

# INTRODUCTION: LAW AND POLITICS OF FREEDOM OF RELIGION IN COMPARATIVE PERSPECTIVE

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## I INTRODUCTION: WHAT IS RELIGIOUS FREEDOM AND WHY DO WE PROTECT IT?

United Nations Special Rapporteur on the Freedom of Religion and Belief, Heiner Bielefeldt, once wrote that the freedom of religion or belief is “neither the first nor the only historical project aimed at eliminating fanaticism, religious intolerance, hostility against religious minorities or religiously motivated violence”, but it is a “very specific project particularly suitable for the modern world and its inherent pluralism.”<sup>1</sup> Freedom of religion and belief is a well-established right under international law. It is found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,<sup>2</sup> as well as other specialist human rights treaties, including the Convention on the Elimination of Discrimination against Women<sup>3</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>4</sup> Besides international law, there has also been a proliferation of religious freedom clauses in constitutional documents around the world.<sup>5</sup> This is in line with a global diffusion of rights formulations in constitutional texts. For instance, Law and Versteeg observes a “rights creep” in their study of national constitutions, whereby an increasing number of constitutions contain an increasing number of

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<sup>1</sup> Heiner Bielefeldt, ‘Freedom of Religion or Belief—A Human Right under Pressure’ (2012) 1(1) Oxford Journal of Law and Religion 15, 15.

<sup>2</sup> Ibid.

<sup>3</sup> See *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 2, 15(1) and 16.

<sup>4</sup> See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 12.

<sup>5</sup> Natan Lerner, *Religion, Belief, and International Human Rights* (Orbis Books, 2000) 129; John R Witte Jr, ‘A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective’ (2001) 42 William and Mary Law Review 707, 709.

rights in common.<sup>6</sup> With specific reference to religious freedom, this global diffusion of rights is perhaps not surprising. The concept of religious freedom has been around for a long time and is sometimes considered “the oldest of the internationally recognized human rights”, forms of which have been afforded treaty protection as early as the Treaty of Westphalia in 1648.<sup>7</sup>

Scholars like Tore Lindholm have identified what are considered the minimum standards that form the normative core of the human right to freedom of religion or belief in international law. There are eight components to this:

(1) Internal freedom, i.e. the right to freedom of thought, conscience, and religion, which includes the freedom for all to have, adopt, maintain or change religion or belief;

(2) External freedom, i.e. the freedom, either alone or in community with others, in public or private, to manifest his or her religion or belief in teaching, practice, worship, and observance;

(3) Non-coercion, i.e. that no one shall be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice;

(4) Non-discrimination, i.e. that states are obliged to respect and ensure to all individuals within their territory and subject to their jurisdiction the right to freedom of religion or belief without distinction of any kind, such as race, colour, sex, language, religion, or belief, political or other opinion, national or other origin, property, birth or other status;

(5) Rights of parents and guardians, i.e. states are to respect the liberty of parents, and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions;

(6) Corporate freedom and legal status, i.e. that religious communities have freedom of religion or belief, including a right to autonomy in their own affairs;

(7) Limits of permissible restrictions on external freedom, i.e. that such restrictions are allowed only if they are prescribed by law and applied for the

<sup>6</sup> They further argue that variations in the rights-related content of the world’s constitution can be explained as a function of two variables—comprehensiveness, which refers to the tendency of a constitution to contain a greater or lesser number of rights provisions, and the ideological character of the constitution. See David S Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163.

<sup>7</sup> W Cole Durham Jr, ‘Perspectives on Religious Liberty: A Comparative Framework’ in John R Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Martinus Nijhoff Publishers, 1996) 1.

purpose of protecting public safety, order, health, morals or the fundamental rights of others and are necessary, proportionate and not excessive; and

(8) Non-derogability, i.e. that states may make no derogation from the right to freedom of religion or belief even in times of public emergency.<sup>8</sup>

Within this international consensus, internal freedom or protection of the *forum internum* is largely considered inviolable and protects the freedom to have, adopt, maintain or change religion or belief. While limits could be placed on the *forum externum* which involves the manifestation of one's religion or belief in teaching, practice, worship, and observance, these limits are often viewed with restraint.

However, textual references to the right to religious freedom, or indeed any right, does not mean that there is sufficient protection of that particular right, if at all. There is often a divergence between *de facto* protections and *de jure* constitutional rights.<sup>9</sup> Oftentimes, constitutional provisions 'guaranteeing' rights fall short in practice and at times may even be "insincere promise[s]" meant to deflect criticism and obscure untrammelled power.<sup>10</sup> Such divergences has led to claims that these are "sham constitutions".<sup>11</sup> Indeed, studies continue to show that religious intolerance, discrimination, and conflict remain critical issues around the world.<sup>12</sup> A recent Pew Research Centre study for instance shows that social hostilities involving religion around the world remain high, and that a growing share of the incidents involved political parties or social groups espousing nationalist position. The same study also observed that the number of countries where religious groups were harassed either by government or social groups have increased since 2016.<sup>13</sup>

Legal protection of religious liberty could vary significantly depending on a variety of factors. Durham identifies some of these factors as including:

<sup>8</sup> Tore Lindholm, 'Freedom of Religion or Belief from a Human Rights Perspective' in Hans Aage Gravaas et al (eds), *Freedom of Belief and Christian Mission* (Regnum Books International, 2014) 9–10. See also Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004) xxxvii–ix.

<sup>9</sup> See, eg, Jan-Erik Lane, *Constitutions and Political Theory* (Manchester University Press, 1996) 118, 122 (specifically on communist states).

<sup>10</sup> See, eg, Brown's critique of Arab constitutional documents: Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, 2002).

<sup>11</sup> David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 California Law Review 863.

<sup>12</sup> Witte Jr, above n 7.

<sup>13</sup> Katayoun Kishi, Key findings on the global rise in religious restrictions, Pew Research Centre, 21 June 2018, <<https://www.pewresearch.org/fact-tank/2018/06/21/key-findings-on-the-global-rise-in-religious-restrictions/>>.

the stability of political regimes, the nature and history of traditional relationships between church and state, the degree of religious pluralism at the local level, the nature of the dominant religion or religions and its (their) commitment to religious liberty and toleration, the history of interactions between religious groups, and a variety of other factors.<sup>14</sup>

There are also civilizational and regional oppositions to different aspects of religious freedom. Such opposition can strike at the very core of the right to religious freedom, questioning whether there is even a right to choose one's religion, including the right to leave one's religion and take on another religion or have no religion. Restrictions on the right of Muslims to convert to another religion can be found in the domestic laws of various countries, and continue to challenge the search for an international and regional consensus on the normative content of religious freedom.<sup>15</sup> Furthermore, there are attempts to rearticulate the content of religious freedom in international law. For instance, the Cairo Declaration on Human Rights in Islam, promulgated as a competing normative framework to universal human rights law, conceptualises 'religious freedom' not in the formulation commonly found in other human rights documents,<sup>16</sup> but in terms of non-compulsion. Article 10 of the Declaration provides that "Islam is the religion of unspoiled nature" and that it is "prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to *convert him to another religion or to atheism.*"<sup>17</sup> Such restrictions on the right to choose one's religion clearly violates the internal freedom or *forum internum* of persons, which is widely considered in international human rights law to be inviolable. Accordingly, while there is some consensus that religious freedom is a right worthy of protection, there continues to be contestation as to the normative content of this right.

Beyond this foundational debate, however, there remains other areas of contestation. In this Introduction to the Special Issue, we wanted to identify three

<sup>14</sup> Ibid 2.

<sup>15</sup> Jaclyn L Neo, 'Realizing the Right to Freedom of Thought, Conscience and Religion: The Limited Normative Force of the ASEAN Human Rights Declaration' (2017) 17(4) Human Rights Law Review 729.

<sup>16</sup> See Donna E Arzt, 'Heroes or Heretics: Religious Dissidents under Islamic Law' (1996) 14 Wisconsin International Law Journal 349, 361. The Cairo Declaration has been strongly endorsed by Iran and Saudi Arabia.

<sup>17</sup> *Cairo Declaration on Human Rights in Islam*, adopted at the Nineteenth Islamic Conference of Foreign Ministers on 5 August 1990, [art 10](#) (emphasis added).

major areas of contestations that have to be navigated in the advancement of religious freedom. This will be examined in the next section.

## II RELIGIOUS FREEDOM: THREE AREAS OF CONTESTATION

### A *Religious Exemptions from General Laws*

Religious freedom, conventionally conceptualized, is meant to be a negative liberty. It serves to protect religious adherents from state encroachments and interference in their religious practice. Under the terms of religious freedom, persons are free to profess their religion and worship in their own ways. There are of course limits to religious practice. However, under most international conventions, such limits have to be properly circumscribed. For instance, article 18.3 of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. In General Comment No. 22, the Human Rights Committee imposed a further limitation that “[t]he freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.”<sup>18</sup> Restrictions on religious freedom must also be consistent with other protected rights, including the right against religious discrimination.

One major area of contention for courts administering rights-protection has been whether religious freedom grounds a right to religious exemptions from general laws. Laws are enacted by states exercising powers of coercion and dominance over individuals and groups. A key foundation of any society based on the rule of law is that laws must be equally applicable to all. However, religious individuals and groups may experience the burden of certain laws differently because of their religious beliefs. For instance, general laws banning the wearing of head coverings in schools, and compulsory recitation of pledges of allegiance, etc, are just some laws that are generally applicable but which cause differential burdens for individual religious believers due to the conflict with their religious beliefs. Furthermore, other laws such as noise pollution restrictions between dusk to dawn,<sup>19</sup> the banning of consumption even of small amounts of alcohol

<sup>18</sup> Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, 48<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

<sup>19</sup> See eg, the discussion on the discriminatory impact of noise pollution laws in Israel, which have been dubbed the Muezzin laws: Udi Shaham, ‘Cabinet Advances “Muezzin Bill”’, *Jerusalem Post* (online), 12 February 2017 <<https://www.jpost.com/Israel-News/Cabinet-advances-muezzin-bill-481351>>.

for minors, or an absolute prohibition on the use of certain drugs substances<sup>20</sup> could have a disproportionate impact on religious groups in their freedom to worship in accordance with their beliefs. While not many objectors may face fiery furnaces,<sup>21</sup> conscientious objectors, including those who do so on religious grounds, still continue to face disabilities and sometimes persecution.<sup>22</sup> Jehovah's Witnesses, for instance, still face persecution and prosecution in many countries in the world for their strong opposition to any form of 'patriotic' activity which, according to their theological beliefs, may be seen as a form of worship. Indeed, religious exemptions could be necessary if it is shown that individuals would otherwise be discouraged from practicing their religion (assuming it is shown to be part of their religion), and that the exemption would not encourage or incentivize non-religionists to start practicing the religion.<sup>23</sup>

Clearly, the line to be drawn between legitimate religious exemptions and non-legitimate religious exemptions is a difficult one. Reasonable accommodation requires a fair amount of balancing and weighing of conflicting rights and interests. The challenge is to articulate clear standards which can provide a principled and workable theory of how legislatures and courts can establish when exemptions ought to be granted.<sup>24</sup> Paul Billingham has proposed a framework for assessing the weight of religious claims to exemption across two dimensions: first, the importance of the burdened religious practice, which is determined by its level of obligation and centrality, according to the beliefs of the individual claimant; and second, the extent of the burden on the practice, which depends on the cost the individual bears if he or she both undertakes the religious practice and obeys the law or rule, where costs are assessed using an impartial account of individual interests.<sup>25</sup> Exemptions should be granted when claims are weighty on either of these dimensions and the countervailing value is relatively weak.<sup>26</sup> While the application of this approach may vary in practice, what seems clear is that religious freedom requires that courts and legislatures to give due

<sup>20</sup> *Employment Division v Smith*, 494 US 872 (1990).

<sup>21</sup> See Chapter 3 of the Book of Daniel.

<sup>22</sup> See eg, Stijn Smet, 'Conscientious Objection through the Contrasting Lenses of Tolerance and Respect' (2019) 8(1) *Oxford Journal of Law and Religion* 93.

<sup>23</sup> Douglas Laycock, 'Substantive Neutrality Revisited' (2007–2008) 110 *West Virginia Law Review* 51, 55.

<sup>24</sup> Ernest Lim, 'Religious Exemptions in England' (2014) 3(3) *Oxford Journal of Law and Religion* 440.

<sup>25</sup> Paul Billingham, 'How Should Claims for Religious Exemptions be Weighed?' (2017) 6(1) *Oxford Journal of Law and Religion* 1.

<sup>26</sup> *Ibid.*

regard to religious claims and to balance them appropriately against interests advanced under general law, including the costs exemptions exacted on others.

### B *Religious Freedom and Equality*

A second area of contestation is in equality and religious freedom. Equal protection and non-discrimination on the basis of religion is a core aspect of religious freedom. Historically, equality serves to protect religious believers from state discrimination through the application of religion tests for positions in government and in access to public services and opportunities. On one level, one may see the issue as a particular form of religious exemption – religious believers seeking exemption from anti-discrimination laws. However, the contemporary conflict is one that is much more particular and really stems from the penetration of equality rights in the private sphere. This horizontalization has led to new configurations of conflict, whereby an individual’s right not to be discriminated against is pitted against another individual or group’s right to religious freedom. This frequently raises critical issues concerning private conscience, and the nexus between conscience and action.

The balance between religious freedom and private discrimination is not an easy one to navigate. The clash between the right to religious freedom and equality has raised difficult issues and given rise to several controversial cases in several jurisdictions. Some have arisen from what seem like fairly mundane matters—cakes and the right of bakers/bakeries to invoke religious freedom as a defence against anti-discrimination claims. Two such cases, one in the United States and another in the United Kingdom, exemplify the complex balance that needs to be struck between equality and religious freedom. In both cases, the complainants placed orders for cake. In *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*,<sup>27</sup> it was a wedding cake for a same-sex union. In *Lee v Ashers Baking Company Ltd*,<sup>28</sup> it was a cake bearing a picture of Bert and Ernie from The Muppets, the logo of an LGBT+ organisation called “QueerSpace”, and the words “Support Same-Sex Marriage”. In both cases, the Supreme Courts ruled for the bakers. Different approaches were however taken in these cases.

In *Masterpiece*, the Supreme Court held in favour of the baker, Phillips, on the basis that the Commission’s treatment of the case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a

<sup>27</sup> *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, 138 S Ct 1719 (2018) (*Masterpiece Cakeshop*).

<sup>28</sup> *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49 (*Lee*).

religion or religious viewpoint. The issue was cast as a matter of reconciling state authority to “protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services” and “the right of all persons to exercise fundamental freedoms under the First Amendment”.<sup>29</sup> Characterizing Phillips as having “sincere religious beliefs and convictions”,<sup>30</sup> the majority focused their attention on religious hostility on the part of the Colorado Civil Rights Commission, thus creating a very narrow decision and leaving unresolved key questions for future cases.<sup>31</sup> Such questions would include the extent of free speech or free exercise exceptions in the application of non-discrimination statutes. Although the Supreme Court sidestepped the underlying First Amendment issues, it gestured towards an appreciation of the free speech and free exercise rights at stake in the case. As Justice Kennedy observed in the majority decision:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.<sup>32</sup>

However, most of the cases will come up in situations outside of the core institution of the church and many will involve the question of whether businesses can be required to provide services for gays and lesbians, or others, against their religious conscience.<sup>33</sup> The majority did not say much to define the contours of First Amendment protections except to suggest that these protections should be carefully defined. As they put it, otherwise, “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”<sup>34</sup>

<sup>29</sup> *Masterpiece Cakeshop* 138 S Ct 1719, 1720.

<sup>30</sup> *Ibid.*

<sup>31</sup> Erwin Chemerinsky, ‘Not a Masterpiece: The Supreme Court’s Decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*’ (2018) 43(4) *American Bar Association Human Rights Magazine* 11.

<sup>32</sup> *Masterpiece Cakeshop* 138 S Ct 1719, 1729.

<sup>33</sup> Chemerinsky, above n 31.

<sup>34</sup> *Lee* [2018] UKSC 49.

In comparison, the United Kingdom Supreme Court's decision in *Lee v Ashers Baking Company Ltd*<sup>35</sup> was more instructive, though not without its problems. As Lady Hale put it in the unanimous judgment, the substantive question was whether it was unlawful discrimination for a bakery to refuse to supply a cake iced with the message "support gay marriage" because of the owners' sincere religious belief that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God. The Court held for the bakers on the basis of their religious freedom and freedom of expression, specifically the freedom not to be obliged to hold or to manifest beliefs that one does not hold. In doing so, the Court drew a distinction between discrimination of a person and objection to a political message. As the Court put it:

The bakery could not refuse to provide a cake—or any other of their products—to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different—obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake—support for living in sin, support for a particular political party, support for a particular religious denomination.<sup>36</sup>

The Ashers case is illuminating, because it makes clear that the baker was not discriminating against a customer based on that customer's sexual orientation, but was objecting to communicating the message in the requested cake. The bakery would have refused the request whether it was made by someone who was gay or straight. This was an important contrast to the Masterpiece cakeshop case, where the facts were construed by the majority and minority differently. The applicant, Lee, has since lodged papers to take his case to the European Court of Human Rights.<sup>37</sup>

### C *Religious Nationalism and Equal Protection of Religious Minorities*

The third issue that has come up recently relates to religious nationalism and its impact on equal protection of rights. Indeed, as Bielefeldt has observed, a persistent problem with regards to the protection of religious freedom has been selectivity: "in some States only the followers of the monotheistic 'religions of

<sup>35</sup> Ibid 55 [55].

<sup>36</sup> Ibid.

<sup>37</sup> 'Ashers "gay cake" row referred to European Court', *BBC News* (online), 15 August 2019 <<https://www.bbc.com/news/uk-northern-ireland-49350891>>.

revelation' receive recognition" while in other States, "'traditional religions' or 'known religions'" are prioritized to the marginalization or exclusion of "less known, new or alternative communities".<sup>38</sup> As we recently observed in our introduction to an upcoming special issue on Religious Nationalism and Religious Freedom in the *Asian Journal of Law and Religion*, religious nationalism aggravates differentiation among citizens. Indeed, the rise of religious nationalism in the region has made religion and religious freedom part of the political discourse on inter and intra-group dynamics, resulting in the politicization of the freedom of religion itself. The freedom becomes embroiled in political contestation among majority-minority groups. Majority groups, striving to assert their privileged status, would seek to impose laws that restrict the rights of minorities to profess, manifest, and practice their religion. While such restrictions have been justified as necessary to maintain inter-group harmony, their effect has been to ensure a priority of one religion over others. The politicization of the freedom of religion further manifests itself in the use of the term to advance and resist restrictions on religious group rights whereby both the proponents and opponents of discriminatory laws employ the language of religious freedom to advocate their respective positions.<sup>39</sup>

Religious nationalism has been defined as "a social movement that claims to speak in the name of the nation and that defines the nation in terms of religion."<sup>40</sup> The nation is asserted to be "religiously based"<sup>41</sup> and religion is "central" to conceptions of belonging to the nation.<sup>42</sup> Religious nationalism is more than the politicization of religion, encompassing social and political movements that claim to speak on behalf of a nation, and it defines the nation in religious terms. Indeed, because religious nationalists seek to align and sharpen the boundaries of the religious and political communities, this results in a very high level of political animosity to those outside of it.<sup>43</sup> Thus, a religious dissenter is also easily

<sup>38</sup> Bielefeldt, above n 1, 20.

<sup>39</sup> For instance, proponents and opponents of arguably discriminatory laws on conversion and inter-faith marriage in Myanmar both employ the discourse of religious freedom to advocate their positions. See Iselin Frydenlund, 'Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy' (2017) 35(1) *Nordic Journal of Human Rights* 55, 70.

<sup>40</sup> Philip S Gorski and Gülay Türkmen Dervişoğlu, 'Religion, Nationalism, and International Security: Creation Myths and Social Mechanisms' in Chris Seiple, Dennis R Hoover and Pauletta Otis (eds), *The Routledge Handbook of Religion and Security* (Routledge, 2015) 136, 140.

<sup>41</sup> Barbara-Ann J Rieffer, 'Religion and Nationalism: Understanding the Consequences of a Complex Relationship' (2003) 3(2) *Ethnicities* 215, 225.

<sup>42</sup> Philip W Barker, 'Religious Nationalism in Modern Europe: If God be for Us' (Routledge, 2009) 13.

<sup>43</sup> Gorski and Dervişoğlu, above n 40.

characterized as being a national traitor, *vice-versa*. This alignment of religious and national boundaries tends to neutralize the “cross-cutting cleavages” that could otherwise vitiate the centripetal tendencies of pluralistic societies.<sup>44</sup> Across the world, religious nationalism is on the rise. Buddhist nationalism in Myanmar to Hindu nationalism in India, and even traces of Christian nationalism in Hungary are only some movements that have sought to redefine the nation and accentuate an exclusivist politics of belonging, with deleterious and sometimes devastating effect on religious minorities. Religious nationalism therefore will bring about different challenges for religious freedom because of its emphasis on an exclusivist perspective on citizenship.

### III OVERVIEW OF THIS SPECIAL ISSUE

Against these persistent and controversial issues concerning religious freedom worldwide, this particular Special Issue examining the law and politics of religious freedom in Australia is a timely addition. The spark for this Special Issue was a conference that we convened in December 2018 at the National University of Singapore Faculty of Law. The conference, which focused on the Law and Politics of Freedom of Religion in Asia, was jointly supported by the National University of Singapore Centre for Asian Legal Studies and the International Centre for Law and Religion Studies at Brigham Young University. A few of the articles in this current Issue started out as drafts presented at the conference, and others generously joined after. Our gratitude is to Renae Barker, Neville Rochow and Rick Sarre for working to put this Issue together, and for inviting us to offer these comments in a short introduction.

The first three articles in this Special Issue contextualises religious freedom debates within Australia’s existing constitutional framework and international law commitments. The Issue opens with Rick Sarre’s analysis of religious freedom legislation in Australia. With recent tensions over marriage equality having reignited debates over models of religious freedom, he argues that Australia’s history and present legal landscape point to a symbiotic relationship between religion and the state, and that this relationship should be advanced by the unwavering commitment of legislators to tolerance. To this analysis is added Nicholas Aroney and Paul Taylor’s article, which points to Australia’s international law commitments to further illuminate upon debates over religious

<sup>44</sup> Ibid.

freedom in Australia. In particular, they advocate that the recognition of religious freedom as a fundamental right under international law calls for a recalibration in the existing legal framework. Indeed, international law supports domestic law in creating what Paul Babie calls “an ‘ethos’ of protection” for freedom of religion or belief in Australia. Deftly examining existing international law obligations, the Constitution, statutory law, case law, and the common law, he points to a protective ethos, which serves to ground a commitment to religious freedom, albeit in a piecemeal fashion.

The next three articles examine more specific legal issues implicating religious freedom that have arisen in Australia. In their article, the fourth in this Issue, Neville Rochow QC and Jaqueline Rochow examines the concept of “dignity” as a new phenomenon in Australian constitutional law, and analyzes how the concept has been impacted by the Ruddock Report and two recent High Court decisions regarding legislative restrictions on protests outside abortion clinics. Next, Sarah Moulds examines the scope of exemptions for religious bodies in Australian anti-discrimination laws, and highlights the existing uncertainty and divergences in these laws across states and territories. She also considers the implications of recommendations in the Ruddock Report for the anti-discrimination legal regime in Australia. Renae Barker touches upon a highly salient issue—the rights of children to exercise their religious freedom in schools. She observes that while some courts have sought to displace religion from educational environments, others have embraced a multi-faith approach that permits and even encourages diverse religious expression in schools. Barker argues that how each state understands secularism and its role in education will ultimately determine which approach prevails.

Lastly, Neil Foster wraps up the Special Issue by discussing how religious organizations interact with the notion of “dignity” in religious rights adjudication. By engaging in a comparative analysis between Australia, the United Kingdom and the United States, Foster considers the extent to which courts should attempt to determine the content of religious doctrine, and proposes a legal test to assist courts and parties in such matters.

#### IV CONCLUSION

The importance of freedom of thought, conscience, and religion is of paramount importance to all human beings, including those who are parts of a religious majority, religious minorities, those who reject religion, and those for

whom it is not an important part of how they identify themselves. In a 2012 article, Heiner Bielefeldt, the then United Nations Special Rapporteur on the Freedom of Religion and Belief, observed:

No doubt, freedom of religion or belief is a human right under pressure. On a daily basis we receive reports about harassment or persecution of countless people on grounds of religion or belief, sometimes connected with arbitrary detention or torture and ill-treatment. Houses of worship are torched and graveyards demolished. Blasphemy laws have a chilling effect on critics, dissenters or members of religious minorities. We read horrible stories about individuals who have to run for their lives because a fanaticized mob is throwing stones at them and cheering whenever a person is being hit. Sometimes members of minorities face difficulties to hold funerals in a quiet and dignified way. It also happens that parents, due to their dissenting convictions, lose the right to custody of their own children. Women often suffer from multiple or intersectional forms of discrimination.<sup>45</sup>

Added to existing challenges are changes to religious demography across the world. The general trends are towards greater religious pluralism, increased religious disaffiliation and non-identification in some places, while increased religious affiliation and identification in other places. The number of religiously unaffiliated people, also known as religious “nones,” is increasing in places such as the United States, Europe and Australia, but globally, in other places, the percentage of people who identify as religious is increasing. Overall, the unaffiliated are expected to decrease as a share of the world’s population between 2010 and 2050 (from 16% to 13%).<sup>46</sup>

Clearly, in increasingly secularized societies—and Australia may well be one of those—the challenges for religious freedom will differ from those in states with more religious societies. One important issue is the shape and contours of what a secular state should aspire towards, ranging from forms of hard secularism that have been and are hostile to religious institutions and religious belief, to more moderate or even soft versions of secularity that strive to create political frameworks for pluralism and to create constitutional space for individuals and community to live together harmoniously or at least with a measure of respect

<sup>45</sup> Bielefeldt, above n 1, 34.

<sup>46</sup> Michael Lipka, ‘7 key changes in the global religious landscape’, *Pew Research* (online), 2 April 2015 <<https://www.pewresearch.org/fact-tank/2015/04/02/7-key-changes-in-the-global-religious-landscape/>>.

and toleration.<sup>47</sup> One should guard against the view that a right to religious freedom is “unwarranted”<sup>48</sup> or as inherently ‘unequal’ because religion is treated as a special category. Some have questioned whether religious freedom should be protected as a distinct category of rights, or whether it should be subsumed under a broader idea of freedom of choice.<sup>49</sup>

The history of discrimination against religious believers, especially religious minorities, and the distinctive weight of religious beliefs suggest that religious freedom should not yet be discounted. As Arif Jamal argues, freedom of religion is an important aspect of the protection of minority views and is symbolically important, especially for those who hold religious convictions, such that the horizons of our political epistemology would be weakened by dispensing with freedom of religion.<sup>50</sup> The right to religious freedom is a key protection against majoritarian oppression, and should be available to religious groups even while they transition from majority to minority status. It is a matter of principle. In the context of the recent heated debates in Australia over religious freedom and equality, Carolyn Evans points out that it is not helpful to reduce the issues surrounding religious freedom protection versus equality in “simple terms” and that there are legitimate tensions that “cannot be reduced to simply put one group in the right and the other in the wrong.”<sup>51</sup> She calls for both sides to take each other seriously,<sup>52</sup> and indeed respectfully. This may well be the best and only way forward.

<sup>47</sup> See further: Brett G. Scharffs, ‘Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism,’ (2011) 6 *Religion and Human Rights* 109.

<sup>48</sup> Carolyn Evans, ‘Religious Freedom: One Right Among Many’, *Pursuit* (online), 8 March 2018 <<https://pursuit.unimelb.edu.au/articles/religious-freedom-one-right-among-many>>.

<sup>49</sup> Michael Sandel, ‘Religious Liberty-Freedom of Conscience or Freedom of Choice?’ (1989) *Utah Law Review* 597.

<sup>50</sup> Arif A Jamal, ‘Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful?’ (2017) 6 *Oxford Journal of Law and Religion* 433; see also Rex Ahdar, ‘Is Freedom of Conscience Superior to Freedom of Religion?’ (2018) 7 *Oxford Journal of Law and Religion* 124.

<sup>51</sup> Evans, above n 47.

<sup>52</sup> *Ibid.*