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The principle of religious liberty may well lay claim to being the foundation of all civil liberties and a democratic state. The concept of religious liberty was the inevitable result of a way of thinking about the nature of religion, the nature of the human person, and the nature of the state. By "religious liberty" is meant the inherent right of a person to profess or not to profess a religious faith; to worship or not to worship, in public or in private, according to one's own conscience, understanding, or preferences; to witness to or to propagate one's faith or beliefs; to join in association with others of like faith or beliefs; and to change one's religious identity or beliefs—all without hindrance, molestation, or discrimination. In the words of Lord Acton more than a century ago, "Religious liberty . . . is possible only where the coexistence of different religions is admitted, with an equal right to govern themselves according to their own several principles."[1] To express it in somewhat more restrictive terms, religious liberty requires the absence of discrimination based on one's religion or belief—namely the equality of all religions, as well as irreligion, before the law. It also requires that a citizen neither enjoy advantages nor suffer disadvantages because of one's religion or beliefs.[2]

I. RELIGIOUS LIBERTY IS INTEGRAL TO THE NATURE OF RELIGION

The concept of religious liberty is integral to the nature of religion. For this reason, religious intolerance, including any

1. JOHN EMERICH & EDWARD DALBERG-ACTON, THE HISTORY OF FREEDOM AND OTHER ESSAYS 152 (1967).

2. This principle was explicitly affirmed by the United Nations in its *General Assembly Resolution on the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Agenda Item 75, U.N. Doc. A/RES/36/55 (1981), which was adopted by unanimous consent by the U.N. General Assembly on November 28, 1981.

form of discrimination based on religion or belief, is antithetical to religion and is, indeed, religion's worst adversary. To believe is a voluntary act. To be true to itself, authentic religion must wait upon the voluntary responses of persons who are free from coercion. Recognition of this principle was conceded by the early church fathers. Near the close of the second century, Justin Martyr, who argued for the principle of the *logos spermatikos*, namely that the seed of the divine word is to be found in all humankind—even in those outside of the Christian tradition—perceptively wrote, "[N]othing is more contrary to religion than constraint."[3] In the third century, when Emperor Septimus Severus issued a decree in A.D. 202 forbidding conversion to Christianity, Tertullian wrote that freedom of religion is a fundamental right. "It is a matter of both human and natural law," he declared, "that every man can worship as he pleases. . . . It is not in the nature of religion to impose itself by force," but "should be adopted freely."[4] Almost a century later, and with considerable insight into the nature of religion, Athanasius declared, "It is not with the sword and spear, nor with soldiers and armed force that truth is to be propagated, but by counsel and sweet persuasion."[5] Similarly, Lactantius, the tutor of Emperor Constantine's son, argued that "it is only in religion that liberty has chosen to dwell. For nothing is so much a matter of free will as religion, and no one can be required to worship what he does not will to worship. He can perhaps pretend, but he cannot will."[6]

During the Middle Ages, when religious liberty did not exist in Europe, Marsilius of Padua, a Catholic lawyer, eloquently argued that coercion is completely foreign to the nature of religion and that religious convictions by their very nature cannot be forced. No religious authority, he argued, has the right to exercise coercion for compliance with religious commandments:

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3. M. SEARLE BATES, RELIGIOUS LIBERTY: AN INQUIRY 137 (1945) (quoting Justin Martyr).

4. Joseph Lecler, S.J., *Religious Freedom: An Historical Survey*, *in* RELIGIOUS FREEDOM 5 (Neophytos Edelby & Teodoro Jimenez-Urresti, eds., 1966) *quoting Ad Scapulam* at 2; 1 MIGNE, PATROLIA LATINA 699.

5. DIVINA INSTITUTA 54; 6 MIGNE, *supra*, note 4, at 1061.

6. LACTANTIUS, DIVINA INSTITUTA, 1,5c 20; 6 MIGNE, *supra* note 4, at 516.54.

> For it would be useless, for him to coerce anyone to observe them, since the person who observed them under coercion would be helped not at all toward eternal salvation . . . . For Christ did not ordain that anyone should be forced to observe in this world the law made by him, and for this reason he did not appoint in this world a judge having coercive power over transgressors of his law.[7]

"[E]ven if it were given to the bishop or priest to coerce men in those matters which relate to divine law," he wrote, "it would be useless. For those who were thus coerced would not be helped at all toward eternal salvation by such compulsion."[8] As with earlier voices for freedom of religion, Marsilius espoused religious liberty as a matter of principle and viewed religious liberty as an essential feature of authentic religion.

Two centuries later, Desiderius Erasmus, the great Catholic humanist and irenicist, wrote similarly that the use of coercion is contrary to the nature of religion and, therefore, he argued for the "futility of persecution."[9] In a letter to John Carondolet, Erasmus wrote,

> When faith is in the mouth rather than in the heart, when the solid knowledge of Sacred Scripture fails us, nevertheless by terrorization we drive men to believe what they do not believe, to love what they do not love, to know what they do not know. That which is forced cannot be sincere, and that which is not voluntary cannot please Christ.[10]

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7. MARSILIUS OF PADUA, DEFENSOR PACIS 164 (Alan Gewirth trans., 1956).
8. *Id.* at 135.
9. ROLAND H. BAINTON, ERASMUS OF CHRISTENDOM 185 (1969).
10. CONCERNING HERETICS: WHETHER THEY ARE TO BE PERSECUTED AND HOW THEY ARE TO BE TREATED: A COLLECTION OF THE OPINIONS OF LEARNED MEN, BOTH ANCIENT AND MODERN 34 (Sebastian Castellio ed. & Roland H. Bainton trans., 1935) (quoting letter from Erasmus to John Carondolet (Jan. 5, 1523), *in* 5 *Opus epistolarum* 11.362-81). Later in 1519, in response to Martin Luther's dramatic public challenge at Wittenberg of the Roman Catholic Church, Erasmus wrote to the archbishop of Mainz, the following:

> [I]f he is innocent, I should be sorry to see him overwhelmed by some villainous faction; if he is wrong, I would rather he were set right than destroyed; for this agrees better with the example Christ has given us, who according to the prophet quenched not the smoking flax and did not break the bruised reed.

Letter from Erasmus to Archbishop Mainz, *in* THE CORRESPONDENCE OF ERASMUS: LETTERS 993 TO 1121, 1519 TO 1520, at 111 (R.A.B. Mynors trans., 1987).

Tribute must also be given to the Radical Reformers who championed voluntarism in religion and its corollary the separation of church and state, that is the denial of the use of temporal power by the church *or*, in religious matters, the state, predicated on the separation of the institutions of church and state.[11] The voices of the Radical Reformation for religious liberty were based upon the premise of the uncoerced response to the gospel. This, they held, was essential for the *esse* of the true church. Thus, the use of any form of coercion in religion was opposed. "A Turk or a heretic," Balthasar Hubmaier wrote, "is not convinced by our act, either with the sword or with fire, but only with patience and prayer; and so we should await with patience the judgment of God."[12]

Writing a century later in England, in a book which boldly set forth for the first time in the English language the right of universal religious liberty, Thomas Helwys argued that the nature of religion removed it from the jurisdiction of the civil ruler:

> Our Lord the King is but an earthly King, and he hath no authority as a King, but in earthly causes, and if the Kings people be obedient & true subjects, obeying all humane lawes made by the King, our Lord the King can require no more: for men's religion to God, is betwixt God and themselves; the King shall not answere for it, neither may the King be jugd betwene God and Man. Let them be heretikes, Turks, Jewes, or whatsoever it apperteynes not to the earthly power to punish them in the least measure.[13]

11. In his monumental study of the Radical Reformation, George H. Williams concluded that "almost all the Radicals [i.e., Radical Reformers] insisted on the utter separation of the church from the state and found in the willingness of the Magisterial Reformers [e.g., Martin Luther, Ulrich Zwingli, and John Calvin] to use the coercive power of princes, kings, and town councilors an aberration from apostolic Christianity no less grievous than papal pretensions." *See* GEORGE HUNTSTON WILLIAMS, THE RADICAL REFORMATION 860 (1962). In the American experience, this has been interpreted to mean that the state may not use religion for the accomplishment of a secular purpose and the church may not use the state for the accomplishment of a religious purpose.

12. HENRY C. VEDDER, BALTHASAR HUBMAIER: LEADER OF THE ANABAPTISTS 86 (1905); *see also On Heretics and Those Who Burn Them*, *in* BALTHASAR HUBMAIER: THEOLOGIAN OF ANABAPTISM 62 (H. Wayne Pipkin & John H. Yoder eds. & trans., 1989).

13. THOMAS HELWYS, A SHORT DECLARATION OF THE MISTERY OF INIQUITY 69 (fac. reprint ed. (1935)).

Similarly, Leonard Busher, like Helwys an English Separatist, wrote in 1614 the following in opposition to the use of temporal power in religion: "It is not only unmerciful, but unnatural and abominable; yea, monstrous for one Christian to vex and destroy another for difference and questions of religion."[14]

The voluntary character of the nature of religion and belief, namely the concept of freedom of religion and conscience, has come to be increasingly recognized in contemporary political and religious thought. Affirmation of the voluntary character of religion has been clearly affirmed, for example, in twentieth-century Christian ecumenical thought. The World Council of Churches has on various occasions acknowledged religious liberty as integral to the nature of religion and religious faith. "God's redemptive dealing with men is not coercive. Accordingly human attempts by legal enactment or by pressure of social custom to coerce or to eliminate faith are violations of the fundamental ways of God with men. The freedom which God has given . . . implies a free response to God's love . . . ."[15] In the words of Vatican II, "God calls men to serve Him in spirit and in truth. Hence they are bound in conscience but they stand under no compulsion."[16]

The heart of the matter is that for religion to be authentic, it must be a voluntary, personal, and free act, and membership in a faith community is one of voluntary association. Faith is not faith if its voluntary character is abridged by coercion. As Augustin Leonard, a Catholic theologian, wrote, "An imposed faith is a contradiction in terms . . . . Faith must be free if it is not to destroy itself."[17] In the words of the late Spanish scholar, A.F. Carrillo de Albornoz, who served for some years as the Secretary of the Secretariat on Religious Liberty of the World Council of Churches, "No intellectual ingenuity, no organized

14. Leonard Busher, *Religious Peace: or a Plea for Liberty of Conscience*, *in* TRACTS ON LIBERTY OF CONSCIENCE AND PERSECUTION 1614-1661, at 1, 24 (Edward Bean Underhill ed., 1846).

15. *Statement on Religious Liberty*, *in* THE NEW DELHI REPORT: THE THIRD ASSEMBLY OF THE WORLD COUNCIL OF CHURCHES, 1961, at 159, 159 (1962).

16. De Libertate Religiosa: A Delcaration of Religious Freedom, *in* THE DOCUMENTS OF VATICAN II: ALL SIXTEEN OFFICIAL TEXTS PROMULGATED BY THE ECUMENICAL COUNCIL 1963-1965, at 675, 690 (Walter M. Abbott, S.J. ed. & Joseph Gallagher trans., 1966) [hereinafter VATICAN II].

17. Augustin Leonard, *Freedom of Faith and Civil Toleration*, *in* TOLERANCE AND THE CATHOLIC 113 (1955).

institution, no kind of compulsion and no power of persuasion can change the fact that God deals with men as with free and responsible beings and that he expects from them an uncoerced response."[18] Or, as Albert Hartmann expressed it, "A person's one and only means of learning God's will is the voice of one's conscience."[19] The right to religious identity and to a personal religious faith, including association with others of like faith, requires voluntariness. Freedom of religion is thus undermined and vitiated whenever any form of external coercion is superimposed on the individual.

II. RELIGIOUS LIBERTY AND CIVIL LIBERTY ARE ROOTED IN THE DIGNITY AND SANCTITY OF THE HUMAN PERSON

The ultimate basis of religious liberty, as with all civil liberty, is found in the dignity and sanctity of the human person and the inviolability of the human conscience. This is what ultimately forms the basis of constitutional government, a limited state, and a free and democratic society. The Preamble of the United Nations Universal Declaration of Human Rights (1948) rightly speaks of "the inherent dignity . . . of all members of the human family" and "the dignity and worth of the human person."[20] The Preamble, which is common to both the International Covenant on Civil and Political Rights (1966)[21] and the International Covenant on Economic, Social, and Cultural Rights (1966),[22] declares, "These rights derive from the inherent dignity of the human person." The former affirms that "everyone shall have the right to freedom of thought, conscience, and religion"[23] and that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[24] While the sacredness of personhood is widely acknowledged as the foundation of all

18. A.F. CARRILLO DE ALBORNOZ, THE BASIS OF RELIGIOUS LIBERTY 74 (1963).

19. ALBERT HARTMANN, TOLERANZ UND CHRISTLICHER GLAUBE 5 (1955).

20. *Universal Declaration of Human Rights*, G.A. Res. 217A(111), at 71, U.N. Doc. A/810 (1948) (entered into force Mar. 23, 1976) [hereinafter *Universal Declaration*].

21. U.N. GAOR, 21st Sess., Supp. No. 16, at 71, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter *ICCPR*].

22. *See* 1 HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 12 (James Avery Joyce ed., 1978) [hereinafter *ICESCR*].

23. *Universal Declaration*, *supra* note 21, art. 18(1).

24. *Id.* art. 18(2).

human rights, it has particular meaning in the exercise of one's sense of the sacred, i.e., one's religious faith or beliefs. Søren Kierkegaard wrote with profound insight that "[m]an is himself primarily and genuinely in his free choice."[25]

The intrinsic worth of the human person is simply too sacred to be violated by religious coercion or an enforced conformity of belief, either of which is a denial of the dignity and worth of the human person. If religious liberty and civil liberty are to have any existential meaning in the nation state, there must be legal recognition on the part of the state of the inalienable right of every citizen to decide matters of religious identity and/or belief for oneself. As the World Council of Churches affirmed at the time of its founding almost fifty years ago, "The nature and destiny of man . . . establish limits beyond which the government cannot with impunity go."[26] And Vatican II proclaimed, "The protection and promotion of the inviolable rights of man ranks among the essential duties of government."[27]

Inextricably bound to the sanctity of the human person is the concept of freedom of conscience. Marsilius was perhaps the first to recognize the right of conscience both as a natural and a political right. Although freedom of religion in the modern world is usually rooted in religious or theological thought, it stems from the concept of "liberty of conscience," a phrase of modern origin which came into use after the sixteenth century. Even though the Protestant Reformation, by and large, did not espouse the principle of freedom of religion, it did represent a revolt against both established religious and established political authority and, in turn, fostered the emergence of new nation-states and a new national spirit throughout Europe and Great Britain. The Reformation was, first of all, rooted in a revolt against established religious authority. When his views of Christian Scripture were challenged by the ecclesiastical authorities of his day, Martin Luther proclaimed, "I cannot and will not recant, for it is neither safe nor honest to violate one's

25. SØREN KIERKEGAARD, TRAINING IN CHRISTIANITY (1850), *quoted in* Niels H. Søe, *The Theological Basis of Religious Liberty*, 11 ECUMENICAL REV. 36, 41 (1958).

26. THE FIRST ASSEMBLY OF THE WORLD COUNCIL OF CHURCHES: HELD AT AMSTERDAM, AUGUST 22-SEPTEMBER 4, 1948, at 97 (W.A. Visser 't Hooft ed., 1949) [hereinafter FIRST ASSEMBLY OF THE WORLD COUNCIL OF CHURCHES].

27. VATICAN II, *supra* note 16, at 684.

conscience. I can do no other . . . . [F]or I am more afraid of my own heart than the Pope and all his cardinals."[28]

Aided by the humanism of the Renaissance, a bold new spirit of freedom in religion appeared, which inevitably gave rise to the cry, "faith is free." Gradually the principle of religious liberty was forthrightly affirmed, leading finally to an insistence upon "the competency of the individual under God in all matters of religion."[29] Freedom of religion was proclaimed as both a natural and a divine right. Furthermore, it was argued, religious liberty demanded civil liberty and civil liberty required liberty of conscience. In his seminal work in which he argued against restrictions on freedom of press, John Milton wrote, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[30]

In their plea for freedom of religion, the Free Churches held that freedom of conscience was, in fact, the basis for freedom of religion. For this reason, as Franklin H. Littell observed, "The most direct contribution of the Free Churches to the individual citizen, whether church member or not, was in the establishment of liberty of conscience."[31] As generally used then and now, freedom of conscience held to the inherent right of each person to follow the dictates of his or her own conscience without interference from civil authority or submission to majority opinion. In his monumental and trenchant work, *History of Freedom*, Lord Acton, a prominent Catholic thinker in nineteenth-century England, wrote that liberty of conscience is "the assurance that every man shall be protected in doing what he believes [to be] his duty against the influence of authority and majorities, custom and opinion."[32]

In the Western world, freedom of conscience has been based upon two fundamental principles. First, freedom of conscience is held to be a natural, inalienable, and sacred right of all persons, a domain which the true state must protect and into which it must not lightly intrude. Whereas the final aim of

28. 2 REFORMATION WRITINGS OF MARTIN LUTHER 155 (Bertram Lee Woolf ed., 1956).

29. A phrase frequently used by the Radical Reformers and in the confessions of faith by the Free Churches.

30. JOHN MILTON, AREOPAGITICA 73 (1644).

31. FRANKLIN H. LITTELL, THE FREE CHURCH 48 (1957).

32. EMERICH & DALBERG-ACTON, *supra* note 1, at 3.

religion is truth, the ultimate goal of the state, as Baruch (Benedictus) Spinoza argued, is freedom.[33] The second axiom is that because conscience is a natural and sacred right, innate and universal, no person is to be above another in the freedom of its exercise. All persons are equal in rights as in duties, which human authority cannot take away in the case of the former, and to which it cannot add in the case of the latter.

Recognition of the right of freedom of conscience means the acknowledgment of one's right to believe or not to believe a religious dogma; to worship one God or many or not to worship; to be a member of a religious association or of none; and to enjoy the "free exercise" of religion, without civil disabilities, so long as such exercise is not deemed to be detrimental to the basic fabric of society and the security of the state.

By its very etymology, conscience refers to moral awareness or moral insight, by which one experiences the impulse to do right and experiences restraint from doing wrong. The very nature of religion requires that it be rooted in conscience, which theologians have termed a "gift" or the "voice" of God. In the words of the Westminster Confession of Faith: "God alone is Lord of the conscience; and hath left it free from the doctrines and commandments of men, which are in anything contrary to His Word—or beside it, if matters of faith or worship. So that to believe such doctrines or to obey such commands out of conscience, is to betray true liberty of conscience . . . ."[34]

More than a half century ago, United States Supreme Court Chief Justice Harlan F. Stone, in his dissent in the 1940 *Gobitis* case, wrote that if the Constitutional guarantees of liberty "are to have any meaning they must . . . be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions."[35] For the state to intrude on the inviolability of conscience is for the state to assume a transcendency and an ultimate power that belong

33. *See* BARUCH SPINOZA, TRACTATUS THEOLOGICA-POLITICUS 237-49 (1670). Spinoza vigorously defended the principle of religious toleration and opposed any established form of religion.

34. *Westminster Confession of Faith Section XX, Of Christian Liberty and Liberty of Conscience, quoted in* DOCUMENTS OF THE CHRISTIAN CHURCH 347 (Henry Bettenson ed., 2d ed. 1963).

35. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, C.J., dissenting).

only to the Divine. Freedom of religion can never be secure if the state and state institutions, even if supported by the collective will of majorities, are allowed to ignore the rights of conscience, for recognition of freedom of conscience lies at the heart of a free and democratic society and is a check on political absolutism. As Henry David Thoreau wrote more than a century ago,

> There will never be a really free and enlightened State until
>
> the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly. I please myself with imagining a State at last which can afford to be just to all men . . . ."[36]

III. RELIGIOUS LIBERTY IS THE CORNERSTONE OF ALL CIVIL LIBERTIES AND A DEMOCRATIC STATE

Recognition of freedom of religion and conscience is integrally related to all other civil liberties and to the maintenance of a free and democratic state.[37] This relationship arises from the sanctity or intrinsic worth ascribed to the human person (even when personhood is defined in radically different ways as in the various religious traditions), which ultimately form the basis of all human freedom. It is the sanctity or intrinsic worth of the person, whether explicitly acknowledged or not, that forms the basis of democracy and constitutional government in which the concept of human rights is accepted as inalienable and, therefore, as binding on government. Each human being has juridical rights because he or she possesses certain inalienable moral rights as a person. And basic to all human rights are religious rights, without the guarantee of which all other human rights are in peril.

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36. Henry David Thoreau, *Essay on Civil Disobedience in* 4 THE WRITINGS OF HENRY DAVID THOREAU 356, 387 (1906).

37. There are those who argue that the very concept of civil liberty, like all human rights, is "ineliminably religious." *See* Michael J. Perry, *The Idea of Human Rights: Is the Idea of Human Rights Ineliminably Religious? in* PROBLEMS AND CONFLICTS BETWEEN LAW AND MORALITY IN A FREE SOCIETY 55-116 (James E. Wood, Jr. & Derek Davis eds., 1994). In the words of Perry, "*If* the conviction that every human being is sacred is inescapably religious, it follows that the idea of human rights is ineliminably religious, because the conviction is an essential, even foundational, constituent of the idea." *Id.* at 79.

It was the principle of religious liberty that gave birth in the New World to the founding of "the first secular state of modern times."[38] As the founder of Rhode Island, Roger Williams insisted that the authority of the state is "not religious, Christian, etc., but natural, human [and] civil," and therefore it is "improper" in proscribing conscience or religious matters. "All lawful magistrates in the world both before the coming of Christ Jesus and since," Williams wrote, "are but derivatives and agents . . . serving for the good of the whole."[39] Williams' close associate, John Clarke, who (having petitioned Charles II in 1662 for a charter for Rhode Island) is generally credited with being the "Father of Rhode Island," argued that "a most flourishing civil state may stand, yea, and best be maintained . . . with full liberty in religious concernments."[40] The ratification of the religion clauses of the First Amendment more than a century later would come to be widely regarded as constituting the cornerstone of the American Bill of Rights.

Today, it is widely conceded that freedom of religion is a basic civil liberty or human right. Therefore, it should not be surprising that virtually all types of governments throughout the world, even the most totalitarian, profess to be democratic republics, and at least make the claim of their giving legal recognition to freedom of religion. It may well be said that freedom of religion has become a normative constitutional principle for virtually all modern nation states throughout the world.

While there is a sense in which all civil liberties, as with all human rights, both individual and social, may be said to be indivisible, religious liberty constitutes the cornerstone of all other civil liberties and all human rights. This is not in any way intended to diminish the critical role to be played on behalf of economic and social rights, as well as civil and political rights, in the overall struggle for human rights, for all human rights are inextricably interrelated. Rather, what is being argued here

38. CARL BRIDENBAUGH, FAT MUTTON AND LIBERTY OF CONSCIENCE SOCIETY IN RHODE ISLAND 1636-1690, at 5 (1974).

39. Roger Williams, *The Bloudy Tenent of Persecution, discussed in* A CONFERENCE BETWEEN TRUTH AND PEACE (1644) *in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963).

40. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 205 (1950) (quoting Records of the Colony of Rhode Island and Providence Plantations).

is that freedom of religion and conscience is fundamental and integral to the advancement of all other human rights because of their final grounding in the nature and sacredness of the human person. For this reason, as is increasingly affirmed in modern jurisprudence and in much Christian ecumenical thought, freedom of religion and conscience is the cornerstone of all civil liberties. As Franklin I. Gamwell has recently written in this regard, the principle of religious freedom

> cannot be merely one constitutional principle among others; all implications taken into account, it is the *only* constitutional principle. One may even say that religious freedom *is* the constitution, in the sense that other constitutional prescriptions are, properly speaking, stipulations necessary to the full and free political discourse that religious freedom constitutes.[41]

On numerous occasions since World War II, ecumenical conferences, including those held even outside the West, have affirmed that "'the most fundamental freedom is religious freedom.'"[42] For many reasons, too numerous to be expanded upon here, freedom of religion and conscience is the foundation of all other freedoms, and is fundamentally interrelated to all other civil liberties. In the words of the World Council of Churches, "religious freedom is the condition and guardian of all true freedom."[43] Without freedom of religion, freedom of speech, freedom of press, freedom of assembly, and freedom of association are all endangered. Without recognition of freedom of religion and conscience, the very right of dissent is seriously threatened, if not denied. In the words of Charles Evans Hughes, a former Chief Justice of the United States Supreme Court, "When we lose the right to be different, we lose the right to be free."[44]

Respect for religious human rights is profoundly important in the state's regard for other human rights and its view of the

41. FRANKLIN I. GAMWELL, THE MEANING OF THE RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION 162 (1995).

42. Carrillo de Albornoz, *supra* note 18, at 35 (quoting statement of the Eastern Asia Conference, Bangkok, 1949).

43. *Statement on Religious Liberty*, *in* MINUTES AND REPORTS, CENTRAL COMMITTEE OF THE WORLD COUNCIL OF CHURCHES 15 (1949).

44. 2 Stokes, *supra* note 40, at 462.

worth of its individual citizens. Indeed, by respecting *religious* rights, the state is giving substantive expression to its regard for the dignity and worth of its citizens. Such recognition is not only an acknowledgment of the state's limited political authority, as against the claims of the totalitarian state, but is likely to result in giving far greater recognition to other human rights, both civil and political, and economic and social. It is entirely reasonable to argue, again in the words of the late A.F. Carrillo de Albornoz, that

> respect for the highest values of loyalties of man (which are the religious ones) will be the final "test" and also the best guarantee of the respect for all other human values. If, for instance, a totalitarian state does not recognize even the most sacred sphere of religion and the most intimate human autonomy, it will most probably not stop before other less important values and less intimate spheres. In this sense it seems perfectly correct to affirm that, if society does not respect religion and its liberty, one does not have any security that the rest will be respected.[45]

With the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the United Nations went out of its way to note that such discrimination must be regarded not only as an "affront to human dignity," but also a "disavowal" of the very principles of the Charter of the United Nations and a violation of the other freedoms guaranteed in the Universal Declaration of Human Rights.[46] Religious rights are not only individual, but also corporate and social, since they must include the right of religious association and the free exercise of religion within a social context. In sum, recognition of freedom of religion and conscience is the cornerstone of all human rights—civil, economic, and social—and quintessential for the emergence of a free and democratic state in which respect for both individual and social rights for all are assured.

45. Carrillo de Albornoz, *supra* note 18, at 41.

46. *Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief*, GA Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981) [hereinafter *Declaration on Religion or Belief*].

IV. RELIGIOUS LIBERTY AS THE BASIS OF ALL CIVIL LIBERTY AND A DEMOCRATIC STATE IS TODAY WIDELY RECOGNIZED IN INTERNATIONAL LAW AND ECCLESIASTICAL PRONOUNCEMENTS

During the past half century, freedom of religion and conscience has been given international recognition in the norms of international law and international agreements and in international ecclesiastical pronouncements. Indeed, this year marks the fiftieth anniversary of the adoption by the United Nations of The Universal Declaration on Human Rights, with its specific references to freedom of religion and conscience, preceded four months earlier by a declaration on freedom of religion and conscience by the World Council of Churches. In international law, as noted earlier, freedom of religion and conscience was explicitly affirmed by the United Nations as an international standard among signatory nation-states with The Universal Declaration of Human Rights (1948),[47] The International Covenant on Civil and Political Rights (1966),[48] The International Covenant on Economic, Social, and Cultural Rights (1966),[49] and The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).[50] In addition to these, The Principles of the Helsinki Final Act (1975),[51] an international agreement ratified by thirty-five signatories of Europe, along with Canada and the United States, also includes concerns for freedom of religion and conscience in its human rights provisions.

Although freedom of religion was long advocated by individuals and religious dissenters, who at least sought religious freedom for themselves, freedom of religion was nowhere legally realized until the modern era and, even today, is far from being a reality in most of today's world. As late as World War II, as one worldwide study declared, "[N]o writer asserts that there is a generally accepted postulate of international law that every State is under legal obligation to

47. *Universal Declaration*, *supra* note 20.

48. *ICCPR*, *supra* note 21.

49. *ICESCR*, *supra* note 22.

50. *Declaration on Religion or Belief*, *supra* note 46.

51. Conference on Security and Cooperation in Europe: Final Act (1975), *reprinted in* 14 I.L.M. 1923 (1975) [hereinafter Final Act].

accord religious liberty within its jurisdiction."[52] Today, however, freedom of religion and conscience has come to be recognized as an accepted postulate in international law.

It is of profound historical significance that following the organization of the United Nations in 1945, concerted efforts were soon directed toward both the formulation of the principle of freedom of religion and conscience as a fundamental right to which all member nations were to subscribe and recognition of the vital relationship of this principle to relations between states. As is well known, one of the basic principles included in the Charter of the United Nations is that of "the dignity and equality inherent in all human beings."[53] Therefore, all member nations "pledged themselves to take joint and separate action in cooperation with the Organization to promote and encourage universal respect for an observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[54]

Three years after its founding, the United Nations General Assembly adopted The Universal Declaration of Human Rights in which it gave specific attention to a person's right to religion as a basic human right.[55] Article 2 affirmed that everyone is entitled to all the rights and freedoms in the Declaration without respect to religion.[56] Article 18 declared, "Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[57] In various forms, this portion of the Declaration has been incorporated into the national constitutions of many nations throughout the world, particularly in the nations that have emerged since 1948.

After more than three decades of ongoing consultation and negotiation, the United Nations Assembly in November 1981 adopted the Declaration on the Elimination of all Forms of

52. BATES, *supra* note 3, at 476 (quoting NORMAN J. PADELFORD, INTERNATIONAL GUARANTEES OF RELIGIOUS LIBERTIES (1942)).

53. U.N. CHARTER art. 56.

54. *Id.*

55. *Universal Declaration*, *supra* note 20.

56. *Id.* art. 2.

57. *Id.* art. 18.

Intolerance and of Discrimination Based on Religion or Belief,[58] in which the religious rights of The Universal Declaration of Human Rights were reaffirmed and expanded. The 1981 Declaration categorically declared that "no one shall be subject to discrimination by any State, institution, group of persons or person on grounds of religion or other beliefs."[59] Such discrimination, the Declaration went out of its way to note, must be regarded not only an "affront" to human dignity, but also a "disavowal" of the principles of the Charter of the United Nations and a violation of the freedoms guaranteed in the Universal Declaration of Human Rights. Thus, at long last, freedom of religion and conscience was given explicit and unequivocal recognition in the family of nations as an inviolable and sacred human right.

The growing recognition of freedom of religion and conscience in international law has been accompanied by broad ecumenical endorsements of the principle by the churches—Catholic, Protestant, and Orthodox. With the convening of the First Assembly of the World Council of Churches in Amsterdam in 1948, a clear voice for freedom of religion and conscience was sounded in a document titled Declaration on Religious Liberty. The Declaration called on the churches to

> support every endeavor to secure within an international bill of rights adequate safeguards for freedom of religion and conscience, including rights of all men to hold and change their faith, to exercise it in worship and practice, to teach and persuade others, and to decide on the religious education of their children.[60]

The Declaration further asserted that religious liberty is "an essential element in a good international order . . . [that should be] everywhere secured. In pleading for this freedom," the Declaration declared, "[Christians] do not ask for any privilege to be granted to Christians that is denied to others."[61] Adopted unanimously, the Amsterdam Declaration remains a landmark in the history of freedom of religion and conscience and must be

58. *Declaration on Religion or Belief*, *supra* note 46.
59. *Id.* art. 2.
60. FIRST ASSEMBLY OF THE WORLD COUNCIL OF CHURCHES, *supra* note 26, at 97.
61. *Id.*

credited with having influenced the United Nations in its final adoption a few months later of The Universal Declaration of Human Rights.[62]

Subsequent assemblies of the World Council of Churches have not only reaffirmed the Amsterdam Declaration but have continued to give voice to the Council's commitment to religious rights and religious freedom. Likewise, the endorsement of freedom of religion and conscience by the Roman Catholic Church in Vatican II remains a significant chapter in the advancement of freedom of religion and conscience. Affirming both the natural right of corporate religious freedom as well as individual religious freedom, Vatican II declared that "the right to religious freedom has its foundation in the very dignity of the human person" and that a person "should not be coerced to act against his own conscience, nor be impeded to act according to this conscience" and religious communities "have the right not to be hindered from publicly teaching and testifying to their faith both by the written and the spoken word."[63]

It is well to remember that historically, pleas for freedom of religion and conscience have come primarily from religious minorities and dissenters, the religiously disenfranchised and persecuted, and not from religious majorities which enjoyed state patronage and support. At the same time, it should be noted that the major advances toward the recognition of freedom of religion and conscience in the modern world have come not from religious confessions of faith, ecclesiastical councils or synods, but from constitutions, legislative bodies, and courts of law. After the Middle Ages, the emergence of new nation-states and a new national spirit weakened the political power of old religious establishments to a degree from which they could generally not recover. In widely varying degrees, freedom of religion became inexorably linked to the modern democratic state. In the twentieth century, among both communities of faith and nation-states throughout the world, a broad consensus gradually evolved toward support of the

62. *See generally* OTTO FREDERICK NOLDE, THE CHURCH AND THE NATIONS 149-69 (1970) (setting forth the role of the churches in the formation of the United Nations and their influence in the United Nations' adoption of the Universal Declaration of Human Rights in 1948).

63. *The Declaration on Religious Freedom*, 11 POPE SPEAKS 84-94 (1966).

principle of freedom of religion and conscience, at least in some form.

Legal recognition of freedom of religion and conscience has been particularly aided, both in principle and in practice, by international relations that resulted in the ratification of treaties between states. As one major study on religious liberty written fifty years ago declared, "[I]nternational law and religious liberty grew in intimate association."[64] The study found that a substantial majority of the writers of general treaties on international law following the time of Hugo Grotius, long recognized for his work as a codifier of international law, specifically referred to freedom of religion in their documents. In the nineteenth century, with sovereign states identified with different religious traditions, it became common in the drawing up of treaties to include provisions granting the right of religious expression to the nationals of each contracting party in the territory of the other. Since these foreign nationals were identifiable by both their nationality and their religion, it was inevitable that specific safeguards came to be provided for freedom of religion and conscience, worship, and religious work "upon the same terms as nationals of the state of residence," to use a phrase common to many of these international treaties with provisions of religious liberty.

There are many examples of the role of international agreement in the advance of freedom of religion and conscience. The Treaty of Berlin in 1878 at the close of the Russo-Turkish War, with its provisions for the equal rights of religious minorities, has been called "the most important single expression of international agreement for religious liberty" prior to the post-World War I era.[65] Similar guarantees of religious freedom were embodied in the General Act relating to African Possessions[66] and the Minorities Treaties of 1919-23 following World War I.[67] Of special historical significance is the

64. BATES, *supra* note 3, at 476. From this study, Bates observed, "[A] review of the forty-seven writers of the more important general treatises on international law, following the time of Grotius, shows that [a] full thirty refer to religious liberty." *Id*.

65. *Id*. at 478.

66. General Act of the Berlin Conference Respecting the Congo, Feb. 26, 1885, 165 Consol. T.S. 485.

67. *See* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS

European Convention for the Protection of Human Rights and Fundamental Freedoms of 1953, which declared that "everyone has the right to freedom of thought, conscience, and religion."[68] Still later, thirty-five nation-states in 1975 signed the Helsinki Final Act (The Final Act of the Conference on Security and Cooperation in Europe), in which religious rights were made an integral part of a major international agreement between thirty-five nations of Europe, Canada, and the United States. Principle 7 of the document gives special attention to "respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion, or belief."[69] Meanwhile, more and more states throughout the world voluntarily entered into constitutional and treaty commitments to secure freedom of religion and conscience for their own citizens as well as for foreign residents. With the increasingly wide geographical distribution of adherents to the world's major religions, the religions themselves challenged those national policies that denied religious rights to their adherents and faith communities.

Indeed, the principle of freedom of religion and conscience has increasingly become one of those axiomatic commitments that is almost universally recognized. In at least some modified form, the principle of freedom of religion has come to be affirmed by virtually all national governments throughout the world. Even where highly restrictive, guarantees of freedom of religion now appear in almost all national constitutions throughout the world.[70]

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324 (3d ed. 1995).

68. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(1), 213 U.N.T.S. 222.

69. Final Act, *supra* note 51, at 1295.

70. A somewhat random sampling well illustrates this among the following countries.

EUROPE: CONST. BULG. art. 37 (1991) ("Freedom of conscience, freedom of thought, and choice of religion or religious or atheistic views are inviolable."); CONST. F.R.G. art. 4 (1991) ("Freedom of faith and conscience as well as freedom of creed, religious or ideological (*weltanschaulich*), are inviolable."); Soviet Law on Freedom of Conscience and Religion art. 1 (1991) ("Establishes guarantees of the realization of human rights to freedom of conscience and freedom of religion."); CONST. SPAIN art. 16.1 (1978) ("Freedom of ideology, religion and cult of individuals and communities is guaranteed . . . . ").

AFRICA AND THE MIDDLE EAST: CONST. ALG. art. 36 (1989) ("The freedom of conscience and the freedom of opinion are inviolable."); CONST. EGYPT art. 46 (1971)

Nonetheless, freedom of religion and respect for freedom of conscience remain far from realized in most of today's world. While freedom of religion is almost universally recognized de jure, the principle is by no means recognized de facto in most of today's world. Ironically, the very century that has witnessed the emergence of freedom of religion and religious human rights as norms in international law and in most of the constitutions of the world has been the very century in which religious rights and religious freedom have repeatedly and flagrantly been violated on a wholesale scale throughout much of the world. For the first time in human history and for much of this century, numerous governments came into power with a sworn hostility to religion and expressly dedicated to the eradication of all religion.

Meanwhile, in more recent years, new democracies of both old and new nation-states have come into being which recognize freedom of religion as crucial to a democratic state. This was seen most recently in the debates on religious human rights surrounding the emerging democracies of Eastern or the New Europe. Throughout the New Europe, for example,

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("The State shall guarantee the freedom of belief and the freedom of practice of religious rites."); CONST. ISR. (1949) (stating Israel "will guarantee freedom of religion, conscience, language, education, and culture"); CONST. NIG. art. 35 (1979) ("Every person shall be entitled to freedom of thought, conscience and religion."); CONST. S. AFR. art. 15.1 (1993) ("Every one has the right to freedom of conscience, religion, thought, belief and opinion.").

ASIA AND OCEANIA: CONST. AUSTL. ch. V (1986) ("The Commonwealth shall not make any law for establishing any religion, . . . or for prohibiting the free exercise of any religion . . . ."); CONST. INDIA art. 15.1 (1950) ("The State shall not discriminate against any citizen on grounds only of religion . . . ."); CONST. INDON. art. 29.2 (1945) ("The State shall guarantee the freedom of the people to profess and to exercise their own religion."); CONST. JAPAN art. 20 (1947) ("Freedom of religion is guaranteed to all."); CONST. S. KOREA arts. 19, 20.1 (1988) ("All citizens shall enjoy freedom of conscience"; "All citizens shall enjoy freedom of religion."); CONST. SRI LANKA art. 10 (1945) ("Every person is entitled to freedom of thought, conscience and religion . . . .").

AMERICAS: CONST. BRAZ. art. 5.6 (1988) ("[F]reedom of conscience and of belief is inviolable . . . ."); CONST. CAN. art. 2 (1982) ("Everyone has . . . freedom of conscience and religion . . . ."); CONST. CHILE art. 19 (1980) (affirming "[f]reedom of conscience, manifestation of all creeds, and the free exercise of all cults"); CONST. CUBA art. 55 (1992) ("The State . . . respects and guarantees the freedom of conscience and religion"); CONST. ECUADOR art. 19.5 (1995) (affirming "freedom of conscience and religion, individually and collectively"); CONST. PARA. art. 24 (1992) ("Freedom of religion, worship, and ideology is hereby recognized without any restrictions other than those established in this Constitution and the law.").

constitutional reform commissions have been involved in addressing questions of freedom of religion and conscience, along with a broad range of other human rights. In some countries, permanent standing committees have been named by parliaments to address questions relating to new laws on religion on an ongoing basis. While there are many complex and difficult questions yet to be resolved in the face of counter forces of resistance, the subject of freedom of religion and conscience has become, as never before, a subject that is coming to be viewed, at least by some, as crucial to the movements of nations toward democracy and freedom. Among the questions inextricably intertwined with freedom of religion and conscience is one of ethnic identity, which in many countries throughout the world is virtually conterminous with the rights of religious minorities.

V. CONCLUSION

The issue of religious and civil liberty is one of growing significance in today's world. The growth of cultural and religious pluralism is worldwide and constitutes one of the major challenges facing virtually all nations and societies throughout the world today. Religious liberty has become particularly crucial with the emergence of religious pluralism throughout most of the world. As one scholar recently wrote, "[R]eligious freedom legitimates an indeterminate plurality of religions."[71] The increasing presence of multiple faiths in increasingly secular societies makes religious isolation impossible and interfaith encounters inevitable. The worldwide distribution of faith communities of virtually all of the major religious traditions has exacerbated the concern of virtually all nations and religions for guarantees of freedom of religion and the protection of the religious rights of one's own adherents in particular and for religious minorities in general.

The call for the recognition of religious liberty in the world community needs to be sounded not only by nation-states, based upon instruments of national and international law, but also by the religions themselves. The international dimension of

71. GAMWELL, *supra* note 41, at 153. For a recent constructive theological understanding of this phenomenon, see JACQUES DUPUIS, S.J., TOWARD A CHRISTIAN THEOLOGY OF RELIGIOUS PLURALISM (1996).

the major world religions holds the promise of effecting important gains not only for the advancement of freedom of religion, but also for genuine interfaith dialogue and collaboration on behalf of freedom of religion for all and the building of a world community. Religious liberty, like world peace, is not only a moral imperative worthy of universal support of nation-states and religions around the world, it also needs to be seen as essential for the emergence of civil liberty and the creation of a world community that may well prove to be crucial to the survival of the human family.

It is to be fervently hoped that the words of the Charter of Paris for a New Europe, signed by thirty-four member nations of the Helsinki Final Act in which freedom of religion and other fundamental freedoms are made "the birthright of all human beings . . . inalienable, guaranteed by law," may become realized throughout the world.[72]

72. Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity, Nov. 21, 1990, 30 I.L.M. 193 (1990).