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# FIDES ET LIBERTAS



## 2016-2017

GLOBAL CHALLENGES TO THE UNIVERSALITY  
OF RELIGIOUS FREEDOM

**International Religious Liberty Association**

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We believe that religious liberty is a God-given right.

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We believe that government is divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; and that in so doing, government warrants respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of conscience—to have or not have a religion; to adopt the religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with others in worship, observance, practice, promulgation, and teaching—subject only to respect for the equivalent rights of others.

We believe that religious liberty also includes the freedom to establish and operate appropriate charitable or educational institutions, to solicit or receive voluntary financial contributions, to observe days of rest and celebrate holidays in accordance with the precepts of one's religion, and to maintain communication with fellow believers at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential to promote understanding, peace, and friendship among peoples. We believe that citizens should use lawful and honorable means to prevent the reduction of religious liberty.

We believe that the spirit of true religious liberty is epitomized in the Golden Rule: *Do unto others as you would have others do unto you.*

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The purposes of the International Religious Liberty Association are universal and nonsectarian. They include:

1. Dissemination of the principles of religious liberty throughout the world;
2. Defense and safeguarding of the civil right for all people to worship, to adopt a religion or belief of their choice, to manifest their religious convictions in observance, promulgation, and teaching, subject only to the respect for the equivalent rights of others;
3. Support for religious organizations to operate freely in every country through the establishment of charitable or educational institutions;
4. Organization of local, national, and regional chapters, in addition to holding seminars, symposiums, conferences and congresses around the world.

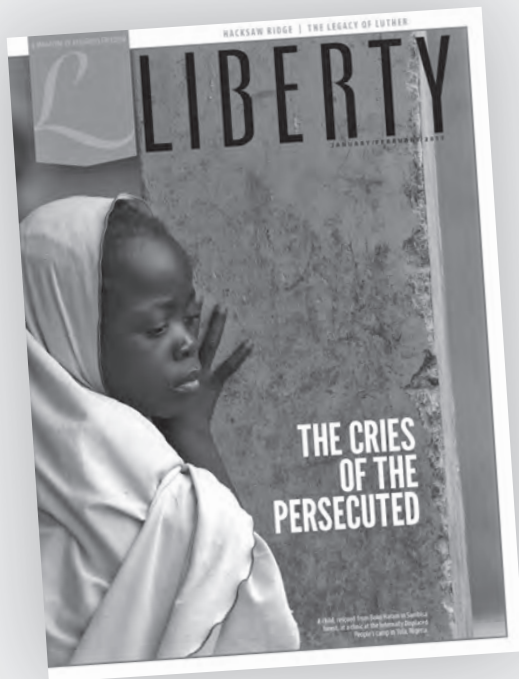
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The mission of the International Religious Liberty Association is to defend, protect and promote religious liberty for all people everywhere.

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## INTRODUCTION

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The premise upon which all human rights are based is the unity of all human beings; and thus, the universality of human rights is connected to our understanding of what it means to be human. There is one human race, indeed one human family. This is the principle that should be the foundation of human solidarity.

However, the record of human interactions with other humans has been abysmally cruel, and the way humans continue to treat other humans is often inhumane. History is replete with atrocity crimes, genocides, conquests, and the subjugation of people depriving them of their freedom to live according to the dictates of their conscience. This has led, not surprisingly, to disenchantment with the idea that we are all one human family.

Tribalism, nationalism, regionalism, or continentalism have been the norm. Wars based on ethnic generational hostilities surface all too frequently. Conflicts and proxy wars plague the possibility of peace in too many parts of the world.

The belief in one humanity, and the fact that human rights are justifiably based on what is human and humane in humanity, is a sure antidote against the exploitation of other people. It acts as a deterrent to the demeaning or trampling of others' dignity.

The dignity and infinite value of every human being is based on the sacred nature of every person. From a religious perspective, the fact that humans are created in the image of God places them beyond any form of instrumentalisation by any other person, for any reason. As Immanuel Kant wrote, humans should not be used as mere means to an end. All ought to be honored in their humanity. This benevolent disposition towards all human beings, and the respect due to everyone, is grounded in this premise.

This edition of *Fides* will explore the universality of human rights in general, and freedom of religion and belief in particular. Contributors have explored, from many different perspectives, the pivotal positioning of the universality of human rights.

The horrors of the holocaust and various genocides, forced migrations of people of African descent during the transatlantic and trans-Saharan slavery, the brutal deportations that have punctuated human history, human trafficking and the spoiling of earth resources—all this has led many



to believe that cruelty, greed, and inter-generational grudges are incurable evils. But the corruption of the good should not lead us to conclude that genuine good does not exist.

People of good will in every part of the world are showing a solidarity that transcends ethnic, national, or regional boundaries. They deliberately sustain the dignity of difference while affirming a deeper bond that contributes to peaceful coexistence. IRLA members and supporters feel privileged to partner with those who wish to uphold freedom of religion or belief for all in the name of the sacredness of every person's conscience.

Ganoune Diop, Ph.D.

Secretary General, International Religious Liberty Association.

# FIDES ET LIBERTAS



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## PART ONE

### CHALLENGES TO THE UNIVERSALITY OF RELIGIOUS FREEDOM

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# UNIVERSALITY OF HUMAN RIGHTS OR DISGUISED IMPERIALISMS?

## CURRENT GLOBAL CHALLENGES TO HUMAN RIGHTS AND FREEDOM OF RELIGION OR BELIEF

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GANOUNE DIOP<sup>1</sup>

*Are human rights universal or are they a constructed narrative purposed to support a new mission to civilize so-called non-Western nations and people groups? Some have argued that fundamental freedoms, in general, and freedom of religion or belief, in particular, constitute a hegemonic Western cultural imperialism intended to subjugate cultural distinctiveness. Thus, it is argued, these narratives need to be deconstructed and exposed for what they really are. From this perspective, the concept of universal norms is considered an intrusion and a violation of other peoples' cultural uniqueness, and the West is accused of imposing its world-views on the rest of the world.*

### INTRODUCTION

On June 23, 2016, the Pew Research Center released its annual study on global restrictions on religion. It found that, worldwide, government restrictions on religion and social hostilities involving religion decreased modestly from 2013 to 2014, despite a rise in religion-related terrorism; it was down to 24 percent from 28 percent. Even so, the reality remained that “roughly three-quarters of the world’s 7.2 billion people . . . are living in countries with high or very high restrictions or hostilities in 2014.”<sup>2</sup>

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1 Ganoune Diop, Ph.D., *Doctor Honoris Causa*, is Secretary General of the International Religious Liberty Association. He also serves as Director of Public Affairs and Religious Liberty for the Seventh-day Adventist World Church.

2 Pew Research Center, Religion and Public Life, “Trends in Global Restrictions on Religion” (June 23, 2016). Retrieved from <http://www.pewforum.org/2016/06/23/trends-in-global-restrictions-on-religion/>.



A global consensus for securing the most intimate freedom—freedom of conscience, and the broader category of freedom of religion or belief—is a major challenge. It is far from being achieved.

The fact that three fourths of the world’s population does not benefit from this fundamental freedom called religious liberty is in itself a compelling and urgent argument for mobilizing the international community to improve the lives of more than 5 billion persons; for this freedom goes to the essence of what makes us truly human, allowing us to genuinely live as a responsible human being, morally accountable by virtue of a functioning conscience.

Our global context presents us with a paradox. Human rights in general and freedom of religion or belief seem to benefit from a worldwide recognition and acceptance. They are inscribed in most national constitutions. However, even among nations which adopt these rights as part of their foreign policy, at home, the legitimacy of the language, discourse, and concept of human rights is increasingly contested. This has certainly been the case for totalitarian regimes; but in academic, philosophical, and political circles, religious freedom “once a self-evident human right” is now deconstructed. Several scholars, contemporary thinkers, and politicians have written to challenge the very concept of human rights and their relevance. There has also been a considerable increase in recent publications making a case against the universality of human rights.

Professor David Little has provided us with a very significant map of the terrain of the objections and/or resistance to the legitimacy of human rights advanced in the marketplace of ideas.<sup>3</sup> I have built the following upon his insightful analyses and added other authors’ objections. They are as follows:

1. A convincing theoretical basis for human rights is impossible.<sup>4</sup>
2. Human rights are fabrications and fictions without legitimate foundations.<sup>5</sup>

3 David Little, *Essays on Religion and Human Rights: Ground to Stand On* (New York: Cambridge University Press, 2015) provides us with a helpful overview and critique of the objections to human rights. See also, David Little, “Law, Religion, and Human Rights: Skeptical Responses in the Early Twenty-First Century” in *Journal of Law and Religion*, Volume 31, Issue 3 (November 2016), 354–366.

4 See Peter Danchin, “Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law,” *Harvard International Law Journal* 49, 2 (Summer 2008), 316; also, “Who is the ‘Human’ in Human Rights? Claims of Culture and Religion,” *Maryland Journal of International Law* 24, 94 (2009).

5 See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (South Bend, IN: Notre Dame Press, 1981) 67, who stated that “there is no such rights [human rights] . . . human rights are fictions.”



3. The language of human rights is considered utopian or illusory.<sup>6</sup>
4. There are contradictions between the claims of universality of the so-called ideology of human rights emphasized in the Western world, and the economic and social rights emphasized in the former communist bloc. All this translates into divergent or contradictory cultural applications.<sup>7</sup> A polarization between national sovereignty and individual rights seen in recent concerns over security is currently at play in several countries. It is argued that these contradictions erode the foundations of human rights. These contradictions are exacerbated by an ongoing conflict of interpretations between individual and political rights.
5. Despite the widespread use of human rights language to challenge people, governments, and various institutions, it is considered “vague and confusing, having been the subject of conflicting interpretations and deep philosophical disagreement.”<sup>8</sup>
6. The universal nature and legitimacy of human rights and the ideas of “inherence” and “inalienability” have not been proven convincing and compelling, and according to this line of reasoning, they should be dismissed.<sup>9</sup>
7. The concept of universal common truth in morality or in anything else is an “urge that should be repressed,” according to Richard Rorty.<sup>10</sup>
8. The concept of inalienable rights is interpreted as a philosophical mistake. It has been postulated that “America is the only country that has the misfortune of being founded on a philosophical mistake—namely the notion of inalienable rights.”<sup>11</sup>

6 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010). In his view, the present understanding of human rights as a universal system of moral and legal protection of basic individual rights was not invented until the middle of the 1970s. See David Little’s critique in “*Essays on Religion and Human Right: Ground to Stand On*,” Loc 991 of 13412.

7 Alain de Benoist, *Au-delà des droits de l’homme, défendre les libertés* (Paris: Krisis, 2004), who argues that the ideology of human rights is the most recent civil religion to date and he tries to debunk the very philosophical foundation of human rights.

8 See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, and Species membership* (Cambridge, MA: Belknap Press, 2006), 19–20; 29ff.

9 Jeffrey Stout, *Democracy and Tradition* (Princeton, NJ: Princeton University Press, 2004), 204ff.

10 Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982), xlii–xliii.

11 Stanley Hauerwas, *Hauerwas Reader*, eds., John Berkman and Michel Cartwright (Durham, NC: Duke





9. Human rights as used in Liberal Rights' discourse is, in fact, a self-serving cover for ulterior national interests, particularly on the part of dominant countries such as the United States. A group of scholars from anthropology, international relations, and law—self-designated as “The Immanent Frame”—postulated that human rights are “floating signifiers that can be attached to or detached from various subjects and classes constituted by market principles and by the most powerful nation-states.”<sup>12</sup>
10. Governments that use the concept of human rights to attempt to propagate their democratic ideals are going beyond their legitimate prerogatives. In other words, they are crossing boundaries of national sovereignty.<sup>13</sup>
11. Secular theories of human rights are not intelligible, it is argued. According to this exclusivist line of argument, human rights can only be consistently justified on religious premises.<sup>14</sup> This argument would cancel the universality of human rights. They would just be reduced to partisan religious perspectives.
12. An anti-intellectual trend, which tends to downplay the importance of human rights in favor of an exclusively pragmatic approach to human rights, claims that there is no need to try to find a foundation or legitimacy for human rights. It is sufficient to settle with consensus on a list of rights without the need for their philosophical justification, their normativity, or prescriptive nature.

The roots of current challenges to religious liberty are multifaceted. They are historical, philosophical, moral, political, socio-cultural, and existential. They all converge into a crisis of credibility, disenchantments and disbelief in human capacity for justice, and in societal and governmental commitment to the good of all.

Most criticisms against the promotion of human rights and religious freedom consist of pointing to a lack of credibility in light of global violations of human rights and the despicable record of human treatment of

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University Press, 2005), 608.

12 Talal Assad, *Formations of the Secular: Christianity, Islam, and Modernity* (Stanford: Stanford University Press, 2003), 158. See also, Eric Posner, who is a professor at the University of Chicago Law School. His latest book is *The Twilight of International Human Rights Law*, (New York: Oxford University Press, 2014).

13 Hubert Vedrine, “Entretien,” *Le Temps*, (24 Mai 2007).

14 Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998), 39.



other human beings. Some of the criticisms can be helpful against complacencies and relaxations of moral imperatives; however, they do not by themselves invalidate the legitimacy of international norms. Some of the critiques appear as propaganda of philosophies or worldviews that would erode the very foundations of human dignity, which grounds the concept of humanity and the noble aspirations of human beings for freedom, justice, peace, unity in diversity, and harmony.

Human rights are interrelated, interdependent, and indivisible, as stated in the text of the 1993 Vienna Convention. From this perspective, promoting any one of the fundamental freedoms implies intersections and the adoption of other rights or freedoms. More fundamentally, justice cannot be sectorial or compartmentalized. A pick-and-choose approach to human rights is self-defeating. The very concept of justice is much more comprehensive.

From this premise, it follows that a multidisciplinary, comprehensive, or holistic approach to human rights and religious freedom is warranted. A universalist perspective that ties religious freedom to other freedoms does indeed do justice to the whole account of human rights.

## I. CONTENT OF THE CRITICISMS AND RESISTANCE TO HUMAN RIGHTS LANGUAGE AND REGIME

Much of the skepticism, resistance, or outright rejection of the human rights regime is born out of disillusionment with the motives of religious people, or disenchantment with political ideologies and politicians. Belief in the reality of rights wavers in the face of constant examples of violations of people's right to peace and decent living. The widespread traumas witnessed in much of the world due to the suffering inflicted upon millions of humans, many of whom are used as disposables, victims of wars and terrorism seem to categorize human rights as wishful thinking.

Moreover, natural disasters and devastations seem to make a mockery of the meaning of human existence and of the sacredness of human lives. For many, the toll of deaths is a scandal impossible to rationalize and reconcile to the idea of "right."

In reference to specific resistance to human rights, aspects formerly taken for granted are now deconstructed and dismissed. For many disenchanting contemporaries, it is hard to believe in an orderly universe that would justify human rights in the face of the human brutality witnessed



in various religious and geopolitical wars, the total wars of the 20th century, slavery (both transatlantic and trans-Saharan), and the various genocides and disasters that have punctuated human history.

Many, after Frederick Nietzsche, believe that chaos subtends human existence. Life is unjust, meaningless, and unfixable. This belief has led many post-war intellectuals and racial supremacists to flirt with fascism. Human rights have no place in ideologies that led to the Holocaust and other genocides. Human violence, not only in the form of mass atrocities but also everyday abuses and murders, has created disenchantment and distrust.

Most human problems are connected to the issue of justice. How can one solve issues of this magnitude? So many abuses, murders, cases unsolved. Skeptics of the reality of human rights evoke everyday violence in every country, dismissing discourse about religious freedom as a mere fashion of bourgeois circles.

The following statistics make some question the very concept of the Land of Liberty. In America, it is reported that every 12 seconds a woman is beaten. Half of the women beaten are pregnant. Every eight minutes a woman is raped. Every six hours a woman is murdered. Domestic violence is the number one cause of hospital emergency room visits.<sup>15</sup>

One could add that in many countries inhumane treatment of prisoners is a daily reality adding fuel to the belief in the inhumanity of humans. In other words, what humans do to one another discredits the concept of universal human rights. Moreover, the sight of child soldiers and children working in mines is taken as additional evidence of meaninglessness. Human trafficking and forms of contemporary slavery are certainly an assault to our sense of human dignity; nevertheless, they are still practiced. This track record of violations of human rights militates for the prevalence of the dark side of humanity.

When it comes to the issue of distribution of world resources resulting in massive poverty, the statistics reveal systemic injustice and leads people to despair when it comes to the very idea of human rights. The scandal of poverty is another argument that is used to dismiss the reality of rights and the impossibility to make the world right.

One percent of the world's population owns 50 percent of world resources. Ten percent owns 86 percent of world re<sup>sources</sup>. Forty percent, largely the middle

15 See *Statistics on Violence and Peace* compiled by the NGO Peace Alliance. Retrieved from <https://peacealliance.org/tools-education/statistics-on-violence/>.



class, share the remaining 14 percent. This means that 50 percent of the world's population have nothing.

These injustices lead people to the conclusion that chaos subtends human existence. Rights are illusion. Inequality reigns and human solidarity based on rights is not the norm.

## II. CURRENT SKEPTICISM OF HUMAN RIGHTS AND RELIGIOUS FREEDOM

### A. UNIVERSALITY OF HUMAN RIGHTS CHALLENGED

Doubters of the universality of human rights point to the diversity of cultures as something that, in itself, renders such an enterprise impossible. In fact, it has been postulated that: “International human rights are part of a tradition of optimistic humanism that seeks to transcend national, ethnic, and cultural chauvinism in favor of objective scientific and moral truths. They stand against the moral relativism of the disenchanting post-modernist and the provincial traditionalism of the social conservative.”<sup>16</sup> Diversity of cultures militates against universal norms.

### B. CHALLENGE TO THE FOUNDATIONS AND PRIMACY OF HUMAN RIGHTS

The foundation for human rights, human dignity, and the pivotal role of freedom of religion or belief, have been denigrated. The foundation upon which all human rights are based—human dignity—has been dismissed as irrelevant. Several thinkers find it elusive, empty rhetoric, a tool for propaganda.

In his evocatively entitled book, *The Endtimes of Human Rights*, Hogwood postulates that: “The increasing use by advocates of the language of ‘dignity’ to anchor human rights can be understood as an attempt to hold ground in the face of eroding authority.” Later in his book, he intimates that “the protection of human dignity can lead us in various directions, many of which are paternal and conservative.”<sup>17</sup>

Earlier and in his context, Schopenhauer sarcastically dismisses the notion of dignity when he writes: “That expression dignity of man, once uttered by Kant, afterward became the shibboleth of all the perplexed and

16 Jack Donnelly, “The Relative Universality of Human Rights,” in *Human Rights Quarterly* 29:2 (May 2007), 281-306. See also, Richard Thompson Ford, *Universal Rights Down to Earth* (New York: W.W. Norton, 2011), 12.

17 Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca and London: Cornell University Press, 2013), XIII, 159.



empty-headed moralists who concealed behind that imposing expression their lack of any real basis of morals, or at any rate, of one that had any meaning. They cunningly counted on the fact that their readers would be glad to see themselves invested with such a dignity and accordingly be quite satisfied with it.”<sup>18</sup> Along the same line, it has been postulated that dignity is a pompous façade, flattering to our self-esteem but without any genuine substance behind it. Furthermore, it is said to be redundant at best and that any content it has comes from another value—autonomy.

The belief in the primacy of rights and in the importance of individual freedoms which seems to characterize the Western world, is deconstructed and dismissed. The argument is that the majority of people in the world do not define themselves as rights-bearing individuals, but rather as bearers of duties to kin and community.

A critique of human rights advanced by some Asian thinkers sees them as an expression of dysfunctional individualism that fosters immoral and decadent societies. They see the contemporary focus on human rights discourse as a hegemonic attempt to justify and consolidate the Western ideology centered on individualism.

### C. POSTMODERNIST CRITIQUE

Postmodern objections to the nature of human rights are built on the rejection of absolute truth, the perceived dubious legitimacy of metanarratives, and the suspicion that the very language of rights is a disguise of power, control, and nostalgia of imperialism, colonialism and Western hegemony. In some contemporary circles where Foucault’s influence hovers, human rights are considered a tool in the hands of those in power. In fact, challenges to human rights and suspicion of global manipulations of the concept of rights are inextricably connected.

“This postmodernist relativism began as an intellectual fashion in Western campuses, but it has seeped slowly into Western human rights practice, causing all activists to pause and consider the intellectual warrant for the universality they once took for granted.”<sup>19</sup>

The promotion of human rights as part of national governments’ foreign policy has fed the suspicion that governments, focused on self-interest, are not the best vehicles to promote supposed universal rights.

18 See Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012), 178.

19 Michael Ignatieff, “Human Rights and Politics as Idolatry,” *The Tanner Lectures on Human Values*. Delivered at Princeton University April 4–7, 2000. Retrieved from <http://pgil.pk/wp-content/uploads/2014/11/Human-Rights-politics1.pdf>.



One of the arguments evoked in support of this suspicion is what is perceived as a paradox: a paradox in the land of religious liberty. “America has promoted human rights norms around the world, while also resisting the idea that these norms apply to American citizens and American institutions.”<sup>20</sup>

In essence, from a postmodern perspective, human rights are a political tool intended to perpetuate the subjugation of so-called developing countries and their people. In other words, the critique against the universality of human rights postulates that they are, in reality, another tool of Western imperialism, intrusion, and erosion of other people groups’ self-determination.

#### D. PHILOSOPHICAL OBJECTIONS TO HUMAN RIGHTS

Philosophical objections find their most radical expression among promoters of Nihilism, which is based on the belief that chaos, not order, subtends human existence and reality as a whole. This belief was particularly exacerbated by both the devastation of the 18<sup>th</sup> century Lisbon earthquake and the wars and loss of life that punctuated the religious and political world of the time. These calamities climaxed in the total wars of the 20<sup>th</sup> century. The following analysis of this historical trauma may be in order:

The generation of French intellectuals that came of age circa mid-century was exposed to a series of shattering historical traumas: the fall of France, the ignominies of occupation and collaboration, the existential uncertainties of the Cold War and the nuclear age, humiliating defeat in Indochina, and a colonial uprising in Algeria that precipitated the end of the Fourth Republic and brought the nation to the brink of civil war. The social and cultural changes France experienced during these years were equally profound. France was transformed from predominantly rural to primarily urban. Traditional cultural values seemed threatened by a rising tide of mass culture. Formerly one of the Europe’s leading powers, France was forced to accustom itself to a new role as a bit player on the stage of world politics. For French intellectuals, these events proved nearly unassimilable. One common response was a radical mistrust, bordering on rejection, of the very concepts of language, culture, and reason. . . . If one is

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<sup>20</sup> Ibid.



searching for the origins of French philosophical nihilism—the avidity with which French intellectuals deconstructed and sent packing the concepts of the individual, reason, and truth—this historical sequence constitutes the indispensable subtext and background.<sup>21</sup>

It seems paradoxical that deprivation of hegemony becomes the justification for despair over order or the possibility of moral values. French occupation of Berlin during Napoleonic conquests may have been forgotten too easily. It could be that human rights have deeper foundations, which are not to be subjected or invalidated by the fluctuations of human aspirations to power and the evil of inflicting pain and suffering on fellow human beings.

### III. A CASE FOR THE UNIVERSALITY OF HUMAN RIGHTS

The authenticity and legitimacy of promoting human rights and religious freedom have been questioned from various quarters. Nonetheless, the reason for commitment to the universality of human rights remains inseparable from the conviction that human beings have intrinsic and indelible value and dignity.

It is a fact of history that the track record of human interactions with humans has been deplorable. One has just to think about religious wars and other atrocities inflicted on members of the human family.

Obviously, one could argue that the shortcomings of the current status of freedom of religion or belief serve as evidence against its universality. However, it is worth exploring the roots of the global moral movement to combat the dehumanization of fellow human beings. This movement is driven by the determination of people of good will in every nation and people group to stand against discrimination, abuse, criminalization of others and restriction of their right to fundamental freedoms, based on their believing differently. Their willing to sacrifice their own comfort, and even life, speaks about something deeply humane in humans that has no boundary.

The current human rights regime was born with the Universal Declaration of Human Rights, formulated after the Second World War when Europe was on the verge of imploding. The Declaration has become the sacred text of what Elie Wiesel has called a “world-wide secular religion;”

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21 Richard Wolin, *The Seduction of Unreason: The Intellectual Romance with Fascism* (Princeton, NJ: Princeton University Press, 2004), 39.



a kind of *lingua franca* of global moral thought.<sup>22</sup> Years ago, UN Secretary General Kofi Annan called the Declaration the “yardstick by which we measure human progress.” Nobel Laureate Nadine Gordimer described it as “the essential document, the touchstone, the creed of humanity that surely sums up all other creeds directing human behavior.”<sup>23</sup>

Beneath or undergirding the UDHR, are values without which peace will remain elusive. The foundations for these values are moral imperatives anchored on human dignity; what has been called an overlapping normative consensus.

If all human rights are interrelated, interdependent, and indivisible, it is also because they stand on a common foundational plinth and pillar: their very universality which translates into the moral imperative of honoring the dignity of every human being. Essentially, it provides the foundations of justice. As aspiration to justice is universal, despite local interpretations and adaptations, human rights bind the whole human family, one humanity.

Disbelief in the universality of human rights has increased because of human violence and cruelty. But in the words of Ambassador Robert Seiple, former president of World Vision, the best of faith can indeed overcome the worst of religions. In fact, the best of belief can be an expression of the most profound positive principles and values in humans. They all converge in the common denominator of promoting life.

The lack of sustained political will to put people and their dignity first, and the lack of global peace, seem to demonstrate that humans are locked in selfish pursuits with rules regulated by the survival of the fittest. Competition, violence, and instrumentalization of others for the sake of self-interest seem to dominate human relations. This would explain the stubborn lack of sustainable security. A pessimistic anthropology seems to undergird this worldview. But human experience cannot be reduced to this aspect of reality. There is more to humanity. There are positive and universal values that are found in human experience worldwide.

Despite the abysmal record of cruelty and violence in human history in terms of dehumanizing acts of wars, imperialism, conquests, occupations, subjugations, trampling of human dignity and abuses of people’s

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22 Elie Wiesel, “A Tribute to Human Rights,” in Y. Danieli et al. (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, N.Y.: Baywood, 1999), 3.

23 Nadine Gordimer, “Reflections by Nobel Laureates,” in Danieli et al., *Universal Declaration of Human Rights*, p. vii.





rights, there is a deep intuition that the best in human experience testifies to a more optimistic outlook of the human experience. People can change and overcome rapacious tendencies and work for the betterment of the human condition, through solidarity, hospitality, and friendship.

Humans are also capable of heroic acts of abnegation, service, and justice, especially distributive justice. A philanthropic disposition and the sharing of resources, energy, and even life with those less fortunate than oneself, is not rare. It is found in all parts of the world and speaks in favor of a common universal foundation of human existence and destiny.



# IS FREEDOM OF RELIGION A TRULY UNIVERSAL RIGHT?

SILVIO FERRARI<sup>1</sup>

## THE COLLECTIVE AND INDIVIDUAL DIMENSION OF RELIGIOUS FREEDOM

Is freedom of religion a truly universal right? Fifty years ago, we would have answered yes without much thought, today the answer is much more complex. The universality of the right to religious freedom is at the center of a debate that involves not only philosophers, theologians, legal experts and political scientists but also diplomats and politicians. The philosophical and legal terms of this debate, as well as its political implications, are outlined in the first part of this contribution. The second part provides some answers to the questions that have been raised.

First of all, we should define what are we talking about more precisely. To understand exactly the subject of the investigation, the right of religious freedom needs to be deconstructed in its two main components. One, the oldest, is designated as *libertas Ecclesiae*, freedom of the Church.<sup>2</sup> In this first perspective, religious freedom is the freedom of the faithful community and its institutions, not only in the face of the political power but also of the individual. When speaking of *libertas Ecclesiae*, we frequently think of the distinction between God and Caesar, religion and politics, Church and State. Here, I would like to stress that this collective and institutional dimension of freedom of religion entails also a tension with the individual dimension of the same freedom. The rights corresponding to the collective and individual dimensions of freedom of religion took shape at different times, the latter emerging later than the first. In any religious tradition there are examples of individuals who affirmed the primacy of their conscience against not only the political but also the religious

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2 See Giuseppe Dalla Torre, *La città sul monte. Contributo ad una teoria canonistica sulle relazioni fra Chiesa e Comunità politica* (Roma: A.V.E., 1996); on the historical and legal conditions that made it possible the development of this notion, see Harold J. Berman, *Law and Revolution, The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1985).



power. However, before modern times, it is difficult to find State legal systems that recognize the right of the individuals to make freely their own religious choices. The history of dissidents, heretics, and apostates shows that for a long time, freedom of religion has been conceived as the freedom of a religious community to proclaim its truth, frequently with the support of the secular arm provided by confessional States. Obviously, there have been exceptions. In some States, individual religious freedom was granted before others, and the United States may be classed among this first group. But in most States, individuals who did not accept the official truth were discriminated against and sometimes persecuted.

It is interesting to note that the same collective and institutional dimension of freedom of religion inspired, for a long time, international law provisions. Until the Second World War, international law protected primarily the freedom of religious minorities, first, through the system of capitulations and, later, through the League of Nations treaties on the rights of minorities. Apart from a very few exceptions, the individual right of religious freedom was not recognized by international law until the declarations and conventions that followed the end of the Second World War. Before these, individual freedom of religion was a reflection of the collective freedom granted to the religious group of which the individual was a member. Within this scenario, it was difficult to conceive of the right of freedom of religion as a universal right. Freedom of religion was a right to be granted with *ad hoc* measures when it was needed, not a right that each religious group was entitled to claim.

The individual dimension of religious freedom became dominant in the legal systems of some Western countries only in late modernity. Its theological basis was provided by the Lutheran Reformation, which identified the core of religion in the relationship between each person and God, without the need of a public and institutional intermediation. In this perspective, freedom of religion is conceived as an individual right that primarily protects the conscience of each person. At the end of the 18<sup>th</sup> century, the American and French declarations of rights, and the constitutions that preceded and followed them, gave the first legal foundation to the individual dimension of religious freedom. "All men are equally entitled to the free exercise of religion, according to the dictates of conscience," states art. 16 of the Virginia Declaration (1776). The right to religious freedom is now recognized as a right that belongs to



every human being by the mere fact of being a person. As a human right, freedom of religion has to be granted to everybody, irrespective of the religion that is professed. This conclusion entails the secularization of the right to freedom of religion. Previously, freedom of religion was granted to the faithful of a specific religion on the presupposition (accepted by the confessional states of that time) that that religion had a monopoly on the truth. Now, the right to freedom of religion no longer has the goal of granting a religious institution the freedom to proclaim the truth, because in liberal states, religions are no longer considered to be the holders of truth. Religions are regarded as the proponents of visions of life that have to compete with alternative visions. Individuals are free to choose among these the one they deem to be the best. In this context, freedom of religion becomes the legal tool to grant individuals the right to search for their personal truth without facing any limitation of civil and political rights because of their religious or non-religious choices.

At the time of the Second World War, the cultural and legal conditions for constructing the right of religious freedom as a universal right were in place. On the one hand, the fact that each human being is the holder of the right to religious freedom made it possible to speak of a universal right, whose enjoyment must be recognized for every person independent of race, ethnicity, sex, citizenship, and any other personal condition. On the other hand, the universal dimension of the right was assured by its secularization that made it possible to free this right from the connection to a specific religion. What was still missing was the political drive to make the change from the collective to the individual dimension of freedom of religion and this was provided by the failure of the League of Nation system of minority rights protection. Confronted with this failure, Franklin Delano Roosevelt proposed a new “moral order” to support international relations after the Second World War catastrophe. Four pillars were placed at its foundation, the second of which was precisely the “freedom of every person to worship God in his own way—everywhere in the world.”<sup>3</sup> The individualization and universalization of the right to religious freedom was now complete.

From this short description of the historical process of formation of the right to religious freedom, it seems possible to conclude that the shift of focus from the collective to the individual dimension of this right has

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3 Franklin D. Roosevelt, *Annual Message to Congress on the State of the Union (1941)*, available at [www.presidency.ucsb.edu/ws/?pid=16092](http://www.presidency.ucsb.edu/ws/?pid=16092).



been a necessary step in constructing it as a universal right. This conclusion raises a number of questions. First, this shift is characterized by deep differences in space, time, and intensity. It did not happen at the same time everywhere, it did not happen everywhere, and when and where it happened, its intensity has been diverse. Second, the tensions between the collective and individual dimension of religious freedom are on the rise<sup>4</sup> and sometimes take the form of a contrast between Western countries, where the second dimension is prevalent, and African and Asian countries, where the collective dimension has maintained all its strength.<sup>5</sup>

These questions have fueled a lively debate on the universal nature of the right of religious freedom. The debate revolves around two issues, which concern the holder and the content of the right. First, a right is universal if its entitlement is recognized for all human beings; second, it must present the same content or at least an identical nucleus. The universal entitlement of the right to religious freedom raises difficult problems, linked to the possibility of enforcing it also within legal systems that do not recognize it. However, these problems are shared by many other human rights and do not present specific profiles that concern the right to religious freedom. Therefore, I shall focus on the content of the right, examining the arguments put forward in favor of and against its universal nature.

## IN FAVOR OF UNIVERSALITY

The universal nature of the right to freedom of religion is defended with many different arguments. Two of them are particularly frequent. The former focuses on the notion of religion, the latter on the notion of freedom. The claim that religion is part of the experience of every human being supports the first argument:

Religion is the universal human search for a greater than human source of being and ultimate meaning. So long as humans have existed they have engaged in this search, asking, as it was, the religious questions . . . the right to religious freedom is grounded precisely in the value of that enterprise as a human good. The search for a higher-than-human source of being and ultimate meaning is self-evidently

4 José Casanova, "Globalization and the Free Exercise of Religion Worldwide," in Gerard V. Bradley (ed.), *Challenges to Religious Liberty* (Cambridge: Cambridge Univ. Press, 2012), 140-41.

5 Silvio Ferrari, "Religious Rules and Legal Pluralism. An Introduction," in Rossella Bottoni, Rinaldo Cristofori, Silvio Ferrari (eds.), *Religious rules, State law, and Normative Pluralism. A Comparative Overview* (Charm, Switzerland: Springer, 2016), 10-18.



necessary for human flourishing. To deny a person the right to engage in this search as his conscience demands, and to live in accord with the truth he discovers, is to deny the very essence of what it means to be human.<sup>6</sup>

In this perspective, the universal nature of the religious experience supports the recognition of an equally universal right to religious freedom, conceived as the right to engage in the search for a transcendent meaning of human existence and to live in accordance with the results of this search. This is the first foundation of the universality of the right to religious freedom.

The second argument is based on individual autonomy. The right to religious freedom, like other rights (for example, freedom of expression), is a manifestation of the freedom that characterizes every human person. It should be extended to every person and protected everywhere as a manifestation of the right of each individual to make the choices he or she feels more appropriate, at least as far as these choices do not infringe other people's rights. This is a central argument of liberal thought, already expressed in the 19<sup>th</sup> century, by the father of Italian unification, Camillo Cavour:

We believe that a system of freedom must be introduced in all parts of religious and civil society. We want economic freedom, we want administrative freedom, we want the full and absolute freedom of conscience. We want all the political freedoms compatible with the maintenance of public order. And therefore, as a necessary consequence of this order of things, we believe it necessary for the harmony of the building we want to raise, that the principle of freedom is applied to the relations of the Church and the State.<sup>7</sup>

From this point of view, religious freedom is part of human beings' innate aspiration to be free to make the choices concerning their life.

The two arguments are convergent but not identical. The former, echoing themes dear to the school of natural law, underlines that the right to religious freedom is special because it reflects a unique experience—

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6 See 2014 remarks by Thomas F. Farr, "A global crisis of religious liberty: evidence, origins, and significance," available at [repository.berkeleycenter.georgetown.edu/140620FarrGlobalCrisisReligiousLibertyEvidenceOriginsSignificance.pdf](https://repository.berkeleycenter.georgetown.edu/140620FarrGlobalCrisisReligiousLibertyEvidenceOriginsSignificance.pdf).

7 Camillo Benso Conte di Cavour, *Discorsi Parlamentari* (Rome: Botta, 1872), 9:347-8.



the search for transcendental significance—shared by all human beings.<sup>8</sup> Potentially, this approach paves the way for a specific discipline of this right. The second argument emphasizes the solidarity between human freedoms and therefore goes in the direction of their common regulation without any concession to the idea that the right of religious freedom should be construed as a special right. However, both arguments come to the conclusion, through different ways, that the right to religious freedom is a universal right.

## AGAINST UNIVERSALITY

The critics of the universal nature of the right to religious freedom also make use of multiple arguments. The first denies that it is possible to attain a universal definition of religion and argues that the current notion of religion is the result of a historical process that took place within Christianity and the Western world. This thesis was developed through a wealth of arguments by Talal Asad<sup>9</sup> and has been more recently reformulated by William Cavanaugh.<sup>10</sup> They each move from the idea that “there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes.”<sup>11</sup> These processes found their philosophical expression at the end of the 18th century, when Kant was able to produce a “fully essentialized idea of religion,” summed up in the statement that, under various historical manifestations, there is “a single religion valid for all men and times.”<sup>12</sup> This Kantian construction of a universal paradigm of religion is contested by Cavanaugh with the argument that, “There is no transhistorical and transcultural essence of religion, but at different times and places, and for different purposes, some things have been constructed as religion and some things have not.”<sup>13</sup> In conclusion, “what counts as religion and what does not count in any given context is contestable and depends on

8 J. Finnis, “Why Religious Liberty Is a Special, Important and Limited Right” in *Notre Dame Law School Legal Studies Research Papers*, n. 09-11 (October 2008), available at <http://goo.gl/sCj6WL>; see also, Andrew Koppelman, *Defending American Religious Neutrality*, (Cambridge: Harvard University, Press, 2013).

9 Talal Asad, *Genealogies of Religion. Disciplines and Reasons of Power in Christianity and Islam* (Baltimore: The John Hopkins Univ. Press, 1993).

10 William Cavanaugh, *The Myth of Religious Violence. Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford Univ. Press, 2009).

11 Asad, *op.cit.*, 29.

12 Asad, *Genealogies of Religion*, 42, quoting Kant, 1795.

13 Cavanaugh, *The Myth of Religious Violence*, 119.



who has the power and authority to define religion at a given time and place.”<sup>14</sup> These authors do not deal specifically with the right of freedom of religion, but the implications of their arguments are clear: if there is no notion of religion that can be valid in all places and times, how can one refer to the right to religious freedom as a universal right? The content of religious freedom is determined by the notion of religion which is adopted in a given context and therefore the right to religious freedom cannot claim to be a neutral—and even less a universal—instrument for the government of religious diversity in a globalized society.

The legal consequences implicit in this deconstruction of the notion of religion have been expounded by a group of law scholars. Through a series of case studies, they have concluded that “religious liberty is not a single, stable principle existing outside of history or spatial geographies but is an inescapably context-bound, polyvalent concept unfolding within divergent histories in different political orders.”<sup>15</sup> Consequently, these scholars contest the “reigning teleological narratives that advance the simultaneous neutrality and universality of the right to religious freedom” and the political strategies based on the idea that “religious freedom is universally valid and can be objectively assessed as a social fact.”<sup>16</sup>

Comparing the arguments that affirm or contest the universality of the right to religious freedom, one has the impression that the two positions are not incompatible. Asserting that the right of religious freedom is rooted in the very nature of human beings does not mean that its regulation cannot be different depending on time and space variables. There is, in other words, the space for affirming the universality of the right to religious freedom without denying that its genesis, contents, and function are historically determined. However, a dispassionate consideration of this middle course has been complicated by the political significance this debate has taken in recent years that exacerbated the differences between advocates and opponents of the universality of the right to religious freedom.

## POLITICAL IMPLICATIONS OF THE DEBATE ON THE UNIVERSALITY OF THE RIGHT TO RELIGIOUS FREEDOM

It all began in October 1998 with the enactment of the US International Religious Freedom Act.<sup>17</sup> This law opens with the assertion

<sup>14</sup> Ibid., 59.

<sup>15</sup> Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, Peter G. Danchin (eds.), *Politics of Religious Freedom* (Chicago-London: Chicago Univ. Press, 2015), 5-9.

<sup>16</sup> Ibid.

<sup>17</sup> Public Law 105-292, H.R. 2431, 27/8/1998.





that “the freedom of religious belief and practice is a universal human right”<sup>18</sup> and continues by declaring the United States’ government’s commitment to “condemn violations of religious freedom and to promote and assist other governments in the promotion” of this right. The law provides aid to countries committed to promoting religious freedom and strikes the States that are guilty of the most serious violations with a number of sanctions. To this end, appropriate bodies have been set up with the task, among other things, to draw up annual reports assessing violations of religious freedom all over the world.<sup>19</sup> With this law, freedom of religion became a significant factor within US foreign policy. The example of the US was quickly followed by other countries and some international bodies (including the European Union), which engaged to include a more incisive protection of religious freedom in their foreign policy and to develop the legal tools necessary to achieve this goal.<sup>20</sup>

The International Religious Freedom Act has been the subject of conflicting judgments. Some exalted it as a sign of attention to the development of human rights, others denigrated it as an expression of an imperialist attitude. There is no need to go into that controversy here, but it is worth pointing out that the idea that it is possible to classify different countries according to their degree of respect for the right to religious freedom presupposes the existence of a universal and globally enforceable notion of this right. Without the implicit confidence in the universality of the right to religious freedom (and also in the beneficial effects that respect for this right can have on the development of international relations), the political initiatives promoted by the International Religious Freedom Act and the measures that have followed it in the United States and other countries would have no foundation.

In this way, the debate on the universality of the right of religious freedom has acquired a political dimension. According to some political actors, affirming the universality of this right is part of a broader attempt to export Western values all over the world; for others, opposing it means showing an anti-religious prejudice and a lack of respect for human rights. This polarization does not help a dispassionate examination of the

18 Ibid., Sec. 2 (a), 2.

19 L.B. Handford, “*The International Religious Freedom Act: Sources, Policy, Influence*,” in *The Review of Faith and International Affairs*, 6:2 (2008), 33-39.

20 Pasquale Annicchino, *Esportare la libertà religiosa. Il Modello Americano nell’Arena Globale* (Bologna: Il Mulino, 2015) 69-113 and 152-156.



problem. I shall try to overcome the negative impact of this politicization of the debate by going back to its philosophical and legal profiles and trying to fill the gap between supporters and critics of the universality of the right to religious freedom.

## PARTICULAR UNIVERSALITIES?

Different arguments have been proposed to resolve this tension between the universality of human rights and the particularity of the historical and cultural contexts in which they take shape and to which they apply. Some point to the distinction between universal values and particular rights<sup>21</sup> or between the universal content and the particular language in which human rights are formulated; others seek an answer by establishing a hierarchy of human rights, some of which would be more universal than others. I shall follow two other paths, that focus on the dynamics between particular and universal, on the one hand, and on the bottom-up versus top-down processes on the other.

The starting point of both paths is provided by the sociologist José Casanova and the Italian philosopher Adriano Fabris. The former writes that “every universalism . . . is particularistic,”<sup>22</sup> the latter adds that “the starting point for the implementation of the universal . . . is in the particular and its assumption as a particular.”<sup>23</sup> Their ideas suggest the notion of “embedded universality.” Every vision and project that provides a universal response to a given problem (that is, a response valid for everyone and everywhere) is necessarily rooted in the particular history and culture in which it has been conceived. The possibility of a regard from nowhere, that is presupposed by any non-embedded conception of universality, is beyond the human condition and reserved to God, if he exists. Starting from here, the Jewish thinker David Novak suggests the first path to overcome the opposition between particular and universal. Discussing natural law, he writes:

Instead of an attempt to find some universal phenomenon to ground natural law, or posit some ideal from which to deduce natural law, it seems to be more philosophically astute to see natural law as the projection of a universal horizon by a thinker *in* a particular culture *for*

21 Gordon R. Woodman, “The Possibilities of Co-Existence of Religious Laws with Other Laws” in R. Mehdi, H. Petersen, E. Reenberg Sand, G.R. Woodman (eds.), *Law and Religion in Multicultural Societies* (Copenhagen: Diöf, 2008), 41.

22 Casanova, *Globalization*, 147.

23 Adriano Fabris, *TeorEtica. Filosofia della relazione* (Brescia: Morcelliana, 2009), 156.



one's own culture. One does that by abstracting certain norms from one's cultural-linguistic matrix, then seeing how they could well apply to all persons and not just to the members of one's own historical community.<sup>24</sup>

Novak advocates the convergence of different embedded universalities through a bottom-up process which is significantly different from the top-down process followed in the last 70 years by the international community. Novak's proposal, however, poses a new problem. The convergence of these particular universalities towards a meeting point cannot be taken for granted. They can conflict, and this conflict may be intractable particularly when it reflects deep-seated cultural differences. In the cultural context of a country, a ban on proselytism can be seen as a measure protecting collective religious freedom, while in another country the same measure can be condemned as an intolerable violation of individual freedom of religion. Once we have excluded the "regard from nowhere" possibility, how can we compare and assess cultural differences that, by our own admission, are incommensurable?

A convincing answer to this question has been provided by Margaret Davies' studies on law and feminism. Davies accepts that:

[C]ultures and religions are incommensurable because they have developed in quite different contexts of language, history, and physical environment. There is no place outside the environment, language or history from which cultures can be measured and made commensurable according to abstract universal standards. However, to say that cultures are incommensurable and that there is no objective point of view from which to evaluate them does not imply that no dialogue can be entered into particular cultural or religious practices. Such a dialogue cannot take place on the basis of the final and dogmatic truths, but on the basis of open, honest and contingent perspectives. . . . Therefore, instead of falling into a debate about relativism and universalism, there is a need to . . . negotiate contingent, rather than universal, norms responding to practical contexts and immediate needs.<sup>25</sup>

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24 David Novak, "Natural Law and Judaism" in Anver M. Emon, Matthew Levering, and David Novak (eds.), *Natural Law. A Jewish, Christian, and Islamic Dialogue* (Oxford: Oxford Univ. Press, 2014), 29.

25 Margaret Davies, "Pluralism and Law and Religion" in Peter Cane, Carolyn Evans, Zoe Robinson (eds.), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge Univ. Press, 2008), 87.



The *querelle* of the full-face veil, the *burqa* or the *niqab*, is a good example of these two different approaches. Once it is certain that wearing the veil is a free and conscious choice of the woman who wears it, the matter can be addressed in two ways. The veil can be taken as the symbol of a clash of civilizations, as happened in France, where this issue was regarded as a conflict between two incompatible cultural systems and their different views of women's rights. Alternatively, as has been the case in other countries, it is possible to identify places, times, and activities that require a person's face to be visible and limit the prohibition of the veil to them. The second solution seems to be more appropriate to safeguard the legitimate interests of the social community without sacrificing women's religious freedom. Although it is not always possible to find a satisfactory solution to the expressions of cultural and religious differences, this example shows how productive the contingent and pragmatic approach suggested by Davies can be.

In conclusion, according to Davies it is possible to compare and assess how valid and effective different legal translations of freedom of religion are, provided that what is compared are not systems of values or beliefs but the answers they give to concrete and specific problems. Davies suggests a pragmatic strategy that can be particularly appropriate for our time of transition when the balance of power at the international level is shifting and cultural worlds that were marginalized in the past are taking up a more central position.

At the end of these considerations, it is possible to conclude that we do not need to give up the universality of human rights in general and of religious freedom in particular, but we need to reconsider the relationship between universal and particular. The two paths I have indicated provide a way to do so based on the idea of particular or embedded universalities. They suggest a bottom-up and pragmatic approach that is only partially reflected in the political initiatives that have recently been taken by the international community to strengthen the respect of freedom of religion globally. The international coalitions of parliamentarians, academic centers, and government think tanks that have been built to defend and promote freedom of religion are a step forward, but without a strong presence of voices from Africa and Asia, which are still missing, they are bound to be seen as another Western attempt to impose a specific vision of universality. Another element of imbalance is the almost exclusive focus on foreign countries. The European Union



has appointed a special envoy to promote freedom of religion or belief *outside the European Union* and there is a plethora of national bodies assessing the respect of religious freedom abroad while comparable bodies assessing the same respect domestically are very few. Again, this is damaging the effort to build a global system of promotion of religious freedom because it can easily be seen as an example of double standards.

Finally, let me go back to my initial question. Is the right to religious freedom a universal right? I think the answer can be affirmative. Nobody, independent of cultural background, political opinions, or religious affiliation, would be happy to face the choice between abandoning a religious faith or death; converting to another religion or emigrating; educating his or her children in a certain faith or running the risk of them being taken away. This is probably not enough to say that freedom of religion is a universal right, but it is enough to say that a universal right of freedom of religion is possible. The difference between these two statements becomes clear if we accept that the universality of freedom of religion is not something we know, possess, and need only to proclaim and implement, but something that needs to be constantly built.<sup>26</sup> The building we have erected leans too much toward the individual dimension of the right to freedom of religion. It needs to be re-balanced, paying more attention to the collective side of this right. Comparing the practical results of different particular visions of the universal may be the route to attain this goal.

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26 An-Na'im Abdullahi, *Religion, Law, and the Politics of Human Rights: Talal Asad and Abdullahi An-Na'im in Conversation* (September 29, 2009), available at <https://tif.ssrc.org/wp-content/uploads/2009/11/Talal-Asad-and-Abdullahi-An-Naim-in-conversation.pdf>



# HUMAN RIGHTS DISCOURSE AND INTERCULTURALITY: INSIGHTS FROM THE MARGINS

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RAIMUNDO C. BARRETO JR.<sup>1</sup>

Since the early 1970s, human rights discourse has swept across the globe, becoming common currency in world politics.<sup>2</sup> Approaching the end of the 20<sup>th</sup> century, not only was there a significant increase in the use of the term “human rights” in official documents but the number of countries ratifying important international treaties protecting human rights also proliferated. According to Emilie Hafner-Burton and James Ron, 150 countries have ratified the two principal human rights treaties, namely, the International Covenant on Civil and Political Rights (ICCPR) and the Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>3</sup> On top of that, new global social movements employ the language of “rights” or “human rights” in their reasoning; such movements include the women’s movement, green movement, and the indigenous peoples’ movement.<sup>4</sup> Despite the sweeping use of human rights language, important questions have been asked about its efficacy. In the opening chapter of his book *If God were a Human Rights Activist*,<sup>5</sup> Boaventura de Sousa Santos denounces the “disturbing reality” that human rights has been turned into a hegemonic discourse on human dignity. According to him, “a large majority of the world’s inhabitants are not the subjects of human rights. They are rather the objects of human

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2 See Emilie M. Hafner-Burton and James Ron, “Human Rights Institutions: Rhetoric and Efficacy,” *Journal of Peace Research* 44/4 (2007), 379.

3 *Ibid.*, 380.

4 Neil Stammers, “Social Movements and the Social Construction of Human Rights,” *Human Rights Quarterly*, 21/4 (1999), 989.

5 Boaventura de Sousa Santos, *If God Were a Human Rights Activist* (Stanford, CA: Stanford University Press, 2015).



rights discourses.”<sup>6</sup> His charge raises the question of “whether human rights are efficacious in helping the struggles of the excluded, the exploited, and the discriminated against, or whether, on the contrary, they make those struggles more difficult.”<sup>7</sup> But, contrary to other critics, he does not dismiss human rights language *per se*. Instead, he is interested in learning whether or not human rights can be used in a counter-hegemonic way.”<sup>8</sup>

Among human rights scholars and activists, there has been a concern about protecting human rights discourse against its critics.<sup>9</sup> Of particular concern is the defense of the universalist claims of human rights discourse. This article goes in a different direction. In line with de Sousa Santos’ quest, it is concerned with making human rights—a discourse on human dignity—more meaningful and efficacious for the lives of those who are impoverished, oppressed, excluded, or discriminated against in different cultures and contexts. Taking into consideration the current globalized and plural world landscape, the emergence of postcolonial Africa and Asia, and what has been called the coloniality of power in Latin American decolonial theories, I suggest an intercultural approach to human rights, which takes into full consideration different voices, understandings, and interpretations, and the power relations that play a role in eclipsing and obstructing the freedom of postcolonial discourses. In contrast to a top-down imposition of an abstract universalizing human rights discourse, I suggest that in order to be more meaningful and efficacious for everyone, human rights must be reconsidered from the bottom up, taking seriously the multiplicity of traditions and cultures, which inform people’s world-views and everyday life. For this to happen, human rights discourse must be freed from epistemological coloniality in order to flourish.

An intercultural approach to human rights is one in which religious traditions and cultural differences are taken into account as people from different cultures become full subjects of human rights; that is, participants in the production of human rights discourse. One of the reasons why human rights discourse seems so foreign in different cultures around the world is that this discourse has privileged Western thought and tradition as standard and central, relegating other rationalities and epistemologies to

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6 Ibid., 1.

7 Ibid.

8 Ibid.

9 See, for instance, David Little, *Essays on Religion and Human Rights: Ground to Stand On* (New York, NY: Cambridge University Press, 2015). See especially chapter 1 and the afterword starting on page 363.



a secondary role, when not totally dismissing them.<sup>10</sup> This article, in paradox, centralizes the dialogue and interweaving of different epistemologies for the construction of an intercultural approach to human rights, which emphasizes respect, solidarity, conviviality, dialogue, and collaboration.<sup>11</sup> Such approach, I argue, can make human rights more meaningful and effective to the millions who, in spite of being objects of human rights discourse, have not been taken as seriously as subjects of human rights.

### THREE CASES TO SET THE TABLE

There is a significant distance between the universal ambition of human rights language and its universal efficacy. Part of that gap exists because of a lack of contact between that language and the worldview of individuals and communities, which should benefit from it. Let's consider three examples in which human rights discourse does not seem to fully speak to the reality lived on the ground:

- 1) Commenting on a human rights speech delivered by a UN human rights officer in a visit to his country, a Pakistani Catholic priest said: "That speech did not have much meaning for the Pakistani people. God was not mentioned even once."<sup>12</sup> For him, in order for the UN officer to speak in a meaningful way to Pakistanis about human rights, human rights discourse needed to be woven together with the cultural and religious fabric of that society. Without that, it remained a foreign discourse, which could not appeal to the conscience of his people.
- 2) Another similar example can be found in the still-common practice of honor killing.<sup>13</sup> According to Sharmeen Obaid-Chinoy, a member of the Forum's Young Global Leaders community: "From its origins to its execution, 'honor' killing is entirely community

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10 One could press this line of argument further to dismiss a discourse based on rights in its entirety as a Western discourse. Although that line of thought is perfectly logical, my approach here is one that takes the acceptability of human rights language by the international community since the last quarter of the 20<sup>th</sup> century as a valid and real framework informing international relations and does not see it as eminently flawed.

11 Roberto E. Zwetsch, "Apresentação," in *Conviver: Ensaios Para uma Teologia Intercultural Latino-Americana*, ed., Roberto E. Zwetsch (S. Leopoldo, Brazil: Editora Sinodal/EST, 2015), 18.

12 Recollection of a conversation with a Pakistani priest in Washington, DC, some years ago. Details about the occasion and identity of the priest are intentionally omitted.

13 According to the World Economic Forum, 5,000 women are killed every year in the name of honor. See Stephanie Thomson, "5,000 women a year are still being killed in the name of 'honor,'" (July 22, 2016). Retrieved from: <https://www.weforum.org/agenda/2016/07/honour-killings-pakistan-qandeel-baloch/>.





sanctioned. It is difficult to change a mindset in a society where people feel it is acceptable to punish a woman for transgressions against perceived codes of honor, even if it results in the death of a person.”<sup>14</sup>

Unless something takes place on the cultural level, leading the community to reconsider some elements in its moral tradition, international condemnation on the basis of human rights violation will not be enough to protect the lives and human rights of those girls. Change will only be possible if one takes full account of the local moral traditions and of the religious language used to sanction those killings.

- 3) The third case, which I describe more thoroughly, speaks even more directly to the main argument of this article. There are disputes within the international community as to whether or not the protection of environment rights must be considered as a form of human rights. More individualistically-oriented states resist the idea of putting environmental rights on the same level as fundamental human rights. On the other hand, most indigenous peoples around the world cannot understand themselves apart from the environment. For them, protecting the rights of nature is inherently connected to protecting their own rights and survival. Let’s take the case of Brazil, a country stuck in the middle of such debate. Environmental rights have gained a prominent place in Brazilian law, since they were inscribed into Brazil’s democratic constitution of 1988.<sup>15</sup> The Constitution provides the framework for the regulation of environmental protection, specific federal laws have been passed to protect the environment, and two important national agencies have been created to put those laws into effect. On top of that, aggressions against the environment and administrative breaches have been criminalized. Yet, the enforcement of such protection has been significantly flawed. The application

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14 Quoted by Stephanie Thomson, *Ibid.* Sharmeen Obaid-Chinoy, a member of the Forum’s Young Global Leaders community won an Oscar in 2015 for *A Girl in the River*, a documentary about a woman in Pakistan who survives an honor killing.

15 Luis Roberto Barroso, “Constitutional Law,” in *Introduction to Brazilian Law*, eds., Fabiano Defentti and Welber Barral (Alphen aan den Rijn, The Netherlands: Kulwer Law International, 2011), 18. I could have picked basically any Western country for this case. I chose my country of birth, Brazil, for its well-known environmental policies and for all the discussions Brazil elicits among environmentalism since it houses 60 percent of the Amazon rainforest, the largest and most biodiverse remaining rainforest in the world.



of the law protecting indigenous lands (a constitutional right) remains loose, and its interpretation has become a matter of political taste. Indigenous peoples trying to protect their rights, lands, and the environment are often murdered.<sup>16</sup> On top of that, due to the powerful agribusiness lobbying, existing protective regulations continue to be rolled back.

The indigenous people who have lived in the rainforest for centuries perceive themselves as part of that larger living organism. Their communities suffer the most immediate impact of the disregard for environmental rights. They understand with more clarity than most people in Western societies that destruction of the environment implies their own death. Indigenous forms of wisdom and knowledge have been displaced in the Western world. Without the reinstatement of their cosmologies as valid and important knowledge, an important piece of human self-understanding will remain missing in human rights discourse. Thus, the efforts of many indigenous leaders to raise awareness in international forums propose an encounter between these different “worlds” and distinct cosmologies.<sup>17</sup>

The three cases above exemplify how abstract universalizing language in human rights discourse might not be nuanced enough to make human rights meaningful and equally efficacious for specific social groups in different cultures. A broader and deeper dialogue, which takes cultural difference seriously without giving up on the challenge to protect human rights or the well-being of all individuals and communities, is called for. Accordingly, a dialogical approach, where different cultures and cosmologies may encounter and make sense of one another, is crucial today.

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16 In 2014 only, Global Witness documented 116 killings of environment and land defenders in 17 countries around the world. Brazil was the worst affected country, with 29 deaths. Indigenous communities continue to take the hardest hit in land-related conflicts, which tend to discriminate against peasants and indigenous communities by branding them anti-development groups standing against the pro-development powerful corporations. See Global Witness, *How Many More? 2014's Deadly Environment*. Retrieved from <https://www.globalwitness.org/en/campaigns/environmental-activists/how-many-more/>. According to David E. Toohey, just in the opening decade of the 21<sup>st</sup> century, 1,150 activists were murdered in the Amazon region. According to his report, ranchers tend to be responsible for the murder of indigenous peoples. See David E. Toohey, “Indigenous Peoples, Environmental Groups, Networks and the Political Economy of Rainforest Destruction in Brazil,” *International Journal of Peace Studies* 17/1 (2012), 73, 88.

17 See Ana Maria Gomes and Davi Kopenawa, “O Cosmo Segundo os Yanomami: Hutukara and Urihi, in *Revista UFMG*, 22/1&2 (2015), 142-159.



Bringing cultural differences and religious traditions back to the table in a dialogical and intercultural manner is fundamental for human rights to become a language for everyone, and for all human beings, including individuals and communities living in greater vulnerability, to claim their place as real subjects of human rights.

## ON THE UNIVERSALITY OF HUMAN RIGHTS DISCOURSE

Questions about particularity and universality have been of great significance for human rights as a modern discourse on human dignity. In pluralistic societies, no particular worldview should be universalized. Different traditions compete with one another to inform societal moral values and norms. Since the moral claims of a given tradition cannot easily transfer to followers of other traditions, notions of secularity have emerged, allowing for different traditions to coexist in the common public arena. In such context, moral values that can be universalized must result from appeals to reason, which thus becomes a common and universal denominator. But even that does not resolve all problems, because there are different rationalities and ways of reasoning. Modern appeals to reason in the West, for instance, tend to eclipse non-Western forms of knowing and reasoning.

In the peak of Western secularization, religion was displaced from its public role. As Dietrich Bonhoeffer put it, in the world come-of-age it is possible to address all important issues of life “without recourse to God as a working hypothesis.”<sup>18</sup> Secularity was the backdrop against which the discourse on universal human rights was constructed.<sup>19</sup> In a secularized and pluralistic world, one needs a moral compass that is independent from and goes beyond any particular religious or traditional morality. According to this framework, religious language, relegated to the private sphere, fulfills at most a secondary role, informing or justifying particular understandings of human rights in the context of a specific religious tradition, since it does not reverberate beyond the adherents of that particular faith.

For most non-Western societies, though, religion continues to be central to inform worldview and communal life. Religious language in such contexts remains a crucial source for any meaningful comprehension of human rights.<sup>20</sup> Life in community and the traditions that sustain

18 Rubem Alves, *A Theology of Human Hope* (Washington, DC: Corpus Books, 1969), 29.

19 Johannes B. Metz, *Theology of the World* (New York, NY: Herder and Herder, 1969), 13.

20 The resurgence of religion and theology in the public sphere in “Western” societies since the 1970s shows that this is true also in the “West,” in spite of the prevalence of secularizing discourses in that context.



it inform the moral codes, which in turn protect the existence of those communities and societies as well as their members. Thus, religion, in its plural forms, remains an important source of moral values and a resource that cannot be neglected in human rights discourse. Religious traditions “determine, at least in part, the moral values and norms to which their followers adhere.”<sup>21</sup> That influence cannot be ignored by human rights scholars and advocates.

The question then becomes how to deal with the multiplicity of cultural and religious traditions in light of the universalistic demand of human rights, which can only work if it speaks to all human societies and protects all human beings. Can there be any universal language that is truly free of traditional influences and equally applicable in different cultural settings? As Alasdair MacIntyre has forcibly argued, different theories of justice and competing rationalities<sup>22</sup> coexist in the world. If he is right, human rights discourse cannot claim a universality that is not shaped within a particular tradition. At the end of the day, all human discourses, in spite of universalizing aspirations, are grounded in competing traditions.

Wouldn't we do better, then, by situating all human languages, including human rights discourse, in the traditions they emanate from? If we do so, one would have to acknowledge that even within what one could generally name Western discourses, human rights competes with other Western moral discourses based on notions of utility and social contract, just to mention two. Although MacIntyre may be right as for the need to acknowledge different traditions and sources of rationalities, such a move would be an incomplete and inefficient solution to our problem. Swinging the pendulum and focusing entirely on the cultural embeddedness of human rights discourse would leave us unable to deal with the universal demand to protect human rights.<sup>23</sup> A universalizing framework is thus necessary, and the modern language of rights has

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21 Abdullahi A. An-Na'im, et al., “Preface,” in *Human Rights and Religious Values: An Uneasy Relationship?* eds., Abdullahi A. An-Na'im et al. (Grand Rapids, MI: William B. Eerdmans, 1994), x.

22 Alasdair MacIntyre, *Whose Justice, Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 1ff.

23 The acknowledgement of the embeddedness of human rights discourses in particular traditions by itself would simply make us unable to deal with the universalizing demands of human rights protection, which partially emerged from the recognition that, in the contemporary world society, the responsibility to protect individuals from dehumanizing treatment (as that seen in the Fascist regimes that emerged between the two world wars) goes beyond the sphere of national sovereignty developed by the modern states.



gained enough international support to be considered a kind of *lingua franca*. Irrespectively of its critics, that language shapes international relations and discourses on politics and ethics. Instead of opposing it, I propose that we reflect on the means through which its universalistic ambitions can more fully take account of difference, making it more efficacious in the sense that anyone in any culture can claim to be a subject of human rights.

U.S. Presbyterian theologian David Little has provided a sophisticated framework for understanding the universality of human rights, which takes different religious traditions into account. In his two-tiered argument for the universality of human rights, his second tier, in particular, takes different interpretations, concerns, and languages into account. According to Little, human rights language is rooted in the natural rights tradition.<sup>24</sup> As such, it does not depend on religious belief. For many centuries, rights language has been present in the writings of a number of philosophers and in documents produced by modern states. Nevertheless, only in response to the atrocities seen during World War II, was human rights language codified. Its codification into international law was key to give it its current status as an internationally compelling moral and legal language, and a global movement, which shapes politics and ethics around the world. The passing of the Universal Declaration of Human Rights (UDHR) in 1948 was a landmark for the contemporary human rights movement. The UDHR is considered by many to be the “single most influential document of the 20<sup>th</sup> century.”<sup>25</sup> The worldwide human rights movement includes a set of internationally accepted documents, treaties and conventions, intergovernmental organizations, governmental agencies, and civil society organizations, working as a complex web with the common goal of protecting rights that, in the language of the UDHR, every human being is entitled to. Regardless of race, ethnicity, religion, nationality, gender, sex, age, economic and social strata, and culture, everyone is “entitled to basic rights and every country [is] obligated to protect such rights.”<sup>26</sup>

24 David Little, *Essays on Religion and Human Rights: Ground to Stand On* (New York, NY: Cambridge University Press, 2015), 8.

25 Menno T. Kamminga, review of J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Pennsylvania Studies in Human Rights (Philadelphia, PA: University of Pennsylvania Press, 1999), *Tijdschrift voor Rechtsgeschiedenis/Revue d’Histoire du Droit/The Legal History Review* 68/4 (2000), 605.

26 Samuel Totten and Milton Kleg, *Human Rights, Issues in Focus* (Hillside, N.J.: Enslow Publishers, Inc., 1989), 19.



As Little suggests, the preamble of the UDHR is unapologetically universalistic, functioning as a conscience for humankind, outraged in the wake of the atrocities committed against millions of human beings before and during WWII.<sup>27</sup> Little is concerned with the multiple attacks such universalist ambition continues to suffer. His book effectively responds to those attacks, strongly affirming the philosophical grounding for human rights language as a “moral language that is universal in character.”<sup>28</sup> By moral, he means that such language addresses fundamental matters of human welfare; whereas, by universal he means that it can justifiably apply to all human beings, everywhere. To counter critiques of the hegemonic nature of human rights discourse, Little affirms that the UDHR and other human rights documents such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESR) take a thin approach in their moral foundations, adopting a language that is non-comprehensive; that is, not taking a position “on philosophical or theological controversies regarding the ultimate grounds and nature of moral life and responsibility, let alone metaphysical and cosmological ideas related to them.”<sup>29</sup> Consequently, such language is in theory religiously neutral—or secular. In spite of its universal foundation, it permits that different communities ground its justification in their own cultural or religious traditions and values.

Little proposes, thus, a two-tiered approach to the justification of human rights. The first tier, a natural or secular justification, “serves to hold people everywhere accountable to the terms of the language.”<sup>30</sup> The second tier takes plurality into consideration, making room for multiple “‘extranatural’ justifications for human rights language.”<sup>31</sup> Thus, religious language can play a role on this level, although limited to mobilizing adherents of a particular faith to the cause of human rights.

Little debates several arguments that question the universality of human rights discourse or the idea that human rights discourse has the natural rights tradition as its foundation. I do not intend to revisit those debates here. My particular interest is in the reception, interpretation,

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27 Little, *Essays*, 25.

28 *Ibid.*, 34.

29 *Ibid.*, 35.

30 *Ibid.*, 6.

31 *Ibid.*



and efficaciousness of human rights discourses particularly from a Global South perspective. Thus, I focus on the second tier of Little's approach, where he makes room for diversity in his universalistic argument. I argue, though, that this second tier cannot take the back seat in contemporary human rights discussions, particularly considering the formerly colonized world.

## HUMAN RIGHTS IN POSTCOLONIAL PERSPECTIVE

The UDHR did not fall from heaven. It was as much the result of honest aspirations of freedom, peace, and justice as the product of power politics, intrigue, lobbying and bargaining.<sup>32</sup> The ascendance of human rights to a place of prominence in the postwar world took place in the midst of tense negotiations and fears. The main proponents of the United Nations Charter, the so-called Big Three—Britain, the Soviet Union, and the United States—along with France and China, admitted by courtesy into that powerful circle, had conflictive views on how prominent human rights should be in the new organization *vis-à-vis* the protection of national and colonialist interests. On the other hand, among the other 45 allied countries invited to the San Francisco Conference in 1945 to prepare the UN Charter, there was some fear about how human rights would be used, as “the addition of human rights references to the Charter might encourage stronger states to intervene in their affairs under pretext of championing the rights of their citizens.”<sup>33</sup> Contradictory views on human rights quickly spread through the still colonized nations, and persisted in the postcolonial period.

In spite of that, human rights language became prominent in the Third World—the movement of nonaligned countries—and its solidarity against colonialism. However, the meaning of “human rights” varied, and the rights stressed in the anticolonial struggle differed from those usually stressed by the Western European powers and the United States. The effort from anti-colonialist movements brought, for instance, the demands for self-determination to the center stage in human rights discourse, giving birth to the right of self-determination. And, as Kathryn Sikkink has argued, less powerful states, including many in Latin America, played a

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32 These are some of the words used by Lebanese philosopher Charles Malik, one of the UDHR drafters, in his diary to express discomfort at the San Francisco Conference, in 1945, at the convention of the UN Charter. Malik Diary, no. 2102, “Reflections on the Conference,” cited in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House Publishing Group, 2001), 19. Kindle Edition.

33 *Ibid.*, 20.





protagonist role in shaping the language of the international protection of human rights.<sup>34</sup> At the same time, there were tensions between the interest of the most powerful states and the Third World nations who feared the manipulation of human rights language for interventionist ends. It was in the midst of such tension and much negotiation that human rights discourse developed.

Particularly for what Glendon refers to as “the smaller nations,”<sup>35</sup> the Third World nations, the encounter with human rights language never took place in abstract. It developed, instead, in a highly complex, concrete, and politicized environment, where the meaning of the term varied depending on who was using it, and aspirations of freedom and self-determination were central to how human rights discourse was understood. In the context of the social movements and of many Third World human rights actors, priority was set on how the term “human rights” was interpreted and used by the most powerful nations, which rights needed to be uplifted in the international sphere (like the right of self-determination), and to what extent the peoples at the fringes of power were actual subjects of human rights.

This matter remains of the greatest relevance for human rights advocates in the 21<sup>st</sup> century, helping them to question the efficacy of human rights discourse to the large number of impoverished and marginalized communities and individuals around the globe. Such question cannot be responded to only in terms of abstract concepts about the universal nature of human rights or the neutrality of human rights language. It can only be properly addressed when all the interested voices, particularly the voices of those who have been pushed to the margins of the current globalized order, are fully taken into consideration—and no longer as “the little

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34 For more on this conversation, see, for instance, Meredith Terretta, “We Had Been Fooled into Thinking that the UN Watches over the entire World’: Human Rights, UN Trust Territories, and Africa’s Decolonization,” *Human Rights Quarterly* 34 (2012), 329–360; Meredith Terretta, “From Below and to the Left? Human Rights and Liberation Politics in Africa’s Postcolonial Age,” *Journal of World History*, 24/2 (2013), 389–416; and Kathryn Sikkink, “Latin America’s Protagonist Role in Human Rights,” *Sur-International Journal on Human Rights*, 22/12 (2015), 207–219.

35 Glendon, *A World Made New*, 15. Glendon borrows this term from Carlos Romulo, the Filipino leader who called himself “a third world soldier at the UN.” (See Carlos Romulo and Beth Day Romulo, *Forty Years: A Third World Soldier at the UN* (New York, NY: Greenwood Press, 1986). She also mentions the use of a similar expression by Churchill’s foreign affairs advisor, Sir Alexander Cadogan, in his disdain for the complaints coming from representatives of the other 45 nations invited to the San Francisco summit against the self-appointed power of the permanent members of the UN Security Council. He referred to them as “little fellows yapping at our heels.” Glendon, *A World Made New*, 12.





fellows,” but as full participants in a serious and ongoing conversation shaping the ideas of human dignity and peaceful coexistence that have inspired the contemporary international human rights movement. For such a conversation to be meaningful, the diverse cultural and religious foundations of human rights discourses must be put in dialogue with one another. The apparent neutrality of human rights language hides the fact that it is still grounded in Western modern moral discourses, not taking full account of many other cultural contributions.

## BUILDING HUMAN RIGHTS INTERCULTURALLY

Women, indigenous peoples throughout the world, ethnic and religious minoritized groups, and migrant and displaced populations, among others, continue to have their fundamental rights violated in different places and contexts. Whereas international and constitutional provisions have been important instruments for the acknowledgement of their rights, it is their mobilization, and the mobilization of others in solidarity with them, that has given visibility to their demands for greater protection of their rights. The number of people around the world who are oppressed, tortured, killed, and left out of societal structures remains colossal. In a country like Brazil, for instance, a young black woman is two times more likely to be killed than a young white woman.<sup>36</sup> Universal validity, thus, cannot be taken for granted. It can only be embodied as a social construct based on global participation. In other words, “The Universal Declaration of Human Rights has to be interpreted from all possible points of view and integrated into all possible traditional frameworks, in order to acquire universal validity.”<sup>37</sup>

Therefore, human rights as a legal and moral language must be reflected upon dialogically and interculturally. As Andre Droogers states, “Human Rights presuppose a minimum of communality, and a minimal intercultural communication.”<sup>38</sup> The international human rights movement as we know it today took shape almost at the same time that most of Africa and many countries in Asia were transitioning into a postcolonial era. Up to that point, Western culture was accustomed to see itself “as the apogee and ultimate criterion to all the other cultures in the

36 Agencia Brasil, “Risco de Jovens Negras Serem Mortas é Duas Vezes Maior que o de Brancas.” Retrieved from <http://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2017-12/risco-de-jovens-negras-serem-mortas-e-duas-vezes-maior-que-o-de>.

37 Abdullahi A. An-Na’im, et al., *Human Rights and Religious Values*, xi.

38 Andre Droogers, “Cultural Relativism and Universal Human Rights,” in Abdullahi A. An-Na’im, et al., eds., *Human Rights and Religious Values*, 79.



world.”<sup>39</sup> Postcolonial Africa and Asia—and the Third World movement that they formed with other eclipsed peoples during the Cold War—promoted the rehabilitation of cultures formerly considered primitive, which in turn made an impact upon the political–ethical dimension, serving as a “weapon to struggle against growing Western influence.”<sup>40</sup> Although such development is commonly associated with other hermeneutical discourses (postmodern ones), which emphasize contextuality and fragmentation, Andre Droogers sees the postcolonial situation as promoting cultural integration. With the emergence of new faces and voices in the international arena, the myth of “the ‘primitive isolate’ no longer existed.”<sup>41</sup> He is right in seeing the role played by postcolonial actors as moving beyond binary modern discourses (on both the right and left wing of the spectrum). According to that logic, constructions based on “oppositions between extremes—such as the pairs universal/local, rational/irrational, science/religion, tribal religions/world religions,” are no longer helpful.<sup>42</sup> We must move beyond such dichotomies, towards a constructive perspective focused on meaning-making processes.<sup>43</sup>

However, Droogers cautions that there is still a need to take power relations into consideration: “At any rate, in the context of a discussion on human rights the power dimension cannot be ignored.” Attention to culture cannot be divorced from power analysis. The discussion of power is complementary to culture, particularly as a tool for either the preservation of the status quo and/or for the promotion of an alternative order.<sup>44</sup>

Droogers, therefore is not simply another culturalist approach. It is also political and ethical. However, by moving culture to the center of the conversation, he acknowledges a universal element that is often absent in dominant human rights discourse. In defining human beings by “their capacity to produce signification, to give meaning to the world they live in and to the events that happen to them or that they help to bring forward,” Droogers reminds us that this capacity to produce “culture” is in itself a universal feature to all human beings.<sup>45</sup> Thus, it cannot be neglected in our attempts to make human rights universally valid.

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39 Ibid.

40 Ibid., 80.

41 Ibid.

42 Ibid., 84.

43 Ibid., 85.

44 Ibid., 85, 86.

45 Ibid., 6.



The emergence of a postcolonial reality, therefore, contributed to the democratization of human rights as it allowed non-Western individuals and communities to claim their place as subjects of human rights; that is, as constructors and interpreters of human rights discourse, no longer standing merely as potentially protected by an abstract universalistic language that does not speak to their world.

## LIBERATING INTERCULTURALITY:

### HUMAN RIGHTS FROM AND TO EVERYONE

Boaventura de Sousa Santos' indignation at the disturbing fact that the large majority of impoverished people around the world are not full subjects of human rights strongly echoes in the hearts and minds of many people living in situations of vulnerability and exclusion. If human rights discourse is not efficacious to the destitute who form the majority of the world's population, its legitimacy can be rightly questioned. Thus, more urgent than defending the language of human rights against its detractors is the need to answer his question: Can human rights discourse "be used in a counterhegemonic way?"<sup>46</sup>

Argentinian philosopher Enrique Dussel agrees with the idea that intercultural dialogue must be a cultural and political priority on the global level. However, considering the asymmetric (power) relation between the Global North and the Global South, "it is necessary that this global dialogue begins with an inter-philosophical dialogue among the world's post-colonial communities."<sup>47</sup> He urges philosophers of the Global South, thus, to claim an even more protagonist role in setting the agenda for a global intercultural dialogue as they "come together to define and claim for themselves a philosophical practice—generating its topics and methods from its own historical, socio-economic-political realities and traditions—that is critical of and goes beyond the European 'I' which, by virtue of its colonial history, has asserted itself as the universal standard of humanity and philosophy."<sup>48</sup>

What Dussel proposes is a plural universality, or a "pluriversality," where each of these voices can assert "the particularity of their own traditions and the creative possibilities of their own situation" in a kind of dialogue which, on one hand, seeks "a common 'similarity,'" continuously recreating in turn "its own analogical 'distinction,' which diffuses itself

46 De Sousa Santos, *If God Were a Human Rights Activist*.

47 Enrique Dussel, "Agenda for a South-South Philosophical Dialogue," *Human Architecture*, 11/1 (2013), 3.

48 Ibid.



within a dialogical, reciprocally creative space.”<sup>49</sup> Such dialogical framework stretches the reach of the question “What is the meaning of human rights for those living in the margins?” which de Sousa Santos asks. This “pluriversal” formula allows for the whole and the parts to be interwoven in a way that makes all parts active subjects in the production of human rights discourse. Dussel proposes an epistemological turn necessary to make human rights meaningful for those who had previously been pushed aside by a self-proclaimed world center, modern Europe, that in the process universalized its own epistemology, to the point of eclipsing other forms of knowing. Such eclipsing of the other violates the freedom upon which human rights discourse is supposed to be based.

Thus, from a Global South perspective, human rights need to be historicized, and in order for that to happen, human rights discourse cannot ignore the ignominy of the modern coloniality of power.<sup>50</sup> Franz Fanon was already aware of the lasting and damaging distortions colonialism imposed on those it oppressed:

[C]olonialism is not simply content to impose its rule upon the present and the future of a dominated country. Colonialism is not satisfied merely with holding a people in its grip and emptying the native’s brain of all form and content. By a kind of perverse logic, it turns to the past of the oppressed people, and distorts it, disfigures and destroys it.<sup>51</sup>

The reversal of that distortion requires epistemological disobedience, a decolonial epistemology which unmask the coloniality of power. Anibal Quijano introduced the term “coloniality of power” to refer to the epistemological and cultural dimension of modern/colonial oppression, which outlives colonialism and very often goes unchecked. In the words of Walter D. Mignolo, this is “the invisible and constitutive side of ‘modernity’”<sup>52</sup> Colonial power in the political and economic spheres goes side-by-side with the coloniality of knowledge. Thus, “if knowledge is colonized one of the tasks ahead is to de-colonize knowledge.” That task is thus the task of de-coloniality, which not only operates on the level of political and economic pow-

49 Ibid.

50 Anibal Quijano, “Coloniality and Modernity/Rationality,” *Cultural Studies* 21/2-3 (2007), 168-178.

51 Franz Fanon, *The Wretched of the Earth* (New York, NY: Grove Press, 1961), quoted by Walter D. Mignolo in “Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-coloniality,” *Cultural Studies* 21/2-3 (2007), 449.

52 Ibid., 451.



er, but also on the subjective level of knowledge production.<sup>53</sup> Decoloniality denounces the complicity of modernity/rationality and an exclusionary notion of Totality “that negates, excludes, occludes the difference and the possibilities of other totalities,”<sup>54</sup> uplifting alternative forms of knowledge and knowing. The problem, therefore, is not the idea of universality *per se*, but a totalizing and authoritarian notion of universality, the one experienced when the coloniality of power goes unchecked.

From the perspective of most non-European peoples, there is a memory and still very visible marks<sup>55</sup> of military, political, social, and cultural domination, which are present in all peoples impacted by the European colonialism in all continents. Such domination was codified in terms of gender, race, ethnicity, and nationality, among other categories, as objective and rational. For Quijano, the critique of this Eurocentric paradigm of modernity/rationality is urgently necessary in order for formerly colonized peoples to be free from the distorted images imposed on them. Epistemological decolonization, or “decoloniality,” then, is a key step “to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality.”<sup>56</sup> In other words, the move from authoritarian and totalizing universality to intercultural universality (or pluriversality) is not an easy one. Before making such a move, it is necessary to “liberate intercultural communication from the prison of coloniality,” freeing “all peoples to choose, individually or collectively, such relations.”<sup>57</sup> Thus, I would call the notion of interculturality advanced here a liberative decolonial interculturality, which historicizes human rights discourse, and takes power disparities in all its dimensions—the coloniality of power—into account, thus enabling a liberative intercultural human rights discourse to flourish.

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53 Ibid.

54 Ibid.

55 Marks of violence and domination that are everywhere, particularly visible in formerly colonized societies, but also in the hierarchized global order *vis-à-vis* the coloniality of power. In Brazil, the largest Latin American country and the one with the largest population of African descendants outside the African continent, recent research showed that illiteracy is twice as prevalent among black and dark-skinned (identified in the Brazilian census as “pardo” or brown) Brazilians than among those who claim to be white. Statistics retrieved from <http://www.dw.com/pt-br/brasil-tem-duas-vezes-mais-analfabetos-entre-n%C3%A3o-brancos/a-41895241>. Whenever and in whatever manner non-European populations are subalternized, the coloniality of power can be perceived. For the idea of subalternization, see Steven Ratuva, “The Subalternization of the Global South: Critique of Mainstream ‘Western’ Security Discourses,” *Cultural Dynamics* 28/2 (2016), 211–228.

56 Quijano, *Coloniality and Modernity*, 177.

57 Ibid., 178.



David Little's two-tiered philosophical grounding of human rights is comprehensive enough to take difference into account. However, his concern with universality does not go far enough to consider the full implications of difference in human self-understanding in non-western cultures, or of the profound and multifaceted power asymmetry which cannot be ignored by those approaching human rights from "the underside of history."<sup>58</sup> The dialogical approach to human rights proposed in this chapter, not conceding to postmodern cultural relativism or reified understandings of multiculturalism, affirms human rights' pretensions to universality interculturally, from the bottom-up, allowing for all stakeholders to rightfully claim their place as subjects of human rights.

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58 Dietrich Bonhoeffer, "After Ten Years," in *Dietrich Bonhoeffer: Writings Selected with an Introduction*, ed., Robert Coles, (New York, NY: Orbis Books, 1998), 114.



# SEGMENTATION, REGIONALIZATION, AND MINORITY RIGHTS: DEBATES ON THE UNIVERSALITY OF HUMAN RIGHTS IN THE DRAFTING OF AN AMERICAN CONVENTION ON RELIGIOUS FREEDOM

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JUAN MARTIN VIVES<sup>1</sup>

## INTRODUCTION

The universality of human rights is a topic that can be addressed from very different viewpoints. I will discuss universality in a sense that involves at least three levels: the logical, the temporal, and the spatial or geographical planes.<sup>2</sup>

In the logical level, universality means that all human rights belong to every person for the mere sake of being human beings. In this sense, all human beings have such rights regardless of personal circumstances.

In the temporal level, universality means that human rights do not depend on a particular time. In other words, these rights are valid at any point in history.

Finally, in the spatial or geographic level, universality implies that human rights apply around the globe, thus not being limited by the political barriers that divide different regions.

It is important to acknowledge that the concept of the universality of human rights, at least in the sense that I am using here, has been and still is intensely criticized by different sectors. For example, utilitarians and relativists oppose the universality in a logical sense. Historicists and romanticists might refute universality in the temporal sense. And lastly, nationalists<sup>3</sup> could object to universality in the spatial sense.

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1 This paper was presented by Juan Martin Vives, Ph.D. in Global Public Law (Autonomous University of Barcelona) at the 2017 IRLA Meeting of Experts, in Princeton, NJ., August 29-31, 2017. Dr. Vives is Director of the Center for Studies on Law and Religion at River Plate Adventist University.

2 Gregorio Peces-Barba, "La Universalidad De Los Derechos Humanos," *Doxa: Cuadernos de filosofía del derecho*, no. 15 (1994), 614-15.

3 *Ibid.*, 615.



Some of these criticisms are very harsh, for instance, those deriving from cultural relativism. Such criticisms are more concerned about rhetoric and demagoguery than valid argumentation.<sup>4</sup> However, I believe there is a criticism of the concept of universality that has solid grounds,<sup>5</sup> and can thus not be automatically defeated without careful, thoughtful reflection. Once this is done, however, it can lead to a strengthening of the concept of universality. An idea of universality built with these objections in mind could address the difficulties raised without losing its essential nature.

I find particularly appealing the problem of the practical application of the concept of universality in human rights. It seems relatively easy to find the universal sense of human rights when one thinks of those rights abstractly. Conversely, the more specific the situation to which they are applied, the more tempting it is to give in to relativism and contingency.<sup>6</sup>

I will try to link the three sides of human rights universality I have mentioned (logical, spatial, and temporal) and I will refer, as well, to some of the questionings of this universality through a concrete case.

## THE UNIVERSALITY QUESTION AND THE DRAFTING OF A CONVENTION ON RELIGIOUS FREEDOM

Some time ago, I had the opportunity to collaborate in the drafting team of an Inter-American Convention of Religious Freedom. Even though my contribution was small, limited to the drafting of a few specific clauses related to the field of my specialty, the tension in the team discussions regarding these three aspects of universality became evident.

During approximately the past two years, the Argentinean Council for Religious Freedom (CALIR, for its acronym in Spanish) has been working on a project for an International Convention on Religious Freedom.

The text had been drafted collaboratively by a team of experts in law and religion, each of them with religious backgrounds. They acted for themselves but belonged to Roman Catholicism, different Protestant denominations (such as Baptist, Seventh-day Adventists, Methodists), and Judaism.

The draft was presented to the Argentinean Ministry of Foreign Affairs and several ambassadors in Argentina. The Minister of Foreign Affairs

4 Johnny Dávila, "La Universalidad De Los Derechos Humanos Y Su Fundamentación Absoluta. Una Visión Crítica," *Analecta Política* 3, no. 4 (2013), 52.

5 Peces-Barba, "La Universalidad De Los Derechos Humanos," 623.

6 Arthur Kaufmann, "La Universalidad De Los Derechos Humanos: Un Ensayo De Fundamentación," *Persona y derecho: Revista de fundamentación de las Instituciones Jurídicas y de Derechos Humanos*, no. 38 (1998), 25.





committed to having the Argentinean diplomatic representation in the Organization of American States present the project and promote debate on a possible Convention.

## CHALLENGES TO THE NOTION OF HUMAN RIGHTS

### UNIVERSALITY

In the course of the debates related to this process, some difficulties became apparent regarding the notion of the universality of human rights. I believe, however, that these challenges can be met with adequate responses and do not invalidate the universality of human rights.

### SEGMENTATION

The first and most evident challenge is the so-called segmentation of human rights. The mere fact of referring to an International Convention of Human Rights that exclusively addresses one such right—that is, freedom of conscience and religion—already poses difficulties to the notion of the logical universality of human rights.

The Universal Declaration of Human Rights (1948) sustains a sort of catalogue of universally recognized rights. After outlining these, the international community gathered in the United Nations understood that it was necessary to draft more specific agreements, legally binding for the parties, which developed the rights recognized in the Declaration.

These pacts, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both from 1966) manage this purpose of setting out the recognized rights.

After signing these covenants, the international community began to address other rights related to specific issues (forced labor, racial discrimination, gender equality, working union freedom), or to particular categories of individuals (women, children, elderly, inmates, disabled, refugees).<sup>7</sup> As a result, new international declarations and new international covenants were signed.<sup>8</sup>

There is also a UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, dating from 1981. However, an international treaty on the issue, binding to the party

7 Antonio Cassese, *Los Derechos Humanos En El Mundo Contemporaneo*, Ariel (Barcelona: Ariel, 1991), 80.

8 Carlos Hakansson Nieto, "El Impacto De La Declaración Universal De Los Derechos Humanos En Las Constituciones Iberoamericanas," *Persona y derecho: Revista de fundamentación de las Instituciones Jurídicas y de Derechos Humanos*, no. 59 (2009), 61.



states, has never been achieved. CALIR has taken upon itself the challenge of filling that gap by promoting the signing of an international treaty on the right to religious freedom.

But does this not contradict the notion of a temporal universality of human rights? If human rights go beyond time, why are there some of them that have already been instrumented, while others have not? Why must we wait for decades for some of these generally mentioned rights to be specifically developed in compulsory instruments for states?

The problem seems to be even more evident when the right to religious freedom stands in opposition to other rights, such as the right to equal treatment and non-discrimination. In fact, the Organization of American States recently promoted the signing of an Inter-American Convention against All Forms of Discrimination and Intolerance (A-69). This convention contains provisions protecting minorities in a way that can be deemed dangerous for the protection of other fundamental rights, religious freedom among them.<sup>9</sup> Even though the A-69 has not yet been ratified and is, thus, not being enforced, it has upset many religious people. In fact, in the opinion of many, a convention on religious freedom could operate as a limit to possible excesses in the application of the A-69.

These controversies seem to conspire against the notion of a logical universality of human rights.

## REGIONALIZATION

A second challenge to the idea of the universality of human rights is regionalization. By regionalization, I mean the drafting of regional treaties and control instruments (for instance, those of Europe or Latin America). The idea underlying these forms of regional instruments is that states close by are relatively homogeneous in cultural, ideological, economic, and political terms.<sup>10</sup> Therefore, it is more likely for neighboring states to reach acceptable consensus than for non-neighboring ones.

This idea of human rights applicable to some regions (and by opposition, non-applicable to the rest) seems to oppose the notion of the spatial or geographical universality of human rights.

It is true that universality is not the same as internationality.<sup>11</sup> Internationality refers to the process carried on by the international community

9 José Manuel Díaz De Valdés Juliá, "Análisis Crítico De La Convención Interamericana Contra Toda Forma De Discriminación E Intolerancia," *Actualidad Jurídica*, no. 30 (2014), 63.

10 Cassese, *Los Derechos Humanos En El Mundo Contemporáneo*, 79-80.

11 Dávila, "La Universalidad De Los Derechos Humanos Y Su Fundamentación Absoluta. Una Visión Crítica," 35-36.



to achieve the effective application of human rights through positive legal norms enforced within the states. This internationality may reach a global level or may be limited to regional systems. In any case, internationality to a global extent might be a hint of the universality of human rights, but not its basis.<sup>12</sup>

The problem, however, remains: If human rights are geographically universal, why can internationality sometimes be only regional?

When the CALIR thought of an international treaty on religious freedom, it initially proposed a global treaty. But shortly after beginning to draft, various difficulties soon became apparent in finding acceptable formulas for countries with diverse religious majorities, with different systems of relationship between church and state, different balances between majorities and minorities, and particular relations between religion and nationality, among others.

Thus, the CALIR chose to reduce the spatial outreach of the treaty to within the American continent. In spite of the diversity of our states, the promoters of the convention were of the mind that there is a common basis among all of them that would make it feasible to accept the proposed text.

## MINORITY RIGHTS

A third challenge to the idea of universality of human rights is the existence of special rights for minorities.<sup>13</sup> The argument can be summarized as follows: There exists a contradiction between the universality of human rights—in the sense that all human beings are entitled to those rights—and the granting of rights to some minorities.

During the deliberations on the Inter-American Convention on Religious Freedom draft, this notion was topic of debate. Some of the arguments supporting the granting of rights to religious minorities are, for instance, the vulnerability of minority cultures to decisions made by the social majority. This results in injustice since it fails to comply with the principle of equality of treatment.<sup>14</sup> Another argument is the importance of respect for minorities for the consolidation of democracy. A third reason is the acknowledgment of the value of religious diversity for all society.

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12 Ibid., 36.

13 José Antonio Seoane Rodríguez, “La Universalidad De Los Derechos Humanos Y Sus Desafíos: Los ‘Derechos Especiales’ De Las Minorías,” *Persona y derecho: Revista de fundamentación de las Instituciones Jurídicas y de Derechos Humanos*, no. 38 (1998), 206.

14 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford Political Theory (Oxford: Clarendon, 1995), 126–27.



However, there have also been arguments against the inclusion of specific rights for religious minorities. The main argument is that everyone is equally entitled to the right to religious freedom, and thus it cannot be differentiated based on the number of followers of a specific religious group. If human rights are the same for everyone, why would we recognize special rights for a specific group? Ironically, some of the most fervent defenders of this position are members of religious minorities that do not accept the existence of differences—of any sort—between themselves and the majority.

### REAL OR APPARENT CHALLENGES?

The question that came to my mind during the debates about these issues was: Do segmentation, regionalization, and minority rights really oppose the universality of human rights?

I believe the answer is “no,” as long as a difference can be drawn between the universality of the abstract principles, the general and timeless reach of these principles, and the actual application of those principles into positive law.

I propose that the descent of the principles of a universal nature to a specific place in the real world does not refute its universality. Quite the opposite, it helps synthesize the legal experience and define the situations deserving of particular treatment. This way, the universal principles pierce the merely ideal nature and avoid falling into pure formalism. The universality of human rights blooms when, without compromising the general principles, the reality of facts and experience nurtures these rights.

What happens is that the more specific the situation to which the general principles apply, the harder it is to reach a broad consensus on such application. For instance, the right to life, stated in a general way, will hardly be called into question. However, the concrete situations in which this principle is applied are not as easy to solve. For example, there are significant debates regarding abortion, euthanasia, and capital punishment. But this does not imply rejecting the universal principle. On the contrary, it is the actual application—together with its difficulties and contradictions—that makes the principle bloom, and which makes it relevant to the real world.

When attempting a universal approach in the drafting of a bill of rights, it seems reasonable to understand that universality does not equate to the immediate and automatic application of a group of rules valid in



any and all places, times, or groups of individuals. In sum, the universality of human rights should not pursue uniformity, but rather a minimum of common principles assuring (beyond time and space) respect for human dignity.

In my opinion, it is the notion of human dignity that supports the universality of human rights. This is an intrinsic human value, that is, a quality that all human beings share, at least potentially. Dignity implies that all individuals must be seen as ends, and not as means.

This potential dignity, innate and universal, must become a dignity in action. Each person should have living conditions that allow them to choose a life plan freely. This is the aim of the implementation of human rights that should establish the minimum circumstances for this passage to be possible. The core principles and values are announced at a general level; as they descend to particular rules, the precision and accuracy increase, though there may be some diversity in application.

This is precisely what happens with segmentation and regionalization. Both are ways of implementing human rights without contradicting the notion of universality. Within this framework, maintaining that human rights are a historical concept is not incompatible with the universality of basic morality underlining the idea of human dignity.

Correspondingly, recognizing special rights for minorities does not oppose universality. In fact, this recognition is implicit in the very notion of human rights. Of course, dignity is an attribute of all individuals, regardless of their ethnicity, nationality, or religion. But some circumstances exist that justify differentiation when implementing rights, in such manner that those who, in fact, have fewer opportunities of accessing dignity receive more favorable treatment. In other words, treating differently those who have different conditions to reestablish equality in accessing dignity.

From a different viewpoint, dignity—as a universal human potential—must be complemented with other two principles: freedom and equality. There should be a balance among these principles. When one is disregarded in favor of another, human dignity is compromised.

## CONCLUSIONS

Francesco D'Agostino, referring to the problem of universality, said that “it is certainly not us that will solve this completely. But we will have done good work if we manage to be fully conscious of it.”<sup>15</sup> I do not

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15 Francesco D'Agostino, *Pluralità Delle Culture E Universalità Dei Diritti*, *Recta Ratio: Testi E Studi Di Filo-*



purport to do this. The only goal of this work is to briefly report some of the discussions that arise when applying the principles of universality to a specific human rights document.

I believe that the universality of human rights is a tool that significantly influences the recognition of the dignity of all individuals. However, an approach to universality that renders it too idealistic could be insufficient in contributing to individuals achieving actual dignity. It can be argued, in turn, that this universality is expressed in rights that are progressively implemented in different regions and historical moments.

For this, universality must be considered not only a starting point but also a finish line. The universality of human rights is not just a fact or a concept but rather a challenge and a conquest.<sup>16</sup> It is a presupposition, but also a goal. It is towards that goal that we are working in the American Convention on Religious Freedom.

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sofia Del Diritto (Torino: Giappichelli, 1996), 5.

16 Soane Rodríguez, "La Universalidad De Los Derechos Humanos Y Sus Desafíos," 189.



# FREEDOM OF RELIGION, CIVIL RIGHTS: CASUALTIES IN THE CROSSFIRE?

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DUDLEY C. ROSE<sup>1</sup>

There has been an increasingly loud charge by some that religious freedom is under attack in the United States. For those whose work covers areas of the world where religious freedom is often violently and inflexibly inhibited, such a claim may seem laughable. After all, the freedom of religion clause of the First Amendment to the United States Constitution (December 15, 1791) states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Generally, then, in the United States the government may not impose a religion; neither may it prevent the practice of one. Of course, in practice the “separation of church and state,” as it is often called is not so simple. One can easily imagine religious practices, for example child sacrifice, that a religion might include but that the state would prohibit.

Courts in the United States have generally concluded that religious beliefs can be freely expressed but that the actions springing from those beliefs may legitimately be regulated by the government. Which actions springing from religious belief are allowed and which are not has historically been the battleground. For example, in 1878 *Reynolds vs. the United States*<sup>2</sup> the Supreme Court concluded that George Reynolds could lawfully be prevented from having multiple wives even though his Mormon beliefs allowed it.

Recent controversies about religious freedom in the United States are, it seems to me, of a different kind in a few ways. Rather than concerns over what individuals are allowed to do or are prevented from doing in relation to their religious beliefs, the recent most prominent concerns have centered around two areas: 1) actions that individuals, because of their religious beliefs, believe *others* should be prohibited from doing,

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<sup>1</sup> Dudley Rose is associate dean for ministry studies and Lecturer on Ministry at Harvard Divinity School. He delivered this paper at the 2017 IRLA Meeting of Experts, in Princeton, NJ., August 29-31, 2017.

<sup>2</sup> *Reynolds v. the United States*, 98 U.S. 145 (1878).



and 2) actions that individuals see themselves as required to do, actions that contradict their religious beliefs. An example of the former: some individuals believe that it is an abrogation of their religious freedom if same-sex couples are allowed to marry. To the latter point, some individuals have claimed that if such marriages are allowed by legislation and/or judicial decree, their religious freedom is denied if they are required to be a party in any way to the offending action. For example, shortly after the Supreme Court's ruling that same-sex marriage is lawful in the United States,<sup>3</sup> Kim Davis, Rowan County, Kentucky Clerk refused to issue wedding licenses to same-sex couples on religious grounds.<sup>4</sup> In another case, a family owned business, Hobby Lobby, objected to a government requirement that it provide healthcare insurance that included coverage under the Affordable Care Act<sup>5</sup> of certain kinds of birth control that Hobby Lobby believed were tantamount to abortion, and which was against the religious beliefs of the owners of the closely held corporation.<sup>6</sup> Other similar concerns have arisen. Photographers and caterers who oppose same sex marriage on religious grounds and who say they would refuse to provide services for same-sex weddings have been accused of discrimination and threatened with boycotts and legal action.

It is clearly specious to argue that one's religious freedom is denied simply because someone else does something that is contrary to one's religious beliefs. It is more complicated when the law requires one to participate in actions contrary to one's religious beliefs. Over the past quarter century, the United States' courts have tried to walk a fine line informed by the Religious Freedom Restoration Act of 1993,<sup>7</sup> which ruled that the state could limit religious freedom but only when the compelling constitutional purpose the prohibition served could not be met by less restrictive means. Most situations, such as Hobby Lobby, have ultimately been addressed by finding less restrictive ways to assure the state's compelling interest.

Nonetheless, in the currently polarized environment, many participants eschew reasonable compromises. Often the debates are framed in zero-sum terms pitting religious freedom against civil rights.

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3 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

4 Miller v Davis [2015] Dist Court Civil Action No. 15-44-DLB; Miller v Davis (No 15A250) (Supreme Court).

5 The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

6 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)

7 The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993).





Additionally, in past cases most allegations of the abridgement of religious freedom were made by people in minority religious groups. Good examples are the previously mentioned case of *Reynolds vs. the United States*<sup>8</sup> in which Mormons felt their religious freedoms were denied. Another is the case of the Native American Church in the 1990 *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>9</sup> which ruled that Alfred Smith and Galen Black could be fired for cause and be refused unemployment benefits for using the illegal drug peyote, even though the drug was ingested as part of a religious ceremony. More recently it has become much more common that majority religion adherents, primarily Christians, have claimed their religious freedoms are under attack. Many, myself included, have worried that First Amendment guarantees that were quite clearly meant to protect minority religious groups are now being marshalled by majority groups to discriminate against minorities.

In an August 2015 interview I stated:

Ironically, one could argue that the perception of loss of religious freedom in the United States has to do with the fading hegemony of Christianity. Longingly claiming that the United States was established as a Christian nation, which plays loosely with the truth to begin with, actually harkens to an era of less religious freedom when Christianity and the state were presumably of one accord. (Again, the supporting facts for such an era are questionable.) Losing this pride of place can certainly feel like an attack.

Nonetheless, prohibiting discrimination against those whose religious views one finds abhorrent, however unpleasant, doesn't in my mind constitute an attack on religious freedom. I should note, though, that it has hardly been unheard of to invoke religious freedom to clothe prejudice in pious garb.<sup>10</sup>

A colleague of mine, Professor Jon Levenson, an Orthodox Jew, responded to the interview with a plea that I look at an essay and series of responses in the August 2015 issue of the online magazine *Mosaic*. Since

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8 Ibid.

9 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

10 Michael Naughton, "Religious Freedom: Under Attack or Misunderstood?" (August 5, 2015). Retrieved from Harvard Divinity School website: <https://hds.harvard.edu/news/2015/08/05/religious-freedom-under-attack-or-misunderstood#>



the pieces expressed concern about the state of religious freedom in the United States from a minority religion point of view, I was interested.

The main article by Bruce Abrahamson, “The Decline—and Fall?—of Religious Freedom in America,” argues, as the subtitle suggests, “America’s ‘first freedom’ is under attack from an ascendant cultural secularism. Christians are its first target, but Jews and Judaism may not be far behind.”<sup>11</sup> Abrahamson rehearses the history of the religious freedom debate and cases in the United States and then in language that invokes one side of the current polarized rhetoric avers:

Among the educated, secular urban elites with whom American Jews identify most closely, recent decades have seen a growing tendency to regard membership in a faith community as ominously parochial, traditional moral codes as divisive and exploitative, and attachment to tradition as retrograde.<sup>12</sup>

Unfortunately, Abrahamson’s article too frequently relies on this trope of the cultural attack against religion to dismiss arguments that have more to them than he wishes to admit. It’s unfortunate because he does raise other points that need to be taken seriously.

He states, “The 2010 passage of Obamacare presaged the attack on religious practice by creating a conflict between two sets of rights that Americans hold dear—religious rights and abortion rights.”<sup>13</sup> To suggest that what Affordable Care Act presaged was entirely new is disingenuous. A simple example makes the case. The government has long used some form of taxation to wage wars. Many people have objected to these wars on deeply religious grounds, but the state has not exempted citizens, even on religious grounds, from the legal obligation to pay the taxes that fund them. This seems to me to be roughly analogous to requiring employers to fund employee health insurance that may cover procedures to which the employer objects on religious grounds. Furthermore, to suggest that the dividing line is between religious adherents and “secular urban elites” misses the mark and is dismissive. Many people who support abortion rights do it on religious grounds.

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11 Bruce Abrahamson, “The Decline—and Fall?—of Religious Freedom in America,” in *Mosaic* (August 3, 2015). Retrieved from: <http://mosaicmagazine.com/essay/2015/08/the-decline-and-fall-of-religious-freedom-in-america/>.

12 Ibid.

13 Ibid.



Abrahamson does raise legitimate concerns that potentially face Jews as a minority religious group. Among them is the Jewish religious requirement for male circumcision. He rightly notes that there has arisen an “intactivist” movement, which seeks to prevent male circumcision, which it sees as tantamount to genital mutilation and likens to female genital mutilation. Indeed, this movement sought to put the issue to referendum in San Francisco in 2011 and was prevented only by a technicality. While that referendum was prevented, Abrahamson says,

Intactivists have already achieved some quiet success. A “defunding” project has eliminated Medicaid support for circumcisions in certain jurisdictions, thereby reducing the number of poor families in which newborn males would otherwise be circumcised on medical (as opposed to ritual) grounds.<sup>14</sup>

Ironically, this concern for families who are denied Medicaid insurance for circumcisions is comparable to the concern that Hobby Lobby employees had when they found certain birth control procedures withheld from them because of the moral sensibilities of their employer. Abrahamson misses the common cause. I will come back to this below.

In seeking a model to guide thinking through the thorny issues of religious freedom, Abrahamson turns to the topic of marriage and weddings. I quote at some length.

Ironically, the Jewish community has much to offer in this debate, having spent decades confronting an issue that parallels the tension between adherents of traditional Jewish-Christian moral codes and proponents of broadening the definitions of marriage and family. That issue is intermarriage. American Jews have had ample experience grappling with family and community celebrations in which many rejoice while others fret and grieve. Yet for all the animosity and acrimony that such situations entail, no one has ever suggested that a refusal to perform, cater, attend, or even acknowledge an interfaith marriage is a human-rights violation—and no one has ever called for government intervention.<sup>15</sup>

Abrahamson’s point here is persuasive. If, as I would argue, some “religionists” have been too eager to characterize positions with which they

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14 Ibid.

15 Ibid.



disagree as violations of their religious rights, it is true that those he calls the “urban elites” have sometimes been too eager to name any positions with which they disagree as a violation of human rights. He cites the bakers and caterers who have refused to attend or serve at same-sex weddings and who have been accused of human rights violations. There is a salient difference here, however. It’s one thing for family members to fail to attend or recognize a marriage and even for Rabbis to refuse to perform weddings when the marriage violates their religion. It might be another thing for a public hotel owned by a Christian, for example, to refuse to host a Jewish wedding and reception. I would expect many Jews would find those actions to be discriminatory and an unacceptable application of religious freedom.

Abrahamson’s example of weddings is a good one with which to interrogate some of the complexities. It seems quite clear that there is a continuum of circumstances, and that judgments along the continuum will vary. At one end might be a hotel that invites the public onto its premises as customers. Refusing to serve potential customers on religious or racial/ethnic grounds would almost always seem to be a violation of human rights. At the other end might be a church that performs weddings in its sanctuary and holds receptions in its function space. Few would suggest that the clergy were obliged to perform weddings or the church to host weddings or receptions for those outside its own religious sphere or for those with whose marriages they disagree on religious grounds.

In the middle might be the Indiana pizza shop that invites the public onto its premises as customers, serves anyone who comes into the shop, but that also says it would decline to cater a same sex wedding. The context for this case is revealing. As stated earlier, the Religious Freedom Restoration Act of 1993 ruled that the state could limit religious freedom only when prohibiting an action that served a compelling constitutional purpose that could not be met by less restrictive means. Democratic Congressman Charles Schumer and Democratic Senator Edward Kennedy sponsored the act. According to Abrahamson, “The House passed the bill in a unanimous voice vote. The Senate voted 97–3 in favor.”<sup>16</sup> Congress passed this act to protect minority religions in direct response to *Employment Division v. Smith* which it judged unnecessarily limited the religious freedom of the Native American Church to use Peyote in its religious ceremonies. Bill Clinton signed the bill into law to great fanfare.

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<sup>16</sup> Ibid.



But as Abrahamson says:

That was not quite the end of the matter. Four years later, the Supreme Court ruled that the federal government had overstepped its authority by imposing RFRA on the states. In response, various states then began to adopt their own RFRAs. By 2014, with little or no fanfare, twenty states had enacted state-level RFRAs and the courts of eleven others had recognized similar protections.<sup>17</sup>

Abrahamson argues that from 1993 to 2014 there was demonstrable public support for RFRA as a means to protect religious freedom. But soon cultural shifts and debates that had been simmering began to boil. Abrahamson identifies two events that raised the heat under the pot, the passage of the Affordable Care Act<sup>18</sup> and the Supreme Court's rulings on same-sex marriage.<sup>19</sup> Suddenly, the specter of legally funded actions (government funded health insurance for birth control means that some saw as abortion) and legally permitted actions (same-sex marriage) affronted many people who objected to both on religious grounds. Lawsuits such as *Hobby Lobby* and targeted boycotts of small businesses such as *Memories Pizza* in Indiana erupted.<sup>20</sup> The widely supported uproar alleged that *Hobby Lobby* and *Memories Pizza* were using a masquerade of religious freedom to justify illegal discrimination. In a demonstration of just how quickly things had changed, in March of 2015, after Indiana sought to enact its own RFRA, Tim Cook, the CEO of Apple, passionately and to wide approbation decried the act charging that it was designed to sanction discrimination while posing as an instrument to protect religious freedom.<sup>21</sup>

Within a very short period, then, heralded legislation that had been designed to protect religious freedom was judged to promote its opposite. What happened? It is worth stating again that most laws meant to protect religious freedom were designed to protect minority religions.

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17 Ibid.

18 The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

19 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

20 See, David Uberti, "How a pizzeria took center stage in coverage of Indiana's religious freedom law" in *Columbia Journalism Review* (April 2, 2015). Retrieved from [https://www.cjr.org/hit\\_or\\_miss/the\\_front\\_lines\\_of\\_the.php](https://www.cjr.org/hit_or_miss/the_front_lines_of_the.php).

21 See, for example, Ben Rooney and Aaron Smith, "Apple's Tim Cook 'deeply disappointed' in Indiana's anti-gay law," *CNN Money* (March 27, 2015). Retrieved from <http://money.cnn.com/2015/03/27/news/companies/businesses-fight-indiana-gay-discrimination/>.



Indeed, the Freedom Restoration Act of 1993 was specifically in response to *Employment Division v. Smith*. More recently, worries about the loss of religious freedom have been expressed by those in majority religions, especially Christianity. As I wrote in an earlier interview, the perception that Christianity in particular and religion in general is losing its foothold in American society is widespread among those currently most vexed by the alleged loss of religious freedom. They see their adversaries as “secular urban elites.” The fight is against a Godless enemy, so any call the opponents make to human rights, or even to religious freedom for their own part, is seen as a ruse and subterfuge.

The suspicion that some calls for religious freedom are deployed for discriminatory purposes cannot be dismissed out of hand. Slavery and then segregation, for example, were often defended on religious and Biblical grounds. However, Abrahamson believes the dividing is along cultural positions, the “secular urban elites” vs. religious people. Furthermore, Abrahamson tends to believe that the “secular urban elites” seek to force religious people to do things in utter disregard of the people’s religious freedoms. It’s a convenient trope for him in that it also tends to pit purported government coercion against freedom of conscience. Unfortunately, his allegiances don’t map perfectly onto his legitimate concerns. He strongly objects to any requirement of government mandated insurance for procedures to which he objects on religious grounds, such as certain forms of birth control. Implicit in his argument, and intentionally so, is a strategy to reduce abortions more generally. He believes that making coverage widespread would increase the use of the procedures and, conversely, limiting such coverage would tend to decrease the use of such procedures. He and others who seek to defund Planned Parenthood and abortion services generally quite explicitly acknowledge that limiting the number of abortions is meant not only to cause fewer abortions but also to ultimately turn public opinion against them as a strategy toward outlawing them. But when Abrahamson argues about the intactivists’ threat to the religious freedom for circumcision he takes the exact opposite side of the argument. He says:

The San Francisco experience did, however, call attention to an area in which the intactivists have already achieved some quiet success. A “defunding” project has eliminated Medicaid support for circumcisions in certain jurisdictions, thereby reducing the number of poor families in which newborn males would otherwise be circumcised on



medical (as opposed to ritual) grounds. The movement's objective in reducing Medicaid funding is transparent: for a ban to become feasible, a practice must become uncommon.<sup>22</sup>

Abrahamson argues for the defunding of certain forms of birth control is an exercise of religious freedom. He then argues that attempts to defund Medicaid coverage of circumcision is ultimately a restriction of religious freedom. This a serious and quite revealing contradiction in his argument.

Nonetheless, while Abrahamson gets seriously off track, he makes at least one valuable point. He worries that the polarized rhetoric of our times sows so much distrust that arguments made on the grounds of religious freedom are dismissed as proxies for license to sanction human rights violations. The rapid reversal in public opinion about RFRAs is stunning proof. But he is less attuned to the way he dismisses civil rights advocates as "secular urban elites" who are using claims to human rights as a subterfuge to undermine religious freedom. He also misses that he himself is so deeply motivated by his specific religious and social beliefs that he argues for and against defunding of government sponsored healthcare depending on the issue at stake. He is nonetheless right; the rhetoric on both sides clouds the real issues at stake. And there are real issues to be sure.

Abrahamson did not address the case of Kentucky county clerk Kim Davis.<sup>23</sup> This case is interesting on a number of counts, not the least of which is that she refused to perform duties of her office as a government employee. In the summer of 2015 in response to *Obergefell v. Hodges*, county clerks in Kentucky were ordered to begin issuing wedding licenses to same-sex couples. Kim Davis, the clerk of Rowan County, objected on moral and religious grounds and asked the governor for an executive exemption. Since all wedding licenses in Kentucky are issued in the name of the county clerk, the governor refused the exemption. Eventually Davis chose not to issue any wedding licenses rather than issue licenses to same-sex couples, which meant that no licenses could be obtained in Rowan County. Davis was sued by four couples. She lost in court, was jailed, and appealed to the U. S. Supreme Court, which refused to hear the appeal. Ultimately, the county allowed deputy clerks to sign wedding licenses in her stead, a decision quite consistent with RFRA. Davis at first

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22 Abrahamson, "The Decline—and Fall?" *Mosaic* (August 3, 2015).

23 *Miller v Davis* [2015] Dist Court Civil Action No. 15-44-DLB; *Miller v Davis* (No 15A250) (Supreme Court).



questioned the legality of those licenses since they were not signed by the county clerk, but their legality was eventually upheld.

The Davis affair was also an example of the shrill rhetoric that currently swirls around issues of sexuality in the United States. Each side vilified the other. Davis claimed that she was following what God required of her, and she became a national cause célèbre for anti-gay marriage advocates. Her critics doubted her sincerity, given that her personal life included multiple divorces and children out of marriage, both of which things were also against her purported religious beliefs. The perception of her sincerity was further undermined by her questioning the legality of licenses that others in her office issued. Her actions would have been more persuasive as expressions of her religious freedom, had she either resigned her position, as did some other Kentucky county clerks, or sought and accepted provisions that would have allowed her to follow her conscience but allow others to issue the licenses. On the other hand, many same-sex marriage advocates were unsatisfied with the compromise allowing deputy clerks to issue the licenses. They argued that allowing Davis to avoid issuing the licenses, even if they could be issued by someone else, was a civil rights violation, not a proper expression of religious freedom. Rather than allow assistant clerks to sign the licenses, they insisted that Davis should be fired forthwith.

In the end, the resolution of the case was a perfect example of what should happen, though there was a good deal of objection and ill will from both sides of the debate. From a strict legal standpoint, the law was clear. Davis could voice her religious beliefs, but if she wanted to remain the clerk she would have to do her job. Ultimately, a compromise was reached, one that preserved the compelling constitutional interests of the citizens and the ability of an individual to maintain her opposing religious beliefs. Others in the clerk's office were allowed to issue same-sex wedding licenses. It was a compromise consistent with the intent of the Religious Freedom Restoration Act of 1993.

Religious freedom and civil rights are two of the most precious liberties in the United States and, I would argue, in any civil society. There are inevitably disagreements over religious and civil rights, sometimes within them, sometimes between them. The conflicts may be particularly apparent in times of great societal change. These disagreements often erupt in bitter and emotional clashes. They can be extraordinarily difficult to adjudicate, but adjudication becomes





nearly impossible if either side vilifies the other and misconstrues its arguments. Abrahamson is right that such denigration is evident in the current discourse in the United States. Indeed, he himself has become its victim, and to some degree it clouds some of his own arguments and positions. The same can be said on all sides.



# UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY:

## THE CATHOLIC CHURCH'S VIEW

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ROSA MARIA MARTÍNEZ DE CODES<sup>1</sup>

### INTRODUCTION

In the contemporary age, few people dispute that the Universal Declaration of Human Rights was a seminal document in international law and marked a milestone in the journey of humanity towards respect for the rights of every human being. As a matter of fact, since 1948 the Universal Declaration, together with other juridical instruments, has played a specific role in inserting new precepts and forms of behavior into national and international relations.

Pope Benedict XVI backed up this interpretation, within the context of the Declaration's 60<sup>th</sup> anniversary, publicly acknowledging: "The merit of the *Universal Declaration* is that it has enabled different cultures, juridical expressions and institutional models to converge around a fundamental nucleus of values, and hence of rights."<sup>2</sup> He expressed concern, however, about the fast-growing tendency to deny its universality: "Today, though, efforts need to be redoubled in the face of pressure to reinterpret the foundations of the *Declaration* and to compromise its inner unity so as to facilitate a move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests."<sup>3</sup>

The undergirding thread of this issue of *Fides et Libertas* gives me the opportunity to examine and reflect upon the Catholic Church's long engagement with human rights, to review the current challenges to the ambitious modern human rights project, and to explore the main schemes that have been proposed to overcome those challenges.

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2 *L'Osservatore Romano*. Weekly Edition in English, n°17 (April 18, 2008), 12, 13. Retrieved from: [http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit.html](http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html).

3 Ibid.



The dialectic relationship between the Catholic Church and human rights, which took place during modernity, has not come to an end; new problems and new challenges persistently arise and they require exploration and discernment. In this sense, the prominent Jesuit, Richard McCormick, asked some decades ago: “What is the Church’s proper mission in the sphere of the defense and promotion of human rights?” His answer is that we know “human dignity” in “the Christ-event and the Church’s commission to spread the good news.” However, he clarifies, “Unless the Church at all levels is an outstanding promoter of the rights of human beings in word and deed, her proclamation will be literally false.”<sup>4</sup>

In the context of recent developments of Roman Catholic social teaching—I refer to *The Compendium of the Social Doctrine of the Church* (2004)—there is a consensus that not until the encyclical, John XXIII’s *Pacem in Terris* (1961), did “human dignity” become the foundation for Roman Catholic Social teaching.

Any human society, if it is to be well ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And as these rights are universal and inviolable so they cannot in any way be surrendered.<sup>5</sup>

David Hollenbach, one of the major Catholic writers on human rights, argues that the Catholic tradition offers two warrants for the principle of human dignity as the foundation of all human rights. The first is accessible to all persons, whether they are religious or not: “The imperative arising from human dignity is based on the indicative of the person’s transcendence over the world of things.” The second is rooted in Christian faith: “The beliefs that all persons are created in the image of God, that they are redeemed by Jesus Christ, and that they are summoned by God to a destiny beyond history serve both to support and to interpret the fundamental significance of human existence.”<sup>6</sup>

4 Quoted in Robert A. Evans and Alice Frazer Evans, *Human Rights: A Dialogue Between the First and Third Worlds* (Maryknoll, N.Y.: Orbis Books, 1983), 245.

5 *Pacem in Terris*, 1963 Encyclical of John XXIII on World Peace, in Joseph Gremillion, ed., *The Gospel of Peace and Justice: Catholic Social Teaching since Pope John* (Maryknoll, N.Y.: Orbis, 1976), 9.

6 David Hollenbach, S.J., *Justice, Peace, and Human Rights: American Catholic Social Ethics in a Pluralistic Context* (New York, N.Y.: The Crossroad Publishing Company, 1988), 95–96.



This foundation for human dignity, and thus for human rights, is assumed by the Catholic tradition and developed within it.

## THE BREADTH, DEPTH, AND UNIVERSALITY OF HUMAN RIGHTS IN THE CATHOLIC TRADITION

### A. THE ROOTS OF THE TRADITION

The Universal Declaration of Human Rights, considered by Paul VI as one of the United Nations' greatest achievements, has been fundamental in contemporary history in consolidating the collective awareness of the respect for rights, and integrating the grandeur and dignity of the human person within subsequent Declarations. This process has been positively influenced by the Catholic Social Doctrine on human rights, which has become operational even in non-Western cultures and traditions. Especially since the Encyclical *Pacem in terris*, the Catholic Church has offered growing support to the Universal Declaration.<sup>7</sup>

This main conclusion of the 18<sup>th</sup> Plenary Session of the Pontifical Academy of Social Sciences, which took place in May 2009, had previously received deep attention from, amongst others, Mary Ann Glendon in her book, *A World Made New: Eleanor Roosevelt and The Universal Declaration of Human Rights*<sup>8</sup> and in her most recent contribution on "The Influence of Catholic Social Doctrine on Human Rights."<sup>9</sup>

Reflecting upon the final form of the Universal Declaration of Human Rights, Glendon argues that Catholic Social Doctrine is one of the many tributaries that fed into its formation. Her research shows that there were astonishing similarities between the language of the social encyclicals of Leo XIII and Pius XI and the emphasis found in the document of the Human Rights Commission on the worth of the human person. No doubt *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931) were part of the process through which the Church began to reflect on the Enlightenment, socialism, and the labor question in the light of Scripture and tradition.

On the other hand, and for the purposes of tracing the Catholic influence, one of the most cited channels through which Catholic thought

7 Roland Minnerath, et al., eds., Final Statement: "Catholic Social Doctrine and Human Rights," *The Proceedings of the 18<sup>th</sup> Plenary Session of the Pontifical Academy of Social Sciences*, Acta 15, (1-5 May, 2009) Casina PioV.

8 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and The Universal Declaration of Human Rights* (New York, N.Y.: Random House, 2001).

9 Mary Ann Glendon, "The Influence of Catholic Social Doctrine on Human Rights" in *Journal of Catholic Social Thought* 10:1 (2013), 69-84.



helped shape the UDHR relates to the members of the UDHR's drafting committee. Both René Casin and Charles Malik, the Lebanese philosopher of the Greek Orthodox faith, together with Catholic thinker Jacques Maritain, helped articulate a vocabulary in consonance with the Preamble of the Universal Declaration, in its assertion of the inherent dignity and the equal and inalienable rights of all members of the human family.<sup>10</sup>

Maritain's ethics and political philosophy occupies a middle ground between the extremes of individualism and collectivism. Developed during a period when cultural diversity and pluralism were beginning to have an impact on ethics and politics, his thinking provides a defense of natural law and natural rights that continues to be timely:

The worth of the person, his liberty, his rights, arise from the order of naturally sacred things which bear upon them the imprint of the Father of Being and which have in him the goal of their movement. A person possesses absolute dignity because he is in direct relationship with the Absolute, in which alone he can find his complete fulfilment.<sup>11</sup>

Against this background, the handling of the rights discourse by the Fathers of Vatican II and the Popes from John XXIII to Benedict XVI—during the 50s, 60s and 70s—intertwined with the human rights movement. This movement understood the UDHR as though it were simply a list of rights rather than an integrated document whose parts were meant to be interdependent and mutually conditioning.

## B. FROM THE SECOND VATICAN COUNCIL TO JOHN PAUL II

In 1965, less than two decades after Article 18 of the UDHR, the Fathers of the Second Vatican Council affirmed these same principles in *Dignitatis humanae*. I refer to the Declaration on Religious Liberty, the one that provided an important key to the problem of the foundation, interrelation, and institutionalization of human rights: "This Vatican Synod declares that the human person has a right to religious freedom . . . The Synod further declares that the right to religious freedom has its foundation in the revealed Word of God and by reason itself." Furthermore, because people cannot discharge their obligation to seek and do the truth without immunity from coercion, "the right to religious

<sup>10</sup> *General Assembly Resolution 217 A(III)* of 10.12.1948.

<sup>11</sup> Jacques Maritain, *Christianity and Democracy and The Rights of Man and Natural Law* (San Francisco: Ignatius Press, 2011), 67.



freedom has its foundation, not in the subjective disposition of the person, but in his very nature.”<sup>12</sup>

The Fathers of the Second Vatican Council took a step further when they reaffirmed in its only Pastoral, *Constitution on the Church in the Modern World*, that human rights are the necessary condition for human dignity:

There is a growing awareness of the exalted dignity proper to the human person, since he stands above all things, and his rights and duties are universal and inviolable. Therefore, there must be made available to all men everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one’s own conscience, to protection of privacy and to rightful freedom in matters religious too.<sup>13</sup>

However, it is not clear in the tradition what forms of government are best suited to realize the conditions of human dignity. Hollenbach suggests that this ambiguity in part reflects recognition by the Council that human dignity is only realized in specific historical and social circumstances. Therefore, “social, economic and cultural rights, defined in relation to historical conditions, assume a new place of importance in the Catholic human rights tradition.”<sup>14</sup>

One year after the promulgation of these two relevant statements, the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR). Happily, Article 18 of this Covenant restated and expanded upon the principle of religious freedom as contained in the Universal Declaration.

The central place that human rights have come to hold in Catholic social thought became even more visible through the numerous addresses of Pope John Paul II during his world travels. Whether in Poland or Brazil, the United States or the Philippines, Mexico or Africa, the most consistent and forceful theme of this pope’s message has been the appeal for the protection of human rights and the denunciation of patterns of human rights violations.

<sup>12</sup> *Dignitatis Humanae*, no. 2, in Gremillion, *The Gospel of Peace and Justice*, 339.

<sup>13</sup> *Gaudium et Spes*, no. 26, in Gremillion, *The Gospel of Peace and Justice*, 264.

<sup>14</sup> David Hollenbach, *Justice, Peace, and Human Rights*, 90.



It is worth noting that no pope before John Paul II has deployed the language of human rights so powerfully as when he called religious freedom “the source and synthesis of all the basic human rights” and defined religious freedom as “the right to live in the truth of one’s faith and in conformity with one’s transcendent dignity as a person.”<sup>15</sup>

Moreover, his encyclicals represent a relevant development of Catholic social thought in several ways. One of his concerns was to give a theoretical and practical basis to human rights through an adequate concept of personhood and the priority of culture over economics and politics. In *Centesimus Annus*, 1991, the centenary of the promulgation of *Rerum Novarum*, he underlined that democratic politics and economic systems can foster common growth if they are based on a public moral culture.

It is therefore necessary to create life-styles in which the quest for truth, beauty, goodness and communion with others for the sake of common growth are the factors which determine consumer choices, savings and investments. . . . I am referring to the fact that even the decision to invest in one place rather than another, in one productive sector rather than another, is always *a moral and cultural choice*.<sup>16</sup>

By the mid-1990s, efforts to manipulate the prestige of the human rights project for assorted causes was particularly high at all levels. In the international arena, two UN conferences—in Cairo and Beijing—placed under attack provisions relating to marriage, the family, parents’ rights, and freedom of religion. Pope John Paul II’s answer came in the format of a new encyclical, *Evangelium Vitae*, (March 1995) where he attacked the ideological bias of many who espouse human rights without respecting life from conception to death, and without according due regard to the right of religious freedom.

The Church’s social doctrine developed further when he identified abortion, euthanasia, and questions raised by new bio-technologies with “social justice issues” and when he pointed out that the entire human rights project was threatened by accepting grave moral evils as rights:

Precisely in an age when the inviolable rights of the person are solemnly proclaimed, and the value of life is publicly affirmed, the very right to life is being denied or trampled upon, especially at the more

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15 John Paul II, *Centesimus Annus* (May 1, 1991), § 47.

16 *Ibid.*, § 36,4.



significant moments of existence: the moment of birth and the moment of death. . . . These attacks go directly against respect for life and they represent a direct threat to the entire culture of human rights. It is a threat capable, in the end, of jeopardizing the very meaning of democratic coexistence: rather than societies of “people living together,” our cities risk becoming societies of people who are rejected, marginalized, uprooted and oppressed.<sup>17</sup>

## A DEVELOPING BODY OF THOUGHT IN THE 21<sup>ST</sup> CENTURY: THE COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH

At the dawn of the third millennium, Pope John Paul II asked the Pontifical Council for Justice and Peace to write a detailed description of Catholic social teaching. The result was *The Compendium of the Social Doctrine of the Church* issued in 2004 to address Catholic social thought on human rights, family life, economics, work, the political community, the international community, the environment, and the promotion of peace.

It is striking how strongly the new Compendium affirms the Catholic Church’s commitment to human rights as moral standards to which all nations and cultures should be held accountable. Like earlier church documents, this one grounds the link between Christian faith and human rights in the dignity of the human person as created in the image of God. But its discussion has greater theological depth than all previous teachings, which serves to link its ministry in the domain of human rights tightly to its essential religious identity. Thus, the Church’s work in support of human rights is essentially connected to its mission to proclaim the Gospel. Human rights, the vocation of every Christian, and the mission of the church are inseparable:

The Church sees in these rights the extraordinary opportunity that our modern times offer, through the affirmation of these rights, for more effectively recognizing human dignity and universally promoting it as a characteristic inscribed by God the Creator in his creature.<sup>18</sup>

<sup>17</sup> John Paul II, *Evangelium Vitae* (March 25, 1995), 18.

<sup>18</sup> *Compendium of the Social Doctrine of the Church, chapter 3, Human Rights IV, n ° 152*. Retrieved from [www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html).





Moreover, the many elements brought together here are shared by other churches and ecclesial communities, as well as by other religions. The text has been presented in such a way as to be useful not only from within, that is among Catholics, but also from outside. Work for human rights is a task shared by Christians with all other human beings. An integral and shared humanism links all human beings together in mutual responsibility. Therein lies the hope that people of all religious traditions can come to support human rights. In our multicultural environment this is an important contribution.

Given the interreligious conflicts of our world, the Compendium's treatment of the right to religious freedom is also significant. Theologically, freedom is affirmed as one of the highest manifestations of the image of God in persons (nº. 135); further, humans can seek God only in freedom. The right to religious liberty thus does not arise from relativism or indifference to the truth about God, as some critiques of religious freedom had suggested before the Second Vatican Council. Rather, it flows directly from a Christian understanding of the human person and of the way persons come to faith in God. Intimately connected to our relationship with God, religious freedom is a "paramount" right.

The Compendium stresses that peace in our time is increasingly dependent on the protection of this freedom. Religious and cultural differences are, sadly, often occasions for violence and war; as such, commitment to both freedom and dialogue by the great religious and cultural traditions of the world is a precondition of peace.

Commitment to equal worth calls forth a special concern for the poor and the marginalized. In this spirit, the Compendium strongly affirms that all have the right to necessities, such as food, housing, just wages, and adequate social security."<sup>19</sup>

At the same time, the existence of social and economic rights is presented as a fundamental requirement of human dignity. Democracy is likewise unambiguously affirmed as the preferable political system; yet the Compendium insists that democracy is important not because we cannot really know what values are truly important, but precisely because democracy reflects the truth that political power must be accountable to the dignity of human persons.

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<sup>19</sup> Ibid.



One last word concerning this Compendium is its silence about the time when the Church opposed many of these rights or violated them in practice. I refer, among other rights, to religious freedom, free speech and democratic self-governance. Catholic social thought has been a changing and evolving tradition and the Compendium is the latest phase of a developing tradition. In other words, historicity and development need not be threats to the Catholic tradition. They can lead to growth in understanding of both the requirements of the Gospel and the demands of human reasonableness.

## ANTHROPOLOGICAL FOUNDATION OF HUMAN RIGHTS: THE NATURAL LAW, RIGHTS, AND DUTIES

Today, one of the most awkward challenges facing the human rights project is the problem of supplying credible foundations for the practical consensus embodied in major human rights instruments.

It was Pope John Paul II who warned the Diplomatic Corps in his address of January 9, 1989, that: “Declaration does not contain the anthropological and moral bases for the human rights that it proclaims. It is clear today that at that time such an undertaking would have been premature. It is thus the task of the various schools of thought—in particular the communities of believers—to provide the moral bases for the juridical edifice of human rights.”<sup>20</sup>

The Church has always affirmed that fundamental rights, above and beyond the different ways in which they are formulated and the different degrees of importance they may have in various cultural contexts, are to be upheld and accorded universal recognition because they are inherent in the very nature of man, who is created in the image and likeness of God. If all human beings are created in the image and likeness of God, then they share a common nature that binds them together and calls for universal respect. But if there are no common truths to which people of different backgrounds and cultures can appeal, it is difficult to see how universal rights can be upheld.

In the tradition of the social doctrine of the Church, human rights are rooted in the natural moral law (Catechism of the Catholic Church, n. 1955). In Benedict XVI’s words:

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20 John Paul II, *Address to the Diplomatic Corps* (January 9, 1989), 7. Retrieved from [https://w2.vatican.va/content/john-paul-ii/en/speeches/1989/january/documents/hf\\_jp-ii\\_spe\\_19890109\\_corpo-diplomatico.html](https://w2.vatican.va/content/john-paul-ii/en/speeches/1989/january/documents/hf_jp-ii_spe_19890109_corpo-diplomatico.html).



The natural law is a universal guide recognizable to everyone, on the basis of which all people can reciprocally understand and love each other. Human rights, therefore, are ultimately rooted in a participation of God, who has created each human person with intelligence and freedom. If this solid ethical and political basis is ignored, human rights remain fragile since they are deprived of their sound foundation.<sup>21</sup>

The persistent problem of foundation is a thorny dilemma that has long bewitched the human rights project. The Church notices that contemporary culture has inherited an anthropocentric view of the world in which the individual is the source of good and evil, while the “social contract” is an agreement that can be changed at will. This view is challenged by the realistic Aristotelic-Thomistic anthropology adopted by the Social Doctrine of the Church, which considers the human person as being in a constitutive relationship with other people and with Creation, that is, in an order—called natural law—that reason must highlight.

To sum up, the Catholic tradition on human rights arises from a natural order whose laws can be discovered by reason through study and experience by believer and unbeliever alike. “The great option of Christianity—Benedict XVI said—is the option for rationality and the priority of reason.”<sup>22</sup>

The Church’s action in promoting human rights is therefore supported by rational reflection, in such a way that these rights can be presented to all people of good will, independently of any religious affiliation they may have.

This Christian anthropology is currently challenged by other secular anthropologies based on evolutionistic and constructivist ideologies that refuse the idea of a common human nature and believe that the human being is a social construct in which only the historicity of the various cultures, the relativity of moral rules, and the centrality of individual choices emerge. In the case of the family and procreation, this anthropology means that maternity and paternity are socially constructed realities that we can redefine freely.

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21 “Address of his holiness Benedict XVI to participants in the fifteenth plenary session of the pontifical Academy of Social Sciences” (May 4, 2009). See *Catholic Social Doctrine and Human Rights*, Acta 15, eds. R. Minnerath, et al., (Vatican City, 2010).

22 Quoted in Giorgio Israel, “Quando Ratzinger Difese Galileo a ‘La Sapienza,’” in *Chiesa Espresso Repubblica* (January 17, 2008). Retrieved from [Chiesa.expresso.repubblica.it/articolo/186421](http://Chiesa.expresso.repubblica.it/articolo/186421).



At this point I will recall David Little's conclusion in his *Essays on Religion and Human Rights* when he mentions that:

In the spirit both of liberal Calvinism and contemporary human rights understanding, fundamental beliefs in things such as the "foundations of human rights" . . . however fervently embraced, are nevertheless matter of "conscience, religion or belief," and as such are subject to the conditions of "the sovereignty of conscience" and the "laws of the spirit." Other people are clearly at liberty to propose alternative ideas, and it is hoped that resulting exchanges will contribute to the indispensable process of what Roger Williams called the "chewing and weighting" of fundamental beliefs.<sup>23</sup>

The search for the anthropological bases of the Universal Declaration also gives rise to a reconsideration of the inseparable relationship between rights and duties and the need for a new attention to duties, especially in certain geopolitical and cultural areas where new rights are frequently demanded, but without offering any justification or explanation of their connection with duties. Rights without duties is a growing weakness of our time. The Church's voice has pointed out those broken ties on many occasions:

Another observation needs to be made: the international community, which since 1948 has possessed a charter of the inalienable rights of the human person, has generally failed to insist sufficiently on corresponding duties. It is duty that establishes the limits within which rights must be contained in order not to become an exercise in arbitrariness. A greater awareness of universal human duties would greatly benefit the cause of peace, setting it on the moral basis of a shared recognition of an order in things which is not dependent on the will of any individual or group.<sup>24</sup>

## THE DEBATE ABOUT NEW RIGHTS

One source of concern for the Church in today's world is the pressure to expand the category of rights that are so fundamental as to be

23 David Little, *Essays on Religion and Human Rights: Ground to Stand On*, (New York: Cambridge University Press, 2016), 196-197.

24 *Pacem in Terris: A Permanent Commitment*, Message of His Holiness John Paul II for the Celebration of the World Day of Peace (January 1, 2003). Retrieved from [https://w2.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf\\_jp-ii\\_mes\\_20021217\\_xxxvi-world-day-for-peace.html](https://w2.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf_jp-ii_mes_20021217_xxxvi-world-day-for-peace.html).



deemed universal. The social doctrine of the Church has tried to clarify which rights are more fundamental than others; those, specifically, that spring from the nature of the person, such as the right to life, to physical and mental inviolability, to freedom of conscience, and to religious liberty. These rights are inherent to human nature and cannot be taken away by any person. They are distinguished from the rights inherent to the person as a member of society, such as civil and political rights. For these rights to be recognized at a practical level, the cultural conditions must exist. A person can be deprived of certain civil rights but not of his fundamental rights. An analogous situation exists with social and cultural rights. As for the third generation of rights, the right to peace, to a healthy environment, to development, and to diversity—are these rights? Or are they objectives to be reached for the achievement of the “common good”?

As history proceeds, new situations arise that require great discernment in dealing with demands for new rights. On the sixtieth anniversary of the Universal Declaration, at the United Nations in Geneva, the Holy See drew attention to ideologies that attempt to rewrite human rights or create new ones, and thus move away from the protection of human dignity towards the satisfaction of simple interest.

When a breach is caused between what is claimed and what is real through the search of so-called “new” human rights, a risk emerges to reinterpret the accepted human rights vocabulary to promote mere desires and measures that, in turn, become a source of discrimination and injustice and the fruit of self-serving ideologies.<sup>25</sup>

The Holy See’s permanent observer at the United Nations, Silvano Tomasi, has become increasingly focused in recent years on the controversy about the development of new rights. The Vatican concern about novel rights seems to be focused mainly on issues related to sexuality and gender. Tomasi, in 2012, expressed concern about states and organizations at the UN Human Rights Council promoting “an agenda to advocate for special rights for special groups, including so-called rights to same-sex marriage and to adoption by homosexual persons.” He was insistent that “new rights” were not required and that “any attempts to define ‘new rights’ could result in a deterioration of the universality of human rights

25 Silvano M. Tomasi, “Address on the occasion of the commemoration of the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights, Geneva,” (December 12, 2008). Retrieved from [http://www.vatican.va/roman\\_curia/secretariat\\_state/2008/documents/rc\\_seg-st\\_20081212\\_60-universal-declaration\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081212_60-universal-declaration_en.html).



and pose a risk to traditional marriage between husband and wife, the natural family, and freedom of conscience and religion.”<sup>26</sup>

In consequence the Church condemns the contemporary drift of human “rights” that proclaim the right to an abortion, the right of a couple of the same sex to adopt children, and the right to avoid juridical precision about concepts such as “the person,” “life” and “the family.” These trends represent harmful developments to human dignity.

On the other hand, there are voices inside the church that argue that it is a serious mistake for the Church to try and arrest the development of human rights jurisprudence. They take issue with the notion that human rights are frozen in pre-agreed international instruments, which cannot be supplemented or re-interpreted in the light of new social phenomena and new emerging norms and social expectations.

In the case of same-sex marriage, these voices claim that an extension of the international law of human rights to incorporate same-sex marriage cannot be categorized as an unwarranted interference with the universality of human rights. On the contrary, they argue that such a change would further contribute to the universality of human rights, enhancing the concept. Frank Brennan asserts that, “The rights of all persons (including children) and the common good need to be considered when contemplating an expansion of the right to marriage. Such an expansion, after due consideration of all other factors and rights, would not undermine the universality of human rights, but would rather enhance that universality.”<sup>27</sup>

In this sense, the dialogue among different kinds of knowledge and interpretations can guide us to a better understanding of the common good. This is true today for the dialogue between scientific knowledge and theological knowledge. It is worth underlining that the right to life, the first human right, “from the first moment of conception,” is not just an affirmation of the Catholic Church, but also the result of the best current scientific research.

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26 Quoted in Silvano Tomasi, et al., *The Vatican in the Family of Nations: Diplomatic Actions of the Holy See at the UN and other International Organizations in Geneva* (Cambridge, U.K.: Cambridge University Press, 2017), 204.

27 Keynote address by Frank Brennan, SJ Professor of Law at the Australian Catholic University, at the “International Congress of Dominicans in the Promotion and Defence of Human Rights: Past, Present, Future on the occasion of their 800th anniversary” in Salamanca, Spain (September 4, 2016). Retrieved from <https://www.eurekastreet.com.au/article.aspx?aid=49843>



## CONCLUSION: WHAT IS THE ROLE OF THE CATHOLIC CHURCH IN THE CONTEMPORARY RIGHTS DISCOURSE?

Professor Glendon notes that at the beginning of the twenty-first century, the ideas that have been most influenced by Catholic social thought in international rights instruments are decreasing in contemporary rights discourse. There is, however, one exception: “[T]he successful effort of Holy See diplomats to secure the adoption in many UN documents of the concept that the human person must be at the center of concern in development.”<sup>28</sup>

As a matter of fact, the Church’s principal focus in the public arena, whatever the issue, has been the protection of the human person. In this sense Benedict XVI said in his *Address to the Members of the European Peoples Party*, March 30, 2006:

As far as the Catholic Church is concerned the principal focus of her interventions in the public arena is the protection and promotion of the dignity of the person, and she is thereby consciously drawing particular attention to principles which are not negotiable. Among these the following emerge clearly today:

- protection of life in all its stages, from the first moment of conception until natural death;
- recognition and promotion of the natural structure of the family—as a union between a man and a woman based on marriage—and its defense from attempts to make it juridically equivalent to radically different forms of union which in reality harm it and contribute to its destabilization, obscuring its particular character and its irreplaceable social role;
- the protection of the right of parents to educate their children.<sup>29</sup>

From the contemporary rights discourse, bringing human rights to life implies two major tasks for the Catholic Church: a) the effective assurance of rights that have been proclaimed, but which have not become

<sup>28</sup> See *Journal of Catholic Social Thought* 10:1 (2013), 69–84.

<sup>29</sup> *Address of his holiness Benedict XVI to the members of the European People’s Party on the study days on Europe* (March 30, 2006). Retrieved from [https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/march/documents/hf\\_ben-xvi\\_spe\\_20060330\\_eu-parliamentarians.html](https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/march/documents/hf_ben-xvi_spe_20060330_eu-parliamentarians.html).



effective for a significant portion of humanity, on the one hand; and, b) forging a pathway to identifying new real rights, on the other.

The first task requires special attention to rights that are currently under assault, such as the right to life, the right to found a family, freedom of conscience and religion, and to those rights that have too long awaited fulfillment, such as the right to decent subsistence. The second task implies exploring the expanding circle of human rights protection to discern how new rights claims are, or are not, conducive to the common good.

On the other hand, the correlation between human rights and social cooperation opens important horizons in domestic and international politics, both in the relationship between peace and development, and with respect to the still unresolved problems posed by globalization. In this regard, Roland Minnerath points out:

[T]he implementation of human rights cannot take place in a coercive way following a single rationalistic Western model. It should be done by respecting the basic cement of the various societies of the world, the integrity of their peoples, and their cultures, which have experienced a long sedimentation, unless notable violations of human rights take place within them.<sup>30</sup>

Nowadays, questions arise in relation to the enforceability of human rights and the associated process of verifications. In the words of Benedict XVI to the United Nations, “the responsibility to protect” remains a question of the highest interest. The right to humanitarian interference raised by the Holy See urges engagement with pressing issues such as humanitarian intervention, the crime of genocide, and the protection of human rights by international criminal courts. The Holy See has effectively advanced the right to humanitarian interference by clarifying its limits, questioning jurisdictional procedures, and the effectiveness of political-diplomatic processes.<sup>31</sup>

30 *Catholic Social Doctrine and Human Rights*, Fifteenth Plenary Session, 1–5 May 2009, *Acta 15*, eds., R. Minnerath, et al., (Vatican City, 2010), 30.

31 Apostolic journey to the United States of America and visit to the United Nations organization headquarters. “Address of his holiness Benedict XVI,” in *L’Osservatore Romano*. Weekly Edition in English, n°17 (April 2008), 12, 13. Retrieved from [http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit.html](http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html).





Jesuit Richard McCormick asked some decades ago: “What is the Church’s proper mission in the sphere of the defense and promotion of human rights?” I dare to say that most Catholics today consider that the Church’s view on human rights will retain relevance in the future only to the extent that the Church’s own structures and actions reflect its rhetoric of human rights, and only to the extent that those rights are enjoyed by all within the Church.



# THE EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS AND ITS APPROACH TO RELIGIOUS FREEDOM

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JAIME ROSSELL<sup>1</sup>

## I. PRECEDENTS OF THE AGENCY

The genesis of the European Agency for Fundamental Rights (FRA) cannot be traced back to any elaborate political strategy. The origin was a report by the “Comité des Sages” in 1998 proposing the extension of the remit of the European Monitoring Centre on Racism and Xenophobia with a view to creating a European Union Human Rights Agency, which could serve to improve the coordination of the fundamental rights policies pursued by the Member States.

The main argument was that it could encourage the Union to adopt a more preventive approach to human rights: “Systematic, reliable and focused information is the starting point for a clear understanding of the nature, extent and location of the problems that exist and for the identification of possible solutions.”<sup>2</sup>

In 1999–2000, two developments took place which significantly transformed the role of fundamental rights in the Union. The first was the entry into force on May 1, 1999, of the Treaty of Amsterdam. This Treaty not only outlined (in Article 6.1) the values on which the Union was founded,<sup>3</sup> but it also backed up this affirmation by a mechanism provided for in

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2 See, *Leading by example: a human rights agenda for the European Union for the year 2000 : agenda of the Comité des Sages and final project report*, (Florence, Italy: European University Institute, 1998).

3 “1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.” European Union: Council



Article 7,<sup>4</sup> allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values.

Secondly, on December 7, 2000, the Charter of Fundamental Rights of the European Union was proclaimed at Nice. It was the single most authoritative restatement of the *acquis communautaire* of the Union in the field of fundamental rights. But its main impact was not as a legal document—indeed, the Charter had no binding force when it was initially proclaimed.<sup>5</sup> Its impact resided in the transformation it brought about in the culture and the practice of the institutions.

On the basis of the Charter, it became possible for the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles which had been proclaimed in Nice.<sup>6</sup> Also, in 2001, the Commission announced its intention to verify the compatibility of its proposals with the Charter.

With the adoption of the Charter of Fundamental Rights and its constitutionalization in the Treaty of the EU, it is beyond any doubt that

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of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html>. Art. 6.1.

4 “1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.” *Treaty of Amsterdam*, (December 1997), Art.7.

5 The Reform Treaty, signed at Lisbon on 13 December 2007 and expected to enter into force in 2009 or 2010, will contain a reference to the Charter, thus confirming its status as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law. In that sense, see Article 6.2 of the Treaty.

6 See, Article 34 of the Rules of Procedure of the European Parliament.



human rights are the core of the Union's values and that their protection is guiding the Union's policy-setting and law-making.

In that sense, the European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. Before the Treaty entered into force, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union.

This practice was justified by the consideration that, "following the proclamation of the Charter, it is . . . the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7.1."<sup>7</sup>

But the resources of the LIBE Committee and the expertise were not sufficient to conduct this monitoring function, so the European Parliament requested that "a network be set up, consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts."<sup>8</sup>

The EU Network of Independent Experts on Fundamental Rights was set up in September 2002 and is composed of 25 experts monitoring the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights.

In October 2003, the European Commission adopted a communication in which referring to the work of the EU Network of Independent Experts recognizes that:

Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches. Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between

<sup>7</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, 177-350), par. 2-3.

<sup>8</sup> *Ibid.*, par. 9.



Member States which could imperil the mutual trust on which Union policies are founded.<sup>9</sup>

What the Commission was, in fact, suggesting was that a permanent form of monitoring of the compliance with fundamental rights by the EU Member States should be established.

Thus, little by little, a “fundamental rights culture” was being established within the EU institutions. It was clear that the EU wanted to advance not only the protection but also the promotion human rights. But a number of different directions were being explored at the same time.<sup>10</sup>

First, the idea had taken root that neither the EU institutions, nor the EU member States when they implemented EU law, could afford to ignore the requirements of fundamental rights in the course of their activities.

Secondly, the role performed on the basis of Article 7 EU by the European Parliament and by the Network of Independent Experts on Fundamental Rights gave birth to the idea that the EU might progressively develop a monitoring role.

Third, finally, was the idea that such a systematic comparison could constitute a condition for the development of an active “fundamental rights policy” of the EU.

For this reason, when the Heads of States and Governments of the Member States announced at their Brussels European Council of December 13, 2003, their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia (EUMC) in order to create a “Human Rights Agency,” most observers were taken by surprise.

## II. THE CREATION OF THE EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS (FRA)

The Agency was established on the basis of a Council Regulation 168/2007 of February 15, 2007, with the objective:

To provide the relevant institutions, bodies, offices and agencies of the Community and its member states when implementing Community

<sup>9</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

<sup>10</sup> See Olivier De Schutter, “The EU Fundamental Rights Agency: Genesis and Potential,” REFGOV (Working Paper series: REFGOV-FR-23), Retrieved from [https://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR\\_\(11.08.2008\\_17h08\)\\_WP-FR-23.pdf](https://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR_(11.08.2008_17h08)_WP-FR-23.pdf).



law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.<sup>11</sup>

In summary the mandate of the Agency is confined to three core functions:<sup>12</sup>

- a. Data collection and analysis.
- b. Preparation of opinions for EU institutions and member states.
- c. Development of a communication strategy and dialogue with civil society.

To carry out these functions, the territorial and substantive scope of FRA is limited to:

- a. What is referred in art. 2 within the competences of the Community law as laid down in the Treaty establishing the European Community.
- b. Fundamental rights as defined in art. 6.2 of the Treaty of the EU.

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<sup>11</sup> Art. 2., Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

<sup>12</sup> Art. 4.1 of the Council Regulation delineates the concrete tasks entrusted to FRA: “1. To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall:

- a) Collect, record, analyze and disseminate relevant, objective, reliable and comparable information and data, including results from research and monitoring communicated to it by Member States, Union institutions as well as bodies, offices and agencies of the Community and the Union, research centers, national bodies, non-governmental organizations, third countries and international organizations and in particular by the competent bodies of the Council of Europe
- b) Develop methods and standards to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States.
- c) Carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies, including, where appropriate and compatible with its priorities and its annual work program, at the request of the European Parliament, the Council or the Commission.
- d) Formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission.
- e) Publish an annual report on fundamental-rights issues covered by the areas of the Agency’s activity, also highlighting examples of good practice.
- f) Publish thematic reports based on its analysis, research and surveys.
- g) Publish an annual report on its activities.
- h) Develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights and actively disseminate information about its work.”



- c. Fundamental rights issues in the EU and in its member states when implementing community law.

Regardless of the necessity to create a body of these characteristics, the establishment of the Agency has raised several delicate questions related to:

- a. Its legal basis.
- b. The delineation of its activities.
- c. Its concrete tasks.
- d. The relations it might develop with the Council of Europe and other international organizations.

### III. EU FUNDAMENTAL RIGHTS AGENCY *VERSUS* THE COUNCIL OF EUROPE: A CONFLICT OF COMPETENCES?

The initial reaction of the Council of Europe to the decision by the European Council to set up a “Human Rights Agency” for the European Union was not openly hostile, but it was clearly defensive.

Related to the competences of the Agency, the Council of Europe insisted on distinguishing between monitoring as collection and analysis of data on the one hand (what might be called “advisory monitoring”) and monitoring as evaluation of compliance with certain standards on the other (or “normative monitoring”).<sup>13</sup>

The preoccupation behind this distinction was clear enough: the Agency should not duplicate the work of the monitoring bodies of the Council of Europe. It should constitute a think tank, a pole of expertise on human rights issues for the EU institutions, but not constitute some appeals tribunal for the evaluation performed by the Council of Europe.

The question of duplication of tasks between the EU Fundamental Rights Agency and the Council of Europe bodies cannot be answered without keeping in mind the strict limits imposed on the Fundamental Rights Agency by its founding regulation.

First, the Fundamental Rights Agency is not conceived of as entrusted mainly with a monitoring mission, in the sense of “normative monitoring.” It is to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights

13 See De Schutter, “The EU Fundamental Rights Agency,” 15-24.



in the Member States. The EU Fundamental Rights Agency will publish annual reports and formulate conclusions and opinions on fundamental rights dimensions of the implementation of Community law by the Member States. The adoption of reports or recommendations on individual Member States is not defined as one of the tasks of the Agency.

Secondly, the EU Member States will only be provided assistance by the Agency and be “monitored” through the opinions and reports of the Agency in the implementation of EC Law.

In the same sense, the Parliamentary Assembly of the Council of Europe (PACE) insisted that “there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe.”<sup>14</sup> This understanding of the role of the EU Fundamental Rights Agency had three implications:

- a. First, it should have a mandate limited to the scope of application of Union law, including the implementation by EU Member States of Union law, but should not intervene in areas outside EC/EU competence, where member states act autonomously.
- b. Second, the Agency should work on a thematic, not a country-by-country basis, focusing on certain specified themes having a special connection with EC/EU policies.
- c. Thirdly, the future Agency should include within its reference instruments not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe.

But there exists an argument leveled by the Council of Europe institutions relating to the risk of duplication of tasks. The Council of Europe in a Memorandum of September 8, 2005, explained that any duplication of the role of the Council of Europe bodies by a general monitoring of the EU Member States or even, under the circumstances described above, of non-member countries, would entail a real risk of undermining legal certainty.<sup>15</sup>

A situation where assessments made by the Agency would diverge from, or even contradict, assessments made by Council of Europe

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14 Parliamentary Assembly of the Council of Europe, Resolution 1427 (2005) par. 10.

15 See De Schutter, “The EU Fundamental Rights Agency,” 26–31.





monitoring bodies would result in considerable confusion for individuals and Member States. It would also be highly detrimental to the overall coherence and effectiveness of human rights protection in Europe.

To avoid these situations, a Memorandum of Understanding signed on May 23, 2007, between the Council of Europe and the EU established that “the European Union regards the Council of Europe as the Europe-wide reference source for human rights. In this context, the relevant Council of Europe norms will be cited as a reference in European Union documents. The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant. The European Union will develop co-operation and consultations with the Commissioner for Human Rights with regard to human rights.”<sup>16</sup>

Finally, the 2008 Agreement on cooperation between the Agency and the Council established that “without prejudice to the rules on data protection in force for the Agency and Council of Europe respectively, the Agency and the Council of Europe shall provide each other with information and data collected in the course of their activities, including access to online information.”<sup>17</sup>

Further:

The Agency shall take due account of the judgments and decisions of the European Court of Human Rights concerning the areas of activity of the Agency and, where relevant, of findings, reports and activities in the human rights field of the Council of Europe’s human rights monitoring and intergovernmental committees, as well as those of the Council of Europe’s Commissioner for Human Rights.<sup>18</sup>

#### IV. FRA INSTITUTIONAL MODEL

The Agency has a very unique status given the idiosyncrasies of its thematic and substantive focus.<sup>19</sup> By force of its mission and goals, it is therefore closer to the UN standardized model of human rights institutions (defined General Assembly Resolution 48/134 of 20 December

16 See Memorandum of Understanding between the Council of Europe and the European Union (May 23, 2007), available at <http://perma.cc/8L4SRGSU>.

17 L 186/8, Official Journal of the European Union, 15-07-2008.

18 Ibid.

19 See Nadja Milanova, “EU Agency for Fundamental Rights (FRA): a reality check,” (Paper Prepared for Human Rights Without Frontiers International, Brussels, 2011). Retrieved from [www.strasbourgconsortium.org/content/blurp/files/fra%20a%20reality%20check.pdf](http://www.strasbourgconsortium.org/content/blurp/files/fra%20a%20reality%20check.pdf).



1993). In that sense, the Paris principles prescribe a broad mandate with competences to both promote and protect human rights.

The Agency was created along the informational model with a mandate in data collection and analysis and as such represents a mixture of the committee model and the institute model. “A well-designed body with a clear data-gathering, information providing mainstreaming, advisory, and network-coordinating role can, if sufficiently resourced and politically supported, play a powerful role in governing by information, advice, persuasions, and learning.”<sup>20</sup>

In the EU administrative landscape, FRA is therefore classified as a regulatory policy agency and with regard to its mandate, is to be classified as an information agency with some advisory functions

FRA has no legislative or regulatory power and no quasi-judicial competence. In accordance with art. 3.3 of the Regulation, the Agency “shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law.” This is even more restrictive than the Charter, which refers in art. 51.1 to the entire field of EU law. The exclusive focus on Community law is also narrower than that of the EUMC as FRA’s predecessor, which could also monitor member states outside the remit of Community law, though with a limited thematic focus on some forms of discrimination.

The Agency can still play an important role in setting out normative trends within the remit of its mandate. Moreover, the production of annual reports on fundamental rights dealing, in part, with examples of good practices, is based on a process of a horizontal monitoring across member states. This, in a way, represents some sort of monitoring, though not in the sense applied by the Council of Europe’s process of monitoring the compliance of states with their international obligations. In this regard, one of the most important aspects of the mandate of the FRA is to develop common indicators and analytical standards with a view to improving the coherence and compatibility of data.

The political power of the Agency is based on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues.

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20 Ibid.



## V. AGENCY'S COMPOSITION: IS IT AN INDEPENDENT AGENCY?

The Regulation refers explicitly to the Paris principles with regard to the Agency's independence. The existence of guarantees for independence and pluralism is a crucial indicator for the effectiveness of a human rights institution but, in this case, the composition of their governing bodies shows that while pluralistic representation may not be a problem, its operational independence seems to be seriously restricted.<sup>21</sup>

Firstly, the FRA Management Board is composed of one independent person appointed by each of the 27 member states, one independent person appointed by the Council of Europe, and two representatives of the Commission (which would contravene the principle of independence since the Board adopts the Annual Agency's work and the Agency's annual reports).

Secondly, art. 5.1 regulation<sup>22</sup> confers competence on the Council to adopt the Multiannual Framework for the Agency, while the Commission is entrusted with proposing the Framework, after consulting the FRA Management Board.

## VI. THE AGENCY'S MANDATE AND WORK

The Agency's mandate and work are further limited on two other counts:

Firstly, the work of FRA is confined to a list of topics under the Multiannual Framework (MAF).<sup>23</sup> The MAF is negotiated in the Council after consulting the European Parliament and is based on a proposal by the European Commission.<sup>24</sup> When selecting MAF areas,<sup>25</sup> the Council has to

21 Ibid.

22 "The Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt a Multiannual Framework for the Agency. When preparing its proposal, the Commission shall consult the Management Board." Art. 5.1 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

23 Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, in OJ L 79 as of 21 March 2013.

24 The Multiannual Framework, currently covers the following areas (2013-2018) and the Management Board of the Agency since February 2016 is working for the new period (2018-2022):

- (a) access to justice;
- (b) victims of crime, including compensation to victims of crime;
- (c) information society and, in particular, respect for private life and protection of personal data;
- (d) Roma integration;
- (e) judicial cooperation, except in criminal matters;
- (f) rights of the child;
- (g) discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;
- (h) immigration and integration of migrants, visa and border control and asylum;
- (i) racism, xenophobia and related intolerance.

25 For the period 2018-2022, a revised MAF should cover the following eight thematic areas (the order



respect the following conditions:

- a. The selected areas must include “the fight against racism, xenophobia and related intolerance.”
- b. They have to “be in line with the Union’s priorities, taking due account of the orientations resulting from EP resolutions and Council conclusions in the field of fundamental rights.”
- c. They have to have “due regard to the Agency’s financial and human resources.”
- d. They must ensure “complementarity” with the remit of other EU bodies and international bodies, including the Council of Europe.

Secondly, the Regulation does not envisage any role for the FRA in examining the conformity of EU legal acts to fundamental human rights. The Agency is not empowered to:

- a. Examine individual complaints.
- b. Have regulatory decision-making powers.
- c. Monitor the situation of fundamental rights in the member states for the purposes of art. 7 of the Treaty.
- d. Deal with the legality of Community acts or question whether a member state has failed to fulfill a legal obligation under the Treaty.

To make all this work possible, the Agency will use different tools such as:

- a. The Charterpedia, which is an online tool that provides easy-to-access information about that encompassing fundamental rights framework and includes the full text and legal explanations of

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simply reflects the order of the current MAF):

- (a) access to justice and victims of crime;
- (b) information society and, in particular, respect for private life and protection of personal data;
- (c) Roma integration, and social inclusion;
- (d) judicial and police cooperation;
- (e) rights of the child;
- (f) equality and non-discrimination;
- (g) migration, borders, asylum and integration of refugees and migrants;
- (h) racism, xenophobia and related intolerance.



the Charter articles, related EU and national case law, and related FRA publications, provided on an article-by-article basis.

The original compilation was created by the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee. It is currently maintained by the FRA.

- b. Data and maps with the themes of Gender, LGBTI, Roma, Racism and Related Intolerances, and Hate Crime.
- c. The FRA Case-law Database, which provides a compilation of Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) case law with direct references to the Charter of Fundamental Rights of the European Union.

It also contains a selection of national case law with direct references to the Charter from all EU Member States. The data include a formal reference to the decisions, judgments and opinions, an abstract in English, excerpts of the paragraphs where the Charter is quoted and, if available, a link to the full text document.

- d. Opinions and conclusions to EU institutions and Member States on specific thematic topics. The European Parliament, the Council of the European Union, or the European Commission can request the agency to deliver opinions on EU legislative proposals “as far as their compatibility with fundamental rights are concerned.” This specific task contributes to the agency’s overall objective to support EU institutions and Member States to fully respect fundamental rights.

In this sense, regarding the exercise of the fundamental right of religious freedom, the Agency continuously collects evidence and publishes comparative reports on racism, xenophobia, and ethnic discrimination. The overall aim of this body of work is to provide evidence-based advice to EU institutions and Member States to support their efforts to counter these phenomena when implementing EU law. FRA collects and analyzes data on racism, xenophobia, and ethnic discrimination as part of its work on the Annual Report on the situation of fundamental rights in the EU.



As required by article 17 of the Racial Equality Directive, the Agency delivered an opinion on the implementation of the equality directives in the EU. The Agency publishes an annual overview of recorded incidents of antisemitism in the EU. FRA conducted a survey on discrimination and hate crime against Jews. The Agency engages with Member States to facilitate exchanges of practices on reporting and recording of hate crime and hate speech, in close cooperation with the European Commission and the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

## VII. AN EXAMPLE: HATE CRIMES AND THE LIMITS TO FREEDOM OF EXPRESSION

Freedom of expression plays a key role between the rights and freedoms guaranteed in the European Convention on Human Rights. Its importance has been highlighted by the European Court of Human Rights, which said: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”<sup>26</sup>

However, despite its importance and scope, it is necessary to note that freedom of expression is not unlimited.

Although many international and regional documents exist in this regard, there is not an unanimously accepted concept of what constitutes hate speech.

In this respect, the EU has accepted the definition put forward in 1997 by the Committee of Ministers of the Council of Europe:

The term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.<sup>27</sup>

Later, the Venice Commission’s Report (“On the relationship between freedom of expression and freedom of religion: the issue of regulation and

<sup>26</sup> See *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24.

<sup>27</sup> Recommendation No. R (97) 20 on Hate Speech of the Committee of Ministers of the Council of Europe of October 30, 1997.



prosecution of blasphemy, religious insult and incitement to religious hatred” adopted in October 2008),<sup>28</sup> concluded that:

1. It is beyond doubt that hate speech towards members of other groups including religious groups “is in contradiction with the Convention’s underlying values, notably tolerance, social peace and non-discrimination.” Consequently, the author of hate speech “may not benefit from the protection afforded by Article 10 of the Convention.” This arises by virtue of Article 17 of the Convention.<sup>29</sup> No one is allowed to abuse his or her right to freedom of expression to destroy or unduly diminish the right to respect for the religious beliefs of others.
2. That incitement to hatred, including religious hatred, should be the object of criminal sanctions.
3. That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component.

### A. Hate Speech Elements

The Indian political scientist Bhikhu Parekh identifies three fundamental elements in this type of discourse:

- i. First, the speech must define an individual or group of individuals based on certain characteristics.<sup>30</sup>
- ii. Secondly, hate speech stigmatizes its “target,” ascribing a number of qualities that are generally regarded as undesirable. The generalization of the stereotype implies that these qualities are always present in the components of the group.

28 Study no. 406 / 2006. CDL-AD(2008)026.

29 “Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Article 17, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

30 If someone says he hates all humans, we cannot say that this statement is qualified as hate speech. Therefore, it is irrelevant that the speech is not directed against a certain sector of mankind or also including the subject who makes statements; the group is so abstract and indeterminate that it cannot lead or inspire a certain action against him.



- iii. Finally, the group is expelled from normal social relations. Individuals of that group are accused of being unable to fulfill the normal rules of society and their presence is considered as hostile and unacceptable.<sup>31</sup>

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches which are provided for by the European Convention on Human Rights:<sup>32</sup>

- a) The approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention.
- b) The approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).

Among the cases in which the Court has applied art. 17 are:

- a) Firstly, the totalitarian doctrines.<sup>33</sup>
- b) Secondly, negationism and revisionism.<sup>34</sup>

In the case *Garaudy v. France* (24 June 2003), the applicant, the author of a book entitled *The Founding Myths of Modern Israel*, was convicted of the offences of disputing the existence of crimes against humanity, defamation in public of a group of persons—in this case, the Jewish community—and incitement to racial hatred.

31 Bhikhu Parekh, “Hate Speech: Is There a Case for Banning?” *Public Policy Research*, 12 (2005–2006), 213–223.

32 See the Factsheet of the European Court of Human Rights “Hate Speech,” (consulted at [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf))

33 The Commission on Human Rights stated that the establishment of the communist social order through proletarian revolution and the dictatorship of the proletariat was contrary to the Convention (Decision of 20 July 1957 on the case of Communist Party KPD c. RFA). The Commission also stated that “National Socialism is incompatible totalitarian doctrine to democracy and human rights and its adherents undoubtedly pursue aims of the kind mentioned in Article 17” (Decision of October 12, 1989 Bh, MW, HP and GK v. Austria).

34 In the case *Lehideux and Isorni c. France* (23 September 1998), the Court emphasized that there is “a category of clearly established historical facts—such as the Holocaust denial or revision—which is outside the protection of Article 10 under the provisions of Article 17.” See also: *Honsik v. Austria* (18 October 1995), decision of the European Commission of Human Rights concerning a publication denying the committing of genocide in the gas chambers of the concentration camps under National Socialism; *Marais v. France* (24 June 1996) concerning an article in a periodical aimed at demonstrating the scientific implausibility of the “alleged gassings.”





The Court considered that “the content of the applicant’s remarks had amounted to Holocaust denial” and pointed out that denying crimes against humanity was one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.

Disputing the existence of clearly established historical events did not constitute scientific or historical research; the real purpose was to rehabilitate the National Socialist regime and accuse the victims themselves of falsifying history.” As such, the acts were manifestly incompatible with the fundamental values the Convention sought to promote. The Court applied Article 17 (prohibition of abuse of rights) and held that the applicant was not entitled to rely on Article 10 (freedom of expression) of the Convention.<sup>35</sup>

Finally, among the cases reviewed by Article 17 are those concerning incitement to racial hatred and religious hatred.

In *Norwood v. the United Kingdom* (16 November 2004), the applicant had displayed in his window a poster supplied by the British National Party, of which he was a member, representing the Twin Towers in flames. The picture was accompanied by the words “Islam out of Britain—Protect the British People.” As a result, he was convicted of aggravated hostility towards a religious group. The applicant argued, among other things, that his right to freedom of expression had been breached.

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35 In the same sense, *M’Bala M’Bala v. France* (20 October 2015). “This case concerned the conviction of Dieudonné M’Bala M’Bala, a comedian with political activities, for public insults directed at a person or group of persons on account of their origin or of belonging to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith. At the end of a show in December 2008 at the “Zénith” in Paris, the applicant invited Robert Faurisson, an academic who has received a number of convictions in France for his negationist and revisionist opinions, mainly his denial of the existence of gas chambers in concentration camps, to join him on stage to receive a “prize for unfrequency and insolence”. The prize, which took the form of a three-branched candlestick with an apple on each branch, was awarded to him by an actor wearing what was described as a “garment of light” – a pair of striped pyjamas with a stitched-on yellow star bearing the word “Jew” – who thus played the part of a Jewish deportee in a concentration camp. The Court declared the application inadmissible in accordance with Article 35 of the Convention, finding that under Article 17, the applicant was not entitled to the protection of Article 10. The Court considered in particular that during the offending scene the performance could no longer be seen as entertainment but rather resembled a political meeting, which, under the pretext of comedy, promoted negationism through the key position given to Robert Faurisson’s appearance and the degrading portrayal of Jewish deportation victims faced with a man who denied their extermination. In the Court’s view, this was not a performance which, even if satirical or provocative, fell within the protection of Article 10, but was in reality, in the circumstances of the case, a demonstration of hatred and anti-Semitism and support for Holocaust denial. Disguised as an artistic production, it was in fact as dangerous as a head-on and sudden attack, and provided a platform for an ideology which ran counter to the values of the European Convention. The Court thus concluded that the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which, if admitted, would contribute to the destruction of Convention rights and freedoms.”



The Court found that such a general, vehement attack against a religious group, linking the group with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace, and non-discrimination. The Court therefore held that the poster in his window had constituted an act within the meaning of Article 17 of the Convention, and that the applicant could thus not claim the protection of Article 10 of the Convention.<sup>36</sup>

But there are other cases in which the court does not apply art. 17 but establishes that there are limits to freedom of expression that cannot be transferred.

Under Article 10, paragraph 2, of the Convention, the Court will examine successively if an interference to the freedom of expression exists, if this interference is prescribed by law and pursues one or more legitimate aims, and, finally, if it is necessary in a democratic society to achieve these aims.

In *Soulas and Others v. France* (10 July 2008), the applicants, published a book entitled *The Colonisation of Europe*, with the subtitle “Truthful remarks about immigration and Islam.” The proceedings resulted in their conviction for inciting hatred and violence against Muslim communities from northern and central Africa. The applicants complained in particular that their freedom of expression had been breached.

The Court held that there had been no violation of Article 10 of the Convention.<sup>37</sup> It noted, in particular, that, when convicting the applicants,

<sup>36</sup> See also, *Jersild v. Denmark* (23 September 1994). “The applicant, a journalist, had made a documentary containing extracts from a television interview he had conducted with three members of a group of young people calling themselves the “Greenjackets,” who had made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. The applicant was convicted of aiding and abetting the dissemination of racist remarks. He alleged a breach of his right to freedom of expression.

The Court drew a distinction between the members of the “Greenjackets”, who had made openly racist remarks, and the applicant, who had sought to expose, analyse and explain this particular group of youths and to deal with “specific aspects of a matter that already then was of great public concern”. The documentary as a whole had not been aimed at propagating racist views and ideas, but at informing the public about a social issue. Accordingly, the Court held that there had been a violation of Article 10 of the Convention.”

<sup>37</sup> *Sürek (no.1) v. Turkey* (8 July 1999) (Grand Chamber). “The applicant was the owner of a weekly review which published two readers’ letters vehemently condemning the military actions of the authorities in south-east Turkey and accusing them of brutal suppression of the Kurdish people in their struggle for independence and freedom. The applicant was convicted of “disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people.” He complained that his right to freedom of expression had been breached.

The Court held that there had been no violation of Article 10. It noted that the impugned letters amounted to an appeal to bloody revenge and that one of them had identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence. Although the applicant had not personally associated himself with the views contained in the letters, he had nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court considered that, as the owner of the review, he had been vicariously



the domestic courts had underlined that the terms used in the book were intended to encourage readers to feel rejection and antagonism, exacerbated by the use of military language, toward the communities in question, which were designated as the main enemy. And further, these terms used in the book were intended to lead readers to share the solution recommended by the author, namely a war of ethnic re-conquest. Holding that the grounds put forward in support of the applicants' conviction had been sufficient and relevant, the Court considered that the interference in the latter's right to freedom of expression had been necessary in a democratic society. Finally, the Court observed that the disputed passages in the book were not sufficiently serious to justify the application of Article 17 of the Convention in the applicants' case.

On the other hand, a number of cases exist in which the right to free-

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subject to the duties and responsibilities which the review's editorial and journalistic staff undertook in the collection and dissemination of information to the public, and which assumed even greater importance in situations of conflict and tension."

*Féret v. Belgium* (16 July 2009). "The applicant was a Belgian member of Parliament and chairman of the political party Front National in Belgium. During the election campaign, several types of leaflets were distributed carrying slogans including "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home." The applicant was convicted of incitement to racial discrimination. He was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He alleged a violation of his right to freedom of expression.

The Court held that there had been no violation of Article 10 of the Convention. In its view, the applicant's comments had clearly been liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. His message, conveyed in an electoral context, had carried heightened resonance and clearly amounted to incitement to racial hatred. The applicant's conviction had been justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community."

*A. v. Turkey* (no. 42571/98) (13 September 2005). "The applicant, the owner and managing director of a publishing company, published 2,000 copies of a book which addressed theological and philosophical issues in a novelistic style. The Istanbul public prosecutor charged the applicant with insulting "God, the Religion, the Prophet and the Holy Book" through the publication. The court of first instance sentenced the applicant to two years' imprisonment and payment of a fine, and immediately commuted the prison sentence to a small fine. The applicant appealed to the Court of Cassation, which upheld the judgment. The applicant alleged that his conviction and sentence had infringed his right to freedom of expression.

The Court held that there had been no violation of Article 10 of the Convention. It reiterated, in particular, that those who chose to exercise the freedom to manifest their religion, irrespective of whether they did so as members of a religious majority or a minority, could not reasonably expect to be exempt from all criticism. They had to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the present case concerned not only comments that were disturbing or shocking or a "provocative" opinion but an abusive attack on the Prophet of Islam. Notwithstanding the fact that there was a certain tolerance of criticism of religious doctrine within Turkish society, which was deeply attached to the principle of secularism, believers could legitimately feel that certain passages of the book in question constituted an unwarranted and offensive attack on them. In those circumstances, the Court considered that the measure in question had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and had therefore met a "pressing social need." It also took into account the fact that the Turkish courts had not decided to seize the book in question, and consequently held that the insignificant fine imposed had been proportionate to the aims pursued by the measure in question."



dom of expression prevailed against expressions that could be understood as hate crimes.

In *Gündüz v. Turkey* (4 December 2003), the applicant was a self-proclaimed member of an Islamist sect. During a televised debate broadcast in the late evening, he spoke very critically of democracy, describing contemporary secular institutions as “impious,” fiercely criticizing secular and democratic principles, and openly calling for the introduction of Sharia law. He was convicted of openly inciting the population to hatred and hostility on the basis of a distinction founded on membership of a religion or denomination. The applicant alleged a violation of his right to freedom of expression.

The Court held that there had been a violation of Article 10 of the Convention. It noted in particular that the applicant, who had represented the extremist ideas of his sect, with which the public was already familiar, had been taking an active part in an animated public discussion. That pluralist debate had sought to present the sect and its unorthodox views, including the notion that democratic values were incompatible with its conception of Islam. The topic had been the subject of widespread debate in the Turkish media and concerned a problem of general interest. The Court considered that the applicant’s remarks could not be regarded as a call to violence or as hate speech based on religious intolerance. The mere fact of defending sharia, without calling for violence to introduce it, could not be regarded as hate speech.

In *Faruk Temel v. Turkey* (1 February 2011), the applicant, the chairman of a legal political party, read out a statement to the press at a meeting of the party, in which he criticized the United States’ intervention in Iraq and the solitary confinement of the leader of a terrorist organization. He also criticized the disappearance of persons taken into police custody. Following his speech, the applicant was convicted of disseminating propaganda on the ground that he had publicly defended the use of violence or other terrorist methods. The applicant contended that his right to freedom of expression had been breached.

The Court held that there had been a violation of Article 10 of the Convention. It noted in particular that the applicant had been speaking as a political actor<sup>38</sup> and a member of an opposition political party, presenting his party’s views on topical matters of general interest. It took the view that his speech, taken overall, had not incited others to the use

38 In the same sense, *Erbakan v. Turkey* (6 July 2006). “The applicant, a politician, was notably Prime Minister



of violence, armed resistance or uprising and had not amounted to hate speech.

As we see, in connection with hate speech, restrictions on freedom of expression have a very strict margin of appreciation, especially when it comes to political speech or debate on issues of general interest. That discretion is, however, broader when the legally protected interest relates to morality, due to the lack of a common European consensus on the meaning of this term.

On religious freedom, States enjoy a wide margin of appreciation because of the lack of a common European consensus about the meaning of religion and what constitutes an offense to it. This situation has been exacerbated by the accession of new Member States to the Council of Europe, one of which has a very different Christian religious tradition, as is the case in Turkey. However, despite this wide margin of appreciation when there is a contrast between freedom of expression and religion, seen in the recent case law of the European Court of Human Rights, there is a progressive affirmation of the protection of the first right (freedom of expression) with respect to the second (freedom of religion).

And we cannot agree. We understand that this issue is subject to the same standards that are applied to pursue hate speech in the protection of other minorities that exist around us, such as Roma or LGTBI collectives.

I agree that regarding hate speech, offensive language may not be restricted, but that there is a limit or boundary that cannot be crossed and our laws should promote:

- a) The prohibition of dissemination of slander or insults to persons or institutions.

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of Turkey. At the material time he was chairman of Refah Partisi (the Welfare Party), which was dissolved in 1998 for engaging in activities contrary to the principles of secularism. He complained in particular that his conviction for comments made in a public speech, which had been held to have constituted incitement to hatred and religious intolerance, had infringed his right to freedom of expression. The Court held that there had been a violation of Article 10 of the Convention. It found that such comments—assuming they had in fact been made—by a well-known politician at a public gathering were more indicative of a vision of society structured exclusively around religious values and thus appeared hard to reconcile with the pluralism typifying contemporary societies, where a wide range of different groups were confronted with one another. Pointing out that combating all forms of intolerance was an integral part of human-rights protection, the Court held that it was crucially important that in their speeches politicians should avoid making comments liable to foster intolerance. However, having regard to the fundamental nature of free political debate in a democratic society, the Court concluded that the reasons given to justify the applicant's prosecution were not sufficient to satisfy it that the interference with the exercise of his right to freedom of expression had been necessary in a democratic society."



b) The use in the public space of a language to create a respectful and tolerant climate.

It is not the first time the Agency is concerned with these issues. As I related before, among the documents it publishes every year—in addition to the Annual Report of fundamental-rights issues which highlights “examples of good practices”—it makes a record of hate crimes in Europe,<sup>39</sup> anti-Semitism and perceptions of Jews in the EU<sup>40</sup> and it has published various documents to combat hate speech and hate crime in the EU.<sup>41</sup>

Furthermore, in relation to that issue, the Agency has published the document entitled “Promoting respect and diversity. Combating intolerance and hate.”<sup>42</sup> The Agency, in this contribution paper for the Annual Colloquium on Fundamental Rights, suggests ways in which governments can ensure they fulfil their duty to safeguard the right to be treated equally, to be respected and to be protected from violence for everyone living in the EU.

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39 “*Antisemitism- Overview of data available in the EU 2004-2014*” (September 2015). Antisemitism can be expressed in the form of verbal and physical attacks, threats, harassment, property damage, graffiti or other forms of text, including on the internet. This report relates to manifestations of antisemitism as they are recorded by official and unofficial sources in the 28 EU Member States

40 “*Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of anti-Semitism*” (November 2103). This FRA survey is the first-ever to collect comparable data on Jewish people’s experiences and perceptions of antisemitism, hate-motivated crime and discrimination across a number of EU Member States, specifically in Belgium, France, Germany, Hungary, Italy, Latvia, Sweden and the United Kingdom. Its findings reveal a worrying level of discrimination, particularly in employment and education, a widespread fear of victimisation and heightening concern about antisemitism online.

41 As an example, “*Combating hate crime in the EU*” (December 2013). The Fundamental Rights Conference 2013 was organised by the European Union Agency for Fundamental Rights (FRA) in cooperation with the Lithuanian Presidency of the Council of the EU. The focus of the conference was on the issue of ‘Combating hate crime in the EU’. The conference featured thematic working groups that addressed the issues most pertinent for policy making in the field of hate crime, including (1) evidence on the extent of hate crime, (2) underreporting, (3) gaps in monitoring and recording, (4) legal instruments pertaining to hate crime in the EU, (5) victim support services, (6) effective practices of investigation and prosecution, (7) the discriminatory aspects of hate crime, (8) human rights education and remembrance, (9) capacity building for law enforcement and criminal justice systems, and (10) the challenges of cyberhate. The conference discussions resulted in a variety of concrete suggestions by conference participants. These conference conclusions are reflected in the Council conclusions on combating hate crime in the European Union adopted at the Home Affairs Council adopted at the Justice and Home Affairs Council meeting on 6 December 2013.; “*Ensuring justice for hate crime victims: professional perspectives*” (April 2016). Drawing on interviews with representatives from criminal courts, public prosecutors’ offices, the police, and NGOs involved in supporting hate crime victims, this report sheds light on the diverse hurdles that impede victims’ access to justice and the proper recording of hate crime.

42 September 2015. Regardless of ethnic origin, religion or belief, everyone living in the Union has a fundamental right to be treated equally, to be respected and to be protected from violence. This contribution paper to the Annual Colloquium on Fundamental Rights provides evidence of the fact that such respect is lacking, and suggests ways in which governments can ensure they fulfill their duty to safeguard this right for everyone living in the EU.



Evidence collected by the Agency shows that racism, xenophobia, and related intolerance are widespread, despite measures taken by governments and civil society across the EU. Overall, this situation has a negative impact on social cohesion, as well as on respect for fundamental rights and, thus, political action is necessary to ensure full implementation of the EU's existing legal framework in order to afford effective protection from discrimination and hate.

The Agency states that the work of international organizations such as the Council of Europe and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) has shown that a mixture of varied measures is needed in order to counter hate and intolerance effectively.

These range from legislation and measures to ensure its effective implementation,<sup>43</sup> to raising rights awareness,<sup>44</sup> confronting racism and intolerance in public discourse, improving reporting and recording of hate crime,<sup>45</sup> providing effective operational training to law enforcement,<sup>46</sup> and programs to promote dialogue between communities.<sup>47</sup>

It is essential that the Agency exploit the possibilities offered by its legal framework and occupy a leading position in promoting the mainstreaming of human rights in EU policies, and suggesting new measures

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43 See the implementation of the Framework Decision on Racism and Xenophobia (2008/913/JHA). The Commission found that although the majority of Member States penalize incitement to racist and xenophobic violence and hatred, their legal provisions do not always fully transpose the offences covered by the framework decision. The Commission engaged in bilateral talks with Member States in 2014 to ensure full and correct transposition of the framework decision.

44 Awareness must therefore be raised about the ethnic, religious and cultural diversity that is the reality of the EU today, about the extent of discrimination and hate crime, about existing laws, and about where and how victims can receive support. This should take place in cooperation with and through public authorities, statutory human rights bodies and civil society organizations.

45 Building more confidence in the police and criminal justice is thus a precondition not only for increasing reporting of hate crime, but also for positive community relations. These, together with greater rights awareness and a decreasing sense of discrimination, could help reduce the risks of social marginalization and radicalization. The identification and recording of hate crimes require filing officers to have a specific set of knowledge and skills.

46 Community policing also offers Member States a way to increase trust in public authorities among members of ethnic and religious minorities. Developing such practices can help restore relations between the police and local communities, and build trust in law enforcement. At the same time, police officers need training to be sensitive to particular issues.

47 More honest and open dialogue between and among communities, and between and among faith groups, is a crucial step to fostering understanding and subsequently acceptance and inclusion. Some important steps have been made, in particular at the local level. The European Commission also hosts a high level inter-faith dialogue every year. However, so-called 'intercultural/interreligious dialogues' are often not a dialogue, but a mere presentation of each party's views. The use of dialogue (facilitation) methods to enable truly respectful dialogue would therefore be a significant move way forward.



and strategies to the institutions and Member States for defending and promoting fundamental rights.

The creation of the Agency will lead the Union to move from a reactive approach to fundamental rights, focused on the obligation to avoid violating them, to a proactive approach, asking instead how it may contribute to their promotion.



# FIDES ET LIBERTAS



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## PART TWO

### BOOK REVIEWS

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REVIEW:  
*THE POLITICS OF RELIGIOUS FREEDOM  
AND BEYOND RELIGIOUS FREEDOM:  
THE NEW GLOBAL POLITICS OF RELIGION*

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DAVID LITTLE<sup>1</sup>

BOOKS REVIEWED

*The Politics of Religious Freedom*, by Winnifred F. Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter G. Danchin, eds., Chicago: University of Chicago Press, 2015, and *Beyond Religious Freedom: The New Global Politics of Religion* by Elizabeth Shakman Hurd, Princeton: Princeton University Press, 2015.

The skepticism expressed in *The Politics of Religious Freedom*, edited by Winnifred Sullivan *et al.*, and *Beyond Religious Freedom* by Elizabeth Hurd, is focused on the relation of religion to human rights language, and, particularly, to issues of interpreting and applying existing provisions regarding freedom of conscience, religion, or belief.

The four editors of *The Politics of Religious Freedom*, Sullivan, Hurd, Mahmood, and Danchin, all contribute to the Immanent Frame website, hosted by the Social Science Research Council as part of the Politics of Religious Freedom research project. The project is a three-year study funded by the Henry Luce Foundation that examines legal and other discussions of religious freedom in parts of Asia, Africa, the Middle East, Latin America, Europe, and the United States. Sullivan is a legally trained member of the religious studies department at Indiana University; Hurd is a political scientist at Northwestern University; Mahmood is an anthropologist at the University of California, Berkeley; and Danchin is a professor of law at the University of Maryland Law School.

*The Politics of Religious Freedom* consists of twenty-seven essays written mainly by religion scholars, social scientists, and historians (besides Sulli-

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van and Danchin, only two authors are legal scholars). The book begins with a general introduction by the editors, and is divided into four sections: Religion, History, Law and Politics, and Freedom. Each section, in turn, is introduced by one of the editors in the order listed on the cover.

The editors leave no doubt about the overriding intention of their project, as stated in their introduction: to “unsettle the assumption—so ubiquitous in policy circles—that religious freedom is easily recognized and understood, and that the only problem lies in its incomplete realization.”<sup>2</sup>

Our basic assumption is that, before either championing religious freedom or rejecting it, we need to understand the complex social and legal lives of this concept. Those impatient for an improved definition of religious freedom, or those demanding a political manifesto, may be disappointed in this book. But to understand the contested historical genealogy of the concept of religious liberty, we believe it is important to grasp the ways in which this seemingly obvious and neutral right has yielded mutually contradictory and often discriminatory results.

Our hope is that policy makers, academics, and others will learn, as we have, from examining this often messy story.<sup>3</sup>

The editors say their project “does not take a position for or against religious freedom,” but it is clear from the remarks just cited, as well as from the prominent tone of most of the essays in the volume, that at least *one way* of understanding and applying the idea of religious freedom—namely, the approach embraced by many officials and experts committed to implementing religious freedom standards codified in existing human rights instruments (UDHR, ICCPR, and the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief [DEID], and the European Charter of Human Rights)—is under attack. Unsurprisingly, Elizabeth Hurd’s book is simply a further development and elaboration of what is indisputably a critique of a particular approach to religious freedom. Therefore, the two volumes may conveniently be considered together.

The Basic Argument [BA] underlying both volumes is quite complicated for having what appears to be seven subparts (with still some further subdivisions), and it is difficult, finally, to assess the argument without get-

2 Winnifred Sullivan *et al.*, *The Politics of Religious Freedom*, 2.

3 *Ibid.*



ting clear on what the subparts are, how they fit together, and how they are each defended in the two books. It is hoped that one important contribution of this review is to provide, for once, a full, systematic accounting of the underlying approach—in all its dimensions—that animates the Politics of Religious Freedom project.

- 1) It is widely assumed in “policy circles”—namely, among members of international institutions and INGOs, of the US and other governments, and of American and other academic and NGO communities, all of whom are devoted to the implementation of international human rights—that a particular idea of a *human right of religious freedom*, inscribed in the human rights instruments and including the notion of “religion” underlying it, is univocal and transparent in meaning and universally applicable in a similar way.
- 2) It is further assumed that if implemented by effective laws and policies, the widespread enjoyment of this right will reduce intolerance, discrimination, persecution, and violence.
- 3) This prevailing idea of the right of religious freedom, and of the notion of religion underlying it, embodies a specific bias and partisan spirit. The bias, the partisan spirit, is shaped by a parochial conviction concerning the universal applicability of a Western and particularly American notion of religion. The notion is “hyperprotestant” with a strong emphasis on individual autonomy and “conscience,” meaning private belief that is voluntarily chosen, focused on rationalized dogma and doctrine and opposed to ritual and ceremony, and is understood as sharply isolated from other forms of social engagement and activity. Commitments having these characteristics are arbitrarily assumed to be “good” or “authentic” religion, which, if duly protected and encouraged, will lead to tolerance, equal respect, and peace. Nonconforming commitments are assumed, equally arbitrarily, to be “deviant” and “bad” or “inauthentic,” and, if unregulated, will produce intolerance, discrimination, persecution, and violence.
- 4) The bias, the partisan spirit, in question is *political* in two senses.
  - a. It aligns with a “secular/liberal” political system, one that falsely considers itself “neutral” and “impartial” as among di-



verse religious perspectives, but, in fact, surreptitiously and unjustly privileges some perspectives over others. It does that by reserving the authority to distinguish authentic from inauthentic religion, based on the (covert) parochial notion of religion it relies on. The bias and partisanship typically work to the advantage of the majority rather than minorities or subalterns.

- b. It represents a disguised Western/American political objective of dominating the laws, policies, and practices of governments and peoples around the world, thereby advancing self-serving American/Western cultural as well as economic and strategic interests. Of special importance is a “neoliberal” perspective, presupposing a close parallel between the ideals of the free market, economically understood, and the “market place of ideas,” religiously understood. Extensive deregulation is equally beneficial in both settings (and particularly beneficial to Western/American cultural and economic interests).
- 5) Because this approach is biased and partisan, it is also *counterproductive* and *simplistic*. Counterproductive because applying self-serving standards “risks exacerbating the [very] social tensions, forms of discrimination, and intercommunal discord [the approach is supposed] to transcend.”<sup>4</sup> “It structures societies around religious markets that, though purportedly self-regulating, are shot through with political and economic inequalities,” as Hurd puts it.<sup>5</sup> She adds that “contemporary religious freedom advocacy is a story of the costs in human dignity,” and a “modern attempt at mind control.”<sup>6</sup> Simplistic because the causes of intolerance, discrimination, persecution, and violence are complex, and are not avoided or reduced by concentrating on religion to the exclusion of economic, political, and other causal factors, particularly when the notion of religion involved is so distorted.
- 6) The definitional and political bias and partisan spirit of the approach, as well as its counterproductive and simplistic character, are best exhibited by

4 Elizabeth Hurd, *Beyond Religious Freedom*, 64.

5 Winnifred Sullivan, et al., *The Politics of Religious Freedom*, 54-55.

6 *Ibid.*, 55.



- a. exposing the parochial genealogy or history of this purported right, and/or
  - b. exposing the flaws in the way the right is interpreted and applied at present in law and policy by international and governmental officials and by academic and INGO/NGO experts.
- 7) Though the approach recommended as an alternative is nowhere carefully described, the following things may be said: The approach rests on a strong *moral* presumption, as is clear from the comments in 4) and 5), and the summary of the authors' position quoted above. It does imply certain methodological revisions as compared with the approach it opposes, but those revisions are important not simply as a matter of accurate description. Understanding and embracing the revisions has urgent consequences as regards advancing human dignity, economic and political equality, tolerance, harmony, and peace. The implied revisions in method fall into two categories, which are not consistent with each other.
- a. *Methodological relativism*: It is not possible to find single concepts like "religion" or "tolerance," not to mention "human rights," that apply univocally to all cultures and peoples. Context is everything, and things go better for everyone concerned if all effort at developing a general theory of such things is abandoned. If "religious freedom" has any common meaning at all, it is that the term applies differently in different settings, and all attempts to discover and impose one meaning is bad science and bad morality.
  - b. *A brand new general theory*: There does exist an understanding of "religion"—"lived religion"—that applies generally, an understanding in line with recent work by anthropologists other social scientists, and members of religious studies departments, and one that fits the actual experience of people around the world much more adequately than the distorted Western/American notion being rejected. Lived religion means a fluid, loosely organized, non-doctrinaire way of be-



having “as practiced by everyday individuals and groups”<sup>7</sup> that does not draw sharp lines between that experience and other forms of social activity. In the hands of Elizabeth Hurd in *Beyond Religious Freedom*, and most likely in accord with the other editors of *Politics of Religious Freedom*, this understanding is the basis for a new general theory of religious freedom. According to her, lived religion is regularly subverted around the world by government officials and academic and other experts bent on imposing the Western/American notion of religion to the detriment of practitioners of lived religion. If that practice stops, and this new theory is allowed to guide policy, tolerance, harmony, and peace will follow in greater measure.

Given the complexity of the BA, many things need saying by way of assessing its adequacy and coherence, and the attempts at verifying it available in both books. To begin with, the editors and authors involved ought to be much clearer on the methodological questions raised in 7a. and b. Are they methodological relativists or proponents of a brand new general theory? It is possible to find hints of both positions in each of the books, though the brunt of the argument in *Beyond Religious Belief* supports 7b., a new theory. While Hurd is aware of the contradiction between these two positions,<sup>8</sup> she in no way overcomes it by stating that “conceptual imprecision is warranted, even necessary in these circumstances.”<sup>9</sup> Hurd, along with many authors in *Politics of Religious Freedom*, does not write as though she thinks there is the slightest uncertainty about the conceptual boundaries between the conventional approach to religious freedom she opposes and the one she defends, nor about the conflicting effects of the two approaches as regards the incidence of discrimination, political and economic inequality, and “costs in human dignity.”<sup>10</sup>

One problem not addressed is that methodological relativism is not a coherent position. How can one tell that “religion” varies in its meaning according to context unless one presupposes some standard understanding of “religion”? Things cannot be compared without a common reference point. The same is true of “tolerance,” “nondiscrimination,” “religious

7 Elizabeth Hurd, *Beyond Religious Freedom*, 8.

8 *Ibid.*, 13.

9 *Ibid.*, 14.

10 Winnifred Sullivan, *et al.*, *The Politics of Religious Freedom*, 55.



freedom” and so on. A related difficulty concerns the issue of “bias” and “partisan spirit,” mentioned in 3). In chapter 8 on the history of toleration in *Politics of Religious Freedom*, it is suggested by the author, consistent with methodological relativism, that every theory of tolerance is biased, is partisan, by seeking special advantage for theorist’s view of religion. But is that also true of the author’s theory? If so, doesn’t that cast doubt on the theory? If not, why not?

Another problem is that whether methodological relativism or a new theory is favored, the BA already presupposes, for example, a common standard of “nondiscrimination,” according to our comments in 5). Its proponents confidently affirm that the Western/American approach consistently violates the standard, while their approach invariably upholds it. What is that standard, and how is it to be defended? Is it related in any way to a human rights understanding of that and other standards? If so, in what way? If not, the differences must be explained and defended. Lastly, if a new theory of religious freedom is being proposed, much more responsibility needs to be taken for clarifying and defending that theory. As things stand in Hurd’s book, the theory is defended by default. The deficiencies of the rejected approach are dealt with at length; the nature and basis of the new theory as such are discussed hardly at all. In the first place, then, these elementary theoretical matters must all be cleared up before it is possible to render a final verdict on the adequacy and coherence of the BA.

Perhaps the most important question about the BA is whether 3) and 4) are true. The key issue here, nowhere addressed head on, is whether existing human rights standards in respect to freedom of conscience, religion, or belief *must necessarily or unavoidably* be interpreted and applied in the way specified. For one thing, no attempt is made to analyze comprehensively and carefully what human rights language and jurisprudence actually say about the subject. While it may readily be conceded that some legal and other officials and experts interpret and apply the standards in the way criticized, it is not at all apparent that their judgments are the only reasonable or authoritative way to do so. For example, in *Politics of Religious Freedom*, repeated reference is made to various rulings against Muslim minorities in Europe by the European Court of Human Rights, giving the impression that such rulings were inevitable, and no other judgments imaginable. However, such conclusions overlook the widespread objections to those rulings, both by members of the Court in dissent, and by numerous academic and other experts, as we pointed out in responding to Moyn, above. Also, there





is some interesting discussion in two chapters in *Politics of Religious Freedom* as regards the creative and constructive application of existing religious freedom standards to minority injustices in places like South Africa and Hawaii. Evidence of that kind needs to be taken into account in arriving at a final verdict on the question, and it ought to figure into the summary reflections of the editors more than it does.

Hurd's treatment in *Beyond Religious Freedom* of an example of mistreatment of the K'ich'e people, a Mayan ethnic minority living in the western highlands of Guatemala, is relevant. She complains that "the logic of religious rights renders politically invisible less established religions, collective ways of life, and modes of being and belonging that do not qualify as 'religious.' Nontraditional, unprotected religions, and nonreligions are pushed into the wings."<sup>11</sup> The K'ich'e people strongly objected for "religious and cultural reasons" to mining operations undertaken on their land by multinational corporations backed by the state. Their objections were ignored because devotion to the land was not regarded by the authorities as "legally religious" according to the standards of "governed" and "expert religion." "When [the case is] cast in terms of religion understood as the right to believe or not, violations of the K'ich'e religio-cultural heritage fall below the threshold of [what is politically or judicially adjudicable]."<sup>12</sup>

But such a judgment by officials seems, on its face, to be blatantly inconsistent with existing human rights law and jurisprudence. Since "religious and cultural reasons" were explicitly given in defense of their objections, the issue is not whether an artificial standard of belief is being imposed on the K'ich'e people; they are clearly citing beliefs in defense of their position. In addition, protected beliefs, as we have seen, need not be religious, but only conscientious, and, what is more, "nontraditional, unprotected religions, and [conscientious] nonreligions" are explicitly covered by human rights jurisprudence. Finally, Article 27 of the ICCPR (which Guatemala ratified in 2000) guarantees that persons belonging to "ethnic, religious, or linguistic minorities" "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (emphasis added).

A good example of the capacity for sensitivity and broadmindedness of a judicial official involved in interpreting and applying religious free-

11 Elizabeth Hurd, *Beyond Religious Freedom*, 49-50.

12 Ibid.



dom standards is the dissent by Justice William J. Brennan in *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>13</sup> a case having some benefit for minorities, according to the chapter in *Politics of Religious Freedom* on Hawaii, cited earlier. *Lyng* is a 1988 U.S. Supreme Court decision overruling a lower court judgment that the U.S. Forest service had violated Navajo religious rights by constructing a road across a mountain sacred to the Navajo. In supporting Navajo rights that he believed the majority opinion had disregarded, Brennan wrote as follows:

For Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life is in reality an exercise which forces Indian concepts into non-Indian categories... In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation.... Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.”<sup>14</sup>

Brennan’s opinion should, in my opinion, have prevailed, but whether it did or not, his opinion proves that prominent judicial officials, charged with upholding religious freedom standards, are in fact profoundly capable of appreciating the special perspective and distinctive interests of indigenous peoples.

Much more remains to be said about the acceptability of the Basic Argument underlying *Politics of Religious Freedom* and *Beyond Religious Freedom*. It is hoped that this review has at least clarified the terms of the skepticism contained in these books and raised questions for further consideration about the underlying approach.

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<sup>13</sup> *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

<sup>14</sup> *Ibid.*, 460-61.



REVIEW:  
*RELIGION, LIBERTY AND THE JURISDICTIONAL  
LIMITS OF LAW*

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NICHOLAS P. MILLER<sup>1</sup>

**BOOK REVIEWED**

*Religion, Liberty and the Jurisdictional Limits of Law*, by Iain Benson and Barry Bussey, eds., Toronto, ON: LexisNexis Canada, 2017.

This book is based on papers from a scholarly conference at the University of Toronto, about the growing conflict between religious freedom and equality rights. It focusses primarily on the legal system of Canada, though some attention is given to the United Kingdom as well. The importance of this book is not limited to Canada, or even Commonwealth heritage legal systems. Rather, this is a report from the front lines of a more advanced stage of a legal conflict that is already underway in the United States and in many other places around the world.

The United States tends to be about a decade or two behind its neighbor to the north in the process of secularization. Whatever political and legal conflicts Canadians experience between religion and secularity today, will very soon be on the agenda of the US. These same conflicts are already well under way in various countries of northern and western Europe, as well as in South and Central America. Thus, legal practitioners and scholars in virtually any country connected with a European law heritage who wish to understand the growing legal conflict between religious freedom and equality rights will find this book of real value.

The chapters are divided into five sections:

Part I – Religion in Liberal Thought

Part II – Religious Freedom of Religious Organizations

Part III – Private Choices, Public Consequences

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## Part IV – The Clash of Rights

## Part V – Equality and Religious Freedom

There is a diversity of opinion expressed, though within limits. While the authors generally lean towards viewing religious freedom as deserving of greater legal protection, there is some difference and disagreement as to how this should be accomplished. One or two papers seem quite happy with the relative preference for rights of equality and non-discrimination versus religious freedom under the present system. But there are not really full-throated defenses of a non-religious or anti-religious secularism to be found in this collection. There are, however, plenty of other scholarly and academic defenses of that to be found. This volume makes a welcome contribution to an often underserved, though not undeserving, point of view of the importance of robust religious freedom to liberal democracies.

The Foreword presents the overall theme of the book as the limits of the “jurisdiction of law itself.” It is argued that understanding the jurisdiction of law, and its limits, is essential to tracing the “boundaries of church and state, religion and law.” Some areas are not practically subject to legal review (a person’s thoughts) or are beyond its competence (regulation of friendship or family relations), or prudentially are recognized to be beyond practical regulation (most things in the domestic sphere).<sup>2</sup>

This limit on law is a fruitful issue to raise in discussing the role of law and religion, as the modern state tends to view its legal jurisdiction as essentially unlimited. While this theme is not explicitly mentioned in all the articles that follow, it certainly is in the background of most of the discussions and is a helpful frame for the book as a whole.

The first section on Religion in Liberal Thought opens with one of the strongest chapters in the book by co-editor Iain Benson. In it, he argues that there should be a legal presumption in favor of moral diversity in society. This would mean that religious persons and organizations should generally be protected in their moral convictions and viewpoints, consistent with natural justice, evil to others, and the peace and safety of the state. Of course, there is always the question of how these values are defined and applied; but Benson argues that should happen on a case-by-case basis, rather than ahead of time at the level of abstracted claims.<sup>3</sup>

2 Iain T. Benson, “Foreword: The Limits of Law and the Liberty of Religious Associations,” xxi–xlvi.

3 Iain T. Benson, “Should There Be A Legal Presumption in Favor of Diversity? Some Preliminary Reflec-



This argument for case-by-case adjudication becomes a continuing theme throughout much of the book. It is an argument against seeking for a hierarchy of rights (where rights of equality, or non-discrimination, or religious freedom, should always win). Rather, these various rights and values should be affirmed as having shared importance, and then when they come into tension or conflict, the outcome should depend on the equities and intrusions to each party in each case.

This opening section also recognizes the basic challenge and even conflict of religious moral diversity operating within a system of liberal pluralism. This discussion revolves around some basic questions, such as: Is there a right kind of secularism in a liberal democracy? How should the difference between public and private spheres impact the inquiry, and can the border between the two be effectively located? Where can public morality limit or trump religious morality? Is there a difference between a “secular” society, and one that is “neutral” towards comprehensive systems of belief, including religion and secularity? And perhaps most broadly, and contentiously, what must we agree on to maintain a civil society?

These broader questions are explored in the more specific set of facts and circumstances in a variety of Canadian legal cases. Should a Christian college that abides by biblical standards of sexuality be allowed to graduate teachers or lawyers qualified to teach and practice in various Canadian provinces? What jurisprudential principles should be applied when there is a clash of rights and values, all of which are protected by the Canadian Charter of Rights? One article gives extended attention to exploring how Islam is impacting the constitutional territory of the freedom of speech in countries as diverse as France, Holland, and the United States. How does the law balance the religious sensitivities, and even potential violence, of one group, against the free speech rights of the larger community?

Section II explores an issue that is also becoming quite controverted in the United States, that of the religious freedom of organizations. Tocqueville was invoked in pointing out the importance of religious organizations and associations to the functioning of democracy. Without religious organizations functioning to create a shared moral public environment, how can the self-restraint and morality needed for self-governance be attained and maintained? Religious associations help push back against the modern extremes of individualism that Cartesian-based

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tions,” 3-27.



modernism has unleashed. But can all religions play this important role? Or are some religions less capable of doing so, and may even threaten the civil, social fabric? How should a government relate to these religions?

Other questions raised include: Can too much emphasis be placed on the rights of religious groups at the expense of individual religious rights? What is the social ontology of religious freedom as well as religious organizations? How can these ontologies inform the legal analysis of group versus individual rights and freedoms? If one gets the sense that more questions are raised than satisfactory answers are given, one would be largely correct, though most of the chapters point in some helpful directions.

The third section wades into the troubled waters of trying to distinguish religious conviction from conscience. A secular system generally prefers the category of conscience to that of religious belief or conviction. What would the clash between secular and religious rights look like if we evaluated all personal conviction type claims in terms of conscience rather than religious belief? Presumably this would cover a broader range of claims and would lessen the objection that the beliefs of religious people get prioritized over non-religious beliefs or convictions. This is an interesting proposal, though it is unclear how conscience should be defined, and how it would differ from a strongly held opinion.

In the 17<sup>th</sup> and 18<sup>th</sup> centuries, conscience was viewed as the imposition of an external standard or claim on my conviction and action. In a sense, it had an inherently religious element, in that it was viewed as something more than strongly held opinion, but rather as a response to an obligation that one believed came from an external source, whether a Deity directly, or through some order of natural morality or law.

How does conscience work in a purely secular environment? When does a strongly held opinion cross over into conscience? And if all strongly held opinions are going to be judicially protected, what happens to a democratic process that can be thwarted or voided or gridlocked by anyone's strongly held opinions?

Again, these chapters do a better job of asking some of these questions than in providing full answers. But they certainly further this important conversation. The law in the United States is having a similar conversation, not so much about religion and conscience, but whether freedom of religion really adds anything to free speech claims, which levels the playing field between ideology, conscience, and religious belief. Both conversations are really questioning whether there is a special role or place for



religion in a liberal constitutional scheme, or whether we must think in purely secular categories.

The final two sections of the book deal with the same theme: how to evaluate the clash of rights between equality and religious freedom. A number of overlapping, but somewhat differing approaches to dealing with such clashes are proposed. One author (Newman) is not content with an approach that calls for a balancing between rights, believing that such an approach reduces rights to a utilitarian calculus. It has too much of a tendency to either prefer one right over another in the abstract, or to take an approach that will be a “split of the difference.”<sup>4</sup> But what is the alternative to some kind of balancing?

It is suggested that other values, presumably also found in the Canadian Charter of Rights and Freedoms, could decide the outcome. But does this not just complicate the clash, or balancing of rights, by introducing further rights or values into the mix? Does this move itself not create a hierarchy of rights and values, with those in the initial “clash” being subordinated to other, more “fundamental” rights in the Charter? Ultimately, these are hard questions to answer, and most of the authors agree on the need for some kind of balancing between rights, but not at a pre-conflict level of abstraction. Rather, the balancing should happen after the conflict has manifested itself, and when one can assess the level of intrusion into the conscience, integrity, and well-being of the individual or association on both sides.<sup>5</sup> Proposals are also made that there should be a distinction between the public and private spheres. That in the former, equality should usually win, but that in the latter, faith and religious beliefs should prevail.<sup>6</sup>

There is a repeated call that there be no abstract hierarchy of rights instituted, and it is claimed that the Canadian Supreme Court holds this view itself.<sup>7</sup> It is acknowledged, however, that many, if not most, judicial decisions in Canada operate under this assumption; that is, that most of the time, most courts side with rights of equality and non-discrimination over against religious freedom. There is a real sense that traditional religious communities in Canada exist in a perpetual state of at least semi-embattlement against the mainstream legal and political culture.

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4 Dwight Newman, “Judicial Method on Rights Conflicts in the Context of Religious Identity,” 245–260.

5 *Ibid.*, at 254–257.

6 Alvin A.J. Esau, “Freedom of Religion, Competing Rights and Spatial Priority Presumptions,” at 288–289.

7 Janet Epp Buckingham, “Competing Rights under the Canadian Charter: Are Some Issues More Equal than Others?” at 266–267.



The final section of the book illustrates the realities of this siege experience by looking in some detail at the travails of Trinity Western University. TWU is an evangelical college with biblical standards of sexual behavior for its students and faculty. In 2001, TWU sought to offer degrees in education, but found itself blocked by the state because of its Christian lifestyle standards. It successfully litigated its way out of that problem, only to be confronted by a similar issue when it established a law school about 15 years later.

Now, TWU finds itself back in the high court of Canada, litigating as to whether its students can actually practice as lawyers in a number of different provinces. It is not an exaggeration to say that the very existence of the law school is at stake. A law school whose graduates cannot practice law is a highly endangered species.

Co-editor Barry Bussey, who is also helping litigate the TWU case, gives a helpful overview of the case. He uses it to illustrate the tension between “Charter Values” as they have come to be applied by the courts, and the right of religious freedom. He makes a careful case that Charter Values should not be construed to require moral conformity, and to do so will result in the rise and imposition of a new, secular leviathan which will push religion and religious belief to the very edges of society.<sup>8</sup>

The experience of religious organizations in Canada serve as a rather strong warning to other countries that have just begun to experiment and implement same-sex marriage. Whether TWU again prevails in its battle for existence, it will probably need to be ready to undertake the long slog again when it arises in some other academic program, whether social work, psychology, or counseling. At some point, even if one generally wins these legal contests, one begins losing just by constantly having to litigate one’s right to exist as a religious organization.

What the TWU story doesn’t reveal is how many other Christian groups, associations, or schools have been discouraged from starting programs in various disciplines because they know that the licensing requirements will require expensive legal challenges. This “chilling effect” appears to become a standard feature of a legal system and culture that is given over to a thoroughgoing secularism, and where “neutrality” is treated as meaning that religion and religious ideas—at least those that conflict with secular orthodoxy—cannot be part of the public square, even within non-state associations and enterprises.

8 Barry W. Bussey, “The Charter is Not a Blueprint for Moral Conformity,” 367-414.





Should this happen more fully in Canada, as well as in the United States, then law will really have overrun its jurisdictional limits. The invasive and domineering leviathan will again be among us, but this time with the invasive tools that come with our technological, internet-invaded, social-media monitored society from which there is hardly any escape already. The issues and questions raised in this book should be considered by all who hope to avoid that rather dire prospect.



# GLOBAL FAITH & FREEDOM



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# FIDES ET LIBERTAS



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## PART THREE

### IRLA ACTIVITIES

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*The IRLA's 8th World Congress for Religious Freedom, held August 22-24, 2017, in Ft. Lauderdale, Florida, brought together more than 550 religious freedom advocates from around the world and marked the culmination of five years of planning and coordination by IRLA staff.*

*Yet, although this was the largest event on IRLA's 2016/2017 calendar, it was just one of hundreds of engagements, publications, and activities during this period that focused on expanding the reach and capacity of the IRLA to promote and defend the freedom of religion or belief as a fundamental human right for all people. What follows are some highlights from the past two years.*

## **NEW IRLA PRESIDENT**

In October 2016, the IRLA Board unanimously voted to invite Ambassador John R. Nay to become President of the IRLA, recognizing both his international experience and his long-standing commitment to advancing the cause of religious liberty.

Formerly a career member of the United States Senior Foreign Service, Ambassador Nay was unanimously confirmed by the U.S. Senate in July 2009 to serve as the U.S. Ambassador to the Republic of Suriname. During his service in Suriname (September 2009–September 2012), Ambassador Nay particularly emphasized the importance of human rights, freedom of the press, and the value of protecting our environmental heritage. Ambassador Nay particularly enjoyed interacting with Suriname's diverse religious communities, which shared impressively good mutual relations. Another of his best memories of Suriname was when he and a press and Embassy team made four lengthy bicycle trips that traversed the entire width of Suriname and also went into the interior as far as the roads went. During their bicycle trips, Ambassador Nay and his fellow bikers enjoyed meeting with Surinamers and Peace Corps Volunteers across the country, while highlighting the beauty of nature, the importance of conservation and environmental preservation, and underlining the importance of fitness.

Prior to his service in Suriname, Ambassador Nay was the U.S. Consul General in Toronto, Ontario, Canada from 2006–2009, and served as Consul General in New Delhi, India from 1999–2002. He had earlier tours of duty in Taiwan, Singapore, Canada, and South Africa as well as in Washington working on issues relating to Africa, Southeast Asia, North Asia, and Oceania. In all he had assignments on four continents and served temporary assignments on two others.



During the course of his career he frequently wrote and edited religious freedom reports, human rights reports, and trafficking in persons reports, with the goal of helping people everywhere to enjoy freedom, human rights, and religious liberty.

Ambassador Nay retired from Foreign Service in 2013. He holds Masters Degrees from Andrews University and from the National Defense University, and is language qualified in Chinese (Mandarin). During his career he received three Superior Honor Awards and four Senior Performance Awards. A native of Michigan, he and his wife Judith Ashdon Nay, have three adult children and two grandchildren.

In welcoming Ambassador Nay, the IRLA Board also voted heartfelt thanks to retiring IRLA President, Ambassador Robert A. Seiple. Ambassador Seiple, former U.S. Ambassador-at-Large for International Religious Freedom (and the first person to serve in that role), was president of the IRLA from 2012 until his retirement from that position in 2016.

## IRLA EVENTS

*A vital part of the IRLA's mandate is to sponsor and coordinate symposiums, think-tanks, dinners, rallies, and other events. Their purpose is to connect with public officials, scholars, religious leaders, and other thought leaders in society, and to help shape understanding of religious liberty issues around the world.*

## UNITED NATIONS SYMPOSIUM SERIES

In 2016 and 2017, the IRLA co-organized the Second and Third Symposiums on the Role of Religion and Faith-Based Groups in International Affairs, held at the United Nations Secretariat in New York.

Religious extremism and violence was the focus of the **2016 Symposium**, held February 1, which brought together more than 130 representatives from various UN agencies, along with religious and non-governmental organizations. Dr. Diop, one of the keynote speakers at the event, challenged the “simplistic generalization” that religion and religious faith should bear the blame for driving extremist violence. “Violence finds fertile ground in any religion or ideology that instrumentalizes human beings, that fails to recognize the sacredness of human life and the innate dignity of every person, or that refuses to acknowledge the freedom of others,” he said. Other presenters at the symposium included Adama Dieng, the UN Secretary-General’s Special Advisor for the Prevention of Genocide; Zainab Hawa Bangura, Special Representative of the UN



Secretary-General on Sexual Violence in Conflict; and, Dr. John Esposito, Professor of Religion and International Affairs at Georgetown University. The **2017 Symposium**, held January 23, focused on the role of religion in building a “just and inclusive peace.” It drew almost 200 representatives from various UN agencies and non-governmental organizations. IRLA Secretary General, Dr. Diop, gave two presentations, along with other public officials and scholars, including Adama Dieng, the UN secretary-general’s special advisor for the prevention of genocide, His Excellency Pekanbaru Metso, ambassador-at-large on intercultural and interreligious dialogue for Finland, Jesus Dureza, Presidential Advisor for Peace Process for the Philippines, and Dr. Miguel Ceballos Arevalo, Dean of the School of Politics and International relations, Universidad Sergio Arboleda in Bogota, and former Vice Minister of Justice for Colombia.

## RELIGIOUS LIBERTY GALAS IN WASHINGTON, D.C.

The IRLA continued as a co-sponsor and co-organizer of the annual Religious Liberty Dinner, which brings together ambassadors, members of Congress, officials from the State and Justice departments, faith leaders, and representatives of the religious freedom advocacy community. Other sponsors of the event are *Liberty* magazine, the North American Religious Liberty Association (NARLA), and the Seventh-day Adventist world church.

The **14<sup>th</sup> annual Religious Liberty Dinner**, held May 24, 2016, at the Newseum in downtown Washington, D.C, featured keynote speaker Erastus J.O. Mwencha, Jr., deputy chairman of the African Union. Dr. Mwencha, who has helped lead Africa’s top pan-national organization for more than eight years, told the group of Washington D.C.’s policy makers and thought leaders that there is no room for complacency when it comes to defending religious freedom. David Lopez, General Counsel for the US Equal Employment Opportunity Commission, received the National Award for Religious Freedom for his “outstanding and consistent advocacy of civil rights, religious rights, and employment rights throughout a remarkable legal and government career of service.” Brian Grim, founding president of the Religious Freedom & Business Foundation, received the International Award for his work to educate businesses and governments on the economic benefits of protecting religious freedom.

The **15<sup>th</sup> annual Religious Liberty Dinner** was held June 1, 2017—again at the Newseum in Washington, D.C.—and brought togeth-



er some 150 diplomats, religious liberty advocates, and guests to focus attention on religious freedom as a central human right. The keynote speaker was US Secretary of Housing and Urban Development, Dr. Ben Carson. Dr. Bert Beach, former Secretary General of the IRLA, was honored for his lifetime of service to promoting religious freedom. Other honorees included: Kimberlee Colby, director of the Christian Legal Society's Center for Law and Religious Freedom, and Thomas Farr, president of the Religious Freedom Institute.

## INTERNATIONAL RELIGIOUS LIBERTY SUMMIT

The IRLA was a co-sponsor of an International Religious Liberty Summit, held June 1, 2016, which brought together advocacy groups to find ways to better engage government leaders and the media, and to mobilize efforts on behalf of persecuted religious minorities around the world. The event took place at the Newseum's Religious Freedom Center, and featured speakers including, Former U.S. Representative Frank Wolf, now Distinguished Senior Fellow, 21st Century Wilberforce Initiative; Brian Bachman, Senior Advisor to the Ambassador-at-Large, Office of International Religious Freedom, U.S. Department of State; Michael Wear, Founder, Public Square Strategies and former Director of Faith Outreach, President Obama's 2012 campaign; and, Elizabeth Cassidy, acting Co-Director for Policy and Research, U.S. Commission on International Religious Freedom.

Dwayne Leslie, Deputy Secretary General of the IRLA, was a key organizer of the Summit, which also featured a panel of nationally renowned journalists who discussed the role of the media in framing public policy issues.

## MEETING OF EXPERTS

The **2016 Meeting of Experts**, the IRLA's annual gathering of scholars, researchers and thought leaders in the field of freedom of religion or belief, met in August at Harvard University Divinity School, Cambridge, Massachusetts. The focus of this meeting was to study a disturbing paradox: while the principle of religious freedom has gained a strong foothold within international law, restrictions on religious practice are actually on the rise around the world. Among the scholars who presented papers at the meeting were David Little, Professor Emeritus of Harvard Divinity School; Cole Durham, Professor of Law and Founding Director of the International Center for Law and Religion Studies



at Brigham Young University; Rosa Maria Martines de Codes, History Professor at Complutense University in Madrid; Pasquale Annichino, Research Fellow at the European University Institute in Florence, Italy; Dudley Rose, Associate Dean of Harvard Divinity School; Mohamed Mahfoudh, Dean of Law School at the University of Tunisia, Dr. T. Jeremy Gunn, Professor of Law and Political Science International University of Rabat and Amal Idrissi, Law Professor at the University of Moulay Ismael in Morocco.

The purpose of the **2017 IRLA Meeting of Experts**, held in August 2017, was to explore challenges to the idea of the universality of human rights, in general, and religious freedom or belief, in particular. The panel of scholars met at Princeton University, New Jersey, and heard presentations on the topic from scholars including Silvio Ferrari, Professor of Law and Religion, Canon Law at the University of Milan; Raimundo César Barreto Jr., assistant professor of world Christianity at Princeton Theological Seminary; David Little, Professor Emeritus of Harvard Divinity School; Cole Durham, Professor of Law and Founding Director of the International Center for Law and Religion Studies at Brigham Young University; and, Dudley Rose, Associate Dean of Harvard Divinity School.

## REFORMATION SYMPOSIUM

On June 1, 2017, the IRLA was a co-sponsor and organizer of a unique event that brought together religious and academic leaders to explore freedom of conscience in light of the 500-year anniversary of the 16th century Protestant Reformation. Dozens of religious freedom scholars, advocates, and supporters met at the Newseum's Religious Freedom Center in downtown Washington, D.C., for the event entitled: Conversations on the Reformation, Christian Identities, and Freedom of Conscience. Speakers represented a range of religious communions—Quaker, Baptist, Seventh-day Adventist, Mennonite and Mormon—and included Neville Callam, General Secretary and Chief Executive Officer of the Baptist World Alliance; Gretchen Castle, General Secretary of the Friends World Committee for Consultation; Ganoune Diop, Secretary General of the IRLA; César García, General Secretary of the Mennonite World Conference; David Trim, Director of Archives, Statistics, and Research at the General Conference of Seventh-day Adventists; and Ted N.C. Wilson, president of the Seventh-day Adventist world church.





The presentations from this event were compiled and published in a book, which was released on October 31, 2017, exactly 500 years to the day after Martin Luther is said to have posted his 95 theses at the door of Wittenberg Castle church.

## 8<sup>TH</sup> WORLD CONGRESS FOR RELIGIOUS FREEDOM

“Now, more than ever, we need a wholistic understanding of religious freedom.” These words from Dr. Diop, Secretary General of the International Religious Liberty Association (IRLA), summed up one of the key objectives of this unique international gathering of religious freedom advocates held August 22 to 24 in Hollywood, Florida. Its theme addressed one of today’s most pressing global issues: Religious Freedom and the Hope for Peaceful Co-existence.

This was our most diverse Congress yet, bringing together more than 550 participants, including scholars, public officials, religious leaders, and advocates from 64 countries. The event aimed to take a multi-disciplinary look at the relationship between religious freedom and the challenge of nurturing peaceful coexistence in today’s religiously and politically fractured global landscape.

Ambassador John Nay, IRLA President, challenged attendees to see the task of building stable, peaceful communities as central to the quest for religious freedom. Both must come together, he said because “without freedom of religion there will not be peaceful coexistence, and without peaceful coexistence it is not possible for freedom of religion to thrive.” Other speakers echoed this call for a broader, more innovative approach to promoting religious freedom. “We can’t keep doing the same things over and over again; it’s not working,” said Brian Grim, founder and president of the Religious Freedom & Business Foundation.

Public officials attended from Colombia, Cuba, Jamaica, the Philippines, Russia, Spain, Ukraine, and Zambia. Ahmed Shaeed, UN Special Rapporteur for Freedom of Religion or Belief, sent a video message.

Among the faith leaders addressing the Congress were Rev. César García, General Secretary of the Mennonite World Conference; Dr. Ted N.C. Wilson, President of the General Conference of Seventh-day Adventists; and Dr. Elizabeta Kitanović, Executive Secretary of the Conference of European Churches, Rev. Dr. Thomas Schirmmacher, chairman of the Theological Commission of the World Evangelical Alliance.



More than 30 presenters from around the world provided insights from academic, religious, activist, and public policy perspectives. Speakers included, Jabulile Buthelize, a South African social activist; Knox Thames, Special Advisor for Religious Minorities in the Near East and South/ Central Asia at the U.S. Department of State; Richard Foltin, director of national and legislative affairs for the American Jewish Committee; David Little, research fellow at Georgetown University's Berkley Center; Miroslav Volf, founder and director of Yale Center for Faith and Culture and professor at Yale University Divinity School; Carol Palmer, Permanent Secretary at Jamaican Ministry of Justice; Ambassador John Nay, IRLA President; Tina Ramirez, president and founder of Hard-wired; and, Brian Grim, president and founder of the Religious Freedom & Business Foundation.

For the first time, the International Religious Liberty Association will publish a post-Congress book for international distribution. Production is already underway on the book, which will bring together key presentations and insights.

## STAFF ACTIVITIES

*Many of the IRLA's activities take place behind the scenes—visiting lawmakers, participating in United Nations' sessions in Geneva and New York, building friendships within the diplomatic corps, hosting government officials for protocol meals, traveling to different countries to visit state leaders, maintaining ties with professional and academic communities. These are all ways the IRLA works to build positive relations with governments, international organizations, and thought leaders in society and to raise awareness of international challenges to religious freedom. Here are just a few examples of recent IRLA engagements.*

## KEYNOTE TO NATIONAL RELIGION COMMUNICATORS

Dr. Diop gave a keynote presentation in March 2016 at the Religion Communicators' Council convention in New York City. He told the group of some 140 top religion writers, reporters, and communicators from across the United States that their work will be at its best when it's "informed by the reality of human dignity." Dr. Diop gave his presentation on the final day of the convention and shared the platform with Former Archbishop of Canterbury Lord George Carey, each giving their perspective on the changing global religious landscape.



## **SECRETARY GENERAL TALKS PEACE-BUILDING ON THE SIDELINES OF THE G20 SUMMITS**

IRLA secretary general Dr. Diop was invited to present papers to religious scholars from around the world at the 2016 and 2017 G20 Interfaith Summits. For the past eleven years, these events have taken place on the sidelines of every G7, G8, and G20 Summit to consider the role of faith in current global issues. The 2016 summit was hosted by the Chinese Academy of Social Sciences in Beijing, China. The 2017 Summit was held in Berlin, Germany. At each event, Dr. Diop joined religious leaders, scholars, and advocates from around the world to consider how religion can help foster international dialogue and problem-solving, and to highlight concrete contributions made by religion. Dr. Diop was first invited to give a plenary presentation at the 2015 G20 Interfaith Summit in Istanbul, Turkey.

## **AFRICAN COUNCIL OF RELIGIONS FOR PEACE**

In October 2016, Dr. Diop was a keynote speaker at the general assembly of the African Council of Religions for Peace in Abuja, Nigeria. This organization is a pan-African, inter-faith group working to promote a culture of tolerance in African communities. It brings together key leaders from across the continent to discuss challenges and to promote peace-building networks.

## **IRLA SECRETARY GENERAL AWARDED FOR HUMAN RIGHTS ADVOCACY**

In February 2017, Dr. Diop received the 2017 Thomas L. Kane Religious Freedom Award at the annual three-day conference of the J. Reuben Clark Law Society in Philadelphia, Pennsylvania.

In accepting the award, Dr. Diop told conference attendees that religious freedom is not a narrow legal right, but is a foundational human freedom that supports a whole range of other fundamental rights. He pledged to continue working “on the side of life, promoting a culture of freedom, the dignity of difference, and the sacredness of all human beings created in the image of God.” The J. Reuben Clark Law Society is a global professional organization for lawyers and law students of faith, with some 190 chapters on six continents. The Thomas L. Kane award is named for a renowned nineteenth century attorney and abolitionist from Philadelphia who risked his reputation to give legal and political assistance to members of the Church of Jesus Christ of Latter-day Saints—then a widely reviled and persecuted religious minority.



## MEETING WITH COLOMBIAN LEADER

Dr. Diop met with Colombia's Minister of the Interior, Guillermo Rivera Flórez, in November 2017. As the country's government continues to grapple with the aftermath of some 60 years of civil violence and unrest, Dr. Diop spoke about the need to include minority voices in the peace process. "'Shalom,' the Hebrew word for peace, is a word that encompasses the idea of 'completeness' and the inclusion of all parts," he said. "There can be no shalom—no deep and durable peace—without broad participation from all sectors of society, including the voices of non-majority religious groups, as well."

## BUILDING RELATIONSHIPS AT THE UN AND IN WASHINGTON, D.C.

**Dr. Nelu Burcea**, Deputy Secretary General of the IRLA, continues to attend key meetings at the United Nations in New York and Geneva, and to build relationships with UN officials and UN ambassadors from around the world. In late 2016, he met in New York City with Dr. Ahmed Shaheed, who is the UN's new Special Rapporteur on freedom of religion or belief. Dr. Shaheed is a veteran politician and diplomat from the Indian Ocean island nation of Maldives, and previously served as the UN's top human rights observer for the Islamic Republic of Iran. "I have followed Dr. Shaheed's work as Special Rapporteur on human rights for Iran and I've been struck by his passionate commitment to defending the defenseless, and speaking out for those who have no voice," said Dr. Burcea after the meeting.

**Attorney Dwayne Leslie**, Deputy Secretary General of the IRLA, continues his work on Capitol Hill, forging relationships with members of Congress, with the White House, and with the many NGO and advocacy organizations headquartered in Washington, D.C. He is also invited to speak to different groups in the United States on issues related to U.S. legislation and religious freedom accommodations in law and policy, and he advises globally on issues of governmental engagement. Mr. Leslie also continues his association with the International Panel of Parliamentarians for Freedom of Religion or Belief as a member of its organizing secretariat. He represented the IRLA at the group's most recent event in late 2016 in Berlin, Germany. This gathering brought together more than 140 elected politicians from some 45 countries to explore new strategies for promoting freedom of religion or belief. Ger-



man Chancellor Angela Merkel was one of many high-profile speakers who addressed this group.

## **ACTIVITIES OF IRLA REGIONAL ASSOCIATIONS**

*There are 13 regional associations of IRLA, which span the globe. Each association plans and coordinates events, communication, and engagements, focused on local religious freedom issues and challenges. What follows are highlights from some recent activities of these associations.*

### **FIRST RELIGIOUS FREEDOM CONGRESS FOR MEXICO CITY**

IRLA leaders in Mexico coordinated a weekend religious liberty congress—the first ever to be held in Mexico City—in January 2016. Some 220 people, including university students, lawyers, professionals, and religious leaders, attended the event. In conjunction with the congress, IRLA leaders met with Dr. Eruviel Ávila Villegas, governor of the State of Mexico, to express gratitude for religious freedom safeguards in Mexico. Dr. Ganoune Diop, Secretary General of the IRLA, also attended the meeting, and presented the governor with an award for promoting religious freedom in his state. Ávila Villegas pledged continued support in promoting human rights and thanked Dr. Diop for his global work in safeguarding religious freedom.

### **CÔTE D’IVOIRE INTERFAITH PEACE SUMMIT**

Following a horrific attack by Muslim extremists in Côte d’Ivoire, IRLA leaders in West Africa urged the citizens, no matter what their faith, to confront the causes of religiously motivated violence. At a March 18 summit and press conference in the capital city of Abidjan, religious leaders from many different faith communities came together to reject intolerance and violence in the name of religion. The peace summit was prompted by a jihadist attack that took place just five days earlier in the nearby seaside resort of Grand-Bassam.

### **IN COLOMBIA, IRLA FOCUSES ON POST-CONFLICT CHALLENGES**

A peace forum in Bogotá aimed to forge constructive partnerships between NGOs, scholars, and the faith community. As the Colombian government and rebel groups moved toward ending the country’s long-standing civil conflict, the IRLA co-sponsored an event seeking



ways to support the peace efforts and to help rebuild a society damaged by almost five decades of violence. The two-day peace forum held March 2016 in the capital, Bogotá, brought together religious leaders, non-governmental organizations (NGOs), academics, and others, to discuss strategies for supporting post-conflict reconciliation and rebuilding. Gabriel Villarreal, coordinator of the forum, said it was focused on ways NGOs and religious groups could contribute to peace efforts, while also helping to support vulnerable populations in Colombia. Lorena Ríos, Colombia's National Coordinator of Religious Affairs at the Ministry of Interior, represented the national government at the event, and Ganoune Diop, Secretary General of the IRLA, also attended and was one of the presenters at the forum.

## **IRLA ARGENTINA HOSTS SOUTH AMERICAN RELIGIOUS LIBERTY FORUM**

More than 150 people gathered at the government headquarters of the city of Buenos Aires, Argentina, in November 2016 for the inaugural South American Religious Liberty Forum organized by the IRLA and the Argentine Council for Religious Liberty (CALIR). The much-anticipated event brought together leaders from several institutions, religions and countries, including Brazil, Uruguay, Chile, Peru, Argentina, Ecuador, Spain, and the United States. Discussions during the event were focused on religious freedom and its relationship with the state, education, and worship practices. There were also presentations regarding the exercise of religiously prescribed days of rest, the use of religious symbols in public spaces, and the financing of religious services. The National Secretary for Worship of Argentina, Ambassador Santiago de Estrada, spoke at the event, as did the General Director of Worship of the Government of the City of Buenos Aires, Professor Federico Pugliese.

## **NEW TRAINING CENTER FOR RELIGIOUS FREEDOM OPENS IN EUROPE**

The International Center for Religious Freedom and Public Affairs—the first of its kind—opened February 4, 2017, at the Adventist University at Collonges-sous-Salève, France. It will teach students how to work with national and international organizations and to promote the principles of religious liberty. Ambassador Ibrahim Salama, Director of the Division of Treaties Relating to Human Rights at the High Commissioner for Human Rights' Office at the United Nations in Geneva spoke at opening,



and said that religious organizations have a significant responsibility, globally, in defending and promoting basic human rights. Former IRLA Secretary General, Dr. John Graz, is the center's director.

# FIDES ET LIBERTAS



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## PART IV SUBMITTING MANUSCRIPTS AND REVIEWS

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## SUBMITTING MANUSCRIPTS

*Fides et Libertas* encourages the submission of manuscripts by any person, regardless of nationality or faith perspective, who wishes to make a scholarly contribution to the study of international religious freedom. *Fides et Libertas*, as the scholarly publication of the International Religious Liberty Association, seeks to obtain a deeper appreciation for the principles of religious freedom that IRLA has enunciated, including the following: religious liberty is a God-given right; separation of church and state; government's role of protecting citizens; inalienable right of freedom of conscience; freedom of religious community; elimination of religious discrimination; and the Golden Rule. *Fides et Libertas* is open to a wide perspective in upholding those principles including:

- Historical studies
- Articles that deal with theoretical questions of theology and freedom
- Essays on the meaning of such concepts as human rights and justice
- Works focused on politics and religion; law and religion

Articles should be accessible to the well-educated professional as well as to the lay person who seeks to know more. They are to be a means of continuing a scholarly conversation of the subject at hand. Therefore, it is incumbent on the author to bring a new insight or knowledge to the conversation.

### ARTICLE SUBMISSION

Submitted articles are evaluated by academic and professional reviewers with expertise in the subject matter of the article. *Fides et Libertas* will seek to ensure that both the identity of the author and the identity of the reviewer remain confidential during this process. *Fides et Libertas* accepts simultaneous submissions but requires the author to notify the editorial staff immediately if he/she accepts another offer.



*Fides et Libertas* prefers to accept articles under 11,000 words. Articles should be submitted as an electronic attachment. Articles must be submitted in U.S. or U.K. English. A paper copy only manuscript will not be accepted. In order to ensure an anonymous and expedited review process, we request a copy with no headers or other author-identifying information (make sure tracking feature is turned off). Although published articles will appear in footnote format, manuscripts may be submitted in endnote format. Citations in each article should conform to the latest edition of *Chicago Manual of Style*.

## REVIEW PROCEDURE

After an initial review of the article by the editors of the *Fides et Libertas* to ensure that articles minimally meet its mission, standards and priorities, each article is referred to an outside peer reviewer. Final decisions on accepting or rejecting articles, or sending them back with encouragement to re-submit, are made by the editors. Upon acceptance, articles then undergo a thorough technical and substantive review, although authors retain full authority on editorial suggestions on the text. If technical deficiencies, such as significant errors in citations or plagiarism, are discovered that cannot be corrected with the help of staff, the Executive Editor reserves the right to withdraw the manuscript from the publication process. Generally, *Fides et Libertas* publishes material which has not previously appeared, and it does not simultaneously publish articles accepted by other journals. Articles or author's requests for information should be addressed to:

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## BOOKS IN REVIEW

*Fides et Libertas* book reviews are meant to carry on the conversation with the authors under review. A simple description of the book fails to reach the goal envisioned by *Fides et Libertas*. We are looking for essays



that take positions and provide clear reasons for such—being in the range of 2,500–5,500 words. Smaller review essays will be considered provided they actively engage with the topic and the author.

The Editor will make a decision on publishing the review based on the quality of the review and whether it is in keeping with the mission of *Fides et Libertas*.

Book reviews should be submitted by email attachment in Microsoft Office Word or compatible format.

Book review manuscripts should be double-spaced, with the following information at the top whenever it is available:

1. Name of book
2. Book's author(s) or editor(s)
3. Publisher with date
4. Number of pages and price

Review essays may have a title (which is not necessary) which should be placed immediately above the identifying information.

Reviewer's name for book reviews should appear at the end of the review, together with a footnote giving the reviewer's title(s), if any, and institutional affiliation(s) together with the institution's location.

For further information about the *Fides et Libertas* book review policies and procedures, or to submit your name as a reviewer, or an idea for a book to be reviewed, contact:

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