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## CHAPTER 2

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# Ambiguities of Freedom

### 1. Alleged Incompatibilities

From early on, freedom of religion or belief elicited objections among religious traditionalists, who feared that the human rights approach would subject issues of truth, loyalty, and identity to the personal whims, tastes, or preferences of the individual, thus turning the “right” order of things upside down. In his notorious *Syllabus Errorum* (1864), Pope Pius IX even condemned religious freedom as one of the grave errors of modernity. He castigated this right as a way “to corrupt the morals and minds of the people, and to propagate the pest of indifferentism.”<sup>1</sup> Just about one hundred years later, with the adoption of the Second Vatican Council’s Declaration *Dignitatis humanae* (1965), the Catholic Church abandoned the previous anti-liberal stance thoroughly and became an active supporter of the human rights approach, in particular in the area of religious freedom.<sup>2</sup> Nonetheless, traditionalists from different religions and denominations as well as proponents of religiously colorized national identity politics continue to associate the right to freedom of religion or belief with a general decline of religious traditions or the erosion of community values.

What is more surprising is the observation that freedom of religion or belief can also evoke mixed feelings among liberals and in liberal milieus. Assuming that freedom of religion or belief is a “liberal right” in the broadest sense of the word, a liberal resistance to a liberal right may sound like an oxymoron. Indeed, freedom of religion or belief seems to be the only example of a “classical liberal right” that currently does not receive unanimous applause in liberal circles in the West and elsewhere. Some objections are based on misunderstandings, such as the occasional assumption that freedom of religion or belief provides a pretext for inciting or committing

acts of religiously motivated violence. As we will discuss later, this is not the case. Yet ambivalent reactions stem not only from misunderstandings and a lack of knowledge. Being confronted with a religious pluralism that exceeds what is usually considered “normal” may be disturbing also for many people who understand themselves as liberals. Surely, liberal societies define themselves not least by the acceptance of diversity, including in the area of religion and belief. Yet it is not uncommon that believers who manifest their faith visibly and aspire to shape their lives in conformity with their convictions confront inimical reactions, since their behavior does not seem to fit into the proverbial “liberal lifestyle,” defined by a dispassionate and perhaps even ironic approach to religious ideas and practices.

Hence, whereas religious traditionalists (or some of them) may have difficulty in fully appreciating the element of *freedom* within the right to freedom of religion or belief, some liberals in turn wonder which role *religion* could possibly play in a modern liberal society. What is the place of religion in an open society, which defines itself by principles of freedom and equality? Could religion play any positive part in a liberal public culture? Some express their doubts. “God is dangerous,”<sup>3</sup> the late sociologist Ulrich Beck pointed out in an article in the German weekly *Die Zeit*, in which he ironically remarked: “Health ministers warn: religion kills. Religion should not be imparted on juveniles below the age of 18.” Obviously, this is supposed to be a joke. Yet it illustrates an existing fear that religion could become the entry-point for fundamentalism and obscurantism, thus eroding dearly won liberal and secular achievements.

What skeptics from both camps, religious traditionalism and secular liberalism, have in common is that they both assume that the two components defining the right at issue—freedom and religion—ultimately do not fit together. Winnifred Fallers Sullivan voices such an antagonistic assessment from her point of view when opining: “It is the peculiar nature of religion itself to restrict freedom.”<sup>4</sup> And she concludes: “To be religious is not to be free, but to be faithful.”<sup>5</sup> Based on this premise, a right to religious freedom cannot make much sense. According to Michael Lambek, religious freedom is an enterprise fraught with an irredeemable contradiction: “Hence, the very idea of freedom of religion is paradoxical; it is the freedom to be unfree in a particular kind of way.”<sup>6</sup>

The present chapter challenges the alleged incompatibility of freedom and religion. Section 2 starts with a brief phenomenology of human freedom, whose multiple dimensions cannot be reduced to the aspect of free

“choice,” which nonetheless remains crucial in human rights law. Subsequently (in Section 3), we deal with the legal contours of the right to freedom of religion or belief. In this context, we *inter alia* focus on how to handle the relationship between the guarantee of freedom, on the one hand, and the possibility of the state imposing certain limitations, on the other. Section 4 describes current political trends, which in different ways obfuscate the core of this human right—for instance, by twisting it into a protection of the reputation of certain religions, utilizing it for purposes of identity politics, or reducing religion to a merely private matter. The chapter ends with a short résumé (in Section 5).

## 2. Self-Undermining Freedom?

Can there be a freedom to be unfree? Would it be legitimate to use freedom in such a way that the destruction of freedom is the expected or even intended result? Philosophers of the European Enlightenment discussed this question mainly with regard to slavery and state absolutism. Can human beings sell themselves—and possibly even their posterity—into slavery? Can they surrender to the mercy of an absolute ruler against whom they cease to have any legal claims? To put the question more broadly, are human beings free to forfeit their freedom deliberately once and for all? Kant’s categorical response is: no. He argues that if someone were to subject himself totally to somebody else’s command, he would thereby abandon his own responsible agency. Without responsible agency, however, the preconditions for any normative practice would *ipso facto* collapse. Hence, any imagined social contract corroborating the total surrender of a person’s freedom would be from the outset null and void. Kant concludes that “every human being still has his inalienable rights, which he can never give up even if he wanted to.”<sup>7</sup>

Kant was neither the first nor the only philosopher of his day to insist that fundamental rights of freedom have the peculiar quality of “inalienable rights.” In the introductory chapter, we cited a similar statement by Moses Mendelssohn. He more specifically refers to religious freedom when pointing out that “a contract concerning things which, by their very nature are *inalienable*, is intrinsically invalid, and cancels itself.”<sup>8</sup> According to Kant, Mendelssohn, and many other thinkers, freedom is something precious; it is profoundly interwoven with issues of personal identity and, even more

importantly, with the awareness of one's capacity of responsible agency. From this point of view, human freedom, as recognized and protected through fundamental rights, does not give the individual a *carte blanche* to discard or destroy that freedom. The opposite is true: human beings owe it to themselves as well as to others to cherish, develop, and defend their freedom. This obligation to cherish freedom provides the moral reason for establishing an order of rights with the purpose of protecting everyone's freedom in line with the principle of equality.<sup>9</sup>

In the framework of human rights, freedom of religion or belief serves the specific purpose of preventing and eradicating all forms of coercion with regard to a person's conscientious positions, religious (or nonreligious) convictions, and the various conviction-based practices, which people often exercise together with others. As the guarantor of this right, the state is obliged to ensure strict noncoercion within society as a whole and, if need be, also in the midst of the religious communities themselves. Threat or use of coercion against dissidents or converts can never be permissible, whatever theological arguments the religious authorities may invoke. The litmus test is the freedom to leave a religious community. Where this minimum condition is not respected, freedom of religion or belief simply does not exist.

In keeping with the logic of the human rights approach, freedom of religion or belief can merely recognize noncoercive forms of religiosity.<sup>10</sup> The prevention of coercion, positively speaking, means guaranteeing everyone's *freedom of choice*. As already briefly discussed in the previous chapter, choice is a crucial and indeed indispensable term in human rights law. Article 18(1) of the ICCPR confirms everyone's "freedom to have or to adopt a religion or belief of his choice." The subsequent paragraph 2 corroborates and further strengthens free choice by proclaiming: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." When interpreting this provision, the UN committee tasked with monitoring the ICCPR pointed out that "choice" *inter alia* covers the possibility "to replace" one's religion or belief by another religion or by nonbelief,<sup>11</sup> thereby making it crystal clear that the term "choice" functions as an equivalent of the right to "change" a religion or belief, as *expressis verbis* enshrined in Article 18 of the UDHR.<sup>12</sup>

A person's freedom of choice does not disappear after an important choice has been made. Indeed, it never ceases to exist—at least as a possibility—as long as the respective person lives. People remain free to reconsider, regret, revise, or modify their personal choices, including in the

area of religion. An individual who has decided to dedicate his life to religious contemplation in a monastery, must have the option to correct his former decision thoroughly and leave the monastery. Freedom of conversion also includes the freedom to reconvert to one's previous religion or to turn to yet another faith or to no faith. Choice remains a possibility, as long as human life endures.

Human freedom would be inconceivable without having choices. It is from this angle that human rights law protects freedom, namely, by recognizing everyone's right to make choices in various areas of life: the choice of a profession, the choice of a spouse, the choice of one's residence, participation in the choice of political representation, and not least the choice of a religion or worldview. Notwithstanding its practical significance, however, the term "choice" cannot fully exhaust all aspects of how human beings experience their freedom. Freedom is more than choice. In the previous chapter we had a short discussion on "choice" as a legal term. The point we wanted to make in that context is that the term choice, when employed within freedom of religion or belief, does not reduce issues of faith to "commodities" in a neoliberal market of religious or spiritual items. When now resuming the reflection on choice, we do so from a slightly different angle. Our interest in the present chapter on freedom is to avoid another form of reductionism, which the insistence on choice can inadvertently produce, that is, losing sight of the existential dimension of human freedom, which transcends the possibility of just having options.

One of the most intensive experiences of freedom comes from being *seriously committed* to one's freely adopted and freely developed profound convictions. Any serious commitment is characterized by a subjectively felt imperative; it has an element of "here I stand, I can do no other."<sup>13</sup> Acting against one's profound religious convictions can amount to no less than a feeling of self-betrayal, which originates from the awareness of not doing justice to one's own religious identity. Failing to honor one's own convictions in practice can literally tear a person apart. This experience is not limited to the sphere of religion. It also concerns the attachment to moral principles, whether they are based on a religious ethos or formulated in secular ethical language. Whoever is serious about certain moral principles will also feel compelled to act in conformity with those principles; otherwise the principles would lack existential significance. People can have similar experiences in other areas of life, too, for example when it comes to partnership, friendship, or family relations. Being faithful to one's dearest and

nearest can become a strong existential demand. Now the point we would like to stress is that such *existential demands are part of human freedom*, provided the convictions, principles, significant relationships, and so forth, which have the demanding quality, are freely adopted, freely undertaken, and freely developed.

Reducing freedom to a life devoid of any demanding commitments would amount to a caricature of freedom. Freedom does not mean to lead an undetermined life, that is, a life without existential demands. What is at stake is to *find one's own determination freely*, without external coercion. This is the meaning of "free self-determination." Human rights can only indirectly contribute to facilitating such free self-determination by prohibiting any coercion, thereby ensuring freedom of choice. This is the reason why the term "choice" plays such an important role in human rights law; it is the indispensable entry-point for all rights of freedom. At the same time, the search for meaning and the finding of one's own determination exceeds what the legal order can accomplish. Free self-determination in the sense of finding one's determination freely is a task which only the concerned human being can fulfill in lifelong endeavors. Human rights law can merely improve the external preconditions for this to be possible, namely by eliminating external constraints and obstacles, thus creating and broadening the space for individual "choices."

The emphasis we have placed on freely finding one's own determination should not be misperceived as trivializing the element of "choice," which remains indispensable as long as a person's life endures. Life plans can change thoroughly, convictions once developed can lose their inner persuasiveness, and important decisions taken in the past may require far-reaching revisions in the light of new experiences. Without choices, human life would be frozen in the status quo of what once was achieved. Choice is furthermore the decisive entry-point for human rights law, as already pointed out. In spite of the indispensable role that "choice" has for the realization of freedom, however, it does not—and cannot—capture the whole range of what freedom signifies in human life. Choice is merely the necessary precondition of free self-determination, which itself, if successfully achieved, transcends the aspect of choice. Reducing freedom to having mere choices may actually amount to missing the crucial point that living in harmony with one's freely adopted profound convictions can be the most intense experience of freedom. From the perspective of the concerned individual, the demand to live in accordance with his or her convictions

can even come close to a subjective feeling of having “no choice.” Although the possibility of changing one’s conviction, life plans, and loyalties—and in that sense making new choices—actually continues to exist, it may sink into the background of the consciousness of a fully committed person.

The above-cited remark “to be religious is not to be free, but to be faithful” construes an abstract dichotomy between freedom and faith, which does not match human experience. Remaining faithful to one’s convictions, principles, significant relationships, and so on, is fully compatible with human freedom, as long as it remains free from coercion. Living faithfully and in harmony with one’s own self-determination may even be the most profound experience of freedom that human beings can make. Again, this is not merely true for the religious sphere, but applies to other important dimensions of human life as well. The demand to be faithful is often spelled out in metaphors like “calling” or “vocation,” which at first glance seem to stand in direct contradiction to freedom of choice. However, from an adequately complex understanding of human freedom, that *prima facie* contradiction ultimately evaporates. There is nothing paradoxical about a convinced pacifist who insists on his legally guaranteed freedom of “choice” when refusing compulsory military service, while at the same time feeling that he has simply to follow the dictates of his conscience. Likewise, for a Baha’i, obeying religious fasting rules may be intimately linked to her religious identity and thus a demand that she wishes to fulfill as part of her personal freedom. For some atheists, public criticism of religion is more than just an intellectual game, namely a personal “calling” as it were, to which they need to respond in order to do justice to their own convictions, principles, and worldviews.

Surely, there may be many cases in which the situation is unclear. Whether a young woman wears the hijab as a manifestation of her personal conviction or whether she merely gives in to social pressure from her religious milieu may remain disputable. In some situations, this may not even be entirely clear to the concerned person herself. When she declares that “she can’t do otherwise,” this may therefore sound ambiguous in that it can be either a statement on her freely adopted self-determination or reflect a lack of personal freedom. Similar questions arise when a young candidate for Catholic priesthood professes lifelong celibacy—perhaps without fully knowing what he is about to promise. In reality, situations are usually not just black and white, but full of ambiguities. To deal with such grey zones requires sensitivity and a readiness to listen carefully to the concerned individuals.



However, when human beings let themselves be “determined” by a religious, ethical, or other conviction, this is per se neither pathological nor indicative of an absence of personal freedom. Indeed, it may well be a successful manifestation of free self-determination in the sense that they have managed to find their personal determination without coercion. To expel religion from the sphere of freedom, simply because it makes demands on believers, betrays a sadly one-dimensional understanding of freedom. At the same time, this plays into the hands of those anti-liberals who have often discredited rights to freedom as an alleged expression of shallowness and the decline of binding values. “To be religious is not to be free, but to be faithful” is a motto to which the Grand Inquisitor could have gladly signed up.

### **3. Primacy of Freedom and Criteria for Justifying Limitations**

Freedom of religion or belief, as enshrined in Article 18 of the ICCPR and similar human rights provisions, is a complex entitlement. It protects everyone’s freedom to search for an ultimate meaning; to communicate their convictions or doubts openly or to keep their faith to themselves; to join a religious group or to stay within the community in which they have grown up; to change or abandon their faith; to invite others to reconsider their religion or belief; to exercise rituals alone and in community with others; to express public criticism of religion or to defend religion against such criticism; to initiate and educate their children in conformity with their own convictions; to receive and impart information on religious issues; to import religious literature from abroad and circulate it; to shape their lives in conformity with religious precepts; to establish a religious infrastructure, including places of worship, schools, and charity organizations; to recruit clergy in conformity with the self-understanding of the community, and so forth. Freedom of religion or belief is a right of individuals as well as communities, and it has private as well as public dimensions. Against a widespread stereotype, it does not one-sidedly focus on issues of personal conviction or spirituality, but equally covers ceremonial or ethical practices, including dietary prescriptions, dress codes, or collective pilgrimages, as well as institutional and infrastructural aspects of community life.<sup>14</sup> Any list of the various components belonging to that right will necessarily remain nonexhaustive, since freedom of religion or belief receives its practical

contours in response to ever-new challenges, which may lead to a “discovery” or “re-discovery” of aspects that had been previously ignored.

Rights of freedom are defined by leaving the decision as to whether and how to make use of that freedom to the rights holders themselves. That is why freedom of religion or belief necessarily includes the right not to profess a religion or belief, not to show any interest in such issues, not to participate in religious ceremonies, not to observe any dietary or other religious rules, not to have one’s children educated in a particular religion, and so on. Freedom *from* religion is a logical ingredient of freedom of religion or belief itself, because it follows from the nature of a right of freedom.

It is a truism that rights of freedom cannot be without limitations, since an unlimited freedom would amount to the elbow freedom of those who disrespect the freedom of others. Pointing to the obvious need for some limitations, at the same time, is dangerous, because it may invite arbitrary, discriminatory, or overly broad restrictions. Countless examples demonstrate that this danger is not merely hypothetical. Governments when trying to preserve an existing religious hegemony or being driven by sheer control obsessions, typically invoke an alleged necessity of limiting freedom of religion or belief in the interest of some “higher goods,” which they often define as they see fit. Many authoritarian governments rhetorically agree that freedom of religion is a good thing in theory, as long as they have wide leeway to cut down on its practical exercise. Instead of openly saying “no” to human rights, it is more convenient to react in a “yes—but” fashion. The promised respect thus often ends up as just an empty rhetoric. Yet even democratic states have a tendency to invoke limitation clauses in a lax and loose manner, without always presenting compelling reasons as to why certain limitations are really needed and appropriate. Unfortunately, courts, including even the European Court of Human Rights, have not always been straightforward in demanding a precise and diligent handling of limitation clauses.<sup>15</sup> The result is that the contours of freedom of religion or belief and other rights of freedom may get increasingly blurred.

How can we steer a way that pragmatically accommodates certain limitations, when really necessary, without running the risk of selling out the substance of freedom of religion or belief? This is one of the most pressing questions in human rights practice. The general response provided by international human rights law is that limitations must be strictly linked to a number of criteria all of which must be satisfied for a proposed limitation to be justifiable. In case of failure, the proposed limitation will lack

legitimacy. It is in that sense that Article 18(3) of the ICCPR specifies the conditions for the justifiability of limitations: “Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.” The decisive term within that provision has often been overlooked or neglected, namely the tiny word “only.” What it signifies is that states do not have a general permission to impose limitations as they see fit. Instead, it is the other way around in that limitations are generally impermissible—unless and until the said criteria are fully met.<sup>16</sup> Indeed, the whole thrust of limitation clauses is not on permitting limitations but, rather, on limiting the scope for legitimate limitations by linking them to a set of binding criteria. To capture this function, German lawyers have coined the concept of “*Schranken-Schranken*,” which in literal translation means “limits to limitations.”

According to the criteria listed exhaustively in Article 18(3) of the ICCPR, limitations must be legally prescribed, and they must be obviously “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 remain within the realm of proportionality, which *inter alia* means they must always be limited to the minimum degree of interference deemed necessary to achieve one of the enumerated legitimate purposes. The measures taken must furthermore be suitable to accomplish the envisaged purpose. These and other criteria serve the purpose of safeguarding the substance of freedom of religion or belief even in situations of conflict with the rights or freedoms of others or other important public interests. Confirming this critical function, the UN Human Rights Committee tasked with the oversight of the ICCPR, has insisted “that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there. . . . Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”<sup>17</sup> Finally, the legitimacy of limitations depends on the availability of legal remedies. Everyone who thinks his or her rights have inappropriately been infringed upon must have access to courts or other mechanisms.

An appropriate understanding and handling of limitations clauses, far from being just a “technicality,” is of utmost significance for the flourishing

of human rights in practice. Otherwise rights of freedom will end up as empty promises, which can be easily sidelined once conflicting state interests enter the scene. From a human rights perspective, one should always take freedom as the normative starting point against which limitations must be justified. In reality, however, many governments, including democratic governments, do the opposite, for instance when reducing freedom to a “dividend” of successful control politics. This means that freedom will end up as an unreliable “grant” always depending on precarious political circumstances. In the face of this danger, the handling of limitation clauses in theory and practice warrants utmost critical attention. It cannot be left to legal specialists, but should also become an issue for human rights education, political discourse, and awareness raising. In this context, one also should critically tackle the language and metaphors used to circumscribe the conditions of limitations and their (exceptional) justifiability.

A word that all too quickly and all too frequently comes up in discussions on rights and their limitations is the term “balance.” It even occurs in countless scientific articles and commentaries on human rights.<sup>18</sup> Whenever a conflict seems to arise between a right of freedom and another consideration, this allegedly becomes a matter for “balancing.” However, as Guglielmo Verdirame has observed, “balancing” is a dangerously vague notion, which invites all sorts of trade-offs. How can the elevated status of inalienable human rights survive, once these rights are vaguely balanced against public order interests or other issues that the government deems important? Verdirame’s answer is: not at all. He concludes: “A right that is balanceable and negotiable cannot be fundamental.”<sup>19</sup> Ample experience illustrates that this critical assessment is correct; as soon as mighty considerations of order, security, or collective identity are put on the weighing scales, rights of freedom will usually lose out.

To counter that danger, the limitation clauses attached to rights of freedom should not be spelled out in analogy to diffuse metaphors like “weighing scales” or “balancing processes.” Instead, the criteria for limitations must follow the logic of *strict justification requirements*. The starting point must be everyone’s entitlement with inalienable rights to freedom, upon which the whole human rights approach is premised. Accordingly, rights to freedom remain the rule, while a proposed limitation can merely be an exception to the rule, which furthermore requires strong arguments in keeping with all the criteria set out for that purpose. This strict justification

logic manifests itself in the wording of Article 18(3) of the ICCPR. As already mentioned, the little word “only”<sup>20</sup> functions as a reminder that any proposed limitation should be considered illegitimate unless and until it meets all the criteria laid down for justifying a limitation. Strangely enough, however, many commentators fail to take the crucial role of the term “only” systematically seriously.<sup>21</sup>

Limitation clauses like the ones contained in Article 18(3) of the ICCPR do not grant states a general permission to “balance out” rights to freedom and limitations in ways that suit their political purposes. It is the other way around in that the state has to meet a high threshold defined by a combination of important caveats. The list of caveats includes presenting compelling empirical and normative arguments, issuing a formal law, persuasively demonstrating the need of such a law for the pursuance of a legitimate purpose, keeping limitations to the necessary minimum, avoiding any discriminatory effects and being willing to defend all of this to the democratic public and before courts. As Jeremy Gunn stresses: “The State . . . should be obligated to prove that the threats to the public order, public health, and the like are real and measurable rather than merely speculative or ideological, as well as that the proposed restrictions would actually reduce the danger.”<sup>22</sup>

Additional complications may arise if freedom of religion or belief seems to be colliding with other human rights concerns. Within the list of purposes, in the interest of which limitations can be justified, securing “the fundamental rights and freedoms of others” may be particularly persuasive. But even then, caution is necessary. The first task of legislators or courts is to conduct a precise empirical assessment of the situation. In many cases, it may turn out that the supposed normative conflict does not even exist. One example is the prohibition of the Islamic headscarf undertaken on the empirically questionable assumption that it symbolizes an inferior status of women compared to men. Yet even in situations where a normative conflict in the intersection of different human rights standards apparently does exist, the task remains to do justice to all the human rights claims at issue—to *the maximum degree possible*. The term “balancing” fails to describe this demanding task adequately. Instead, it signals that one should settle for some sort of “middle ground,” which remains normatively undefined. This amounts to trivializing the diligence required to uphold the substance of human rights provisions, especially in complicated situations.<sup>23</sup>

Finally, the *forum internum* dimension of freedom of religion or belief even enjoys absolute protection: “No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.” This apodictic provision in Article 18(2) of the ICCPR is remarkable for two reasons. First, it confirms a component within freedom of religion or belief that has been—and continues to be—particularly controversial. The freedom to have or adopt a religion or belief implies the possibility of changing one’s religion or abandoning any religion. Even sticking to one’s inherited religion would cease to be a manifestation of personal freedom, if the option of reconsidering, modifying, or changing did not exist.<sup>24</sup> Second, the protection of the *forum internum* within freedom of religion or belief has received an unusually strong formulation. The prohibition of coercive interferences, including against converts, is one of the few “absolute” norms in international human rights law. It clarifies that not everything can be justified as long as it is based on some more or less plausible pragmatic arguments.

Coercing individuals to profess a faith they do not genuinely believe means nothing less than forcing them to betray themselves. To cite a traditional metaphor coined in the early seventeenth century by Roger Williams, the use of coercion against the nucleus of a person’s religious or moral identity would be an act of “soul rape.”<sup>25</sup> This can undermine the victim’s self-respect beyond repair. Forced self-betrayal furthermore denies the very preconditions of any normative interaction, since it nullifies the due respect for human beings as responsible agents. Brainwashing, too, is a manifestation of total disrespect, comparable to trading and selling people like cattle in a slave market or forcing them to swallow their own excrements, which is a widespread torture practice. Such practices are beyond any conceivable justification.

It is no coincidence that the wording in Article 18(2) of the ICCPR comes close to the formulations used in the absolute prohibitions of slavery and torture. Apart from their practical function as legal safeguards, those absolute prohibitions also fulfill an important symbolic role for the whole system of international human rights protection. They serve as reminders that, in spite of the pragmatic elasticity that human rights norms display in order to be applicable in the real world, not everything is justifiable as soon as strong pragmatic reasons are put on the table. Human rights have the status of inalienable rights after all. This very inalienability implies upholding certain “red lines,” which can never be legitimately crossed.<sup>26</sup>

#### 4. Anti-Liberal Distortions of a Human Right

Freedom of religion or belief is a right of *freedom*. This clarification may sound like an utterly trivial remark. Politically speaking, however, it is far from trivial. Various trends obfuscate the defining component of freedom that permeates all aspects of this right: free search for meaning, free articulation of one's belief, free and open communication on religious issues, free religious practice in private and in public, free community developments, and so forth. Strangely enough, even academic commentators sometimes drop the essential component of freedom when employing terms like "the right to religion" or loosely speaking of people's "religious rights." There may be good reasons for using shorthand formulations in human rights law but leaving out the core element of freedom can lead to serious misunderstandings. In recent years, anti-liberal distortions of freedom of religion or belief have emerged under different headings, such as (a) "combating defamation of religions"; (b) protecting collective religious identities; (c) preserving a state-imposed interreligious harmony; or (d) purging the "secular" public sphere of the presence of any visible religion.<sup>27</sup>

##### (a) "Combating Defamation of Religions"

Until some years ago, one of the biggest challenges to freedom of religion or belief in the United Nations came from demands to fight "defamation of religions." Between 1999 and 2010, the Organisation of Islamic Cooperation (OIC), an intergovernmental body composed of fifty-seven member states,<sup>28</sup> regularly tabled UN resolutions entitled "combating defamation of religions." Although triggering fierce debates, these resolutions in the end always scored a relative majority of votes, albeit with a downward trend as illustrated in the diagram below.<sup>29</sup>

The controversy in the United Nations peaked during the notorious Danish cartoons crisis in 2005–2006. While it is understandable that many Muslims felt offended by those tasteless cartoons, one cannot ignore the danger that political calls for combating such "defamation" could pave the way for authoritarian policies of censorship, criminalization, and other restrictive measures, which would collide with freedom of expression—and with freedom of religion or belief as well.<sup>30</sup> What makes the resolutions on "defamation of religions" particularly confusing is that they convey the message that *religions themselves*—and in particular Islam—should receive





international legal protection of their reputation. However, the idea of protecting the honor of religions is clearly incompatible with the human rights approach, which institutionalizes respect for the dignity, freedom, and equality of *human beings*. Another problem is that the resolutions appear to legitimize draconian measures, such as anti-blasphemy laws, which typically have intimidating effects on members of religious minorities as well as on religious critics and dissenters. In Pakistan, ill-defined blasphemy offences can even lead to a death sentence.<sup>31</sup>

Owing to their authoritarian spirit, the UN resolutions on combating defamation of religions stand in clear contradiction to a number of human rights, including freedom of religion or belief. Nonetheless, the fact that these resolutions carried “religion” in their title gave rise to superficial perceptions that the whole debate was about the supposedly tense relationship between freedom of religion or belief, on the one hand, and freedom of expression, on the other. The assumption was that while freedom of expression signals “green light” for all sorts of provocations, freedom of religion supposedly functions more like a “stop sign” as soon as religiously delicate issues would be affected. In other words, while freedom of expression was seen as the epitome of a genuinely liberal right, freedom of religion or belief seemed to be a “less liberal” right or even a conservative antidote to an excessive understanding of free speech—or so was the perception.<sup>32</sup> Many years of emotional controversies around the issue of defamation thus contributed to further alienate some liberals from the “liberal” right to freedom of religion or belief.

It was all the more important that Asma Jahangir, UN Special Rapporteur on freedom of religion or belief from 2004 until 2010, clarified that the fight against “defamation” of religions had nothing to do with freedom of religion or belief. She insisted that there can be no right to be free from criticism or even ridicule.<sup>33</sup> Postulating such a right would endanger the very preconditions of an open and pluralistic society, based on intellectual and communicative freedom. Jahangir’s successor, Heiner Bielefeldt (Special Rapporteur between 2010 and 2016), followed the same line of argumentation, which also received support from other thematic Special Rapporteurs, most notably Frank La Rue, mandate holder on freedom of expression (2008–2014).<sup>34</sup> Bielefeldt dedicated his last report to the UN Human Rights Council to the “close interrelatedness of freedom of religion or belief and freedom of expression,” thus highlighting again that both rights follow the same logic as human rights to intellectual and

communicative freedom.<sup>35</sup> The current mandate holder, Ahmed Shaheed, has also called for repealing anti-blasphemy laws as they have a stifling impact both on freedom of religion or belief and on freedom of opinion and expression.<sup>36</sup>

After more than a decade of bitter controversies in different UN forums around this issue, the OIC refrained from tabling a resolution on defamation of religions in 2011. Instead, the organization submitted a resolution titled “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons based on religion or belief.” This resolution 16/18 of the UN Human Rights Council was adopted without a vote on 24 March 2011.<sup>37</sup> It has subsequently served as a main reference document in the United Nations. As the complicated title of resolution 16/18 illustrates, the purpose is *protection of human beings* from extreme manifestation of hatred rather than safeguarding the reputation of religions. In this sense, resolution 16/18 signals a step forward. At the same time, caution remains imperative. The anti-hatred legislation in many states is not less vague and diffuse than many of the anti-blasphemy laws, and it can likewise serve as an invitation to employ restrictive measures.<sup>38</sup>

It should be noted in passing that although Western governments mostly voted against the OIC resolutions on “defamation of religions,” things are not always clear and consistent in the West.<sup>39</sup> For instance, some European states continue to have anti-blasphemy provisions in their domestic criminal law books.<sup>40</sup> Even some judgments of the European Court of Human Rights remain ambiguous in that they may convey the impression that religious feelings should be protected against offensive expressions deemed “blasphemous” by some believers.<sup>41</sup>

Unfortunately, it currently appears that the debate on “defamation of religions” might reemerge. At a conference held in June 2015 in Jeddah, the old fault lines became again fully visible.<sup>42</sup> During the Jeddah conference, some representatives of the Gulf countries divided the world into states which believe in God and states which believe in freedom of expression. In addition, the Russian Federation has also increasingly pursued a strict anti-blasphemy agenda in recent years. In this context, a superficial “religious freedom” language has been harnessed, with the result that the spirit and letter of freedom of religion or belief, *as a human right of freedom*, becomes increasingly obfuscated. This worrisome trend warrants ongoing critical attention.

## (b) Protecting Collective Religious Identities

Another entry-point for profound misunderstandings is the demand for *protecting religious identities*. Whereas the authoritarian overtones of the OIC resolutions on defamation of religions are obvious, demands for respecting collective identities are less clear and have come up in most different political camps. The language of identity can back up right-wing policies of protecting a country's traditional religious hegemony, but it can also be part of left-wing or liberal multiculturalism agendas. Politically speaking, the identity semantics permeates the entire spectrum from nationalistic conservatism to left-wing liberalism and multiculturalism. Be that as it may, the promotion of identity (in the singular) or identities (in the plural) harbors the risk of marginalizing the crucial component of *free choice and free articulation* around which the right to freedom of religion or belief is conceptualized. The warning once raised by Jürgen Habermas against Charles Taylor's multicultural identity semantics, namely that applying ecological categories like the "preservation of different biological species" to human culture would lead to anti-liberal results,<sup>43</sup> has a particular bearing on discussions about religious identities, too. Like other rights of freedom, the right to freedom of religion or belief empowers human beings to freely find their own ways and freely articulate their own convictions, needs, and interests. Freedom of religion or belief cannot be reduced to the recognition or promotion, by the state, of preexisting religious identities. Rather, the state ought to give people the options freely to develop, freely to change, freely to ignore, or freely to defend their individual or communitarian identity and freely to reach out to others and challenge their identities in a noncoercive manner. There is always a risk that the crucial component of freedom gets overshadowed by ubiquitous demands for respecting and protecting identities in themselves.

That danger increases once religious identities get amalgamated with ethnic or "racial" identities. It is true that some religious communities define themselves by an assumed common ethnic origin, with the result that phenomena of ethnic and religious identities overlap. In order to address such overlapping phenomena, the UN Human Rights Council established an ad hoc committee mandated to discuss possible new standards complementing the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The idea is that those complementary standards would specifically deal with discrimination

faced by religious groups within the context of racism.<sup>44</sup> However, a systematic integration of religious issues into the framework of anti-racism could lead to an “ethnicization” or even “racialization” of religions, with highly problematic implications for the understanding of freedom of religion or belief.

Although at the *phenomenological level* overlaps between religion and ethnicity undoubtedly exist, the *conceptual distinction* between those categories should be kept intact. Unlike ethnic or “racial” group characteristics (or at least to a much larger degree than those), religions and beliefs typically include intellectual ideas—for instance, metaphysical ideas or ethical norms—which can become objects of reflection, communication, and critical comment. They may furthermore be exposed to systematic theological, philosophical, ethical, or jurisprudential argumentation. Such possibility of critical communication constitutes an indispensable core component of freedom of religion or belief. In this regard, religions and beliefs have a different epistemological status than ethnicities. For instance, whereas critical comments on particular ethnic characteristics—an obvious case would be skin color—have met with broad disapproval,<sup>45</sup> critical remarks on religious ideas like, for instance, monotheism, divine revelation, or reincarnation, although possibly deemed offensive by the affected believers, deserve a different assessment. This follows from the explicit recognition of the rights to free choice and free communication in the area of religion or belief. Simply lumping together religion, belief, ethnicity, “race,” and other elements of a person’s or a group’s identity, with the purpose of protecting such identities, implies the serious risk of eroding crucial elements of freedom of religion or belief, in particular the freedom to search, choose, change, reach out, communicate, convert, invite, and peacefully provoke in the field of religion 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, which conceivably could even arise from within the midst of the human rights community itself.

### (c) State-Imposed Interreligious Harmony

Another source of confusion is the amalgamation of freedom of religion or belief with projects of fostering interreligious harmony. Governments when talking positively about the situation of freedom of religion or belief in

their countries often conjure up the harmonious relations between the various faith groups, thereby implicitly assuming that freedom of religion or belief is tantamount to such harmony. At a closer look, however, this assumption proves questionable. Surely, human rights are part of a peace project. The preamble of the UDHR proclaims that respect for human rights constitutes “the foundation of freedom, justice and *peace in the world*.”<sup>46</sup> However, a peace based on recognizing people’s most diverse deep convictions and concomitant practices will always sit uneasy with authoritarian ideas of a state-imposed societal “harmony.” Moreover, freedom of religion or belief *inter alia* protects the rights of minorities, internal minorities within minorities, converts and reconverts, reformers, including feminist theologians, just as it recognizes the rights of followers of mainstream theologies, orthodoxies, or conservative interpretations of religious traditions. Hence, a society respectful of freedom of religion or belief for everyone will inevitably be a religiously diverse society, with shifting boundaries between different communities and subcommunities. Such a society will furthermore accommodate peaceful competition and intellectual controversies on religious and belief-related questions. In other words: if freedom of religion or belief is part of a broader peace project, this will be a not too harmonious peace. What Kant ironically remarked in the introduction to his essay on “Perpetual Peace,” namely, that peace should not be mistaken for the tranquillity of a graveyard,<sup>47</sup> likewise applies to the peace facilitated by freedom of religion or belief: it will be a noisy peace, possibly alongside a certain degree of messianic messiness.

Important test cases in this regard are the closely related issues of conversion and missionary activities. Many states—especially in the Middle East and in large parts of Southern and South-Eastern Asia—restrict the possibilities to change a religion or to invite others to reconsider their faith. Restrictive political measures range from social mobbing and structural discrimination in education or the labor market to administrative obstacles and even criminal sanctions.<sup>48</sup> Some governments claim that by prohibiting “proselytism,” “unethical conversions,” or similar practices they want to uphold societal peace and interreligious harmony. The same argument is also used to back up measures targeting religious dissidents or people holding “deviant” interpretations of their faith. Imposing such prohibitions and restrictions in the name of interreligious harmony, however, has nothing to do with the peace project envisioned in the UDHR, which defines peace by respect for everyone’s human dignity, freedom, and equality.

## (d) Purging the “Secular” Public Space of Visible Religion

Authoritarian ideas of a state-imposed harmony also occur in the name of “negative freedom of religion” or as some prefer to call it, “freedom *from* religion.”<sup>49</sup> Many people associate religion with bigotry, moralistic complacency, community pressure, religious dogmatism, fanaticism, or even violence. Some would therefore prefer to live in a society without any visible and audible religion. The idea is that while in the private sphere everybody should be allowed to think, believe, and practice whatever they wish, the public sphere should remain clear of the “disturbing” presence of religious speeches and symbols and in that specific sense be purely “secular.”<sup>50</sup> In his song “Imagine All the People,” John Lennon in 1971 invoked such a vision. Verse after verse, the refrain always ends with the words “and no religion, too.” One should not underestimate the popularity of such ideas in larger milieus within and beyond Western societies.<sup>51</sup>

As mentioned previously, freedom of religion or belief actually has the “negative” component of also protecting the freedom not to profess a religion or belief, not to attend worship, or just not to care about religious or belief-related issues, and so on. The same holds true for freedom of expression, freedom of peaceful assembly, freedom of association, and other rights of freedom, all of which have their “positive” and “negative” applications. Any attempt to isolate one of those components would undermine the liberating essence of freedom of religion or belief in general. Just as those who exclusively focus on the “positive” application typically marginalize the freedom *from* religion, an undue focus on its “negative” side would likewise lead to anti-liberal results. “Freedom *from* religion,” when seen in isolation, is sometimes used to justify authoritarian policies of purging the public sphere of any open religious manifestations. Much of this happens under the auspices of secularism—a term open to most different interpretations, as we will discuss in Chapter 5.

Freedom “from” religion has an indispensable role to play by protecting people against any pressure, especially by the state or in state institutions, to profess a religion or belief or to participate in religious activities against their will. However, freedom from religion does not provide anyone with a legal title against exposure to visible or audible religion in the public sphere. The right to publicly manifest one’s religious or belief-related conviction, either individually or in community with others, is enshrined in clear terms in all international guarantees of freedom of religion or belief, including

Article 18 of the ICCPR, which explicitly covers manifestations in public or private. A policy of enforced “privatization” of religion would thus presuppose an authoritarian regime disrespectful of human rights. It would furthermore be at odds with the idea of a pluralistic society.

### 5. Toward a Complex Understanding of Freedom

In the case of freedom of religion or belief, the principle of freedom warrants highlighting, since this human right has been exposed to practical, ideological, and conceptual distortions. To start with the practical level, many governments loosely and broadly invoke limitation clauses in order to “balance” human rights norms out against all sorts of public order interests. Given the experience of numerous abuses of limitation clauses, it remains important to stress that limitation clauses do not give those in power a *carte blanche* to restrict freedom of religion or belief as they see fit. It is the other way around in that limitations to rights of freedom should generally be considered illegitimate—unless and until the government presents persuasive arguments in accordance with all the criteria laid down for that purpose. Instead of permitting a general “balancing” of freedom of religion or belief against competing rights and other important interests, the logic of justification requirements should strictly apply in order to safeguard the substance of freedom of religion or belief in situations in which this right collides, or seems to collide, with other important considerations.

Apart from ongoing restrictive practices, freedom of religion or belief has also seen far-reaching ideological distortions. In the past, UN resolutions wrongly confused freedom of religion or belief with authoritarian policies of “combating defamation of religions.” Another danger stems from the primacy given to the preservation of collective religious identities or the maintenance of a state-imposed interreligious “harmony.” Freedom *from* religion can also become a pretext for twisting freedom of religion into a mere private right, at the expense of manifestations in public life. These and other authoritarian distortions, especially when enacted under the auspices of religious traditionalism, may further nourish a reluctance, which exists on the side of some liberals, to fully appreciate the significance of freedom of religion or belief as part of a holistic human rights agenda.

Finally, distortions also arise from shallow (mis)conceptualizations of freedom itself. Those who reduce freedom to a particular urban, ironic, and

religiously dispassionate “lifestyle” miss the point that rights to freedom open up the space for a much broader diversity of convictions and practices, possibly beyond what some liberals may consider “normal.” Commentators who even construe an abstract dichotomy between “being free” and “being faithful” fail to do justice to the experience that remaining faithful to one’s freely developed personal commitments—religious or otherwise—can be a profound experience of one’s *successful self-determination*, provided it remains free from coercive interferences. By challenging such wrong dichotomies, freedom of religion or belief contributes to a more demanding understanding of the multidimensionality of human freedom and thus to a more sophisticated conceptualization of the human rights project in general.