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# THE INTERRELATIONSHIP BETWEEN FREEDOM OF THOUGHT CONSCIENCE AND RELIGION AND THE RULE OF LAW

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## **ABSTRACT**

This article explores the connection between the rule of law and the right to freedom of thought, conscience, and religion (FTCR) from an empirical and theoretical perspective. It posits that the two are not merely interdependent, but that FTCR is foundational for embedding the rule of law. To support this thesis, the article first identifies a conundrum facing states seeking to embed FTCR as a constitutional right. This is that FTCR requires the maximization of an individual's freedom to follow one's own ethical framework. At the same time, a state will want to build common consensus to encourage compliance with societies' core norms. It further posits that a state needs to facilitate FTCR to encourage the exploration of virtue to inform consensus around societies' common norms. This virtue building role of FTCR gives it its foundational role for embedding the rule of law. This is based on Martin Krygier's analysis of the sociological conditions necessary to embed the rule of law. Krygier argues that any given society needs to have accepted the norms which lay the ground for more than mere isomorphic mimicry in rule of law implementation. Having explored the theoretical links between FTCR and the rule of law, the article moves on to explore whether the foundational nature of FTCR for the rule of law is born out in practice. A comparison is undertaken of the worldwide rule of law, religious freedom and happiness indexes. The conclusion is that the data

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demonstrates a strong but not exhaustive correlation. This leads to an intermediate conclusion that global rule of law measures ought to include a weighted measure of religious freedom in any given state. A key problem identified in the theoretical and empirical analysis is that current approaches to FTCR and the rule of law carry a Western bias with an individualistic approach which potentially and ultimately undermines of the rule of law. To address this, the article then explores an expanded theory to support FTCR to bolster its acceptance as universal right. The theory of common grace is proposed, together with Rowan Williams' other-regarding, communal approach to rights. This is then situated in the framework for plural living together proposed by Herman Dooyeweerd.

This article proposes that Dooyeweerd's Christian theological approach could be adapted with a plural metanarrative to accommodate dialogue around virtue building and dispute resolution within societies with very different outlooks. This approach would potentially support a universal approach supporting the interconnection between FTCR and the rule of law.

**KEYWORDS:** rule of law, religious freedom, Reformed and Anglican theology

## **INTRODUCTION**

This paper considers the extent to which the right to freedom of thought, conscience, and religion (FTCR) and the rule of law are inter-dependent. It explores whether FTCR can, in fact, be said to be foundational to effective implementation of the rule of law. After a brief overview of the right to FTCR, the article considers the challenge faced by a state seeking to incorporate the right into its constitutional structure, in what are very different social and political environments across the world. The conundrum for states is that FTCR, as it has been developed in the jurisprudence of national and international courts, seeks to maximize

individual freedom. A state will, however, want to build consensus or impose common norms for society which may conflict with the ethical frameworks by which individuals may want to live their lives. This necessitates a form of dialogue around the virtues informing the lives of individuals and that of the communal life of society.

It is this dialogue on the virtues upon which individuals and societies center their lives that provides the foundational link between FTCD and the rule of law. To explore this further, the article moves on to consider the rationale underpinning the rule of law, exploring Martin Krygier's sociological approach.<sup>2</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 does a country comply with a list of attributes of the rule of law? It is rather about building the type of virtues in society that ensure the rule of law can be embedded. Krygier argues that this will need to be contextualized for different countries: embedding the rule of law will take a different approach depending on the sociological and historical context. I propose that it is this task which requires the operation of FTCD as well as mechanisms to facilitate dialogue and virtue building.

The article then moves on to identify whether the theory posited, that FTCD is foundational for the rule of law, is born out in the empirical data. It does this by comparing the Rule of Law Index 2021 from the World Justice Project,<sup>3</sup> the Pew Centre's Report on Religious Restrictions Around the World 2021<sup>4</sup>, and the World Happiness Report 2021<sup>5</sup> (as an

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<sup>2</sup> Martin Krygier, "Inside the Rule of Law," University of New South Wales Faculty of Law Research Series 4 (2014) and *Rivista di Filosofia del Diritto* III, no.1, (2014), 77–98 accessed November 2, 2021, <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLRS/2014/4.html>; Martin Krygier, "What's the point of the rule of law" (The Graduate Institute Geneva, Switzerland 2018), accessed November 5, 2021, <https://www.youtube.com/watch?v=gEJEOWtVz0>.

<sup>3</sup> World Justice Project, "2021 WJP Rule of Law Index®", accessed December 22, 2022, [WJP Rule of Law Index \(worldjusticeproject.org\)](http://www.worldjusticeproject.org)

<sup>4</sup> Chris Baronavski, Samirah Majumdar, Virginia Villa and Bill Webster, "Religious restrictions around the world" (Pew Research Centre, 2021), accessed November 5, 2021, <https://www.pewforum.org/essay/religious-restrictions-around-the-world/>.

<sup>5</sup> "World Happiness Report 2021," ed. John Helliwell, Richard Layard, Jeffrey D. Sachs, Jan-Emmanuel De Neve (New York, Sustainable Development Solutions), accessed November 5, 2021, [World Happiness Report 2021 | The World Happiness Report/](http://www.worldhappinessreport.com/).

approximation for a measure of freedom of thought and conscience). The intermediate conclusion is that generally there is a link between these three indices. Countries scoring highly on one, likewise score highly on the others. There are, however, some outlying results which lead to the suggestion that a weighted FTCR measure should be used in the Rule of Law Index. It is proposed that this would not only 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 future within a given state.

Having identified the importance of FTCR for rule of law implementation and the internationalization of the rule of law, I propose that a fresh approach needs to be taken to the theory supporting FTCR. FTCR needs to find a theoretical basis that is universally acceptable if it is to support the embedding of the rule of law across the world. This needs to sit within a framework for plural living together that can also find acceptance both within and beyond Western Liberal democracy. I do this by aligning 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 FTCR and consequently support the embedding of the rule of law, the article then analyses the philosophical political theology of Herman Dooyeweerd.<sup>6</sup>

Dooyeweerd's Christian metanarrative supporting interactions between different spheres of social organization provides a framework which, it is suggested could equally fit within a plural metanarrative to support the internationalization of the rule of law. A Christian theological dialogic approach is taken, providing a metanarrative open to discourse with those of other faiths and none.

The overarching aim of the paper is to promote a multivalent approach to FTCR and the rule of law. Proposing a theoretical basis for weighing individual, communal, and societal

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<sup>6</sup> Jonathan Chaplin, *Herman Dooyeweerd: Christian Philosopher of State and Civil Society* (Indiana, Notre Dame: University of Notre Dame Press, 2011).

interests to reach consensus at a national and international level. This is to strengthen the interrelationship of FTCCR 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 FTCCR<sup>7</sup> has won almost universal acceptance across the globe. This is evidenced by the list of signatories to the International Covenant on Civil and Political Rights<sup>8</sup> and other international treaties incorporating or supporting the enjoyment of the right.<sup>9</sup> Even in its early stages, however, incorporation of the right was contentious. This was particularly so within academic circles and, within the 57 member states of the Organisation of Islamic Cooperation. It has remained the subject of controversy ever since.<sup>10</sup> Violations, when they

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<sup>7</sup> Article 18, International Covenant on Civil and Political Rights; Article 9, European Convention on Human Rights.

<sup>8</sup> The United Nations Office of the High Commissioner for Human Rights reports that there are 173 state parties to the International Covenant on Civil and Political Rights, with 6 further 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 are recorded against Article 18.

<sup>9</sup> The International Covenant on Economic, Social and Cultural Rights; The International Convention on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention relating to the Status of Refugees, accessed October 30, 2021, <https://www.ohchr.org/en/issues/freedomreligion/pages/standards.aspx>.

<sup>10</sup> Karen Engle, “From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999,” *Human Rights Quarterly* 23, no.3 (2001): 536–559.

occur, occur both within and outside countries that adhere to the internationally recognized rule of law framework,<sup>11</sup> albeit to varying degrees.<sup>12</sup>

The core content of the right has been adjudicated by international, regional, and national courts.<sup>13</sup> There is some judicial, academic, and international consensus that freedom to choose for or against a belief system is essential to the right to FTCCR. Freedom from religion is thus an aspect of freedom of religion.<sup>14</sup> Although, as Paul Cliteur argues, the space for open public debate at the intersection of FTCCR and freedom of speech has become increasingly restricted in the face of “theoterrorism”.<sup>15</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 FTCCR prevents the very enjoyment of it.<sup>16</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

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<sup>11</sup> Melanie Adrian, *Religious Freedom at Risk. The EU, French Schools, and Why the Veil was Banned* (Cham, Switzerland: Springer International Publishing, 2016). The United States Commission on Religious Freedom, *Annual Report 2021*, (USCIRF 2022), accessed December 21, 2022, [2022 USCIRF Annual Report 1.pdf](https://www.uscifr.org/2022-USCIRF-Annual-Report-1.pdf) documents some of the restrictions occurring outwith Western liberal democratic regimes. See also, Alexis Artaud de la Ferrière “Coronavirus: how new restrictions on religious liberty vary across Europe,” *The Conversation*, April 9, updated May 2, 2020, accessed October 30, 2021, <https://theconversation.com/coronavirus-how-new-restrictions-on-religious-liberty-vary-across-europe-135879>. De la Ferrière identifies restrictions within Europe during the Covid-19 pandemic.

<sup>12</sup> Generally, countries which adhere to the rule of law see a higher degree of protection of the right to freedom of thought, conscience and religion.

<sup>13</sup> See for example Jessica Giles, “Religious Freedom in Global Context,” *Implicit Religion* 21, no. 3, (2018): 239–270, accessed June 27, 2022, <https://doi.org/10.1558/imre.38617>.

<sup>14</sup> The 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 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications,” (Geneva: United Nations, March 10, 2011), accessed November 5, 2021, <https://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.

<sup>15</sup> Paul Cliteur, *Theoterrorism v. Freedom of Speech. From Incident to Precedent* (Amsterdam, Netherlands: Amsterdam University Press, 2019).

<sup>16</sup> Paul Cliteur explores reactions to Charlie Hebdo, Samuel Paty, and Salmon Rushdie. Together with Tom Herrenberg and Bastiaan Rijpkema, he analyses 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 Gelijs Mollier (The Hague, The Netherlands: 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).

entered public consciousness and reawakened an interest in the “presence of religion”<sup>17</sup>.

Hans-Martien ten Napel, on the other hand, argues that whilst there appear to be a greater number of secular people in society, there is also more diversity among the significant part of the population that remains religious.<sup>18</sup> This changing nature of religion in society has existential implications for the operation of FTCT 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>19</sup> The dispute centers, particularly, on whether freedom of thought and conscience are individual subjective notions dependent on genuinely and sincerely held beliefs. Alternatively, whether they are defined and articulated either in the wider context of relationship, a community or at least a system of thought.<sup>20</sup> This is important for the virtue building role of FTCT for embedding the rule of law. This is because enabling individuals to explore virtue and exercise agency within their conscience-based communities is equally as important as facilitating it for those in faith-based communities.

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<sup>17</sup> Sophie van Bijsterveld, *State and Religion. Re-assessing a Mutual Relationship* (The Hague, The Netherlands. Eleven International Publishing, 2018): 2

<sup>18</sup> Hans-Martien Ten Napel, *Constitutionalism, Democracy and Religious Freedom* (Abingdon, Oxford, New York, NY. Routledge, 2017): 8

<sup>19</sup> Rafael Domingo “Restoring Freedom of Conscience,” *Journal of Law and Religion* 30, no. 2 (2015): 176–193. 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 (2021): 146–170.

<sup>20</sup> Rex Ahdar “Is Freedom of Conscience Superior to Freedom of Religion?” *Oxford Journal of Law and Religion* 7, no. 1 (2018): 124–142; Robert K Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: Cambridge University Press, 2010); Rafael Domingo “Restoring Freedom of Conscience”: 13. Examples include conscientious objection to military service: *Bayatyan v. Armenia* [2011] ECHR 1095, and objection by nurses or midwives to engaging with patients who undergo a termination of pregnancy: *Ellinor Grimmark v. Sweden* Application No 43726/17 (ECtHR, February 11, 2020) and *Linda Steen v. Sweden* Application No 62309/17 (ECtHR, February 11, 2020).



What we see in practice across the globe are very different constitutional contexts and approaches to public living together within which FTCT is expected to find its place.<sup>21</sup> This can pose states with a conundrum.

### ***The FTCT Conundrum***

The FTCT conundrum faced by states relates to the need to maximise individual freedom and flourishing on the one hand: whilst also supporting peaceful plural living together built around core consensual norms for society on the other.

Generalizations are difficult in the face of multiple religions and systems of thought and conscience practiced worldwide. It can, however, generally be said that religious and thought systems provide adherents with, amongst other things, a moral framework according to which those adherents 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 behaviour of adherents. In some cases this will be so even if this puts their own lives at risk or leads them to civil disobedience.<sup>22</sup> John Perry, in Gavin D’Costa et al, describes this as people of faith “finding themselves subject to multiple loyalties that admit of no harmonization”.<sup>23</sup> In addition, where state mandated norms deny the individual the ability to live according to their own moral framework and the difference between state and individual norms is too great, , individuals who adhere to a faith or

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<sup>21</sup> *Religion, Pluralism, and Reconciling Difference*, ed. W. Cole Durham Jr and Donlu D Thayer, (London: Routledge, 2019); Jonathan Fox, *A World Survey of Religion and the State* (Cambridge: Cambridge University Press, 2008) and *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*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2015); Gavin D’Costa, Malcolm Evans, Tariq Modood and Julian Rivers, 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, Massachusetts. London, England: Harvard University Press 2017) and Paul Cliteur and Afshin Ellian, “The Five Models for State and Religion: Atheism, Theocracy, State Church, Multiculturalism, and Secularism” *The Vienna Journal on International Constitutional Law* 14, no.1 (2020): 103–132, <https://doi.org/10.1515/icl-2018-0056>.

<sup>22</sup> “Modern Martyrs” Westminster Abbey, n.d., accessed October 31, 2021, <https://www.westminster-abbey.org/about-the-abbey/history/modern-martyrs>.

<sup>23</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*, 219–243.

conscious based framework are likely to suffer cognitive dissonance. They can potentially give rise to individuals disengaging with public life. Ultimately it could cause forms of isolation or ghettoization for faith or conscience-based groups. This is particularly true when the telos of a faith or conscience-based group relates 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.

This conundrum of 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 outworkings of the incorporation of a right to FTGR will look different in various nation states, whilst still bearing the hallmarks of a universal right. Second, from a political perspective, a government will be concerned to establish its own common rules. This will be based on a moral framework which accommodates the ongoing operation of government, the economic wellbeing, flourishing and peaceful co-existence of those within its borders. The need for minimum rules is bound to come up against faith or conscience-based norms which may set higher or different standards. This requires balance between majority mandated norms and civil society groups' norms. Third, legally, if a government is to foster pluralism, a set of rules will be needed to establish minimum standards to govern civil society interactions. This needs to leave capacity for rule setting by civil society groups to enable the practices, traditions, and ethical frameworks of these groups to operate.<sup>24</sup>

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<sup>24</sup> In this paper capacity and capacity to exercise agency are deemed to be applicable to all humankind, regardless of actual physical or mental capacity. This is 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 but, 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 to be exercisable, by another on their behalf.

This leads to the question as to what comes first. FTCT or the implementation of the rule of law? The rule of law can theoretically provide a secure foundation for the embedding and enjoyment of FTCT within a nation state. However, without the type of virtue building supported by FTCT necessary to embed the rule of law in civil society, the rule of law may not be effectively implemented. On this basis FTCT is arguably foundational for the rule of law.<sup>25</sup> This will be considered further in the next section.

## THE RULE OF LAW

The rule of law has 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, amongst 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>26</sup> Jeremy Waldron,<sup>27</sup> John Tasioulas,<sup>28</sup> and Martin Krygier. The minimal/formal/thin concept of the rule of law belongs to the Diceyan tradition.<sup>29</sup> It incorporates basic principles for procedural fairness in law making, application,

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<sup>25</sup> John Witte in his historical analysis of the reformed approach to rights 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. John 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): John Witte, *The Reformation of Rights*, 4 and 56–58. He identifies that this provided the bedrock for the development of the Dutch reformed political theology that is explored later in this paper: see Witte, *The Reformation of Rights*, 152–184.

<sup>26</sup> Joseph Raz, “The Rule of Law and its Virtue” in, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press and Oxford Scholarship online 1979), accessed November 5, 2021, [http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue\\_%20%20Joseph%20Raz.pdf](http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf).

<sup>27</sup> Jeremy Waldron, *The Rule of Law and Human dignity* (Sir David Williams Lecture, Centre for Public Law, Cambridge Law School, Cambridge University 2011), accessed November 5, 2021, <https://www.youtube.com/watch?v=X3cyYnle0ec>; Jeremy Waldron, “The Rule of Law” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2020 Edition, accessed November 2, 2021, <https://plato.stanford.edu/entries/rule-of-law/>.

<sup>28</sup> John Tasioulas, “The Rule of Law” in *The Cambridge Companion to the Philosophy of Law* ed. John Tasioulas (Cambridge: Cambridge Companions to Law, Cambridge University Press 2020).

<sup>29</sup> Expounded in modern times, for example, by Joseph Raz and John Tasioulas.

and adjudication. It has increasingly become contested around first, 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. Second, whether the rule of law should also 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 of legitimacy becoming inappropriately elided. This begs the question not only as to whether the rule of law encompasses legitimacy, but also whether a system can be legitimate independent of the rule of law.

The substantive account of the rule of law, encompassing a tranche of internationally agreed 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/thin concept of the rule of law,<sup>30</sup> argues that substantive approaches are inappropriate. This is 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. This is because 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, as to whether and what extent fundamental rights can be incorporated into national constitutions. For many states there may be a different approach to public living together which does not accord with the individualistic, and at times litigious

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<sup>30</sup> Joseph Raz’s eight principles are: 1. All laws should be prospective, open and clear 2. Laws should be relatively stable 3. The making of particular laws 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 8. The discretion of the crime-preventing agencies should not be allowed to undermine the purposes of the relevant laws: Joseph Raz, “The Rule of Law and its Virtue”, 214–18.

nature of the Western rights culture.<sup>31</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 of rule of law adherence, 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. It is argued that FTCT becomes foundational to any such approach. More so than if one adopts a thin concept of the rule of law.

The substantive (thick) account of the rule of law, incorporating a tranche of internationally accepted fundamental rights, has been adopted as the gold standard, including by the United Nations.<sup>32</sup> It finds support in the work of the Rt Hon Lord Bingham, Lon Fuller,<sup>33</sup> Ronald Dworkin,<sup>34</sup> Waldron,<sup>35</sup> and others. It incorporates an understanding of law that considers its inner morality (Fuller), valid social objectives (Waldron), and adherence to international rights obligations (Dworkin and Bingham). The content of the rule of law, as well as the way it is embedded within societies, has taken on universal significance. This is because globalization has necessitated the removal of elements of policy and decision making to an international level.<sup>36</sup> FTCT thus becomes foundational for the rule of law at the level of international governance, as well as at the national level. The danger is that the interlinking of

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<sup>31</sup> This is particularly so for Asian, African and Islamic approaches to rights. Joan Lockwood O'Donovan "Faith and Human Rights" (Yale University Faith & Globalization Initiative: Yale Divinity School, Yale School of Management, Tony Blair Foundation, 2010), accessed 22 December 2022, [Faith and Human Rights, Joan Lockwood O'Donovan - YouTube](#), critiques the legal nature of Western approaches to rights.

<sup>32</sup> Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law Autumn* (1997): 467–487.

<sup>33</sup> Lon L. Fuller, *The Morality of Law* revised edition (New Haven, Connecticut: The Storrs Lectures Series, Yale University Press 1965).

<sup>34</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA. Harvard University Press, 1986).

<sup>35</sup> Jeremy Waldron, *The Rule of Law*.

<sup>36</sup> This is explored further by John Tasioulas, *The Rule of Law*.

the rule of law and FTCTC creates the appearance of a “Western” approach to international governance. This might do more to divide, rather than unite nation states.

### ***The Internationalization of the Rule of Law and FTCTC***

It is the internationalization of the rule of law and the incorporation of rights into the account of the rule of law that throws the relationship of the rule of law and FTCTC 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”. 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 is particularly relevant given the strong pull from various directions in favor of a “neutral” form of governance.<sup>37</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.

This issue is highlighted by Krygier, 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>38</sup> According to Krygier, conceptualization of the thick and thin rule of law have in common that they conceive of the rule of law as a series of institutional elements.

They consist of a list of specific aspects relating to law creation, adjudication and implementation. Dicey lists 3 core elements, John Rawls 4,<sup>39</sup> Lon Fuller, Raz,<sup>40</sup> John

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<sup>37</sup> Jessica Giles, *Religious Freedom in Global Context*.

<sup>38</sup> Krygier, *Inside the Rule of Law*, 42. See also, Martin Krygier and Adam Winchester “Arbitrary power and the ideal of the Rule of Law,” in *Handbook of the Rule of Law* ed. Christopher May and Adam Winchester, (Cheltenham: Edward Elgar Publishing, 2018), 75–95 and 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>39</sup> John Rawls, *A Theory of Justice* revised edition (Cambridge, Massachusetts: Belknap Press, Harvard University Press 1999), 208–210.

<sup>40</sup> Joseph Raz, “The Rule of Law and its Virtue”, 214–218.

Finnis,<sup>41</sup> Tasioulas 8, Bingham and Waldron list 10 elements. Robert Summers<sup>42</sup> lists as many as 18 elements. The substantive conceptualization of the rule of law is evident in definitions in the Rule of Law Index 2021. The Rule of Law Checklist from the European Commission for Democracy Through Law (Venice Commission)<sup>43</sup> and the definition provided by the United Nations.<sup>44</sup> Krygier, taking an approach not dissimilar to Nassar Hussain,<sup>45</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 transpose the list of measures from Western liberal 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. This will depend on how they were embedded. The outcome can be what David Landau identifies as “abusive constitutionalism”.<sup>46</sup> In this case, governments use or abuse legal mechanisms and the law in subtle and unsubtle ways to exercise power. Krygier argues that consequently, law becomes useful to authoritarian regimes rather than a tool to prevent abuse and misuse of power. Further, that 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 on central government or move to other groups within civil society because government does not command the respect of the people.

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<sup>41</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 270–271.

<sup>42</sup> Robert S Summers, “The Principles of the Rule of law” (Cornell Law Library: Cornell Law Faculty Publications, 1999), paper 1206, accessed November 5, 2021, <https://scholarship.law.cornell.edu/facpub/1206/>.

<sup>43</sup> 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).

<sup>44</sup> United Nations, United Nations and the Rule of Law, “What is the Rule of Law” (United Nations n.d), accessed August 12, 2021, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

<sup>45</sup> Nassar Hussain *The Jurisprudence of Emergency: Colonialism and the Rule of Law*. (Michigan: University of Michigan Press, 2003), accessed 22 December 2022, <https://doi.org/10.3998/mpub.17774> . Hussain explores the harnessing of the rule of law by colonial powers to impose a Western colonial approach to governance in India.

<sup>46</sup> David E Landau, “Abusive Constitutionalism,” *University of California, Davis Law Review* 47 (2013): 189–260, Florida State University College of Law, Public Law Research Paper No 646. Last revised April 5, 2017.

***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. Krygier argues that what we need to consider is 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 set of social ideals for society. 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 workings of this are likely to vary from nation state to nation state, depending on where negative or abusive power lies. Here, Krygier refers to Philip Selznick's concept of institutionalization,<sup>47</sup> arguing that those institutions implementing the rule of law need to be infused with the virtues the concept espouses. In this way the system does not mimic the rule of law but actually implements a form of the rule of law that will bring about lasting change in a given national context. Tasioulas also 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>48</sup>

It is at this point that a link between the rule of law and the right to FTCCR 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, it needs to rest on social and political acceptance of the underpinning virtues on which the rule of law relies. The

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<sup>47</sup> Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (New York: Harper & Row 1957).

<sup>48</sup> Tasioulas, *The Rule of Law*, chapter 8, part I.



conditions for this can only exist where individuals have the freedom to explore ideas relating to faith, conscience, and belief. By this account FTCR is not just interdependent with the rule of law, but essential to it.<sup>49</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 rule of law.<sup>50</sup> This is because, 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>51</sup> Tasioulas adopts an Aristotelian approach arguing that the application of the principle of equity (both in 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, FTCR 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.

The initial analysis of FTCR and the rule of law in this article has led to the proposition that FTCR is foundational for the rule of law. It is proposed that this interconnection requires a stronger theoretical basis to support the ongoing articulation of this essential link. Before expanding the theoretical approach, this article will first explore empirical data. This is first, to identify whether state practice bears out the proposed essentiality of FTCR for embedding the rule of law. Second, to inform the development of a theoretical approach by analyzing current trends and identifying how a theoretical approach might need to respond to them.

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<sup>49</sup> And is built on the type of popularization of social responsibility proposed by John Milton: Witte, *The Reformation of Rights*, 13.

<sup>50</sup> Tasioulas, *The Rule of Law*, part II.

<sup>51</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 implementation and end goals of any given legal and political system.

### *Measuring Rule of Law Compliance*

If FTCCR is foundational to embedding and sustaining the rule of law, this has implications for the methodological approach taken by the tools used to measure rule of law compliance. This is because weighting would need to be given to FTCCR in the methodology used to assess rule of law compliance. Higher levels of FTCCR within a nation state ought to result in stronger adherence to the rule of law. A deterioration of FTCCR compliance ought to 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 non-governmental organizations has led to their incorporation into rule of law measures. These measures provide ranking for states' rule of law compliance. These measures do not appear to undertake 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 FTCCR as in any way significant, over and above compliance with other fundamental rights. There are some outlying cases indicating that a state can have a relatively poor record on FTCCR compliance, but still score relatively high overall on rights compliance.

If rule of law measures were to incorporate an additional weighted measure to identify the extent to which FTCCR is enjoyed within a state, this would not only assess current state practice but, it could also have a predictive application. A poor performance flag for FTCCR could indicate that a country was starting to drift from maintaining the rule of law. Enhanced weighting for FTCCR 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 FTCCR flag could signal the need for additional groundwork to create the conditions necessary to embed the rule of law.

The following section explores the extent to which current empirical data bears out the theoretical propositions on the foundational nature of FTCR. In the absence of a specific focus on FTCR within the current Rule of Law Index, it uses the Pew Centers data on FTCR compliance to make a comparative analysis between the two. It uses the Happiness Index as the nearest approximate measure for freedom of conscience. Once this additional evidence for the foundational nature of FTCR is established, the article then moves on to explore a stronger theoretical basis for FTCR. This is to support its foundational role for the rule of law. Also, to identify an approach which is more likely to find universal acceptance in the light of the internationalization of the rule of law.

## **EMPIRICAL EVIDENCE**

According to the World Justice Project, Rule of Law Index 2017-18, 113 countries around the world adhere to the rule of law.<sup>52</sup> Although other sources claim that 57% of the world population lives outside the protection of the rule of law.<sup>53</sup> The more recent 2020 index surveyed 128 countries applying 8 factors and 44 sub-factors 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, legal practitioners and experts, on the operation of the rule of law. The focus was on policy

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<sup>52</sup> 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 in respect of corruption, control on government powers and human rights protection: World Justice Project, "World Justice Project Rule of Law Index 2020 Insights. Highlights and Data Trends from the WJP Rule of Law Index® 2020," accessed 22 December 2022, [Insights-2020.pdf \(worldjusticeproject.org\)](#), and "World Justice Project Rule of Law Index® 2021," accessed 22 December 2022, [World Justice Project Rule of Law Index 2021 | World Justice Project](#).

<sup>53</sup> LexisNexis ®Legal and Professional. "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>.

outcomes, namely whether there was cost-effective access to courts and public services and whether crime control was effective.<sup>54</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”. Denmark, Norway and Finland sit at the top of scale, Denmark with a score of 0.9. DR Congo, Cambodia and Venezuela sit at the bottom, Venezuela with a score of 0.27.<sup>55</sup> Countries are also grouped into low, lower middle, upper middle and high-income countries.<sup>56</sup> When a comparison is made between the Pew Research Centre 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 restrictions on religious freedom and very high levels of social hostilities towards expression of religious freedom in the Pew Research study on religious freedom. This compared to a better performance on the rule of law index (India rank 69/128 with a score of 0.51 in the rule of law index and Indonesia ranked 59/128 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>57</sup> whereas it ranked 20<sup>th</sup> on the rule of law index with an overall score of 0.73. In

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<sup>54</sup> The 2020 global report on the rule of law indicated a correlation between high adherence to the rule of law and high-income. In order to obtain a fuller analysis of the absence of corruption and implementation of human rights it is necessary to additionally explore the corruption and indicators of human rights compliance. For example, Transparency International, The Global Coalition Against Corruption. “Corruptions Perceptions Index 2021.” Accessed December 22, 2022, [2021 Corruption Perceptions Index - Explore the... - Transparency.org](https://www.transparency.org/en/cpi)

<sup>55</sup> Vietnam is ranked 85/128 and saw an improvement in the World Justice Project. Rule of Law Index, 2020 Report, accessed November 5, 2021, <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>. This was an improvement of 0.49%. USA was 9/128 (a drop of 0.72) and UK was 13/128 (a drop of 0.79).

<sup>56</sup> World Justice Project. Rule of Law Index, 2020 Report.

<sup>57</sup> See, for example, *Samira Achbita and another v. G4S Secure Solutions NV* (Case C-157/15) and *Asma Bougnaoui and another v. Micropole SA* (Case C-188/15).

practice, therefore, it can be said<sup>58</sup> that the application of the rule of law is not an absolute guarantee that a state will demonstrate a commitment to religious freedom.<sup>59</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.

This is because the methodological approach takes a snapshot in time of rule of law compliance. To track the correlation between rule of law and FTICR overtime, the methodology and analysis used by the rule of law index would need to expand. A rule of law index incorporating enhanced FTICR review would need to not only adjust the weighting given to FTICR but, would also need to explore the extent to which deterioration in FTICR was a significant flag for future deterioration in rule of law compliance in general.

Incorporating a FTICR weighting the rule of law measure would obviate the need to compare two different reports. This is important because the Pew Research Centre measures restrictions on religious freedom, whereas the international right to FTICR guarantees freedom of thought and conscience, as well as religious freedom. A rule of law measure which adopts the theoretical proposition that FTICR is foundational would need to adopt a methodology which incorporates a means to measure freedom of thought and conscience, as well as freedom of religion.

Another measure which currently might inform the interaction between the rule of law and FTICR 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

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<sup>58</sup> On the basis of measures encompassed in this paper and subject to the limits of the methodologies used in those studies.

<sup>59</sup> The Pew Research Centre survey considers religious freedom as an independent aspect of its research and does not survey the freedom of thought and conscience. It is anticipated that if it did so, this would impact to a greater degree on the differential between the enjoyment of FTICR and the application of the rule of law.

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. This is because 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 happiness index. However, there is no essential link between FTCD, application of the rule of law and general happiness in current measures. There is, however, data which supports the thesis that the three are interlinked.

For example, in the World Happiness Report 2021,<sup>60</sup> Costa Rica (25 rule of law ranking), United Arab Emirates (30 rule of law ranking), Guatemala (101 on rule of law ranking), Uruguay (22 rule of law ranking), Bahrain, Taiwan, Saudi Arabia (did not take part in the rule of law ranking), all rank 31 or above out of 149 countries surveyed on the happiness index. What is more noticeable is that some countries ranking high in the happiness index appear to have a majority of citizens who adhere to one particular faith. Thus, 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>61</sup>

Looked at from the reverse perspective 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. In the Pew Research Center's 2018 report it scored in the top grouping with low social hostility towards religious freedom and low government restrictions on religious

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<sup>60</sup> Helliwell et al, "World Happiness Report 2021".

<sup>61</sup> The World Happiness Index involves subjective measures of well-being, including three main indicators: life evaluations, positive and negative emotions – the 2021 report paid particular attention to tracking how Covid-19 had affected different aspects of life. Those surveyed were asked to assess their current life as a whole, using the image of a ladder, with the best possible life as a 10 and the worst possible life as a 0. This was based on 1000 responses annually per country and an average taken over 3 years. The emotional poll 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 than negative emotions. Finland, Iceland, Denmark, Switzerland, and the Netherlands were the highest-ranking countries with Rwanda, Zimbabwe and Afghanistan registering the lowest scores.

freedom.<sup>62</sup> In the Rule of Law Index, however it ranked 80<sup>th</sup> out of 128 with an index score of .5. In the 2021 World Happiness Report it scored 63/149.

It is possible to tentatively deduce, based on the current international measures, that, based on a snapshot in time, FTCCR, the rule of law and general happiness are usually, but not necessarily, interdependent. It is perhaps important not to get 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, whilst 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 (FTCCR), is not about material wealth or positive emotion (happiness) but about experiencing a peace which 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 *Eudaimonia*, living a human life well, in the Aristotelian sense. This might include a broader concept of wellbeing and human flourishing, alone and in community. This broader understanding of happiness informing a FTCCR measure could inform the methodology used to assess FTCCR within a rule of law measure.

In summary, international measures indicate that a country can protect FTCCR absent strong adherence to the rule of law and conversely a country can demonstrate strong adherence to the rule of law without fully protecting FTCCR. The data does, nevertheless, tend to support

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<sup>62</sup> Chris Baronavski et al, "Religious Restrictions Around the World".

the theoretical proposition that there is an interdependence between the rule of law and FTGR.

To support both the theoretical and empirical foundational nature of FTGR for the rule of law, the following section seeks to identify a stronger theoretical basis of FTGR. This is proposed to act persuasively to support the foundational role of FTGR for the rule of law in an international context. After this, the article concludes by exploring a theory of social pluralism to facilitate the embedding FTGR within society.

### **FTGR: THEORETICAL UNDERPINNINGS**

At the outset of this paper, it was noted that 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. It is further proposed that taking a multivalent approach to building consensus would avoid polarization of views on rights theory and 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 towards 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 an even stronger concept, than 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>63</sup> The danger is that if non-Western approaches to public living together are not accounted for in informing both rights, and particularly, FTCT 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 discussion on the interconnectedness of the rule of law and FTCT, the final section of this paper explores a theoretical foundation of FTCT based on the theory of common grace which supports a multivalent plural approach to building a consensual FTCT theory. This is combined with the other regarding theology of rights proposed by Rowan Williams.<sup>64</sup> These Christian theological approaches are chosen because they have a theological metanarrative which 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 human rights, according to Waldron,<sup>65</sup> are often defined in positive law terms, by ostension. Political expediency can often result in the exclusion of a tranche of moral rights from

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<sup>63</sup> This critique of the individualistic nature of Western rights culture is voiced powerfully by, for example, Stanley Hauerwas, “What’s Wrong with Rights? Christian Perspectives Pro and Con” (The McDonald Distinguished Lectures on Christian Scholarship. Emory School of Law, Emory University, March 26, 2014), accessed November 5, 2021, <https://www.youtube.com/watch?v=o9Sz0TOZEAI>. His concerns are reinforced by Michael Sandel, “Kellogg Lecture on Jurisprudence: Justice, Neutrality and Law” (US Library of Congress 2015), accessed December 22, 2022, [2015 Kellogg Lecture on Jurisprudence: Justice, Neutrality and Law | Library of Congress \(loc.gov\)](https://www.youtube.com/watch?v=do_OxIXN14s). He identifies the individualistic and economic/transactional nature of Western rights culture.

<sup>64</sup> Rowan Williams, *Faith in the Public Square* (London: Bloomsbury Publishing Plc, 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, Alexander Goldberg, Tony Gray, Liz Ison, Richard Nathan, and Michael Newman (London: Routledge, 2019), 141; Rowan Williams, “Human Rights and Human Identity” (Fuller Theological Seminary, School of Theology: Payton Lectures, 2018), accessed November 5, 2021, [https://www.youtube.com/watch?v=do\\_OxIXN14s](https://www.youtube.com/watch?v=do_OxIXN14s). Rowan Williams, “Rights, Recognition and the Body of Christ” (Fuller Theological Seminary, School of Theology: Payton Lectures 2018), accessed November 5, 2021, <https://www.youtube.com/watch?v=yqOmWiNUPtQ>.

<sup>65</sup> Jeremy Waldron, “The Rule of Law and Human Dignity.”

enforceable hard law.<sup>66</sup> Waldron argues that consequently, to seek to find one single source of rights is misguided. This situation is compounded when the expanding nature of rights is accounted for.<sup>67</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 outworkings of policy and political decisions. What is perhaps helpful is to identify, as Waldron does, that rights frameworks are “in conclusory form the accumulated heritage of” moral and political arguments.

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

### ***Sociological implications of Changing Religious Practice for FTCT 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>68</sup>. Thus, practice of religion is either undertaken as a matter of individual choice rather than communal practice (Putnam and Campbell). Alternatively, religion operates communally through the leadership and practice of a select few (Davie). According to Jonathan Fox, outside the American and European

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<sup>66</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press: Oxford Scholarship Online, 2008), accessed November 5, 2021, <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199238781.001.0001/acprof-9780199238781-chapter-2>.

<sup>67</sup> See Jeremy Waldron, “The Rule of Law and Human Dignity”. Some key issues facing rights frameworks include AI, quantum computing, climate change, food security, refugees, modern slavery, 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>68</sup> Grace Davie, *Religion in Britain: A Persistent Paradox*, 2<sup>nd</sup> ed., (Hoboken, New Jersey: Wiley Blackwell, 2015) and Robert D Putnam and David E Campbell, *American Grace: How Religion Divides and Unites Us*, 2<sup>nd</sup> ed. (New York: Simon & Schuster, 2012)

Context, religion *per se* and religion in its entanglement with government, shows no sign of abating.<sup>69</sup>

It is perhaps consequently inevitable that while there is some ongoing recognition and acceptance of the private good that is understood to flow from FTGR, the public good is less well understood. A theory supporting FTGR as a human right, as well as 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.

### ***Political implications of changing religious practice***

From a political perspective FTGR faces increasing resistance from various quarters.<sup>70</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>71</sup> Consequently, religion is not uniquely singled out, but is one amongst several potential ethical frameworks within the liberal egalitarian approach. If society adopts a multivalent approach to consensus-building to establish core societal norms this is not problematic. What is problematic is the creation of a “neutral” space which excludes systems of thought, conscience, and religion from public debate. This is because the public exploration and articulation of virtue then necessarily occurs in something of a vacuum and there can potentially be a breakdown in moral consensus, as identified by

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<sup>69</sup> Jonathan Fox *A World Survey of Religion and the State*

<sup>70</sup> Jessica Giles “Religious Freedom in Global Context”

<sup>71</sup> Cécile Laborde, *Liberalism’s Religion*, 14, who explores and endorses a nuanced approach to liberal egalitarianism in her book *Liberalism’s Religion*, authority for this liberal egalitarian approach draws on John Rawls, Ronald Dworkin, Charles Taylor, Christopher Eisgruber, Lawrence Sager, Micah Schwartzman and Jonathan Quong.

MacIntyre.<sup>72</sup> The issues facing plural living together in a Western democratic context can be juxtaposed against non-Western approaches which can challenge pluralism from different perspectives.<sup>73</sup> Ultimately, as Stanley Hauerwas observes, governments become the body to which one looks in order to establish the moral compass and framework for civil society to live together.<sup>74</sup> This can result in a self-perpetuating lack of capacity building for peaceful plural living together under the rule of law. A theory of FTCR therefore needs to account for the importance of each aspect of the right. Accepting multivalent reasoning building consensus around the right's core content 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 (Laborde) may paradoxically be a consequence of enshrining fundamental rights into legally enforceable mechanisms in the absence of corollary duties. Criticisms have been raised from various quarters on this ground.<sup>75</sup> From a moral perspective it is argued that rights individualism is not only corrosive of the concept of duty but also can undermine a sense of community. Since 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 impacted on human capacity for expanding virtue. Despite the changing nature of religious practice, the memory of the virtues underpinning the operation

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<sup>72</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Indiana: University of Notre Dame Press, 3<sup>rd</sup> ed., 2007).

<sup>73</sup> Jessica Giles, "Religious Freedom in Global Context".

<sup>74</sup> Stanley Hauerwas, "What's Wrong with Rights".

<sup>75</sup> See, for example, the analysis of Hans-Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 4-6.

of the rule of law in the West may still, nevertheless, be relatively strong. This is due, perhaps to the influence of those who exercise vicarious authority (Davie). The situation is, however, accepting Davie's analysis, precarious. First 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 over dependence on law as societies' moral compass. This is coupled with decreasing understanding of concepts of equity and the exercise of discretion. The courts become adjudicators of disputes which 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 FTGR 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 FTGR 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 FTGR, as a legal right, requires a multivalent theoretical approach. In order to support its universal application, it needs to account for the concept of duty and the idea of the role of communities within civil society. In order to create an environment for its ongoing enjoyment it needs to support

individual capacity to explore virtue. An underlying rationale on this basis would provide a strong link with the intersection between FTCT and the rule of law.

In previously published work I began to explore the theory of common grace as a rationale underpinning FTCT.<sup>76</sup> That account identifies a multivalent dialogic approach to FTCT based in the theory of common grace. It invites dialogue with other faiths and thought systems to build consensus around the theoretical grounding of the right.

### ***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, this later type of grace has soteriological as well as realized eschatological impact.

N. R. 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>77</sup>

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<sup>76</sup> Jessica Giles “A theological justification for freedom of religion and belief as a universal human right” in ed. Dawid Bunikowski and Alberto Puppo, *Why Religion? Towards a Critical Philosophy of Law, Peace, and God*, (Cham, Switzerland. Springer, 2020).

<sup>77</sup> Nicholas. R. Needham, *Common Grace and the Work of the Christian Institute* (Newcastle-upon-Tyne: The Christian Institute, 2008), 11–12.

Needham proposes that the community of common grace (civil society) will be greatly advantaged by the activity of saving grace (the Church). Particularly, by the Church supporting and aiding the state to be a just social order.<sup>78</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>79</sup> It is based on the theory of the total depravity of humankind which 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>80</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 for 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>81</sup>

This was explored by Kuyper in respect of the restraining effects of common grace<sup>82</sup> and on the ability of unbelievers to perform both acts of civic good and demonstrate skills and

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<sup>78</sup> Nicholas. R. Needham, *Common Grace and the Work of the Christian Institute*, 18.

<sup>79</sup> See: Genesis 6.3; Psalm 145.9; Ezekiel 31.2, 3; 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>80</sup> Cornelius Van Til, *Common Grace and the Gospel*, ed. K Scott Oliphint, 2<sup>nd</sup> ed (Phillipsburg, New Jersey: Presbyterian and Reformed Publishing Company, 2015), 24.

<sup>81</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 Mouw, that there was: "... a kind of non-salvific attitude of divine favour 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*. The Stob Lectures 2000. (Grand Rapids, Michigan; Cambridge, UK: William B. Eerdmans Publishing Company, 2001), 9.

<sup>82</sup> Richard J. Mouw, *He Shines on All that's Fair*, 44 and Abraham Kuyper, *Common Grace. God's Gifts for a Fallen World. Volume 1: The Historical Section*, ed. Jordan J Ballor and Stephen J Grabill (Bellingham, WA: Acton Institute for the Study of Religion & Liberty, Lexham Press, 2015).

achieve accomplishments.<sup>83</sup> The theory of common grace is not totally at odds with the major alternative views which explain God's attitude towards creation and humankind, namely general revelation, natural law and natural theology.<sup>84</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 co-operative basis.<sup>85</sup>

Categorical statements about exactly how common grace operates, particularly, those that might appeal to the theory of human rights law, and its intersection with the rule of law, are difficult. This is because of the different methodological approaches to the disciplines of law and theology.<sup>86</sup> It is proposed that this intersection of law and theology supporting a plural theoretical rationale for FTCT thus requires a fresh methodological approach which is comfortable with the synthesis of theological and legal methodology. An approach whereby legal methodology is accepting of the more apparently subjective theological approach.

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<sup>83</sup> Abraham Kuyper, *Common Grace. God's Gifts for a Fallen World. Volume 2: The Doctrinal Section*, ed. Jordan J. Ballor and Stephen J. Grabill (Bellingham, WA: Acton Institute for the Study of Religion & Liberty, Lexham Press, 2019). For further discussion see Richard Mouw, *He Shines on All That's Fair*, 48–50. Particularly, in relation to multiple divine purposes encompassing not only the ingathering of humankind at the end of time but also of humankind's cultural endeavours and of creation.

<sup>84</sup> Richard Mouw, *He Shines on All That's Fair*, 90.

<sup>85</sup> Richard Mouw, *He Shines on All That's Fair*, 90–92 and Cornelius 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>86</sup> The otherness and mystery of God and of God's 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 cited in Richard Mouw, *He Shines on All That's Fair*, 89, observed that theology is best described as "a mystery discerning enterprise" rather than a "problem solving one". 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: Nicholas Needham, *Common Grace and the Work of the Christian Institute*, 21, and Mouw argues that God gives positive moral appraisals to non-elect persons: Mouw, 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": Cornelius Van Til, *Common Grace and the Gospel*, 79, argues, that the ontological trinity is the "concrete universal" for the philosophical starting point. Kuyper believed that some empirical observations are common to both groups whereas other aspects of, for example, the natural sciences are not: Cornelius Van Til, 53.



The reformed position is that common grace is the Holy Spirit's operation in or co-operation 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 and/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>87</sup> The difference is perhaps one of degree and willingness (or lack therefore) 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>88</sup> This emphasizes human solidarity and a universalizing meta-narrative possible through the endeavors of human rationality.<sup>89</sup> The implications are first, that there is a universal moral standard that can consensually inform international human rights laws. Second, that 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. Third, that discernment and dialogue is necessary to reach consensus on universal legal norms.<sup>90</sup>

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<sup>87</sup> This is because in both cases there is activity of some sort on the part of the Holy Spirit in co-operation with the individual, preserving the free will of the individual.

<sup>88</sup> According to Nicholas Needham, *Common Grace and the Work of the Christian Institute*, 26 and Richard Mouw, *He Shines on All That's Fair*, 16, Calvin explained that the Christian commandments and the law is within the conscience of all humankind. Some argue that this draws reformed theology too close to natural theology and that without scripture it is not possible to understand universal moral standards: Cornelius Van Til, *Common Grace and the Gospel*.

<sup>89</sup> Richard Mouw, *He Shines on All That's Fair*, 12. Although it is this aspect of reformed theology that led Alasdair MacIntyre to voice concerns about the tendency of Calvinism towards rationalism which he argues paved the way for enlightenment thought which relied on autonomous rational thought (rather than the Holy Spirit inspired biblical rational thought intended by reformed theology) Mouw, *He Shines on All That's Fair*, 66. Bavinck was insistent that God can only be known through scripture and that natural reason could not operate independent of scripture: Cornelius Van Til, *Common Grace and the Gospel*, 56.

<sup>90</sup> There is a debate amongst 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 Richard Mouw, *He Shines on All That's Fair*, 15–17, Calvin used positive, although qualified, terms to outline the capacity of those in the former category. According to Van Til, Kuyper saw plural engagement in civic life as essential. While emphasising the vital role that the Christian community plays in society: Mouw, 27.

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>91</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>92</sup>

This recognizes the potential for a multivalent theoretical basis for FTCR, the outworkings of which is a plural civil society.

If, as this Reformed Theological approach 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 FTCR is of utmost importance.

The underlying rationale proposed above, grounded in the theory of common grace, accounts for a multivalent approach to FTCR 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

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Dooyeweerd, who although he distinguished between believers and non-believers, argued that this was not a dividing line between Christian and non-Christian civil society groups, but that it was a dividing line between two spiritual principles that could arise in human civic engagement regardless of group allegiance: Mouw, 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, 26. Mouw, 36, 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 which facilitates human flourishing in another is something God delights over regardless of the faith of the actor.

<sup>91</sup> Richard Mouw, *He Shines on All That’s Fair*, 67.

<sup>92</sup> Richard Mouw, *He Shines on All That’s Fair*, 68.

approach is identified in the theology of rights proposed by Williams.<sup>93</sup> William'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.

Williams undertakes a sophisticated analysis of rights as relational and communal, building on the critique of Oliver O'Donovan,<sup>94</sup> echoing Emmanuel Levinas' concept of the other<sup>95</sup> and Nicholas Wolterstorff's bestowal of worth.<sup>96</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. William'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:

#### Article 29

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<sup>93</sup> Rowan Williams, *Faith in the Public Square*, 156–159; Rowan Williams, "Religious Liberties and the Need for Moral Universalism", 141; Rowan Williams "Human Rights and Human Identity" and "Rights, Recognition and the Body of Christ".

<sup>94</sup> Oliver O'Donovan, *The Ways of Judgement. The Bampton Lectures 2003* (Grand Rapids, Michigan: William B Eerdmans Publishing Company, 2005).

<sup>95</sup> Bettina Bergo, "Emmanuel Levinas," in *The Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta, (Fall 2019 Edition), accessed November 5, 2021, <https://plato.stanford.edu/archives/fall2019/entries/levinas/>.

<sup>96</sup> Nicholas Wolterstorff, *Justice Rights and Wrongs* (Princeton, New Jersey, and Oxford: Princeton University Press, 2008).

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

Article 29 stresses that duties are “the corollary of rights”. 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.<sup>97</sup>

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.

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 “building up a fully mutual network of personal nurture. A just situation is about each receiving their due and serving the community and their neighbour”. Echoing Krygiers’ observations on embedding the rule of law through

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<sup>97</sup> “Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 29.” (United Nations Office of the High Commissioner for Human Rights n.d.), accessed November 5, 2021, [Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 29 | OHCHR](#).

developing the capacity to explore virtue, Williams<sup>98</sup> 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 positioning in relation to the creator and the rest of an inter-woven system”. 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>99</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 whilst holding in tension the need to protect individuals from human rights abuses.<sup>100</sup> In this broader communal context rights abuses are not only individual wrongs but “tear at the seams of the social order”.<sup>101</sup> Like Krygier, Williams recognizes the need to address power, identifying the need to reimagine power “as freedom to share or bestow that which is most proper”.<sup>102</sup>

It is this deeper mutuality and responsibility that more fully informs not only human rights in general, but particularly for FTCR. This is because it addresses the essential communal aspect of FTCR. The exercise of FTCR is empty in the absence of religious and conscience-based groups. Their role in civil society stems both from their existence as groups of mutual support and loci for human flourishing. This links FTCR as foundational in nature for the rule of law, since these groups have a role in speaking truth to power when policy making may take a nation, or nations in a misguided direction.<sup>103</sup> In Krygier’s terms they are able to engage in tempering abusive power.

Williams’ theological 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

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<sup>98</sup> Rowan Williams “Human Rights and Human Identity.”

<sup>99</sup> Rowan Williams “Rights, Recognition and the Body of Christ.”

<sup>100</sup> Rowan Williams “Human Rights and Human Identity.”

<sup>101</sup> Rowan Williams “Rights, Recognition and the Body of Christ.”

<sup>102</sup> Rowan Williams “Rights, Recognition and the Body of Christ.”

<sup>103</sup> These ideas are explored by proponents of sphere sovereignty: Jonathan Chaplin, *Herman Dooyeweerd*.

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 recognize humanity” and engage in “communicative liberty”. He explains that: “the complex life of a just social order does not prescribe in advance what right of contribution each agent will make. It lets it be taught that in civil life”. Justice and rights require “a moment” in the social debate, an interaction and communication between individuals.

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 which 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.<sup>104</sup> Also, that resources exist in other communities to do the same. It is the core ideas of other-regarding and community that can be drawn out from other theological and philosophical accounts to align with Williams’ theological account, to create an expanded metanarrative informing FTCR. It is these concepts that are likely to facilitate consensus building around the rationale for FTCR from elsewhere.

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<sup>104</sup> See also: Jessica Giles, “A Theological Justification for Freedom of Religion and Belief as a Universal Right”.

The point that brings the proposed underlying rationale of FTCT and the rule of law together is found in the dialogic communal approach. This has 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 only be feasible 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 FTCT 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>105</sup> This takes us back to the conundrum identified earlier in this paper: how does society reach a consensus around common norms for public living together in circumstances which support individual and communal flourishing?<sup>106</sup> Added to this is the concern that if FTCT 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 will also be necessary to address how disputes between different civil society groups might effectively be resolved.

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<sup>105</sup> Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence. Legality, Legitimacy, and the Foundations of Law* (London: Routledge, 2019).

<sup>106</sup> Jessica Giles, "Tradition as a Peacebuilding Tool" and "A Theological Justification for Freedom of Religion and Belief as a Universal Rights".

Political and legal philosophers have addressed plural living together from various perspectives.<sup>107</sup> Hans Martien ten Napel<sup>108</sup> and Iain Benson<sup>109</sup> support a social pluralist approach. Ten Napel undertakes a sophisticated analysis of the interconnection between constitutionalism, democracy, and the rule of law. This 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 final section of this article explores the logic of a social pluralist approach in the light of the philosophical theology of Herman Dooyeweerd. This is not proposed as the only or definitive system relevant to supporting social pluralism. Dooyeweerd himself identified his philosophy as opening a discussion moving forward, rather than as a definitive answer to the basis for civil society interactions. Dooyeweerd's theological philosophy of civil society interactions is proposed because of its potential to appeal to theological and non-faith based ethical frameworks. While it is grounded in the Christian theological tradition it supports pluralism in civil society interactions. This is because it supports the variability in the analysis and definition of social structures<sup>110</sup> and their interaction.<sup>111</sup> 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 distinguishes Dooyeweerd from Talbott Parsons, Niklas Luhmann and Nicholas Wolterstorff, who regard social interactions and social structures as situated in current context<sup>112</sup>. Jonathan Chaplin

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<sup>107</sup> A helpful summary is provided by Hans-Martien ten Napel in his book "Constitutionalism, Democracy and Religious Freedom. To Be Fully Human." (Abingdon, Oxfordshire and New York, NY: Routledge, 2017). Jessica Giles, "Religious Freedom in Global Context"; Jessica Giles, "Tradition as a Peacebuilding Tool," in *Why Religion? Law, Religion and Tradition*, ed. Jessica Giles, Andrea Pin and Frank S Ravitch (Cham, Switzerland: Springer International Publishing, 2018), 153–191, and Jessica Giles, "A Theological Justification for Freedom of Religion and Belief as a Universal Right" in *Towards a Critical Philosophy of Law, Peace, and God* ed. Dawid Bunikowski and Alberto Puppo (Cham, Switzerland: Springer International Publishing, 2020): 101–136.

<sup>108</sup> Hans Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom*.

<sup>109</sup> Iain Benson in Hans Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 133–135

<sup>110</sup> Jonathan Chaplin *Herman Dooyeweerd*, 94.

<sup>111</sup> Jonathan Chaplin *Herman Dooyeweerd*, 93 and 108.

<sup>112</sup> Jonathan Chaplin *Herman Dooyeweerd*, 98 in respect of Wolterstorff.



proposes an anthropological reformulation of Dooyeweerd structural principles proposing that “normative design of social structures emerges out of a normative conception of the human person.”<sup>113</sup> Consequently, “Norms 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>114</sup> An anthropological approach to social pluralism would, potentially, accommodate current human rights theory more comfortably given its focus on human dignity as a grounding narrative. This might facilitate the integration of the resolution of rights claims onto the conceptual framework of sphere sovereignty.

It is proposed that the Christian theological metanarrative for social pluralism, whether grounded in the order of creation (Dooyeweerd), human nature (Chaplin) or God’s grace (Giles), could adopt the plural approach. This would adopt the mechanisms proposed by Dooyeweerd for the interactions (interlacements) within and between social structures and lift this to the higher metanarrative level to engage faith based and non-faith-based actors in building consensus around societies core norms. As such it is proposed that it can provide a nuanced approach which would be potentially 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 FTCSR and the rule of law.<sup>115</sup>

Dooyeweerd’s theological approach and the existence of a theological metanarrative distinguishes it from the social systems theories of sociologists Talcott Parsons<sup>116</sup> and Niklas Luhmann<sup>117</sup>. Parsons and Luhmann approach the analysis of civil society interactions from a

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<sup>113</sup> Jonathan Chaplin *Herman Dooyeweerd*, 106.

<sup>114</sup> Jonathan Chaplin *Herman Dooyeweerd*, 108.

<sup>115</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: Hans Martien Ten Napel, *Constitutionalism, Democracy and Religious Freedom*, 124-125.

<sup>116</sup> Talcott Parsons, *The Social System*, (Glencoe, Ill. Free Press, 1951).

<sup>117</sup> Mathias Albert, “Luhmann and Systems Theory”, *Politics*, 5 August 2016, 2019 version <https://doi.org/10.1093/acrefore/9780190228637.013.7>, accessed 11 January 2023.

sociological, rather than a theological perspective. As such they are descriptive of 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. It is proposed below that building a plural metanarrative into Dooyeweerd's theory could provide the type of grounding necessary supportive of civil society interactions for the type of capacity building necessary to embed the rule of law.

### ***The FTCR 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>118</sup> It conceptualizes society as spheres or groups of interests within which individuals interact independent of government regulation or control. Government intervention is acceptable where it is necessary for the administration of justice; the protection of the welfare of those who would otherwise be in need and to coerce contributions for the sake of national unity.<sup>119</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 that preceded him, absolute sovereignty rests in the Trinitarian God.<sup>120</sup> The individual, as God's image-bearer, has the capacity to contribute to,

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<sup>118</sup> See Craig G Bartholomew, *Contours of the Kuyperian Tradition: A Systematic Introduction* (Downers Grove, Illinois: InterVarsity Press Academic, 2021), 131. 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: see Craig G Bartholomew, 156. 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.

<sup>119</sup> Vincent E Bacote, *The Spirit in Public Theology. Appropriating the Legacy of Abraham Kuyper* (Ada, Michigan: Baker Academic, 2005), 81.

<sup>120</sup> This is based on the belief that The Trinity (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: Vincent E Bacote, 80; James Edward

and collaborate towards the common good, within their particular spheres of interest.

Government constitutes a sphere in and of itself. Each sphere has its own particular focus or common goal towards which members orientate their rule and decision making.<sup>121</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 FTCR and the rule of law. This is so even though modern society is differently constituted to that into which Dooyeweerd was writing.<sup>122</sup> Nevertheless, the theoretical approach proposed by Dooyeweerd has potential

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McGoldrick, *God's Renaissance Man. The Life and Work of Abraham Kuyper* (Welwyn Garden City, United Kingdom: Evangelical Press Books, 2000, second reprint, 2009), 62, 68–69. However, neither Kuyper, nor Dooyeweerd proposed a theocracy: Vincent E Bacote, 80. McGoldrick, *Abraham Kuyper*, 70. Kuyper did not support the idea of morality by consensus: James Edward 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 recognised 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: Jonathan Chaplin, *Herman Dooyeweerd*. 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). Whilst a theocracy would interfere with the concept individual free will, a confessional approach would require a majority of parliament to commit to the Christian faith. Since Kuyper and Dooyeweerd saw the Christian ethic as the role of individual politicians, in today’s multicultural political environment this would make their approach apologetic. For 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, as well as its missiology (the expansion of the church). The approaches are similar in so far 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>121</sup> Jonathan Chaplin, *Herman Dooyeweerd*.

<sup>122</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: Grace Davie, *Religion in Britain: A Persistent Paradox*, 2<sup>nd</sup> ed., and Robert D Putnam and David E Campbell, *American Grace: How Religion Divides and Unites Us*, 2<sup>nd</sup> ed. report that there is still strong individual commitment to religion but a weaker communal practice. Davie, writing in the 1990s, described this phenomenon as believing without belonging in the first edition of her book *Religion in Britain since 1945* (Chichester, West Sussex: Blackwell Publishers, 1994). In the second edition she observed that by the first decade of the 21<sup>st</sup> century this phenomenon evolved into a form of vicarious religion whereby a minority of individuals are overtly religious on behalf of a silent majority. Jonathan Fox *A World Survey of Religion and the State i-viii. Cambridge Studies in Social Theory, Religion and Politics*, (Cambridge: Cambridge University Press 2008) explores how, despite modernization and 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, *The Unfree Exercise of Religion: A World Survey of Discrimination against Religious Minorities*, (Cambridge: Cambridge University Press 2016).

because it re-emphasizes the importance of communal aspects of public living together and lays the foundations for a more complex plural public life.<sup>123</sup>

As a theory of society, sphere sovereignty anticipated the synthesis of fundamental rights and the rule of law proposed by jurists such as Bingham.<sup>124</sup> It did this by emphasizing the need to temper state sovereignty and foster human agency, and 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>125</sup>. This could be harnessed to articulate and resolve difference beyond the particular facts of specific cases arising on an *ad hoc* basis before the courts in human rights litigation. It could also be adapted to create a more universal approach to human rights. This is because it facilitates a dialogue around ethical choices governing public living together. Prioritization of ethical choices could be nuanced according to country context. A pluralistic metanarrative could inform a minimum baseline setting international norms.

Dooyeweerd’s theory of enkaptic interlacement is a complex system exploring the principles and functions definitive of various civil society spheres<sup>126</sup>. It proposes that to decide priorities in public life it is necessary to first understand the nature of the sphere/activity. Once this is understood, it is then possible to analyze and articulate its interaction with other types of spheres/activity. So, for example, if there is a clash between interests relating to family life

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<sup>123</sup> Vincent E Bacote, *The Spirit in Public Theology*, 155, for example, argues that key relevant principles for civic life are first, that religion must be respected. Second, that public life should foster FTCR. Further that the space to develop individual conscience is vital and its absence is dangerous. Third, engagement in public life is important, including the requirement for universal suffrage. Fourth, that government should be run in a spirit of compassion.

<sup>124</sup> Tom Bingham, *The Rule of Law*, (Harlow, England: Penguin Books, 2011).

<sup>125</sup> Jonathan Chaplin Herman Dooyeweerd, 110, 130–138.

<sup>126</sup> Dooyeweerd identifies normative types of social structures: religious communities (pistically qualified); marriages, families, trade unions, schools (morally qualified); states and international organizations (judicially qualified); theatres 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: Jonathan Chaplin *Herman Dooyeweerd*, 111.

and those relating to business/economic life, it is necessary to consider not just the particulars giving rise to the clash of interests, but the broader implications of resolving a situation. In the modern human rights context this could provide a sophisticated tool for understanding the broader implications of the narrow issues that tend to arise in FTICR litigation.<sup>127</sup> It could potentially 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>128</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 FTICR. 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 state as discrete individuals."<sup>129</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 societies minimum rules applicable to everyone. It also requires the capacity building of individuals within society. First to strengthen capacity to live with substantial differentiation in public life. Second, to be able to resolve clashes of interests as they arise. Dooyeweerd's approach to

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<sup>127</sup> Jessica Giles "Religious Freedom in Global Context".

<sup>128</sup> William Temple, *Christianity and Social Order*, (First published London: Penguin Books UK, 1942. London, Shephard-Walwyn Limited and S.P.C.K. 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. Which were 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>129</sup> Jonathan Chaplin *Herman Dooyeweerd*, 114

enkaptic interlacement requires an ability to understand and articulate both public virtues and the value to be attributed to them. This is so that those responsible can make choices conducive to human flourishing. It is also in line with the broader public consensus or meta-narrative for public living together.

To facilitate such plural living together it would be necessary not only to encourage debate amongst decision makers, but 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, what is needed is a reinvigoration of the capacity for rhetoric.<sup>130</sup> An increased capacity for rhetoric would need to be combined with a deeper understanding across society of the various ethical frameworks as well as the traditions (moveable rules which enable faiths to enculturate over time) of faith and conscience based groups.<sup>131</sup> It would then be possible to envisage an increased capacity for plural peaceful public living together, developing capacity for the enjoyment of FTGR 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 (Dooyeweerd) together with an understanding of the extent to which any given faith, belief or conscience group was able to adapt over time (Giles)<sup>132</sup>, and the capacity for articulating this through rhetoric (Perry)<sup>133</sup> within a constitutional system designed to foster debate, and articulation of virtues (Temple)<sup>134</sup> could provide the nuance approach necessary to not only resolve public difference but provide a solid foundation for embedding FTGR and fostering plural public living together under the rule of law.

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<sup>130</sup> John Perry, "Arguing Out of Bounds," 219.

<sup>131</sup> Jessica Giles "Tradition as a Peacebuilding Tool" in ed Andrea Pin and Professor Frank S. Ravitch, *Law, Religion and Tradition* (Cham, Switzerland. Springer, 2018).

<sup>132</sup> Jessica Giles, "Tradition as a Peacebuilding Tool".

<sup>133</sup> John Perry, "Arguing Out of Bounds".

<sup>134</sup> William Temple, *Christianity, and Social Order*.

## **CONCLUSION**

This article has argued that FTCR is foundational for embedding the rule of law from a theoretical and empirical perspective. It explored Krygier's sociological analysis of the rule of law, this 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. The article then posited that FTCR 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 it proposed an expanded theory to support FTCR as a foundational right for the rule of law. This expanded underlying rationale for FTCR was based on the theory of common grace, supporting a multivalent approach to building consensus. This was combined with Rowan William's other-regarding, community building rights theory. It was proposed that by situating this expanded theory for FTCR within the social pluralism of Dooyeweerd, this 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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