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## Tensions of Universal Claims and Contextual Sensitivities: The Case of Religious Freedom

*-An examination of Martha Nussbaum and Saba Mahmood's ways of mediating the tensions of religious freedom*

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# Abstract

This thesis uses a philosophical discussion to explore the tensions that result in the meeting between universal claims and particular contexts regarding human rights and how these tensions can be mediated by exploring the right to religious freedom. In order to do this, two approaches will be studied, one liberal and one postcolonial, represented by Martha Nussbaum and Saba Mahmood respectively. In comparing the approaches of Nussbaum and Mahmood, their arguments and positions become clearer, but also the nuances of the debate between universalism and contextualism. The right to religious freedom, with its many tensions between theory and practice, has been useful in exploring what values are at stake when we talk about human rights in general and how we can think about the apparent tension between universalism and contextual sensitivity. The thesis thus shows that there are more similarities between these two approaches than it may first seem and that they are not incompatible. This is argued to provide insight into possible ways of mediating human rights between theory and practice.

*Key words: Religious freedom, liberty of conscience, human rights, universalism, contextualism, postcolonialism, liberalism, universal values, Martha Nussbaum, Saba Mahmood*

Denna uppsats utgår från en filosofisk diskussion kring spänningen mellan universella anspråk och specifika sammanhang när det kommer till mänskliga rättigheter och hur dessa spänningar kan medlas utifrån en undersökning av religionsfriheten. För att åstadkomma studeras två inriktningar, den ena liberal och den andra postkolonial. Dessa inriktningar representeras av Martha Nussbaum respektive Saba Mahmood. I och med en jämförande analys mellan dessa två inriktningar är förhoppningen att deras likheter och skillnader blir tydligare, samt att nyanserna inom debatten mellan universalism och kontextualism blir tydligare. Det finns många spänningar mellan teori och praktik när det kommer till rätten till religionsfrihet och just denna rättighet är på så sätt användbar för att utforska spänningen mellan universalism och kontextualism när det kommer till mänskliga rättigheter. Denna uppsats visar därmed att det finns flera likheter mellan dessa inriktningar och att de därför inte kan anses vara oförenliga med varandra. Detta för med sig en insikt i möjligheter till att medla mänskliga rättigheter mellan teori och praktik.

*Nyckelord: Religionsfrihet, samvetsfrihet, mänskliga rättigheter, universalism, kontextualism, postkolonialism, liberalism, universella värden, Martha Nussbaum, Saba Mahmood*

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# 1 Introduction

Religious freedom is a human right enshrined in a number of international, regional and national documents. The Universal Declaration of Human Rights states that everyone has the right and freedom to (alone or in community with others) ‘manifest his religion or belief in teaching, practice, worship and observance.’ Despite its widespread acclaim in different legal documents and declarations, it is perhaps one of the trickier rights to understand and implement. There is no consensus on what is considered to be religious and thus neither of what, exactly, is to be protected. It is also unclear what should get precedence when the right to religious freedom comes into conflict with other rights, interests or claims. Furthermore, some may argue that religious freedom is superfluous if the other human rights are respected – and why should religious conscience receive special treatment?

Freedom of religion is often divided into two clauses, one protecting the absolute right to belief and the other the limited right to manifest this belief. This division of religious belief into internal and external components is one aspect of the right that can be considered to cause several problems. Such a distinction relates to understandings of the public/private sphere as well as the individual and the collective. Another source of problems is the nature of limitations that are allowed to be placed on religious practice and manifestation, often with reference to public order or morals, and to what extent this can be said to place an unwarranted burden on an individual’s liberty. Cases that have come up invoking the right to religious freedom have shown the difficulties involved when the state reserves the right to define what is considered a threat to public order and morals. This has caused some groups, such as religious minorities, to find little refuge in the right to religious freedom. There are thus several tensions surrounding the principle of religious freedom, as well as within the right itself.

The many questions surrounding the principle of religious freedom has caused it to be one of the human rights on which scholars from a variety of academic fields have an opinion. The question of what place religion should have in the public sphere and to what extent religious expression should be tolerated has been explored in many different fields such as philosophy, law, gender studies, ethics, and anthropology. Religious freedom has become a contested right where larger political debates take place; on the distinction between the private and public sphere, between the individual and the collective, and between the universal and the particular.

By making normative arguments about how religion should be dealt with, and how the right to religious freedom should be understood, something is also being said about how we should understand human rights in general. These questions thus touch upon the longstanding debate on whether human rights are universal to the extent that they can be applied directly, or if they need to be modified/translated when applied to local contexts. In order to explore these tensions, the work of the two prominent scholars Saba Mahmood (an anthropologist) and Martha Nussbaum (a philosopher), arguing from different standpoints, will serve as platform for discussion. This thesis hopes to contribute to a fruitful discussion on an important subject which concerns everyone, namely, how to achieve peaceful coexistence in pluralistic society, particularly with regards to religious expressions. If we think it is important to have a diverse society with peaceful and respectful coexistence, I argue that it is necessary to think carefully about how we should understand, think and implement human rights, for this reason, I have chosen to attempt to explore this difficult yet interesting topic.

### ***1.1 Purpose and research questions***

The purpose of this paper is to explore ways of mediating the tensions of religious freedom within the debate between universalism and contextualism. While Mahmood and Nussbaum can be said to represent different positions within this debate, they have been chosen because they complicate this apparent binary between universalism and contextualism. The purpose is thus not to decide which approach is more convincing, but to explore what ways of mediating the tensions of religious freedom these two scholars offer. This has been comprised into the following research question:

What tools do Saba Mahmood and Martha Nussbaum offer for mediating the tensions between universal claims and contextual sensitivity within religious freedom?

The following questions will guide the analysis:

- *What value is at stake within the principle of religious freedom?*
- *Is the value at stake universal or subject to contextual interpretation?*
- *How do Nussbaum and Mahmood understand universalism and contextualism?*
- *Should religion be singled out for protection?*
- *Does religious freedom offer protection for religious minorities?*

Since religious freedom is often thought of as offering particular protection for religious minorities, this group will be studied closer. Both Nussbaum and Mahmood are concerned with the situation of religious minorities and what protection religious freedom could offer. The

situation of religious minorities will thus serve as a way to test whether adhering to universal values or being more sensitive to context offers any further protection.

## ***1.2 Methodology and material***

As Grenholm points out, a reader always has a purpose when reading a text.<sup>1</sup> Being aware of the purpose is thus helpful when identifying which method is best used to find the information one is interested in. Since both Nussbaum and Mahmood make normative arguments, a comparative method is thought to be most useful. Furthermore, an underlying assumption of Mahmood and Nussbaum is that the dilemmas of religious freedom cannot be solved by for instance legal mechanisms alone. Therefore a complimentary philosophical discussion is suggested as useful in offering a wider perspective by illustrating how politics and law, as well as morals and ethics, are at interplay with each other. The method of a comparative *content analysis of ideas* is considered the most useful and appropriate when dealing with such abstract and philosophical material. This method consists of assessing the tenability of arguments and clarifying the logical connection within positions.<sup>2</sup> When used to compare two normative positions such as those of Nussbaum and Mahmood, this method is expected to help clarify the differences and similarities, as well as weaknesses and strengths of each approach.

The analysis of the normative arguments and approaches will itself be of a philosophical character. I will here follow the approach taken by Modée and Strandberg, where a philosophical discussion serves as a method for critical reflection on concepts and approaches.<sup>3</sup> This means, for example, that commonly known and used concepts such as “freedom” or “tolerance” are not taken for granted or left unexamined.<sup>4</sup> The meaning and understanding given to a concept is necessarily influenced by the approach that is taken, so what will be examined is *why* a specific concept is given importance, *how* it is understood and *what* implications this may have.

As is clear by now, the work of Martha Nussbaum and Saba Mahmood constitutes the primary material of this paper. In the second chapter I present several other scholars; Sullivan<sup>5</sup>, Danchin<sup>6</sup>, Leiter<sup>7</sup>, Namli<sup>8</sup>, Manga<sup>9</sup>, and Bangstad<sup>10</sup>, whose selected work will help develop the

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<sup>1</sup> Grenholm, Carl-Henric. *Att förstå religion – Metoder för teologisk forskning*, 2006, p. 213

<sup>2</sup> *Ibid.*, p. 213-215

<sup>3</sup> Modée, Johan & Strandberg, Hugo (eds.), *Frihet och gränser: filosofiska perspektiv på religionsfrihet och tolerans*, 2006, p. 14

<sup>4</sup> *Ibid.* p. 14

<sup>5</sup> Sullivan 2005

<sup>6</sup> Danchin 2008



theoretical framework.

### **1.3 Theoretical framework**

Within the study of human rights, the question of universalism and relativism is constantly present. This paper will consider these questions, but will also complicate the binary position of universalism versus contextualism. This section will only offer a brief overview of the theoretical framework of this paper which will be developed further in the second chapter.

Since the right to religious freedom is of primary interest in this paper, the discussion will take place around this principle. Whether one adopts a more universalistic or contextual view of religious freedom has significant consequences for how it is understood. It thus also has a significant influence on how one thinks the tensions of religious freedom should be mediated. An extreme version of universalism would suppose that the way human rights are currently understood is so fundamental that they can be applied as they are anywhere, in any context, without any translation or interpretation. In this view, human rights reflect values that are important to all humans and there is only one way to understand them, hence they can be applied directly as they are. On the other end we find relativism, where it is considered that moralities and values can only be understood within their particular contexts – they can thus not be understood in the same way in another tradition. In this view, an action can be morally wrong in one context while being morally right in another.

Although Grenholm's purpose is quite different than mine, as he wants to explore how Christian ethics meets with humanistic ethics and especially so with its universal claims, I find him useful in order to gain a better understanding of the span between universalism and cultural relativism and the many nuances of this tension.<sup>11</sup> Grenholm speaks of *ethical universality* and *ethical contextualism* as positions which approach the question of universalistic and relativistic claims differently.<sup>12</sup> There is thus a span with universalism at one end, and relativism at the other end. Universalism argues that it is both possible and necessary to make universal claims for morality to hold any meaning. There is, according to this view, *a common moral language* which

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<sup>7</sup> Leiter 2013

<sup>8</sup> Namli 2013

<sup>9</sup> Manga 2014

<sup>10</sup> Bangstad 2011

<sup>11</sup> Grenholm, Carl-Henric, *Bortom humanismen: en studie i kristen etik*, 2003, p . 15

<sup>12</sup> *Ibid.*, p. 17

can be accepted regardless of the particular social or cultural context. Contextualism and relativism have sprung out of the postmodern and postcolonial critiques against ethical universalism, which make universal claims of Western conceptions of morality– thus claiming that everyone should adhere to these particular conceptions.<sup>13</sup> Contextualism generally rejects any absolute claims to universality, arguing for the need to pay attention to *particular contexts and realities*. It is different from relativism, which views moralities as *only* understandable within their particular traditions in which there is no common moral language. Contextualism thus moves between universalism and relativism, critiquing universal claims of Western conceptions, yet not going so far as relativism in saying that moralities can only be understood within their particular context. I think promoters of the different views sometimes all too quickly turn to criticism of ‘the other side’, leading to misunderstandings. Yet the debate, I would say, need not take place between two (incompatible) extremes, as I hope to illustrate when considering Mahmood and Nussbaum. This section will thus serve to illustrate the different nuances in the span from universalism to relativism.

Let’s take a look at how the right to religious freedom would be applied in practice if we adopt some of these views. As we will see in more detail in chapter 2, Edda Manga and Sindre Bangstad each go into a critique of Nussbaum and Mahmood respectively. Manga argues that the universal view (which is closely related to the liberal approach) fails to understand the importance of religion in people’s lives. This view, argues Manga, is stuck in a binary thinking which makes it blind to seeing and understanding traditions other than its own. Manga takes the example from Mahmood’s book *Politics of Piety*<sup>14</sup> in which a women’s pious mosque movement in Egypt is used to illustrate how the universalistic liberal approach fails to pick up the nuances and complexities of human life. This thinking results in an inability to even attempt to understand why women choose to participate in this movement since they are automatically discarded as victims of subordination and male dominance. In this liberal-secular view, religious freedom as it is understood in the liberal approach places a strong emphasis on the values of *freedom* and equality, and would be likely to disregard the participation of the women in the pious movement; seeing it as a result of subservience rather than free choice. In this way, an

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<sup>13</sup> Grenholm, Carl-Henric, *Bortom humanismen: en studie i kristen etik*, 2003, p. 18

<sup>14</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, Princeton, 2005

extreme universalist view which refuses to look at particular realities can result in a violent (as Namli argues) form of human rights.

Meanwhile, Bangstad is skeptical of the way anthropological work such as that of Mahmood in *Politics of Piety* can become apologetic of illiberal practices in its attempt to pose a critique of the liberal approach and its universal claims. While Mahmood herself describes her ambition with the book as an attempt to “lay bare a parochial and narrow conception of autonomized agency that refuses to grant legitimacy to any other form of subjectivity or criticality”<sup>15</sup> Bangstad views it as culturalist.

As we have seen, relativism and contextualism came from a critique of Western universalistic claims. To different degrees, these views can also adopt a postcolonial critique. Postcolonialism “continues in a new way the anti-colonial struggles of the past” by offering a critique of the ‘grand narratives’ of the “dominant western ways of seeing things” - and of which universalism is said to be part.<sup>16</sup> But its subject of concern is not only with those who live in nations who have been colonized, but “its fundamental sympathies [are also] for the subaltern, for the peasantry, for the poor, for the outcasts of all kinds.”<sup>17</sup> The main concern in a postcolonial critique is thus power relations, whether they are based on gender, ethnicity, religion or something else. What is central in this approach is that when dealing with rights claims one must consider both the particular context in which it is taking place and the larger context of global politics of which it is part. This is what Mahmood attempts to do in *Politics of Piety*, where a women’s pious movement is not studied in isolation, but also in relation to it being situated in post-colonial Egypt. Likewise, as we shall see in this paper, religious freedom in its meetings with particular realities must be understood within the larger context of global power relations.

Postcolonial critique, such as it is employed by Talal Asad (of whom Mahmood is a former student), makes a critique of the (what I shall henceforth call) Western-liberal-secular<sup>18</sup>, hegemonic<sup>19</sup> standing from which it claims neutrality and objectivity. Thus, in the anthology *Is Critique Secular?*<sup>20</sup> Asad and Mahmood enter a discussion with Judith Butler around the Danish

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<sup>15</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, Princeton, p. xii

<sup>16</sup> Young, Robert J.C., *Postcolonialism: an historical introduction*, 2001, p. 4

<sup>17</sup> *Ibid.*, p. 114

<sup>18</sup> In *Politics of Piety*, Mahmood speaks of the secular-liberal in describing the discomfort of seeing religious outside the appearance of religion outside of “the private space of individualized belief.” p. xi

<sup>19</sup> In this essay, ‘hegemony’ is understood as “the social, cultural, ideological, or economic influence exerted by a dominant group” (Merriam Webster)

<sup>20</sup> Asad, Talal (ed.), *Is critique secular?: blasphemy, injury & free speech*, 2009

cartoon controversy, as it “provided an extraordinary platform for rethinking the putatively secular foundations and premises of critique.”<sup>21</sup> The Danish cartoon controversy serves to illustrate how the West claims to be posing a critique from a neutral standpoint (for example in its condemnation of the Muslim’s worlds reaction to the cartoons, arguing that they lacked tolerance for freedom of expression), while other forms of critique falling outside of this secular-liberal framework are considered irrational, unmodern and biased. Thus, those supporting the publishing of the cartoons argued that they were arguing from an unbiased and neutral position, simply affirming their right to freedom of expression – as such, there was nothing more to discuss and any argument against it was automatically considered to be coming from an illiberal standpoint, thus not worth listening to. Asad and Mahmood’s work is focusing on an attempt to illustrate the double standards and inequalities that come as a result of the hegemonic standing of the Western-liberal-secular and its particular understanding of the world. What they argue is not that this view lacks merits, but that it needs to be viewed as one understanding among others. Furthermore, they argue that the reason why this particular tradition has been accepted as universal is related to international power politics, where the West is currently dominating.

Judith Butlers’ response to Asad and Mahmood is interesting, as she accepts their criticism, yet adds that “our critiques of these fields are themselves driven by normative commitments that aim to remake our affective and moral responses to the world we inhabit.”<sup>22</sup> I find a similar notion in Bangstad’s critique of Mahmood, who argues that posing such a critique risks becoming apologetic of illiberal practices. We will look into this further in the next chapter.

To sum up this brief discussion, postcolonial critique is related to contextualism in that it does not accept claims to universality as neutral but places them within a tradition of unequal relations. It should also be clear by now that the debate on universalism versus contextualism is not one between two clearly defined positions which are mutually exclusive, but that it is a span of many nuances. A universalist position can have degrees of contextual sensitivity, while a contextualist usually has some principles which are considered universal (even if not made so explicitly). We will continue to develop this theoretical framework and deepen our understanding for these positions and concepts in the second chapter.

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<sup>21</sup>Asad, Talal (ed.), *Is critique secular?: blasphemy, injury & free speech*, 2009, p. 1

<sup>22</sup> *Ibid.*, p. 12

## 1.4 Delimitations

The ambition of this paper is to explore the tensions between universalism and contextualism within the right to religious freedom, although it will do so primarily within the study of Saba Mahmood and Martha Nussbaum. I will neither be able to include their entire work within the scope of this paper and have thus limited the analysis to selected works that have been assessed as relevant for the purposes of this paper. Considering that the argumentations Nussbaum and Mahmood develop are highly abstract and philosophical at times, and the language tends to be (sometimes unnecessarily) intellectual (especially so Mahmood), I do not claim to have a full understanding of their entire argumentations or positions, nor the details of their ideas. I have merely attempted to distill what I consider to be central to the purposes of this paper and found Nussbaum and Mahmood to provide an interesting platform for discussion. Thus, even though I haven't captured every nuance of these complex approaches, I hope to have grasped them sufficiently to answer the questions and issues at hand in this paper.

Before even choosing Nussbaum and Mahmood as the primary material of this paper, several different thinkers were considered. I had started off with the vague idea of wanting to discuss something concerning the secular-religious relations after having read Talal Asad's *Formations of the Secular* in a previous course. An obvious candidate for a comparison with Asad<sup>23</sup> would have been Charles Taylor.<sup>24</sup> The focus of the paper would then have been more on secularism and the secular rather than religious freedom. There are also several other interesting writings on the subject, for example the anthologies edited by Judith Butler et al.<sup>25</sup> on the role of religion in the public sphere and by Craig Calhoun et al.<sup>26</sup> on rethinking secularism, to name just a couple. Abdullahi An-Na'im<sup>27</sup> writes interestingly about reconciling sharia with secularism and Tariq Modood<sup>28</sup> about the place of religion in a multicultural society. Although the issue of secularism is closely related with understandings of religion, as well as the debate between universalism and contextualism, I chose instead to focus on religious freedom as this also brings the subject of the paper more directly into the field of human rights.

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<sup>23</sup> *Formations of the secular* (2003), *Is Critique Secular?*. 2009

<sup>24</sup> *A Secular Age* (2007), *Secularism and Freedom of Conscience* 2011

<sup>25</sup> *The power of religion in the public sphere* 2011

<sup>26</sup> Calhoun, Craig J., Juergensmeyer, Mark & VanAntwerpen, Jonathan (eds.), *Rethinking secularism*, 2011

<sup>27</sup> An-Na'im, Abdullahi, *Islam and the secular state: negotiating the future of shari'a*, 2008

<sup>28</sup> Modood, Tariq, *Multicultural politics: racism, ethnicity, and Muslims in Britain*, 2005

Mahmood and Nussbaum were finally chosen because they are prominent within the field and because they articulate well some of the most difficult questions and tensions concerning religious freedom, thereby also complicating the apparent incompatibility between universal claims and contextual sensitivity. Both Mahmood and Nussbaum also relate to feminism (more or less directly) when discussing religion and religious freedom, which neither Taylor nor Asad do (to my knowledge).

### ***1.5 Disposition***

This paper is divided into five chapters. The majority of the paper is devoted to the chapters that present and analyze Nussbaum and Mahmood's approaches. The second chapter will develop the theoretical framework of the paper and present previous research on Nussbaum and Mahmood. The final chapter will be a concluding discussion where the analysis questions are answered more concretely and the comparison between Nussbaum and Mahmood made clearer. The paper will end with some final comments and reflections on the results of the study and what it could mean beyond the comparison between Nussbaum and Mahmood.

## 2 Theoretical development and previous research

In this chapter, I will develop the theoretical framework introduced in the previous chapter by offering a research overview of some contemporary scholars writing on religious freedom from a liberal and postcolonial standpoint. I treat the universalist approach as part of the liberal tradition and the contextual approach as part of a postcolonial critique. The concepts applied throughout the paper, such as universalism, contextualism, and postcolonialism should thus become clearer before we enter the chapters on Nussbaum and Mahmood. My discussion of previous research goes hand in hand with the analysis of Nussbaum and Mahmood. This overview will thus serve to form the positions of which I argue Nussbaum and Mahmood are part.

Toward the end of this chapter I also consider some previous research which has offered critiques of both Nussbaum and Mahmood and their respective approaches (centered on the issue of feminism). I will build on this previous research by offering a comparison between Nussbaum and Mahmood. By so doing I believe their differences as well as their similarities will become more apparent. This paper is also more focused on their approach as applied to the right to religious freedom rather than feminism.

### ***2.1 Religious freedom in international documents – a brief overview***

Before we move on into theoretical development and previous research, we need to consider how the principle of religious freedom is commonly formulated in international documents. Religious freedom is protected in a number of international and regional conventions, declarations and charters as well as in national laws and constitutions. To name just a few, the right to religious freedom is enshrined in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights. Below we will see some examples of how the right to religious freedom has been formulated:

#### *Universal Declaration of Human Rights, Article 18:*

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

*Universal Declaration of Human Rights, Article 29 (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.

*International Covenant on Civil and Political Rights, Article 18:*

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

*African Charter on Human and Peoples' Rights, (Banjul Charter), Article 8:*

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

*European Convention on Human Rights, Article 9:*

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

One thing these formulations have in common is their vagueness regarding what exactly is to be protected. Furthermore, they all include a clause stating in which cases the right is subject to limitations (as is the case with most if not all human rights and freedoms) with respect to public order, morals, health and the rights and freedoms of others.



This vagueness opens up a space, a form of margin of appreciation, in which the state interprets what is to be understood as public order and morals and who poses a threat. As we shall see later on, both Nussbaum and Mahmood consider this vagueness to pose several dangers, particularly concerning the vulnerability of minorities at the hands of majoritarian rule. Minorities do indeed often fall victim to majoritarian rule and the ability to restrict the right to religious freedom has sometimes been used for that purpose. This, I will argue in this paper, is an illustration of how benevolent and well-intentioned rights and freedoms can, in the wrong hands, have consequences in their implementation that go against their very purpose.

There are many other dilemmas, tensions and contradictions related to the principle of religious freedom, some of which we will consider in the following sections. In the following chapters we will consider Nussbaum and Mahmood's normative arguments of *how we should* mediate these tensions and issues. In so doing, we will enter the debate between universalism and contextualism on how rights should be understood and implemented.

## ***2.2 Defining religion***

The right to religious freedom relies on the underlying assumption that religion is something in need of special protection. It was thus a natural to include it in the Universal Declaration on Human Rights. Indeed, the right to religious freedom continues to be held in high regard. Yet, as mentioned in the introduction of this paper, it is one of the trickier rights to understand and implement, since it relates to difficult issues such as the “proper” distinction between belief and exercise, between the private and the public, but also because there is no clear understanding of what religion actually is. This paper will touch upon all these issues as well as whether there is any reason to offer special protection to religion as such. This section is intended to show these difficulties but also (indirectly) show how these difficulties depend on the issue of universality – where a ‘neat and tidy’ right is expected to be the solution even when meeting with complex realities.

This section will problematize the attempt to form a tidy definition of religion which is applicable in all cases. I shall argue that such attempts relate to the assumptions that human rights can be adopted as positive law and applied equally on anyone without paying attention to particular contexts.<sup>29</sup> For this reason I have chosen to take Winnifred Sullivan's *The*

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<sup>29</sup> Namli 2013 develops this critique in her article.

*Impossibility of Religious Freedom* as a point of departure for this discussion as it questions the ability of a right to offer protection for something as ambiguous as religion – and how this has to do with the difficulties of defining religion. The difficulty lies not so much with the impossibility of properly defining what religion is, but that the attempt is even made – or that it is supposed that there is something out there which can be captured and labeled as ‘religion’.

Sullivan came to such an insight when serving as a “religion expert” at the trial of *Warren vs Boca Raton* in Florida; “[d]rawing a line around what counts as religion and what does not is not as easy as periodically recommitting ourselves politically to religious freedom.”<sup>30</sup> Thus, simply proclaiming one’s support for religious freedom doesn’t solve the many issues which surrounds it.

The trial which Sullivan attended as an expert concerned a multi-faith cemetery where families of different faiths had buried their loved ones. Seven families had come together to make a case against the City of Boca Raton regarding the regulations of the cemetery which they claimed had violated their right to religious freedom. The families had decorated the memorial places of their loved ones with different ornaments, symbols and other artifacts. The plaintiffs were Catholic, Protestant and Jewish and many of the artifacts were commonly known religious artifacts, such as crosses, statues of Virgin Mary and Jesus, and stars of David. But many of the objects around the graves were not such commonly identifiable religious artifacts; they were stones, ropes, benches, cherubs, flower pots, and pillars which were given meaning as they were used to decorate or mark the graves.

The purpose of the ‘experts on religion’ was to determine whether the plaintiffs’ activities at the local cemetery were to be considered religious and thereby determine whether the plaintiff’s right to free exercise of religion had been *substantially burdened*.<sup>31</sup> This was necessary in order to establish whether the case concerned a violation of religious freedom or whether it fell within the City’s right to restrict religious expression. Throughout the trial, the cross-examination of the plaintiffs seemed to be aimed at testing both the degree of piety of the plaintiffs and the degree to which their actions corresponded with religious orthodoxy. The judge at the trial, together with the city’s lawyers, asked questions such as: “*The marble chips that are there, do they have any independent religious significance to you?*”, “*Does this bench have any*

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<sup>30</sup> Sullivan, Winnifred Fallers, *The impossibility of religious freedom*, 2005, p. 1

<sup>31</sup> *Ibid.*, p. 55

*religious significance?*” and “*Do you consider a glass pot or a cement vase to be an expression of religious significance in the Jewish law or tradition?*”<sup>32</sup> As Sullivan rightly states, “[l]aws protecting religious freedom invite such intrusive and offensive questions.”<sup>33</sup>

What the court failed to understand was that the objects didn’t *in themselves* or *independently* hold any religious significance; their meaning was created within the particular context in which the plaintiffs placed the objects around their loved ones’ graves. The court, having at hand a vaguely formulated right to religious freedom, found little guidance other than resorting to orthodoxy when considering these claims of religious conscience; “religiously motivated activity, as the City understood it, would be authoritatively prescribed and defined from above, not improvised from below.”<sup>34</sup> But in their testimonials, the plaintiffs didn’t cite sources of authority to support their actions but instead referred to traditions carried out from generation to generation in their families and communities:

The plaintiffs often elaborated on biblical accounts, making such untutored and naive, sometimes plainly heterodox, efforts to articulate positions of biblical interpretation and theology, searching their personal repertoire of stories and images and teachings to explain what they had done and why.<sup>35</sup>

Unfortunately, their attempts were unfruitful as such descriptions didn’t fit into the judge and city lawyers’ understanding of what constituted a legitimate religious practice. The result was that the decorations of the graves were considered to be a matter of ‘purely personal preferences’ rather than expressions of religious conscience.<sup>36</sup>

Although much more could be said about the *Warner v. Boca Raton* trial, for the purposes of this paper it will not be discussed further here. The discussion of the case should have served to illustrate the difficulties arising when religious freedom meets with particular realities and how the right as it is most commonly formulated provides little guidance in dealing with hard cases. It also serves to illustrate the problems that arise when it is left up to courts to evaluate whether someone’s practices are religious or not, and thereby determine whether they deserve protection or not. If the free exercise of religion is considered important in a democratic society, perhaps Sullivan makes a valid point; “freedom and equality of religion are better realized, and liberty better defended, if religion, *qua* religion, is not made an object of specific

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<sup>32</sup> Sullivan, Winnifred Fallers, *The impossibility of religious freedom*, 2005, pp. 43, 123, 130

<sup>33</sup> *Ibid.*, p. 123

<sup>34</sup> *Ibid.*, p. 35

<sup>35</sup> *Ibid.*, p. 39

<sup>36</sup> *Ibid.*, p. 35

legal protection.”<sup>37</sup>

The argument which Sullivan makes, I argue, is about assumptions of there being universal solutions that can be applied equally and thereby holding a neutral position. The court, in resorting to orthodoxy as a standard on which the plaintiff’s actions were measured, relates to the tension arising when universal claims are made without any sensitivity to context. In thinking that religion can be defined in ‘a tidy way’, understandings of religion which fall outside of this definition are automatically excluded. If the aspirations of laws protecting religious freedom are to protect people’s right to freely exercise their religion, then something is wrong when this aspiration does not translate in its meeting with reality.

A court deciding on whether a person’s right to religious freedom has been violated needs to consider the law at hand, and the law, as we have seen, is often vague and open to interpretation. This is not problematic in itself, since it would be more problematic if the law gave a definite definition of what religion is. But the reality is that when the court is dealing with a particular case, it must define what is to be considered legitimate expressions of religion when deciding whether there is a case of infringement on religious freedom. An underlying question to this paper is thus whether religious freedom in the form of laws or rights is really useful in protecting people’s desire to live and manifest their religions. This question, I shall argue, is not only relevant on the local and national level as in the case of Boca Raton, but also when it comes to human rights on an international level.

### ***2.3 The liberal approach: toward universal claims***

We will now develop the theoretical underpinnings of the liberal approach as it is understood in this paper. As was stated in the introduction to this chapter, I relate universalism to the liberal tradition. The liberal approach which is studied in this paper primarily draws from the Kantian and Rawlsian traditions; treating each person as an end and placing the values of liberty and equality at the center. These are then formulated as universal claims which can be arrived at through rational thinking building on Rawls’ *veil of ignorance* and *original position*.

When considering the span between universalism and contextualism, I will identify two positions which would be situated at different points of this span, yet nonetheless belong to the same liberal tradition. For this purpose, we will look into the arguments of Brian Leiter so that

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<sup>37</sup> Sullivan, Winnifred Fallers, *The impossibility of religious freedom*, 2005, p. 138

we can later compare him to Nussbaum. As we shall see, Leiter moves more towards adhering to universal claims with as few exemptions as possible while Nussbaum makes space for a more generous contextual sensitivity in the form of accommodation.

Leiter follows the Rawlsian theory of justice (with some minor alterations<sup>38</sup>) where the principle of equal liberty is the principle that could be agreed upon by rational individuals when thinking within the ‘original position.’<sup>39</sup> Knowing that they will belong to some conviction, but not whether they will belong to the minority or majority, whether they will be privileged or unprivileged, Rawls argues that each person is more likely to choose *equal liberty of conscience* as a basic principle as a way to avoid prosecution.

A central issue within the liberal approach concerns how to deal with religious difference, whether religion as such deserves special treatment (sensitivity to context) or whether it is better (and more equal) to remain neutral and apply the law equally. In *Why Tolerate Religion?*, Leiter is interested in examining whether there is any reason, moral or otherwise, for granting *special* protection to religious conscience beyond the more general protection offered by liberty of conscience. Arguing from the point of view of the U.S. context, where religious expression has considerable protection, Leiter asks the question of why religion as such receives special protection and accommodation, while other forms of conscience generally do not. The arguments which Leiter puts forward relate to the question of whether offering accommodation (in the form of exemptions from generally applicable law) can be reconciled with equal treatment within a democratic society.

While Leiter accepts that religion is a significant part of many people’s lives, and a democratic and liberal state should tolerate religion as such (which Leiter refers to as *principled toleration*), there is no moral ground for demanding more than toleration. Principled toleration thus establishes a minimum for coexistence among difference, where one is expected to “put up with” different practices, even those one disagrees of.<sup>40</sup> The principle of toleration is also central to the idea of the individual’s liberty, since without toleration (both from individuals and the state) this liberty would be infringed on. Liberty is thus central to justifying the Western ideal of religious freedom. Nonetheless, one person’s liberty ends where another’s begins, and thus there

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<sup>38</sup> Leiter’s discussion on Rawls build on the latter’s earlier work *A Theory of Justice* (1971) rather than *Political Liberalism* (1993) which is an update of the former.

<sup>39</sup> Leiter, Brian, *Why tolerate religion?*, 2013, p. 15-16

<sup>40</sup> *Ibid.*, p. 3

must be some rules as to where the limits of liberty should go. Such a view is not sustainable, however, since it is impossible to maintain fully one person's liberty while also maintaining another's liberty, especially if these conflict. Thus, Danchin (which we will consider further in section 2.4), argues that liberal theory can resolve such conflicts:

[B]y (tacitly) positing a hierarchy of values - or perhaps a single, trumping, "covering value" - or by drawing "domain restrictions" between spheres of incommensurable values (for example, between a putative public "secular" sphere and a private "religious" sphere).<sup>41</sup>

Could liberty form such a "trumping, covering value"? That is part of the issue which will be explored in this paper. Because the human rights regime, as it is currently understood, is said to be indivisible and equal, yet when meeting with reality such a stance cannot be maintained. The question is then what should guide us when dealing with such conflicts. When it comes to religious freedom the dominant understanding (as can be seen in all the different international documents in section 2.1) rests on a distinction between the public and the private, where religion is free and absolute in the private sphere, yet subject to restriction in the "secular public sphere."

As we saw in section 2.1, limitations can be placed on the right to religious freedom if it is considered to pose a threat to the rights or freedoms of others, or to public order and morals. While these restrictions offer some guidance as to when a state may justifiably restrict a person's religious freedom, it is unclear at what point a claim of conscience becomes a threat. In order to identify the point at which a burden is necessary, Leiter proposes John Stuart Mill's Harm Principle as guidance; "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>42</sup> Furthermore, there is no reason why the burden should go the other way, argues Leiter, to the point that it becomes *burden-shifting*.<sup>43</sup> This is however also quite a vague proposition. In this sense, Leiter's reasoning is more or less in line with the limitations formulated in international documents in that a practice may not pose a threat to others.

Leiter argues that an exemption of a claim of conscience can be said to be burden-shifting when it demands of others or the state that they go beyond toleration. An example of this could be claiming that one's conscience demands that one be exempted from being drafted to the

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<sup>41</sup> Danchin, Peter, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law', *Harvard International Law Journal* (2008), p. 313

<sup>42</sup> Leiter, Brian, *Why tolerate religion?*, 2013 p. 22

<sup>43</sup> *Ibid.*, p. 100

national army. Such an exemption, it could be argued, poses a threat to national interests, and it is not unreasonable, argues Leiter, for a state to establish some *vision of the good*; “a vision, broadly speaking, of what is worthwhile or important” in a society.<sup>44</sup> Leiter gives the example of teaching evolution theory in public schools which involves the state making certain assumptions, yet it cannot, argues Leiter, be said to violate the principle of tolerance. In this regard the state is not neutral, yet it needs to remain compatible with the principle of toleration; while evolution theory is taught in public schools, people are free to believe whatever they want. Even illiberal values must thus be granted the right to expression, unless they violate the Harm Principle. However, a general ban on expressions that doesn’t fit into the state’s vision of the good (such as that the ban on ostentatious symbols and clothing in France) is not compatible with the Harms Principle and principled toleration.

Concerning the dilemma of courts defining religion (as we explored in section 2.2), Leiter is also skeptical; “how are courts to determine whether someone’s claim to defy the law is *really* a claim of conscience?”<sup>45</sup> He argues that there is no moral basis for granting religious claims of conscience special protection, and to my knowledge, neither does Sullivan. Neither Sullivan nor Leiter thus seem to think that claims of conscience *in general* can be adequately treated by courts. Yet Leiter’s worry seems to have more to do with the risk of making the mistake of exempting someone from generally applicable law whose claim of conscience is not sincere. If I understand Sullivan correctly, her concern, on the other hand, lies more with how the narrow and orthodox interpretations of the court fail to grant protection to those expressions of conscience which are “improvised from below.”<sup>46</sup> Considering the case of Boca Raton, it is perhaps unlikely that the decoration of graves could be said to pose a threat to the rights and freedoms of others or to public order or morals, yet the City argued that the cemetery rules served a purpose which should not be exempted from. As we shall see further on (particularly in section 4.3), the vagueness of the principle of religious freedom opens up for interpretations by the state of what constitutes a threat, which can result in inconsistent implementation and sometimes serve to restrict unpopular groups of society.

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<sup>44</sup> Leiter, Brian, *Why tolerate religion?*, 2013, p. 118-119

<sup>45</sup> *Ibid.*, p. 95

<sup>46</sup> *Ibid.*, p. 35

In arguing for tolerance of religious expressions, Leiter is adopting what he himself refers to as “minimal” respect.<sup>47</sup> He contrasts this to “affirmative” respect, which he argues that Nussbaum adopts in her approach. Nussbaum considers mere toleration to be “too grudging and weak.”<sup>48</sup> As we have seen minimal respect refers to principled toleration with the limits of burden-shifting and the Harms Principle. In this view, exemptions from generally applicable law to a religious minority should be given in a restrictive manner; it is argued that this is the best way to promote equality. Affirmative respect demands more than just toleration, it demands that an effort is made to accommodate difference. This view, adopted by Nussbaum, also argues that accommodation is needed precisely to ensure equality.

As we shall see in more detail later on, Nussbaum argues that since laws are generally made with the majority in mind, minority claims of conscience should be accommodated to the greatest extent possible in order to balance this unfair disadvantage. Not granting exemptions from generally applicable laws could “impose a burden on matters of minority conscience, since, for obvious reasons, societies are unlikely to create legal prohibitions that burden widely accepted demands of conscience, religious or otherwise.”<sup>49</sup> While Leiter is aware of the unfair burden placed on minorities as a result of laws being formed by the majority in mind, he still argues that toleration is all that can be demanded. Furthermore, Leiter argues, the unfair burdening of minorities is no more unacceptable than the current advantage given to religious conscience.<sup>50</sup>

While both Leiter and Nussbaum can be said to belong to the liberal tradition, and both believe it is both possible and desirable to make universal claims, they still arrive at different conclusions regarding the treatment of religious freedom. This illustrates how the debate between universalism and contextualism is more complex than it might seem at first.

#### ***2.4 The postcolonial critique: toward contextual sensitivity***

We will now consider the postcolonial approach which offers a critique of the liberal approach. The postcolonial approach is necessarily more oriented towards contextualism since it is skeptical of universal claims. Yet as with the two strands within the liberal approach, represented

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<sup>47</sup> Leiter, Brian, *Why tolerate religion?*, 2013, p. 73

<sup>48</sup> Nussbaum, Martha C., *Liberty of conscience: in defense of America's tradition of religious equality*, 2008, p. 24

<sup>49</sup> Leiter, Brian, *Why tolerate religion?*, 2013 p. 101-102

<sup>50</sup> *Ibid.*, p. 130-131



by Leiter and Nussbaum, it cannot be said that the postcolonial approach is entirely contextual. For this purpose I have chosen to consider Peter Danchin and Elena Namli.

Danchin discusses the debate between universalism and contextualism in terms of liberal pluralism and value pluralism, in which the former rests on the possibility of there being certain basic values which can be agreed upon and the latter sees such an understanding as one among others. The competing claims arising within and between basic human rights is in itself a testament to the failure of the liberal rights regime, argues Danchin, because how could a right be both fundamental and infringe on someone else's rights at the same time? Liberal philosophers like John Rawls attempted to address this 'glitch' by introducing a 'minimalist' conception of human rights in his *Law on Peoples*. Yet Danchin argues that such attempts cannot "rescue us from this impasse."<sup>51</sup> In other words, perhaps the way out of the impasse is not to continuously reduce the amount of rights in an attempt to find the most fundamental or basic ones, but instead to embrace the complexity of reality and adapt theory to this complexity.<sup>52</sup>

These conflicts thus "raise serious challenges to the determinacy and efficacy of the concept of rights and, as a direct result, to liberal rights regimes in general."<sup>53</sup> Human rights theory and practice reveal the inconsistency between universal claims and the conflicts and tensions that arise when these meet with particular realities. In this regard, a value pluralist approach, by not making any universal claim for a particular understanding, would offer a more sustainable way to deal with the conflicts and tensions arising between and within human rights. A value pluralist approach doesn't offer any clear-cut solutions, but is intended to be closer to particular realities with all its complexities. The current liberal case may offer a clean and tidy theory, but it fails to see its own understanding as a tradition of among others. In this way, the inability to recognize that human rights law (as it is currently understood) is itself part of a tradition causes the human rights project to be 'violent' and insensitive, as Namli argues.<sup>54</sup>

Recognizing that human rights law is part of its own (Western, liberal, and Christian) tradition would not serve to delegitimize it, but rather to make it more sustainable.<sup>55</sup> It would, as Danchin suggests, be included in a value pluralist approach as one understanding among others.

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<sup>51</sup> Danchin, Peter, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law', *Harvard International Law Journal*, 49/2 (2008), p. 253

<sup>52</sup> *Ibid.*, p. 253

<sup>53</sup> *Ibid.*, p. 252

<sup>54</sup> Namli, Elena, 'Universal Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia', *Religion and Human Rights*, 8/2 (2013), p. 150

<sup>55</sup> *Ibid.*, p. 143

What is not acceptable in this view, however, is that the liberal understanding makes a claim on the universality of its particular understanding of human rights. Thus, the particular origins of human rights as belonging to the Western, Christian tradition (although some, including Nussbaum, would argue that different traditions were included)<sup>56</sup> would be recognized but it would not mark the end of how human rights should be understood.

Human rights law is often presented as rational and secular while religious law (especially Sharia) is considered unmodern and irrational. Such thinking in terms of binaries cannot be maintained if human rights are to become sustainable and widely respected, argues Namli. To avoid this, each tradition must be placed within their specific contexts and traditions, as this, Namli argues, will “uncover differences as well as similarities in a more dynamic way, and will avoid, or at least reduce, the risk of discriminating against one tradition while uncritically promoting another.”<sup>57</sup> The strict incompatibility that is often asserted between human rights and Sharia has been a significant obstacle to dialogue and hindered any development or opening on either side. Instead, the positions have hardened, especially by the way in which human rights are generally asserted as universal and neutral, to the point of being presented as positive law, thus excluding any alternative understandings or traditions.<sup>58</sup> This has some similarities with the issues we considered in the Boca Raton case, where it is thought that equality is being promoted by sticking to a set standard against which difference is measured.

The realization that the liberal conception is one among others should lead us to reevaluate how we think about human rights and what it means when we call them universal. If, as Danchin seems to argue, the evident tension within and between basic human rights indicates that the liberal conception is just one among others, then we should adopt a different approach if we are serious about rights. This would mean that we accept that the complexity of different ways of life cannot be reduced to a list of ‘fundamental’ or ‘basic’ rights. Such attempts have already been promoted by the liberal approach and to a certain extent failed, since rights come into conflict with each other, making it necessary to choose between equally fundamental rights.<sup>59</sup> Value pluralism refrains from making such choices seeing “the plurality of valuable

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<sup>56</sup> See Nussbaum, Martha C., *Liberty of conscience: in defense of America's tradition of religious equality*, 2008

<sup>57</sup> Namli, Elena, ‘Universal Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia’, *Religion and Human Rights*, 8/2 (2013), p. 151

<sup>58</sup> *Ibid.*, p. 147

<sup>59</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 253

options and ways of life [as] ultimate and irreducible.”<sup>60</sup> A danger that remains, and which Nussbaum is concerned of, is how to translate such an approach into practice. We will consider some of here objections in the next chapter, and continue the discussion in chapter 5.

The (liberal) human rights regime was indeed itself an attempt to avoid having to make choices among fundamental rights, granting all rights equal status, yet when applied in reality things got more complicated and the ‘indivisibility’ of human rights could not be upheld. The vagueness of the rights opens up for different interpretations and competing claims. It is not practically possible to fully uphold one person’s liberty while at the same time maintaining another’s full liberty. The question of group rights and minority rights complicates the issue further since this places the individual within a larger context. Danchin argues that when dealing with conflicting claims of rights, we must also consider other dimensions surrounding the individual’s right; “between differently situated groups within the state and the corresponding tensions that arise from different individual and collective rights claims.”<sup>61</sup> In other words, it matters if one claim is part of a minority tradition while the other is part of the dominant religious tradition of the state.

An objection to this coming from the liberal approach would be that the state must maintain its neutrality to the greatest extent possible, and should thus not take into consideration the context in which the claim is being made. But that would represent a rather extreme universalist approach, and not a view which Nussbaum, for instance, would endorse. The issue is thus also whether it can be said that the individual can be considered independent of the context of which it is part and whether the state is ever really neutral. Danchin argues that it cannot, at least not if we want to be able to address and understand right claims in a meaningful way.<sup>62</sup>

Thus to make religious freedom ‘more manageable,’ Danchin suggests we stay away from trying to provide a “tidy and universally applicable theory of religious freedom.”<sup>63</sup> This is not to say that we discard the liberal human rights regime altogether, but that we embark on a different, more sensitive, path which “requires the constant search for forms of accommodation, mutual understanding, and overlapping consensus between actual communities and the

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<sup>60</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 253

<sup>61</sup> *Ibid.*, 280

<sup>62</sup> *Ibid.*, 286

<sup>63</sup> *Ibid.*, p. 319

normative claims of rights discourse.”<sup>64</sup>In some ways, it requires more work and reflection, but it is also more in line with the complexities that exist in reality. A major obstacle to achieving this, however, is the still persistent “inability of many Western rights theorists to see their culture as one among others.”<sup>65</sup>I shall argue that Leiter may be said to be such a theorist, while Nussbaum should not be discarded so easily. It remains to be seen whether she is able to reconcile universal claims with an ability to see her own culture as one among others.

While Danchin refrains from making any explicit claims to universality, Namli does use this label, although she does so in a similar way to Danchin’s value pluralism. On this point, there might be a slight difference between Danchin and Namli, although it is quite insignificant, I would argue. The idea, I believe, is basically the same. Like Nussbaum, Danchin adopts Rawls’ *overlapping consensus*, but he does so in a modified way, where “particular theories of justice are not seen as tied to or generated by particular conceptions of the good.”<sup>66</sup>It is thus an *overlapping consensus* among many different ways of life, not just those that fit into the liberal understanding.

Universal claims as such are not problematic, argues Namli, so long as they are “understood and practiced primarily as universal visions of political morality...[a]s such, they are abstract and dynamic, and thus cannot be adequately formulated in terms of positive law.”<sup>67</sup>There are some similarities here with Nussbaum, who also argues for visions which are abstract that can serve to guide us. The form of universal morality which Namli argues for is not the same as that claimed by the current (liberal) human rights regime, or any other tradition, but instead “functions as a means of deconstructing claims to universality by any particular norm...[i]n order to be critical of our moral conventions (as well as politics) we need to believe in universal morality, yet we never possess universal morality.”<sup>68</sup> It is thus not a form of universality which claims to have all the answers, but instead a form of universality that is not attainable but there to inspire. It is a universal morality towards which we strive but never really grasp, yet it serves as a

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<sup>64</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 321

<sup>65</sup> *Ibid.*, p. 321

<sup>66</sup> *Ibid.*, p. 315

<sup>67</sup> Namli, Elena, ‘Universal Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia’, *Religion and Human Rights*, 8/2 (2013), p. 159

<sup>68</sup> *Ibid.*, p. 144-145

reminder “to remain critical of every particular moral or legal judgment.”<sup>69</sup> What would this universal morality be?

## ***2.5 Previous research on Nussbaum and Mahmood***

In this section, we will look at some critiques of Nussbaum and Mahmood. In their articles, both Edda Manga and Sindre Bangstad make mention of both Nussbaum and Mahmood, yet focus on critiquing the liberal and anthropological approach respectively. I shall argue that they pose this criticism from within contextual and universal traditions. While Manga, arguing from a contextualist position, criticizes Nussbaum for failing to pay enough attention to context, Bangstad, arguing from a more universalist position, accuses Mahmood of being apologetic of illiberal practices.

The focus in these articles lies primarily with what ways forward Nussbaum and Mahmood offer for feminism. While a feminist perspective is indispensable when thinking of ways of mediating the tensions of religious freedom, it will not form the main focus of this paper. Mahmood does not explicitly deal with questions of feminism when writing about religious freedom, focusing instead on the treatment of minorities. In Bangstad’s critique of Mahmood’s approach, however, we will get an understanding of some of the difficulties that may come when attempting to promote both feminism and contextual sensitivity. Nussbaum, on the other hand, does develop a way of dealing with the possible conflicts between feminism and religion as we shall see in the following chapter. These articles thus offer a useful insight into some of the criticisms that Nussbaum and Mahmood have received, yet they do not do so in a comparative way to the extent that will be attempted in this paper.

### ***2.5.1 A critique of Nussbaum’s approach and the liberal tradition***

We first turn to Manga’s article, which builds on the critique of Lila Abu-Lughod against the liberal and secular approach. Manga situates Nussbaum’s approach in the “currently dominating political discourse that postulates a contradiction between religion and human rights and between individual rights and group rights.”<sup>70</sup> This article is interesting because it paints a harsher division between universalism and contextualism. As we have briefly seen in section 2.3,

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<sup>69</sup> Namli, Elena, ‘Universal Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia’, *Religion and Human Rights*, 8/2 (2013), p. 144

<sup>70</sup> Edda Manga: Kvinnors rättigheter från antropologisk synvinkel, *Feministiskt Perspektiv*, accessed 2014-05-06 (translated from Swedish)

Nussbaum represents a more generous strand of the liberal approach and strongly argues for accommodating claims of conscience, including religious ones. It remains to be seen then, whether the critique Manga gives is unfairly harsh or accurate. Meanwhile, Mahmood's anthropological work in *Politics of Piety*, which offers a critique of liberal-secular feminism, is used to exemplify the opposite (or at least significantly different) position, one that carefully considers context and warns against setting standards against which 'other traditions' are tested. As we shall see in the next section, Bangstad is skeptical of Mahmood's attempt to pose an anthropological study as a critique against Western hegemonic discourses.

While Danchin and Namli offer ways of incorporating the liberal conceptions into an open dialogue on the project of human rights, Manga's article seems to have as its main purpose to discredit the liberal regime while promoting a postcolonial and contextualist approach. Like Danchin and Namli, however, the core of the criticism against the liberal approach lies in its inability to see itself as a particular tradition of its own, and not universal or neutral, thereby also failing to see that "empirical and detailed knowledge of specific social contexts [] show that the meaning of concepts such as "rights" and "freedom of choice" vary depending on social contexts" and as such limit the extent of the liberal claims of universality.<sup>71</sup> The liberal approach is further criticized (in a similar way as Danchin) for oversimplifying complex matters, resorting to thinking in binaries; "it tries to make [this complexity] into that we are either free or unfree, either have freedom or not, [that we] either keep religion in its place or are controlled by it."<sup>72</sup>

Finally, it is interesting to note that Manga's article argues that the secular veil under which the liberal approach finds itself fails to comprehend the impact and importance religion plays in people's everyday life; where religion is viewed as something which can be removed when needed. We will see if Nussbaum's approach fits into this description or whether it offers a way forward for the liberal approach. We will also return to the liberal views' understanding of religion as something which can be dissected into a dichotomy of (private, individual) belief and practice, and the potential dangers this poses, in the chapter discussing Mahmood.

### ***2.5.2 A critique of Mahmood's approach and anthropology as critique***

Sindre Bangstad examined Mahmood's *Politics of Piety* and its possibilities for offering a way forward for feminism. His critique lies primarily in Mahmood's attempt to reconcile illiberal

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<sup>71</sup> Edda Manga: Kvinnors rättigheter från antropologisk synvinkel, Feministiskt Perspektiv, accessed 2014-05-06

<sup>72</sup> Ibid.

practices with a critique of feminism. Bangstad places Mahmood in the poststructuralist and postcolonial tradition, with an “Asadian and Butlerian approach,” referring to Talal Asad and Judith Butler.<sup>73</sup> Indeed, Bangstad considers Mahmood’s contribution to be part of fulfilling Butler’s anticipation that the concept of difference and the encounter with the non-West would have to “incur the risk of supporting forms of feminism that may not turn out to be conducive to advancing women’s rights at all.”<sup>74</sup> In other words, Mahmood’s approach, in its criticism toward hegemonic discourses, opens up for the inclusion of illiberal traditions, while attempting to maintain a feminist and non-discriminatory approach. As we shall see, Bangstad argues that Mahmood’s approach fails to offer a consistent and sustainable way forward for feminism. For the purposes of this paper, it is important to note that this discussion relates to the question of what value is at stake for religious freedom and how this value can be understood in the tension between universalism and contextualism. We will continue to explore this issue and attempt to arrive at a (partial) answer in the final chapter.

What Mahmood wants to critique is what she terms the secular liberal feminism in which any movements (particularly those belonging to Islam) are discarded as illiberal when they don’t fit into the liberal idea of individual freedom and autonomy. She is thus critical of there being universal claims to how an individual is expected to act when free and autonomous, arguing that this description fails to understand all life forms. While Bangstad finds Mahmood’s analysis useful in “identifying the role of mainstream secular feminist understandings and categories as central to the exclusion of practising Muslim men and women in contemporary and late modern ‘Western’ social and political imaginaries,” he also sees several problems with using an anthropological study as a base for a larger ideological critique.<sup>75</sup> Bangstad also recognizes that Mahmood’s work “constitutes an important intervention at a point in time when secular feminist discourses are increasingly instrumentalized across the political spectrum in anti-Muslim discourses in the ‘Western’ world and in Europe,” but argues that she nonetheless fails to pose some critical questions.<sup>76</sup> The critique of Mahmood’s approach is thus not so much aimed at her questioning of the hegemonic standing of the Western-liberal-secular, but how she goes as far in her critique to the point where it can be questioned if there is any standard or core which can

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<sup>73</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011, p. 28

<sup>74</sup> *Ibid.*, p. 31

<sup>75</sup> *Ibid.*, p. 29

<sup>76</sup> *Ibid.*, p. 28

serve as a base to compare people's lives. In other words, it remains to be seen if Mahmood's approach lacks any central values that can guide us when dealing with the tensions of religious freedom (and human rights in general).

The reasoning within Mahmood's study, argues Bangstad, requires her to consider Islamic traditions and Muslim debaters as "the embodiments of 'difference' and 'alterity' in order to form a criticism against the Western-liberal-secular while directing little criticism toward the Islamic traditions."<sup>77</sup> Bangstad's worry lies in what happens when illiberal movements, such as (parts of) the Salafi pious movement which Mahmood studied, are used to form a critique of larger geopolitical<sup>78</sup> projects; "it is difficult to see this as a stance which does not in effect lend itself to culturalist assumptions."<sup>79</sup> Meanwhile, Mahmood argues that the fact that "the tilt of the current political climate is such that all forms of Islamism (from its more militant to its more quiescent) are seen as the products of a roving irrationality" makes her feel the need to "immers[e] [her]self within the thick texture of [Islamisms] sensibilities and attachments" in order to "dislocate the certitude of [her] own projections and even begin to comprehend why Islamism, at least in one of its renditions, exerts such a force in people's lives."<sup>80</sup> Thus, in an attempt to escape the secular-liberal framework of which she is part, and which hinders her from taking in other desires and life-worlds, she needs to be fully immersed, not attempting to throw in criticisms here and there. But by not explicitly critiquing the illiberal practices within the Salafi movement, Bangstad argues that Mahmood is rendered apologetic of these same practices:

[A] politics which subordinates the exercise of female autonomy and agency to the interests of a 'preservation of life forms' – as Mahmood's account in effect does – becomes in fact and impact culturalist.<sup>81</sup>

Mahmood is required to adopt an uncritical and unreflective stance similar to that which she wants to critique within the Western-liberal-secular discourse, which according to Bangstad makes her fall into the trap she wants to critique. Nonetheless, I would argue, she does not claim to be neither neutral nor making universal claims and her critique comes from the particular towards the universal. Yet in Bangstad's opinion this results in Mahmood refraining from

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<sup>77</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011, p. 36

<sup>78</sup> Merriam Webster defines geopolitics as "a study of the influence of such factors as geography, economics, and demography on the politics and especially the foreign policy of a state."

<sup>79</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011, p. 39

<sup>80</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 199

<sup>81</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011, p. 42



critically examining the way in which Salafism itself, like liberalism and secularism, also “seeks to ‘passionately remake’ or ‘destroy the life forms’ embodied by many Muslim women in Cairo” through its calls for living a disciplined and pious life.<sup>82</sup> Again we arrive at the question of the values at stake in each approach. The issue of concern is thus whether it is possible to completely immerse oneself in an illiberal tradition while not holding on to some core values.

Mahmood is also criticized for not offering ways of dealing with the tensions between contextual sensitivity and illiberal and anti-feminist practices; “[she] does not seem to offer any practical way out of the current impasse.”<sup>83</sup> In effect, by not openly denouncing illiberal practices within the Salafi movement, Bangstad considers such an approach a way of dismantling feminism and fulfilling Butler’s anticipation (mentioned at the beginning of this section):

For if feminism is to mean anything at all, it is extremely difficult to avoid the conclusion that women’s entitlement to rights and dignity regardless of religious and ethnic affiliation must be central to its minimal and core definition... If a term like feminism is to retain any force, there must in fact be something with which it is in fact incompatible.<sup>84</sup>

The ‘anxieties about cultural imperialism’ cause a form of relativism that renders any attempt to qualify practices as oppressive to women or as promoting gender inequality very difficult. Instead Bangstad argues for an approach more along the lines of Martha Nussbaum’s capabilities approach,<sup>85</sup> where certain core principles must be agreed upon and a line drawn for what is to be considered feminism. Such an approach is sensitive to particularities, religious or not, but it remains centered on some core principles:

Nussbaum is by no means opposed to exploring the feminist potentialities in religious traditions ... but she is also quite clear about the fact that religious discourse and practice may at times lead to infringements of women’s basic rights...and that women may at times partake in these very infringements themselves.<sup>86</sup>

We will consider Nussbaum’s capabilities approach in more detail in chapter 3. After becoming more familiar with the approaches which Nussbaum and Mahmood represent, we can start thinking about the question of where on the scale between contextual sensitivity and universal claims, we could find an approach that is more conducive to a sustainable form of feminism and human rights.

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<sup>82</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011, p. 39

<sup>83</sup> *Ibid.*, p. 44

<sup>84</sup> *Ibid.*, p. 42-43

<sup>85</sup> See Nussbaum, *Women and Human Development: The Capabilities Approach*, (2000)

<sup>86</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011 p. 43

## ***2.6 Summary of theoretical framework***

As was stated at the beginning of the chapter, the theoretical framework would be developed through the consideration of several scholars, representing different views on religious freedom, universal claims and contextual sensitivity. I will here provide a brief recap of the main ideas presented so far, which we will then carry with us into the following chapters. The liberal approach as it has been presented in this chapter sees it as not only possible but necessary to have certain core values which are given universal validity, if morality is to have any meaning at all. There are also, as we have seen, different ways to deal with contextual sensitivity within this approach; adopting what Leiter calls ‘minimal’ or ‘affirmative’ form of respect towards difference. The postcolonial critique that has been considered here is concerned with the liberal approach’s difficulties to see itself as a tradition among others, and to understand the importance religion plays in many people’s lives.

We have also started to see what values are at stake within each approach. Within the liberal approach liberty and equality are central, as well as individual autonomy. While the postcolonial approach doesn’t reject these values, it is skeptical of the particular liberal understanding of them, where they are thought to be applied equally across contexts and that they provide individuals with the ability to make rational and free choices.

We have also started to think about how these different understandings of values affects how we think about mediating religious freedom and whether these values should be considered universal or more sensitive to context. Furthermore, we have started to see where Mahmood and Nussbaum are situated within this debate, although the previous research discussion should also have served to complicate their positions – in other words, neither Mahmood nor Nussbaum can be easily identified as either ‘universalists’ or ‘contextualists’. In the following two chapters we will take a closer look at the approaches of Nussbaum and Mahmood.

## 3 Nussbaum: In defense of universal values<sup>87</sup>

Martha Nussbaum is Professor of Law and Ethics, holding appointments within a variety of institutions she is undeniably cross-disciplinary. In this chapter we will explore Nussbaum's capabilities approach which is placed within the liberal tradition. As we have already seen, however, Leiter also belongs to this same tradition yet he and Nussbaum arrive at different conclusions regarding how to deal with religious freedom. Nussbaum thus represents a 'milder' form of universalism where contextual sensitivity is considered important.

Nonetheless, Nussbaum sees it as not only possible but necessary to have certain "fixed stars" – universal core values - when considering dilemmas caused by the tensions of human rights theory and practice. Inspired by John Rawls, Nussbaum considers the principle of *equal respect for conscience* useful as guidance when dealing with difficult cases concerning religious freedom. In the texts below, we will see why Nussbaum argues that equality and liberty should serve as universal values central to the right to religious freedom. As we consider Nussbaum's arguments in relation to the analysis questions, it is important to keep in mind the philosophical method of this paper, meaning that when it is said that Nussbaum is sensitive to context, it does not necessarily mean that she is sensitive in the same way as Mahmood is sensitive to context. We will enter a more detailed discussion about this in the final chapter. We should also carry with us the theoretical framework from the previous chapter when we consider both Nussbaum and Mahmood.

### 3.1 *The Capabilities Approach*

We now turn to Nussbaum's own development of a (partial) theory of justice, which she has named the capabilities approach. Nussbaum considers the capabilities approach to be a feminist philosophical project that is "strongly universalist" yet "sensitive to local particularity, and to the many ways in which circumstances shape not only options but also beliefs and preferences"<sup>88</sup>In this approach, the value of liberty is considered fundamental to ensuring each person's ability to fulfill their capabilities. As we shall see in section 3.3, the right to religious freedom is considered to be included within the capabilities approach as an important part of each person's flourishing in life.

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<sup>87</sup> This is also the title of the first chapter in *Women and Human Development – The Capabilities Approach* (2000)

<sup>88</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 7

Clearly inspired by John Rawls and his idea of an *overlapping consensus* as well as Immanuel Kant's idea of each person as an end and not a mean, Nussbaum's capabilities approach places the individual's liberty to choose at the center. Nussbaum finds Rawls' approach useful because it is "highly attentive to concerns about pluralism and paternalism, and yet at the same time it takes a stand about the importance of basic liberties and opportunities for all citizens."<sup>89</sup>

It is interesting to consider that Nussbaum finds the Rawlsian approach attentive to concerns of paternalism considering the widespread criticism it has received, especially from postcolonial critics such as Asad and Danchin. Yet Nussbaum doesn't adopt the Rawlsian approach in its entirety, as she thinks it fails to take notice of the fact that "individuals vary greatly in their needs for resources and in their abilities to convert resources into valuable functionings;" abilities may vary according to age, sex, health, social or other status.<sup>90</sup> The capabilities approach overcomes this shortcoming by going deeper to assess the quality of life of each person, including *basic* capabilities such as life, bodily health and integrity, but also *internal* capabilities such as imagination and emotions.<sup>91</sup> Internal capabilities refer to people's "inner lives...what they hope for, what they love, what they fear, as well as what they are able to do."<sup>92</sup> In this way, Nussbaum's capabilities approach is more concerned with the individual than the Rawlsian approach, as it also includes internal capabilities and thereby gives greater sensitivity and respect for "the struggle of each and every individual for flourishing."<sup>93</sup> We will see in the next chapter that Mahmood speaks of 'desires' and it will be interesting to see whether this concern can be considered to be 'taken care of' within the capabilities approach.

### ***3.2 The values of liberty and equality at stake***

Nussbaum, while belonging to the liberal tradition, differs from Leiter as we have seen, in that she places emphasis on going beyond tolerance to accommodate difference. They both identify the values of liberty and equality as central to religious freedom, and in dealing with issues concerning claims of conscience, these values should be guiding us. Nussbaum refers to these as 'fixed stars' which help us determine if human dignity is respected; "an account of basic

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<sup>89</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 66-67

<sup>90</sup> *Ibid.*, p. 68

<sup>91</sup> *Ibid.*, p. 70

<sup>92</sup> *Ibid.*, p. 31

<sup>93</sup> *Ibid.*, p. 69

constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.”<sup>94</sup> When applied as tools of mediating the tensions of religious freedom, the results are different. Thus, the understandings given to seemingly fundamental and basic values, such as liberty and equality, can be understood differently within the same liberal tradition. This should tell us something about universal claims.

If Nussbaum argues that in dealing with difference in a pluralist world, particularly when dealing with claims of conscience, we must have certain universal values that serve as political goals.<sup>95</sup> Yet it is not clear how such values can ever be agreed upon, if even what seem to be basic values are interpreted and understood differently. Yet need theory and ‘overarching analytical concepts’, argues Nussbaum, in order to deal with the complexities of practice.<sup>96</sup> She thus argues for a flexible approach, yet the values of liberty and equality are still considered universal. It thus seems like it is not entirely unproblematic to have both a flexible approach while the central values remain within a particular liberal understanding. Mahmood, as we will see, complicates this view.

I understand Nussbaum’s approach as a true attempt of striking a balance between universality and contextuality. Or perhaps, since Nussbaum tends to reject this very platform of debate, she sees her capabilities approach as a way to transcend this impasse. By so doing, Nussbaum finds that the dangers of imperialism in a universalist approach on the one hand, and the dangers an apologist contextual approach on the other, can be avoided:

[I]t is one thing to say that we need local knowledge to understand the problems women face...it is quite another matter to claim that certain very general values, such as the dignity of the person, the integrity of the body, basic political rights and liberties, basic economic opportunities, and so forth, are not appropriate norms.<sup>97</sup>

Yet it remains to be seen whether Nussbaum’s capabilities approach is flexible enough to deal with this apparent contradiction, by establishing certain standards (certain capabilities) from which people are free to do what they want. Indeed, Nussbaum acknowledges that “we cannot really see the meaning of an incident or a law without setting it in its context and

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<sup>94</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 5

<sup>95</sup> *Ibid.*, p. 60

<sup>96</sup> *Ibid.*, p. 35

<sup>97</sup> *Ibid.*, p. 41

history.”<sup>98</sup> While Nussbaum sees capabilities as the object for a possible overlapping consensus, she does so in a way that differs from Danchin’s value pluralism:

We need to ask, then, whether it is appropriate to use a universal framework at all, rather than a plurality of different though related frameworks. And we also need to ask whether the framework we propose, if a single universal one, is sufficiently flexible to enable us to do justice to the human variety we find.<sup>99</sup>

We can compare this to Danchin:

This inquiry, I believe, will point us toward a non-foundational, and hence perpetually self-(re)creating, attempt to find an overlapping consensus on a plurality of equally ultimate, equally sacred - but intrinsically incommensurable - values.<sup>100</sup>

We will continue to explore the differences and similarities in the last chapter as this relates to the core idea of this paper; how to mediate universal claims and contextual sensitivities. Mahmood’s approach, I will argue, is similar to that of Danchin although she does not develop a theory in the same way as Nussbaum and Danchin. Thus, Danchin’s value pluralism and Nussbaum’s capabilities will serve as an interesting way to compare different forms of overlapping consensus. In this discussion we will also consider Namli’s idea of a universal morality. Another question that remains to be answered is whether an overlapping consensus, where the idea is that people adhere to some basic principles even though the reasons for doing so vary, should be open to illiberal traditions.

At this point we have (at least partially) answered the first two analysis questions concerning Nussbaum; that the values she identifies within the protection of religious freedom are liberty and equality, and that these values should be considered universal while leaving space for contextual sensitivity. The values should serve as ‘fixed stars’ while still being sensitive to context. Such an approach is what, according to Bangstad, is needed if projects like feminism and human rights are to “mean anything at all” – it thus needs some “core definition” to which we can at least make some judgments about what is compatible with the principle, and what is not.<sup>101</sup> In Nussbaum’s view, the test for compatibility is that human dignity is respected.

As we have seen then, Nussbaum’s approach thus combines a stern commitment to the core values of liberty and equality while maintaining a contextual sensitivity and (a certain)

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<sup>98</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 9

<sup>99</sup> *Ibid.*, p. 40

<sup>100</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 313

<sup>101</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011 p. 42-43

flexibility to how these values are interpreted and understood. Thus, as I understand Nussbaum, we must accommodate different traditions as much as we can while still staying committed to these values.

### ***3.3 Feminism and religion within universalism and contextualism***

Feminism and religion are not usually thought of as overly compatible, often being posed as mutually exclusive even. On the question of religion, Nussbaum argues for a strong universalist and liberal stance which places constraints on those strands which are considered illiberal. By asserting that all capabilities deserve equal respect, and that each person should be treated as an end and not a means, she argues for promoting those strands within religion which are compatible with liberalism, while not including the illiberal strands.

Nussbaum sees both dangers and possibilities with religion when it comes to women's rights and gender equality. She is clear about the need to include religion; urging liberals to reject any account that "unduly marginalizes religious speech...[and instead] encourage the liberal elements in the religious tradition."<sup>102</sup> In this sense, Nussbaum does not fit into Manga's criticism as she aware of the importance of religion in people's lives. What she does not accept, however, is when religion is used to subordinate, discriminate or keep an individual from "flourishing in life."

But does arguing for constraints on illiberal speech within religious traditions entail an exclusion of traditions and conceptions which are not compatible with the liberal understanding? Is this a form of steering religion into a liberal understanding? If that is the case, it would be an example of the unsustainable and violent form of a liberal understanding which Danchin and Namli speaks of, an understanding that does not see itself as one among others. Yet I believe Nussbaum is aware that she is promoting a particular tradition, and is thus not under the illusion that her understanding is independently neutral nor objective.

At this point Nussbaum differs from both Danchin and Namli who argue for an inclusive dialogue in which even 'illiberal' traditions must be invited. Mahmood's critique of the liberal as well as leftist and secular feminism is that its own understanding of how life should be lived creates a framework which excludes practices such as those studied within the Egyptian pious movement. Applied on the case of the women's pious movement, this would mean, as we shall

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<sup>102</sup> Weithman, Paul J., *Religion and contemporary liberalism*, 1997, p. 135-136

see further in section 3.3, that the speech and practices which are not illiberal are promoted while any speech or practice which is considered to go against women's rights and basic capabilities, must be constrained as much as possible (through means such as boycotts, sanctions and diplomacy).<sup>103</sup>

Considering that the capabilities approach is feminist, putting women's rights at the front, we will now turn to see how this approach would deal with religious freedom. It is likely that Nussbaum would agree with Bangstad's critique of Mahmood, urging us to "reflect before we conclude that women without options really endorse the lives they lead."<sup>104</sup> Even though Mahmood doesn't explicitly endorse the 'illiberal' practices within the pious movement, her intention is to show the problematics with adopting a conception of free/unfree (as Manga spoke of) that too quickly dismisses the women in the movement as submissive and subordinated:

[I]n mentioning the tenacity of such views is not to suggest that there is no violence against women in the Muslim world, but that it is the reductive character of this framing, one that orchestrates an entire chain of equivalences associated with Islam, that needs to be questioned.<sup>105</sup>

Unlike Mahmood, Nussbaum takes a clear stance against illiberal practices which are detrimental to women's rights arguing for "a basic core of international morality that constrains all religious actors in the public realm."<sup>106</sup> In this sense, Nussbaum's contextual sensitivity ends where it meets with illiberal practices, while Mahmood argues that the liberal framework is too narrow to capture different desires and life worlds and too quick to dismiss them as illiberal.

Yet such a universal claim need not unnecessarily burden religious exercise, argues Nussbaum, as we shall see further on in this chapter. Religious freedom should, with the values of liberty and equality at the center, only be restricted and constrained when it inhibits others from fully enjoying these values. This does not mean that it is an easy task, but that is what we should strive for. Cultural relativism, argues Nussbaum, often fails to see the diversity *within* a tradition, and in thinking that one promotes respect for different traditions, one fails to see how some traditions themselves lack tolerance and respect for difference. Simply put, respect for difference and diversity is only sustainable if what one is respecting does not itself promote intolerance.

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<sup>103</sup> Weithman, Paul J., *Religion and contemporary liberalism*, 1997, p. 134

<sup>104</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 43

<sup>105</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 190

<sup>106</sup> Weithman, Paul J., *Religion and contemporary liberalism*, 1997, p. 134



Central to the capabilities approach is thus Nussbaum's understanding of traditions and cultures as fluid and not stable entities; as such people within traditions and cultures reinvent themselves all the time and so does the tradition and culture. Furthermore, the view of cultures as relativistic where values are only understood within their particular context can be rejected in its entirety according to Nussbaum, since "[p]eople are resourceful borrowers of ideas."<sup>107</sup> The context is thus never fixed, and in arguing that values are bound by context, relativism in itself is making a universal claim which has little resemblance to reality.<sup>108</sup>

To criticism that may say that such a claim are "Westernizing" or colonizing, Nussbaum thinks liberals should hold their position and not let "the loudest voices in a religious tradition [represent] the totality of its possibilities."<sup>109</sup> As Nussbaum rightly points out, women are seldom included in such voices, and that is problematic from a feminist standpoint. But does this response address the issue taken up by Mahmood in *Politics of Piety*, where the strict stance taken by the liberal approach fails to understand practices that don't fit into their own conception? It would further be interesting to see what Nussbaum, who wants to be attentive to women's perspectives, would answer to Mahmood's anthropological work of the women's pious movement in Egypt, which Mahmood argues "speak[s] back to normative liberal assumptions about freedom and agency against which such a movement is held accountable."<sup>110</sup>

While Nussbaum calls for the need to pay attention to "women's perspective," she does so from a particular tradition based on a strict conception of what it means to be a free and autonomous individual. As a feminist, Mahmood found herself increasingly dissatisfied with the dominant form of feminism which is inherently part of the liberal tradition; "freedom is normative to feminism, as it is to liberalism, and critical scrutiny is applied to those who want to limit women's freedom rather than those who want to extend it."<sup>111</sup> The dominance of a liberal conception within feminism poses several difficulties, according to Mahmood, as it renders "other forms of human flourishing and life worlds [as] necessarily inferior."<sup>112</sup> As such, the Western-liberal-secular not only fails to understand other 'life worlds,' but also fails to see how this very conception itself has contributed to some "spectacular human disasters" such as

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<sup>107</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 48

<sup>108</sup> Ibid.

<sup>109</sup> Weithman, Paul J., *Religion and contemporary liberalism*, 1997, p. 134-135

<sup>110</sup> Mahmood, Saba, 'Feminist theory, embodiment and the docile agent,' *Cultural Anthropology*, (2001), p. 203

<sup>111</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 10

<sup>112</sup> Ibid., p. xxiii

colonialism.<sup>113</sup> Thus, Mahmood wants to question the liberal approach's tendencies to make use of the illiberal strands within religion, particularly within Islam, to point fingers and impose their own understandings:

[Mahmood's] attempt at comprehension offers the slim hope in this embattled and imperious climate, one in which feminist politics runs the danger of being reduced to a rhetorical display of the placard of Islam's abuses, that analysis as a mode of conversation, rather than mastery, can yield a vision of coexistence that does not require making others lifeworlds extinct or provisional.<sup>114</sup>

Thus, what Mahmood is asking for is not to become apologetic to practices that are anti-feminist but that the liberal approach examines itself for the values it supposedly stands for and how it forcedly wants all others to adopt the same understandings.

As I understand Nussbaum, she is aware of her taking a particular stance and arguing for its universality, yet she rejects any criticisms of this being a form of imperialism. Taking such a stance, in Nussbaum's view, is necessary, particularly if we care about women's rights and gender equality. We thus come to a central issue within the debate between universalism and contextualism; how to reconcile projects which should promote everyone's wellbeing, such as feminism and human rights, with the persistent tension between how these projects are intended in theory and how they are employed in practice. What I am trying to get at is the difficulty in reconciling the idea of everyone's equal right, while these very projects which are aimed at achieving this are themselves 'hijacked' by particular traditions which claim universality and thereby exclude different understandings.

Another issue of particular concern of Nussbaum, which we will study closer further on, lies with minorities. This is also a primary concern for Mahmood. This issue is also closely related to the right to religious freedom – as this right is thought of as offering special protection particularly for religious minorities. Before we turn to the question of whether religious freedom actually offers protection for minorities we will consider how Nussbaum fits religious freedom into the capabilities approach.

### ***3.4 Religious freedom and the capabilities approach***

We may now start thinking about how the principle of religious freedom is to be understood within the capabilities approach. Religious freedom undoubtedly fits into Nussbaum idea of

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<sup>113</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. xxiii

<sup>114</sup> *Ibid.*, p. 199

central capabilities, both basic and internal, in the form of both having the liberty to believe and to manifest this belief freely. Furthermore, as we have seen, Nussbaum recognizes that religion is a fundamental part of many people's lives. Religious freedom can thus be said to be central to a person's capability to flourish in life, and is thus a universal sentiment which deserves respect and protection no matter the context. When it comes to the question of whether religion should be singled out for special protection, however, Nussbaum does not see any reason why religion as such should be treated differently than other forms of conscience. As such, she develops an understanding of religion which is wider than it is traditionally understood so as to include other forms of conscience.<sup>115</sup>

The capabilities approach respects the faculty within each human being to search for the meaning in life, regardless of whether this search is religious or not, and concerns not just the internal belief but also the space required to pursue this conscience; a "space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others or comes up against some compelling state interest."<sup>116</sup>Nussbaum's boundaries are similar to those included in formulations on the right to religious freedom in international documents yet in dealing with particular cases accommodation should be offered to the greatest extent possible.

Unlike Leiter then, Nussbaum argues that there is good reason to respect and accommodate claims of conscience to the greatest extent possible as part of respecting each person's capabilities. As we have seen, capabilities could be "the object of an *overlapping consensus* among people who otherwise have very different comprehensive conceptions of the good."<sup>117</sup>

### ***3.5 Burdens on minorities under majoritarian rule***

Despite the ambition of the modern liberal state not to burden its citizens unnecessarily, when meeting with reality several difficulties have come up which pose several dilemmas for the liberal tradition. This has become particularly clear when it comes to dealing with the right to religious freedom, as it is one of those rights which similarly to freedom of speech, tend to come into conflict with other rights, freedoms and interests.

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<sup>115</sup> Nussbaum, Martha C., *Liberty of conscience: in defense of America's tradition of religious equality*, 2008, p. 169

<sup>116</sup> *Ibid.*, p. 169

<sup>117</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 5

As we have already seen in chapter 2, there are different ways of dealing with this dilemma within the liberal tradition. In this section we will look at how Nussbaum would argue on the question of whether the right to religious freedom offers protection for religious minorities since this is related to how one thinks religious freedom should be understood and implemented. We are now familiar with the more restrictive strand, represented by Leiter, which maintains a strict adherence to treating everyone equally with minimal exemption, even if this in practice has an unfair outcome. We will now turn to the more ‘generous’ and sensitive strand represented by Nussbaum. These different positions within the liberal approach show that the idea of not interfering or unnecessarily burdening an individual’s liberty can be interpreted in different ways.

Furthermore, these two different positions also serve to illustrate different understandings of the values of equality and liberty, which is central to the liberal tradition. While Leiter saw it as a matter of protecting the value of equality when arguing for a ‘minimal-exemptions’ approach when it comes to claims of conscience, Nussbaum argues that she is promoting the same value when she argues for accommodation. Nussbaum argues for an accommodation principle which: “suggests that sometimes some people (usually members of a religious minority) should be exempted from generally applicable laws for reasons of conscience.”<sup>118</sup> Such a view is also thought to promote the value of liberty. When it comes to religious freedom, a major factor in this failure lies in the fact that democracies are ruled by the majority resulting in a tendency of insensitivities towards minorities:

Majorities decree public holidays and days of rest, thinking, as they do so, of the religious needs of the dominant religion. Majority thinking is usually not malevolent, but is often obtuse, oblivious to the burden such rules impose on religious minorities.<sup>119</sup>

The examples of such rules are plenty; army dress codes, national holidays, how to testify in court, etc. These rules force people of strong convictions into the dilemma of having to choose between violating the “unwritten laws” of their conscience and breaking the law. Accommodation should, Nussbaum argues, offer a form of solution to this dilemma. In many cases, the laws causing such dilemmas rely on matters of less weight (than the burden they cause to a person) and can thus offer accommodation; “often matters lying behind laws of general applicability are not so weighty; sometimes they come down to the mere desire for homogeneity

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<sup>118</sup> Nussbaum, Martha C., *Liberty of conscience: in defense of America's tradition of religious equality*, 2008, p. 24

<sup>119</sup> *Ibid.*, p. 116

and an unexamined reluctance to delve into the details of a little-known or unpopular religion.”<sup>120</sup> Thus, in order to promote the values of liberty and equality as well as the principle of equal concern and respect, accommodation should be accorded to claims of conscience so long as they do not pose any threat to the rights and freedoms of others, or state interests. Perhaps Leiter’s position is due to a “desire for homogeneity,” as he suggests it is better to treat everyone the same across the board. Nussbaum’s approach requires more work and reflection than that yet may have the reward of making the outcome of ‘neutral’ laws less unfair where possible.

### ***3.6 Possible objections to the capabilities approach***

Interestingly, Nussbaum argues for her capabilities approach would provide the philosophical and theoretical underpinnings for political liberalism, towards which national constitutions can find inspiration and guidance, providing clarity to how tensions within a democratic society may be mediated:

[Although] [l]aw is only one force in a democratic society, and constitutional law is only one, sometimes small, part of the legal order. Nonetheless, we can see clearly how the fluid and ill-defined character of fundamental constitutional principles made this mess worse, and how their gradual clarification, through a growing tradition of precedent, began to make it better.<sup>121</sup>

Now let’s consider Danchin’s arguments, to see whether this poses any significant challenges to the capabilities approach:

There is simply no single, objective foundation for human rights to be found, whether in a putative state of nature, in a psychological conception of human nature, or in any unimpeachable theory of the relationship between individual autonomy and political order... This dilemma can only meaningfully be addressed by recognizing that human rights are not fixed entities to be arrived at either by abstract deontological deduction or (tacit) consensual agreement alone, but rather are sites of contestation and tension straddling opposing spheres-mediating between consent and justice, autonomy and community, freedom and order, passion and rationality.<sup>122</sup>

Does the capabilities approach fall into the same traps as the human rights regime by attempting to provide an “objective foundation for human rights” or does it offer a way forward for human rights? Although Mahmood does not present a ready-to-apply approach to the extent that Nussbaum does, she agrees on the need for an approach that goes beyond the law as a solution:

[I]n order to understand Islamism’s enmeshment within, and challenges to, assumptions at the core of the secular-liberal imaginary, one must turn not to the usual spaces of political struggle (such as the state, the economy, and the law) but to *arguments about what constitutes a proper*

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<sup>120</sup> Nussbaum, Martha C., *Liberty of conscience: in defense of America’s tradition of religious equality*, 2008, p. 167

<sup>121</sup> *Ibid.*, p. 222

<sup>122</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 315

*way of living ethically* in a world where such questions were thought to have become obsolete [emphasis added].<sup>123</sup>

Nussbaum and Mahmood thus agree that a philosophical discussion is needed, not just political and legal mechanisms.

Furthermore, Nussbaum is aware that the capabilities approach will be subjected to criticisms, particularly from more contextualist approaches such as postcolonialism. Nussbaum is aware of such objections:

[E]ven if one defends theory as valuable for practice, it may still be problematic to use concepts that originate in one culture to describe and assess realities in another – and all the more problematic if the culture described has been colonized and oppressed by the describer’s culture.<sup>124</sup>

This is indeed Mahmood’s concern. Does Nussbaum manage to mediate this tension between the liberal tradition and its tendencies to make ‘violent’ universal claims? Nussbaum argues that it does offer the best way of reconciling universal values with sensitivity to difference:

[A] universalist feminism need not be insensitive to difference or imperialistic, and that a particular type of universalism, framed in terms of general human powers and their development, offers us in fact the best framework within which to locate our thoughts about difference.<sup>125</sup>

Yet a concern that remains that the capabilities approach remains centered on a particular idea of individual agency and autonomy. This is critiqued within postcolonialism for adhering to a conception which “involves a male Western bias toward self-sufficiency and competition, as opposed to cooperation and love” and thus fails to consider the importance of community.<sup>126</sup> Nussbaum rejects this criticism in two ways; firstly, because the importance of community is not incompatible with the capabilities approach, and secondly, because a sole focus on the wellbeing of community disregards the idea of human dignity and each person’s worth and value as an end.<sup>127</sup> As part of the *principle of each person as end* there is nothing, according to Nussbaum, which hinders an individual to choose to live primarily as part of a community and for the welfare of that community, but that should not result in a neglect of the inherent value of each person; “there is no incompatibility between the idea that politics should treat each person as an end and the idea that some people may choose to make sacrifices for

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<sup>123</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 192

<sup>124</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, Cambridge University Press, Cambridge, 2000, p. 36

<sup>125</sup> *Ibid.*, p. 7

<sup>126</sup> *Ibid.*, p. 55

<sup>127</sup> *Ibid.*, p. 56

others.”<sup>128</sup> Yet, it is unclear how subordination as a choice could fit into the capabilities approach.

The issues of agency and free choice become central here and this marks a significant point of difference between Nussbaum and Mahmood. The fixation on the dichotomy of resistance/subordination within the liberal tradition which is brought up by both Manga and Mahmood has a lot to do with understandings of agency. Nussbaum argues that when dealing with illiberal traditions, or voices of traditions, “it is best to drive out bad speech with more speech.”<sup>129</sup> For this reason we need “active, unintimidated, educated democratic citizens...[who] are active and reflective, not merely submissive to the powerful interpreters of [their own religious tradition].”<sup>130</sup> Such citizens are required, argues Nussbaum, if we are to be committed to religious freedom in a liberal democratic society. With this reasoning, it is likely that Nussbaum would consider the women of the pious movement in Egypt to be submissive rather than “active and reflective” citizens. While Nussbaum is to some extent also arguing for such an approach within the liberal tradition itself, her entire capabilities approach still relies on an understanding of agency as that of an autonomous individual making rational and free choices. Should the women in Mahmood’s *Politics of Piety* be considered agents? Mahmood’s aim was not to decide whether these women were agents or not, but rather to “develop an analytical language for thinking about modalities of agency that exceed liberatory projects (feminist, leftist or liberal).”<sup>131</sup>

Mahmood recognizes the contribution of liberalism in linking the notion of self-realization with individual autonomy.<sup>132</sup> Individual autonomy builds on the idea of free choice and free will, without any coercion from external factors such as tradition or custom. While Mahmood in no way rejects the importance and achievements resulting from this notion, particularly in what it has achieved for women around the world, she questions the way in which this liberal understanding has become the only valid understanding, and how it has become

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<sup>128</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, Cambridge University Press, Cambridge, 2000, p. 56-57

<sup>129</sup> Weithman, Paul J., *Religion and contemporary liberalism*, 1997, p. 135

<sup>130</sup> *Ibid.*, p. 137

<sup>131</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. x

<sup>132</sup> *Ibid.*, p. 11

“naturalized in the scholarship on gender.”<sup>133</sup> Furthermore, she questions the idea that freedom and liberty have been made into the *only* valid values which everyone “naturally” pursues:

If we recognize that the desire for freedom from, or subversion from, norms is not an innate desire that motivates all beings at all times, but is also profoundly mediated by cultural and historical conditions, then the question arises; how do we analyze operations of power that construct different kinds of bodies, knowledges, and subjectivities whose trajectories do not follow the entelechy of liberatory politics?<sup>134</sup>

With this Mahmood wants to say that conceptions such as ‘agency’ cannot be predetermined because the way it is understood varies across time and space. Here Mahmood argues from what may be considered a quite strong form of cultural relativism, in saying that “what may appear to be a case of deplorable passivity and docility from a progressivist point of view, may actually be a form of agency – but one that can be understood only from within the discourses and structures of subordination that create the conditions of its enactment.”<sup>135</sup> Yet what Mahmood wants to achieve with such a statement, I believe, is not to argue for an extreme cultural relativist position but rather to illustrate the narrowness of the currently dominant secular-liberal conception. Such a view, argues Mahmood, does not fall into a renewed form of “Orientalizing,” but rather to recognize that understandings of notions such as agency are socially and culturally contingent, and in this way liberal conceptions can be accepted, but cannot exclude “desire[s] for submission to recognized authority.”<sup>136</sup>

This view, then, is similar to that employed by Danchin and Namli, where even illiberal traditions are included and the liberal tradition doesn’t set the standard for what is considered universally held values. In many ways, this view serves to complicate and break away from the fixation on the dichotomy of resistance/subordination, as the pious movement helps to illustrate by not fitting into such a dichotomy. In response to this, Nussbaum is likely to argue (in a similar vein as Bangstad) that the practical consequences are nonetheless illiberal and anti-feminist at the cost of the women’s ability to choose how to live their lives freely. Nussbaum would reiterate the principle of treating each person as an end and not a mean.

Mahmood does not disregard such an objection, stating that it is “is feasible and has been useful at times,” yet the liberal traditions refusal to see its own understanding as one among

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<sup>133</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 13

<sup>134</sup> *Ibid.*, p. 13

<sup>135</sup> *Ibid.*, p. 15

<sup>136</sup> *Ibid.*, p. 15



others (as Danchin and Namli also have pointed out) continues to pose a significant obstacle.<sup>137</sup> Not including desires such as those of the women in the pious movements, which at times includes a desire for subordination, only makes the feminist and human rights project violent, and thus unsustainable since it will not be adopted by those who feel excluded by its presumptions. Mahmood and Nussbaum's understandings of what it entails to practice contextual sensitivity are thus of different characters, the former belonging to a postcolonial critique and the latter to the liberal universalist tradition, but what they both want to achieve is more equality and understanding between different traditions. The point of difference is thus how flexible the approach should be and how strict it should be concerning core values. But as we shall consider in the last chapter, when applying the philosophical method, we must try to think what it is that these approaches are really attempting to do, and whether their apparent differences are caused by misunderstandings. We are now at the very core of the tension between universal claims and contextual sensitivity. It is a tension which neither Nussbaum nor Mahmood are fully able to solve – and most likely it will never be solved.

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<sup>137</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 15

## 4 Mahmood: A postcolonial critique of the secular-liberal

Saba Mahmood is Associate Professor of Social Cultural Anthropology at UC Berkeley. Despite her academic roots in the discipline of anthropology, her work extends into many other fields. As a former student of Talal Asad, she is clearly influenced by Asad's study of the concepts of the modern and the secular, their hegemonic standing and the way they shape identities. As we have already seen, Mahmood is critical of the liberal traditions making universal claims, arguing that it is insensitive to context and unable to understand other 'life worlds' and 'desires'. We will now turn to Mahmood's work on religious freedom and religious minorities. In a similar vein as with the pious movement in *Politics of Piety*, the articles which will form the basis of this discussion make use of anthropological studies which are then posed as criticism of the Western-liberal-secular claims to universality.

The Western-liberal-secular refers to the hegemonic standing of the idea that there is such a thing as a modern, liberal, and secular society in which the state is neutral and its citizens are autonomous individuals who make rational and free choices. Of course, this is a sort of caricature, but it is argued that such an imaginary (or at least parts of it) has influenced the formulation of human rights as fundamental and 'indivisible,' often presented as the final solution for establishing respect for human dignity and peaceful coexistence. Among these rights, religious freedom has been championed as the marker of tolerance putting an end to religious wars and sectarian strife. Indeed, the principle of religious freedom has been regarded as "a crowning achievement of secular-liberal democracies, one that guarantees the peaceful coexistence of religiously diverse populations."<sup>138</sup> The persistence on maintaining this idea and claiming its universality, despite the obvious clashes occurring when meeting with the complexities of reality, makes the human rights project lose not just the ability to solve the tensions that arise in these meetings, but also causes it to lose credibility. The underlying tension is that while the human rights regime claims to treat everyone equally, it is applied inconsistently and it reflects a particular tradition which in itself constitutes an inequality, because other understandings have been excluded and it is applied inconsistently (contingent on geopolitical

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<sup>138</sup>Mahmood, Saba, 'Religious Freedom, the Minority Question, and Geopolitics in the Middle East', *Comparative Studies in Society and History*, 54/2 (2012), p. 418

interests). Mahmood argues that this is due to how “religious freedom has been tied from its very inception to the exercise of sovereign power, regional and national security, and the inequality of geopolitical relations.”<sup>139</sup>

We can reduce from this that Mahmood’s concern lies with how religious freedom, as it is currently formulated and part of the liberal regime of human rights, reproduces unequal power relations. Thus the fact that religious freedom, as we shall see in the next section, has been used as a tool for geopolitics produces inequality (and unfreedom) while being promoted as doing the opposite. We can thus already here say that the values which Nussbaum and Mahmood identify to be at stake with the principle of religious freedom (and human rights in general) are primarily the values of equality and freedom. It remains to be seen if these concepts are understood the same by Nussbaum and Mahmood and how they suggest to mediate these values between universality and contextual sensitivity.

#### ***4.1 Religious freedom as a tool for geopolitics***

As we have seen, Mahmood offers a postcolonial criticism of the ‘grand narrative’ of the well-known principles of religious freedom. Religious freedom also relates to minority rights, since religious minorities are supposed to benefit the most. Yet the special treatment which is involved with both these rights sometimes serve for the opposite ends. Minority rights have become a ‘permanent institution,’ as Hannah Arendt has pointed out.<sup>140</sup> The way the rights regime is currently bound up by a particular tradition, as well as the way in which it is instrumentalized to pursue unequal politics, does not in fact promote equality or liberty, but rather the opposite.<sup>141</sup>

Mahmood argues that “religious freedom has been tied from its very inception to the exercise of sovereign power, regional and national security, and the inequality of geopolitical relations.”<sup>142</sup> She is thus interested in seeing how religious freedom has been used as a tool of Western power since the 16<sup>th</sup> century; “first in its Christian and later secular modalities, shaping its formulation in contemporary and international law” and now through, for example, the

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<sup>139</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 429

<sup>140</sup> Hannah Arendt, “Decline of the Nation-State” quoted in Mahmood 2012, The minority question, p. 425

<sup>141</sup> An example of this which Mahmood takes up in her article *Religious Freedom, the Minority Question, and Geopolitics in the Middle East*, is the way the U.S. has used religious freedom in pursuing geopolitical goals in the Middle Eastern region, while claiming to do so to protect ‘religious minorities,’ especially Christians.

<sup>142</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 429

International Religious Freedom Act (IRFA).<sup>143</sup>The IRFA is a law passed by Bill Clinton which gives “unprecedented powers to the U.S. federal government to expand its regulation of religious life on an international scale in the name of enforcing and protecting religious freedoms.”<sup>144</sup>Among other things, the IRFA gives the U.S. president the right to intervene internationally in the name of religious freedom. What is most problematic about this law, however, is that it is applied inconsistently, providing the president with both the right to place sanctions on a state that is considered to violate religious freedom, but also to provide exemptions if there is a geopolitical interest involved. In this logic, the very principle of religious freedom is put to play at the hands of foreign policy interests. The principle of religious freedom has thus lost its appeal to some groups within Egypt<sup>145</sup>, such as the Coptic minority, who sees the IRFA as “an imperial intervention.”<sup>146</sup>At the same time, some fractions within the Coptic community do see the IRFA as a way to deal with the discrimination they have endured in Egyptian society as well as the increasingly sectarian climate. Thus, the IRFA has also served to split the Coptic community in how it should best deal with its grievances.

Religious freedom has, as we saw with agency, never been stable, it varies over time and space, it is mediated by the context in which it is being used and understood. Yet the liberal values of liberty, tolerance and individual autonomy have become primary within dominant understanding of religious freedom which is also seen as “a moral good that Western Europeans discovered for themselves that they slowly introduced to less enlightened cultures sometimes through imperial force and sometimes through soft means such as international diplomacy.”<sup>147</sup> A major inconsistency within this imaginary can be seen in the promotion of religious freedom and minority rights abroad by the West, while domestic minorities were not granted the same rights and acknowledgement.<sup>148</sup>

The currently dominant understanding of religious freedom and the way it is formulated

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<sup>143</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 419

<sup>144</sup> Mahmood, Saba, ‘Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation’, *Public Culture*, 18/2 (2006), p. 327

<sup>145</sup> In the Middle East region, Egypt is only second to Israel in receiving U.S. military aid. Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012)

<sup>146</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 441

<sup>147</sup> *Ibid.*, p. 428

<sup>148</sup> *Ibid.*, p. 428

in international documents, argues Mahmood, has severe consequences for religious minorities.<sup>149</sup> Even though religious minorities have traditionally been thought of as primarily aimed at the protection of minorities, Mahmood argues that the opposite is often the case.<sup>150</sup> The current formulation and conception of religious freedom is detrimental to religious minorities in primarily two ways according to Mahmood; first, it serves to make them more vulnerable by accentuating their difference from the majority, and second, it reshapes the identity of the group.

The principle of religious freedom, when connected with geopolitics, reshapes identities by making “specific notions of freedom and unfreedom possible and imaginable.”<sup>151</sup> But, as Mahmood points out, this is not merely a question of ‘using’ religious minorities for national interests, it is a symptom of “how the discourse on religious liberty has participated in the production of ‘the minority problem’.”<sup>152</sup> It is thus clear that Mahmood is not a promoter of international intervention, as this is often serving particular interests. But she also sees a danger in the adopting of the human rights language in general. This is due to the particular understandings which have influenced the way rights were formulated. This is particularly clear within the right to religious freedom.<sup>153</sup> It is problematic because it builds on particularly Western-liberal-secular understandings of freedom, agency and belief/practice. We will explore how this is so later on, but for now it is sufficient to state that Mahmood’s main objection to religious freedom, as it is currently understood, is that it reflects the “inequality between Third and First World sovereignty” and as such does not promote equality yet it claims to do just that.<sup>154</sup>

In the following sections, we will look closer into how Mahmood argues that religious freedom poses dangers, rather than protection, to religious minorities, by looking at her studies of the Bahai and Coptic communities in Egypt. Before this however, we will attempt to gain a better understanding of what Mahmood means when she claims that the very “conceptual architecture” of the principle of religious freedom is cause of its inability to actually provide the protection it promises.<sup>155</sup>

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<sup>149</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 419

<sup>150</sup> *Ibid.*, p. 429

<sup>151</sup> *Ibid.*, p. 419

<sup>152</sup> *Ibid.*, p. 419

<sup>153</sup> *Ibid.*, p. 428

<sup>154</sup> *Ibid.*, p. 440

<sup>155</sup> *Ibid.*, p. 420

## **4.2 *The forum internum and forum externum of religious freedom***

Section 2.1 provided some examples of how the right to religious freedom is formulated in international documents. As was briefly discussed then, there are certain points that are common for all the different formulations; they are vague in defining what exactly is meant by ‘religion,’ they state when the right to exercise or manifest belief is subject to restriction, and they make a distinction between belief and exercise/manifestation. The last factor will be looked into further in this section. This section will thus form a basis for the discussion on how Mahmood would relate to most of the analysis questions.

The understanding of religion as consisting of a forum internum (belief) and forum externum (exercise/manifestation of belief) poses several issues according to Mahmood. Therefore the way the right to religious freedom is formulated thus rests on a particular conception of the private and public sphere, and the place that religion should hold in these. The forum internum is considered absolute, protecting the ‘untouchable’ “inner dimension of human conscience.”<sup>156</sup> Forum externum refers to the external manifestations of this inner belief, which are not absolute, but subject to restriction.

Mahmood finds it problematic to distinguish individual belief from practiced religion, as if these components of faith were independent from each other to the result that the limitation of one (the manifestation or expression) would not affect the other (the individual belief). This problematic distinction is also addressed in certain ways by Nussbaum in her capabilities approach, as we have seen, where the freedom to exercise one’s conscience is a necessary part of a person’s capability to pursue the meaning of life and “each person’s struggle for flourishing.”<sup>157</sup> Nussbaum’s defense of the principle of liberty of conscience (including religious freedom) is, I think, based on a similar understanding of some of the personal dilemmas that can occur as a result of an interpretation that makes too harsh a distinction between belief and exercise/manifestation.

But it is not just the *forum internum/forum externum* distinction which is a source of dilemmas, but also within the forum internum itself. While the forum externum makes the free exercise of belief subject to restrictions based on public order and morals, and can thus be abused

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<sup>156</sup> Mahmood, Saba and Danchin, Peter, ‘Immunity or Regulation? Antinomies of Religious Freedom’, *South Atlantic Quarterly*, 113/1 (2014), p. 141

<sup>157</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 69

by the majority and state against the minority (as we shall further on), the forum internum poses different dangers:

It entails [] how the very category demarcated as “religious” in the *forum internum* is defined in the first place. Such a definition implicitly challenges the equation of the *forum internum* with individual belief alone.<sup>158</sup>

We thus return to the dilemma posed by Sullivan, although Mahmood extends it beyond the courtroom as she also connects it with geopolitical practices. As I understand Mahmood, it entails ways of defining what is considered legitimate religion and thereby reshaping how people themselves understand their faith in relation to its practice, in other words, they begin to reshape their understanding to fit with the formulations given in international documents as well as how it is interpreted nationally. In this way, religious freedom as it is currently tied up with global inequalities does not serve to protect minorities, but as we shall see, can serve to make them more vulnerable. We will return to this issue in the following section. The dilemmas concerning the principle of religious freedom touched upon so far in this chapter are part of what Mahmood calls ‘the Minority Problem’ to which we will now turn in considering the cases of the Bahai and Coptic communities in Egypt.

### ***4.3 Dangers in special protection of minorities - ‘The Minority Problem’***

The principle of religious freedom is inherently made up of an (it seems) unresolvable tension: on the one hand it uplifts the status of a group and its membership in a nation and society, on the other hand, its marked difference against the majoritarian population. The restriction of the exercise and manifestation of belief inevitably leads to a paradox:

[T]he second clause of the right to religious liberty authorizes the state to intervene in what appears to be mere expressions of religious belief but in fact involves the state in making substantive judgments about religion, a domain toward which it claims to be neutral.<sup>159</sup>

The state’s interpretation of what it considers to be unacceptable expressions of belief thus also affect the forum internum, which should be absolute. In the implementation of the right to religious freedom, the state sends out signals for what it considers to be acceptable religion, how it may be expressed in the public sphere and which expressions pose a threat to the collective identity of the nation. At the same time, the state is claiming to hold a neutral position on the

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<sup>158</sup> Mahmood, Saba and Danchin, Peter, ‘Immunity or Regulation? Antinomies of Religious Freedom’, *South Atlantic Quarterly*, 113/1 (2014), p. 141

<sup>159</sup> *Ibid.*, p. 129-130

issue. On this point, it is clear that Mahmood does not see religious freedom, as it is currently formulated, as offering protection for minorities. There is a tendency that courts that have an issue of religious freedom on their table “privilege the values and sensibilities of the majority religion and discriminate against minority faiths through recourse to the secular concept of public order.”<sup>160</sup> The law thus tends to reflect the sentiments of the majority, to the disadvantage of the minority. In this respect, Mahmood’s position is similar to that of Nussbaum.

As we have seen, the question of whether religious freedom is a useful tool for protecting religious freedom poses some dilemmas. In the context of postcolonial societies, it is particularly sensitive to call upon the right to religious freedom as a minority, as this makes it necessary to accentuate the groups’ difference against the rest of the population; thereby “[t]he conditions of their empowerment are also those of their vulnerability.”<sup>161</sup>

Mahmood’s anthropological work in Egypt is very useful in illustrating these problematics. Religious minorities such as the Copts and Bahai living in a country with a colonial past illustrate how the right to religious freedom fails to offer protection, or worse, serves to increase the group’s vulnerability. The call for religious freedom by Copts in Egypt was interpreted as an abandonment of the postcolonial nation-building project and accused of causing sectarianism. This was further accentuated by some calls for international intervention:

Such a polemical accentuation of Coptic difference from Egypt’s Arab and Muslim history may well gain foreign protection, but it also makes more difficult the project of finding ways of living together.<sup>162</sup>

The accentuation of difference against the rest of the population is a feature that is required by international law to even get the attention required to receive protection. In other words, those groups within a postcolonial society, whose rights are not being respected or who in other ways feel discriminated, must translate their plights to fit into the language of international norms and laws.<sup>163</sup> The question of what the consequences of adopting the minority label has been debated within the Coptic community:

The paradox that haunts the postcolonial religious minority in this moment is precisely that the terms that render religious discrimination legible are also the terms that suture religious identity to other forms of difference, and in doing so, make the minority identity unstable as much as it

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<sup>160</sup> Mahmood, Saba and Danchin, Peter, ‘Immunity or Regulation? Antinomies of Religious Freedom’, *South Atlantic Quarterly*, 113/1 (2014), p. 130

<sup>161</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 446

<sup>162</sup> *Ibid.*, p. 446

<sup>163</sup> *Ibid.*, p. 446



weakens the possibility of forging a collective life together.<sup>164</sup>

Furthermore, there were “representatives of the Coptic community refused to accept the assignation “minority” on the ground that they were no different than their fellow Egyptians.”<sup>165</sup> Although a powerful and unifying vehicle during the decolonization period, the idea of a nation free from colonial rule has started to lose its ability to unite the Egyptian population in recent times, not least in the past few years. The tensions at play here are thus that of wanting and finding pride in belonging to both a group that is religiously different from the majority while simultaneously belonging to a nation. In Mahmood’s view, the very value of coexistence, which is intertwined with the value of tolerance, is thus threatened by invoking the right to religious freedom in the case of Egypt.

It is for this reason that Mahmood thinks one should consider carefully what consequences universal claims of rights can have in particular contexts. It is not just a question of universal claims having to mediate within particular contexts, however, as we have seen there is also the added dimension of a particular tradition being promoted as universal as well as the dimension of geopolitical interests at play. Thus the right to religious freedom which is thought to embody the principle of tolerance and the values of liberty and equality serve to reproduce unequal relations, both between and within nations. Revealing these inconsistencies, inherent paradoxes and double standards is necessary in order to move forward to a conception in which the value of equality is consistent and not used to serve particular interests.

#### ***4.4 Religious freedom in the postcolonial context***

The inherent paradoxes of religious freedom became clear in court rulings concerning the right to religious freedom of the Bahai, a religious minority in Egypt. The case concerned their right to state their religion as ‘Bahai’ on their identity cards (which are essential to receive public services and rights). Egypt is obliged to follow the rights granted in the International Covenant on Civil and Political Rights (ICCPR) which similarly to ECHR opens up for states to restrict religious manifestations in the name of maintaining public order and morals. Nonetheless, Egypt’s obligation is conditioned on the ICCPR’s compliance with Islamic Sharia. The national identity cards are needed to gain access to civil and political rights and religious belonging must

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<sup>164</sup> Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 446

<sup>165</sup> *Ibid.*, p. 435

thus be listed. The only acceptable entries under the rubric of religion are Christian, Jewish and Muslim. However, up until 2004, when the system for issuing national identity cards was first computerized, it was generally practiced and accepted locally for the Bahai to record their religion on their identity cards. In the computerized system, however, this was no longer possible since 'Bahai' was not accepted. Those with 'Bahai' stated on their identity cards (from the older system) had their cards confiscated by the government.

This caused several dilemmas for those who held a strong conviction to express their identity as Bahai. Being deprived of civil and political rights as a result, the Bahai took their case to the courts on the grounds of claiming their right to religious freedom. The issue at hand for the Egyptian courts was to; 1. Guarantee the constitutional right to religious belief, 2. Guarantee the political and civil equality of all Egyptian citizens 3. Maintain public order and morals 4. Decide whether or not to recognize the Bahai as an official religion. The fourth issue was especially sensitive since the Bahai faith is not part of the 'People of the Book' (Christianity, Judaism and Islam), and is thus not recognized within Sharia. Three different cases were brought to court, each illustrating the failure of religious freedom to provide adequate protection for minorities.

There are several interesting points in these rulings that illustrate the tensions related to the right to religious freedom. Whether the main concern lies with the state defining what is considered legitimate religion or determining what constitutes a threat to public order, the resulting contradictions "emanates from [this] fraught and contested distinction...that is at the heart of the conceptual formulation of the right [to religious freedom] itself."<sup>166</sup> The rulings resulted in the accentuation of difference between the Bahai and the Muslim majority, illustrating how law cannot fully solve such issues:

In Egypt's increasingly sectarian climate, this is not an easy burden to carry and is a reminder that legal remedies are only partial resolutions of deep prejudices and social inequalities.<sup>167</sup>

Although she does not explicitly reject religious freedom and minority rights, I understand Mahmood as arguing that national unity, with equal citizenship, is a preferable way to avoid discrimination of minorities and promote coexistence. She argues that since it is only the state that can guarantee and provide rights to citizens, political and civil rights are much more effective than human rights that are part of a (Western) international discourse. The values at

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<sup>166</sup> Mahmood, Saba and Danchin, Peter, 'Immunity or Regulation? Antinomies of Religious Freedom', *South Atlantic Quarterly*, 113/1 (2014), p. 137

<sup>167</sup> *Ibid.*, p. 142-143

stake for Mahmood are thus also equality and liberty, I would argue, though not bound by the Western-liberal-secular understanding. These values are not anti-liberal, but are more open to different understandings than a universalist approach would.

Before moving on, it should be noted that despite the focus on the case of Egypt (for the sake of the postcolonial perspective), the dilemmas which Mahmood identifies are also present elsewhere, for example in the dealings with religious freedom by the European Court of Human Rights.<sup>168</sup>The result of these inherent paradoxes of religious freedom, regardless of where they are applied, is that the protection is extended in an inconsistent and unfair manner.

#### ***4.5 Possible objections to Mahmood's approach***

Refusing to resort to Western formulations of rights would then also constitute a continuation of the colonial resistance, and pose an objection to the persisting inequality between the West and the rest of the world.<sup>169</sup>Thus, in Mahmood's view, it is not enough to pay attention to other perspectives or offering accommodation, as Nussbaum suggest, without considering the 'grander politics involved' both in the present and in the past. While recognizing that the liberal tradition is but one among others, by proclaiming certain liberal understandings of values as universal, Nussbaum's approach is still at risk of becoming 'violent' and unsustainable, as Namli argues. Furthermore, it remains to be explored whether accentuating difference can be useful to draw attention to a problem, or whether it causes further vulnerability, or if it does both, perhaps depending on the context, as Mahmood argues.

We have seen that Mahmood seems to be arguing that the value at stake in religious freedom is equality. She is skeptical both of how religious freedom can serve to protect traditionally vulnerable groups such as religious minorities, and how religious freedom is instrumentalized within geopolitical interests, marking the inequality between the West and the rest. The promotion of religious freedom by actors such as the U.S. in Egypt is not merely a case of one state supporting the other to find and promote the enlightened principle of toleration that religious freedom is supposed to represent, but a reflection of how the principle is both used to promote inequality and how its very architecture is intertwined with creating this inequality.

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<sup>168</sup> See Mahmood, Saba and Danchin, Peter, 'Immunity or Regulation? Antinomies of Religious Freedom', *South Atlantic Quarterly*, 113/1 (2014)

<sup>169</sup> Mahmood, Saba, 'Religious Freedom, the Minority Question, and Geopolitics in the Middle East', *Comparative Studies in Society and History*, 54/2 (2012), p. 440

In this, Mahmood wants to find different analytical tools for understanding participation in illiberal movements. Yet Mahmood is concerned that the hegemonic standing of the secular-liberal is so enveloping that it is difficult to even imagine anything outside of it, thus the reading of *Politics of Piety* will inevitably rest on a particular understanding on which the message is judged: “regardless of whether I stage such juxtapositions or not, the horizon of secular-liberal presuppositions about the proper role religiosity should play in the constitution of a modern subjectivity, community, and polity will inevitably structure my audience's reading of this book.”<sup>170</sup> In this way, Mahmood would meet Bangstad’s criticism as exemplifying the hegemonic standing of the secular-liberal. It inevitably reflects a particular (liberal) assumption, while not admitting that this is one assumption among others.

By focusing on a postcolonial context, Mahmood has shown how problematic it can be to make universal claims thinking that these are the same over time and space. It is perhaps for this reason that Mahmood is hesitant to offer any ‘way out’ (which was part of Bangstad’s criticism of her approach), because she is skeptical of any such overall solution. While Bangstad remains skeptical of Mahmood’s use of anthropological study to form a critique against the Western-liberal-secular, arguing that it is apologetic of illiberal and anti-feminist practices, it is her approach in itself that can be seen as her contribution to the how the tensions of religious freedom should be mediated. As Danchin pointed out, the largest obstacle to more inclusive and sustainable human rights is the “inability of many Western rights theorists to see their culture as one among others.”<sup>171</sup>

Mahmood’s approach is thus more in line with Danchin and Namli in seeing the way forward for human rights as a continuous process of dialogue and critical reflection without which we may never achieve a regime of rights that actually fulfills its purpose and promise of protection. Nonetheless, we will return to the question of whether contextual sensitivity such as that proposed by Mahmood is harmful or necessary to projects such as that of human rights. In the next and final chapter, we will summarize the arguments made in this paper so far and continue to reflect on the research and analysis questions.

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<sup>170</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 191

<sup>171</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 321

## 5. Concluding discussion

By comparing two seemingly incompatible approaches, this thesis has argued that there may be some unexpected points of similarities which can offer ways forward from the current impasse concerning religious freedom. For example, the value of equality can be identified as central in both Nussbaum and Mahmood's approaches and though they have slightly different understandings of this value, I have argued that they are more similar than it may seem. The purpose of this paper was to explore ways of mediating the tensions of religious freedom within the debate between universalism and contextualism. As such, this thesis has also attempted to mediate the tensions in the debate between universalism and contextualism as well. Let us reiterate the research question of this paper:

What tools do Saba Mahmood and Martha Nussbaum offer for mediating the tensions between universal claims and contextual sensitivity within religious freedom?

Before answering this question in more detail and reflecting on what possible conclusions can be drawn from it, however, this chapter will attempt to crystallize Mahmood and Nussbaum's arguments and positions to form a clearer base for comparison on each analysis question, thereby making their similarities and differences more accentuated. More importantly it serves to consider if the universalist and contextualist approaches (as represented by Nussbaum and Mahmood) really are as incompatible as it is often made to appear. Even though these questions have steered the analysis in chapters 3 and 4, for the sake of clarity and to refresh our memory, we will consider them again here, in a more concrete format. The analysis questions are as follows:

- *What value is at stake within the principle of religious freedom?*
- *Is the value at stake universal or subject to contextual interpretation?*
- *How do Nussbaum and Mahmood understand universalism and contextualism?*
- *Should religion be singled out for protection?*
- *Does religious freedom offer protection for religious minorities?*

These questions are clearly interrelated and as such will not be treated independently, yet each question serves a purpose in answering the main research question. Do the approaches of Nussbaum and Mahmood really differ in their answers to these questions to the point that they become incompatible? Answering this question will help us think about what tools each approach offers in mediating the tensions that have been discussed in this paper. As we have

seen in the previous chapters, although arguing from different positions, it can be said that they meet on several points. It is, as I will argue in this concluding chapter, largely a matter of method (the *how* rather than the *what*) that sets Nussbaum and Mahmood apart, while their visions share similarities. If their vision is a human rights regime that fulfills its promises and is not instrumentalized for unequal purposes, their methods of how to achieve this may be slightly different yet they should not be seen as incompatible. Here a content analysis becomes useful, and particularly so a comparative one, as it considers how the arguments function logically within the approach, making it clearer in what way the concepts are understood. This is not to say that their approaches are de facto the same, but that they are not as different as for example Manga and Bangstad attempt to argue by placing them in a polemic position against each other.

Let us also recall that the purpose of this paper is not to pick one approach over the other, but to see what each has to contribute (which tools) to mediating the tensions of religious freedom. Nussbaum and Mahmood have thus served as a platform for a wider discussion on the tension between universalism and contextualism when considering the right to religious freedom. We will now turn to the analysis questions and will end the chapter with some final reflections.

## **5.1 Values at stake**

We have established that both Nussbaum and Mahmood place the value of equality at the core of their argumentation, although Nussbaum places equal emphasis (if not more) on the value of liberty. Individual autonomy and self-determination are central to the capabilities approach and a precondition for this is that each individual needs to be living with certain standards which ensure a life in liberty and equality: “the capabilities approach is fully universal: the capabilities in question are important for each and every citizen, in each and every nation, and each is to be treated as an end.”<sup>172</sup>

Would Mahmood argue against this view? As we have seen, Mahmood does not discredit the achievements of the liberal values, particularly regarding women’s rights, yet it is not enough to remain committed to liberal values as they are, considering their alliance with unequal power relations. Thus, by posing a strong, seemingly dichotomizing critique, Mahmood is attempting to displace the hegemonic standing of the Western-liberal-secular. The value in such an approach is necessarily one of equality, since she is attempting to get at the persistent unequal relations from

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<sup>172</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 6

which much ‘other traditions’, particularly Islamic ones, are then evaluated against a set standard.

Nussbaum’s approach centers on the individual and *each person as an end rather than a means*. While Mahmood and Nussbaum both promote equality, I would argue that they differ more when it comes to the value of liberty. Mahmood speaks of freedom and the assumption that this is something intrinsic to human nature, that women participating in what may be considered subordinate practices and traditions would not possibly choose this if they were actually free (possessing individual autonomy); “is such an assumption valid? What is the history by which we have come to assume its truth?”<sup>173</sup> As we have seen, Nussbaum’s approach is an attempt to refrain from claiming to hold all the answers while maintaining liberty and equality as core values, for central capabilities that gives each individual the autonomy to choose for herself.

Yet, as we have seen, Mahmood is skeptical of this view of liberty. As a self-described feminist and secular-leftist growing up in Pakistan, Mahmood grew increasingly skeptical of religion seeing how it was used to reach and maintain power and started to adopt a language of secular-liberal feminism. While remaining a feminist, Mahmood has since then grown increasingly uncomfortable and unsatisfied with the secular-leftist feminism’s way of approaching practices and views which fell outside their traditional understanding. What was not secular and rational with the individual’s autonomy at the center was considered unmodern, irrational, anti-feminist. Mahmood thus builds on the postcolonial critique by emphasizing how religious freedom, a seemingly benevolent and well-meaning principle, could not be seen in isolation from the context in which it was created as well as the context in which it was implemented. Thus, it could be argued that Mahmood argues for a form of liberty in the sense of being free from hegemonic discourses masked as neutral and universal.

## ***5.2 Understandings of universalism and contextualism***

The question of how Nussbaum and Mahmood approach the questions of universalism and contextualism necessarily relates to the question of what values are at stake. We have seen that Mahmood is critical of the liberal fixation on the dichotomy of subordination/resistance. In this liberal view, since individual autonomy is at the center, an individual in order to fully live the values of equality and liberty must resist any form of subordination. But what if a person chooses

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<sup>173</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 2

to be subordinated? As I understand Mahmood, she is not arguing for a completely relativist view in which all forms of subordination, even violent ones, are accepted merely because we must respect different traditions, but instead her intention is to complicate this apparently fixed dichotomy. If we accept this reasoning, then Nussbaum, despite her attempts to reconcile universal claims and contextual sensitivity, fails to pay enough attention to how larger political schemes influence how rights are understood.

If taking the example of the women's pious movement in Egypt, Nussbaum's approach would assess whether their capabilities are met, and thus whether they would be choosing that life if they had all the basic capabilities. The principle of treating each person as an end and not a means becomes difficult to apply on this case, I think. Would a woman choosing to be subordinated to a higher authority be considered to be treated as a means rather than an end? Would Nussbaum adopt the "false consciousness thesis" which Mahmood speaks of, in which it is believed that if only these women are 'freed' they would express their discuss of the patriarchal structures they were living under – in other words, if they are living in subordination they are necessarily unfree and thus living under false consciousness.<sup>174</sup>

These are difficult questions to answer, and perhaps it illustrates Mahmood's point that some liberal frameworks are inadequate to deal with different conceptions than its own. Although freedom and self-determination are important values, they have not been the most important for everyone at all times, argues Mahmood.

Furthermore, the problematics regarding the instrumentalization of rights which Mahmood speaks of is indirectly addressed in the capabilities approach; "putting the central capabilities in the place of rights: central capabilities may not be infringed upon to pursue other types of social advantage."<sup>175</sup> Despite the fact that Nussbaum does not adopt a similarly critical stance as Mahmood, I believe the values she places in her capabilities approach have the potential to be flexible to such criticism. She is also aware of the dangers that come with promoting a coercive approach which results in being imperialistic; "we want universals that are facilitative rather than tyrannical, that create spaces for choice rather than dragooning people into a desired total mode of functioning."<sup>176</sup> Yet she does not see such criticism as an excuse to let go of universal claims for basic standards, she would thus maintain that although any approach to

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<sup>174</sup> Mahmood, Saba, *Politics of piety: the Islamic revival and the feminist subject*, 2005, p. 2

<sup>175</sup> Nussbaum, Martha C., *Women and Human Development: The Capabilities Approach*, 2000, p. 14

<sup>176</sup> *Ibid.*, p. 59



complex issues must retain a certain amount of flexibility, it is equally important to remain uncompromising on some core principles.

### ***5.3 Religion as special and the protection of minorities***

Although the principle of religious freedom is central to this study, and to a certain extent legitimized as such, it is also the subject of discussion. Therefore, the question of why religion is granted special protection has been asked since it is related to the question of what values are at stake. For example, as was most notably brought up by Leiter in his book with the provocative title *Why Tolerate Religion?*, it is questionable whether such a special treatment is justifiable. Is such special treatment compatible with a liberal principle of equality? While Leiter argued for “minimal” respect, Nussbaum argued that we should be generous and grant all forms of conscience accommodation to the greatest extent possible. In Leiter’s case, it was argued that in order to maintain the highest degree possible of equality and fairness, it is best to avoid making exemptions from generally applicable laws. Nussbaum, also placing the value of equality at the center of her argument, instead pursued an approach which develops along with society; treating new cases as they come and attempting to accommodate difference as much as possible.

Meanwhile, Mahmood raised the issue of how the principle of religious freedom *in itself* could have unintended consequences in the form of increasing the vulnerability of minorities by accentuating difference within a society. Furthermore, the way the right to religious freedom is generally formulated and divided into two clauses causes a space which may be misused by the state. The vagueness of religious freedom can thus serve to promote and legitimate practices that go against its very purpose when used to restrict or discriminate religious minorities.

Although Mahmood is not as explicit in arguing for what way forward she suggests for dealing with religious freedom, I am of the understanding that she prefers equal citizenship over rights that are aimed at specific groups. Perhaps surprisingly then, Mahmood’s position shares similarities with Leiter. Nonetheless, I am less sure of how Mahmood would argue regarding accommodation- is she really of the opinion that accommodation would serve to accentuate difference? I find this unlikely. What Mahmood aims to do is show the inherent bias of the (what I have been calling) the Western-liberal-secular and how its hegemonic discourse is intertwined with such rights as religious freedom “religious freedom has been tied from its very inception to

the exercise of sovereign power, regional and national security, and the inequality of geopolitical relations.”<sup>177</sup>

As we have seen Mahmood is very skeptical of offering any special protection, as this serves to accentuate difference rather than promote unity. As I understand Mahmood, given her attention to context, this is mostly applicable to the postcolonial context, particularly Egypt with its relations to the U.S. since the rights are intertwined with geopolitics. I am less sure of how she would argue when it comes to Europe, for example, where rights such as religious freedom do not carry the same connotations of colonialism. The criticism she offers would nonetheless be useful to show how certain understandings dominate the discourse which excludes religious minorities, particularly Muslim ones.<sup>178</sup>

#### ***5.4 Tools for mediation?***

I find both Nussbaum and Mahmood useful in dealing with the many tensions and dilemmas of religious freedom. Nussbaum offers clarity and practicality to a debate that is complex while taking a clear stance in favor of the need for universal values that should serve as guiding “fixed stars” without failing to see the dangers of becoming too abstract or detached from local realities. The capabilities approach is also a constructive attempt at arriving at a way forward beyond the apparent incompatibility between universalism and contextualism.

Meanwhile, Mahmood contributes with much needed criticism about the double morals that are part of how the current human rights regime is functioning. Her analysis of how the right to religious freedom is intertwined with geopolitics in Egypt is a painful reminder of how complex the issue of religious freedom is, not to mention the entire human rights regime. Her analysis also serves to illustrate how well-intentioned protection, such as religious freedom, can have unexpected consequences that go against the very essence of what it is supposed to protect. Nonetheless, Bangstad may have a point in that Mahmood sometimes takes the point too far in an effort to critique the Western-liberal-secular. In the end, Mahmood’s critique is invaluable and necessary but her conclusions amount to a form of pessimism that simply states how wrong things are, without offering any solution or prospects of improvement.

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<sup>177</sup>Mahmood, Saba, ‘Religious Freedom, the Minority Question, and Geopolitics in the Middle East’, *Comparative Studies in Society and History*, 54/2 (2012), p. 429

<sup>178</sup> For a discussion on hegemonic discourses in Europe, taking the Danish cartoon controversy as an example, see *Is Critique Secular?*(2009)

Nonetheless, it is worth to consider that not offering any ‘way out’ of dilemmas may, as Bangstad points out; “not matter all that much for anthropology as an analytical discipline, but it does matter for those anthropological scholars interested in exploring potential convergences in and between various traditions, rather than merely affirming existential difference.”<sup>179</sup> Bangstad’s own suggestion is that “a good starting point would be to avoid reducing ethnographies of actual Muslim women’s lives to the function of templates for ideologically motivated critiques from either side of the political spectrum.”<sup>180</sup>

Furthermore, I think it is worth considering Namli and Danchin’s ways forward for the human rights regime, it is necessary that such assumptions are made explicit. The point I believe Mahmood is trying to make is not an ‘extreme’ relativist one, she is not attempting to say that women’s subordination is something which should be accepted but rather wants to illustrate the secular-liberal framework of consensus from which such practices are expected to be analyzed. Mahmood’s criticism is thus that the secular-liberal is not thought of as one way of seeing things among other ways, but as the *only* way, and this is problematic when promoting equality.

Namli and Danchin may thus offer an important insight; that human rights need to be thought of as a constant process and “requires the constant search for forms of accommodation, mutual understanding, and overlapping consensus between actual communities and the normative claims of rights discourse.”<sup>181</sup> Nussbaum’s capabilities approach could be the object of such an overlapping consensus, but it is also useful to keep in mind some of Mahmood’s skepticism.

Furthermore, the issue of minorities illustrates the need of a perspective which offers an analysis of power relations, because while minorities are often discriminated against by the majority, it is not always the minority that is vulnerable, but the majority can also be the group in power. What we can take from this discussion is that human rights are complex and that theory cannot be made to fit onto reality in a ‘neat and tidy way’ yet some core values such as, although they may never be clearly defined, need to form some form of ethical guidance. This thesis has also served to show that we need to think about rights like religious freedom carefully and that any claims to universality within particular traditions must be made explicit.

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<sup>179</sup> Bangstad, Sindre. *Saba Mahmood and Anthropological Feminism After Virtue* 2011 p. 44

<sup>180</sup> *Ibid.*, p. 44

<sup>181</sup> Danchin, Peter, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’, *Harvard International Law Journal*, 49/2 (2008), p. 321

## ***5.5 Final comments***

It is my hope that this paper has served to dive into the debate on human rights and their universality by placing the magnifying glass on the right to religious freedom. The right to religious freedom was chosen because it is a highly contested right and relevant in how it deals generally with questions of tolerance and coexistence. It is, I believe, important to carefully examine concepts and words which are widely used, how they are understood and what happens when they are implemented. It is also a matter of carefully weighing them and thinking about the functionings of rights.

This thesis has attempted to show, by comparing Mahmood and Nussbaum, that universalism and contextualism share similarities yet have different approaches. Mahmood sees a need to show the currently biased liberal tradition as a hegemonic discourse, and the issues this poses if one is concerned with equality. Nussbaum is also concerned with equality and in promoting each person as an end, ensuring each person's liberty by setting certain central capabilities as a standard for human dignity.

I believe both Nussbaum and Mahmood would agree with this, because if they did not care about equality they would not have made normative arguments about how rights such as religious freedom are best understood and practiced. Neither Nussbaum nor Mahmood's approaches are thus ethically neutral; they see both equality and respect and sensitivity to difference as important.

We have seen that both Nussbaum and Mahmood see certain dangers in the way the principle of religious freedom is commonly formulated in international documents (and national law). While coming from different traditions and clearly promoting different approaches to religious freedom; and human rights in general, they both see the need to make the current human rights project more inclusive.

What we have learned from the discussion around the apparent tensions between universalism and contextualism is that this debate need not be seen as a debate between two extremes; that some vague idea of values such as equality and liberty are important across this spectrum. Although the results of the comparison between Nussbaum and Mahmood may not be subject to too much generalization, we can speculate that it could constitute some form of insight regarding the apparent contradiction between universalism and contextualism.

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