

BYU Law Review

Volume 2001 | Issue 2

Article 8

5-1-2001

Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?

David Little

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

David Little, *Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?*, 2001 BYU L. Rev. 603 (2001).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2001/iss2/8>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?

*David Little**

I. INTRODUCTION

Renewed controversy surrounds the status of Article 18, as it appears both in the Universal Declaration¹ and in the International Covenant of Civil and Political Rights (ICCPR),² because of the unanimous adoption by the United States Congress of the International Religious Freedom Act of 1998 (IRFA).³ Considerable concern was expressed during the period of drafting and debate over that bill as to whether the United States, in embracing such legislation, intended to single out and give special priority to religious freedom.⁴ By requiring the President and other U.S. officials to exert extra effort in support of the right of religious freedom around the world, does the legislation imply that that right has a higher—or at least different—status from other human rights?

While the United States is apparently trying to elevate this right, some other governments are urging extreme caution, if not opposition, to promoting religious freedom. These governments, and publicists sympathetic to their cause, fear that American policy, in its new-found exuberance, will ignore—and at times unfairly subvert—the particular historical experience of others and the delicate place religion occupies in each nation's peculiar identity. What religious

* Professor, Harvard Divinity School. Professor Little is the former Director of the U.S. Institute for Peace and is currently a member of the International Academy for the Freedom of Religion and Belief.

1. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

2. See International Covenant of Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

3. See International Religious Freedom Act of 1998, 22 U.S.C. § 6401 et seq. (2000).

4. Because it is cumbersome to keep referring to “freedom of conscience, religion, and belief,” the phrase “religious freedom” occasionally is used for shorthand. The other two ideas are decidedly implied. See *infra* note 9 (indicating why “freedom of thought,” a term also included in Article 18, should be seen in a different light from the other three ideas).

freedom means in one national context may be altogether different from what it means in another.

In other words, religious freedom is just now the subject of intense international debate, usually described as a controversy over “cultural relativism,” or what my colleague Samuel Huntington calls “the clash of civilizations.”⁵ The assumption of those espousing the relativist view is that the world is made up of distinct, self-contained, and conflicting units of culture or civilization. It is supposed to follow from this assumption that notions of human rights, including rights to religious freedom, vary according to culture and tradition. They are not readily translatable from one setting to another. This prompts a pointed question: How does the United States, which is only one country among many, have the authority, by means of IRFA or anything else, to impose on others its particular view of the meaning of religious freedom?

In response, I want to raise and comment on two questions regarding the status of the right to freedom of conscience, religion, and belief. One is the status of that right within the corpus of international human rights as well as in Western history. This is essentially a descriptive, empirical matter. The second question concerns the status of this right from the perspective of world opinion. Here we are concerned with normative issues: whether the right to religious freedom is properly regarded as universally applicable in the same way that at least some other human rights are, such as prohibitions against extrajudicial killing, torture, enslavement, etc.

II. LEGAL AND HISTORICAL STATUS OF RELIGIOUS FREEDOM

As to the relation of religious freedom to other human rights, it seems clear that existing human rights documents and recent international jurisprudence *do* give the right to religious freedom a certain kind of special status. The documents themselves elevate that right in some interesting ways. Recall that the right to religious freedom is, with some limitations, included among the nonderogable rights contained in Article 4 of the ICCPR. That fact itself suggests that freedom of conscience, religion, and belief is intended to be thought of as among the most sacred or most fundamental of the universally recognized human rights. Of course, it is not the only

5. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996).

right so designated. Article 4 also stipulates that protections from racial, religious, gender, and other forms of discrimination, as well as the prohibition against arbitrary killing, torture, enslavement, etc., are also nonderogable.

To be sure, the limitations on the freedom to “manifest one’s religion or belief” in regard to “public safety, order, health, or morals or the fundamental freedoms and rights of others,” mentioned in paragraph 3 of Article 18 of the ICCPR, also obtain in Article 4. At the same time, recent authoritative interpretation of Article 18 by the Human Rights Committee attaches some important qualifications that narrow the application of paragraph 3.⁶

First, the freedom to hold or admit to any theistic, nontheistic, or atheistic belief or to refrain from holding or admitting to any such belief is, and remains, absolute. Governments and others are completely prohibited from compelling or punishing belief as such. “Manifestation” would appear to mean public advocacy or the expressing of belief in the form of overt behavior. Only activity of that sort is properly subject to limitation. Second, the state bears the burden of showing that any restrictions on religious freedom are “directly related and proportionate to the specific need on which they are predicated.”⁷ Third, the limitations clause may not be administered in a discriminatory fashion. That means that all fundamental beliefs must be treated without preference or prejudice. It also means that when authorities impose restrictions on the manifestation of religious or other basic beliefs by appealing to “morals,” they must take into account “many social, philosophical and religious traditions” and *not* rely on principles “deriving exclusively from a single tradition.”⁸ In short, the Human Rights Committee is aware of the possible abuses to which the limitations clause of Article 18 might be susceptible and sensibly moves to narrow the range of potential misuse.

Moreover, it is important to remember that Article 18 includes three discrete terms: “conscience,” “religion,” and “belief.” We shall single out the idea of conscience presently, but, before doing that,

6. See UNITED NATIONS HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO. 22 (48), U.N. Human Rights Committee, ¶¶ 1, 2, 3, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), *reprinted in* RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 92–95 (Tad Stahnke & J. Paul Martin eds., 1998).

7. *Id.* ¶ 8.

8. *Id.*

let us emphasize another aspect of the *special status* that the Human Rights Committee extends to the right of freedom of conscience, religion, and belief. According to the committee, “the [ICCPR] does not explicitly refer to a right of conscientious objection, but . . . such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with freedom of conscience and the right to manifest one’s religion or belief.”⁹ This is a profound pronouncement for two reasons. First, some fundamental beliefs, even those enjoining otherwise illegal forms of behavior such as refraining from military conscription, are entitled, *as a matter of right*, to special deference. Second, the pronouncement incisively calls attention to the problematic character of the relation of force and fundamental belief. To be compelled against one’s conscience, religion, or belief to use force in military service may reasonably appear as objectionable as employing force to compel belief itself. The arresting implication of the committee’s opinion is that being forced against one’s basic convictions to use force is a severe violation of the right of conscience, religion, and belief. (This special connection also serves, usefully, to narrow the range of actions exemptible on grounds of conscience, etc.)

Beyond these textual and jurisprudential references, there are additional historical reasons for assigning some kind of special status to religious freedom. Article 18, paragraph 2 of the ICCPR states that “No one shall be subject to coercion which would impair [one’s] freedom to have or to adopt a religion or belief of [one’s] choice.” This implies an opposition between coercion and fundamental belief that lies deep within the Western tradition from which formulations of this sort have emerged. That opposition was highlighted by the twelfth century, when the age-old distinction between *forum internum* and *forum externum* took on new prominence and saliency in European life. At that time, the idea of an internal tribunal, understood as the conscience, was assigned special sovereignty and protec-

9. *Id.* ¶ 11. Notice that the committee here refers only to “conscience” or “religion or belief” in reference to a right to conscientious objection and *not* to “freedom of thought” (which is also mentioned in Article 18). It is unlikely that that omission is accidental. It would appear that “thought” is a much more inclusive category than “conscience, religion, and belief.” The latter seems to refer to a quite narrow and select range of “thought,” namely, certain fundamental convictions that occupy an especially important and potent place in the life of any individual. It is these, and not “thought” in general—however protected it may also be—that yields a special exemption like a right of conscientious objection.

tion, as a matter of “natural right,” over and against the external tribunal or civil authority.¹⁰ The phrase “sovereignty of conscience” conveys the basic understanding that the civil authority is ultimately in business, so to speak, to defend and encourage the rights of conscience, religion, and belief. To be sure, these notions were subject, subsequently, to various and variable interpretations. Nevertheless, to conclude that the *forum externum* owes special deference and special forms of exemption to the *forum internum*, as has the Human Rights Committee, is perfectly consistent with the underlying assumptions. Indeed, one way to think about a crucial implication regarding the state’s responsibility, namely, the enforcement of rights against murder, theft, libel, and other forms of arbitrary injury, is that such protection is a necessary condition for the exercise of conscience, religion, and belief. If individuals were not protected against violence and abuse of that sort, they would not be free—they would not enjoy the “sovereignty”—to pursue and work out the fundamental beliefs that make them who they are.

Incidentally, the whole idea of the sovereignty of conscience is very important in the formative period of United States history. The thoughts of individuals like Thomas Jefferson and James Madison eventually exerted considerable influence on existing human rights understanding. There is much to be said here. Let us be satisfied with an eloquent quotation from Jefferson: “[O]ur 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.”¹¹ It follows that to surrender to “our rulers” the “inalienable” rights of the internal forum would be tantamount to surrendering the core of the human personality.

III. RELIGIOUS FREEDOM AND WORLD OPINION

Regarding the universal applicability of the right of conscience, religion, and belief, two things may be said. First, on inspection, we live in a world dominated not so much by a clash as by a confusion of civilizations. Contrary to the claims of cultural relativists and oth-

10. See Brian Tierney, *Religious Rights: An Historical Perspective*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 17, 26–30 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

11. Thomas Jefferson, *Notes on Virginia*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 185, 274–75 (Adrienne Koch & William Peden eds., 1944).

ers that our world is divided up into distinct, self-contained, and conflicting units of culture or civilization, things are much more complicated and convoluted. In reality, there is no one Asian view, no one Islamic or European view, just as there is no one American view, of how rights, or anything else, ought to be interpreted and applied. Far from being unified and harmonious, cultures and civilizations are dynamic and fluid affairs, particularly under the influence of modern information technology. They are arenas of contention and controversy. Which version of "official culture" becomes dominant typically depends not on the result of informed and deliberative national consensus, but on the strength and influence of particular political and economic factions.

Ours is an age of nationalism where there is a strong impulse on the part of state authorities to ally themselves with one, often a majority, ethnoreligious group so as to create a national faith considered essential for political identity. The problem is that dissenters and minorities are left out. They are not treated according to the norms of nondiscrimination and freedom of conscience, religion, and belief enshrined in the human rights documents. On the contrary, they are regularly suppressed or punished as deviant and disloyal for no other reason than that they refuse to espouse or identify with the dominant faith.

This state of affairs explains the deficiencies of the cultural relativist position, as well as why the new emphasis on the freedom of conscience, religion, and belief is so relevant. Cultural relativists, in a word, have no place for minorities. A leading feature of modern international politics is the widespread existence of minorities. The radical problems they pose for dominant majorities readily defy and disprove the popular image of a world composed of monolithic, harmonious cultures or civilizations.

That is also why the right of religious freedom has such power throughout the world. Minorities recognize, in ways that majorities often do not, the urgency of protecting dissent and deviance. Therefore, minorities, and those who support them, frequently champion the rights of the dispossessed and disadvantaged, including the right to espouse and practice (within limits) the dictates of one's fundamental beliefs. In fact, there is new, compelling evidence that, among other things, human rights standards designed to protect the

religious and cultural independence of minorities are beginning to have a positive effect.¹²

According to the recent findings of Gurr and associates, the “first and most basic” reason for the improvement of the treatment of minorities and the decline of ethnopolitical conflict worldwide is “the recognition and active protection of the rights of minority peoples: freedom from discrimination based on race, national origin, language, or religion, complemented by institutional means to protect and promote collective interests,” implying “the right of national peoples to exercise some degree of autonomy within existing states to govern their own affairs.”¹³

The second thing to be said on behalf of the universal applicability of the right to the freedom of conscience, religion, and belief is what we might call “the lesson of fascism.” The fundamental reason the world embraced human rights after World War II was not because people suddenly became enamored of liberal philosophy or even because of the postwar dominance of the United States. The primary reason was the moral revulsion worldwide to the indisputable atrocities perpetrated in the name of fascism, in both its European *and* Asian versions.

A key feature of fascism was the direct assault on the right of conscience, religion, and belief. Those who, for whatever reason, questioned the national faith, who dissented from the collective myth, were automatically branded as subversives and thus became the fitting target of suppression and/or elimination. Their primary sin was *to fail to believe in* the theory of collective domination. The crucial part of the lesson of fascism is that it violated religious freedom along with the whole range of other rights now understood to be requisite for human fulfillment. Denial of the right of conscience, religion, or belief, it appears, seldom occurs in isolation.

12. *See, e.g.*, TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 275 (2000). Gurr states:

The breakup of the international system into warring ethnic statelets, which many feared in the early 1990s, has been checked by more effective international and domestic strategies for managing ethnopolitical conflict. Relations between [ethnic] groups and states in heterogeneous societies changed in the 1990s in ways that suggest that a new regime governing minority-majority relations is under construction.

Id.

13. *Id.* at 278.

IV. CONCLUSION

We may conclude both that the freedom of conscience, religion, and belief *does* enjoy a certain special status legally and historically and that it *ought* to enjoy such a status in the court of world opinion. At the same time, we should emphasize that the freedom of religion is part of a wider bundle of rights. To support freedom of conscience, religion, and belief requires the enforcement of rights against murder, torture, enslavement, and the whole host of other human rights that weave together into a fabric of protection essential to clothe human life with dignity. To single out and promote religious freedom in isolation from other human rights would be as mistaken as to deny the distinctive status of that right.