Freedom of Religion or Belief—A Human Right under Pressure

HEINER BIELEFELDТ*

The article starts by outlining the basic features of the right to freedom of religion or belief. As part of the broader infrastructure of international human rights protection, its interpretation and implementation must be guided by the interrelated principles of normative universalism, freedom and equality. In this context, also the ‘second order principles’ of State neutrality and political secularism are addressed. The article subsequently deals with some of the root causes of abuses in the field of freedom of religion or belief. The last section discusses examples of recent tendencies to blur the contours of freedom of religion or belief, for instance by amalgamating it with policies of protecting the reputation of religions against defamation or by re-interpreting concepts of neutrality and secularism in an anti-liberal, doctrinal way. The author wants to raise awareness that conceptual clarity is needed to defend the normative basis for shaping peaceful coexistence in our religiously and philosophically pluralistic world by institutionalizing equal respect for the dignity and rights of ‘all members of the human family’.

1. The Human Rights Approach

When looking back at history we see ample evidence that freedom of religion or belief is neither the first nor the only historical project aimed at eliminating fanaticism, religious intolerance, hostility against religious minorities or religiously motivated violence. However, I would claim it is a very specific project particularly suitable for the modern world and its inherent pluralism. In order to highlight the specific features of freedom of religion or belief as an internationally binding human right, it may be useful to briefly compare it with other attempts to overcome manifestations of religious intolerance and concomitant societal devastations.

Take, for instance, the various programmes of building consensus on theological or metaphysical grounds. A famous example is the treatise ‘De pace fidei’, written by Nicolaus Cusanus in 1453 shortly after the Fall of

* Heiner Bielefeldt is Professor of Human Rights and Human Rights Politics at the University of Erlangen-Nuremberg, Germany, and he assumed his mandate as United Nations Special Rapporteur on freedom of religion or belief on 1 August 2010. E-mail: Heiner.Bielefeldt@polwiss.phil.uni-erlangen.de.

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Constantinople. By constructing a fictitious dialogue among representatives of all major religions of his day Cusanus wanted to persuade his audience that existing differences between religions merely concern marginal issues. Cusanus went as far as to claim that all religions essentially coincide, thus ultimately forming one single religion with a variety of different rituals—‘una religio in rituum varietate’. Such an idea may sound familiar especially to mystics from various traditions. For instance, followers of Islamic Sufi orders have expressed similar views maintaining that the spiritual paths of all religions ultimately lead to one and same goal, with the result that remaining differences should not matter too much. In a somewhat different spirit, religious liberals in the age of the enlightenment, such as Diderot, Lessing or Kant, also pursued a programme of eradicating denominational conflicts by presenting metaphysical arguments for what they called the ‘natural religion’ underlying all historical religions. This enlightenment idea of the one natural religion could be used to unmask remaining denominational differences as mere societal prejudices which, it was hoped, would gradually disappear.

Unlike the various attempts to overcome religious intolerance by defining a common theological or metaphysical denominator, an opposite approach rests on the assumption that all religious truth claims finally amount to mere illusions. In the opinion of those holding such a sceptical position, an awareness of the uselessness of absolute truth claims can have liberating effects, as people may decide to give up an enterprise that ultimately would only lead to false pretence, self-deceit, frustration or fanaticism. In the spirit of Michel de Montaigne, adherents to philosophical scepticism indeed advocated an attitude of serene resignation as the best antidote to all forms of fanaticism. In their view, a well-tempered tolerance should replace heated battles over religious dogmas, and humanity should concentrate on the solution of practical questions instead of wasting intellectual energy on theological and metaphysical mysteries that go beyond human comprehension. From such a sceptical perspective, the Prussian king Frederick II coined the famous motto that in his realm ‘everybody may pursue happiness in their own fashion’. This was to say that diversity in questions of religion or belief could be tolerated as long as people did not make too much fuzz about their different convictions. In other words, diversity was fine in the sense of mere folkloristic habits or spiritual idiosyncrasies.

The human right to freedom of religion or belief essentially differs from those two approaches in that it takes diversity seriously. Diversity in the area of religion or belief cannot be marginalized as a mere variety of external rites, nor

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2 cf Ernst Cassirer, Die Philosophie der Aufklärung (Meiner 2007) 168ff.
3 cf Uwe Schultz, Die Erfindung der Toleranz. Michel de Montaigne und Henri Quatre, König von Frankreich (EVA 1998).
should denominations be treated as out-dated relics of the past, and the search for meaning should also not be denounced as just a waste of time and energy. Moreover, diversity is not only an irreversible fact, especially in the modern world; it can and should be appreciated as a manifestation of the potential of human responsibility and hence as something intrinsically positive. People may have most different views on the ultimate meaning of life, on the existence or non-existence of a divine being, on how to achieve happiness for themselves and for their fellow humans and on countless other questions—is not this very diversity in itself a manifestation of moral earnestness? Should we not respect such diversity also beyond the positions that we personally think to be true or at least reasonable? And cannot this respect become the common normative denominator on which to base a peaceful coexistence?

Indeed, respect is a keyword for any understanding of human rights in general and freedom of religion or belief in particular. It does not primarily refer to this or that concrete religion or belief which we still may consider wrong or unreasonable. Rather, respect is due for the underlying ability of human beings to have and develop deep convictions in the first place. People can exercise this ability in most different ways, for instance, by searching for an ultimate meaning or by giving up such an enterprise, by adopting a belief or by changing it, by communicating on religious questions with others or by disagreeing with their convictions, by building communities or by leaving a particular group, by manifesting their religion or belief publicly or by insisting to be left alone. What all these possibilities, and countless others, have in common is that they all are manifestations of the human ability of responsible agency and for this very reason deserve respect.

That human beings have the potential of responsible agency constitutes the basis insight underlying human rights in general. It is an insight which, although traceable far back in history, has clearly become more pronounced in the modern era of increasing pluralism in questions of religion or belief—and pluralism in many other societal areas as well.\(^5\) The more we experience pluralism and diversity on a daily basis and perhaps even within our immediate neighbourhoods or families, the more we may see the necessity of learning at least to civilize the concomitant disagreements by according one another a basic respect that should guide the way in which we cope with on-going disagreements, competitions and conflicts. The daily experience of pluralism itself thus ultimately helps to find a new common ground on which we can normatively organize our coexistence.

The main concept defining the status or human beings as subjects of a basic respect is human dignity. Just like respect, human dignity is also an indispensable keyword in the context of human rights. Both of these terms are closely intertwined and, in a way, mutually presuppose each other. Respect for human

dignity constitutes the very precondition for any normative interaction, thus having *an axiomatic status* in all areas of morality and law. We cannot even begin any serious normative negotiations or embark on any common normative projects unless we respect the dignity of human beings by virtue of their potential of responsible agency. This axiomatic insight also manifests itself in the first sentence of the preamble of the mother document of codified international human rights law. Indeed, the 1948 Universal Declaration of Human Rights (UDHR) goes as far as to proclaim that ‘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’.6 This sentence has been cited in most of the subsequent human rights conventions. It thus has a fundamental significance for understanding the human approach in general.

The concept of human dignity has a long history and strongly resonates within most different religious, philosophical and cultural traditions, including the Bible, the Qur’an, the work of Confucius or Stoic philosophy, to mention just a few examples.7 For the concept of human dignity to function as the ultimate normative reference in international human rights law, however, it is crucial to make sure that the notion of dignity is not claimed as a monopoly by any of those traditions. Proposals made during the discussions on the adoption of the UDHR to explicitly base human dignity on the Biblical idea that humanity has been ‘created in the image and likeness of God’8—thereby simply equating human dignity with the Biblical tradition—were indeed rejected by a clear majority of delegates. This indicates the awareness that the concept of human dignity, at least in the context of international human rights, must remain open for a wide diversity of religious or philosophical readings.9

This openness does not mean emptiness, though. For all the different interpretations of what human dignity may signify in the last analysis, ie in the framework of philosophical or theological reasoning, this concept at the time has the precise and indispensable function of reminding us of the universalistic nature of those basic rights which all human beings have a claim to just because they are human beings. Human dignity thus represents the idea of normative universalism.10

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8 See the proposed amendment to draft Article 1 submitted by Brazil in the Third Committee of the General Assembly, UN Doc A/C.3/215.
9 It may be useful, in this regard, to draw on the Rawlsian distinction between ‘comprehensive doctrines’ and political justice. For a systematic integration of John Rawls’s idea of an ‘overlapping consensus’ into the discussion of freedom of religion, with a purpose of accommodating cultural pluralism without undermining normative universalism, cf Tore Lindholm, ‘Philosophical and Religious Justifications of Freedom of Religion or Belief’ in Tore Lindholm, W Cole Durham, Bahia G Tabbiz-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff 2004) 19–61.
The opening sentence of the preamble of the UDHR links the ‘inherent dignity’ of all human beings to their ‘equal and inalienable rights’ which means that respect for human dignity receives an institutional backing in internationally binding rights of everyone. At the same time, it is this very focus on human dignity that accounts for the specific qualification of human rights as ‘equal and inalienable rights’. The principle of equality necessarily follows from the axiomatic status of human dignity that does not depend on any particular qualities, talents or societal status positions that an individual may happen to have or not to have. In other words: the universalistic notion of human dignity manifests itself in equality of basic rights. Likewise, the specific rank of human dignity is mirrored in the ‘inalienability’ of those basic rights that are aimed at the legal protection of everyone’s dignity and which, as Kant has put it, a human being ‘can never give up even if he wanted to’.11

This connection between human dignity and internationally binding universal rights is historically a novelty. It has implications both for the understanding of human dignity and for the legitimacy of human rights. While the concept of human dignity receives a more practical relevance as a guiding principle within international law, commitment on behalf of human rights at the same time can draw on genuinely moral motivations that goes way beyond a mere positivistic recognition of existing legal obligations.

The link between human dignity and human rights also occurs in the first sentence of Article 1 of the UDHR which in clear terms states: ‘All human beings are born free and equal in dignity and rights.’ In a nutshell, this most famous sentence of the UDHR represents the normative profile of human rights in general. As rights of freedom and equality they epitomize the due respect for the potential of responsible agency of human beings. It is by virtue of their dignity that all human beings have the status of right holders in the sense that they all should enjoy, on the basis of equality, their inalienable rights of freedom in various areas of human life, including in the field of religion or belief.

2. Freedom of Religion or Belief as a Universal Human Right

Needless to say that the fundamental features of human rights in general—universalism, freedom and equality—must also guide the interpretation of freedom of religion or belief as laid down, for instance, in Article 18 of the UDHR, Article 18 of the International Covenant on Civil and Political Rights (ICCPR),12 or the UN Declaration on the Elimination of All Forms of

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12 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
Intolerance and of Discrimination Based on Religion or Belief. First, freedom of religion or belief is a universal right which all human beings have a claim to just because of their inherent dignity as ‘members of the human family’. Secondly, given its liberating thrust as a right to freedom, it aims at empowering people to realize their potential of responsible agency and thus freely find their ways in the field of religion or belief, as individuals and together with others. Finally, in keeping with its universalistic nature, freedom of religion or belief must be respected and implemented in a non-discriminatory manner, since equality in human dignity necessarily implies equality of all in their basic rights.

A. Normative Universalism

Today nearly all State constitutions contain a provision guaranteeing freedom of religion, alongside other human rights. On closer inspection, however, things often turn out to look less promising, since in many cases this freedom remains confined to a given list of religious options. While in some States only the followers of the monotheistic ‘religions of revelation’ receive recognition, other States take concepts like ‘traditional religions’ or ‘known religions’ as the starting point, with the result that members of less known, new or alternative communities are excluded or discriminated against. The list of recognized religions may be short or may be long. In any case, the problem remains that, based on such an understanding, religious or belief pluralism can only unfold within a predefined set of permissible options.

From the point of view of normative universalism, however, such practices are unacceptable as they clearly go against the insight that the right holders are ‘all members of the human family’, to cite again from the preamble of the UDHR. Rather than working with a predefined list of legitimate religious options, what finally counts is the self-understanding of human beings—all of them—which obviously can be very diverse. This must also be the starting point for defining freedom of religion or belief as a universal human right which, as a result, has a very broad scope of application. In this context, it is worth noting that the component of ‘belief’ complementing ‘religion’ indicates the necessary inclusion of non-religious convictions too, such as for instance agnosticism or atheism. In fact, the Human Rights Committee, in its General Comment No 22, made it clear that freedom of religion or belief must be broadly construed. According to the Committee, Article 18 of the ICCPR ‘protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief’. In addition, freedom of religion or belief equally includes followers of traditional and of non-traditional religions or beliefs, members of large or small communities, minorities as well as minorities within minorities, converts or re-converts and dissenters or other critical voices.

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Last but not least, one must not forget the rights of women who continue to have only marginalized positions within many religious traditions.

Thus, following from the universalistic claim inherent to the notion of human rights, freedom of religion or belief must have a very wide application. It goes way beyond the limited provisions as they exist in some State constitutions. However, in order not to get lost in mere trivialities, its scope is not completely unlimited. Not any opinion which I might just happen to have today can claim the status of a serious ‘belief’, and turning any coffee circle into a religious community would certainly go too far, because as a result of such inflation, freedom of religion or belief would finally lose its significance and its applicability. Where precisely to draw the line is an extremely complicated question, and dealing with this sensitive issue requires a high degree of caution and diligence. Still I would argue that some formal criteria, such as earnestness and comprehensiveness, can be used to ensure that the concepts of religion and belief keep their basic contours as relating to people’s deep and existential convictions and concomitant individual and communitarian ethical or ritualistic practices. At the same time, it is important that these criteria remain open and for this reason merely formal so as to allow for the inclusion of most different manifestations of existing deep convictions and related practices. In case of doubt we better err on the side of being too inclusive rather than running the risk of excluding some people from the protection of freedom of religion or belief. In this context, also the mandate of the United Nations Special Rapporteur on freedom of religion or belief has interpreted the scope of application of the freedom of religion or belief in line with the principle ‘in dubio pro libertate’. After all, only such a wide and open understanding can do justice to the real diversity existing among human beings all of whom are right holders in the context of universal human rights.

B. Dimensions of Freedom

Freedom is a main feature of human rights in general even occurring in the titles of many of those rights, such as freedom of assembly, freedom of association, freedom of opinion and expression, freedom of religion or belief and other rights. As a consequence of respect for human dignity, human beings should be empowered to freely find their own ways in all areas of human life, as individuals as well as together with others. In the field of religion or belief, for instance, they have the freedom to adopt or change a religion or belief, to try to

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16 cf W Cole Durham and Brett G Scharffs, Law and Religion. National, International, and Comparative Perspectives (Aspen 2010) 46. In this context, Durham and Scharffs refer to Paul Tillich’s concept of a person’s ‘ultimate concern’, a concept at times also taken up by the US Supreme Court.
persuade others including by engaging in missionary activities, to hold worship and other ceremonies either alone and together with others, to abandon a religious community, to manifest their convictions in private or in public, to educate their children in conformity with their own convictions, to import religious literature from abroad and to communicate across State boundaries.\footnote{cf Paul M Taylor, \textit{Freedom of Religion. UN and European Human Rights Law and Practice} (CUP 2005) 24ff.}

If people join together in religious or belief communities—old ones or new ones—such communities should be able to undertake important functions, such as owning property or employing staff, which may require a status of legal personality that should be accessible without undue bureaucratic burdens.

Taking freedom seriously necessarily implies equal concern for what has been called ‘positive’ freedom and ‘negative’ freedom. These are two sides of one and the same coin. No one can be free to do something unless he or she is also free not to do it, and vice versa. That is why freedom of religion or belief also covers the ‘negative’ dimensions, for example, the freedom \textit{not} to profess a religion or belief, \textit{not} to attend worship or just \textit{not} to care about religious or philosophical issues, etc. There is no hierarchy between positive and negative freedom. Indeed, any attempt to establish such a hierarchy would finally obscure the liberating essence of freedom of religion or belief in general.

For all the due emphasis on freedom, it is a truism that the exercise of any right has its limitations. In cases of direct conflicts with other human rights or with important public order interests, restrictions may be justified. However, the decisive point in human rights is that the onus of proof always falls on those who argue on behalf of restrictions, not on those who defend a right to freedom. The relationship between freedom and its restriction is a relationship between rule and exception. In case of doubt the rule prevails, and exceptions always require an extra burden of argumentation. Moreover, any restrictions must meet a number of criteria and must be connected with the provision of legal remedies available to everyone who think their rights have inappropriately been infringed upon.\footnote{cf Manfred Nowak, \textit{UN Covenant on Civil and Political Rights. CCPR Commentary}, 2nd enlarged edn (Strasbourg 2005) 425ff.}

In the case of freedom of religion or belief, its internal dimension called the ‘forum internum’ even has an \textit{absolute protection}, according to Article 18, paragraph 2, of the ICCPR which prohibits any coercive interference concerning the personal freedom to have or adopt a religion or belief of one’s own choice. This must be ensured even in extreme situations, such as a state of public emergency. With regard to external manifestations of a religious or philosophical conviction (in the ‘forum externum’), restrictions can only be permissible if they are legally prescribed and if they are clearly needed to pursue a legitimate aim—the protection of public safety, order, health or morals or the fundamental rights and freedoms of others. In addition, restrictions must meet the requirements of proportionality; they must be
limited to a minimum of interference and furthermore must be enacted in a strictly non-discriminatory manner. All these and other criteria are laid down in international law and are further specified in case law with the purpose of safeguarding the substance of freedom of religion or belief even in situations of a direct collision with other rights or important public interests.\textsuperscript{20}

A frequently cited formula coined at the 1993 Vienna World Conference on Human Rights relates to the positive synergies between all human rights which are said to be ‘universal, indivisible and interdependent and interrelated’.\textsuperscript{21} Freedom of religion or belief should therefore not be seen in isolation but rather as forming an \textit{integral part of the entire system of human rights}. A particularly close relationship exists between freedom of religion or belief and freedom of expression, freedom of assembly, freedom of association or other ‘communicative’ rights of freedom that can mutually reinforce each other in the on-going project to shape societies based on respect for the dignity and freedom of all.

C. \textit{Equality and Non-Discrimination}

Like the principle of freedom, equality also constitutes one of the basic features of human rights directly deriving from normative universalism. In the context of human rights, freedom and equality inextricably belong together.\textsuperscript{22} Without equality in the sense of non-discriminatory implementation, rights of freedom would amount to mere privileges of the happy few. Vice versa, without due account of the spirit of freedom underlying human rights in general, equality could easily be mistaken for uniformity or ‘sameness’, a misunderstanding that in fact has often occurred in the writings of conservative critics of human rights starting with Edmund Burke’s polemics against the French Revolution.\textsuperscript{23} However, rather than making the world uniform, human rights represent the aspiration to empower human beings—on the basis of equal respect and equal concern for everyone—to develop and pursue their own specific life plans, to express their most diverse opinions and convictions freely and to generally enjoy respect for their irreplaceable personal biographies. There is not the slightest tension, let alone an inherent antagonism, between equality and diversity. Instead, working for an equal implementation of human rights for everyone will make societies more diverse and more pluralistic.

In practical terms, equality first of all means non-discrimination. All major human rights documents contain a provision of non-discrimination which thus naturally has a bearing also on the interpretation of freedom of religion or belief. The non-discriminatory implementation of freedom of religion or belief

\textsuperscript{20} For more details cf Taylor (n 18) 203ff.
\textsuperscript{21} Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I, para 5.
\textsuperscript{22} cf Heiner Bielefeldt, \textit{Philosophie der Menschenrechte} (Wissenschaftliche Buchgesellschaft 1998) 68ff.
\textsuperscript{23} cf Edmund Burke, \textit{Reflection on the Revolution in France} [original 1790] (Dent 1910).
in all areas of society certainly presents an enormously difficult task. First of all, it implies a consistent policy of non-discrimination within the State institutions themselves, like for instance, accessibility of public positions to everyone regardless of their religious or philosophical orientations. Furthermore, the State must also combat discriminatory practices within society at large—such as school and university education, the labour market, the housing market and other societal systems. For this to be possible, however, one has to dig deeper and critically address the root causes of societal discrimination, i.e., existing stereotypes and prejudices. Hence the State is also in charge of promoting a general climate of societal openness and tolerance, for instance, by providing fair information about different religious or belief traditions as part of the school curriculum, by facilitating encounters of people from different denominations and by encouraging interreligious communication.24

In order to be able to operate as the guarantor of freedom of religion or belief in a non-discriminatory manner, the State should be ‘neutral’ in the sense of not identifying itself with one particular religion or belief. A State religion, albeit not directly prohibited in international human rights law, at least gives rise to critical questions in this regard, since there obviously exists a prima facie contradiction between the principle of non-discrimination in the field of religion or belief on the one hand and the provision of a special status for one particular religion on the other. States preserving such a special status thus have to carry an extra burden of argumentation to demonstrate that this does not lead to discrimination, de jure or de facto, against the followers of other religions or beliefs.

The principle of neutrality of the State in questions of religion or belief can easily be misunderstood. To many people, the concept of neutrality does not sound particularly attractive, as neutrality has often been associated with something sterile, merely procedural and generally indicating a lack of serious moral commitment. However, I would say that the opposite is true. The principle of neutrality represents the high normative aspiration of the State to consistently act in a fair, inclusive and non-discriminatory manner vis-à-vis the existing or emerging religious and philosophical diversity in society. This is a very demanding task and one may rightly object that such an aspiration is finally utopian. I would indeed agree that the requirement of State neutrality in questions of religion or belief will never be completely fulfilled. In other words, it will always remain ‘work in progress’ within an unfinished societal learning process aimed at overcoming discrimination. It is also for this very reason that members of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their

24 cf the 2011 annual reports of the Special Rapporteur on freedom of religion or belief to the UN Human Rights Council and the UN General Assembly which are devoted to freedom of religion or belief in public school education and the role of the State in promoting interreligious communication <www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx> accessed 21 December 2011.
conscientious convictions. Such measures of ‘reasonable accommodation’, which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination from which members of minorities typically suffer even in liberal democracies that are devoted to the principle of neutrality in questions of religion and belief.25

A concept that may be even more controversial than the principle of neutrality is political secularism. While receiving a lot of approval, it likewise meets with a large degree of scepticism or even outright rejection. I would admit that, at first glance, the connection between freedom of religion or belief and secularism is far from obvious. There are quite a number of examples of harsh dictatorships operating under the auspices of secularism. Moreover, the concept of secularism itself has at times been interpreted in very restrictive or ideological ways clearly at variance with respect for freedom of religion or belief. Secularism can and has even become a pretext for antireligious political agendas and concomitant human rights abuses.

Nevertheless I would argue that there is a meaningful connection between freedom of religion or belief and the concept of the secular State.26 Once again, the point of departure for understanding that connection is the requirement of non-discriminatory implementation of human rights. In the area of freedom of religion or belief, the principle of non-discrimination, if taken seriously, implies a policy of deliberate ‘non-identification’ of the State with any particular religion or belief in order to be fair and inclusive to all people living in the country. Neither should the Government use (or abuse) religion as a source of its own political legitimacy, nor should it privilege one particular tradition with a view to thereby promoting national cohesion or for any other political purposes. In order to make it clear that this non-identification, despite the negative formulation, has a positive significance I would further qualify it as the normative principle of ‘respectful non-identification’. After all, it is out of respect for freedom of religion or belief—and its non-discriminatory implementation—that the State exercises and institutionalizes such self-restraint. The principle of respectful non-identification represents what may be called the ‘deep grammar’ of the various secular constitutions of modern liberal democracies.

Political secularism has a function similar to the principle of State neutrality. In both cases, these principles are ‘second order’ principles which derive their normative persuasiveness from something superior, namely, freedom of religion or belief which itself ranks as a ‘first order’ principle. It is important to preserve

this ranking. Political secularism, like State neutrality, is not a purpose in itself but, rather, has a derivative status as a critical principle operating in the service of freedom of religion or belief and its non-discriminatory implementation.\(^{27}\) Once we forget this order of things or even turn it upside down, we easily end up with restrictive notions of secularism which has indeed repeatedly become an ideological ingredient of anti-liberal control politics.

### 3. Violations

Abuses of freedom of religion or belief occur under different political auspices, in various regions of the world and from most different motives. They are perpetrated in the name of religious truth claims, in the interest of preserving national identity, for purposes of defending law and order or in the context of counter-terrorism agendas. The range of repressive means includes bureaucratic harassment, compulsory indication of religious affiliations in passports, formal or informal pressure to attend religious ceremonies, indoctrination of children in public schools, exclusion from basic societal services, discrimination in the labour market or in higher education, State imposed obstacles against interreligious marriages, the spread of negative stereotypes in private or public media, desecration of religious buildings or graveyards, confiscation of religious literature, legal or administrative prohibition of missionary activities, denial of the possibility of conscientious objection to military service, State surveillance of community activities, silencing of critical voices through blasphemy laws, stoking resentments against minorities and orchestrating mob violence.\(^{28}\) Needless to say that this list is far from exhaustive.

The simplistic idea that some religions, by virtue of their specific theological tenets, have a ‘natural’ tendency to become perpetrators while others for the same reason have an equally ‘natural’ tendency to end up as victims certainly cannot do justice to the complex political, historical and socio-psychological causes of human rights abuses that occur in most different settings. It happens that a particular religious group—say a Christian, Muslim, Hindu, Buddhist or other denomination—whose members suffer terribly from persecution in one country is actively involved in human rights abuses in another country. While in some cases we can clearly distinguish between perpetrators and victims, in many other cases applying such a distinction turns out to be complicated or even outright impossible. It may also happen that minorities having a traumatic history of religious persecution at the same time exercise an enormous pressure against internal critics or dissidents in order to keep their ranks closed, with the possible result of violations of the rights of minorities within those minorities.

\(^{27}\) cf Nussbaum (n 25) 20: ‘The idea that there should be a “separation of church and state” is mentioned a lot, but I argue that it should be seen as posterior to the ideas of equality and liberty.’

Moreover, we must not forget existing phenomena of multiple or intersectional discrimination, such as women suffering simultaneously from gender-based discrimination and from the societal marginalization of their religious community.\textsuperscript{29} A problem so far largely under-explored concerns the situation of LGBTI people in various religious groups.

In the face of regional, political, sociological, religious and historical complexities, one may doubt that it would be possible to establish a comprehensive worldwide typology of violations of freedom of religion or belief. Still, one important distinction that actually can be drawn is the distinction between abuses directly perpetrated by the State and abuses stemming from within society at large.\textsuperscript{30} In the latter case, the State also bears a responsibility, as human rights law obliges States not only to refrain from human rights abuses within their own institutions but also to actively protect people against human rights violations from third parties. However, in many situations of abuses, State institutions and societal actors even play into each other's hands. For instance, stoking public resentments against minorities has been used by State agents as a recipe for political mobilization that unfortunately has often turned out to be very effective.

The likeliness of State abuses of freedom of religion or belief increases when a tight law and order agenda goes together with political invocations of national identity, a pattern occurring in quite a number of countries, in particular in Central Asia and the Middle East.\textsuperscript{31} Typical targets of such restrictive policies are members of those religious or belief groups that have—or are said to have—a tendency to evade State control and, the same time, are perceived as not really fitting into the historical and cultural landscape of the country. Minorities which particularly suffer from harassment or even fully fledged State persecution, for example, include Jehovah’s Witnesses, Baha’is, Ahmadis and Falun Gong practitioners.

Violations from within society often stem from a paradoxical combination of fear and contempt. In my opinion, these are the two main sources of the various manifestations of extreme hatred which so devastatingly affect many societies. The combination of fear and contempt sounds paradoxical, as people typically have fear of someone deemed more powerful and thus somehow ‘above’ themselves, whereas with contempt it is usually the other way around in that people ‘look down’ on those they despise. Nonetheless this strange combination seems to occur rather frequently. Fear can even escalate into political paranoia and fully fledged conspiracy theories fabricated by political entrepreneurs who play their cynical games. Anti-Semitic propaganda of the Nazis, with


\textsuperscript{31} Ample evidence can be found in NGO reports, such as eg those by Forum 18, NGO specialized on freedom of religion or belief. cf <www.forum.18.org> accessed 21 December 2011.
all their horrible consequences culminating in the Holocaust, is certainly the most dramatic historical example in this regard. Surprisingly often, political paranoia targets small or even tiny minorities that are portrayed as having some mysteriously ‘infectious’ power by which they allegedly pose a fatal threat to societal cohesion. At the same time, minorities often become addressees of public contempt by being depicted negatively as completely lacking in moral values. On the side of majority society, it thus happens that—in response to those two strangely combined sentiments of fear and contempt—two sources of aggressiveness merge into a toxic mix, ie aggressiveness from a feeling of vulnerability and aggressiveness from the pretence of moral superiority.

Working on behalf of overcoming the various violations of freedom of religion or belief obviously requires a complex strategy and a number of instruments ranging from courts and other formal bodies to informal mediation and the involvement of civil society organizations. Of course, the media play an important role as well, and special attention should be given to education and the facilitation of daily encounters between people across different denominations. A precondition of meaningful human rights activities, however, is a clear understanding of what these human rights are. Conceptual questions as they exist and emerge in the field of freedom of religion or belief may thus also have an immediate political relevance.

4. Conceptual Challenges and Misunderstandings

Freedom of religion or belief has been described as ‘a particularly controversial right’. Indeed, it will never cease to be debated and exposed to very different interpretations in academia, politics and law. Some of the interpretations emerging in recent years, however, show a tendency towards obscuring the human rights approach and its three interconnected features of universalism, freedom and equality: For instance, particularistic identity politics pervading international human rights rhetoric may undermine the status of all human beings as right holders; the amalgamation of freedom of religion or belief with political projects of ‘interreligious harmony’ may marginalize the human rights of dissenters, critics or other people who might disturb a superficial harmony; and the specific features of non-discrimination can get lost out of sight when mixed with vague concepts of general humanitarian values. In addition, some conceptualizations convey the impression that freedom of religion or belief could be generally cut off from the broader human rights framework or even be abstractly played off against other human rights concerns, such as freedom of expression or comprehensive anti-discrimination agendas, especially if the latter also contain provisions on behalf of members of sexual minorities. There is, at any rate, a real danger for the contours of freedom of religion or belief to

32 Nowak (n 19) 408.
become increasingly blurred. Unless we pay attention, its basic principles may in the long run even be turned upside down. The following paragraphs will only give a few selected examples of such problematic tendencies.

In recent years quite a number of proposals have been presented, including in UN forums, which clearly contradict normative universalism by limiting freedom of religion to the followers of a predefined list of traditional religions while implicitly excluding members of other religions, especially small or new religions. For instance, a host of UN resolutions addressing the various forms of existing ‘phobias’ that relate to religions typically include Islamophobia, Christianophobia and anti-Semitism (sometimes also called Judeophobia) while never mentioning phenomena like ‘Bahaiophobia’, a term I have not come across so far. To be sure, one may object that no list of examples can ever be fully exhaustive and all-inclusive. But the fact that, for instance Baha’is, despite the well-documented harsh persecution they are facing, have never figured implicitly in the various resolutions on the elimination of religious ‘phobias’ is a troubling phenomenon that gives rise to serious concerns from the point of view of normative universalism. In addition, there generally seems to be too little awareness that freedom of religion or belief also covers non-theists, atheists and agnostics.

According to the human rights approach, the right holder is the human being, as an individual and together with others. Over more than a decade, however, the Organisation of Islamic Cooperation (OIC) regularly tabled resolutions in the UN Commission on Human Rights, General Assembly and Human Rights Council under the title of ‘combating defamation of religions’. These resolutions conveyed the impression that religions per se should somehow be entitled to international legal protection of their reputation. Thus the question has come up who should actually claim such protection against defamation: religious authorities, the majority of believers, or States pretending to operate in the service of religions? Raising this question already shows that the idea of protecting the honour of religions is at variance with the human rights approach, which claims due respect for the dignity and rights of human beings rather than protecting religions as such.

I can understand that many Muslims feel outrage, for instance, at the Danish Mohammed cartoons which I personally find tasteless and offensive. This is something we need to debate publicly, with the purpose of identifying existing stereotypes and developing effective policies to overcome prejudices which

33 cf General Assembly resolution 65/224, preambular para 9.
34 The OIC’s previous name ‘Organisation of the Islamic Conference’ was changed in June 2011 to ‘Organisation of Islamic Cooperation’.
constitute the root causes of misunderstandings, mistrust and even hatred. For this to be possible we need a culture of open public discourse based on freedom of expression. A main problem of the OIC resolutions on combating defamation of religions, however, was that they could easily be perceived as legitimizing anti-blasphemy legislation and other restrictive measures that go against freedom of expression. Apart from obscuring the issue of the right holders, this restrictive and anti-liberal thrust constituted the most problematic feature of the resolutions against defamation of religions. Now, by somehow amalgamating freedom of religion or belief with the fight against ‘defamation of religions’, the false impression could even emerge that there exists an inherent antagonism between two human rights: freedom of religion versus freedom of expression. Some people actually seem to think that it is the purpose of freedom of religion to put a limit to an ‘overly extensive’ use of freedom of expression. From such an antagonistic assumption, however, what gets lost is the fundamental insight that freedom of religion and belief and freedom of expression closely belong together as two interrelated legal safeguards of communicative freedom. Although not completely identical in their content, they can and have to mutually reinforce each other in the project of building free societies based on equal respect for the dignity and freedom of everyone.

Interestingly, no resolution on combating defamation was tabled in 2011. Instead, the OIC submitted to the UN Human Rights Council a resolution on ‘Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons based on religion or belief’. This resolution HRC 16/18 was adopted without a vote. It marks a turning point in the international debate, corroborated by the fact that the same happened in the General Assembly whose Third Committee adopted a resolution with the same title, tabled by the United Arab Emirates. As the title of both resolutions indicates, they aim at protecting human beings rather than religions and thus have received a broad approval. This is clearly a positive development. It would be naïve, however, to assume that the controversial issues have now been settled.

Western Governments mostly voted against the OIC resolutions on combating defamation of religions, and they had good reasons for doing so. On closer investigation, however, things look less clear also in the West. For instance, some European States continue to have domestic anti-blasphemy provisions in their criminal law books. Even the wording of some of the

historical judgments of the European Court of Human Rights remained somewhat unclear in that they could convey the impression that feelings of believers should be protected against offensive expressions, again with the result of an antagonistic understanding of freedom of religion supposedly standing in some sort of inherent contradiction to freedom of expression. In order to maintain the liberating essence of human rights as rights to freedom, it is all the more important to stress the positive interrelatedness of these two—and other—human rights that mutually complement each other.

A source of much confusion is the term ‘identity’ that plays a major role in many current debates on human rights, minority issues and anti-discrimination policies. It is one of those keys terms one can in fact hardly avoid using. However, the problem may arise than an unspecified invocation of ‘identity’ in the context of freedom of religion or belief can obscure the component of ‘change’ or ‘choice’ that forms an integral and indispensable part of this human right. Given the right to also change one’s religion or to have and adopt a religion or belief of one’s own choice, the notion of identity in the area of religion or belief conceptually differs from, say, identity in the area of ethnicity. When using the somewhat fashionable identity language, at least one has to insist that religious or belief-based identity is always an identity ‘in the making’, ie in the sense that it can change in most different ways and can also legitimately be exposed to missionary activities, including non-violent forms of provocation. Saying this does not imply denying the possibility of serious changes also in other areas, like ethnicity. But still there remains a conceptual difference that in my opinion receives too little attention. To give just one example to illustrate the significance of that difference: While negative comments on some particular ethnic characteristics—an extreme case would be skin colour—for good reasons are generally condemned as unacceptable, negative remarks on religious ideas like, for instance, monotheism, divine revelation or re-incarnation, although possibly deemed offensive by the recipient groups, in my view clearly deserves a different assessment. I would insist, at any rate, that there is a wider scope of legitimate intellectual provocation in the field of religion or belief than in the field of ethnicity—which has to do with the explicit recognition of the rights to change and to make choices in the field of religion or belief. Hence, if we simply lump together religion, belief, ethnicity, ‘race’ and other elements of a

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42 cf European Court of Human Rights, judgment of 20 September 1994, Otto-Preminger-Institut v Austria, Series A No 295-A.

43 cf the joint submissions by three Special Rapporteurs to the 2011 OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred <www2.ohchr.org/english/issues/opinion/articles1920_iccpr/> accessed 1 March 2012.

44 I do not deny that on the phenomenological level there is a lot of overlap between religious, cultural or ethnic facets of identity. It is also the case where the religion is sometimes treated as a proxy for ethnicity. On the conceptual level, however, we cannot give up basic differentiations without seriously endangering the essence of freedom of religion or belief.

45 This does not mean that it should be treated as a criminal offence. For good reasons, the threshold for criminalizing even hate speech is very high and should remain at the very high level.
person’s or a group’s identity, with the purpose of protecting such identities, we run a serious risk of losing out of sight some crucial elements of freedom of religion or belief, including the freedom to search, choose, change, reach out, communicate, convert and peacefully provoke in the field of religious or belief. Ignoring these components in turn can mean that we could too easily fall prey to yet another debate on combating ‘defamation’ of religions or end up with similar conceptual misunderstandings that conceivably could even arise from within the midst of the human rights community itself.

Anti-liberal misunderstandings of freedom of religion or belief have also occurred under the auspices of State neutrality or political secularism. Strangely, the principle of State neutrality is sometimes presented as an argument for the State not to get involved with any questions of religion or belief at all and instead to remain completely passive in this entire field. Neutrality can thus become just a proxy for non-commitment. Some go even further by demanding the State to create a ‘neutral public sphere’ purged of the presence of any religious symbols. An example is the public school which some prefer to be cleansed of all visible signs of religions. In such a vein, the religiously ‘neutral’ State would be a State committed to reducing the public presence of religions and their symbols rather than operating in the interest of a fair inclusion of everyone in their diverse religions and beliefs. Neutrality thus seems to justify a restrictive political agenda of enforced privatizing of religion and belief. One should not underestimate the popularity of such ideas on some Western European countries.

Understanding neutrality as a ‘second order’ political principle can help to clarify things. As mentioned above, State neutrality can make sense only if it is understood as a political fairness principle relating to something superior, i.e freedom of religion or belief which has the rank of the ‘first order’ principle. Freedom of religion or belief as laid down in Article 18 of the ICCPR and other international instruments, however, explicitly includes the right to manifest one’s religion or belief also in the public sphere. Turning the order of things upside down and pursuing a policy of enforced privatization or societal marginalization of religions in the name of ‘neutrality’ would thus clearly amount to a violation of human rights.

Some people may object that a ‘neutral’ State is ultimately impossible and that pursuing such a policy only leads to self-deceit or deception of others. They may further argue that even a secular State has an official belief system,

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46. The ambivalence of these and similar principles which harbour different—liberal, less liberal or anti-liberal—meanings is discussed in some detail by Jocelyn Maclure and Charles Taylor, *Laïcité et liberté de conscience* (Édition du Boréal 2010).

47. In this regard, it is worth mentioning that some confusion exists concerning the concept of ‘negative’ freedom of religion or belief. Against a typical misunderstanding, this does not mean the right not to be confronted with any religious manifestation in the public sphere. Instead, its purpose is to protect people against being urged especially by the State, or in State institutions, to profess a religion or belief or to expose their own convictions against their will.
namely ‘secularism’. According to such a view, the only distinction between, say, an Islamic State and a secular State would be that while the first is based on a traditional religious belief system, the latter relates to a non-traditional and non-religious belief system. It thus may seem that the secular State is a State run by believers in the official ‘secular creed’ or even more simplistically: a State governed by atheists and agnostics. And while in a religiously governed State non-religious people or followers of alternative creeds will inevitably suffer discrimination, the secular State will de facto lead to discrimination of religiously oriented individuals, or so it is perceived. Allegedly, there seems to be no way of avoiding discrimination, as any State is governed by some sort of belief system, with the result of drawing a line between those adhering and those not adhering to that belief system. I am always struck by how many people seem to more or less subscribe to such an interpretation of the secular State which can be found both among those defending the secular State and, even more frequently, among its critics.

So the question we have to tackle is whether secularism constitutes just another State ideology, basically on the same level as classical State religions. In dealing with this question I would always admit that secularism can and has at times been turned into a comprehensive belief system. No doubt, secular creeds exist. We have quite a number of historical and contemporary examples of comprehensive secular worldviews designed to replace traditional religions, sometimes by using similar means, including secular missionary activities, community rituals and erecting places of meditation. For instance, George Holyoake, the leader of the British ‘Secular Society’ established in the mid-19th century, used religious language when expressing his conviction that ‘science is the available providence of man’. Likewise, the German ‘Monistenbund’, a group of secularist-minded people headed by Darwin’s ardent disciple Ernst Haeckel, published their own ‘Monist Sunday Sermons’. Whereas holding and publicly promoting such comprehensive secular beliefs naturally falls within the scope of freedom of religion or belief, it would be a problem if secularist creeds were to directly guide State activities. An example of such an aspiration is the post-religious scientific ‘religion de l’humanité’ created by the French philosopher August Comte, one of the founding fathers of sociology. Comte envisaged the State to adopt his post-religious secular creed in order to pave the way to what he called a ‘sociocracy’. That this neologism bears a striking resemblance to the term ‘theocracy’ is no coincidence. Indeed, Comte wanted to create a society of secular believers by harnessing the State to enforce his post-religious sacralisation of science and progress with all available political means. Incidentally,

the early days of Turkish Kemalism had a strong flavour of such an enforced State ideology.

In order not to end up with a mere choice between religious or non-religious State ideologies and concomitant discriminations against those not following the respective State creed, we have to draw a clear line between the various forms of ‘doctrinal secularism’ on the one hand and ‘political secularism’ on the other. While doctrinal secularism, once guiding State activities, may claim an ideological priority over freedom of religion or belief, the secular State in the second meaning of political secularism sees itself as operating in the service of a non-discriminatory implementation of freedom of religion or belief for everyone. This is an important difference, indeed a difference not merely of degree but of principle. As elaborated above, non-discrimination in questions of freedom of religion or belief, if taken seriously, implies the principle of ‘respectful non-identification’ of the State with any particular belief system in order to remain open, fair and inclusive. Just like it is the case in the question of State neutrality, political secularism constitutes a ‘second order’ principle and thus essentially differs from all forms of ‘doctrinal secularism’.

To be sure, in political reality, there may be overlaps and grey zones between both types of secularism. Whether particular secular political agendas are pursued as a purpose in itself or in the service of a fair implementation of freedom of religion or belief for everyone may not always be clear at first glance. In order to cope with existing ambivalent phenomena of secularism, however, it is all the more important to stick to conceptual precision in this regard. Otherwise we would intellectually undermine the very possibility of a State being committed to a non-discriminatory understanding and implementation of freedom of religion or belief as a universal human right.

5. Short Conclusion

No doubt, freedom of religion or belief is a human right under pressure. On a daily basis we receive reports about harassment or persecution of countless people on grounds of religion or belief, sometimes connected with arbitrary detention or torture and ill-treatment. Houses of worship are torched and graveyards demolished. Blasphemy laws have a chilling effect on critics, dissenters or members of religious minorities. We read horrible stories about individuals who have to run for their lives because a fanaticized mob is throwing stones at them and cheering whenever a person is being hit. Sometimes members of minorities face difficulties to hold funerals in a quiet and dignified way. It also happens that parents, due to their dissenting convictions, lose the right to custody of their own children. Women often suffer from multiple or intersectional forms of discrimination.

Apart from actual violations, freedom of religion or belief is under pressure also on the conceptual level, with a danger that its very nature as a human right
may get blurred. Conceptual questions, however, are of an immediate practical relevance, since any institution-building on behalf of a more efficient implementation of freedom of religion or belief presupposes clear ideas about the right holders, content, areas of absolute protection, the scope of possible restrictions, remedies against infringements and the interrelatedness with other human rights. In order to enhance the prospects of freedom of religion or belief what we need is an on-going practical commitment of many people in governments, parliaments, courts, civil society organizations, religious or belief communities, international organizations, media and academia. This commitment, though, should be based on an unequivocal understanding of what it means that freedom of religion or belief has the rank of an inalienable human right to freedom and equality held by all human beings by virtue of their inherent dignity.