

FOI ET LIBERTÉ  
FE Y LIBERTAD  
FÉ E LIBERDADE  
FAITH AND LIBERTY  
GLAUBE UND FREIHEIT

# FIDES ET LIBERTAS



## 2011

SECULARISM AND  
RELIGIOUS FREEDOM

**International Religious Liberty Association**

Printed in partnership with *Liberty Magazine*  
12501 Old Columbia Pike

Silver Spring, Maryland 20904-6600, United States of America

Phone: +301.680.6686 Fax: +301.680.6695

E-mail: [Info@IRLA.org](mailto:Info@IRLA.org) Web site: [www.IRLA.org](http://www.IRLA.org)

---

# INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION

---

## BOARD OF DIRECTORS

**Delbert Baker** (USA)

Vice President

**Bert B Beach** (USA)

Vice President

**Barry W Bussey** (Canada)

**Williams C Costa Jr** (Brazil)

**Alberto de la Hera** (Spain)

Vice President

**Rosa Maria Martinez de Codes** (Spain)

Vice President

**Ganoune Diop** (Senegal)

Deputy Secretary General

**Karnik Doukmetzian** (Canada)

Vice President

**John Graz** (Switzerland)

Secretary General

**Dan Jackson** (Canada)

**Bettina Krause** (Australia)

Communication Director

**Robert Kyte** (Canada)

**Dwayne Leslie** (USA)

Deputy Secretary General

**Denton Lotz** (USA)

President

**Todd McFarland** (USA)

Legal Advisor

**G T Ng** (Singapore)

**Daisy J F Orion** (Philippines)

Treasurer

**Robert Seiple** (USA)

Vice President

**David Trim** (UK)

## ADVISORY DIRECTORS

**Guillermo Biaggi**

**Lee Boothby**

**Gordon Christo**

**Rajmund Dabrowski**

**W Cole Durham**

**Albert C Gulfan Jr**

**Eugene Hsu**

**Erton Köhler**

**Anatoly Krasikov**

**Jairyong Lee**

**Israel Leito**

**Roland Minnerath**

**Barry D Oliver**

**John Rathinaraj**

**Paul S Ratsara**

**Blasious Ruguri**

**Gunnar Stålsett**

**James Standish**

**Halvard Thomsen**

**Bruno Vertallier**

**Victor Vitko**

**Gilbert Wari**

**Bertil Wiklander**

**Ted N C Wilson**

## PANEL OF EXPERTS

**Delbert Baker**

**Jean-Paul Barquon**

**Jean Bauberot**

**Bert Beach**

**Lee Boothby**

**Barry W Bussey**

**José Camilo Cardoso**

**Hui Chen**

**Jaime Contreras**

**Pauline Cotes**

**Rajmund Dabrowski**

**Derek Davis**

**Alberto de la Hera**

**Marcos Vinicius de Campos**

**Jean-Arnold De Clermont**

**Rosa Maria Martinez de Codes**

**Ganoune Diop**

**Karnik Doukmetzian**

---

# INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION

---

**Cole Durham**

**Silvio Ferrari**

**Alain Garay**

**John Graz**

**Eugene Hsu**

**Mar Gregorios Ibrahim**

**Vaughn James**

**Anatoly Krasikov**

**Michael Kulakov**

**Natan Lerner**

**Dwayne Leslie**

**David Little**

**Denton Lotz**

**Todd McFarland**

**Dallas Miller**

**Nick Miller**

**Roland Minnerath**

**Daniel Nsereko**

**Blandine Chelini Pont**

**Gerhard Robbers**

**Jaime Rossell**

**Robert Seiple**

**Amjad Shammout**

**Henri I Sobel**

**Tad Stahnke**

**Gunnar Stalsett**

**James Standish**

**Paul Taylor**

**H Knox Thames**

**M Rik Torfs**

**David Trim**

**Mitchell A Tyner**

**John Witte Jr**

STAFF

**John Graz**

Secretary General

**Ganoune Diop**

Representative to the United Nations

**Dwayne Leslie**

Representative to the United States Government

**Bettina Krause**

Director of Communications

**Carol Rasmussen**

Executive Assistant

**Gail Banner**

IRLA Specialist

INTERNATIONAL  
REPRESENTATIVES

**Elkana Kerosi**

(East-Central Africa Region)

**Glenn Mitchell**

(Northern Asia-Pacific Region)

**Gordon Christo**

(Southern Asia Region)

**Unannounced**

(North American Region)

**Raafat Kamal**

(Trans-European Region)

**Paul Charles**

(Southern Africa Region)

**Jean Emmanuel Nlo Nlo**

(West-Central Africa Region)

**Jonathan C. Catolico**

(Southern Asia-Pacific Region)

**Karel Nowak**

(Euro-Africa Region)

**Brad Kemp**

(South Pacific Region)

**Roberto Herrera**

(Inter-American Region)

**Vasily D. Stolyar**

(Euro-Asia Region)

**Edson Rosa**

(South American Region)

---

## DECLARATION OF PRINCIPLES

---

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

We believe that legislation and other governmental acts which unite church and state are contrary to the best interest of both institutions and are potentially prejudicial to human rights, and hold that religious liberty is best exercised where separation is maintained between church and state.

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.*

---

## STATEMENT OF PURPOSES

---

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.

---

## MISSION STATEMENT

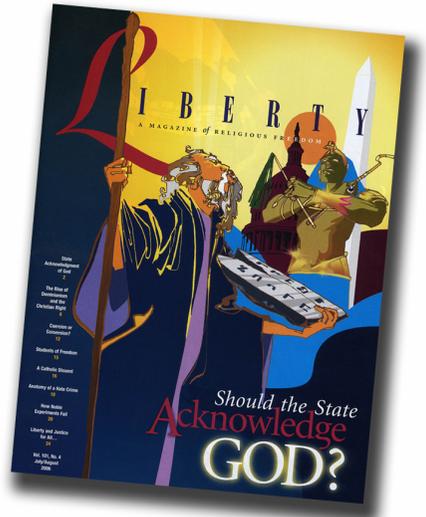
---

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

# Give the gift of *Liberty*!

A contribution of just \$7.95 will sponsor a year-long subscription to the oldest and best champion of church-state separation.

Subscribe for yourself or give the gift of *Liberty* to a friend or colleague.



**Share your passion for religious freedom today!**

NAME

STREET

CITY, STATE, ZIP

AMOUNT ENCLOSED:

PLEASE MAKE CHECKS PAYABLE TO: LIBERTY, 12501 OLD COLUMBIA PIKE, SILVER SPRING, MD 20904  
TO PREVIEW THE CURRENT ISSUE, PLEASE VISIT OUR WEBSITE: [WWW.LIBERTYMAGAZINE.ORG](http://WWW.LIBERTYMAGAZINE.ORG)



FIDES ET LIBERTAS  
THE JOURNAL OF THE INTERNATIONAL  
RELIGIOUS LIBERTY ASSOCIATION

---

12501 Old Columbia Pike  
Silver Spring, Maryland 20904-6600, USA  
Phone: 301.680.6686 Fax: 301.680.6695  
[www.IRLA.org](http://www.IRLA.org)

John Graz, Publisher  
Barry W. Bussey, Editor  
Ganoune Diop, Assistant Editor  
Gail Banner, Managing Editor  
Lisa Clark Diller, Book Review Editor  
Natasha Pinczuk, Copy Editor  
Lindsay Sormin, Graphic Design/Layout Editor

Statements of fact in this issue of FIDES ET LIBERTAS are those of the authors as they understand the facts. The views expressed by the authors are their own and do not necessarily represent the International Religious Liberty Association. Copyright © 2011 International Religious Liberty Association. All rights reserved.

**Price US\$10.**

This periodical is indexed in the ATLA Religion Database(r), a product of the American Theological Library Association, 300 S. Wacker Dr., Suite 2100, Chicago, IL 60606, USA. email: [atla@atla.com](mailto:atla@atla.com), <http://www.atla.com>.

ISSN 1940-6924

---



## DEDICATION

---



### TO KAREL NOWAK, OUR GOOD FRIEND

“WHEN PEOPLE TALK ABOUT KAREL, CERTAIN WORDS KEEP REOCCURRING LIKE THE REFRAIN OF A GREAT SONG...”

I'm in the plane flying to Cairns. It's Thursday, August 25. Just a few days ago, Karel made this same trip. I can imagine him preparing to travel to Australia to attend the 13th IRLA Meeting of Experts held at the University of Sydney, School of Law. He knew this meeting would open new opportunities and he'd probably already thought about some articles he could publish. As Secretary General of the Association Internationale de Défense de la Liberté Religieuse and editor of its journal *Conscience et Liberté*, Karel would have been anxious to see old friends and to meet new friends.

But Karel was not there and his absence was felt deeply by each one of us.

He had decided to take a few days prior to the meeting to see Australia's barrier reef and to spend a few days in Cairns on the north coast. But he never came back.

In a few hours, I will fly back to Sydney with Karel's ashes and bags. Then when I can get all the necessary documents I will fly to Prague where his beloved wife and three children wait.

Just over a week ago, my plane from Washington arrived in Sydney at 6:15 a.m. on Friday morning, and at that moment Karel, our good friend, was still alive. He was probably enjoying the reef and the beautifully colored coral.

Then, at 5 a.m. on Saturday I received a telephone call from my wife in Washington. Karel had died while he was swimming the day before. I was utterly shocked and my first thought was to cancel our meeting. But Karel would have strongly opposed such a decision. On the contrary, he would have encouraged us to make sure that this 13th IRLA Meeting of Experts was the best yet.



He wouldn't have been disappointed. We were hosted by Professor Patrick Parkinson of the University of Sydney School of Law and the program was indeed one of the best we've ever had. The campus was beautiful; the presentations were superb. But Karel was not there.

Karel was not there but his presence was everywhere, in our thoughts and in our discussions throughout the three days of the meeting. At the opening session we observed a minute of silence and on Tuesday we held a memorial service which was attended by all the meeting participants. Over and over again, we heard how Karel was appreciated. Certain words kept reoccurring like the refrain of a great song: "kind," "competent," "wise," "easy to work with," "committed." Karel had a gentle manner in all his interactions with others. He was a professional: he knew the issues he had to deal with, but never imposed his knowledge. Rather, he made it accessible and he was always ready to help anyone who asked. His advice was always wise and thoughtful.

Karel had a special vision for his journal, *Conscience et Liberté*, and for the association he represented so well at the United Nations and in international meetings. He was fluent in three languages and was open to broad international cooperation. Our relations with him were always excellent.

Two years ago, I asked him if he would be ready to join our IRLA team and move to Silver Spring, Maryland. He declined. He thought he could serve better religious freedom and his church while working in Europe. I knew he could have done a great work with us, but I respected his choice.

And now my plane is soon to land in Cairns. Out the window I can see beaches and mountains, but images of Karel are crowding my memory. I've known him for more than 25 years. I remember him as the president of his church after the communist regime collapsed in Czechoslovakia. He was a young man facing a difficult time and I admired his quiet strength and kindness. Twelve years later, he organized the first religious liberty symposium in Prague—the city where I will be in just a few days.

What will I say to Karel's wife and family? I will say that although Karel's journey is over for now, his life was dedicated to serving God and people and he made a difference for the cause of good. Everywhere he went, he made life better for others. For as long as my journey lasts, I will keep with me his peaceful and kind presence, his wisdom and conviction. Karel believed in the resurrection when Jesus returns. I want to be there and see him again. I want to talk with him again. I want his hope to make my hope stronger.

The plane has just landed.

Goodbye, Karel, and see you again.

Dr. John Graz, IRLA Secretary General

---

# CONTENTS

---

DEDICATION

8

---

BARRY W. BUSSEY

EDITORIAL

13

---

## PART ONE: SECULARISM AND RELIGIOUS FREEDOM

CHRISTOPH ENGEL

LAW AS A PRECONDITION FOR RELIGIOUS FREEDOM

18

---

KRISTINE KALANGES

TAKING GOD SERIOUSLY: WHY RELIGION IS ESSENTIAL  
TO THE DEFENSE OF RELIGIOUS HUMAN RIGHTS

37

---

NICHOLAS P. MILLER, JD, PHD

BETWEEN SECULARISM AND RELIGIOSITY:  
AMERICA'S FOUNDING PROTESTANT PHILOSOPHY

59

---

MEINS G.S. COETSIER

EUROPE'S SECULARISM AND THE POLITICS OF THE SOUL

70

---

---

ROBERT C. BLITT  
WHITHER SECULAR BEAR: THE RUSSIAN ORTHODOX  
CHURCH'S STRENGTHENING INFLUENCE ON RUSSIA'S  
DOMESTIC AND FOREIGN POLICY  
89

---

LI-ANN THIO  
CAESAR, CONSCIENCE AND CONVERSION:  
CONSTITUTIONAL SECULARISM AND THE REGULATION OF  
RELIGIOUS PROFESSION AND PROPAGATION IN ASIAN STATES  
127

---

**PART TWO: BOOK REVIEWS**

THOMAS R. POPE  
RELIGION, THE ENLIGHTENMENT, AND THE NEW GLOBAL ORDER  
161

---

ANN M. WARNER  
CHRISTIANITY AND THE DAWNING OF A NEW  
HUMAN RIGHTS HERMENEUTIC  
170

---

ZANE YI  
RELIGION, SOLIDARITY AND HUMAN RIGHTS  
IN "A SECULAR AGE"  
178

---

---

PART THREE: REPORT OF IRLA ACTIVITIES

DR. JOHN GRAZ  
GETTING READY FOR A CHANGING WORLD  
190

---

FIDES ET LIBERTAS  
SUBMITTING MANUSCRIPTS  
196



## EDITORIAL

---

In this issue we explore the concepts of secularism and religious freedom. Western liberal democracies have struggled to find the right balance between interests of the state and religious interests of the individual. Recent political thought on the matter suggests that the individual, to be wholly free, requires a state that is unencumbered with religious sentiment. That is to say, the state is to be totally secular—not favouring one religious group, or religious thought over another. Simply put, the state is to have no interest in matters of religion. In principle, so the argument goes, the state cares only for the public safety and well being of its citizenry irrespective of the religious persuasion of the citizen. Each country has its own unique historical context and ethnic diversity (or lack of it) that results in distinctive approaches to the general sentiment of the need for religious freedom.

While the individual rights argument has much to offer it is not the whole story. The reality is much more complex. Included in that complexity are the religious communities of which the individuals are a part. Such communities not only enrich a society but through their own internal structures and traditions, provide another layer of ordering the individual's life who holds such strictures as authoritative. Further, there are the socio-economic arguments that modernization and material increase leads inevitably to less religiosity. One has to be mindful that there are no straight jacket explanations for secularity and its effects on religious freedom. In our quest for understanding this phenomenon we take time to hear the conversation of those who explore the boundaries of this fascinating topic.

In this issue we join the scholarly conversation and consider some theoretical and practical dimensions that surround secularism and religious freedom. On tap first we present Christoph Engel's piece arguing that law is a precondition for religious freedom. The enshrining of religious protection in a constitution is a must according to Engel, in order that religious freedom becomes practical. Such protection allows religious communities to flourish without fear of state intrusion in their practise. The state benefits because society is blessed by the good works of religious adherents; their otherworldliness makes them less inclined to corruption because of the eternal consequences; and because of this they have the willingness to face down state brutality. However, while both benefit both also see such protection as a threat. Religions, argues Engel, fear that constitutional protection implies secularism. The threat to the state is that religions are willing to forgo material benefits for a transcendental cause—this limits state control. The dilemma is resolved by the recogni-



tion of law as a practical “social technology” that resolves conflict. “Pragmatic law does not stand outside the battles between competing religions, and between religion and the state. Pragmatic law is policy-making in the guise of legislation and adjudication.”

We move then to Kristine Kalanges work on why religion is essential to defending religious human rights. Whenever religious freedom is violated, she argues, then “almost invariably” so are other rights. As I read her I could not but wonder if religious freedom is much like the “canary in the mine shaft.” The problem is this, “if religion is an important source of international legal norms, if globalization means that religious and value homogeneity can no longer be taken for granted, and if the global resurgence of religion in part represents a project of self-definition by non-Western countries, then variation among the religious traditions (and legal-political cultures) that dominate Western and non-Western states suggests a fundamental challenge to the universalizability of the principles upon which international human rights law is based.” For Kalanges, the current models of religious pluralism fail to provide an answer. Muslim reformers, she maintains, are essential to the defense of religious human rights in Muslim states just as the Judeo-Christian principles will be necessary for the defense of religious human rights in the West.

Nicholas Miller has been prescient in reminding us of the prominent role that the Protestant experience had in laying the foundation for the American experience of religious freedom. “It was not religion versus secularism, but rather one kind of medieval-like church/state arrangements versus various kinds of “enlightened” ideologies that promoted the idea of a state that was neutral in matters of religion.” Amongst the “enlightened” were those who sought a separation of church and state that recognized different “spheres of sovereignty.” Miller seeks to show that “secularism does not need to mean anti-religious.” In his presentation of the ideas of Samuel Pufendorf, John Locke and Pierre Bayle, he argues that it was the thinking of John Locke that was persuasive to the founders of the American republic. Church and state had distinctive roles—the church to protect the individual rights both as a member of the spiritual world and as a citizen of the temporal world. The move toward the American concept was the result of a religious view and not simply the non-religious “Enlightenment” view. The point is “that a “secular” version of government that has a healthy and robust freedom of religion can exist in a highly religious community.”

We then move over to Europe with Meins Coetsier’s piece on Europe’s secularism. Unlike the early American experience which, as noted by Miller, had a distinctly religious element—Europe is “challenged by radical atheism.” Coetsier fears the removal of the Judeo-Christian heritage. He sees it as a sign of Europe’s degradation



and a “need of finding restoration of an open conversation with God, and a free dialogue between man and man.” “The solution to religious conflict or to major social, cultural and economic problems is not established by ‘scapegoating’... but a ‘politics of the soul,’ that is *politike episteme* or understanding of how to live in society, which brings justice to all people.” There is a need to be open “to the pull of the Beyond” beyond “one’s present horizon of knowledge, of religious and ethical orientation towards the divine.” “[W]e confront our fears and ignorance and allow ourselves to be moved by a genuine desire for love and truth, for a relationship with the ‘Eternal Thou.’ This is the politics of the soul.”

From the politics of the soul we are treated with an in-depth look into modern Russia. In Russia, according to Robert Blitt, the concept of a secular state is well established in the constitution and other statements of law. However, in practise, the legal definition holds little sway. Increasingly, the Russian government has laid aside its secular legal requirements and adopted favouritism toward the Russian Orthodox Church. Blitt paints a dark picture of the future. The government endorsement of “spiritual values,” he maintains, is seen as a means for national security and Russian identity. The irony is that there is a risk “of bringing about a return of the subordination of the Russian Orthodox faith to the Kremlin’s political diktats.”

From Russia we move to Asia with another great piece by Li-ann Thio who “examines the state’s role in regulating religious propagation within Asian multi-religious secular democracies where religious conversions are politically sensitive and raise issues of national identity, communal integrity and ‘public order’ through laws pertaining to apostasy, the maintenance of religious harmony and explicit anti-propagation laws.” She argues that there is a “close inter-relationship between religious propagation and the right to change one’s religion, and the quality of constitutional secularism.” Focusing on India, Malaysia and Singapore Thio presents the contextual complexities that are faced by these three multi-religious and multi-ethnic former British colonies that have written constitutions purporting to protect religious propagation. She concludes that “an accommodative form of agnostic rather than atheistic secularism best sustains the importance and legitimacy of sharing religious views.”

Our book reviews have been enhanced greatly under the leadership of Dr. Lisa Clark Diller who is providing us with three great reads by Thomas R. Pope, Ann M. Warner, and Zane Yi. We have as a policy with *Fides* that our book reviews be more than a simple presentation of the synopsis of the book under review but that the reviewer engage with the authors.

There are others who need to be thanked for their dedication in making this year’s issue a success. Natasha Pinczuk for her outstanding work as our copy editor,



and our ever patient and talented Lindsay Sormin for her graphic design and layout. Gail Banner is thanked for her steady hand and guidance as we got the manuscript to our printer. Our peer reviewers comments were most helpful as we worked on the exciting pieces in this volume.

Finally, I make a note about our dedication. Karel Nowak was a great friend of the IRLA—we are going to miss his wisdom and his assistance on *Fides et Libertas*. Karel was to be one of our peer reviewers this year. Unfortunately he did not get to serve because of his untimely passing. We honour him in this issue for his many years of dedicated service and deep commitment to the cause of religious freedom.

Barry W. Bussey  
Casalaba  
Trent Hills, Ontario  
Canada  
November 18, 2011

# FIDES ET LIBERTAS



---

PART ONE:  
SECULARISM AND  
RELIGIOUS FREEDOM

---



# LAW AS A PRECONDITION FOR RELIGIOUS FREEDOM

CHRISTOPH ENGEL<sup>1</sup>

## ABSTRACT

Throughout history, people have suffered for the sake of their religion. Religious organisations have been forbidden or governments have tightly controlled them. The constitutional protection of freedom of religion is a necessity. In a religiously pluralistic world, granting the guarantee is also in the state's best interest. Yet religions have been hesitant to embrace the guarantee. It implies secularism. Religious freedom is balanced against other freedoms, and against legitimate state interests. Government is faced with social forces that are grounded in eternity and that cannot be proven to be wrong. Seemingly the constitutional protection is a threatening for religions and the state as it is beneficial. Yet the essentially pragmatic nature of law overcomes the tragic dilemma – albeit only at the price of acknowledging that jurisprudence is policy-making.

## I. THE ISSUE

Religion is universal. Everywhere in the world, people believe that there exist forces they cannot see with their eyes, and that even science cannot make visible for them. They believe that these forces matter for their lives, be it today or after their physical existence will have come to an end. Usually they even believe that these unintelligible forces command goods or evils that have higher value than anything money can buy, political power can impose, or attachment can bestow. Yet this universal human trait has played itself out very differently across time and space. Some religions believe there is one God. Others believe there are many gods. Yet others do not personify the supreme forces at all. For some religions, life after death is the supreme goal. In others, not being forced into reincarnation is bliss. Some religions care about saving the souls of those who have not had the privilege of meeting God. Others do not feel the urge to spread their mission. The list of differences is at least as long as the number of religions. And there are sceptics. While of course

<sup>1</sup> Christoph Engel, (First State Exam in Law, Tübingen, 1981; Second State Exam in Law, Hamburg, 1987; Dr. juris, Tübingen, 1988; Habilitation, Hamburg, 1992), is the Director at Max-Planck-Institute for Research on Collective Goods, Bonn, Germany and a law professor in the Faculty of Law and Economics (Rechts- und Staatswissenschaftliche Fakultät), University of Bonn, Germany.

This paper has originally been written on invitation by the Pontifical Academy for the Social Sciences. I am grateful to President Professor Mary Ann Glendon for permission to submit the paper to *Fides et Libertas*. Helpful comments by Felix Bierbrauer and Stefan Magen are gratefully acknowledged.



nobody is able to prove that religion is superstition, the existence of religion, or the correctness of the beliefs on which a specific religion is grounded, cannot be proven either. By its very nature, religion defies human epistemic abilities. Sceptics go on: and therefore I ignore it; or even: and therefore it should be ignored.

Since from the perspective of a religious person being in line with the commands of one's religion is of the utmost importance, throughout history religious leaders have sided with worldly powers. In the name of religion, wars have been declared, countries have been depopulated, those holding a different belief have been prosecuted, freedom of expression has been stifled. It has taken religious leaders centuries to adopt a more tolerant attitude. Instead of combating competing religions, and of forcing pagans to join them, some now aim at organising peaceful coexistence. While historically, the main driving force behind this shift in attitude has been the experience of all too many cruelties, globalisation has added a new facet. The world's economy remunerates physical by social mobility. Those who move to the thriving centres stand a much better chance to secure a prosperous life for themselves and their families. Yet the ensuing migration engenders religious pluralism in many societies that used to be religiously homogeneous.

Peaceful coexistence implies freedom of religion.<sup>2</sup> While one religion may well deeply believe all or some other religions to be fatally wrong, it still accepts that other religions think differently. It may try to persuade the adherents of different religions to convert. But it will not force them to give in to what this one religion, from an internal perspective, of course believes to be the truth. This attitude of tolerance could follow from insight. It might even be backed up by religious doctrine. Yet insight is elusive, and different religions are very differently prepared to build tolerance into their set of doctrines. It was a horrendous religious war that prompted Thomas Hobbes to proclaim absolute state power.<sup>3</sup> The state is able to guarantee religious freedom precisely because it musters the power to coerce. It may not only oblige but even effectively force reluctant religious leaders and fanatic followers to play by the rules of peaceful coexistence. This is not only important with respect to what the literature tends to call "strong religions".<sup>4</sup> If the state credibly commits to combating aggression between religions, it also creates a level playing field. Religions that would not intrinsically be aggressive have no longer reason to nonetheless act aggressively, just because they are afraid otherwise their theological competitors will invade their spheres.

For Thomas Hobbes, containing the war of all against all was so important that he postulated the moral obligation to absolutely transfer original individual liberty to a worldly ruler. Unsurprisingly, the ensuing historical experiments amply extolled

<sup>2</sup> Stefan Huster, *Die ethische Neutralität des Staates. Eine liberale Interpretation der Verfassung* (2002); Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 *Cardozo Law Review*, 2369-2382 2371 (2009).

<sup>3</sup> Thomas Hobbes, *Leviathan*, or, *The matter, forme, & power of a common-wealth ecclesiasticall and civill* (1651).

<sup>4</sup> See e.g. Andrés Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 *Cardozo Law Review*, 2401-2429 2403 and 2421 (2009).



the downside of the solution. Heads of state abused their powers lavishly. Quite a few of them were not enlightened, but stupid or reckless. Even religious wars did not disappear. Religious divergence served as a pretext for countries invading each other, in the interest of enlarging their territories. It once more took centuries before sovereignty was constitutionalised. Constitutional states rest on the idea of sovereignty. Yet the exercise of sovereign powers is bounded by a rich institutional arrangement, the law. The law sets substantive and procedural limits. Those in power may not overstep these limits. When they exercise sovereign powers, they have to obey the constitutional rules for making and for applying rules.

The constitutional state is not only in a position to enforce religious tolerance without the risk of itself deteriorating into tyranny. Once all governance is constitutionally embedded, the state also disposes of much more elegant technologies for managing a religiously pluralistic society. These subtle tools make the state sensitive to historic context. Interventions may keep the balance between determination and predictability on the one hand, and the maximum respect for the individual religion to which they are targeted on the other hand. The state may use the same technologies for solving an equally pressing, related problem: the peaceful coexistence between state and religion(s).

In the title of this paper, the term religious freedom is used to describe social reality. It characterises a society in which everyone is in principle free to hold the religious beliefs of their choosing, and to live their worldly lives in line with the commands of their religions. To make this possible, despite a plurality of religions, and in deference to the legitimate needs of the state, the state uses its sovereign powers to manage this plurality. Once the relationship between competing religions, and the relationship between religion and the state, are governed by law, religious freedom has a second meaning. This second meaning is doctrinal. The Constitution obliges government to act in a way that makes peaceful coexistence practical. To that end the Constitution guarantees freedom of religion as a fundamental right. Consequently, a more complete version of the title of this paper would read: "The Constitutional Protection of Freedom of Religion as a Precondition for Making Religious Freedom Practical".

In the following, I speak of religious freedom when I mean social reality, and of freedom of religion when I mean the constitutional guarantee. I then read the constitutional guarantee broadly. I mean it to encompass any constitutional protection of religiously motivated action, and against any religiously motivated exercise of sovereign powers, even if concrete legal orders rather bring the respective action under the rubric of freedom of life and limb, of property, of immigration and emigration, of profession, or whichever constitutionally protected aspect of life may be affected.

My way of presenting the issue implicitly votes again two alternatives. The constitution of a country may more or less intensely side with one specific religion. This is of course the historically widespread model of a state religion. In its extreme form,



as in the peace of Augsburg, it is built on the principle *cuius regio, eius religio*. Under that principle, freedom of religion is only granted to heads of state. If the Prince has chosen to be Protestant, his Catholic subjects must choose between leaving the country and converting. Today, some Islamic countries come close to this radical version of a state religion. Milder versions survive in Western democracies. A well-known example is England where one has to be Anglican to be Prime Minister. By contrast, this paper starts from the assumption that the Constitution does not privilege any religion. Doctrinally, this is the state of affairs in most democracies, and under human rights treaties. And practically, constitutional neutrality is a precondition for managing a religiously diverse society.

This paper also votes against a more recent competing concept. This concept accuses the “enlightenment project” of being hidden ideology.<sup>5</sup> This claim is based on post-modern philosophy. It maintains that the distinction between faith and reason itself requires a leap of faith. In the name of “the religion of secularism”, constitutional law unnecessarily tramps on the exercise of religious freedom. I have two counterarguments, one conceptual and one pragmatic. While I am willing to grant that our understanding of reality is bound to be constructed,<sup>6</sup> this does not mute objectivity as a regulative idea. Even if we know that we will never completely achieve it, it makes a difference whether we strive for intersubjectivity or not. My more important reason is, however, pragmatic. We need the neutral, disinterested, and at least purportedly objective vantage point of constitutionalised law to make a religiously plural society viable.

Religion is as old as humanity. There has never been just one religion. Individual religions have sided with worldly forces to combat competing religions. And worldly authorities have fought religions as competing sources of power. Centuries ago, treaties and constitutions have guaranteed freedom of religion. I can therefore certainly not claim my research question to be new. I am also self-consciously confessing that I am very likely to have missed some earlier voices. I try to make two contributions. I first aim at finding a concise conceptual language for explaining why freedom of religion poses a dilemma: safeguarding this freedom is a necessity: for religions, and for the state (II). Yet at the same time, freedom of religion also is a threat: again for religions, and for the state (III). While theory helps understand the character of the dilemma, I try to show that theory cannot offer a closed solution. Against this backdrop, my second contribution is to show why only legal pragmatism is able to mitigate the dilemma, and how law becomes a precondition for religious freedom (IV).

<sup>5</sup> Karl-Heinz Ladeur, *The Myth of the Neutral State and the Individualization of Religion. The Relationship Between State and Religion in the Face of Fundamentalism*, 30 *Cardozo Law Review*, 2445-2471 (2009); Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 *Cardozo Law Review*, 2333-2368 (2009) but see Frances Raday, *Secular Constitutionalism Vindicated*, 30 *Cardozo Law Review*, 2769-2798 (2009).

<sup>6</sup> Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality. A Treatise in the Sociology of Knowledge* (1967); Michael Thompson, Richard Ellis and Aaron B. Wildavsky, *Cultural Theory* (1990).



## II. FREEDOM OF RELIGION AS A NECESSITY

### 1. NECESSITY FOR RELIGIONS

Freedom of religion, in its doctrinal meaning, i.e. the constitutional protection of holding and exercising one's freely chosen religion, first and foremost protects the individual believer. They invoke the constitutional guarantee when the state prevents them from some course of action which they claim is religiously mandated.<sup>7</sup> Such prohibition may result from the state's desire to contain religious conflict. An example would be the interdiction for a procession to pass through a residential area mainly populated by militant members of a competing church. Or the prohibition may be grounded in a regulatory purpose that, at least at face value, has nothing to do with religion. An example would be the obligation for Sikhs to wear a helmet when riding a motorcycle.

The believer may also invoke freedom of religion since she feels discriminated against due to her religion.<sup>8</sup> Again, discrimination may result from the state directly privileging one religion. In modern constitutional states, the privilege is frequently couched in the statement that the privilege is not granted to a religion, but to national "culture".<sup>9</sup> Yet discrimination may also result from the application of rules that do not directly target religion. For instance, Native Americans complain that they are prosecuted for the sacramental use of peyote, while the ritual use of wine was allowed for Catholics and Jews during Prohibition.<sup>10</sup>

All of this certainly matters. Yet these are rather minor conflicts. Bringing them under the purview of the Constitution is certainly conducive to making religious freedom practical. But one could hardly claim that such protection is a necessity. Happily enough, these days in civilised democracies, those conflicts that originally made the constitutional protection paramount are not real. But one need not go far back in history to find vital conflicts. Sadly enough, they can even be found in these days if only one broadens geographical scope. Most often, conflicts become vital once the state uses its sovereign powers to combat religion, be that in the interest of a state religion, or in the interest of atheism, as in the former communist countries. Consequently, conflicts have been particularly acute when the majority religion has sided with the state in its fight against religious minorities.

Let me recall a few of the ominous examples from my own country. During the

<sup>7</sup> Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 Emory International Law Review, 841-888 (2005); Claus Dieter Classen, *Religionsrecht* (2006); More from Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 Cardozo Law Review, 2369-2382 (2009); Axel von Campenhausen, *Religionsfreiheit*, in *Handbuch des Staatsrechts* (Josef Isensee and Paul Kirchhof, 2009).

<sup>8</sup> Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 Emory International Law Review, 841-888 (2005); Claus Dieter Classen, *Religionsrecht* (2006); More from Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 Cardozo Law Review, 2369-2382 (2009); Axel von Campenhausen, *Religionsfreiheit*, in *Handbuch des Staatsrechts* (Josef Isensee and Paul Kirchhof, 2009).

<sup>9</sup> Gerd Roellecke, *Religion-Recht-Kultur und die Eigenwilligkeit der Systeme* (2007).

<sup>10</sup> Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 Cardozo Law Review, 2333-2368 2353 (2009).



Nazi regime, the Jews were almost extinguished, purportedly because of their race, but also because of their religion. Lamberti Church in Münster to these days still boasts three iron cages where the corpses of the leaders of the Anabaptist movement had been displayed after public execution. The Archbishop of Salzburg forced thousands of his subjects who had clandestinely remained Protestants to leave the country within a couple of days. Many of them were permanently separated from their children. In the GDR, those who confessed their membership in a church stood little chance to receive university education, and many of them went to jail.

Why were so many prepared to endure so much for the sake of their religions? Why does religion make so vulnerable? Certainly, the general utilitarian argument may be featured in: people seem to have a preference for a religious lifestyle. Everything else held constant, people holding this preference are better off if neither the state nor a competing religion prevent them from living in line with the commands of their respective religions.<sup>11</sup> Moreover, religions offer side benefits, like social solidarity, psychological comfort, and a better way of coping with the unknown and death.<sup>12</sup> Yet none of this would suffice to explain martyrdom, or the willingness to sacrifice all professional aspirations.

Such observations point to the fact that religious freedom is not an ordinary good. There are three reasons for this. For a believer, leading a religious life has extreme value. Believers know that they do not know. They must take faith for knowledge. Once they have made the leap of faith, they become tied to their choice. Finally, many religions threaten heretics with worldly sanctions.

The first of the three reasons carries most weight. To understand how religious freedom is special, it is helpful to use the utilitarian language of economics. Economic theory starts from preferences. In the standard model, all is relative. The model assumes desires to be infinite. If I can have another piece of cake, another house, another education for free, I want it. The problem to be understood is how I choose if I cannot have everything, for instance since my wealth is limited. My preferences tell me how many units of one good I am willing to trade for a unit of another. Apparently, for many believers the freedom to live a religious life does not fit this model. They are not willing to make tradeoffs. They do what their religion asks them to do, whatever the cost.

There are several ways of capturing this behaviour within the economic model. One stays closest to the standard framework if one assumes standard preferences, but for the fact that the utility derived from a religious life is infinite. One may also model being in line with one's religion on the one hand and worldly goods on the other as strict complements. For religious individuals, worldly goods only have value conjointly with leading a religious life. Another modelling alternative is lexicographic preferences. Actors holding such preferences in principle engage in

<sup>11</sup> Brian Leiter, *Why Tolerate Religion?*, 25 Constitutional Commentary, 1-27 7 (2008).

<sup>12</sup> Frances Raday, *Secular Constitutionalism Vindicated*, 30 Cardozo Law Review, 2769-2798 2776 (2009).



the same tradeoffs between ordinary goods as do standard agents. Yet they consider these trade-offs only if they first meet the minimum standard of a religious life their religion has set for them.

One may also use non-economic language. Religions issue categorical demands on action, demands that must be satisfied, no matter what the believer desires otherwise, and no matter what incentives or disincentives the world offers.<sup>13</sup> Due to this, religious conflicts become “intractable”.<sup>14</sup> Religion not only provides the individual with well-being, it provides her with an identity.<sup>15</sup> Identity is a precondition for the ability to choose.<sup>16</sup>

Why are religious values so important? Because they are transcendental. For a religious person, eternity is at stake. One may also say: for a religious person, obeying the commands of her religion is a precondition for dignity.<sup>17</sup> To this, religious doctrine frequently adds transcendental incentives. Those who live a religious life will be rewarded in Paradise. Those who commit sins at least have to endure the purgatory, if they do not directly go to hell. Not so rarely, religious doctrine even holds those living today responsible for the transcendental fate of their ancestors. If only they pray enough, the ancestors can be saved, the Mormons teach. Yet other religions even expect their members to simply save the world.<sup>18</sup>

*Credo quia absurdum*, as Tertullian is said to have taught. A religious person may recognise God in any sunbeam. But those adhering to a different religion, or not religious at all, will not accept this as proof. From the very fact that religion is transcendental it follows that the superiority of one religion over another cannot be proven by scientific means. For the same reason, no religious person can prove that a command of her religion is vital. Religion requires faith.<sup>19</sup> This increases vulnerability for two reasons. The first reason is a corollary of the fact that eternity is at stake. Therefore potentially mistakes are fatal.<sup>20</sup> The believer has to navigate uncertainty where certainty would be of the utmost importance. All the more she will stick to her conviction once she has made the leap of faith. Moreover since proof is out of the question, government stands no chance to convince the believer that the risk of compromising on a command of her religion is minor.

Religions do not only threaten with transcendental sanctions. They also inflict tangible punishment. They do not longer accept a believer to religious services, they

<sup>13</sup> Brian Leiter, *Why Tolerate Religion?*, 25 *Constitutional Commentary*, 1-27 15 (2008).

<sup>14</sup> Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 *Cardozo Law Review*, 2333-2368 2354 (2009).

<sup>15</sup> John Witte, *Religion and the American Constitutional Experiment*. Essential Rights and Liberties (2000).

<sup>16</sup> Karl-Heinz Ladeur, *The Myth of the Neutral State and the Individualization of Religion. The Relationship Between State and Religion in the Face of Fundamentalism*, 30 *Cardozo Law Review*, 2445-2471 2463 (2009).

<sup>17</sup> Matthias Mahlmann, *Freedom and Faith. Foundations of Freedom of Religion*, 30 *Cardozo Law Review*, 2473-2493 2474 (2009).

<sup>18</sup> András Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 *Cardozo Law Review*, 2401-2429 2421 (2009).

<sup>19</sup> More from Timothy Macklem, *Faith as a Secular Value*, 45 *McGill Law Journal*, 1-63 (2000).

<sup>20</sup> Cf. Brian Leiter, *Why Tolerate Religion?*, 25 *Constitutional Commentary*, 1-27 15 (2008).



prevent her from holding religious offices, or they even expel her. Religions also exploit private and public law for the purpose. They for instance fire an employee if she has aborted her child. Some religions even sanction believers for the mere fact that they have been soft on the violation of religious commands by others.<sup>21</sup>

Not all religions are organised in churches. But all religions are supra-individual. Religions are social, not individual phenomena. This is not only an empirical fact. It also follows from the impossibility of proving religious convictions to be true. Believers therefore feel the urge of relieving the burden of uncertainty by entrusting the formulation of religious commands, and the interpretation of the signs that gods are sending them, to those holding an office, having better education, or otherwise having superior access to the transcendental.<sup>22</sup>

Organisations are much better regulatory targets than individuals. Government frequently exploits this fact. It for instance obliges a dozen of car producers to fit catalytic converters, rather than obliging millions of car owners to adopt a more environmentally friendly driving style. By the same token, a few tightly organised churches are much easier to monitor than millions of individual church members. Organisations are also more vulnerable. Ultimately, government can only break the individual's will by killing her. Even in jail she can go on proselyting. History provides ample proof of individuals who have indeed been willing to risk their lives for the sake of eternity. By contrast, for an organisation to function smoothly, people must meet, and resources must be available. It is relatively easy for government to prevent people from meeting, and resources from being used.

## 2. NECESSITY FOR THE STATE

“Religion is opium for the people”.<sup>23</sup> Karl Marx had not meant this as a piece of advice to government. Yet the explanation he gave is utilitarian. “Religion is the sigh of the oppressed creature, the heart of a heartless world and the soul of the soulless conditions”.<sup>24</sup> If there is the promise of a better life after death, people are willing to endure and to risk more. This may help government if it is unable to alleviate the burden, or if it even wants to knowingly impose hardship, for instance if it declares war.

Among German lawyers, a more civilised, and a deeper version of the dictum is famous. “The liberal, secular state is built on conditions it cannot guarantee itself”.<sup>25</sup> Constitutional lawyers have built a whole doctrine of “the preconditions of the Con-

<sup>21</sup> Cf. Daniel G. Arce and Todd Sandler, *An Evolutionary Game Approach to Fundamentalism and Conflict*, 159 *Journal of Institutional and Theoretical Economics*, 132-154 (2003).

<sup>22</sup> Cf. Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 *Cardozo Law Review*, 2369-2382 2373 and 2376 (2009).

<sup>23</sup> Karl Marx, *Zur Kritik der Hegel'schen Rechts-Philosophie*, 1 *Deutsch-Französische Jahrbücher*, 71-85 71 (1844).

<sup>24</sup> *ibid.* .

<sup>25</sup> Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* 112 (1991).



stitution” (*Verfassungsvoraussetzungen*) on this one sentence.<sup>26</sup> Religion generates the culture of mutual respect that is a precondition for democratic government. Critically, the constitutional state lacks the mandate to create this culture itself. The state may intervene if words or actions can be shown to be dangerous. But the state is not entitled to educate the electorate.<sup>27</sup>

Freedom of religion also complements governmental assistance to the needy. Religious organisations are not only cheaper, and willing to help when public officials refuse to become active. More importantly, religious assistance is not just a service. For the recipients it matters that help has a soul.<sup>28</sup> Freedom of religion further complements freedom of expression. Religiously motivated speech enriches the marketplace of ideas.<sup>29</sup> Religious people are less easily tempted by worldly perks and therefore less vulnerable to corruption. Their faith even empowers them to resist fatal threat.<sup>30</sup> This explains why deeply religious people were among the few who resisted totalitarian government, be that the Nazi state (the *Bekennende Kirche*) or the communist state in the GDR.

Eventually the reverse side of this medal is even more compelling. Since for believers eternity is at stake, religious organisations may credibly threaten government with vigorous resistance against interventions that curtail what the religion considers to be essential. Sadly the US have seen devoutly religious persons bombing abortion clinics and flying airplanes into highrises.<sup>31</sup> In the technical language of economics: religions command high nuisance value. It is in the best interest of the state to accommodate, and to establish a regime of peaceful coexistence: among each religion and the state, and between religions.

### III. FREEDOM OF RELIGION AS A THREAT

#### 1. THREAT FOR RELIGIONS

The attitude of most religions towards freedom of religion as a constitutional guarantee is ambivalent at best. Over centuries, even the Christian churches have seen religious freedom as a threat, rather than a benefit.<sup>32</sup> In the Catholic church, this has only changed with the second Vatican Council.<sup>33</sup> In the Protestant churches, change was more gradual but also basically not before the middle of the 20th century.<sup>34</sup> In Israel, the religious lobby has seen to it that freedom of religion is not

<sup>26</sup> See only Veröffentlichungen der Vereinigung der Staatsrechtslehrer 2009.

<sup>27</sup> Jörn Lüdemann, *Edukatatorisches Staatshandeln* (2004).

<sup>28</sup> Adam B. Seligman, *Living Together Differently*, 30 *Cardozo Law Review*, 2881-2896 2881 (2009).

<sup>29</sup> John Stuart Mill, *On Liberty* (1859).

<sup>30</sup> Brian Leiter, *Why Tolerate Religion?*, 25 *Constitutional Commentary*, 1-27 16 (2008).

<sup>31</sup> *ibid.* .

<sup>32</sup> Axel von Campenhausen, *Religionsfreiheit*, in *Handbuch des Staatsrechts* (Josef Isensee and Paul Kirchhof, 2009).

<sup>33</sup> (*Dignitatis Humanae*, 1966).

<sup>34</sup> More from Axel von Campenhausen, *Religionsfreiheit*, in *Handbuch des Staatsrechts* 517 (Josef Isensee and Paul Kirchhof, 2009).



constitutionally recognised to these days.<sup>35</sup>

This hesitance has a reason. If the constitution guarantees freedom of religion, this implies secularism. State action may not be grounded in the commands of any one religion.<sup>36</sup> Through the very guarantee, government is obliged to stay neutral between religions. The law starts from the assumption that there are different interpretations of the transcendental. For the purposes of law, no religion is unique or absolute. The law does not even assume that the set of religions is finite. If a new movement originates and claims to be a religion, this claim is to be assessed against an abstract definition of religiosity. Once freedom of religion is constitutionally protected, believers are not only legally obliged to accept a plurality of eternities as a matter of fact. Government is also prevented from openly siding with one religion. This has for instance led to the prohibition of prayer in US schools<sup>37</sup> and to the prohibition of hanging the crucifix in German classrooms.<sup>38</sup>

The doctrine of constitutional guarantees is not the same in all legal orders. In the German and in the European traditions, no fundamental right is absolute. Even if the provision does not explicitly have limitations, these limitations result from the fact that the Constitution protects a whole set of freedoms, and that fundamental freedoms have to be harmonised with competing value judgements of the Constitution.<sup>39</sup> Therefore other normative goals may be pitted against freedom of religion. The legislator may be prevented from turning religious belief into legal command, even if a large majority deems this desirable. A current case in point is the legalisation of homosexuality.<sup>40</sup>

## 2. THREAT FOR THE STATE

Protecting freedom of religion is not without risk for the state either. In so doing, the constitutional state faces the paradox of tolerance.<sup>41</sup> It grants a protected sphere to individuals and organisations that may not be inclined to reward the protection by being tolerant themselves with competing religions or with the state. Potentially religious freedom threatens the authority of the law.<sup>42</sup> The problem is particularly

<sup>35</sup> Frances Raday, *Secular Constitutionalism Vindicated*, 30 *Cardozo Law Review*, 2769-2798 2771 (2009).

<sup>36</sup> Herbert Krüger, *Allgemeine Staatslehre* 178 ff. (1964).

<sup>37</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>38</sup> *Crucifix*, BVerfGE 95,1 (1995).

<sup>39</sup> This concept of “practical concordance” goes back to Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (1995).

<sup>40</sup> Jennifer Gerardo Brown, *Peacemaking in the Culture War between Gay Rights and Religious Liberty*, 95 *Iowa Law Review*, 747-819 (2010); Shannon Gilreath, *Not a Moral Issue. Same-Sex Marriage and Religious Liberty*, *University of Illinois Law Review*, 205-223 (2010); Laura K. Klein, *Rights Clash. How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 *Georgetown Law Journal*, 505-535 (2010).

<sup>41</sup> Matthias Mahlmann, *Freedom and Faith. Foundations of Freedom of Religion*, 30 *Cardozo Law Review*, 2473-2493 2475 (2009).

<sup>42</sup> Ernst Joachim Mestmäcker, *Der gestrandete Leviathan. Über Gedanken- und Religionsfreiheit in der bürgerlichen Gesellschaft*, in *Festschrift Dieter Reuter* (Michael Martinek, Peter Rawert and Birgit Weitemyer, 2010).



acute with what has been called “strong religions”<sup>43</sup> like fundamentalist movements and sects.<sup>44</sup> Devoutly religious individuals have not only resisted the Nazi regime, they have also brought terrorism to Western democracies.<sup>45</sup> The European Court of Human Rights has acknowledged the problem and allowed Turkey to dissolve a political party since it aimed at abolishing the constitutional protection of secularism<sup>46</sup> and it has allowed the German government to issue warnings against the brainwashing methods applied by the Osho sect.<sup>47</sup> By contrast, if a religion itself acknowledges a plurality of transcendental powers, like the religions prevalent in ancient Rome, the conflict is particularly mild.

Freedom of religion is a threat for the state for the very same reasons that make this freedom valuable, and even necessary, for religion and the state itself. Religious goods are transcendental. The correctness of religious beliefs and commands defies proof. Many religions expect believers to bring faith to pagans and to save the souls of those who are not feeling the urge themselves.

Again the transcendental character of religions carries most weight. For the individual believer, eternity is at stake. Living in line with the commands of her religion has infinite value. Worldly goods are only considered once the threshold of a life without sin has been passed. Worldly goods are worth nothing if religious commands are violated. From the internal perspective of religious belief systems, the individual believer is not entitled to compromise, whatever non-religious reasons the state brings forward for limiting the exercise of religious freedom. The state lacks jurisdiction for the modification of religious doctrine. Religions systematically blur a line that is essential for the constitutional state. Religions are not content with legality. They ask for morality. From the perspective of her faith, if she gives in to governmental pressure, a religious person ventures transcendental sanctions. Her religious identity is in peril. Not so rarely, religious organisations may also inflict earthly harm.

The state is not only likely to provoke religious resistance if it prevents believers and religious organisations from specific courses of action. By the very fact of protecting freedom of religion, the constitution adopts an external perspective on religion.<sup>48</sup> It inevitably treats religions as historically contingent social phenomena. For a true believer, this very thought is heretical.

For the constitutional state, the threat is exacerbated by the fact that religious beliefs and commands defy scientific proof.<sup>49</sup> Therefore the state cannot assuage anxieties of religious addressees by showing that the legal expectation is not at vari-

<sup>43</sup> Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 *Cardozo Law Review*, 2333-2368 2347 (2009); András Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 *Cardozo Law Review*, 2401-2429 2403 (2009).

<sup>44</sup> James T. Richardson, *Regulating Religion. Case Studies from Around the Globe* (2004).

<sup>45</sup> Brian Leiter, *Why Tolerate Religion?*, 25 *Constitutional Commentary*, 1-27 16 (2008).

<sup>46</sup> *Refah Partisi v. Turkey*, 37 *Eur.H.R.Rep* 1, 33 (2003).

<sup>47</sup> *Leela Förderkreis v. Germany*, app. 58911/00 (2008).

<sup>48</sup> Cf. for the parallel question for law Herbert Lionel Adolphus Hart, *The Concept of Law* (1961).

<sup>49</sup> Brian Leiter, *Why Tolerate Religion?*, 25 *Constitutional Commentary*, 1-27 15 and 25 (2008).



ance with religious commands, or that the sacrifice is minor.

Many religions are missionary. Believers have the duty, or they are at least encouraged and rewarded, if they bring faith to those who have not had the privilege of awakening. Many religions are also not content with enunciating ethical precepts. They want to effectively ban unethical behaviour, in their members, but also in non-members. The unborn life shall be protected, the human genome shall not be manipulated, marriages shall not be dissolved. On all of these issues, in most modern democracies substantial fractions of the population think differently. If constitutional protection gives religions room for thriving, this is likely to also heat religiously motivated conflict. The constitutional guarantee potentially makes it more difficult for government to hold society together.

In one way or other, all religions are social. The individual believer's insight in and access to the supreme transcendental forces is facilitated, moderated or even mediated by more or less formalised organisations. These organisations provide believers with the authoritative reading of holy texts, with rules and ceremonies for membership, with a religious community that generates or heightens their sense of identity, and with a host of more mundane services. From the perspective of state constitutions, the most important feature of religious organisation is governance. These organisations do not only give individual believers assistance. They aim at governing their lives. From the outside perspective of law, this is an exercise of power. Fundamental freedoms do not require that they be exercised in a power free vacuum. In this respect, the constitution even limits internal sovereignty. Yet the right to govern others is necessarily in conflict with the constitutionally protected freedom of addressees. The freedom of religious organisations to guide their members inevitably conflicts with the freedom of these same members to live the religious life they have been choosing themselves. It may also conflict with the desire of democratically elected government to govern these same lives. For both reasons, for a constitutional state granting autonomy is a greater risk than just granting individual freedom.<sup>50</sup>

Finally, religious freedom is not only a precondition for a viable democracy.<sup>51</sup> It at the same time is also a risk for democracy.<sup>52</sup> In their internal doctrines, religions need not be, and indeed often are not, individualistic. The supreme goal of religions is not the individual's autonomy but her fate in eternity, maybe also the victory of this religion over erroneous competitors. Religions may adhere to a concept of human dignity. But for them dignity is indirectly defined, by the individual's relationship with the transcendental, not directly by attaining self-selected goals and aims. Religions may not value liberty at all. If they do, they do not define liberty the same

<sup>50</sup> More from Christoph Engel, *Autonomie und Freiheit*, in *Handbuch der Grundrechte II* (Detlef Merten and Hans-Jürgen Papier, 2004).

<sup>51</sup> See again Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit*. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte 112 (1991).

<sup>52</sup> Christoph Möllers, *Religiöse Freiheit als Gefahr?*, 68 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 47-87 84: "Gefährdungen der demokratischen Gemeinschaftsbildung" (2009).



way as democracies. For them, liberty is not deference to the individual's wishes whatever they happen to be. Rather they define liberty as liberating individuals from obstacles that prevent them from recognising what truly matters for them.<sup>53</sup>

To the extent that religions are missionary, and that they care about state legislation being in line with religious ethics, granting freedom of religion creates a further problem for democratic governance. Religion will be used as a conversation stopper.<sup>54</sup> Religion instils "divisiveness" into politics.<sup>55</sup> Religious argument will be used to disempower the free marketplace of ideas. Much as those dominating a market of goods are tempted to turn regulation into a barrier to market entry,<sup>56</sup> religions are tempted to have the legislator help them combat their actual or potential competitors in the "free marketplace of religions" guaranteed by freedom of religion.

#### IV. MITIGATING THE DILEMMA BY LEGAL PRAGMATISM

Seemingly, we have spotted a tragic dilemma. The power of the state to coerce saves religious freedom and the viability of democratic government. Yet at the same time freedom of religion is a threat for religions and the state. Seemingly we cannot make a definite recommendation. We must leave it to historical accident whether a constitution guarantees freedom of religion and, if so, how this freedom is interpreted. On grounds of principle, a narrow reading seems as justifiable as a broad reading.

Yet law is neither science nor philosophy. For good reason, the discipline is called jurisprudence. The adoption of a new rule, and a new interpretation of an existing one, are not predicated on deriving the rule from first principles, nor on grounding it in scientific evidence. For sure, the law should not be blind to science and philosophy. Over the last decades, the law as an academic discipline has become more and more scientific. Yet ultimately the law as a social technology is about dissolving conflict<sup>57</sup> and about governing peoples lives.<sup>58</sup> The gold standard is neither consistency<sup>59</sup> nor objectivity.<sup>60</sup> Law is as good as its effects. The task of lawyers is not advancing knowledge, but making decisions. Ultimately, a decision is a good one because the professional legal decision maker is able and willing to take on responsi-

<sup>53</sup> For a similar secular concept see Jürgen Habermas, *Wahrheitstheorien*, in *Wirklichkeit und Reflexion*. Walter Schulz zum 60. Geburtstag (Helmut Fahrenbach, 1973).

<sup>54</sup> Richard Rorty, *Religion as Conversation-stopper*, 3 *Common Knowledge*, 1-6 (1994).

<sup>55</sup> Stephen G. Breyer, *Active Liberty*. Interpreting our Democratic Constitution 122, 124 (2006); Noah Feldman, *Divided by God*. America's Church-state Problem--and What We Should Do About it (2006).

<sup>56</sup> Randall G. Holcombe and Lora P. Holcombe, *The Market for Regulation*, 142 *Journal of Institutional and Theoretical Economics*, 684-696 (1986).

<sup>57</sup> More from Christoph Engel, *Causes and Management of Conflicts*, 159 *Journal of Institutional and Theoretical Economics*, 1-15 (2003a).

<sup>58</sup> More from Christoph Engel, *Herrschaftsausübung bei offener Wirklichkeitsdefinition - Das Proprium des Rechts aus der Perspektive des öffentlichen Rechts*, in *Das Proprium der Rechtswissenschaft* (Christoph Engel and Wolfgang Schön, 2007a).

<sup>59</sup> More from Christoph Engel, *Inconsistency in the Law. In Search of a Balanced Norm*, in *Is There Value in Inconsistency?* (Lorraine Daston and Christoph Engel, 2006b).

<sup>60</sup> Cf. Lorraine Daston, *Objectivity versus Truth*, in *Wissenschaft als kulturelle Praxis, 1750-1900* (Hans Erich Bödeker, Peter Hanns Reill and Jürgen Schlumbohm, 1999).



bility for it.<sup>61</sup>

In safeguarding religious freedom, the pragmatic nature of law is not only helpful. Given the otherwise tragic dilemma between necessity and threat, a pragmatic approach is the only feasible one. Pragmatism is of course never perfect.<sup>62</sup> Pragmatic solutions are “conventions”,<sup>63</sup> which gives them a dose of historical contingency, and traces of power play. Pragmatism risks to hiddenly privilege the religion of the majority<sup>64</sup> and to perpetuate its historical dominance.<sup>65</sup> Pragmatic interventions are bound to be imperfect. They cannot dissolve the dilemma, but they may help mitigate its obnoxious effects. Pragmatism may take a long time to overcome religiously motivated resistance. These days, the Bible is not proffered as a justification for slavery, although one may find passages in it that take slavery for granted.<sup>66</sup> But the Bible is used to justify the differential treatment of men and women.<sup>67</sup> Pragmatic law does not stand outside the battles between competing religions, and between religion and the state. Pragmatic law is policy-making in the guise of legislation and adjudication.

Yet pragmatic law is policy-making of a very special kind, and under very special conditions.<sup>68</sup> The interpreter of the Constitution is not entitled to policy-making from scratch. While responsibility brings in a grain of subjectivism, the legal decision maker may not simply impose her individual will on the law’s addressees. She is bound by the text of the Constitution and, much more importantly, by the judicial tradition of interpreting it. Any political argument must be couched in doctrinal terms. Legal power is not invested in individuals, but in complex institutional arrangements. The right of initiative is with the parties, not with those deciding. If the parties do not bring the right case, decision-makers must wait. Conversely, those directly interested in one solution, i.e. the parties, have no direct influence on the outcome. All they may do is exploit the opportunities of procedure, and make their case as compelling as they can. Usually, and in particular when it comes to constitutional scrutiny, legal decision-makers are not individuals, but benches. They must

<sup>61</sup> More from Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction. A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 Vermont Law Review, 435-467 (2009).

<sup>62</sup> Daphne Barak-Erez, *Law and Religion Under the Status Quo Model. Between Past Compromises and Constant Change*, 30 Cardozo Law Review, 2495-2507 (2009).

<sup>63</sup> András Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 Cardozo Law Review, 2401-2429 2411 f. (2009).

<sup>64</sup> *ibid.* 2417 .

<sup>65</sup> Cf. Karl-Heinz Ladeur and Ino Augsberg, *The Myth of the Neutral State. The Relationship between State and Religion in the Face of New Challenges*, 8 German Law Journal, 143-152 (2007).

<sup>66</sup> E.g. Exodus 21:2-6.

<sup>67</sup> Norman Solomon, *Religion and Human Rights with Special Reference to Judaism*, in *Does God Believe in Human Rights?. Essays on Religion and Human Rights* (Nazila Ghanea-Hercock, Alan Stephens and Raphael Walden, 2007).

<sup>68</sup> More from Christoph Engel, *The Constitutional Court - Applying the Proportionality Principle - as a Subsidiary Authority for the Assessment of Political Outcomes*, in *Linking Political Science and the Law* (Christoph Engel and Adrienne Héritier, 2003b).



give explicit reasons,<sup>69</sup> and they know that the reasons of today will be held against them tomorrow. If they change doctrine for one fundamental freedom, the change risks spreading over to other freedoms, where its effects might be less welcome. Even more fundamentally: judges know that the power of the judiciary will be curtailed if they more than very rarely fail to convince the population that their rulings are at least acceptable, if not desirable.

Specifically, the pragmatic nature of law is able to address the three reasons why religious freedom is at the same time a necessity and a threat. Law is aware of the fact that all normative argument is fundamentally relative.<sup>70</sup> One can, for instance, not prove that the growth of the economy is more important than improving the dire fate of the needy. Nonetheless, constitutional law does not content itself with creating a procedure for policymakers to fight this out. For instance, the German Basic Law simultaneously guarantees freedom of commerce and property, and it obliges government to make sure that everybody has at least enough to lead a humane life. In principle, it is for the legislator to exactly draw the borderline. But the Constitutional Court sees at it that the legislator does not overstep the constitutional limits. If necessary, as just a couple of months ago, the court even spells out that the law as it stands is no longer within these limits.<sup>71</sup>

The same techniques may be used to balance the freedom of one religion against the freedom of another, the freedom of religion against the freedom to choose not to be religious, the freedom of a believer against the autonomy of her religious organisation, and the freedom of religion against competing freedoms that are also constitutionally protected, or against objective goals that have constitutional status. Balancing is not calculable, but controlled. The conceptual steps are worked out in the principle of proportionality.<sup>72</sup> The way how they are used and filled is predetermined by the existing body of constitutional jurisprudence.

The law is also prepared to alleviate the epistemic challenge. Courts may not refuse to decide cases. Yet in court, the scientific standards of evidence can hardly ever be met. The legal order has reacted by rules on the standard of proof and on the burden of proof. The standard depends on the relevance of the decision to be taken. But even the most stringent standard is content with silencing “reasonable doubt”. And this high standard is not regarded as appropriate in all cases. Different legal orders have different techniques for alleviating the standard. American law may then be content with “preponderance of the evidence”. Continental law would rather redistribute the burden of proof. It would for instance accept “prima facie” evidence,

<sup>69</sup> More from Christoph Engel, *The Psychological Case for Obliging Judges to Write Reasons*, in *The Impact of Court Procedure on the Psychology of Judicial Decision Making* (Christoph Engel and Fritz Strack, 2007b).

<sup>70</sup> More from Christoph Engel, *Offene Gemeinwohldefinitionen*, 32 *Rechtstheorie*, 23-52 (2001).

<sup>71</sup> BVerfG 9 Feb 2010, 1 BvL 1/09.

<sup>72</sup> Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 *Emory International Law Review*, 841-888 (2005); Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 *Cardozo Law Review*, 2369-2382 2375 (2009).



and leave it to the opponent to cast doubt on its applicability in the case at hand. Of course, none of this makes it possible to prove the existence of God. Yet the legal order may accept a proxy. It may accept the consistency of theological doctrine, or a long-standing practice of a confession.

Finally the law may also respond to the additional conflicts resulting from religions becoming missionary, or trying to influence general politics. Neither of this is prohibited. The former squarely comes under freedom of religion. The latter at least is protected by the general political freedoms. One may even discuss whether this too is an exercise of freedom of religion. Yet then religions try to impose their will on others who, themselves, are also protected by freedom of religion, including the freedom to decide against any religion at all. Therefore, constitutional freedom is pitted against constitutional freedom. If they try to introduce a religiously motivated argument into general politics, furthermore freedom of religion is pitted against the guarantees of democratic process. Using the principle of proportionality, the competing freedoms have to be balanced out. From the very fact that two constitutional protections are in conflict it follows that, in such cases, freedom of religion may be more intensely limited.

Pragmatic law is sensitive to local conditions. If a conceptual divide does not affect the case at hand, pragmatic law sets it aside. It is content with “incompletely theorised agreement”.<sup>73</sup> If a theoretical conflict is not practical in the concrete instance, pragmatic law grants more freedom to those present.<sup>74</sup> As long as the demand for tolerance is marginal, as in the case of the Amish, pragmatic law is more open-minded than with respect to similar wishes from less contained religions.<sup>75</sup> If being strict on legal principles risks causing revolt, the judiciary may act more cautiously. It may start by establishing a principle, and granting exceptions for a while, announcing that it will become gradually stricter. If a community is already more advanced on the road towards tolerance, the judiciary may impose closer scrutiny on one and the same case here. Under the European Convention on Human Rights, this is brought about by the doctrine of “margin of appreciation”.<sup>76</sup>

Where the law cannot slight the conflict, it can try to transform it. The practically most important shift is from freedom to equality.<sup>77</sup> Instead of dissolving an intractable conflict between religions, religious and nonreligious people, or religion

<sup>73</sup> Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harvard Law Review, 1733-1772 (1995).

<sup>74</sup> Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 Cardozo Law Review, 2333-2368 2343 (2009).

<sup>75</sup> Critical on this András Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 Cardozo Law Review, 2401-2429 2422 (2009).

<sup>76</sup> Christoph Engel, *Die Schranken der Europäischen Menschenrechtskonvention. Das Merkmal „notwendig in einer demokratischen Gesellschaft“ in den Schrankenvorbehalten, das Diskriminierungsverbot, und die „margin of appreciation“*, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, 261-287 (1986); Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 Emory International Law Review, 587-636 (2005).

<sup>77</sup> Stefan Huster, *Die ethische Neutralität des Staates. Eine liberale Interpretation der Verfassung* (2002); Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 Cardozo Law Review, 2369-2382 (2009).



and the state, on grounds of first principles, the law approaches a solution from the premise that it may not discriminate on transcendental grounds.<sup>78</sup> One and the same action may not be treated differently only because in one case it is mandated or at least justified by religious doctrine.<sup>79</sup> Translation requirements may also be brought under this rubric. The neutrality of the law between religions does not require that the law bans any religiously motivated act and any religious speech from the public sphere. It suffices that the legal decision can be translated into a criterion that does not condition on religious doctrine, or on religiosity.<sup>80</sup>

Finally, the law may offer religions a deal. If they are willing to organise themselves in a way that makes conflicts with other religions, with the nonreligious, or with the state less likely or more manageable, they are granted the privilege. To my reading, this is the essence of what in German law is often referred to as the choice between *Staatskirchenrecht* and *Religionsrecht*.<sup>81</sup> Of course, giving churches the right to collect taxes through public administration, to send their teachers to public schools, to grant university degrees, to be remunerated by government for running hospitals privileges them in competition with other religions. Yet using the translation principle, this does not violate religious neutrality as long as the offer is good for any religion. It may be justified by the very reason why freedom of religion is a necessity. All these privileges not only help religions attracting believers. They also bring these religions into a permanent relationship with the state. Religions who accept these privileges have something to lose if they frustrate the legitimate expectations of the state. As part of the quid pro quo they have made themselves more “regulable”.<sup>82</sup> Given religious conflicts are theoretically not tractable and have all too often proven atrocious for those suffering from them, I am convinced this technology for making these conflicts negotiable is justified. I think so, even if one acknowledges that the promise of these privileges puts religions under pressure to organise such that they become credible negotiation partners for the state. In Germany, this is currently an issue with Islam, since the Islamic religion is intrinsically less prepared to organisation than in particular the Catholic church.

<sup>78</sup> See for the European Convention of Human Rights Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, 30 *Cardozo Law Review*, 2575-2591 2582 (2009).

<sup>79</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Does it Matter What Religion Is?*, 84 *Notre Dame Law Review*, 807-836 (2008).

<sup>80</sup> Stefan Huster, *Die ethische Neutralität des Staates. Eine liberale Interpretation der Verfassung* (2002); András Sajó, *Constitutionalism and Secularism. The Need for Public Reason*, 30 *Cardozo Law Review*, 2401-2429 2401 (2009) this is missing in Michael Rosenfeld, *Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religious Revival?*, 30 *Cardozo Law Review*, 2333-2368 (2009).

<sup>81</sup> Stefan Magen, *Körperschaftsstatus und Religionsfreiheit. Zur Bedeutung des Art. 137 Abs. 5 WRV im Kontext des Grundgesetzes* (2003); Claus Dieter Classen, *Religionsrecht* (2006); Hans Michael Heinig and Christian Walter, *Staatskirchenrecht oder Religionsverfassungsrecht? Ein begriffspolitischer Grundsatzstreit* (2007).

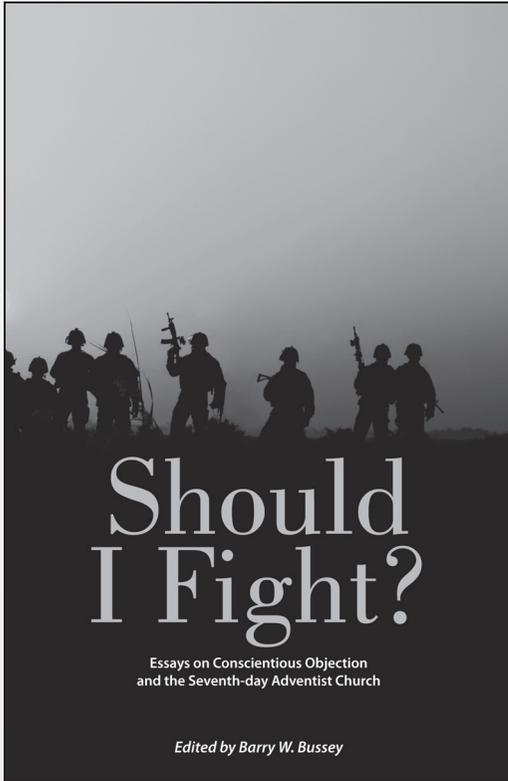
<sup>82</sup> The term has been coined by Lawrence Lessig, *Code and other Laws of Cyberspace* (1999) for an application see Christoph Engel, *Corporate Design for Regulability. A Principal-Agent-Supervisor Model*, 162 *Journal of Institutional and Theoretical Economics*, 104-124 (2006a).



## V. CONCLUSION

Arbiters sometimes say with tongue in cheek: if both parties complain, the award can't be that bad. With my presentation of the issue I have certainly fulfilled the condition. I must have disappointed believers, non-believers, religious organisations, government officials, and my legal colleagues. Believers will surely dislike the areligious perspective. Throughout this paper, I adopt an external perspective on religion. I see it as a social phenomenon. I insist that religions are historically contingent. I accept a religiously pluralistic society as a fact. I regard religion inasmuch as a threat as I regard it as a necessity for governing this world. I say that the signs of God's presence in this world, of which believers think dearly, do not count as proof. By contrast, non-believers will dislike how much room I am willing to grant religion. I do not oblige government to combat what they see as superstition. I am not holding the absence of scientific evidence against religion. Through the many facets of pragmatism I effectively give government some room for supporting religiosity. I even allow for outright deals between the state and organised religions. Religious organisations will dislike that I allow for privilege only to the extent that it makes them vulnerable to regulatory intervention. They will also dislike that I am accepting their historically gained dominant positions in specific jurisdictions only to the extent that they can be translated into religion-neutral criteria, and that I insist on the constitutional right of competing religions to erode these dominant positions. Government officials will dislike that I am calling for tolerance even with religions that seem alien if not hostile to the culture on which this government's power is built. They may also find it restrictive that I limit the proper scope of government to the management of religious plurality. Finally my legal colleagues may dislike the external view on our discipline. I am not talking about the constitution because it is in force, but because it might be instrumental. It is key for my argument that legal doctrine is neither a mere exercise of logic, nor of tradition. For my solution to work the law in action must be only partly determined by the legislator. In my perspective, judges are not just legal professionals. They are policymakers, only of a different kind and under different constraints. Yet I deeply believe that partly disappointing all involved is the only possibility to overcome the otherwise tragic dilemma. The constitutional protection of freedom of religion is indeed a precondition for religious freedom being a social fact.





In an age of terrorism and increasing war, how do Christians pray for their enemies and answer the state's call to war?

Since its organization in 1863, the Seventh-day Adventist Church has taken a non-combatant position to war. Despite the historic stance on the refusal to bear arms, today more Seventh-day Adventist young people have voluntarily joined the military than in any previous generation. *Should I Fight?* is a compilation of essays that were presented at a conference called to discuss the Church's position on conscientious

objection. The presenters considered the history of the Church's stand and the changing views. These discussions were not limited to the American context but considered other countries including South Africa and Canada.

Scholars, historians and those who want to gain a deeper understanding of the Adventist struggle to remain faithful to the Sermon on the Mount and yet relevant in the modern age will want this book.

"But what emerges clearly from all the essays is that the answer to the question, 'Should I fight?' can never be a simple and straightforward "Yes." Bussey's call to Christians to take a stand on conscience, rather than easily fit in with what society expects or the state wants, is timely and vital, and needs to be heard far and wide among those who acknowledge Jesus as Lord."

- Dr. David J. B. Trim, University of Reading, U.K.

**Order your copy today for \$19.95 CAD at [www.essencebookstore.com](http://www.essencebookstore.com)**



# TAKING GOD SERIOUSLY: WHY RELIGION IS ESSENTIAL TO THE DEFENSE OF RELIGIOUS HUMAN RIGHTS

KRISTINE KALANGES<sup>1</sup>

## INTRODUCTION

It can be easy to perceive within the framework of international human rights law a universalism that transcends religious and political difference. The language of law itself contributes to this impression, framed as it so often is in terms of legitimate authority and neutral principles. However, in an era of globalization, the nature and extent of such legitimacy and neutrality appear as questions in the eyes of ever more diverse beholders, and while those who look with a Western gaze may be satisfied (at least initially), those whose vision has been shaped by the non-Western world sometimes see matters differently.

These differences are salient to debates about human rights, generally, and the right to freedom of religion or belief, in particular. Religious liberty, sometimes referred to as the first freedom, emerged and evolved within a specific historical context – one integrally informed by both sacred and secular intellectual traditions in the West, as well as by their attendant legal-political institutionalization. As international law has developed, its reach has expanded to include states outside of this originary context. The vast majority of these have demonstrated a strong desire to participate in the constitutive processes by which international law is constructed. Whether they are willing or able to arrive at the same human rights formulations, especially with regard to freedom of religion, is a separate question and one that is the subject of my forthcoming book.<sup>2</sup> Here, I would like to introduce the project and explain its relevance for secular challenges to religious freedom.

## THE SIGNIFICANCE OF RELIGION FOR HUMAN RIGHTS AND INTERNATIONAL RELATIONS

Religious liberty rights merit special attention in part because they are closely correlated with the observance of other human rights. For example, in one comparison of ratings for religious freedom with ratings for political rights and civil liberties in one hundred and one countries, the ratings for religious freedom were identical

<sup>1</sup> Kristine Kalanges, (B.A. International Political Economy, University of Puget Sound; J.D. Yale Law School; M.A./Ph.D. Government (International Relations), Georgetown University), Assistant Professor, SPA: Justice, Law & Society, American University, Washington, D.C.

<sup>2</sup> The material in this article is excerpted, in modified form, from that work. *Religious Liberty in Western and Islamic Law: Toward a World Legal Tradition* (©Copyright Oxford University Press, 2012).



to or within one point of the ratings for civil liberties in eighty-seven of them.<sup>3</sup> This “interdependence of human rights” is further suggested by the fact that violations of religious rights “almost invariably” involve the violation of other rights, including those catalogued by international law and human rights theorist Johan D. van der Vyver: the right to life, liberty, and security of the person; the right to freedom from torture or cruel, inhuman, or degrading treatment or punishment; the right to a fair and public hearing by an independent and impartial tribunal; the right to freedom of movement and residence; the right to freedom of opinion and expression; freedom of assembly and association; and the right to privacy.<sup>4</sup> In other words, “religion exists not (only) in a transcendent realm but is a fundamental and integral part of all human freedom.”<sup>5</sup>

This connection assumes even greater significance because the world is experiencing a religious resurgence with profound implications for contemporary international relations. To be more precise, it is not so much that greater numbers of people are religious (even though their choice of religion may be changing, as with the spread of Pentecostalism throughout the Global South), but rather that their religiosity has acquired new theoretical and empirical salience for international law and politics.

Even prior to the September 11th terrorist attacks, the “secularization thesis” (i.e., that modernization leads inevitably to a decline in religious experience at both social and individual levels) was being challenged.<sup>6</sup> Leading sociologists observed that while modernization has had some secularizing effects, it has also led to counter-secularization movements; moreover, social secularization does not necessarily imply secularization at the level of individual belief and behavior, and some religious organizations continue to exert social and political influence despite loss of widespread membership.<sup>7</sup> Additionally, the religious communities that have survived and prospered in modern society are precisely those that, contrary to expectation, have refused adaptation strategies, instead maintaining “beliefs and practices dripping with...supernaturalism.”<sup>8</sup> Some of these are the same religious communities whose contributions to the development of religious liberty as a human right provide international law with powerful moral anchors.

Perhaps it should not be surprising, then, that nearly four centuries after the

<sup>3</sup> Paul A. Marshall, “The Range of Religious Freedom.” In *Religious Freedom in the World: A Global Report on Freedom and Persecution*, edited by Paul A. Marshall (Lanham, MD: Rowman & Littlefield, 2008), 8.

<sup>4</sup> Johan D. van der Vyver and John Witte, Jr., eds., *Religious Human Rights in Global Perspective: Legal Perspectives* (Boston: Martinus Nijhoff Publishers, 1996), XLVI.

<sup>5</sup> Paul A. Marshall, ed. *Religious Freedom in the World: A Global Report on Freedom and Persecution* (Nashville, TN: Broadman & Holman Publishers, 2000), 21. See also Brian J. Grim, and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (New York: Cambridge University Press, 2011).

<sup>6</sup> Barry Rubin, “Religion and International Affairs,” in *Religion, the Missing Dimension of Statecraft*, ed. Douglas Johnston and Cynthia Sampson (New York: Oxford University Press, 1994), 21.

<sup>7</sup> Peter L. Berger, ed. *The Desecularization of the World* (Grand Rapids, MI: Ethics and Public Policy Center & William B. Eerdmans Publishing Company, 1999), 2-3.

<sup>8</sup> *Ibid.*, 4.



publication of Grotius's *De Jure Belli ac Pacis* (positing law as a means of tempering religious war), religion remains bound up with the cultivation of international law. Indeed, religious teachings and traditions have historically been fertile sources of international legal content, providing inspiration for enthusiasts (e.g., the nineteenth-century movement to promote international arbitration and adjudication), and serving as a legitimating force that, in turn, generates voluntary compliance.<sup>9</sup> As law and religion scholar John Witte, Jr. notes:

...[H]uman rights laws are inherently abstract ideals...[that] depend upon the visions of human communities and institutions to give them content and coherence, to provide the 'scale of values governing the(ir) exercise and concrete manifestation.' Religion is an ineradicable condition of human lives and communities. Religions invariably provide... 'scales of values' by which many persons and communities govern themselves.<sup>10</sup>

Put briefly, an international legal and political system built on democracy and human rights needs religion to survive.<sup>11</sup>

## THE RESEARCH PROBLEM: RELIGIOUS PLURALISM AS A CHALLENGE TO UNIVERSAL HUMAN RIGHTS

Acknowledging the vital role of religion poses new problems even as it solves others. In recent decades, more than one hundred new, mostly non-Western states have joined the international political community, bringing with them a wide variety of religious teachings and traditions.<sup>12</sup> While modernity may not have borne out the secularization thesis, it has undeniably resulted in religious pluralism in social life and at the level of individual consciousness.<sup>13</sup> Globalization and its corresponding patterns of migration have accelerated this process, leaving virtually no corner of the world untouched by the diversity of faith communities.<sup>14</sup>

Importantly, religious pluralism is not solely a result of modernity, but also represents a reaction to it: that is, the global resurgence of religion reflects, in part, "the failure of the modernising, secular state to produce both democracy and development in the Third World," as well as "the search for authenticity" in such countries.<sup>15</sup> This is particularly relevant given legal-political landscapes in which religious plurality is hierarchically ordered – with majority religious traditions and dominant political cultures shaping the coexistence of faith communities.<sup>16</sup>

<sup>9</sup> Mark W. Janis and Carolyn Evans, eds., *Religion and International Law* (Boston: Martinus Nijhoff Publishers, 1999), 321-22.

<sup>10</sup> John Witte, Jr., "Law, Religion and Human Rights," *Columbia Human Rights Law Review* 28 (1996): 2.

<sup>11</sup> *Ibid.*, 31.

<sup>12</sup> Janis and Evans, eds., *Religion and International Law*, xi.

<sup>13</sup> Peter L. Berger, "Orthodoxy and Global Pluralism," *Demokratizatsiya* (Summer 2005): 438.

<sup>14</sup> *Ibid.*, 439.

<sup>15</sup> Scott M. Thomas, "Taking Religious and Cultural Pluralism Seriously: The Global Resurgence of Religion and the Transformation of International Society," *Millennium: Journal of International Studies* 29, no. 3 (2000): 817.

<sup>16</sup> Thomas Banchoff, ed. *Democracy and the New Religious Pluralism* (New York: Oxford University Press, 2007), 6.



In sum, if religion is an important source of international legal norms, if globalization means that religious and value homogeneity can no longer be taken for granted, and if the global resurgence of religion in part represents a project of self-definition by non-Western countries, then variation among the religious traditions (and legal-political cultures) that dominate Western and non-Western states suggests a fundamental challenge to the universalizability of the principles upon which international human rights law is based.<sup>17</sup>

This tension is evident both at the meta-level (i.e., human rights broadly conceived) and with regard to specific rights (e.g., freedom of religion). The former is rendered problematic because “(t)he religions disagree among themselves about the nature of human beings, their goal, their good, and their responsibilities, and this disagreement is clearly demonstrated in different approaches to human rights.”<sup>18</sup> Similarly, the latter is complicated by the growing religious pluralism in states, which correlates with increases in problems concerning freedom of religion.<sup>19</sup>

Against this backdrop emerges what might be termed “the dilemma of religious freedom,” poignantly captured by international relations scholar Daniel Philpott:

Although religious freedom is central to the tradition of human rights, expressed in both international and constitutional law and in moral and religious sources, it is also contrary to the principled policies of several contemporary regimes. It is a right that, if valid, ought to limit the sovereignty of states, yet one whose validity is contested. . . . Relinquishing an important human rights commitment or provoke [*sic*] conflict over deep values: this is the difficult choice.<sup>20</sup>

A difficult choice indeed – one that echoes across the literature and policy debates, haunted by the spectre of Samuel P. Huntington’s “clash of civilizations” thesis, and, if unnavigable, one that would bode ill for the prospects of a (relatively) peaceful international order founded on democracy and human rights.<sup>21</sup> This project is not naïve about the nature and stakes of religion and politics, but neither is it prepared to concede the inevitability of a (paradoxical) tradeoff between human rights and peaceful coexistence. Thus, it will attempt to reframe the debate such that the choice not only becomes traversable, but is itself transformed. To do so requires journeying through the conceptual, legal, and political history of religious liberty in the human rights instruments of the West, as well as in those of the most developed

<sup>17</sup> Michael W. Reisman, “Aftershocks: Reflections on the Implications of September 11,” *Yale Human Rights and Development Law Journal* 6 (2003).

<sup>18</sup> Peter Stuart, “A Christian Perspective on Religious Freedom in a Pluralist World,” *Stimulus* 15, no. 2 (May 2007): 38.

<sup>19</sup> Tage Kurten, “Introduction: Freedom of Religion in a New Millennium,” *Studia Theologica* 54 (2000): 2.

<sup>20</sup> Daniel Philpott, “Diversity or Cacophony?: New Sources of Norms in International Law,” *Michigan Journal of International Law* 25 (2004): 993.

<sup>21</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1998).



alternative human rights paradigm to date – that which is oriented by Islam.

## TEST CASE: RELIGIOUS LIBERTY IN WESTERN AND ISLAMIC LAW

Speaking of his experience as a member of the 1946 UNESCO Committee on the Theoretical Bases of Human Rights, Jacques Maritain famously stated, “We agree on these rights, *provid[ed] we are not asked why*. With the ‘why,’ the dispute begins.”<sup>22</sup> This pithy observation captured the tremendous difficulty in attempting to craft a global consensus around the foundation for human rights – a consensus that was not achieved despite the accomplishment of the 1948 Universal Declaration of Human Rights (UDHR). This lack of underlying agreement acquired new significance in 1981, and again in 1984, when Said Rajaie-Khorassani, Iran’s representative to the 36th and 39th sessions of the United Nations General Assembly, declared that the UDHR represented a secular interpretation of Judeo-Christian tradition that could not be implemented by Muslim states.<sup>23</sup> Throughout, the book will explore that claim, focusing especially on the right to freedom of religion or belief.

It is worth noting that debates about this right include not only the boundaries of free thought, but also those of free exercise, that is, the extent to which “religious orientations, rationales, and authorities of any kind are permitted a determinative role in the lives of their carriers and in the operation of other social institutions.”<sup>24</sup> These controversies are directly relevant to the question of the (in)compatibility of Western and Islamic understandings of freedom of religion. For example, in a study of forty-four predominantly Muslim countries, the U.S. Commission on International Religious Freedom found that despite the ratification by many of them of the UDHR and the International Covenant on Civil and Political Rights (ICCPR), several nonetheless maintain constitutional provisions that limit the freedom to manifest a religion or belief, in contradiction to their treaty obligations.<sup>25</sup> What is striking is not the inconsistency per se, but rather that it is so widespread among countries that claim an Islamic identity.

This fact, in keeping with others to be presented and in view of both the statement made by Iran’s representative and the creation of alternative human rights models by Islamic states, raises two primary research questions. First, why are there

<sup>22</sup> Kevin J. Hasson, “Religious Liberty and Human Dignity: A Tale of Two Declarations,” *Harvard Journal of Law and Public Policy* 27 (2003): 81, quoting Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1956), 77 (alteration in Hasson, italics in original).

<sup>23</sup> David G. Littman, “Human Rights and Human Wrongs,” *National Review Online*, January 19, 2003; U.N. General Assembly, 36th Session. Third Committee. *Summary Report of the 29th Meeting*. 26 Oct. 1981. (A/C.3/36/SR.29). Official Record. 4 Nov. 1981: paras. 10-19; U.N. General Assembly, 39th Session. Third Committee. *Summary Report of the 65th Meeting*. 7 Dec. 1984. (A/C.3/39/SR.65). Official Record. 17 Dec. 1984: paras. 91-95.

<sup>24</sup> Peter Beyer, “Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context,” *Journal for the Scientific Study of Religion* 42, no. 3 (2003): 334.

<sup>25</sup> United States Commission on International Religious Freedom, “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries,” (March 8, 2005).



differences between Western and Islamic human rights instruments as they pertain to freedom of religion or belief? Second, what are the implications of these differences for religious liberty as a human right? These two questions are intended as positive (or descriptive) endeavors. However, insofar as it calls for a response, the second question also contains an explicitly normative dimension.

In reply to the first question, the book will demonstrate that variation in the religious-intellectual histories of the Western and Islamic worlds has contributed significantly to divergence in their respective formulations of freedom of religion or belief. Ideas matter, especially religious ones. In response to the second question, the book will argue that while these divergent formulations indeed challenge the characterization of religious liberty as a uniform, universal human right, they do not necessarily result in an intractable “dilemma of religious freedom.” Rather, the cultivation of a world legal tradition bears the hope that human rights and religious pluralism can meaningfully coexist.

## THE THEORETICAL RESPONSE: HAROLD BERMAN’S WORLD LEGAL TRADITION

This project sits squarely at the intersection of international law and politics. As such, it should draw upon the theoretical insights of both disciplines. While that may sound facile, it is potentially quite complicated: international relations theory is prone to dismiss international law as epiphenomenal, while international legal scholars often fail to account sufficiently for the realities of political power. There is, too, the additional burden of incorporating religion, for the book will claim that religious ideas drive the unfolding of legal-political processes in history. Thus, the search for a coherent theoretical framework is especially challenging, but also very necessary.

Harold Berman’s scholarship incorporates law, religion and politics, provides for an understanding of change over time, and is explicitly global in scope and comparative in method. With more time to explore and cultivate his theory’s tremendous potential, Berman – the twentieth-century’s leading scholar of law and religion – may have once again redefined the field. He died before he could fully articulate his vision for a world legal tradition (the latest instantiation of his integrative jurisprudence).<sup>26</sup> Fortunately, the general shape and elements of his theory are preserved, and, contextualized by his life’s work, its foresight and creative genius are readily discernible. Accordingly, in what is perhaps best understood as a project of theory development, the book will utilize “world legal tradition” as the theoretical framework within which to explore the comparative development of religious liberty

---

<sup>26</sup> Douglas Martin, Obituary, “Harold J. Berman, 89, Who Altered Beliefs About Origins of Western Law, Dies,” *The New York Times*, November 18, 2007. See also Howard O. Hunter, *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: WestviewPress, 1996).



in Western and Islamic human rights instruments.<sup>27</sup> It will employ Berman's theory as a guide to answering the research questions, seeking also to demonstrate the analytical leverage and practical power of his ideas.

## BACKGROUND

Explaining Berman's contribution to the field of law and religion provides a good introduction to his thought. This is aptly done by Witte, who characterizes his mentor's work in the following way:

[Berman] has demonstrated that law has a religious dimension, that religion has a legal dimension, and that legal and religious ideas and institutions are intimately tied. He has shown that there can be no divorce between jurisprudence and theology, legal history and church history, legal ethics and theological ethics. He has argued that law and religion need each other – law to give religion its social form and function, religion to give law its spirit and vision.<sup>28</sup>

However, as Berman articulated in his *Law and Revolution* series, politics must also be considered as a third party to the intimate relationship between law and religion.<sup>29</sup> He had already planned a third volume in this series and, at the time of his death, was in the midst of planning a fourth.<sup>30</sup> Some of Berman's more recent work suggests that the development of a world legal tradition may have been a primary focus.

For example, in October 1999, Berman delivered two lectures on "The Western Legal Tradition in a Millennial Perspective: Past and Future," as part of Louisiana State University's Edward Douglass White Lectures on Citizenship.<sup>31</sup> The first lecture, on history, concerned the development of the Western legal tradition from its origins in the late eleventh and twelfth centuries through the national revolutions in Germany, England, France, and the United States (i.e., the subjects of his first two books in the *Law and Revolution* series).<sup>32</sup> The second lecture, on prophecy, concerned the crisis of the Western legal tradition in the twentieth century (e.g.,

<sup>27</sup> With rare exceptions, the book will refer to the theory as "world legal tradition," since that name distinguishes it from the broader intellectual endeavor to which it is related (i.e., "integrative jurisprudence"), while serving as a simpler, more accessible and relevant descriptor than possible alternatives (e.g., "ecumenical jurisprudence of the Holy Spirit" – another of Berman's designations).

<sup>28</sup> Martin E. Marty, "The Foundations of Law: The Religious Foundations of Law," *Emory Law Journal* 54 (2005): 294.

<sup>29</sup> In *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), Berman discusses the roots of modern Western legal institutions and concepts in the papal revolution, when political lines were drawn between the Church and secular rulers. In *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Belknap Press, Harvard University Press, 2003), Berman explores how the sixteenth-century German Reformation and the seventeenth-century English Revolution gave birth to a civil order distinct from religion.

<sup>30</sup> Martin, Obituary, "Harold J. Berman, 89, Who Altered Beliefs About Origins of Western Law, Dies."

<sup>31</sup> Berman, "The Western Legal Tradition in a Millennial Perspective: Past and Future," 739.

<sup>32</sup> *Ibid.*, 739-52.



the Russian Revolution and the World Wars), and also the future of the Western legal tradition as it enters a multicultural millennium and encounters an evolving tradition of world law.<sup>33</sup> These themes from the second lecture may have been the subjects of the planned third and fourth volumes of his *Law and Revolution* series, respectively. Indeed, Berman's discussion of world law provides the contours of an insightful new theory.

Berman observes that community formation and the evolution of a common legal tradition require a common set of spiritual values, common concepts of human nature, and a shared understanding of the relation of persons to society; in short, a common language and a common belief-system.<sup>34</sup> The great cultures of the world are distinguished, in part, by their different languages and different belief systems. Nonetheless, Berman notes:

[I]n the twentieth century the diverse cultures of the world have been joined together in a world economy and in an emerging world society, with branches of a common world law and the beginnings of a world legal tradition. And that is the great challenge to humanity...to transform the world society into a world community and to transform the branches of world law into an evolving world legal tradition.<sup>35</sup>

On its own, his observation sounds optimistic to the point of naïveté and risks conjuring a false – and therefore dangerous – universalist utopia, not unlike that of the idealists during the interwar period. But Berman is well-steeped in history, and, shortly after this, he sets forth a more specific framework for the encounter between the Western and world legal traditions.

### WORLD LEGAL TRADITION DEFINED

Berman's theory is relational: each tradition has something to learn from the other.<sup>36</sup> The contribution of the West is the very concept of a legal tradition itself, which includes “the conscious historical evolution of law...its conscious balancing of continuity and change, its concept of an ongoing autonomous legal tradition that can even survive great revolutions and be renewed by them.”<sup>37</sup> According to Berman, this Western concept rests upon the integration of three main schools of legal philosophy: positivism (rooted in political will), natural law theory (rooted in moral rea-

<sup>33</sup> Ibid., 752-63.

<sup>34</sup> Ibid., 761.

<sup>35</sup> Ibid.

<sup>36</sup> As a theory, world legal tradition is simultaneously descriptive, predictive, and normative. Berman believed in the accuracy and rightness of his historical sociological jurisprudence, its contemporary application, and his prediction that the third millennium would witness the transformation of the emerging world society into a world community – a transformation in which the gradual creation of a world legal tradition could and should play a pivotal role. Ibid., 763. A spiritual sense of hope, cautious but genuine, suffuses his remarks on the subject.

<sup>37</sup> Ibid., 762.



son and conscience), and historical jurisprudence (rooted in historical experience).<sup>38</sup> Not until the twentieth century was natural law theory “almost wholly subordinated to positivism” and the historical school “almost entirely eliminated” – developments that Berman laments.<sup>39</sup>

Thus, the reciprocal contribution that an evolving world legal tradition can make to its Western counterpart is “to challenge it to rediscover its religious roots and its threefold source in... politics, morality, and history,” to illuminate the untenability of separating the “is” of political will from the “ought” of moral reason and the “was and is becoming” of historical memory.<sup>40</sup> Elsewhere, Berman refers to this as part of a broader “integrative jurisprudence” and deems it necessary to the recognition, interpretation, and support of world law.<sup>41</sup> In summarizing what the West may learn from its encounter with the world legal tradition, Berman eloquently captures one theoretical ambition of this project: “the moral and historical basis of law in other cultures challenges the West to re-examine the moral and historical basis of its own legal tradition and to reconcile the various religious influences that in the past have played significant roles in the formation of that tradition.”<sup>42</sup>

By bringing these two traditions – one established, one emergent, both evolving – into conversation with each other, Berman seeks peaceful integration defined by love of neighbor and meaningful respect for difference in the form of religious pluralism. This pluralism should recognize and integrate the Christian traditions of the West, including Roman Catholic, Lutheran, and Calvinist conceptions of law (which he correlates with natural law, positivism, and historical tradition, respectively); non-Christian faiths, including but not limited to Judaism and Islam, that “recognize the God-given character of the human qualities of will, reason, and memory;” and even secular belief systems (or civil religions) that privilege spiritual over material values in pursuit of order and justice.<sup>43</sup>

These traditions intersect not only in the West, but also in “world law,” which Berman defines to include public international law, contractual and customary legal norms governing cross-border relations among persons and enterprises – in short, “what was once called *jus gentium*, the law of nations, the common law of mankind, embracing common features of the various legal systems of the peoples of the world.”<sup>44</sup> The vision thus seems to be one in which the great religions emphasize their tendency to be universalistic and tolerant (rather than their competing ten-

<sup>38</sup> These are the jurisprudential traditions that Berman long sought to combine in his “integrative jurisprudence.” See Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta, GA: Scholars Press, 1993). One way of understanding world legal tradition is as a consciously comparative integrative jurisprudence.

<sup>39</sup> Berman, “The Western Legal Tradition in a Millennial Perspective: Past and Future,” 762.

<sup>40</sup> *Ibid.*

<sup>41</sup> Harold J. Berman, “World Law: An Ecumenical Jurisprudence of the Holy Spirit,” *Public Law and Legal Theory Research Paper Series*, no. 05-4 (February 2005).

<sup>42</sup> Berman, “The Western Legal Tradition in a Millennial Perspective: Past and Future,” 763.

<sup>43</sup> Berman, “World Law: An Ecumenical Jurisprudence of the Holy Spirit,” 11.

<sup>44</sup> *Ibid.*, 13.



dency to be exclusivist) in pursuit of a humane global governance – governance supported crucially, though not exclusively, by a comparative integrative jurisprudence of international law.<sup>45</sup>

### THE PROMISE AND LIMITATIONS OF WORLD LEGAL TRADITION

Berman's analysis could be interpreted as attempting to reconcile the problem of the many and the one in the "world in time," and, by implication, as "immanentizing the eschaton."<sup>46</sup> In other words, world legal tradition might be understood as underestimating the extent of human brokenness and overestimating the capacity of human institutions – legal and political – to perfect an imperfect world.<sup>47</sup> If such were the case, it would, in the view of this project, represent a grave mistake: theologically speaking, it would flirt with pride; in the political arena, it would fundamentally misconstrue the dilemma and risk walking the road shared by all false universalisms in history – a pathway marked by ever more (not less) violence and injustice.<sup>48</sup>

This project cannot claim definitively that such an interpretation would be inaccurate. However, Berman, citing the influence of Christian historian and philosopher Eugen Rosenstock-Huussy, writes of the Holy Spirit as inspiring diverse peoples to listen to and learn from each other in the hope of overcoming divisive forces and discovering their common humanity.<sup>49</sup> The location of the unifying impulse in a transcendent source signals a certain theological humility that speaks to the above concerns, but does not entirely resolve them.

Therefore, because it implicates both how the theory will be developed and deployed (to answer the positive/descriptive research questions), as well as how the results will be interpreted (to address the normative element), this project's assumptions should be rendered explicitly: it will maintain that religious differences are real, that they are significant, and that they will neither disappear nor cease to be relevant in world history. Religious beliefs and practices are sources of deep meaning for the vast majority of the world's people; hence, religious difference inherently bears the potential for conflict – legal, cultural, and political.

Even still, while the book will not advance a vision of human institutions as capable of eliminating this potential for discord generally and permanently, it does not follow that specific disputes cannot be mediated or diffused, or even that common

<sup>45</sup> Richard A. Falk, "A Worldwide Religious Resurgence in an Era of Globalization and Apocalyptic Terrorism," in *Religion in International Relations: The Return from Exile*, ed. Fabio Petito and Pavlos Hatzopoulos (New York: Palgrave, 2003), 184-85.

<sup>46</sup> James V. Schall, S.J., "The Encyclical on Hope: On the 'De-Immanentizing' of the Christian Eschaton," (December 3, 2007).

<sup>47</sup> William J. Wagner, "The Just and the Holy Are One: The Role of Eschatology in Harold Berman's Vision of Normative Jurisprudence," *Emory Law Journal* 42 (1993): 1075-77.

<sup>48</sup> See, for example, Howard Caygill, *Levinas and the Political* (New York: Routledge, 2002).

<sup>49</sup> Berman, "World Law: An Ecumenical Jurisprudence of the Holy Spirit," 4-5.



ground cannot be established where enmity once reigned. Recalling the “dilemma of religious freedom,” the immediate challenge is to transform the “difficult choice” between religious liberty as a universal human right and peaceful coexistence of diverse legal-political cultures. The cultivation of a world legal tradition is an important component of that transformation. This is the spirit in which Berman’s theory is here understood, and this is the spirit in which it will be applied.

World legal tradition focuses attention on the comparative moral and historical bases of law in the subject spheres of study – here, the Western and Islamic worlds. Within these two areas, its integrative jurisprudence requires consideration of the contributions made by religion, politics, and historical circumstance to the evolution of law. Berman’s integration of these three is not syncretic. In particular, Berman emphasizes history (too often overlooked by legal scholars, in his opinion) both because its tendency toward synthesis imbues jurisprudence with coherence,<sup>50</sup> and also because it serves as a normative source of law.<sup>51</sup> Professor of law and philosophy William Wagner explains:

Berman...holds the apprehension of value to originate historically and to be mediated through changing historical circumstances by means of subjective and objective human structures. It follows that the elements of an adequate normative jurisprudence should be found “piecemeal” in the record of historical reflection, awaiting the creative insight that can transform them into a synthesis capable of meeting the challenges at the moment.<sup>52</sup>

This recourse to historical record will serve the project well, since it facilitates careful examination of the development and institutional processing of ideas over time.

## THE THEORY APPLIED: THE RELIGIOUS SOLUTION TO THE PROBLEM OF RELIGIOUS PLURALISM

The book will argue that differences between Western and Islamic legal formulations of religious freedom are attributable, in substantial part, to variations in their respective religious-intellectual histories. Further, it will suggest that while divergence between the two bodies of law challenges the characterization of religious liberty as a uniform, universal human right, the dilemma of religious freedom – the difficult choice between the universality of religious liberty rights and peaceful coexistence of diverse legal cultures – may yet be transformed through the cultivation of a world legal tradition. This argument will be advanced through comparative

<sup>50</sup> Wagner, “The Just and the Holy Are One: The Role of Eschatology in Harold Berman’s Vision of Normative Jurisprudence,” 1053.

<sup>51</sup> Paula G. Shkelton, “Remembering What Cannot Be Forgotten: Using History as a Source of Law in Interpreting the Religion Clauses of the Connecticut Constitution,” *Emory Law Journal* 52 (2003): 998.

<sup>52</sup> Wagner, “The Just and the Holy Are One: The Role of Eschatology in Harold Berman’s Vision of Normative Jurisprudence,” 1053-54.



analysis of human rights instruments from the Western and Muslim worlds, with attention to the legal-political processes by which religious and philosophical ideas have been institutionalized.

## OVERVIEW OF THE RESEARCH FINDINGS

The first part of the book will chart the evolution of religious liberty as a human right in the West, beginning with the influence of Reformation theology (e.g., Luther's separation of church and state and Calvin's theology of limited sovereignty and natural law). Protestant ideas were elaborated and modified in early America, where the religious and philosophical arguments of Roger Williams, John Locke, and James Madison centrally informed the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution.

This historic experiment in religious liberty<sup>53</sup> contributed, in turn, to the Western formulation of religious freedom as a human right, as reflected (albeit incompletely) in the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. Against the backdrop of these international treaty debates, a comprehensive rationale for religious freedom and human rights was offered in the teachings and diplomacy of the Catholic Church – a rationale rooted in both reason and Christian revelation.

During roughly the same historical period (i.e., the latter half of the twentieth century), Islamic international law (*as-siyar*) began to emerge as an alternative/oppositional human rights paradigm. Its formulations of religious freedom were, and remain, facially incompatible with global human rights norms. The second part of the book will explore the reasons for, and the implications of, this conflict.

From the outset of the tradition, Islam maintained that there should be no compulsion in religion. Yet classical Islamic law also differentiated between the rights of Muslims and non-Muslims, as well as between different types of non-Muslims; the legacy of this *dhimmi* system has persisted, to the detriment of religious freedom for religious minorities. Also, as orthodox Islam has traditionally proclaimed *Shari'a* to be eternal and immutable truth, apostasy has been punishable by serious physical pain or death. At least historically, Islamic law has proven to be inconsistent with accepted international standards of religious freedom. Because Islam is not just a religion of rules, but also one of interpretation (in some though not all schools of thought), Muslim reformers have advocated for changes in the Islamic approach to religious liberty. Their efforts have been complicated, however, by shifts in the political landscape, and especially by the rise of political Islam.

Beginning in the 1970s, Islamists sought to institutionalize their religious

<sup>53</sup> This language paraphrases that of John Witte, Jr. and M. Christian Green, "The American Constitutional Experiment in Religious Human Rights," in *Religious Human Rights in Global Perspective: Legal Perspectives*, ed. Johan D. van der Vyver and John Witte, Jr. (Boston: Martinus Nijhoff Publishers, 1996), 497-557.



and political power in state constitutions, to the detriment of religious freedom in countries like Iran, Egypt, and Pakistan. Concurrently, and building on the momentum of national and transnational Muslim identification, they started developing Islamic alternatives to Western international law. The resulting agreements, such as the Universal Islamic Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam, challenge the universality of religious human rights. Even in Muslim-majority Turkey, a declared secular state, Islam remains an immediate and powerful force animating legal-political action and debates about the scope and content of religious liberty.

Indeed, while “Islamic states from Egypt to Malaysia have endorsed the rule of law,” the seductive neutrality of this concept should not be employed “to hide contested normative views about human rights.”<sup>54</sup> Insofar as Islamic international law is underwritten by a fundamentally different legal order than that of public international law,<sup>55</sup> and insofar as it arrives at definitions of religious freedom that diverge significantly from global human rights norms, it challenges not just the existence but the very possibility of universal human rights.

Thus, while it may be true that international human rights law provides general direction and not “a plan of implementation that can be applied mechanically, irrespective of political, economic, and cultural diversity,”<sup>56</sup> it is also doubtful that the bands of diversity can stretch to accommodate, for example, “Sharia-based punishments that the international rights regime condemns as cruel and inhumane, ... the status of women [in Islamic fundamentalism], ... [or] the clash between theocracy and (liberal) democracy.”<sup>57</sup> Two distinct but related problems follow from this: how to manage the challenges to the universality of human rights that emerge under conditions of religious pluralism generally, and what to do in the specific case of Islam.

## CONCLUSION #1: CURRENT MODELS OF RELIGIOUS PLURALISM FAIL

Religious pluralism has been the subject of several recent commentaries. Robin Lovin, a theorist of political ethics, writes that normative religious pluralism (i.e., a condition in which “religious diversity is encouraged and protected by social practices and sometimes by law”) is upheld in most modern democracies and tends

<sup>54</sup> Randall Peerenboom, “Human Rights and Rule of Law: What’s the Relationship?,” *Georgetown Journal of International Law* 36 (2005): 825, 944.

<sup>55</sup> A fact that makes legal pluralism (e.g., formal recognition of parallel religious legal systems) more complicated than many scholars acknowledge. For an instructive overview of the literature on legal pluralism, see Paul Schiff Berman, “Towards a Jurisprudence of Hybridity,” *Utah Law Review* 2010 (2010). For an outstanding introduction to the legal, philosophical, and theological implications of Islamic law in the Western world, see Rex Ahdar and Nicholas Aroney, eds., *Shari’a in the West* (New York: Oxford University Press, 2010). Also, for an illuminating discussion of specific issues raised by Islamic law in the European context, see Jorgen S. Nielsen and Lisbet Christoffer-son, eds., *Shari’a as Discourse: Legal Traditions and the Encounter with Europe*, Cultural Diversity and Law (Farnham: Ashgate Publishing Limited, 2010).

<sup>56</sup> Perry, “A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture,” 417.

<sup>57</sup> Peerenboom, “Human Rights and Rule of Law: What’s the Relationship?,” 819.



to result from political pluralism.<sup>58</sup> On this view, political reforms would almost certainly be necessary before Muslim states with recent histories of authoritarianism could generate and sustain the cultural transformations that would enable more robust protections of religious freedom. Other scholars look to the European Court of Human Rights and its “margin of appreciation” for a model of how to incorporate “a jurisprudence of diversity within universal human rights.”<sup>59</sup> However, this margin “cannot be invoked to avoid implementation of any particular right, or even to redefine the right with a view to regional or cultural preferences...”<sup>60</sup>

Islamic law scholar Mohammad H. Fadel appeals to John Rawls, suggesting that public reason could serve usefully as a strategy for principled reconciliation of Islamic law and international human rights law.<sup>61</sup> Fadel argues, for example, “that much of the current conflict between the substantive norms of human rights law and Islamic law could be resolved if human rights justifications were grounded in an overlapping political consensus rather than in foundational metaphysical doctrines that are necessarily controversial.”<sup>62</sup> This is not altogether different from international relations theorist Jack Donnelly’s argument that philosophical consensus on the foundation of human rights is unnecessary in view of the practical consensus that exists.<sup>63</sup> Similarly, legal philosopher Martha Nussbaum links Roger Williams with Rawls, asserting that equal respect as a value can only be secured by the separation of “key moral/political values from religious ideas,”<sup>64</sup> in pursuit of an overlapping consensus, underwritten by the fact that citizens “respect their fellow citizens as fully free and equal... [thus limiting] the ways in which they will seek to enact” their religious and secular comprehensive doctrines.<sup>65</sup>

Though well-intentioned, these analytical moves are unpersuasive for this debate precisely because Rawlsian liberalism denies the ultimacy of the very types of religious meaning and argument that animate it. International human rights treaties are one measure of this purported political or practical consensus, and insofar as those

<sup>58</sup> Robin W. Lovin, “Religion and Political Pluralism,” *Mississippi College Law Review* 27 (2007-2008): 91-92.

<sup>59</sup> Douglas Lee Donoho, “Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights,” *Emory International Law Review* 15 (2001).

<sup>60</sup> Johan D. van der Vyver, “Universality and Relativity of Human Rights: American Relativism,” *Buffalo Human Rights Law Review* 4 (1998): 49-50.

<sup>61</sup> Mohammad H. Fadel, “Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law,” *Chicago Journal of International Law* 8 (2007).

<sup>62</sup> *Ibid.*, 701.

<sup>63</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989).

<sup>64</sup> Steven D. Smith has recently argued that it is precisely these secular rationalist constraints that impoverish public discourse by preventing citizens from “openly presenting, examining, and debating the sources and substance of our most fundamental normative commitments.” Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge: Harvard University Press, 2011), 211.

<sup>65</sup> Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality*: 361-362. See also Jean Leca, “Political Philosophy in Political Science: Sixty Years on (Part II: Current Features of Contemporary Political Philosophy),” *International Political Science Review* 32, no. 1 (2011). To interject some realism into this debate as it concerns religious liberty, the book will document the explicit failure of many states and citizens to treat their fellow citizens as free and equal human beings worthy of respect.



pertaining to religious liberty are continually violated by signatories with a common religious-cultural orientation, there is good reason to suspect that the absence of an underlying philosophical consensus does indeed matter and that practical consensus will not suffice. International law scholar David Bederman, comparing Berman's notion of world law with Rawls's argument in *The Law of Peoples*, rightfully notes that Berman's vision exists beyond the realm of pure theory and is supported by facts and institutions on the ground; more important, however, is Bederman's observation that Berman is influenced by shared religious and moral values among peoples.<sup>66</sup> Conflicts and consensus in international human rights law can be neither understood nor resolved solely through present-day liberalism. Religious beliefs and practices are an essential part of the conversation.

As part of his effort to develop a theory of religious freedom in international law, Peter Danchin thus argues for value pluralism, which "holds that the freedom to manifest religion or belief does not include the right of Muslims in Europe, or any other majority or minority religious group, to elevate their faith into the established faith governing all others in a political regime," but also requires that secular Enlightenment Europeans reassess their own tendency "to treat belief as neatly separable from disciplinary practices, cultural routines, and the education of sensory experience."<sup>67</sup> Danchin challenges the "dogmatic assertion" that the Kantian quest for the coexistence of multiple faiths in the same public space can only be accomplished in one way (i.e., the relegation by classical liberal theory of religion to the private realm), and calls for an "*ethos* of engagement in public life among a plurality of controversial and theistic and nontheistic perspectives."<sup>68</sup> Insofar as "value pluralism" acknowledges a role for religion in shaping public discourse about law, this is helpful, but it is unclear how actual legal controversies would be resolved.

Somewhat similarly, Mark Modak-Truran calls for "a new constructive postmodern paradigm of law and religion that embraces legal indeterminacy as a structural characteristic of law which allows for a plurality of religious convictions to implicitly legitimate the law..."<sup>69</sup> On his account, religious pluralism renders outdated or erroneous the unitary religious (pre-modern) or secular (modern) legitimation of law; hence, law should be desecularized in a way that allows for the plurality of religions and comprehensive convictions in a culture.<sup>70</sup> Modak-Truran's analysis is especially instructive with regard to weaknesses in the legal theories of Rawls, as well as Weber, Habermas, and French secularism – theories that "[aspire] to make the law secular or

<sup>66</sup> David J. Bederman, "World Law Transcendent," *Emory Law Journal* 54 (2005): 72-73; John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001).

<sup>67</sup> Peter G. Danchin, "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law," *Yale Journal of International Law* 33 (2008): 61; Peter G. Danchin, "Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law," *Harvard International Law Journal* 49 (Summer 2008).

<sup>68</sup> Danchin, "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law," 61.

<sup>69</sup> Mark C. Modak-Truran, "Beyond Theocracy and Secularism (Part I): Toward a New Paradigm of Law and Religion," *Mississippi College Law Review* 27 (2007-2008): 166.

<sup>70</sup> *Ibid.*: 231.



neutral as among different religious convictions.<sup>71</sup> Yet here, too, there does not appear to be a means for reconciling deep conflicts over the substantive content of law: how would the law provide for and protect religious liberty rights if certain groups, religious or secular, refused to legitimate them?

In responding to these challenges of religious pluralism, others variously posit the importance of democratic processes for legitimating international norms in domestic Arab political contexts,<sup>72</sup> the need to recognize that religious liberty evolved as a human right in the West over hundreds of years (that is, human rights norms are accepted and sustained only when they are enculturated over time),<sup>73</sup> or that freedom of religion is merely a specific application of more general basic liberties and can thus be dispensed with as a category of separate enumeration.<sup>74</sup> The second of these claims may be historically accurate, but it is not very helpful for thinking about how to move forward; the third one is simply unsustainable for many reasons that will be discussed throughout the book. Therefore, while each of these models sheds light on different aspects of the problem, none offers sufficient means for overcoming conflicts between competing legal, moral, and political ontologies, especially at the level of international law.

Of course, another option is to deny this way of framing the debate altogether. For instance, Audrey Guichon claims that because human rights offer the best protection for human dignity, the universalist project is justified: it wants only for consideration of some cultural claims, and then human rights will be understood, experienced, mainstreamed, and legitimized – in Muslim communities and elsewhere.<sup>75</sup> Likewise, while recognizing that some cultural traditions will clash with global human rights norms, Susan Breau maintains that human rights can be protected in *any* cultural context.<sup>76</sup> This assertion is virtually irreconcilable with empirical reality. It is unclear, for example, how the right to covert away from Islam would be protected in a culture animated by Islamic fundamentalism and the jurisprudence

<sup>71</sup> Ibid: 201-22.

<sup>72</sup> David Mednicoff, “The Importance of Being Quasi-Democratic: The Domestication of International Human Rights in American and Arab Politics,” *Victoria University of Wellington Law Review* 38 (2007). The longer-term consequences of the “Arab spring” will be particularly interesting to observe in this regard.

<sup>73</sup> Christopher Marsh and Daniel P. Payne, “The Globalization of Human Rights and the Socialization of Human Rights Norms,” *Brigham Young University Law Review* 2007 (2007): 684.

<sup>74</sup> James W. Nickel, “Who Needs Freedom of Religion?,” *University of Colorado Law Review* 76 (2005). Brian Leiter makes the related argument that religious conscience claims do not warrant special protection vis-à-vis claims of conscience generally. Brian Leiter, “Foundations of Religious Liberty: Toleration or Respect?,” *San Diego Law Review* 47 (2010): 957-958. Andrew Koppelman summarizes Leiter’s views thus: “there is no good reason for law to single out religion for special treatment and religion is not an apt candidate for respect in the ‘think’ sense of being an object of favorable appraisal.” Andrew Koppelman, “How Shall I Praise Thee? Brian Leiter on Respect for Religion,” *San Diego Law Review* 47 (2010): 961.

<sup>75</sup> Audrey Guichon, “Some Arguments on the Universality of Human Rights in Islam,” in *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, ed. Javaid Rehman and Susan C. Breau (Boston: Martinus Nijhoff Publishers, 2007), 193-94.

<sup>76</sup> Susan C. Breau, “Human Rights and Cultural Relativism: The False Dichotomy,” in *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, ed. Javaid Rehman and Susan C. Breau (Boston: Martinus Nijhoff Publishers, 2007), 163 (emphasis mine).



of apostasy. In one sense, however, Pope John Paul II agreed with Guichon and Breau, for he insisted upon the universality of human rights. The question, then, and one not yet answered satisfactorily by existing models, is how to provide for such rights under conditions of religious pluralism.

## CONCLUSION #2: MUSLIM REFORMERS ARE ESSENTIAL TO THE DEFENSE OF RELIGIOUS HUMAN RIGHTS IN MUSLIM STATES

When he first addressed the U.N. in October 1979, Pope John Paul II defended basic human rights as “the moral foundation of any just polity and of any international order capable of fostering peace among nations.”<sup>77</sup> Between then and the time of his second U.N. address in 1995, two focal events transpired. First, the Revolution of 1989 seemed to prove “the trans-cultural moral power of human rights claims and the political potency of dedicated, often religiously-motivated human rights movements.”<sup>78</sup> Yet, as George Weigel explains, the dissolution of Communism was also accompanied by new voices challenging the universality of human rights – initially those of East Asian autocrats, who were then joined at the Vienna World Conference on Human Rights in June 1993 by militant Islamists intent on denouncing the UDHR.<sup>79</sup>

Responding to the growing threat of relativism, Pope John Paul II insisted in his 1995 U.N. address upon the global character of the human rights revolution – one that was structured internally by a common moral core “discern[able] amidst the vast diversity of the world’s cultures,” essential to the very possibility of international politics (provided politics is understood as “mutual deliberation about the common good”), dependent in the first instance upon religious freedom, and capable of being engaged by all rational persons (i.e., it was not theologically specific).<sup>80</sup> This last point echoes the approach in *Dignitatis Humanae*, which, by opening with a natural law defense of religious freedom, claims a universality grounded in reason (albeit one supplemented by revelation).

Whether Islam is similarly open to arguments based on reason (rather than divine will) has been the subject of recent controversies involving Pope Benedict XVI.<sup>81</sup> Much appears to depend upon the extent to which Muslim intellectuals (including those who draw on rationalist strains of Islamic thought) succeed in developing cultural and political support for their religious reformism. This bears directly on the

<sup>77</sup> George Weigel, “Roman Catholicism in the Age of John Paul II,” in *The Desecularization of the World*, ed. Peter L. Berger (Grand Rapids, MI: Ethics and Public Policy Center & William B. Eerdmans Publishing Co., 1999), 25.

<sup>78</sup> *Ibid.*, 25.

<sup>79</sup> *Ibid.*, 26.

<sup>80</sup> *Ibid.*, 26-28.

<sup>81</sup> Benedict XVI, “Meeting with the Representatives of Science, ‘Regensburg Lecture’” (September 12, 2006); James V. Schall, S.J., “God as Logos, Allah as Will,” *Zenit*, October 3, 2006; “Benedict on Islam,” *Commonweal*, October 6, 2006; “Open Letter to His Holiness Pope Benedict XVI by 38 Leading Muslim Scholars and Leaders,” *Islamica Magazine*, October 12, 2006. See also Robert R. Reilly, *The Closing of the Muslim Mind* (Wilmington, DE: ISI Books, 2010).



question of Islamic international law, for while the contemporary *as-siyar* of the Universal Islamic Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam are incompatible with accepted international standards of religious liberty and thereby threaten the universality of human rights, alternate interpretations of Islamic law and thought could (at least theoretically) generate Islamic defenses and formulations of religious human rights.<sup>82</sup>

At a macro-level, this might involve Abdullahi A. An-Na'im's model of "internal discourse – cross-cultural dialogue," which stresses "the importance of domestic cultural legitimacy for the successful implementation of international human rights standards primarily in areas of perceived conflict between human rights and Islam."<sup>83</sup> Indeed, the desire of many Muslims to tap their own cultural resources, including *Shari'a*, has kindled efforts to elaborate the Islamic foundation of human rights and the Qur'anic authorization of religious liberty.<sup>84</sup>

For instance, attributing the admittedly significant differences between the West and Islam on matters of religious liberty to dissimilar cultural and historical experiences, Abdulaziz A. Sachedina employs an exegesis of the Qur'an to argue that various theological and philosophical roots of Western principles of religious freedom have counterparts in Qur'anic teachings.<sup>85</sup> Alternatively, Majid Khadduri, observing that "justice would be meaningless if the fundamental rights of man were to be unrecognized or ignored by society," qualifies the freedom to change one's religion

<sup>82</sup> But see Bassam Tibi, *Islam's Predicament with Modernity: Religious Reform and Cultural Change* (New York: Routledge, 2009). Tibi argues that contemporary *Shari'a*, embedded in *fiqh* orthodoxy, is an invention of political Islam – one that contradicts democratic constitutionalism and is not open to religious reform. While he does not reject *Shari'a* altogether, he characterizes it as a morality that was "developed by Islamic scribes into a kind of divine civil law... [but one that] was never a constitutional or state law as it is now promoted by the Islamists in the context of the shari'atization of Islam" (128). Tibi does not believe that that legal reform in Islam is yet in sight, but he salutes the "tiny minority" of Muslims within the *umma* who persevere in such efforts, despite the often great personal cost (128-29).

<sup>83</sup> For an example of this framework applied in the American context, see Elizabeth M. Bruch, "Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States," *Tennessee Law Review* 73 (2006): 677. Also, for an attempt to build upon, but also modify, An-Na'im's model in the Islamic context, see Jason Morgan-Foster, "A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context," *ILSA Journal of International and Comparative Law* 10 (2003). An-Na'im elaborates on this in great detail in his recent work, *Muslims and Global Justice* (Philadelphia: University of Pennsylvania Press, 2011).

<sup>84</sup> See Mashood A. Baderin, "The Role of Islam in Human Rights Development in Muslim States," in *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, ed. Javaid Rehman and Susan C. Breau (Boston: Martinus Nijhoff Publishers, 2007); Noor ul-Amin Leghari, "The Concept of Justice and Human Rights in Islam," in *Justice and Human Rights in Islamic Law*, ed. Gerald E. Lampe (Washington, D.C.: International Law Institute, 1997). But see Ann Elizabeth Mayer, "Current Muslim Thinking on Human Rights," in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi A. An-Na'im and Francis M. Deng (Washington, D.C.: The Brookings Institution, 1990), 154. Mayer notes, "it is highly significant that Muslims are showing a growing eagerness to incorporate international human rights protections in their legal systems and that the resistance to this in the name of applying Islamic law is largely emanating from governments and ideologues of movements aspiring to governmental power."

<sup>85</sup> David Little, John Kelsay, and Abdulaziz A. Sachedina, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (Columbia, SC: University of South Carolina Press, 1988), 53-90. On natural law in the Qur'an, see Ali Bardakoglu, "The Concept of Justice in Islamic Jurisprudence," in *Justice and Human Rights in Islamic Law*, ed. Gerald E. Lampe (Washington, DC: International Law Institute, 1997).



in Islam: to turn one's back on Islam after adopting it is apostasy, but "in matters pertaining to human conscience, it is inconceivable that God would prescribe death, [as] the Revelation...clearly stated that there should be no compulsion in religion."<sup>86</sup>

In a creative synthesis of old and new, Khaled Abou El Fadl suggests that the historic purpose of *Shari'a* in fulfilling the welfare of the people – constituted by necessities (*daruriyyat*), needs (*hajiyyat*) and luxuries (*kamaliyyat*) – could ground a systematic theory of individual rights based on the five basic values of the *daruriyyat* (e.g., religion, life, intellect, honor, and property).<sup>87</sup> Under such a system, protection of the basic value of religion could be achieved by religious liberty rights. In a similar spirit, Ahmad S. Moussalli traces the classical and medieval roots of religious rights in Islam (*al-huquq al-shar'iyya*) and their incorporation into modern Islamist conceptions of human rights.<sup>88</sup>

Of special interest, Moussalli describes the text of a pact (*mithaq*) published and distributed by Muhammad al-Hashim al-Hamidi to other Islamists. It states, in pertinent part: "[t]he success of the Islamic movement after it takes control of government hinges on establishment of a just and democratic system in the Arab world. Lifting the community from the tyranny that it has been plunged into necessitates that any such movement establish limits and a program for justice, *shura*, and human rights."<sup>89</sup> Equal rights for women and minorities, as well as freedom of thought, belief, expression and religion are among the specific rights enumerated – preliminary but notable evidence that Islamic legal and political institutions may yet, over time and with support, move toward greater compliance with international legal standards of religious freedom.

This brings us to the theoretical questions with which the book will open: namely, whether a world legal tradition has begun to, or could yet, emerge; and what role such a tradition might play in transforming the dilemma of religious freedom. Recall that, for Berman, "world law" includes public international law, as well as the contractual and customary legal norms governing cross-border relations. Human rights law is an integral part of public international law. Thus, to the extent that the UIDHR and the Cairo Declaration represent a countermodel of human rights (one that conflicts with global legal norms concerning religious liberty), it would be difficult to characterize contemporary *as-siyar* as part of a (new) *jus gentium*. In such a case, the dilemma of religious freedom would appear to hold: the universality of religious human rights could not be secured alongside institutional recognition of formulations based on *Shari'a*.

<sup>86</sup> Majid Khadduri, *The Islamic Conception of Justice* (Baltimore, MD: The Johns Hopkins University Press, 1984), 239.

<sup>87</sup> Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam," in *Human Rights and Responsibilities in the World Religions*, ed. Joseph Runzo, Nancy M. Martin, and Arvind Sharma (Oxford, England: Oneworld Publications, 2003), 332-33.

<sup>88</sup> Ahmad S. Moussalli, *The Islamic Quest for Democracy, Pluralism, and Human Rights* (Gainesville, FL: University Press of Florida, 2001).

<sup>89</sup> *Ibid.*, 156-57.



Yet the fundamentalist understanding of Islam embodied in these declarations is not the only one. Muslim reformers, many of whom build on centuries-old rationalist currents in Islamic thought, offer an alternative vision of *Shari'a* – one that preserves a role for religion and religious influence in legal and political institutions (and hence may be more capable than Western models of securing cultural legitimacy in Muslim states), but one that is also oriented toward just and democratic laws that accord with international standards of human rights. Under this vision, the dilemma of religious freedom might yet be transformed: the baseline scope and content of religious liberty could perhaps be universalized, even as diverse religious and philosophical principles were invoked to legitimate the resulting laws and institutions.

This appears to be in part what Berman meant by a world legal tradition: mutual recognition of and respect for the distinct moral and historical bases of law across cultures; one that, moreover, embraces “common features of the various legal systems of the peoples of the world.”<sup>90</sup> Indeed, the forging of a world legal tradition could arguably constitute a new type of foundational consensus based on respect for the religious (and not just the secular) foundations of law, thereby increasing the possibility that political consensus on religious liberty, and perhaps other human rights issues, could be achievable and lasting.

### CONCLUSION #3: JUDEO-CHRISTIANITY WILL BE ESSENTIAL TO THE DEFENSE OF RELIGIOUS HUMAN RIGHTS IN THE WEST

While the elements of a world legal tradition are to be found in the intellectual and institutional resources of the Western and Islamic worlds, the emergence of such a tradition is not inevitable. Tensions between competing factions within Muslim societies (and the opposing Islamic schools that they represent) are serious, often violent, and very much an ongoing concern. At stake are many pressing legal and political issues, not least of which are the universality of human rights, generally, and the protection of religious freedom – that “first right” – in particular. Moreover, new threats to religious freedom are emerging in Western states. While it is true that certain formulations of Islam threaten religious liberty in the Muslim world, it is also true that increasing hostility to religion in some parts of the West threatens religious liberty in the place of its birth. Such is why the debate over religious freedom must be reframed to account for comparative religious context (i.e., not just the contributions of Islamic law to Muslim states, but also Judeo-Christian contributions to the Western legal tradition<sup>91</sup>).

For example, three years ago, Phillip Blond and Adrian Pabst published a piece

<sup>90</sup> Berman, “World Law: An Ecumenical Jurisprudence of the Holy Spirit,” 13.

<sup>91</sup> See, for example, John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (New York: Cambridge University Press, 2010). See also Zachary R. Calo, “Human Rights and Healthy Secularity,” *Journal of Catholic Social Thought* 7, no. 2 (2010): 1-21.



in *The New York Times* under the headline “Integrating Islam into the West.”<sup>92</sup> Writing shortly after Archbishop Rowan Williams made intensely controversial remarks regarding the adoption by Britain of certain aspects of *Shari’a* law (with the goal of integrating Britain’s growing Muslim population), they insightfully observed that “the genuine target of the archbishop’s lecture is the increasingly authoritarian and anti-religious nature of the modern liberal state.” The concern over “militant secularism” and freedom of religion or belief is thus linked with broader Western fears about “the consequences of failing to integrate a growing, devout and alienated Islamic minority within a relativistic and increasingly aggressive secular culture.”

Anticipating recent statements by German Chancellor Angela Merkel and British Prime Minister David Cameron denouncing state multiculturalism as a failure, Blond and Pabst noted that “communities sharing the same space but leading separate lives” serves to segregate rather than integrate, while damaging “any conception of a common good binding on all citizens.” Instead of Europe’s problematic secular models of integration, which they argued have failed (citing Britain, the Netherlands, Germany, and France as examples), they pointed to the American model – one that, by allowing for public expression of religion and individual rights alongside the relative autonomy of religious communities, has substantially removed the dichotomous choice between loyalty to the state and loyalty to one’s faith. They suggested that this may explain why American Muslims are better integrated than their European counterparts.

Blond and Pabst concluded, provocatively, that “[o]nly a new settlement with religion can successfully incorporate the growing religious minorities in Western Europe;” moreover, this settlement can only be achieved by the recovery of Europe’s Christian roots. Why? Because “[o]nly Christianity can integrate other religions into a shared European project by acknowledging what secular ideologies cannot: a transcendent objective truth that exceeds human assertion but is open to rational discernment and debate.” The proper response to religious pluralism is thus the Christian accomplishment of a non-secular model of the common good that is “the only basis for the political integration of Muslims and peaceful coexistence.”

A scholarly discussion and defense of several of these themes has recently been offered by British theologian John Milbank.<sup>93</sup> As a preliminary matter, Milbank expands the framework to include both Judaism and Christianity; his focus is on the latter, but he acknowledges that Jewish resources are available to defend religious liberty against secularist challenges and, centrally for his argument, support a corporatist constitutionalism that is able to comprehend ‘the other’ (thereby providing for constitutional pluralism).<sup>94</sup> Rabbi David Novak draws upon Jewish tradition to offer a vigorous defense of religious liberty and human rights, which, read in tandem

<sup>92</sup> Phillip Blond and Adrian Pabst, “Integrating Islam into the West,” *The New York Times*, February 14, 2008.

<sup>93</sup> John Milbank, “Shari’a and the True Basis of Group Rights: Islam, the West, and Liberalism,” in *Shari’a in the West*, ed. Rex Ahdar and Nicholas Aroney (New York: Oxford University Press, 2010), 136-57.

<sup>94</sup> *Ibid.*, 139, 147.



with Milbank's piece, illuminates many theological and philosophical commonalities between the two religious traditions that are relevant to these legal-political challenges.<sup>95</sup>

In any event, while Milbank's essay engages several issues of profound significance for the relationship between church and state, as well as the West and Islam (particularly Islamic law in Western states), his discussion of religious liberty is especially relevant to this project. Milbank cautions that while the European Union "still declares that religious liberty...has priority over all other rights," this priority is "rooted in an ultimately Christian and not secular background..."<sup>96</sup> There is nothing to stop a secular legal order from asserting its authority over religious bodies in the event of a conflict (e.g., a dispute about whether or not women should be ordained), and Milbank warns that many legal thinkers are beginning to move in precisely this direction. Indeed, he notes that "[s]ome secular thinkers actually now wish to abolish the right to religious freedom."<sup>97</sup>

This, according to Milbank (and also Blond and Pabst), is Williams's real concern – the growing hostility of the secular liberal state to religion. If classical Islam subordinated the state to religion, militant secularism increasingly looks to subordinate religion to the state: neither is compatible with religious freedom. Instead, "a genuine defence of religious liberty can only be genuinely secured from a religious perspective," for "[l]iberal principles, when pressed to a logical extreme, will always ensure that the rights of the individual override those of the group... It follows that churches will not be able to fight the threat to the integrity of religious bodies in liberal, secular terms alone..."<sup>98</sup>

Religious freedom, a crucial aspect of human dignity, is inherently worthy of protection; moreover, its interdependence with other human rights arguably makes it the linchpin of international human rights law. Muslim reformers are working to infuse their legal, cultural, and political traditions with robust and resonant defenses of religious liberty. It is necessary for Western intellectuals, working in part from within Jewish and Christian traditions, to do the same. If religious liberty is to be secured, if sustainable pluralism of diverse peoples is to be achieved, a theological jurisprudence rooted in love of God and love of neighbor and informed by reason will be required. This is the calling of a world legal tradition.



<sup>95</sup> David Novak, *In Defense of Religious Liberty* (Wilmington, DE: ISI Books, 2009).

<sup>96</sup> Milbank, "Shari'a and the True Basis of Group Rights," 139.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, 139, 145.



# BETWEEN SECULARISM AND RELIGIOSITY: AMERICA'S FOUNDING PROTESTANT PHILOSOPHY

NICHOLAS P. MILLER, JD, PHD<sup>1</sup>

We tend to think of the battle between religion and secularism as a distinctly modern one. We often see it as arising in the early 20th century, or at the earliest, in the late 19th century, with the rise of Darwinism and philosophical positivism. But the conflict is a lot older than that, even if we limit our view to post-medieval western Europe. Even before the skeptical philosophes of the French Revolution, such as Voltaire and Rousseau, the ideas of Hume and Spinoza were challenging conventional views of religious revelation. But an even more important point than the age of the conflict is its originally tri-part, rather than dual nature. It was not religion versus secularism, but rather one kind of medieval-like church/state arrangements versus various kinds of “enlightened” ideologies that promoted the idea of a state that was neutral in matters of religion.

Some of these “enlightenment” ideologies were overtly hostile towards ideas of revelation and theistic religion. For these systems, separation of church and state needed to happen to protect a reasoned, enlightened state from the superstitions and misguided zeal of religious fanatics. But other versions of these “enlightenment” systems of thought were sympathetic towards religious claims. Indeed, some versions seemed to be products of certain kinds of dissenting religious thought. These sought a separation of church and state out of a mutual respect for the dual but differing spheres of sovereignty assigned to each one. Both, it was thought, should protect and respect the role of the other.

I am certainly not the first to make this observation about the diversity of enlightenment, or what we have come to call, secular thought. In the 1970s, Henry May wrote his famous book, *The Enlightenment in America*, that identified four strands of the enlightenment. Of interest to us is his “skeptical enlightenment,” which was much like the stereotypical, anti-religious, skeptical kind of secularity found in revolutionary France. But there was also the “moderate enlightenment,” a much more religiously-sympathetic, even influenced, system of thought found in Scotland and England. There was also the “Didactic Enlightenment,” flowing from Scotland to America, which was also very religious in perspective, with many of its

---

<sup>1</sup> Nicholas Miller, (BA, Union College; JD, Columbia University PhD, Notre Dame University), is an Associate Professor of Church History Director, International Religious Liberty Institute at Andrews University, Berrien Springs, Michigan.



primary thinkers being Protestant clergymen.

I raise this point about the diversity of secularities in early America to draw the contrast with today, where secularism seems all on the non-religious side. In today's battles over religious freedom between the religious and the secular, the differences between how different religious believers view church and state has become overshadowed by the apparent gulf between skeptics and believers. The implications of May's work on the Enlightenment, however, is that the modern contest is not two-sided, but three-sided. There is a moderating position between the so-called religious right and secular left, one based on the dissenting Protestant heritage that came to be forcefully expressed at the constitutional founding. I think an understanding of this position can be helpful to other communities and societies as they seek to bring culturally religious peoples into an acceptance of the freedoms and tolerances offered by a secular government. It can show a pathway to how secularism does not need to mean anti-religious.

This position can be understood by examining differing approaches of each to the relationships between the individual, church, state, and God. To understand our possible futures, it will be helpful to revisit the past. Specifically, the end of the seventeenth century when the revocation of the Edict of Nantes sent legal thinkers to their libraries to prepare defenses of religious toleration. At that time, these positions were ably expressed by three of the most brilliant legal and theological minds of that time.

The three were Samuel Pufendorf, a Lutheran natural rights lawyer and counselor to the King of Sweden; John Locke, political philosopher whose acquaintance we have already well made; and Pierre Bayle, an influential French Huguenot theologian and philosopher. In their writings can be found the basic outlines of the Puritan, semi-theocratic model; the separationist model based on the right of private judgment; and the secular, liberal separationist model.<sup>2</sup>

## 1.1 PUFENDORF AND MEDIEVAL PRIVILEGES

Born in 1632 in Saxony, Pufendorf was best known for his works on international law, especially *The Law of Nature and Nations*.<sup>3</sup> Published in 1672, this work was widely influential on the continent, in Scotland, and in the newly formed American colonies.<sup>4</sup> When the Edict of Nantes was revoked, Pufendorf took the opportunity to write what has been described as an "appendix," which applied his natu-

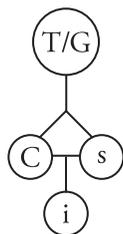
<sup>2</sup> This article includes material originally published in Nicholas P. Miller, "The Dawn of the Age of Toleration: Samuel Pufendorf and the Road not Taken," *Journal of Church and State*, Vol. 50, Spring 2008, 255-275.

<sup>3</sup> Samuel Pufendorf, *Of the Nature and Qualification of Religion in Reference to Civil Society* (Indianapolis, IN: Liberty Fund, 2002), xii-xiii. A discussion of Pufendorf and his views on toleration can be found at Simone Zur-buchen, "From Denominationalism to Enlightenment: Pufendorf, Le Clerc, and Thomasius on Toleration," in John Christian Laursen, ed., *Religious Toleration: "The Variety of Rites" From Cyrus to Defoe* (New York, NY: St. Martin's Press, 1999), 191-204.

<sup>4</sup> J.B. Schneewind, *The Invention of Autonomy* (UK:Cambridge University Press, 1998), 118.

ral law theory to issues of church and state.<sup>5</sup> Entitled *Of the Nature and Qualification of Religion in Reference to Civil Society* (“*Religion and Civil Society*”), Pufendorf’s work was published in 1687. It set out a principled basis for what was ultimately a pragmatic, anemic toleration. It represented the magisterial Protestant continuation of the medieval view of church and state.

Pufendorf dedicated the book to the elector of Brandenburg-Prussia and used it to recommend himself for a post in the elector’s Berlin court, which he indeed received.<sup>6</sup> The intended audience perhaps helped shape the work. He sets out a high view of the state and its power and a rather limited and weak basis for religious toleration. The work begins with apparently strong principles of separation between ecclesiastical and civil spheres, as well as a commitment to individual rights. But the last third of the book returns spiritual powers and oversight to the “Christian” ruler that is denied to secular rulers in the first portions of the book. To simplify his thinking in a useful way, we can diagram it. The diagram contains four basic elements: God/Truth, the church, the state, and the individual. Pufendorf’s arrangement of these elements would look like this:



Here, God and the accessibility of truth are recognized. A distinction between church and state is also accepted, but that distinction allows for a great deal of cooperation, especially when the ruler is a Christian. The importance of the individual is minimized, because of his or her need to go through the organs of church and state to obtain truth, whether spiritual or civil. It represents the world of the divine right of kings and popes, where no individual rights exist, but only privileges extended by the rulers. It is one where church and state are distinct entities, but play a role in cooperating to civilly enforce the majority religious beliefs and practices of society. Under this system, the church in theory has a superior position in society, as kings and ruler are subject to the superior spiritual authority of church. Bishops and Popes at times provided legitimacy to the claims of leaders to civil authority, at times crowning them, as Pope Leo III did for Charlemagne. This relationship is shown by the capital “C” and lowercase “s.”

Pufendorf criticized the revocation of the Edict of Nantes, but not because the Huguenots had some sort of natural right claim to religious liberty. Rather, he believed that the crown, once having extended the toleration, should keep its word

<sup>5</sup> Pufendorf, *Religion in Reference to Civil Society*, xi.

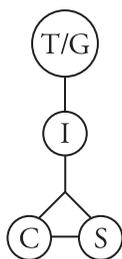
<sup>6</sup> *Ibid.*, xiii.



and not withdraw it. It was a question of honoring agreements and contracts, and the social stability protected by that practice. Pufendorf had no principled or moral argument for why the Edict should have been entered into in the first place. That was a policy calculation that brought political peace against an aggressive and armed minority. In Pufendorf's model, religious liberty became a question of policy, a privilege to be extended or denied at the inclination of the ruler. His philosophical fruit fell not far from the medieval tree.

## 1.2 LOCKE AND PROTESTANT RIGHTS

John Locke's church/state principles were most clearly outlined in his *Letter on Toleration* published in 1789. His views show the shape of the new world that Luther helped create in proposing that each person should access God through prayer and Bible study. The priesthood of all believers inverted the bottom half of Pufendorf's diagram. The belief vaulted the individual to a position above the church and the state, with direct access to God and truth. Locke's model of these four elements would look like this:



This model accepted, like the medieval model, that God exists and that certain truths can be ascertained about both the world and spiritual things. But the new, Protestant view placed the individual above church and state. Each person now had the duty and right to seek this truth from God, through both the Bible (especially about spiritual things) and through nature (especially political matters and civil morality). The church and the state existed to support and protect the rights of the individual, one as a member of the spiritual world, the other as a citizen of the temporal world. There was a separation between these two powers, since their jurisdiction is limited to their separate spheres of concern, whether spiritual or civil. It is a separation of equality and mutual respect, with each entity respecting the sovereignty of the other in its own sphere. Hence, both are represented by the capital symbols "C" and "S."

The individual's rights against the state, in turn, derived from the duties that he or she owed to God. This is essentially the political expression of the Protestant model of the priesthood of all believers. It serves as a robust foundation for individual rights, hence the individual is shown by a capital "I." This is the model that we have traced through the early modern west and seen to be an important part of the



impulse to disestablishment in colonial America.

### 1.3 BAYLE AND SKEPTICAL RIGHTS

The third writer during this period was Pierre Bayle. While ostensibly a Calvinist theologian, Bayle was actually a strongly skeptical thinker who based his view of toleration on broad epistemological skepticism. Bayle was accused by fellow Calvinist theologians of supporting atheism, and was deprived of his professorship at his Protestant university as a result.<sup>7</sup> Rather than an heir of Calvin and ancestor of the New England Puritans, Bayle was more an heir of Pyrrhonius and ancestor to Hume, Voltaire, Rousseau, and eventually Franklin and Jefferson.<sup>8</sup>

Bayle largely shared Pufendorf's view on the supremacy of the state over the individual. He rejected Locke's notion of a reciprocal contract between ruler and people, denied the right of rebellion, and upheld a strong duty of obedience to the ruler.<sup>9</sup> But unlike Pufendorf, Bayle held a skeptical view of the world. Especially in the area of speculative truths, including religion, he affirmed a strong difference from mathematical or empirical truths. For the former, he believed one could only attain a "reputed" truth, rather than actual truth.<sup>10</sup> This led Bayle to defend the notion of individual conscience.

Other thinkers of the day often spoke of the rights of conscience, but it was generally understood that they were not talking about erroneous conscience or acts against one's conscience. Bayle was one of the first to propose that rights of conscience should extend to consciences that were believed to be in error—the so-called "erroneous conscience."<sup>11</sup> Even if one could know that someone else was in error, argued Bayle, how could one know that the other person was convinced of that error?<sup>12</sup> This question was a central point of contention in the debate between Roger Williams and John Cotton over the issue of toleration and persecution.

Bayle's strong defense of conscience, then, was based on a weak view of truth, or at least human ability to know truth. This led him to view individual judgment and conscience as important. Thus, he held a strong view of the duty of the state to tolerate religious differences. To put Bayle's view into our diagram looks like this:

<sup>7</sup> Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton: Princeton University Press, 2003), 285. For an extended discussion of the opposition to Bayle within French Protestant circles see Guy H. Dodge, *The Political Theory of the Huguenots of the Dispersion* (New York: Columbia University Press, 1947).

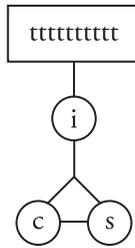
<sup>8</sup> Pierre Bayle, *Political Writings*, Sally L. Jenkinson, ed. (Cambridge University Press, 2000), back cover; for a helpful overview of Bayle's thought in relation to toleration see Sally Jenkinson, "Bayle and Leibniz: Two Paradigms of Tolerance and Some Reflections on Goodness without God," in John Christian Laursen, ed., *Religious Toleration: "The Variety of Rites" From Cyrus to Defoe* (New York, NY: St. Martin's Press, 1999), 173-186.

<sup>9</sup> Zagorin, *How the Idea of Religious Toleration Came to the West*, 270.

<sup>10</sup> *Ibid.*, 282-283.

<sup>11</sup> *Ibid.*, 280-281; Bayle, *A Philosophical Commentary*, 219-233.

<sup>12</sup> Bayle, *A Philosophical Commentary*, 145-149.



The lowercase “t”s represent the individualistic conception of truth, where no universal view of truth exists, but everyone conceives his or her own truth. Church and state are still separate, but it is not a separation of mutual equality and sovereign spheres. Rather, it is a separation based on a suspicion of the truth claims made by religious people. The tolerance in this scheme is dependent on a commitment to skepticism—from the logic that if truth cannot be known, then no one can or should enforce it. The real threats to this system are those who claim knowledge of absolute truths.

Churches and people who believe in special revelation were such a threat. Therefore, religious people and their beliefs are to be kept far away from politics and the public square generally. Separation of church and state, rather than being based on a view of separate sovereignties, becomes founded on hostility to the truth claims of religious people and their views of special revelation. Religious people and their ideas are kept not only out of government, but on the fringes of the public square generally. The attitude under this view of the state towards the church was symbolically expressed by Napoleon when, in contrast to Charlemagne, he crowned himself emperor in the presence of the pope. The marginalization of the church and religion in this system is represented by a lowercase “c.”

Rights in this system are not quite as secure as under the Lockean view. Individual autonomy is a somewhat fragile thing when it is based merely on skepticism, rather than on individual duties to, and rights before, God. The solitary autonomy of the individual becomes fairly quickly outweighed by the interest of the group once accommodation of the individual becomes anything more than a slight inconvenience. This is seen very clearly in the skeptical/atheistic communist systems, where respect for the individual is very quickly submerged to the common good. A similar thing happens in a democracy, we have seen, when terrorism threatens national security. Hence, the “i” for individual is lowercase.

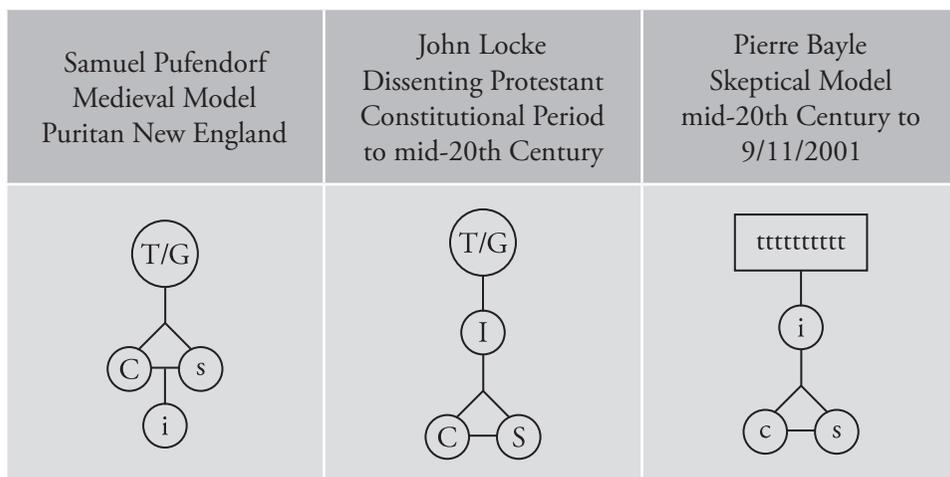
Under this model, there is no real reason why religious claims to truth should obtain greater protection than claims to convictions in other areas. Why should religious claims have special protection beyond that received by a wide range of special interest claims, such as environmentalists or animal rights supporters or advocates of unions and labor? People feel strongly about all these issues. If it is the individual conviction only that provides the basis for rights, as this model suggests, then all



these convictions should be treated equally. But ultimately, if all convictions are equally protected, none can be meaningfully protected, or democracy will ultimately become gridlocked amidst a cacophony of clashing rights claims.

### 1.4 THREE VIEWS IN AMERICAN HISTORY

My discussion of the third view has moved beyond what Bayle himself would have suggested into how at least parts of modern liberalism has developed this view. All three of these views, the Pufendorfian, the Lockean, and the Baylean models, have been influential at various times in American history. A side-by-side comparison of these models, a representative advocate, the historical periods they represent, and their time of greatest influence in America, is represented in the diagram below.



The American Puritans developed a Pufendorfian-like church/state arrangement in early New England, with a civil magistrate involved in enforcing ecclesiastical rules and discipline. Thus, the earliest American colonies were founded on the theory of the Medieval model on the left, with the exception of Rhode Island. Some later ones, especially New Jersey, Pennsylvania, Delaware and North Carolina, were founded basically on the Protestant theory in the center box, which also guided the formation of the national constitution. Despite Pufendorf's enormous influence in both Scotland and the American colonies, the founders of the American republic explicitly rejected his form of church/state arrangement.<sup>13</sup> At the time of the Revolution and the formation of the Constitution, Pufendorf's model of toleration was limited to two or three New England states, and within a few years vanished from even there.

It was Locke's formulation, mediated by Madison, Witherspoon, and other key American thinkers, of dissenting Protestantism that carried the day in the founding

<sup>13</sup> Schneewind, *The Invention of Autonomy*, 118.



of the American republic. Their views of the separate roles of the two powers were the ideological victors on the topic of tolerance and religious freedom in the early Republic. It is this shift from a medieval, paternalistic, hierarchical model to an individualistic, egalitarian, rights-based outlook that Gordon Wood so ably documents in his justly famed *The Radicalism of the American Revolution*.<sup>14</sup> Wood broadly and convincingly documents the change from hierarchy, patriarchy, aristocracy, and patronage to democracy, equality, republicanism and the rule of law in colonial America. This chart can perhaps shed light on one of the puzzles in Wood's book. In his sub-title, he asserts that the book shows "How a Revolution Transformed a Monarchical Society into a Democratic One Unlike Any Other That Had Ever Existed." While he is right about the uniqueness of American society, it seems apparent from the story in his book that the Revolution did not cause the shift from monarchical to republican ethos. Rather, the Revolution was a symptom of a shift that had already occurred in American culture and society.

Wood does an excellent job of describing that shift from monarchical to republican outlook, but offers, in my view, less than convincing arguments for the reasons or causes of the shift. He focuses on the Enlightenment, arguing that "for the revolutionary generation America became the Enlightenment fulfilled."<sup>15</sup> This raises the problem, earlier discussed, of trying to explain a movement with tremendous popular appeal by appeal to an elite affinity and state of mind. Wood is unwilling to give religious thought much, if any, credit for the paradigm shift to a republican outlook, instead crediting Enlightenment and rationalistic sources. Indeed, he views religion as a conservative force that largely resisted that shift.<sup>16</sup>

But it seems that Wood is looking at only one version of religion in telling this story, that of magisterial Protestantism. This is most obviously displayed when he describes the belief in "liberty of conscience and separation of church and state" as an "Enlightenment belief" that was resisted by "many religious groups."<sup>17</sup> Indeed, there were religious groups that opposed religious liberty and the separation of church and state. But the dominant religious groups in early Republican America had taken on a dissenting Protestant perspective, which Wood seems to miss almost completely. Wood's larger story becomes much more explicable when religion and religious belief are given their due weight in shifting popular views along from a medieval to a protestant outlook on church, society and the individual.

The religious support for American independence as well as religious liberty was well understood by those closer to the Revolution, such as Edmund Burke, the British parliamentarian. Burke famously explained the independent character of the American colonists by fact that "the people are Protestants, and of that kind which is the most adverse to all implicit submission of mind and opinions.... All Protestant-

<sup>14</sup> (New York, NY: Alfred A. Knopf, 1992).

<sup>15</sup> Wood, *The Radicalism of the American Revolution*, 191.

<sup>16</sup> *Ibid.*, 330-331.

<sup>17</sup> *Ibid.* 331.



ism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies is a refinement on the principle of resistance: it is the *dissidence of dissent, and the Protestantism of the Protestant religion*.<sup>18</sup> Burke, a strong critic of the Enlightenment-driven ideology of the French revolution, saw very different, and much more religious and Protestant principles at work in America.

But by the late nineteenth century, the rise of uncertainty in theology, science, and philosophy undermined the American Protestant outlook, and laid the groundwork for a toleration based on skepticism. John Stuart Mill's view of skeptical individualism increasingly became the prism through which Locke was understood. As a consequence, the twentieth century saw a wholesale move, at least in the elite centers of thought, to toleration based on epistemological uncertainty and moral relativism.

After the Civil War, the rise of Darwinism, and the growth of philosophical uncertainty, many American elite institutions, including colleges and universities, the professions, and the media began to move towards the much more skeptical view represented by Bayle. This shift did not happen overnight, and much has been written on the involved process of secularization in American history.<sup>19</sup> The Protestant umbrella broadened to include an even more generic and diffuse sense of American spiritual identity.

The influence of German higher idealism, with its attendant historicism and philosophy of relativism, in the mid-to-late-nineteenth and early twentieth century called into question the natural law foundations of the country. This philosophy also undercut the Protestant model of church and society that was based on these views of natural law and natural rights. New approaches to the law based on social and pragmatic concerns accompanied the gradual acceptance of legal positivism. These ideas gained ground in the early twentieth century and especially influenced legal thought in the second-half of the twentieth century.<sup>20</sup>

These new ideas made progress to different degrees in differing parts of society. They made greater inroads earlier in "elite" institutions, such as colleges and universities, and in the press and media. Old paradigms continued to hold sway at more popular levels. The civil rights movement of the 50s and 60s could be described as the last gasp of Protestant-style natural rights/public morality arguments at the popular level, which combined with a more modern, liberal rights perspective among its

<sup>18</sup> Edmund Burke, *The Portable Edmund Burke*, Kramnick, Isaac, ed. (New York, NY: Penguin Books), 263 (emphasis added).

<sup>19</sup> A good overview is provided by Christian Smith, *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Public Life* (Berkeley, CA: University of California Press, 2003). Helpful works dealing more generally with secularization in the west include, Callum G. Brown & Michael Snape, eds., *Secularization in the Christian World: Essays in Honor of Hugh McLeod* (Burlington, VT: Ashgate, 2010); Hugh McLeod & Werner Urstorf, eds., *The Decline of Christendom in Western Europe, 1750-2000* (Cambridge: Cambridge University Press, 2003); Steve Bruce, ed., *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis* (Oxford: Oxford University Press, 1992).

<sup>20</sup> Steven Green documents the rise of the substitution of secular theories for natural law foundations occurring as early as the mid-19th century in a wide range of legal areas, from oaths, to probate law, to church property disputes, to Sunday closing laws. Green, *The Second Disestablishment*, 204-247.

leadership, the media, and the courts.

But the cycle of ideas has continued to roll, and now a vocal segment of the American public, especially after the events of 9/11, is vigorously rejecting the skepticism and relativism that has come to be associated with our current system of rights. Rather than returning to a pre-Mill, Lockean view, however, there are many who appear ready to embrace a model more like that of Pufendorf.<sup>21</sup> In this post-9/11 world, significant segments of American society are simultaneously rejecting moral relativism as well as seeking for the security provided by a stronger government.

This rejection of the modern paradigm moves society from the right side of the tolerance diagram generally leftward. It does not require a conscious repudiation of the importance of the individual to move over the Locke column into the Pufendorf column. The difference between Locke and Pufendorf was not over their ostensible commitment to the individual and freedom to worship. Rather, it was that a strong view of the supremacy of the state generally negated Pufendorf's theoretically positive view of the individual.

But the point of all this for overseas observers is that a "secular" version of government that has a healthy and robust freedom of religion can exist in a highly religious community. France, with its de-religioned public square, is not the only, or most attractive, model of a "secular" government that exists. The traditional American system offers a philosophical framework that is sympathetic towards religion and claims about a Supreme Being, while offering respect and accommodation to all religious claims that respect the well-being of the state and other individuals.

In this system, while the state should not promote your religious view, you and your fellow believers should be free to do so, even within the public square, as long as you respect the rights and freedoms of others to do the same. In this sense, a fair and balanced state secularism can actually lead to a greater and more robust religiosity.



---

<sup>21</sup> Scholars who would largely reject the stricter separation between church and state and would be sympathetic to a model of greater church-state cooperation would include Robert N. Bellah, *The Broken Covenant: American Civil Religion in Time of Trial* (Chicago, IL: University Of Chicago Press, 1992); Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: NYU Press, 2003); Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002); Richard John Neuhaus, *The Public Square: Religion and Democracy in America* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 1986); Harold J. Berman, *Law and Revolution, II, The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Belknap Press, 2006).



# GLOBAL FAITH & FREEDOM



Global Faith & Freedom is an inspirational talk show covering controversial issues on religion and politics. You will hear thoughtful discourse from experts in the field of Religious Freedom.

Watch Global Faith & Freedom on the HOPE Channel (Hopetv.org) at the following times (EST):

**Wednesday - 3:30pm; 11:00pm**

**Thursday - 2:30am**

**Sabbath - 3:30pm**



For the first time ever, you can own an official version of the **Global Faith & Freedom DVD set**, containing 13 dynamic episodes.

**\$20.00 +S/H**

Call 805-955-7675 to order your copy today.

[www.GlobalFaithandFreedom.org](http://www.GlobalFaithandFreedom.org)



# EUROPE'S SECULARISM AND THE POLITICS OF THE SOUL

MEINS G.S. COETSIER<sup>1</sup>

The faith and freedom of men and women in present-day Europe is being challenged by radical atheism<sup>2</sup> and the fanaticism of secularists, religious extremists and political fundamentalists. As Europe becomes increasingly secular, the moral underpinnings of our Judeo-Christian heritage are being shaken; in other words, the constructive elements which promote peaceful coexistence and tolerance are being threatened. The racial discrimination and abhorrence that has spread between different cultural, religious and ethnic groups is alarming; likewise, anti-Christian sentiment, mounting anti-Semitism and sweeping statements about 'islamization' are harming political discourse. Three monotheistic religions<sup>3</sup> currently suffer the most from incitement and hatred due to a clash of cultures and the global rise of religious and political fundamentalism.<sup>4</sup> Judaism, Christianity, Islam and their symbols are recurrently satirized, ridiculed and abused.

Europe is facing a critical moment regarding the evolution of the place of God in society—be it the experience-symbolization of 'YHWH,' 'Jesus Christ,' or 'Allah.' We will have to address the wider framework of uncertainties, fears and political unease about religion in the West. I hope to offer an all-encompassing picture and

<sup>1</sup> Meins G.S. Coetsier, (B.A. and M.A. in philosophy at the Milltown Institute of Theology and Philosophy (National University of Ireland) in Dublin, PhD. Ghent University), is a professor at the Etty Hillesum Research Centre, The Centre of Eric Voegelin studies, Ghent University, Faculty of Arts and Philosophy, Department of Languages and Cultures of the Near East and North Africa, Ghent, Belgium.

<sup>2</sup> 'Radical atheism' is a current within twenty-first century thought that aims to challenge and overthrow religion by strongly opposing accepted religious dogmas and traditional faith in God. It is a particular human experience that radically shuts out the existence of any deity; the deliberate choice by the individual human mind to allow for a 'closure' and/or 'revolt' against God.

<sup>3</sup> In this article I focus on the three monotheistic religions. I deliberately choose a European "Judeo-Christian" solution to the present European malaise. I am aware that my main argument comes fairly close to that of Christianity. Nonetheless, my broad-based appeal is to evoke a discussion of the void created by the increased absence of transcendence in European life. As a starting point of open dialogue with other "believers" around the globe, who affirm transcendence in the universe—e.g., Buddhists, Muslims, Hindus, among others—the article presents a way to affirm divinity and man's need to find his place in the divine reality. Man's attunement to "the Ground" is to discover and practice an "ethics of love" and "harmony," that is, in "the flow of presence," recognizing the underlying spiritual reality. Drawing on the positive features of Europe's Judeo-Christian spiritual tradition, the article presents the need for real dialogue and cooperation among all believing peoples, through a 'politics of the soul' in order to face the closed and unreal state of European civilization.

<sup>4</sup> 'Political fundamentalism' is an ideology which exploits religion and/or the fear of religion. It makes use of any (anti-) religious sentiments in society for a political purpose, solely as a means to further political influence and power. It tends to be 'apocalyptic' and is extraordinarily anti-spiritual and resentful—or what Eric Voegelin calls "Gnostic." Eric Voegelin, *Modernity without Restraint* (Columbia, MO: University of Missouri Press, 2000), 257-77.



understanding of the experience-symbolization of the divine presence, attending to a major gap in the scholarship on 'coexistence' in the European context and on politics and policies of the EU.

The tragic history of Christianity in Europe and the negative role of institutional religion in the pursuit of social justice and freedom have arguably contributed to the present malaise. What is urgently called for is careful discernment regarding the misuse of political and religious language<sup>5</sup> and honest reflection on the prevailing attitudes and complex influences which are capable of impelling the human will toward good or evil. One of the major stumbling blocks of such analysis is a lack of imaginative reenactment of divine reality, since 'love' and 'reason' are recurrently commercialized and God is either declared 'dead,' 'non-existent,' 'delusional,' or becomes strongly politicized.

Eric Voegelin (1901-1985), Martin Buber (1878-1965) and Dietrich Bonhoeffer (1906-1945)—two philosophers and one theologian<sup>6</sup>—have challenged such grim 'anti-God-sentiment.' One of the typical phenomena in the quest of these spiritually energetic thinkers is the event of breaking out of the dominant intellectual group in order to find the spiritual reality that has been lost. As representatives of true spiritual order, they argue their case for surrender to transcendent reality, for a 'politics of the soul.'<sup>7</sup> In the works of Buber and Bonhoeffer in particular, God is represented as a universal, essentially nonpolitical, vulnerable God who creates order in the soul and in society, moving the focus back to love, to an *I-Thou* relationship and 'covenant.'

## SECULARISM RAMPANT IN EUROPE

Negative attitudes and intolerance toward traditional monotheistic religious expression are spreading. Culture, media and places of worship are saturated with hatred of religious and ethnic minority groups and those who think differently. The experience of profound uncertainty (*aporein*) and feeling confused about how to proceed in the political sphere is not uncommon these days. Unmistakably, there is a lack of wisdom (*alogos*) and a sweeping fear of the unknown which is disquieting.

'Secularization' in Voegelin's terms is the process by which the cosmos, which had once been described as having a dimension of transcendence, comes to be interpreted as lacking any relation to transcendence, also referred to by Voegelin as 'a polite word for deculturation.'<sup>8</sup> Regrettably, Europe's secularization is becoming notorious for denying its well-orderedness, its 'good social order' (*eunomia*). In Voegelin's use specifically, 'the existence ordered morally and cognitively by the tension of

<sup>5</sup> Eric Voegelin, *Autobiographical Reflections* (Columbia, MO: University of Missouri Press, 2006), 177.

<sup>6</sup> Note: Of course there have been other spiritually energetic thinkers too, but for the purpose of this article I focus on these three.

<sup>7</sup> Cf. Glenn Hughes, ed. *The Politics of the Soul: Eric Voegelin on Religious Experience* (Lanham, Oxford: Rowman & Littlefield, 1999).

<sup>8</sup> Eric Voegelin, *Order and History, Vol. 4, The Ecumenic Age* (Columbia, MO: University of Missouri Press, 2000), 256. Voegelin, *Autobiographical Reflections*, 179.



existence toward the pole of the transcendent perfection of being.<sup>9</sup> In this context, it is obvious that religious and cultural heritage, found in Europe's holy history (*historia sacra*), and freedom of speech and religion, are being seriously neglected. One could speak of Europe's 'spiritual disease' (*pneumapathology*).

Unavoidable identity crises particularly among European Christians have risen to the surface after the result of public inquiries conducted into sexual abuse scandals in the Catholic Church. At length and in great detail, cases of emotional, physical and sexual abuse of hundreds, if not thousands of children in various European countries over decades have been reported. On top of these serious offenses, an economic crisis has contributed to an air of despondency and reserve not only towards religious institutions, but towards any minority group who could be expediently used as a scapegoat for the predicament of the recession. Furthermore, the prevalent acceptance of the European Union's refusal to embrace specific reference to God or Christianity's influence on Europe's distinctive civilization in its first constitution has marked the religious crisis within the EU as being far from inconsequential.<sup>10</sup> We seem to have forgotten that European history is not only a dynamic process, but also a spiritual one in which God is operating. Buber suggests to "listen all over again," and writes:

History is a dynamic process, and history means that one hour is never like the one that has gone before. God operates in history, and God is not a machine which, once it has been wound up, keeps on running until it wears out. He is a living God. He expresses his truth through his will, but his will is not a program. At this hour, God wills this or that for mankind, but he has endowed mankind with a will of its own, and even with sufficient power to carry it out. So, mankind can change its will from one hour to the next, and God, who is deeply concerned about mankind and its will and the possible changes it may undergo, can, when that will changes, change his plan for mankind. This means that historical reality could have been changed. One must rely on one's knowledge. One must go one's way and listen all over again.<sup>11</sup>

In Europe, however, there are politicians and secular fundamentalists who refuse to listen and seek to do away with God and religion altogether, specifically targeting Islamic and Jewish but also Christian influences in the public sphere. We've seen the ban on the wearing of visible religious symbols in French public schools in 2004<sup>12</sup> and the 2009 attempt of Belgium politicians to ban the Crucifix at the entrance of a

<sup>9</sup> Voegelin, *Autobiographical Reflections*, 159.

<sup>10</sup> Stephen Castle, "EU celebrates 50th birthday-with a row about religion," *The Independent*, March 21, 2007.

<sup>11</sup> Martin Buber, *A Land of Two Peoples: Martin Buber on Jews and Arabs* (New York, NY: Oxford University Press, 1983), 143.

<sup>12</sup> Henry Astier, "The deep roots of French secularism," *BBC News Online*, September 1, 2004.



cemetery—the avowal for an absolute separation between Church and State.<sup>13</sup> These restrictions on the freedom of religion and on its expression amount to the capitulation and appeasement of Europe to aggressive secularists, as well as to religious and political extremists. More recently, in September 2011, the visit of Pope Benedict XVI divided Germany. Thousands of opponents marched through the streets to protest his visit, and politicians in the *Bundestag* boycotted the Pope's speech in the parliament, expressing concerns regarding the separation of Church and State.<sup>14</sup> Europe's fierce hostility and aggression towards religious leaders, as if leading a religion was a criminal act, makes one wonder what the so called 'freedom' of Europe's secular ethos really means.

The secularism rampant in Europe and its hostile self-alienation or *alotriosis*<sup>15</sup> is such that a genuine possibility of experiencing peaceful human coexistence, can only be achieved if those with a reflective and moderate religious and political conviction become sufficiently courageous to take up their responsibility and make their voices heard. Bonhoeffer in his work *Ethics* reminds us of the core Christian value of surrendering our actions to 'grace' and 'love'. He refers to 'God' and 'neighbor' as the origin of responsible action<sup>16</sup>:

By recognizing that responsible action is limited both by surrendering our action to God's grace and judgment, and by the responsibility of the neighbor, it simultaneously becomes apparent that precisely these limits qualify the action as responsible in the first place. For God and neighbor, as we encounter them in Jesus Christ, are not only the limits of responsible action, as we have already recognized, but they are also its origin. Irresponsible action is defined by its disregard for these limits of God and neighbor. Responsible action, on the other hand, gains its unity, and ultimately also its certainty, from this very limitation by God and neighbor. It is not its own lord and master, nor is it unbounded or frivolous. Instead, it is creaturely and humble. This is precisely why it can be sustained by an ultimate joy and confidence, knowing that in its origin, essence, and goal it is sheltered in Christ.<sup>17</sup>

In order to achieve some form of responsible and political action promoting

<sup>13</sup> The proposal of 'the Crucifix-ban' initially had the support of the Belgian parties Open VLD, PS, MR and Ecolo. They accounted for 35 votes, but it was not enough (3 votes short) to approve the proposal. Available from: <http://www.kerknieuws.nl> and <http://www.gva.be>

<sup>14</sup> Nicholas Kulish and Judy Dempsey, "Pope Weathers Protests and Boycotts in First Official Visit to Germany," *New York Times*, September 22, 2011.

<sup>15</sup> Voegelin, *Autobiographical Reflections*, 102.

<sup>16</sup> John W. De Gruchy, *The Cambridge Companion to Dietrich Bonhoeffer* (Cambridge, NY: Cambridge University Press, 1999), ch. 11.

<sup>17</sup> Dietrich Bonhoeffer, *Ethics* (Minneapolis: Fortress Press, 2005), 269. Cf. Bonhoeffer's *Collective Works*: Vol. 6: *Ethik*, eds. Ilse Tödt, Heinz Eduard Tödt, Ernst Feil, and Clifford Green (Munich: Chr. Kaiser Verlag, 1992; 2nd ed., Gütersloh: Chr. Kaiser/Gütersloher Verlagshaus, 1998). Translated by Reinhard Krauss and Charles West, with Douglas W. Stott, as *Ethics*, edited by Clifford J. Green (Minneapolis: Fortress Press, 2004).



coexistence, European countries would have to agree that any religious consortium, be it of Jews, Christians, Muslims or any other religious grouping living on the continent, must become integrated into a democratic society. Should this fail, intensified disarray among the various groupings might ensue, which would have serious repercussions on the future of Europe and on the retention of religious freedom and expression in the West, thus influencing the values, possibilities and challenges that it presents to us.

## THE DISORIENTED AND DEMAGOGUES

The disorder and disintegration at present is characterized by misconstructions of reality by the 'disoriented' and 'demagogues.' Buber analyzed this phenomenon of 'false prophets' in opposition to 'true prophets':

... The true prophets are the true politicians of reality, for they proclaim their political tidings from the viewpoint of the complete historical reality, which it is given them to see. The false prophets, the politicians who foster illusions, use the power of their wishful thinking to tear a scrap out of historical reality and sew it into their guild of motley illusions. When they are out to influence through suggestion, they display the gay colors, and when they are asked for the material of truth, they point to the scrap, torn out of reality.

... False prophets are not godless. They adore the god "Success." They themselves are in constant need of success and achieve it by promising it to the people. The craving for success governs their hearts and determines what rises from them. They do not deceive; they are deceived, and can breathe only in the air of deceit.<sup>18</sup>

Signs of Europe's degradation and *egophany* point toward the need of finding restoration of an open conversation with God, and a free dialogue between man and man.<sup>19</sup> The spiritual outbursts of today must, in opposition to 'the air of deceit,' maintain faith in God and so preserve our democracy for future generations. The struggle between true 'order' vs. 'disorder' are weighed and being felt in Europe. Currently, Hellenic philosophy and Judeo-Christian revelation are being replaced in the public spheres, in politics and in universities by an extreme secular and atheistic understanding of human life. Europe's problems concerning ethnic and cultural diversity, and warnings about 'mass immigration', have led to a blatant intolerance. The threat to European society, values and identity does not lie, as some would like us to believe, in 'Islam' or any other religion, ethnic race or nation. Therefore, the

<sup>18</sup> Buber, *A Land of Two Peoples*, 143.

<sup>19</sup> Martin Buber, *Between Man and Man* (London and New York, NY: Routledge, 2002). Includes "Dialogue" (Zwiesprache, 1929), "The Question to the Single One" (*Die Frage an den Einzelnen*, 1936), "Education" (*Rede über das Erzieherische*, 1926), "The Education of Character" (*Über Charaktererziehung*, 1939) and "What Is Man?" (*Was ist der Mensch?* 1938).



solution is *not* to ban churches, synagogues and mosques or to enforce an ‘ethnic cleansing’ of our cities and streets.<sup>20</sup> The threat to Europe lies first of all within us, within each person’s heart and mind. It lies in our spiritual illiteracy and amnesia and our deep-rooted fear of the unknown, the fear of *the Other*.<sup>21</sup>

Above all, it is the ancient bewildering experience of *Eros tyrannos*, the lust for power—one could call it ‘original sin’, *libido dominandi* or *Wille zur Macht*—that still corrupts religion and politics. In Voegelin’s commentary, the *Eros tyrannos* is “the satanic double of the Socratic Eros [citing Plato, *Rep.* 573B, D]. . . . The desire that turns the soul toward the Good and the desire that succumbs to the fascination of Evil are intimately related.”<sup>22</sup> Both Eroses are modes of *mania* and familiar in the context of the current European situation. There is always a chance that the evil demon will take over—“the danger of straying from the difficult path of the spirit and of the falling into the abyss of pride.”<sup>23</sup> The *Eros tyrannos* is dangerous; it could stir the human heart to rebellion and to the “spirituality of evil,”<sup>24</sup> hating God and overpowering our fellow man to such extent that it could send *the Other* towards a spiritual and/or psychological death. In *The Cost of Discipleship* Bonhoeffer reminds us of Matthew 7.13-23, discussing such dark powers of perverted and tyrannical order: “Beware of false prophets, which come to you in sheep’s clothing, but inwardly are ravaging wolves. By their fruits ye shall know them. Do men gather grapes of thorns, or figs of thistles?”<sup>25</sup>

## DUTCH EROS TYRANNOS

An illustration of someone who stirs the *Eros tyrannos* within society is Geert Wilders (b. September 6, 1963), the controversial politician and leader of the Dutch Freedom party (PVV). Wilders is one of Europe’s most contentious anti-Islam and

<sup>20</sup> For “ethnic registration” see Geert Wilders, “De agenda van hoop en optimisme. Een tijd om te kiezen: PVV 2010-2015.” Freedom party, PVV (2010): 11. Available from: <http://www.pvv.nl/index.php/visielverkiezing-sprogramma>.

<sup>21</sup> For Emmanuel Levinas on “the Other” (*l’autre, autrui*) see: Simon Critchley and Robert Bernasconi, eds. *The Cambridge Companion to Levinas, Cambridge Companions* (New York, NY: Cambridge University Press, 2002). Emmanuel Levinas, *Ethics and Infinity: Conversations with Philippe Nemo*, tr. Richard Cohen (Pittsburgh, PA: Duquesne University Press, 1985 [1982]); *Totalité et infini: essai sur l’extériorité* (Paris: Librairie Générale Française (LFG), 2009 [The Hague: Martinus Nijhoff, 1961, 1971]); translated in English as *Totality and Infinity: An Essay on Exteriority*, tr. Alphonso Lingis, Duquesne Studies. Philosophical Series (Pittsburgh: Duquesne University Press, 2005 [1969]); *Le temps et l’autre* (Paris: Presses universitaires de France, 1991 [1948]); translated in English as *Time and the Other: And Other Essays*, tr. Richard A. Cohen (Pittsburgh, PA: Duquesne University Press, 2002 [1947, 1979]); *Entre nous: Essai sur le penser-à-l’autre* (Paris: Librairie Générale Française (LFG), 2010 [Grasset, Paris, 1991]); *Entre Nous: Thinking-of-the-Other*, tr. Michael B. Smith & Barbara Harshav, Continuum Impacts (New York, NY: Continuum, 2006 [Columbia University Press, 1991, 1998]).

<sup>22</sup> Eric Voegelin, *Order and History, Vol. 3, Plato and Aristotle* (Columbia, MO: University of Missouri Press, 2000), 181.

<sup>23</sup> Voegelin, *Plato and Aristotle*, 181.

<sup>24</sup> *Ibidem*, 181.

<sup>25</sup> Dietrich Bonhoeffer, *The Cost of Discipleship* (New York, NY: Touchstone, 1995), 189. Cf. Bonhoeffer’s *Collective Works*: Vol. 4: *Nachfolge*, eds. Martin Kuske and Ilse Tödt (Munich: Chr. Kaiser Verlag, 1989; 2nd ed., Gütersloh: Chr. Kaiser/Gütersloher Verlagshaus, 1994). Translated by Barbara Green and Reinhard Krauss as *Discipleship*, edited by Geoffrey B. Kelly and John D. Godsey (Minneapolis: Fortress Press, 2001).



right-wing populists. Although European politics is more than Dutch politics, the political situation in the Netherlands is a good example of an alarming secular trends that exist within the EU.<sup>26</sup> As a former Catholic, now atheist and/or agnostic, Wilders has become the chief voice speaking out against what *he* calls “the multicultural nightmare,”<sup>27</sup> “the mass immigration” and “the Islamization” of the Netherlands. In the Dutch national newspaper *De Volkskrant* he writes:

I’ve had enough of Islam in the Netherlands; let not one more Muslim immigrate, I’m tired of the worship of Allah and Mohammed in the Netherlands: not one more mosque. I’ve had enough of the Qur’an in the Netherlands: forbid that fascist book. Enough is enough.<sup>28</sup>

His strategy (*techne politike*) for gaining political power till now has been effective, appealing to the prejudices, emotions, fears and expectations of the Dutch public via impassioned rhetoric against Islam. Using nationalist, populist and religious themes, the demagogy and melodrama of Wilders’s ideas have been the subject of global debate ever since. Consequently, he is living under tight security after death threats by suspected Islamist terrorists.<sup>29</sup>

Internationally Wilders is best known for his fierce criticism of Islam, summing up his views by saying, “I don’t hate Muslims, I hate Islam.”<sup>30</sup> Although he identifies Islamic extremists as a small minority of Muslims, he also believes that there is no such thing as “moderate Islam.” Wilders is warning the West that Islam is not a “religion” but a “totalitarian ideology.” Not only does he oppose building mosques and Muslim schools, but he also proposes to tax the Muslim headscarf, which he described as a “head-rag-tax” (“*kopvoddentaks*”),<sup>31</sup> and advocates banning what he calls the “fascist Qur’an,” which he portrays as a manifesto for violence. He stated: “Ban this wretched book like *Mein Kampf* is banned!”<sup>32</sup> The call to treat the Qur’an in the same way as Adolf Hitler’s biography, which has been banned from sale in the Netherlands for over 60 years, is just one of the confrontations in a long line of Islamic controversies sparked by Wilders. Subsequently, he faced charges for his outspoken anti-Islam comments and his film *Fitna*, which juxtaposed the Qur’an and terrorist attacks, including the September 11, 2001 attacks and the 2005 London Tube and bus bombings.<sup>33</sup>

<sup>26</sup> Because of the length of this article, the focus of the analysis lays chiefly with the political ideology of Geert Wilders, which is arguably a striking example of the deep theological, political and philosophical problems associated with secularism in today’s Europe.

<sup>27</sup> Geert Wilders, “Moslims, bevrijd uzelf en u kunt alles,” *NRC*, July 19, 2010.

<sup>28</sup> Geert Wilders, “Genoeg is genoeg: verbied de Koran,” *De Volkskrant*, August 8, 2007.

<sup>29</sup> Anthony Browne, “Death threats force controversial Dutch MP Underground,” *The Times*, November 20, 2004.

<sup>30</sup> Ian Traynor, “‘I don’t hate Muslims. I hate Islam,’ says Holland’s Rising Political Star,” *The Guardian*, February 17, 2008.

<sup>31</sup> “Wilders wil ‘kopvoddentaks,” *Trouw*, eds. Politiek, September 16, 2009.

<sup>32</sup> Wilders, “Genoeg is genoeg: verbied de Koran.” Bruno Waterfield, “Ban Koran like *Mein Kampf*, says Dutch MP,” *The Daily Telegraph*, August 9, 2007.

<sup>33</sup> David Charter, “Anti-Islam MP Geert Wilders Faces Trial over Controversial Film,” *The Times*, January 22, 2009.



Wilders blames everything on Islam by stripping it of its religious dimension and connecting it to “Hitler,” “fascism” and “totalitarianism”. He has found a scapegoat. A study of the Dutch situation makes it painfully clear how far politicians in the Netherlands continue to tolerate the dangerous manifestation of such provocations. Moreover, the strong assaults by Wilders are going a step too far as they promote “ethnic registration for everyone.”<sup>34</sup> Careful analysis shows that Wilders’s nationalistic dreams and antagonistic dichotomies (‘us’ vs. ‘them’) are based on fear. Characteristic of what Voegelin calls the ‘counteridea’ (Wilders: ‘us’ vs. ‘the Islam’) is the push towards conflict and/or ethnic violence.<sup>35</sup> On February 6, 2004 Wilders declared in *HP/De Tijd*: “If it ever may come to racial riots, which I really don’t want, then this doesn’t necessarily have to have a negative result.”<sup>36</sup> Wilders’s revolt against the *conditio humana* and his attempt to overlay its reality by the ‘political’ construction of a ‘second reality’<sup>37</sup> that uses ‘the Islam’ and excludes its followers, is disquieting. The cynical use of ‘identity politics’ to set people up against each other for political gain is not a new method invented by the Dutch Freedom Party.

It is astonishing that Islam, by way of Wilders’s ongoing provocation, should have become the ‘counteridea’ of the tolerant Dutch with such extraordinary intensity, especially considering that in the Netherlands Muslims account for only 6 percent of the population.<sup>38</sup> The unconstructive *metastasis*,<sup>39</sup> or aggressive change that Wilders hopes to evoke in the Netherlands, is based on unrealistically expected transformations of human beings, Dutch society, and the structure of existence. The fundamental form of anti-Islam and utopian expectations is that it provokes an escape from the tension of existence, a movement out of *humanity*, out of what Voegelin calls the *metaxy*, toward a ‘true Dutch identity’ or ‘freedom’ (*vrijheid*) in union with one of its poles, namely with that of a society without *otherness*, without Islam. Or in Wilders’s own words: “It is time for the great spring cleaning of our streets.”<sup>40</sup>

Speaking of “hope” and “optimism”—even if fear for “Eurabia” is the party’s driving force—Wilders invigorates the Netherlands to choose *against* Islam, *against* immigration, *against* human beings who think and believe differently.<sup>41</sup> He clearly articulated his stance in the ‘Town council election’s Debate’ on Monday February 15, 2010: “The faith ‘Islam’ is a dangerous evil ideology for which there is, in our

<sup>34</sup> Wilders, “De agenda van hoop en optimisme. Een tijd om te kiezen: PVV 2010-2015,” 11.

<sup>35</sup> Eric Voegelin, *Race and State* (Baton Rouge, LA: Louisiana State University Press, 1997), ch. 7.

<sup>36</sup> Frank Verhoef, “Citeren doe je zo,” *HP/De Tijd*, Augustus 24, 2010.

<sup>37</sup> Voegelin, *Autobiographical reflections*, 122.

<sup>38</sup> Based on the statistics of the CBS the number of Muslims in the Netherlands in early 2010 was estimated at 6% of the population. In 2006, CBS came out with 857000 Muslims. On the basis of population growth the International department of FORUM estimated the number of Muslims 40 000 people higher. In other words 907000 persons that is 6% of the Dutch population. Available from: <http://www.forum.nl/Portals/0/Publicaties/Moslims-in-Nederland-2010.pdf>

<sup>39</sup> Eric Voegelin, *Order and history, Vol. 1, Israel and Revelation* (Columbia, MO: University of Missouri Press, 2001), 506.

<sup>40</sup> “Wilders wil ‘kopvoddentaks,’” *Trouw*, September 16, 2009.

<sup>41</sup> Wilders, “De agenda van hoop en optimisme. Een tijd om te kiezen: PVV 2010-2015,” 13.



opinion, no place in the Netherlands.”<sup>42</sup> The kind of *metastatic faith* involved here is the expectation of a transformation of reality in the Netherlands and of what it means to be ‘Dutch.’ Hence, a new nationalistic ‘anti-faith’ is created that expects such an anti-Islam transformation to be caused by an act of political and possibly military intervention.<sup>43</sup> Conceivably, one may speak here of a minor Dutch ‘metastatic apocalypse’: a radical transformation in the Netherlands that would be produced by such ‘anti-faith.’

Even though Wilders successfully won new votes during the 2010 Dutch general election, it was not as much through virtues defined in terms of beauty and goodness (*Kalokagathia*), as through appeals to the ethnic and nationalistic prejudices and anxieties of the Dutch people. Debasing the meaning of the term ‘freedom’ (*vrijheid*), the PVV insinuates that the Netherlands and all of Europe can only be ‘free’ when it rids itself of Islam. These political ideas of so-called ‘*vrijheid*’ are an illusionary freedom, a creation of second reality, which only leads to hatred, violence and bigotry. Voegelin’s term “second reality,” drawn from Robert Musil’s *The Man without Qualities*,<sup>44</sup> refers to a fictitious world imagined as true by a self-alienated person who uses it to mask and thereby ‘eclipse’ genuine reality—which in a healthy society contains religious freedom for Muslims, Jews, Christians, and for anyone else.

The causes of disorder related to such antagonism in the Netherlands are revealed by a variety of secondary symptoms, like the disruptive indulgence in anti-Islam infatuation. It is alarming that since the rapid growth of Wilders’s Freedom Party, ordinary Dutch people feel increasingly legitimized to display immoral behavior toward immigrants because of their skin color and/or religion. Careful analysis of Wilders’s anti-Islam propaganda shows that behind the secondary symptoms lies the fundamental problem of the *apostrophe*—the withdrawal of man from his own humanity. The experience of an alienated consciousness, according to Voegelin, always retains an index of negativity or distress, a residual awareness of its imbalance and closure.<sup>45</sup> Wilders’s ideological system is essentially built on fear, on a stressful anxiety for what he terms the uncontrollable “tsunami of Islamization,” a ‘wave’ or ‘flood’ that will engulf the unsustainable sleepy West. It is not based on the balanced vision of the *polis*, a state or society characterized by a sense of community and founded on the shared *nous* or *caritas*. Voegelin’s description (following Aristotle) of a healthy society is “an association of like people [*koinonia ton homoion*] striving for the best life, and not an association of just any human beings.”<sup>46</sup> The great political misconstruction of Wilders’s Party lies in its direction towards the transcendent. With Wilders, there is *no* real direction towards the transcendent, because he cuts

<sup>42</sup> “Wilders heeft geen concrete plannen,” *AD*, February 15, 2010.

<sup>43</sup> Robin van der Kloof, “PVV: Leger inzetten tegen straatterror Gouda,” *Elsevier*, September 15, 2008.

<sup>44</sup> Voegelin, *Autobiographical Reflections*, 179.

<sup>45</sup> Eric Voegelin, *The Drama of Humanity and Other Miscellaneous Papers, 1939-1985* (Columbia, MO: University of Missouri Press, 2004), 341.

<sup>46</sup> Voegelin, *Plato and Aristotle*, 406.



himself off. And since man cannot live or does not live without accounting for himself in terms of a 'ground,' Wilders seeks a replacement, a 'substitute ground.' Voegelin explained that when 'the Ground,' which is the transcendent ground, has been imaginatively eclipsed and replaced by substitute world-immanent pseudo-grounds of being, something goes seriously wrong.<sup>47</sup> In Wilders's case the substitute ground is 'safety;' perhaps a 'patriotic revival,' with the opportunity to order Dutch society, politics and history according to an 'anti-Islam' principle and the struggle of races and religion. History has taught us that such principles can only lead to severe disorder and destruction.

## TOWARDS A POLITICS OF THE SOUL

The solution to religious conflict or to major social, cultural and economic problems is not established by 'scapegoating'—the practice of singling out one ethnic or religious group—or by evoking the raw and antagonistic choice between us and them, but a 'politics of the soul,' that is, a *politike episteme* or understanding of how to live in society, which brings justice to all people. Europe's refusal to apperceive the intellectual and political constructions of second realities by scientists (e.g. Richard Dawkins) and politicians alike is disturbing.<sup>48</sup> Voegelin uses the term *idiotes*, as Heraclitus does, to refer to those who live in a private imaginary world of 'closed existence' instead of the shared, common (*xynon*) world known through the *logos*, a central feature of *theoria* or *episteme*—that is to say, "reason," "rational capacity," "quest for intelligibility," "intelligible structure," or a "critical analysis" (as compared with the creation of social myths by the disoriented and demagogues).<sup>49</sup>

The Voegelinian diagnostic we may use here is to determine which part of reality has been excluded to make these fake systems possible. Always excluded or distorted—if not fully eclipsed—is the experience of the divine ground. Voegelin saw that the modern restriction of consciousness to sense perception is the hidden trick in the construction of systems. Hence, he recognized an important criterion for diagnosing a fake system.<sup>50</sup> Classic philosophers knew that consciousness is the experience of structures—but not as 'things'—and of turning toward the divine ground. If sense perception is dominant, experiences of God and divine reality are eclipsed and must be deformed into propositions about transcendent reality, about *the Other*. Hence, propositional metaphysics, but also radical atheism, religious fanaticism and political extremism, are sensitive to a brawny deformation of reality. What challenges the ideas of a politician like Wilders is that Muslims, who are dedicated to Islam, share in 'human nature,' and all of the qualities that are inherent to *metaxy*, existence, and horizon. As clarified by Voegelin in *Anamnesis*: "At its core human nature ... is

<sup>47</sup> Voegelin, *The Drama of Humanity*, 224-234.

<sup>48</sup> Cf. Richard Dawkins, *The God Delusion* (London: Bantam Press, 2006). Meins G.S. Coetsier, "Between Realities: Dawkins vs. Voegelin," *Modern Age: A Quarterly Review* 51, no. 3 & 4, (Summer/Fall 2009): 220-230.

<sup>49</sup> Voegelin, *Autobiographical Reflections*, 163, 166.

<sup>50</sup> *Ibidem*, 123.



the openness of the questioning knowledge and the knowing question about the ground.”<sup>51</sup>

For Voegelin, Buber and Bonhoeffer, the turning toward or turning away from God and man from the divine ground are the fundamental categories descriptive of human order and disorder. The “darkening” (*scotosis*) in Europe, evident in the obscuring of sectors of reality and the voluntary ignorance of the people, is problematic.<sup>52</sup> Europe’s true *homonoia* in the Greek sense must be rediscovered; the ‘like-mindedness’ as in Aristotle’s friendship, which is based on likeness in participation in *nous*, not the sharing of ‘opinions’ (*doxa*) or of ‘substitute grounds’ such as the anti-position *against* Islam, but the sharing in *nous* as the dynamic movement elicited by the attraction of transcendent perfection, of God. Conceivably, Europe’s *homonoia* in general should refer to the idea of *peace* among citizens, equivalent to Alexander the Great’s use of peace among the subjects of his ecumenic empire, his plan ‘to gain for all men harmony [*homonoia*] and peace [*eirene*] and community [*koinonia*] among one another.’<sup>53</sup>

We may have to find ‘the beautiful’ (*kalon*) in recovering the traditional Christian notion of the participation in the *nous* and the *caritas* of Christ, precisely in true dialogue with Islam and the Muslim world. Even though the interreligious dialogue with Islam may seem difficult, if not impossible, hatred is certainly no solution.<sup>54</sup> The following passage in the diaries of the Dutch Jewish writer Etty Hillesum, who died in Auschwitz at the age of 29, illustrates it quite well. She writes to a close friend:

We shan’t get anywhere with hatred [...] All I really wanted to say is this: we have so much work to do on ourselves that we shouldn’t even be thinking of hating our so-called enemies. We are hurtful enough to one another as it is [...] I see no alternative: each of us must turn inward and destroy in himself all that he thinks he ought to destroy in others. And remember that every atom of hate we add to this world makes it still more inhospitable.<sup>55</sup>

If Hillesum could say and live this facing her cruel Nazi persecutor, how much more should we try to stop hating Islam and equating it to an extremism, which is

<sup>51</sup> *Ibidem*, 162.

<sup>52</sup> *Ibidem*, 179.

<sup>53</sup> Voegelin, *The Ecumenic Age*, 212.

<sup>54</sup> See the author’s analysis on the Dutch Jewish writer Etty Hillesum, who made a conscious choice not to hate her enemies. Cf. Meins G.S. Coetsier, *Etty Hillesum and the Flow of Presence: A Voegelinian Analysis*, Eric Voegelin Institute Series in Political Philosophy, Studies in Religion and Politics (Columbia, MO: University of Missouri Press, 2008); “Etty Hillesum and the Light of Faith: A Voegelinian Analysis,” *Modern Age: A Quarterly Review* 50, no. 3 (2008): 198-206.

<sup>55</sup> Etty Hillesum, *Etty: The Letters and Diaries of Etty Hillesum, 1941-1943*, ed. Klaas A.D. Smelik, tr. Arnold J. Pomerans (Ottawa, ON / Grand Rapids, MI: Novalis Saint Paul University / William B. Eerdmans Publishing, 2002), 528-9. Cf. the original Dutch edition: *Etty: De nagelaten geschriften van Etty Hillesum, 1941-1943*, ed. Klaas A.D. Smelik (Amsterdam: Balans, 1986 [5th revised edition in 2008]).



the deformed expression of a minority of Muslims.

## TO RECAPTURE REALITY

Considering the current signs of spiritual disorder and deculturation in Europe, the loss of culture by a withdrawal of man from his own humanity, we are obliged to make an effort to recapture transcendent reality and address what Voegelin calls the 'leap in being,' the moment of surrender to the Question of transcendence and an experience-symbolization beyond the horizon. This 'Question' refers to the tension of existence as a questioning unrest seeking a more transcendent pole of truth. Voegelin clarifies: "not just any question but the quest concerning the mysterious ground of all Being."<sup>56</sup> We could speak of the renewal of 'existential consciousness,' of the rekindling of reflective self-awareness of human existence in the *metaxy*, to be precise in the tension between poles of 'immanence' and 'transcendence,' 'finitude' and 'infinity,' 'imperfection' and 'perfection.'<sup>57</sup>

Reflection on Europe's blatant secularism and extremism benefits to the extent that it builds upon political and religious insight into the moral potential and mystical dimension of human beings who seek to resist the attempt of modern-day ideologies and radical atheism to make history without God and to base it on the strength of man alone. There are few thinkers of the Nazi period who have surpassed Voegelin, Buber and Bonhoeffer in opposing the brutal dishonesty at the core of totalitarian movements. These thinkers' diagnosis of the 'eclipse of reality,'<sup>58</sup> the 'eclipse of God,'<sup>59</sup> and the disorder at the root of closed societies was matched by a common concern about the philosophical and theological resources for the rediscovery of the politics of the soul and defense of human civilization. They fought against the willed, perverse closure of consciousness against reality, especially the reality of *metaxy* existence. Eclipse in the European context is equivalent to what Voegelin calls 'closed existence'; it is a state that may become habitual and unconscious, but never entirely free from the pressure of reality and the anxiety produced in society by the attempt to evade it.

European politics and culture needs to be interpreted again as a process in which soul and character are formed through experiences of transcendence and love, and possibly through other virtues such as faith, hope, reason (*ratio, nous*) which are essential to 'open existence.' The 'openness' and the mode of existence in which consciousness is consistently and unreservedly oriented toward truth is a movement toward the transcendent pole of the tension of existence: God. Consequently, *Ratio*,

<sup>56</sup> Voegelin, *The Ecumenic Age*, 393.

<sup>57</sup> Voegelin, *Autobiographical Reflections*, 159.

<sup>58</sup> Eric Voegelin, *What is History? And Other late Unpublished Writings* (Baton Rouge, LA: Louisiana State University Press, 1990), 111-62.

<sup>59</sup> Cf. Martin Buber, *Gottesfinsternis: Betrachtungen zur Beziehung zwischen Religion und Philosophie* (Zürich: Manesse Verlag, 1953 [1952]); translated in English as *Eclipse of God: Studies in the Relation between Religion and Philosophy* (Atlantic Highlands, NJ: Humanities Press International, 1988).



or reason (as described by Voegelin),<sup>60</sup> is the directional factor in the tension of consciousness “as the quest for the ground,” which orders it and thereby gives it structure as open inquiry.<sup>61</sup> In this sense, ratio is the existential response of *nous* to the Question.<sup>62</sup> Hence, God or the divine ground—and not the anti-Islam propaganda of someone like Wilders—are considered as supreme reality, as *realissimum*, that is to say the ‘most real.’<sup>63</sup>

Greater emphasis should be placed on the social and political aspects of the process of decline, of ‘closure’ or ‘closed existence,’ which contrasts ‘openness.’ The atheistic de-divinization of the world whereby the world is interpreted as empty of God, or lacking the dimension of transcendence, is disconcerting. ‘Reason’ is not a calculative function as some modern ‘scientists’ would like us to believe, but rather the expression in thinking of the love of ‘the ground of being’ or ‘divine reality.’<sup>64</sup> Reason is the human capacity or ‘faculty’ that becomes active through ‘the adequate articulation and symbolization of the questioning consciousness.’<sup>65</sup> Consequently, the present cultural deformation, the demolition of reason or the destruction of the order of the soul, damages the core of man and society, which should be ‘formed’ by and receive its vital principle from the experience of love between God and man, or, in Voegelin terms, from the love of transcendent perfection inherent in the fundamental tension of existence.<sup>66</sup>

Why should the ‘spiritual man’ (*Daimonios aner*), the person sensitive to the pull (*helkein*) of transcendence, bother philosophizing in the context of Europe’s ‘closure,’ in the face of secularism and radical atheism, of swelling ignorance (*amathia*) and political folly? Voegelin’s answer is demanding: to defend and recapture Reality!<sup>67</sup> He uses *amathia* for political ‘ignorance,’ ‘folly,’ ‘rudeness,’ ‘boorishness.’ Plato used it in the *Laws* to refer to voluntary ignorance motivated by aversion to truth (consequently a stronger term than ‘folly’ in English), an unwillingness to be drawn into the consideration of the transcendent. Given that *openness* and attunement to the divine, however perceived, is the condition of existence in truth, or ‘order,’ in that social form; *closure* to the divine, aversion from it, rebellion against it, is existence in untruth, ‘disorder’ in Voegelin’s sense. Seeing that religious extremism and the corruption of language by current political ideologies makes honest dialogue to a great extent impossible, the comprehending community of language must be (re-) discov-

<sup>60</sup> Eric Voegelin, *Anamnesis: on the Theory of History and Politics* (Columbia, MO: University of Missouri Press, 2002), 352-3.

<sup>61</sup> Glenn Hughes, *Mystery and Myth in the Philosophy of Eric Voegelin* (Columbia, MO: University of Missouri Press, 1993), 48-9.

<sup>62</sup> Eric Voegelin, *Published Essays: 1966-1985* (Baton Rouge, LA: Louisiana State University Press, 1990), ch. 10.

<sup>63</sup> Eric Voegelin, *Anamnesis: On the Theory of History and Politics* (Columbia, MO: University of Missouri Press, 2002), 176.

<sup>64</sup> Voegelin, *Anamnesis*, 177.

<sup>65</sup> Voegelin, *Published Essays: 1966-1985*, 269; *What is History?*, 88.

<sup>66</sup> Voegelin, *Autobiographical Reflections*, 155. Cf. *What is History?*

<sup>67</sup> Voegelin, *Autobiographical Reflections*, ch. 22.



ered and established.<sup>68</sup>

Since some of the language symbols in Western society have lost contact with reality due to an intellectual terrorism of secular institutions (such as the mass media, university departments, foundations, commercial publishing houses, and the ferocious misuse of the internet), they cannot be used for expressing the truth of existence.<sup>69</sup> A way of regaining transcendent reality is to revisit the thinkers of the past who had not lost contact with reality or who were engaged in regaining it.<sup>70</sup> Voegelin explored the techniques and structure of deformations and developed a vision by which deformation and its symbolization can be categorized. In particular, ‘the refusal to apperceive’ has become a central theme in his works for the understanding of ideological aberrations and deformations. Voegelin’s methodological rules insist on going back to the experiences that engender symbols.<sup>71</sup> He believes that the “reservoirs of reality” are to be found “in the sciences that deal with intact experiences and symbolizations of reality, even if the sciences themselves have been badly damaged by the influence of the ideological climate.”<sup>72</sup> Hence, we have to reconstruct the fundamental categories of existence, experience, consciousness and (spiritual) reality: “In resistance to the dominance of idols—i.e., of language symbols that have lost their contact with reality—one has to rediscover the experiences of reality as well as the language that will adequately express them.”<sup>73</sup>

All language symbols today are suspected of corruption, especially the language used in the public sphere.<sup>74</sup> Having gone through periods of severe distortion of existence, Europe’s phenomenon has been understood by Voegelin as ‘pathological,’ therefore, the question of a spiritual, well-ordered existence again ought to attract attention. The phenomenon of the rediscovery of existential and political order is not peculiar to the modern period. We can observe a similar situation in the time when Plato and Aristotle started their work -- the Classic Greek period.<sup>75</sup> Voegelin argues that in the conventional interpretation of Plato, it is practically forgotten that the central Platonic concepts are dichotomic: “Problems of justice are not developed in the abstract but in opposition to wrong conceptions of justice, which in fact reflect the injustice current in the environment.”<sup>76</sup> The character of today’s political ‘scientist’ or ‘philosopher’ gains its specific meaning through its opposition to that of the ‘demagogue’ or ‘false prophet’ who engages in misconstructions of reality for the purpose of gaining social ascendance and material profits.<sup>77</sup> Hence, the ‘philosopher’

<sup>68</sup> *Ibidem*, 118.

<sup>69</sup> *Ibidem*, 119.

<sup>70</sup> *Ibidem*, 120.

<sup>71</sup> *Ibidem*, 121-2.

<sup>72</sup> *Ibidem*, 120.

<sup>73</sup> *Ibidem*, 118-9.

<sup>74</sup> *Ibidem*, 121-2.

<sup>75</sup> *Ibidem*, 126.

<sup>76</sup> Voegelin, *Autobiographical Reflections*, 119.

<sup>77</sup> *Ibidem*.



has to find men and women of his own kind in a community that comprehends both the present and the past. Although there is, according to Voegelin, always a dominant climate of ideological opinion, there is also present, even in our society, a large community of scholars who have not lost contact with reality and thinkers who try to regain the contact that they are in danger of losing.

## FIDES FORMATA

By recalling its spiritual and Judeo-Christian heritage, Europe's political community (*koinonia politike*) needs to rediscover its *fides formata*, a 'formed faith,' a faith with 'love' as its vital principle, which means no 'fear' and no 'hatred.' Aquinas used the term "love" for the adequate orientation of the soul toward God, not only through correct teachings about Him, but also through participation in divine love experienced within the soul.<sup>78</sup> According to Aquinas, it is "love" (*caritas*) that is the soul or vital principle of faith. This is a more developed faith than *fides informis*, which, lacking love as its vital principle, is incomplete. Aquinas's used the term *fides informis* for a proper but rudimentary orientation toward God through doctrine (a lower level of faith than *fides formata*).<sup>79</sup> 'Deformed faith,' but also 'unformed faith' in today's European culture, is the kind of faith that lacks its vital principle. In Buber's words, "man's standing before the face of God" is threatened:

From the earliest times the reality of the relation of faith, man's standing before the face of God, world-happening as dialogue, has been threatened by the impulse to control the power yonder. Instead of understanding events as calls which make demands on one, one wishes oneself to demand without having to hearken. "I have," says man, "power over the powers I conjure." And that continues, with sundry modifications, wherever one celebrates rites without being turned to the Thou and without really meaning its Presence.<sup>80</sup>

The emphasis on a *fides formata* is advanced herein that Voegelin's characterization of the 'open society' is mirrored by Bonhoeffer's Christian *Ethics*<sup>81</sup> and by Buber's *Das dialogische Prinzip*, his philosophy of dialogue,<sup>82</sup> to convey the directness and living force of the ancient biblical word.<sup>83</sup> In assessing the moral vitality of individuals and religious and/or political groups in Europe today, their search for the ground of existence remains significant. Specifically in terms of the *summum bonum*

<sup>78</sup> Eric Voegelin, *History of Political Ideas, Vol. 1, Hellenism, Rome, and Early Christianity* (Columbia, MO: University of Missouri Press, 1997), 35-6.

<sup>79</sup> Voegelin, *Autobiographical Reflections*, 160.

<sup>80</sup> Buber, *Eclipse of God*, 125.

<sup>81</sup> Cf. Dietrich Bonhoeffer, *Ethics*.

<sup>82</sup> Cf. Martin Buber, *Ich und Du*, Nachwort von Bernhard Casper (Stuttgart: Reclam, 1995); *I and Thou*, tr. Ronald Gregor Smith (London & New York, NY: T. & T. Clark; a Continuum Imprint, 2003); *Das dialogische Prinzip: Ich und Du; Zwiesprache; die Frage an den Einzelnen; Elemente des Zwischenmenschlichen* (Gütersloh: Gütersloher verlagshaus, 2006).

<sup>83</sup> Buber, *Eclipse of God*, x.



or 'highest good,' their *euboulia* or 'wise judgment' in private and public affairs may evoke in us the *epistrophe*, a turning toward the divine ground after having previously been lost or gone astray through self-alienation (*allogtriosis*).<sup>84</sup>

Bonhoeffer's Christian realism exposes the tension between man's finiteness and inner freedom, his everlasting struggle in the call away from idolatry and "cheap grace" ("*Billige Gnade*") towards the "costly grace" ("*Teure Gnade*") of discipleship.<sup>85</sup> He sums up what he sees as the essence of the political life: "All things whatsoever ye would that men should do unto you, even so do ye also unto them: for this is the law and the prophets' [...] for this is none other than the supreme commandment: to love God above all things and our neighbours as ourselves."<sup>86</sup> This tensional relationship is found in Buber's analysis of man's drifting away from the divine-human encounter toward the world of things, of "It" (German: "*Es*"), rather than his relationship with the "Eternal Thou" ("*Das ewige Du*"). Buber insists that with each we have the prospect of conversing with the divine, the Eternal One.<sup>87</sup> This relation with God and man is direct: "No system of ideas, no foreknowledge, and no fancy intervene between *I* and *Thou*. The memory itself is transformed, as it plunges out of its isolation into the unity of the whole."<sup>88</sup>

The polarities in the experiences of immanent and transcendent divine being bind us to commit ourselves to the moral choices that lie behind the purpose of our being in this world. In opposing the ideological perversion that one could be liberated by a 'cultural atheistic revolution' and/or by a disposal of any of the three monotheistic religions, Voegelin, Buber and Bonhoeffer challenge us with the idea that the promise of inner freedom and genuine liberty requires an open, receptive, and generous spirit towards God, man and the three monotheistic expressions of religious faith—despite their unique symbolizations and differences. The understanding, the prudent action and practical wisdom (*phronesis*) of these three sensible sagacious human beings (*phronimos* or *uphronimos*) are, in the Greek sense, a guide to ethical virtue and have a contemplative emphasis (*nous*).<sup>89</sup>

## CONCLUSIONS

If our eyes and ears are the basis of any authority at all, besides a pile of anecdotal evidence, the programs of various political parties in Europe show that a hostile form of secularism is stirring our continent. As Bonhoeffer already had noticed in the twentieth century, "God as a working hypothesis in morals, politics, or science, has been surmounted and abolished; and the same thing has happened in philosophy and religion (Feuerbach!) [...] Anxious souls will ask what room there is left for

<sup>84</sup> Voegelin, *Autobiographical Reflections*, 158, 180.

<sup>85</sup> Bonhoeffer, *The Cost of Discipleship*, 43-78.

<sup>86</sup> *Ibidem*, 188.

<sup>87</sup> Buber, *Ich und Du*, 71.

<sup>88</sup> Buber, *I and Thou*, 25.

<sup>89</sup> Voegelin, *Anamnesis*, 153-6; *Autobiographical reflections*, 174.



God now; and as they know of no answer to the question, they condemn the whole development that has brought them to such straits.<sup>90</sup> As a result, there is no other way to God and to the politics of the soul, according to Bonhoeffer, than through love, repentance, and through *ultimate* honesty. He writes:

And we cannot be honest unless we recognize that we have to live in the world *etsi deus non daretur*. And this is just what we do recognize—before God! God himself compels us to recognize it. So our coming of age leads us to a true recognition of our situation before God. God would have us know that we must live as men who manage our lives without him. The God who is with us is the God who forsakes us (Mark 15.34). The God who lets us live in the world without the working hypothesis of God is the God before whom we stand continually. Before God and with God we live without God. God lets himself be pushed out of the world on to the cross. He is weak and powerless in the world, and that is precisely the way, the only way, in which he is with us and helps us. Matt. 8.17 makes it quite clear that Christ helps us, not by virtue of his omnipotence, but by virtue of his weakness and suffering.<sup>91</sup>

Here lies for Bonhoeffer a decisive difference between Christianity and all other religions in Europe. Our modern curiosity and ‘religiosity’ makes us look in our distress to the *power* of God in the world, to the supremacy of man (e.g. charismatic politicians, religious leaders). God is the *deus ex machina*, so to speak. The Bible directs us, however, not to ‘power’—or to some ‘delusion’ in the Dawkinsian sense—but to God’s *powerlessness* and suffering. Bonhoeffer concludes that “the development towards the world’s coming of age outlined above, which has done away with a false conception of God, opens up a way of seeing the God of the Bible, who wins power and space in the world by his weakness. This will probably be the starting-point for our ‘secular interpretation.’”<sup>92</sup>

Opposing the extreme religious, political and secularist expressions in today’s Europe, this article advocates humanity’s relationship with transcendent reality as the dynamic link between man and man,<sup>93</sup> as the constituent of society and history. It maintains that love, the relationship between God and man, and its religious symbolization, form the ground of order (*aition, aitia*) and have been fundamental

<sup>90</sup> Dietrich Bonhoeffer, *Letters and Papers from Prison*, The Enlarged Edition, ed. Eberhard Bethge (New York, NY: Simon & Schuster, 1997), 360; *Widerstand und Ergebung: Briefe und Aufzeichnungen aus der Haft* (Munich: Christian Kaiser Verlag, 1970). Cf. Bonhoeffer’s Collective Works: Vol. 8. *Widerstand und Ergebung*, ed. Christian Gremmels, Eberhard Bethge, & Renate Bethge with Ilse Tödt (Gütersloh: Chr. Kaiser/Gütersloher Verlagshaus, 1998). Translated by Isabel Best *et al.* as *Letters and Papers from Prison*, edited by John W. de Gruchy (Minneapolis, MN: Fortress Press, 2010). See also Martin E. Marty, *Dietrich Bonhoeffer’s “Letters and Papers from Prison”: A Biography* (Lives of Great Religious Books) (Princeton, NJ: Princeton University Press, 2011).

<sup>91</sup> Bonhoeffer, *Letters and Papers from Prison*, 360-1.

<sup>92</sup> *Ibidem*, 361.

<sup>93</sup> Cf. Buber, *Between Man and Man*.



to Western civilization.

Europe stands in a continuum of vital experience and articulate symbolization of the divine presence, stemming from philosophical Judaism, ancient philosophy and Christianity, and from the absorbed wisdom of Islamic civilization—specifically, Islamic contributions to Medieval Europe. The sparkle of hope in our battle with secularism and blatant atheism are the aspirations and desires of those whose goal it is to represent the truth of the soul, the *imago Dei*, the image of God. Voegelin writes: “Through spirit man actualizes his potential to partake of the divine. He rises thereby to the *imago Dei* which it is his destiny to be.”<sup>94</sup> But it will require all our efforts to kindle the glimmer of the *imago Dei* into a flame for a future generation. To address Europe’s secularist and atheistic corruption, it takes a true prophet’s renewal and not a false prophet’s craving for ‘Success’ and ‘Power.’ Buber clarifies the issue:

The true prophets know the little bloated idol which goes by the name of “Success” through and through. They know that ten successes that are nothing but successes can lead to defeat, while on the contrary ten failures can add to a victory, provided the spirit stands firm. When true prophets address the people, they are usually unsuccessful; everything in the people which craves for success opposes them. But the moment they are thrown into the pit, whatever spirit is still alive in Israel bursts into flame, and the turning begins in secret which, in the midst of the deepest distress, will lead to renewal. The false prophet feeds on dreams, and acts as if dreams were reality. The true prophet lives by the true word he hears, and must endure having it treated as though it only held true for some “ideological” sphere, “ethics” or “religion,” but not for the real life of the people....<sup>95</sup>

The observations of Voegelin, Buber and Bonhoeffer in the middle of the twentieth century are no less instructive for Europe and for the West today. The way in which our religious heritage is conceived and used will determine its worth as instrument of true spiritual freedom. The lesson for any of us is that misconstructions of reality and the creation of deformed ideologies can easily degenerate into manipulation and reckless majorities. Yet, the truth of divine-human experience is that man cannot be confined to world-immanent existence, to manmade religious and/or political systems. A Judeo-Christian ethics underscores this truth based on the positive understanding of man as a creature of God, who is ‘loved’ and ‘free.’

However, people’s views in today’s Europe differ concerning the dangers posed by a lack of transcendence in society and its recognition by the state. Not everyone agrees that we must return to a Europe of ‘Judeo-Christian ethics.’ Some believe that we must move forward with a more ‘general view of transcendence’ that will embrace all forms of religion and spirituality, and even rejection of spirituality, and

<sup>94</sup> Voegelin, *Published Essays: 1966-1985*, 7; Voegelin, *Autobiographical reflections*, 163.

<sup>95</sup> Buber, *A land of Two Peoples*, 144.



not just those of the three great Monotheistic faiths. In any case, when life reaches out to an eternal world beyond the horizon, it affects our shared life in the secular sphere. To opt for transcendence in a European context means to literally surpass the boundaries of narrow political, secular and religious categories, and to go beyond the horizon of present knowledge by asking further questions. We only transcend our present mode of existence through a new openness to the pull of the Beyond, to a relationship with God. Experiences of transcendence are spiritual experiences of reaching, of being drawn beyond one's present horizon of knowledge, of religious and ethical orientation towards the divine. Opting for meaning, for transcendence over the material plane, does not necessarily mean something abstruse. In ordinary day-to-day experiences we confront our fears and ignorance and allow ourselves to be moved by a genuine desire for love and truth, for a relationship with the 'Eternal Thou.' This is the politics of the soul.





# WHITHER SECULAR BEAR: THE RUSSIAN ORTHODOX CHURCH'S STRENGTHENING INFLUENCE ON RUSSIA'S DOMESTIC AND FOREIGN POLICY

ROBERT C. BLITT<sup>1</sup>

## I. INTRODUCTION

As 2012 presidential elections in Russia draw near, evidence points to a collapse in that country's constitutional obligation of secularism and state-church separation. Although early signs of this phenomenon can be traced back to the Yeltsin era, the Putin and Medvedev presidencies have dealt a fatal blow to secular state policy manifested both at home and abroad, as well as to Russia's constitutional human rights principles including nondiscrimination and equality of religious beliefs. The first part of this article argues that leadership changes in the Russian government and the Russian Orthodox Church (ROC)<sup>2</sup> have triggered an unprecedented deepening of state-ROC ties manifested by a number of key domestic "breakthroughs" for the Church, including bestowing its long-coveted prizes of access to the public education system and the military.

But this is only half the story. In addition to encroachment on domestic state policy, the second part of this article illustrates that the ROC has been actively participating in shaping and executing Russia's foreign policy not only in the "near abroad" specifically, but more generally across the European continent and beyond. By welcoming this exclusive ROC function, the government has enabled a paradoxical situation whereby a secular state openly advocates on behalf of Orthodoxy and "traditional" values abroad. This ensuing relationship not only generates deleterious implications for the content of international human rights law, but also serves to reinforce the already deficient human rights situation within Russia, thus further widening the rift between constitutional promise and government practice.

In the face of these developments, the ROC today enjoys unprecedented influence on virtually every aspect of Russian government policy, an arrangement that coincides with the vision set out by the Moscow Patriarchate in its *Bases of the Social Concept*. More immediately in the context of 2012 presidential elections, this favored treatment has positioned the Church to reap further dividends given its de facto role in validating the government's legitimacy. From this vantage point, an explicit return to Putinocracy promises continued disdain on the part of the Kremlin and ROC for

<sup>1</sup> Robert C. Blitt, B.A. magna cum laude, McGill University, M.A., J.D., LL.M., University of Toronto, is an Associate Professor of Law, University of Tennessee College of Law, Knoxville, Tennessee.

<sup>2</sup> The terms Russian Orthodox Church, ROC, Russian Church, the Church, and Orthodox Church are used interchangeably herein to refer to the Moscow Patriarchate.



freedom of thought, conscience, and religion or belief, as well as freedom of expression and related human rights, in the domestic and international arena alike.

## II. A RUSSIAN ORTHODOX CHURCH “NO LONGER POWERLESS AND WEAK” AT HOME

During Vladimir Putin’s first two terms as president, most of the informed opinion concerning Russian government–ROC dealings agreed that the relationship undercut Russia’s official constitutional secularism, with the ROC gaining influence and state support for the church growing stronger.<sup>3</sup> This situation continued until March 2008, when presidential candidate Dmitry Medvedev scored an “overwhelming victory” in an election described as “more coronation than contest.”<sup>4</sup> At this point, preliminary signs indicated that Medvedev would continue President Putin’s relationship with the Church.<sup>5</sup> However, no one could have predicted that Alexy II, leader of the Russian Orthodox Church for nearly two decades, would die less than one year later and leave the position of ROC Patriarch an open race.<sup>6</sup>

Upon learning of the Patriarch’s demise, Medvedev, abroad in India and only seven months into his presidency, dramatically canceled a planned visit to Italy and returned forthwith to Russia.<sup>7</sup> A Kremlin statement described Alexy’s death as a “very grievous event...in the life of this country, our society.”<sup>8</sup> As if to emphasize the point, Medvedev swiftly declared Alexy’s funeral a day of national mourning,<sup>9</sup> signed a decree requiring cultural institutions and television and radio stations to “cancel entertainment events and programs on the day of the patriarch’s burial,”<sup>10</sup> and ordered national media to provide live coverage of the almost eight-hour long funeral ceremony.<sup>11</sup>

Metropolitan Kirill of Smolensk and Kaliningrad, the ROC’s locum tenens (interim leader), eulogized the departed Patriarch at a funeral service attended by Medvedev, Putin, and other officials from the Kremlin and Duma: “Today his Holi-

<sup>3</sup> See Zoe Knox, *The Symphonic Ideal: The Moscow Patriarchate’s Post-Soviet Leadership*, 55 EUR.–ASIA STUD. 575, (2003); John Anderson, *Putin and the Russian Orthodox Church: Asymmetric Symphonia?*, 61 J. INT’L AFF. 185, (2007); Oleg Shchedrov, *Putin Promises Support to Russian Orthodox Church*, REUTERS, Nov. 19, 2007; Robert C. Blitt, *How to Entrench a De Facto State Church in Russia*, 2008 BYU L. REV. 707; Clifford J. Levy, *At Expense of All Others, Putin Picks a Church*, N.Y. TIMES, Apr. 24, 2008, at A1; *A New Patriarch for the Russian Orthodox Church*, U.S. NEWS & WORLD REP., Jan. 28, 2009, *Russia—Media Say Church Divided on Choice of Patriarch*, U.S. OPEN SOURCE CTR., Jan. 23, 2009 [hereinafter *Media Say Church Divided*], and Tony Halpin, *Russian Orthodox Church Choses [sic] Between ‘ex-KGB Candidates’ as Patriarch*, TIMES ONLINE (London), Jan. 26, 2009.

<sup>4</sup> Peter Finn, *Putin’s Chosen Successor, Medvedev, Elected in Russia*, Wash. Post, Mar. 3, 2008, at A11.

<sup>5</sup> Blitt, *supra* note 3, at 773–78.

<sup>6</sup> Yuri Zarakhovich, *Russian Orthodox Church Loses Its Leader*, Time, Dec. 5, 2008.

<sup>7</sup> Sophia Kishkovsky, *Patriarch Alexy II, Russian Orthodox Leader, Dies at Age 79*, N.Y. Times, Dec. 5, 2008, at A19.

<sup>8</sup> Halpin, *supra* note 3.

<sup>9</sup> Sophia Kishkovsky, *Russian Leaders Attend Patriarch’s Funeral*, N.Y. Times, Dec. 10, 2008, at A16.

<sup>10</sup> *Media Say Church Divided*, *supra* note 3; see also Yulia Taratuta & Pavel Korobov, *Russian Church to Elect New Patriarch*, Kommersant (Moscow), Dec. 8, 2008, at 1 (discussing Alexy’s political legacy).

<sup>11</sup> Alexander Osipovich, *Russia Buries First Post-Communist Church Leader*, AFP, Dec. 10, 2008.

ness, standing before the face of God, can say that he left us with a different Church: no longer powerless and weak.”<sup>12</sup> Press accounts concluded that the ceremony signaled “the elevation of the Russian Orthodox Church to de-facto state religion.”<sup>13</sup> After Alexy’s burial, the Church Council turned to the task of electing a new patriarch. Kirill, despite his conspicuous position as locum tenens, was by many accounts not a shoo-in for the revered post in part because of criticism he was too “liberal”.<sup>14</sup> Nevertheless, the Metropolitan—after a flurry of speculation and jockeying amid the candidates—secured election as the 16th Patriarch of Moscow and All Russia. To cement the vote, on February 1, 2009, Russian President Medvedev and Prime Minister Putin, alongside other government officials,<sup>15</sup> waited with bated breath in Moscow’s Christ the Savior Cathedral, as bells chimed for fifteen minutes before Kirill arrived in a limousine for his enthronement ceremony.<sup>16</sup> Like Alexy’s funeral, Russian television provided live coverage of the ceremony. Although Putin did not give a speech, he and other dignitaries queued up to congratulate the new Patriarch and for the opportunity to kiss Kirill’s crucifix.<sup>17</sup> Svetlana Medvedeva, Russia’s First Lady, was first in line to receive communion from Kirill.<sup>18</sup>

In a speech delivered after his enthronement, Patriarch Kirill offered thanks to Putin and Medvedev.<sup>19</sup> President Medvedev declared the enthronement:

an outstanding event in the life of our country and of all Orthodox nations—an event that opens a new chapter in the development of Orthodox religion in our country, and which, hopefully, creates new conditions for a fully-fledged and solidarity dialogue between the Russian Orthodox Church and the state.<sup>20</sup>

As if to demonstrate his commitment to fostering these “new conditions,” Medvedev invited the newly enthroned Patriarch—as his first duty as head of the ROC—to lead a service in the Kremlin’s Assumption Cathedral.<sup>21</sup> At a reception in Georgy Hall for ROC Local Council delegates following the service, both Kirill and Medvedev addressed the assembled clergy.<sup>22</sup> Medvedev’s speech stressed that

relations between church and state are built on the foundation of the constitutional principles of freedom of conscience and worship and non-

<sup>12</sup> Russian Orthodox Patriarch Alexy II Laid to Rest, RIA Novosti (Moscow), Dec. 9, 2008.

<sup>13</sup> E.g., Osipovich, *supra* note 11.

<sup>14</sup> *Media Say Church Divided*, *supra* note 3. E.g., Halpin, *supra* note 3.

<sup>15</sup> Sophia Kishkovsky, Russian Leaders Attend Installation of Orthodox Patriarch, N.Y. Times, Feb. 2, 2009, at A8.

<sup>16</sup> *Russian Orthodox Church Enthrones New Patriarch*, Radio Free Eur./Radio Liberty (Feb. 1, 2009).

<sup>17</sup> Russian Orthodox Church Enthrones New Patriarch, AFP, Jan 31, 2009.

<sup>18</sup> Leonid Sevastyanov & Robert Moynihan, *100 Days of Patriarch Kirill*, Moscow Times, May 18, 2009.

<sup>19</sup> *Russian Orthodox Church Enthrones New Patriarch*, *supra* note 17.

<sup>20</sup> Medvedev: Kirill’s Enthronement Creates New Setting for Broader Dialogue Between Church and State, Interfax (Moscow), Feb. 1, 2009 [hereinafter Dialogue Between Church and State].

<sup>21</sup> Kirill Conducts First Duty as Patriarch, RT, Feb. 2, 2009.

<sup>22</sup> *Russian Orthodox Church Enthrones New Patriarch*, *supra* note 17. Georgy Hall is the largest and most ceremonial room within the Kremlin compound.

intervention by the state authorities in religious organisations' activities, and at the same time, on the state authorities' recognition of the Church's great contribution to building Russia's statehood, developing its national culture and affirming spiritual and moral values in society.<sup>23</sup>

Although Medvedev acknowledged that the Constitution provides for freedom of conscience and separation of religious associations from the state, he conspicuously omitted mention of Article 14's affirmation that the "Russian Federation shall be a secular state" and religious associations "shall be equal before the law."<sup>24</sup> In essence, Medvedev's myopic and selective pronouncement on church–state relations cast aside constitutional principles in favor of the malleable mortar of "the Church's great contribution to building Russia's statehood"—a contribution that has no basis or authority in operative Russian law.

Faced with the death of one patriarch and the election of another during his first year in office, President Medvedev missed two major opportunities to redefine the controversial church–state relationship charted during Putin's previous two terms. Rather than begin to remedy the profound infidelity to Russia's constitutional touchstone of secular rule, Medvedev's management of church–state relations in the era of Patriarch Kirill has further weakened Russia's rule of law and widened the chasm between constitutional promise and practice. Although some examples of this conduct might strike the casual observer as quaint or trivial, when added to the context of more significant policy concessions, the emerging picture underscores a burgeoning relationship between Orthodoxy and the state which effectively displaces secular rule, forecloses the possibility of all religious groups benefitting from the promise of nondiscrimination, and undermines Russian respect for fundamental human rights.

#### A. PREFERENTIAL ROC TREATMENT IN THREE ANECDOTES

Three revealing if seemingly innocuous examples of preferential ROC treatment set the tone for larger concessions to the Church on more sensitive policy issues. First, consider the coveted *migalki* or flashing light affixed to the Patriarch's automobile. Under a 2006 government decree, fewer than one thousand Russian cars belonging to senior government officials were supposed to be equipped with special flashing lights intended to facilitate bypassing traffic when "absolutely necessary."<sup>25</sup> Yet Patriarch Kirill, despite the fact that he is not considered a government official, has been extended this privilege to the exclusion of other religious leaders, including

<sup>23</sup> President Dmitry Medvedev, Speech at a Reception Given by the President of Russia in Honour of Senior Clergy Who Took Part in the Russian Orthodox Church Local Council (Feb. 2, 2009).

<sup>24</sup> Konst.RF art. 14.

<sup>25</sup> Alexander Bratersky, Angry Drivers Take Stand Against Flashing Blue Lights, *Moscow Times*, Apr. 6, 2010.



representatives from Russia's so-called traditional religions.<sup>26</sup> During public debates over the omnipresent *migalki*—sparked in part due to related traffic fatalities—Yuri Luzhkov, the now sacked Mayor of Moscow, asserted that only three individuals were worthy of the blue light: “the President, the Prime Minister, and the patriarch of the Orthodox Church.”<sup>27</sup>

In the second instance, when the Patriarch—flashing blue lights and all—needs to escape Moscow's temporal but ever-vexing traffic jams, he too needs a *dacha* getaway. Construction of a new summer residence near the Black Sea resort town of Gelendzhik commenced during Alexy's tenure, following an unusual land grant from the mayor of the village. A travel guide describes this up-market and idyllic location as an ostensibly protected nature reserve boasting fantastic air, which has become all the rage of Russia's new elite.<sup>28</sup> To execute the grant of protected forestland to the ROC, the local government openly flaunted federal law permitting removal of protected status only in exceptional cases<sup>29</sup> limited to where the state or municipality is implementing “international commitments of the Russian Federation,” or acting for a purpose of “state or local significance in the absence of other options.”<sup>30</sup> It is not immediately obvious how the transfer of protected land to the Church might fulfill the narrow requirements stipulated under the law, or how such a move could occur without public consultation. At least one individual present at a town hall meeting protested the fact that the Patriarch's residence was proceeding without any environmental impact study: “We are present at a farce. Everything has already been put up, so what are we discussing? And how could a three story building appear without an ecological expert test?”<sup>31</sup> Despite these issues, the local prosecutor's office maintained that “there was no violation” of the applicable law.<sup>32</sup>

<sup>26</sup> Bratersky, *supra* note 51. For more on the division between “traditional” and “nontraditional” religions in Russia, see Blitt, *supra* note 3, at 731–35; Wallace L. Daniel & Christopher Marsh, *Russia's 1997 Law on Freedom of Conscience in Context and Retrospect*, 49 J. Church & St. 5 (2007); ArinaLekhel, *Leveling the Playing Field for Religious “Liberty” in Russia: A Critical Analysis of the 1997 Law “On Freedom of Conscience and Religious Associations,”* 32 Vand. J. Transnat'l L. 167 (1999).

<sup>27</sup> Shaun Walker, *Flashing Light Traffic Dodge Leaves Moscow's Motorists Screaming Blue Murder*, Independent (London), Apr. 21, 2010, at 30; Ruslan Krivobok, *Russian Drivers Protest Cars with Flashing Lights Breaking Road Rules*, RIA Novosti, Apr. 15, 2010.

<sup>28</sup> Andreas Sternfeldt & Bodo Thöns, *Die russische Schwarzmeerküste: Unterwegs zwischen Sotschi und Anapa* (Trescher-Reihe Reisen, 2005).

<sup>29</sup> *Zemelnyi Kodeks Rossiiskoi Federatsii* [ZK] [Land Code] art.101(3) (Russ.) (repealed 2006) (“Изъятие земель, занятых лесами первой группы, для государственных или муниципальных нужд допускается только в исключительных случаях, предусмотренных подпунктами 1 и 2 пункта 1 статьи 49 настоящего Кодекса.”). See also Yevgeniy Titov, К Путину в плавках [*To Putin in Swimwear*], *Novaya Gazeta* (Moscow), July 1, 2009.

<sup>30</sup> *Zemelnyi Kodeks Rossiiskoi Federatsii* [ZK] [Land Code] art. 49(1) (“Изъятие, в том числе путем выкупа, земельных участков для государственных или муниципальных нужд осуществляется в исключительных случаях, связанных с: [1] выполнением международных обязательств Российской Федерации; [2] размещением объектов государственного или муниципального значения при отсутствии других вариантов возможного размещения этих объектов.”).

<sup>31</sup> Titov, *supra* note 29.

<sup>32</sup> *Id.*



Lastly, Russia's Federal Court Marshals Service recently inked a deal with the Church whereby ROC priests nationwide will denounce the failure to repay debts, including "men dodging their alimony payments,"<sup>33</sup> in sermons and during private meetings with debtors organized by court marshals.<sup>34</sup> Russia's Chief Bailiff, Artur Parfenchikov, observed that the ROC "will exercise spiritual influence over the debtors to teach them about the unacceptability of living in debt."<sup>35</sup> According to another spokesperson for the Marshals, "[p]riests will say that unpaid debt is the same as theft in Christianity."<sup>36</sup> While the global economic crisis might justify extreme measures, this is not the first time the ROC and state have mixed sermonizing with public policy. In December 2008, priests preached to unsuspecting scofflaws flagged down by traffic police,<sup>37</sup> despite the fact that Article 4(4) of Russia's 1997 Law on Freedom of Conscience—passed at the behest of the ROC—mandates that:

The activity of agencies of state power and . . . local administration [shall] not [be] accompanied by public religious rites and ceremonies. Officials of state power, or of other state agencies, or of agencies of local administration, as well as military figures, [shall] not have the right to use their official status for advancing one or another religious affiliation.<sup>38</sup>

One reaction to the developments outlined above may be: "So what? Flashing lights and a land grant do not establish a state church or even pose a challenge to the principle of secularism." From this perspective, any benefits—even those handed out exclusively to the ROC—are more quaint than illustrative of a breakdown in Russia's constitutional principles of secularism and equality for all religions. However, the reality is more complicated and troubling. In practice, these examples demonstrate a consistent and pervasive pattern of special treatment for the ROC, carried over and enlarged under Medvedev's rule. In addition, each instance carries potentially negative implications for upholding respect for Russia's Constitution. For example, flashing lights for the Patriarch's car are problematic not only as discriminatory against other religions, but also as an erosion of the government's separation from religious associations. Likewise, the issues arising from a cost-free grant of federally protected land for a summer residence raise red flags concerning preferential treatment and the flaunting of constitutional and federal law. It is even more troubling to consider what consequences might follow from blending the coercive force of the

<sup>33</sup> Russian Orthodox Priests to Help 'Shame' Debtors, AFP, June 24, 2009.

<sup>34</sup> Natalya Krainova, *Church Calls on Debtors to Repay or Face Hell*, St. Petersburg Times, June 26, 2009. The Moscow Patriarchate's department on cooperation with military forces and law enforcement agencies brokered the deal. *Id.*

<sup>35</sup> *Russian Orthodox Priests to Help 'Shame' Debtors*, supra note 33.

<sup>36</sup> Krainova, supra note 34. Reports indicate that the Marshals are in talks to sign similar agreements with Muslim and Buddhist religious leaders as well. *Id.*

<sup>37</sup> Priests, Cops Fight Traffic Violation, AFP, Dec. 4.

<sup>38</sup> O Svobode Sovesti i o Religioznikh Objedinenijah [On the Freedom of Conscience and Religious Associations], art. 4(4), *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 1997, No. 39, Item 4465 (Federal Law No. 125-FZ) [hereinafter 1997 Law].



state (embodied in the traffic cop or court bailiff) with the Orthodox priesthood. The agent of a specific religious denomination walking in lockstep with an agent of the state in the course of carrying out state functions presents a clear challenge to the constitutional obligation of secularism, but it also forces a citizen—whether nonbeliever, Protestant, Catholic, or Mormon—into an uncomfortable situation in which a specific religious point of view appears to be sanctioned by the governing authority. Russia’s Constitution specifically guarantees that “[n]obody shall be forced to express his thoughts and convictions or to deny them.”<sup>39</sup> However, if an Orthodox priest, with a police officer standing at his side, hurls Orthodox dogma at a driver for running an amber light, the driver could foreseeably be placed in such a position. Moreover, simply duplicating the practice with Buddhist monks or Muslim imams does nothing to relieve this burden on freedom from coercion or to correct the ensuing inequality and government endorsement of one or more select religions.

As Nikolai Mitrokhin has observed, “Kirill has already received more from Medvedev than [Patriarch Alexy II] got from Putin during his whole presidency.”<sup>40</sup> Yet, in the Patriarch’s mind these mere perquisites—not unlike the Putin-era practice of government institutions adopting patron saints and official prayers, and building churches within state owned structures<sup>41</sup>—are indicative only of an innocuous church-state “partnership” and “fruitful cooperation.”<sup>42</sup> According to Kirill, the “absence of such agreements with certain other religious organizations active in Russia is not evidence of discrimination.”<sup>43</sup> In the face of this favoritism “lite”, some observers, Mitrokhin included, have maintained that Kirill’s influence reaches “over a very narrow sphere—education, culture, spirituality—but not more than this.”<sup>44</sup> Similarly, Irina Papkova writing in 2008 concluded that the ROC is “unable to exercise real social or political influence... at least where it concerns the federal plane of Russian life.”<sup>45</sup>

Kirill himself has expressed revulsion at the slightest implication that the ROC might enjoy anything approaching the status of an official church. Writing in 2005 to then U.S. Secretary of State Condoleezza Rice, Kirill demurred that there “are

<sup>39</sup> Konst. RF art. 29(3).

<sup>40</sup> Brian Whitmore, *Russia’s Patriarch Increasingly Becoming Major Force in Politics*, Radio Free Eur./Radio Liberty (Sep. 6, 2009).

<sup>41</sup> Blitt, *supra* note 3, at 740–41.

<sup>42</sup> Department for External Church Relations of the Russian Orthodox Church, Предстоятель Русской Православной Церкви поздравил Президента России Д.А.Медведева с днем рождения

[Primate of the Russian Orthodox Church Congratulates President of Russia Dmitry Medvedev on his Birthday] Sept. 14, 2009.

<sup>43</sup> Letter from Metropolitan Kirill of Smolensk and Kaliningrad to Condoleezza Rice, U.S. Sec’y of State (Dec. 6, 2005) [hereinafter Letter from Kirill].

<sup>44</sup> Whitmore, *supra* note 40.

<sup>45</sup> Irina Papkova, The Orthodox Church and Civil Society in Russia, and: Russian Society and the Orthodox Church: Religion in Russia after Communism, and: Russkaia pravoslavnaia tserkov’: Sovremennoe sostoianie i aktual’nye problemy [The Russian Orthodox Church: Contemporary Condition and Current Problems], 9 Kritika: Explorations in Russian and Eurasian History 481, 483, 485 (2008).

absolutely no grounds” to make such an assertion because ROC “clergy do not participate in the work of the state organs or political parties and movements,” and the Church operates without state funding of religious activity.<sup>46</sup>

From the present vantage point, however, the above conclusions and assertions downplaying the extent of the ROC’s influence on Russian government policy appear dubious at best. Examining developments in matters of greater gravitas—including education, the military, and foreign policy—it becomes untenable, even disingenuous, to profess that the clergy do not participate in the work of the state organs or that the Church operates without state funding. This underlying reality confirms two things: first, that the Church is successfully advancing a wide-ranging legislative and policy vision that extends beyond the narrow confines identified by Mitrokhin (which in any event already challenges Russia’s constitutional order). And second, that the Medvedev government has little regard for safeguarding separation of church and state or upholding human rights in Russia.

## B. BREAKING THE ROC’S DOMESTIC GLASS CEILING

Metropolitan Hilarion Alfeyev’s open-ended vision of “noninterference” in the context of church–state relations is instructive for framing the extent of the ROC’s growing political muscularity:

And this is what we call noninterference: We on our side do not interfere . . . into concrete political affairs. Which does not mean that the Church does not express views on various political and social issues. On the contrary, the Church is free to explore not only purely theological or moral themes, but also themes related to history, related to present political situations, [and] to the future. And this is what I call noninterference.<sup>47</sup>

The doctrine of “non-interference” is mirrored in the nonexhaustive list of areas for church-state cooperation enumerated in the ROC’s *Bases of the Social Concept*.<sup>48</sup> One of these areas where the Church has tirelessly pursued the opportunity to express its views is access to Russia’s military. Kirill has addressed elements of Russia’s military on numerous occasions. In Severodvinsk, Russia’s largest military shipyard, he called upon workers to harness Orthodox Christian values to reinforce Russia’s defense capabilities: “You should not be ashamed of going to church and teaching the Orthodox faith to your children. . . . Then we shall have something to defend with our missiles.”<sup>49</sup> On a separate visit to Russian sailors stationed in Sevastopol, the headquarters for Russia’s Black Sea Fleet, Kirill stressed the need to offer spiritual support to the military: “For warriors to be capable of [sacrificing their lives], we

<sup>46</sup> *Letter from Kirill*, supra note 43.

<sup>47</sup> *Russian Archbishop Describes Limits of Noninterference in Church–State Ties*, Ria Novosti (Sept. 18, 2009). Hilarion replaced Kirill as head of the Moscow Patriarchate’s external relations department following Kirill’s election to Patriarch.

<sup>48</sup> See Russian Orthodox Church, *The Bases of the Social Concept* [hereinafter *Bases of the Social Concept*].

<sup>49</sup> Whitmore, supra note 40



must support them with our prayers, while clergymen should be working with the armed forces.”<sup>50</sup> In another ceremony held at the Strategic Missile Forces Academy in Moscow, Patriarch Kirill presented the Commander of the Missile Forces with a banner emblazoned with the image of the Holy Great Martyr Barbara.<sup>51</sup> Kirill opined that “such dangerous weapon [sic] can be given only to clean hands—hands of people with clear mind, ardent love to Motherland, responsibility for their work before God and people.”<sup>52</sup> The Patriarch also reminded the audience that the Church had been teaching Orthodox culture at the Academy for thirteen years and that over 1,600 officers and members of their families had graduated from that program.<sup>53</sup>

These episodes, with their heady mix of military hardware and Orthodox pageantry, further complicate the entanglement of church and state. Under Putin, practices including the blessing of the President’s nuclear launch code briefcase and the sprinkling of holy water by a ROC priest on a S-400 Triumph surface-to-air missile system during a ceremony broadcast on national television became commonplace, ostensibly to strengthen statehood and state security. Remarkably, despite the Church’s vehement objection to “consecrat[ing] places that can serve a ‘double purpose’ and establishments directly or indirectly encouraging sin,”<sup>54</sup> no high-level ROC priest has objected to sanctifying weapons of mass destruction<sup>55</sup> or the successor agency to the KGB, the institution responsible for defiling and laying waste to the Church under Soviet rule.

More troubling still, this comingling of church and military has reached new heights under Medvedev’s rule. In 2009, the president announced his intention to support on “an ongoing basis the work of chaplains from our traditional Russian faiths in our Armed Forces.”<sup>56</sup> This sea change in policy—pursued by the ROC during the eight years of Putin’s rule but never officially attained<sup>57</sup>—signals a dramatic deepening of the church–state relationship. In Medvedev’s view, the new chaplaincy program is intended to “help strengthen the moral and spiritual foundations of [Russian] society,” as well its “multiethnic and multireligious” unity.<sup>58</sup> However,

<sup>50</sup> Roger McDermott, *Medvedev “Sanctifies” the Russian Army*, Eurasia Daily Monitor, Aug. 17, 2009.

<sup>51</sup> Patriarch Kirill Awarded Strategic Missile Forces to St. Barbara Pennant, Interfax, Dec. 8, 2009.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Patriarch Kirill Believes It Unacceptable to Consecrate Nightclubs and Restaurants*, Interfax, Dec. 23, 2009. For Kirill, places that can serve a “double purpose” appear limited to “night clubs, discos, restaurants, [and] shops selling dubious production.” *Id.*

<sup>55</sup> For example, when asked whether he thought it was inappropriate for the Church to bless “all kinds of weapons,” Kirill replied, “[p]riests do that when they are asked.” *Interview with Russian Orthodox Metropolitan Kyrill [sic]: ‘The Bible Calls it a Sin.’* Spiegel Online Int’l, Jan. 10, 2008.

<sup>56</sup> President Dmitry Medvedev, Opening Remarks at Meeting on Teaching the Fundamentals of Religious Culture and Secular Ethics in Schools, and the Introduction of a Chaplains Institute in the Armed Forces (July 21, 2009) [hereinafter *Medvedev Opening Remarks*].

<sup>57</sup> Even prior to Medvedev’s formal approval of military chaplains, over 2,000 Orthodox priests ministered to soldiers on a voluntary, unofficial basis. Blitt, *supra* note 3, at 741. This allowed for a situation whereby “[o]nly the Orthodox clergy [were] entitled to give ecclesiastic guidance to the military.” Zarkhovich, *supra* note 6.

<sup>58</sup> *Medvedev Opening Remarks*, *supra* note 56.



some critics of the program have voiced concern that the ROC is better-situated than other “traditional” faiths to capitalize on state-sanctioned access to the military, in part because of its “nationwide infrastructure of seminaries and colleges to train priests” for missionary work, something the Muslim, Jewish, and Buddhist faiths do not share.<sup>59</sup> This head start has in turn prompted concern that members of the military who adhere to other faiths will either go without spiritual care or be led to Orthodoxy as a more accessible alternative.<sup>60</sup>

Even if the three other “traditional” religious groups manage to train and field their own chaplains, the state is poised to reject their admission into the military. The terms governing the chaplaincy program require adherents of a “traditional” religious faith to account for 10 percent of a military unit before the state will authorize an official chaplain.<sup>61</sup> According to a recent Russian Defense Ministry survey, 83 percent of soldiers identifying themselves as religious adherents are Orthodox.<sup>62</sup> Based on this official government statistic, it appears unlikely that any of the “traditional” religious minorities will be able to satisfy the 10 percent per unit bar with any regularity.<sup>63</sup> Coincidentally, the 10 percent hurdle endorsed by Medvedev marries well with the ROC’s desire to retain a monopoly—or at least a very tightly guarded oligopoly—over access to the Russian military. As early as 1995, the Moscow Patriarchate told military officials that if its access to the armed services could not be exclusive, only Muslim clerics should be tolerated, and no other religions should be permitted to “penetrate” fighting units.<sup>64</sup>

Patriarch Kirill, a longstanding advocate of inserting Orthodox clergy into Russia’s military, was quick to praise Medvedev’s plan to admit clergy into the ranks of the military. Shortly after the President’s historic proclamation, Defense Minister Anatoly Serdyukov announced that he would “hire up to 250 clerics and would pay their salaries.”<sup>65</sup> By December 2009, thirty ROC priests were already selected, and some dispatched, to serve at Russian military bases, including in the North Cauca-

<sup>59</sup> Robert Parsons, Russia: Muslims Oppose Bill to Add Chaplains to Army, Radio Free Eur./Radio Liberty (Mar. 17, 2006); Paul Goble, Muslim Faithful Outnumber Orthodox Believers in Russian Military District, World Sec. Network (Feb. 19, 2010).

<sup>60</sup> See *Training Centers to Prepare Priests for Russian Army*, RIA Novosti, Feb. 2, 2010, (reporting that 83 percent of servicemen identify as Orthodox Christians, and noting Medvedev’s support for “a project to restore full-scale military priesthood”); Goble, *supra* note 59 (discussing the possibility that the percentage of Orthodox Christian servicemen is significantly lower than what the government reports).

<sup>61</sup> U.S. Comm’n on Int’l Religious Freedom, Annual Report 2010, at 276 (2010).

<sup>62</sup> *Id.* “The Armed Forces Sociological Center says more than 70% of Russia’s military personnel consider themselves religious. About 80% of them identify themselves as Orthodox Christians, about 13% as Muslims, about 3% as Buddhists, and 4% as followers of other faiths.” *Orthodox Church to Appoint 400 Priests as Military Chaplains*, Interfax, Feb. 3, 2010.

<sup>63</sup> According to one critic, “Most likely, everybody, other than Russian Orthodox parishioners, will be having a problem. I doubt even the Muslims will number the required 10%.” Anatoly Pchelintsev, *Religious Strife May Hit the Army*, Def. & Sec. (Rus.), Feb. 3, 2010.

<sup>64</sup> Zoe Knox, Russian Society and the Orthodox Church: Religion in Russia After Communism 125 (2005).

<sup>65</sup> Nabi Abdullaev, *Medvedev Backs More Religion in Class, Army*, Moscow Times, July 22, 2009; see also *Orthodoxy and Other Faiths to Be Taught in Russian Schools Voluntarily*, Itar-Tass (Moscow), July 22, 2009 (noting events and policies that may lead to greater religious discrimination).



sus.<sup>66</sup> The state, therefore, is now paying the ROC directly for its religious activities, and the ROC's priests, in turn, have become agents of the state.<sup>67</sup> Notably, much of the development of the chaplain system is taking place by administrative decree, outside formal legislative channels. This procedure has given rise to concerns over the implementation of the framework that will govern rights and obligations of clergy, their responsibilities, and their competences.<sup>68</sup> For its part, the Church reportedly is preparing "a textbook of Orthodox Christian culture for conscript servicemen" and is developing methods for counteracting the "penetration of totalitarian sects, especially neo-pagans, to the army."<sup>69</sup>

Putting aside the 10 percent rule for "traditional" faiths and the methods used to implement the program, the most troubling aspect of the military chaplain program stems from its confirmation that the preambulatory distinction between "traditional" and "nontraditional" faiths contained in the 1997 Law on Freedom of Conscience has become the law of the land.<sup>70</sup> As a consequence of this distortion, the President is able to freely divide religious groups into three tiers, with each assigned a distinct degree of privilege or lack thereof: first, the Russian Orthodox Church; second, the other "traditional" faiths, which are afforded the opportunity to operate with the blessing of the government, at least on paper;<sup>71</sup> and finally, the so-called nontraditional faiths, which are saddled with government-sanctioned barriers of discrimination that obstruct the ability to practice faith and service communities freely and equally. By giving legal effect to the distinction between "traditional" and "nontraditional" religious groups under Russia's plan for military chaplains, the program facially discriminates against certain religions without anything more than a preambulatory reference as the basis for establishing such a distinction in the first instance. As currently implemented, the program goes beyond what President Putin permitted and stands in stark contradiction to the Constitution's guarantees of equality, non-discrimination, and freedom of religion.

Church access to the public education system represents a second long-coveted area where Medvedev has seen fit to extend the ROC's influence. During his address announcing the military chaplain program, the president endorsed teaching the

<sup>66</sup> Russia Restores Full-Scale Military Priesthood, RIA Novosti, Dec. 8, 2009.

<sup>67</sup> To underscore the increasingly common phenomenon of state funding of the ROC's activities, consider the \$150 million price tag associated with building a new ROC church in Paris and plans underway to authorize government funding for ROC parishes engaged in efforts to prevent abortions and "support . . . young families on a priority basis." *Russian Religious Organizations Likely to Gain Right for State Help*, Interfax, Feb. 17, 2010.

<sup>68</sup> Open Letter from the Slavic Center for Law & Justice and the Institute of Religion & Law, to the Minister of Defense.

<sup>69</sup> Igor Yegorov, *Priests Will Be Drafted into the Russian Army?*, Def. & Sec., Feb. 3, 2010.

<sup>70</sup> For additional discussion on the impact of the 1997 Law on Freedom of Conscience, see Blitt, *supra* note 3, at 733–34.

<sup>71</sup> For example, the U.S. Commission on International Religious Freedom (USCIRF) has reported "Russian authorities rarely allow Islamic services in the military and often deny Muslim conscripts time for daily prayers or alternatives to pork-based meals." U.S. Comm'n on Int'l Religious Freedom, Annual Report 2011, 291.

fundamentals of religious culture and secular ethics in Russia's schools.<sup>72</sup> The ROC has for many years advocated introducing such a course, as an opportunity to infuse the state's educational curriculum with traditional Orthodox values. In the official view of the Church,

it is desirable that the entire educational system should be built on religious principles and based on Christian values. . . . The danger of occult and neo-heathen influences and destructive sects penetrating into the secular school should not be ignored either, as under their impact a child can be lost for himself, for his family and for society.<sup>73</sup>

In vowing to allow religious instruction in public schools, Medvedev stated that the new educational program would adhere to "fundamental constitutional provisions at every stage."<sup>74</sup> However, implementation of the program is being driven by input from the representatives of only designated traditional religions,<sup>75</sup> thus omitting from the outset all other so-called nontraditional faiths. Moreover, Medvedev's promise that "every legislative act in this area will have to be appraised by experts"<sup>76</sup> offers little assurance for compliance with constitutional or human rights norms because Russia's record is mixed at best when it comes to employing "experts" to reach "objective" decisions.<sup>77</sup>

Even if the pilot program currently being implemented in 19 regions under the banner "The basics of religious cultures and secular ethics"<sup>78</sup> proves capable of providing adequate accommodation to students from religious minorities, based on the current discourse and track record of previous efforts such as the "Foundations of the Orthodox Culture" course,<sup>79</sup> national deployment seems fated to generate another fault line of inequality and discrimination for religious minorities and nonbe-

---

<sup>72</sup> *Medvedev Opening Remarks*, *supra* note 56.

<sup>73</sup> *Bases of the Social Concept*, *supra* note 48, art. 14(3).

<sup>74</sup> *Medvedev Opening Remarks*, *supra* note 56.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> For example, in February 2009, the Justice Ministry established an Expert Religious Studies Council. The U.S. Commission on International Religious Freedom (USCIRF) reported that this Council has "wide powers to recommend investigations of religious groups during the registration procedure, to assess if a registered community's activity is in accord with its charter, and to ascertain if an organization, one of its members, or the literature it produces or distributes is extremist." Yet, the Council is chaired by Aleksandr Dvorkin, an individual who lacks academic credentials as a religion specialist and is known as "Russia's most prominent 'anti-cult' activist." Other members of the Council include five ROC-affiliated individuals known for their "anti-sect" activities and attacks on the Protestant faith. U.S. Comm'n on Int'l Religious Freedom, *supra* note XX, at 181-182 and 279.

<sup>78</sup> Press release, Public council discussed the first results of approbation of complex educational course "Basics of religious cultures and secular ethics", Ministry of Education and Science of the Russian Federation, Oct. 14, 2010, <http://eng.mon.gov.ru/press/release/42911/>. Six courses are being offered under the program: Basics of Orthodox culture; Basics of Islamic culture; Basics of Buddhist culture; Basics of Judaic culture; Basics of world religious cultures; and Basics of secular ethics.

<sup>79</sup> See, for example, Svetlana Osadchuk, *Schoolboy Takes Unorthodox Stand*, *Moscow Times*, Nov. 13, 2007, Anastasiya Lebedev, *Lesson in Nativity Cards and the Constitution*, *Moscow Times*, Sept. 25, 2006, and Geraldine Fagan, *Patchy Local Provision of Orthodox Culture Classes*, *Forum 18 News Service*, Sept. 25, 2007.



lievers.<sup>80</sup> Moreover, it is unlikely the ROC will abandon efforts to further influence the emerging curriculum if their desired outcome is not forthcoming.<sup>81</sup> According to Metropolitan Hilarion, “[t]he time has come for the monopoly of Darwinism and the deceptive idea that science in general contradicts religion. These ideas should be left in the past... Darwin’s theory remains a theory. This means it should be taught to children as one of several theories, but children should know of other theories too.”<sup>82</sup> In addition, the ROC continues to advocate that all students—regardless of religious persuasion—be required to study to the specifics of “Orthodox culture” in some standalone framework: “the rising generation of citizens cannot fail to have basic notions of... icon painting, church architecture, and the historical path of the Orthodox Church.”<sup>83</sup>

### III. THE RUSSIAN ORTHODOX CHURCH AS A LYNCHPIN IN RUSSIA’S NATIONAL SECURITY AND QUEST FOR RESTORED SUPERPOWER STATUS

The policies discussed above represent significant “concessions from the secular government that [Kirill’s] predecessors had been trying to obtain for years.”<sup>84</sup> But they are by no means the only concessions. Turning to the foreign policy arena, multiple points of cooperative overlap and commonality shared by the ROC and the Russian state underscore the breakdown of secularism and church-state separation, and further suggest that the continued disregard for Russia’s constitutional order has negative implications for the content and development of existing international human rights norms. This emerging church-state collaboration and mutual reliance has

<sup>80</sup> For example, how will the schools determine what critical mass is necessary before a specific course is made available to an individual or small group of students? Similarly, in light of Russia’s constitutional guarantee that “[n]obody shall be forced to express his thoughts and convictions or to deny them”, what implications arise from potentially compelling an individual student to self-identify as a religious minority? Konst. RF art. 29(3)..

<sup>81</sup> Early statistics indicate under-enrollment in the Basics of Orthodox Culture course. See Paul Goble, *Russian Pupils Will Study Ethics and History rather than Religion, Statistics Show*, Georgian Daily, Mar. 19, 2010, [http://georgiandaily.com/index.php?option=com\\_content&task=view&id=17807&Itemid=70](http://georgiandaily.com/index.php?option=com_content&task=view&id=17807&Itemid=70); *Public council discussed the first results of approbation of complex educational course “Basics of religious cultures and secular ethics”*, *supra* note 78.

<sup>82</sup> Conor Humphries, *Russia Church Wants End to Darwin School “Monopoly”*, Reuters, June 10, 2010.

<sup>83</sup> Патриарх Московский и всея Руси Кирилл – “Известиям”: “Церковная жизнь должна быть служением” [Patriarch of Moscow and All Russia, Kirill to Izvestiya: “Church Life Should Be Service”], *Izvestiya* (Moscow), May 12, 2009 [hereinafter *Patriarch Kirill to Izvestiya*].

<sup>84</sup> Andrei Zolotov, Jr., *The Tireless Preacher*, RIA Novosti, Feb. 2, 2010.



been neglected in much of the existing literature analyzing Russian foreign policy.<sup>85</sup>

Patriarch Kirill today enjoys the ear of Russia's Foreign Ministry and the Moscow Patriarchate plays a key role in both formulating and advancing Russian interests abroad. The Church's interest in foreign relations is not limited to the "near abroad" former Soviet bloc states or its self-declared canonical territory.<sup>86</sup> Rather, the Church actively seeks to engage with all other states where Russian Orthodox Christians may be living, provided they "voluntarily" join the Patriarchate's jurisdiction.<sup>87</sup> This purview is truly global, covering virtually every country as well as many major intergovernmental institutions. In Kirill's mind, "The Church acts on equal footing as a subject of relations with different states and with international public and political organizations. We defend our values and promote the rights and interests of our congregations."<sup>88</sup>

Most of the ROC's effort abroad is managed through its department of external church relations (DECR), which is tasked with the sweeping responsibility of "maintain[ing] the Church's relations with Local Orthodox Churches, non-Orthodox Churches, Christian organizations and non-Christian religious communities, as well as governmental, parliamentary, inter-governmental, religious and public bodies abroad and public international organizations."<sup>89</sup> In practice, the DECR operates as a foreign ministry that hosts ambassadors, travels widely, and interacts with the United Nations (UN), European Union (EU), and Organization for Security and Cooperation in Europe (OSCE), among others. The Church's foreign policy objectives are multi-pronged and diverse, yet they share a remarkable amount of overlap with the Kremlin's perspective. As Patriarch Kirill observed in a letter to Foreign Minister Lavrov: "During your service as foreign minister, the cooperation between the Russian foreign policy department and the Moscow Patriarchate has considerably broadened."<sup>90</sup> The following section highlights several examples of this broad-

<sup>85</sup> For example, many leading texts analyzing Russian foreign policy make little or no mention of the current role Orthodoxy plays, limiting their scrutiny to the tsarist period, or altogether omitting any discussion of the close connection between the Moscow Patriarchate and the Russian foreign ministry. See Jeffrey Mankoff, *Russian Foreign Policy: The Return of Great Power Politics* (Rowman & Littlefield, 2009), Olga Oliker, et al., *Russian Foreign Policy: Sources and Implications* (RAND Corporation, 2009), Robert H. Donaldson and Joseph L. Noguee, *The Foreign Policy Of Russia: Changing Systems, Enduring Interests*, 4th Ed., (M.E. Sharpe, 2009), Robert Legvold, ed., *Russian Foreign Policy In the Twenty-First Century and the Shadow of the Past*, (Columbia University Press, 2007), Andrei P. Tsygankov, *Russia's Foreign Policy: Change and Continuity In National Identity*, (Rowman & Littlefield, 2006), Andrei Melville and Tatiana Shakleina, *Russian Foreign Policy In Transition: Concepts and Realities*, (Central European University Press, 2005), Bobo Lo, *Vladimir Putin and the Evolution of Russian Foreign Policy* (Wiley-Blackwell, 2003), and Michael Mandelbaum, *The New Russian Foreign Policy* (Council on Foreign Relations, 1998).

<sup>86</sup> Defined to include "Russia, Ukraine, Byelorussia, Moldavia, Azerbaijan, Kazakhstan, Kirghizia, Latvia, Lithuania, Tajikistan, Turkmenia, Uzbekistan and Estonia." Department for External Church Relations of the Moscow Patriarchate, *The Statute of the Russian Orthodox Church*, art. 3.

<sup>87</sup> *Id.*

<sup>88</sup> Church Diplomacy Is Not Just a Matter of Inter-Church Relations, *Diplomat*, Sept. 2008.

<sup>89</sup> Department for External Church Relations of the Russian Orthodox Church, *DECR Today*.

<sup>90</sup> Department for External Church Relations of the Russian Orthodox Church, *Patriarch Kirill's congratulatory message to Russian Foreign Minister S. Lavrov*, Mar. 22, 2010.

ened cooperation and demonstrates how the ROC and Russian government's shared objectives compromise Russia's secular constitution and respect for human rights generally, both abroad as well as at home.

#### A. "SPIRITUAL VALUES" UNDERPIN RUSSIA'S NATIONAL SECURITY

One of the central rhetorical pillars of Russia's foreign policy is encapsulated in the constant if ironic refrain in favor of "spiritual values." So pervasive is this notion that it has implanted itself at the apex of Russia's strategic planning documents and is repeatedly invoked by Russia's Ministry of Foreign Affairs (MOFA) as well as in speeches by President Medvedev and others. Yet this vague, seemingly nondiscriminatory concept in fact has a very specific and problematic meaning that is discernable in concrete policy ventures implemented abroad, and illustrates a governmental willingness to further burnish the already glossy—but nevertheless constitutionally verboten—patina of religious favoritism routinely demonstrated in the context of domestic affairs.

Russia's *National Security Concept* (NSC) from 2000 garnered attention for its unusual emphasis on the need for "spiritual restoration."<sup>91</sup> According to this document, Russia faced a dual threat: internally by "the depreciation of spiritual values" which promotes tension in relations between regions and the center;<sup>92</sup> and externally by "cultural-religious expansion into the territory of Russia by other states."<sup>93</sup> To eliminate these risks, the NSC called for *inter alia*, protection of the cultural, spiritual and moral legacy...the formation of government policy in the field of the spiritual and moral education of the population, and... counteraction against the negative influence of foreign religious organizations and missionaries."<sup>94</sup> Although the NSC invoked the generic term "spirituality", in substance the policy objective intended the restoration of Orthodoxy specifically, and to a much lesser degree Russia's other "traditional faiths." Indeed, the NSC went on to brand foreign religious organizations a "negative influence", despite the fact that many of these religions had existed in Russia for decades. The ROC had long endorsed this view, painting missionary groups as a threat to "the integrity of [Russia's] national consciousness and our cultural identity," bent on destroying Russia's "traditional organization of life" and "the spiritual and moral ideal that is common to all of us."<sup>95</sup>

In 2008, the Medvedev government released a revised *National Security Strategy*

---

<sup>91</sup> Pt. II, *National Security Concept of the Russian Federation*, Approved by Presidential Decree No. 24 of 10 January 2000.

<sup>92</sup> Pt. III, *Id.*

<sup>93</sup> Pt. IV, *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Marat S. Shterin & James T. Richardson, *Local Laws Restricting Religion in Russia: Precursors of Russia's New National Law*, in *Religious Liberty In Northern Europe In the Twenty-First Century*, at 155 n.48 (Derek H. Davis ed., 2000).



(NSS) intended to replace the NSC.<sup>96</sup> However, many aspects of Medvedev's plan embody a clear continuation of Putin's strategic vision. For example, "intelligence and other activities of special services and organizations, foreign governments and individuals"<sup>97</sup> is listed as the primary threat to Russia's national security, beating out even the activities of terrorist organizations.<sup>98</sup> The need to combat this bogeyman—ostensibly manifested under the guise of foreign religious organizations and non-governmental organizations (NGOs)—through the creation of various bureaucratic hurdles and other tactics is ripped directly from Putin's playbook and enthusiastically supported by the ROC.<sup>99</sup>

To make more explicit this continuation in policy, Medvedev specifically singles out the perceived threat posed by religious and other organizations intending to disrupt Russian unity and territorial integrity, and destabilize the political and social status quo.<sup>100</sup> Such groups have at various times been labeled as "weapons [of] destruction" designed to promote American geopolitical interests,<sup>101</sup> and more recently, by a Russian court in the case of Scientology, as extremist and "undermining the traditional spiritual values of the citizens of the Russian Federation."<sup>102</sup> This latter feat is impressive particularly in the face of a European Court of Human Rights (ECtHR) ruling rejecting Russia's decision to deny the same Scientology branches status as a religious group because they had not existed for at least 15 years in Russia.<sup>103</sup>

Even Medvedev's stated belief that the "main idea" behind his NSS is "security through development"<sup>104</sup> appears derivative of Putin's previous approach<sup>105</sup> and

<sup>96</sup> Decree of the President of the Russian Federation on May 12, 2009 No. 537 "On National Security Strategy of the Russian Federation until 2020," declares null and void Presidential Decree of 17 December 1997 No. 1300 "On approval of the National Security Concept of the Russian Federation" (Collected Legislation of the Russian Federation, 1997, No. 52, Art. 5909) and Presidential Decree of January 10, 2000 No. 24 "On the Concept of National Security of the Russian Federation" (Collected Legislation of the Russian Federation, 2000, No. 2, Art. 170). Security Council of the Russian Federation, Стратегия национальной безопасности Российской Федерации до 2020 года, May 12, 2009.

<sup>97</sup> Part IV(2)(37), "On National Security Strategy of the Russian Federation until 2020", *supra* note 96.

<sup>98</sup> *Id.*

<sup>99</sup> For more on the Church's relationship to Russia's NGO law, see Robert C. Blitt, Babushka Said Two Things—"It Will Either Rain or Snow; it Either Will or Will Not": An Analysis of the Provisions and Human Rights Implications of Russia's New Law on Nongovernmental Organizations as Told Through Eleven Russian Proverbs, 40 Geo. Wash. Int'l L. Rev. 1 (2008).

<sup>100</sup> Part IV(2)(37), "On National Security Strategy of the Russian Federation until 2020", *supra* note 96.

<sup>101</sup> Anderson, *supra* note 3, at 194.

<sup>102</sup> UPI, Russia Bans Scientology Literature, Apr. 22, 2010.

<sup>103</sup> *Church of Scientology Moscow v. Russia*, application no. 18147/02, April 5, 2007. Scientology now joins the Jehovah Witnesses and the collected works of Said Nursi on Russia's ever-lengthening list of banned extremist materials. As of July 2011, the list included 918 prohibited items (up from 614 items listed in March 2010). Federation Ministry of Justice, Федеральный список экстремистских материалов [*The federal list of extremist materials*].

<sup>104</sup> President of Russia (Kremlin.ru), Beginning of Meeting with Security Council On National Security Strategy of the Russian Federation Through to 2020 and Measures Necessary to Implement It, Mar. 24, 2009.

<sup>105</sup> Putin's 2000 security strategy mentioned development no less than 20 times. *National Security Concept of the Russian Federation*, *supra* note 91.

creates prominent space for the role of spirituality and the ROC.<sup>106</sup> Coincidentally also in 2009, the ROC and United Russia expressed their intent to “jointly decide... what their common values are and what modernization tasks must be accomplished” in the context of Russia’s development plans.<sup>107</sup> The party of Putin and Medvedev then went on to assert that “Russian modernization should be based on Orthodox faith.”<sup>108</sup> Conveniently, Medvedev’s NSS lays the groundwork for this by calling for greater cooperation with institutions of civil society, including religious groups.<sup>109</sup>

Medvedev’s fallback on spirituality as the adhesive for a coherent national security policy generates significant opportunities for the Church to play an instrumental role in shaping Russia’s national development priorities, and as a natural extension of this, impacting Russia’s security policy and threat perception as well. Notably, all senior political figures in Russia are speaking from the same set of spirituality-infused talking points: at an exhibit on Orthodox Russia, Medvedev remarked that the “Intransient spiritual values of Orthodoxy and other traditional confessions have always been at the centre of our national identity.”<sup>110</sup> During an Orthodox Christmas Eve meeting with Patriarch Kirill at the ROC’s Danilov Monastery, Prime Minister Putin praised the Church for “educating citizens in a spirit of patriotic love for their country and passing on a love for spiritual values and history.”<sup>111</sup> Speaking to the OSCE, Russia’s Deputy Minister of Foreign Affairs invoked spiritual values as a component of Russia’s security interests.<sup>112</sup> And finally, Foreign Minister Larvov has explained the Russia government’s interest in Orthodox religious sites outside of Russia as a natural extension of the “spiritual revival...taking place in Russia, [and] our return to spiritual values and shrines.”<sup>113</sup>

To be clear, the ostensibly dogma-neutral concept of “spiritual development” entails a very particular meaning limited in the main to Russian Orthodoxy. This is evidenced in the active promotion of government-funded programs such as *Days of Russian Spiritual Culture*,<sup>114</sup> as well as in Russia’s 2008 Foreign Policy Concept

<sup>106</sup> Remarkably, two separate analyses of the 2009 NSS fail to mention even in passing the central role envisioned for spirituality and culture in guaranteeing Russia’s national security. See Marcel de Haas, *Medvedev’s Security Policy: A Provisional Assessment*, 62 Russian Analytical Digest 2 (June 18, 2009) and Henning Schröder, *Russia’s National Security Strategy to 2020*, 62 Russian Analytical Digest 6 (June 18, 2009).

<sup>107</sup> Church, United Russia want state-church partnership sealed by laws, Interfax, Dec. 1, 2009, [Factiva DAN-WS00020091202e5c1000ry].

<sup>108</sup> United Russia considers Orthodoxy as moral basis for modernization, Interfax, Feb 17, 2010.

<sup>109</sup> Part IV(3)(52), National Security Strategy of the Russian Federation until 2020, supra note 96.

<sup>110</sup> Medvedev’s Wife Visits Exhibition ‘Orthodox Russia’, Itar-Tass, Nov. 4, 2009

<sup>111</sup> Alexandra Odynova and Galina Stolyarova, *Church Calls For Return of Treasures*, St. Petersburg Times, May 11, 2010.

<sup>112</sup> Ministry of Foreign Affairs of the Russian Federation, Statement by Deputy Minister of Foreign Affairs Alexander Grushko at the Opening of the OSCE Annual Security Review Conference, July 1, 2008 (Doc. No. 961-01-07-2008).

<sup>113</sup> Ministry of Foreign Affairs of the Russian Federation, Russian Foreign Minister Sergey Lavrov’s Interview with Cyprus News Agency, Dec. 26, 2007.

<sup>114</sup> This program is discussed in greater detail in Part III(B)(3), below.



(FPC)<sup>115</sup> which, among other things, acknowledges that the Russian government “actively interacts with the Russian Orthodox Church and other main confessions of the country” for the purpose of strengthening Russia’s international security.<sup>116</sup>

The discussion of how “spirituality” has infiltrated into Russia’s national security strategy rhetoric would be incomplete without also examining the connection between spirituality and culture in Russia’s NSS and FPC. From the content of these documents, it is clear that culture is deemed to include religion, and more particularly, Russian Orthodoxy. This linkage in turn generates additional points of entry for the ROC, from which it is able to further challenge the secular promise of Russia’s constitution. According to the NSS, national security threats within the cultural arena are exemplified in the domination of mass (i.e. western) culture targeting the spiritual needs of marginalized groups and the unlawful encroachment on cultural objects.<sup>117</sup> To meet these challenges, the NSS endorses the paramount role of Russian (Orthodox) culture in reviving and preserving moral values and strengthening the spiritual unity of the multinational people of the Russian Federation.<sup>118</sup> The FPC paints a similar picture, concluding that the increase in cultural and civilizational diversity necessitates creating a larger role for religion in shaping international relations. To facilitate this role, the document calls for engaging the “common denominator that has always existed in major world religions.”<sup>119</sup> Minister of Culture Alexander Avdeev makes the equation of Russian culture with Russian Orthodoxy explicit: “Russian culture will flourish and remain the center of the national idea only if it will be in very close dialogue with the Russian Orthodox Church, if it is connected with the understanding that the spiritual and historical value are both sacred values.”<sup>120</sup>

Confirming the Moscow Patriarchate’s intent to take advantage of these entry points, its *Basis of the Social Concept* already endorses cooperation with the state in “spiritual, cultural, moral and patriotic education”, as well as “culture and the arts” more generally.<sup>121</sup> For the Church, culture at its essence is religion.<sup>122</sup> Metropolitan Hilarion has called for the “complete destruction of the wall between the

<sup>115</sup> Part II “The Modern World and the Foreign Policy of the Russian Federation”, *The Foreign Policy Concept of the Russian Federation*, approved by Dmitry A. Medvedev, President of the Russian Federation, on 12 July 2008.

<sup>116</sup> Part III “Priorities of the Russian Federation for addressing global problems”, *Id.*

<sup>117</sup> Part IV(7)(80), “On National Security Strategy of the Russian Federation until 2020”, *supra* note 96.

<sup>118</sup> Part IV(7)(84), *Id.* The task of strengthening the spiritual unity of a multinational—and *multireligious*—people may strike some as being contradictory. It is also questionable whether the promotion of such a task is rightfully suited to a secular government.

<sup>119</sup> Part II “The Modern World and the Foreign Policy of the Russian Federation”, *The Foreign Policy Concept of the Russian Federation*, *supra* note 115. Use of the term “major world religions” implies an exclusive and discriminatory approach regarding which groups might reasonably be part of such engagement.

<sup>120</sup> Russkiy Mir Foundation, Александр Авдеев: Российская культура будет успешно развиваться только в сотрудничестве с Русской православной церковью, [“Alexander Avdeev: Russian culture will flourish only in cooperation with the Russian Orthodox Church”].

<sup>121</sup> Part III(8) “Church and State,” Russian Orthodox Church, *The Bases of the Social Concept*, Russian Orthodox Church: Official Website of the Dep’t for External Church Rel.

<sup>122</sup> Part XIV(2), “Secular science, culture and education,” *Id.*



Church and culture that was established in Soviet times,” and asserted that “If the Church does not take part in the country’s cultural life, culture is running the risk of turning into an anti-culture.”<sup>123</sup> In a similar vein, Patriarch Kirill has reasoned that the ROC’s parishes abroad “fulfill a cultural mission. They are an important link between their Motherland and the people living far away from their native country. The parishes [enable children] to be educated in the spiritual and cultural traditions of their native country.”<sup>124</sup>

Feeding into the government’s emphasis on spiritual values, spiritual revival, and spiritual development—or perhaps even as shorthand for all these terms—is the Russian notion of “spiritual security”,<sup>125</sup> a concept embodying efforts to protect Orthodoxy by framing the threat of religious competition from missionaries and “non-traditional” faiths as endangering nothing less than Russia’s national security. In part, this protection is achieved through an alliance between the ROC and the FSB,<sup>126</sup> as well as the burgeoning relationship with Russia’s predominant political party, United Russia. The ROC is at the vanguard of projecting spiritual security abroad as well: in its interactions with other “Sister-Churches”, the ROC defends “the national and spiritual identity of Russians”;<sup>127</sup> and through collaboration with the MOFA, it “protect[s] the spiritual security of the Russian diaspora from non-Orthodox religions and especially from the spread of secularism.”<sup>128</sup> Medvedev has allowed his administration to grow this exclusive partnership significantly. At the 3<sup>rd</sup> World Congress of Compatriots Living Abroad, Medvedev approved “the role of the Russian Orthodox Church and our other traditional confessions in reviving the spiritual unity of compatriots and strengthening their humanitarian and cultural ties with the historical homeland” and expressed his intent to “certainly continue contacts between the state and appropriate confessions.”<sup>129</sup>

The outcome of this ongoing arrangement has the following symbiotic results: abroad, the government benefits from the ROC’s efforts as a willing partner in

<sup>123</sup> Senior cleric urges Russian church to play greater cultural role, RIA Novosti, Mar. 9, 2010. According to the ROC’s *Bases of the Social Concept*, “if culture puts itself in opposition to God, becoming anti-religious and anti-humane and turning into anti-culture, the Church opposes it.” Part XIV(2), “Secular science, culture and education,” *The Bases of the Social Concept*, *supra* note 121.

<sup>124</sup> Church Diplomacy Is not Just a Matter of Inter-Church Relations, *supra* note 88.

<sup>125</sup> Anderson, *supra* note 3, at 194.

<sup>126</sup> Julie Fedor, *Russia and the Cult of State Security: The Chekist Tradition, From Lenin to Putin* (Routledge, 2011), 162 and 168.

<sup>127</sup> Payne, *Spiritual Security, The Russian Orthodox Church, and the Russian Foreign Ministry: Collaboration or Cooptation?*, *Journal of Church and State*, first published online Nov. 9, 2010 (doi:10.1093/jcs/csq102), at 3.

<sup>128</sup> *Id.*, at 8.

<sup>129</sup> DECR, *Patriarch Kirill attends the opening of the 3d Congress of Compatriots living abroad*, Dec. 1, 2009. Medvedev’s inclusion of “traditional confessions” rings hollow here. As part of the Congress, a meeting was held at the Danilovskaya hotel (within the Danilov Monastery compound, which serves as the patriarch’s official residence) entitled “The Russian Orthodox Church and other traditional confessions in consolidating the united spiritual space of the Russian World.” The substance of this meeting focused exclusively on increasing cooperation between the MOFA and the ROC abroad. See DECR, *3d World Congress of Compatriots section meeting on ‘The role of the ROC and other traditional confessions in consolidation of united space of the Russian World’*, Dec. 2, 2009.

reinforcing Russia's "spiritual security", which in turn boosts available channels for the projection of Russian power. On the home front, the government ensures that religious groups or "sects" deemed by the ROC to constitute a threat are sufficiently repressed. But the potential damage caused by the Russian government's preoccupation with spiritual security runs deeper still. According to Julie Fedor, insofar as Russia's FSB has "cloak[ed] itself in spiritual rhetoric, [it] will not only attain moral respectability, but will effectively place itself beyond the reach of any legitimate criticism, scrutiny or control."<sup>130</sup>

From this more contextualized vantage point—and even before considering practical ramifications—it would appear that the theoretical notions of safeguarding and promoting spiritual development, culture and spiritual security already establish a conceptual approach to foreign policy and national security that undercuts Russia's constitutionally mandated secularism and separation of religion and state. To underscore the incongruity of this position, the vast majority of Russia's own citizens appear to reject restoring and protecting "spiritual" values and culture as an overriding national security priority. According to recent polling data, only three percent of respondents shared the ROC and government's perspective, whereas eleven percent considered the economic crisis and weak industry as the major threat facing Russia.<sup>131</sup> Despite this reality check, as the next section demonstrates, the government and the ROC have worked diligently to put their rhetoric into concrete practice through a variety of tacit and intentional endeavors and partnerships. These tangible efforts more definitively confirm Medvedev's willingness to encourage an expanded influence for the Moscow Patriarchate, as well as the enthusiasm both parties have for intensifying the relationship despite its toxicity for Russia's constitutional directives of secularism, separation of religion and state, and nondiscrimination.

## B. PUTTING "SPIRITUAL VALUES" INTO PRACTICE IN RUSSIA'S SECULAR FOREIGN POLICY

### 1. RUSSIAN ORTHODOX CHURCH-MINISTRY OF FOREIGN AFFAIRS WORKING GROUP

In 2003 a delegation of ROC officials headed by Patriarch Alexy paid their first official visit to Russia's MOFA.<sup>132</sup> During their inaugural meeting, the two parties agreed to establish an official working group dedicated to developing policies intended to defend and deepen Russia's "spiritual" values and the ROC's interactions overseas. In Foreign Minister Lavrov's words, the new working group would

<sup>130</sup> Fedor, *supra* note 126 at 181.

<sup>131</sup> *Opinion poll: Only 3% of Russians think the lack of spiritual values to be a major national threat*, Interfax, Jul. 13, 2009. Other threats most cited by those polled included alcoholism, drug addiction, and Russia's shrinking population (9%).

<sup>132</sup> Ministry of Foreign Affairs of the Russian Federation, Opening Remarks by Foreign Minister Sergey Lavrov at Press Conference After Tenth Meeting of Working Group on MFA-Russian Orthodox Church Interaction, Nov. 20, 2007 (Doc. No. 1836-21-11-2007).



enable the Church and Foreign Ministry to work “together realizing a whole array of foreign policy and international activity thrusts,”<sup>133</sup> including the maintenance of cultural and spiritual links with Russians abroad, the upholding of their rights, and preserving “the cultural and historic legacy of [the] Fatherland and of the Russian language.”<sup>134</sup> Cementing the ROC-MOFA partnership in the form of a permanent working group struck Lavrov as natural, reflecting “an age-old tradition of Russian domestic diplomacy.”<sup>135</sup>

Meetings of the ROC-MOFA working group serve as strategy sessions that address the planning of the Patriarch’s international travels and evaluate the ROC’s activities in international organizations as well as developments in its inter-religious relations, including with the Vatican.<sup>136</sup> From this vantage point, the Church’s past and future actions are coordinated (and possibly modified) based on implications for—and advantages to—Russia’s “secular” foreign policy. In this manner, the Church and MOFA operate in tandem to advance the state’s foreign policy goals, including, for example, giving the ROC and “traditional” religious values greater prominence within the international system.<sup>137</sup>

At the same time, the existence of the working group is another tangible reminder of the ROC’s special treatment, the inequality of other religious faiths, and the state’s failure to abide by its constitutional obligations. This is particularly evident when the working group’s substantive sessions are juxtaposed with the apathetic and intermittent efforts of MOFA’s advisory council on cooperation with Muslim organizations. The latter group has met only a handful of times since its establishment in June 2007<sup>138</sup> and has limited its discussions to the status and prospects of Islamic education, and problems encountered by Russian Muslims during the *hajj* to Saudi Arabia.<sup>139</sup>

## 2. THE RUSSKIY MIR FOUNDATION: A CHIMERA STATE-CHURCH FOREIGN POLICY TOOL

In addition to the collaboration growing out of the ROC-MOFA working group, the government and Church have established additional avenues for coating Russia’s foreign policy with a veneer of Orthodoxy. The Russkiy Mir (Russian World)

<sup>133</sup> Ministry of Foreign Affairs of the Russian Federation, *Transcript of Foreign Minister Lavrov Remarks at Orthodox Easter Reception*, Moscow, Apr. 30, 2008, (Doc. No. 605-01-05-2008).

<sup>134</sup> *Id.* Lavrov has described the ROC as nothing less than “a huge mainstay of government actions in this sector.”

<sup>135</sup> *Id.*

<sup>136</sup> DECR, О проведении XIII заседания Рабочей группы по взаимодействию Русской Православной Церкви и Министерства иностранных дел Российской Федерации [*13th meeting of the Working Group on the Interaction of the Russian Orthodox Church and the Ministry of Foreign Affairs of the Russian Federation*], June 29, 2009.

<sup>137</sup> *Id.*

<sup>138</sup> *Diplomacy Needs a Moral Foundation* (Interview with Sergei Lavrov), *Diplomat*, Sept. 2008.

<sup>139</sup> For example, see Russian Mufties Council, *Attention to the problems*, Mar. 4, 2011, <http://muslim.ru/2/news/4/1323.htm>.

Foundation<sup>140</sup> is a quasi-governmental institution<sup>141</sup> established by Vladimir Putin in 2007 under presidential decree. The foundation's stated purpose is to "promot[e] the Russian language, as Russia's national heritage and a significant aspect of Russian and world culture, and [to support] Russian language teaching programs abroad."<sup>142</sup> More broadly, Russkiy Mir's mission statement provides for "supporting, enhancing and encouraging the appreciation of Russian language, heritage and culture" by "showcas[ing] vibrant examples of Russian art and culture around the world" in the form of "artistic, musical, literary, and scientific contribution[s]" by Russia's "talented writers, artists and academics spreading and uniting Russian language and culture."<sup>143</sup>

The Russian government retains significant ties to Russkiy Mir because it operates as "a joint project of the Ministry of Foreign Affairs and the Ministry of Education and Science and [is] supported by both public and private funds."<sup>144</sup> At the foundation's 2009 annual meeting, a statement by Prime Minister Putin hailed the "close cooperation established between the foundation and the government."<sup>145</sup> To be certain, this high level of cooperation is ensued by the presence of foreign minister Lavrov, Andrei Fursenko, Minister of Education and Science, and Sergey Vinokourov, Head of president Medvedev's Office for Interregional and Cultural Relations with Foreign Countries, on Russkiy Mir's board of trustees.<sup>146</sup>

Coupled with its governmental linkage, the foundation also has developed an increasingly overt connection with the ROC. The Russian language version of the Russkiy Mir website elaborates no less than 17 main objectives of the foundation (beyond those cited above), including, at the very end of the list, interaction with the Russian Orthodox Church and other religions in promoting Russian language and Russian culture.<sup>147</sup> As an outgrowth of this, much of the content posted to Russkiy Mir's website is Orthodoxy-driven, consisting of a constant stream of entries seemingly unrelated to the mandate of advancing the Russian language. These stories carry headlines such as: "Russia's Patriarch Visits Azerbaijan",<sup>148</sup> "Orthodoxy Should Become Foundation Of Russia's Life – Patriarch Kirill"<sup>149</sup>, "Russian Pilgrimage Center To Open In Jordan This Autumn",<sup>150</sup> "European Population Will Die If It Fails

<sup>140</sup> The Russian word "mir" also means "peace" and "community".

<sup>141</sup> It might also be considered a government-organized NGO, or GONGO.

<sup>142</sup> *Id.*

<sup>143</sup> Russkiy Mir Foundation, "About Russkiy Mir Foundation: Mission Statement".

<sup>144</sup> Russkiy Mir Foundation, "About Russkiy Mir Foundation: Creation".

<sup>145</sup> Russkiy Mir Foundation, The Third Russkiy Mir Assembly: Summary of Results, Nov. 9, 2009.

<sup>146</sup> Russkiy Mir Foundation, "Board of Trustees".

<sup>147</sup> Russkiy Mir Foundation, "О Фонде" ["About the Foundation"]. There is no parallel reference to the ROC on Russkiy Mir's English language webpage.

<sup>148</sup> Russkiy Mir Foundation Information Service, *Russia's Patriarch Visits Azerbaijan*, Apr. 26, 2010.

<sup>149</sup> Russkiy Mir Foundation Information Service, *Orthodoxy Should Become Foundation Of Russia's Life – Patriarch Kirill*, Jul. 19, 2011.

<sup>150</sup> Russkiy Mir Foundation Information Service, *Russian Pilgrimage Center To Open In Jordan This Autumn*, Jul. 12, 2011.



To Come Back To Its Spiritual Sources - Patriarch Kirill”,<sup>151</sup> and “Patriarch Kirill Interested In Space Travel.”<sup>152</sup>

As noted, Russkiy Mir is ostensibly focused on the seemingly secular task of promoting the Russian language and related teaching programs abroad.<sup>153</sup> At the time of its inception in 2007, no ROC representative was included either on the founding executive staff or board of trustees.<sup>154</sup> Despite this apparent disconnect, Putin’s 2000 NSC explicitly foreshadowed the linkage between language and Russia’s “spiritual renewal” now embodied by Russkiy Mir:

The spiritual renewal of society is impossible without the preservation of the role of the Russian language as a factor of the spiritual unity of the peoples of multinational Russia and as the language of interstate communication between the peoples of the member states of the Commonwealth of Independent States.<sup>155</sup>

The NSC’s vision demonstrates that the ROC’s connection to Russkiy Mir is not a stroke of kismet, but rather part of a longstanding, long-term vision originally espoused by Putin and continued today under the Medvedev administration: Orthodoxy shall be promoted not only under the banner of an ostensibly more inclusive notion of spirituality or culture, but also as part of the government’s broader effort to safeguard the Russian language. Taking a deeper look at Russkiy Mir’s most recent interactions with the ROC, it becomes obvious that the relationship is intensifying as the foundation drifts away from its core mission of promoting the Russian language and wanders into the realm of disseminating an exclusively Orthodox version of spirituality and Russia culture abroad.

At the end of 2009, Russkiy Mir and the ROC entered into a formal cooperation agreement intended to solidify systematic collaboration. This milestone agreement calls for *inter alia* “strengthening the spiritual unity of the Russian world,”<sup>156</sup> preserving the “spiritual, linguistic and cultural identity” of Russians abroad,<sup>157</sup> and

<sup>151</sup> Russkiy Mir Foundation Information Service, European Population Will Die If It Fails To Come Back To Its Spiritual Sources - Patriarch Kirill, June 23, 2011.

<sup>152</sup> Russkiy Mir Foundation Information Service, Patriarch Kirill Interested in Space Travel, Dec. 2, 2010.

<sup>153</sup> *Decree of the President of the Russian Federation on the Establishment of the Russkiy Mir Foundation*, June 21, 2007. Original Russian: Указ Президента Российской Федерации О создании фонда “Русский мир” (Moscow, June 21, 2007 No. 796).

<sup>154</sup> *Id.*

<sup>155</sup> Pt. IV, National Security Concept of the Russian Federation, *supra* note 91.

<sup>156</sup> Журналы заседания Священного синода от 25 декабря 2009 года [Holy Synod Journals, Dec. 25, 2009]. See also <http://www.sedmitza.ru/news/903430.html>, and Russkiy Mir Foundation, “Agreement on cooperation between the Russian Orthodox Church and the Foundation ‘Russian World’”.

<sup>157</sup> Department for External Church Relations of the Russian Orthodox Church, Подписано соглашение о сотрудничестве между Русской Православной Церковью и фондом «Русский мир» [An agreement on cooperation between the Russian Orthodox Church and the Foundation “Russian World”], Nov. 3, 2009.



promoting structures created by the Moscow Patriarchate overseas,<sup>158</sup> including organization of tours to Orthodox pilgrimage sites outside of the Russian Federation.<sup>159</sup> The agreement also acknowledges the importance of the ROC's foreign activities,<sup>160</sup> mandates that ROC representatives will be appointed to Russkiy Mir's grant making council and board of trustees,<sup>161</sup> and establishes a permanent ROC-Russkiy Mir working group.<sup>162</sup>

The newly minted and far-reaching formal alliance between Russkiy Mir and the ROC places the Kremlin in a constitutionally untenable position. As a consequence of its direct financial and political support for the foundation, the Kremlin has created and sanctioned a proxy body that represents nothing less than a fusion of Orthodox and state institutions. Consequently, this chimera body—originally tasked with the modest goal of showcasing examples of Russian art and culture abroad—today embodies how gravely respect for secularism and religious equality has deteriorated within the context of Russia's foreign policy priorities.

### 3. SUPPORT FOR DAYS OF SPIRITUAL CULTURE: “A LITTLE DOOR, TINY AND UNNOTICEABLE; AND—LO!—FAITH APPEARS”

One of the projects to emerge from the ROC-MOFA working group is the “Days of Russian Spiritual Culture.” This program, part of a broader “Days of Russia” public relations initiative launched by the Russian government, is operated with support from Russia's MOFA, the Ministry of Culture, and the ROC, among others.<sup>163</sup> To date, the program has been a traveling roadshow of sorts, held in over a dozen states including Serbia, Croatia, Costa Rica, Venezuela, Brazil, Argentina and Chile.<sup>164</sup> In 2010, the Vatican hosted a similar program, which included an “international theological forum...devoted to the common Christian roots of the Roman Catholic and the Eastern Orthodox Churches and the common tasks they are facing in today's Europe.”<sup>165</sup>

According to Foreign Minister Lavrov, the “Days of Russian Spiritual Culture” program offers “a series of meetings, exhibitions, film showings and concerts...and...

<sup>158</sup> Russkiy Mir Foundation, *Заключено соглашение между патриархом Кириллом и фондом «РУССКИЙ МИР»* [*Agreement between Patriarch Kirill and “Russian World” Foundation*], Nov. 3, 2009.

<sup>159</sup> An agreement on cooperation between the Russian Orthodox Church and the Foundation “Russian World”, supra note 157.

<sup>160</sup> *Id.*

<sup>161</sup> *Agreement between Patriarch Kirill and “Russian World” Foundation*, supra note 158. At present, the Orthodox Church enjoys a monopoly as the sole religious organization bestowed with a seat on the foundation's board of trustees. Metropolitan Hilarion, Chairman of the Moscow Patriarchate Department for External Church Relations, represents the Church in this capacity. “Board of Trustees”, supra note 146.

<sup>162</sup> An agreement on cooperation between the Russian Orthodox Church and the Foundation “Russian World”, supra note 157.

<sup>163</sup> Russkiy Mir Foundation, *Days of Russia to Take Place in Latin America for First Time*, Oct. 9, 2008.

<sup>164</sup> Latin America to celebrate the Days of Russian Spiritual Culture, Interfax, Sept. 30, 2008. See also *Days of Russian Spiritual Culture in Serbia*, *The Voice of Russia*, Sept. 15, 2010.

<sup>165</sup> *Vatican to hold Days of Russian Spiritual Culture*, Interfax, Feb. 12, 2010. See also *Russkiy Mir Foundation Information Service, Days of Russian Spiritual Culture Kick off in Vatican*, Feb. 12, 2010.

joint divine services”<sup>166</sup> to help acquaint others with Russian spiritual culture. Putting aside the question of whether the foreign ministry is operating *ultra vires* of Russia’s constitution by actively promoting religious services, Lavrov’s description conveniently ignores the fact that the program is wholly Orthodox in orientation and directly pairs the Moscow Patriarchate with the state to the exclusion of all other faiths existing in Russia today.<sup>167</sup>

More accurately, a program organizer describes the Days of Russian Spiritual Culture exhibit as designed to generate “positive public opinion” about the reunification of the ROC and the ROCOR, and highlight the revival of Orthodoxy and the restoration of its holy sites in Russia.<sup>168</sup> A press release—coincidentally published by Russkiy Mir—explains that the “exhibition highlights the life of Russian churches today and spiritual development in society, the revival of sacred sites and the historic significance of the Russian Orthodox Church Outside Russia and its reunification with the Moscow Patriarchate.”<sup>169</sup>

Beyond concerts by the Sretensky Monastery Choir for the “secular public”, the Foreign Ministry’s sponsorship of the program has facilitated sales of orthodox literature published by the Moscow Patriarchate<sup>170</sup> and “the introduction of modern Russian Orthodoxy to believers in Latin America.”<sup>171</sup> When viewed from ground level, the Foreign Ministry’s support for “Days of Russian Spiritual Culture” has in fact embroiled the Russian government directly in the work of supporting ROC proselytizing abroad. Father Alexy Aedo, a Chilean native and Orthodox archpriest, lauds the program for

help[ing to] draw [people] closer to the Orthodox faith because during... the Days of Russian culture, Chileans have had the chance to converse with clergy—with priests and hierarchs... people may be very far from the Church... until they become acquainted with a priest. The Lord God literally opens for them a little door, tiny and unnoticeable; and—lo!—faith appears.<sup>172</sup>

In addition to actively sponsoring the ROC’s missionary efforts, the “Days of Russian Spiritual Culture” also advances Russia’s temporal foreign policy. According to Dmitry Kravtsov, director of “Russia House” in Buenos Aires, the program is

<sup>166</sup> Transcript of Foreign Minister Lavrov Remarks at Orthodox Easter Reception, supra note 133.

<sup>167</sup> Remarkably, Lavrov in the same breath goes on to describe Russia as having “for centuries existed as a multinational and multiconfessional society.” *Id.*

<sup>168</sup> Latin America to celebrate the Days of Russian Spiritual Culture, supra note 164.

<sup>169</sup> Russkiy Mir Foundation, Days of Russian Spiritual Culture start at Vatican, May 19, 2010. See also Days of Russia to Take Place in Latin America for First Time, supra note 163.

<sup>170</sup> В Латинской Америке пройдут Дни русской духовной культуры, [*Days of Russian Spiritual Culture to be Held in Latin America*] Interfax, Sept. 29, 2008.

<sup>171</sup> Russkiy Mir Foundation, *Days of Russian Spiritual Culture to Take Place in Latin America*, Sept. 29, 2008, <http://www.russkiymir.org/en/news//index.php?from4=109&id4=3963>.

<sup>172</sup> Hieromonk Paul Scherbachev, *Opening a Door for the Lord in People’s Hearts: An interview*, XIII(1) The Voice of Orthodoxy, Jan-Feb 2009.

important because it works to strengthen Russia's public diplomacy abroad.<sup>173</sup> Mixed in with the icons and clergy, activities include sessions on promoting regional cooperation, strategic partnership and profitable investments.<sup>174</sup> From this perspective, the "Days of Russian Spiritual Culture" initiative crystallizes the synthesis between Russia's foreign policy objectives and the active propagation of Russian Orthodoxy.

#### 4. FACILITATING AN EXCLUSIVE PODIUM FOR RUSSIAN ORTHODOXY ON THE INTERNATIONAL STAGE

##### I. SPONSORING A UN EXHIBIT ON THE SPIRITUAL REVIVAL OF RUSSIA

The Russian MOFA also has sought to establish a prominent role for the Moscow Patriarchate within a variety of UN fora. Similar to the "Days or Spiritual Culture" program described above, Russia's Permanent Mission to the UN sponsored an exhibit at UN Headquarters in New York entitled "Russian Orthodox Church and Interreligious Dialogue: Spiritual Revival of Russia."<sup>175</sup> While the title purported to emphasize "interreligious dialogue", the event's production and content reflected a transparent effort to undercut Russia's constitution and legitimate ongoing discrimination against so-called "nontraditional" religions in Russia. Remarks at the opening ceremony by then Patriarch Alexy glaringly excluded thousands of believing Russian citizens by proclaiming "we, Russian Orthodox Christians, Muslims, Judaists, and Buddhists, live in peace. And at the heart of this peace is our respect for each other's traditions, ways of life and social models."<sup>176</sup>

Not to be outdone, Vitaly Churkin, Russia's Permanent Representative to the UN, affirmed this exclusionary and disingenuous view when he boasted that his Mission "wanted to show how modern Russia is addressing the challenging task of promoting interreligious and intercultural understanding."<sup>177</sup> This brash statement came only months after the ECtHR ruled that Russia's effort to deny re-registration to the Salvation Army on the basis that it was a "paramilitary organization" amounted to an unjustifiable interference with the right to freedom of religion and association under the European Convention on Human Rights.<sup>178</sup>

<sup>173</sup> Дни русской духовной культуры в аргентинской провинции Санта-Круз [*Days of Russian Spiritual Culture In the Argentine Province of Santa Cruz*], <http://www.pravoslavie.ru/news/34001.htm> and *Días de la cultura espiritual rusa en la provincia Santa Cruz* [*Days of Russian Spiritual Culture in the Province of Santa Cruz*], Feb. 2, 2010, <http://www.casaderusia.org/ar/ficha-evento.php?idevento=62>.

<sup>174</sup> Days of Russia to Take Place in Latin America for First Time, supra note 163.

<sup>175</sup> Permanent Mission of the Russian Federation to the UN, On the opening at the UN Headquarters of the photo exhibition "Russian Orthodox Church and Interreligious Dialogue: Spiritual Revival of Russia", Oct. 8, 2007.

<sup>176</sup> *Id.*

<sup>177</sup> Talking Points by H.E. Vitaly Churkin, Permanent Representative of the Russian Federation to the United Nations, at the opening of the photo exhibition "Russian Orthodox Church and Interreligious Dialogue: Spiritual Revival of Russia", <http://www.un.int/russia/new/MainRoot/docs/press/041007eprel.htm> (undated).

<sup>178</sup> The Court *inter alia* found "no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities." ¶ 82, *Case of the Moscow Branch of the Salvation Army v. Russia*, (Application no. 72881/01), Judgment, Strasbourg, Oct. 5, 2006 (Final, Jan. 5, 2007) (internal notes omitted).

## II. PUSHING FOR A CONSULTATIVE COUNCIL OF RELIGIONS

During the UN General Assembly's 62<sup>nd</sup> session, Foreign Minister Lavrov labeled the “spiritual and moral foundations of human solidarity” increasingly vital and proposed “establishing under the UN auspices, a special forum—a kind of consultative Council of Religions—for the exchange of views among representatives of major world confessions.”<sup>179</sup> Since this time, Russia has consistently and repeatedly advocated in favor of such a council across a variety of international fora,<sup>180</sup> as part of a methodical effort to increase the points of entry available to the ROC on the international level and in turn boost the projection of Russian state power. For example, the desire to establish a religious council has been a prominent selling point in Russia's bid to bolster ties with the Muslim world. In 2008, Lavrov invited the Organization for the Islamic Conference (OIC) to support Russia's UN initiative, framing the need for the council in the context of the “legitimate and growing role of the religious factor in the modern-day international relations.”<sup>181</sup> One former Indian diplomat familiar with the region described the move as a “major political initiative”, elevating Russian standing in the Muslim world to a “qualitatively new level.”<sup>182</sup> Soon thereafter, Saudi Arabia and other Muslim states embraced Russia's proposal as part of the fourth forum of the “Strategic Vision Group: Russian and the Islamic World.”<sup>183</sup> The final communiqué issued by the group—which included representatives from the ROC<sup>184</sup>—not surprisingly adopted a recommendation to endorse the Russian government's proposal for a consultative council.<sup>185</sup>

While international interreligious cooperation may be a laudable objective, it is important to recognize that Russia's implementation of such an endeavor is rooted in its own skewed and exclusionary domestic vision for religious dialogue and intended to serve as a vehicle for boosting its own political power within a “polycentric”

<sup>179</sup> Minister of Foreign Affairs of the Russian Federation, Address By Sergey V. Lavrov, Minister of Foreign Affairs of the Russian Federation at the 62nd Session of the UN General Assembly, New York, Sept. 28, 2007.

<sup>180</sup> See Russia's Foreign Minister answers your questions exclusively, RT, Apr. 30, 2009, and Minister of Foreign Affairs of the Russian Federation, Transcript of Speech by Minister of Foreign Affairs Sergey Lavrov at the XIV World Russian People's Council, Moscow, May 25, 2010, (Doc. No. 719-25-05-2010). As if to confirm how closely the ROC and MOFA operate on the foreign policy level, it was the ROC rather than MOFA that set out for UN Secretary General Ban Ki-moon “the essence of Russia's proposal to create a consultative council of religions under the aegis of the UN.” Minister of Foreign Affairs of the Russian Federation, Visit to the Russia of UN Secretary General Ban Ki-moon, Apr. 14, 2008, (Doc. No. 483-14-04-2008).

<sup>181</sup> Minister of Foreign Affairs of the Russian Federation, Points of the address by the Minister of Foreign Affairs of the Russian Federation Mr. S. Lavrov at the XI Summit of the Organization of the Islamic Conference, March 13, 2008.

<sup>182</sup> M. K. Bhadrakumar, *Russia challenges US in the Islamic world*, Asia Times Online, Mar 29, 2008.

<sup>183</sup> The Strategic Vision Group was established in 2006 “to broaden cooperation between Russia and the Muslim countries.” The group held its fifth meeting in December 2009. Kremlin.ru, *Dmitry Medvedev sent his greetings to delegates and guests of the fifth meeting of the Russia-Islamic World Strategic Vision Group*, Dec. 21, 2009.

<sup>184</sup> Russia-Islamic World group backs Russia's proposal to set up UN religious council, Interfax, Oct.31, 2009.

<sup>185</sup> Recommendation 5, Strategic Vision Group: Russia and the Islamic World, *Final Communiqué of the Fourth Forum of the Strategic Vision Group: Russia and the Islamic World* (King Abdullah Bin Abdulaziz initiative for interfaith and intercultural dialogue: a new vision for international relations), Oct. 29, 2008.

international system.<sup>186</sup> President Medvedev himself has confirmed this approach, stressing that such consultations “should help to address important issues such as the settlement of interreligious conflicts, [and] combating defamation of religions...”<sup>187</sup>: “Russia has its own place in the sun and unique experience of interreligious dialogue, experience which has accumulated over centuries...we believe that this is very advantageous; it has helped us create a great country...where the fundamental rights of religious denominations are respected, where civil peace and harmony reign.”<sup>188</sup>

This gross distortion of Russia’s actual track record in the context of religious freedom, fundamental rights and tolerance is, not surprisingly, echoed by the ROC in its effort to preach the virtues of adopting Russia’s model on the global level. According to Archpriest Vsevolod Chaplin, head of the ROC’s department for church-society relations, Russia’s example of inter-religious harmony “is in demand in the world which increasingly understands that it is necessary to respect different civilizations with their religious or secular roots, their laws, rules, social models and political systems.”<sup>189</sup> Yet the ROC plainly asserts that any cooperation with international bodies, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), can only be achieved “on condition of constructive interaction with *traditional religious communities*” exclusively.<sup>190</sup> In other words, before any “dialogue” can commence, minority and “nontraditional” faiths, as well others, must be left by the wayside or permitted merely as token participants.<sup>191</sup>

The Russian MOFA’s continued advocacy of this type of international pseudo-interreligious engagement ratifies the discriminatory status quo that persists within Russia’s domestic context and reinforces the government’s unwillingness to respect

---

<sup>186</sup> Transcript of Speech by Minister of Foreign Affairs Sergey Lavrov at the XIV World Russian People’s Council, supra note 180.

<sup>187</sup> Kremlin.ru, Dmitry Medvedev met with Director-General of UNESCO Koichiro Matsuura and members of the high level group for interreligious dialogue under the aegis of UNESCO headed by Patriarch Kirill of Moscow and All Russia, Jul. 21, 2009.

<sup>188</sup> Dmitry Medvedev, Opening Remarks at Meeting with Director-General of United Nations Educational, Scientific and Cultural Organisation (UNESCO) Koichiro Matsuura and Members of the High Level Group for Inter-religious Dialogue under the Aegis of UNESCO’s Director-General, Kremlin.ru, Jul. 21, 2009.

<sup>189</sup> A Russian priest visits Saudi Arabia for the first time, Interfax, Oct. 29, 2008.

<sup>190</sup> Russian Patriarch urges UNESCO to cooperate with religious communities, Interfax, Oct. 20, 2009.

<sup>191</sup> Sergei Lavrov has expressed his conviction that only the “main world religions” can restore the “common moral denominator” underpinning the concept of rights, and that “harmonious development of all humanity is impossible without this.” *Minister of Foreign Affairs of the Russian Federation Sergey Lavrov addresses the XV Assembly of the Council on Foreign and Defense Policy* (Mar. 17, 2007), Info-Digest

Mar. 21, 2007, at 5. For example, consider the ROC’s decision to break off a 50 year “dialogue” with the Evangelical Church in Germany (ECG) following the election of Bishop Margot Kaessmann as head of the Church Council. *Archbishop Hilarion’s answers [sic] questions from Der Spiegel*, Dec. 14, 2009, <http://www.mospat.ru/en/2009/12/14/news10180>.

its constitutional obligations.<sup>192</sup> More problematically still, on the international level, such activities undermine existing international human rights norms by denying equal and nondiscriminatory treatment to all religious groups, and underpin a larger effort to upend traditional international human rights norms by generating political space for promoting, *inter alia*, a ban on “defamation” of religion<sup>193</sup> and the downgrading of other recognized rights in light of so-called “traditional” and “religious” values.<sup>194</sup>

### III. SPONSORING AND ENDORSING PATRIARCH KIRILL’S TIRADE AGAINST UNIVERSAL HUMAN RIGHTS

In between lobbying the UN and its individual member states for the establishment of a consultative council on religions and sponsoring Russia’s “spiritual” renewal in lockstep with the ROC, the Russia MOFA also facilitated a key speech by then Metropolitan Kirill to the UN Human Rights Council (HRC). In March 2008, the HRC held a discussion entitled “Intercultural Dialogue on Human Rights”, “[a]ctively supported by the Russian Federation and Russian Orthodox Church.”<sup>195</sup> Metropolitan Kirill took this opportunity to lament his belief that:

The human rights approach has been...used to justify the outrage against and distortion of religious symbols and teachings...to impose a certain course of introduction to various religions in schools instead of teaching the basics of their own religion...In addition, there is a strong influence of extreme feministic views and homosexual attitudes to the formulation of rules, recommendations and programs in human rights advocacy, which are destructive for the institution of family and reproduction of population.<sup>196</sup>

Further on in his address, Kirill stressed the need for a relativistic approach to

<sup>192</sup> It also further evidences that the preambularly distinction between “traditional” and so-called “non-traditional” religions established under the 1997 Law on Freedom of Conscience has achieved legal recognition. See Arina Lekhel, *Leveling the Playing Field for Religious “Liberty” in Russia: A Critical Analysis of the 1997 Law “On Freedom of Conscience and Religious Associations,”* 32 Vand. J. Transnat’l L. 167 (1999). О Свободѣ Совѣсти и о Религиозних Объединениях [On the Freedom of Conscience and Religious Associations], art. 4(4), Sobranie Zakonodatel’sva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1997, No. 39, Item 4465 (Federal Law No. 125–FZ).

<sup>193</sup> For more on the challenge presented by the effort to enshrine a ban on defamation of religion, see Robert C. Blitt, *The Bottom up Journey of “Defamation of Religion” from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas*, in Special Issue Human Rights: New Possibilities/New Problems (56 Studies in Law, Politics, and Society 1), 121-211 (Austin Sarat ed., 2011).

<sup>194</sup> UN Human Rights Council, *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, UN Doc. A/HRC/12/21, Oct. 12, 2009. Human Rights Watch labeled the resolution “divisive and dangerous” and “a cause for concern.” Human Rights Watch, *UN Human Rights Council: ‘Traditional Values’ Vote and Gaza Overshadow Progress*, Oct. 2, 2009.

<sup>195</sup> Minister of Foreign Affairs of the Russian Federation, *Intercultural Dialogue on Human Rights Discussion at the 7th Session of the UN Human Rights Council* (Press Release), Mar. 21, 2008, (Doc. No. 366-21-03-2008).

<sup>196</sup> The address of Metropolitan Kirill of Smolensk and Kaliningrad, Chairman of the Moscow Patriarchate DECR on the panel discussion on Human Rights and Intercultural Dialogue at the 7th session of UN Human Rights Council, Interfax, Mar. 18, 2008.



international human rights, one that ought to be “implement[ed]...taking into account the cultural distinctive features of a particular people.”<sup>197</sup> In closing, the Metropolitan (as he then was) called for the fundamental moral norms of “major world religions” to inform the development of international law as a means of avoiding “alienation and opposition of a considerable part of humanity to the [existing] global processes.”<sup>198</sup> Shortly after the speech, the Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations (CONGO) Sub-committee on Freedom of Religion and Belief decried the fact that “no government had criticized Metropolitan Kirill’s dismissive remarks about multi-cultural education and also about the rights of women.”<sup>199</sup>

What is most remarkable about Kirill’s railing against 60 years of human rights development (to say nothing of his ignorance concerning the diversity of views included in the drafting of the Universal Declaration of Human Rights), is the fact that the Russian government went out of its way to publicize the event, in essence elevating Kirill to the status of government spokesperson. A survey of 150 “Info-Digests” published by Russia’s Permanent Mission to the UN between 2007 and 2010 reveals that Kirill’s speech was the only non-governmental event ever reported by that office.<sup>200</sup> Further augmenting the impression that the Metropolitan’s words carried the weight of state sanction is the fact that Russia’s delegation in Geneva, in addition to promoting the address through its office, took the time to Xerox Kirill’s speech onto the Permanent Mission’s official government letterhead for circulation in both paper and electronic format.<sup>201</sup> Likewise, the Information and Press Department of Russia’s Foreign Ministry distributed Kirill’s speech in its entirety, and supplemented it with a separate press release excerpting highlights from the Metropolitan’s address.<sup>202</sup>

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> CONGO Committee on Sub-committee on Freedom of Religion and Belief, *Draft Minutes of Meeting of 22 April 2008*.

<sup>200</sup> The author conducted the survey based on the list of “Info-Digests” available from Russia’s Permanent Mission website. The period covered runs from March 15, 2007 to May 18, 2010. Permanent Mission of the Russian Federation to the UN Office and other International Organizations in Geneva, *Digests*, <http://www.geneva.mid.ru/digests/digests.html>.

<sup>201</sup> A copy of Kirill’s address on the Permanent Mission’s letterhead is on file with the author.

<sup>202</sup> Minister of Foreign Affairs of the Russian Federation, *Выступление председателя Отдела внешних церковных связей Московского патриархата Митрополита Смоленского и Калининградского Кирилла на панельной дискуссии 7-й сессии Совета ООН по правам человека «Межкультурный диалог по правам человека», Женева, 18 марта 2008* [*Speech by the Department for External Church Relations of Moscow Patriarchate Metropolitan Kirill of Smolensk and Kaliningrad on the Panel Discussion, 7th Session of the UN Human Rights Council, “Intercultural Dialogue on Human Rights”, Geneva, March 18, 2008*], Doc. No. 361-20-03-2008, Mar. 20, 2008, and Minister of Foreign Affairs of the Russian Federation, *О выступлении митрополита Кирилла на 7-й сессии Совета ООН по правам человека [On the Statement by Metropolitan Kirill at the 7th Session of the UN Human Rights Council]*, Doc. No. 359-20-03-2008, Mar. 20, 2008.

## 5. ENLARGING THE ROC'S PRESENCE ABROAD

Another way the Russian government has put the rhetoric of spiritual values into practice is manifested in its intimate involvement in enlarging the ROC's physical and geographic reach abroad. Perhaps most dramatically, President Putin played an instrumental role in ending the 80-year schism between the ROC and the long-estranged Russian Orthodox Church Outside Russia (ROCOR).<sup>203</sup> The merger brought the ROCOR's 400 parishes and 400,000 members worldwide within the fold of the Moscow Patriarchate. As the *Wall Street Journal* observed at the time, "The [ROC] gains influence in the U.S., Western Europe and South America, where it had little presence. Mr. Putin also gains. The [merger] blunts what has been one of his largest group of critics—Church Abroad clerics who regularly attacked his policies and human-rights record."<sup>204</sup>

Although the accord ostensibly preserves the ROCOR's autonomy in organizational and economic matters, this assurance has proven inadequate for assuaging the concerns of many ROCOR clergy<sup>205</sup> and parishioners who believe the Moscow Patriarchate has failed to adequately address its legacy of KGB infiltration<sup>206</sup> or sufficiently insulate itself against current Russian government interference. On this latter point, it is instructive to note Foreign Minister Lavrov's observation that the signing of the Act of Canonical Communion heralded "a new stage in our efforts to consolidate the Russian World" and a means of ensuring stability and a "just world order."<sup>207</sup> More directly, President Medvedev welcomed the Moscow Patriarchate's growing significance as a force for securing Russia interests abroad, and pointed to the ROC-ROCOR merger as the first step in consolidating Russia's "near abroad":

We support the Church's efforts to strengthen the fraternal ties between Russia and its close neighbours. We are separated by national borders but we share a common past and common historic destiny... [The reunification of the ROC and ROCOR] gave decisive impetus to consolidating the Russian world, making our ties with our compatriots all around the globe stronger than ever.<sup>208</sup>

In Medvedev's view, part of strengthening ties with compatriots abroad means ensuring a local foothold for ROC churches and clergy. Accordingly, the Russian government has been a strong proponent of building new Orthodox churches and

<sup>203</sup> David Holley, *Russian Orthodox Split is Mended*, *L.A. Times*, May 18, 2007. The split occurred in the 1920s when members of the Russian Orthodox faith severed ties with the Moscow Patriarchate in response to Patriarch Sergy's decision to swear loyalty to the communist government.

<sup>204</sup> Suzanne Sataline, *Cold War Lingers At Russian Church In New Jersey*, *Wall St. Journal*, July 18 2007, at A1.

<sup>205</sup> Estimates put the number at almost one third of ROCOR's clergy pre-merger. See Sataline, *Id.*, and Alexander Osipovich, *Pushing 2 Churches Closer to Each Other*, *Mosc. Times*, Feb. 12, 2008.

<sup>206</sup> Oleg Kalugin, *Spymaster: My Thirty-Two Years in Intelligence and Espionage Against the West* (2009), at 225-226 (discussing the KGB's "nearly total control" of the ROC "both at home and abroad.").

<sup>207</sup> *Diplomacy Needs a Moral Foundation*, *supra* note 138.

<sup>208</sup> President Dmitry Medvedev, Speech at a Reception Given by the President of Russia in Honour of Senior Clergy Who Took Part in the Russian Orthodox Church Local Council (Feb. 2, 2009).



pursuing ownership claims against property currently maintained or controlled by Russian Orthodox communities that have either grown estranged from the Moscow Patriarchate or are actively affiliated with the Constantinople or Ecumenical Patriarchate.<sup>209</sup>

New Orthodox churches are being built across the globe, situated in far-flung and often strategic locales such as Africa,<sup>210</sup> Argentina,<sup>211</sup> China,<sup>212</sup> Tokyo, Havana,<sup>213</sup> Thailand,<sup>214</sup> Madrid,<sup>215</sup> and the United Arab Emirates.<sup>216</sup> According to Patriarch Kirill: “our parishes [abroad] fulfill a cultural mission. They are an important link between their Motherland and the people living far away from their native country.”<sup>217</sup> But Kirill has also opined that new churches operate as “another bridge to unite” Russia with other nations.<sup>218</sup> To be certain, the construction of new churches represents more than a just a facility for providing spiritual succor to an Orthodox Russian flock now living in a global village. As journalist Geraldine Fagan has observed, “One of the very few things the Soviet government ever encouraged the Russian Orthodox Church to do was promote national interests abroad.”<sup>219</sup> And this is precisely what ROC churches abroad are doing today. In the words of one high-level Russian government official, new church construction is “a very important event even for Russia’s secular power.”<sup>220</sup>

To be certain, the ROC does not undertake the impressive task of building new onion-domed churches singlehandedly. Russia’s MOFA is virtually omnipresent in the Church’s construction efforts abroad. Sergei Lavrov has stated that the MOFA and its diplomatic missions abroad “comprehensively help the expansion of the pres-

<sup>209</sup> See Alicja Curanovic, *The Attitude of the Moscow Patriarchate towards Other Orthodox Churches*, 35(4) *Religion, State & Society* 301-318 (Dec. 2007). See also Archpriest Vsevolod Chaplin wants Russia to become “Byzantium without its faults”, *Interfax*, Feb. 29, 2008, (According to Chaplin, Byzantium “has reincarnated in Russia.”)

<sup>210</sup> Patriarch Kirill intends to open Russian parishes and build churches in Africa, *Interfax*, Apr. 12, 2010.

<sup>211</sup> A new Russian church to be constructed in Argentina, *Interfax*, Nov. 7, 2008.

<sup>212</sup> Department for External Church Relations of the Russian Orthodox Church, *An Orthodox church consecrated in the territory of Russian embassy in Beijing*, Oct. 13, 2009.

<sup>213</sup> *Orthodox Church spreads Kremlin’s word*, *Intelligence Online*, March 11, 2010 (Factiva Doc. No. IN-TON00020100414e63b0000e).

<sup>214</sup> The ROC consecrated its second church in Thailand, located in the resort town of Pattaya, in December 2009. *Archbishop Hilarion consecrates new Russian church in Thailand*, *RIA Novosti*, Dec. 12, 2009.

<sup>215</sup> Department for External Church Relations of the Russian Orthodox Church, *Russian Orthodox Church to be given a plot of land for building a church in Madrid*, June 24, 2010.

<sup>216</sup> *First Russian Orthodox Church in the Arabian Peninsula Consecrated*, *AsiaNews.it*, June 8, 2011, <http://www.asianews.it/news-en/First-Russian-Orthodox-church-in-the-Arabian-Peninsula-consecrated-21773.html>.

<sup>217</sup> Payne, *supra* note 127, at 6.

<sup>218</sup> Patriarch Kirill believes new Russian parishes likely to appear in Latin America, *Interfax*, Sept. 21, 2009.

<sup>219</sup> Geraldine Fagan, *Russia’s ambitious new Patriarch*, Feb. 12, 2009, <http://www.opendemocracy.net/article/email/russia-s-ambitious-new-patriarch>.

<sup>220</sup> Putin’s visit to UAE to consolidate RF’s positions in Arab world, *Organization of Asia Pacific News Agencies*, Sept. 4, 2007.

ence of the Russian Orthodox Church.”<sup>221</sup> What this means more specifically, Lavrov explains at length:

The Foreign Ministry of Russia actively helps communities of the Russian Diaspora, even to meet their spiritual needs. And, whenever our compatriots say they want to build a church, we begin working on the matter in close cooperation with [ROC] leaders...and the host country concerned. This is also so when it comes to transferring the property rights to temples that are monuments of Russian culture and faith back to Russia. We proceed from the assumption that the establishment of spiritual life is one of the key factors in the well-being of the Russian Diaspora.<sup>222</sup>

The most prominent recent example of this commitment came in February 2010 when the Russian government “went to extraordinary lengths”<sup>223</sup> to emerge as the highest bidder for a two acre plot of land abutting the Seine River in downtown Paris, “à deux pas de la tour Eiffel.”<sup>224</sup> Despite president Medvedev’s office publicly pitching the project as a generic “spiritual and cultural center”, all other indicators—including a 2007 meeting between President Nicolas Sarkozy and then Patriarch Alexy II<sup>225</sup>—point to the upmarket property as being earmarked for exclusive use as a Russian Orthodox Church<sup>226</sup> and “seminary for educating priests.”<sup>227</sup> Indeed, the Russian government’s international architectural competition that closed in October 2010 more candidly sought the “best design” for a “Russian Orthodox Religious and Cultural Center...intended as a place for meetings, cultural events and spiritual nourishment for the Russian community and for introducing Parisians to the Russian Orthodox culture.”<sup>228</sup> The construction cost for the winning design announced in March 2011 is estimated at upwards of \$50 million dollars,<sup>229</sup> while the purchase

<sup>221</sup> Ministry of Foreign Affairs of the Russian Federation, Russian Minister of Foreign Affairs Sergey Lavrov Interview with RIA Novosti on Russian Relations with the Countries of Latin America and the Caribbean Basin, Nov. 17, 2008, (Doc. No 1830-17-11-2008), [http://www.in.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/40dff6a7982643e5c3257523003f9f19?Open](http://www.in.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/40dff6a7982643e5c3257523003f9f19?Open) (emphasis added). The interview also underscores the secular importance and relevancy of Latin America for Russian foreign relations.

<sup>222</sup> *Diplomacy Needs a Moral Foundation*, *supra* note 138.

<sup>223</sup> Among other steps, it “employed a French lobbying firm to get across the message: the Kremlin would consider a sale to anyone else an ‘unfriendly act.’” Matthew Campbell, *Onion domes to rise in Paris*, The Sunday Times, June 6, 2010 (Factiva Doc. No. ST00000020100606e666000fs).

<sup>224</sup> Vincent Jauvert, *L'affaire de la cathédrale du Kremlin à Paris*, *NouvelObservateur*, May 28, 2010. Russia’s bid bested two other rivals, Canada and oil rich Saudi Arabia. Irina Filatova, *Kremlin Acquires Plot Alongside Eiffel Tower*, The Moscow Times, Feb. 9, 2010.

<sup>225</sup> Jauvert, *supra* note 224.

<sup>226</sup> Department for External Church Relations of the Russian Orthodox Church, *A Russian Orthodox church to be built in downtown Paris*, Feb. 9, 2010.

<sup>227</sup> *Putin thanks France for decision to build Russian spiritual center*, ITAR-TASS World Service, June 11, 2010 (Factiva Doc. No. TASS000020100611e66b001e3).

<sup>228</sup> Department for External Church Relations of the Russian Orthodox Church, International contest for best design of Russian Orthodox Religious and Cultural Center announced in Paris, Oct. 1, 2010.

<sup>229</sup> Henry Samuel, *Domed Russian Orthodox cathedral to be built at foot of Eiffel Tower*, The Telegraph UK, Mar. 18, 2011, <http://www.telegraph.co.uk/news/worldnews/europe/france/8390743/Domed-Russian-Orthodox-cathedral-to-be-built-at-foot-of-Eiffel-Tower.html>.



price of the land acquired by the Russian government has been pegged at nearly \$100 million dollars.<sup>230</sup>

Plainly, the Russian government's commitment to this decidedly high-priced transaction demonstrates its utter disregard for the constitutional propriety of expending state funds abroad to promote a single privileged faith.<sup>231</sup> It also confirms the fact that in its view, the term "spirituality" translates not into "traditional" Buddhism, Islam or Judaism (to say nothing of other so-called "nontraditional" faiths), but rather into Orthodoxy alone to the exclusion of all others. The government's decisive action in this case also begs the further question: precisely what interest is advanced by building a landmark Russian Orthodox Church in a city where the majority of Russians—immigrants from the Bolshevik revolution—already have a church, and in any case are affiliated with the Ecumenical Patriarchate and thus do not recognize the Moscow Patriarchate's jurisdiction?<sup>232</sup> This conduct is rendered more dubious against the backdrop of hundreds of rural churches in Russia lying in disrepair and hundreds of thousands of Russian Orthodox parishioners living in poverty.<sup>233</sup>

The government's active support for repossessing old churches and building new ones underscores that these facilities are not mere houses of worship; rather, they operate as concrete manifestations of Russia's willingness to avail itself of the Church as a potential lever of soft power. As a means of further facilitating this relationship—and expanding its own geographic reach—the Moscow Patriarchate appears willing to contravene its own doctrine of "canonical territory", an ecclesiastic rule which posits the principle of "one city—one bishop—one Church."<sup>234</sup> Daniel Payne observes that the "establishment of multiple churches in a single territory goes against the ecclesiological basis of the Orthodox Church."<sup>235</sup> However, this is precisely what the ROC is poised to do in a variety of locales. The manner in which the ROC has pursued the establishment of churches abroad betrays that the strategy is in no way intended to be limited or restricted to the narrow rationale of providing "full-fledged, effective spiritual support to its flock."<sup>236</sup> As noted above, one of the express purposes of the new Orthodox Church planned for Paris is to share Orthodox "culture" with Parisians at large, not only existing Orthodox parishioners. In fact, the ROC has exhibited a tendency to stray beyond even the most generous reading of canonical

<sup>230</sup> Jauvert, *supra* note 224.

<sup>231</sup> The government will provide the Moscow Patriarchate with exclusive use of the property at no charge. Alexander Soldatov, Широкошагает православная церковь [Wide Strides for the Orthodox Church], Novaya Gazeta, No. 18 Feb. 19, 2010.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Bishop Hilarion (Alfeyev), "One city—one bishop—one Church". The Principle of Canonical Territory and the Appearance of "Parallel Hierarchies", 84 Europaica Bulletin, Jan. 23, 2006.

<sup>235</sup> Payne, *supra* note 127, at 14.

<sup>236</sup> Patriarch Alexy II, The Russian Orthodox Church in the Modern World: The International Activity of the Russian Orthodox Church, 55 Int'l Affairs 2 (2009) (Moscow, All-Union Society "Znaniye").

confines, expressing open support for assisting ethnic Russians in election campaigns to legislative bodies in the European Union<sup>237</sup> and working to “establish a political dialogue between [President Medvedev’s] United Russia party and the conservative forces of Europe and the USA.”<sup>238</sup>

#### IV. A VICIOUS CIRCLE: INTERNATIONAL EFFORTS TO DEGRADE HUMAN RIGHTS REINFORCE RIGHTS VIOLATIONS AT HOME

The Orthodoxy-tinged foreign policies currently advocated by Russia and the Moscow Patriarchate augur grave implications for the scope, coherence and enforcement of existing international human rights norms. In essence, these policies demonstrate a willingness to constrain freedom of thought, conscience, religion or belief, and reduce the free exchange and expression of ideas on a global level. Furthermore, by insisting on a role for so-called “traditional values” in informing universal human rights norms, Russia has sanctioned the unlocking of a relativistic Pandora’s box full of detrimental practices such as female genital mutilation and discrimination against women and religious minorities—to say nothing of Orthodox traditional values that reject rights for homosexuals, “non-traditional religions”, and others. As Patriarch Kirill has asserted: “The [Orthodox] religious tradition...contains a criterion for discerning good from evil. From the perspective of this tradition, the following cannot be accepted as normative: mockery of sacred things [i.e. blasphemy], abortion, homosexuality, euthanasia *and other actions that are actively advocated today by the concept of human rights.*”<sup>239</sup>

Meanwhile, the government and ROC energetically use the challenge mounted against human rights law on the international level to legitimate further hostility towards these norms at home. This is evident across a variety of areas, including discrimination against religious and other minority groups, and the prosecution of “defamation of religion” offenses. For example, Patriarch Kirill continues to denounce gay pride parades as a “blatant display of sodomy” that “degenerates public morality.”<sup>240</sup> In 2010, the ROC “welcome[d] solidarity between the government and society in rejecting sex minorities’ attempts to hold a gay pride parade in Moscow.” According to the Moscow Patriarchate, the gay pride parade—banned in Moscow since 2006—symbolizes a challenge to “the values of traditional religions...[designed] to erode the clear borderlines between the good and the evil.”<sup>241</sup> Despite an ECtHR ruling that Russia’s ban violated rights to free assembly

<sup>237</sup> Whitmore, *supra* note 40.

<sup>238</sup> Russian Church to help expand dialog between United Russia and western conservatives, Interfax, May 31, 2010.

<sup>239</sup> Metropolitan Kirill of Smolensk and Kaliningrad: Human Rights and Moral Responsibility: Part 3

Paper read at the Tenth World Russian People’s Council “Faith. The Person. The World. Russia’s Mission in the 21st Century”, Europaica Bulletin, No. 97, May 23, 2006, <http://orthodoxeurope.org/page/14/97.aspx#3>, (Translation from Russian by Deacon Basil Bush) (emphasis added).

<sup>240</sup> Ann-Dorit Boy, *Pride In Moscow*, Der Spiegel, May 12, 2009.

<sup>241</sup> *Russian Church supports ban on gay pride parade*, Interfax, May 31, 2010. Until President Medvedev deposed him in 2010, Luzhkov was a longstanding supporter of the Moscow Patriarchate.

and nondiscrimination,<sup>242</sup> the government—with ringing endorsement from the Church—continues to dispatch police forces to break up gay rights protests and related gatherings.<sup>243</sup>

Russia's efforts to promote an international norm prohibiting defamation of religion also lend legitimacy to the government's parallel willingness to prosecute related offenses under the guise of incitement in domestic courts. The ROC continues to be a steadfast proponent of such laws as well as the organization that primarily benefits from its enforcement. For example, one art exhibition entitled "Forbidden Art" landed the organizers in court, where a judge branded the artwork on display "a public offense to Christianity"<sup>244</sup> and concluded the organizers were guilty of inciting hatred.<sup>245</sup> This trial, "allegedly instigated by elements within the Moscow Patriarchate",<sup>246</sup> followed the heels of a similar lawsuit filed against a 2003 art exhibit entitled "Caution, Religion!"<sup>247</sup> In the latter case, after an "organised group of self-professed Orthodox believers"<sup>248</sup> ransacked the exhibit,<sup>249</sup> the state opted to prosecute the exhibit's organizers for "inciting hatred and enmity" under the same provision of Russia's Criminal Code.<sup>250</sup> At trial, the prosecution led testimony from six expert witnesses, none of whom had a background in contemporary art.<sup>251</sup> The court convicted the defendants and fined each in the amount of \$4,000. On appeal, the Moscow City Court upheld the judgment in its entirety.<sup>252</sup>

## V. CONCLUSION

In the short timespan of three years, the Medvedev–Kirill partnership has opened multiple new channels of influence for the ROC in Russian social and political life, handed the Church its long-coveted prizes of access to the public education system and the military, and continued to entrench a discriminatory three-tiered status system for religious groups. Much of this activity is premised on rhetorical endorsement of "spiritual values"—or more accurately Orthodoxy—as a glue for national security and Russian identity. These growing channels of influence are

<sup>242</sup> *Case of Alekseyev v. Russia* (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment, Strasbourg, Oct. 21, 2010 (Final, Apr. 11, 2011).

<sup>243</sup> Over 30 gay parade supporters, opponents arrested in central Moscow, RIA Novosti, May 28, 2011, and Church grateful to city authorities for preventing Moscow gay parade, Interfax, May 22, 2011.

<sup>244</sup> Forbidden Art-2006 exhibition organizers to pay fine, RIA Novosti, Jul. 12, 2010.

<sup>245</sup> The organizers were sentenced to pay fines totaling \$12,000. Joanna Impey, *Russians convicted over Forbidden Art show*, Deutsche Welle, Jul. 12, 2010. Amnesty International labeled the verdict "yet another blow to freedom of expression in Russia." Laetitia Peron, *Russia convicts art experts over exhibition*, AFP, Jul. 12, 2010.

<sup>246</sup> U.S. Comm'n on Int'l Religious Freedom, Annual Report 2010, *supra* note 61, at 282.

<sup>247</sup> The ECtHR admissibility decision provides additional details regarding the actual content of the exhibit. *Samo-durov and Vasilovskaya v. Russia* (Decision as to admissibility), Application no. 3007/06, Dec. 15, 2009.

<sup>248</sup> *Id.*, at 3.

<sup>249</sup> A district court deemed that this did not amount to a criminal offense. *Id.*, at 5.

<sup>250</sup> This decision came despite an initial investigation that concluded there was insufficient evidence to show the artists' requisite intent to publicly display their work. *Id.*

<sup>251</sup> Quoted in *Id.*, at 7-8.

<sup>252</sup> *Id.*, at 11.



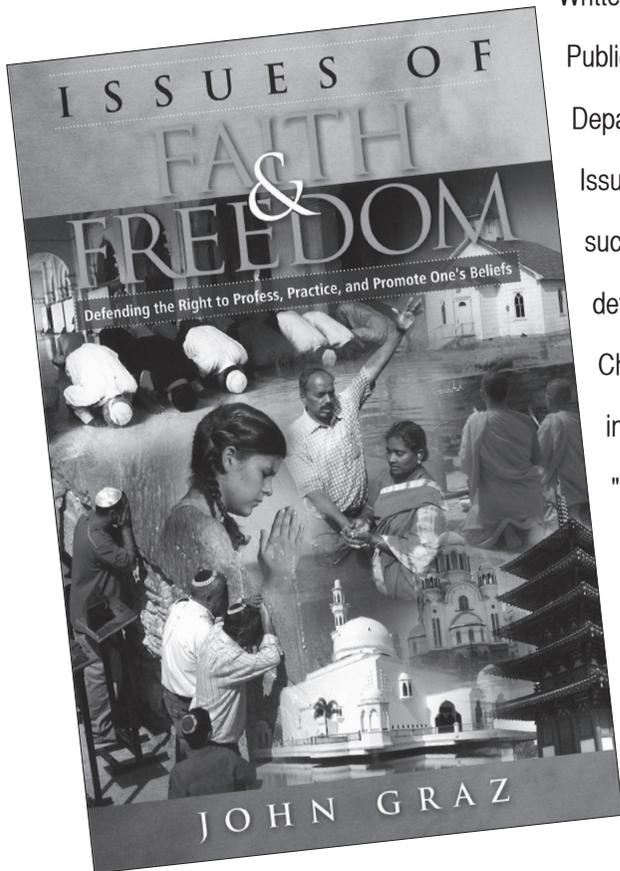
reinforced by a burgeoning—if similarly constitutionally suspect—role for the ROC in the formation and execution of foreign policy. This latter ROC-state partnership—manifested in efforts to supplant universal human rights norms and give credence to the belief that certain select religions merit greater influence than others in the formulation of international rules—indicates that the Kremlin's disregard for constitutionally-mandated separation of church and state generates negative implications on the international level as well. Moreover, espousal of these international policies in turn reverberates within Russia's domestic realm to exacerbate an environment already hostile to human rights.

Ultimately, the current ROC-state dynamic—premised on the creeping infusion of religiosity and discriminatory treatment into official state policy—leaves both parties as deliberate collaborators in the ever-worsening collapse of Russia's constitutional order and respect for human rights. Disturbingly, this relationship also carries the toxic risk of compromising the Church's post-Communist independence and bringing about a return of the subordination of the Russian Orthodox faith to the Kremlin's political diktats. Given this state of affairs, the church-state relationship is likely to prove a critical focal point as Russia moves towards 2012 presidential elections. To maintain its privilege of place, the Moscow Patriarchate likely will be expected to rally behind Putin's orchestrated return to power in 2012, and also potentially open itself up to greater government control and influence. At the same time, Putin is likely to further incentivize the ROC in exchange for securing its public endorsement as well as for the validating function it will play in blessing the pretense of democratic rule in Russia.



# ISSUES OF FAITH & FREEDOM

JOHN GRAZ



Written by John Graz, Director of the Public Affairs and Religious Liberty Department of the General Conference, Issues of Faith and Freedom discusses such issues as "Why do Christians defend religious freedom?" "Should Christians become involved in politics in order to promote their values?" and "What was Jesus' position regarding religious liberty?" Using modern-day stories of discrimination, oppression, and persecution, John Graz tackles issues of religious liberty that concern all Christians.

---

Order your copy today for US \$14.99 at [www.adventistbookcenter.com](http://www.adventistbookcenter.com)





# CAESAR, CONSCIENCE AND CONVERSION: CONSTITUTIONAL SECULARISM AND THE REGULATION OF RELIGIOUS PROFESSION AND PROPAGATION IN ASIAN STATES

LI-ANN THIO<sup>1</sup>

## I. INTRODUCTION: RELIGIOUS PROPAGATION AS CONTESTED LIBERTY

Within polities espousing a commitment to secular democracy, the scope of religious freedom guarantees is determined by the constitutional ordering of state-religion relations. This remains a contested site in both constitutional law and human rights discourse. Typically, religious freedoms rights are classified in terms of rights belonging to the *forum internum* (conscience-based rights to hold or not to hold a religious belief) and *forum externum*, (the external manifestation of religious beliefs, including publishing, teaching, preaching and proselytism). Within secular constitutional orders, religious freedom is predicated on voluntarist conceptions of religious identity as an absolute freedom; religious actions are qualified by reference to social goods.

There is in liberal thinking an inseparable link between the liberty of thought and expression; except for “hermits and long-term coma patients.”<sup>2</sup> We are all proselytizers, since we communicate to persuade and influence our hearers. Religious speech or propagation, a product of the missionary impulse of many religions,<sup>3</sup> is the outward expression of inward belief. The endgame of religious propagation is not merely to inform but to win religious converts through persuasion on questions of religious truth.

At the inter-personal level, religious propagation may flow from the speaker’s discharge of his religious duty to ‘bear witness’, which a legal framework securing a free market of idea facilities; from the hearer’s perspective, religious propagation may be beneficial in exposing the seeking individual to a broad range of worldviews. The act of conversion is profound, entailing a reorientation in the reference point for relationships, meaning and value: “when people proselytise, they represent not just

<sup>1</sup> Li-ann Thio, (B.A. Hons, Oxford, Barrister (G.I.); LL.M Harvard; Ph.D. Cambridge), is a Professor of Law, National University of Singapore. This paper was originally presented at the International Association of Constitutional Law VIIIth World Congress, Mexico, 6-20 Dec 2010.

<sup>2</sup> Paul J Griffiths, ‘Proselytizing for Tolerance’ (Nov 2002) 127 First Things 31

<sup>3</sup> E.g., Christianity, Islam, Buddhism, are missionary religions”: Carl Clemen, ‘Missionary Activity in the Non-Christian Religions’ (1930) 10(1) Journal of Religion 107-126; Arvind Sharma, ‘Ancient Hinduism as a Missionary Religion’ (1992) 39(2) Numen 175-192.



an impulse or an emotion but a world.”<sup>4</sup> However, a privatist model insufficiently considers the social impact and repercussions of religious conversions, which may entail the loss of inheritance rights or provide a ground for divorce under religious law. In terms of inter-group relations, religious propagation may threaten the integrity of religious groups losing members to other proselytising faiths. This may precipitate inter-religious disharmony within religiously plural societies, or undermine a national identity closely allied with traditional religion.

That the right to religious propagation is apprehended as both facilitating and undermining individual religious choice testifies to its contentious nature and the complex nature of associated issues. This implicates the content and scope of religious freedom, the close inter-relationship between religious propagation and the right to change one’s religion, and the quality of constitutional secularism. States which reject a liberal model of religious freedom may adopt anti-conversion and anti-propagation measures and laws which ban, restrict or punish proselytism, apostasy, blasphemy or heresy, to preserve religious equilibrium or religious orthodoxy.

Not every constitutional or human rights religious freedom formulation expressly includes the right to propagate religion and indeed, such formulations have been resisted. It was a “bone of contention”<sup>5</sup> and “the focal point of some controversy”<sup>6</sup> during the mid 20<sup>th</sup> Century Indian constituent assembly debates; in the 21<sup>st</sup> Century’s first decade, disquieted Christian communities unsuccessfully opposed the deletion of the pre-existing right to religious propagation from the proposed Kenyan constitution.<sup>7</sup> There has also been a steady watering-down of human rights standards in relation to religious freedom, from the high water mark of article 18 of the Universal Declaration of Human Rights which unequivocally referred to “freedom to change his religion or belief.”<sup>8</sup> Subsequently, article 18 of the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup> replaced the express right to change religion with the compromise formulation: to “have a religion or belief of his choice”, deferring to Muslim state objections. The Saudi Arabian delegate feared that the article 18 UDHR formulation would favour missionary activities or give licence to propagating anti-religious beliefs. Others criticised the clause for hinting that more than one religious choice might be prevented.<sup>10</sup> The tendency towards weakening the freedom to change and emphasising the freedom to maintain a religion continued in the 1981

<sup>4</sup> Martin & Greenspahn eds., *Pushing the Faith: Proselytism and Civility in a Pluralistic World* (New York: Crossroads, 1988), 157.

<sup>5</sup> TN Madan, ‘Freedom of Religion’ (2003) *Economic and Political Weekly* (EPW) 1034.

<sup>6</sup> HR Khanna, *Making of India’s Constitution* (Lucknow: Eastern Book Company, 1981), 46.

<sup>7</sup> Compare the old art 78(1), Kenya Constitution (2001) with the weaker art 32(2), proposed Constitution of Kenya (6 May 2010), omitting the express right to change religion or propagate religious belief.

<sup>8</sup> The Saudi Arabian delegate in 1948 wanted to remove this reference to prevent foreign missionaries or politically motivated intervention but eventually abstained. The clause was adopted by a vote of 27-5 with 12 abstentions: Natan Lerner, ‘Proselytism, Change of Religion and International Human Rights’ (1998) 12 *Emory International Law Review* 477-561, 502.

<sup>9</sup> 999 U.N.T.S. 171

<sup>10</sup> Lerner, *supra* note 7, 512.



UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief<sup>11</sup> where some 40 Muslim states sought to delete the 'right to change' reference, notwithstanding that some had already ratified article 18 ICCPR without reservation. Certain representatives insisted that the Koran did not allow exit from Islam<sup>12</sup> but eventually, an implicit albeit weakened right to change religion was retained.<sup>13</sup>

Clearly, there are competing views towards whether proselytism is a right and its scope.<sup>14</sup> Its advocates argue for the widest protection to be accorded, since they view it as a fundamental freedom of ultimate concern. Antagonists seek freedom from unwanted religious propagation. The term 'proselytism' today bears pejorative connotations,<sup>15</sup> suggesting coercion, intimidation or economic enticement; terms like 'evangelism' and 'missionary activity' are considered to relate to legitimate acts of proselytism.

Nonetheless, without propagation, the right to change religion would be devoid of content. The essential question in constitutional discourse is framed in terms of what constitutes a licit and illicit expression of religious propagation rights; there is no bright line but anti-proselytism law and judicial interpretations thereof indicate that coercive, fraudulent or manipulative propagation activities tend towards illicitness. Within the human rights framework, both the Human Rights Committee and European Court of Human Rights have recognised proselytism as a legitimate manifestation of religious freedom under articles 18 and 10 of the ICCPR and European Convention on Human Rights<sup>16</sup> respectively. This is qualified by the prohibition against forced conversions and respect for parental rights over the religious educations of their children be respected, for minority cultures and requirement not to violate the rights and freedoms of others, in respecting their religious dignity and autonomy.<sup>17</sup> In addition, religious manifestation is subject to public goods such as public order, safety, health and morals. These factors raise important structural issues implicating the degree of entanglement between state and religion such as whether

<sup>11</sup> G.A. Res 36/55(25 Nov 1981); Natan Lerner, 'Proselytism, Change of Religion and International Human Rights' (1998) 12 *Emory International Law Review* 477-561 at 503; Donna Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Tolerance and Discrimination' (1988) 82 *Am. J. Int'l L.* 487

<sup>12</sup> Lerner, 522. Notably, omitting the freedom to change religion as embodied in art 18, Covenant on Civil & Political Rights (ICCPR) 999 U.N.T.S. 171 was instigated by Muslim countries, as apostasy is a capital offence under one version of Islamic law: Brice Dickson, 'The United Nations and Freedom of Religion' (1995) 44 *ICLQ* 327 at 342.

<sup>13</sup> This was through article 8 which provided that nothing in the 1981 Declaration derogation from the standards in the UDHR and ICCPR. Article 1 merely provides that freedom of religion included "freedom to have a religion or whatever belief of his choice...": Natan Lerner, 'Proselytism, Change of Religion and International Human Rights' (1998) 12 *Emory International Law Review* 477-561 at 520

<sup>14</sup> Jose Casanova, 'For and against proselytism', Symposium on Proselytism and Religious Freedom in the 21st Century, Georgetown University, *Berkeley Center for Religion, Peace, and World Affairs* <http://blogs.ssrc.org/tiff/2010/04/26/proselytism/>

<sup>15</sup> Lawrence Uzzell 'Don't Call It Proselytism,' *First Things*, October 2004, p. 14)

<sup>16</sup> ETS No. 5

<sup>17</sup> See articles art 18, 19, 26, 27, ICCPR.



to recognize an official religion, accord religion(s) an official status, how and whether to promote minority religions

This paper examines the state's role in regulating religious propagation within Asian multi-religious secular democracies where religious conversions are politically sensitive and raise issues of national identity, communal integrity and 'public order' through laws pertaining to apostasy, the maintenance of religious harmony and explicit anti-propagation laws. The paper focuses on the situation in India, Malaysia and Singapore - three multi-religious and multi-ethnic former British colonies with written constitutions containing explicit albeit qualified rights to religious propagation. These states share a constitutional commitment to secular democracy within a primarily parliamentary system and a history of religion-based conflict, which, in India's case, led to the creation of Pakistan. All three constitutions reject a strict separationist model of religion-state relations, such as that found in the US 'wall of separation' between church and state, itself a contested doctrine,<sup>18</sup> or in French or Turkish *laïcité*. It was instead envisaged that the state would interact with religious groups in both a regulatory and supportive manner, as where the Indian Constitution sought to propel social reform by regulating secular activity closely associated with religion, such as intruding into Hindu casteism by requiring that dalits (untouchables) had temple access.<sup>19</sup>

The Malaysian constitution recognises Islam as the official religion of the Federation, while all 3 constitutions recognise religious identity in according special protection to minorities through affirmative action and schemes of limited legal pluralism, which permit religious exemptions from general rules and authorise the creation of religious institutions to implement religious and personal law. This is distinct from polities where religion is not linked with core national principles nor religious exemptions from general law allowed, for fear of undermining religious neutrality.

During the Indian Constituent Assembly debates, a contested view suggested that "no Constitution of the world had incorporated right to propagate religion recognized as a fundamental and justiciable right."<sup>20</sup> This is significant given the context where colonial history generated an antipathy towards foreign missionary work, associated with Western imperialism. The debates<sup>21</sup> over its eventual inclusion in article 25 are instructive in highlighting the range of state, group and individual

<sup>18</sup> See general Michael W. McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion', (1989) 103 Harv. L. Rev. 1409; Barry Adamson, *Freedom of Religion, the First Amendment and the Supreme Court: How the Court Flunked History* (Penguin Books, 2007).

<sup>19</sup> Article 25(2)(b) provides that the state is empowered to make law "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." C. H. Alexandrowicz considered that this revolutionised the traditional conception of religion in India as the state was engaged in "an extensive program of disentanglement of religious and secular activities." 'The Secular State in India and in the United States', (1960) 2 Journal of the Indian Law Institute, 273 at 284-285

<sup>20</sup> HR Khanna, *Making of India's Constitution* (Lucknow: Eastern Book Company, 1981), 47, referencing the statement of Constituent Assembly member Shri Lokanath Misra, 6 Dec 1948,

<sup>21</sup> See Sebastian Kim, *In Search of Identity: Debates on Religious Conversion in India* (India: Oxford University Press, 2005) at 37-58.



concerns implicated in this conception of religious liberty. Article 25 reads:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”

Aside from the social similarities, the religious guarantees in the Malaysian and Singapore constitution are genetically derived from the Indian Constitution as article 15 of the Singapore Constitution is derived from the Malaysian article 11,<sup>22</sup> which in turn was influenced by article 25 of the Indian Constitution.<sup>23</sup> Article 11(1) and (4) provides:

(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

(4) State law... may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

Even when Singapore was a state within the Malaysian Federation between 1963-1965, its government officially declared it had no intention “to introduce legislation to control or restrict the propagation of any religious doctrine or belief.”<sup>24</sup> Upon Independence, it further distanced itself from the confessional Malaysian constitution, whose article 3 provides that “Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation.” Although constitutional history indicates that this was meant to be an innocuous, ceremonial reference, and part of a pre-commitment strategy to secure the interests of the non-Muslim communities, in recent years, article 3 has been invoked to support politicised claims that Malaysia is an Islamic, not secular, state.<sup>25</sup> These debates have been avoided in Singapore, whose constitution does not recognise an official religion. First Prime Minister (PM) Lee Kuan Yew noted: “Alone in Southeast Asia, we are a state without an established church.”<sup>26</sup> The government accepted the 1966 Constitutional Commission’s recommendation to modify the religious freedom

<sup>22</sup> Part IV (Fundamental Liberties) of the Singapore Constitution is derived from Part II of the Malaysian Constitution as after Singapore seceded from Malaysia in 1965, it selectively retained and adopted parts of the Malaysian Constitution through the 1965 Republic of Singapore Independence Act No. 9 of 1965. Part IV contains 8 articles which the Privy Council considered “identical with similar provisions” in the Malaysian Constitution: *Ong Ah Chuan v Public Prosecutor* [1980-1981] SLR 48, 61-62.

<sup>23</sup> “It is well known that our constitution is modeled on the Indian constitution...” Suffian LP, *Merdeka University v Government of Malaysia* [1982] 2 MLJ 243 (F.C.).

<sup>24</sup> Ministerial Statement, ‘Religious Freedom in Singapore after Malaysia’, Singapore Parliament Reports, 29 July 1963, col. 261

<sup>25</sup> For example, Faiza Thamby Chik J in *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 MLJ 119; [2004] 6 CLJ 242 at 252d. rejected the ascription in *Che Omar Che Omar v PP* [1988] 2 MLJ 55 of a mere ceremonial role to Islam and advocated reading Article 3(1) to give it ‘a far wider and meaningful purpose than a mere fixation of the official religion.’ For the history behind article 3, see Joseph M Fernando, “The Position of Islam in the Constitution of Malaysia” (2006) 37(2) J. of Southeast Asian Studies 249-266.

<sup>26</sup> PM Lee Kuan Yew, addressing a Buddhist Convention: “No dominance by religious group over others - Lee” *Straits Times* (Singapore), 5 Jan 1967, 6.



guarantee by deleting the Malaysian clause allowing states to enact anti-propagation laws to benefit a politically dominant religious majority. The Commission considered that expressly singling out a particular religion “for special treatment of this nature” would be “inappropriate” and “inconsistent” within a democratic secular state.<sup>27</sup> Thus, article 15(1) is cast in unqualified fashion, although it is accompanied by a limitation clause (4), which is derived from article 11(5) of the Malaysian Constitution:

(1) Every person has the right to profess and practise his religion and to propagate it.

(4) This article does not authorise any act contrary to any general law relating to public order, public health or morality.

Certain Malaysian judges and academics have sought to distance Malaysia from ‘purely secular’ states like Singapore and India, characterising Malaysia as a hybrid between the secular and theocratic state: while it gives preferential status to Islam, it is not theocratic after the Saudi Arabia or Iran model.<sup>28</sup> Thus, Malaysia may be described as ‘a secular state with Islamic characteristics and bias’<sup>29</sup> while India and Singapore may be described as quasi-secularist states where the state variously protects, cooperates and interacts with religious groups, regulates religious activity to serve the common good, and facilitates the operation of religious-personal laws.<sup>30</sup> In examining state attitudes towards conversion and propagation of faiths, this paper considers how ‘secularity’ as a constitutional principle is variously seen as a ‘saviour’ in preserving the pacific co-existence of distinct ethno-religious communities and alternatively as a source of grievance associated with colonial rule and resisted through political or legal movements to elevate religion as a source of public law. It evaluates whether modalities adopted by states to facilitate, regulate, protect and proscribe basic rights to religious profession and propagation preserve or undermine fidelity to a commitment to constitutional secularism, with a view to identifying minimal components to the protean conception of secularism as an ordering principle for State-Religion relations.

<sup>27</sup> Para 38, Report of the Constitutional Commission (Singapore National Printers, 1966).

<sup>28</sup> *Freedom of Religion in Malaysia* by Lee Choon Min, cited by Thamby Chik J in *Lina Joy* [2004] 2 MLJ 119,, p 128 at para 18. Chik J argues that the meaning of article 3 was not authoritatively determined in *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55. See Ran Hirschl, ‘The Rise of Constitutional Theocracy’ (2008) 49 Harv ILJ Online 72.

<sup>29</sup> Wu Min Aun, ch.4, ‘Islamic Law’ in *The Malaysian Legal System*, (Kuala Lumpur: Longman, 2000), 147, 154.

<sup>30</sup> See generally Li-ann Thio, ‘Control, Co-optation and Co-Operation: Managing Religious Harmony in Singapore’s Multi-Ethnic, Quasi-Secular State’ (2005) 33 (2) and (3) *Hastings Constitutional Law Quarterly* 197-253; Lai Ah Eng ed., *Religious Diversity in Singapore* (ISEAS, 2008); Rajeev Dhavan, ‘Religious Freedom in India’ (1987) 35(1) *American Journal of Comparative Law* 209-254; Gary Jeffrey Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context* (Princeton University Press, 2003).

## II. LIBERAL INDIVIDUALISM, COMMUNAL IDENTITY AND AUTONOMY AND THE REGULATORY ROLE OF THE STATE OVER RELIGIOUS PROSELYTISM

The right of religious propagation has not achieved universal support; much depends on the differing attitudes of religions towards issues of propagation, and that of the state towards religious evangelism and conversion against competing interests.

### A. SKETCH OF COMPETING INTERESTS: PROPAGATION AND CONVERSION

#### 1. COMPETING RIGHTS, COMPETING GOODS: FACTORS TO BE BALANCED

The right to change a religion relates to two closely related components: first, the right to proselytise, to engage in religious free speech for the purposes of communication and to persuade the hearer to adopt a specific religion. Second, the right to convert, which facilitates the process of changing religious affiliation as an expression of personal conviction and identity. This brings into focus two competing rights at the inter-personal level: the freedom of religious expression may compete against a competing claim of the individual hearer not to be interfered with through uninvited speech or privacy violations, to maintain his existing faith or belief.

However, one must not assume that the entirety of religious freedom is concerned with religious identity; belief is paramount too as is “the duty of every man to render to the Creator such homage...as he believes to be acceptable to him,” which is antecedent to the juridical order and takes precedence over the claims of civil society.<sup>31</sup> In presenting an alternative religious choice and inviting the hearer to subscribe to its principle, propagation is protected, provided it does not become abusive, by amounting to hate speech, inciting violence or disrespecting others by undermining their rights and freedoms. From the hearer’s perspective, propagation informs his search for spiritual truth; where this leads to change in religion, religious conversion is an assertion of agency in personal development. The implicit assumption is that the best way to find out religious truth is by free discussion, complemented by a free marketplace of religious ideas, which sustains religious pluralism and democracy.

Beyond the inter-personal level, conflicts between the individual and the group arise where the former wants to leave a religion while the latter insists on the institutional right to choose, retain and expel members in accordance with its internal religious laws. The group may become a political pawn, should it appeal to political power to enforce its internal laws.

The concept of the religious community and the basis for membership and belonging is also significant. Where a religious group is seen as a voluntary association, which individuals *qua* individuals join in search of salvation or spiritual fellowship,

<sup>31</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785) reprinted in Adams and Emmerich, *A Nation Dedicated to Religious Liberty* at p 104.



the principle of proselytism poses no problem as religious choice is a function of individual decision-making on the basis of reason, revelation and experience. However, where individuals are embedded in religious communities where membership is kinship-based rather than volitional, flowing from territorial or ethno-cultural bases and inter-generational obligations drawn from non-religious communitarian principles, to opt out is to forsake solidarity pursuant to egoistic individualism. It is also to neglect duty to family and community,<sup>32</sup> as for groups practising ancestral worships.

How then does one “craft a legal rule that respects Orthodox, Hindu, Jewish or Traditional groups that tie religious identity not to voluntary choice but to birth and caste, blood and soil, language and ethnicity, sites and sights of divinity?”<sup>33</sup> Furthermore, there may be repercussions to leaving a religion, as changing religion affects one’s personal status under law.

Where religious freedom is viewed as a public good which cannot exist apart from religious communities, the multi-cultural state may seek to protect minority cultures, given their marginal social position; this may entail limits on individual rights, as loss of members may threaten the survivability of the group. The state will also have an interest in intervening to deal with public order issues, insofar as proselytism and religious switching is a zero-sum game, such that one rival group’s gain is another’s loss; proselytism is viewed as an attack, particularly against indigenous religions, which may inflate inter-religious tensions. While it is open to all religious groups to proselytise, it appears that more mission-oriented religions espousing a set of objective truths, where evangelism is a sacred duty, are better at recruiting members; if so, the religious freedom principle cannot be interpreted in a ‘neutral’ manner between religions like Islam and Christianity, and the traditions of Hindus, Buddhists and Jains which usually do not actively market their faith.<sup>34</sup> This could prove a source of social instability.

The problem of proselytism involves clashes between rights of religious expression and freedom to protect one’s religious identity; at the inter-group level, the state must balance the right of a community to propagate its faith and expand its numbers, with that of another community’s right to be left alone or not to have its

<sup>32</sup> As Prime Minister Lee Hsien Loong noted, in speaking of intolerance between faiths: “Sometimes, we have parents who have traditional religions, and children have converted away. Then when the parents die, and they had asked to be buried according to traditional rites, the children stay away from the funeral or the wake. It is very sad. From a traditional point of view, it is the ultimate unfilial act but it does happen occasionally.” National Day Rally Transcript, August 2009. So too, a trust for the observance of Sinchew ceremonies (ancestral worship) failed as all the testator’s children had become Christians, to whom Sinchew rites were repugnant: *Bermuda Trust (Singapore) Ltd v Richard Wee* [2000] 2 SLR 126, 136.

<sup>33</sup> John Witte Jr, *God’s joust, God’s justice: law and religion in the Western tradition* (Cambridge University Press 2002), 103.

<sup>34</sup> See Rosalind Hackett, ed., *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars* (London; Oakville, CT: Equinox Pub., 2008).



traditions hampered, to secure its cultural integrity.<sup>35</sup> To what extent should the law protect communal identities and religious minority rights? This is an area defined more by the delicate balancing of interests rather than the drawing of bright lines.

## 2. MANNER OF EXERCISING RELIGIOUS PROPAGATION RIGHTS

The motives for the state regulation of proselytism are various and will turn on its political philosophy. Between the two extremes of completely banning<sup>36</sup> and completely protecting religious propagation,<sup>37</sup> the state may permit propagation and subject it to exceptions, such that legitimate evangelism will not involve coercion,<sup>38</sup> brainwashing, fraud, use of superior/subordinate position in the military<sup>39</sup> or inducement through offering social or material advantage to swell the number of the faithful, as this undermines the religious freedom of others.<sup>40</sup> The issue has received scant judicial attention.<sup>41</sup>

### B. THE INDIFFERENCE OF THE RELIGIOUSLY NEUTRAL LIBERAL STATE

Secular constitutional orders exhibit a range of approaches towards ordering religion-state relations, from separationist to accommodative and cooperative models,<sup>42</sup> but share in common the separation of political and religious authority. While states at one end of the spectrum may adhere to the principle of non-identification with any religion, separation does not connote nor require hostility or even state indifference to religion and can allow for reciprocal cooperation and interaction. Neutrality towards religion does not require neglect of cultural traditions.

<sup>35</sup> Makau Mutua, "Proselytism and Cultural Integrity" in Tore Lindholm, W. Cole Durham Jr and Bahia Tahzib-Lie, eds., *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden: Martinus Nijhoff, 2004) 651.

<sup>36</sup> E.g. Article 3 of the 1990 Nepal Kingdom provides "nobody has the right to convert another person to another religion". Art 13(2), Constitution of Greece states "proselytism is prohibited."

<sup>37</sup> A robust affirmation of freedom of conscience under the German Basic Law is the judicial recognition that this "embraces not only the personal freedom to believe or not to believe (i.e. profess a faith, to keep it secret, to renounce a former belief and uphold another), but also the freedom to worship publicly, to proselytize and to compete openly with other religions." Rumpelkammer case, BVerfGE 24, 236 (1968), quoted by Renate Uitz, in *Freedom of Religion in European constitutional and international case law* (Council of Europe) at p. 59.

<sup>38</sup> Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practice (1978\_ 11 NYU-JILP 227, 230-233 (what constitutes a coercive act)

<sup>39</sup> *Larissis and others v Greece* (24 Feb 1998)

<sup>40</sup> See Johan D. van der Vyver, 'Religious Freedom and Proselytism: Ethical, Political and Legal Aspects' (1998) 50(4) *The Ecumenical Review* 419-429.

<sup>41</sup> The European Court of Human Rights considered the distinction between proper and improper proselytism in *Kokkinakis v. Greece* (1994), 17 E.H.H.R. 397, the latter being "a corruption or deformation of [true evangelism]." See K.N. Kyriazopoulos, "Proselytization in Greece: Criminal Offence vs Religious Persuasion and Equality" (2004–2005) 20 *J.L. & Religion* 149; Tad Stahnke, "The Right to Engage in Religious Persuasion" in Tore Lindholm, W. Cole Durham Jr and Bahia Tahzib-Lie, eds., *Facilitating Freedom of Religion or Belief: A Deskbook*, (Leiden: Martinus Nijhoff, 2004), 641 identifies 4 important factors aiding the line-drawing process: (i) characteristics of the source; (ii) target; (iii) where proselytism takes place; (iv) nature of the proselytising act and its propensity to generate coercive pressure.

<sup>42</sup> W. Cole Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in Johan van der Vyver & John Witte Jr. (eds), *Religious Human Rights in Global Perspective*, 1st ed., (Martinus Nijhoff, 1996), 1-44.



Within polities practising a form of secular liberal constitutionalism, which “have as their primary orientation the freedom of individuals to pursue their own vision of the good,”<sup>43</sup> three crucial tenets in relation to state-religion relations may be identified. First, religious conviction and affiliation are personally determined, private matters beyond state regulation. This idea, Protestant “by initial inspiration,”<sup>44</sup> posits the centrality of individual faith to religion and religious voluntarism, incorporating the hard-fought right to enter and exit a religion. To Rawls, the issue of equal liberty of conscience is “settled”<sup>45</sup> as this is something reasonable people in the original position behind a ‘veil of ignorance’ would endorse. Flowing from this faith-based conception of religion, individuals may band together to form voluntary associations and may exit such groupings at will, such as over religious doctrinal disputes.<sup>46</sup>

Second, in a secular polity, political authority is derived not from sacred scripture or divine mandate; constitutionalism is the “modern and secular legitimization of government, prior to any legitimization by performance.”<sup>47</sup>

Lastly, in being religiously neutral in its equal treatment of religions, the liberal state does not endorse or prefer “competing moral and theological visions”<sup>48</sup> of the good life. Instead, it endorses a vision of the unencumbered sovereign self “unbounded by moral ties antecedent to choice,”<sup>49</sup> whose agency is the only source of obligation that constrains. The role of law would be to preserve peace and secure a framework where individuals choose their own conceptions of the good life.<sup>50</sup> The state is unconcerned with a citizen’s religious affiliation, being agnostic on the desirability of conversion and religious truth, indifferent to the maintenance of the social religious quo. Secular liberal states seek to minimise restrictions on the liberty of its

<sup>43</sup> Brian Z Tamanaha, “The Rule of Law for Everyone?”, St John’s Legal Studies Research Paper (2003) Available at SSRN: <http://ssrn.com/abstract=312622> or doi:10.2139/ssrn.312622

<sup>44</sup> John Witte Jr, ‘A Primer on the Rights and Wrongs of Proselytism’ (2000-2001) 31 Cumberland Law Review 619 at 624.

<sup>45</sup> John Rawls, *A Theory of Justice* (1971) p. 206

<sup>46</sup> Jeff Spinner-Halev, ‘Hinduism, Christianity and Liberal Religion Toleration’ (2005) 33(1) Political Theory 28-57 at 28.

<sup>47</sup> Carl J Friedrich, *Limited Government: A Comparison* (New Jersey: Prentice Hall, 1974), p.110.

<sup>48</sup> Michael J Sandel, ‘Freedom of Conscience or Freedom of Choice’ in *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (James Davidson Hunter & Os Guinness eds., Brookings Institution Press: 1990), 74

<sup>49</sup> Sandel, 75.

<sup>50</sup> This laissez faire model is captured by this description of the US Church and State model: “We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma....[the Constitution does not require that] the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects.” *Zorach v Clauson* 343 U.S. 306, 314 (1952).



citizens and also to secure individual autonomy through recognising specific constitutional liberties, such as religious freedom, which indicates the special social value of the protected activity. To a liberal, the contribution of religion to social morality and personal well-being cannot serve as the exclusive basis for such guarantees.<sup>51</sup> The liberal's first impulse is to value individual autonomy, including a free conscience, which relates to the individual's deepest normative beliefs and moral integrity.<sup>52</sup> The liberal tolerance for the fundamental conviction of dissenters and the pluralism of many faiths would support an absolute right to change religion; a religiously neutral state would not allow unreasonable restrictions on religious propagation. If the state regulates proselytism, it does so to keep the peace necessary for the enjoyment of liberty.

### C. THE MISSION OF THE RELIGIOUSLY PROTECTIVE STATE

Secular polities have rejected the idea of a *laissez-faire*, neutralist approach towards state-religion relations, through confessional constitutions which favour an official religion while guaranteeing religious freedoms for other faiths.

In strong non-liberal or communitarian confessional communities, religion may challenge constitutionalism as a basis of legitimation, given the primacy of the community as the provider of the spiritual and social context, such as Judaism in Israel<sup>53</sup> and Islam in theocratic constitutions;<sup>54</sup> the state may assume the truth of a particular religious worldview and promote this as a substantive good. Due rendition must be made to Caesar and God, but the jurisdictional scope of "the things that are God's" will be broader than under stricter separationist regimes. Further, in protecting communal identities, states may commit to protecting religious minorities, challenging the individualistic approach of liberal polities.

#### 1. ATTITUDE OF RELIGIONS TOWARDS PROPAGATION AND CONVERSION

An important factor influencing the resistance towards religious propagation within religiously diverse societies is the different ways various religions view the issue of religious conversion. While the liberal vision of religious toleration and respect for conscience flows from Protestant thought and allows Christians in the West

<sup>51</sup> On rationales for protecting religious freedom, see Gidon Sapir & Daniel Statman, 'Why Freedom of Religion does not include Freedom from Religion' (2005) 24(5) *Law and Philosophy*, 467-508

<sup>52</sup> Conscience may be variously understood as being subject to and enlightened by divine revelation or in the liberal sense, acting on conscience is seen as been independent of the content of the action. See generally Lucas Swaine 'Institutions of Conscience: Politics and Principle in a World of Religious Pluralism' (2003) 6(1) *Ethical Theory and Moral Practice* 93-119.

<sup>53</sup> See Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, 1994).

<sup>54</sup> See, e.g., Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010); Larry Cata-Becker, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' [2009] 16 *Indiana J of Global Legal Studies* 101.



to convert easily into and out of the faith,<sup>55</sup> it does not resonate in two important situations.

First, the theology of certain religions rejects religious voluntarism and holds the perspective that to commit apostasy by leaving a religion is punishable, up to even death sentences.<sup>56</sup> Muslims may find it easy to convert into Islam but not out of it.<sup>57</sup>

Second, there are practice-based religions, where religion is tied up with ethnicity, caste and blood. The individual is not isolated but embedded in a socio-cultural context which gives meaning to choice. To opt out of such a religious community threatens social structure and harmony and evokes political repercussions, such as the diminution of a political constituency owing to mass conversions, as in the cases where dalits in India leave Hinduism to escape the caste-based system of discrimination entangled with that religion. Hinduism has no doctrine to keep or central text, so it is more concerned with “legitimizing hierarchical social relationships and mollifying deities, not with faith or belief.”<sup>58</sup> It is difficult to reconcile liberal exit rights in the context of natal religions, where religious membership is by birth. In such non-liberal polities, the law actively seeks to secure some substantive conception of common welfare; in this setting, the Right is not prior to the God/God(s).

Further, when the traditional state religion exerts significant influence in the state-driven project of “(re)shaping national identity,”<sup>59</sup> its ability to secure its preferred vision of the common good is undermined by actively proselytising foreign new religious movements. Like Russia, other post-Communist countries like Armenia and Bulgaria have adopted anti-proselytism laws to nurture a religion-influenced national identity by minimising the influence of foreign missionary religions. The danger of over-protecting a religion from proselytism is that of closing the system, such that the religion ossifies. Further, minority groups will be harmed by proselytising bans as they need to propagate to survive, given the attrition they face from declining membership and assimilationist secular pressures.<sup>60</sup>

## 2. ANTI-PROPAGATION LAWS, THE PATERNAL AND LIBERAL STATE

Anti-propagation laws avowedly protect state-defined vulnerable groups, distin-

<sup>55</sup> Joel A. Nichols, ‘Missions, Evangelism and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents’ (1998) 12 *Emory International Law Review* 563-656

<sup>56</sup> Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law* (1999) *BYU L Rev* 251, 258

<sup>57</sup> Donna E. Artz, ‘The Treatment of Religious Dissidents under Classical and Contemporary Islamic Law’ in *Religious Human Rights in Global Perspective: Religious Perspectives* 387-453 John Witte Jr and Johan D. Van der Vyver eds., (1996)

<sup>58</sup> Jeff Spinner-Halev, *supra* note 45, 35.

<sup>59</sup> Paul Taylor, *Freedom of Religion: UN and European human rights law and practice* (CUP 2005), 65.

<sup>60</sup> For a minority religion perspective towards proselytism, see W. Cole Durham Jr., “The Impact of Secularization on Proselytism in Europe: A Minority Religion Perspective,” in *Global Mormonism in the 21st Century*, ed. Reid L. Neilson (Provo, UT: Religious Studies Center, Brigham Young University, 2008), 114–33, available at <http://rsc.byu.edu/archived/global-mormonism-21st-century/7-impact-secularization-proselytism-europe-minority-religion->



guishing between legitimate and illegitimate proselytism. For example, in *Kokkinakis v Greece*<sup>61</sup> a Greek law defined improper proselytism as any direct or indirect attempt to “intrude on the religious beliefs of a person of different religious persuasion” to undermine the beliefs by “any kind of inducement or promise of an inducement or moral support or material assistance or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.”<sup>62</sup> The vagueness of this criteria recentralises state power by committing broad discretion to state officials. However, as dissenting Judge Martens noted, the issue of indeterminacy could not be resolved either by favouring the right to retain or maintain a religious belief over the right to proselytise. Although the majority deferred to the state in finding Greek law legitimate as it protected the rights of others, Uitz noted the failure to enquire into the real legislative object and effect of the law: to entrench the dominant group, protecting the dominance of Greek Orthodox religion.<sup>63</sup> Judge Martens argued it was not within the state’s province to interfere with proselytiser-proselytized relations without a special duty of care; he further noted the importance of keeping state powers within “the strictest possible boundaries” given the “rising tide” of religious intolerance.

In seeking to control propagation, state laws cast the speaker as predator and hearer as vulnerable victim, dramatically described by Judge Valticos as entailing “the rape of the belief of others.”<sup>64</sup> However, the predilection for state paternalism may stultify an individual’s search for religious truth within an open system, hindering personal development. This rests on the inconsistent assumption that the individual cannot autonomously change, but can autonomously retain religion, favouring the status quo in assuming that personal development was best optimised within the existing belief system. This predator paradigm discounts the value of the truth-seeking process and conversion to the convert.

When a non-liberal state assumes the truth of a religion and the superiority of its conception of the good, it raises the threat of abuse of powers by bad leaders. Even

<sup>61</sup> 17 Eur. H.R. Rep., 21

<sup>62</sup> Judge Valticos, 17 Eur. H.R. Rep., 31.

<sup>63</sup> Renate Uitz, *Freedom of Religion in European constitutional and international case law* (Council of Europe) at p. 61-62; T Jeremy Gunn, ‘Adjudicating Rights of Conscience under the European Convention on Human Rights’, Johan van der Vyver & John Witte Jr eds., *Religious Human Rights in Global perspective: Legal Perspectives* (Martinus Nijhoff, 1996), 305-330 at 323.

<sup>64</sup> Judge Valticos’ dissenting judgement in *Kokkinakis* exemplifies the over-expansive interpretation of improper proselytism: “Let us look now at the facts of the case. On the one hand, we have a militant Jehovah’s Witness, a hard-bitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy, and, on the other hand, the ideal victim, a naive woman, the wife of a cantor in the Orthodox Church (if he manages to convert her, what a triumph!). He swoops on her, trumpets that he has good news for her (the play on words is obvious, but no doubt not to her), manages to get himself let in and, as an experienced commercial traveler and cunning purveyor of a faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness. Who, indeed, would not like peace and happiness? But is this the mere exposition of Mr. Kokkinakis’s beliefs or is it not rather an attempt to beguile the simple soul of the cantor’s wife? Does the Convention afford its protection to such undertakings? Certainly not.”



so, a liberal approach towards religious change based on free conscience is still attractive, insofar as it is accepted that one should be free to affirm what is deemed good, to reject what is considered bad or a lesser religious doctrine and to draw evaluative distinctions.<sup>65</sup>

### III. CASE STUDIES

The constitutional recognition of the right to religious freedom in common law jurisdictions like India, Singapore and Malaysia, facilitates the right of religious profession, exposing citizens to a plurality of belief systems which informs the search for truth. However, religious propagation, falling within the *forum externum*, is a contentious liberty insofar as it provokes inter-group disharmony, and is subject to state regulation to preserve 'peace'.

#### A. INDIA: 'A SECULAR BUT NOT AN ANTI-RELIGIOUS STATE'<sup>66</sup>

First PM Nehru observed in 1980<sup>67</sup> that communally divided India was "supposed to be a religious country above everything else." It is not surprising that religion wields a significant influence in the constitution and life of this democratic polity, as the state reflects the character of its society. Thus, the difficult task was to build a secular state, in a religious society. The Constitution itself demonstrates an ambivalence towards religion in the state's simultaneous support and challenge to vested religious interests. For example, the abolition under article 17 of untouchability was meant to protect low-caste Hindus, which reflects how secularism in India "has acted as a balance between socio-economic reforms which limits religious options and communal developments."<sup>68</sup> However, as a "concession to high caste sentiment,"<sup>69</sup> article 48 prohibited cow slaughter in the same breath as speaking of developing animal husbandry on 'modern and scientific lines.'

The Constitution of India, adopted in 1947 does not refer to a specific religion; it was not until 1976 that the 42<sup>nd</sup> constitutional amendment added the word "secular" to the preambular description of the polity as a "sovereign socialist secular democratic republic." The Supreme Court declared that the principle of secularism was a basic feature of the Indian Constitution in *Kesavananda Bharati Sripadagalvaru v.*

<sup>65</sup> Swaine, 99-100

<sup>66</sup> HM Seervai, *Constitutional Law of India*, p. 897, quoted by RM Sahai J, *Indra Sawhney v Union of India* [1992] 6 SCR 321

<sup>67</sup> TN Madan, *The Crisis of Indian Secularism, in Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (OUP India, 1999), 239

<sup>68</sup> S.H. Kapadia, J., *M. Nagaraj and Ors v Union of India (UOI) and Ors*. AIR 2007 SC 71, (2006) 8 SCC 212 at para 22. Allow the state to regulate any secular activity associated with religion under art 25(2) was revolutionary in effect, in involving the state in "an extensive program of disentanglement of religious and secular activities." This is indeed one aspect of the revolution, best illustrated by the standardization of Hindu personal law as one big step toward a uniform civil code: C. H. Alexandrowicz, "The Secular State in India and in the United States," (1960) 2 Journal of the Indian Law Institute, 1960, 273 at 284-285

<sup>69</sup> TN Madan, *The Crisis of Indian Secularism, in Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (OUP India, 1999), 249



*State of Kerala*.<sup>70</sup> In a nutshell, this means that “the ‘state’ will have no religion”<sup>71</sup> and will “treat all religions and religious groups equally and with equal respect” without interfering with individual rights. Thus, the twin pillars of Indian secularism<sup>72</sup> are the equality of citizens regardless of religious affiliation and a ‘neutral’ or ‘non-preferential’ state,<sup>73</sup> which does not discriminate between religious communities. Secularism was thus liberal and egalitarian, envisaging a “cohesive unified and casteless society,”<sup>74</sup> a ‘saviour’ insofar as it bolstered the rule of law by assuring religious protection to all, rather than nurturing among people of diverse religions, “one’s own presumptuous good social order.”<sup>75</sup>

However, the principle of secularism faces challenge from the forces of Hindu nationalism promoting *Hindutva*, a cultural nationalist ideology propounding a Hindu way life, which transcends religion and encompasses Indian culture or heritage. In a controversial decision, the Supreme Court in *Bramchari Sidheswar Shai v State of West Bengal*<sup>76</sup> equated *Hindutva* with the culture of all peoples in India rather than Hindus alone, stating it was not to be equated with “religious Hindu fundamentalism,” since Hindus could remain Hindu while embracing a non-Hindu religion. This is because the Hindu “is inclined to revere the divine in every manifestation...and is doctrinally tolerant”; thus the Hindu tends to regard other forms of worship “inadequate rather than wrong or objectionable” and “tends to believe that the highest divine powers complement each other for the well-being of the world and mankind.”<sup>77</sup> Detractors consider *Hindutva* a form of religious nationalism which privileges the historically oldest Indian religion. In sitting uneasily with the idea of the equality of religions, *Hindutva* derogates from the principle of secular democracy.<sup>78</sup> If the state purports to identify itself with any particular sector of the population, it cannot represent all the people.

The issue of *Hindutva* as a form of Hindu nationalism comes to the fore with respect to the conversion of Hindu *dalits* to other religions, often in response to

<sup>70</sup> AIR 1973 SC 1461

<sup>71</sup> *Bal Patil and Anr. v. Union of India* AIR 2005 SC 3172 para 36

<sup>72</sup> While a Gandhi perspective of secularism views religion as an important source of constitutive principles, Nehru as an agnostic rationalist focussing on economic priorities saw secularism as a strategy to deal with the realities of a religious society: TN Madan, *The Crisis of Indian Secularism, in Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (OUP India, 1999), 244-245

<sup>73</sup> As Radhakrishnan noted, constitutional non-preferentialism emphasises the ‘universality of spiritual values’ which may be attained in a variety of ways, and does not prefer spirituality or materialism: TN Madan, *The Crisis of Indian Secularism, in Modern Myths, Locked Minds: Secularism and Fundamentalism in India* (OUP India, 1999), 245

<sup>74</sup> Kuldip Singh J, *Indra Sawbhay v Union of India* [1992] 6 SCR 321

<sup>75</sup> *State of Karnataka v Dr. Praveen Bhai Thogadia*, AIR 2004 SC 2081 para 6.

<sup>76</sup> AIR 1995 Supreme Court 2089

<sup>77</sup> AIR 1995 Supreme Court 2089, para 478, reproduced in Annex II, GNS Raghavan & Seshadri Chari, *A New Era in the Indian Polity: A Study of Atal Bihari Vajpayee and the BJP* (Gyan Publishing House, 1996)

<sup>78</sup> V. M. Tarkunde Supreme court judgment: a blow to secular democracy, PUCL Bulletin, 19 Feb 1996, at: <http://www.pucl.org/from-archives/Religion-communalism/sc-judgement.htm>. See generally Brenda Cossman & Ratna Kapur, ‘Secularism’s Last Sight? The Hindu Right, the Courts and India’s Struggle for Democracy’ (1997) 38 Harv Int Law Journal 113.



the efforts of missionary religions like Christianity or Islam. Dalits or Harijans (untouchables) fall to the lowest rung of the Hindu caste system with virtually no upward social mobility, and are economically privated: “Living in abject poverty and squalor, engaged in demeaning occupations to keep body and soul together, and bereft of sanitation, medical aid and other facilities, these unfortunate classes of citizens bearing the badges of historical discrimination and naked exploitation.”<sup>79</sup>

There have been many instances of dalits converting out of Hinduism to escape the stigma of caste, improve their economic situation and find new dignity in faiths which welcome them as co-equal believers.<sup>80</sup> Attempts to curb conversions through legislation have ostensibly been to protect the credulous from exploitation, though critics argue that these paternalistic laws serve only to protect Hindu nationalists and erode the principle of secularity as well as the “absolute” freedom of conscience and absolute belief.<sup>81</sup> However, one must recall that mass conversions are not a new phenomenon; the father of the Indian Constitution, Dr. BR Ambedkar, a dalit converted to Buddhism from Hinduism, urged other dalits to renounce Hinduism and embrace any religion that gave them equality of status and treatment. In October 1935, he declared, “I was born a Hindu, I had no choice. I will not die a Hindu, because I do have a choice.”<sup>82</sup> In a 1956 mass conversion ceremony, Ambedkar led 500,000 dalits out of Hinduism into Buddhism.<sup>83</sup>

A change in religion changes one’s rights and privileges before the law.<sup>84</sup> If a dalit leaves Hinduism, he is denied of the privileges constitutionally afforded to economically depressed Scheduled Tribes and Scheduled Castes, contrary to the goal of economic amelioration. For example, the Bombay Government issued a 1947 Order providing that dalit converts to Christianity would not be eligible for educational concessions; less than a year later, another Order provided that dalits who reconverted to Hinduism would be eligible again. So too, under the Hindu Succession Act of 1956, children of former Hindus do not benefit from Hindu property inheritance laws unless they reconvert to Hinduism.<sup>85</sup> Cumulatively, this promotes Hindu solidarity as the legal regime and, to some extent, serves as a disincentive to covert out of Hinduism or provides economic incentives to reconvert back into Hinduism. Maintaining numbers translated into political influence.

<sup>79</sup> Thommen J, *Indra Sawhney v Union of India* [1992] 6 SCR 321, para 271.

<sup>80</sup> Manpreet Singh, ‘India: Despised Dalits quit Hinduism find new dignity in. Christ’, 12 Sept 2002, Christianity Today, at <http://www.christianitytoday.com/ct/2002/december9/15.22.html> sm,

<sup>81</sup> S. *Rajendra Bâbur, J. Commissioner of Police and Ors. Vs. Acharya Jagadishwarananda Avadhuta and Anr.* (2004) 12 SCC 770, para 79

<sup>82</sup> Bibu, 84

<sup>83</sup> Benedict Rogers, ‘Untouchable – The Human Face of India’s Caste Sytem’ 8 May 2007, Catholicity at <http://www.catholicity.com/commentary/brogers/00060.html>

<sup>84</sup> Until 1850, apostates who formerly were Hindus or Muslims were deprived of their property, inheritance rights and guardianship over children until the 1850 Caste Disabilities Removal Act: Donald Eugene Smith, *India as a Secular State* (London & Bombay, OUP, 1963), 176-180

<sup>85</sup> Donald Eugene Smith, *ibid.*, 187.

## 1. CONSTITUTIONALISING PROPAGATION OF RELIGION

The Constituent Assembly's first draft<sup>86</sup> of the religious liberty article did not include a right to religious propagation; its eventual inclusion, over spirited opposition, was "largely through the initiative of the Christian minority."<sup>87</sup> In October 1945, a joint committee of the Catholic Union of India and All India Council of Indian Christians adopted a resolution proposing the inclusion of 'propagation' in the Constitution, sparking off a fierce debate,<sup>88</sup> of which conversion was the corollary, since insulating an individual from external pressures in matters of religious choice was a feature of modern secular democracies.

The inclusion of 'propagation' was opposed as some considered the matter covered by the free speech clause; or alternatively, that propagation fell within the ambit of religious 'practice.'<sup>89</sup> A chief Hindu objection was directed against the link between propagation and conversion, which was not considered to be a legitimate aspect of religious freedom. This was influenced by the Gandhian vision of universalist Hinduism which had metaphysical and religious objections to conversion. This posited that all religions were of equal validity and shared an essential unity, therefore, proselytism was considered "a profoundly unspiritual act"; legitimate propagation was limited to sharing spiritual insights, sans desire for conversion.<sup>90</sup> This contrasted starkly with the view of Indian Christians, who considered it dogmatic to assert 'all religions are the same'; the missionary impulse was central to Christian spirituality and the goal of propagation was conversion, as is the case for all faiths espousing absolute truth-claims. This rejected the Hindu distinction between propagating religion and making converts.<sup>91</sup> Thus, the right to change religions was central to religious freedom.<sup>92</sup>

In addition other Hindu leaders feared that a propagation clause would target vulnerable lower caste members or provoke communalism. To Misra, the clause paved the way for "the complete annihilation of Hindu culture, the Hindu way of life and manners", abusing the generosity of Hinduism which was "just an integrated vision and a philosophy of life and cosmos, expressed in organized society to live that philosophy in peace and amity." The clause was "intolerable and unjust", "a device to swallow the majority in the long-run" in the name of minority protection.<sup>93</sup>

<sup>86</sup> This largely followed the 1931 Karachi Resolution on fundamental rights: "Every citizen shall enjoy freedom of conscience and the right freely to profess and practice his religion, subject to public order and morality", Donald Eugene Smith, *ibid.*, 181-183

<sup>87</sup> *Ibid.*

<sup>88</sup> NB Rakshit, 'Right to Propagate Religion' *EPW*, 30 Sept 2000, 3564-3565

<sup>89</sup> Donald Eugene Smith, *supra*, note 83, 101.

<sup>90</sup> *Ibid.*, 168

<sup>91</sup> *Ibid.* 172-173

<sup>92</sup> See generally Kim Chang Hwan, "'Freedom of Religion' Legislation in India: The Hindu-Christian Debate on Religious Conversion" (June 2002) Vol. 9 *Mission and Theology* 227.

<sup>93</sup> December 6, 1948, Constituent Assembly of India – Volume VII, available at <http://www.indiankanon.org/doc/1933556/>



Krishnamachari<sup>94</sup> stated that many people in India, especially the untouchables, had “embraced Christianity” because of the “status” it gave them, equalising an untouchable with the high-caste Hindu. He asserted that “if we remove the need for that advantage, apart from the fact that he has faith in the religion itself – well, the incentive for anybody to become a Christian will not exist.”<sup>95</sup> KM Munshi<sup>96</sup> argued the free speech clause would allow any religious community to urge others to join their faith, and a religious propagation clause “is nothing very much out of the way as some people think, nor is it fraught with dangerous consequences.”<sup>97</sup> K. Santhanam<sup>98</sup> agreed and characterised the proposed article as a clause on “religious tolerance”, emphasising it was restricted by “public order, morality and health.” Further, to address the objections many had to past Christian missionary activities in relation to mass conversions, Santhanam underscored that the word “convert” was not present, to preclude an exodus out of one religious community through “undue influence either by money or by pressure or by other means.” Munshi supported protecting religious minorities and noted that the Indian Christian community laid the “greatest emphasis” on the word “propagation” “not because they wanted to convert people aggressively, but because the word ‘propagate’ was a fundamental part of their tenet”. Its inclusion was a compromise to reassure minority communities and would avail all propagating communities, such as the Hindus, Arya Samaj, Muslims, Jains and Buddhists.<sup>99</sup> Thus, “so long as religion is religion, conversion by free exercise of the conscience has to be recognized.”<sup>100</sup> A secular impartial state “tolerates all religions” to the extent that “To say that some religious people should not ... propagate their views is to show intolerance on our part”.<sup>101</sup>

However, several Constituent Assembly members stressed that religionists should avoid the bad example of past missionaries and not “cry down another religion,”<sup>102</sup> or “throw mud” and “bring out their unsatisfactory features.”<sup>103</sup> Subsequently, Hindu politicians made concessions to Christians as they had demonstrated confidence in majority rule by giving up their legislative representation quota and had not supported the Muslim demand for partition.

## 2. THE RATIONALE FOR ANTI-PROPAGATION LEGISLATION

The Constitution is silent as to whether to enact anti-propagation laws. No

<sup>94</sup> Tiruvellore Thattai Krishnamachari was a former Indian Finance Minister (Congress).

<sup>95</sup> December 6, 1948, Constituent Assembly of India – Volume VII, available online: Indian Kanoon <<http://www.indiankanoon.org/doc/1933556/>>.

<sup>96</sup> Kanhaiyalal Maneklal Munshi was an Indian politician who joined various political parties, including the Indian National Congress when he was a member of the constituent assembly.

<sup>97</sup> *Supra* note 68. K. Santhanam also argued that to deny the right to propagate was tantamount to negating freedom of speech, which article 13 guaranteed.

<sup>98</sup> Kasturiranga Santhanam was an Indian politician serving in PM Nehru’s cabinet.

<sup>99</sup> Krishnamachari, *supra* note 68.

<sup>100</sup> Munshi, *ibid*.

<sup>101</sup> L. Krishnaswami Bharathi, *ibid*.

<sup>102</sup> *Ibid*.

<sup>103</sup> Rohini Kumar Chaudhari, *ibid*.



such laws existed in British India, although some predominantly Hindu-led princely-states enacted such laws, including the Freedom of Religion Act (Patna 1942), Apostasy Act (Surguja State, 1945) and Anti Conversion Act (Udaipur State, 1946).<sup>104</sup> The first one, the 1936 Raigarh State Conversion Act was in response to Roman Catholic priests who sought to gain conversions and entered the state without permission. Under the Act, to change religion, an individual had to apply using a prescribed form directed to a designated government officer who investigated the matter and issued certificates for authentic conversions. The Apostasy Act specifically required that the government be notified 3 months in advance before the intended conversion out of Hinduism to “an alien faith”. It was only concerned with Hindu apostates.

A 1955 private member’s bill<sup>105</sup> sought to create a general law to control propagation, which was directed at foreign missionaries, as, if there was a Pakistan, “why should there not be in India a Christianstan even?”<sup>106</sup> The government rejected this; PM Nehru warned that the proposed bill would create more evils than it would remedy, noting his anxiety “to avoid giving the police too much power of interference everywhere” through a proposed law that would “likely inflict considerable harassment on a large number of people.” Additionally, it was important not to do anything causing “any feeling or suppression in the minds of our Christian friends and fellow-countrymen in this country.”<sup>107</sup> Further attempts to enact similar laws, ostensibly to protect the backward communities against forced conversion from Hinduism to ‘non-Indian religions’, defined as Christianity, Islam, Judaism and Zorastrianism, was rejected as discriminatory and based on unsubstantiated allegations of mass conversions.<sup>108</sup> Notably, the hostility towards Christian missionaries in particular continued; they were labelled foreign, despite the long-standing presence of Christian communities in India, such as the ancient churches in Kerala. PM Nehru noted before Parliament that Christianity found roots in India before England, Portugal and Spain and was as much a religion of Indian soil as any other religion in India.<sup>109</sup> One example was the report of the Christian Missionary Activities Inquiry Committee (the Niyogi Committee) which the Indian Christian community

<sup>104</sup> Saadiya Suleman, ‘Freedom of Religion and Anti-Conversion Laws’ [2010] 1(1) ILI Law Review 106 at 116, available at [http://www.ili.ac.in/pdf/note\\_1.pdf](http://www.ili.ac.in/pdf/note_1.pdf)

<sup>105</sup> Jethalal Joshi (Congress Party) moved in Private Members Bill entitled the Converts (Regulation and Registration) Bill in December 1954 in the Lok Sabha (House of the People). The basic provisions were: persons or institutions engaged in converting people would have to secure a license from the district magistrate; a register of conversions would be maintained; a prospective convert would have to make a declaration of his intentions to the district magistrate one month prior to the actual date of conversion; the license-holder and the convert would be required to give particulars regarding the conversion within three months after it took place. Lok Sabha Debates, 1955, part 2, vol. 8, col. 16001.

<sup>106</sup> Donald Eugene Smith, *India as a Secular State* (London & Bombay, OUP, 1963), 183

<sup>107</sup> *Ibid.*

<sup>108</sup> See discussion of the Backward Communities (Religious Protection) Bill moved by Prakash Vir Shastri, Swatantra Party: *id.*, 184-185.

<sup>109</sup> Speech in Lok Sabha, 3 Dec 1955



considered a slander on the community.<sup>110</sup> The Madhya Pradesh government had commissioned this investigation into charges that missionaries were converting illiterate aboriginals and backward peoples by fraud, coercion or monetary inducement, causing widespread Hindu resentment. In turn, missionaries denied these allegations, charging that it was in fact local officials and others who were harassing the Christian communities in the tribal areas.<sup>111</sup> Although prominent Hindu leaders also affirmed that it was not Christian missionaries but caste Hindus who exploited tribal people, the report, alleging that Christianity denationalised Indians and promoted foreign interests as part of Western Cold War strategies, is a clear example of the force of communal Hindu groups which threatened the democratic secular state.<sup>112</sup>

The Hindu bias in subsequent anti-propagation state legislation is clear in that while couched as protecting minority religions from improper proselytism and forcible conversions, the general understanding is that they apply “only to cases of conversion by the Hindus to a non-Hindu religion, and not vice versa.”<sup>113</sup> Further, there have been few complaints,<sup>114</sup> and “hardly been any convictions” under these “mainly deterrent”<sup>115</sup> laws. This makes one question whether the object of the laws, to prohibit forcible conversion, is over-stated if not mythical, and whether these laws are not a means for harassing religious minorities.<sup>116</sup>

### 3. THE ANATOMY OF THE ANTI PROPAGATION LAWS

At present, five Indian states<sup>117</sup> have anti-conversion legislation designed to prohibit attempts to convert any person from one religious faith to another, through use of force, inducement, allurements or fraudulent means, and captures anyone who aids or abets such conversions. Certain statutes specifically deal with conversions out of ‘indigenous’ religions alone. The first was the 1968 Madhya Pradesh Dharma Swantantra Adhiniyam (Freedom of Religion Act).

In substantive terms, these laws do not completely ban religious propagation

<sup>110</sup> Chad M. Bauman, ‘Postcolonial Anxiety and Anti-Conversion Sentiment in the Report of the “Christian Missionary Activities Enquiry Committee’ (2008) 12(2) *International Journal of Hindu Studies*, 181-213.

<sup>111</sup> Report of the Christian Missionary Activities Inquiry Committee, Government Printing, Madhya Pradesh, Nagpur, 1956, vol. i, p. 1; Donald Eugene Smith, supra note 105, 206.

<sup>112</sup> An example of a biased finding which Indian Christian leaders vehemently protested was “As conversion muddles the convert’s sense of unity and solidarity with his society, there is a danger of his loyalty to his country and state being undermined.” Donald Eugene Smith, *India as a Secular State* (London & Bombay, OUP, 1963), 206.

<sup>113</sup> Tahir Mahmood, Religion and the Secular State: Indian Perspective 387 at 390, Religion and the Secular State: Interim National Reports – The XVIIIth International Congress of Comparative Law, Washington DC 25 July – 1 August 2010 at <http://jrcb-lar.byu.edu/common/files/India.pdf>

<sup>114</sup> ‘India: State admits few complaints of ‘forced’ conversions’ Goanet News, 17 July 2008 (3 complaints, 10 years).

<sup>115</sup> Supra, note 112.

<sup>116</sup> G Bibu, The Anti Conversion Laws examined in Light of the Indian Constitution: [http://www.sakshitime.org/index.php?option=com\\_content&task=view&id=316&Itemid=40](http://www.sakshitime.org/index.php?option=com_content&task=view&id=316&Itemid=40). At page 51, he argues that although anti-conversion laws have been in force in Orissa, Madhya Pradesh and Chhattisgarh for over 40 years, not a single person had been found guilty of forced conversion

<sup>117</sup> Orissa, Madhya Pradesh, Chhattisgarh, Himachal Pradesh and Gujarat: American Centre for Law and Justice: ‘Religious Freedom Acts’: Anti Conversion Laws in India at [http://www.aclj.org/media/pdf/Freedom\\_of\\_Religion\\_Acts.pdf](http://www.aclj.org/media/pdf/Freedom_of_Religion_Acts.pdf)



but serve the limited objective of protecting against “forcible” conversion, which is defined as “renouncing one religion and adopting another.”<sup>118</sup> Conversion is defined as excluding ‘reconversion.’ For example, section 2(b) of the Arunachal Act considers ‘conversion’ as renouncing an indigenous faith (‘religion of our forefathers’) and adopting another.<sup>119</sup> Typically, the law prohibits conversion “by use of force or by allurements or by any fraudulent means” or through “inducement.” These terms have been statutorily defined but remain vague. “Force” for example includes “shows of force or threat of injury or threat of divine displeasure or social excommunication.” “Allurement” or “inducement” refers to “any temptation” or “offer” in the form of a gift or grant of material benefit, in cash or in kind,<sup>120</sup> involving “fraudulent means” and misrepresentation.

In terms of regulation, these acts require potential converts to give prior or subsequent notice to a stipulated official with discretion to permit or disallow a person from changing religion, with no stipulated time frame within which such decision must be made.<sup>121</sup> The intrusiveness of such regulations is exemplified by the 1989 Orissa Freedom of Religion Rules, made under the auspices of the 1968 Act. Section 5(1) requires the priest performing the conversion ceremony to “intimate the date, time and place of the ceremony... along with the names and addresses of the persons to be converted to the concerned District Magistrate before fifteen days of the said ceremony.” Failure incurs a fine of 1000 rupees (USD\$22). Harsher penalties apply to attempts to convert minors, dalits, women and tribals, and entail imprisonment for up to 3 years and a fine of 50,000 rupees.<sup>122</sup>

#### 4. THE EFFECT OF ANTI-PROPAGATION LAWS: A TOOL FOR RELIGIOUS OPPRESSION AND PERPETUATED WARDSHIP

The anti-propagation laws, as public order statutes, vest unfettered discretion in the hands of state officials who have no clear standards for guidance to decide upon the legitimacy of religious conversions. Statutory definitions of “allurement” or “inducement” if construed too broadly may capture acts of charity, as there is a fine line between the humanitarian and missionary motives of religionists, in the provision of medical care, education or disaster aid.<sup>123</sup> The unclear line between permissible and prohibited acts may erode even legitimate methods of proselytising, particularly if accusations of non-compliance are made by third parties serving their own agenda, unrelated to public order considerations. If the “threat of divine dis-

<sup>118</sup> Section 2(a) Orissa Freedom of Religion Act 1967, section 2(b) Madhya Pradesh Dharma Swatantraya Act, 1968, Chhattisgarh Dharma Swatantraya Adhiniyam 1968; Himachal Pradesh Freedom of Religion Act, 2006

<sup>119</sup> Saadiya Suleman, ‘Freedom of Religion and Anti-Conversion Laws’ [2010] 1(1) ILI Law Review 106, 119 available at [http://www.ili.ac.in/pdf/note\\_1.pdf](http://www.ili.ac.in/pdf/note_1.pdf)

<sup>120</sup> Saadiya Suleman, *ibid.*, 121 (Madhya Pradesh, Chhattisgarh, Gujarat, Rajasthan and former Tamil Nadu Act).

<sup>121</sup> Prior notice must be given to the District Collector under section 5, Gujarat Freedom of Religion Act (2002). Subsequent notice must be given to the District Magistrate under section 5, Arunachal Act.

<sup>122</sup> Gujarat Act: Saadiya Suleman, *supra* note 118, 123.

<sup>123</sup> In the Sri Lanka context, see Alexandra Owens, ‘Using Legislation to Protect against Unethical Conversions in Sri Lanka’ (2006-2007) XXII *Journal of Law and Religion* 323-353



pleasure or social excommunication” constitutes force, the vagueness of these terms sustain uncertainty with respect to their practical operation. The idea of ‘social excommunication’ as a threat at the hands of the would-be convertor is also illogical (“join my group or I will shun you”) as excommunication goes to terminating group membership, not to inducing membership.

Cumulatively, the vague terms confide great discretion to enforcement agencies who may abuse it to oppress religious minorities, even those engaged in the legitimate exercise of religious freedom rights. This may inhibit interactions between proselytiser and potential converts, chilling speech such that the latter will not be fully informed. Further methods of stultifying religious freedom are found in the harsh penalties applied and the intimidating methods of supervision over the conversion process. By imposing more onerous penalties for attempts to forcibly convert children, women and tribals, like the 180 million dalits who are portrayed as “innately weak and credulous,”<sup>124</sup> these vulnerable sectors are treated like contemporary state wards. The underlying political motives to nullify threats to Hindutva is not healthy for a secular democracy.

In addition to seeking to protect the religious status quo, these laws discriminate on religious grounds. To a liberal mindset, induced conversion is as offensive as induced reconversion. Further, targeting only conversions out of indigenous faiths contravenes equal protection. The goal was clearly not to prevent forcible conversions per se, but to avoid losing Hindu converts to ‘foreign’ religions like Christianity and Islam, especially, to keep the Dalits within the Hindu system. This motivation is reflected in the subsequent amendment of relevant laws by the BJP government to classify Buddhism, Jainism and Sikhism as branches of Hinduism.<sup>125</sup> This reflects an anti-secularist concern for the religious identity of citizens. It is hard to avoid the implication that these laws constitute a Hindutva motivated strategy to recover the Hindu flock, to keep members of the Scheduled Castes and Tribes in the Hindu system as “vote banks of which the elite classes are the custodians.”<sup>126</sup>

The anti-propagation laws favour social cohesion over individual freedom, predicated on the belief that conversion disrupts caste and family patterns, undermines national culture and involves the use of unethical methods, such as providing humanitarian service for conversions. Arguably, these laws have had the effect of promoting more violence and injustice against religious minorities by being the conduit through which Hindu nationalists harness state power to prevent conversions out of Hinduism, through regularly making allegations against Christians, in addition to using intimidatory tactics against Christian communities, such as assaulting pastors and disrupting worship sessions. Christians are further victimised when they, instead of their attackers, are arrested for disrupting the peace. Anti-conversion laws

<sup>124</sup> Laura Dudley Jenkins, ‘Legal Limits on Religious Conversion in India’ (2008) 71 *Law & Contemporary Problems* 109

<sup>125</sup> US Department of State, *International Religious Freedom Report 2008: India*

<sup>126</sup> Bibu, 59.



are a source of abuse and Christian missionaries have been criminally penalised in instances not involving public order threats, as in the case where 2 priests and 1 nun were penalised for converting Hindus without registering them with the local police, despite the fact that the ex-Hindus sent letters to the police vouching for the authenticity of their conversions.<sup>127</sup>

Unsurprisingly, there has been popular resistance against such laws, causing the repeal of the Tamil Nadu law in 2006 under pressure from its dalit minorities who compose 20% of its population. The constitutionality of the laws have also been challenged for violating religious freedom and equality of religious minorities.<sup>128</sup>

## 5. JUDICIAL DETERMINATION OF THE RIGHT TO RELIGIOUS PROPAGATION

In 1957, the Supreme Court in *Ratilal v Bombay*<sup>129</sup> interpreted article 25 as giving everyone “the right to propagate his religious views for the edification of others,” consistent with secular state neutrality towards religions. Twenty years later in the heavily criticised decision of *Stanilaul v Madhya Pradesh*,<sup>130</sup> Ray CJ stated that article 25 protected “not the right to convert another person to one’s own religion but to transmit or spread one’s religion by an exposition of its tenets.” Thus, if a person “purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all citizens.”<sup>131</sup> He underscored that religious freedom was “not guaranteed in respect of one religion only, but covers all religions alike” and can only be “properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions.”<sup>132</sup> The Supreme Court affirmed that the purpose of the anti-conversion laws were to prevent public disorder stemming from forcible conversions.<sup>133</sup>

This distinction between the right to transmit information and explain what one’s religion means, and the right to convert any person to one’s own religion is reminiscent of the Gandhian view that propagation was unspiritual and should be confined to communication, absent an intent to convert. This decision effectively enforces the Hindu view that propagation should only be informational as propagation with intent to convert was considered to violate free conscience and raised public order issues, violating that “state of tranquillity which prevails among members of

<sup>127</sup> Arpita Anant, ‘Anti Conversion Laws’ *The Hindu*, 17 Dec 2002. It is worth noting that Hindus constitute a 82% majority while Christians compose only 2.3% of the population

<sup>128</sup> James Andrew Huff, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws* (2009) 10(2) *Journal of Law and Religion* at <http://org.law.rutgers.edu/publications/law-religion/articles/A10S-6Huff.pdf>

<sup>129</sup> 1967 AIR 1639, 1967 SCR (3) 926

<sup>130</sup> AIR 1977 SC 908; 2 SCR 611 (1977)

<sup>131</sup> AIR 1977 Supreme Court 908-912.

<sup>132</sup> AIR 1977 SC 908 para 18

<sup>133</sup> AIR 1977 SC 910 at 911-912

a political society as a result of internal regulations enforced by the government.”

## B. MALAYSIA: SECULARISM WITH ISLAMIC CHARACTERISTICS?

When the British colonial government was drafting the Constitution of the Malayan Federation in conjunction with local political elites, it had to negotiate the question of tradition and history, especially the status and role of the Malay sultans in the new polity and as the position of Islam. Before the advent of British colonial rule in Peninsula Malaya, the Malay sultans had been both political rulers and heads of Islam in their own state since the 15<sup>th</sup> century. In other words, Mosque and State were conflated, as the rulers and their subjects were all Muslims subject to Islamic law such that the state was “Islamic in the true sense of the word.”<sup>134</sup> British ‘indirect rule’ was inaugurated through a series of treaties signed with the sultans, beginning with the watershed 1874 Treaty of Pangkor which became the emulated template.<sup>135</sup> In return for British recognition as heads of Islam within their states, the sultans accepted the appointment of a British Resident Adviser whose ‘advice’ had to be sought and complied with on all matters, with the exception in Clause VI of matters “touching the Malay religion and customs”. Consequently, Malays were not exposed to evangelism given the *de facto* belief among European circles that Clause VI forbade missionary work amongst Malays.<sup>136</sup>

One of the “largest single remaining grievance in connection with the imposition of colonial law” in South-east Asia, is “the failure of Islamic law to attain the status of global doctrine.”<sup>137</sup> ‘Secularism’ is thus perceived in some quarters as sabotaging Muslim ambitions for a Malayan sultanate and Islamic state in South-East Asia (*Daulah Islamiyah*). This is expressed through contested revisionist attempts in legal<sup>138</sup> and political forums<sup>139</sup> to redefine the character of the Malaysian polity as an Islamic state, contrary to the historical constitutional commitment to secularism.<sup>140</sup> Inter-group tensions are exacerbated where divisive assertions of Islamic supremacy

<sup>134</sup> *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55 (Federal Court, Malaysia)

<sup>135</sup> Charles Donald Cowan, *Nineteenth-Century Malaya: The Origins of British Political Control* (London: Oxford University Press, 1961). Malaya was not to formally be a colony as the British ruled in the name of the sultans. [20Pangkor%20Treaty%201874.pdf](#)

<sup>136</sup> Ghazali Basri, ‘Christian Mission and Islamic Da’wah in Malaysia (Kuala Lumpur: Nurin Enterprise, 1992) pp. 22-23.

<sup>137</sup> A.J. Harding, ‘Global Doctrine and Local Knowledge: Law in South East Asia’ (2002) 51 ICLQ 35 at 40.

<sup>138</sup> See generally Li-ann Thio, ‘Religious Dress in Schools: The Serban Controversy in Malaysia (July 2006) 55 *International & Comparative Law Quarterly*, 871-888 (with Jaelyn LC Neo).

<sup>139</sup> Opposition group Parti Islam SeMalaysia (PAS) has campaigned to amend the Constitution to permit only Muslims to be Prime Minister: Cheong Suk-Wai, ‘Promises, promises; but can either side deliver? That’s the real issue facing voters’, *Straits Times* 17 March 2004

<sup>140</sup> As Sikh religious leader V Harcharan Singh noted: “It is neither in law nor in form an Islamic country. At the time the social contract was agreed upon, the population was almost 50:50, Muslim and non-Muslim. Since then, the ratio has been shifting. Just because the ratio is now 60% Muslim and 40% non-Muslim, this cannot automatically go against the provision agreed to by all parties in the Constitution.” ‘Working towards religious understanding’, *The Sun* (Malaysia), 28 Jan 2005.



are conflated with those of Malay ethnic supremacy and the demand for the growing Islamisation of public culture and continuation of Malay privileges.<sup>141</sup>

Thus, the inclusion of the anti-propagation in the Federal Malaysian Constitution reflects the privileged position accorded to Islam in article 3, even as the constitution as a secular instrument enjoys supremacy under article 4. The state does not adhere to the principle of religious neutrality; in fact, article 12(2) of the Constitution authorises the government to establish and maintain Islamic institutions and promote Islamic instructions; it also provides for religious courts to administer Islamic law (*syariah*), which falls within the province of state law-making powers under List II (State List), in relation to Muslim personal and family law, laws pertaining to religious charities, the running of mosques, offences committed by Muslims against Islam and “the control of propagating doctrines and beliefs among persons professing the religion of Islam.”

The state has increasingly taken a position on the truth of Islamic religious propositions which has had deleterious effects on religious freedom, particularly, in cases where Muslims have decided to change religion. This is evident in cases involving the regulation of deviationist sects and apostatising Malay Muslims (*murtads*), as well as cases when the state actively protects its endorsed school of Islam.<sup>142</sup>

The majority of Malaysian Muslims belong to the Shaifi (Sunni) sect. Notably, the government has deployed or threatened to deploy preventive detention rules to curb the activities of Shi'ites, who were considered fanatical and a threat to national unity,<sup>143</sup> and the anti-Hadith sect which adhered to the Koran alone, rejecting Hadith (prophetic tradition).<sup>144</sup> It has also banned deviationist sects like Al-Arqam and Sky Kingdom,<sup>145</sup> and established rehabilitation centres for the voluntary reform of followers of deviationist groups<sup>146</sup> with a view to facilitating their return to true Islamic teaching. In so doing, the government is not motivated merely by keeping civil peace but acts as defender of the (true version) of the faith or religious orthodoxy, in upholding a particularist substantive religious conception of the good, which is allied to the concept of a Malaysian Islamic polity. In this sense, the government involves itself in theological questions

Indeed, the government has undertaken assimilationist positive action to promote Islam amongst indigenous groups by encouraging aggressive state-directed

<sup>141</sup> It is in fact seditious to question Malay privileges, established under art 152 of the Constitution, as art 10(4) provides.

<sup>142</sup> See Poh-Ling Tan, 'Paying the Price for Religious Freedom – A Non Muslim Perspective' in *Public Law in Contemporary Malaysia*, Wu Min Aun ed., (Longman 1999), 134-177

<sup>143</sup> Govt to curb spread of Shi'ite ideology for security reasons' *Straits Times*, 5 March 1996, 15

<sup>144</sup> 'ISA may be used against anti-Hadith group, says Minister' *Straits Times*, 2 July 1995 at 20.

<sup>145</sup> *Che Minah bte Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu* [2008] 5 MLJ 206 (Court of Appeal, Putrajaya). The wife of the Sky Kingdom leader, in relation to which the Terengganu Islamic Council had issued a fatwa stating his teachings were deviant, alleged that Muslim judges would be biased in hearing her appeal.

<sup>146</sup> Centre for reforming Muslim deviationists to open in October, *Straits Times*, 9 July 1997, 28



Islamic missionary activities (*dakwah*) in Orang Asli settlements.<sup>147</sup> Reportedly, development aid or other material incentives have been used as carrots for conversion, and government officials have attempted to trick persons into conversion by making them recite a specific formula (*syahadah*), despite their lack of intent.<sup>148</sup> This is tantamount to the negation of free conscience, which is overborne by state-sponsored economic incentives or fraud to facilitate the Islamicisation process.

The preferential state treatment of Islam has led to certain discriminatory practices, such as forbidding Malay language translations of the Bible and prohibiting Christians from using Malay translations (*bahasa malay*) of religious terms, which might confuse Muslims.<sup>149</sup> In particular, officials have objected to the use of the word 'Allah' in Christian publications, arguing this was an Islamic word only Muslims should use. This ignores the fact that 'Allah' is the Arabic word for God, used by Arab-Christians long before the advent of Islam, which has been incorporated into the Malay language. The government paternalistically fears that this will confuse Muslims, rejecting the laissez-faire approach of leaving a religion to "flourish according to the zeal of its adherents and the appeal of its dogma."

### 1. ANTI-PROPAGATION LAWS

Pursuant to article 11(4), ten states have enacted laws to control and restrict the propagation of religious doctrine or belief among Muslims,<sup>150</sup> the earliest dating back to 1980.<sup>151</sup> This indicates that the state is not indifferent to the religious status and affiliation of Malay Muslims in seeking to insulate them from exposure to alternative religions, which limits the right of non-Muslims to proselytise or to communicate religious views. The Malaysian state rejects the free marketplace of ideas and faith in the rationality of persons. Its laws are discriminatory insofar as Muslims retain the right to proselytise non-Muslims without impediment. This demonstrates how in societies where religious identity is closely related to ethnic heritage and shapes the definition of the polity, those outside the faith community have a lesser slate of rights, suggesting tiers of citizenship differentiated by religious identity.

Under state enactments restricting the propagation of religions other than Islam, those found guilty of "persuading, influencing or inciting a Muslim to leave Islam or to embrace another religion" may be fined up to RM10,000 (over USD\$3000) and/or imprisoned for up to a year. Other offences include contacting a Muslim by any means of communication to subject him to a speech or to display material concerning a non-Islamic religion, sending unsolicited publications or distributing publica-

<sup>147</sup> Kirk Endicott and Adela Baer, *The Orang Asli assistance Fund*, cited in <http://dartmouth.edu/~asli/cs.html>

<sup>148</sup> Ding Jo-Ann, 'JHEOA Involved in Orang Asli Convention', *The Nut Graph*, 4 May 2010, archived at Center for Orang Asli Concerns at [http://www.coac.org.my/codenavia/portals/coacv2/code/main/main\\_art.php?parentID=0&artID=12734895488906](http://www.coac.org.my/codenavia/portals/coacv2/code/main/main_art.php?parentID=0&artID=12734895488906)

<sup>149</sup> Malaysia, International Religious Freedom Report (US State Department, 2003)

<sup>150</sup> These are listed at: [2010] 2 MLJ 78 at [51].

<sup>151</sup> Control and Restriction of the Propagation of Non Islamic Religious Enactment 1980 (State of Terengganu Enactment No 1 / 1980). The most recent is the Perlis Enactment No 6 of 2002.



tions in public places concerning non-Islamic religions.<sup>152</sup> This is to protect Muslims from exposure to heresy, which means that non-Muslims and ‘heretical’ Muslims whose views are disjoint with Sunni Islamic orthodoxy do not have an equal right to propagation as orthodox Muslims do. Furthermore, as in Greece, appeal is made to the state to intervene on behalf of those opposed to propagation by sanctioning proselytizers.

### C. SINGAPORE: ‘SECULARISM WITH A SOUL’ AND CONSTITUTIONAL PRAGMATISM

Within the Singapore constitutional order, there are no substantive limits on religious conversion as the espoused model of ‘accommodative secularism’ that recognise that “the protection of religion under our Constitution is premised on removing restrictions to one’s choice of religious belief.”<sup>153</sup> A voluntarist conception of religious identity is adopted and citizens may enter or exit a religion volitionally.

What is notable too in terms of religion-state relations is that upon secession Singapore deliberately departed from the Malaysian model of state-religion relations. First, the Constitution does not contain an official religion. Second, it does not conflate religion and ethnicity, although in terms of minority protection, the government is obliged to protect and promote their interests of Malays as “the indigenous people of Singapore,” including their religious interests. Pursuant to constitutional mandate,<sup>154</sup> the legislature adopted the Administration of Muslim Law Act which deals with the personal and customary law of all Muslims. An overwhelming number of Malays are Muslims. This Act permits exemption from general laws in specific respects and, in assuming a protective and supportive role over the Malays and the religion they are associated with, the government departs from a strict religious neutrality. Lastly, consonant with its vision of a secular democracy, the religious freedom clause does not authorise the enactment of anti-propagation laws as this would accord preferential treatment to the protected religion. The government thus seeks to treat all religions in an equal manner, viewing its role as holding “the ring so that all groups can practise their faiths freely without colliding with one another.”<sup>155</sup> The government cooperates with religious charities to deliver social welfare and recognises the legitimate role of religious convictions in public debate, while reserving to itself the role of making final decisions on law and policy issues. It adopts a ‘secularism with a soul’ model, where the state is not anti religion, since religion is “allowed

<sup>152</sup> Sections 4-8, Control and Restriction of the Propagation of Non-Islamic Religious Enactment, 1980 of the state of Terengganu. See ‘Qualified Religious Freedom’, NECF Malaysia (March-April 2004), available at <http://www.necf.org.my/newsmaster.cfm?&menuid=2&action=view&retrieveid=412>

<sup>153</sup> *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR 569, 575G-H (C.A.)

<sup>154</sup> Arts 152-153, Singapore Constitution.

<sup>155</sup> PM Lee Hsien Loong, National Day Rally Speech, 16 August 2009, text available at <http://www.pmo.gov.sg/News/Messages/National+Day+Rally+Speech+2009+Part+3+Racial+and+Religious+Harmony.htm> [‘NDR Speech 2009’]



to play its role in forging a harmonious and cohesive society.”<sup>156</sup>

The state also utilises its police powers to address religious practices or acts which threaten public order, health and morality. While viewing religion as a constructive social force, in terms of providing social services and source of social morality, the government is wary of the mixing of religion and politics and the dangers of the sort of fundamentalism which fuels terrorism. Given a history of race riots, compounded by the religious factor, the government is acutely aware of the importance of keeping the peace between religious groups and between religious and irreligious groups

The courts have generally adopted a deferential attitude in adjudicating cases involving religious liberties, construing public order expansively. For example, the Jehovah’s Witness were deregistered as a society as their pacifist tenets were considered prejudicial to the public welfare and good order of Singapore, where military service is compulsory. When this was challenged, the High Court declared that the paramount unwritten constitutional mandate was the “Sovereignty, integrity and unity of Singapore” such that “anything, including religious beliefs and practices which tend to run counter to these objectives must be restrained.”<sup>157</sup> This tends to give a parsimonious construction to the importance of rights in the adjudicatory process.

## 1. REGULATORY APPROACHES

While there are no specific anti-propagation laws, the court does deploy both formal and informal methods to regulate propagation, not for the purposes of protecting a religious orthodoxy, to which the state remains aloof, but for the instrumental purpose of keeping civil peace. This may be impaired where religious feelings are wounded or religious harmony attacked where inter-religious hostility is incited.

The government recognises a core right to propagation but the manner of conducting it is subject to regulation and sometimes, government direction. For example, PM Lee Kuan Yew in 1965 directed Christians not to aim their evangelical efforts at Muslims,<sup>158</sup> given their special sensitivities and the geo-political realities of being surrounded by Muslim-majority Indonesia and Malaysia.

As religious fervour might disrupt inter-religious harmony, a balance had to be struck between respecting “the right of each individual to hold his own beliefs and to accept or not to accept any religion”, and the importance of acknowledging “the multi-racial and multi-religious character of our society, and the sensitivities of other

<sup>156</sup> Zainul Abidin Rasheen (2002) Singapore Parliament Reports vol. 74, 23 May 2002, col; 2220

<sup>157</sup> *Colin Chan v Public Prosecutor* [1994] 3 SLR 662 at 684

<sup>158</sup> “I have assured the Christians that Singapore has many people with no religious guidance whatsoever, no religious beliefs whatsoever... I see no need for going around looking for the 12 per cent Muslims to try and convert them because I think there are 60 to 70 per cent of people who are in need of some form of religious and moral guidance.” Transcript of the Prime Minister’s Statement to Religious Representatives and Members of the Inter-Religious Council, 30th September 1965



religious groups.”<sup>159</sup> The government constantly reiterates the importance of safeguarding “racial and religious harmony” which is integral to its conception of the rule of law, such that this norm may be said to have acquired quasi-constitutional status or at least is an important lens through which public order is conceptualised and weighted.

In terms of regulating religious propagation or speech, the government is focused on the manner of communication and the ‘effects’ of speech, rather than its content; its sole concern is with broadly construed public order considerations of which religious harmony is key. In this respect, ‘aggressive and insensitive proselytisation’ has been identified as threat to public order:

What is of particular security concern is when religiosity manifests itself in a highly public and assertive manner in a multi-religious setting like Singapore, with all our attendant sensitivities. One example is the increase in proselytisation activities. Although the right to propagate one’s faith is enshrined in our Constitution, it becomes problematic when followers become over-zealous and self-righteous in their missionary activities, and carry them out in an aggressive and insensitive manner, disregarding the feelings of other religions. Unlike previously, devotees of the different faiths today appear to be less tolerant over perceived slights to their religion, and are more ready to retaliate.<sup>160</sup>

## I. PRE-EMPTIVE STRIKES

The government is conscious that litigating an issue in relation to religious propagation in a public courtroom might exacerbate social tensions. To that end, it adopted the Maintenance of Religious Harmony Act (MRHA)<sup>161</sup> in 1989 under which it may issue non-justiciable restraining orders to religious leaders or other persons who instigate religious groups to commit specified acts, including “causing feelings of enmity, hatred, ill-will or hostility between different religious groups.”<sup>162</sup> This limits the right to address religious groups on specified topics or to publish religious material without first obtaining ministerial permission. Words like ‘feelings’ are by nature vague and subjective. Although there are some statutory procedural safeguards, such as the right to be heard and to appeal a minister’s decision, this regime centralises enormous discretion with minimal accountability in the executive.

<sup>159</sup> Para 18, MRH white paper (Cmd 21 of 1989). The government’s duty was “to ensure that every citizen is free to choose his own religion, and that no citizen, in exercising his religious or other rights, infringes upon the rights and sensitivities of other citizens.”

<sup>160</sup> Deputy PM Wong Kan Seng, ‘Speech, ISD Intelligence Service Promotion Ceremony’, 14 March 2010, para 19: [http://www.mha.gov.sg/news\\_details\\_print.aspx?id=MTcwNQ==Q9CJuc52SKk=&tcaid=7](http://www.mha.gov.sg/news_details_print.aspx?id=MTcwNQ==Q9CJuc52SKk=&tcaid=7)

<sup>161</sup> Ss 8-9, MRHA (Cap 167A).

<sup>162</sup> Section 8(1)(a) Maintenance of Religious Harmony Act (Cap 167A)



## II. SOFT CONSTITUTIONAL LAW: GUIDANCE AND REMONSTRANCE

The white paper preceding the Act identified situations which threatened religious harmony when religious groups failed to “show respect and tolerance for other faiths” within a multi-faith setting in two ways: first, by “denigrating other faiths” and second “by insensitively trying to convert those belonging to other religions.”<sup>163</sup> While appreciating that religious faiths are mutually exclusive and that imparting religious doctrine to the faithful is part of religious practice, the white paper observed that “an unrestrained preacher pouring forth blood and thunder and denouncing the followers of other faiths as misguided infidels and lost souls may cause great umbrage to entire communities”<sup>164</sup> and indeed provoke a virulent response. Implicit in this is the exhortation to religionists to propagate with sensitivity and moderation, to keep the peace, rather than an outright prohibition of propagation. Propagation should be persuasive, not gratuitously provocative. There is also an implicit government preference to maintain a religious status quo insofar as if one religious group sought “to increase the number of its converts drastically at the expense of the other faiths”, other groups would “strenuously” resist this.<sup>165</sup> Religious groups should therefore act with self-restraint to secure the common good of the pacific co-existence of disparate ethnic and religious groups. Thus, sensitivity to other communities and the norm of propagation without denigration was identified as part of “the ground rules of prudence and good conduct” needed to preserve religious tolerance and harmony.<sup>166</sup>

Within the context of a dominant party parliamentary system, authoritative executive statements exhorting compliance with preferred norms can shape the behaviour of relevant constitutional actors, particularly against the background of punitive laws and political sanction. While such soft constitutional norms are not legally binding, they are capable of having some legal effect, perhaps in offering a persuasive interpretation of the scope of a right and what a legitimate exercise of it entails.<sup>167</sup> In certain instances, where inter-religious conflict is provoked, the government seeks to manage the situation by facilitating mediation and reconciliation between the parties, as legislative solutions do little to heal the breach and overcome distrust and offense. However, after tensions are diffused, the government takes care to reiterate the informal norms which should govern religious propagation, enhancing expectations that these standards warrant prospective compliance. This fleshing out of terse constitutional guarantees by soft norms is useful in the absence of judi-

<sup>163</sup> Maintenance of Religious Harmony White Paper (Cmd 21 of 1989), para 13

<sup>164</sup> *Ibid.*, para. 16

<sup>165</sup> Para 17, *Id.*

<sup>166</sup> The ISD Report “Religious Trends – A Security Perspective”, lists examples of insensitive proselytism fuelling inter and intra group tensions: Annex, paras. 2-12, *id.*

<sup>167</sup> Thio, ‘Constitutional ‘Soft’ Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony’ (2004) *Singapore Journal of Legal Studies* 414-443



cial pronouncement on the scope of religious propagation, within a context where there is no rights culture and many disputes are not legally resolved but diffused by petition to the political branches and their intervention.

## 2. EVALUATION VALUATION OF RELIGIOUS SPEECH AND PUBLIC ORDER

Within a religiously plural society, religious propagation may stir social tensions by causing offense to other religious communities, whether this be ‘seditious’ disparaging or ‘insensitive’, and are provoked to hostile reaction. ‘Aggressive or insensitive’ proselytisation can pose public order issues, and to that extent, may be considered an abuse of the constitutional right of religious propagation.

The government within Singapore’s communitarian context takes a less absolutist stance towards free (religious) speech and may curtail it in the interests of protecting religious feelings and civil peace, which may be higher up the hierarchy of values in plural divided societies than stable democracies. In a western liberal setting, the obligation not to react violently may fall on the hearer offended by insulting or denigrating words; in Singapore, the burden falls on the speaker not to offend by demeaning another’s religion in the process of religious propagation. Although regulation of religious propagation is not content-based, the focus on how the hearers will react to provocative speech and how this may affect social order entails the elusive search for how to weigh sensitivities, which may not be justiciable. If, however, religious sensitivities are too easily stirred, where disagreement is received as denigration, creating a low threshold of tolerance towards hearing disliked speech critical of the hearer’s beliefs, should the government intervene over-eagerly to halt even the hint of disquiet, speech will be unduly chilled. As a right, religious propagation should be exercised responsibly with an eye to persuasion, not antagonism; it may be provocative speech, but there is no constitutional right not to be offended, although there are prudential reasons to refrain from aggressive or insensitive proselytisation. It falls to Caesar not to treat religious propagation itself<sup>168</sup> as an intolerant act, but to cultivate a tolerant ethos which values viewpoint diversity as a common good shared by the members of a democratic society.

## IV. CONCLUDING OBSERVATIONS

In relation to Caesar and the regulation of religious conscience, two competing political philosophies are identifiable.

First, the state adopts a policy of non-intervention in relation to religious beliefs,

<sup>168</sup> Neighbour DJ in *Ong Kian Cheong* [82] declared: “Both the accused by distributing the seditious and objectionable tracts to Muslims and to the general public clearly reflected their intolerance, insensitivity and ignorance of delicate issues concerning race and religion in our multi-racial and multi religious society.” While it is fair to consider the accused to have acted insensitively, it is troubling that they were also deemed intolerant. This is because ‘intolerance’ was apparently misused to assert that the very act of religious propagation was intolerant because it implicitly assumed the superiority of the propagated view and the wrongness or inferiority of other religious views. It is illogical to assert the relativist proposition that all religions are equally true and valid. Tolerance extends to respecting the right of all believers to profess their faith, without requiring one to accept the veracity of all beliefs.



recognising equal rights for all citizens in developing their spirituality and promoting religious pluralism. A voluntarist conception of religious association is grounded in an emphasis on individual rights where the state does not seek to control what believe, but to provide a legal framework and environment which facilitates individual choices. Exit rights are secured, as part of the minimum content of the concept of secularism, which is understood as a non-religious rather than anti-religious ideology, which privileges reason, values relativism and seeks to privatise religion. The state plays an instrumental role in demarcating the boundaries of religious liberty to serve the strategy of religious freedom and peaceful co-existence of religious groups, while maintaining a vision of integrating these groups into a broader polity.

Second, the state defends a specific religion, may treat it as constitutive of public values and espouses the concept of a homogenous people, which is difficult, given the plural social settings of the 21<sup>st</sup> century as well as the fact that religious beliefs and groups are not static. In privileging the 'community' rights of a dominant religion, the state may encourage continued adherence to the dominant religion as well as inhibit conversions out of it, providing fertile ground for the politicisation of religion for communal advantage and undermining the equal treatment for all religious groups and faiths. Further, individual group members are at risk, particularly when exit issues are concerned. Over-extensive government regulation of rights to change and propagate religion can nullify the practical meaning of religious freedom. Thus, the state has to find the right balance between securing religious choice and allowing religionists to share what they consider to be the ultimate truth with their fellow citizens. The proviso is that regulation must not denude a right of its content; the right should be protected, but the manner of its exercise (rather than its content) may be regulated. Thus religious propagation rights should not be emptied by attaching punitive consequences to changes in religious affiliation; coercive forms of propagation, using 'brain-washing' tactics or propagation in a manner which threatens social order may legitimately be restrained.

Within a secular order, the state should neither coerce nor penalise belief. While the external expression of religious belief may be regulated, the goal should be to achieve an optimised balance which gives due weight to all competing considerations. While religious propagation may provoke inter-religious tensions and disrupt social harmony, public safety considerations may justify a temporary limit but not a wholesale prohibition; restrictions should also be applied in a non-discriminatory fashion, pursuant to a state commitment to treat all religions in an even-handed fashion, even in polities where a single religion for historical or other reasons is specially recognised and bears ceremonial significance. As religious freedom is predicated on free conscience, religious propagation which contravenes free conscience is the marker forming the boundary between legitimate and illegitimate propagation. Applying coercive methods to bring about change in religious belief through physical force or penal sanctions would be illegitimate, but this should not include attempts



to engage in moral or intellectual religious persuasion. While presenting one set of beliefs as true implicitly impugns or disqualifies other beliefs, it should not rise to the level of an incitement to hostility; while religious sensitivities may be hurt when one's cherished beliefs are attacked, it must be recalled that free speech protection within a democratic society does not merely apply to inoffensive speech but also to speech others may find "shocking, disturbing or offensive."<sup>169</sup> This is not to say that one has an unimpeded right to offend (which is a poor tactic if one's goal is to persuade). As a matter of civic responsibility, given the heightened emotions that religious or indeed any kind of ideologically fuelled speech can provoke, citizens should (as a matter of civility) refrain from giving gratuitous offense, since legislation alone cannot promote maintain social harmony. Many religious groups have sought to achieve mutual understanding by adopting voluntary codes of conduct in relation to proselytising activities. Further, the propagating citizens should focus on imparting information rather than ridiculing other religious beliefs. As religion does implicate matters of ultimate concern, on which there is profound division, it is a conversation which warrants protection and the appreciation of viewpoint diversity as a common good, without necessarily capitulating to a relativist stance. In this respect, the term 'tolerance' should not be used to unduly restrict propagation, on the basis that the act of propagation is itself intolerant or 'insensitive', as this confuses the holding of a view which one believes to be objective truth, which is incompatible with competing views, with intolerance. One tolerates what one does not agree with to secure an overarching principle, whether the securing of civil peace or free conscience.

While the state should not trespass into the *forum internum*, within a secular democracy, the right to propagate and the right to retain religious identity are not absolute rights, divided from restraint considerations by bright lines; rather they fall to be contextually balanced. To that end, an accommodative form of agnostic rather than atheistic secularism best sustains the importance and legitimacy of sharing religious views,<sup>170</sup> informing how the citizen makes due rendition to God and Caesar.



<sup>169</sup> *Handyside v UK* (1976) 1 EHRR 737

<sup>170</sup> Paul M Taylor, 'The Questionable Grounds of Objections to Proselytism and Certain other Forms of Religious Expression' (2006) BYUL Rev 811

# FIDES ET LIBERTAS



---

PART TWO  
BOOK REVIEWS

---



# RELIGION, THE ENLIGHTENMENT, AND THE NEW GLOBAL ORDER

THOMAS R. POPE<sup>1</sup>

John M. Owen IV and J. Judd Owen, editors. *Religion, the Enlightenment, and the New Global Order*. Columbia University Press, 2011. 304 pages, \$29.50

The terrorist attacks of September 11<sup>th</sup>, 2001 brought the subject of radical Islam to the fore of public discourse in the United States. We seemed at first unable to process the motivations of our aggressors, attributing to them the mindset that we ourselves might adopt. We sought out justifications emphasizing the social, economic, or political disparities between our cultures — the sort of things that cause unrest among modern liberal democrats, and which can be resolved through the political mechanisms with which we are comfortable. Yet, it became increasingly clear that the attack could not be traced to strictly material concerns, but instead it found its formal cause in a militant religious zeal. This new threat with metaphysical roots terrified us, as it placed the assailants beyond reason, compromise, or even that primary motivator of modern man: the fear of violent death. Those who fight under the auspices of a higher cause cannot be awed by the mere strength of our material superiority. We must instead look to assuage the theoretical tensions between their faith and our way of life.

Such violent outbreaks between individual faith and civil society are infrequent in the West, as we have largely relegated religion to the private sphere. We are accustomed to the strict division between public and private. This, of course, has not always been the case. The history of Church-State relations in the West is rife with crusades, inquisitions, and violent struggles over national religious identity. From the death of Socrates to the Thirty Years War, much of our philosophic and cultural heritage has resulted from the state's interest in the private beliefs of its citizens. As the Gospel tells us, "No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."<sup>2</sup> Various attempts were made to reconcile the demands of pious citizenship, but none successfully disentangled the concerns of this life and the next. Two attempts in the early 16<sup>th</sup> century are particularly illustrative of the premodern inability to divorce the public and the private. The first is Niccolò Machiavelli, who sees the Church as

<sup>1</sup> Assistant Professor of Political Science, Lee University, Cleveland, Tennessee

<sup>2</sup> Luke 16:13, KJV

simply another instrument of temporal power.<sup>3</sup> Erasmus, operating from the opposite vantage, aims to ease the tensions between faith and politics, but ultimately subsumes the latter to the former. The Christian prince is Christian first and prince second, and he is responsible for both the bodies and the souls of his people.<sup>4</sup> It is not until the 17<sup>th</sup> century that we truly begin to see a lasting solution to the problem of religious violence in the West. This paradigmatic shift can largely be credited to the spread of Enlightenment principles throughout Europe. Philosophers such as Thomas Hobbes aimed to reestablish the political realm on human, rather than divine, grounds. This left room for later intellectuals, such as John Locke, to argue that the proper temperament of the state with regard to individual faith is one of general neutrality and toleration. As an increased reliance on rationalism and toleration grew among the people, religiously-motivated violence in Europe evaporated. Finally, the founding of America explicitly codified Enlightenment principles into law, thereby solidifying its ideological hold in the West. With very few exceptions, differences between individual faith and civil society have rarely come to blows since.

*Religion, the Enlightenment, and the New Global Order* looks to understand the historical, cultural, and philosophical factors behind the success of Enlightenment in the West, asking whether such a project would produce similar results in the Near East. “To what extent is the Enlightenment able to extend its influence beyond the West?” ask its editors. “To what extent should we wish it to do so? Does the post-9/11 world force us to confront some essential limitations of Enlightenment principles, which as such affect their validity not only outside the West but within it?”<sup>5</sup> The Arab Spring of 2011 makes this discussion of the relationship between religion and the principles of modern liberalism associated with the Enlightenment even more timely. The work, edited by John M. Owen IV and J. Judd Owen, is composed of eleven essays by some of the most preeminent scholars in their respective fields. These writings can be divided broadly into three categories: those exploring the theoretical implications of the Enlightenment, those questioning or reinterpreting the orthodox historical record of the Enlightenment, and those which use case-studies to highlight some of the obstacles standing in the way of implementation. For the most part, each work does an excellent job considering the nuances of reapplying Enlightenment principles to contemporary international struggles.

Unfortunately, this careful consideration is also one of the most unsatisfy-

<sup>3</sup> “This has to be understood: that a prince, and especially a new prince, cannot observe all those things for which men are held good, since he is often under a necessity, to maintain his state, of acting against faith, against charity, against humanity, against religion.” Niccolò Machiavelli, *The Prince*, trans. Harvey C. Mansfield (Chicago: University of Chicago Press, 1998), 70.

<sup>4</sup> “If you can be a prince and a good man at the same time, you will be performing a magnificent service; but if not, give up the position of prince rather than become a bad man for the sake of it.” Erasmus, *The Education of a Christian Prince*, trans. Lisa Jardine (Cambridge: Cambridge University Press, 1997), 51.

<sup>5</sup> John M. Owen IV and J. Judd Owen, “Religion, the Enlightenment, and the New Global Order” in *Religion, the Enlightenment, and the New Global Order*, ed. John M. Owen IV and J. Judd Owen (New York: Columbia University Press, 2010), 7.



ing features of the book as a whole. The authors tend to retreat from any positive policy recommendations, instead opting for merely descriptive claims. For example, William Galston, a one-time advisor to President Clinton and certainly a capable policy analyst, presents us with a discussion titled “Religious Violence or Religious Pluralism,” wherein he argues that “the more a religion expresses itself in external law, the more extensive its scope, and the more universalistic its claims, the less accommodating will be its stance toward plurality, and the more likely it will be to resort to violence to overcome or eliminate plurality.”<sup>6</sup> Setting aside the near-tautological nature of this hypothesis, we are left to wonder how we should respond to it. Once we accept that faiths which claim comprehensive sovereignty over human life will be less likely to coexist with competing religions, what should we do about them? Galston concludes that Islam (and to a lesser degree, Catholicism) will have particular difficulty integrating into a liberal framework. So, where does this leave us? Isn’t this what we already knew from the outset? A much more satisfying conclusion would be some hint about what we can do to assuage this tension.

To be fair, Galston does suggest that one choice which is unlikely to succeed is the implementation of Enlightenment principles. The West, he argues, arrived at peace not through the spread of ideas or a single historical event, but through the tedious process of evolving historical experiences.<sup>7</sup> Such a unique evolution is impossible to recreate artificially. Again though, we are left with a quandary: the situation is dire and Enlightenment is not the answer.

This theme is repeated throughout *Religion, Enlightenment, and the New Global Order*. The overwhelming response to the possibility of incorporating lessons from the Enlightenment is decidedly negative. Several of the introductory essays bring into doubt the very existence of a single historical movement that we can use as a reference point for Enlightenment philosophy.<sup>8</sup> Other authors highlight the uneasy contradictions inherent in modern Western philosophy. We have turned a blind eye to these tensions until now, but they are becoming increasingly difficult to ignore. Perhaps then, seems the implication, the West is not the model to emulate. Or, at the very least, there is a cost to the philosophic compromise that we have made. This review article will elaborate upon some of these criticisms and, while giving them due credit, will try to offer a more optimistic analysis of the Enlightenment’s potential outside of the West.

<sup>6</sup> William A. Galston, “Religious Violence or Religious Pluralism” in *Religion, the Enlightenment, and the New Global Order*, 43.

<sup>7</sup> Galston, 37.

<sup>8</sup> “It is a mistake, I believe, to think of the Enlightenment... as a single, unified historic phenomenon. We may identify a *radical* Enlightenment, atheistic in theory and aggressively secularist in practice... But there was also a moderate Enlightenment that wished to open a social space for free inquiry and religious diversity without denigrating or expunging specific faiths.” Galston, 39.

## THEORETICAL IMPLICATIONS OF THE ENLIGHTENMENT

The book's first section, delving into the theoretical questions of the Enlightenment, is easily its strongest subdivision. Its three essays offer serious critiques of the West's hope in a new Enlightenment, each advancing a different perspective of what lies at the core of our modern liberalism. However, these perspectives are at odds with each other and the varying accounts of the Enlightenment cannot all be true.

As I have mentioned, William Galston opens the discussion by arguing that the Enlightenment as a unified historical phenomena is something of a misnomer. Instead, he asserts, there exist at least two discernible traditions. The first is the more radical tradition, which is characterized by a militant secularism. Exhausted by centuries of religious strife, this faction chose to eliminate the most obvious source of conflict: religion itself. The clearest fruit of this intellectual tradition is the Revolution in France. Galston highlights the fact that moderns who appeal to this face of the Enlightenment for relief from religious violence must first recognize that the remedy may be worse than the affliction. The second tradition, which Galston identifies as the more appropriate intellectual model, emphasizes toleration and pluralism instead of preference for the secular over the sacred. It is from this latter source that America finds its Enlightenment roots. Therefore, Galston argues, "It is a mistake to see liberal constitutionalism as strictly supreme over, or subordinate to, claims based on religious conviction."<sup>9</sup> His account reminds us that accommodation to the free exercise of individual faith is at the heart of our success at ending religious violence in the West. Attempts to allay conflict abroad must avoid the institutional ostracism of genuine public religious observances.

Jean Bethke Elshtain continues the discussion with a reflection on the unfortunate trend of modernity to ideological monism. Like Galston, he sees the Enlightenment as a piecemeal development, coming together in fits and often without the philosophic consistency we might prefer. Yet unlike Galston, Elshtain appears to flatly reject a tradition of pluralism within the Enlightenment, instead arguing that "the monistic drive infects all areas of endeavor in modernity."<sup>10</sup> That is, there is a tendency within modern thought to assume that civic discourse must conform to purely secular standards in a sort of Rawlsian fashion. Humans may not be able to compartmentalize themselves so neatly, however. The equally monist alternative is to unite the civil and the sacred in a comprehensive civil religion. Both of these options are deeply unsatisfying to Elshtain. The most serious danger of monism is its forceful reduction of reality to an artificial paradigm that cannot hope to account for the full range of life's nuances. We lose some of the core principles which undergird our society. In particular, Elshtain fears that the loss of Christian moral foundations leaves our modern understanding of justice and human rights as nothing but a vacuous

<sup>9</sup> Galston, 40.

<sup>10</sup> Jean Bethke Elshtain, "Religion, Enlightenment, and a Common Good" in *Religion, the Enlightenment, and the New Global Order*, 62.

shell. A proper appreciation of human rights relies largely upon a notion of human dignity and freedom, which is best understood within the context of our reflection of the divine image. Likewise, our just war tradition cannot be separated from Christian *caritas* and its treatment in an Augustinian framework. These things demand a “theological anthropology” which is quickly evaporating in the West.<sup>11</sup> Galston and Elshtain seek the same end: namely, legitimate pluralism in public discourse. However, while Galston hopes to recall our attention to what he sees as a legitimate yet overlooked tradition within the Enlightenment, Elshtain must ground her pluralism apart from the Enlightenment project entirely.

Thomas Pangle is similarly concerned with the erosion of philosophic foundations in the West, but sees the problem from a rather different perspective. The crisis lies not with any sort of monistic ascension, and certainly not with the loss of Judeo-Christian ideals. Quite the opposite. The primary contribution of the Enlightenment was a cultural framework “dedicated to the proposition that ‘everyone can think whatever one wishes, and say whatever one thinks,’ above all concerning God.”<sup>12</sup> This pluralism, however was bounded in the sort of secular monism that both Galston and Elshtain challenge. One has absolute freedom in the private sphere, insofar as one recognizes that the common language of civil society must conform to the tenets of rationalism. Such an intellectual framework “manifestly contradicts and supplants the grounding conception of the human essence that is found in the suprarational revelation given in the Bible.”<sup>13</sup> Yet, despite this apparent hostility, the Christian tradition is on the rise. Particularly in America, individuals are increasingly likely to re-found liberal principles on suprarational biblical revelation. Elshtain’s thesis is precisely the rejection of rationalism that Pangle identifies and disparages. Unable to justify itself based on universally accessible principles, the West has lost confidence in its ability to model the good society. The alternative, which Pangle associates with the natural law tradition, can only uncomfortably conform itself to our liberal sensibilities. Scripture, after all, speaks of duties rather than rights. Thus, Pangle flatly rejects Elshtain’s claim that the proper understanding of rights is nested within a Christian framework.

These three approaches to making sense of the Enlightenment’s core tenets should be lauded for their refusal to simply recite the biases of their regime without reflection. Nonetheless, the broad and contradictory criticisms of these authors are indicative of the fact that they are unable to offer a coherent alternative. Yet despite their scattershot appraisal of the Enlightenment’s faults, there remains an underlying consensus that some degree of pluralism and toleration is necessary to move forward. It is upon this ground that a more optimistic assessment of the Enlightenment may be established.

<sup>11</sup> Elshtain, 73.

<sup>12</sup> Thomas L. Pangle, “How and Why the West Has Lost Confidence in Its Foundational Political Principles” in *Religion, the Enlightenment, and the New Global Order*, 74.

<sup>13</sup> Pangle, 75.

## REINTERPRETING ENLIGHTENMENT ORTHODOXY

The second section of *Religion, the Enlightenment, and the New Global Order* includes a pair of essays which attempt to comprehend the Enlightenment from the perspective of two minority religious groups contemporary to the movement: the Jews and the Puritans. The former essay dwells upon the complicated relationship between Baruch Spinoza's cultural commitment to Judaism and his intellectual commitment to secular philosophy. The latter essay highlights the contribution of the Puritans to our tradition of religious toleration. Connecting both accounts is the overarching theme that those who would distill the Enlightenment to a single sectarian perspective are sorely mistaken. There is a nuance to the historical particulars of era itself that makes it difficult to appreciate in its fullness. As the former author, David Novak, asserts, "to avoid Spinoza is to miss just how radically the Enlightenment really began."<sup>14</sup> This sentiment is echoed by John Witte Jr. when he contends that "modern Enlightenment teachings on law, liberty, and human rights were not all invented out of whole cloth, but were often derived and abstracted from prevailing religious theories," such as Puritanism.<sup>15</sup> Endeavors to apply Enlightenment principles to contemporary problems will inevitably face the charge of reductionism. And yet, these two essays taken together demonstrate very clearly that toleration flowing from the principles of rationalism are accessible to radically diverse religious and cultural traditions. Despite their deep commitment to a calling that transcends the values of this world, both the Puritans and the Jews are willing to embrace reason as a way (although certainly not the only way) of coming to appreciate the will of God for man.

## OBSTACLES FOR IMPLEMENTATION

Section three, considering some of the practical hurdles facing those who would utilize Enlightenment principles to assuage religious tensions, reminds us that the particulars of implementation in the West must be adapted to match new circumstances elsewhere. These chapters examine the exceptional character of Hinduism, Islam, and the Christian Democratic Movement, highlighting their relative incompatibilities with the liberal democracy of the modern West. Some of the greatest challenges arise when recreating democratic institutions, such as a spirit of constitutionalism and specific guarantees of free exercise. Their words of caution ring true, yet while the Enlightenment cannot be transported whole-cloth to an unfamiliar and unsympathetic audience, its underlying principle of rationalism is not at stake here. Instead, it is simply the appropriate expression of this idea that is being debated. Keeping this in mind, we needn't be hung up on how to establish democratic institutions or a particular rights tradition. The core principle of the Enlightenment

<sup>14</sup> David Novak, "The Enlightenment Project, Spinoza, and the Jews" in *Religion, the Enlightenment, and the New Global Order*, 112.

<sup>15</sup> John Witte Jr., "Puritan Sources of Enlightenment Liberty" in *Religion, the Enlightenment, and the New Global Order*, 141.

is a disposition towards using reason in the service of political problems. Pratap Bhanu Mehta provides us with an excellent example when he writes of the troubles plaguing Indian courts when determining the appropriate distance of government to allow for the free exercise of Hindu religion.<sup>16</sup> Despite the fact that Hinduism is notoriously difficult to compartmentalize, Indian judges have found themselves forced to outline an orthodox practice that the law can account for. The faithful who find their practice outside of the state-defined norms risk disenfranchisement. Yet, for all of the unusual hoops that the government (and its citizens) must jump through, there is certainly progress toward the goal of toleration and the peaceful coexistence of sacred and secular.

### CONCLUDING REMARKS

*Religion, the Enlightenment, and the New Global Order* is an important work insofar as it reminds us to approach the task of spreading Western values with a certain healthy conservatism. It does an excellent job reemphasizing the nuances of such a project in both theory and practice. However, the work frequently descends into an unwarranted pessimism, leaving the reader with the impression that the contributions of the Enlightenment are so bound to historical time and place that one begins to wonder if any lessons at all can be drawn from the great philosophic movement. With the notable exception of Thomas Pangle, it appears as though our authors are prepared to abandon the enterprise entirely without any alternative in its stead. Instead, I would argue, while the particular expressions of the era may indeed be non-repeatable, its underlying philosophy is capable of taking new forms to meet the needs of a world altogether new. This core tenet, which I identify as a spirit of rationalism, simply prefers reason to unreason when given the choice. Such a position is not immediately hostile to faith and promotes dialogue and compromise as the appropriate steps in conflict resolution. When agreement cannot be reached and the disagreement escalates to exercises of force, at the very least, both sides have made an argument that is comprehensible to the other side. Again, I reiterate, revelation needn't give way to reason in all instances, but it must at minimum give reason an opportunity to operate. This modest contribution from the Enlightenment appears not to run afoul of any of our authors' criticisms, while allowing at least some hope for future progress. What this looks like in concrete implementation may, and should, differ depending on circumstances. While there is regrettably little else to connect them, the various essays in the second and third sections of the book demonstrate this point quite plainly. What is important is the emphasis on and disposition in favor of reasonable discussion. It may not be the responsibility or interest of the West to impose this agenda on the global community. Luckily, reason is natural to man and trends in this direction are already coming from the people themselves.

<sup>16</sup> Pratap Bhanu Mehta, "India: The Politics of Religious Reform and Conflict" in *Religion, the Enlightenment, and the New Global Order*, 189.



Insofar as states continue to experiment with policies aimed toward this end, we can continue to remain hopeful of peace in the years to come.



# HONOR those who *advance* RELIGIOUS FREEDOM

Every year, Washington gathers to attend the Religious Liberty Dinner. This year, join us as we celebrate and bring attention to a central human right – the freedom of religion or belief – both in the United States and around the world.

June 2012  
Washington, D.C.

For more information visit:  
[www.ReligiousLibertyDinner.com](http://www.ReligiousLibertyDinner.com)



Religious  
Liberty  
DINNER

*Championing Freedom  
of Conscience for All*



# CHRISTIANITY AND THE DAWNING OF A NEW HUMAN RIGHTS HERMENEUTIC

ANN M. WARNER<sup>1</sup>

John Witte, Jr., and Frank S. Alexander (Editors), *Christianity and Human Rights*. New York and Cambridge: Cambridge University Press, 2010. 390pp. Paper: \$29.99 ISBN 9780521143745

The Universal Declaration of Human Rights (1948) seeks to set a common standard for all people, since “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom.”<sup>2</sup> Among the foundations utilized by this and similar instruments that comprise the framework of modern human rights, the teachings of Christianity take a prominent place. In *Christianity and Human Rights*, twenty leading scholars contribute to a collection of essays that offers an accessible introduction to the history, contributions, shortcomings, and potential of Christianity’s relationship with human rights, and addresses critical issues that command the attention of the modern Christian.

*Christianity and Human Rights* (hereafter referred to as *CHR*) depicts how Christianity has directly impacted the theory of human rights and provides a compelling basis for its practical application. The book illustrates how historical Christian faith and doctrine provide a powerful case for the sanctity and dignity of the human person, from roots in Judaic and Roman law through the developments of early Christian, Orthodox, Catholic, and Protestant thought. It also illustrates how modern Christianity has limited its potential contribution to the global human rights dialog as a result of internal strife and disputes over controversial issues such as the equality of women.<sup>3</sup> Nevertheless, Christianity can restore and further its influence through efforts to establish common ground on human rights among Christians, commit to the preservation of religious autonomy, and cultivate cooperation and respect in a multifaith society.

Christian participation in the human rights arena is one of the most natural responses to flow from Christian faith and doctrine (332-34). Although the formula-

<sup>1</sup> Ann M. Warner is an author, medieval scholar, and human rights advocate residing in Northern California.

<sup>2</sup> Preamble, The Universal Declaration of Human Rights. Full text on The United Nations website, <http://www.un.org/en/documents/udhr>. For more on the UN and the creation of the international human rights framework, see *CHR*, 195-205.

<sup>3</sup> On inter-Christian conflicts, see also Silvio Ferrari’s chapter, “Proselytism and human rights,” (253-266).



tions of many political human rights are constructed on the pathological elements of human nature, Christianity is in a unique position to champion the intrinsic nobility of human beings and their redemptive value through the belief that God loves all people equally and perpetually (20, 183). A frequently missing dimension in human rights today is the ingredient of human hope. Into this void, the Christian message of consolation, healing, and divine concern introduces a compelling basis for the application of human rights on the ground. In his forward to *CHR*, Desmond Tutu attests how Christian faith in the ultimate victory of love and goodness afforded much of the inspiration and motivation for the human rights struggle of his people (7). Christian principles exceed so-called “secular” formulations of rights by the teaching and practice of mercy and forgiveness even toward enemies.<sup>4</sup> The church cannot excuse itself from participating in the fight for human rights and dignity when it is confronted from the beginning with the example of Christ himself and the human causes he held dear (182).

Christian precepts of rights owe their ideals to a diverse heritage of Jewish tradition, Roman law, and historical Christian thought and practice. Christianity makes a powerful case for the sanctity and dignity of the human person implicit in the Judeo-Christian doctrine of *imago Dei* (human beings made in God’s image). For the Christian, any discussion of liberties and duties comes back to *imago Dei* as the basis for human rights (327-29). Moreover, Christianity defines human beings by dignity instead of merely rights, inasmuch as *imago Dei* intrinsically makes human beings *all alike* (165).<sup>5</sup>

The development of ethical rules in Judaic law articulated the privileges and duties of individuals, while also distinguishing them from the rights and covenants of the community. Nevertheless, when at variance, community rights trumped individual rights and law was paramount to mercy (62). This contrasted with the example of Jesus, who placed the value of human beings above ritual demands and his willing association with miscreants and sinners above the requirements of Jewish purity laws.

In his chapter on human rights and early Christianity, David Aune follows his commentary on the humane and compassionate example of Christ with an examination of Pauline conceptions of equality for Jews, Greeks, women, and slaves. He analyzes the apostle’s influence on the application of these principles in the early Christian church, especially with regard to the treatment of women. Aune defends the interpretation that Paul intended his principles of equality to be applicable only *coram Deo* (“before God”) and limited to the sphere of the church and an eschatological framework, not to the realities of everyday life. Although Aune concedes the

<sup>4</sup> The principle of forgiveness reflects the exemplary compassion of Christ even toward his murderers. Jeremy Waldron puts this teaching to the test in his discussion on the human rights of murders or terrorists. He argues that the “unlawful combatant is also *man-created-in-the-image-of-God* and the status associated with that characterization imposes radical limits on how we must treat the question of what is to be done with him” (225).

<sup>5</sup> See also Nicholas Wolterstorff’s additional comments on *imago Dei* (162-165), and Waldron’s chapter, “The image of God: rights, reason, and order” (216-234).



occasional mistranslation of Greek names in some twentieth-century versions of Pauline accounts from female to male forms, he leaves his opinion on the modern interpretations of women's equality ambiguous (87-98).

The complex tapestry of Christian thought and practice on human rights has emerged over the centuries from Orthodox, Catholic, and Protestant constructs. The Orthodox Church made a profound contribution by defining the *value* of human beings individually, not only collectively. This belief emerged from Byzantine doctrine on the personhood of Christ, which Orthodoxy introduced to European thought and discourse in the fifth century (179). Orthodox tradition also laid a foundation for separation of church and state, through the Byzantine theory of *symphonia*. Frequently misunderstood and misused in modern post-communist talk, as John McGuckin explains, the original meaning of *symphonia* was "a harmony of powers whose very juxtapositions delineated precise limits of power: to each their own, and from each their proper sphere of accountability" (175). He argues, rightfully, that contemporary Orthodox leaders have neglected their own rich history and philosophical tradition when setting their course in modern human rights debate (180).

The writings of western Christian intellectuals and ascetics from the late fourth to the mid-sixth centuries gave birth to crucial new forms of philosophical thought while providing justification for the preservation of Antique culture. Catholicism borrowed many of its legal and organizational forms from Roman law. The concept of subjective rights was not original to medieval canonists or civilians, but rather was fundamental to Roman law through the use of *ius*. Canon law expanded the meaning and application of *ius*, although its definition of rights had not progressed to include the modern sense of human *liberties*. Catholicism did not embrace principles of religious liberty until the twentieth century, introduced during the conciliar era and culminating in Vatican II and its overdue proclamation of *Dignitatis Humanae* (The Declaration of Religious Freedom).<sup>6</sup>

From the beginning, religious liberty has been a rallying call in the Protestant movement. John Witte Jr. demonstrates the rights talk that emerged from early modern Protestantism through the example of Calvinism and its belief in natural law, positive law, and rule of law. From its demands for a basic separation and reformation of church and state in the sixteenth century to the ideology of American Puritanism, Calvinism served as "one of the driving engines of Western constitutional laws of rights and liberties" (135). However, a startling difference exists between early Calvinist works on rights and those of twentieth-century Protestantism. Nicholas Wolterstorff compares and contrasts various schools of modern Protestant thought—from totalitarianism to libertarianism—demonstrating Christianity's contemporary efforts to find its voice on human rights.<sup>7</sup>

<sup>6</sup> See *CHR* chapters 2, 4, and 5.

<sup>7</sup> See Wolterstorff's chapter, "Modern Protestant developments in human rights" (155-171).



Christianity's contribution to rights discourse is illustrated throughout *CHR*. However, in the book's presentation of Christian doctrine as a justification for rights, one basic assumption proves itself problematic. Although several authors emphasize the doctrine of *imago Dei* and its implications for human rights, Christian assumptions about creation that serve as a basis for *imago Dei* are not developed.<sup>8</sup> None of the authors offer pertinent analysis of current theoscientific deliberation on a literal interpretation of the Genesis creation narrative, or how theories such as day-age creationism and theistic creationism may affect the viability of *imago Dei* as a basis for Christian human rights. This oversight represents a weakness in the cogency of several authors' arguments in *CHR*.

In the court of public opinion, present-day Christianity has worked against itself in a variety of ways. Conflicting Christian opinions on issues such as gay rights and women's rights breed a great deal of confusion among the non-Christians public, as well as among Christians themselves. Included in *CHR*'s discussion on individual rights, a full chapter is dedicated to women's rights, another to children's rights, and occasional reference is made to ethnic and religious minority rights. Conspicuously absent, however, is deliberation on the issue of gay rights or other aspects of rights with regard to sexual orientation.

Although the words "gay rights" and "homosexuality" are not listed in the book's index, Kent Greenawalt makes a very brief reference to the subject in his chapter on religion and equality. There he addresses whether religious organizations should be allowed to legally discriminate in their hiring practices of openly gay individuals based on their own internal policies (241, 249-250). Although Greenawalt's brief insights are articulate, a deeper treatment of the controversial issues surrounding gay rights would have proved a useful addition to *CHR*. Frequent Christian ambivalence or outright evasion of the subject of gay rights with relation to the jurisdiction of church and state, religious autonomy, and individual rights, weakens the effectiveness of Christian influence on other relevant issues, such as women's rights.<sup>9</sup>

Christian disagreement on the equality of women and women's role in the church has hampered its influence within the greater human rights dialog. Women have made a profound contribution to the Christian movement from the time of Christ and the apostles to the present.<sup>10</sup> Nevertheless, Christianity has a mixed

<sup>8</sup> Waldron does acknowledge that *imago Dei* exhibits a variety of weaknesses when introduced into the broader human rights dialog, particularly in matters of logic or appeal in a multifaith global society (216). However, he does not address the assumptions underlying the Christian profession of *imago Dei*. Kent Greenawalt mentions only parenthetically that by requiring the teaching of theories like evolution as fact in public schools, the government suggests that any contradicting religious teachings are false (242).

<sup>9</sup> For an excellent Christian analysis of what rights are cultural and what rights are timeless with respect to these issues, see William Webb, *Slaves, Women and Homosexuals*, (Downers Grove, IL: InterVarsity Press, 2001).

<sup>10</sup> N. Christian Green highlights works of women thinkers from the Renaissance to the present, and he provides useful footnotes (304-312). For a perspective on early Christian women from the viewpoint of the Greco-Roman world, see Margaret MacDonald, *Early Christian Women and Pagan Opinion*, (Cambridge: Cambridge University Press, 1996).



history in the discussion and application of women's claims and entitlements. The dualities of liberation and subordination with regard to women promulgated in the Deutero-Pauline letters led to the resurgence of patriarchal attitudes within the Christian church in the late first and early second century (94-95, 303).<sup>11</sup>

These attitudes have carried over into the modern Christian belief systems, particularly among conservative denominations and in developing countries. M. Christian Green concedes that "the Christian response to secure *women's rights as human rights* has been one of ambivalence, contestation, and sometimes outright antagonism" (313). He cites recent examples of the joint activism of Christian ultra-conservatives (including evangelicals, Catholics, and Mormons) with conservative Muslims in an effort to fight against sexual and reproductive rights for women advocated by progressive groups who promote them as individual rights (313, 317).

In a similarly traditionalist fashion, the late Don Browning's work calls for government to return to forms of family law that require "adult behavior to conform to the normative requirements of the legal marriage that in the past has regulated procreation, parenthood, and children's rights" (284). Whether the law has ever successfully regulated these rights in the best interests of all concerned is highly debatable. Browning's argument that "marital institutions stabilize human inclinations" certainly challenges the personal experience of many women (and men) who find themselves in troubled or abusive relationships (294).<sup>12</sup>

Despite the views of ultra-conservatives, many mainstream and liberal Christians are taking a stand in favor of women's claims and entitlements on a global scale (302-30). President Jimmy Carter and other religious leaders supporting CEDAW (the Convention on the Elimination of Discrimination Against Women) declare as unacceptable "the justification of discrimination against women and girls on the grounds of religion or tradition, as if it were prescribed by a higher authority."<sup>13</sup> In his own words President Carter went even further, stating that "male religious leaders have had—and still have—an option to interpret holy teachings either to exalt or to subjugate women."<sup>14</sup> Through these and other examples, Green challenges Christianity to encourage an emancipatory interpretation of scripture and to purposefully contribute to a transformation of the rights of women within the global community and the modern human rights framework. He calls for Christianity to move "beyond a hermeneutic of nature and *creation* to grace and *redemption*" (319, 302-303). Other recent Christian scholarship also articulates the contribution Christianity can make to women's human rights if it seeks to practice a redemptive-movement

<sup>11</sup> For a gauge of conditions for women in pre-Christian world of Judaism, see Tal Ilan, *Jewish Women in Greco-Roman Palestine*, Peabody, MA: Hendrickson Publishers, 1995).

<sup>12</sup> Despite the restriction of women's rights implied in Browning's chapter, he accomplishes his intended goal to raise awareness of critical issues affecting children's rights (283-300).

<sup>13</sup> The Elders, "Equality for Women and Girls," July 2, 2009, <http://www.theelders.org/womens-initiatives>.

<sup>14</sup> Jimmy Carter, "The Words of God Do Not Justify Cruelty to Women," July 12, 2009, <http://www.guardian.co.uk>.



hermeneutic rather than one that is static.<sup>15</sup>

Christianity can endeavor to maximize its voice on human rights in several ways. These include stimulating solidarity on fundamental rights within the global Christian community, preserving and promoting rights of religious autonomy, and cultivating inter-faith cooperation and respect. The potential and influence of unanimity on a core of human rights values by the global Christian community is immense—sociological statistics associate more than 2.2 billion people with Christianity.<sup>16</sup> Robert Bellah discusses the conceivable benefits of a “global cultural consensus with a religious dimension” (352). A more specific approach would recommend the influence of a Christian consensus on rights as a powerful dimension of the global human rights framework. By the most inherent definition, common denominators of Christian belief on human rights include the principles of a divine universal order, man made in the image of God, the intrinsic and redemptive value and dignity of human beings, compassion, forgiveness, freedom of conscience, and the most fundamental rights of subsistence.<sup>17</sup>

It is vital to realize that a united Christian voice on core human rights need not demand compromise on the finer interpretations or moral code of various Christian confessions. Rather, Christian churches and institutions should join in the effort to preserve and promote their rights of religious autonomy whenever possible, protecting autonomous leadership, membership, and confessional systems of theological principles and moral policy based on their own interpretation of scripture.

In their attempts to be comprehensive, present systems of global human rights sometimes exceed their usefulness by treading on the very rights and institutions they were established to protect. Religious organizations need not accept the seemingly boundless expansion of scope and control of these state and international instruments and organizations (13). Greenawalt reemphasizes the dangers of state established religion and interference by governments in setting religious policies and agendas that disregard the reality of modern religious pluralisms and the attendant ideals of institutional religious polity (241, 279).

Although not always evident or properly understood, separation of church and state *protects* religious freedom, and clear distinctions must be maintained between religious and government institutions. Religion plays an indispensable role in the social enforceability of rights, and constitutionalism is dependent on non-state polities and the interaction of self-governing religious organizations and communities (279). When these systems function properly, government allows organized religion to retain its authority to require doctrinal or moral obedience from its members, and the state insures that every individual has the freedom to chose their

<sup>15</sup> See Webb, *Slaves, Women and Homosexuals*, (30-66)

<sup>16</sup> CIA statistics in 2011 associate 33.3% of the world's population with Christianity (or approximately 2.2 billion people), including practicing and cultural Christians. See CIA World Factbook, accessible at [www.cia.gov/library/publications/the-world-factbook/geos/xx.html](http://www.cia.gov/library/publications/the-world-factbook/geos/xx.html).

<sup>17</sup> On rights of subsistence see John Copeland Nagle's chapter, “A right to clean water” (335-349).



religion. Green explains that this synergy is vital to religious liberty:

It is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state and thereby clears out and protects a social space, within which persons are formed and educated, and without which religious liberty is vulnerable (Green 280).

Separation of church and state, religious autonomy, and freedom of conscience and choice must be fundamental elements of international human rights systems and domestic legal structures.

In a global society where religious plurality is sharply on the rise, Christians have a duty to cooperate with other religious traditions. This is essential to supporting religious liberty and making a meaningful contribution to sustainable human rights efforts in a multifaith society. Bellah argues that only collaboration by world religions may carry enough weight to elicit real and lasting change in international and multilateral human rights frameworks and instruments (361). Such united efforts carry the potential for what Witte calls the dawn of a “new ‘human rights hermeneutic’” among world religions (13).

In support of this movement, Christians have the opportunity to practice *respect* rather than merely *tolerance* toward the members of other faiths. Too often the distinction between respect and tolerance is lost, and with it much of Christianity’s potential to influence religious liberty and diversity in a multifaith global society. Some Christians accept the idea of political or social equality with people from different religious traditions, but choose to view these individuals as spiritually ignorant, misguided or fundamentally unenlightened (237). Robert Seiple succinctly lays out the distinctions between tolerance and respect:

It is important to differentiate respect from mere tolerance. Respect elevates. Tolerance seeks a lower common denominator. Respect ultimately comes from the heart. Tolerance is an exercise of the intellect. Respect celebrates humanity. Tolerance allows for a cheap form of grace to be applied to people we do not especially like. It is forbearance, not equality. Tolerance is a lesser value. Those who reflect ‘the image of God’ must demonstrate respect (327).

Christians are often quick to forget that Christ’s “other sheep” are still sheep.<sup>18</sup> Many of the authors in *CHR* join in challenging Christianity to new and continued interfaith cooperation on behalf of human rights by uniting with other faiths in a common purpose to forge what Bellah describes as a “genuine institutional force” within the global community (361).

In his compelling chapter, “Christianity, human rights, and a theology that

---

<sup>18</sup> John 10:16, NIV.



touches the ground,” Seiple shares several moving stories that demonstrate the effectiveness of uncompromised compassion that treats even the most ignoble human beings with the value Jesus would have placed on them. This kind of Christianity knows no boundaries and its agents of hope fully grasp Christ’s declaration that “whatever you did for one of the least of these brothers and sisters of mine, you did for me.”<sup>19</sup> *Christianity and Human Rights* challenges every Christian to draw from of the rich heritage of their faith to defend individual and religious liberty, bringing freedom, dignity, and hope to all members of the human family.



---

<sup>19</sup> Matt. 25:40.



# RELIGION, SOLIDARITY AND HUMAN RIGHTS IN “A SECULAR AGE”

ZANE YI<sup>1</sup>

Taylor, Charles, *A Secular Age*. The Belknap Press of Harvard University Press, 2007. 874 pp. \$39.95

*A Secular Age* is a sprawling work that engages numerous disciplines—philosophy, history, literature, sociology, religious studies, etc. The heart of the work is Taylor’s account of the rise of modern, secular society in the West. In what follows, I focus on the main arch of his narrative, explicating the issue(s) that will most likely be of interest to readers of this journal, namely, Taylor’s account of natural law and rights. Although rights, and more specifically the right to the freedom of religion, are not an obvious focus of the work, Taylor’s argument can be understood to be an indirect argument for the importance of such rights. My analysis will show that Taylor’s narrative is part of a larger argument for the continuing relevance of religion in modern, secular societies.

According to Taylor, belief in God is not the same as it was 500 years ago. What was an assumed truth, for most people, is today considered questionable, and for some, difficult to believe. What has changed? Taylor ambitiously attempts to answer this question by tracing what he calls a shift in “the background” of reasoning. What Taylor refers to with this term is the set of unarticulated presuppositions that shape the way we consciously reason about things. Taylor’s objective in *A Secular Age* is to articulate the presuppositions that make belief in God seem difficult and problematize them.

One of the obvious targets of the book is the overly simplistic narrative many people unconsciously hold about the genesis of modern society: “the subtraction story” of modernity. The process of secularization, i.e. the development of scientific rationality and differentiated social institutions, is understood to lead to the inevitable decline of superfluous (and false) metaphysical beliefs, an ethical focus on improving social conditions and the removal of factors that obstruct an essentially benevolent human nature.

Against this understanding, Taylor offers his own “Reform master narrative.” According to Taylor, a society where belief in God seems theoretically optional only becomes possible because of changes in other beliefs, namely ethical ones. Changes

<sup>1</sup> Zane Yi is a Ph.D. candidate in Philosophy at Fordham University in Bronx, NY.



in beliefs about human nature, its abilities and values are the precondition for a change in theoretical beliefs about the nature of ultimate reality. “Disenchantment”, to use Weber’s term, alone is not enough for unbelief to become plausible for wide sectors of society;<sup>2</sup> the positive option of “exclusive humanism” is needed.<sup>3</sup>

“Exclusive humanism” is defined as “a humanism accepting no final goals beyond human flourishing, nor any allegiance to anything beyond this flourishing.”<sup>4</sup> Humans had to grow confident in their abilities to create such a flourishing order before they could think of that flourishing order being an end-in-itself and existing by itself, i.e. without appealing to a transcendent order. Instead of seeing the love of worship of God as an end, or the afterlife, humans grow to understand improved social conditions as a valuable and attainable end. This involved a self-understanding of humans as possessing “the active capacity to shape and fashion our world, natural and social; and it had to be actuated by some drive to human beneficence.”<sup>5</sup>

But what made this new self-understanding plausible? Taylor argues that social reform movements motivated by Christian ideals played a crucial role. Taylor traces the beginning of such reform movements to the Hildebrandine Reform of the eleventh century. Through this effort, Pope Gregory VII sought to improve the moral and educational standards of the clergy; this was the first of numerous attempts to raise monastic and clerical practice to a higher standard of devotion and piety. These efforts grew to include efforts to improve the religious practice of the laity as well. In 1215, the Lateran Council demands “a regime of once-yearly confession, absolution and communion on all lay people.”<sup>6</sup> This, according to Taylor, is the genesis of more ambitious reform movements that eventually attempt “to change the habits and life-practices, not only religious but civil, of whole populations; to instill orderly, sober, disciplines, productive ways of living in everyone.”<sup>7</sup>

The relative success of these reform movements resulted in enough individuals developing “disciplined, sober, and industrious” lives as a second nature to lead to a general increased confidence in the human ability to transform individual lives, as well as society.<sup>8</sup> An important development of this confidence is a new understanding of human nature, one that is motivated by benevolence on a universal scale.

<sup>2</sup> The term “secularization” was coined by Max Weber who explained the modernization of society primarily in terms of increased scientific rationalization; the inevitable result of this rationalization was the “disenchantment of the world.” See Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, New York: Penguin, 1904-5, reprinted in 2002.

<sup>3</sup> Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007), 41, 423.

<sup>4</sup> *A Secular Age*, 18.

<sup>5</sup> *A Secular Age*, 28. This further distinguishes modern humanism from the humanisms articulated by ancient philosophers. For example, Epicureans sought to achieve *ataraxia* through a passive acceptance of the fact that the gods are indifferent to the plight of humanity.

<sup>6</sup> On the significance of this council, see also Michel Foucault, *The History of Sexuality: An Introduction*, Vol. 1, trans. Robert Hurley (New York: Vintage Books, 1990), 58, 116. Taylor’s thesis seems to have been significantly influenced by Foucault.

<sup>7</sup> *A Secular Age*, 244.

<sup>8</sup> *A Secular Age*, 228.



It [i.e. exclusive humanism] was accompanied by an increased sense of human power, that of the disengaged, impartial, ordering agent, or of the self-giver of law, or of an agent who could tap immense inner resources of benevolence and sympathy, empowering him/her to act for universal human good on an unprecedented scale.<sup>9</sup>

Taylor claims that the creation/discovery of such moral sources is “one of the great realizations in the history of human development.”<sup>10</sup>

So Taylor’s historical claim is that exclusive humanism became a widespread view because of the success of Christian reform movements. It is the development of this understanding, reinforced by the success of attempts at societal reform that led to the widespread plausibility of metaphysical views like deism and eventually, atheism. Furthermore, Taylor makes the stronger claim that exclusive humanism *could not* have arisen in any other way.<sup>11</sup> Admitting that this claim is difficult to demonstrate, he argues for its plausibility, asking, “How could the immense force of religion in human life in that age be countered, except by using a modality of the most powerful ethical ideas, which this religion itself had helped to entrench?”<sup>12</sup>

This is not to say that Christianity is the only factor to consider in this process of developing anthropological conceptions. Taylor acknowledges the important role that Stoicism, as well as the natural law tradition, played, discussing the views of Hugo Grotius and John Locke. In the seventeenth century the idea that humans possess rights and have certain obligations toward each other, which precede their political bonds, is articulated and begins to gain traction. Humans are understood to enter into society for mutual benefit and any legitimate political authority formed through social contract must protect the rights humans naturally possess.

This understanding of natural law marked a departure from the Aristotelian-Thomistic understanding of natural law, which is based on a teleological conception of human nature. On the new model, human nature, instead of being directed towards certain ends, is understood to be essentially social and rational, and “a rational being who is also sociable would have to have laws which made living together possible.”<sup>13</sup> In other words, ideal political laws are also based on natural laws. This, Taylor points out, is also a marked departure from conceptions of laws being the “law of the people” or the view that society is ordered after the hierarchical cosmos, i.e. “nature”, which previously dominated ways of thinking of political order.

What was originally a political theory shared by intellectuals to legitimate and critique established governments has seen a remarkable expansion in both extension and intensity. It shapes the way more and more people think, unconsciously, about

<sup>9</sup> *A Secular Age*, 261-262.

<sup>10</sup> *A Secular Age*, 255.

<sup>11</sup> *A Secular Age*, 259, 267.

<sup>12</sup> *A Secular Age*, 267.

<sup>13</sup> *Ibid.*, 126.



society and politics, as well as morality. Today, the demand to recognize and protect the natural rights of individuals is “heavier and more ramified.”<sup>14</sup>

How did this expansion happen? Taylor, again, claims it was driven by praxis. His claim is worth quoting in full, as it articulates the assumption that drives his entire counter-narrative of modernity, described above. He writes:

[F]or the most part, people take up, improvise, and are inducted into new practices. These are made sense of by the new outlook, the one first articulated in the theory; this outlook is the context that gives sense to the practices. And hence the new understanding comes to be accessible to the participants in a way it wasn't before. It begins to define the contours of their world, and can eventually come to count as the taken-for-granted shape of things, too obvious to even mention.<sup>15</sup>

The cycle continues both individually and collectively with new practices expressing new understanding, which gives rise to more new practices, etc.

Some readers will doubtlessly be concerned with the historicist and constructivist nature of Taylor's account of human nature and rights. In a recent response to critics, Taylor explains that his narrative intentionally resists both intellectualism and essentialism; instead of a linear process of purely intellectual development, Taylor understands human nature and cultures to be “constructed” over time “by long processes which no one oversees or controls.”<sup>16</sup> Our understanding of human nature cannot be separated from the self-understandings we have ourselves, for humans are self-reflective beings, and these self-understandings are inevitably historically and culturally contingent.

When it comes to human rights, then, this means that humans do not “essentially” have rights derived from nature, but that “we,” at least in the West, cannot help but think we do. This raises many important questions about the universal legitimization of rights. If Taylor is correct, the idea that humans are bearers of rights is one conception among many and the difficult task remains of explaining how this conception is one that should apply to everyone else.

Taylor does not attempt this. His point is that most Westerners cannot help but think of themselves, as well as others, as beings that possess rights. Possessing them, advancing them and protecting them are what most Westerners assume are part a full life. Taylor uses the term “fullness” to describe the general sense people have of what it means to live a good life. While there are different understandings

<sup>14</sup> *A Secular Age*, 160.

<sup>15</sup> *A Secular Age*, 175-76.

<sup>16</sup> Charles Taylor, “Afterward: Apologia pro Libro suo” in *Varieties of Secularism in a Secular Age*, edited by Michael Warner, Jonathan VanAntwerpen and Craig Calhoun (Cambridge: Harvard University Press, 2010), 301-02.



of what such a life looks like, Taylor claims that the desire for fullness is universal.<sup>17</sup> For many people living in modern, Western societies, fullness involves ideals of lives spent in the pursuit of the actualization of universal justice and benevolence for others.

Taylor’s account makes the fragile and contingent nature of this self-understanding evident, as well as the difficulty of sustaining it. Nietzsche’s influence is evident here; Taylor sees a disparity between the ethical demands many people feel and the motivational resources that are available to them to consistently act on those demands.

This brings us back to the argumentative arch of Taylor’s book. He asks:

Our age makes higher demands of solidarity and benevolence on people today than ever before. Never before have people been asked to stretch out so far, and so consistently, so systematically, so as a matter of course, to the stranger outside the gates...[W]e are asked to maintain standards of equality which cover wider and wider classes of people, bridge more and more kinds of difference, impinge more and more in our lives. How do we manage to do it?<sup>18</sup>

Taylor argues that non-religious motivational sources, what he calls “moral sources,” are insufficient to motivate people to act in accordance to their high moral ideals but suggests that religious moral sources, i.e. the Christian concept of *agape* or the Buddhist concept *karuna* are.<sup>19</sup>

Taylor explores the attempt, in modern societies, to achieve a self-stabilized social-order through promoting enlightened self-interest, free-market economies and political democracy. Noting the short-comings of these resources alone, Taylor explores how more social solidarity could be achieved. He argues that a higher level of general altruism is needed.<sup>20</sup> According to his analysis, however, the non-religious moral sources inherited from the Enlightenment, are either inadequate to generate this or prone to a dangerous negative dialectic.

For example, one’s own sense of *personal dignity* as a rational agent is a fragile motivation—“A solidarity ultimately driven by the giver’s own sense of moral superiority is a whimsical and fickle thing,” Taylor claims, and falls short of meeting the

<sup>17</sup> Taylor writes, “I’m taking it as axiomatic everyone, and hence all philosophical positions, accept some definition of greatness and fullness in human life” (*A Secular Age*, 597). Taylor’s claim about “fullness” in *A Secular Age* is one that has been misunderstood by numerous critics. For criticisms, see Simon During, “Completing Secularism: The Mundane in the Neoliberal Era” in *Varieties of Secularism in a Secular Age*, eds. Michael Varner, Jonathan Van Antwerpen, and Craig Calhoun (Cambridge, MA: Harvard University Press, 2010), 107, 109. See also Jonathan Sheehan, “When was Disenchantment? History and the Secular Age” in the same volume, 229-232. Taylor responds to these objections by clarifying his use of the term “fullness” in the final chapter of the volume. See “Afterward: Apologia pro Libro suo”, 315-318.

<sup>18</sup> *A Secular Age*, 696

<sup>19</sup> *A Secular Age*, 18.

<sup>20</sup> *Ibid.*, 692.



universality and unconditionally demanded of us by our sense of fullness.<sup>21</sup> Grounding motivation in *the dignity and worth of others* and their immense potential, however, fares no better. As humans consistently fall short of their potential, one struggles with disappointment and “a growing sense of anger and futility”; respect of others can gradually become contempt, hatred, and aggression.<sup>22</sup> As the actual performance of individuals falls short of the ideals one has for them, there is the risk of an ugly reversal.

Similarly, moral motivation grounded in a sense of *justice* can legitimate further hatred and violence. One senses a feeling of indignation against wrong doings and inequalities in society. However, this sense of indignation can be fueled to become hatred against those one identifies as being a perpetrator or cause of these injustices. Taylor warns, “The stronger sense of (often correctly identified) injustice, the more powerfully this pattern can become entrenched. We become centres of hatred, generators of new modes of injustice on a greater scale...”<sup>23</sup>

After his critical assessment, Taylor suggests that Christian theism, with its understanding of a God of *agapic* love, as well as the Buddhist concept of *karuna*, could provide an adequate source that is not prone to such reversals. Taylor’s reference to *karuna* is insufficiently brief, but he offers a remarkably theological robust explanation of *agape*, describing it

Either as a love/compassion that which is unconditional, that is not based on what you the recipient have made of yourself; or as one based on what you are most profoundly, a being in the image of God. They obviously amount to the same thing. In either case, the love is not conditional on the worth realized in you just as an individual, or even in what is realizable in you alone. That’s because being made in the image of God, as a feature of each human being, is not something that can be characterized just by reference to this being alone. Our being in the image of God is also our standing among others in the stream of love which is that facet of God’s life we try to grasp, very inadequately, in speaking of the Trinity.<sup>24</sup>

In sum, Taylor argues that the ethical ideals of the modern West are historically derived from Christianity, and although they may no longer need religion to normatively legitimate them, they need theological resources to consistently motivate or sustain them. This being the case, Taylor presents an either/or by out-lining three ethical options:

<sup>21</sup> Ibid., 696.

<sup>22</sup> Ibid., 697.

<sup>23</sup> Ibid., 698. Taylor’s assessment of secular moral sources stems from his own personal political experience, and a close read of both Nietzsche and Dostoevsky, along with René Girard theory of scapegoating. See René Girard, *La Violence et le Sacré* (Paris: Grasset, 1972). Girard argues that the worst atrocities can be justified by reasoning that the elimination of a perceived evil in society requires it. This form of legitimization, according to Taylor, is prevalent in humans, generally, and cannot be applied to solely to religious fundamentalists.

<sup>24</sup> *A Secular Age*, 701.

1. Heroic humanism – This is the kind of humanism exemplified by Dr. Rieux in Camus’ *The Plague*. Dr. Rieux faithfully treats patients suffering from a mysterious disease with no explanation, for no apparent reason.
2. Nietzschean anti-humanism – A rejection of the virtues and values of the Western, liberal tradition as anti-natural, demeaning and unhealthy.
3. Christian humanism – A re-affirmation of Western, liberal values, but with an epistemic openness or affirmation of theism, which can adequately motivate people to behave altruistically on a global scale.<sup>25</sup>

Taylor rejects the first two options as being untenable. He argues that Dr. Rieux is a fictional character. While he acknowledges the growing prominence and legitimacy of the Nietzschean, anti-humanist tradition, he seems to think it is an unpalatable and unviable option for most people.<sup>26</sup> This means Christian humanism is the remaining option for those that want to affirm the ethical ideals of the Western liberalism.

Lest this sound overly triumphalistic, Taylor is quick to acknowledge that generating “proof,” in the strong sense, of the adequacy and inadequacy of moral sources is impossible. Yet, he holds out the possibility of “a careful examination of what actual works on the ground” to settle the question of what is true or false.<sup>27</sup> “These questions, Taylor claims, “can only be answered by a close study of the actual human record, together with a sensitive and perceptive understanding of the different motivations at play.”<sup>28</sup>

In other words, Taylor seems to think that close empirical observation and careful analysis will support his own position over alternative accounts. While he acknowledges the historically troublesome record of Christians acting inconsistently of their purported ethical ideals, he points to exemplars like Mother Teresa, as well as Jean Vanier, the founder of L’Arche, who devoted his life to creating communities for the developmentally disabled.<sup>29</sup>

However, the secular humanist, in addition to reiterating examples of historic or contemporary examples of Christian violence and injustice, will offer counter examples of numerous secular “saints” who devote their time, efforts and resources to selfless causes. Take, for example, the philanthropic activity of Bill and Melinda Gates, who for apparently non-religious reasons have focused their energies on giving away at least half of their considerable wealth during their lifetime. Other

<sup>25</sup> *A Secular Age*, 699-701.

<sup>26</sup> Taylor describes contemporary cultural debates as a three-cornered debate between secular humanists, neo-Nietzscheans, and religious believers; any pair can gang up against the third on some important issue. Secular humanists and Nietzscheans will accuse believers of being other-worldly; humanists and believers, however, find Nietzschean anti-humanism unpalatable; lastly, and ironically, believers and Nietzscheans join together in critiquing humanists for the failed promises and progress of the Enlightenment. See *A Secular Age*, 636-637.

<sup>27</sup> Charles Taylor, “Reply,” *Thesis Eleven*, 99 (2009), 101.

<sup>28</sup> *Ibid.*, 101.

<sup>29</sup> *A Secular Age*, 765.



examples of non-religious philanthropists include individuals like Warren Buffet and Ted Turner. One might provide further examples of some of the physicians and staff who serve in Médecins Sans Frontières, itself a non-religious organization.

Taylor's suggestion that one pay special attention to the motivations at play for altruistic action is just as inconclusive. Motivations are difficult to gauge, and it seems that one can always attribute ignoble motivations to the other. Taylor's own analysis seems to be a reversal of Nietzsche's genealogical analysis of the motivations for Christian belief and morality. According to Nietzsche, Christian morality (and belief) is an expression of slave morality and really motivated by *ressentiment* and a will to power.<sup>30</sup> Religious people can be motivated by ignoble motives as nonreligious people can be by noble ones and vice versa.

What then is the outcome of Taylor's argument? Despite the objections above, minimally, Taylor presents a compelling account of how religious movements and ideals have played a role in the formation of modern societies in the West. Taylor's narrative blurs the clean distinction polemicists make between “religion” and “secularism.” If Taylor is correct, the view that the ideals of secular, modern society are something wholly other or opposed to the ones that religions provide, or an overcoming of religion, betrays a deep historical connection.

Because of this history, religion is not something that can be shed like a cicadian shell, but intricately intertwined the continuing ideals of modern, liberal, secular societies, at least in the West. “The account I'm offering here has no place for unproblematic breaks with a past which is simply left behind us,” Taylor writes at the close of his book. Citing Robert Bellah, Taylor claims, “Nothing is ever lost.”<sup>31</sup>

This conclusion runs contrary to the widely accepted secularization thesis in sociology, which claims that as societies progress intellectually and socially, religion is no longer needed, functionally, to explain the world or provide for the basic needs of its citizens. This leads to predictions of religion's eventual complete privatization and/or demise.<sup>32</sup> For several decades, this theory enjoyed widespread acceptance in the social sciences.<sup>33</sup>

More recently, however, this theory has been contested by a growing group of scholars, of which Taylor is just one example. For example, the seemingly global proliferation of religion in modern societies has caused Peter Berger, a major proponent

<sup>30</sup> Frederich Nietzsche, *Genealogy of Morals*.

<sup>31</sup> *A Secular Age*, 772.

<sup>32</sup> Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1967); Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* (New York: Macmillan, 1967); Brian Wilson, *Religion in Secular Society* (London: C.A. Watts, 1966). For an overview of the development of secularization theory and its claims, see Jose Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994), 17-39.

<sup>33</sup> According to Jose Casanova, it is the only theory which attained “truly paradigmatic status” in the modern social sciences. See Casanova, *Public Religions in the Modern World*, 17.



of the theory in the 1960's, to reverse his views.<sup>34</sup> Others have argued, using data from polling, that modern societies like America, are just as, if not more religious, than in the past.<sup>35</sup>

Beyond offering a plausible historical account of the role religion has played in the formation of modern self-conceptions and ethical ideals, Taylor offers a rich exploration of the potential that religious beliefs have to continue sustaining these ideals, arguing that religion is still vital and relevant to modern society. Beyond beliefs, however, Taylor envisions religious communities themselves, motivated by their beliefs, playing a vital role in society. He refers the Church as a “network of agape.” This community creates close relations between strangers that are not based on kinship or law, but a common understanding of the love that God has for humans.<sup>36</sup>

Taylor is not the only prominent political philosopher that seems to have come to the conclusion that religions have a continuing relevance for individuals and social morality. Jürgen Habermas' recent statements about the relationship between religion and morality mirrors Taylor's views; they seem to be reversal of Habermas' early views where he envisions the social relevancy of religion being replaced by pure philosophical discourse.

In his recent lecture “An Awareness of What is Missing,” Habermas' shares his position on the relationship between religion and philosophy as one of complementary dialogue between equals.<sup>37</sup> According to Habermas, although practical reason can provide universalistic justifications for morality, it is motivationally weak. He claims:

[T]he decision to engage in action based on solidarity when faced with threats which can be averted only by collective efforts calls for more than insight into good reasons... [P]ractical reason fails to fulfill its own vocation when it no longer has sufficient strength to awaken, and to keep awake, in the minds of secular subjects, an awareness of the violations of solidarity throughout the world, an awareness of what is missing, of what cries out to heaven.<sup>38</sup>

Aside from these claims of religion's continued relevance based on historical and ethical considerations, more ambitiously, Taylor's argument can be understood to have epistemic consequences, as well. If all belief, including contemporary unbelief, takes place in the context of a “background,” what Taylor has done is identified some of the elements of the background that make theistic beliefs seem problematic

<sup>34</sup> Peter Berger, ed. *The Desecularization of the World: Resurgent Religion and World Politics* (Washington, DC: Ethics and Public Policy Center, 1999). Berger claims that the “whole body of literature by historians and social scientists loosely labeled ‘secularization theory’ is essentially mistaken” (2).

<sup>35</sup> Rodney Stark, “Secularization, R.I.P.” *Sociology of Religion*, 60.3 (1999): 249-273.

<sup>36</sup> *A Secular Age*, 737-741.

<sup>37</sup> Jürgen Habermas, et al. *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age*, trans. Ciaren Cronin (Malden, MA: Polity Press, 2010), 18.

<sup>38</sup> *Ibid.*, 18-19.



and undermined them. If his account of reasoning is correct, materialistic accounts of reality rest on an over-simplistic narrative of history and tenuous assumptions about human nature; thus if Taylor's account is right, minimally, one should be less dogmatic in his or her materialism.

Although Taylor does not broach the topic of religious rights specifically, there are important implications of his account for the freedom of religion. If religion has played an essential role in the development of modern society, shaping its moral aspirations, and if it can continue to play an irreplaceable role in motivating those ideals, the preservation of religious rights is essential for the continuing survival of modern, liberal society, providing one of the conditions of possibility for the realization of its deepest and most demanding ideals—citizens that deeply, and unconditionally, love one another.



# *The Secular Challenge to Religious Freedom*

INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION

**7<sup>th</sup> World Congress  
April 24-26, 2012**

PUNTA CANA, DOMINICAN REPUBLIC

As western societies become increasingly secular, how will the change in world view impact religious freedom? Can religious freedom remain a treasured value even when religion itself loses its allure? When new rights regimes clash with religious freedom rights, which prevail in the secular society?

You will not want to miss this opportunity to meet and hear the experts in the field of religious freedom who have thought about the issues of secular challenges to religious freedom around the world

**Registration now open at [www.irla.org](http://www.irla.org)!**



International Religious Liberty Association

# FIDES ET LIBERTAS



---

PART THREE:  
REPORT OF IRLA ACTIVITIES

---



# GETTING READY FOR A CHANGING WORLD IRLA REPORT 2011

DR. JOHN GRAZ, IRLA SECRETARY GENERAL

Anyone reading the news headlines over the past year could be forgiven for thinking that religion is a force which serves mainly to spawn intolerance, divide nations, and fuel extremism. We've seen the brutal slaughter of Shabaz Bhatti, Pakistan's only Christian cabinet member; the deregistration of all but 14 "traditional" churches in Hungary; the imposition of more restrictions on religious freedom in Kazakhstan; a new anti-sect law proposed in Belgium; increasing uncertainty for religious minorities following the turmoil of the "Arab Spring;" political back-and-forth in the United States over the future of a key religious freedom watchdog; and a new French law that tells Islamic women, "You cannot leave your home wearing a burqa."

And then, there was the release of a major international study suggesting that more than a third of the world's population—2.2 billion men, women, and children—live in places where religious persecution not only exists, but is actually on the rise.<sup>1</sup> A grim forecast, indeed, for minority religious groups. And now as the end of the year approaches, the world watches as a young Iranian pastor awaits his fate: will the state of Iran listen to the appeals of the international community and release him? Or will he be executed for the crime of following his conscience?

Even as the IRLA responds to these developing situations—as we work each day with our partners at the United Nations, on Capitol Hill, and with associations and governments around the world—we also realize it's critical to sometimes step back and take the time to examine the underlying currents—social, political, economic, and legal—which are moving beneath the surface of these headlines.

Now, more than ever, I believe we need to understand these forces that are remaking our world in ways that will have far-reaching implications for the future of religious freedom advocacy.

## ARE WE READY FOR A CHANGING WORLD?

Consider this: In an unusually candid speech early last year, the former president of The World Bank made a startling prediction. James Wolfensohn told Stanford Graduate School of Business students that the world is poised on the edge of a major global power shift. The next few decades, he said, will see today's leading economic

<sup>1</sup> Pew Forum of Religion & Public Life, "Rising Restrictions on Religion: One-third of the world's population experiences an increase." Found at: <http://pewforum.org/Government/Rising-Restrictions-on-Religion%282%29.aspx> (retrieved October 10, 2011).



countries go from controlling 80 percent of the world's income to a mere 35 percent. According to his reckoning, we're living in the waning days of dominance for the euro, the British pound, and the US dollar. And where currency leads, political influence follows.

So what does this have to do with religious freedom?

Simply put, as the economic and political plates of our world continue to shift, the foundations of our current human rights discourse will also be shaken. And already the ideological ground is beginning to move beneath our feet. In tomorrow's world, the model of religious freedom we now take for granted—religious freedom as an overarching, inviolable, *universal* human right—will have a less inevitable feel.

### TOSS OUT THE RULEBOOK?

Today's global environment is radically different to the war-shocked, nationalism-weary world of 1948 that gave birth to the Universal Declaration of Human Rights—a set of ideals which Eleanor Roosevelt, who chaired the drafting committee, called “the international Magna Carta of all mankind.” She, and the other framers, saw religious freedom as a cornerstone human right, which helped prop up the entire framework of these newly-minted international rights.

Could it be that this robust conception of religious freedom is now passing into the realm of nostalgia? Have we passed the high water mark of international recognition and protection of the rights of religious minorities? Are we now heading into uncharted social, legal and political territory?

Think about these trends of the past decade:

- The ongoing struggle in many countries—especially in the former Soviet bloc states—to assert a national identity, often focusing on a particular religious tradition as a unifying cultural force. Hence, both Hungary's and Kazakhstan's move to recognize a handful of “historic religions” and limit the activities or legal status of minority or “new” faiths, which are often perceived as carrying foreign cultural baggage.
- Growing calls from many countries—from China to Saudi Arabia to some African nations—to recalibrate the language of international rights to acknowledge “cultural relativism,” and to move beyond merely a Western model of individual rights.
- An ever-increasing global sensitivity to religious extremism and religiously-motivated terrorism which, since September 11, 2001, has been cast as perhaps the most significant destabilizing force in today's geo-political struggles.
- The changing role of “secularism” within the religious freedom discourse. The secular state, which is characterized by an attitude of neutrality between different religions, has long been seen as an essential precondition for protecting religious minorities. But secularism as a worldview is now at times taking on a less benign and more proactive guise, perhaps seen most



vividly in the 2011 French law which banned the wearing of the Islamic burqa in public—a move some government officials claimed was necessary to preserve the “secular nature of the French state.”

- The growing social influence of postmodernism, which doesn't see religion as something deserving “special protection,” but rather as just another “special interest group” within a milieu of competing moral and social voices.

## LEARNING A NEW LANGUAGE

The way the international community understands, articulates, and protects religious freedom is changing. This conviction—along with a realization that we need to become fluent in the evolving language of religious freedom rights—is driving plans for what we hope will be the IRLA's largest-ever religious freedom congress.

The 7th World Congress will be held April 24 to 26, 2012, in Punta Cana, Dominican Republic, and will bring together some of the world's leading experts to examine the changing face of the religious freedom discourse. Together, we'll ask a question that's becoming increasingly important: “Is secularism friend or foe when it comes to religious freedom?” For many people of faith, the word “secularism” carries a host of negative connotations. They may see it as a force inherently hostile toward religion, which aggressively seeks to cleanse the public sphere of any manifestation of faith. They may see the increasing influence of the secular worldview as a frightening trend—a direct threat to the role of religion in shaping society's values. But the reality is far more nuanced than any simple black and white analysis. And as voices for freedom, we need to know how to speak effectively in a world where secular ideology is an evolving, dynamic, and increasingly dominant force.

Like our previous world congresses, the Punta Cana event will attract a diverse, international group of thought leaders, academics, government officials, religious leaders, NGO representatives, lawyers, and others. A series of plenary sessions and breakout groups will feature more than 50 internationally renowned experts, scholars, and speakers, including such dignitaries as Ambassador Robert Seiple, former US Ambassador at Large for International Religious Freedom, and Dr. Neville Callam, Baptist World Alliance General Secretary and leader of 100 million Baptists worldwide.

Are we ready for a changing world? The days when we dreamed of a universal, consensus-driven “Magna Carta of human rights” may be behind us. But as we meet together next year in Punta Cana for the 7th World Congress, I hope we'll learn new, more effective ways to speak the language of freedom in today's complex, rapidly changing global environment.

*A personal note:* This year was marked by a great sadness for the IRLA with the death of Karel Nowak, a wise and tireless advocate for freedom. He died August 19 while taking a few days' vacation in Cairns, Australia, en route to the IRLA Meeting of Experts in Sydney. During his years of work at the United Nations, the European



Parliament, and with a wide range of associations and religious groups, he earned the respect and goodwill of many, many people. Karel was also my friend, and I will miss him greatly. --*Dr John Graz, IRLA Secretary General*

#### SIDEBAR: YOU'RE INVITED!

The IRLA's 7th World Congress, to be held April 24-26, 2012, in Punta Cana, Dominican Republic, will be an historic event—the first Congress to be held in the Inter-America region, and likely the largest Congress to date. It's open to everyone who wishes to deepen his or her understanding of current issues and challenges in the world of religious freedom advocacy.

The International Religious Liberty Association invites you to be a part of this exciting event. More than just an academic conference, this three-day congress will offer practical resources, stimulating presentations, and the opportunity to interact with a truly global group of experts, government officials, religious leaders, and advocates.

The venue itself is unique—the Barceló Bavaro Beach Resort and Convention Center is one of the Dominican Republic's most beautiful, all-inclusive, beachside resorts.

The 7th World Congress website, [www.irla.org](http://www.irla.org), has all the information and links you need to register for this event and plan your visit to beautiful Punta Cana. Or send your questions to us at [info@irla.org](mailto:info@irla.org).

#### IRLA 2011 HIGHLIGHTS

- In January, IRLA Secretary General Dr. John Graz was honored with the Counsel on America's First Freedom's "National Award" for his contribution to the cause of religious liberty around the globe. During his acceptance speech, Dr. Graz noted how his family heritage has shaped his commitment to freedom: his grandfather perished in Dachau concentration camp, where he was imprisoned by the Nazis for his role in helping Jews and French resistance members escape from occupied France to Switzerland. Graz also outlined his dream of active organizations in every corner of the world ensuring the promise of religious freedom becomes a daily reality.
- The Hope Channel studios in Silver Spring, Maryland, came alive in March with the taping of 29 new half-hour episodes of the IRLA's television program, *Global Faith and Freedom*. The programs featured a diverse group of guests, including scholars, such as John Witte, Jr. of Emory University and Bryan McGraw of Wheaton College and representatives from non-governmental organizations such as The Beckett Fund for Religious Liberty and The Sikh Coalition. They addressed a broad range of topics, from religious freedom in the Middle East to religious freedom for the Sikh community in



North America. Visit [www.hope.tv](http://www.hope.tv) for listings or go to [www.globalfaithand-freedom.org](http://www.globalfaithand-freedom.org) to browse all episodes and watch them online.

- The 9th Annual Religious Liberty Dinner in Washington, D.C. brought together more than 200 ambassadors, government officials, religious leaders, and religious liberty advocates on April 5 to celebrate religious freedom and honor those around the world who work to protect and promote this basic human right. The keynote speaker was Dr. Suzan Johnson Cook, President Barack Obama's choice to serve as Religious Freedom Ambassador-at-Large. She praised the work of the IRLA and called on all those present to recommit themselves to the effort of protecting and preserving freedom of conscience around the world.
- Twenty-seven academics and legal experts from 12 countries met at the University of Sydney in August to explore the rise of secularism and its impact on religious freedom. The three-day international think tank—organized by the IRLA in partnership with the Sydney University Law School—was the 13th annual IRLA Meeting of Experts. On the final day of the meeting, Greg Smith, Attorney-General of New South Wales, addressed the delegates. This year's Meeting of Experts was especially important as the material it generated will provide a springboard for next year's 7th IRLA World Congress to be held in Punta Cana, Dominican Republic, April 24-26. The IRLA experts will meet again next year at the Osgoode Hall law school at York University, Toronto, Canada.
- Regional IRLA associations around the world continued their many efforts to advance freedom, often in challenging circumstances. Notably, major training meetings and events were held in Russia, Lebanon, Australia, Mexico, and the Caribbean. In Brazil, a major religious freedom symposium, held June 9 in the National Assembly building in São Paulo, drew national attention. The event was organized by the Brazilian IRLA chapter and was attended by more than 200 lawyers, public officials, religious leaders, and activists.
- In the southern Mexican state of Chiapas, which has endured more than three decades of often violent religious conflict, a meeting organized by the Mexican Chapter of the IRLA celebrated new hope for peace in the region. The Second Forum on Religious Freedom, held in San Cristóbal de las Casas on July 16, attracted more than 650 attendees.
- In 2011, the IRLA said farewell to two outstanding IRLA deputy secretary generals—Attorneys James Standish and Barry Bussey. Each have taken up new challenges internationally but they remain close and valuable friends of the IRLA. These men made tremendous contributions to the cause of freedom in Washington, D.C. and at the United Nations in New York and Geneva.



- In March, the IRLA was delighted to welcome veteran attorney and business leader Dwayne Leslie to be the IRLA's voice on Capitol Hill and among Washington, DC's diplomatic community. Later in the year, distinguished scholar and linguist Dr. Ganoune Diop joined the IRLA team to take up the task of representing the association at the United Nations. Together with new communication director, Bettina Krause, United Nations specialist, Gail Banner, and executive assistant and protocol specialist, Carol Rasmussen, the IRLA team is looking ahead to new challenges and initiatives in the coming year, and beyond.



---

## FIDES ET LIBERTAS SUBMITTING MANUSCRIPTS

---

*Fides et Libertas* encourages the submission of manuscripts by any person, regardless of nation or faith perspective, wishing 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. It is to be seen as 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 remains 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. Copies should be in Word 2003 or compatible format. Articles must be submitted in U.S. or U.K. English. A paper copy only manuscript will not be accepted as it will complicate the process for our staff. 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 *The 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 the *Fides et Libertas's* mission, standards and priorities, articles are 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, *Fides et Libertas* reserves the right to withdraw the manuscript from the publication process. Generally, *Fides et Libertas* publishes material which has not previously appeared nor will it publish simultaneously articles accepted by other journals.

Articles in electronic format or disk, or author's requests for information should be addressed to:

Barry W. Bussey  
Senior Editor  
*Fides et Libertas*  
International Religious Liberty Association  
12501 Old Columbia Pike  
Silver Spring, Maryland  
20904-6600 USA  
busseyb@irla.org

## 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.

Our Book Review 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*.

Electronic Format of Book Reviews: Book reviews should be submitted by email attachment or CD in Microsoft Office Word '03 or compatible format to our Book Review Editor.

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 or editors
  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 above.

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, please contact:

Dr. Lisa Clark Diller  
Book Review Editor  
*Fides et Libertas*  
History Department  
Southern Adventist University  
P.O. Box 370  
Collegedale, TN 37315-0370  
Email: ldiller@southern.edu  
Phone: 423.236.2417

# FIDES ET LIBERTAS



## CALL FOR PAPERS

### Religion and Politics in International Policy

A special issue of **Fides et Libertas** is being planned, is the problem of the mutual interdependence of religion and politics in international policy. We would be interested in articles that provide an analysis of the issue of religion and politics, comparative studies, studies undertaken in a multicultural context and other interesting, in-depth case studies. Possible topics for consideration include but are not limited to:

- The role of religion in international affairs policy
- The public policy issues that Western democracies have to be concerned about in establishing departments of religious freedom in their foreign affairs bureaucracy
- Foreign policy consequences for advocating religious freedom?
- Religious radicalism

Please send your submissions to the Editor at: [barrybussey@gmail.com](mailto:barrybussey@gmail.com). **The deadline for submissions is May 15, 2012.** Accepted applicants will begin to be notified by June 30, 2012. In the body of the e-mail, please include the following information: name, affiliation(s) – corporate or university and department, level of graduate study, and title of paper. **PLEASE** be sure to follow the “Submitting Manuscripts” guidelines.

