

RESEARCH ARTICLE

## The Interrelationship between Freedom of Thought, Conscience, and Religion and the Rule of Law

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### Abstract

The article explores the connection between the rule of law and the right to freedom of thought, conscience, and religion from an empirical and theoretical perspective. The author posits that the two are not merely interdependent, but that freedom of thought, conscience, and religion is foundational for embedding the rule of law because a state needs to facilitate freedom of thought, conscience, and religion to encourage the exploration of virtue to inform consensus around society's common norms. This virtue-building role of freedom of thought, conscience, and religion gives the human right its foundational role for creating the conditions required for embedding the rule of law. This conclusion is drawn from Martin Krygier's analysis of the sociological conditions necessary to embed the rule of law and a comparison of the worldwide rule of law, religious freedom, and happiness indexes. To support a universal approach to the human right and to underpin the identified essentiality of it, the author proposes a theoretical approach grounded in the theory of common grace; Rowan Williams's other-regarding communal approach to rights; and the framework for plural living together proposed by Herman Dooyeweerd. The author posits that this approach could be adapted with a plural metanarrative to accommodate dialogue around virtue building and dispute resolution within societies with very different outlooks.

**Keywords:** rule of law; religious freedom; Reformed and Anglican theology

### Introduction

What is the extent to which the right to freedom of thought, conscience, and religion and the rule of law are interdependent? Can freedom of thought, conscience, and religion, in fact, be said to be foundational to effective implementation of the rule of law? What is the challenge faced by states seeking to incorporate the right into their constitutional structures? How is this challenge shaped by the very different social and political environments across the world?

The conundrum for states is that freedom of thought, conscience, and religion, as it has been developed in the jurisprudence of national and international courts, seeks to maximize individual freedom. A state however, needs to build consensus for or impose common norms for society—norms that may be in conflict with the ethical frameworks by which individuals may want to live their lives. This disconnect necessitates a form of dialogue around the virtues informing the lives of individuals and those of the communal life of society. Such a

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dialogue on the virtues upon which individuals and society center their lives provides the foundational link between freedom of thought, conscience, and religion and the rule of law.

One way to consider the rationale underpinning the rule of law is by drawing on Martin Krygier's sociological approach.<sup>1</sup> For Krygier, the rule of law is about controlling abusive power and facilitating power that enhances human flourishing. The question when embedding the rule of law is not how far a country complies with a list of attributes of the rule of law. The question is rather about building the type of virtues in society that ensure the rule of law can be embedded. Krygier argues that this needs to be contextualized for different countries, and thus embedding the rule of law will take a different approach depending on the sociological and historical context. I propose that it is this task that requires the operation of freedom of thought, conscience, and religion as a mechanism to facilitate dialogue and virtue building.

Is the theory that freedom of thought, conscience, and religion is foundational for the rule of law borne out in the empirical data? A comparison of the *Rule of Law Index: 2021* from the World Justice Project, the Pew Research Center's data on religious restrictions around the world, and the *World Happiness Report 2021* (as an approximation for a measure of freedom of thought and conscience)<sup>2</sup> suggests that there is generally a link between these three indices. Countries scoring highly on one score highly on the others. There are, however, some outlying results suggesting that a weighted measure of freedom of thought, conscience, and religion be used in the Rule of Law Index. A weighted measure not only would make it possible to measure current state practice but could provide a litmus test to enable international organizations to identify where the rule of law was in danger of being eroded in the future within a given state.

It is not enough, however, to identify the importance of freedom of thought, conscience, and religion for rule of law implementation and the internationalization of the rule of law. A fresh approach is needed to support freedom of thought, conscience, and religion. Indeed, if it is to support the embedding of the rule of law across the world, this critical freedom needs a theoretical basis that is universally acceptable. Such a theory needs to sit within a framework for plural living together that can also find acceptance both within and beyond Western liberal democracy.

In what follows, I align the theory of common grace with the other-regarding community-building rights theology of Rowan Williams. To address the need to facilitate the operation of freedom of thought, conscience, and religion and consequently support the embedding of the rule of law, I offer an analysis of the philosophical political theology of Herman Dooyeweerd.<sup>3</sup> Dooyeweerd's Christian metanarrative supporting interactions between different spheres of social organization provides a framework that could equally fit within a plural metanarrative to support the internationalization of the rule of law. I offer a Christian theological dialogic approach—a metanarrative open to discourse with those of other faiths and none.

<sup>1</sup> Martin Krygier, "Inside the Rule of Law," *Rivista di Filosofia del Diritto* 3, no. 1 (2014): 77–98; Martin Krygier, "What's the Point of the Rule of Law?" Geneva Graduate Institute, November 29, 2018, video, 1:36.15, <https://www.youtube.com/watch?v=gEJEOIwTVz0>.

<sup>2</sup> World Justice Project, *Rule of Law Index: 2021* (Washington, DC: World Justice Project, 2021). The World Justice Project also maintains an interactive website detailing the findings of the Rule of Law Index since 2015, see World Justice Project, WJP Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index/>. Pew Research Center, "Religious Restrictions around the World," November 29, 2022, <https://www.pewforum.org/essay/religious-restrictions-around-the-world/>. The Pew Research Center's report is an interactive website allowing users to examine Pew's data regarding restrictions on religion gathered from 2007 through 2020. John F. Helliwell, et al., eds., *World Happiness Report 2021* (New York: Sustainable Development Solutions, 2021), <https://worldhappiness.report/ed/2021/>.

<sup>3</sup> Jonathan Chaplin, *Herman Dooyeweerd: Christian Philosopher of State and Civil Society* (Notre Dame: University of Notre Dame Press, 2011).

I believe that a multivalent approach to freedom of thought, conscience, and religion and the rule of law is possible. A theoretical basis for weighing individual, communal, and societal interests to reach consensus at a national and international level strengthens the interrelationship of freedom of thought, conscience, and religion and the rule of law to facilitate the more effective embedding of the rule of law within civil society.

### Initial Propositions: Freedom of Thought, Conscience, and Religion and the Rule of Law

The right to freedom of thought, conscience, and religion has won almost universal acceptance around the globe.<sup>4</sup> This is evidenced by the list of signatories to the International Covenant on Civil and Political Rights<sup>5</sup> and other international treaties incorporating or supporting the enjoyment of the right.<sup>6</sup> Even in the early stages, however, incorporation of the right was contentious. This was particularly so within academic circles and within the fifty-seven member states of the Organisation of Islamic Cooperation. It has remained the subject of controversy ever since.<sup>7</sup> Violations, when they occur, occur both within and beyond countries that adhere to the internationally recognized rule of law framework,<sup>8</sup> albeit to varying degrees.<sup>9</sup>

The core content of the right has been adjudicated by international, regional, and national courts.<sup>10</sup> There is some judicial, academic, and international consensus that freedom to choose or ignore a belief system is essential to the right to freedom of thought, conscience, and religion. Freedom *from* religion is thus an aspect of freedom of religion.<sup>11</sup> Although, as

<sup>4</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 18 (Dec. 16, 1966); European Convention on Human Rights art. 9, Nov. 4, 1950, 213 U.N.T.S. 2889.

<sup>5</sup> The United Nations Office of the High Commissioner for Human Rights reports 173 state parties to the International Covenant on Civil and Political Rights, with 6 other states signatories and no action on the part of 18 other states. "International Covenant on Civil and Political Rights. All Countries. Ratification of 18 International Human Rights Treaties. Status of Ratification Interactive Dashboard (1996–2014)," United Nations Office of the High Commissioner for Human Rights, accessed November 5, 2021, <https://indicators.ohchr.org/>. Only a limited number of reservations against Article 18 are recorded.

<sup>6</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) art. 2.2; G.A. Res. 36/55, Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981); G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) art 2; G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Sept. 3, 1981) art. 1; G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) arts. 1 & 3; G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990) art. 1; G.A. Res. 260 A (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948) art. 2; & G.A. Res. 429 (V), Convention Relating to the Status of Refugees (Dec. 14, 1950) arts. 3 & 4.

<sup>7</sup> See, for example, Karen Engle, "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999," *Human Rights Quarterly* 23, no. 3 (2001): 536–59.

<sup>8</sup> See, for example, Melanie Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil Was Banned* (Cham: Springer International, 2016) (an analysis of the restrictions on religious freedom in France); United States Commission on Religious Freedom, *Annual Report 2022* (USCIRF 2022), accessed December 21, 2022, [https://www.uscirf.gov/sites/default/files/2023-05/2023%20Annual%20Report\\_1.pdf](https://www.uscirf.gov/sites/default/files/2023-05/2023%20Annual%20Report_1.pdf). The report documents some of the restrictions occurring in countries other than Western liberal democratic regimes. See also, Alexis Artaud de la Ferrière, "Coronavirus: How New Restrictions on Religious Liberty Vary across Europe," *The Conversation*, May 2, 2020, <https://theconversation.com/coronavirus-how-new-restrictions-on-religious-liberty-vary-across-europe-135879>. De la Ferrière identifies restrictions within Europe during the global COVID-19 pandemic.

<sup>9</sup> Generally, countries that adhere to the rule of law also provide a higher degree of protection of the right to freedom of thought, conscience, and religion.

<sup>10</sup> See, for example, Jessica Giles, "Religious Freedom in Global Context," *Implicit Religion* 21, no. 3 (2018): 239–70.

<sup>11</sup> United Nations Office of the High Commissioner for Human Rights, *Rapporteur's Digest on Freedom of Religion or Belief: Excerpts of the Reports from 1986 to 2022 by the UN Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications* (Geneva: United Nations, 2023), 82, <https://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.

Paul Cliteur argues, the space for open public debate at the intersection of freedom of thought, conscience, and religion and freedom of speech has become increasingly restricted in the face of “theoterrorism.”<sup>12</sup> According to Cliteur, Tom Herrenberg, and Bastiaan Rijpkema, freedom from religion thus becomes difficult to enjoy. Thus, fear of the reaction to the exercise of freedom of thought, conscience, and religion prevents the very enjoyment of it.<sup>13</sup> Echoing the experience in the UK Parliament, Sophie van Bijsterveld traces public nervousness in respect of religion to an earlier stage. She argues that religion “had slowly become a collective blind spot” within a secularized Dutch society. This was before Islam entered public consciousness and reawakened an interest in the “presence of religion.”<sup>14</sup> Hans-Martien ten Napel, on the other hand, argues that while it seems that more people are secular, there is also more diversity in the significant part of the population that remains religious.<sup>15</sup> This changing nature of religion in society has existential implications for the operation of freedom of thought, conscience, and religion and its interconnection with the rule of law.

Although there is substantial case law defining freedom of religion as a human right, freedom of thought and conscience are disputed concepts. According to Rafael Domingo, they have in recent years been elided.<sup>16</sup> The dispute centers, in particular, on whether freedom of thought and conscience are individual subjective notions dependent on genuinely and sincerely held beliefs or they are defined and articulated in the wider context of relationship, a community, or a system of thought.<sup>17</sup> This is important for the virtue building role of freedom of thought, conscience, and religion for embedding the rule of law. Enabling individuals to explore virtue and exercise agency within their conscience-based communities is equally important as facilitating it for those in faith-based communities.

In practice around the globe are very different constitutional contexts and approaches to public living together within which freedom of thought, conscience, and religion is expected

<sup>12</sup> Paul Cliteur, *Theoterrorism v. Freedom of Speech: From Incident to Precedent* (Amsterdam: Amsterdam University Press, 2019).

<sup>13</sup> Paul Cliteur explores reactions to Charlie Hebdo, Samuel Paty, and Salmon Rushdie. Together with Tom Herrenberg and Bastiaan Rijpkema, he analyzes the type of censorship that arises in consequence, creating extrajudicial restraints on free speech: Paul Cliteur, Tom Herrenberg, and Bastiaan Rijpkema, “The New Censorship: A Case Study of Extrajudicial Restraints on Free Speech,” in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Mollier (The Hague: Eleven International Publishing, 2015), 291–318. See also Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief* (Oxford: Oxford University Press, 2016).

<sup>14</sup> Sophie van Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship* (The Hague: Eleven International Publishing, 2018), 2.

<sup>15</sup> Hans-Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom* (Abingdon: Routledge, 2017), 8.

<sup>16</sup> Rafael Domingo, “Restoring Freedom of Conscience,” *Journal of Law and Religion* 30, no. 2 (2015): 176–93. Frank Cranmer explores freedom of thought in the United Kingdom. Frank Cranmer, “The Right to Freedom of Thought in the United Kingdom,” *European Journal of Comparative Law and Governance* 8, no. 2–3 (2021): 146–70.

<sup>17</sup> Rex Ahdar “Is Freedom of Conscience Superior to Freedom of Religion?” *Oxford Journal of Law and Religion* 7, no. 1 (2018): 124–42; Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (Cambridge: Cambridge University Press, 2010). Domingo observes that in America freedom of conscience has been supplanted by freedom of religion and that in Europe it has been supplanted by freedom of thought. He argues for freedom of conscience as an independent right because it protects “moral obligation as a political value.” Domingo, “Restoring Freedom of Conscience,” 192. One example is conscientious objection to military service. See Bayatyan v. Armenia, App. No. 23459/03 (July 7, 2021), <https://hudoc.echr.coe.int/eng?i=001-105611>. Another example is objection by nurses or midwives to engaging with patients who undergo a termination of pregnancy. See Grimmark v. Sweden, App. No. 43726/17 (Feb. 11, 2020), <https://hudoc.echr.coe.int/fre?i=001-201915>; Steen v. Sweden, App. No. 62309/17 (Feb. 11, 2020), <https://hudoc.echr.coe.int/fre?i=001-201732>.

to find its place.<sup>18</sup> Those states attempting to embed freedom of thought, conscience, and religion can find themselves faced with a conundrum.

### ***The Freedom of Thought, Conscience, and Religion Conundrum***

The conundrum that states face regarding freedom of thought, conscience, and religion is the need to maximize individual freedom while also supporting peaceful plural living together built around core consensual norms for society.

Generalizations are difficult in the face of the multiple religions and systems of thought and conscience practiced worldwide. However, it can generally be said that religious and thought systems provide adherents with, among other things, a moral framework according to which they are expected or choose to orientate their lives. Those who are deeply committed to a given faith or belief system are likely to have a strong commitment to the moral framework guiding the behavior of adherents. In some cases, this will be so, even if the commitment puts their lives at risk or leads them to civil disobedience.<sup>19</sup> John Perry describes this as people of faith “finding themselves subject to multiple loyalties that admit of no harmonization.”<sup>20</sup> In addition, when the state denies the individual the ability to live according to a specified moral framework different from their own faith norms, it can cause cognitive dissonance for the believer or adherent and could lead the individuals to disengage with public life. Ultimately, such denial of this freedom by the state could cause forms of isolation or ghettoization for faith- or conscience-based groups, especially if the telos of a faith- or conscience-based group may relate to realized or future eschatological benefits. Life holds enhanced meaning for the faithful. Priority may be given to faith-mandated norms, in view of promised future (heavenly) benefits.

The conundrum—needing to mediate between individual freedom and national cohesion—has sociological, political, and legal implications. First, from a sociological perspective, the way a government and the people of any given state mediate religious difference in public life will be contextual. The practical effects of the incorporation of a right to freedom of thought, conscience, and religion will look different in various nation states, while still bearing the hallmarks of a universal right. Second, from a political perspective, a government will be concerned with establishing its own common rules based on a moral framework that accommodates the ongoing operation of government, economic well-being, and peaceful coexistence of those within its borders. The need for minimum rules is bound to come up against faith- or conscience-based norms that may set higher or different standards, this requiring balance between majority-mandated norms and civil society groups’ norms. Third, legally, if a government is to foster pluralism, a set of rules is necessary to establish minimum

<sup>18</sup> For global surveys on the question, see the contributions in W. Cole Durham Jr. and Donlu D. Thayer, eds., *Religion, Pluralism, and Reconciling Difference* (London: Routledge, 2019); Jonathan Fox, *A World Survey of Religion and the State* (Cambridge: Cambridge University Press, 2008); Jonathan Fox, *The Unfree Exercise of Religion. A World Survey of Discrimination against Religious Minorities* (Cambridge: Cambridge University Press, 2016). See also, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2015); Gavin D’Costa et al., eds., *Religion in a Liberal State* (Cambridge: Cambridge University Press, 2013); Melanie Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil was Banned*; Cécile Laborde, *Liberalism’s Religion* (Cambridge, MA: Harvard University Press, 2017); Paul Cliteur and Afshin Ellian, “The Five Models for State and Religion: Atheism, Theocracy, State Church, Multiculturalism, and Secularism” *Vienna Journal on International Constitutional Law* 14, no. 1 (2020): 103–32.

<sup>19</sup> For a catalogue of recent examples from global Christianity, see the contributions in Daniel Philpott and Timothy Samuel Shah, eds., *Under Caesar’s Sword: How Christians Respond to Persecution* (Cambridge: Cambridge University Press, 2018).

<sup>20</sup> John Perry, “Arguing Out of Bounds: Christian Eloquence and the End of Johannine Liberalism,” in D’Costa et al., *Religion in a Liberal State*, 219–43, at 219.

standards to govern civil society interactions. The process must include capacity for rule setting by civil society groups to enable the practices, traditions, and ethical frameworks of these groups to operate.<sup>21</sup>

This leads to the question of what comes first, freedom of thought, conscience, and religion or the implementation of the rule of law. In theory, the rule of law can provide a secure foundation for the embedding and enjoyment of freedom of thought, conscience, and religion within a nation state. However, without the type of virtue building supported by freedom of thought, conscience, and religion necessary to embed the rule of law in civil society, the rule of law may not be effectively implemented. As I discuss below, on this basis, freedom of thought, conscience, and religion is arguably foundational for the rule of law.<sup>22</sup>

## The Rule of Law

The rule of law developed in the writings of great thinkers spanning millennia, with Magna Carta 1215 often cited as the document from which it emerged and Albert Venn Dicey (1835–1922) regarded as its founding father. Constitutional theory supporting the principle is grounded in, among others, the philosophies of Aristotle, John Locke, Montesquieu, F. A. Hayek, and Jacques Maritain. It has found support in modern legal and political philosophy in the works of Joseph Raz,<sup>23</sup> Jeremy Waldron,<sup>24</sup> John Tasioulas,<sup>25</sup> and Martin Krygier. The minimal/formal/thin concept of the rule of law belongs to the Diceyan tradition expounded in modern times, for example, by Joseph Raz and John Tasioulas. It incorporates basic principles for procedural fairness in law making, application, and adjudication. It has increasingly become contested around whether the formal concept of the rule of law is in fact morally neutral, consisting simply of a framework for achieving a variety of goals. Also contested is whether the rule of law should include a substantive account of what law ought to be. Tasioulas argues that a substantive approach results in the rule of law and the notion

<sup>21</sup> For the purposes of this article, I deem capacity and capacity to exercise agency to be applicable to all humankind, regardless of actual physical or mental capacity because the rule of law and freedom of thought, conscience, and religion are discussed as legal concepts. In law, individuals who do not have actual capacity are protected by the appointment of someone to protect or exercise their interests. This might be through the appointment of a guardian ad litem, by power of attorney or trusteeship. This is not to ignore rights theory debates as to whether capacity can ground human rights; it acknowledges that legal (human) rights are a subset of moral rights and operate within the wider context of law and legal rights in general. The agency of an individual who lacks capacity is thus deemed exercisable, by another on their behalf.

<sup>22</sup> In his historical analysis of the reformed approach to rights, John Witte signals a resounding “yes” to this question. John Witte, *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 2–3. This is not to say that within the Western liberal democratic model of government a majority, even a religion-based majority, cannot hold power. But rather that under the rule of law there are checks to ensure minority groups and interests are protected. Witte argues that the interconnectedness between the rule of law and rights was built into Reformed theology, particularly into ecclesiology, as early as John Calvin (1509–1564). Witte, *The Reformation of Rights*, 4, 56–58. He identifies that this provided the bedrock for the development of the Dutch reformed political theology that I explore below. See Witte, *The Reformation of Rights*, 152–84.

<sup>23</sup> Joseph Raz, “The Rule of Law and Its Virtue,” in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 117–34.

<sup>24</sup> Cambridge Law Faculty, “The Rule of Law and Human Dignity: The 2011 Sir David Williams Lecture—Professor Jeremy Waldron,” March 26, 2014, video, 1:14.16, <https://www.youtube.com/watch?v=X3cyYnle0ec>; Jeremy Waldron, s.v. “The Rule of Law,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, June 26, 2016, <https://plato.stanford.edu/entries/rule-of-law/>.

<sup>25</sup> John Tasioulas, “The Rule of Law,” in *The Cambridge Companion to the Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press 2020), 117–34.

of legitimacy becoming inappropriately elided.<sup>26</sup> This raises questions: Does the rule of law encompass legitimacy? Can a system be legitimate independent of the rule of law?

The substantive account of the rule of law, encompassing a tranche of internationally agreed-upon fundamental human rights, has become the gold standard adopted by Western liberal democracies and by international organizations, including the United Nations. It is this later account of the rule of law that is used in international measures, such as the *Rule of Law Index: 2021*. These measure state practice against a list of attributes of the rule of law. Raz, supporting an expanded formal, or thin, concept of the rule of law,<sup>27</sup> argues that substantive approaches are inappropriate because they involve stepping from legal theory into the remit of political philosophy. He argues that this inappropriately necessitates decisions about what constitutes good law.

Raz's analysis has implications for rule of law implementation in non-Western contexts. For many non-Western states, even for those that adhere to a formal concept of the rule of law, universal human rights norms are aspirational goals. It is a political decision taken in the light of national context about whether and to what extent fundamental rights can be incorporated into national constitutions. For many states, there may be a different approach to public living together that does not accord with the individualistic, and at times litigious, nature of the Western rights culture.<sup>28</sup> To combine an assessment of formal rule of law requirements with human rights compliance is combining two different aspects of a constitutional structure and governance. If a substantive approach to the rule of law is adopted, as it is within international measures assessing adherence to the rule of law, the method of embedding it necessitates a different and more sophisticated approach. A substantive rule of law is highly dependent on building capacity for the virtues espoused by the rule of law. Freedom of thought, conscience, and religion becomes foundational to any such approach—more so than if one adopts a thin concept of the rule of law.

The substantive, or thick, account of the rule of law, incorporating a tranche of internationally accepted fundamental rights, has been adopted as the gold standard,<sup>29</sup> including by the United Nations.<sup>30</sup> It finds support in the work of, among others, Tom Bingham; Lon Fuller;<sup>31</sup> Ronald Dworkin;<sup>32</sup> and Waldron.<sup>33</sup> It incorporates an understanding of law that considers its inner morality (as offered by Fuller), valid social objectives (as offered by Waldron), and adherence to international rights obligations (as offered by Dworkin and Bingham). The content of the rule of law and the way it is embedded within societies has taken on universal significance because globalization has necessitated the removal of

<sup>26</sup> Tasioulas, 117–18, 120–23, 127–29.

<sup>27</sup> Joseph Raz's eight principles are as follows: (1) "All laws should be prospective, open, and clear." (2) "Laws should be relatively stable." (3) "The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules." (4) "The independence of the judiciary must be guaranteed"; (5) "The principles of natural justice must be observed." (6) "The courts should have review powers over the implementation of the other principles." (7) "The courts should be easily accessible." and (8) "The discretion of the crime-preventing agencies should not be allowed to pervert the law." Joseph Raz, "The Rule of Law and its Virtue," 214–18.

<sup>28</sup> This is particularly so for Asian, African, and Islamic approaches to rights. Joan Lockwood O'Donovan critiques the legal nature of Western approaches to rights. Joan Lockwood, "Faith and Human Rights, Joan Lockwood O'Donovan," Yale University, February 8, 2010, video, 21:23, [https://www.youtube.com/watch?v=jjue3C9h7\\_c](https://www.youtube.com/watch?v=jjue3C9h7_c).

<sup>29</sup> Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law*, no. 3 (1997): 467–87.

<sup>30</sup> "What is the Rule of Law," United Nations and the Rule of Law, United Nations, last visited September 15, 2023, [https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=For%20the%20United%20Nations%20\(UN,and%20which%20are%20consistent%20with](https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=For%20the%20United%20Nations%20(UN,and%20which%20are%20consistent%20with).

<sup>31</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1965).

<sup>32</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

<sup>33</sup> Waldron, *The Rule of Law*.

elements of policy and decision making to an international level.<sup>34</sup> Freedom of thought, conscience, and religion thus becomes foundational for the rule of law in both national and international governance. The danger is that the interlinking of the rule of law and freedom of thought, conscience, and religion creates the appearance of a Western approach to international governance, which might do more to divide than unite nation states.

### **The Internationalization of the Rule of Law and Freedom of Thought, Conscience, and Religion**

The internationalization of the rule of law and the incorporation of rights into the account of the rule of law throws the relationship of the rule of law and freedom of thought, conscience, and religion into sharp relief. What proponents of both formal and substantive concepts of the rule of law have in common, according to Tasioulas, is that they seek to “satisfy the desiderata of pluralism and coherence.”<sup>35</sup> The question is to what extent can both the rule of law and religious freedom be effectively globalized or perhaps universalized as interdependent on each other. This question is particularly relevant given the strong pull from various directions in favor of a “neutral” form of governance.<sup>36</sup> Where neutrality implies the exclusion of pluralism in public life, the danger is that public memory of virtue becomes lost. The embedding and ongoing operation of the rule of law consequently could become problematic.

Krygier highlights this issue, taking what might be described as a philosophical sociological approach. Krygier envisages the rule of law as a social reality that tempers arbitrary power.<sup>37</sup> According to Krygier, conceptualizations of the thick and thin rule of law have in common viewing the rule of law as a list of institutional elements relating to creation, adjudication, and implementation of the law.<sup>38</sup> The substantive conceptualization of the rule of law is reflected in definitions in the *Rule of Law Index: 2021*, the Rule of Law Checklist from the European Commission for Democracy through Law (Venice Commission), and the definition provided by the United Nations.<sup>39</sup> Krygier, taking an approach similar to that of Nasser Hussain,<sup>40</sup> argues that when the rule of law became an export commodity and a measure by which nations would be assessed across the globe, it was assumed that it was in fact appropriate to apply the list of measures from Western liberal

<sup>34</sup> Tasioulas, “The Rule of Law,” 133–34.

<sup>35</sup> Tasioulas, 120.

<sup>36</sup> Giles, *Religious Freedom in Global Context*, 241, 254.

<sup>37</sup> Krygier, *Inside the Rule of Law*, 84–85. See also Martin Krygier and Adam Wincheste, “Arbitrary Power and the Ideal of the Rule of Law,” in *Handbook of the Rule of Law*, ed. Christopher May and Adam Wincheste (Cheltenham: Edward Elgar, 2018), 75–95; Martin Krygier, “Tempering Power,” in *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, ed. Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballin (Cambridge: Cambridge University Press, 2017), 34–59.

<sup>38</sup> A. V. Dicey lists three core elements; John Rawls list four; Lon Fuller, Joseph Raz, John Finnis, John Tasioulas and Tom Bingham each list eight; and Robert Summers lists as many as eighteen. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: MacMillan, 1915), 183–85, 189–90, 191–92; John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Belknap Press of the Harvard University Press, 1999), 208–10; Kristen Rundle, “Fuller’s Internal Morality of Law,” *Philosophy Compass* 11, no. 9 (2016): 499–506; Joseph Raz, “The Rule of Law and Its Virtue,” 214–18; John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 270–71; John Tasioulas, “The Rule of Law,” 117–34; Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010), 137; Robert S. Summers, “The Principles of the Rule of Law,” *Notre Dame Law Review* 74, no. 5 (1999): 1691–712, at 1693–95.

<sup>39</sup> World Justice Project, *Rule of Law Index: 2020*; Council of Europe, European Commission for Democracy through Law (Venice Commission) “Rule of Law Checklist” (2016), accessed November 5, 2021, [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf); United Nations, “What is the Rule of Law,” accessed August 12, 2021, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

<sup>40</sup> Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003). Hussain explores the harnessing of the rule of law by colonial powers to impose a Western colonial approach to governance in India.

democracies into a variety of different contexts. This, Krygier claims, can lead to isomorphic mimicry whereby the form envisaged by the rule of law list is copied. The outcome of the application of these norms and rules, however, can be quite different, depending on how they are embedded. The outcome can be what David Landau identifies as “abusive constitutionalism”—governments use or abuse legal mechanisms and the law in subtle and unsubtle ways to exercise power.<sup>41</sup> Krygier argues that consequently, law becomes a tool useful to authoritarian regimes in wielding control rather than a tool to prevent abuse and misuse of power. Further, one result of such regimes is a generation of public servants and government officials who insist on adherence to rules without necessarily understanding the rationale behind them. In such instances, power can either become focused in central government or move to other groups within civil society because government does not command the respect of the people.

### ***Krygier, The Rule of Law, and Freedom of Thought, Conscience, and Religion***

Krygier builds on Waldron’s concept of the rule of law as a solution concept.<sup>42</sup> Krygier argues that we need to consider not *what* the rule of law is, but what problem it is designed to address. He explains that while enabling power is a necessary and positive element of governance, the exercise of arbitrary power undermines the rule of law. The rule of law is a mechanism for tempering arbitrary power. This is not primarily a legal ideal, but a social ideal. The question is, in any given context, what are the sociological and political conditions necessary to think about how one might temper power. The legal implications of this are likely to vary from nation state to nation state, depending on where negative or abusive power lies. Krygier refers to Philip Selznick’s concept of institutionalization,<sup>43</sup> arguing that those institutions implementing the rule of law need to be infused with the virtues the concept espouses.<sup>44</sup> Thus, the system does not mimic the rule of law but implements a form of the rule of law that will bring about lasting change in a given national context. Tasioulas echoes this idea when he writes, “securing [the rule of law] is not merely a task for a narrowly political morality, aimed exclusively at officials and institutions, but also for the wider ethos animating the attitudes and conduct of individuals and groups within society more generally.”<sup>45</sup>

At this point a link between the rule of law and the right to freedom of thought, conscience, and religion becomes clearer. If there is to be institutional change supporting the maintenance of the rule of law within a nation state or within international governance structures, there must be social and political acceptance of the underpinning virtues on which the rule of law relies. The conditions for this can exist only where individuals have the freedom to explore ideas relating to faith, conscience, and belief. By this account, freedom of thought, conscience, and religion is not just interdependent with the rule of law, but essential to it.<sup>46</sup>

Arguably, the ability to exercise human agency and autonomy and explore virtue is necessary whether one supports a narrow or substantive concept of the rule of law. Tasioulas, for example, argues that human agency is essential to a narrow concept of the

<sup>41</sup> David E. Landau, “Abusive Constitutionalism,” *University of California, Davis Law Review* 47, no. 1 (2013): 189–260.

<sup>42</sup> The following discussion is drawn from Krygier, “What’s the Point of the Rule of Law?,” 25:04–28:56.

<sup>43</sup> Philip Selznick, “Institutionalism ‘Old’ and ‘New’ (40th Anniversary Issue),” *Administrative Science Quarterly* 41, no. 2 (1996): 270–77.

<sup>44</sup> Krygier, “What’s the Point of the Rule of Law?,” 54:15–55:30.

<sup>45</sup> Tasioulas, “The Rule of Law,” 123.

<sup>46</sup> This is built on the type of popularization of social responsibility proposed by John Milton. Witte, *The Reformation of Rights*, 13.

rule of law.<sup>47</sup> By its very nature, the rule of law addresses subjects as rational agents in the moment of decisions that they take within the formal legal and governance structures established by the rule of law.<sup>48</sup> Tasioulas adopts an Aristotelian approach, arguing that the application of the principle of equity (in both its philosophical and legal sense) to the resolution of particular legal issues softens the impact of the application of the formal conceptualization of the rule of law. Together they are a means for attaining justice. Thus, even within this more limited understanding of the rule of law, freedom of thought, conscience, and religion would appear essential in order for members of society to be able to develop capacity to exercise agency and to explore principles of equity and justice.

This initial analysis of freedom of thought, conscience, and religion and the rule of law leads to my proposition that freedom of thought, conscience, and religion is foundational for the rule of law. This interconnection requires a stronger theoretical basis to support the ongoing articulation of this essential link. The first step to expanding the theoretical approach is exploration of the empirical data to identify whether state practice bears out the proposed essentiality of freedom of thought, conscience, and religion for embedding the rule of law. In analyzing current trends, we can identify how a theoretical approach might need to respond to them.

### **Measuring Rule of Law Compliance**

If freedom of thought, conscience, and religion is foundational to embedding and sustaining the rule of law, it therefore has implications for the methodological approach used in the tools measuring compliance with the rule of law. For example, weighting would need to be given to freedom of thought, conscience, and religion. Higher levels of freedom of thought, conscience, and religion within a nation state should reflect stronger adherence to the rule of law. A deterioration of freedom of thought, conscience, and religion would signal that the rule of law is being undermined.

The incorporation of fundamental rights into the rule of law by the United Nations and other international nongovernmental organizations has led to incorporation of these rights into measures ranking states' compliance with the rule of law. What these measures do not appear to do, however, is provide the slightly more sophisticated analysis to assess the extent to which the virtues espoused by the rule of law have been embedded within institutions and civil society. Nor do they identify freedom of thought, conscience, and religion as in any way significant over and above compliance with other fundamental rights. Some outlying cases suggest that a state can have a relatively poor record on compliance with freedom of thought, conscience, and religion but still score relatively high overall on compliance with rights.

If measures of compliance with the rule of law were to include an additional weighted measure to identify the extent to which freedom of thought, conscience, and religion is enjoyed within a state, it would be possible not only to assess current state practice but also to predict direction of movement. Poor performance in freedom of thought, conscience, and religion could indicate that a country was starting to drift from maintaining the rule of law. Enhanced weighting for freedom of thought, conscience, and religion also has implications for the more foundational question, particularly in non-Western cultures, as to whether the conditions in a given nation state were appropriate for embedding the rule of law in its substantive form in the first place. A flag designating the level of freedom of thought, conscience, and religion could signal the need for additional effort to create the conditions necessary to embed the rule of law.

<sup>47</sup> Tasioulas, "The Rule of Law," 123–29.

<sup>48</sup> Although for Tasioulas, compliance with the rule of law does not necessarily give rise to a morally appropriate legal system. Morally acceptable outcomes are about the implementation and end goals of any given legal and political system. Tasioulas, 120–23.

Below I explore the extent to which current empirical data bears out the theoretical propositions on the foundational nature of freedom of thought, conscience, and religion. In the absence of a specific focus on freedom of thought, conscience, and religion within the current Rule of Law Index, I use the Pew Research Center's data on freedom of thought, conscience, and religion compliance to make a comparative analysis between the two. I use the World Happiness Index as the nearest approximate measure for freedom of conscience.

## Empirical Evidence

In the World Justice Project, *Rule of Law Index: 2017–18*, a pre-COVID-19 pandemic measure of rule of law compliance, 113 countries around the world submitted to an assessment under the rule of law survey.<sup>49</sup> Each country was accorded a place on the scale of rule of law compliance. However, other sources claim that 57 percent of the world population lives outside the protection of the rule of law.<sup>50</sup> The more recent 2020 index surveyed 128 countries, applying eight factors and forty-four subfactors drawn from two sources of data collected by the World Justice Project, the aim being to establish the extent to which each country satisfied the chosen indicators for the application and enjoyment of the rule of law.

The data sources for the 2020 Rule of Law Index were a general population poll and a qualified respondents' questionnaires survey. The data sources included marginalized members of society. The 2020 surveys reflected perceptions of the general public and legal practitioners and experts on the operation of the rule of law. The focus was on policy outcomes, namely whether there was cost-effective access to courts and public services and whether crime control was effective.<sup>51</sup>

The rule of law is defined in the World Justice Project from the perspective of outcomes that the rule of law brings to a society. The index ranks countries from 0 to 1, with countries at the lower end of the scale going into the "red" and countries at the higher end of the scale in the "green." In the 2021 report, Denmark, Norway, and Finland sit at the top of scale; Denmark with a score of 0.9. The Democratic Republic of Congo, Cambodia, and Venezuela sit at the bottom; Venezuela with a score of 0.27.<sup>52</sup> Countries are also grouped into low, lower middle, upper middle and high-income countries.<sup>53</sup> When a comparison is made between the Pew Research Center data on the enjoyment of religious freedom and the 2020 global rule of law report, the correlations between government restrictions on religious freedom when compared to the rule of law index were not as straightforward. For example, at least two governments (India and Indonesia) registered as imposing high levels of government

<sup>49</sup> World Justice Project, *World Justice Project Rule of Law Index: 2017–2018* (Washington, DC: World Justice Project, 2018), 5, [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf). The World Justice Project reports that government action in the light of the global COVID-19 pandemic has tipped the scales, resulting in lower scores for many countries around the world, particularly with respect to corruption, control on government powers, and human rights protection. World Justice Project, *World Justice Project Rule of Law Index: 2020 Insights* (Washington, DC: World Justice Project, 2020), 6–7, <https://worldjusticeproject.org/sites/default/files/documents/Insights-2020.pdf>; World Justice Project, *Rule of Law Index: 2021*, 10–11.

<sup>50</sup> LexisNexis, "The Rule of Law: What is the Rule of Law and Why Is It Important?" accessed August 8, 2021, <https://www.lexisnexis.co.uk/about-us/rule-of-law>.

<sup>51</sup> The 2020 global report on the rule of law indicated a correlation between high adherence to the rule of law and high income. To obtain a fuller analysis of the absence of corruption and implementation of human rights, it is necessary to explore the corruption and indicators of human rights compliance. See, for example, Transparency International, The Global Coalition against Corruption, "Corruption Perceptions Index 2021," accessed December 22, 2022, <https://www.transparency.org/en/cpi/2021>.

<sup>52</sup> World Justice Project, *Rule of Law Index: 2021*, 10–11.

<sup>53</sup> World Justice Project, 26–27.

restrictions on religious freedom and very high levels of social hostilities toward expression of religious freedom in the Pew Research Center's study on religious freedom. This compared to a better performance on the Rule of Law Index (India ranked 69th of 128 with a score of 0.51 in the rule of law index and Indonesia ranked 59th of 128 in the rule of law index with a score of 0.59). Similarly, France registered moderate to high social restrictions on religious freedom and moderate government restrictions,<sup>54</sup> whereas it ranked 20th on the Rule of Law Index with an overall score of 0.73. In practice, therefore, it can be said—on the basis of measures encompassed in this article and subject to the limits of the methodologies used in those studies—that the application of the rule of law is not an absolute guarantee that a state will demonstrate a commitment to religious freedom.<sup>55</sup> It also indicates that the rule of law measure is broad enough to enable a state to avoid adherence to one or more fundamental rights without its overall score being negatively affected.

It is not possible, based on the empirical data within one report, to predict correlative trends because the methodological approach takes a snapshot in time of rule of law compliance. To track the correlation between rule of law and freedom of thought, conscience, and religion overtime, the methodology and analysis used by the rule of law index would need to expand. A rule of law index incorporating enhanced freedom of thought, conscience, and religion review would need not only to adjust the weight given to freedom of thought, conscience, and religion but also to explore the extent to which deterioration in freedom of thought, conscience, and religion was a significant indicator for future deterioration of compliance with the rule of law. Incorporating a freedom of thought, conscience, and religion weighting into the rule of law measure would obviate the need to compare two different reports. This is important because the Pew Research Center measures restrictions on religious freedom, whereas the international right to freedom of thought, conscience, and religion guarantees both freedom of thought and conscience and religious freedom. A measure of rule of law that adopts the theoretical proposition that freedom of thought, conscience, and religion is foundational would need to use a methodology that incorporates a means to measure both freedom of thought and conscience and freedom of religion.

Another current measure that might inform the interaction between the rule of law and freedom of thought, conscience, and religion in the absence of a new type of rule of law methodology proposed above is the World Happiness Report. Empirically, however, this comparison creates an even more complex picture. The analysis becomes more complex, particularly, in the survey taken during the COVID-19 pandemic. Theoretically, the happiness of a population could be one of several indicators of the levels of rule of law and freedom of thought, conscience, and religion in a country. The freedom to pursue one's own earthly and heavenly life goals in accordance with one's beliefs ought to result in the recording of high levels in the World Happiness Index. However, there is no essential link between freedom of thought, conscience, and religion, application of the rule of law, and general happiness in current measures. However, there is data supporting the thesis that the three are interlinked.

A country can rank high in the World Happiness Index without necessarily providing religious freedom for its citizens or adhering to the rule of law.<sup>56</sup> Compare, for example,

<sup>54</sup> See, for example, Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203 (Mar. 14, 2017), and Case C-188/15, *Bouagnaoui v. Micropole SA*, EU:C:2017:204 (Mar. 14, 2017).

<sup>55</sup> The Pew Research Center survey considers religious freedom an independent aspect of its research and does not survey the freedom of thought and conscience. See generally, Pew Research Center, "Religious Restrictions around the World." If it did so, it would have a greater degree of impact on the differential between the enjoyment of freedom of thought, conscience, and religion and the application of the rule of law.

<sup>56</sup> The World Happiness Index involves subjective measures of well-being, including three main indicators: life evaluations, positive emotions, and negative emotions. The 2021 survey paid particular attention to tracking how the COVID-19 pandemic affected different aspects of life. Those surveyed were asked to assess their current life as a

select rankings from the *World Happiness Report 2021* and the *Rule of Law Index: 2021* as presented in [table 1](#).<sup>57</sup>

Conversely, a country may support religious freedom but rank less favorably on the rule of law index and the happiness index. Peru is an example of such a country. According to the Pew Research Center's data, Peru has consistently demonstrated low social hostility toward religious freedom and low government restrictions on religious freedom, placing it high in a ranking of countries supporting religious freedom. In the *Rule of Law Index: 2021*, however, Peru ranked 87 of 139 with an index score of 0.49; in the *World Happiness Report 2021* it ranked 63 of 149.<sup>58</sup>

It is possible to tentatively deduce, based on the current international measures, that based on a snapshot in time, freedom of thought, conscience, and religion, the rule of law, and general happiness are usually, but not necessarily, interdependent. It is perhaps important not to be distracted by exceptions to the general impression, as much as it is possible to gain an impression in comparing three different indexes. Several countries indicate a high score on the rule of law, religious freedom, and happiness indexes. It can be concluded that, while empirically neither the rule of law nor religious freedom appears to be an absolute prerequisite for the other, there is evidence of correlation between them in the majority of cases.

These reports demonstrate some interesting and perhaps surprising results. It is necessary to bear in mind that for many, faith, or the exercise of one's conscience (freedom of thought, conscience, and religion), is not about material wealth or positive emotion (happiness) but about experiencing a peace that comes from a deep belief and commitment, together with a sense of belonging to a community. This can often involve self-denial and sacrifice. Ultimately for some, it involves martyrdom. For some faith or conscience would be a priority over and above wealth and transitory happiness. It could be argued that the exercise of faith, belief, and conscience would encompass something more akin to eudemonia, living a human life well, in the Aristotelian sense. This might include a broader concept of well-being and human flourishing, alone and in community. This broader understanding of happiness informing a measure of freedom of thought, conscience, and religion could inform the methodology used to assess freedom of thought, conscience, and religion within a rule of law measure.

International measures indicate that a country can protect freedom of thought, conscience, and religion absent strong adherence to the rule of law and conversely a country can demonstrate strong adherence to the rule of law without fully protecting freedom of thought, conscience, and religion. Nevertheless, the data does tend to support the theoretical proposition that there is an interdependence between the rule of law and freedom of thought, conscience, and religion.

To support both the theoretical and empirical foundational nature of freedom of thought, conscience, and religion for the rule of law, below I identify a stronger theoretical basis to

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whole, using the image of a ladder, with the best possible life as a 10 and the worst possible life as a 0. The questions on emotional indicators asked respondents to indicate whether they smiled or laughed a lot the previous day and whether they experienced specific negative emotions (worry, sadness, and anger). Globally, positive emotions were almost three times as frequent as negative emotions. Finland, Denmark, Switzerland, Iceland, and the Netherlands were the highest-ranking countries, with Rwanda, Zimbabwe, and Afghanistan registering the lowest scores. Helliwell et al., *World Happiness Report 2021*, Statistical Appendix 1 for chapter 2, 20–22.

<sup>57</sup> Helliwell et al., *World Happiness Report 2021*, 20–22; World Justice Project, *Rule of Law Index: 2021*, 10–11. The happiness rankings in the table are drawn from the composite happiness rankings for 2018–2020.

<sup>58</sup> Compare Pew Research Center, "Religious Restrictions around the World" (examining data related to Peru), with World Justice Project, *Rule of Law Index: 2021*, 11; Helliwell et al., *World Happiness Report 2021*, 21.

**Table 1.** —Comparison between happiness and rule of law rankings

Country	Happiness ranking	Rule of law ranking
Costa Rica	16	31
United Arab Emirates	25	37
Guatemala	30	109
Uruguay	31	25
Kosovo	33	60
Brazil	35	77
Mexico	36	113

support the foundational role of freedom of thought, conscience, and religion for the rule of law in an international context.

### Freedom of Thought, Conscience, and Religion: Theoretical Underpinnings

As noted above, a substantive conceptualization of the rule of law encompassing core human rights lies open to accusations of a Western approach. This poses problems for the internationalization of the rule of law. Both within international rule of law measures of national state practice and in the synthesizing of rule of law with public international law practice. It is proposed that this could be avoided where the debate around compliance with the rule of law incorporated a full and open debate as to the political and moral theory supporting rights. Taking a multivalent approach to building consensus would avoid polarization of views on rights theory and support the incorporation of rights within the rule of law.

A plural debate would facilitate a more open and nuanced approach to embedding the rule of law as required by Krygier's account. It would also create an equitable discussion whereby Western and non-Western approaches could mutually inform each other. There is, for example, a richness of approaches toward public living together evident in non-Western contexts. Here the Asian and African approaches to community, tribe, and family come to mind. In these contexts, duty is as strong or even stronger a concept than is the concept of individual rights. There is much in these communal approaches that counters the strong individualistic approach that has given rise to criticisms of Western rights cultures.<sup>59</sup> The danger is that if non-Western approaches to public living together are not accounted for in informing both rights and freedom of thought, conscience, and religion, then embedding the rule of law becomes difficult in a national context, and synthesizing the rule of law with public international law becomes highly problematic. A multivalent, dialogic approach to rights theory could address this issue.

Existing rights theory tends to focus on rights as a group, rather than on justification of individual rights to support their specific role in a constitutional structure. In view of the

<sup>59</sup> This critique of the individualistic nature of Western rights culture is voiced powerfully by, for example, Stanley Hauerwas in one of the McDonald Distinguished Lectures on Christian Scholarship. "What's Wrong with Rights? Christian Perspectives Pro and Con," Emory School of Law, March 26, 2014, video, 32:25, <https://www.youtube.com/watch?v=o9SzoTOZEAI>. His concerns are reinforced by Michael J. Sandel in a lecture at the Law Library of the US Library of Congress. "2015 Kellogg Lecture on Jurisprudence: Justice, Neutrality and Law," US Library of Congress, October 20, 2015, video, 1:16:04, <https://lcn.loc.gov/2021689932>. Sandel identifies the individualistic and economic/transactional nature of conceptions of the public good and Western rights culture. Sandel from 16:48.

discussion on the interconnectedness of the rule of law and freedom of thought, conscience, and religion, below I offer a theoretical foundation of freedom of thought, conscience, and religion based on the theory of common grace, which supports a multivalent plural approach to building a consensual freedom of thought, conscience, and religion theory. This is combined with the other-regarding theology of rights proposed by Rowan Williams.<sup>60</sup> I suggest these Christian theological approaches because they have a theological metanarrative that is open to other faith and non-faith-based approaches. By their nature, they are supportive of a plural approach and so will tend to be supportive of the rule of law.

Just as the rule of law is often expressed as a list of attributes expected of a legal system, so, according to Waldron, are human rights often defined in positive law terms, by ostension.<sup>61</sup> Political expediency can often result in the exclusion of a tranche of moral rights from enforceable hard law.<sup>62</sup> Waldron argues that consequently, to seek to find one single source of rights is misguided.<sup>63</sup> Waldron points out that while we might recognize the moral underpinnings of rights, we should acknowledge them in their legal frameworks for what they are, the result of policy and political decisions. What is perhaps helpful is to identify, as Waldron does, that rights frameworks account for both moral and political arguments.<sup>64</sup>

This conceptualization of rights informs a theory of freedom of thought, conscience, and religion as a legal, political, and sociological tool interconnected with the rule of law.

### ***Sociological Implications of Changing Religious Practice for Freedom of Thought, Conscience, and Religion Theory***

From a sociological perspective, contrary to the anticipation of Enlightenment thinkers, religion has continued to thrive. According to sociologists of religion, however, the practice of religion has changed. There is lower attendance at forms of communal and public worship for some faith groups and a higher reliance on interpersonal relations to support religious belief and practice. Robert Putnam and David Campbell describe the phenomena of unattached belief, and Grace Davie writes of vicarious religion.<sup>65</sup> Thus, practice of religion is either a matter of individual choice (rather than communal practice) (as offered by Putnam and Campbell), or religion operates communally through the leadership and practice of a select few (as offered by Davie). According to Jonathan Fox, both within and outside the American and European context, religion per se and religion in its entanglement with government, shows no sign of abating.<sup>66</sup>

<sup>60</sup> Rowan Williams, *Faith in the Public Square* (London: Bloomsbury Continuum, 2012); Rowan Williams, "Religious Liberties and the Need for Moral Universalism," in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and Its Continuing Relevance*, ed. Carla Ferstman et al. (London: Routledge, 2019), 141–47. See also two lectures by Williams in the Payton Lecture series of the Fuller Theological Seminary: "Human Rights and Human Identity/Rowan Williams," Fuller Studio, September 18, 2018, video, 58:43, [https://www.youtube.com/watch?v=do\\_OxlXN14s](https://www.youtube.com/watch?v=do_OxlXN14s); "Rights, Recognition and the Body of Christ/Rowan Williams," Fuller Studio, June 18, 2018, video, 54:34, <https://www.youtube.com/watch?v=yqOmWiNUPtQ>.

<sup>61</sup> Waldron, "Rights and Human Rights," in Tasioulas, *The Cambridge Companion to the Philosophy of Law*, 152–70.

<sup>62</sup> James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 22–56.

<sup>63</sup> See Waldron, "Rights and Human Rights," 157, 161. Some key issues facing rights frameworks include artificial intelligence, quantum computing, climate change, food security, refugees, modern slavery, and online misogyny. Many of these are interconnected and are likely to require rights frameworks to evolve in order to protect newly disadvantaged individuals and communities.

<sup>64</sup> Waldron, "Rights and Human Rights" 167–70.

<sup>65</sup> Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us*, 2nd ed. (New York: Simon & Schuster, 2012); Grace Davie, *Religion in Britain: A Persistent Paradox*, 2nd ed. (Hoboken: Wiley Blackwell, 2015), especially 71–90.

<sup>66</sup> Fox, *A World Survey of Religion and the State*, 354–55, 361–64.

It is perhaps consequently inevitable that while there is some ongoing recognition and acceptance of the private good that is understood to flow from freedom of thought, conscience, and religion, the public good is less well understood. A theory supporting freedom of thought, conscience, and religion as both a human right and a right foundational to embedding the rule of law needs to account for this changing religious practice. It also needs to account for higher levels of systems of conscience developed on a non-faith basis and articulate the public as well as private good it supports.

### **Political Implications of Changing Religious Practice**

From a political perspective, freedom of thought, conscience, and religion faces increasing resistance from various quarters.<sup>67</sup> Cécile Laborde argues that the public good that is thought to flow from religion has become contested as the political philosophy underpinning liberal democracy has moved from a predominantly religiously plural understanding of public living together, to a conceptualization of public living together as a space in which it is possible to take a “neutral” stance vis-à-vis religion.<sup>68</sup> Consequently, religion is not uniquely singled out, but is one among several potential ethical frameworks within the liberal egalitarian approach.

If society adopts a multivalent approach to consensus building to establish core societal norms then Laborde’s analysis is not problematic as it might otherwise be. However, the creation of a neutral space that excludes systems of thought, conscience, and religion from public debate is problematic because the public exploration and articulation of virtue then necessarily occurs in something of a vacuum. There could consequently be a breakdown in moral consensus, as identified by MacIntyre.<sup>69</sup> The issues facing plural living together in a Western democratic context can be juxtaposed against non-Western approaches that can challenge pluralism from different perspectives.<sup>70</sup>

Ultimately, as Stanley Hauerwas observes, governments can become the body that is looked to in order to establish the moral compass and framework for civil society to live together.<sup>71</sup> This can result in a self-perpetuating lack of capacity building among the population for peaceful plural living together under the rule of law. A theory of freedom of thought, conscience, and religion therefore needs to account for the importance of each aspect of the right and the capacity-building among the population for articulating the ethical views espoused by the religion or belief informing societal consensus over common norms. Accepting multivalent reasoning to build consensus around the right’s core content addresses this because it incorporates various religious- and conscience-based approaches to build a universally applicable right supportive of embedding the rule of law.

### **Moral Implications of Changing Religious Practice**

From a moral perspective, the individualism within religious practice identified by Davie and Putnam and Campbell together with the disaggregation of religion into its constituent parts to justify its place within a liberal democracy (as offered by Laborde) may paradoxically be a consequence of enshrining fundamental rights into legally enforceable mechanisms in the

<sup>67</sup> Giles, “Religious Freedom in Global Context,” 252–56.

<sup>68</sup> Laborde, *Liberalism’s Religion*, 13–14. In developing her particular approach to liberal egalitarianism, Laborde draws on the work of John Rawls, Ronald Dworkin, Charles Taylor, Christopher Eisgruber, Lawrence Sager, Micah Schwartzman, and Jonathan Quong.

<sup>69</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame: University of Notre Dame Press, 2007).

<sup>70</sup> Giles, “Religious Freedom in Global Context,” 254–56.

<sup>71</sup> Hauerwas, “What’s Wrong with Rights,” 2:25–4:40.

absence of corollary duties. Criticisms have been raised from various quarters on this ground.<sup>72</sup> From a moral perspective, rights individualism is not only corrosive of the concept of duty but also can undermine a sense of community. Because community building is essential to civil society building and to individual human flourishing, any rights theory that is to find universal acceptance needs to account both for the concepts of duty and community.

Similarly, individualism has had an impact on human capacity for exploring virtue. Despite the changing nature of religious practice, the memory of the virtues underpinning the operation of the rule of law in the West may nevertheless be relatively strong due, perhaps, to the influence of those who exercise vicarious authority (as offered by Davie). However, accepting Davie's analysis, the situation is precarious because the trust between those whom faith leaders represent and those who accept their lead may, for any number of reasons, be broken. In the absence of trustworthy leadership, society needs individuals with capacity to step in. A vicarious approach to leadership creates an overdependence on law and leaders as society's moral compass. This is coupled with decreasing understanding of concepts of equity and the exercise of discretion. The courts become adjudicators of disputes that might otherwise be resolved within the community. Vicarious religion also leads to a lacuna in skills and capacity for decision making.

Ultimately, individuals need to engage as moral agents in civic life. Otherwise, civic life becomes a form of strict rule implementation in the absence of an understanding as to why the rule exist. This can lead to forms of unquestioning obedience to governing authorities. Engagement in public life needs to be more than the assertion of legal rights under the supervision of the judiciary. In such a case, both the rule of law and freedom of thought, conscience, and religion could imperceptibly become lost to priorities set by leadership and the judiciary at any given point in time. From a moral perspective, the theory of freedom of thought, conscience, and religion therefore needs to account for the importance of both the individual and communal aspects of plural living together. It also needs to encompass human potential for agency in developing capacity to explore virtue.

### ***Theoretical Thoughts on Freedom of Thought, Conscience, and Religion Together with the Rule of Law***

It has been argued that from a sociological, political, and moral perspective freedom of thought, conscience, and religion, as a legal right, requires a multivalent theoretical approach. Support for its universal application needs to account for the concept of duty and the idea of the role of communities within civil society. To create an environment for its ongoing enjoyment freedom of thought, conscience, and religion needs to support individual capacity to explore virtue. An underlying rationale on this basis would provide a strong link with the intersection between freedom of thought, conscience, and religion and the rule of law.

Elsewhere, I explore the theory of common grace as a rationale underpinning freedom of thought, conscience, and religion.<sup>73</sup> This account identifies a multivalent dialogic approach to freedom of thought, conscience, and religion based in the theory of common grace, and it invites dialogue with other faiths and thought systems to build consensus around the theoretical grounding of the right.

<sup>72</sup> See, for example, the analysis of Ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 4–6.

<sup>73</sup> Jessica Giles, "A Theological Justification for Freedom of Religion and Belief as a Universal Right," in *Why Religion? Towards a Critical Philosophy of Law, Peace, and God*, ed. Dawid Bunikowski and Alberto Puppo (Cham: Springer, 2020), 101–36.

### The Theory of Common Grace

The theory of common grace recognizes that the trinitarian God (Father, Son, and Holy Spirit), as a God of love, empowers all humankind by His grace. This gives all individuals the capacity to be other-regarding. It is distinguished from saving grace, which is the act of God in the life of an individual who commits their life to Christ. Saving grace has soteriological and realized eschatological impact.

Nicholas Needham explains the operation of grace as follows: “common grace and saving grace correspond to two communities—namely, civil society on the one hand, and its visible manifestation in the state; and on the other hand, the church. ... These two communities are not set against each other as alternatives ... all Christians ... are in fact simultaneously in both communities. I am a member of the church, the community of saving grace, by my credible profession of faith in Jesus Christ. I am also a citizen: a member of civil society, the community of common grace.”<sup>74</sup> Needham thus proposes that the community of common grace (civil society) will be greatly advantaged by the activity of saving grace (the church), in particular, by the church supporting and aiding the state to be a just social order.<sup>75</sup>

According to the theory of common grace, the exercise of conscience is possible due to the operation of God through the Holy Spirit.<sup>76</sup> The theory is in turn based on the theory of the total depravity of humankind that establishes that without God humankind would be as wicked as they could be, but that God acts to restrain that wickedness. This is not by controlling, but by acting in cooperation with humankind. This means that moral acts of conscience might be undertaken.<sup>77</sup>

In its pneumatology, the theory of common grace perceives a double operation of the Holy Spirit. The Holy Spirit acts in a redemptive and soteriological capacity to save individuals to a redeemed and eternal life. It thus works regeneratively during an individual’s lifetime and at the point of death. This aspect of the operation of the Holy Spirit is the saving grace of God. In addition, the Holy Spirit acts in a collaborative or renewing capacity in the lives of those who have not committed their life to Christ. This facilitates the development of a moral life.<sup>78</sup>

Kuyper explored the notion of the restraining effects of common grace and the ability of unbelievers to perform both acts of civic good and demonstrate skills and achieve accomplishments.<sup>79</sup> The theory of common grace is not totally at odds with the major alternative

<sup>74</sup> Nicholas R. Needham, *Common Grace and the Work of the Christian Institute* (Newcastle-upon-Tyne: The Christian Institute, 2008), 11–12.

<sup>75</sup> Needham, *Common Grace and the Work of the Christian Institute*, 18.

<sup>76</sup> See the following passages in the Bible: Genesis 6:3; Psalm 145:9; Ezekiel 33:11; Ezekiel 18:21–23; Matthew 5:44–45; Matthew 7:9–11; Luke 6:33, 35–36; Acts 14:16–17; 1 Timothy 4:10; Romans 2:14–15; 2 Corinthians 3:5; 2 Thessalonians 2:6–7; James 1:17.

<sup>77</sup> Cornelius Van Til, *Common Grace and the Gospel*, ed. K. Scott Oliphint, 2nd ed. (Phillipsburg: Presbyterian and Reformed Publishing, 2015), 24.

<sup>78</sup> This latter category (common grace) was confirmed by the synod of the Christian Reformed Church in 1924 in an official declaration stating, according to Richard Mouw, that there is “a kind of non-salvific attitude of divine favor toward all human beings, manifested in three ways: (1) the bestowal of natural gifts, such as rain and sunshine, upon creatures in general, (2) the restraining of sin in human affairs ... and, (3) the ability of unbelievers to perform acts of civic good.” Richard J. Mouw, *He Shines on All That’s Fair: Culture and Common Grace* (Grand Rapids: Eerdmans, 2001), 9.

<sup>79</sup> Mouw, *He Shines on All That’s Fair*, 44; Abraham Kuyper, *Common Grace: God’s Gifts for a Fallen World*, 3 vols., ed. Jordan J. Ballor and Stephen J. Grabill (Bellingham: Lexham Press, 2015), for example, 1:1, 5–9; Kuyper, *Common Grace*, for example, 2:14–15. For further discussion, particularly in relation to multiple divine purposes encompassing not only the ingathering of humankind at the end of time but also humankind’s cultural endeavors and of creation, see Mouw, *He Shines on All That’s Fair*, 48–50.

views that explain God's attitude toward creation and humankind, namely general revelation, natural law, and natural theology.<sup>80</sup> The theory of common grace is, however, distinctive in its starting point, namely the total depravity of humankind at birth. It also perceives that God engages with humankind through the power of the Holy Spirit on an ongoing and cooperative basis.<sup>81</sup>

Categorical statements about exactly how common grace operates—in particular, those that might appeal to the theory of human rights law and its intersection with the rule of law—are difficult because of the different methodological approaches to the disciplines of law and theology.<sup>82</sup> This intersection of law and theology supporting a plural theoretical rationale for freedom of thought, conscience, and religion thus requires a fresh methodological approach that is comfortable with the synthesis of theological and legal methodology, whereby legal methodology is accepting of the more apparently subjective theological approach.

The reformed position is that common grace is the Holy Spirit's operation in or cooperation with humankind: there is an extent to which everyone can experience an aspect of spiritual life and know something, even if an individual does not acknowledge how they know it or the source of that knowledge. Epistemologically everyone may well be perceiving facts or know things through the same empowering spirit. This is so even if the operation of common grace has a distinct effect from the work of the Holy Spirit experienced by those benefitting from saving grace.<sup>83</sup> The difference is perhaps one of degree and willingness (or lack thereof) in acknowledging the sovereignty of the Trinitarian God.

The point at which the theory of common grace interlinks with human rights law and freedom of thought, conscience, and religion is in the capacity of all humankind to understand and exercise agency in respect of a universal moral law.<sup>84</sup> This emphasizes human solidarity and a universalizing metanarrative possible through the endeavors of

<sup>80</sup> Mouw, *He Shines on All That's Fair*, 90.

<sup>81</sup> Mouw, 90–92; Van Til, *Common Grace and the Gospel*, 22. Other theories are that there is an upgrading at the point of birth from the state of total depravity (prevenient grace) or that humans are born with an imprint of goodness which provides them with the capacity for character development overtime.

<sup>82</sup> The otherness and mystery of God and of his purposes is set out in scripture. Scripture points to the operation of common grace and there is evidence of the operation of common grace in the acts of humankind throughout history. This does not align with the type of empirical evidence or philosophically secular theoretical reasoning predominantly accepted within the discipline of law: Thomas Weinandy observed that theology is best described as “a mystery discerning enterprise” rather than a “problem solving one.” Thomas Weinandy, *Does God Suffer?* (Notre Dame: University of Notre Dame Press, 2000), 32–34, as cited in Mouw, *He Shines on All That's Fair*, 89. Mouw describes common grace theology as an area of mystery concerning God's dealings with humankind. Needham argues that the theories of special and common grace establish a distinction between the moral and spiritual life. Needham, *Common Grace and the Work of the Christian Institute*, 21. Mouw argues that God gives positive moral appraisals to non-elect persons. Mouw, *He Shines on All That's Fair*, 37–38. Van Til, however, posits that the elect and non-elect have “the metaphysical situation in common ... while epistemologically they have nothing in common.” Van Til, *Common Grace and the Gospel*, 79. Van Til also argues that the ontological trinity is the “concrete universal” for the philosophical starting point. Van Til, 79. Kuyper believed that some empirical observations are common to both groups whereas other aspects of, for example, the natural sciences are not. Van Til, *Common Grace and the Gospel*, 53.

<sup>83</sup> In both cases, there is activity of some sort on the part of the Holy Spirit in cooperation with the individual, preserving the free will of the individual.

<sup>84</sup> According to Needham and Mouw, Calvin explained that the Christian commandments and the law are within the conscience of all humankind. Needham, *Common Grace and the Work of the Christian Institute*, 26; Mouw, *He Shines on All That's Fair*, 16. Some argue that this draws reformed theology too close to natural theology and that without a focus on the ontological trinity and an understanding of scripture it is not possible to understand universal moral standards. For a discussion, see Cornelius Van Til, *Common Grace and the Gospel*, 44–113.

human rationality.<sup>85</sup> The implications are that (1) there is a universal moral standard that can consensually inform international human rights laws; (2) the voice of those from all faith traditions and none are important in discerning that metanarrative and in informing law creation and adjudication based on plurally informed universal norms; and (3) discernment and dialogue are necessary to reaching consensus on universal legal norms.<sup>86</sup>

This brings reformed theology to the point where, as Mouw's critique of the theory of common grace explains, it needs to decide the extent to which it is accepting of natural theology and plurally informed approaches to public living together, or whether it will stick with "Christian particularities" as its focus.<sup>87</sup> He writes, "If God cannot operate with more than one 'ruling passion,' then it would indeed be folly for Christians to attempt to do so; but if God is committed both to the election of individuals to eternal life and to a distinguishable program of providential dealings with the broader creation, then it is quite fitting for us to feature a similar multiplicity in our own theologies."<sup>88</sup> Mouw's analysis thus demonstrates, in principle, the potential for a multivalent theoretical basis for freedom of thought, conscience, and religion, the effect of which is a plural civil society.

If, as Reformed theology proposes, God's spirit does indeed work in the lives of all humankind in respect of civic life, the need to account for plural voices encompassed within freedom of thought, conscience, and religion is of utmost importance.

The underlying rationale proposed above, grounded in the theory of common grace, accounts for a multivalent approach to freedom of thought, conscience, and religion theory. It does not account for the need to emphasize community and duty in the face of the individualism of modern rights theory. Such an approach is identified in the theology of rights proposed by Rowan Williams.<sup>89</sup> Williams's faith-based theology of rights sits well in a multivalent context because it has the potential to align with other faith-based and non-faith-based approaches.

<sup>85</sup> Mouw, *He Shines on All That's Fair*, 12. However, it is this aspect of protestant theology that led Alasdair MacIntyre to voice concerns about the tendency toward rationalism, which, he argues, relied on autonomous rational thought and which has "decisively failed." Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 2007), 50–52; Mouw, *He Shines on All That's Fair*, 66. Herman Bavinck was insistent that God can be known only through scripture and that natural reason could not operate independent of scripture. Cornelius Van Til, *Common Grace and the Gospel*, 56.

<sup>86</sup> There is a debate among reformed theologians as to the extent to which there can be agreement between the "antithesis" (those who have not committed their life to Christ) and the regenerate (those who have). According to Mouw, Calvin used positive, although qualified, terms to outline the capacity of those in the former category. Mouw, *He Shines on All That's Fair*, 15–17. Kuiper saw plural engagement in civic life as essential while emphasizing the vital role that the Christian community plays in society. John Witte Jr., "The Biography and Biology of Liberty: Abraham Kuiper and the American Experiment," in *Religion, Pluralism, and Public Life: Abraham Kuiper's Legacy for the Twenty-First Century*, ed. Louis E. Lugo (Grand Rapids: Eerdmans, 2000), 243–62, for example 244–45. Dooyeweerd, who although he distinguished between believers and nonbelievers, argued that this was not a dividing line between Christian and non-Christian civil society groups, but between two spiritual principles that could arise in human civic engagement regardless of group allegiance. Mouw, *He Shines on All That's Fair*, 25. This avoided an oppositional approach and prevented a pharisaic attitude on the part of Christian groups who might otherwise be tempted to regard themselves as more righteous. Mouw, *He Shines on All That's Fair*, 26. Mouw also argues that God delights in the acts of non-Christians as well as Christians, for their own sakes. So, a beautiful painting or an act that facilitates human flourishing in another is something God delights over regardless of the faith of the actor. Mouw, *He Shines on All That's Fair*, 36.

<sup>87</sup> Mouw, *He Shines on All That's Fair*, 66–67.

<sup>88</sup> Mouw, 68.

<sup>89</sup> Williams, *Faith in the Public Square*, 156–59; Williams, "Religious Liberties and the Need for Moral Universalism"; Williams, "Human Rights and Human Identity"; Williams "Rights, Recognition and the Body of Christ."

Williams undertakes a sophisticated analysis of rights as relational and communal, building on the critique of Oliver O'Donovan,<sup>90</sup> echoing Emmanuel Levinas' concept of the other<sup>91</sup> and Nicholas Wolterstorff's bestowal of worth.<sup>92</sup> Williams grounds rights in the idea of relational justice. Acknowledging the tensions within Christian and Islamic theology in relation to the individualistic legal concept of bearers of human rights capable of making legitimate claims, Williams proposes a middle way. He identifies the manner in which the human rights, written into international instruments after World War II, have become entitlements belonging to each individual giving rise to the freedom to exercise a claim against others. The individual is perceived of as a consumer and the state as producer within the model of the market state. Williams's response is not to argue for the abolition of rights, but to explore the medieval concept of right or *jus* which, he explains, was about balanced reciprocity and essentially relational. Right was not about immediate happiness or temporal satisfaction nor was it a list of entitlements. The classical theological approach was based on mutuality and an understanding of both the individual and the community. Williams points to Article 29 of the Universal Declaration of Human Rights:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.<sup>93</sup>

Article 29 stresses that duties are the corollary of rights.<sup>94</sup> This leads Williams to locate the tranche of rights protected within the Universal Declaration of Human Rights as encompassed within the idea of the world community and social balance and harmony.

It is here that a more universal approach to rights starts to emerge, particularly in terms of embedding the rule of law in cultures that are predominantly communal in their approach to public living together. According to Williams this communal approach is built up by the self-giving of members of a community.<sup>95</sup>

Williams continues his analysis, exploring the medieval concept of *jus*, arguing that humans are agents within the context of a universal order and as such are created as an act of God's self-giving. Each agent is a unique point of creativity and has a role in contributing to the building up of other agents. Human rights are about "a shared discernment as to how the distinct gift of each is respected, nourished and equipped."<sup>96</sup> Echoing Krygier's observations on embedding the rule of law through developing the capacity to explore virtue, Williams argues that what rights implementation requires is cultural skills "a habitual mode of seeing another as occupying a place comparable to your own ... sharing a twofold

<sup>90</sup> Oliver O'Donovan, *The Ways of Judgement: The Bampton Lectures 2003* (Grand Rapids: Eerdmans, 2005).

<sup>91</sup> Bettina Bergo, s.v. "Emmanuel Levinas," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, August 7, 2019, <https://plato.stanford.edu/archives/fall2019/entries/levinas/>.

<sup>92</sup> Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008).

<sup>93</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 29 (Dec. 10, 1948).

<sup>94</sup> United Nations Office of the High Commissioner for Human Rights, "Article 29, Duty to Your Community," in "30 Articles on the 30 Articles of the Universal Declaration of Human Rights," November 14, 2018, <https://www.ohchr.org/en/press-releases/2018/11/30-articles-30-articles-universal-declaration-human-rights>.

<sup>95</sup> Rowan Williams, *Faith in the Public Square* (London: Bloomsbury Continuum, 2012), 161.

<sup>96</sup> Williams, "Rights, Recognition and the Body of Christ," 13:10–13:49; 32:23.

positioning in relation to the creator and the rest of an inter-woven system.”<sup>97</sup> It is in the recognition of the other and the community in which legal rights are located that rights themselves become morally and religiously sustainable.<sup>98</sup> Williams urges a move from the idea that the state is a provider/supplier, and the populace is the client, to a thicker experience of social collaboration. This involves deeper levels of mutuality and responsibility while holding in tension the need to protect individuals from human rights abuses.<sup>99</sup>

Because it addresses the essential communal aspect of freedom of thought, conscience, and religion, this deeper mutuality and responsibility more fully informs not only human rights in general but freedom of thought, conscience, and religion in particular. This communal approach highlights that the exercise of freedom of thought, conscience, and religion is empty in the absence of religious and conscience-based groups. Their role in civil society stems from both their existence as groups of mutual support and loci for human flourishing. It is, however, the role of religious and conscience-based groups in virtue formation and public discourse that links freedom of thought, conscience, and religion as foundational in nature for the rule of law. This is because these groups have a role in ensuring that government policy does not move too far from the lived reality of peoples’ lives and in speaking truth to power when policy making may take a nation in a misguided direction.<sup>100</sup> In Krygier’s terms, religious and conscience-based groups are able to engage in tempering abusive power.

Williams’s theological communal approach to rights explores the idea that the (Christian) church is the locus of all human right, in that in its practice it gives to humans that which is due, namely forgiveness, restoration, and the ability to serve one another rather than oneself alone. For the Christian, participating in the holy sacrament of Communion enables members of the Christian community to serve and recognize their duty in relation to others. It enables them to facilitate the flourishing and agency of others, to hold others in “loving attention.” This he describes as “the freedom to share or bestow what is most proper to us, that is divine creative engagement.” Justice and rights require a moment in the social debate, an interaction and communication between individuals because rights have meaning in community.<sup>101</sup>

Where does this leave those who do not partake in the sacrament(s) of the Christian faith? I propose that the answer can be found first in the moral/legal dichotomy identified by Waldron. Some aspects of a faith-based approach will speak to those within that faith. Other aspects will have universal significance. A Christian account of rights both speaks powerfully to the Christian community in respect of its public engagement. It also contains aspects that can powerfully inform multivalent dialogue. The Reformed theory of common grace, explained above, would suggest that a Christian resource for living an other-regarding empowered public life is found in communion and that different resources exist in other communities to do the same.<sup>102</sup> The core ideas of other-regarding and community can be drawn from other theological and philosophical accounts to align with Williams’s theological account, to create an expanded metanarrative informing freedom of thought, conscience, and religion. It is these concepts that are likely to facilitate consensus building around the rationale for freedom of thought, conscience, and religion from elsewhere.

What brings the proposed underlying rationale of freedom of thought, conscience, and religion and the rule of law together is found in the dialogic communal approach. This has

<sup>97</sup> Williams, “Rights, Recognition and the Body of Christ,” 10:35–10:54, 32:15–33:43, and, in particular, 33:33.

<sup>98</sup> Williams, “Human Rights and Human Identity,” 38:40–39:20.

<sup>99</sup> Williams, 48:09–48:55.

<sup>100</sup> These ideas are explored by proponents of sphere sovereignty. Chaplin, *Herman Dooyeweerd*, 9–10.

<sup>101</sup> Williams “Rights, Recognition and the Body of Christ,” 33:35–33:40, 38:25–35, 44:35–45:32, 48:03–48:55.

<sup>102</sup> See also Giles, “A Theological Justification for Freedom of Religion and Belief as a Universal Right,” 116–27.

the potential to increase capacity for the exercise of human agency and the exploration of virtue. This addresses the need for a dialogic and communal approach to embedding the rule of law as identified by Krygier. It will be feasible only if individuals and civil society groups can develop another regarding capacity in order to contribute to the implementation of the rule of law. This capacity building is supported by freedom of thought, conscience, and religion and involves a contribution from a plurality of voices (the theory of common grace).

This approach is not without its challenges. The danger of such an approach is that dialogically embedding the rule of law could cause the process to descend into cultural relativism. Paul Cliteur and Afshin Ellian argue that this may ultimately result in there being no meaningful base line or moral framework supporting a nationally or an internationally agreed framework for the rule of law.<sup>103</sup> This points back to the conundrum I identify above: how does society reach a consensus around common norms for public living together in circumstances which support individual and communal flourishing?<sup>104</sup> Added to this is the concern that if freedom of thought, conscience, and religion is indeed foundational to embedding the rule of law, then it is necessary to identify a mechanism to address the delicate balance between individual and communal freedoms. It is also necessary to address how disputes between different civil society groups might effectively be resolved.

Political and legal philosophers have addressed plural living together from various perspectives.<sup>105</sup> Hans Martien ten Napel and Iain Benson support a social pluralist approach.<sup>106</sup> Ten Napel undertakes a sophisticated analysis of the interconnection between constitutionalism, democracy, and the rule of law, which leads to an anthropological approach to the interconnectedness of the operation of these mechanisms on grounds that they together allow citizens to become fully human.

The logic of a social pluralist approach such as that of the philosophical theology of Herman Dooyeweerd has much to offer. It is not the only or definitive system relevant to supporting social pluralism—Dooyeweerd himself identified his philosophy as opening a discussion moving forward rather than defining the basis for civil society interactions—but Dooyeweerd’s theological philosophy of civil society interactions has the potential to appeal to theological and non-faith-based ethical frameworks. While Dooyeweerd’s theological philosophy of civil society interactions is grounded in the Christian theological tradition, it supports pluralisms in civil society interactions because it supports the variability in the analysis and definition of social structures and their interaction.<sup>107</sup> At the same time, Dooyeweerd posits that there are key structural principles that remain invariant (immutable) over time, despite the historical contextualization of other aspects of a given social structure. This view distinguishes Dooyeweerd’s thought from that of Talbott Parsons, Niklas Luhmann, and Nicholas Wolterstorff, who regard social interactions and social structures as situated in current context.<sup>108</sup> Jonathan Chaplin has proposed an anthropological reformulation of Dooyeweerd’s structural principles, identifying that “normative design of social

<sup>103</sup> Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy, and the Foundations of Law* (London: Routledge, 2019), 122–64.

<sup>104</sup> See also Jessica Giles, “Tradition as a Peacebuilding Tool,” in *Law, Religion, and Tradition*, ed. Jessica Giles, Andrea Pin, and Frank S. Ravitch, 3 vols. (Cham: Springer, 2018), 1:153–91.

<sup>105</sup> For helpful summaries, see Ten Napel, *Constitutionalism, Democracy and Religious Freedom*; Giles, “Religious Freedom in Global Context”; Giles, “Tradition as a Peacebuilding Tool”; Giles, “A Theological Justification for Freedom of Religion and Belief as a Universal Right.”

<sup>106</sup> Ten Napel, *Constitutionalism, Democracy and Religious Freedom*; Iain Benson, “An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion” (PhD. diss., University of Witwatersrand, 2013). See also Ten Napel’s discussion of Benson. Ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 133–35.

<sup>107</sup> Chaplin, *Herman Dooyeweerd*, 92–94, 108.

<sup>108</sup> Chaplin, 98–99 (regarding Wolterstorff).

structures emerges out of a *normative conception of the human person*.<sup>109</sup> Consequently, “[n]orms for social structures are then seen as arising out of the functional capacities of a complexly articulated human nature ... as these manifest themselves in particular historical conditions.”<sup>110</sup> An anthropological approach to social pluralism could accommodate current human rights theory more comfortably given its focus on human dignity as a grounding narrative. Thus taking an anthropological approach might facilitate the integration of the resolution of rights claims onto the conceptual framework of sphere sovereignty.

The Christian theological metanarrative for social pluralism, whether grounded in the order of creation (as described by Dooyeweerd), human nature (as offered by Chaplin), or God’s grace (as I offer elsewhere), could adopt a plural approach. Doing so would entail adopting the mechanisms proposed by Dooyeweerd for the interactions (interlacements) within and between social structures and lifting this to the higher metanarrative level to engage faith-based and non-faith-based actors in building consensus around societies core norms.

Thus, I propose that Dooyeweerd’s theory of interactions between civil society groups can be plurally reenvisioned to provide a nuanced approach that could be acceptable to other religions and conscience-based groups. It could support embedding the rule of law in a national and international context. It would support dialogue in relation to freedom of thought, conscience, and religion and the rule of law. I expand upon this below.<sup>111</sup>

Dooyeweerd’s theological approach and the existence of a theological metanarrative distinguishes it from the social systems theories of sociologists Talcott Parsons and Niklas Luhmann.<sup>112</sup> Parsons and Luhmann approach the analysis of civil society interactions from a sociological rather than theological perspective. They describe social interactions and do not provide the type of ethical framework for social interactions proposed by Dooyeweerd. In Luhmann’s case, there is an absence of a metanarrative. Below I propose that building a plural metanarrative into Dooyeweerd’s theory could provide the type of grounding necessary to support civil society interactions for the type of capacity building necessary to embed the rule of law.

### ***The Freedom of Thought, Conscience, and Religion Conundrum: Maximizing Freedom***

Dooyeweerd, professor of law and jurisprudence at the Free University of Amsterdam between 1926 and 1965, developed a reformed theological approach to the organization of government and public life based on the concept of sphere sovereignty. The concept of sphere sovereignty builds on the theological tradition of John Calvin (1509–1564), Johannes Althusius (1557–1638), Guillaume Groen van Prinsere (1801–1876), Friedrich Julius Stahl (1802–1861), and Abraham Kuyper (1837–1920).<sup>113</sup> Dooyeweerd conceptualizes society as

<sup>109</sup> Chaplin, 106.

<sup>110</sup> Chaplin, 108.

<sup>111</sup> Ten Napel proposes that such dialogue is important, particularly in exploring the extent to which social pluralist ideals are relevant in the context of Islamic constitutionalism. Ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 124–25.

<sup>112</sup> Talcott Parsons, *The Social System* (Glencoe: Free Press, 1951). Mathias Albert, s.v. “Luhmann and Systems Theory,” in *Oxford Research Encyclopedia of Politics*, published August 5, 2016, last updated December 23, 2019, <https://doi.org/10.1093/acrefore/9780190228637.013.7>.

<sup>113</sup> See Craig G. Bartholomew, *Contours of the Kuyperian Tradition: A Systematic Introduction* (Downers Grove: InterVarsity Press Academic, 2021), 131–32. Kuyper’s conceptualization of sphere sovereignty has been accused of creating a theological basis for apartheid in South Africa, however Bartholomew explains that Kuyper did not support spheres organized according to ethnicity. To do so would misappropriate his theological approach. Bartholomew, *Contours of the Kuyperian Tradition*, 156–57. The approach in this article finds apartheid or any such systems abhorrent and contrary to the dialogic, community building approach underpinning peaceful plural living together and human flourishing.

spheres or groups of interests within which individuals interact independent of government regulation or control. Government intervention is acceptable when it is necessary for administering justice, protecting the welfare of those who would otherwise be in need, and coercing contributions for the sake of national unity.<sup>114</sup> Beyond its role in relation to justice, public welfare, and national cohesion, the sovereignty of the state is limited.

For Dooyeweerd and the theologians who preceded him, absolute sovereignty rests in the Trinitarian God.<sup>115</sup> The individual, as the image bearer of God, has the capacity to contribute to and collaborate toward the common good within their particular spheres of interest. Government constitutes a sphere in and of itself. Each sphere has its particular focus or common goal toward which members orientate their rule and decision making.<sup>116</sup>

Sphere sovereignty characterizes the individual as entitled to and capable of agency. The role of the state is to create an environment conducive to the exercise of that agency within a framework for plural living together. Sphere sovereignty could thus be said to have anticipated the interrelationship of the right to freedom of thought, conscience, and religion and the rule of law. This is so even though modern society is differently constituted to that into which Dooyeweerd was writing.<sup>117</sup> Nevertheless, the theoretical approach proposed by

<sup>114</sup> Vincent E. Bacote, *The Spirit in Public Theology: Appropriating the Legacy of Abraham Kuyper* (Ada: Baker Academic, 2005), 81.

<sup>115</sup> This is based on the belief that God (Father, Son, and Holy Spirit) is creator and sustainer of the universe and all that is in it. He has sovereign power over it all. Bacote, *The Spirit in Public Theology*, 80; James Edward McGoldrick, *God's Renaissance Man: The Life and Work of Abraham Kuyper*, 2nd reprint ed. (Garden City: Welwyn, 2009), 62, 68–69. However, neither Kuyper nor Dooyeweerd proposed a theocracy. Bacote, *Spirit in Public Theology*, 80–81; McGoldrick, *God's Renaissance Man*, 70. Kuyper did not support the idea of morality by consensus. McGoldrick, 70. But by the time Dooyeweerd was writing, universal suffrage was starting to take root across Europe. See, for example, Ruth Rubio-Marin “The Achievement of Female Suffrage in Europe: On Women's Citizenship,” *International Journal of Constitutional Law* 12, no. 1 (2014): 4–34. Dooyeweerd recognized the need for a mechanism to foster what Jonathan Chaplin terms “enkaptic interlacement” between the spheres of interest, in order to maintain peaceful plural living together and resolve clashes between different interests. Chaplin, *Herman Dooyeweerd*, 110, 130–38. This willingness to embrace pluralism led to a tension between a confessional (all-encompassing theological) approach and an apologetic one (an approach that defends Christianity against objections). While a theocracy would interfere with the concept of individual free will, a confessional approach would require a majority of parliament to commit to the Christian faith. Kuyper and Dooyeweerd saw the Christian ethic as the role of individual politicians; in today's multicultural political environment, this view would make their approach apologetic. In Dutch Reformed theology, the church had its own sphere of influence, namely the spiritual and pastoral care of its congregations. This does not reconcile fully with the approach in England, where the established (but not state funded) church engages in public theology (it represents the church's theological position and engages in debate on current issues). This is a distinct role, set apart from its pastoral and ecclesiastical life and its missiology (the expansion of the church). The approaches are similar insofar as both the Dutch reformed and the English approach supports plural public living together, engaging with those of different denominations, those of other faiths, and those of none.

<sup>116</sup> Chaplin, *Herman Dooyeweerd*, 5–10, 86–88.

<sup>117</sup> There is an increase in plural voices contributing to public debate and public policy, together with a stronger emphasis on individual autonomy rather than communal life. Both Davie and Putnam and Campbell report that there is still strong individual commitment to religion but a weaker communal practice. Davie, *Religion in Britain*; Putnam and Campbell, *American Grace*. Davie, writing in the 1990s, described this phenomenon as believing without belonging in the first edition of *Religion in Britain*. Grace Davie, *Religion in Britain since 1945* (Chichester: Blackwell, 1994), 2. In the second edition, she observes that by the first decade of the twenty-first century this phenomenon had evolved into a form of vicarious religion whereby a minority of individuals are overtly religious on behalf of a silent majority. Davie, *Religion in Britain*, 2nd ed., 71–90. Jonathan Fox has also explored how, despite modernization and the claims of secularization theories, there are still high levels of interaction between the state and religion across the globe, although more recent data indicates high levels of discrimination against religious minorities. Jonathan Fox, *A World Survey of Religion and the State* (Cambridge: Cambridge University Press 2008); Jonathan Fox, *The Unfree Exercise of Religion: A World Survey of Discrimination against Religious Minorities* (Cambridge: Cambridge University Press, 2016).

Dooyeweerd has potential because it reemphasizes the importance of communal aspects of public living together and lays the foundations for a more complex plural public life.

As a theory of society, sphere sovereignty anticipated the synthesis of fundamental rights and the rule of law proposed by jurists such as Tom Bingham.<sup>118</sup> The concept emphasizes the need to temper state sovereignty and foster human agency in its account of plural public living together. In his sophisticated analysis of the interaction of the spheres, and with foresight that anticipates the rights clashes arising from modern-day rights frameworks, Dooyeweerd proposes a mechanism of “enkaptic interlacement.”<sup>119</sup>

Dooyeweerd’s theory of enkaptic interlacement is a complex system exploring the principles and functions definitive of various civil society spheres.<sup>120</sup> He proposes that to decide priorities in public life, it is necessary, first, to understand the nature of the sphere or activity. Once this is understood, it is then possible to analyze and articulate its interaction with other types of spheres or activities. So, for example, if there is a clash between interests relating to family life and those relating to business or economic life, it is necessary to consider not just the particulars giving rise to the clash of interests but also the broader implications of resolving a situation.

In the modern human rights context, Dooyeweerd’s theory of enkaptic interlacement could thus provide a sophisticated tool for understanding the broader implications of the narrow issues that tend to arise in freedom of thought, conscience, and religion litigation.<sup>121</sup> It could provide a mechanism for articulating the societal priorities that are, under the common law tradition at least, left to judges to identify as they resolve rights clashes on a case-by-case basis. This could be undertaken in some form of human rights commission or alternatively modelled on an expanded version of William Temple’s theory of middle axioms.<sup>122</sup> The overarching aim of such a system is not only to protect individual rights and protected characteristics, but to guard against the erosion of plural public living together, an essential aspect of the rule of law and freedom of thought, conscience, and religion. Chaplin explains that “the full significance of human persons [for Dooyeweerd] can never be exhausted either in their position as a member of a communal whole or in their status as discrete individuals.”<sup>123</sup> It is this aspect of Dooyeweerd’s philosophy that directly addresses the conundrum outlined in this article. In developing a mechanism to seek to contextually explore the balance between individual and universal needs it speaks powerfully into the problems highlighted with rights theory and consequently with their incorporation into the rule of law.

Sphere sovereignty presupposes a substantial public consensus around society’s minimum rules applicable to everyone. It also requires building the capacity of individuals to live with substantial differentiation in public life and to be able to resolve clashes of interests as they arise. Dooyeweerd’s approach to enkaptic interlacement requires an ability to understand and articulate both public virtues and the value to be attributed to them so that those

<sup>118</sup> Tom Bingham, *The Rule of Law* (Harlow: Penguin Books, 2011), 66–84.

<sup>119</sup> Chaplin, *Herman Dooyeweerd*, 110, 130–38.

<sup>120</sup> Dooyeweerd identifies normative types of social structures: religious communities (pistically qualified); marriages, families, trade unions, schools (morally qualified); states and international organizations (juridically qualified); theaters and orchestras (aesthetically qualified); business corporations and industrial organizations (economically qualified); clubs and fraternities (socially qualified). Dooyeweerd develops a system to explore various aspects of the structures in order to better understand their interlacement. Chaplin, *Herman Dooyeweerd*, 111.

<sup>121</sup> Giles, “A Theological Justification for Freedom of Religion and Belief as a Universal Right,” 129–33.

<sup>122</sup> William Temple, *Christianity and Social Order* (1942; repr. London: Shephard-Walwyn, 1976). Temple proposed a dialogic approach to informing core principles for civil society. Writing in the 1940s, Temple envisaged an elite consulting to inform the development of core principles to create a focus and set of priorities for rebuilding post war Britain. Such an approach could be expanded, particularly to consider plurally informed core principles.

<sup>123</sup> Chaplin, *Herman Dooyeweerd*, 114.

responsible can make choices conducive to human flourishing. It is also in line with the broader public consensus or metanarrative for public living together.

To facilitate such plural living together it would be necessary not only to encourage debate amongst decision makers but also to build capacity amongst individuals to undertake and articulate such debate. Perry argues that, in the light of complex interactions in respect of different aspects of modern life and the multiple ethical frameworks at work, reinvigoration of the capacity for rhetoric is needed.<sup>124</sup> An increased capacity for rhetoric would need to be combined with a deeper understanding across society of the various ethical frameworks and the traditions (moveable rules that enable faiths to enculturate over time) of faith- and conscience-based groups.<sup>125</sup> It would then be possible to envisage an increased capacity for plural peaceful public living together, developing capacity for the enjoyment of freedom of thought, conscience, and religion and embedding the rule of law.

The combination of the articulation of public virtues informing different spheres of activity and an ability to discern relative importance between them (as offered by Dooyeweerd), together with an understanding of the extent to which any given faith, belief, or conscience group was able to adapt over time (as I offer elsewhere)<sup>126</sup> and the capacity for articulating this through rhetoric (as offered by Perry)<sup>127</sup> within a constitutional system designed to foster engagement, debate, and articulation of virtues (as offered by Temple)<sup>128</sup> could provide the nuanced approach necessary to both resolve public difference and create a solid foundation for embedding freedom of thought, conscience, and religion and fostering plural public living together under the rule of law.

## Conclusion

Freedom of thought, conscience, and religion is foundational for embedding the rule of law from a theoretical and empirical perspective. Krygier's sociological analysis of the rule of law posits that embedding the rule of law requires the development of virtue within a society to accommodate the operation, institutionalization, and administration of the rule of law. Freedom of thought, conscience, and religion is foundational to the rule of law if capacity to undertake discourse around virtues relevant to a given society is to take place. On this basis, I propose an expanded theory to support freedom of thought, conscience, and religion as a foundational right for the rule of law. The expanded underlying rationale for freedom of thought, conscience, and religion is based on the theory of common grace, supporting a multivalent approach to building consensus. Combined with Rowan Williams's other-regarding community-building rights theory, this expanded theory for freedom of thought, conscience, and religion within the social pluralism of Dooyeweerd could provide a framework for exploring a multivalent approach to embedding the rule of law at a national and international level.

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<sup>124</sup> Perry, "Arguing Out of Bounds," 231–41.

<sup>125</sup> Giles, "Tradition as a Peacebuilding Tool," 187.

<sup>126</sup> Giles, 187.

<sup>127</sup> Perry, "Arguing Out of Bounds," 231–41.

<sup>128</sup> Temple, *Christianity and Social Order*, 67–98.

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