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Past and Future Visions of Religious Freedom

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2013

[Link to publication](#)

Citation for published version (APA):

Lindkvist, L. (2013). *Past and Future Visions of Religious Freedom*. (PluRel - en blogg om religion og samfunn). University of Oslo, Religion i pluralistiske samfunn (PluRel). <http://blogg.uio.no/prosjekter/plurel/content/past-and-future-visions-of-religious-freedom>

Total number of authors:

1

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Past and Future Visions of Religious Freedom

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*This text originally appeared on the [PluRel blog \(University of Oslo\)](#), October 30, 2013.
<http://blogg.uio.no/prosjekter/plurel/content/past-and-future-visions-of-religious-freedom>*

In the concluding passage of [her powerful take on the U.S. Supreme Court's enigmatic record on religious freedom over the past decades](#), Winnifred Fallers Sullivan boldly suggests that we ought to "...find some other words." The concept of religion (and thus of religious freedom), she maintains, is essentially too vague and too bound up with specific orders of knowledge and power to be considered as a valuable aspect of constitutional and human rights law. To liberate ourselves from the "often unacknowledged flotsam and jetsam of religio-political history" that burden religious freedom when actualized in the courtroom or on the political stage, we need to free ourselves from the concept altogether.

In what follows, I will take my own research on the origins of Article 18 in the Universal Declaration – a statement which reappears as Article 9.1 in the European Convention of Human Rights – as a basis for a different way of thinking about the history and future of religious freedom. I will suggest that the highlighting of the personal freedoms of thought and conscience in these statements was not, as it is often understood, the natural outcome of a distinctly Western tradition of human rights thought. On the contrary, it was the accomplishment of a group of actors who sought to make the right to religious freedom relevant in the particular ideological political struggles of their time.

What this affirms is the fundamental indeterminacy and ambivalence of the concept of religious freedom. The key question then is what we make of it. Sullivan may be justified to conclude that this leaves the concept of religious freedom open to "political opportunism" and abuse by power. My competing claim is that it can also be seen as an opening for creative reconstruction for the purpose of furthering democratic politics.

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In his [comprehensive commentary on religious freedom in international law](#), Paul M. Taylor argues that the hierarchal distinction between the absolute freedom of thought and conscience and the limited freedom to manifest one's beliefs constitutes an "inescapable" aspect of how the right to religious freedom is conceptualized in the central human rights treaties. At face value, this distinction may appear unproblematic. Yet, as several critical scholars have argued, drawing such definite lines tend to reinforce the notion that religion, and by consequence religious freedom, has a natural core which consists in privately held beliefs. It may also support the idea that religiously motivated acts may in some cases be infringed upon without damaging the "core" of religious life itself. This problem was not least manifested in *Leyla Şahin v. Turkey* (2005), where the European Court of Human Rights upheld the claim of the Turkish Constitutional Court, that "once outside the private sphere of individual conscience, freedom to manifest one's religion could be restricted on public-order grounds to defend the principle of secularism." Religiously motivated acts are thus conceived as optional 'manifestations,' rather than essential building blocks of the individual person's beliefs.

While it may be true that this dualistic view of religion and religious freedom is cemented within the logic of contemporary human rights law, there is reason to question its historical "inescapability." This

distinction undoubtedly has a deep history in Western theology and philosophy, but it has not always been a self-evident element in the articulation of religious freedom in constitutional and international law. Through my own research, I have instead come to see this distinction as one of the novelties that entered international legal discourse with the passing of the Universal Declaration of Human Rights in 1948.

This claim is partly derived in my reading of how religious freedom was conceptualized in international law in the aftermath of World War I. When Woodrow Wilson drafted what he intended as a universally applicable religious freedom clause for the League of Nations Charter in 1919, he never mentioned the inner freedoms of thought and conscience. His amendment, which did not make it to the Charter but reappeared in the minority rights treaties that were imposed on the new and reformed states of Eastern and Central Europe, centered on the principles of “free exercise” and non-discrimination against persons “practicing” dissenting religions or beliefs. In keeping with the Wilsonian formula, most prototypes for an international statement on human rights that emerged in the interwar period articulated religious freedom in terms of “free exercise,” or, as Franklin D. Roosevelt preferred, as the “freedom of worship.” The right of the person to be autonomous in the process of forming, and above all ‘changing,’ his or her convictions was rarely seen as a legitimate concern for international law.

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When seen against this background, some of the most remarkable features of the Universal Declaration become discernible. First, the Declaration was not only a document that set out to regulate the relationship between the states and their subjects. To many of its drafters its status as a “moral standard achievement” also meant that it reflected an aspiration to transform the horizontal relations among persons within societies. This was part of the rationale for why the freedom of thought and conscience, as well as the freedom to change one’s religion or beliefs were foregrounded in article 18.

The perhaps strongest advocate behind this decision to segregate the inner and external aspects of religious liberty was the Lebanese delegate, Charles Malik. Tapping into a wider personalist discourse that dominated human rights-talk in the 1940s, Malik argued that the principal threats to the rights of man consisted in various incarnations of materialism and in the ‘rise of the masses’. He rejected proposals made by Communist states that the UN should affirm that human rights “could only be attained through perfect harmony between the individual and the community.” In opposition, Malik affirmed that the human person must be free, not only in relation to the State but also in relation to the group to which he may belong. This was one of the reasons why it was insufficient to conceive of religious freedom as merely a right of to “be” and to give voice to one’s own convictions. Religious freedom also had to be conceived as a right to “become.” To Malik, this process-theological and existentialist notion of becoming was essentially captured in the right to change one’s religion or beliefs.

During the initial stages of the drafting process, Malik urged the Commission of Human Rights to premise its work on the understanding that “The human person’s most sacred and inviolable possessions are his mind and his conscience, enabling him to perceive the truth, to choose freely, and to exist.” Malik’s proposal was immediately picked up by René Cassin, who incorporated it into the religious freedom clause of his early draft Declaration – a clause that later evolved into Article 18.

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The basic point of this account is that the upgrading of the inner freedoms rested on a specific understanding of what kind of social and political issues Article 18 should identify and bespeak, and what kind of human activities it should empower. It was a move that was rooted not only in a historical moment, but also in a specific analysis of that moment and of what constituted its most acute threats to

the rights of man. It was not, in short, inescapable. Above all, it cannot be accredited to what Bonnie Honig labels [the 'chrono-logic' of human rights; or the "independent trajectory of rights as such."](#)

The broader point is that we have little reason to be fatalistic about the future of religious freedom. The drafting of article 18 in the Universal Declaration shows that some elements that we now tend to consider as constitutive of religious freedom are themselves products of situational, and relatively recent innovations. We have no reason to assume that what religious freedom meant to some of the drafters in 1948, or what it has come to mean in institutions like the European Court of Human Rights today, predetermine what religious freedom might come to mean in the future.

When thinking about the future of a concept like religious freedom we must also ask ourselves where we consider the meaning of political concepts to be determined. Are we really justified in limiting our search for answers to the opinions of constitutional courts, international bodies for monitoring state compliance with human rights and fora for international human rights politics? In his just published book, [Radical Cosmopolitics](#), the political philosopher James Ingram follows the lead of thinkers like Claude Lefort, Jacques Rancière and Etienne Balibar to argue that we are not.

The meaning and significance of human rights, Ingram says, is not determined by how they are formulated in the central treaties and declaration, nor by the way they are interpreted by institutions of power, but of what kind of political activities they stimulate. The meaning of human rights is, in short, formed and reformed in the process of making claims in their name.

When we think about the future of human rights, and indeed of the future of religious freedom, it might therefore be more fruitful to study the ways these rights are imagined by those who claim protection from them, or invoke them to challenge established political orders, rather than merely examining how they are interpreted by institutions that themselves form part of such orders. As long as religious freedom can be made relevant as a tool for identifying and challenging ingrained patterns of injustice and exclusion, it is a concept that merits a future.