

# CONSCIENCE AND LIBERTY

2012

*The Universality of Human Rights*



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*Conscience and Liberty 2012*

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## **International Association for the Defence of Religious Liberty**

A non-governmental organization in consultative status with the United Nations and the Council of Europe.

Head Office: Schosshaldenstrasse 17, CH-3006 Bern, Switzerland, [www.aidlr.org](http://www.aidlr.org)  
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## Declaration of Principles

We believe that religious liberty is a God-given right, and hold that it is best exercised where separation is maintained between church and state.

We believe that legislation and other governmental acts which unite church and state are opposed to the best interests of both institutions and are potentially prejudicial to human rights.

We believe that public authorities are divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; in this realm public authorities warrant respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of thought, conscience and religion; this right shall include freedom to have or to adopt a religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion or belief either individually or in community with others and in public or private, in worship, observance, practice 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, humanitarian 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 those who share the same beliefs, individually or collectively in organized communities at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential in the promotion of understanding and peace among peoples.

We believe that citizens should use lawful and honourable means to prevent the reduction of religious liberty, so that all may enjoy the recognition of their freedom of conscience.

We believe that fundamental freedom is epitomized in the Golden Rule, which teaches that every human being should do to others as he would have others do to him.

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## Editorial Office

Schosshaldenstrasse 17, CH-3006 Bern, Switzerland

E-mail: [info@aidlr.org](mailto:info@aidlr.org); Phone: +41 (0)31 359 15 28; Fax: +41 (0)31 359 15 66

Editor: Attorney Liviu OLTEANU

Assistant editors: Sigrid BÜSCH, Jami SIMPSON, Christiane VERTALLIER

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Each author is responsible for accuracy of the quotations used.

From left: Human Rights lawyer Professor Abdelfattah Amor with Dr. John Graz, Secretary General of the International Religious Liberty Association, at the 5th IRLA World Congress, Manila 2002.

*Photo courtesy IRLA*



## IN MEMORY OF PROFESSOR ABDELFATTAH AMOR

### *His Work Will Live On*

There will be an empty seat when the international religious freedom community comes together in Punta Cana this April for the 7<sup>th</sup> World Congress. My friend, Professor Abdelfattah Amor, will not be with us and his absence will be felt by many, many people who knew and admired him.

When Professor Amor died in early January 2012, aged 68, tributes poured in from around the world. He was lauded as a “staunch defender of human rights” and a “prominent diplomat and jurist” who played a key role in exposing religious repression around the world. News articles noted his service to the United Nations as Special Rapporteur for freedom of religion or belief and his most recent role investigating corruption in his home country Tunisia.

I knew Professor Amor as a man of tremendous integrity, intellect and courage, and I felt privileged to call him “friend”.

I received the news of his unexpected death just a few short weeks after I’d met with him in Geneva. He’d heard that I was visiting and generously included me in his busy schedule. I was pleased to be able to introduce him to Dr. Ganoune Diop, my new associate for the United Nations, and we spent an interesting and pleasant time together.

I first met Professor Amor in London in 1995, during a symposium on religious freedom organized by the universities of Exeter and Emory. He was the keynote speaker and I was attending along with my colleagues Dr. Bert Beach and Dr. Gianfranco Rossi. As fellow French-speakers, it was natural that

we should spend time together. Our friendship grew and he accepted my invitations to be the keynote speaker of the IRLA's 4<sup>th</sup> and 5<sup>th</sup> World Congress in Rio and Manila.

In Manila, I remember asking him, "Professor Amor, what are the most important qualities that an Ambassador of Religious Freedom should possess?"

He looked at me, thought for a moment, then replied, "Respect, integrity, honesty, and perseverance."

I have never forgotten his answer. These qualities were central to Professor Amor's tremendous strength and impact as a voice for religious freedom. He was respected because he respected others. He had a great credibility because he was honest and because integrity was his way of living. And, he succeeded in his Mission of United Nations Special Rapporteur, over a long period of time (1993-2004), because he also possessed *perseverance*.

For many years, Professor Amor spoke for the persecuted of the world and defended their rights in the court of the powerful. He made a difference at the United Nations and his memory will survive as an example of excellence and sincerity. Some people have asked, "Can someone be a devout Muslim and also be a sincere defender of religious freedom?" My answer is always, "Of course!" Professor Amor was both.

When I met with him last year, I asked him about his projects for 2012. He answered, "I'll spend my time with my wife and my family." After a life of service to others, he was looking forward to being with those closest to him. I feel a tremendous sense of sadness that he and his family will not enjoy this precious time together.

I'll never forget his face and his eyes as he asked me about our mutual friends from the IRLA, "... and Beach, what is he doing?" And then a long list of names followed: "De la Hera, Martinez de Codes, Jeremy Gunn, Cole Durham, Rossi, Seiple..." And he said, "You know, I miss you all." He saw all of us as a team who, with himself, had committed ourselves to defend freedom of belief.

As the date of the 7<sup>th</sup> IRLA World congress approaches, I feel certain that Professor Amor will be present with us in our thoughts and in our hearts. And for the people around the world whose rights he passionately and ably defended, his work will live on.

*John Graz*  
Secretary General, IRLA

## NEW SECRETARY GENERAL OF IADRL



As of January 2012, the IADRL has a new Secretary-General: Attorney Liviu Olteanu.

Liviu Olteanu is an excellent and suitable person to work in the field of international relations, especially with the United Nations, because of his personality, academic background, integrity, capacity and competency in public affairs and human rights.

He has earned a bachelor's degree in law, a bachelor's and a master's degree in theology, a master's degree in education, the title of Expert in Human Rights, a degree in diplomatic and international studies, a diploma of Advanced Studies in Law, and is currently writing his doctorate in Law.

Born in Brasov, Romania in 1956, Liviu Olteanu is married and has three children.

At the core of his personality, I recognize moral values in Liviu Olteanu. I would identify them as respect for men of all faiths and beliefs. I recognize in him a strong will for dialog and a search for balance and honesty in the quest for human dignity.

My wish for Liviu Olteanu is that he will be able to fulfill his dream of helping liberty of conscience develop in a noble way.

*Bruno Vertallier*  
President, IADRL

# HUMAN RIGHTS AND UNIVERSALITY: A NECESSARY AND CONTINUOUS RELATIONSHIP\*

## *Human rights are universal*

When we speak about *human rights*, we can either discuss all human rights collectively or restrict our focus to a specific right such as religious liberty. Religious freedom is a fundamental liberty, which over the course of time has come to be viewed by some as a *friend*, an integral component of personal dignity. On the other hand, with the increased fear of religious fanatics after 9/11, religious freedom has also come to be seen as a *dangerous matter*. How should we approach such a controversial topic?

Since religious practice is part of contemporary human life, it cannot and should not fall outside the sphere of interest of public authorities, although the state must remain neutral and impartial toward the exercise of various religions, faiths and beliefs.<sup>1</sup> Such '*universality*' opens our horizons regardless of territories, ideologies or temporal frontiers. This vision, conscience and hope can't be imprisoned. There are values, goods, rights and liberties that belong to the patrimony of our humanity, permanently necessary to all human beings regardless of geographic space, ideology, race, color, gender, or social status.

'Universality' is the cornerstone idea of the 1948 Universal Declaration of Human Rights. From the viewpoint of different political systems, civilizations, religions and countries, there are different considerations regarding the universality of human rights. We can also ask: since universality is not a matter of *decree* but rather of *recognition*, is it utopist to seek to realize a certain level of universality?<sup>2</sup> What should be the role and impact of religions and various ways of thinking in this search for universality? Hans

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\* The current issue of this magazine was prepared by Karel Nowak, former Secretary-General of the IADRL, and Editor-in-chief of Conscience and Liberty. Unfortunately, due to his unexpected death on August 19, 2011, he was not able to complete the edition. We thank his successor, Attorney Liviu Olteanu, for kindly writing the editorial.

1 White Paper on Intercultural Dialogue, 3.5 in:

<http://www.coe.int/t/dg4/intercultural/Source/Livre%20final%20FR%20020508.pdf>

2 Forum on the Universality of Human Rights, Oslo, 21-22 October 2010, Workshop 1a: Universality and religions.

Küng proposes a *minimal universal ethic* that goes beyond religions<sup>3</sup> (italics added). *Global Ethics* for us means *fundamental agreement* in respect for the values that must be imposed, for the criteria that must be maintained and for essential personal attitudes. Without such an agreement, each community sooner or later runs the risk of chaos or dictatorship and individuals sink into despair.<sup>4</sup> We also need an 'agreement' to develop training tools to teach us to recognize other people's unique characters and richness, the dignity of each of us, recognition, promotion and defense of the right to liberty and security for all and the right to equality and non-discrimination regardless of where around the globe we make our home.

When speaking about human rights, we encourage dialogue, use of diplomatic tools and promotion of the message that there is unity in diversity. We believe in truth, respect and tolerance. We utilize conferences and councils for peace resolutions that lobby for defending any and all human rights, but we think they are insufficient unless accompanied by practical change. There is a need for honesty, availability and facts.

### ***Increasing the Authority of the United Nations***

The Human Rights Council (HRC) in Geneva recently<sup>5</sup> adopted a Resolution entitled "Promotion on the Right to Peace". I am in agreement with the truth expressed by Ambassador **Eileen Chamberlain Donahoe** of the Delegation from the United States of America: "Like all peace-loving nations, the United States is deeply concerned whenever conflict erupts and human rights are violated. We also know that any peace is unstable where citizens are denied the right to speak freely or worship as they please, choose their own leaders or assemble without fear."<sup>6</sup> Ambassador Donahoe also clearly stated: "The [Human Rights] Council can make the greatest contribution to promoting peace by focusing on the implementation of human rights obligations and commitments. Human rights are universal and are held and exercised by individuals...."<sup>7</sup> Of course, all resolutions are important, but we need to focus on "the implementation of human rights obligations and commitments," an important and suggestive statement from the United States during these trying times!

We need to recognize and grant the United Nations Organization (UN) the place it belongs and the role it deserves in our society. The UN is the most important

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3 [http://www.weltethos.org/dat\\_fra/indx\\_0fr.htm](http://www.weltethos.org/dat_fra/indx_0fr.htm)

4 Declaration pour une Éthique planétaire p. 6, Parlement des religions du monde, Chicago, September 4, 1993; [http://www.weltethos.org/pdf\\_decl/Decl\\_french.pdf](http://www.weltethos.org/pdf_decl/Decl_french.pdf)

5 July 5, 2012, Palais of United Nations, Geneva.

6 UN Human Rights Council, Geneva, 20th Session, July 2012, Explanation of Vote-Promotion of the Right to Peace. Statement by the Delegation of the United States of America.

7 UN Human Rights Council, 20th Session, Ibid.

and necessary universal institution in place to confront today's critical and unsafe contemporary realities and to improve the stability of our world.

No doubt about it, the UN must become more dynamic and influential on fundamental freedoms. More authority, power and respect need to be granted to the UN in order to re-establish and maintain human rights and to protect life and liberty, security and peace, and religious freedom and conscience around the world. The resolutions on fundamental liberties developed by the United Nations (UN) Human Rights Council (HRC) should be more respected and introduced into the legislation of each individual country's government. If these actions were to occur, the *universality of human rights* would be strongly supported. Regardless, with wisdom and good will, the efforts of all the officials and diplomats from the United Nations (UN), European Parliament (EP), Council of Europe (CoE), Organization for Security Co-operation in Europe (OSCE) and other international institutions can be multiplied to create a more stable and normal life no matter where one calls home.

Don't forget that there is a need to value every effort made and the positive work completed over the years by the UN. Today, as we are burdened by different crises and insecurities, the General Secretary of the United Nations, **Ban Ki-moon**, is trying any and all possible means to find the missing piece to this international puzzle. He is fighting to find necessary and safe solutions to better tense situations of poverty, inequity and unfulfillment of human rights and liberties all over the world. For all Ban Ki-Moon's actions, he deserves the appreciation of the entire international community. **Kofi Annan**, former General Secretary of the United Nations and the man who started to reform the UN, is also involved in this peace process and deserves recognition for all his efforts, compromise and daily sacrifice. It is also essential to highlight the important work of the Human Rights Council in Geneva and the UN High Commissioner for Human Rights. **Laura Dupuy Lassere**, the 2012 President of the Human Rights Council, and **Navy Pillay**, UN High Commissioner for Human Rights, deserve special consideration for their capacity of communication, coordination, confidence and positive influence displayed by both in the Geneva Palace and from Pillay in all the places of the world where she is working to implement human rights for everyone. In addition, the work and reports of the intelligence advocates **Abdelfattah Amor** (unfortunately he passed away), **Asma Jahangir** (former Special Rapporteurs on Freedom of Religious or Beliefs) and Professor **Heiner Bielefeldt** (Special Rapporteur on Freedom of Religion or Belief, in function) have contributed and continue to contribute to the promotion and defense of the cornerstone right of religious freedom as an important *dimension* of the universality of human rights. I am convinced that the UN must receive a real show of international support to obtain complete respect, consensus and obedience to its Resolutions and Declarations.

### ***Other Actors in Favor of the Universality of Human Rights***

In addition to those mentioned above, the regional impact and actuation produced by the Council of Europe (CoE) in Strasbourg, by the European Parliament (EP) in Brussels, by the Organization for Security and Cooperation in Europe (OSCE) and by UNESCO cannot be forgotten nor underestimated. On the contrary, there is need for vigilant defending and continuous fighting for the good and dignity of every person and for universal values and human rights, with special *attention* to freedom of religion and conscience, which after 9/11 has come to be considered a very sensitive matter that has influence upon the peace and dynamics of international relationships.

At the same time, I am convinced that universities are a proper place for “*training the trainers*,” offering a place for thoughts and scientific studies and for creating a fresh vision on the matter of human rights and values. National parliaments, religious communities/organizations and non-governmental organizations (NGOs) – such as the International Association for Defense of Religious Liberty (IADRL) – can and must have a tremendous influence on the preparation of a proper social, legal and spiritual environment; on the promotion of respect for differences, peace and non-discrimination; and the stimulation of the defenders of dignity, human rights and universal fundamental liberties.

Are human rights and religious liberty regressing in the 21<sup>st</sup> century? Gregory W. Hamilton cites Brigham Young University professor W. Cole Durham Jr. as stating: “Between 70 and 76 percent of the world population is experiencing persecution.” Religious freedom and human rights are not advancing. While small but major religious freedom and human rights advances are being made in key countries and regions, often accompanied with democratic reform, these values appear to be regressing at a fairly rapid rate.”<sup>8</sup> What can we do about it?

First of all, do not forget that we all have a role: UN, CoE, EP, OSCE, and other international organizations, universities, NGOs, religions, churches, nations, families and all citizens.

Observe and monitor acts of injustice, the unfulfillment of human rights and fundamental liberties, in order to lead to the creation of an international culture of respect and well-argued correctional measures.

We need active determination and renewed availability on the part of all nations and people to influence changes, to see both the entire picture as well as individual components, but always focusing on the heart of the matter, which is the distinct and unchangeable idea that each human being be treated with DIGNITY.

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8 “Discrimination and the Persecutory Impulse”, Reflections on the 7th IRLA World Congress on Religious Freedom. <http://www.irla.org/world-congress-reflection-discrimination-and-the-persecutory-impulse.htm>

Last but not least, we need to make and live in a culture based on values, a culture that educates its people on human rights. This culture needs to start with the leaders and responsible parties in every nation.

### ***Minimal Universal Ethic as Possible Fundamental Agreement***

Those interested in the field of human rights are searching to find a correct understanding of the conflict regarding: the hierarchy of rights, sovereign universal rights, common human heritage, divine right and Western influence over the world. More and more we need to stress the importance of the universality of all human rights. However, we cannot view “the universality of human rights as a strategy of the western world for domination; it is essential to share a common law framework [human rights], which preceded the existence of modern nations, in order to shape the world for future generations.”<sup>9</sup>

There are countries with ideologies and leaders who are intolerant. In a totalitarian system, it is difficult to find a *minimal universal ethic* or to find a definition of *normality*. The ‘principle of normality,’ which is more easily found in a democratic system is not known or respected in a place where the people are moving by the interests of the leader(s) but not by moral or ethical principles; in such conditions there is a distortion of values and reality.

We need a *fundamental agreement* which can be found in the *universal praxis* of the Universal Declaration of Human Rights and Resolutions by the UN in favor of all people. There are risks and consequences when universal values are not realized including chaos, dictatorship, intense suffering and torture, insecurity, reduced or absent personal liberty and possibly death.

The following articles shall focus on the various aspects of the universality of Human Rights, their roles and confluence within a culture of peace.

Liviu Olteanu

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9 Forum on the Universality of Human Rights, 21-22 October 2010, Oslo-Thon Oslofjord Hotel.

# THE ISLAMISATION OF CHRISTIANS IN THE ARAB MIDDLE EAST WITHIN THE SYSTEM OF LEGAL-LEGISLATIVE PLURALISM

**Nael Georges**

*Doctor of Human Rights, Nael Georges is the author of a book entitled: 'The Rights of Minorities: The case of Christians in the Arab Middle East' as well as several scientific review articles based on religion and human rights. Nael Georges is heavily involved in the research into Arab and Muslim rights as well as the protection of human rights and interreligious dialogue in the Arab world. He is currently undertaking post-doctorate studies at the University of Geneva.*

The present day states of the Arab Middle East i.e. Syria, Lebanon, Egypt and Jordan have been governed by Sharia Law since the Islamic conquests of the 7<sup>th</sup> century. The modern legal system did not commence until the Ottoman era and has continued under European mandate when several non-religious codes of law were introduced into the legal systems of these nations. However, religious resistance, particularly in regard to the updating of the codes of personal status<sup>1</sup> is considered a handicap, and because of this, a system of legal-legislative pluralism based on religion remains in effect to this day. Thus, in the area of personal statutes, only in rare cases would civil law affect the jurisdiction and laws of the different denominational communities – for Christians equally as for Muslims<sup>2</sup>.

It is true that legal-legislative autonomy has enabled Christians to avoid, under certain circumstances, Sharia law being applied to their family affairs; nevertheless, these same laws have contributed to the forced Islamisation of a considerable number

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1 These include issues relating to marriage, divorce, wills, estates, etc.

2 Nevertheless, Egypt no longer tolerates the existence of independent religious tribunals. These have been abolished by Law 642/1955; however, this State has maintained the laws relating to non-Muslim communities because Christians have, since 1955, a legislative autonomy without any jurisdictional autonomy.



The religious leaders of the Orthodox Coptic community in Egypt have tended to follow this Catholic interpretation strictly in order to limit divorce. Thus the Egyptian Coptic Church often does not recognise those judgements of divorce obtained through a state tribunal for reasons other than adultery, and as a consequence, does not grant authorisation to remarry<sup>6</sup>. According to some Egyptian authors, the estimated number of Christians who convert each year in order to obtain a judgement of divorce is increasing by the thousands<sup>7</sup>. These people encounter significant difficulties when coming back to Christianity and they are sometimes accused of apostasy<sup>8</sup>. In April 2007, a convert from Christianity had his request to return to Christianity rejected by an Egyptian administrative tribunal which considered 'the conversion to Islam and its subsequent abandonment as a fraudulent manoeuvre against Islam and against Muslims'<sup>9</sup>.

These difficulties in the denominational legislative provisions relating to obtaining a judgement of divorce are not the only ones leading Christians to a conversion to Islam, as we will state below.

## II. Custody and Religion of the Children

Children resulting from a marriage between a Muslim and a Christian are necessarily registered as Muslims<sup>10</sup>. According to Muslim jurists, the children should follow the best of religions i.e. Islam<sup>11</sup>. We will seek to explain the position of the legal and legislative system with regard to the custody of children by a Christian mother in the case of legal conflict.

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6 Pope Shenouda III has adopted the decision No.7 from 1971, whereby no authorisation to remarry can be granted to an individual who has obtained a judgement of divorce from a non-Christian tribunal for a reason other than adultery. Cf. Nabil Loka BEBAWI , *ن ي ي ح ي س م ل ا ل a l -nasher, Egypt, 2004 edition, pg 26.*

7 In this context, Christians have on several occasions threatened the Orthodox Church to renounce their faith in order to solve their problems. Cf., Sabri HASSANIEN , « فلأ 051 » *ا ل a l -nasher, Egypt, 2004 edition, pg 26.*

8 For more details, see 'Christians within the Arab World and the Question of Apostoasy within Islam' by Nael GEORGES, *Maghreb-Machrek*, No.209, Autumn 2011, pgs 109-119.

9 Quoted in French by Sami ALDEEB, 'A view of the places of worship and religious practices in several Muslim and non-Muslim countries, Opinion 07-072', *Swiss Institute of Comparative Law*, 14 September 2007, pg 42.

10 In the Lebanon, children born of a mixed marriage follow the religion or confession of their father no matter what. However, the children can request to change once they reach adulthood. Cf. Bachir AL-BILANNI, 'Laws on Personal Status in Lebanon', Bachir AL -BILANNI, 'Laws on Personal Status in Lebanon', *Dar Al'ilem Lil -malayeen, Beirut, 1979, pgs 28-29.*

11 See below.

In principle, it is not required that the custody holder and the child share the same religion or confession of faith in the Eastern Arab States<sup>12</sup>. This means that a Christian mother of a Muslim child resulting from a mixed marriage may keep the child until a certain age<sup>13</sup>. Nevertheless, this type of custody is jeopardised if the child's religion is threatened by a religious influence from the mother. In such cases, the child is removed from his Christian mother, at least until she converts to Islam. In effect, it is common for this type of dispute to be triggered when the child is at an age when he can receive a religious education. In the Middle Eastern Arab states, this age is settled between five and eleven years, as we will observe.

Certain codes of personal status from the states of the East are often silent on the subject of unity of religion between the child and their guardian. However, the Quadri Code, which is applied in these cases where the law is silent<sup>14</sup>, anticipates in Article 381: 'the removal of the child if the Christian custodian exerts a bad influence upon the religion of the child'<sup>15</sup>. During a judgement on 6 April 1981, the Syrian Court of Annulment had recourse to Article 381, mentioned above, by assigning to the judge the possibility of verifying an allegation concerning the influence on the religion of the child<sup>16</sup>.

The conversion of a Christian husband to Islam authorises him to immediately seek custody of the child. The latter, because he is no longer with his mother, now has to follow his father's religion<sup>17</sup>. It is not necessary to await the registration of

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12 Neither the Hanafi code nor the Maliki code require unity.

13 Thus, the High Constitutional Court of Egypt intervened, in a case between two Coptic Orthodox spouses, to award custody of the child to the mother. The latter claimed that Article 139, the denominational code of personal status, was unconstitutional in that it fixed the custody age at 7 years; this is incompatible with Sharia law which sets it at 10 years of age. The mother claimed a violation of Article 10 of the constitution relating to protecting the interests of the child as well as Article 40 relating to equality. The High Constitutional Court considered in its decision that "Article 139 of the rules of Orthodox Copts effectively established an arbitrary discrimination between the citizens of the same country, by treating Muslim children better than Christian children". Case no. 74 year 17, meeting of 1 March 1997, published in the Official Gazette No. 11 of 27 March 1997. Cf. , Ahmad KHALIL, 'Manual concerning the laws of the family courts of Muslims and non-Muslims', Al-maktab Al-jami'i al -hadeeth edition, Alexandria, 2008, p. 505 and s.

14 As stated in the provisions of the codes of personal status.

15 Article 383 of the Quadri Code also states that the mother loses her right of custody in the event of marriage with a person unknown to the child.

16 Syrian court of cassation, Judgment No. 301 of 6 April, 1981. Case cited by Dina Sharif FELLER, *Al-Hadanah custody in Muslim law and in Egyptian, Syrian and Tunisian rights*, Librairie Droz, Geneva, 1996, p. 188.

17 Ahmad KHALIL, 'Manual concerning the laws of the family courts of Muslims and non-Muslims', Al-maktab Al-jami'i al -hadeeth edition, Alexandria, 2008, p. 376. Cf. also Article 129 of the Quadri Code.





On the other hand, the conversion of the wife to Islam leads to the dissolution of the marriage ties as a marriage between a Muslim female and a Christian male is prohibited according to the aforementioned law<sup>27</sup>. Nevertheless, the position of the legal-legislative system regarding conversion to Islam varies from one state to the next.

As for legislation, it is inspired by the Quadri Code<sup>28</sup>. The preambular paragraph no. 1 of Article 33 of the ancient Jordanian code of personal status no. 61 from 1976 considers all marriages between a Muslim woman and a non-Muslim male to be void. Article 28 of the new code of personal status from 2010 recently confirmed this restriction. Egypt does not expressly mention prohibiting marriage between a female Muslim and a Christian male in their personal status code. Because of this, the judiciary system references the Quadri Code which prohibits this type of marriage. Article 48 of the Syrian code of personal status from 1953 allows that ‘marriage between a Muslim woman and a non-Muslim male is void and any children issuing from this relationship are illegitimate’. To the point that a marriage between a female Muslim and a non-Muslim male is a public order offence in the Muslim states of the Arab Middle East. As a result, anyone can resort to a Sharia tribunal in order to separate the couple<sup>29</sup> using the framework of a trial, said Al-Husba<sup>30</sup>. And furthermore, the judge can decide lack of validity without any complaints allowed from the parties concerned. In the Muslim states of the Arab Middle East, with reference to such a relationship, jurisprudence refers to the rules of the Hanafi School of Thought, that is to say, Article 126 of the Quadri Code. This sets out that a conversion to Islam should be suggested to the Christian husband; if he accepts, the marriage is upheld; otherwise the dissolution of the marriage is pronounced<sup>31</sup>. The Muslim female

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party with an idolater. Article 120 of the Quadri Code states: “The marriage of a Muslim to a Christian or Jewish subject of the state or foreigner is allowed”. Finally, it should be noted that in the Muslim States in the Arab East the marriage between a Muslim and a Christian is celebrated before a Sharia tribunal which will be effective in case of litigation.

27 Cf. the following verses from the Quran: 2:221, 60:10 and 4:141.

28 Cf. Articles 120 to 125.

29 Cf. the decision by the Syrian Sharia tribunal no. 257 from 19 June 1969, base 250. And decision no. 860, base 591, from 30 September 1992, published in the *Al-Mohamoun Journal*, no. 11-12, 1993. Quoted by Ghada HAMAJ, *op. cit.*, pg 401.

30 It is a trial made use of by any citizen to defend a legitimate right before God. It is based in Islam on the verse 3:104 as well as on some ‘hadiths’ which insist on the order to do good and the prohibition of the blameworthy. And in Egypt, it is Law No. 3 of 1996 and Article 6 of Law No. 1 of 2000, which regulate this process in the arena of personal status. It should be noted that the draft of the Syrian Law of personal status (project 1) of 2009 includes, in its Article 21, the possibility of beginning such trials.

31 Judgment of the Syrian court of cassation no. 1101 of 12 May 1965; in the matter between Mrs.

therefore cannot cohabit with her husband, whose only choice in this case, to save his conjugal relationship, is a conversion to Islam.

The effects of this position have grave consequences on the legal and social stability of the Arab East. In one notable case in Syria, there had been a forced separation between a female Muslim and a Christian male. They had married and had a family of two children without being able to register either the marriage or the children at the civil registry office. Under advisement from a judge, the wife pressed charges in front of a Sharia court, claiming that her husband had lied about his actual religion. The tribunal declared their marriage corrupt and ordered an immediate separation between the couple and registered the children as Muslims because it is logical to follow 'the religion of the more honest of the two parents'.<sup>32</sup>

In the same context, it is useful to pause to consider the case of Mister Rezekallah Hanush, a Syrian Christian who was registered as a Muslim against his will. Mr Hanush was the victim of the legal position which prohibited his marriage with a Syrian Muslim woman. The couple had, however, celebrated a spiritual marriage away from court in order to avoid a change of religion. A little while later, the wife went to a Sharia tribunal in order to demand her marriage contract be registered, claiming that Mr Hanush had pronounced the 'Shahada' in front of his brothers-in-law. They then testified before the aforementioned court, leading to the decision number 72/498 on 15 February 1998, on the strength of which it acceded to the demands of his wife. The tribunal declared that the convert should become Muslim following his pronouncement of the 'Shahada' and non-compliance of these conditions would not exempt him from being considered as such by the law. Mr Hanush launched an appeal against this judgement to the Court of Cassation, affirming that he was a Christian, practising Christianity, and that this witness statement ought not to have been accepted by the court, having taken into consideration the family relationship<sup>33</sup>. The Court of Cassation rejected his appeal and confirmed the previous decision of the Sharia tribunal, now considering him to be a Muslim.<sup>34</sup>

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Marine, who converted to Islam, and Mr. Georges. See also the decision of the Court of First Instance in Cairo from September 3, 1956. And Mohamed Zuhir ABDOULHAK, *op. cit.*, pg. 181.

32 Judgment No. 997, base 8741 /96. It is important to note that a change of religion in Syria requires authorisation from the State Security Service. The latter does not authorise this readily.

33 It is also important to note that the Sharia courts do not accept the testimony of a Christian and they consider the testimony of two women equal to the testimony of one man.

34 Cf. the two decisions of the Syrian Court of Cassation, the first of the Sharia chambers no. 515, database 905 of 5 May 1999 and the second relating to the decision of the general administration no. 197, database 352, of 14 June 1999.

Prohibiting this type of mixed marriage constitutes a violation of two fundamental human rights, that is to say – the right to the freedom to marry<sup>35</sup> and the right to equality. A Muslim woman is not only discriminated against in relation to her husband but she is prohibited from entering into a marriage with a Christian. She loses both her right to the freedom to marry and is discriminated against by the fact that permission is denied for Muslims to marry Christians. Note that in this context, Christian legislation includes provision concerning the ban on mixed marriages. These are not applicable given the supremacy of Muslim law. In the face of inhuman conditions and in the absence of a civil institution of marriage, conversion to Islam seems to be the only possibility for a Christian male to be able to marry a female Muslim<sup>36</sup>.

It just remains to cite a few less significant cases relating to the conversion of Christians to Islam. We can quote, notably, the exemption from maintenance payments of a Christian husband if he converts to Islam<sup>37</sup>. Similarly, in the context of a mixed marriage, the Christian wife cannot inherit from her husband as a non-Muslim inheriting from a Muslim is prohibited<sup>38</sup>. As a result, the question

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- 35 Cf. Article 23 paragraph 2 of the International Covenant on civil and political rights.
- 36 Lebanon is the only state in the Arab East which recognises the effects of a civil mixed marriage concluded abroad between its citizens, under article 25 of the 146 L.R. from 18 November 1938. Cf. also the judgment of the Lebanese Court of Cassation No. 36 19 December 1964 and ruling no. 17 of the Court of First Instance from 5 April 1968.
- 37 It is worth noting that Article 160 of the Syrian Code of personal status does not allow alimony, in the case of a difference of religion, except for the husband's parents and his children. Because of this, the Christian wife of a Muslim husband is deprived of her maintenance. On the other hand, article 60 of the Jordanian Code of personal status of 2010 imposed alimony payments, even in the case of a difference of religion between the spouses.
- 38 The majority of the personal status codes of the Muslim States explicitly mention this prohibition of inheritance between a Muslim and a non-Muslim, such as article no. 264 of the Syrian code. It is to be noted that the registration of a testimony in favour of the Christian woman does not solve this problem. In effect, the Muslim law does not allow the testament in favour of others, i.e. the Christian wife, up to a third of her inheritance. The prohibition of the succession between persons belonging to two different religions found its basis in the Quran, verse 4:141, and more evidently in the Sunnah. The latter states: "The infidel does not inherit from the Muslim" and another saying of Mohamed: "Neither the Muslim does not inherit of the unfaithful, nor the infidel of the Muslim". The Muslim doctrine is unanimous on the prohibition for non-Muslims to inherit from a Muslim. However, the contrary is also the subject of controversy. With regard to the laws of the Arab East, these follow the Sunnite schools that prohibit the succession in both directions. Article 264 of the Syrian Code of personal status provides for the prohibition of the inheritance between a Muslim and a Christian and vice versa. In a case before the Syrian Sharia court, a Christian woman claimed her conversion to Islam prior to the

of succession can be resolved after a change of religion by one of the spouses in order to inherit from the other, such as the Christian wife becoming Muslim<sup>39</sup>. The conversion of the Christian husband to Islam allows him to enter into a second marriage. As for the Christian wife, she can separate from her husband, but also enter into a second marriage if she converts to Islam. In addition, conversion to Islam will annul any decisions by the denominational council against the converted person, such as being forbidden to leave the country<sup>40</sup>. Other situations not arising from the legal-legislative system of pluralism, lead equally to conversion, such as the desire to attain certain influential positions and escape from persecution, particularly in Egypt<sup>41</sup>. Lastly, a true belief in Islam and a desire to leave Christianity are also reasons for conversions.

It is clear that the legal-legislative system of pluralism in the Arab East is an instrument of Islamisation in the arena of personal status<sup>42</sup>. The primacy given to the Muslim law and to Muslims violates the right to religious liberty as well as equality between their citizens. The diversity of personal status, not only between Christians and Muslims but also within each community, constitutes shortcomings in the proper functioning of justice. It is clear that such a situation of inconsistency of evasion of the law and injustice will never lead to a legal or social stability or to the establishment of democracy. It is therefore imperative that there should be reform and modernisation. This would involve adopting a unified civil code, which would apply to all citizens without discrimination based on gender or religion. The Church is encouraged to take the first steps to attain the separation between religion

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death of her Muslim husband. The woman was attempting to unite her religion with that of her husband in order to inherit. The Sharia court ruled in favour of the woman and accepted the registration of her conversion to Islam as taking effect before the death of the husband. Cf. Decision No. 79, database 14 of the 28 February 1971 and Decision No. 411, database 432, from 27 April 1976. Cited by Mahmoud SHAMESS in 'Anthologies of standards of Lebanese and Syrian personal status laws', al-Halabi al-hukoukia edition, Beirut, 1999, pgs. 265-266.

39 It so happens that a Christian will convert to Islam to deprive his heirs of their legal shares. The heirs have no other means than a conversion to Islam to retrieve their shares.

40 Mohamed Zuhir ABDLOUHAK, *op. cit.* pg. 51. and Mahmoud SHAMESS, *op. cit.* pg. 69.

41 Throughout history, the exemption of the Jizyah was the main reason for the conversion of Christians to Islam as demonstrated by "the massive transition of the Melkites of Gaza to Islam in 1651, for financial reasons". Cf. Bernard HEYBERGER, 'The Christians of the Middle East at the time of the Catholic Reforms', École Française de Rome, Palais Farnese, Roma, 1994, pg. 77.

42 The Lebanon is a unique case where equality between the various religious groups is the foundation of its system. However, this equality does not create an effective system where religious freedom is respected.

and state. The Christian religious denominations should unify their personal status codes and abolish those which are incompatible with human rights, whilst awaiting the adoption of a civil code which is applicable to all citizens.

This secular system suits a modern society and above all human rights in general, and the principle of equality in the eyes of the law in particular. Nevertheless, the total secularisation of the law relating to family, in the current political climate, has very little chance of being accepted owing to religious opposition. Because of this, the best solution would be the establishment of a secular system in parallel to the current religious system, following the example of certain black African states. As a result, spouses would be free to enter into either a religious or civil marriage according to their beliefs.

It is certain that the years ahead will see a new political and legal outlook in the Arab East and will leave their mark on the legal-legislative system of pluralism. The citizens within this region currently face a profound transition. Will the citizens win the battle against Islamic ambition whose goal is a total and strict implementation of Sharia law?

# THE HISTORY OF HUMAN RIGHTS

## Valentine Zuber

*Historian and lecturer at the Department of Religious Sciences at Ecole Pratique des Hautes Etudes and member of the Research Group "Humanities, Religions and Secularism" at the French National Centre for Scientific Research (CNRS), Paris.*

### **Human Rights – a Political Agenda in Use Throughout the World**

At the end of the eighteenth century, the number of formal declarations proclaiming the natural rights of man increased in multiple countries. Every one of the advocates for these declarations extolled their universality and hoped, thereby, to work toward the progress of all humankind. Beginning in 1770, texts appeared promoting revolutionary upheaval which rocked many countries across continental America and Europe. America, having rid itself of its colonial yoke following a war that was observed and commented on at length in Europe, was initially affected by the political disorder. Encouraged by this example, other European countries subsequently wanted to carry out a revolution of their own: Ireland, Holland, Switzerland then France, successively or in parallel, questioned the traditional political order which had governed them up until that time. Some of these movements failed while others succeeded and in turn served as a model and source of hope for all those peoples who wanted increased access to political freedom and social equality. The different formal declarations of rights produced, even if they were not followed by political reform in their given countries, had a global impact. Translated and distributed widely throughout the Western world, the brevity and summarisation of the ideas which the declarations promoted meant that they efficiently relayed the revolutionary message to the furthest corners of the European continent.

The political effectiveness of these declarations of rights raised questions about this entirely new form of politics and its ideological means. Transcending borders, the proclamations of human rights serves as an ideological platform for most of the emancipation movements that took place in the West throughout the nineteenth century. However, the proclamations remained at the theory level for a long time, and it often took several decades before they were brought into effect. One century

later, as a result of delayed contamination, they once again served as a political platform for the different national freedom movements in various countries outside of Europe.

Colonised countries have indeed taken advantage of the universality of the principles proclaimed to overcome the yoke of their European masters who were the unwitting inventors. Following the atrocities of the Second World War, the idea of human rights was revived on a worldwide scale. Undoubtedly inspired by the early texts from the end of the eighteenth century, the Universal Declaration of Human Rights of 1948 prompted a proactive policy of promoting these human rights across the globe. Extending the political and civil outcomes to the economic and social challenges experienced by the various world populations has significantly expanded the definition of human rights and instigated the development of specific legislation under public law in every country, implementing at long last those solemnly-declared principles.

Nevertheless, human rights from the second half of the twentieth century encountered multiple stumbling blocks as they spread across the globe. Civilisations outside of Europe and its Western annexations, the birthplace of human rights, provided an increasing challenge to spreading them, seeing in them evidence of a cultural and spiritual stranglehold and the political domination of the former colonisers.

Recognition of human rights by every nation around the world can only be achieved through the effective globalisation of their principles, in particular through the transformation from purely legal theory to a smooth and progressive adaptation into a world which is resolutely pluralist and open.

### **Three Symbolic Texts: 1776, 1789, 1948**

#### **The Progress of Human Rights**

A veritable rash of texts detailing human rights in an expositional format emerged at the end of the eighteenth century in North America and Europe. This literary genre, which attempted to be constitutional and lawful, originated in the various American colonies during their march towards independence and thrived in the Western world during the years which followed immediately afterwards. In addition to the texts emerging from each colony, of which the most well-known is the Virginia Bill of Rights in 1776, is the collective version of the American Declaration of Independence from the same year, followed by the adoption of the Bill of Rights (Amendments 1-10) of the American Constitution in 1791.

Meanwhile, the French Constituent Assembly was absolved of its own proclamation of the rights of man and citizen around the time of the particularly turbulent summer of 1789. France's unique revolutionary disorder gave rise to two opportunities to re-edit the bill in 1793 and again in 1795. Other nations followed suit: the Belgians with their



A painting by Robert W. Weir (1803–1890) showing Protestant pilgrims on the deck of the ship Speedwell before their departure for the New World from Delft Haven, Holland, on July 22, 1620. At the left side of the painting is a rainbow, which symbolizes hope and divine protection.

*Photo: Wikimedia Commons / Architect of the Capitol*

Declaration of the Rights of Man and of the Citizen of the Franchimontois people in September of that same year, the Genevan Declaration of the Rights and Duties of Social Man in 1793, and the various declarations of rights and constitutions of the Italian, Batavian and Helvetic republics, which were in the process of being established following the Napoleonic wars (1797–1798). The process continued during the nineteenth century in France with the preamble to the French Constitution of 1848.

A long period of inactivity followed, during which declaratory texts were not considered so vital by those nations in the process of formation. Nationalist ideology had taken priority over the promotion of universal human rights. This was the case right up until the victors of the Second World War deemed it necessary to define politics on a world-wide scale immediately following the Holocaust, which demonstrated the culmination of nationalism and its murderous consequences. These policies were begun in 1948 at Trocadero, Paris, with the formal proclamation of the Universal Declaration of the Rights of Man, which became the new ethical charter of the recently formed United Nations.

## **Universal Rights**

In contrast to the English Bill of Rights of 1689 which laid out the ancient rights and liberties of free Englishmen solely, the texts of 1776, 1789 and 1948 all proclaimed the equality, universality and natural rights of men as human beings, regardless of their national affiliation.

The American Declaration of Independence of 4 July 1776 affirmed as much in its second paragraph: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The Declaration of the Rights of Man and of the Citizen (26 August 1789) states in its first article: "Men are born and remain free and equal in rights." Whereas the Universal Declaration of Human Rights (10 December 1948) proclaimed: "that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... this current Universal Declaration of Human Rights (ought to be) a common standard of achievement for all peoples and all nations."

## **The Origination Question**

### **The Pioneering Role of the Americans**

The significant role of the Anglo-Saxons in the creation and implementation of the theory of human rights during the seventeenth to eighteenth centuries is now recognised throughout the historical community. Inspired by the philosophical musings of the thinkers of that era and drawing from the consequences of their experience in their flight across the Atlantic in order to escape religious persecution on their home continent, the Americans have been both pioneers and a much admired and copied example for the rest of the world. In essence, they were the first to declare and put into practice radically different political solutions to those employed by the old regimes in order to achieve both their isolation and their great religious and social diversity. However, the precedent set by America does not exempt political scientists from questioning the ideas about the origins of the new political principles implemented back then. Having been previously imported from Europe, it is through an intense exchange and an intellectual influence which transitioned from the ancient to the new worlds that human rights were able to be well specified, codified and eventually put into practice first in American and then in European politics.

### **Of Religious Origins?**

Since the end of the eighteenth century, political thinkers have regularly clashed over the identification of the intellectual roots of the rights of man. Some have upheld

a specifically religious origin following the ecclesiastical and theological revolutions brought about by the sixteenth century Reformations. Others have asserted the major role played by secularisation and the individualisation of thought brought about by philosophers from the time of the Cartesian Revolution to the Age of Enlightenment in Europe. These various interpretations were certainly explanatory elements, but also somewhat very ideological motivations which have sullied their self-proclaimed universality. Thus, the underlying ideological aims of those countries which have promoted human rights through overt proselytisation have subsequently been very draconian in dealing with any obstacle to the dissemination of these principles to the rest of the world.

### **The Reformation, the Source of Individual Rights**

Mainstream liberal or reactionary thinkers from the nineteenth century wanted to discover the religious roots of the political revolutions that were in progress at the time or had already taken place; they made the declarations of the rights of man and produced the new table of the law that was adopted by the modern world.

In France, identifying the works of the Reformation with those of the Revolution in a kind of ideological parallel coupling became standard practice within the historiography of the nineteenth century, no matter whether it was of a reactionary, a liberal or a republican bias. Each was searching for the religious and theological key to unlock the problems posed by the arrival of modernism, which brought with it the following consequences: democracy, pluralism and the progressive secularisation of society. The equation between the Reformation and modernism could be interpreted in two opposing ways dependent upon how these thinkers appreciated the evolution of society in their era. Those who claimed the legacy of 1789 generally viewed the Reformation as the starting point of the long and difficult march towards the advent of modern liberty. This was true of the liberal thinkers, often protestants or philo-protestants (from Benjamin Constant to Edgar Quinet to Francois Guizot, Jules Michelet and Alexis de Tocqueville), the French protestant historians and theologians and their political allies, and the Republicans from the nineteenth to the early twentieth century.

On the contrary, those who objected to the introduction and the generalisation of the ideas of the Enlightenment in modern political behaviour saw the Reformation as the revolutionary first act in the beginning of a chain reaction leading the country toward a loss of everything which had up until then provided its backbone, its unity and its identity. This was the case of reactionary thinkers and anti-protestants from Joseph de Maitre to Charles Maurras.

Yet, the Reformation/Revolution equation was more frequently breached by some of the more patriotic (Jacobin) republican historians who at the time placed the emphasis on the specifically French and philosophical origins of these ideals



Jean-Jacques Rousseau (1712–1778), Genevan philosopher and writer of the 18th century. His political philosophy influenced the French Revolution as well as the overall development of modern political, sociological and educational thought.

Rousseau in 1753, by Maurice Quentin de Latour.

*Photo: Wikimedia Commons*

and revolutionary principles. The fact that an investigation by the Germans (Georg Jellinek and his contemporary Max Weber) had again devoted part of their work to the re-evaluation of the contribution made by Protestantism (in its Calvinistic or semi-Calvinist form) was well received by the French Protestants but did not bode well with the French who held that this (the Revolution) was an heroic event that would have been solely achieved by the nation.

### **Of Philosophical and Secular Origins?**

Another school of thought has, in essence, radically rejected any form of religious influence within the genesis of the theory of natural rights. For these thinkers, it was the very process of severance from strict religious thought that allowed the development of a secular and independent ideology of human rights; these then became a privilege enjoyed by all mankind irrespective of their customs or their religion. These authors suggest that a mental and cultural revolution took place in the eighteenth century concerning the apprehension of the individual. This novel state of mind was mostly promoted throughout society via several channels: novels championing the destiny of the individual (Jean-Jacques Rousseau and Richardson), the battle by the philosophers for the abolition of torture (Voltaire), religious liberty and the advent of individual liberties (Condorcet). This cultural climate would have permitted the evolution of new social and political concepts such as the natural

rights of man within society. The European Enlightenment would, therefore, have been instrumental in the advancement of individual autonomy. The likes of Hugo Grotius and John Locke through Jean-Jacques Burlamaqui and Rousseau, the different political theories of the Social Contract and the new education treaties placed the feelings of the individual at the forefront and made for the widespread understanding of the sacredness of the human being.

Whatever the origins of the rights of man, whether religious or philosophical, researchers agree on one fact: human rights essentially originated in the West and they appeared due to a gradual secularisation of Christian societies.

### **Implementation of These Declarations: a Process in Evolution**

#### **A long-delayed implementation**

Despite their common aspiration to universality, the American and French declarations of 1776 and 1789 did not bring about a general implementation of these rights to everyone within their entire population. Admittedly, these rights allowed the limits of individual liberty to be curbed. Thus, the very first civil acts of the French Revolution significantly pushed back the boundaries of personal autonomy. The abolition of 'lettres de cachet' and religious discrimination, the introduction of civil marriage, the right to divorce, the significant lowering of the age of consent, the end of automatic rights and privileges of the firstborn, equality of males and females to inherit and the end of absolute paternalism – these all significantly limited the boundaries of personal autonomy. Yet these all-new rights still did not afford any protection to children, the mentally ill, non-landowners, slaves, freed black men, certain religious minorities and occasionally, but most significantly, for women.

Declarations of rights from the eighteenth centuries contained essentially so-called civil and political rights, which initially only applied to human beings of the male gender and who were politically and economically free. These rights were known, after they were extended to all human beings, as the first generation of human rights. Certainly there were references to economic and social rights within the French declarations from the end of the eighteenth century to the start of the nineteenth century (the right to work, 1793, and the right to welfare, 1848), but they were rarely implemented. It was not until the improvement of national laws relating to the economic and social protection of the weakest in society that these economic rights, as such, fell within the scope of human rights.

#### **The product of international mobilisation**

It was essentially after the Second World War that these all-new rights (the right to work, to strike, to an education, and to social security) were integrated overwhelmingly into the different state rights. Thus, they have been called second generation rights. Since then, new forms of rights have been defined. These new



Mrs Eleanor Roosevelt, First Lady of the United States from 1933 to 1945, supported the formation of the United Nations and chaired the committee that drafted and approved the Universal Declaration of Human Rights. The picture shows her holding a copy of the 1949 issue in Spanish.

*Photo: Wikimedia Commons / Franklin Roosevelt Library*

rights are the subject of constant debate both domestically and among nation states and have not, yet, all been endorsed nationally or internationally. For example, it is possible to find, rather haphazardly, all manner of claims for recognition of these rights: environmental, developmental, self-determination, the right to be different, for minorities, for peace, etc. Since the United Nations' Charter (1945) and the Universal Declaration of the Rights of Man (1948), these human rights have been extended, codified, and international systems put into place to watch over their application.

In 1966, the UN adopted an international covenant relating to civil and political rights and an international covenant relating to economic, social and cultural rights. The following year, a UN Commission created an investigatory mechanism employed within member states to investigate human rights' violations.

The first international meeting of National Institutions for the promotion and protection of Human Rights was organised by the National Consultative Commission on Human Rights (CNCDH) in Paris under the auspices of the UN in 1991. Two years later, a programme of action called 'Vienna' was defined by the UN General assembly. It gave a significant role to democracy and economic and social development, all considered integral to human rights. The declaration resulted in a United Nations High-Commission on Human Rights and required that all signatory states create their own institutions designed to guarantee the respect for human rights on a national level. In 2006, the Commission for Human Rights was replaced by the Council of Human Rights.

Bodies have also been created on a regional level following the signing of the international treaties pertaining to human rights. Regional bodies are generally based on the Universal Declaration of the Rights of Man from 1948. For example, the Convention for the Protection of Human Rights and Fundamental Freedoms, more recently called the European Convention of Human Rights, is a treaty signed by the member states of the Council of Europe (1950-'53). The aim of this treaty is to safeguard human rights and fundamental freedoms through the intermediary of common judicial regulations. Thus, the Committee of Ministers of the Council of Europe was established along with the European Court of Human Rights. The latter, established in Strasbourg in 1959, is responsible for ensuring compliance to the Convention by the signatory states. The Convention has evolved over time, and several protocols have allowed it to take shape and be refined.

### **An Often Contested Universality**

Beyond the delays relating to their effective implementation within human society across the globe, the very definition of human rights has aroused diffidence and controversy that has even today not yet been resolved. Many additional texts have therefore been produced on a national level. Some countries, or groups of countries, have at times felt the need to clarify or even supplement the Declaration of 1948. But deeper challenges exist that have even called into question the relevance of the term 'universal' within the context of human rights. These accusations have become apparent throughout the decline of Western dominance and at the emergence of the rest of the world. Resistance to human rights has been the hallmark of a voluntary emancipation against what has been seen as the directive of Western culture.

Some countries, functioning according to a radically different political model as compared to the liberal Western model, have sought to promote certain types of rights to the detriment of others. During the period known as the Cold War, the UN definition of the scope to be given to these fundamental rights was bitterly disputed. The Western definition, which emphasised human rights based on civic

and political freedom, has long-been opposed by the vision of socialist countries, which emphasise economic, social and cultural rights and the fulfilment of basic needs. Human rights are still very much a subject of contention for countries such as China and North Korea, which theoretically prioritise the development of economic rights rather than safeguard individual and political rights, although they are regularly requested to do so. Human rights in those countries have often been presented as a modern invention of the West.

Some countries denounce the implementation of human rights as benefitting only so-called 'Western' countries rather than the rest of the world. Some even see them as prejudiced towards religious and cultural peculiarities, and denounce the imposition of a neo-colonial and globalised single model imposed through the (economic and cultural) subjugation of other distinct nations. Certain cultural spheres have, therefore, attempted to extricate themselves from international regulations which they consider too restrictive and conflicting with their own culture and have proposed contextualised and culturalised versions of the rights of man. Resistance to the global expansion of known regulations has, at times, been subsequently justified by historical-political concepts that have made the clash of civilisations into an inevitable chapter of the history of humanity.

Certain regional organisations have thus wanted to counter their own human rights declarations. The Organisation of African Unity (OAU) announced an African Charter on Human and People's Rights (1981). Taking up the principles of the Universal Declaration of 1948, it added rights which it considered to have been sidelined, such as the right to self-determination of the people or the obligation of the member states to fight against all "forms of foreign economic exploitation."

The Organisation of the Islamic Conference (since 2011 known as the Organisation of the Islamic Co-operation) has also produced its own human rights declaration (1990), which declares Islam as the "natural religion of man" (article 10).

These various disputes have culminated in the aftermath of the dramatic events of 11 September 2001. It seems, however, that in light of the massive turnaround from a political point of view, in many parts of the world, over the course of the last two decades (the collapse of communism at the end of the 1980s and the popular uprisings of recent months in the Arab world), that the theory of the universality of the rights of man has taken on a new impetus within the heart of those societies which seemed stubbornly resistant to it. This return to grace does not exempt human society from a renewed reflection on the essence of this grand concept which is human rights. In order for their universality to be a reality accepted by all, it seems necessary to question without ceasing its history and its justification in order that the reputation of its principles be no longer bound up in suspicion of imperialism, which has resulted in opposition and has been detrimental to their widespread implementation.

## **Conclusion: The New Deal**

We have seen that from the eighteenth to the twenty-first century, the number of human rights recognised as such has grown enormously. From first generation rights to third generation rights (some authors even classify them as fourth generation rights), the catalogue has become extensive. This quasi-exponential growth proves that the boundaries of human rights remain eminently fickle depending on time and place and that the precise definition of what human rights entail will continue to fuel considerable debate. In each era this debate weakens the self-proclaimed universality of these rights, which can then take on the appearance of a dogma rather than that of a truly rational gift.

In the face of this escalation, the risk is to accept the relativity of certain rights over others. This can also lead to increased opportunity for conflict between different rights. Ultimately, this makes the task of watching over and safeguarding these rights much more difficult to put into action for the nations (especially those countries with low public incomes).

The universality of human rights is also frequently questioned by those who advocate equality between cultures, even for those who would not fulfil the Western criteria of respect for the human individual. Some even denounce human



United Nations General Assembly Hall, New York

*Photo: Wikimedia Commons / Patrick Gruban*

rights as a form of foreign civil religion imposed on the rest of the world by an over-secularised and over-materialistic West. It must be said that the use of strong terminology with religious connotations such as 'universal' or 'sacred rights', may have legitimately upset those who do not place the sacred within the individual as such, but rather in their god(s) or in the supernatural force that they recognise.

It seems that the only way to resolve this debate is to endeavour to secularise the concept of human rights itself. This would involve the study of their history and the move on to a reflection of their philosophical foundations. It is time to refer to a famous historical text on human rights: the mere reflection of a particular moment in history, they (human rights) are a product of a specific context; most certainly they have their importance, but they should only be considered as a cultural witness of a time gone by. In order for human rights to be considered universal, they have to conform to three conditions: they must be natural, equal for all and applicable to all. Moreover, they are not the rights of man in a state of nature but of man within society. It is not human rights as opposed to divine right or animal rights. They must be able to develop in a politically secular world and need to be reinforced by everyone's participation in their implementation.

The secularisation of human rights is underway: it is a question of letting go of their semi-religious demeanour, the appearance of an all-encompassing human morality, which was necessary in the past in the West, but at present poses rather an obstacle to their dissemination across the planet. Rather, it is a matter of creating a basic collection of legal regulations enforceable for everyone without exception by virtue of treaties or international agreements. In many countries, the legal translation and/or constitutions have already been agreed upon; and in some coalitions, they form the condition by which new countries enter regional entities, such as those countries hoping to join the European Union. The development of the respect for human rights is a process to be implemented continuously, rather than an exclusive 'truth' unequally recognised, which only developed nations would have the role of awarding to the rest of the world.

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# RELIGIOUS LIBERTY: WESTERN FOUNDATIONS, INTERNATIONAL DIMENSIONS

David Little

*T. J. Dermot Dunphy Professor of the Practice in Religion, Ethnicity, and International Conflict, Emeritus, Harvard Divinity School. An earlier version of this chapter was published in John Witte, Jr. and Frank S. Alexander, eds., **Christianity and Law: An Introduction** (Cambridge: Cambridge University Press, 2008), and is used herein with the permission of the author and publisher.*

Religious liberty, as currently understood, is the condition in which individuals or groups are permitted without restraint to, within limits, express and act upon religious convictions and identity free of coercive interference or penalty imposed by outsiders, including the state. So conceived, the topic is an explosive one, both historically and at present. Severe theoretical disputes surround it and have for a long time. Why do religious convictions and identity deserve special protection? Where exactly do we draw the line between religious and other sorts of convictions and identities? What are the limits of proper expression and practice, and what constitutes coercive interference or penalty as imposed by the state or others?

In addition, violations of religious liberty have, throughout history, “brought, directly or indirectly, wars and great suffering to mankind,” as stated in the 1981 *UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*. Though examples involve more than just religious oppression, the inquisition and the religious wars of post-medieval Europe, together with the practices of Western colonialists and the Ottomans, especially in the Armenian case, as well as of fascists, state socialists, and ultranationalists in the twentieth century and after, all illustrate the fearsome effects of punishing and degrading individuals or groups because of their religious convictions and identity.

In fact, just because of such baneful circumstances, the human rights system, adopted as a consequence of fascist malefactions in the middle of the last century, includes elaborate provisions for the protection of religious liberty. Since these provisions, as expressed in documents such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *Declaration on the Elimination of Intolerance and Discrimination*, are considered binding by fully three-fourths of the nations of the world, they constitute the appropriate starting point for a contemporary approach to religious liberty.

Accordingly, the first task of this chapter is to exposit the prevailing human rights provisions in the light of relevant jurisprudence, particularly the “general comments” of the United Nations Human Rights Committee, which is authorized to interpret the ICCPR. We may do that by identifying salient features and highlighting important points of controversy. The second task is to excavate the historical background, mainly in the West, out of which the human rights understanding has emerged. The objective in both cases is mainly descriptive. The elucidation of existing standards, as well as the explanation of where they came from, leaves open the subject of how the standards ought to be construed and implemented, though it is not always possible to abstain completely from suggesting preferences.

### **Human Rights Understanding of Religious Liberty<sup>1</sup>**

**Context and Exposition.** The whole edifice of human rights standards is based on the imperative to protect individuals against collective domination and the license for arbitrary abuse thereby entailed. Such was the basic lesson after World War II of the effects of fascist pathology, whose root is the absolute subjection of the individual to the will of the state. As Hitler put it, National Socialism gives priority neither to the individual nor humanity, but to protecting *das Volk* (“the people”) even at the expense of the individual.<sup>2</sup> Revulsion against such views gave rise to the human rights revolution, and to what Mary Ann Glendon, in her book on the subject, calls, “A World Made New.”<sup>3</sup>

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1 This section is drawn from my “Culture, Religion, and National Identity in a Post-Modern World,” in *Anuario del Derecho Eclesiastico del Estado* 22 (2006): 19-35, and “Religion, Human Rights, and Secularism: Preliminary Clarifications and Some Islamic, Jewish, and Christian Responses” in *Humanity Before God: Contemporary Faces of Jewish, Christian, and Islamic Ethics*, ed. William Schweiker, Michael A. Johnson, and Kevin Jung (Minneapolis: Wm. B. Eerdmans Publishing, 2006), 256-85.

2 Cited in Alan Bullock, *Hitler* (New York: Harper and Row, 1962), 401.

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

At the heart of fascist ideology was the impulse to prevent by all means necessary any dissent or independence in matters of religious conviction and identity. Together with their notorious policies of liquidating millions of Jews and “undesirable” religious minorities, like the Jehovah’s Witnesses, the Nazis harassed Catholics, curtailing and suppressing most of their practices, and eventually came to dominate the Protestant church by means of “terroristic methods.”<sup>4</sup> In particular, fascism, especially in its German and Japanese versions, constituted a direct, comprehensive and systematic assault on the four categories of the right to religious liberty that were subsequently guaranteed in the documents and that were explicitly formulated against the background of fascist offenses.

1. “Everyone shall have the right to freedom of thought, conscience and religion. The right shall include freedom to have or to adopt a religion or belief of his choice.... No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”<sup>5</sup> This is a liberty right. It does not allow any limitation whatsoever in regard to harboring thoughts of any kind or choosing and holding beliefs, either religious or not, that have the same fundamental or “conscientious” status that a religious belief has for a believer. This conclusion may be inferred from the fact that the right to freedom of thought, conscience and religion “protects theistic, nontheistic and atheistic beliefs” as well as “the right not to profess any religion or belief”. Furthermore, fundamental or conscientious beliefs as distinct from other thoughts and beliefs appear to be privileged in a special way. They may serve as the basis for legal exemptions, as, for example, in the case of conscientious objection to military service. Accordingly, human rights law may be said to be especially deferent to conscientious belief.<sup>6</sup>

Also guaranteed is the freedom, “either individually or in community with others and in public and private, to manifest ... religion or belief in worship, observance, practice and teaching.” “The observance and practice of religion or belief may

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4 Arcot Krishnaswami, “Study of Discrimination in the Matter of Religious Rights and Practices,” in *Religion and Human Rights: Basic Documents*, ed. Tad Stahnke and J. Paul Martin (New York: Center for the Study of Human Rights, Columbia University, 1998), 10.

5 International Covenant of Civil and Political Rights, art. 18, pars. 1 and 2 [hereafter ICCPR]. For similar wording, cf. Declaration on the Elimination of Intolerance and Discrimination, art. 1, par. 1 (hereafter DEID).

6 Ibid. and United Nations Human Rights Committee General Comment No. 22 (48) (Article 18), par. 2, 11 in *Religion and Human Rights: Basic Documents*, 92, 94 [hereafter UNRC General Comment No. 22]. See further See David Little, “Studying ‘Religious Human Rights’: Methodological Considerations,” in *Religious Human Rights in Global Perspective: Legal Perspectives*, eds. Johan D. van der Vyver and John Witte, Jr. (The Hague: Martinus Nijhoff Publishers, 1996), 50-52, including n. 12.



Warsaw Ghetto Uprising (1943): According to an official report, at least 56,065 Jewish men, women, and children were killed or deported to German Nazi concentration and death camps.

*Photo: Creative Commons/German Federal Archives*

include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head covering,” among other practices. The only allowable limitations are those that governments may impose on manifesting, or overtly expressing or acting on, a religion or belief, for the purpose of protecting “public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>7</sup>

At the same time, the burden of proof clearly rests with the government in regard to such actions. For one thing, what constitutes a “manifestation” of religion or belief should be left primarily to believers and not to the state. For another, the government must show that any limitation on the manifestation of conscientious belief is both “necessary” and “proportionate”; that is, the limitation must be designed and administered so as to impose the least restrictive burden consistent with protecting a truly compelling state interest. It should be noted that limitations on the freedom of religion or belief are *not* permitted for unspecified considerations, such as national security.<sup>8</sup> Since fascists justified the abridgment of any and all rights on grounds of national security, this is an important exclusion.

7 ICCPR, Article 18, par. 1, 3; cf. DEID, art. 1, par. 3; UNHRC General Comment No. 22, par. 4, p. 92.

8 Asma Jahangir, Report of the Special Rapporteur on Freedom of Religion or Belief, E/CN.4/2006/5 (9 January 2006), par. 41, p. 13; UNHRC General Comment No. 22, par. 8, p. 93.

2. “No one shall be subject to discrimination by any State, group of persons or person on the grounds of religion or other beliefs.”<sup>9</sup> This is an equality right, which also includes provisions against “intolerance based on religion or belief.” Discrimination has a clear legal meaning in the documents, namely, “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.” While intolerance is sometimes equated with discrimination in certain sections of the documents, elsewhere it is not, leaving the concept open to interpretation.<sup>10</sup>

According to the right against intolerance and discrimination, a state or official religion is not ruled out as such; nevertheless, its existence may not be used as a basis for “any discrimination against adherents of other religions or non-believers.” For example, any “measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths,” are prohibited. Moreover, this right is broadly inclusive and not limited to protecting “traditional” or majority religions. It prohibits discrimination against “any religion or belief for any reason, including the fact that they are newly established or represent religious minorities that are the subject of hostility by a predominant religious community.”<sup>11</sup>

3. “Persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.”<sup>12</sup> Authoritative interpretation of this right by the Human Rights Committee has moved toward overcoming the weakening of this provision that took place at the time of the drafting of the UDHR, mainly at the urging of representatives of the United States, Canada and Australia, who were seeking to reduce the scope of cultural autonomy for minorities in favor of a policy of assimilation. The recent pronouncements by the Committee suggesting that in the interest of “correcting conditions which prevent or impair the enjoyment” of minority rights, “positive measures by States may ... be necessary to protect

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9 DEID, art. 2, par. 1.

10 DEID, art. 2, par. 2, art. 4, par. 2. Cf. ICCPR, arts. 2 and 27; and Universal Declaration of Human Rights, arts. 2 and 7 [hereafter UDHR]. See David Little, “Rethinking Religious Tolerance: A Human Rights Approach,” in David Little and David Chidester, *Religion and Human Rights: Toward An Understanding of Tolerance and Reconciliation* (Emory Humanities Lectures, No. 3, 2000-01), 9ff.

11 UNHRC General Comment No. 22, par. 9, p. 94; *ibid.* par. 2, p. 92.

12 ICCPR, art. 27; cf. UDHR, art. 27, par. 1.

the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion...," recall more robust formulations of the right of minority protection that were rejected at the time of drafting.<sup>13</sup> It is also worth mentioning that in the 1990s the UN produced a number of documents aimed at substantially expanding minority protection, such as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1993) and the *Draft Declaration on the Rights of Indigenous Peoples* (1994).

4. *The right against "religious ... hatred that incites to discrimination, hostility or violence."*<sup>14</sup> Considerable perplexity surrounds this right. Against the background of fascist practice, it makes good sense to prohibit by law actions aimed at and capable of producing discrimination and violence against religious and other groups and individuals. There is no lack of vivid examples of impermissible behavior from the Nazi era. Moreover, bringing about discrimination (as defined above under right #2) is by now indisputably a violation of human rights, as is inciting violence (except as an expression of "the sovereign right of self-defense or the right of peoples to self-determination"<sup>15</sup>).

On the other hand, it is particularly difficult, for legal purposes, to specify the meaning of "religious hatred" and "hostility," as referred to in the provision. Hatred and hostility, which are largely matters of attitude and emotion, are notoriously hard to police and, because of that, invite conflicts with the rights of free speech and expression, as was clear from the debates surrounding the drafting of this provision. It is predictable that this right, however indispensable, will continue to generate considerable debate around the edges.<sup>16</sup>

**Controversial Points of Interpretation.** Among the States' Parties to the 1966 ICCPR, there are currently two highly sensitive examples of disagreement concerning the interpretation of religious liberty rights. One concerns minority protection, which touches on the first three rights, and the other is hate speech, which touches, of course, on the fourth right, but also on the first two.

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13 See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999), 269-80; Stahnke and Martin, *Religion and Human Rights: Basic Documents*, par. 6.2., p. 99; Morsink, *The Universal Declaration of Human Rights*, esp. 272-274.

14 ICCPR, art. 20, par. 1. Cf. UDHR, art. 7.

15 Stahnke and Martin, eds., *Religion and Human Rights: Basic Documents*, par. 2, p. 96.

16 Morsink, *The Universal Declaration of Human Rights*, 69-72; Natan Lerner, *Religion, Beliefs, and International Human Rights* (Maryknoll, NY: Orbis Books, 2000), ch. 3; David Little, "Rethinking Religious Tolerance."



Jerusalem, Yad Vashem, Janusz Korczak Memorial by Boris Saksier.

*Photo: Wikimedia Commons /proesi*

The French law banning the wearing of Muslim headscarves and other visible religious symbols in state schools was adopted by Parliament in March 2004, and upheld by the European Court of Human Rights in June, as a measure believed to be necessary for several reasons. Lawmakers contended that displaying religious attire or symbols in public schools violates the principle of *laïcité*, or the idea of the French secular state, according to which public life, in the interest of separating church and state, must be shielded from “conspicuous” forms of religious expression. In addition, supporters argued that the law upholds public order and the human rights of children and thus constitutes a legitimate limitation on the right to free exercise. The law guards the state against the threat of Islamic fundamentalism and protects Muslim girls against undue family or community coercion regarding their attire.

In opposition, human rights groups and others have vigorously challenged the law as a violation of the right to manifest religion or belief free of coercion. They argue

that the government fails to prove that there exists a state interest compelling enough to override the strong presumption in favor of the freedom to manifest one's religion or belief in public, including "the wearing of distinctive clothing or head covering." Moreover, the government, it is claimed, has not given adequate evidence that Muslim girls are, in large numbers, being compelled against their will to wear head coverings. Opponents also describe the law as discriminatory, and, by implication, to be a violation of the right of minorities "to profess and practice their own religion," since the impact of the law, however neutrally phrased, "will fall disproportionately on Muslim girls," and leave them no choice but to bear the extra financial burden of attending private school. In partial support of the opposition, a recent report from the UN Special Rapporteur for Freedom of Religion or Belief cites with approval concerns that the law banning religious symbols in public schools "may neglect the principle of the best interests of the child and the right of the child to access to education." It also supports a proposal that the French government consider "alternative means" to law, such as mediation and student participation in policy making, as a way of balancing state interests with the rights of children to religious liberty.<sup>17</sup>

A landmark decision in 1990 by the United States Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*, represents a second example of conflicting interpretation over minority protection in the light of a human rights understanding of religious liberty. The Court denied unemployment compensation to two members of the Native American Church, who had been fired from their jobs with a private drug rehabilitation center because they ingested peyote for sacramental purposes in a religious ceremony. Under the religious free exercise clause of the First Amendment to the U.S. Constitution, the defendants claimed a right of exemption from a state law that criminalized all use of controlled substances, including peyote, except if prescribed by a physician. The Court majority argued that there is absolutely no constitutionally required protection from generally applicable laws. Whatever religious exemptions are allowed must be left to state legislatures, who are fully entitled to ignore and override any conscientiously-held beliefs of citizens, so long as the laws passed do not specifically single out one individual or group for discriminatory treatment. There is an admission that failing to give constitutional protection to "religious practices that are not widely engaged in"—namely, by minority religions like the Native American Church—"will place them at a relative disadvantage." Nevertheless, that is an "unavoidable consequence," since otherwise "anarchy" would result from a system where "each conscience is a law

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17 For example, Human Rights Watch, "France: Headscarf Ban Violates Religious Freedom. By Disproportionately Affecting Muslim Girls, Proposed Law is Discriminatory" [http://hrw.org/english/docs/2004/02/26/france7666\\_txt.htm](http://hrw.org/english/docs/2004/02/26/france7666_txt.htm); see further pages 2-3 above and Asma Jahangir, Report of the Special Rapporteur on Freedom of Religion or Belief, E/CN.4/2006/5 (9 January 2006), par. 46, p. 14.

unto itself or in which judges weigh the social impact of all laws against the centrality of all religious beliefs.”<sup>18</sup>

A storm of protest from religious groups, as well as from other non-governmental organizations and civil libertarians, arose over the *Smith* decision. Opposition forces gathered momentum and eventually coalesced around the Religious Freedom Restoration Act (RFRA) passed by Congress in 1993. The act declared that the government “may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.” The act held until 1997 when the Court partially overturned it in the *City of Boerne v. Flores* for exceeding Congress’s authority by trying to tell the Court how to rule on religious freedom issues. Still, widespread disagreement with *Smith* continues to exist, and there is some indication the Court may be moving away from it.<sup>19</sup>

The dissenters in the *Smith* case took strong exception to the majority arguments. They held that the two-fold test of RFRA—determining the least restrictive means in support of a compelling state interest—epitomizes “the First Amendment’s command that religious liberty is an independent liberty and that it occupies a preferred position” and that it is the responsibility of the Court “to strike sensible balances between religious liberty and a compelling state interest.” The dissenters also added that were the protection of religious liberty rights left to the legislative process, that would contradict the clear purpose of the First Amendment, which is “precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.” They concluded: “The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses or the Amish,” and, it might be added, the Native American Church.<sup>20</sup>

Hate speech laws are another highly sensitive subject of controversy bearing on the interpretation of a human rights understanding of religious liberty. Restricting hate speech is directly addressed by the fourth religious liberty right, though the subject also prompts conflicting opinions concerning the ranking of the rights to liberty and equality of religion or belief (rights #1 and #2). Countries such as South Africa, Canada, Hungary, the Netherlands, Germany, Austria, France, and the United Kingdom, to mention a few, have all adopted laws against utterances or publications that slander, insult, or threaten a group of persons on the basis

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18 494 U.S. 872, 881, 888-890 (1990) (rehearing denied 496 U.S. 913 (1990))

19 Religious Freedom Restoration Act, U.S. Code 42 (1993) § 2000bb-1; Garrett Epps, *To An Unknown God: Religious Freedom on Trial* (New York: St. Martin’s Press, 2001), 239-40.

20 494 U.S. 904-913.

of their nationality, color, race, or religion. Such laws have generally been upheld by the European Court of Human Rights so long as they are necessary to protect a democratic society and are proportionate to the threat. By contrast, the United States, while experimenting in its history with hate speech laws, including campus speech codes, has eventually tended to turn away from them, thereby creating considerable tension between the U.S. and the Europeans and others over the meaning of religious liberty in this matter.

One vexing problem between the two sides focuses, as mentioned, on the difficulty of specifying for purposes of legal enforcement the meaning of “religious hatred” and “hostility,” including the link between them, implied in Article 20.2 of the ICCPR. Generally speaking, both sides agree that it is permissible to prohibit the expression of religious and other forms of hatred that constitute incitement to discrimination or violence. But proponents of hate speech laws argue that, however delicate the task, failing to place legal restrictions on the free exchange of religious beliefs and attitudes has the effect of undermining equal protection. To subject individuals or groups to spoken, written, or symbolic expressions of religious hatred that insult them, “whether by suggesting they are inferior in some respect or by indicating that they are despised or not welcome for any other reason,” is to discriminate against them, and is, in effect, to violate the religious right to equality.<sup>21</sup>

For their part, opponents object that expanding the regulations on free expression in the name of equality produces an ominous and potentially unlimited threat to the rights of free expression and tolerance, a threat that may well, in fact, double back and undermine equality. That happens when, repeatedly, the very minorities who are presumably protected against the incitement of hostility are themselves held liable under such laws for employing abusive language. These problems are caused, as the opponents see it, because of the insuperable difficulty of framing coherent, consistent, and reliable laws capable of governing attitudes or communications that are disconnected from an explicit act of inciting discrimination or violence.

Religious Liberty in the Western Tradition

**The Enlightenment Setting.** The prevailing view that human rights language, and in particular the emphasis on “freedom of conscience, religion or belief,” is a simple product of the Western Enlightenment, is at best a half-truth. For one thing, such a conclusion overlooks the historical context in which the human rights instruments were adopted. The fascist experiment of the last century, vivifying as it did the ominous imbalance in modern life between the technology of force and the institutions of restraint, was global in character, enveloping not just Europe and

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21 Eric Neisser, “Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence,” *South African Journal on Human Rights* 10, no. 3 (1994): 337.

environs, but also the Far East. The worldwide catastrophe caused by the doctrine of collective domination gave urgent impetus everywhere to the cause of individual protection, starting with personal conviction and identity, no matter which country or culture was involved.

That common experience helps explain the universal resonance of human rights ideas, despite the strong traces of culture-specific language, as well as why human rights documents were, in fact, open both to significant intercultural influence and to continuing efforts to anchor the documents in a variety of cultural settings.<sup>22</sup> Beyond that, and just as consequential, the Western cultural roots of a human rights understanding of religious liberty (as well other provisions), go back well before the Enlightenment, and can only be adequately understood when looked at against a broader tradition.

To be sure, there is clear evidence in Enlightenment literature of the crucial conjunction between the idea of a “subjective right”—the existence of a sovereign sphere of individual authority protected from coercive interference—and religious liberty. The contributions of English and American Enlightenment figures like John Locke, Thomas Jefferson, and James Madison are unmistakable, even though here and there, particularly in Locke’s case, there is some ambiguity in their writings on religious liberty.

Representatives of the French Enlightenment, like Pierre Bayle and Jean-Jacques Rousseau, were also proponents in their own way of religious liberty, even though, among Enlightenment figures, the balance of influence on modern human rights language must go to the Anglo-American tradition. While Bayle, for example, developed a view of the freedom of conscience and the importance of tolerance based on his experience of the persecution of French Huguenots, he was nevertheless deeply fearful of “the great concepts of law, liberty, and the limitations of the king’s sovereignty”<sup>23</sup> so central to the development of modern human rights ideas. Similarly, Rousseau’s belief in the omnipotence of the general will threatens to undercut the priority of individual rights.<sup>24</sup> Two provisions in the *French Declaration of the Rights of Man and Citizen of 1789*, which bear Rousseau’s stamp, raise deep questions about the compatibility of French conceptions of religious liberty with the individualistic assumptions of human rights language: “3. The source of all

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22 See Glendon, “Universality Under Siege,” in *A World Made New*, ch. 12.

23 Walter Rex, *Essays on Pierre Bayle and Religious Controversy* (The Hague: Martinus Nijhoff, 1965), 252.

24 Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (Westport: CN, 1901), 11-12. Jellinek also argues convincingly that the French Declaration of Rights drew much of its language from the state declarations of rights of the American colonies.

sovereignty resides essentially in the nation; no group, no individual may exercise authority not emanating expressly there from;" and "6. Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives in its formation."<sup>25</sup>

Many of Jefferson's views are consonant with a human rights understanding of religious liberty, as is made clear in his Statute for Religious Freedom passed by the Virginia legislature in 1786. "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." It goes on to state "that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities," and that "the rights hereby asserted are of the natural rights of mankind." "It is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order." When magistrates intrude on matters of religion they invariably corrupt both religion- "by bribing, with a monopoly of worldly honors and emoluments those who will externally profess and conform to it," and state- "by permitting public officials to abuse their office by making their opinions "the rule of judgment, and approve or condemn the sentiments of others only as they shall square or differ" from that rule."<sup>26</sup>

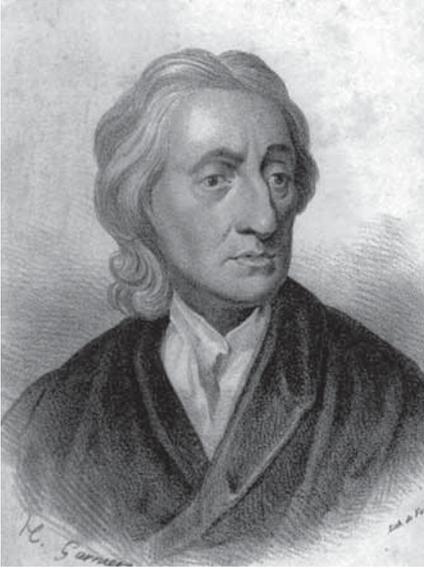
The underlying idea is the sovereignty of conscience. "Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit." Accordingly, the "legitimate powers of government extend to such acts only as are injurious to others. But it [should do] me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."<sup>27</sup> Uniformly enforced religion is neither necessary nor desirable since human beings share a common moral capacity independent of religious conviction or identity. "Some have made the love of God the foundation of morality.... [But] if we did a good act merely from the love of God and a belief that it is pleasing to Him, whence arises the morality of

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25 The Declaration of the Rights of Man (approved August 26, 1789), trans. Avalon Project at Yale Law School. <http://www.yale.edu/lawweb/avalon/rightsof.htm> (accessed June 18, 2007).

26 "An Act for Establishing Religious Freedom," in *The Life and Selected Writings of Thomas Jefferson*, eds. Adrienne Koch and William Peden (New York: Modern Library, 1944), 312-13.

27 Thomas Jefferson, "Notes on Virginia," in *The Life and Selected Writings of Thomas Jefferson*, 275.



John Locke (1632-1704), English philosopher who was regarded as one of the most influential of Enlightenment thinkers. His contributions to classical republicanism and liberal theory are reflected in the American Declaration of Independence as well as in the constitutions of other liberal states.

*Photo: Wikimedia Commons /Library of Congress*

the Atheist[s]?... Their virtue must have some other foundation." These sentiments should be emphasized, even though Jefferson, in these as in other opinions, was not altogether consistent.<sup>28</sup>

The doctrine of the sovereignty of conscience, so central to Jefferson's thinking, is forcefully supplemented in the writings of James Madison. In his famous Memorial and Remonstrance, published in 1785 in defense of Jefferson's proposed Statute for Religious Freedom, Madison puts the doctrine with unforgettable clarity: "Man's duty to his Creator is precedent both in order of time and degree of obligation to the claims of civil society." Moreover, in the subsequent debates in 1789 over the proposed Bill of Rights, Madison's suggested draft of the First Amendment included the following wording: "...nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed...." He even went so far as to propose additional wording to what became the Second Amendment in favor of an exemption from military service for "religiously scrupulous" persons.<sup>29</sup>

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28 "Jefferson to Thomas Law, June 13, 1814," in *Life and Selected Writings of Thomas Jefferson*, 637; see David Little, "Religion and Civil Virtue in America," in *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, ed. Merrill D. Peterson and Robert C. Vaughan (New York: Cambridge University Press, 1988), 238-241.

29 Cited in *Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967*, ed. Lillian Schlissel (New York: E.P. Dutton, 1968), 47.

In most respects, John Locke is the major proximate inspiration for Jefferson and Madison's views on religious liberty. The most important similarity, of course, is the belief, as Locke put it, "that liberty of conscience is every man's natural right, equally belonging to dissenters as to themselves; and that nobody ought to be compelled in matters of religion either by law or force." There is also the common emphasis on the distinction between what Locke calls "the outward and inward court," or "the magistrate and conscience," with the magistrate's jurisdiction being confined to the "civil interest," or "bodies and goods" — namely, "life, liberty, health and indolency of the body" [by which Locke meant, freedom from arbitrarily inflicted pain]; and the possession of outward things, such as money, lands, houses, furniture, and the like."

Locke's doctrine of what may be called "the sovereignty of conscience," according to which, "every man ... has the supreme and absolute authority of judging for himself," illuminates the position of Jefferson and Madison. "Such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.... The magistrate's power extends not to the establishing of any articles of faith or forms of worship by force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind."

The key point for Locke, as for Jefferson and Madison, is that "to believe this or that to be true does not depend on our will." That is why "the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man's goods and person." It follows that while the magistrate may rightfully punish behavior that violates "the public good" and the rights of others, as, for example, the sacrifice of infants even on grounds of conscience, citizens are not obliged to obey laws "against their consciences," "concerning things that lie not within the [limits] of the magistrate's authority (as, for example, that the people, or any party amongst them, should be compelled to embrace a strange religion and join the worship and ceremonies of another church)." The affairs of conscience stand above the affairs of state except where the dictates of conscience violate a compelling public interest, including the rights of equal freedom.

To be sure, Locke was not totally consistent on these matters. The most striking anomaly in his writings on religious liberty concerns his argument against tolerating atheists. "Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all." Here Locke forsook his critical distinction between inward belief and outward action, and attacked atheists for their beliefs however they may

behave. This conclusion, however at odds with other things Locke said, appears to rest on a divine law conception of ethics, according to which morality necessarily presupposes a belief in a divine law giver.

As regards other groups, such as Muslims and Roman Catholics against whom he also preached intolerance, Locke's views are somewhat more understandable. Insofar as they harbor allegiance to a foreign power, whether the Mufti of Constantinople or the Pope in Rome, and thus intend, if able, to take power and to incite violence and discrimination against others, they cannot be accommodated. But in those cases, it is the threat of sedition that is the reason for intolerance, not the beliefs themselves. Even here, of course, it is fair to wonder whether Locke was sufficiently sensitive to the need for safeguards against unwarranted attribution. Still, except for the atheist, the conscience, religion, or belief of everyone is, at least in theory, to be protected against undue coercive interference or penalty.<sup>30</sup>

**The Seventeenth-Century Moment.** The decisive historical locus of the idea of a right to religious liberty generally consonant with a human rights understanding was not the Enlightenment, however, but mid-seventeenth-century England and America.<sup>31</sup> Around the time of the English Civil War (1642-1648), claims for expanding the scope of religious liberty were widely heard. But it was mainly the more radical voices of the period, and, most prominently, that of Roger Williams, by then transplanted to the New World, that definitively filled out the foundations of the modern view. Locke's ideas, and by extension Jefferson and Madison's, derived from Williams and from the supporting figures of the period.<sup>32</sup>

Roger Williams was one of the founders in 1635 of the Rhode Island colony, an experiment rightly called "the first commonwealth in modern history to make religious liberty ... a cardinal principle of its corporate existence and to maintain the separation of church and state on these grounds." Williams wound up in Rhode Island in the first place because, with the help of some Indian friends, he escaped there after being officially banished from Massachusetts Bay and condemned to punishment in England.

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30 John Locke, *Letter Concerning Toleration* (New York: Liberal Arts Press, 1955), 17-18, 39, 45-48, 52. See further See David Little, "A Christian Perspective on Human Rights," in *Human Rights in Africa*, eds. Abdullahi Ahmed An-Na'im and Francis M. Deng (Washington, DC: Brookings Institution, 1990), esp. 51-56, 71.

31 Brian Tierney, "Religious Rights: An Historical Perspective," in Witte and Van der Vyver, eds., *Religious Human Rights in Global Perspective* (The Hague: Martin Nijhoff Publishers, 1996), 35ff.

32 See Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1996), 72; David Little, "Roger Williams and the Separation of Church and State," in *Religion and the State*, ed. James E. Wood, Jr. (Waco, TX: Baylor University Press 1985), 7ff.

He affirmed an array of offending beliefs, which eventually provoked his expulsion. One was his challenge to the right of the English monarch to allocate colonial land, a conclusion apparently inferred from his belief in the “natural and civil rights and liberties” of all human beings. Since, according to a presumed “natural right,” Native Americans, and not the king, are the true owners of the lands of the new world, it is from the natives alone that land must be acquired. Another was his claim that the English flag should be shorn of the prominent red cross at its center because, as a religious symbol, its presence serves to confuse civil and spiritual spheres. Related to that was his opposition to public oaths, particularly when imposed on unbelievers, together with his belief in a very stringent restriction of the jurisdiction state to the “bodies and goods” of human beings, namely, to their “outward state,” and *not* to their spiritual affairs.

These and other highly controversial views all touched on Williams’ radical commitment to the right of “soul liberty,” as he called it. His position was simply an elaboration and reinterpretation of a distinction in the Christian tradition between the internal forum and external forum, or conscience and civil authority, which are parallel in some ways, if differently administered and enforced. The one is governed by the “law of the spirit” and the other by the “law of the sword.”

There are, in Williams’ mind, several grounds on which to draw this distinction. One is clearly religious. He spent considerable time interpreting Christian scripture, and particularly the image and impact of Jesus, to prove that authentic Christianity favors a distinction between spirit and sword. But he also relied on reason and experience. To try to convince a person of the truth of something by threatening injury or imprisonment is to make a mistake about how the mind and spirit work. It is futile, wrote Williams, to try “to batter down idolatry, false worship, and heresy” by employing “stocks, whips, prisons, and swords” because “civil weapons are improper in this business and never able to effect anything in the soul.” Civil efforts to coerce conscience lead either to defiance and thus the probability of extensive bloodshed and suffering, or to hypocrisy, neither of which advances the cause of conscience.

There are various compelling reasons, then, for believing in the existence of an internal forum and its right to freedom: “Only let it be their soul’s choice, and no enforcing sword, but what is spiritual in their spiritual causes ... I plead [on the part of the civil authority] for impartiality and equal freedom, peace, and safety to [all] consciences and assemblies, unto which the people may as freely go, and this according to each conscience,” in keeping of course with the requirements of civil order.

Williams invoked the idea of a universal moral law available to all, regardless of religious identity, as the proper basis for protecting the “common rights, peace and safety” of all citizens, which is, he said “work and business, load and burden

enough” for political officials without presuming “to pull down, and set up religion, to judge, determine and punish in spiritual controversies.” There exist common moral standards that are available to all sorts of people other than Christians, so that “civil places need not be monopolized [by] church members, (who are sometimes not fitted for them), and all other [people] deprived of their natural and civil rights and liberties.” Indeed, Williams’ theory of government is remarkably modern. Particular governments, he said, “have no more power than fundamentally lies in the [body of people who appoint them], which power, might or authority is not religious, Christian, etc., but natural, humane and civil.” In addition, he was as concerned with the corruption caused in the civil order by confusing temporal and spiritual matters as he was with the corruption such confusion produced religious communities: It is “against civil justice for the civil state or officers thereof to deal so partially in matters of God....”.

These common and naturally available moral standards place important limits on tolerable religious practices. Williams held that civil magistrates are entitled to punish religiously authorized behavior that violates what he took to be the fundamental conditions of public safety and order. For example, he approved of the outlawing of human sacrifice, even though practiced for conscience’s sake. But beyond the protection of the “common rights, peace and safety” of all citizens, Williams exhibited a remarkable degree of religious and cultural tolerance. So long as Jews, Roman Catholics, and “Mohammedans” were willing to accept citizenship on Williams’ terms of equal freedom, they were all welcome. It is “known by experience,” he said, that “many thousands” of Muslims, Roman Catholics and Pagans “are in their persons, both as civil and courteous and peaceable in nature, as any of the subjects in the state they live in.”

Despite his own fervent Christian convictions, he resolutely refrained from evangelizing Native Americans because, among other reasons, they mostly lived under colonial legal systems which denied them genuine freedom in matters of religion and conscience. Based on his commitments to “impartiality and equal freedom,” as well as “peace and safety” for all “consciences and assemblies,” he attempted to deal honestly and equitably with native Americans, seeking unsuccessfully to achieve what one historian has called a “bicultural” solution to the relations between colonists and native Americans.

Also worth mentioning in this connection was Williams’ extraordinary willingness not only to promote freedom *of* religion, but freedom *from* religion as well. Even atheists and people altogether indifferent or hostile to religion should be equally respected. He considered the objection, undoubtedly widespread at the time, that if the state does not enforce religion, people are likely to drift away from religion and “turn atheistical and irreligious,” as he put it. Such an outcome, he conceded, is a risk that must be run; “however, it is infinitely better that the

profane and loose be unmasked, than to be muffled up under the veil and hood as of traditional hypocrisy, which turns and dulls the very edge of all conscience either toward God or man.”<sup>33</sup>

**Earlier Christian Foundations.** As to what would come after, Williams’ theory of religious liberty—its elements and the way they were assembled—was clearly formative. But Williams hardly invented those elements, nor did he weave them together without regard to where they had come from. Throughout their history, Christians had disagreed, sometimes violently, over the meaning and application of religious liberty. Williams knew that well enough. What he could not understand was why they had such difficulty choosing the right side.

The idea of conscience and its freedom was important to the early Christian church, particularly as expressed in the Pauline literature. The influential notion of conscience as a private, internal tribunal, adjudicating the probity of an individual’s religious and moral beliefs and practices, is referred to in Romans 2:14-15. The passage speaks of non-Jews possessing “by nature” a moral law “written on their hearts,” to which their “conscience” (*syneidesis*) “bears witness,” and in relation to which their “conflicting thoughts accuse or perhaps excuse them,” all under the authority of God who “judges the secrets of everyone.” The idea that this moral law is universal, according to which “the whole world may be held accountable,” is affirmed in Romans 3:19-20. In the context of a discussion in First Corinthians about tolerating conscientious differences, there is the additional suggestion that the conscience is fundamentally free, since one person’s conscience cannot control anyone else’s.<sup>34</sup>

Furthermore, given that God is understood to be the ultimate judge of conscience, the conviction arises in early Christian experience that an important part of the freedom of conscience is its independence from and superiority to human judgments, including those of the civil authority. Some have even interpreted Paul’s words in Romans 13:5, enjoining political obedience “for the sake of conscience,” to imply a right to stand in judgment concerning the behavior of governments,

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33 Roger Williams, *Complete Writings of Roger Williams*, 7 vols. (New York: Russell and Russell, 1963), 3:148, 363, 398; 4:251; 7:154-55, 181; Roger Williams, *A Key into the Language of America* (Bedford, MA: Applewood Books, 1936) (originally published in 1643), 95. See further quotes and discussion in Edward S. Gaustad, *Liberty of Conscience: Roger Williams in America* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1991), 31-44; James C. Davis, *The Moral Theology of Roger Williams: Christian Conviction and Public Ethics* (Louisville: Westminster John Knox Press, 2004), 94; Russell Bourne, *The Red King’s Rebellion: Racial Politics in New England, 1675-1678* (New York: Oxford University Press, 1990); Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven, CT: Yale University Press, 1972), 182.

34 1 Corinthians 10:29: “For why should my liberty be determined by another’s conscience?” (my translation).



Roger Williams (1603 – 1683), English Protestant theologian who was an early proponent of religious freedom and the separation of church and state. He also advocated fair dealings with Native Americans. Engraved print depicting Roger Williams, founder of Rhode Island, meeting with the Narragansett Indians, 1856.

*Photo: Wikimedia Commons /New York Public Library*

particularly in the light of his preceding claim that “rulers are not a terror to good conduct, but to bad” (Romans 13:3).

Classical texts used to support what later came to be known as the doctrine of the “sovereignty of conscience” are Acts 5:29: “We must obey God rather than human beings,” and Mark 12:17: “Render unto Caesar the things that are Caesar’s, and to God the things that are God’s.” Conflicting opinions of how to interpret and apply these ideas would punctuate the life of the church ever after.

The interpretations of these fundamental ideas by thirteenth-century Catholic theologian Thomas Aquinas and sixteenth-century Protestant reformer John Calvin were particularly important in paving the way for Williams’ definitive articulation in the seventeenth century. Though Thomas did not work out a developed notion of a right to the freedom of conscience, he elaborated some significant features. Since unwilling belief is, he said, an impossibility, the idea of trying to compel belief by force is disallowed. If force is excluded in such matters, then “the state is guilty of

injustice if it interferes with a person's [obeying] conscience in matters of religious choice, profession and worship."<sup>35</sup> Conversely, the state would appear to be acting justly by enforcing the free exercise of conscience. This is, in effect, to argue for a subjective right of conscience – that is, an enforceable title, individually claimable, against coercive interference with conscience.

Thomas Aquinas proceeded to develop an elaborate and very influential theory of conscience, which thereafter kept reappearing in discussions of religious liberty in the Western tradition. Nevertheless, in keeping with general attitudes of the medieval Roman Catholic Church, he applied his theory in a way that drew the limits of religious liberty very narrowly, compared to Williams and his successors. Thomas drew a sharp distinction between uninitiated unbelievers and apostates and heretics. Since the latter at one time accepted Christian faith in the act of baptism, they are subject to civil punishment upon their defection. According to Thomas, since the state has the authority to enforce contracts, it may properly intervene when a religious pledge of faith is broken.

Calvin made a great deal of the doctrine of the sovereignty of conscience, even if he, like Thomas, extensively narrowed its scope. On the one side, he proclaimed a sharp distinction between the "spiritual power" and the "power of the sword," notions linked to the idea of two forums or tribunals so important to Williams and the Anglo-American tradition, and he, like them, gave pride of place to the conscience. In addition, he supported the idea of the superiority of conscience. Conscience, he said, is "higher than all human judgments," and "human laws, whether made by magistrate or church, even though they have to be observed (I speak of good and just laws), still do not of themselves bind conscience."

On the other side, Calvin veered in the opposite direction. Speaking both as a theologian, and as a community organizer frustrated with widespread insubordination and religious dissent, he assigned to the Genevan authorities the right to impose on the unruly masses "the outward worship of God" and "sound doctrine of piety and the position of the church." And then, having declared that the "church does not have the right of the sword to punish or to compel, not the authority to force, not imprisonment, nor the other punishments, which the magistrate commonly inflicts," he contrived an arrangement with Genevan officials to use none other than the "sword, force, and imprisonment" to enforce his doctrines across the city.<sup>36</sup>

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35 Eric D'Arcy, *Conscience and Its Right to Freedom* (London: Sheed and Ward, 1961), 153-54.

36 John Calvin, *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles, 2 vols. (Philadelphia: Westminster Press, 1960), bk. 3, ch. 19, par. 15, pp. 847-848; bk. 4, ch. 10, pp. 1183-1184; bk. 4, ch. 20, par. 2, p. 1487, par. 3, p. 1215. See further John Witte, Jr. *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007).

## Conclusions

A central part of the social and political devastation caused by a grim succession of collectivist ideologies, beginning in the middle of the last century, was the systematic and worldwide assault on religious belief and identity. As a result, the protection of religious liberty as a universal and fundamental human right took on new urgency. The equal right to hold and express religious and other conscientious beliefs has been authoritatively elaborated in a series of broadly ratified international documents, which now set the stage for understanding and applying that right.

The natural rights tradition provided, often against strong resistance, much of the terminology and some critical parts of the rationale for human rights, including religious liberty. Although the tradition was nurtured and conveyed by certain segments of Western Christianity, a key assumption—also essential for human rights language—is that the rights of individual conscience neither depend on nor require prior religious or other comprehensive commitments, just as they neither depend on nor require being born in one place or another, or having this or that gender, culture, or ethnic identity. That such rights are believed to be independent of such considerations is what it means to call them “natural,” or in the human rights idiom, “inherent” or “inalienable.”

What was distinctive about the Christian contribution was the disposition of figures like Roger Williams to foreswear any special claim by Christians or others to civil authority in regard to enforcing religious belief and action. Instead, Christian proponents of natural rights, in varying degrees, held everyone including fellow Christians accountable to a common human standard of political order; a proposition they believed to be thoroughly consonant with their faith.

This principle of what might be called self-abnegation in regard to the religious control of civil and political life, one partially based on theological conviction, constitutes a compelling model for the implementation of religious liberty. The principle is of course highly controversial within Christianity as well as other religions, but there is evidence that it is finding increasing resonance in religions around the world, as it has found resonance, historically, in at least one segment—often a besieged minority—of Western Christianity.

# RELIGION, NATIONALISM, HUMAN RIGHTS AND GLOBALIZATION

**Silvio Ferrari**

*Professor of Canon Law at the University of Milan, Italy*

In recent years, the position of religion has changed dramatically in two respects. First, religious organizations have regained their long lost public importance; and second, they have strengthened their identity profiles. For decades religion did not receive the kind of attention it currently does from politics, culture and diplomacy. One reason religion is regaining prominence is that religious organizations have learned to speak the “public language of identity politics.”<sup>1</sup> Religion provides people a key with which to interpret reality and conveys a sense of belonging to those who feel overwhelmed by a market where the “law of the jungle” prevails (as expressed in a recent article by Guido Rossi)<sup>2</sup> as well as to those who are frustrated by a legal system that has given up trying to ensure fairness (a conclusion reached by Natalino Irti when he writes about the Nihilism of the Right)<sup>3</sup> and to those frightened by the progress in science and technology, which follows its own set of rules.<sup>4</sup>

These changes are to be analysed carefully because they cause tensions with which we must learn to cope. We will briefly look at this issue in the following pages and, in short, discuss the historical processes that have led to the current situation, pointing out the resulting conflicts. Finally, a possible resolution to these conflicts will be examined.

## 1. Religions and Nations

The historical period from the mid-19th century until the end of World War II is commonly referred to as the era of nation states. The concept of a nation includes the cultural and political identity of the people and the state, as the institutionalized

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1 Enzo Pace: *Perché le religioni scendono in guerra?*, Rom-Bari 2004, p. X.

2 Guido Rossi: *Homo homini lupus?* In: *Micro mega*, 2006, 2, p. 76-86.

3 Natalino Irti: *Nichilismo giuridico*, Bari 2004.

4 See the position of Emanuele Severino in: Natalino Irti/Emanuele Severino: *Dialogo su diritto e tecnica*, Bari 2001.



Kirill I (original name Vladimir Mikhailovich Gundyayev) has been the Patriarch of Moscow and All Russia and Primate of the Russian Orthodox Church since February 1, 2009.

*Photo: Wikimedia Commons / [www.kremlin.ru](http://www.kremlin.ru)*

expression of this identity. The state also embodies, according to Staninslao Pasquale Mancini, the legal system of the nation.

Of course there are not only exceptions to this rule, but also significant distinctions. In the old nation states, such as France or Spain, problems arise in a manner different to that of those in newer nations, such as Germany and Italy. However, they have one very important thing in common. In the process of building, or consolidating, a national identity, it is inevitable that all individual identities lose significance. Culture, language and local markets play a less important role. Sooner or later these are replaced by their national counterparts. The national state demands a monopoly on patriotism and is not prepared to share this privilege with others. As demonstrated during the First World War, the religion of the mother country has the sole right to legitimately demand the ultimate sacrifice from its followers, the citizens. The religions and religious communities feel the effects of this process because they represent, at least potentially, alternative centres of identification and patriotism and are therefore, once again, placed under the control of the state.

Depending on the peculiarities of the individual religions, this can occur in different ways. Some religions virtually offer themselves to be absorbed into the nation quite organically. The clearest example for this is the orthodox churches.

They do not have an international management body (the authority of the patriarch in Constantinople is, at most, nominal). The real power lies in the hand of the autocephalous (or self-governing) churches, the boundaries of which are generally identical to the state borders within which they exist. Moreover, in many cases Orthodox churches have represented the centre of national unity (one thinks of the Balkans under Ottoman rule), which allowed people subjected to a foreign political and military power to preserve their own identity. These historical events, together with theological and legal features, have made it possible for the church to identify with a nation and consequently, also with the state representing it. In the typical orthodox notions of the correlation between church and state, in particular church territory, this dynamic is clearly expressed. The territory in which the state exercises its authority is identical to that in which the church claims monopoly over all other religions. Of course, this commonality does not preclude conflict - sometimes severe - between the state and the church. However, it does offer a framework of common interests where differences may be overcome and conciliated.

Those religions whose influence extends beyond national boundaries - and this is particularly true of Roman Catholicism - find themselves in a difficult position. As recently as the 19th century, the Roman Catholic Church still yearned for a political order based on two national authorities: the Pope and the Emperor. This model, however, had already started to crumble in the late Middle Ages as the nation states took shape and demanded the right to control the churches within their territories and also to appoint bishops. The emergence of nation states (and thus the possibility of the formation of national churches) was initially considered by the Holy See as a threat to Church unity and the sovereignty of the Pope. This historical background explains why even in the 19th century some European countries viewed their own citizens of Catholic persuasion with suspicion and cast doubts on their patriotism and loyalty to the nation. The English Catholics were denounced as "papists" and in France part of the Catholic population was considered "ultramontane" because their eyes were supposedly directed across the Alps acknowledging the Pope, the representative of a foreign power, as their highest authority.

In the first decade of the 20th century this suspicion gradually died down. During World War II, the Holy See maintained strict neutrality and avoided supporting any of the warring parties. In the immediate post war period, some of its power was ceded to the episcopate of the various countries (confirmed by the national bishops' conferences) and the formation of Catholic parties was promoted in order to help the faithful of the Roman Catholic Church to participate in the political life of their countries. The conflict between the national and religious identities, which fortunately never assumed the proportions of a war, did not end in a draw: national identity arrogated victory and ever since has dictated the terms on which conventions are now tacitly based.

In many European countries the demise of the state religion meant that religion no longer symbolized national identity as it had, at least informally, since the end of the liberation revolutions of the 19th century. The religions - plural - now have their own collective identities within the system, dominated by the concept of a nation, which itself no longer requires the support of religion to reaffirm its sovereignty over the lives of the citizens. And even where the confessional state has survived, this has progressively become a meaningless phrase (as in the southern European countries), or merely refers to an important part of national identity - albeit only for certain sectors and not universally valid.

## **2. Religions, Ideologies and Human Rights**

The end of the First World War opened up new horizons. The political and cultural forces which had dominated the field since the mid-19th century, namely the nations, were now confronted with a new enemy: the major global ideologies and political movements such as Communism or Fascism. These were characterized by supra-national messages and programs that were able to awaken solidarity and patriotism that went beyond state borders. The nation states, which had won the battle against the internal centres of collective identities, now had to face a new and, due to its international characteristics, even more dangerous opponent.

The answer to this new challenge could not be found on a national level. The confrontation was at a much higher level, and it is here that it must be carried out. At the end of the Second World War, a solution emerged: move to the level of international human rights. The major human rights declarations and conventions were not just a reaction to the horrors of Nazism and Fascism; they were also a response to Communism, the last of the universal ideologies to survive the Second World War. The international human rights declarations and conventions also opened up a global perspective that would evolve into a new patriotism in defence of the "free world". This "free world", which is characterized by political freedoms, freedom of press and religion, etc., was promoted as an international alternative to Communism, in which by and large such freedoms were absent. The religions were also drawn into this changing perspective.

In terms of its universality, religious organizations could not contend with the fundamental rights of man. Even the major international religions like Christianity, Islam or Buddhism were not as universal as what human rights aspired to be. Within this framework, defined by rights that are valid everywhere for each individual, religion had to be satisfied with a very specific and restricted role. This can be clearly understood from the formulation of human rights.

Article 2 of the Universal Declaration of 1948 states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, etc., meaning that universal human



In the Bosnian War (1992-1995), culminating in 'ethnic cleansing' campaigns, the massacre of Srebrenica claimed a death toll of around 8,000 people, mostly men and teenage boys. As of June 2011, 6,594 genocide victims have been identified through DNA analysis of body parts recovered from mass graves and 5,138 victims have been buried at the Memorial Centre of Potočari.

*Photo: Wikipedia / Emir Kotromanić*

rights must be respected regardless of the individual characteristics of people and regardless of their religion. When one considers just the right to religious freedom, it becomes clear that from now on both states and religions must deal with this new, globally applicable legal requirement. The international conventions protect individuals against violations of freedom of religion; and this not only on the part of states, but also on the part of religious communities. When a religious group forbids its own believers from changing religions, it becomes a problem when viewed from the human rights' angle.

The religious and national identities, which decades earlier were opponents, now both find themselves confronted with the fundamental rights of man, which restrict not only the sovereignty of states, but - to a lesser extent - also the autonomy of

religions. The areas in which the latter function are now determined not only by the constitutional law of the states in which they operate, but also by human rights, which put the individual conscience before the rights of religious communities.

### 3. Religions and Globalization

But this is not the end of the story. With the collapse of Communism in 1989, the last barrier to globalization fell. The new world that has been taking shape over the past twenty years is completely under the domination of this new human rights' dimension with all its effects on the economy, technology, communication tools, labour markets, etc. Its most important feature is deterritorialization: there are no longer any boundaries or homelands. Even the law must adapt to these new circumstances, since for the law to be globally applicable, it can no longer reflect the peculiarities of a country or a particular legal system. As Natalino Irti says, "*Kelsen's Pure Theory of Law* becomes a symbol for the liberation of the law from a territory."<sup>5</sup> It would appear that universalism and globalization have finally triumphed over particularism and local peculiarities. It would seem that neither states nor national religions have the power to combat this process.

However, something curious now occurs which has not before been seen. The further globalization progresses, the stronger the need becomes apparent for a local dimension - one anchored in a specific place with its own traditions, language and religion. The more the territory loses its significance, the more clearly does the desire arise for boundaries that show who is inside and who is outside, because without the "other" who is different from me, I cannot develop my own identity nor understand who I am. Even lawyers sense that dimensions are changing. There is a renewed interest in the work of Carl Schmitt whose book, *The Nomos of the Earth*, is once again being seen as a confirmation that there is a connection between law and territory. And once again, the religions of the world are profoundly affected by this change of direction that is dictated by the need for roots, traditions and a sense of belonging. These are all things which, to a large extent, religions can ultimately offer much better than nation states, which often seem too small and unsophisticated to be able to resist globalization.

The first result of this situation is a new version of the old fusion of nationalism and religion. What happened in the 1990s in the Balkans shows that the problems of Communism were merely put on hold, not resolved. After a bloody war, the map of this region of Europe is once again exactly as it was at the end of the age of nation states. It was extremely naive not to recognize that nations and religions would inexorably reclaim their former status as soon as the cohesive band of Communism was removed. Had we paid closer attention to the history of this part of Europe,

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5 Natalino Irti: *Norma e luoghi. Problemi di geo-diritto*, Rom-Bari 2001.

we would have realized that the danger of identification with religion, nation and culture was very much alive and could at any time take a tragic course - which in fact is what happened.

At the same time, we are experiencing something completely new. In the era of globalization, it is no longer chiefly the geographical territory that is crucial for developing identities; it is increasingly the sense of belonging. It is no longer simply, or even primarily, the dialectic between the geographical (or global) law of the market and the territorial (or local) law of identity. The identity frees itself from territorial bonds and defines itself in a relationship without borders. And this possibility is precisely what is offered by the major religious organizations. Religion offers a person purpose or some meaningful content that provides a key to aid in the interpretation of reality and that helps to place a value on human actions. The tenets of religion that govern the entirety of community pilgrimages, festivals and fasts give people a sense of belonging in daily life, which warms the heart and is more likely to motivate to action than the cold laws of the market on which the geographical laws are based.

Above all, "divine" rights possess a dimension capable of overcoming its own territorial origins, without denying them. This ability of the major religions and their rights (in contrast to the states and their rights) to overcome borders without losing their appeal, which proceeds from a historically and geographically qualified identity and sense of belonging, is what has increasingly come to the forefront in recent years. Jerusalem, Rome, Mecca and many other holy places and cities remain a point of reference for the major religions but do not curtail their abilities to expand. European Islam is a good example of this sense of belonging; in the name of a holy law, it offers itself as an alternative to both the territorial law of the European states and the geographical law of the market. The *Umma*, the Muslim community, crosses the borders of states and nationalities because its identity is based on a common faith and common religious practices. This is by no means an isolated incident. A similar dynamic is also found in the Jewish community, which is scattered all over the world, and in the evangelical "born again" movement in which the American executive from New York feels as much at home as does the Mexican peasant from Chiapas. In all these cases, the identities and affiliations cannot be geographically defined. They go beyond territorial limits without, however, dissolving the characteristic geographical dimensions of the global market.

If one wanted to condense everything into a single slogan (despite all the inherent dangers of oversimplification and misrepresentation), one might say that religions could be deemed the new trans-national nations. They are anchored in a common tradition and history. In their statements, one can see one's own reflection. They show everyone a way of life and create solidarity among the members of the community. They nourish a belief in a common destiny and warm the hearts of their followers



Prayers at the Wailing Wall in Jerusalem.

*Photo: Wikimedia Commons / Berthold Werner*

much better than the cold universality of human rights, which are possibly the real losers in this particular game. These are all features that traditionally make up a nation. Religions are not confined to a territory; they cross boundaries, move freely and emigrate, something which is virtually impossible for nations.

Because religions, to a large extent, convey a sense of identity and belonging, they seem to be the answer (or at least one of the most important answers) to the anonymous and impersonal law that globalization has produced. But this answer is not free from problems. The new identity-supplying role of religions, together with their ability to be mobile and to move into new areas, triggers conflict: conflict amongst religions themselves, who find it difficult to develop a credible theology regarding “others” and to enter into effectual ecumenical dialogue; conflict with nation states that are concerned about their own safety; and conflicts with the cross-national macro structures of a common history and culture (one thinks of the tensions produced by the presence of Muslims in Europe or Protestants in Latin America). Finally, there are conflicts with the underlying dynamics of the globalization process, which is oriented to a rationale of efficiency, an idea which only in the rarest of cases is shared by religion groups.

#### **4. Religion, Conflicts and State Secularism**

The three aforementioned conflicts are very different in nature and require a more thorough analysis than can be provided here. However, in order to understand their respective characteristics, it is still useful to identify the key components of each of these conflicts.

Currently, conflicts among religions play one of the most important roles in the formation of identities. In many parts of the world, people have lived, and often still live, in a neighbourly manner together with others who have different religious views but belong to the same culture. This applies, for example, to Christians and Muslims in Egypt, Syria and other Middle Eastern countries. They belong to different religions but are still part of the same Arab culture. This situation did not give rise to serious problems as long as the identifying elements of a religious community, together with its symbols and distinctiveness, were not too conspicuous and as long as not too much importance was placed on such membership. Because belonging to different religions is now understood and experienced as belonging to a different culture, it now becomes difficult to combine the differences in beliefs with a common culture. The differences in religion lead to cultural alienation and make living together in the same territory difficult. This either causes tensions that lead to the phenomena of ghettoization and marginalization or else manifests itself in open conflict.

The situation is different in the case of conflicts between religions and nation states. The emphasis on the identity-establishing nature of religions would not concern the states nearly as much if it were not also accompanied by a trans-national component and if the religions had not succeeded in so easily crossing borders through immigration or modern means of communication. It is no coincidence that in recent years, as far as theology (and law) students are concerned, the issue of national security is receiving increased attention. Until a few years ago, national security was exclusively the responsibility of the political and military officials. Today, however, the main concerns are terrorists who act "in the name of God" or fundamentalist preachers who call for holy war.

The case is somewhat different in conflicts that occur when the rights of religious groups and the representatives of globalization collide. The latter can act independently (just think of a large multinational company) or use their influence to exert pressure on the state. The laws of globalization follow the criteria of rationality and efficiency, which are not always shared by the religious groups as they may be contrary to the laws that govern the life of members of a particular religion. Religious laws may possibly prohibit women's access to the business world; they may require members to fast during the day (which reduces the productivity of workers), or prohibit them from activity on a specific day of the week, to name just a few examples. Laws such as these can be difficult to reconcile with the full utilization of production capacity in business and/or government enterprises associated with globalization.

All these conflicts revolve around the question of redefining the boundaries within which religions, states and trans-national institutions may exercise their powers. The fact that the religions of today are finding it easier than in the past to

cross borders does not mean that borders have been done away with. Boundaries are integral to the formation of personal and collective identities; and for this reason, they cannot disappear, although they may be replaced. For each border removed, a new one is created. For example, although the separation between the citizens of a country and foreigners no longer seems to be distinct, the gap between believers and non-believers is getting wider. The danger is more acute when these dividing lines become blurred and overlap. Europe currently faces the danger of reverting to a type of territory liberated “*cuius region eius religio*” and falling into a situation where there are no longer conflicts between states but between communities within one state and between opponents with differing religious and ethical orientations, such as can be found today within the European community.

It should not be assumed that this new kind of conflict is only a temporary phenomenon that will disappear in a few years’ time. It is much more likely that we will face this conflict for a long time and that we must therefore find a way of mastering it. There is no sense in seeking this governance by allowing the smaller nation states precedence, as they do not have the necessary dimensions to confront the problem. The answer lies at a higher, in our case European, level. However, this level cannot be defined territorially, as if the European Union were simply a state with much broader boundaries. Cultural concepts are necessary along with a guiding principle for the entire area. In regards to Europe, the guiding principle should be the secular state.

The secular state is the only concept that is capable of uniting the two basic components of European cultural tradition: the Christian one of “render unto Caesar that which is Caesar’s” and the secular maxim “*etsi Deus non daretur*” (as if God does not exist). The understanding of the secular state that is expressed in both these formulations differ but are not irreconcilable. “*Etsi Deus non daretur*” requires that in areas of public interest, reason enjoys priority over faith while “render unto Caesar” means that God is entitled to His portion within the public realm.<sup>6</sup>

No state - whether secular or not - owns the magic wand to solve the problems mentioned above. However, the secular state can define the limits within which citizens must remain and can set up rules, especially in terms of respect for the principles of reason and democracy,<sup>7</sup> which must be accepted by all parties.

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6 Elsewhere I have tried to show how these two different viewpoints can be combined. In the process I have emphasized that the secularism needed today, may not rest solely upon one of these principles.

See: Silvio Ferrari: *Laicità dello Stato e pluralismo delle religioni*, in: *Sociologia del diritto*, No. 2, 2006, p. 531; id.: *Sul trattato costituzionale europeo. Radici cristiane della laicità*, in: *Il Regno-attualità*, 15 September 2003, p. 528-530.

7 See: Silvio Ferrari: *Laicità dello Stato*, op. cit., p. 9-11.



Joining together to share in Christian fellowship, praise and worship.

*Photo: Wikimedia Commons / David Ball*

The purpose of these observations is to establish which of the many functions of civil society could be taken over by the secular state and are best suited to achieve the desired goal of protecting human rights. In this context, secularism is not understood as a program but as a method. It is not about the secularism spoken of by philosophers and political scientists but primarily that of lawyers. Lawyers do not purport to give an explanation of the values of civil society; they just want to regulate the relationship between the latter and the state. This pragmatic view of secularism, which sees itself as an instrument for the regulation of social pluralism, ensures the use of mediation through laws, which does not permit any single system of values (not even that of the majority), to determine public institutions. Basically it is not about a call for a utopian state neutrality,<sup>8</sup> as if a democratic state could avoid taking a stand and formulating its decisions in accordance with the wishes of the majority of its citizens. However, it is somewhat different whether a position

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8 That such neutrality is impossible is also emphasized by T.A. Madeley & Zsolt Enyed (Pub.): *Church and State in Contemporary Europe. The Chimera of Neutrality*, London 2003.

is taken in the awareness that every decision is imperfect and only provisionally expresses the value upon which it is based or whether one's own personal views represent the only possible truth. Without wanting to deny that there is an ultimate truth, the secular state declares that it has no jurisdiction in this particular question and leaves the task of defining and propagating "ultimate" values to a number of "participants" (religious groups, amongst others) that operate in a pluralistic society and follow democratic principles.

State legislation may be influenced by these values (depending upon how widely they are accepted in society), but legislative bodies must not themselves be taken "captive" (they should not identify themselves with any of these value systems).

Only a secularism that renounces the right to proclaim ultimate truths and sees its modest, yet significant, role as providing people with the opportunity to search for and commit to these truths as they understand them, can help to create a space for dialogue through which a radicalization of conflict can be avoided.

# CHALLENGES TO HUMAN RIGHTS AND THE ARAB WORLD

**Rosa María Martínez de Codes**

*Professor of History at Complutense University, Madrid*

## Introduction

Looking back at the reasons that motivated the Saudi-Arabian Delegation to abstain from the vote on the final Universal Declaration of Human Rights in 1948 is helpful in understanding the conflict, which made its appearance then and still exists today, due to the fact that human rights in the Arab world can be interpreted in two different ways. At the end of the 1940s, only ten member states of the United Nations invoked Islam in their Constitution: Egypt, Afghanistan, Iraq, Iran, Yemen, Lebanon, Pakistan, Saudi-Arabia, Syria and Turkey. Nine of those countries voted in favour of the final Universal Declaration of Human Rights with only the Saudi-Arabian delegation making a number of objections to Articles 14 (right of asylum), 16 (marriage) and 18 (freedom to change religious beliefs).<sup>1</sup>

At that time, the debates, which took place during the third Committee of the General Assembly, made it clear that there were two differing opinions within the Arab delegations, opinions based mainly on the different cultural understandings of the underlying wording of the Universal Declaration. Those countries which were most open to the West acknowledged that the western values in the text of the Declaration were of great significance; and although these values were not always compatible with the values of the Middle Eastern nations, most of the countries nevertheless supported the acceptance of the Declaration because they firmly believed in the dignity and worth of human beings. Shaista Ikramullah, the delegate from Pakistan, said: "It was imperative that the nations of the world accept the existence of a code of civilized conduct, which applies not only to international relations, but also to domestic affairs."<sup>2</sup> On the other hand the Saudi-Arabian delegation discussed what

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1 Morsink, Johannes: *The Universal Declaration of Human Rights. Origins, Drafting and Intent*, Philadelphia 1999.

2 Morsink, Johannes: *Inherent Human Rights. Philosophical Roots of the Universal Declaration*, Philadelphia 2009, p. 76.

contradictions the adoption of the text would mean for the states professing Sharia and remained with their decision to abstain from the vote.

As a result, the international experts of the late 1940s who interpreted the Universal Declaration concluded that general agreement existed regarding the universal validity of human rights. The basis of this agreement was the horror of the Holocaust and the need to adopt a joint declaration in which, as is stated in the Preamble of the Charter of the United Nations, “the peoples ...reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”<sup>3</sup>

Without any doubt, the historical context in which the wording of the Universal Declaration was formulated obligated the various delegations from differing cultural, religious and economic traditions to protect these inalienable human rights and to generate legal, judicial and public policies to both guarantee and protect these rights in the future.

It is also important to note that the Arab-Muslim states actively supported the internationality of human rights from 1960 to 1970, a time during which both the international covenants on political and civil rights as well as those on economic, social and cultural rights were being formulated and enacted.<sup>4</sup> However, a significant contradiction in the attitude of the Arab states to the international documents also became apparent.

It is interesting to note that the acceptance of the political and judicial models of the West subsequent to 1980 have been perceived as a defeat. In this context, Bruno Etienne speaks of a “halogen state”<sup>5</sup> and Bertrán Badie of an “imported state”.<sup>6</sup> Because these models have little or no roots in the cultures of the recipient states, they appear to have failed. Even though we may agree on the reasoning behind the explanation for the partial failure of the transference of our institutions to the Arab world,<sup>7</sup> it also thereby clearly reveals that some states give Sharia law precedence

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3 United Nations preamble.

4 Waltz, Susan: Universal Human Rights. The Contribution of Muslim States, in: *Human Rights Quarterly*, 26 (2004), p. 799-844.

5 Etienne, Bruno: *L'islamisme radical*, Paris 1987.

6 Badie, Bertrán: *Les deux Etats. Pouvoir et société en terre d'Islam*, Paris 1986, ders. : *L'Etat importé, l'occidentalisation de l'ordre politique*, Paris 1992.

7 Le Roy argues that the institutions which have been taken over are no more than a collection of empty husks, because the transfer did not include the concepts and understanding necessary for the functional reproduction of the model. *L'introduction du modèle européen de l'Etat en Afrique francophone. Logiques et mythologiques du discours juridique*, Bulletin de l'équipe d'investigations en anthropologie juridique, No. 5, Université de Paris 1, 1983.



“Prayer in Cairo”, a faithful photographic reproduction of an original two-dimensional work of art by Jean-Léon Gérôme, 1865.

*Photo: Wikimedia Commons*

and that the basic reason for the rejection in these regions is the difficulty in the co-existence of Islamic law with positive law.

The compulsion to return to the application of Sharia law, as Abu Taleb, President of the Egyptian Parliament said in the early 1980s, is not the expression of a certain nostalgia or indeed fanaticism. “It is above all the desire to regain an Arab identity because as far as it concerns our faith, morality and the law, Sharia is one of the major components of our personality and the best means of achieving cultural unity.” Based on these three dimensions of Islamic law, Abu Taleb states: “The law is not simply a tool for policy development, neither is it just a means of regulation. In the first instance it is a mirror, which reflects the culture of a society and its social, economic and political values.”<sup>8</sup>

The speech of the Egyptian Parliamentary President must be seen against the backdrop of a decade where the failed intention to create a Pan-Arab nation triggered

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8 Taleb, Abu: *La sharia islamique et le droit positif dans les pays arabes: histoire et perspective*, Dossiers CEDEJ, 1994, p. 137.

a process of reflection upon the significant normative and legal foundations of modern Arab society. This reflective process very quickly crystallized into two opposing viewpoints – secular and Islamist. These dictated the internal debate on the challenges of modernity (hadatha) on one side versus the defence of authenticity (asala) in the Arab-Muslim world on the other.

In this dispute, which was barely recognised by the West, the position of the religious intellectuals prevailed. They championed tradition. For them this tradition constitutes the cultural heritage (turath) passed on from generation to generation. The cultural heritage preserves the identity of each traditional society – in this instance the Umma – and acts as a shield against the changes and transformations of the present world. The Islamic discourse in defence of authenticity succeeded in reinforcing the link between the cultural and religious identities and labelled the phenomenon of modernity as a cultural and philosophical import from the West – foreign ideas which, in the name of supposed global progress, worked as a secularizing force which robbed religion of its meaning.<sup>9</sup>

Consequently, the most frequently heard demand for the preservation of identity and cultural unity within the Arab-Muslim world is that one must introduce Sharia, which is the source of all law in the Arab-Muslim areas.<sup>10</sup> At the time the Universal Declaration was adopted, many religious intellectuals saw the issue of human rights as an ideological and cultural by-product of western historical experience, which was oblivious to the peculiarities of the Arab world. The minority secular viewpoint saw the process of modernisation as a positive phenomenon for the development of the Arab society and defended the notion of the universality of human rights, hoping that the political and cultural influence of the West in the region would facilitate its practice.

Over time it appears that the debate now taking place within the Arab world on globalization has had a paradigm shift that replaces the earlier opposing views of *modernity versus authenticity*, namely, the contradiction of globalization on the one hand and local culture on the other.<sup>11</sup> There are still many issues which arouse concern in the West, but the new debate is, in particular, about what challenges the technological, economic and social changes mean for local identities.<sup>12</sup> It should be noted that this new debate has developed within the framework of a crisis in the Arab world – the second Intifada in the occupied Palestinian territories and the terror

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9 Amr Hamzawy: *Globalization and Human Rights: On a Current Debate among Arab Intellectuals*, in: Chase, Anthony & Hamzawy, Amr: *Human Rights in the Arab World*, Philadelphia 2006, p. 57-58.

10 Combalia, Zoila: *El derecho de libertad religiosa en el mundo islámico*, Pamplona 2001, p. 41-55.

11 Amr Hamzawy: *op. cit.*, p. 51-63.

12 Bayer, Peter: *Religion and Globalization*, London 1994, p. 45-69.

attack of September 11 – in which the “Islamic” and “secular” trends have once again taken over the debate and interpret globalization in antagonistic terms.

For Islamic intellectuals, “globalization” is synonymous with hegemony on the part of the West and therefore damaging to the Arab cultural heritage. As a result they see the culture of human rights as a strategy of the West which weakens the institutional and legal framework of Islamic societies. However, from the secular Arab perspective, the dynamic triggered by globalization leads to greater cultural diversity and reinforces the meaning of human rights in the various socio-political areas.

The question as to what role human rights play in the political debate that is currently being undertaken in the Arab world can be tackled in various ways. Amongst other things, the complex relationship among Islamic human rights declarations, the attitude of the Arab states and the relevant international treaties must be thoroughly analysed. These issues do not question the inalienable character of human rights.<sup>13</sup> However, on a political level, they make clear what difficulties the implementation of human rights encounters in the Arab Muslim region.

### **The Islamic Human Rights Declaration in Relation to the Relevant Treaties of the United Nations: Thoughts on the Relevant Basics**

One of the points in which there is great disagreement with regard to comparative law is the question of human rights. This can be ascribed to the fact that the comparisons made between the Islamic declaration and the General Declaration of the United Nations are argued mainly on a socio-political basis and are not analysed on a philosophical legal basis, a difference which leads to a great deal of confusion.<sup>14</sup>

Most human rights declarations or charters in the Arab-Muslim world have no legal force en bloc. Only those standards set out in them which have been incorporated into national legislation in each country are legally binding. This means that claims can only be made through the national legislation as provided for by each country and not by way of international law.

This is why it is necessary to differentiate between the secular oriented regional human rights declarations and those which specifically invoke Islamic law. Belonging to the first group are the Tunisian Charter of Human Rights (1985), the Arab Charter of Human Rights by Algiers for the Maghreb states (1989), the Moroccan Human Rights Charter (1990) and the Arab Human Rights Charter (2008).

All these documents contain a number of principles with the primary goal of protecting both the private and public freedom of the people. In this they contradict the generally held opinion that human rights in the Arab world can only be

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13 Morsink, Johannes: *Inherent Human Rights*, op. cit. p. 17-54.

14 Mikunda, Franco Emilio: *Derechos Humanos y Mundo Islámico*, Universidad de Sevilla 2001, p. 99-112.

interpreted as collective historical rights. In the secular interpretation, there is also no explicit reference to “safeguarding the Islamic personality” or to the particular circumstances of Muslims. There is more talk of “citizens” and “individuals”; they strive to avoid any form of discrimination against women and to promote women’s rights.<sup>15</sup>

Reading these texts, it is logical to think that they offer the ideal framework for cooperation in regard to the future development of legislation, in which rights and freedoms will be adjusted to match those formulated in the Universal Declaration. In particular, the Charter of the Tunisian League surprisingly uses wording almost identical to that of the Universal Declaration. For example, the Tunisian’s Article 15 matches practically word for word the corresponding Article in the text of the United Nations.<sup>16</sup> It is clear that a large number of Arab states – all belonging to the Arab League of Nations – concur with the interpretation of international law without abandoning traditional Islamic values. A particular example is the laws on personal status, which remain part of the national laws of the state (Qanún). As before, they rest upon historical Islamic law, and the population are accustomed to abiding by them. In a final analysis, this is merely a new formulation of the old Turkish-Ottoman code.<sup>17</sup>

As far as the reception of international law is concerned, it is striking that the various drafts of the Arab Human Rights Charter<sup>18</sup> – which in 1971 initially contained only 35 articles; the final version contains 53 articles – was adopted in Tunis in 2004, a very positive development.<sup>19</sup> The final version is more closely aligned to international norms and takes into account the recommendations made by a group of Arab experts in the context of a Technical Assistance Agreement between the United Nations High Commission for Human Rights and the Arab League of Nations.

In fact, the Arab Charter that came into force presents innovative aspects such as the principle of non-discrimination; gender equality; the prohibition of slavery, forced labour and all forms of exploitation and the right to a fair trial and a healthy environment. There is still much to be done with regard to discrimination against women, children and foreign residents, as will be discussed in the next chapter.

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15 See: <http://www.al-bab.com/arab/human.htm>

16 Mikunda, Franco Emilio: *op. cit.*, p. 114.

17 Alya Chérif Chamari : *La femme et la loi en Tunisie*, 1992, p. 1-30.

18 Abdullahi A. An-Na’im: Human Rights in the Arab World: A Regional Perspective, in: *Human Rights Quarterly*, 23 (2001), S. 712-714.

19 The Arab Human Rights Charter came into force in 2008 after it had been ratified by seven Arab countries: Algeria, Bahrain, Jordan, Libya, Palestine, Syria and the United Arab Emirates.

One of the Charters more obvious shortcomings is the lack of independent control mechanisms that would allow for individual complaints in the event of state violation of any recognized rights.

Now while many interpret this Charter as a sort of defence mechanism against the international pressure exerted on the Arab world in connection with human rights, others point out that, despite possible cynicism, it represents a step in the right direction and indicates that the Arab League, at least formally, subscribes to international human rights standards.<sup>20</sup>

In addition to these various regional charters, there is a second category of Islamic statements that subscribe to the dream of their own special Islamic view of human rights, which some authors consider to be older than the secular view.<sup>21</sup> In this respect, please refer to the *Universal Islamic Declaration of Human Rights*, which was presented to UNESCO in Paris in September 1981,<sup>22</sup> and to the *Cairo Declaration of Human Rights in Islam*, which the member states of the Organization of Islamic Conference (OIC) adopted in August 1990.<sup>23</sup> On different levels these declarations contradict the Universal Declaration of Human Rights of the United Nations. The reasons for this are that the wording specifically relates to the Islamic religion and that the rights in question have been tailored to conform to the values and statutes of Islamic law, or Sharia.

Both statements are clearly based on religious beliefs and this leads to discord between Islamic and international standards. From a legal standpoint, it appears neither logical nor consistent to profess to the basic ethical values of Islam and at the same time to subscribe to a secular declaration such as the Universal Declaration of the United Nations. Even if the principles of the Universal Declaration are only informally recognized, it means that the international norms enjoy primacy over Islamic or other laws and thereby nullify the effective application of Islamic laws.

In order to mitigate the impression that the Universal Declaration of Human Rights is a purely western document which overlooks the contributions of other cultures, the United Nations has started a series of initiatives, most notably the academic seminar organized in November 1998 by the Office of the United Nations High Commissioner for Human Rights in cooperation with the OIC, under the

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20 Abdullahi A. An'Na'im: *op. cit.*, p. 715.

21 Botiveau, B.: Démocratie et droits de l'homme: mises en perspective islamistes, in: Martin Muñoz, Gema (Hrsg.): *Democracia y derechos humanos en el mundo árabe*, Madrid 1993.

22 [http://www.aidh.org/Biblio/Txt\\_Arabe/inst\\_cons-decla81\\_1.htm](http://www.aidh.org/Biblio/Txt_Arabe/inst_cons-decla81_1.htm)

23 <http://www.unhcr.org/refworld/Cairo> Declaration on Human Rights in Islam; the German translation may be found in: *Gewissen und Freiheit* 36 (1991), p. 90 ff.



Bedouin serving tea in Morocco.

Photo: Creative Commons / Yago Veith



Maroccan woman.

Photo: Creative Commons / Steve Evans

significant title: *Enrichment of Universal Human Rights: The Universal Declaration of Human Rights from an Islamic Viewpoint.*<sup>24</sup>

At the conclusion of that seminar, the positive value of the Universal Declaration of Human Rights as a major accomplishment of humanity was highlighted, but simultaneously the need for reassessment in the light of new circumstances was stressed. The member states of the Organization of Islamic Conference demanded more attention to and respect for cultural diversity, especially since not many of the countries now making up the United Nations were involved in the drafting of the original document.

It should be pointed out that in the Constitution of the 46 member states of the Organization of Islamic Conference,<sup>25</sup> the identity of Muslim communities was

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24 The results of the Seminar were published by the United Nations (HR/IP/SEM/1999, Part 1, 15. March 1999).

25 <http://www.oic-un.org/about/members.htm>

being defended and that these states were responsible for regulating social order within the Islamic legal system, which co-existed on equal footing with other systems. Viewed in this manner, the words of a delegate to the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights acquire their full meaning when he insisted on “full recognition and respect for the principal legal systems of the world, including the Islamic model ... as essential for the promotion of a wider understanding of the universality of the Universal Declaration of Human Rights.”<sup>26</sup>

The principle difference between the Islamic document and that of the United Nations lies ultimately not in the number of accepted rights, but in the underlying religious derivation. In Islam, human rights are not based on the liberal and rational western world view, which demands freedom and protection from the threat of external oppression; in Islam human rights are based on a particular viewpoint of man as a religious being. This being must answer to God for his deeds and in order to fulfil the mission he has received from his Creator has certain rights and privileges – inseparable from his obligations – that enable the fulfilment of the Divine will.

In contrast to western documents and those of the United Nations that are based on a secular world view, a largely religious spirit is obvious in human rights in Islam. This was made very clear in the previously mentioned 1998 seminar entitled *Enrichment of Universal Human Rights: The Universal Declaration of Human Rights from an Islamic Viewpoint*:

“There is not one single human right that would not be substantiated by a Sura of the Koran or a saying of the Prophet. Islam understands human rights as a way of honouring God. This means that human rights may not be viewed as a gift or as something man may utilize. God punishes those who misuse these rights and rewards those who abide by them. In addition, human rights in Islam are closely linked with the laws of God. Man has not been given freedom to handle unjustly. Disobedience and human vanity, as well as man’s illusion that he is master of the universe, has led to what is called ‘humanism’ today, a concept which does not exist in Arabic and which states that man and not God is the centre of the universe.”<sup>27</sup>

The Islamic Human Rights Declaration, therefore, is infused with a transcendent conception of man in accordance with the tenets of the Islamic religion, and this manifests itself in the formulation of the various rights. The principles, scope and limitations within which human rights are understood are to be determined by Islamic law. An extremely negative view of people proceeds from the quoted text, which implies that the humanistic tendencies of the West demand privileges that they themselves have never claimed.

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26 Resolution No. 56/8 of the Organization of Islamic Conference, adopted at the eighth Session of the Summit in Teheran in December 1997.

27 HR/IP/SEM/1999, Part 1, 15 March 1999, p. 210.

And finally, it should be noted that although Islamic law is the foundation of human rights in the Islamic Declaration, this does not mean that their application is limited exclusively to Muslims. On the contrary, the rights proceeding directly from the dignity of the individual are recognised as the rights of everyone, regardless of whether or not they are part of the Umma.

Why all people are entitled to enjoy these rights is documented in Article 1 of the Cairo Declaration of Human Rights in Islam. It is explicitly stated:

“All human beings form a single family whose members are united by submission to God and descent from Adam. All men are equal in terms of dignity, obligations and responsibilities, without discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other reasons. The true faith is the guarantee for enhancing such dignity along the path to human perfection.”<sup>28</sup>

In short, it can be said that the Islamic declarations are based on a religious point of view of human rights and that they understand man as a transcendent being who is answerable to God for his actions. In order that man is able to fulfil the mission God has assigned to him, he receives a series of sacred rights and liberties that are inseparable from his obligations. These rights, which are derived from human dignity, are accorded to all persons within the regulatory framework established by their own Islamic law.

Within the problems posed by the Islamic tradition of whether or not to allow halal/haram, the question arises as to what extent this tradition is able to adapt to the social realities and policies in which Muslims live. Given this reality, some lawyers, not only those from the West, express certain doubts as to the possibility of adapting this system in relation to the new global context. As part of our globalised world, the communities of believers, as well as those of non-believers, must defend the inalienable human rights of the people and the political rights of citizens, where religious belief is not incompatible with civic responsibility.

### **Human Rights Treaty Ratifications and the Arab World: a step towards the integration of human rights into politics**

The attitude of the states in the Arab world<sup>29</sup> to international documents, and more particularly those relating to human rights, reveal contradictions which deserve consideration. Any analysis of the development of human rights in this

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28 Cairo Declaration of Human Rights in Islam, cited in *Gewissen und Freiheit*, 36, 1991, p. 93.

29 The following independent states (with the exception of Palestine) are members of the Arab League: Egypt, Algeria, Bahrain, Djibouti, Iraq, Yemen, Jordan, Qatar, Kuwait, Libya, Morocco, Mauritania, Oman, Palestine, Saudi-Arabia, Somalia, Sudan, Syria, Tunisia und die United Arab Emirates.

region must take into account the complexities of the interests, factors and context that influence the politics and practices of each individual Arab state. The Arab world is a region of contrasts in which its diversity of peoples and cultures, each with its own historical processes (colony, protectorate or occupied territory, etc.) has generated diverse models of state and society. The religion, Islam, is the dominant factor which holds all these states together under the general heading of "Arab culture", although significant differences exist in the way it is interpreted and implemented. This is particularly true when establishing relationships between the state and public life.

The first proactive steps were taken by the Syrian and Tunisian governments in 1969 when both states ratified two key international treaties (the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights). Since then, a significant number of other member states of the Arab League have formally ratified these international treaties.<sup>30</sup> This, however, contradicts the reality of how these rights are implemented in the region and is construed as a perverse irony by those who defend them and suffer under the devastating violations.

In spite of this, from the perspective of international law, the pro forma ratification of these treaties has a two-fold meaning. First, it means that the formal validity and legitimacy of international human rights law has been recognized since the 1960s and comments that these rights are merely strategies of foreign domination are gradually dying away. Secondly, in the region a sense of political protection emanates from this recognition, which enables civil society to articulate its political, economic, social and cultural rights, citing the legal obligations entered into.<sup>31</sup>

A closer inspection of the ratification of international treaties raises serious doubts as to the efficacy of existing mechanisms which guarantee the human rights system in the Arab world, as does the attitude of reluctance and suspicion displayed by the many reservations and declarations made by the signatory states. At the time of the ratification, it was noted that the states were extremely reluctant to agree to demands for supervision and international responsibility, as mandated in the *Optional Protocol to the International Covenant on Civil and Political Rights*. It is noteworthy that only four states (Algeria, Djibouti, Libya and Somalia) have ratified the Protocol, which allows individual complaints before the Human Rights Committee. Similarly, the designated international monitoring mechanisms envisaged by the *Convention against Torture* were not recognized

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30 See <http://www.un.hchr.ch>

31 Chase, Antony & Hamzawy, Amr: *op. cit.*, p. 237.

since Articles 20, 21 and 22, which gave the committee the authority to accept complaints from other signatory states or individuals, were not accepted by the ratifying states.<sup>32</sup>

The many reservations brought by the Arab states against various provisions in the ratified treaties at times undermine the essence of these standards or else render them ineffective. Technically, reservations which are not compatible with the objects and purposes of the international agreements are not permitted, but in practice they are allowed. In the case of Saudi Arabia, the following scenario can be seen and appears to be widespread among Arab states:

In February 2009 when the Universal Periodic Review (UPR) of Saudi Arabia was conducted, the Office of the High Commissioner for Human Rights (OHCHR) compiled a dossier in which the reports of treaty bodies and special Rapporteurs, as well as observations and comments of Saudi Arabia are included. In the first section on the extent of the international obligations of Saudi Arabia,<sup>33</sup> succinct warnings were issued by the Committees responsible for three of the major international human rights treaties:

“In 2008 the Committee on the Elimination of Discrimination against Women (CEDAW) expressed concern regarding general reservations voiced by Saudi Arabia after the ratification of the Convention and requested the State to consider the possibility of withdrawing its reservation (...). The Committee on the Rights of the Child (CRC) renewed its 2006 recommendation to Saudi Arabia to review its general reservations and either withdraw or restrict them. In 2003, the Committee on the Elimination of Racial Discrimination (CERD) also expressed its concern regarding the extent and the ambiguity of the comments made by Saudi Arabia in their general reservations and asked the contracting State to review its reservations and officially to withdraw them.”<sup>34</sup>

The reservations mentioned are directly related to those rights which conflict with the “rules of Islamic law”, a law which is difficult to codify and interpret and which forms the basis for a large proportion of the reservations expressed by the Arab states. The fact that the people enjoy only limited human rights in the Arab world is an indication that the conflict of the 1940s on the incompatibility of two differing traditions and value systems has not yet been resolved.

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32 Ibid. Attachment 2, p. 239-282.

33 In September 2000 Saudi-Arabia ratified *The Convention on the Elimination of All Forms of Discrimination against Women*; three years earlier, in 1997, they had already ratified the *International Convention on the Elimination of all Forms of Racial Discrimination* as well as signing the *Convention of the Rights of the Child* in January 1996.

34 See the United Nations internet site: A/HRC/WG, 6/4/SAU/2, p. 2.

Paradoxically, from the Saudi perspective, the positions do not appear to be at all irreconcilable. "The religious and cultural characteristics complement the international standards of human rights and do not undermine them."<sup>35</sup> The Saudi perspective then reiterates that the rights in Islam are derived from the Holy Qur'an and the Sunnah (traditions and practices) of the Prophet and are the basis of all legislation and constitutes the typical way of life in the Kingdom of Saudi Arabia. "These rights take precedence over the multi-dimensional rights stipulated in the instruments of international human rights."<sup>36</sup>

The position taken by Saudi Arabia is that the harmonisation outlined in the first paragraph can be solved in practice if it is recognized that in the event of any conflicting regulations the principle is accepted that Islamic law is above the international standards; this means that even when ratified, treaties are only theoretically accepted, in practice they are relegated to second place to avoid inconsistencies with the principles of Islamic law.

An additional problem arises from the interpretation of human rights violations, which are seen as the actions of individuals and which have perverted the original meaning of the law and customs. Saudi Arabia argued along these lines in their national report of 2009:

"Many of these violations fall within the context of domestic violence, to which confusion between the true Islamic Sharia and customs and traditions is a contributing factor. In actual practice, the concept of guardianship, for example, often loses its connotation of responsibility and care, which are transformed into domination and coercion."<sup>37</sup>

Particularly controversial is the influence of Islamic law in the field of human rights, especially when it comes to aspects of personal status concerning equal rights and non-discrimination against women. For this reason, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) triggered a particularly large number of reservations. In general, several states declared their adherence to the Convention, subject to its terms not conflicting with Islamic law, the respective country's constitution or civil law itself. Along with freedom of religion and the treatment of non-Muslims, this issue certainly offers the most grounds for conflict.

It is precisely this source of conflict which prompted the Committee on the Elimination of Discrimination against Women to repeatedly call for the Saudi state

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35 United Nations General Assembly, Human Rights Council, Universal Periodic Review, Report of the Working Group Saudi-Arabia, A/HRC/11/23, p. 3.

36 Ibid. p. 5.

37 United Nations General Assembly, Human Rights Council, Universal Periodic Review, Report of the Working Group on Saudi Arabia, A/HRC/11/23, p. 3.

to unconditionally anchor in its legislation the principle of equal rights for men and women as well as the definition of discrimination on grounds of sex.<sup>38</sup> Likewise, the Committee also repeatedly renewed its request that the system of male guardianship over women (mahram) should be abolished because it represents a significant limitation in the rights of women under the Convention.<sup>39</sup>

Meanwhile, after her visit to Saudi Arabia in February 2008, the *Special Rapporteur on Violence against Women, Causes and Consequences*, noted in her official report how severely the rights of women in this country are limited by their lack of autonomy and economic independence, as well as the practices surrounding divorce and child custody rights.<sup>40</sup>

Does the principle of “equality before the law” for all citizens, which is found in the constitutions of many Arab states, mean that men and women are treated equally before the law, or does it refer to the family code and personal status according to Islamic legal tradition? If the answer to the first questions is yes, this means that these Constitutions comply with international western legal principles. However, if equality is interpreted according to the principles of Islamic law, then the resulting consequences in areas such as guardianship, marriage, child custody, divorce, dowry and inheritance are seriously restrictive of the rights they purport to protect. In short, the dichotomy and conflict between the levels of secular and religiously based law are part of the complex dialogue between Islam and the West, in which both sides want to save face and preserve their identities.

The recommendations that have been made by the 54 delegations that participated in the *Report of the Working Group on the Universal Periodic Review of Saudi Arabia* illustrate the complex dialogue and distinct positions of the different regional blocs. The position of the western states leaves no doubt that the law in Saudi Arabia and practices in force in the country are not compatible with the Convention on the Rights of Women. For example, Canada, Finland and Israel recommend succinctly in their Conclusion 18 that “all laws, policies and practices that discriminate against women be abolished.” Particular reference is made to those measures which prohibit women from participating fully in society on an equal footing with men and, among other things, the strict practices of gender segregation, restrictions on freedom of movement and the limited access of women to work, public places and businesses, the right of women and girls to education, marriage with free and full consent and the strict system of male guardianship.<sup>41</sup>

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38 CEDAW/C/SAU/CO/2, Paragraph 13 and 14.

39 Ibid. Paragraph 15.

40 United Nations press release: “The United Nations Special Rapporteur on Violence Against Women reports on her visit to Saudi Arabia”, 13 February 2008 (A/HRC/11/6/Add.3).

41 A/HRC/11/23, p. 19.



*Interior view of the new railway station in Marrakesh, Morocco. It was opened in August 2008.*

*Photo: Creative Commons /JialiangGao*

The delegation of Arab Muslim countries, for example Egypt<sup>42</sup>, called for alternatives in order to protect human rights whilst still respecting the cultural characteristics and the Sharia; Malaysia<sup>43</sup> spoke of intensifying the efforts already being made to bring the elements of Sharia law into harmony with prevailing legislation to ensure maximum protection for women and children; and according to the Algerian opinion,<sup>44</sup> those recommendations that were compatible with the religious, social and cultural characteristics of Saudi Arabia should be considered, especially those that are derived from the Sharia, as these enhance the general principles of human rights and by no means replace them.

In conclusion, it can be said that the aforementioned Report presents a complex international panorama, where western countries interpret the obligations subscribed to by member states of the United Nations in terms of their *universal*

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42 Ibid. p. 18.

43 Ibid. p. 19.

44 Ibid. p. 21.

validity, whilst the Arab-Muslim states retreat to a position of *cultural relativism*. Ultimately, we are dealing with two different perspectives which have shaped the past decades of international debate both within and beyond the Arab-Muslim societies; a debate in which the importance of human rights is called into question by the Arab states, if not veritably denied.

The opponents of an inclusion of Islamic law in the field of human rights take the position that acceptance of an Islamic human rights system would lead to a reduction of existing standards and the creation of a theoretical framework, which favours the policies of governments that impair the very rights requiring protection.

“Distinctive Islamic criteria have consistently been used to cut back on the rights and freedoms guaranteed by international law, as if the latter were deemed excessive. The literature arguing that Muslims may have human rights, but only according to Islamic principles, provides the theoretical rational for many recent government policies that have been harmful for rights.”<sup>45</sup>

There are also, however, voices calling for a more positive dialogue on human rights, and they stress what extraordinary influence human rights can have on political change in the region and that they may contribute to the creation of alternative structures to the authoritarian political regimes which are the rule in most Arab states. The proponents of this view point out that, just like the development of democracy and civil society, human rights have always been a topic of intellectual debate in the Arab world.

Perhaps it would be appropriate today to resume this old debate, i.e. to consider how rigid the theoretical framework actually is which – according to science and the media – has determined the relationship between the two blocks, “Islam” on one side and “human rights” on the other, a relationship characterized by cultural stereotypes.

One thing must not be forgotten: all participants in Middle Eastern dialogue were in agreement regarding the central role played by Islam in Muslim societies, even the critics. This role has also not been called into question in the debates on other social trends in which the feasibility of political Islam in a diverse geopolitical space is concerned.

Currently, the defenders of human rights in the Arab world hold the view that the political influence of the Islamic heritage cannot be determined precisely and varies both in local as well as international relations. The cultural and political diversity in the Muslim world calls into question the paradigm of “Islamic” and “relativist” positions where Islam is interpreted as the sum total of all the Muslim world’s inherent values. That is, Islam is not the dominant force for the social and political structures in this large geographical area; but it is rather that the political structures

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45 Mayer, Ann Elizabeth: *Islam and Human Rights. Tradition and Politics*, 2006, p. 3.

respond in different ways to various beliefs, cultural groups and movements. Islamic societies are no exception with regard to human rights. They encompass cultural realities with different connotations and implications that interact with each other in complex ways and, as far as Islam as a normative system is concerned, does not dictate political practice.

First, one must consider the simplified paradigmatic perspective of Islamic reality. This must be critically examined because it represents these societies as a monolithic structure, with Islam as the only legitimate cultural model.

Perhaps the form as well as the manner in which human rights are disseminated must also be reviewed, as these are questioned and even criticized from both Muslim and non-Muslim perspectives. This analysis could help to achieve a unified political and cultural practice in which indigenous normative systems, such as Islam in the Arab states, no longer play a relevant role. Many of the procedures practiced by western states on an international level have helped to bolster the simplistic view that the human rights system is a projection of the West. Moreover, this has strengthened the type of nationalism which rejects the international standards as alien and invasive. Unfortunately, this restricted view particularly influences politics. It leads to xenophobia and supports the ideological thesis of the cultural clash between East and West.

It should also be pointed out that in politics human rights represent a natural law within which an international legal framework is formed through a series of standards. Therefore, these standards are monitored by certain organs of the United Nations, the purpose of which is to protect individuals and groups against the abuse of power from various sources. Nevertheless, these standards are sometimes understood as interference in internal political affairs and a means of imposing western culture on Muslim societies, or else they are considered to be an echo of post-colonialism.

The dilemma facing the Arab world has much to do with the fact that they need to free themselves from the negative equation of “western” human rights with “western” imperialism. This equation always resurfaces when certain countries or regional blocs silence the human rights rhetoric in defence of other states which systematically violate these rights in political practice. If progress is to be made in the implementation of human rights in the Arab world, the debate on the origins of human rights or their use in interest-based politics must cease. The central question in this debate is: how useful are human rights in defining an international legal system and how useful are they to the states of the Arab Muslim world and for the people and groups living under their jurisdictions? The current paradigm of confrontation between both stereotypical understandings of Islam and the system of human rights must be abandoned if the cycle of never ending debate is to be broken.

The norms of trans-national Islam and human rights are, in themselves, important. Certainly there may be tensions in their relationships with each other, but these tensions are not to be interpreted as structural confrontations but rather as a tangential manifestation of different ideological contexts. In the Arab-Muslim world a reform-oriented dynamic appears to be emerging, which will expand the recognition of political, social and economic rights as a whole, both for civil society as well as for certain groups and minorities where such rights are currently lacking. Islam, today, has become a protagonist in the globalised world and many no longer see it as a dark area which spurns dialogue. Consequently, any debate between the two normative systems should exclude stereotypes and allow for consideration of the ideological, political and social differences in the region.

# THE ROLE OF RELIGION WITHIN CIVIL REGENERATION – AN IMPLICIT RECOGNITION OF UNIVERSALITY

**Fabrice Desplan**

*Sociologist; Research Fellow in Groups, Society, Religions and Laity at the French National Centre for Scientific Research*

When considering the universality of human rights, it invariably leads to the classical assumption that they relate to fundamental rights applicable within all human societies. This line of reasoning can be stretched further, noting the limited empirical evidence of this stance. Geopolitics, traditions, pressure groups and various interest groups are often obstacles to the expression of rights. In analysing the human rights of man, one often notes the divide between a theoretical universality and an actual universality. Some choose to point out that universality is a dogma, yet on the other hand, the unswerving defenders of universality cry otherwise. This first group points out that despite the contents of the Universal Declaration of Human Rights (UDHR) of 1948, individuals are not able to circulate freely between countries, slavery still persists in various forms, human trafficking exists, arbitrary arrests are commonplace, religious liberty is fragile etc. As for the others, the UDHR is a tenuous achievement wherever it is implemented. Whenever it is denied or flouted, the UDHR becomes an ambition, a standard, and a struggle echoing the most legitimate aspirations.

This article will attempt to sidestep this opposition by approaching the universality of human rights through the position of religion in the resolution of national conflicts. Why choose this approach instead of a more classical stance? The aim is to rely on the will of those people who aspire to the expression of the UDHR to be manifest in them, through approaches that seek to overcome conflict and restore a climate of peace. This angle should highlight those rights which those aforementioned societies regard as fundamental. And indirectly, we should be led to observe how, in the search for peace, the universality of human rights is a lever which facilitates the reconstruction of social ties. From this perspective, religion contributes to weaving an environment conducive to reconciliation, even where it has been previously used to stir up conflict. Overall, the argument integrates a recognition of people's cultural and liturgical



The Nuremberg Trials were a series of trials held between 1945 and 1949 in which the Allies prosecuted German military leaders, political officials, industrialists, and financiers for crimes they had committed during World War II.

*Photo: Wikimedia Commons / Deutsches Bundesarchiv*

uniqueness. We will note through observation, that on the contrary, this will in fact uphold the universality of the UDHR<sup>1</sup>.

The concept of *transitional justice* has been a formalisation of this approach. It has been criticised in particular by noting the way it has distanced itself from the repressive aspect of the law. But through its connection with the experience of individuals and by taking into account the limits imposed by the geopolitics and local reality, transitional justice tacitly highlights the universality of human rights.

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1 The illustration most directly linked to this proposition is Article 2 of the UDHR which states that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

## **Nuremberg, A Starting Point**

Transitional justice takes into account the limits of law enforcement. It incorporates every day realities such as tradition, spirituality, rituals, or even the mandatory cohabitation between perpetrator and victim following conflicts. It is a form of 'realjusticia' which does not liberate itself from the legal system. This is an important variable, but not unique in the reconstruction of peace. We come across this in relation to Archbishop Desmond Tutu, according to the account of Pierre Hazan<sup>2</sup>. Within the context of the Truth and Reconciliation Commission (South Africa), a declaration by Desmond Tutu clearly indicates what transitional justice is:

"We (South Africans) possess traditional or contemporary instruments, and juridical or extra-juridical instruments, to bring to light the truth and put ourselves on the path to justice and reconciliation."

The Nuremberg trial had the effect of establishing the first stages of transitional justice, according to Pierre Hazan. The end of the war opened the door for the need for justice amongst the victors. With the impetus of the Americans, Nuremberg was orchestrated to demonstrate the opinions of the offenders, the extent of their crimes, and the legitimacy of the war. The premise of an international criminal court was being drawn up based on the legal codes of the Allies. Nuremberg, with its pomp and media coverage, attempted to take the witness statements and turn them towards the interest of the geopolitics of the Allies. The intention was to build a legal truth on which the nations could lean on to rebuild peace based on justice that could not be challenged. Hazan reported that the American prosecutor at Nuremberg noted the importance of the issue:

"We must never forget that the facts upon which we judge the accused today are the very ones upon which History will judge us tomorrow. To hold a poisoned chalice to the lips of the accused is to hold it to our very own lips. In our task here, we must demonstrate integrity and an intellectual objectivity in order that, for posterity's sake, this process shall be established as having fulfilled all the aspirations of humanitarian justice."<sup>3</sup>

The Nuremberg trials were dramatised under a geostrategic influence. A rhetoric emerged which will go down in history. At Nuremberg, roles were being defined. Germany initiated the policy of repentance, and the principle of imprescriptibility in the hunt for war criminals was established. For the first time, the victim played an essential role in proceedings.

According to Pierre Hazan, from Nuremberg emerged the limitations of the

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2 'Judging War, Judging History' by Pierre Hazan, Paris edition, Presse Universitaire de France, 2007. (Or English version: Stanford University Press, 2010).

3 Idem page 24.

law for the reconstruction of peace. To legally construct a peace by designating the aggressors and victims is not a guarantee of restored social ties. On the contrary, justice becomes the breeding ground for ideologies and actions which deepen the oppositions. It results in frustrations which will breed all over again. In addition, there was the fact that the unspoken objective of Nuremberg - to send out a cogent message to other nations and leaders to favour respect for the universality of human rights - was not in fact achieved. The repeated conflicts and ideologies which violate the UDHR are examples of this failure.

### **From Nuremberg to Transitional Justice**

Boosted by the limits of international justice following the example of Nuremberg, transitional justice will prevail in many places across the globe. It takes account of the need for justice, of the central role of the victim, the need for peace, but moreover, the need to rebuild social ties. Its final objective will be reconciliation, which incorporates the cultural and religious factors of the nation concerned in its quest for peace.

“Transitional justice fascinates me as it appears to be, at the conclusion of a bloody century, like a New Jerusalem. It purports to answer both the crimes in the past and the violence of the present; it attempts to participate in the healing of societies and in the re-establishment of democracy and the State of Law through the recasting of political communities; by rectifying history; moralising it; by patching it up through lawsuits; the obligation to remember; through the Truth Commission and memorial laws. There is a temptation to confer unlimited authority to the law and to history<sup>4</sup>.”

Transitional justice is backed by the idea that despite radically different historical situations, societies which have survived bloody ordeals employ their own resourcefulness to promote the process of reconciliation. It is this conviction, both instrumental and ethical which was to popularise Archbishop Tutu, president of South Africa’s Truth and Reconciliation Commission. For him it was all about mechanisms, ancient and modern, foreign and indigenous, but above all practical and effective, which would enable a forging of the process of reconciliation adapted to the particular circumstances<sup>5</sup>. It is taking into account the values which create ties. Where the beginnings of rebuilding of ties have been allowed, it has often been driven by taking into account religious traditions. South Africa is the most symbolic example. But it is not unique. The situations in Morocco, Lebanon and Peru are often quoted. It is understood to be a necessity as the protagonists note that within five years after

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4 La Paix contre la Justice? Pierre Hazan, 2010, GRIP, page 43.

5 Quote by Desmond Tutu in ‘Reconciliation after Violent Conflict: A Handbook’ by David Bloomfield, Teresa Barnes and Luc Huyse; Stockholm, Institute for Democracy and Electoral Assistance, 2003 Foreword, page 1. Quoted by Pierre Hazan in ‘Judging War, Judging History’ by Pierre Hazan, Paris edition, Presse Universitaire de France, 2007.



Anglican Archbishop and Nobel Peace Prize laureate from South Africa, Desmond Tutu, attending the annual convention of the German Protestant Church in 2007.

*Photo: Wikimedia Commons / Raimond Spekking*

the resolution of a conflict, 50% of the peace agreements are no longer observed, including those where there has been an international settlement.

### **The Added Value of Religion**

Tutu built the Truth and Reconciliation Commission upon the idea that a pardon would even stretch to the reintegration of criminals. It is a romantic vision. It relies on the South African concept of ‘*Ubuntu*’ which stresses the concept of forgiveness.

“All things considered, this third way (neither that of amnesty, nor that of the courts) is in accordance with the vision of the African world – that which we call ‘*ubuntu*’....*Ubuntu* is about the essence of being human (...) It’s a way of saying: ‘My humanity is inextricably linked to yours’ or ‘We belong in a bundle of life’.”<sup>6</sup>

Hazan notes that Desmond Tutu, dressed in the garb of archbishop to reinforce this conviction, doubled the ‘*Ubuntu*’ of Christian forgiveness. There was an over-

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6 Pierre Hazan, 2010, page 55.

representation of religious personalities at the heart of the commission and hearings began with liturgical singing. For Desmond Tutu, the key was that the country should not sink into the turbulence of revenge. He pointed out:

“We, the South Africans, will not survive and prevail except in togetherness. Whites and Blacks, bound by circumstance and history, struggling free from the quagmire that was apartheid. Neither group will overcome on their own. God has linked us together, shackled us one to another.”

The evidence of the links with this declaration and that of Martin Luther King are obvious, as he said: “We must learn to live together as brothers [and sisters] or perish together as fools.”<sup>7</sup>

In the case of South Africa, there was the renouncement of penal justice. This did not happen without large amounts of frustration, especially when the aggressors did not want to openly enter into the process. Despite extremely divergent opinions, observes Thabo Mbeki, they were prepared to pay the price for a peaceful transition. This goal seemed to be through the criminal justice system. But this was made possible by making use of the religious variable in the peace process. Christian forgiveness and the ‘*Ubuntu*’ tradition united positively on behalf of peace.

Within another framework, the Moroccan situation was also memorable. To backtrack on the lapses of his father, Hassan II’s regime, King Mohammed VI established, amidst much controversy, the Equity and Reconciliation Commission (in French, IER) in 2004. This was one of the international declensions of the South African experience. In the face of increasingly radical Islamism (the geopolitical context marked by the attacks of 11 September 2001, attacks in Casablanca in 2002, and those in Madrid perpetrated by Moroccans in 2003), the limits of the IER were numerous. The strained context, the Moroccan legal framework and the position of the King as Commander of the faithful, would lead the latter to impose limits upon the IER. The IER’s objectives were to be: 1) to shed light on disappearances and arbitrary detentions; 2) to compensate the victims; 3) to prepare a report on the atrocities perpetrated.

Concerning the compensation, the opinion of the IER was consultative and any action extrajudicial, as had been anticipated by the Advisory Committee of Human Rights (CCDH). The CCDH charged the IER to: ‘not undertake any initiative of a nature which would generate disunity or resentment or sow discord’.<sup>8</sup> This was in accordance with the wishes of the King, caught between the necessity of assuming the mantle of his father and the need to distance himself from this very same heritage. In fact, ‘the Moroccan commission could never lead to a process on

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7 ‘The Strength to Love’, by Martin Luther King.

8 Recommendation of the CCDH, reiterated by Pierre Hazan, page 148, 2007.



Mohammed VI, present king of Morocco, inaugurating the new road leading from El Jabha to Tetouan.

*Photo: Creative Commons / Xiquet*

a Peruvian scale nor even that of a South African one. In Peru, the Truth Commission had forwarded documentation to the judges and in South Africa, hundreds of those responsible for human rights violations testified having been offered protection from any legal reprisals. In Morocco, there would be no face-to-face between victim and tormentor, nor the slightest amount of criminal prosecution. Only institutional accountability could be highlighted.<sup>9</sup> This position did not go down well and was met with significant opposition. The performance and conduct of the IER were due to the religious status of the King. It was therefore through its religious legitimacy that the IER was upheld, despite numerous frustrations. The political or ethical justifications were an insufficient foundation for the IER. The Commander in Chief of the faithful played this angle skilfully: “I am certain that the sincere work of reconciliation which we have accomplished (...) is, in fact, a response to the divine summons ‘Absolved from a beautiful absolution’. It is a gracious gesture of collective forgiveness.”

Concerning the IER, national interest did not go through the process of identifying guilty individuals, but rather it highlighted the global responsibility of the political system. The named injunctions seemed to be a risk that the kingdom refused to accept. However, it was the religious variable within the Moroccan political framework through a tense international context, which was the single driving force

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9 Pierre Hazan, page 149, 2007.

to overcome the frustrations, even if the characters in real-life Morocco were held at a distance from the IER. It mustn't go without saying that the Moroccan ruling class took an interest in the limitations of the IER. But let us stress the importance of the religious variable in an approach which touched on civic cohesion, even if in the Moroccan case it was a question of establishing, via the IER, a transitional justice which did not deal with the infringements upon a number of Moroccan people.

### **The Use of Religion, a Tacit Recognition of Universality**

Transitional justice attempts to respond to the tension which exists between justice and peace. It calls upon traditional initiatives. Religion remains highly functional to achieve this objective without responding to every need. The Moroccan, South African and also Peruvian models show that rebuilding occurs in many cases by considering religion as the vehicle for finding common ground and perhaps even reconciliation. Peace is built implicitly by a tacit recognition of religion as an integral element of the UDHR.

In post-conflict situations, it is, then, by resorting to an aspect of the universality of rights that the first fruits of peace are formed in certain cases, where a damper has been applied upon the only opportunity to call upon the legal process. This avenue has the advantage of being functional. It raises the tension that exists between the need for justice and the necessity for peace. One cannot happen without the other. Nevertheless, peace implies adjustments to judicial logic. This cannot take place without considerable frustration. In the case of South Africa, Tutu must have become aware through the injunctions of the participants that those taking part cannot be required to adhere to the concept of Christian forgiveness. But success in South Africa comes from the fact that a dialogue had been possible. Obviously, we cannot anticipate the viability of the process of transitional justice in these different cases. Rebuttals appeared in South Africa where voices were heard complaining about the absence of a traditional application of the law. Culturalist drifts have come to light where no one thinks that an infringement of the UDHR which occurs locally need necessarily be resolved at a local level. Far from the original ideal, this vision leads to a non-universality since it is localism which prevails. In this way, the enthusiasm of some to evade their international obligations is expressed, making transitional justice a populist argument against the universality of human rights. More broadly, this use of transitional justice shows that universality is not at an end since the same opportunity for ratification can also bring about its demise.

Human rights display their universality from a religious slant when we consider conflict resolution and the rebuilding of peaceful ties in certain places. The concept of transitional justice is thus proved. This observation incorporates the inextricable nature of human rights in the same vein as does the philosopher, Emmanuel Levinas. As with the human race, human rights are made up of different elements

which consolidate to give the human race its rights. It is in finally understanding humans as 'a multiplicity of uniquely unsummable beings... where individuals expressly cease to be interchangeable like money'<sup>10</sup>. This is possible because the human differences have need of a set of rights which characterise and consolidate them. This is the universal function of human rights, including by means of the UDHR. In fact, to consider one aspect of the UDHR is to convoke the others since they are mutually reinforcing; and thus will result in the utilisation of religion as a portal in attempting to rebuild peace. The alternative conveys by the same means the universality of human rights. However, religion cannot guarantee universality. Such a guarantee comes from politics and it is towards politics that the most legitimate attempts turn to in this day and age.

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10 E. Levinas, 'Les droits de l'homme et les droits d'autrui en Indivisibilité des droits de l'homme, Actes du 11<sup>ème</sup> Colloque interuniversitaire', Editions Universitaires, Fribourg Press, 1985, p. 37.

# FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: FUNDAMENTAL RIGHT VERSUS LEGAL POSITIVISM

**Roger Kiska**

*Roger Kiska serves as legal counsel with the Alliance Defense Fund and is based in Bratislava, Slovak Republic, where he specializes in international litigation with a focus on European law. Completed with the generous assistance of Christopher Thompson.*

Over the ages, men have asserted their mutual rights in declarations and revolutions. History is largely defined by the struggle between claims of rights by some and the denial of those claims by others. This has occurred both within particular cultures and when two cultures clashed. Now, we have entered a new era. No longer do assertions of the “universality” or “inherence” of rights stay within the insulated communities making them. They have global ramifications. All cultures now have a stake in discussions about rights. These cultures and their perspectives often collide, and there is need for a forum for peaceful resolution of conflict and a need to protect basic rights wherever they are threatened. The UN advanced its Declaration of Human Rights for such a purpose. It claimed the rights within were universal; what then, of differences in opinion between cultures? Are the rights listed in the Universal Declaration of Human Rights merely a product of western civilization, a secular expression of Judeo-Christian values? If so, does that heritage make these rights somehow suspect, untenable, or only narrowly applicable?

In approaching the Universal Declaration as a working hypothesis on universal rights, the task is three-fold. First, one must describe what historical factors produced the Declaration while revealing its basic aims. Second, the philosophical underpinnings of the rights it lists must be shown in order to determine how logically sound and morally compelling they are for all humankind. And third, one must look more specifically into questions of cultural diversity and implications for finding definite ground in which can be rooted at least *some* core rights for everyone. This last point is crucial, for the global community is in dire need of a secure foundation as it advocates

for rights. The diversity of worldviews held by distinct cultures and the often antagonistic implementation of various moral systems – the very real and present conflict of deeply held normative values across cultures – operate in a world where no man nor culture is an island. Some operating principle for enforcing rights is not only advisable, but inescapable: if mere tolerance is not tempered by secure standards, then the purposes of the Declaration – to shield the vulnerable against inhuman atrocities and foster international peace – are frustrated; if mere absolutism is unrelieved by sensitivity and humility, the UN’s mandate against tyranny and oppression is undermined.

The Universal Declaration offers at least a convenient starting point in navigating between universal moral values and the varied expressions of diverse, interdependent, and sovereign nations. It is a product of practical agreement amongst groups of considerably diverse theoretical and cultural legacies; rather than insisting on a unity of justifications for rights, thereby effecting “arbitrary dogmatism” or else encountering “irreconcilable divisions,” the Declaration simply announces “practical truths about [our] life together.”<sup>1</sup> However, the Declaration is only a starting point for a discussion on universal human rights. That same diversity and compromise behind its drafting has led to confusion and misapplication of the principles articulated within. The Declaration’s aspirations can be taken in different directions by later interpreters; it is worth discovering which direction is logically and morally attractive.

### **The History and Drafting of the UN Universal Declaration of Human Rights**

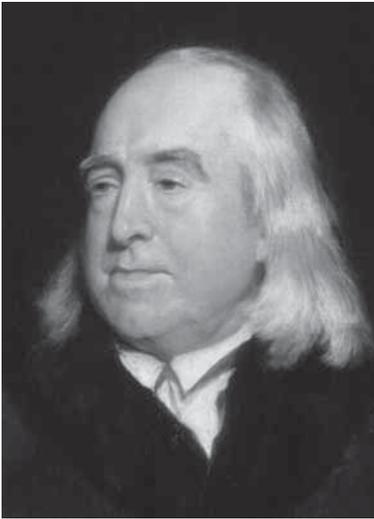
The Declaration emerged suddenly from academic and political thought unheralded by historic events. A long tradition of “Great Declarations” reached back centuries, “a quite special heritage of Western civilization.”<sup>2</sup> Other cultures without the same history of written declarations still recognized and enjoyed– and, when required, secured against oppressors– basic rights.<sup>3</sup> Its heritage aside, the Declaration cannot be understood without regarding the tragedies of the years leading up to its drafting. As the world learned of the “evidence of atrocities, massacres and cold-blooded mass executions” committed by totalitarian regimes during the Second World War, the shocking knowledge goaded the community of nations to defend humanity against

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1 Jacques Maritain, “Philosophical Examination of Human Rights,” *Human Rights: Comments and Interpretations*, 59, UNESCO, Paris, 25 July 1948.

2 Harold Laski, “Towards a Universal Declaration of Human Rights,” *Human Rights: Comments and Interpretations*, 65, UNESCO, Paris, 25 July 1948 .

3 Chung-Shu Lo, “Human Rights in the Chinese tradition,” *Human Rights: Comments and Interpretations*, 185-186, UNESCO, Paris, 25 July 1948.



Jeremy Bentham (1748 – 1832) was an English author, jurist, philosopher, and legal and social reformer. Although strongly in favour of the extension of individual legal rights, he opposed the idea of natural law and natural rights, calling them "nonsense upon stilts." Reproduction of a painting, National Portrait Gallery, London.

*Photo: Wikimedia Commons*

similar future tragedies.<sup>4</sup> The world's reaction bore fruit, as the "response to Nazi tyranny inaugurated a new era of human rights protection."<sup>5</sup> The Declaration voices these aspirations.

The Declaration's goals can also be discerned by considering a contemporary response to the same atrocities: the Nuremberg Trials, which continued in some form until April 1949, months after the adoption of the Universal Declaration. These trials addressed the same problems as the Human Rights Commission. The difficulty and danger in both contexts was that the crimes committed during WWII were state-sanctioned ones—sanctioned by democratically-elected, modern, bureaucratic states. The Trials highlighted the fatal flaw of finding law's legitimacy in state authority. Both at Nuremberg and in the United Nations delegations, the survivors of the 1940s determined to find the origin of human rights in our inherent dignity and worth, rather than in the dictates of a state. To this end, the UN Commission listed human rights that were, they said, inalienable. They declared from the outset that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>6</sup> These were the

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4 See "Statement on Atrocities," *The Moscow Conference*, Roosevelt, Churchill, and Stalin, Oct. 1943 (<http://avalon.law.yale.edu/wwii/moscow.asp>).

5 See *National Coordinating Committee for UDHR50*, Franklin and Eleanor Roosevelt Institute, 1998 (<http://www.udhr.org/Introduction/question4.htm>).

6 *United Nations Universal Declaration of Human Rights*, Preamble.

goals: freedom, justice, and peace, to be achieved in the context of the equal, inherent dignity of each human person. It is significant that this declaration *recognized* inherent, pre-existing rights, rather than created or modified privileges bestowed by modern states. It was against “disregard and contempt for human rights” which “outraged the conscience of mankind” that the Declaration was affirmed.<sup>7</sup> It was through the human conscience that the drafters recognized a problem requiring attention, not through legal scholarship or juridical apparatus. To avoid ambiguity, Article 1 stresses that all are “endowed with reason and conscience,” an inherent basis for universal rights.

The delegate-drafters envisioned this Declaration as a barrier against state intrusion. Far from vesting the state with authority to experiment with its citizens’ human rights, the Declaration charged states with protecting these rights and keeping them unadulterated. The delegates emphasized this barrier between state authority and the rights of man in their last Article: “Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth

herein.”<sup>8</sup> Yet the Declaration was not crafted as a hammer to be wielded against national sovereignty. It affirms that the rights within “may in no case be exercised contrary to the purposes and principles of the United Nations,” a purpose insistent on the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>9</sup> The UN Charter affirms a right to self-determination. Though it urges universal recognition and protection of human rights, the Declaration was not formulated, and has not traditionally been interpreted, without respect for cultural diversity and the role of individual nations in choosing how to implement the Declaration.

This, then, was the desire behind the Declaration: the need to secure human rights against real threats, most vividly the threat of oppressive governments violating the inalienable rights of man, all the while respecting broad national perspectives on these essential issues. To that end, the delegates came relatively swiftly to a set of principles. Yet they approached these principles on distinct paths – only one of which is well established, truly pointing towards universality.

### **The tensions within the Declaration and their resolution**

The most profound issue raised by the Universal Declaration of Human Rights is probably not whether it is a product of Western, Judeo-Christian, liberal democratic, or any other school of thought. Instead, the pressing question is whether the rights

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7 *Id.*

8 *d.*, Article 30.

9 *Id.*, Article 29.3; *Charter of the United Nations*, Article 1.2.

listed can be reasonably defended and extended to all individuals and, if such is possible, what justifications are most sound. To do so, it is necessary to explain and compare the two strands of legal thought that went into the Declaration – Positivism (with its companion, Progressivism) on one hand and Natural Law theory on the other. In truth, the latter is the only one able to legitimately claim universality.

Before those two primary tracks of legal thought are traced, their ability to produce a common list of rights ought to be emphasized. Thinkers of “different cultures and civilizations [and] of antagonistic spiritual associations and schools of thought” arrived at agreement in this fundamental matter, and it cannot be claimed the Universal Declaration of Human Rights is a product of simply one worldview, one system of thought, or one culture.<sup>10</sup> It possesses broader appeal than that. Perhaps it is an amalgam, or synthesis of certain views, a product that falls short of truly universal claims; but it is no mere addendum to a lone school of thought. The discordance of viewpoints, which eventually led to this unified guide to our common assurances about humanity, suggests that the Declaration is something more than just the compromise of a few thinkers. The genuine divergence in theory and justification, combined with the great convergence in content and practical application, offers a hint that, whatever the intellectual trajectories to and from this common ground of the Declaration, that ground itself speaks to something abiding and universal. There is quite a distinction between the *substance of* and the *rationale for* rights; while the Declaration is most certainly not a product of universality of rationales, its history lends credence to the notion that some universality of substance exists.

### Positivism versus Natural Law

The disparate ideologies supporting human rights did not follow parallel tracks toward the content of the Declaration, but rather confronted (as they still confront) each other antagonistically in many areas. Yet they found a list of human rights to which each could give assent, albeit with one reservation: “we agree about the rights *but on condition that no one asks us why.*”<sup>11</sup> The answer to that question – why they agreed on these rights – is still important.

Two distinct strands of political-legal thought combined to create the Declaration. These were, for Jacques Maritain, the classical and the revolutionary; a pairing more evocative to modern ears is Positivism versus Natural Law.<sup>12</sup> Positivists believe “the law is essentially man-made: it is a command issued by a political superior or

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10 Maritain, “Introduction,” *Human Rights: Comments and Interpretations*, ii, UNESCO, Paris, 25 July, 1948.

11 *Id.*, at i. (emphasis in the original).

12 See *id.*, at i, versus

sovereign to whom the populace is in a habit of obedience.” For positivists, laws derive legal legitimacy from the fact of their legal enactment. In this sense, Positivism treats law tautologically: If a decree is a properly enacted law, then it has binding legal effect. A law is, in the end, merely a law. Positivists have often taken care to distinguish legal validity from moral validity; however, for positivists, morality is yet another normative construction, man-made rather than inherent. In a positivist’s view, the force in law which compels individuals is utilitarian and pragmatic, not moral or natural.<sup>13</sup>

The classical or natural law approach, on the other hand, acknowledges a closer, dependent relationship between law and ethics; it does not look for a law’s legitimacy only in the manner of its adoption and promulgation, but also in the content of its statements.<sup>14</sup> Natural law, true to its name, assumes law exists in the form of natural principles, distinct from any man-made construct but discoverable through man’s actions, thoughts, and characteristics. While the underpinnings of natural law can be either secular or religious, “the common denominator...is that the ‘separation thesis’ of legal positivism – the thesis that, while the existence of law is one thing, its moral merit or demerit is quite another matter – is contested.”<sup>15</sup> Considering the diverse and contrasting views on morality even within a single culture, arriving at sound principles through natural law may seem difficult or even implausible. However, natural law holds that an unsettled foundation for law is better than no foundation at all. With the former, at least, there is the possibility of eventual clarity; with the latter, merely the prospect of self-deception.

Much current trouble in the human rights arena has occurred because current jurists and activists have tended to view the question of rights through the wrong lens. The “Positivism lens” views states as progenitors of human rights. Since it comprehends rights as things *created by society*, rather than inborn and precedent, Positivism is ever vulnerable to Progressivism. This rather interdependent theory conceives of civil society as a project for social elites to experiment upon in their efforts to realize better conditions for humanity. There is no inherent, independent moral check on what the state is privileged to visit upon its citizenry; the ends justify the means, however poorly those ends are defined. Positivism and Progressivism are twin paths to totalitarianism, for as the rights of humanity have their origin in the state, so too do they have their definitions and future in the state’s purposes. Oddly,

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13 See Nicola Lacey, “Legal Positivism to 1970” & James Penner, “Legal Positivism since 1970” in *The New Oxford Companion to Law*, Peter Cane & Joanne Conaghan, Oxford University Press, *Oxford Reference Online*, 2011.

14 Roger Brownsword, “Natural Law Theory,” *The New Oxford Companion to Law*, Peter Cane and Joanne Conaghan, Oxford University Press, *Oxford Reference Online*, 2011.

15 *Id.*

even some philosophers who reacted against the tragedies inflicted by the totalitarian states of the 1940s viewed human rights as products of the state. They stated the need for “abandoning the logical basis of those rights regarded as universal rights of man, and reducing them to, at most, the rights of man in history” and believed such rights “are not eternal claims but simply historical facts, manifestations of the needs of such and such an ego and an attempt to satisfy those needs.”<sup>16</sup> This reveals that there is something more deeply seated than one’s philosophy that sensitizes one to the reality of human rights. For the positivist outlook cannot observe the Nuremberg Trials and find illegality in the conduct of those charged (there can be no appeal to international law for positivists here, for no applicable enacted law existed at the time). Yet all but the most committed positivist would fault war criminals for acting according to the laws of their state. This is, it seems, because even positivists have an innate understanding of natural law principles.

The “Natural Law lens” allows one to fault such unprecedented, unspecified crimes while being logically consistent. For this theory finds the source of legal obligation in the natural order and in the dignity and inherent value of the person, rather than in enacted codes of law. Violations of rights exist outside established courts or articulated principles; rights are *prior to* governments and civil society, and indeed civil society was formed largely to protect them. Governments which flout basic human rights undermine their own mandates and, according to natural law theory, can be held to a standard independent of their civil authority. This strand of philosophy conceives of “universal human rights” as more fundamentally different than positivists conceive them. Those positivists who advocated a declaration of universal human rights perceived such “universality” as something descriptive: a standard that, hopefully, would be adopted around the globe. The natural law theorists saw universality as something more elementary than that: these rights were universal because they were equally and naturally endowed upon each and every human person. Indeed, it is only under Natural Law that the label “human rights” can be said with sincere commitment; under Positivism, a more accurate term is “civil privileges.”

### **Human Rights versus Civil Privileges**

Distinguishing human rights from civil privileges does much of the work of separating the positivist and natural law conceptions of what, in fact, these “rights” consist of...and how far the state can invade or erase them. Where do these rights (or privileges) come from? According to the natural law theorist, they are attributes of “the body of unchanging moral principles regarded as a basis for all human conduct,” which the state cannot in good conscience

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16 Benedetto Croce, “The Future of Liberalism,” *Human Rights: Comments and Interpretations*, 81.

disregard.<sup>17</sup> Under natural law, the word *human* is imbued with importance, and *rights* “mean that which belongs to the essence of man, namely, that which is not accidental, that which does not come and go with the passage of time and with the rise and fall of fads and styles and systems.”<sup>18</sup> The positivist cannot really mean “human” rights when using the phrase, or he means it only in a nebulous sense as rights at times *given to*, not *arising from*, a human. These concessions by the state are defined by and dependent upon civil authority; the individual has no inherent, independent right to insist upon them. For positivists, such rights, liberties, privileges – however one denotes them – properly deserve the qualifier “civil” rather than “human.”

Civil privileges can be called “positive” rights – benefits that states must provide, which require positive action. In reality, states must make calculated decisions about where to direct limited resources. It takes no resources to restrain state action – *e.g.*, to refrain from persecuting a religion. State action in the fair and universal application of a benefit (say, equal access to the best available healthcare) may require considerable resources. Sometimes the cost is not worth the benefit; neither the direct and indirect financial costs nor the limit on individual liberty that overwhelming state action can foster. The danger in blurring the line between human rights and civil privileges is this: Positivism tends toward ever more invasive state action, since everything the state gives to the citizen is classified along one continuum of civil liberties, and everything the state refuses the citizen becomes an infringement of those liberties. There is no practical endpoint to the list of rights the state can create and few principled options for resolving conflicts between these rights. This view of law and rights obscures the inalienable and fundamental quality of basic rights for the sake of a little more economic security or a slightly more efficient political process. When everything is significant, nothing is significant. If whatever the state offers – or whatever benefit a group of citizens demands – becomes an indispensable right, then those few truly basic rights are diluted and at times denied.

This has born out in practice. Voices are ever clamoring for new “human rights.” The real crisis facing protection of human rights today is what qualify as rights. Should new privileges be added to the template of what are fundamental, categorical rights? The possibilities inherent in this consideration force one to decide how to treat “zeitgeist” rights, which are newly voiced, newly pertinent rights that are characteristic “of the times” or represent a current trend in social appreciation or legal evolution. This is a doubly important inquiry for it implicates not only the

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17 “Natural Law *noun*,” *Oxford Dictionary of English*, ed. Angus Stevenson, Oxford University Press, 2010, *Oxford Reference Online*, 2011.

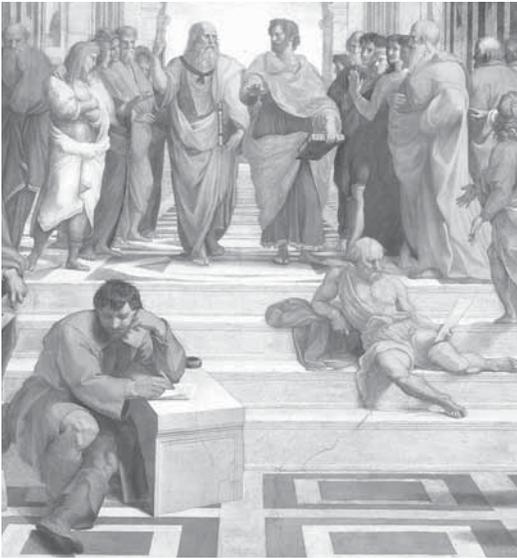
18 Charles Malik, quoted in Quincy Wright, “Relationship between Different Categories of Human Rights,” *Human Rights: Comments and Interpretations*, 132.

“new” but also the “old” rights they often come in conflict with, such as freedom of expression.

When rights are ceaselessly multiplied, universality cannot be achieved without either a global civil authority or else a probably impossible unity in outlook among all societies, for the legal privileges rooted in the enacted law of various states must be identical. Moreover the adoption of new rights – and the compromising of old – in a progressive state makes any claim to universality meaningful only in the paltry sense of universal *at this moment*. When rights are derived from state action, they can always be altered; and if they can be altered, they can only be universal in a descriptive sense, rather than in a categorical sense. Practically speaking, the more “fundamental” rights one insists upon, the less likely an international consensus is to be reached.

There are some rights better called civil privileges within the Declaration. These depend on a civil authority, its benevolent largesse, and indeed its access to sufficient material resources and the know-how to distribute them. An example of such liberties include Article 14’s right to asylum, Article 15’s right to nationality, Article 21’s right to partake in the political process, Article 22’s right to social security, and Article 26’s right to free education. These rights do not exist in a pre-social state, and their contours depend on the growth of civil authority, not upon the single factor of human dignity. The mere dependence of rights on a state does not make them suspect under Natural Law, for “human rights” might compel nations to recognize those rights in certain ways – the fundamental right to liberty may require a right to seek asylum; the right to freedom of thought and expression may require a right to education; the right to life may require access to healthcare. Yet these benefits from the state are not properly determined by the state’s interest, or the enactments of positive law; they are compelled by something prior to such consequences: the status of the citizens who form the civil authority. Indeed, Article 21 confirms this by stating, “The will of the people shall be the basis of the authority of government.” That authority does not exist in statutes and raw power, as Positivism suggests, but rather in the will and action of persons. And so even the “civil privileges” of the Declaration cannot be dismissed as states’ optional charity – a proper understanding of human rights may well be required.

Understanding human rights as creations of the state advances a view vulnerable to totalitarianism, where authority alone determines the rights an individual can claim. If rights have their origin in the state, then the Nuremberg Trials were spurious, simply a case of “to the victor goes the spoils.” The actions of such “war criminals” are not in fact illegal, but simply unpopular to the conquerors. Yet however suspect Positivism is, however favorable Natural Law may be, it is still necessary to describe the content, rather than just the origin, of basic rights.



Socrates and his philosophic heirs, Plato and Aristotle, posited the existence of natural justice or natural right. Of these, Aristotle is often said to be the father of natural law. “The School of Athens” (1511), extract from a fresco by Raphael, showing Plato and Aristotle in the centre. Stanza della Segnatura, Palazzi Pontifici, Vatican.

*Photo: Wikimedia Commons*

## **Articulating an Approach to Human Rights**

A clear understanding of the most essential rights is necessary to navigate consistently between tolerance and tyranny. For tolerance of certain actions means allowing actual abuse of individuals; imposition of a single view on all circumstances is an anathema to diversity or liberty. Difference in some contexts is rightly praised. Stable principles provide an anchor for resolving diversity of opinions under the natural law approach. For positivists, no ground can claim to be absolutely guaranteed, and so course corrections and judgment calls are continually needed and the only hope offered is getting it right for the moment. All civil privileges are subject to change, and one is never sure whether one compromised on something peripheral or vital.

Some core rights are often seen as more critical and foundational than others. A Western Declaration offers such a list with its phrase “life, liberty and the pursuit of happiness.” But not only Western thinkers advocate such core compilations: one Chinese philosopher whose opinion the Commission on Human Rights sought in 1947 offered a parallel list of “(1) the right to live, (2) the right to self-expression and (3) the right to enjoyment.”<sup>19</sup> There are other ways to express this notion that a handful of human rights are unalienable, but it should be readily apparent that

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19 Chung-Shu Lo, “Human Rights in the Chinese tradition,” *Human Rights: Comments and Interpretations*, 187.

not all rights are as central or important as others. As noted above, the danger of Positivism is placing all rights on a single continuum rather than in fundamentally different categories—nothing is truly unalienable, but instead merely more or less alienable than another privilege.<sup>20</sup>

Accepting that at least some rights are universal still fails to answer how the UN Declaration—and other declarations, such as the European Convention on Human Rights—should be implemented. Are they aspirational guides, or can they be interpreted in a binding fashion by courts? Does it matter which right is concerned? How is the diverse international community to approach claims of universality within a document? Treating the UN Declaration as a mandate to be pushed without cultural sensitivity upon member nations would seem to contravene the natural law view (for if these basic rights are universal, they should be negotiable from within each peoples' culture through human characteristics common to all) and the positivist view (which would view the UN's array of rights as just one among many possible legal propositions, the imposition of which would be more tyrannical than corrective).

In *Case of Vo versus France*, a French doctor negligently caused the death of an infant in utero. At the time, he could not be held liable for homicide under French law because a fetus's legal status hinged on legally ambiguous words such as "everyone," "person," and "life." The question posed was whether treaty provisions like Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognize a legally-protected right to life for "everyone," required that the doctor be held liable for negligent homicide under French law. The Grand Chamber of the European Court of Human Rights did not revisit the French legal analysis but instead sought to determine whether French law met the standards placed upon it by treaties. In deciding that the Convention's guarantee of protection of life for everyone did not extend to requiring nations to protect unborn children, it looked to several sources. The Court began with existing case law, noting that "the Court has yet to determine the issue of the 'beginning' of 'everyone's right to life' within the meaning of [Article 2] and whether the unborn child has such a right." Early on the Court hinted at an unwillingness to create new rights not found in case law or explicit in conventions themselves. It noted a lack of consensus in practices across European legal systems, particularly the lack of evidence "that it was the intention of the Parties to the Convention to bind themselves in favor of any particular solution" to the question of whether an unborn child is a "life" for

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20 "Unalienable rights" in natural law theory are in fact alienable in one sense: they can be forsaken by the individual himself, as the criminal forsakes his right to liberty through his crime. However, they cannot rightly be alienated by arbitrary State action—there is no such guarantee in Positivism, where the State defines the rightness of its action.

the purposes of the Convention. The Court also looked to the interpretation of the Commission on Human Rights and its rejection of “an absolute ‘right to life’ of the fetus,” and reiterated the Commission’s judgment “that in such a delicate area the Contracting States had to have a certain discretion.”<sup>21</sup>

The Court considered whether it should declare authoritatively who is a person. It held that this case fell within the margin of appreciation enjoyed by individual states because “the issue of such protection has not been resolved within the majority of the Contracting States themselves [and because] there is no European consensus on the scientific and legal definition of the beginning of life.”<sup>22</sup> The Court did not only look to diversity of practice, but also to a diversity of understanding about critical terms: if nations disagreed on what terms meant, the Court would not impose its own definitions on sovereign states. Such reluctance illustrates a sound way of handling diversity. Nations agreed to be bound to the Convention; nevertheless, they retained their freedom to move at will within the range of meaning found in the agreed to terms. Without a consensus on what terms mean, courts are not free to define them for all.

There are areas where the cultural diversity of nations is more directly implicated. These exist where different cultures or values more regularly confront one another or when the rights themselves come into conflict. This is a growing issue where European jurisprudence accommodates a positivist or progressive worldview that introduces ever more zeitgeist rights, new rights that often oppose well-settled rights. Three important areas where this confrontation takes place are in current developments in hate-speech laws, anti-discrimination regulations, and clashes between parental rights and government policy. The growth of such new interests has challenged traditional freedoms of expression, belief, and association amongst other fundamental rights. The case of “hate speech” laws exemplifies this contest between trends and core values.

Freedom of expression protects more than “information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock, or disturb; such are the demands of that pluralism, tolerance, and broad-mindedness without which there is no democratic society.”<sup>23</sup> Yet this freedom is threatened by “hate speech” laws that often make appeals to moral truth or statements of personal opinion punishable by law. This is most easily seen where “hate speech” rubs against religious belief, as when a pastor expressing Biblically-based ideas in a sermon is threatened with a prison sentence, as was Ake Green in

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21 *Case of Vo versus France*, paras. 75; 76; 77 & 78.

22 *Case of Vo versus France*, para. 82; see also para. 81 for the Court’s explanation of the initial question before it.

23 *Handyside versus The United Kingdom*, 1976.

Sweden. Yet threats to religion are not the endpoint of enshrining a new “right to not be offended.” It would perhaps be tolerable—or less intolerable – if this once-unpopular tool of authority were wielded without prejudice, if all offensive speech were silenced. But we know this is not the case. It really means the re-establishment of notions of heresy and orthodoxy, with some ideas protected, others persecuted, and lives ruined for holding the wrong opinion. When merely causing offense to the wrong, coddled groups – even without malice – becomes grounds for prosecution, the shield of tolerance is turned into a sword of oppression.

There can be little doubt where the Declaration’s guarantees fall. It affirms “the right to freedom of thought, conscience and religion,” including the right to publicly “manifest [one’s] religion or belief in teaching, practice, worship and observance;” the following Article asserts that “Everyone has the right to freedom of opinion and expression...without interference.”<sup>24</sup> Yet even without the clear guidance of the Declaration, jurisprudential concerns should restrict these legal changes. All manner of statements will be thought “hateful” by some. Courts have few if any principled means to determine what is truly offensive or hateful to an individual or group’s interests. The neutrality of courts is compromised when judges decide between rival claims of morality, when they silence someone speaking an opinion merely because it goes against a certain interest group. Courts can, however, make principled decisions about infringement on one’s freedom to expression. It is simpler to spot a violation of this right, but also – revisiting the principles of *Case of Vo* – there is consensus about what the term means and sufficient case law to fill in the gaps. A court does not impose its own definitions by finding a violation of this right.

More important than judicial integrity or documentary analysis, though, is the fact that freedom of belief and expression (two stages in the exercise of the same liberty) is a more fundamental, core right than any “right” to not have one’s feelings hurt. It is more vital perhaps than any save the right to life, though when regarding the many who sacrifice life for beliefs, the hierarchy between the two is unclear. The European Court of Human Rights has repeatedly held that “freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfillment”; other voices have agreed that “social progress depends on each individual’s freedom of expression.”<sup>25</sup> In the end, it is still more vital than that. Freedom of expression is not only a cornerstone of a democratic or progressive society, but the choice between liberty and tyranny. Liberty cannot exist when individuals’ consciences

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24 UNUDHR, Arts. 18 & 19.

25 *Ligens versus Austria*, 1986; *Sener versus Turkey*, 2000; *Thoma versus Luxembourg*, 2001; *Maronek versus Slovakia*, 2001; *et al.*; Chung-Shu Lo, “Human Rights in the Chinese tradition,” 188.



In California, the state's Supreme Court had ruled in May 2008 that a ban on same-sex marriage was discriminatory, and the state began performing them. The ban was restored in a referendum by a ballot measure later the same year. The legality of the ban was upheld by the state's Supreme Court, but in August 2011, a federal judge ruled that it was unconstitutional. In February 2012, a federal appeals court agreed. The case is expected to be resolved by the U. S. Supreme Court.

Same-sex couples gather at San Francisco City Hall during Valentine's Day weekend 2004 to apply for marriage licenses.

*Photo: Wikimedia Commons / Davodd*

are held captive – when belief and expression are stifled by invasive state action or when authorities distinguish individuals based on their opinions. This is not why governments exist. As one time-tested view states, governments derive “their just powers from the consent of the governed” and are instituted to secure person’s “unalienable rights,” not to redefine or curtail their rights. By favoring some opinions over others, states contravene the principles of democracy so ably defended throughout Europe’s recent history.<sup>26</sup>

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26 Cf., “Report of the Committee of Ministers,” in *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof, Kluwer, 1990, 413.

This is why it is important to articulate which rights are truly fundamental, which ones are inalienable. If rights are bestowed upon people by the state (but then, from where does the state's "right" to do so come from, if not naked power?), then the inquiry matters little: the current, ever-shifting composition of a particular government and its vision is simple cause to the rights' effect, and we can only speak of "universal" human rights in jest or skepticism. When rights claims come into conflict, there is need of some non-negotiable principles to weigh and measure the claims – without such principles, the eventual resolution is fated to be arbitrary and political.

Nowhere has this become more clear than in the United Kingdom where four landmark cases dealing precisely with the right of conscience and religious expression in the work place have just been accepted by the European Court of Human Rights. The first companion cases, *Lillian Ladele and Gary McFarlane against the United Kingdom*,<sup>27</sup> deal with the right to conscientious objection in the work place. Ms. Ladele is a Christian registrar who was employed in her position well before same-sex civil partnerships were legalized in the United Kingdom. Because of her strongly held moral beliefs stemming from her Christian faith, Ms. Ladele asked her supervisor for a reasonable accommodation to be exempt from performing same-sex civil unions, stating that to officiate over them would be contrary to her faith. The accommodation she was seeking would not have resulted in the failure to register a single union. Despite this, Ms. Ladele was disciplined under the United Kingdom's so-called Sexual Orientation Regulations. Similarly, Gary McFarlane, a devout Christian and relationship counselor, was terminated from his employment contract for "gross misconduct" for refusing to counsel same-sex couples in having a more active sexual life despite his conscientious objection towards doing so.

The second set of companion cases, *Nadia Eweida and Shirley Chaplin against the United Kingdom*<sup>28</sup>, involves applicants who were disciplined for requesting to wear small crosses at their workplaces despite the fact that other employees in identical positions but of different religious backgrounds had accommodations made for their religious jewelry or wardrobe.

The cases clearly establish a pattern where Christian faith is marginalized and discriminated against when coming into clash with progressively enacted privileges

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27 Application Nos. 51671/10 and 36516/10: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=884740&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

28 Application Nos. 48420/10 and 59842/10: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=884733&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

for those who practice homosexual behavior and under the false guise of laws supporting “tolerance”. The cases further highlight the problem of legal positivism, whereby fundamental rights are being trumped by newly formulated privileges despite the black letter of international treaty law.

Clearly, freedom of thought, conscience and religion emptied of a right of conscience is no longer the fundamental right that is guaranteed protection by the Convention. It becomes the far more limiting freedom of worship which protects only private manifestations of faith. Precisely stated, religious faith is allowed so long as its manifestation does not touch any other boundaries of civil society. Such a state of affairs would have certainly shocked the drafters of the Declaration. The coming months will determine if the European Court will follow suit by upholding the pattern of discrimination or will make a much needed pronouncement upholding religious liberties.

### **Conclusion**

The Declaration of Human Rights enshrines important rights: the right to equal treatment before the law and the rights to life and freedom of expression, association, and religion; and its affirmation of family’s essential place in society. It is praiseworthy for what it represents: it is the product of an international delegation to an international forum, a compromise of varied interests and cultures for the sake of shared esteem for basic human values. It is also valuable because of its claim to universality and to principles, values, and rights that cross governmental boundaries, both preceding and surpassing claims of state authority. This universality is a moral claim. It is more than a meek suggestion that maybe things would go better if all acted the same way. It declares that certain moral rights and duties bind us all, claims that evoke a natural law notion of law and morality.<sup>29</sup> Its catalyst – government-sanctioned abuses – undermines the positivist input. Positivism is not absent from the document, but it is not central. Natural Law rights and positivists’ innate understanding alike are partnered with some sensible “civil privileges” neither fundamental nor inflexible. This is not to reject civil liberties, but rather to suggest that in interpreting the Declaration and other documents and cases concerning rights, we remember what is truly universal and that such things derive from each person’s inherent dignity and worth.

Sometimes debates about rights occur within a single culture or legal system. But as foreshadowed by the UN’s Declaration, we live in a world where transnational forums necessarily exist. How does cultural diversity mesh with universality of

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29 *UNUDHR* “all human beings are born free and equal in dignity and rights,” Art. 1; “recognition of the inherent dignity and of the equal and inalienable rights of all...is the foundation of freedom, justice and peace,” Preamble.

rights? Ideally, in a way that acknowledges the shared and equal human rights enjoyed across borders, while not obscuring the right to self-determination. Governments can abuse the rights of their people; even a majority's consent does not abolish the inherent rights of a vulnerable minority. Such denials of right should be prevented or punished. But it is not the role of pro-active and progressive courts to do so – certainly not in the absence of a broad consensus on what these rights mean. Respecting a nation's proper "margin of appreciation" on these issues is critical. But in the end, it is individual people, not nations, who possess fundamental and universal rights.

# SECRETARY GENERAL'S MESSAGE TO SEMINAR MARKING THE 70TH ANNIVERSARY OF THE UN CHARTER

Organized by the University of London School of Oriental and African Studies, London, 18 January 2012

*Delivered by Dame Margaret Anstee, former United Nations Under-Secretary-General and Special Representative of the Secretary-General in Angola*

It is a pleasure to convey greetings to the distinguished scholars, policy-makers, former UN officials and others who have gathered at Lancaster House to mark the 70th anniversary of the “Declaration by United Nations”. I commend this important meeting and welcome your efforts to delve more deeply into the wartime origins of the United Nations. That pre-history was a period in which states and peoples responded to grave threats with remarkable vision and resolve. The contemporary echoes are clear.

Today the world is living through another pivotal moment. We have witnessed shifts in economic power as parts of Asia and Latin America have emerged as new engines of global growth. We have seen revolution and the birth of grass-roots-led democratic movements in North Africa and across the Middle East, with far-reaching implications in and beyond the region. Climate change and the loss of biodiversity have placed humankind on a collision course with the planet. We are experiencing a rising incidence of mega-disasters, and the widening impact of global food, fuel and economic shocks. And we have seen the increasing salience of a set of global phenomena – the spread of disease, terrorism, organized crime – that easily transcend borders. There is growing inequality, widespread uncertainty, distrust in institutions, and a general sense that the playing field is tilted in favour of entrenched interests and elites.

Future generations may well describe this period as an inflection point, when the contours of a new world began to take shape. Amid the unfolding trends and

events, the United Nations has sought to uphold the values and ideals enshrined in its Charter. We have strived to highlight the needs of the world's poorest and most vulnerable people, in particular by pressing for greater investment in the Millennium Development Goals. We have strengthened peacekeeping, peacebuilding and mediation, and helped Member States with sensitive elections and difficult political transitions. And we have fought impunity for genocide and other serious violations of human rights by supporting the International Criminal Court and taking practical steps to operationalize the responsibility to protect.

We have made important progress since the Second World War, but I am keenly aware of the distance still to travel and the catastrophes – economic, environmental, human – that lurk if we fall short. This past September, I identified five imperatives for collective action: sustainable development, prevention, building a more secure world, supporting countries in transition and empowering the world's women and young people. Many of these issues will also be front-and-centre at the Rio + 20 Conference on Sustainable Development in June. I am determined to bring all relevant partners together, and strengthen the UN itself, to advance this agenda.

Seventy years ago, President Roosevelt coined a term that found resonance with 26 states. Today, 193 states are carrying forward the idea and the machinery. In a world of 7 billion – and with global population expected to increase by another 500 million in just the next five years – we must all do more as a global society. What began as a necessity to defend liberty and human rights is today a vital instrument of common progress across a broad agenda of aspiration and need. Let us learn what more there is to know as we commemorate the UN's origins on the road to the 70th Anniversary of the Charter; and let us all work together today to realize the UN's full potential in building the future we want.

# INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION (IRLA)<sup>1</sup>

## 14<sup>th</sup> Meeting of Experts<sup>2</sup>

### Models of Secularity and Religious Freedom: Canada, the United States of America and Europe

Multi-Faith Centre of the University of Toronto, Canada,  
August 20-22, 2012

#### Final Remarks

After two sessions addressing the relationship between religious freedom and secularization, it is time to assess where we are. This short presentation is not a traditional summary of what we have heard on this subject, but rather a list of some impressions, concerns, and questions that remain to be addressed.

We agree that the terminology of secularism is misunderstood and often carries malevolent implications. It is freighted with negative baggage. Unfortunately, we have yet to find a more appropriate term for substitution. Subsequently, we should give a significant clarification of definitions in any communication on the subject, stressing that secularization occurs in many versions, along a spectrum from benevolent neutrality toward religion to overt hostility toward religion. That clarification alone will be no small achievement, and may be a significant step toward defusing the current popular rhetoric on this topic.

We have spent considerable time debating whether secularism occurs in four types or less, and how the various types relate. While typology is helpful, and arguably necessary, a proper academic analysis alone will not accomplish much in the

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1 IRLA, chartered in 1893, is the oldest association dedicated to freedom of conscience for all people. It is served by a Panel of Experts from many nations and religious denominations.

2 This conference was the second IRLA meeting on the theme of Secularism and Religious Freedom, which was also the theme of the 7th IRLA World Congress held in Punta Cana, Dominican Republic on 24-26 April 2012.

real world. Our goal, as I understand it, is to make a real, quantifiable, meaningful difference in the availability of religious freedom. Therefore the statements we issue, on this subject or any other, must include not only clear academic analysis but also equally clear application to discrete issues.

In secularized societies, we find that religious freedom and religious equality have become suspect and feared ideas. But do we clearly understand the reasons behind those fears and suspicions? I suggest that we must do so. To start the discussion, here are some obvious possible reasons:

Fear of social discord. Religion has often been a divisive, destabilizing and even a contributing factor in the onset of warfare.

Fear of diversity. People - especially those who harbor insecurities - are often threatened by the cognitive dissonance inherent in confronting the multiple answers to the great issues with which religion grapples. Yet religion is inherently messy, constantly changing, not subject to neat, permanent categories.

Disdain for what is perceived as superstition (i.e., a religious doctrine that contradicts our own).

For those who adhere to a majority religion in a given society, fear of the loss of privileges inherent in the status quo.

Many in a secular society will ask, "Why exactly is religion a special category deserving of special attention and treatment?" Is it only to avoid the horrors of interreligious conflict as seen in Europe centuries ago and in many places still today? Or is religion *sui generis*? We each have our own answers to those questions, but a large share of the world isn't hearing them. I suggest that we must be both plain spoken and clear as we answer this question.

Religious freedom often involves accommodation of religious practices. In a secular society that seeks equal treatment and equal opportunity for every citizen, what are the proper limits on such demands for accommodation? And what are the proper limits of state intervention in those practices? We must address both sides of the issue. For instance, in discussing so-called hate speech, we must address not only hate speech directed at religion, but also hate speech originating from religion.

There are many aspects of religious equality that must be addressed. What do we mean by equality? How do we measure it? How do we achieve it in a modern, highly diverse society? Is equality, properly understood, truly a danger to religious freedom? Those of us who have confronted the matter in such areas as the accommodation of religious practices in the workplace know that blind neutrality

will not produce equality. Why not? If a claim of religious freedom is met with a counterclaim that such freedom will interfere with the equality of a nonbeliever, should religion trump such an equality claim? How would you respond to someone who alleged that your practices, your beliefs, your very being are so repugnant to the claimant's world view that it would violate the claimant's religious freedom to grant you equal status in the public square? Can you imagine a scenario where you would yield your own equality to such a claim? To start the conversation, I suggest that religion-based claims that seek to deny equal status in society, equal protection of law, should seldom if ever prevail. But where such a claim is founded only on claims of interference with the profit motive, as in the accommodation of religious practices in employment, the relatively slight burden on the employer's equality may be much more easily justified. It is my own strong conviction that the widely perceived conflict between religious freedom claims and the equality claims of others is a grave danger to the future of religious freedom. The need to clearly enunciate a viable, reasonable, balanced and fair solution to that perceived conflict is therefore of the utmost importance.

Many of the issues identified hereinabove involve questions of law. But we must also hear from those with other perspectives on these matters. Specifically, I suggest that we include consideration of these issues from the perspective of the sociology of religion, and arrange presentations by experts in that field.

Our 2013 meeting will present us with an opportunity to systematically address many of these issues and apply them to a real life situation. I suggest that we prepare our agenda with that goal in mind in order to maximize the productivity of that and future sessions of this group.

*Mitchell Tyner*

