,39] Slotte,[40] and others, have a long and distinguished history in theological as well as philosophical thought. Universalism presupposes that moral judgments can be grounded in universal principles and that there are some basic rights which all individuals possess regardless of cultural or social particularities. The universalism of FoRB presupposes that freedom of religion or belief, including freedom to change one's religion as well as freedom from religion, is a universal good for individuals and societies. This is supported by research from, for example, the Grims'[41] which has demonstrated that religion can be said to be in the interests of the common good from a socio-economic perspective. Although Davie,[42] as a sociologist of religion, cautions that it is necessary to understand religions in their particular context in order to assess their benefits or otherwise for any given

[30] Witte (2007), p. 335.
[31] Bielefeldt (2015).
[32] Lorenzen (2000).
[33] Witte (2007).
[34] Vorster (2010).
[35] McCrudden (2011).
[36] Finnis (2011).
[37] Kipper (2012).
[38] Lenzerini (2014).
[39] Lenzerini, in fact, locates universalism, supported by a theory of rights based in human dignity, in the writings of Cicero and Seneca.
[40] Slotte (2017).
[41] Grim and Grim (2016).
[42] Davie (2018).

society. Laborde,[43] writing within the discipline of political philosophy, has recently addressed the question of religion within Western and non-Western societies, disaggregating religion into its various parts in order to better understand the good of its various elements so as to make a case for its protection under law. As is demonstrated in the following section, although enjoying powerful support in academic thought, these views are far from universally accepted or practiced both within and outside Western legal traditions.

Two of the greatest challenges in modern thought to a theoretical grounding of FoRB as universal are the theory of relativism (both cultural and religious) and the principle of equality.[44] With regard to the former, attempts are being made to find a middle way to identify rights as universal while still accounting for cultural pluralism.[45] The former can potentially be addressed by considering a multivalent dialogic approach to building consensus on a core content for FoRB, while accounting for (constitutional) contextualization in the operation of the right. The debate over the balance between religious freedom rights and equality is likely to prove problematic for the concept of FoRB as a universal right for some time to come, both within Western and non-Western traditions. A mechanism needs to be established in order to better resolve these disputes in a manner that does not simply engage the ad hoc nature of litigation which focuses on the individual and individual rights. Instead what is needed is a mechanism to consider the broader implications for particular civil societies, of the resolution of rights clashes, particularly given their impact on faith groups.

What is proposed in this chapter, after identifying the evidence demonstrating a lack of universal application of FoRB in practice, is to address the issue of relativism by putting forward a dialogic theological approach to rights frameworks which takes up the call of Witte, Bielefeldt and the international community in the Marrakech/Beirut declarations, to seek to find a theological approach to FoRB in order to build a dialogue with both secular and religious traditions which accords religion a place at the table. In doing so it will identify FoRB as aspirationally and intentionally universal, acknowledging the work of political scientists such as Lerner[46] and Bâli and Lerner[47] in this area who have explored ways of incorporating FoRB

[43]Laborde (2017).

[44]Although sometimes related to cultural relativism, for example in those religious cultures which have a distinctive view of women and their role, equality also poses its own unique challenge to universalism, for example, in Western cultures where religious freedom rights clash with same-sex rights. Western states accept the universalism of rights frameworks and couch the equality debate in terms of the balancing of rights claims. The resolution of these clashes are addressed either by the Courts using legal reasoning balancing rights claims or structurally in forms of reasonable accommodation of religious or conscientious objection claims. In contrast to this, non-Western states may make reservations to their international obligations or fail to apply rights frameworks as universal. In some cases only a limited attempt may be made to recognise equality or religious freedom: see for example: Choudhury (2015) and Stopler (2003).

[45]For example, Rosenfeld (1999), Al-Daraweesh and Snauwaert (2015), Dahre (2017).

[46]Lerner (2011).

[47]Bâli and Lerner (2017).

into constitutional structures allowing FoRB to sit aspirationally within entrenched legal structures. This avoids FoRB otherwise creating a stumbling block to peaceful co-existence because its entrenchment proves too alien or legalistic a concept for some cultures to incorporate or successfully accommodate.[48] This is particularly important in those states which have suffered civil society breakdown. This is not to give way to cultural relativism but to recognise that, for some states, steps need to be taken towards implementation. The proposal here is that while acceptance of the universalism of FoRB may be obtainable on a policy level, practically, formulation of entrenched legal norms may not. What is needed is a dialogic approach building consensus on a core universal concept, which keeps the process towards enforcement live and engages religious traditions in this process. It is this that distinguishes the current approach from relativism which would seek to adapt FoRB to given cultures potentially to the extent that it becomes unrecognisable as a universal norm.

4 FoRB—The Lack of Universal Application

Before proceeding to outline the theoretical approaches proposed in this chapter, a brief overview of the evidence demonstrating lack of a universal approach to FoRB will be presented. This will assist in analysing the extent to which the theoretical approaches presented can be said to address the issues which challenge the universal application of FoRB.

There is evidence that, despite multi-layered recognition within both Western and non-Western contexts, FoRB restrictions are ongoing globally.

4.1 Empirical Evidence

Dr. Ján Figel' the Special Envoy for Promotion of Religious Freedom Outside the EU explains that the guarantee of freedom of religion is a litmus test within a state for the guarantee of other rights and freedoms.[49] He explains that where a state abuses that right then abuse of other rights follows. The cry then that comes from those within states with high levels of rights abuses, and in particular from those who are forced to flee as a result of their faith, is understandably: 'there are no human rights'. This was the cry of Mar Nicodemus Sharaf, Archbishop of Mosul[50] speaking in 2016 to the Institute of Cultural Diplomacy when he recounted the murder of Christians, the seizure of his cathedral by ISIS and his forced exile from his homeland, Iraq. Horrific

[48] See, for example, Schonthal et al. (2016) and Künkler et al. (2016).

[49] Dr. Ján Figel' speaking at the Institute of Cultural Diplomacy 2016: see https://www.youtube.com/watch?v=iimjLKoGk6g (date accessed July 2017).

[50] See https://www.youtube.com/watch?v=FZqm0lpWGgg (date accessed July 2017).

rights-abuses, documented and undocumented, still go on despite there having been rights frameworks in place at an international level for over 60 years.[51]

Restrictions on FoRB are evidenced in regional and global reports from Asia, America (the Pew Research Centre and the US Department of State), the United Nations and NGOs such as Open*Doors* and Aid to Churches in Need.[52] Despite the fact that 84% of the global population adheres to a faith,[53] in over 50% of 196 countries surveyed (almost all the countries in the world) there was persecution of religious groups.[54]

When considered with the figures on Christian martyrdom alone there is strong evidence that religious freedom is far from universally enjoyed. The Vatican puts the figure of Christian martyrs at 100,000 a year.[55] Open*Doors* puts the figure at 322 Christians per month, with 772 per month suffering some form of violence.[56] Research puts the figure of Christians martyred since the time of Jesus at 70 million.[57] This is greater than the population of the United Kingdom (65.64 million (2016)). As can be seen, statistics can vary considerably. The problems that arise in obtaining statistical evidence on religious freedom are addressed by Bielefeldt and Wiener[58] in their sophisticated analysis of religious freedom. They explore case studies on restrictions on religious freedom, explaining that the causes for such restrictions are multifaceted. They identify that what is seen and documented is only the tip of an iceberg of restrictions which occur in day to day life in many places and, that such restrictions can often be difficult to document. They also argue that a far more indepth analysis of available data is required in order to draw inferences on it concerning the state of religious freedom in any given place.

4.2 Evidence from Case Law

Even in jurisdictions where FoRB is constitutionally protected as a fundamental right and which provide enforcement mechanisms for individuals to assert that right, there

[51] For example, see the rights abuses highlighted in D'Souza et al. (2007).

[52] Pew Research Centre (2012, 2018), HRRC (2015) FN 12, US Department of State (2017); the annual reports of the UN Special Rapporteur on freedom of religion or belief, in particular UN Special Rapporteur on freedom of religion or belief (2017) which focuses on the increase in religious intolerance. Studies by NGOs also support this finding in specific areas. For example, OpenDoors (2019), Aid to Churches in Need (2016); see also for the conditions arising as a result of ghettoization of religious and cultural minorities: the Casey Report (Casey L (2016)), OpenDoors Germany (2016).

[53] Pew Research Centre (2017a).

[54] Aid to Churches in Need (2016). See also Pew Research Centre (2017a).

[55] Alexander (2013).

[56] OpenDoors (n.d.).

[57] Martin (2014).

[58] Bielefeldt and Wiener (2019).

is evidence, according to authors such as Dingemans[59] and Martinez-Torron[60], that FoRB protections are less than satisfactory. There is also recent evidence in case law that restrictions are on the increase when balanced against same-sex claims or claims by the state or business that they should be entitled to implement a policy of 'neutrality'.[61]

4.3 Theological Challenges

There are only limited reservations within international legal instruments in respect of FoRB as an international fundamental right (in recognition of the operation of Sharia law within a nation state). Nevertheless, Islamic states both individually and within the Organization of Islamic Cooperation can take an approach to FoRB which does not sit comfortably with Western liberal democratic models. This occurs where the preferring of Islam over other religions results in the oppression or exclusion of religious minorities in an Islamic state. Although its purpose is to advance human rights and fundamental freedoms in OIC states and for Muslim minorities in non-member States, article 1 of the OIC Charter sets out its objectives as:

> 11. To disseminate, promote and preserve, the Islamic teachings and values based on moderation and tolerance, promote Islamic culture and safeguard Islamic heritage; 12. To protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions (…).

Where this is interpreted as an exclusive theoretical basis for Islamic civil society building this principled approach can undermine the universal application of FoRB which requires a pluralistic approach to civil society building.

Theoretical opposition to FoRB also comes from Asian and African states where community or family interests take precedence over individual rights claims, including FoRB.[62] Coupled with the restriction of FoRB on public security grounds there remains some way to go before it can be argued that FoRB is a universally accepted or applied right, even if it is enshrined in law at multiple levels.

Bielefeldt et al.[63] identify a number of reasons for lack of universal application of FoRB including fear of freedom itself. That is the fact that rights: 'challenge legal privileges, monopolies of power, traditional gender roles, and cultural or religious hegemonies.'

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[59] Dingemans (2010).

[60] Martinez-Torron (2012).

[61] Some examples include *Preddy v Bull (Liberty intervening)* [2013] UKSC (2014) OJLR 3(2) 362; *Achbita v G4S Secure Solutions NV* (Case C-157/15) OJLR 2017 6(3) 622; *Mme Fatima X, épouse Y v Association Baby Loup* (2013) OJLR 2(2) 478 and (2014) OJLR 3(3) 521; *(Eweida) Chaplin, Ladele and McFarlane v United Kingdom* (2013) OJLR 2(1) 218; *SAS v France* (2014) OJLR 3(3) 520; *Ebrahimian v France* (2016) OJLR 5(2) 365; *Elane Photography, LLC v Willock* (2012) OJLR 1(2) 538. For a critique of the policy of neutrality see Vanoni and Ragone (2018).

[62] Sen (1997), Khong (1997) and Inoguchi and Newman (1997).

[63] Bielefeldt et al. (2016: 1).

They identify that fear of freedom includes a fear of spiritual or moral decline and fear of a drive towards secular society, both used as a ground for opposing FoRB.[64] Bielefeldt et al. also identify that fear of religion plays a role in hostility towards FoRB. Commenting on Glendon[65] they point to a fear of 'la revanche de dieu' causing religion to re-emerge in public and political life. This is because of links to fanaticism, inequality and bigotry, undermining what many see as the ground gained under secular regimes towards more egalitarian, accepting societies. This view has been identified more recently in the writings of Stopler,[66] Calo[67] and McFaul.[68] Thus, it is that, whilst FoRB is intended to protect those who adhere to religious beliefs and those who do not, opposition comes from within various traditions, religious and secular, as a result of fear of loss of that which they hold dear within civil society.

4.4 Conclusions on the Evidence

These current restrictions and challenges are set against a long and chequered history of FoRB and plural living together in law and practice, as well as in political, theological and philosophical thought. A brief overview of the history of FoRB demonstrates that, although the concept of FoRB precedes the modern post-WWII forms it takes at international, supranational and national level by at least two millenia, it has been far from universal in its legal form or practical application. So, whilst history demonstrates a gradual development of FoRB and its ultimate recognition as a universal fundamental human right, its practical application demonstrates that despite it being legally enshrined in international, regional and national law, its application has been and still is far from universal.

Empirical, jurisprudential, academic and historical evidence challenges the claims of FoRB to universalism. In the light of these challenges to its universal application, should FoRB still be regarded as a universal fundamental right and if so what would convince those states and bodies which oppose it to regard it as such? The approach taken in beginning to answer these questions in this chapter is a theoretical one. I have made suggestions as to the creation of a platform for dialogue to strengthen peaceful

[64]By which they mean strongly laic forms of public living together pushing religion into the private sphere. Interestingly within European jurisprudence it is strong forms of secularism that appear to be driving religion out of public life in order to protect equality rights, or the right to conduct a business: Giles (2018b). Resistance to FoRB on grounds that it undermines public morality can be seen in some countries where Islam is the underlying impetus for law creation and adjudication: see for example Bakhshizadeh (2018) and Qureshi (2018). However, as Bielefeldt et al. (2016), p. 2, note it was not until 1965 during the Second Vatican Council that the Roman Catholic Church endorsed religious freedom. Thus opposition to religious freedom arises in more than one quarter.

[65]Glendon (2015).

[66]Stopler (2003).

[67]Calo (2018).

[68]McFaul (2018).

civil society relations elsewhere Giles.[69] This chapter considers how dialogic multivalent faith-based reasoning might be used to establish an underlying rationale for FoRB and build a consensus around its core content. This chapter develops a theological rationale stemming from Reformed theology to facilitate that consensus. It is accepting of rationales proposed by those of other faiths and none. This approach is grounded in plural living together as the optimum condition for civil society and human flourishing. It sees pluralism as necessary for FoRB and FoRB as necessary in order to foster plural societies. It aims to take account of fundamentally different and diverse cultural, legal and constitutional traditions.

5 A Theological Justification for FoRB as a Universal Right

To avoid both the naturalistic fallacy[70] and jurisprudentially[71] stepping into the positivist camp, it is proposed to establish a theory to support the universalism of FoRB grounded in a dialogic theological approach which can enter into dialogue with non-Western faith based and non-faith based theological and philosophical approaches. It does not provide the whole answer but proposes a process of building consensus in a manner which enhances the understanding of the importance of FoRB as universal.

This approach is based on the rationale that faith-based cultures grounded in faith-based reasoning may well have more in common with other-faith based cultures, or at least with cultures accepting of faith-based reasoning, than with cultures which are based predominantly on secular (non-religious) rationales for rights. This is particularly so where secular rationales might otherwise come across as the imposition of a Western liberal democratic approach or even a form of colonialism. This assumes that those of one faith are able and willing to respect the integrity and understand the motivations of those of another faith, even if they fundamentally disagree with the particular doctrines of other faiths. Dialogic theology in this case is the tool whereby a discourse takes place because it provides more common ground than a dialogue stripped of theological content altogether. Its key requirement is that a given faith can recognise the need to accept some form of plural living together as a condition of public living together. It does not necessarily entail disestablishment, the avoidance of forms of theocracy or the preferring nationally of one religion over another. Given the number of countries globally that preference one religion over another or incorporate forms of establishment this would be an unrealistic task. It does regard as axiomatic that a predominant religious group makes space for other religions

[69] Giles (2018a).

[70] The naturalistic fallacy would involve arguing an 'ought' (that FoRB ought to be universal) from an 'is' (for example, because it is claimed in legal instruments that FoRB is universal or because development of the right throughout history leads us to this conclusion, we ought to regard it as such).

[71] Here jurisprudence refers to the philosophy of law rather than the body of case law giving rise to the creation of precedent.

and, optimally, engages in dialogue, concerning the public good, law creation and adjudication, with them.

Given the fundamentally different understandings of public living together amongst worldviews and faith traditions around the globe, support for a universal concept of FoRB—whether legally enforceable, political or aspirational, will necessarily require more than one single justification. It will also require that any given tradition is not requested to surrender the integrity of its foundational principles. Such an approach treads a fine line between universalism (albeit by a multivalent route) and contextualisation on the one hand and relativism on the other. In other words, it is necessary to build sufficient consensus around FoRB to legitimately be able to argue that its conceptualisation as a universal right remains intact. At the same time, it is necessary to find grounds to support its universalism and sufficient consensus around what FoRB consists of as a legal or policy concept within various traditions. It is argued here that by taking a dialogic and aspirational approach its application becomes workable, in particular in those societies which pose a challenge to it.

Religions are particularly well-suited to this dialogic contextualised approach because by their very nature they tend to contain a body of core texts and principles and alongside this they formulate a body of rules enabling the religion to contextualise itself in particular societies over time. This will generally be the Tradition of a particular religion.[72] Judaism and Christianity, for example, are recognisable as such globally and throughout history, based on enduring core doctrines. Each has, however, to a certain degree contextualised itself over time and within different cultures.[73] In addition to the ability to contextualise, Glenn[74] identifies an ability to hold together various strands within themselves as a key attribute that religions are able to contribute to civil society and law formation. The dialogic theological approach put forward in this chapter to justifying FoRB as a universal right feeds into and to a certain extent relies upon this ability to sustain diversity within religions.

Christian theology has been supportive of the conceptualisation of rights frameworks around the concept of human dignity and hence, to some extent, responsible for the perception of rights as individualistic.[75] This contrasts with its self-understanding

[72]For further discussion of this subject see Giles (2018a).

[73]Notable exceptions to this would be, for example, the Amish communities in the United States of America and forms of orthodox Judaism.

[74]Glenn (2014).

[75]Roman Catholic theology has traditionally grounded rights in natural theology and human dignity. The Protestant tradition encompasses various strains of thought including the Lutheran tradition. This has taken a 'two kingdoms' approach towards human rights which distinguishes between the worldly realm governed by law and the realm of the gospel. Human rights fit into the schema as secular norms belonging to the realm of law and are based on human reason rather than on distinctively Christian norms which belong to the gospel realm. Human rights within Lutheran thought do not have a uniquely Christian foundation. Liberation theology and feminist theology identify the common human experience of oppression, and seek to discern how power is being manipulated. The link is then created between fundamental rights and the gospel call to liberation. According to Witte (2007), the reformed tradition has, since Calvin, developed a rights theory based on natural law theory, the concept of human dignity and the inherent worth of humankind. Different theological frameworks support a diversity of human rights. One approach common to

which tends to be primarily and fundamentally communal in its approach to living together and outward looking in its approach to public living together. Coupled with their ability to contextualise themselves within various cultures over time and their philosophical theological approaches to public living together supporting pluralism and fundamental rights, some forms of Christianity contain within themselves the tools for re-engergising the concept of FoRB as universal.[76] They are able to respond to the call of the Marrakech and Beirut Declarations and the Rabat plan of action to engage religious leaders and religious groups in peaceful plural living together.

The approach within the Christian tradition explored in this chapter is rooted in the Reformed doctrine of common grace. This stems from Reformed Calvinist thought that, in addition to God's special or saving grace bestowed upon believers, God's common grace is bestowed on all human kind. It curbs the power of sin making forms of communal orderly life possible.

Traditionally Calvinist thought has grounded human dignity in common grace.[77] The approach I put forward takes a step beyond this, or rather takes a prior step in theological logic, and argues that if common grace is bestowed on all human kind then those within other traditions, religious or not, can contribute to the understanding of FoRB as universal and can contribute to the understanding of the common good. It is an approach which listens and enters into dialogue to build consensus on the basis that God will have given wisdom and understanding to those outside a particular faith tradition. It hears the arguments of those traditions which find FoRB a challenge and enters into dialogue with them. It is based on the understanding that common grace understands those outside the Christian faith to be equally as capable, and in some cases more capable, of understanding how to engender plural peaceful living together, including the living together of various faith groups.

To give an example of how this might work, take a Christian citizen who is suffering from physical and psychological ill-health. They have been to a faith healer within their own tradition, but this has not brought about observable change. They go to a Jewish doctor/psychologist who gives them advice on how to change their

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a number of traditions is to identify a limited number of fundamental principles such as freedom, equality, solidarity, life and dignity. Alternatively, within the various traditions fundamental rights are focused in particular on human dignity and other rights are seen as outworkings of that dignity: see Atkin and Evans (1999).

[76] Although some traditions, such as the Anabaptists advocate a withdrawal from public life, their beliefs still require strong protections within a constitutional framework, in particular the protection of religious freedom and religious minorities. They need to exist within plural systems even if they do not engage with them. Freedom of individual conscience and religious liberty, including toleration of divergence in religious matters, are therefore high on their agenda: see Lorenzen (2000), p. 53. Lorenzen (2000), p. 53, explains how Roger Williams, founder of the colony of Rhode Island, is perceived of as the father of religious freedom by the Baptists since he provided a haven in which religious freedom could be practiced. The colony attracted Quakers, Anabaptists and others. Lorenzen would, however, potentially take issue with Witte on the legacy of Luther, Calvin and Zwingli, accusing them of failing to promote religious liberty and of supporting one religion for one polity. Lorenzen argues that it was the Baptists who supported religious liberty and freedom of conscience, even when subject to persecution.

[77] For a discussion of this see Voster (2010).

lifestyle and provides therapy sessions based on principles within the Jewish faith. The Christian citizen changes their life style, works through the therapy and consequently enjoys good health. The very fact that the Christian citizen and the Christian faith healer are Christian does not necessarily give them the full understanding of how to enjoy good health. Similarly, the fact that rights frameworks are based either, as some would argue, on enlightenment thinking or, as others would argue, on Christian thinking, does not give the West, or Christian groups, exclusive competence to decide how they best operate to bring about peaceful societal relations, understand the common good and protect human dignity (in our example above, components of 'health').

On the basis of the doctrine of common grace a healthy society understands that the ability to contribute to the discussion rests with various individuals and groups, it listens to those of various faiths and those of none—essentially it is a society in which there is religious and conscience-based freedom to develop approaches to societal needs and public living together. It is dialogic in its approach towards building consensus and accepting of multivalent rather than bivalent reasoning in order to accommodate various understandings leading to that consensus. This necessarily entails the ability of groups to meet and practice/worship in accordance with their doctrines and have space to formulate and discuss ideas *intra se*. A doctrine of common grace applied to public living together requires civil society groups and government to accept the need to listen to those from other faith traditions and those from none. It recognises that those of different faiths may have skills in healing (physical, psychological and societal) linked to but independent from their stance on salvation and/or eternal life.[78]

In this light, common grace as a doctrine, recognises FoRB as foundational or key to gain maximum collaborative advantage from the understandings of various faith-based and non-faith-based philosophical traditions and approaches in understanding how to engender peaceful relations in society and foster the common good. Only by allowing the free exercise of conscience and religious belief is it possible to create the dialogue that will draw the understanding needed from various groups and individuals.

The following section explores the doctrine of common grace in more depth, and looks at the difference between common grace and special grace. The proposal here is to formulate a theological rationale for FoRB which is not intended to undermine the tremendous work undertaken on human dignity within and outside the faith traditions. Rather, it is to bolster it and argue for the acceptance of consensus around it and establish a preliminary rationale for FoRB based on the concept of gift. It goes a step further in its willingness to find multiple paths to building a consensus around the rationale and content for the right to freedom of religion and belief—it is not dependent on human dignity as foundational for rights frameworks but

[78]Such that saving grace, by which believers accept Christ as Lord and enjoy realised and future eschatological benefits (the Kingdom of Heaven on earth and eternally after death) operates distinctly from common grace whereby all human kind can enjoy certain benefits bestowed by God's grace on all humankind.

completely accepting of it. In this sense it addresses the deep concerns expressed over the individualistic nature of rights frameworks—it can take into account concerns about communal as well as individual interests.

5.1 Common and Special Grace

In order to understand the concepts of common and special grace it is first necessary to understand the concepts of grace, redemption, salvation and the operation of Trinitarian theology.

The Christian theological concept of grace is divine favour or gift given through Christ.[79] Christian theology teaches that the Trinitarian God (Father, Son and Holy Spirit) created the earth and humankind. God placed humankind in the Garden of Eden, but humankind sinned (Eve gave Adam the forbidden fruit and Adam ate it) and they were cast out of the Garden. Humankind's constant tendency, having offered and eaten the forbidden fruit and gained a knowledge of good and evil, is towards sin. As a consequence, humankind was in need of redemption from this sinful state needing salvation in order to live and enjoy a redeemed life on earth (realized eschatology which gives the believer a taste of what is to come) and enjoy resurrection life (future eschatology). Christian theology explains that as a result of the death and resurrection of Jesus Christ humankind, by acknowledging their sinful state, confessing their sins and accepting Christ as their saviour, can be redeemed from their sin, can live a life empowered by the Holy Spirit to do God's will, and ultimately will be saved to be with God in eternity. Redemption explains how humankind can be forgiven for sins, soteriology explains how humankind is saved from sin and its consequences for present and eternal life. Trinitarian theology posits how God can be three in one: The Father God, the Son, Jesus Christ, and the Holy Spirit (Creator, Redeemer, sustainer).

Christian theology explains that it is by God's grace—that is by an undeserved act of giving and divine favour—that God saves humankind and by His grace that once an individual has a relationship with Christ, the Holy Spirit works within that individual so that they can partake in the redeemed life.[80]

Reformed theology makes a distinction between special grace and common grace. Special grace is the operation of grace outlined above, that is effectual to redeem humankind, fundamentally to enable a relationship between God and his people. Common grace is that grace by which humankind is created. It is given to all humankind and necessary for them to live and flourish. Common grace does not have soteriological effect. It sustains humankind throughout their earthly life. It acts

[79]Mcfarland et al. (2011), p. 292, 'Grace'.

[80]There is a long-term debate within the Calvinist tradition over the extent to which individuals play any part in deciding whether to accept Christ as saviour or whether God predestines them and then acts in them to bring about the relationship with Christ. This debate pertains to saving grace and is beyond the scope of this chapter.

to hold the total depravity of human nature in abeyance to the extent that humankind accepts its operation, operating whether or not an individual has accepted Christ.

Common and special grace should be distinguished from prevenient grace, a doctrine based in Armenian theology and in earlier Catholic theology, that God by his divine grace chooses to act in an individual demonstrating his love such that an individual, exercising their free will, can then make a choice as to whether or not to accept or reject that love and consequently a relationship with God through Christ.

The doctrines of common and special grace stem from a seeking for understanding amongst Reformation theologians from the early to mid 1500s onwards as to why, in a world where those who have committed their life to Christ live alongside those who have not, equal advantages and at times greater benefits and advantages are bestowed upon non-believers compared to believers. Similarly, how there could be good, truth and beauty in the unredemptive life and order in the world despite the fact that the world lies under the curse of sin. The question for reformed Christians was how could those outside the covenant relationship with God have an understanding of right and wrong and live a virtuous life that accords with those within the covenant?[81] The doctrine of common grace responds with the explanation that such is God's love for humankind that by His grace he sustains not only those who have committed their life to Christ, but those who have not accepted Christ as their saviour. This is unconditional love.

5.2 Pre-Reformation and Roman Catholic Theology

Pre-Reformation theology based on Augustine (354–430) and, following on from this, post-Reformation Roman Catholic theology, maintains that God's grace can only act in a redemptive capacity within those who accept salvation and live a redeemed life. The distinction is not made between common and special grace in the manner later adopted by reformed theologians.

Augustine emphasized the fallen state of humankind, their inability, in the absence of the grace of God's renewing power, to do any good and the dependence of humankind on God's redeeming grace: something that could not be earned, but which was a gift. Augustine perceived acts of the unredeemed as sinful because they were not undertaken out of love for God and did not seek the glory of God.[82] During the Middle Ages the Augustinian concept of the lost state of humankind gave way to the theory that prior to the fall humankind was created righteous. This kept the lower nature under control. Consequent upon the Fall humankind tendended towards sin but was still capable of good and true acts. Roman Catholic theology articulated moral virtues through which humankind could develop humility, obedience, meekness, liberality, temperance, chastity and diligence. Humankind's endeavors in these areas could also be assisted by sanctifying grace for those who were saved. This

[81] Berkhof (1958), p. 432.

[82] Berkhof (1958), p. 433.

contrasted with moral virtues of the faithful which included faith, hope and charity, bestowed by sanctifying grace[83] alone. Grace was seen as capable of bringing the natural (created) capacities of the saved to perfection. It is the concept of natural capacity in humankind generally, endowed on humankind at the point of creation, that remains key to Roman Catholic theology today. God's grace is not seen to operate to sustain or enhance the natural capacities of individuals outside the soteriological operation of the Holy Spirit in those who are saved.

5.3 Reformation Theology

Luther,[84] instigating the European Reformation in order to call believers back to what he defined as biblical truth rather than what he perceived in the Roman Catholic Tradition encompassing pious but unbiblical practices, made a distinction between the lower earthly sphere and the higher spiritual sphere. He maintained that while humankind in their fallen state were able to do good in the lower sphere, they were incapable of doing so in the spiritual sphere.[85] Zwingli,[86] also a key figure in the European Reformation, writing on the concept of grace and the state of human nature in Switzerland, understood sin as pollution rather than guilt and therefore conceptualized grace as sanctifying (cleansing) rather than pardoning (forgiving). He determined that sanctifying grace could influence not only those who had accepted Christ, but also to some extent those who had not. For Zwingli it was this sanctifying grace rather than the natural goodness of humankind that accounted for the good in the world.

Calvin, also based in Switzerland and instrumental in the European Reformation, held a different view to both Luther and Zwingli. He maintained that humankind on their own are incapable of doing any good whatsoever and that saving grace was particular to those accepting Christ and living the redeemed life (thus far his teaching is in line with the original Augustinian view and we are back to the total depravity of humankind). Unlike Augustine, Calvin also developed a doctrine of God's common grace. This grace neither pardoned nor cleansed the individual, nor did it have soteriological impact. According to Berkhof's account of Calvin's doctrine of common grace:

> It curbs the destructive power of sin, maintains in a measure the moral order of the universe, thus making an orderly life possible, distributes in varying degrees gifts and talents among men, promotes the development of science and art, and showers untold blessing upon the children of men.[87]

[83] In reformed theological terminology special grace.

[84] 1483–1546.

[85] Augsburg Confession Article XVIII.

[86] 1484–1531.

[87] Berkhof (1958), p. 434.

The doctrine was accepted as part of reformed theology although it was only taken up seriously in theological writings more recently by Abraham Kuyper,[88] Herman Bavinck,[89] Louis Berkhof,[90] Cornelius Van Til[91] and others.

5.4 Common Grace and FoRB as a Universal Right

Despite differences between various Christian traditions there are understandings of grace common to both Roman Catholic and reformed theology. There are several common themes to mention: first, that grace originates exclusively in the life of the Trinity: 'rooted in the eternal love of the Father, manifest in the life, death, and resurrection of the Son, and poured forth on creatures through the power of the Holy Spirit'. Second, grace is free and is a gift, based in divine love and never necessary for God's wellbeing. However, it is not cheap, given that it is based in the sacrifice of Jesus Christ, according it an infinite cost.[92] The essential difference between the reformed doctrine of common grace and other Christian traditions is that the reformed doctrine of common grace holds that God is deemed to work on an ongoing basis in the lives of non-believers as well as believers. Other traditions base their concept of the capacity of humankind outside of the redeemed life, in natural theology. This is on the basis of God's imprint in humankind at birth, grounding rights in human dignity or human ability to reason. The implications of the doctrine of common grace and its intersection with FoRB is that it translates into the willingness to hear and engage with those of all faiths and none accepting that by God's grace their voice is both capable of and essential towards building consensus. From this point of view, this makes FoRB a foundational or core right because it supports and requires the multivalent approach necessitated by this understanding of God's grace towards humankind. This is because the starting point for peaceful living together, a goal towards which FoRB is engaged, is respect for and listening to the voice of others.

6 What Can the Doctrine of Common Grace Add to the Debate?

The implications for the application of the doctrine of common grace to FoRB go further than establishing it as a core or foundational right. It can also facilitate contexualisation of rights frameworks. This is important because taking a country too far

[88] 1837–1920. Kuyper et al. (2016).
[89] 1854–1921.
[90] 1873–1957.
[91] 1895–1987. Van Til (1972, 1977).
[92] McFarlane et al. (2011), 'Grace'.

too fast in constitution rebuilding or transformation can simply result in civil society breakdown—this was acknowledged by the EU when it formed agreements with the former Eastern bloc countries in order to facilitate accession to the EU—it took up to 10 years to bring the legal structures and economic systems into a state of readiness. That model was adopted for states which were willing to take on board the Western liberal democratic model and free market economy. Thus, even where a government and its citizens are willing to adopt structures incorporating rights frameworks, time is required to carefully ensure these are entrenched both in legal and socio-economic forms and mindsets. Similarly, there is a danger that the rights frameworks can fail to account for fears or at least motivations behind a policy that drives a country to pursue extreme forms of neutrality whereby religion is excluded from the public sphere.[93] European states take different policy approaches to dealing with the threat of terrorism and extremist violence—driving religion out of the public sphere is one such approach. Common grace acts as a theoretical basis of FoRB which emphasises FoRB as a foundational norm but also, in its dialogic approach open to understanding plural voices, it seeks to understand context and explores consensus building over time in the interests of the common good.

6.1 Ongoing Abuse of Human Rights

How does common grace as a foundational theoretical basis for a fundamental right speak into ongoing situations of gross violations of fundamental rights? While rights frameworks may to some degree have facilitated peace between European member states, atrocities, including acts of genocide, continue around the globe.

Common grace is based on the concept of the total depravity of human nature. One only needs to listen to the experience of refugees or read about or listen to victims of rights abuses in the Middle East and elsewhere to understand the extent of the depravity of human nature. Common grace steps in and names and supports an understanding of the horror of what victims have been through. It understands that terrible suffering is as a result of the rejection by those with power of any empowering goodness. It condemns such behavior as a deliberate rejection of that which is intended for humankind and, as an underlying rationale for FoRB, identifies a better means of organization of civil society—one in which humankind is protected from human depravity by the acceptance of a system of governance that accommodates difference rather than seeking to eliminate it.

[93] France and Belgium, for example, are two countries currently imposing strong forms of neutrality within the public sphere.

6.2 Individualism

In contrast to many secular and theological approaches to rights, the application of the doctrine of common grace that I propose perceives fundamental rights as a gift—given to humankind as an act of love. On this basis this gift does not stem from anything inherent in humankind and does not locate itself primarily in the individual but locates itself in the will of God and his good and perfect intentions for humankind. While its outworkings can be ascertained based on the concept of human dignity, its initiation is with God. It can therefore exist as a pre-foundational principle to other theories (whether Christian, secular, or based in other faiths). Its first question is what does God want for humankind? Its next question is—what is in the interests of the common good? This is a different starting point for discussion than the question of what human dignity or human worth requires. This approach can address the accusation made by cultures (such as the Japanese and African cultures[94]) which raise community interests above individual interests. It is not that it does not or cannot encompass the concept of human dignity—it can and it does. Before it does, it seeks to retain the integrity of its biblical foundation, while being open to hearing other positions, because it accepts that God can by his common grace care for all humankind individually and communally. It speaks through those of other faiths and none. It is dialogic—willing to accept that although by his special grace God has given illumination to those within the Christian faith, he has also by his common grace given illumination to those outside it. It supports an approach which accepts an individual, in community, where they are and which seeks to engage in dialogue about civil society in order to work towards that which is best for humankind generally and in given contexts.

6.3 Secularism and the Idolatry of Rights Theory

As identified earlier in this chapter, European society and Western academia has increasingly seen a move away from public expressions of and public reasoning based on religion. In some quarters this has resulted in what might be termed the idolatry of rights whereby rights have become a moral framework in and of themselves. This has also been accompanied by a widening gap between cultures and nation states which are predominantly religious and those which are not.[95] Rights theory sets a moral compass which is focused on the individual and on equality, this can downplay the role of religion and community—to some this approach to public living together is at best misguided and at worst incomprehensible and consequently unacceptable.

Common grace speaks into this gap by providing a basis for arguing that there is a dialogue to be had between those of no faith, those of other faiths and those

[94]For a discussion of individualism and universalism of rights frameworks see: Tomuschat (2003), pp. 69–83.

[95]I have commented on this more fully elsewhere: Giles (2019).

within the Christian traditions. This approach supports the integrity of core doctrine but anticipates an ability and willingness to enter into dialogue on the basis that each voice is able to contribute to discussions on law creation, adjudication and public living together. It is supportive of freedom of conscience and belief, just as much as it is supportive of freedom of religion. It makes FoRB the foundational right because it establishes a basis from which discussion can begin in order to building consensus around other rights. It regards the enjoyment of FoRB in community as equally foundational.

6.4 Jurisprudence: The Forum Internum/Forum Externum Divide and Equality

The dual conceptualisation of FoRB in academic literature and in jurisprudence is problematic. This is a form of reasoning whereby an individual's right to believe (*forum internum*) is generally protected absolutely whereas the right to manifest one's belief in public (*forum externum*) can generally be limited where it might infringe another's fundamental rights. This can lead to clashes between rights claims and to clashes between ideologies and theological understandings of the common good. This occurs in particular where a religion does not countenance the division between the *forum internum* and the *forum externum*, but sees praxis as coterminous with belief. Weiler[96] explores this problem in relation to the Muslim and Jewish faiths in an analysis of the *Achbita* and *Bougnaoui* cases. This dual conceptualisation of the right grants a licence to theologians, political philosophers, scholars of jurisprudence and legal practitioners to subsume theological conceptualisation of the common good (constitutional or otherwise) to secular or neutral understandings of the common good. This difference in outlook is clearly expressed in the opinions of Advocate General's Sharpston and Kokott in the *Achbita* and *Bougnaoui* cases when exploring the importance of religion as a protected characteristic when balanced against the interest of a business. It is the opposing views of the nature of religion as a protected characteristic that mark this deep difference of ideology between the Advocate Generals. These are expressed as follows:

Advocate Kokott in her opinion in *Achbita* at paragraph 116[97] states:

> However, unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one moreover, over which the employees concerned can choose to exert an influence. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employee's premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.

[96] Weiler (2017).

[97] (Case C-157/15) 31 May 2016.

Advocate General Sharpston on the other hand at paragraph 118 of *Bougnaoui*[98] states:

> Here, I emphasise that, to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not.

It is interesting to note that based on national and European jurisprudence (both within the European Court of Human Rights and the Court of Justice of the European Union), had the employees been seeking to assert LGBT equality rights, their equality claims would have succeeded in the national courts and the Court of Justice of the European Union—a company cannot exclude expressions of sexuality from the work place. Individuals are free, for example, to present as heterosexual, bisexual, gay or lesbian. Since, however, the claimants' claims were religious equality claims they were not able to challenge a company's general policy of neutrality—namely that no one could present any views, religious or otherwise, at work, although it was possible to challenge a single client's desire not to have an employee attend their premises wearing a hijab. Thus denial of religious freedom to an entire workforce of a multinational company was acceptable, whereas denial of an individual employee's religious freedom at the behest of a client was not.

Conversely equality poses a problem outside as well as within Western liberal democratic traditions. Stopler,[99] and Bakhshizadeh[100] identify these issues in their writing as does Ghanea[101] in her report for the US Commission on International Religious Freedom. In these cases orthodox or fundamentalist beliefs can result in religion being given precedence over equality rights, including women's equality rights.

The interpretation of the doctrine of common grace proposed in this chapter supports an approach which facilitates a dialogue around these issues and identifies that both extremes—that is fundamentalism in the form of neutrality or religion that does not accommodate difference in the public square—are contrary to that which is foundationally important, namely that civil society groups and government listen to and enter into dialogue with those of opposing views. Given that, if the opportunity for dialogue is opened up, opposing views will arise, the rights clashes consequent upon plural living together require a dispute resolution mechanism. Such a mechanism is proposed in the following section applying Dooyeweerd's philosophical approach to balancing the interests of various spheres in society.

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[98](Case C-188/15) 13 July 2016.

[99]Stopler (2003).

[100]Bakhshizadeh (2018).

[101]Ghanea (2017).

6.5 Relativism

Earlier in this chapter relativism was identified as one of the greatest challenges to FoRB as a universal right. The discussion in this section has demonstrated how my interpretation and application of the doctrine of common grace retains as its basis the requirement to hear the arguments and concerns of individuals and society groups. Further, that like religion, rights frameworks, and in particular FoRB are potentially capable of contextualization within given societies over time without foregoing a core content. The doctrine of common grace recognises that individuals, governments and civil society groups have the ability, through God's grace, to discern the common good for their own groups and for society as a whole within given national contexts. Where the core content of FoRB requires at the very least that plural voices are heard within society, it can sit as an entrenched right on one end of the spectrum and as an aspirational right on the other. What is essential is that a consensus is reached around the core content of FoRB even if its operationalisation varies in different contexts.[102]

7 Where Does Dialogue Lead? Resolving Rights Clashes: Dooyeweerd and Normative Institutional Pluralism

This chapter argues that the doctrine of common grace can support a multivalent dialogic theoretical basis for FoRB to support plural living together and consensus building. There are, however, still considerable barriers to acceptance of religious freedom as a universal right. These barriers are likely to stem from fear—fear that pluralism might pose a challenge to state adopted ideals and morals, fear of unrest, fear of difference and individual free will.[103] A workable theory will need not only to foster consensus building, albeit by a multivalent route, but also to facilitate the resolution of differences and disputes. It will be required to address these fears openly while also ensuring a secure place in society for difference. In this way it is likely to be able to undergird a right to religious and conscience-based freedom in a global context.

It is possible to address the theoretcial basis for religious freedom not only through rights discourse but through political philosophy. In this manner structural issues can be addressed not only to permit religious groups to form and flourish within civil society, but also to identify a means of resolving disputes. It should be born in mind, however, that while legal and political structures can facilitate peaceful living together, it is education about faiths, values, legal norms and structures that will ultimately be needed to enable individuals to understand and operate within the structures governing them. An example demonstrating this can be seen in Burma. Although restrictions on freedom of expression were recently lifted to some extent in

[102] For further discussion on the potential core content of FoRB see Giles (2019).

[103] The EU Special Envoy for the Protection of Religious Freedom outside the EU adds intolerance and indifference to the list of challenges to the implementation of FoRB.

Burma—evidence demonstrated that authors were still self-censoring because they had never experienced freedom of expression and did not fully comprehend how to make choices enabling them to enjoy their right. In any regime that has restricted religious freedom—a legal or structural guarantee of the principle will not initially impact unless some form of education can be undertaken to help people understand how to enjoy that freedom. The question can be something of a chicken and egg situation—does one need to educate citizens and facilitate transformation from the bottom up or does one want to enter into dialogue with political and other leaders in order to facilitate change from the top down? Whatever the approach or combination of approaches, one needs to have a workable approach to resolving disputes when they arise, given that FoRB will inevitably give rise to clashes between those holding different religious or conscience-based positions.

With this in mind this chapter will now consider briefly a theological-philosophical approach to organizing civil society and consider this as a supporting tool to establish and maintain religious freedom as part of a pluralistic social structure. It is argued here that the incorporation of this approach into the theoretical justification for FoRB itself is important. This is because FoRB cannot exist in a vacuum, its underlying rationale thus encompasses not only the justification for its inclusion in rights frameworks, but also a justification for, or rather explanation of, its use as a tool for peaceful living together.

7.1 Dooyeweerd and Normative Institutional Pluralism

Chaplin[104] entitles Dooyeweerd's theory of civil society 'normative institutional pluralism', stemming from a group of theories based on normative pluralism. These theories identify, as of particular concern, the increasing tendencies for states, in the absence of public inter-religious discourse, to seek to draw power to the centre and universalize, often assuming for themselves the role of and being looked to by citizens as, the formulator of the moral compass for society. Chaplin writes:

> All were motivated by an anxiety about two characteristic features of modernity: first, the social and economic atomization produced by industrialization and the consequent disintegration of traditional institutions such as estates, guilds, and kinship communities; and second, the political centralization characteristic of the modern nation-state, dramatically accentuated in the aftermath of the French Revolution. Their interest in plural institutions standing between state and individual thus sprang from a concern about both the isolation of individuals from the supportive bonds of pre-capitalist society and the exposure of these unprotected individuals to the encroachments of a dangerously overweening state.[105]

The use by the state of rights frameworks as a moral compass in and of themselves, independent of the theological and/or philosophical underpinnings which for

[104] Chaplin (2011), pp. 14–15.

[105] Chaplin (2011), p. 14.

many were instrumental in placing such frameworks within an entrenched constitutional structure has already been identified as problematic. This has implications for democratic legitimacy of rights-based actions as well as for the proper theoretical grounding of rights theory and the ability of rights discourse to speak powerfully in non-Western contexts. Normative institutional pluralism identifies the need for intermediate institutions to act as a buffer between the universalizing tendencies of the state and the individualism of citizens. This type of individualism is particularly evident within rights-orientated Western democracies centered around the free market economy. Normative institutional pluralism encourages plural ethical reasoning to inform rule making at a subsidiary level with only limited interference by the state. As such it has particular relevance to the fostering of religious freedom.

7.2 Normative Institutional Pluralism and Enkaptic Interlacement

Dooyeweerd's political philosophy built on that of the reformed theologian and statesman, Abraham Kuyper. Kuyper identifies a theological-political-philosophical approach based on the concept of sphere sovereignty. Sphere sovereignty was formulated by Kuyper in the Netherlands in the 19th century within the context of the struggle for religious pluralism that was underway within that state. This theory establishes that society is made up of a variety of civil society groups or spheres.

Sphere sovereignty is based on the concept that a healthy society requires a multiplicity of independent and distinct associations to enable humans to realise their capacity. There is no preferring of membership of the polis over membership of any other organization within society. It is the state's role to actively facilitate and protect the independent functioning of these groups within society.

The spheres have their areas of competence/responsibility and authority. Each sphere holds a position equal to other spheres. The state's role is to regulate disputes between the spheres but not to interfere with or seek to dominate or dictate to them.

At one level the philosophy is descriptive (ontological)—it outlines the structural principles governing the operation of various groups that operate and interact within society. It identifies, for example, the family, business organisations, faith groups, educational institutions, voluntary associations and sports organisations as groups within society capable to a certain extent of self-regulating. It sees the role of the state as limited but essential—in particular where it is necessary to resolve disputes between the spheres.[106] To the extent that it views the role of the state as limited it resonates with the Roman Catholic principle of subsidiarity.[107] Pius X in the 1931 papal social encyclical *Quadragesimo Anno* identified that the state had a subsidiary

[106]For an explanation of the concept of sphere sovereignty developed by Kuyper see for example: McGoldrick (2000), pp. 62–72.

[107]Chaplin (2011) explores this further in his restatement of Dooyeweerd's theory of Normative Institutional Pluralism.

function, stating that higher social bodies were not to usurp the functions of lower bodies where the task could better be fulfilled by the lower bodies. The concept of sphere sovereignty differs to the extent that it is not hierarchical (like subsidiarity) and to the extent that subsidiarity may involve the devolution of power, power is never devolved from central to decentralized authorities within sphere sovereignty. The very sovereignty of the sphere means that power rests there in the first place.

Dooyeweerd developed his own theory looking in more depth at the manner in which it is possible to classify different groups within society and how they interact. This is based on the understanding that societal health is grounded in social ontology—if one can map social institutions and understand how they interact one can create a theory which is correctly orientated to societal health. If one gets this wrong one can, for example, end up with the institution of the family governed by commercial agreements, the institution of sports clubs governed by the need to see justice done in society. Similarly, the interactions or as Chaplin[108] terms Dooyeweerd's theory, the interlacements, between institutions need to be accurately identified in order to ensure that they can be accurately prioritized and disputes can be resolved.

Dooyeweerd establishes his definition of social structures by identifying a 'structural principle' which consists of two modal aspects (also referred to as functions). A social structure has a 'qualifying' function and a 'founding' function. This enables Dooyeweerd to then identify types of structures. In order to blunt the objection that this results in an essentialist view of social structures, Chaplin reconstructs Dooyeweerd's theory to base it more firmly in 'a clearly articulated conception of human flourishing'.[109]

Dooyeweerd claims that social structures are subject to core principles rooted in the created order. The role of social philosophy is to discern the particular principles relevant to specific structures and then contextualize them with data drawn from cultural and historic contexts.[110] The core principles are identified through observing the normative principles that are essential to the operation of a given structure. This can be undertaken on the basis that however marred the image of a particular structure is when compared to the God-given ideal, humankind cannot in fact alter or corrupt the structural principle which makes its existence possible.

While Chaplin criticizes the object of Dooyeweerd's theory, it is nevertheless helpful to at least attempt the definitional exercise because it is particularly relevant to the settling of disputes between the structures, which is relevant to our current enquiry. Where, for example, a rights claim between a business corporation and an individual claiming protection of family life results in a clash of values—the essential definition of the structure within which the parties are located can assist in weighing the claims in the balance to decide which should prevail. In addition, establishing how the two structures interact and can foster human flourishing can also benefit the weighing exercise. If the qualifying function of a business corporation is defined as an economic one orientated purely around profit making and this comes into

[108]Chaplin (2011).

[109]Chaplin (2011), p. 34 and Chap. 6.

[110]Chaplin (2011), p. 86.

conflict with the social structure of the family—defined by its moral nature—the question (put rather crudely here for the purpose of illustration only) is then: will society give more weight to the moral or economic claim?[111] A balancing of rights claims would involve a more nuanced analysis, but this example demonstrates how such an exercise might proceed. This works with the legal norms enshrined in law and confronts legislatures and adjudicators with the essence of the decision in front of them, rather than being narrowly focussed only on the particularities of individual cases. It addresses, in particular, the complaints of individualism arising as a result of rights discourse and rights implementation since it forces a discussion to a higher level, considering the broader implications when claims arise.

The balancing exercise outlined in the previous paragraph can also potentially accommodate different understandings (theological or philosophical) of the essence of a given sphere and accommodate societies where increase weight, for example, is given to family and communal values. For example, a court situated in a Western-liberal democracy, when adjudicating a dispute, will potentially weigh the claims of different spheres in such a way that the outcome will differ considerably to the outcome achieved by a court in a non-Western-liberal democracy. This is because different societies will accord value in different measures, in particular where the application of the principle of subsidiarity will result in plural values being taken into account in the adjudication of disputes. Neither dispute resolution is 'wrong', provided they account for plural living together and are built around a consensus of the core content of FoRB. The decisions are, however, contextualized.

By mapping social structures in this way Dooyeweerd is able to consider how interlacement (interactions) occur between different spheres and identify how some relationships form enkaptic interlacements[112] whereby one structure binds another structure in some manner without destroying the nature of that structure. In enkaptic interlacement each structure can potentially have different intrinsic destinations and so the interrelationship can potentially cause a clash of values or purpose. Enkapsis can also involve a part/whole relationship. The running of a business by a Christian family would result in a Christian business (closely held to use the American phrase). The family and the business independently have different intrinsic destinations. The family business could potentially find conflicts arising in reconciling the two.

Dooyeweerd's theory as restated by Chaplin is complex, but this is potentially a reflection of the complexity of the interactions within modern society. Judges in national courts are confronted daily with highly complex issues and, at times, when it comes to weighing or balancing interests in rights claims, having a framework or mechanism for taking a broader perspective on decision making could provide an invaluable tool. Similarly debates in parliament around law creation could take a step back from the particularities, encompass the views of a broader section of the population and could ensure elements of decision making accommodated the difference and independence of various communities and groups. This would foster an increase

[111] This is assuming that although the rights claims are made by individuals, the claims they make represent the particular spheres in which they, or at least their claims, are located.

[112] This is a term used by Chaplin in his translation of Dooyeweerd's work.

in religious and conscience-based freedom within a plural civil society. Within this framework the state is responsible for establishing the basic norms applicable to all intermediate groups, beyond this groups are left to self-regulate. This creates the basis for plural living together envisaged by and necessary for FoRB to operate effectively. Dooyeweerd's theory thus provides a mechanism to ensure FoRB is capable of functioning as a constitutional right within and outside Western-liberal democratic contexts where there is capacity to permit intermediate civil society groups to function.

8 Conclusion

By taking an interdisciplinary approach to problems identified in the operationalisation of FoRB, integrating approaches from theology and law, this chapter has interpreted the doctrine of common grace to support a dialogic approach to bolstering the universalism of FoRB. It has proposed Dooyeweerd's theory of normative institutional pluralism as restated by Chaplin as a means of fostering plural living together and in particular addressing clashes between rights claims. This chapter has sought to establish common grace as a foundational theory, not to obviate other theories, in particular those based in human dignity, but to engage at an earlier stage in discourse around the will of God and about the common good, to identify the gifting by God of that which can facilitate a peaceful way of living together for humankind. It suggests that freedom of religion is the foundational right upon which other rights depend. The doctrine of common grace proposed recognises that even for those who reject a faith-based approach—the ability to do so is in and of itself justification for this freedom as the primary universal freedom.

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