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TOWARD INTERNATIONAL FREEDOM OF RELIGION: A PROPOSAL FOR CHANGE IN FCN TREATY PRACTICE

Since the founding of this nation, Americans have relied on fundamental constitutional principles for the ultimate protection of their religious liberty.¹ These guarantees have been extended to all persons in the United States, not just citizens.² American nationals traveling or living abroad may discover, however, that religious freedom is not regarded as a fundamental right elsewhere.³ Although most nations do, at least in principle, adhere to the basic idea of freedom of religious belief and exercise,⁴ religious freedom may be denied either to a state's own citizens or to foreign nationals within its boundaries.

It is probably true that all states have, at one time or another, denied liberty of conscience. Often public attention is not drawn to those claims of denial of religious freedom which are settled through negotiation. Yet this in no way decreases the impact on the individuals involved. For example, although American military bases in Spain have chapels in which religious services are allowed, until recently no marriages would be recognized except those performed in accordance with the state religion of Roman Catholicism.⁵ Americans desiring to marry under other rites had to leave Spain for the ceremony.⁶ When Italy discriminated against Amer-

¹ U.S. CONST., amend. I.

² As Mr. Justice Field stated in *Davis v. Beason*, 133 U.S. 333 (1890):

The first amendment . . . was intended to allow *every one under the jurisdiction of the United States* to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper. . . .

133 U.S. at 342 (emphasis added).

³ Perhaps the best evidence that denials of religious freedom still occur comes from the fact that the United Nations is still trying to end such practices. See M. WHITEMAN, 13 DIGEST OF INTERNATIONAL LAW 671 (1963); 4 U.N. MONTHLY CHRONICLE, Nov., 1967, at 40; note by the Secretary-General: Elimination of All Forms of Religious Intolerance, U.N. Doc. A/7930 (1970).

⁴ See C. HYDE, 1 INTERNATIONAL LAW 707 (2d ed. 1945); A. KRISHNASWAMI, STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, 37, indexed as U.N. Doc. E/CN.4/Sub.2/200 (1959); Padelford, *Religious Liberty in International Law and Treaties*, 21 INT'L REV. OF MISSIONS 402, 404 (1932).

⁵ This example is based upon personal knowledge acquired by the author while stationed in Spain from 1969 through 1972. See also *A Matter of One Hour*, 117 AMERICA, Sept. 30, 1967, at 338.

⁶ This particular problem was apparently remedied through diplomatic negotiation. The instance was not technically a denial of religious freedom but rather a licensing problem. Interview with Richard D.S. Dixon, Capt. U.S. JAG Corps previously stationed in Spain, in Ann Arbor, Michigan, Oct. 5, 1973. See A. KRISHNASWAMI, *supra* note 3, at 46 (referring to the use of licensing requirements to restrict religious

ican Jews immediately prior to World War II, all the United States government could do was to point to the religious freedom enjoyed by Italians in the United States and to suggest reciprocal treatment; no treaty existed between the two countries.⁷ Protection and regulation of foreign missionary activities present additional international religious freedom problems.⁸ In some countries, unauthorized religious meetings may be prohibited, and proselytizing may be cause for arrest.⁹

In response to these and other difficulties, the United States has used bilateral treaties of Friendship, Commerce and Navigation (FCN) in order to guarantee religious freedom to Americans traveling or residing abroad.¹⁰ These treaties are concerned with protecting the rights of both juridical and natural persons.¹¹ Usually they contain a clause establishing a reciprocal right of religious freedom for the nationals of the contracting parties when they travel or reside in the other country's territory.¹² Should alleged denials of religious freedom occur, this clause serves as a basis for negotiating a compromise settlement. Because religious freedom

practices). Indeed, there is now purportedly an allowance of religious freedom granted by the Spanish Constitution and a complementary law. *Religious Freedom in Spain*, 118 AMERICA, Jan. 13, 1968, at 38. Although a pertinent constitutional amendment has been passed, a registration requirement for non-Roman Catholics continues to make Protestants uneasy. *Id.* at 39. See also *A Matter of One Hour*, 117 AMERICA, Sept. 30, 1967, at 338; *Religious Freedom in Spain*, 117 AMERICA, July 15, 1967, at 47; *Spanish Protestants Denounce New Freedom Law*, 84 CHRISTIAN CENTURY, July 12, 1967, at 885; 89 TIME, Mar. 3, 1967, at 37.

⁷ R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 269 (1960). A similar situation arose in 1935 with Mexico. G. HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 647 (1941).

⁸ In 1908, a group of Mormon Missionaries was expelled from Prussia, and the United States made inquiries as to whether the expulsion was because of the missionaries' religious beliefs. G. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 148 (1941). In 1923, the Haitian government asked the United States to stop sending any missionaries, except Roman Catholics, to that country. The United States replied that this would do violence to its own fundamental law guaranteeing freedom of religious thought and belief. R. WILSON *supra* note 7, at 267. Problems also arose over the regulation of foreign missionaries in Venezuela, during the early part of this century, under that country's laws of ecclesiastical patronage. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE U.S.: 1914, 1099-1104 (1922). G. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 149 (1941). In Turkey under the Ottoman Empire, a United States protest was evoked when the government tried to restrict the activities of American missionaries. C. HYDE, *supra* note 4, at 706.

⁹ As a contemporary matter, proselytizing in Turkey may be an offense. The holding of religious meetings in unauthorized places is forbidden. Interview with Captain Burrus M. Carnahan, an Air Force JAG officer previously attached to a United States military legal office in Turkey, in Ann Arbor, Michigan, Oct. 5, 1973. Earlier restraints upon religious services occurred in Turkey in 1886. J. MOORE, 5 INTERNATIONAL LAW DIGEST 831 (1906).

¹⁰ See M. WHITEMAN, 8 DIGEST OF INTERNATIONAL LAW 399-400 (1963); R. WILSON, *supra* note 7, at 277; Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958).

¹¹ Walker, *supra* note 10, at 806.

¹² See generally R. WILSON, *supra* note 7. Although Wilson describes various treaty sources of religious freedom guarantees, this article examines only the FCN treaty form since it dominates the field. The first such FCN treaty was concluded with France in 1778. Wilson, *A Decade of New Commercial Treaties*, 50 AM. J. INT'L. L. 927, 928 (1956).

is not yet a customary right of all persons at international law,¹³ the FCN treaty clause on freedom of religion is the only binding basis for protecting this fundamental right.¹⁴

Although FCN treaty clauses respecting freedom of religious practice are useful, they offer considerably less than comprehensive protection. The United States has FCN treaties with only forty-eight of the world's approximately 144 independent states. This is, in part, due to difficulties in drafting provisions acceptable to both parties.¹⁵ Even where treaty clauses are in effect, certain denials of religious freedom persist and present difficult remedial problems.¹⁶

Given the shortcomings of the FCN treaty as a protective device, a general principle and customary right of religious freedom must be established at international law.¹⁷ The international legal status of the right to religious freedom is uncertain,¹⁸ despite seemingly wide acceptance of the religious freedom principle evidenced by recent international institutional proclamations.¹⁹ Even the multilateral documents granting the

¹³ There is no explicit multinational recognition of religious freedom on a scale as broad as the Universal Declaration would provide if it were binding law. W. BISHOP, *INTERNATIONAL LAW* 469-70 (3d ed. 1971).

¹⁴ Walker, *supra* note 10, at 824.

¹⁵ In 1921, the United States and Mexico were attempting to draft a treaty which contained a religious freedom clause. The Mexican Foreign Secretary described the clause as "dangerous and unnecessary" because of the prevailing religious mood in Mexico at the time. The Mexican Foreign Secretary also insisted that there was already religious tolerance in Mexico. Subsequently, the treaty negotiations were dropped. R. WILSON, *supra* note 7, at 264. In more recent times, the proposed 1955 FCN treaty with Haiti eventually had to be abandoned because an acceptable religious freedom clause could not be negotiated. Letter from Charles I. Bevans, Ass't Legal Adviser, Dep't of State, to Bruce F. Howell, Jan. 2, 1974, on file with the *University of Michigan Journal of Law Reform*. See also R. WILSON, *supra* note 7, at 275. There was much dissent in the United States because of the lack of such a clause even though the Department of State felt assured that no religious freedom would be denied Americans in Haiti. *Public Hearings Needed on Haitian Treaty*, 78 *CHRISTIAN CENTURY*, Jan. 18, 1956, at 68. This is also the tenor of a letter sent from the Department of State to Senator Walter F. George, Chairman, Committee on Foreign Relations, Feb. 16, 1955, on file with the *University of Michigan Journal of Law Reform*.

¹⁶ At the same time that Spain was refusing to recognize marriages not performed according to Roman Catholic rites, the United States had an FCN treaty with Spain containing a religious freedom clause. Treaty with Spain on Friendship and General Relations, July 3, 1902, art. IV, 33 Stat. 2105 (1903), T.S. No. 422 (effective Apr. 14, 1903). Cf. Agreement with Spain on Friendship and Cooperation, Aug. 6, 1970, [1970] 21 U.S.T. 1677, T.I.A.S. No. 6924, which does not mention religious freedom.

¹⁷ "Customary, as distinguished from conventional, [*i.e.*, treaty] international law is based upon the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of conduct." G. HACKWORTH, 1 *DIGEST OF INTERNATIONAL LAW* 1 (1941).

¹⁸ A. KRISHNASWAMI, *supra* note 4, at 7.

¹⁹ See, e.g., The American Convention on Human Rights, text at 65 *AM. J. INT'L L.* 679 (1971); The European Convention for the Protection of Human Rights and Fundamental Freedoms, text at 45 *AM. J. INT'L L. SUPP.* 24 (1951); The Universal Declaration of Human Rights, 3 *U.N. GAOR*, I, at 71, *U.N. Doc. A/810* (1948). The achievement of a fundamental freedom of religion without discrimination is also a purpose expressed in the United Nations Charter. *U.N. Charter* art. I, para. 3. See also the American Declaration of the Rights and Duties of Man, approved at Bogotá, Colombia, in 1948; M. WHITEMAN, 5 *DIGEST OF INTERNATIONAL LAW* 231 (1963).

right are without binding force, except for the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰ In spite of these limitations, these documents are considered evidence of a general principle and customary right of religious freedom at international law.²¹ Though bilateral agreements, such as the FCN treaties of the United States, bind solely the contracting parties, they constitute further evidence of international custom. Additional agreements strengthen the evidence that the right to religious freedom has become a customary right at international law.

Given the vast differences in both juridical and theological thought, no precise "international" definition of religious freedom is possible. However, by comparing the meaning of religious freedom in American constitutional law with the standards used in FCN treaties, this article analyzes the scope of religious rights accorded to Americans by treaty. The FCN treaties are also examined to determine their evidentiary value. Finally, a model treaty provision, attempting to improve the utility of the FCN treaty as an evidentiary and protective device, is proposed. Use of such a treaty provision can hasten the elevation of religious freedom to the status of a general principle and customary right of international law.

I. CONSTITUTIONAL PRINCIPLES OF RELIGIOUS FREEDOM

Americans derive their right to religious freedom from the first amendment of the Constitution.²² While this right is fundamental, it is not absolute. The Supreme Court has limited the free exercise of religious belief when it contravenes public policy or presents a hazard to society. In so doing, the Court has never explicitly defined "religion."²³ The decisions do, however, provide a guide, indicating what is allowed under the rubric of "freedom of religion," while identifying actions contrary to public policy.²⁴ In order to provide a substantive legal background for consideration of the religious freedom provisions in FCN treaties, the standard

²⁰ See E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 953 (1963). Austria, Belgium, Denmark, the German Federal Republic, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom are parties. W. BISHOP, *supra* note 13, at 485, n.37.

²¹ The International Court of Justice uses as a source of law "international custom, as evidence of a general practice accepted as law . . ." I.C.J. STAT. art. 38, para. 1(b).

²² "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I.

²³ The Court has gone so far as to discuss the propriety of practical adherence to particular religious beliefs. See *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

²⁴ Courts have explicitly considered the scope of the first amendment in cases like *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (upheld the use of peyote, an hallucinogenic drug, in certain religious services) and *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* *Bunn v. North Carolina*, 336 U.S. 942 (1949) (denied right to handle poisonous snakes in ceremonial rites). Also, the Supreme Court has implied, in dictum, that the practice of religious sacrifice would not be permitted. *Reynolds v. United States*, 98 U.S. 145, 166 (1898).

used by the Court to strike a balance between individual rights and the public interest must be identified.²⁵

One of the first cases delineating the scope of the "free exercise" clause was *Reynolds v. United States*.²⁶ It was held that the "free exercise" clause did not impair the constitutionality of a state criminal statute prohibiting the Mormon practice of polygamy. The extent of the permissible restraint was carefully defined. Although Congress was deprived of all legislative power over mere opinion, it was allowed to control actions which "... were in violation of social duties or subversive of good order."²⁷ Thus, the *Reynolds* Court recognized that while a person is free to hold whatever religious beliefs he desires, his expression of his beliefs must be limited to activities not detrimental to the public weal.

In *Prince v. Massachusetts*,²⁸ a state regulatory statute prohibiting certain uses of child labor was upheld in the face of a constitutional challenge based on a religious freedom claim. A Jehovah's Witness was convicted under the statute for directing her child to publicly sell religious literature. The conviction was sustained despite the parent's protest that such proselytizing efforts were essential to salvation.²⁹ The Court held that the state could limit parental freedom and authority in matters affecting the child's welfare, including matters of conscience and religious conviction.³⁰ Once again, the power to act in accordance with the dictates of one's religion was qualified.

New guidelines for applying restrictions under the "free exercise" clause were developed in *Cantwell v. Connecticut*.³¹ Appellants in *Cantwell* were convicted, *inter alia*, of violating a Connecticut statute which made it illegal to solicit money, services, subscriptions, or anything of value for an alleged religious cause without first obtaining the approval of the Secretary of the Public Welfare Council.³² The Court's opinion explicitly noted that the first amendment guarantee of religious freedom was a "fundamental" right applicable to the states through the fourteenth amendment.³³ The Court described the content of the first amendment:

[T]he Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must

²⁵ For more general considerations of the scope of first amendment religious liberty see Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969). See also Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

²⁶ 98 U.S. 145 (1879).

²⁷ *Id.* at 164.

²⁸ 321 U.S. 158, *rehearing denied*, 321 U.S. 804 (1944).

²⁹ *Id.* at 170.

³⁰ *Id.* at 167.

³¹ 310 U.S. 296 (1940).

³² *Id.* at 305.

³³ *Id.* at 303.

have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.³⁴

Later in the opinion, the Court identified what it considered to be permissible and impermissible restrictions under the "free exercise" clause. If a clear and present danger of riot, disorder, or other threat to public safety, peace or order existed the Court felt the state must have the power to impose regulations.³⁵ The Court carefully noted, however, that arbitrary exercise of restrictive power would be unconstitutional. Passing on the statute's constitutionality, the Court stated:

[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.³⁶

Thus, while limitations may be imposed on the exercise of religious freedom, the actual or potential application of such restrictions must not be arbitrary.

The Supreme Court specifically expressed the proper scope of protection afforded by the religious freedom clause in *Sherbert v. Verner*.³⁷ The plaintiff, a member of the Seventh-Day Adventist Church, would not work on Saturday, which is the Sabbath according to that faith. Because she did not work on Saturday, the plaintiff was denied state unemployment compensation. Responding to this alleged denial of religious liberty, the Court stated:

[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . .'³⁸

This brief presentation of the history of the Supreme Court's attitude toward the first amendment is sufficient to indicate that the Court would look with great suspicion upon any restriction of religious liberty. The right to religious freedom is fundamental to Americans and any regulation purporting to limit it receives the greatest scrutiny. Yet the right is not absolute. While one may believe whatever he will, actions in accordance with that religious belief are subject to limits imposed by the society in which he lives. Conduct which is objectionable, offensive, or dangerous to the community is not free from justifiable restraint. Recognition of this principle explains much of the difficulty associated with defining a substantive right of religious freedom at international law. To

³⁴ *Id.* at 303-04.

³⁵ *Id.* at 308.

³⁶ *Id.* at 307.

³⁷ 374 U.S. 398 (1963).

³⁸ 374 U.S. at 406 quoting from *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (footnote omitted).

the extent that religious and cultural factors vary more widely among nations than within a single state, the difficulty in reaching a treaty accord is significantly increased. Thus, American constitutional practice is merely indicative of the general problem of balancing divergent interests. Yet the American standard for religious freedom may serve as a referent in judging United States treaty practice against the background of the different and often competing interests of other treaty states.

II. EXISTING RELIGIOUS FREEDOM CLAUSES IN FCN TREATIES

Because of the necessary trade-offs at the negotiating table, United States treaty practice often is not in accord with the American constitutional formula for religious freedom. As a result, an FCN treaty may have a detailed religious freedom clause or no such clause at all. Alternatively, negotiators may agree on a general clause stating a basic principle and little else. This section examines the current FCN treaties of the United States³⁹ in order to identify the types of clauses in use.

A. FCN Treaties Without Religious Freedom Clauses

The first type of treaty encountered is that which has no "freedom of religion" clause at all.⁴⁰ Although lacking a religious freedom clause, these treaties enunciate the legal and economic rights of nationals of each State while in the other's territory.⁴¹ Where the applicable FCN treaty does not contain a religious freedom clause, the United States lacks a means by which to exert leverage in guaranteeing its nationals the right of religious freedom while they are present in the territory of the other

³⁹ See generally U.S. DEP'T OF STATE, TREATIES IN FORCE (1973) [hereinafter cited as TREATIES IN FORCE]. If a treaty is not in force but is cited merely for demonstrative purposes, this will be noted.

⁴⁰ See Agreement with Nepal relating to Friendship and Commerce, Apr. 25, 1947, 61 Stat. 2566 (1947), T.I.A.S. No. 1585 (effective April 25, 1947); Agreement with Yemen relating to Friendship and Commerce, May 4, 1946, 60 Stat. 1782 (1946), T.I.A.S. No. 1535 (effective May 4, 1946); Treaty with Iraq on Commerce and Navigation, Dec. 3, 1938, 54 Stat. 1790 (1938), T.S. No. 960 (effective June 19, 1940); General Treaty with Panama on Friendship and Cooperation, Mar. 2, 1936, 53 Stat. 1807 (1939), T.S. No. 945 (effective July 27, 1939); Provisional Agreement with Saudi Arabia on Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation, Nov. 7, 1933, 48 Stat. 1826 (1933), E.A.S. 53 (effective Nov. 7, 1933); Convention with Switzerland on Friendship, Commerce and Extradition, Nov. 25, 1850, 11 Stat. 587 (1855), T.S. No. 353 (effective Nov. 8, 1855); Treaty with Brunei on Peace, Friendship, Commerce and Navigation, June 23, 1850, 10 Stat. 909, (1850) T.S. No. 33 (effective July 11, 1853).

See also Treaty with Morocco on Peace, Sept. 16, 1836, 8 Stat. 484 (1837), T.S. No. 244-2 (effective Jan. 28, 1837); Treaty with United Kingdom on Peace and Amity, Dec. 24, 1814, 8 Stat. 218 (1841), T.S. No. 109 (effective Feb. 17, 1815).

Although these last two treaties are not technically FCN treaties, they apparently are regarded as such. See Hynning, *Treaty Law for the Private Practitioner*, 23 U. CHI. L. REV. 36 (1955).

⁴¹ Walker, *supra* note 10, at 806.

State. Specific denials of religious liberty may not occur even in the absence of a religious freedom clause, but should such actions occur, the United States government must look to other sources of international obligation in seeking to afford relief to an aggrieved national. Fortunately, treaties without a religious freedom clause are older in origin; none have been concluded since 1947. They also comprise a minority of all FCN treaties in force.

B. General Clauses

The inclusion of religious freedom clauses in FCN treaties became a marked feature of American treaty practice during the nineteenth century. One group of treaties concluded during this period contained clauses guaranteeing religious liberty in broad general terms. The clause contained in the 1832 FCN treaty with Chile is representative:

It is likewise agreed that the most perfect and entire security of conscience shall be enjoyed by the citizens of both the contracting parties in the countries subject to the jurisdiction of the one and the other, without their being liable to be disturbed or molested on account of their religious belief, so long as they respect the laws and established usages of the country. . . .⁴²

Although the guarantees are not specific, the intent to create a right which is inalienable may be discerned from the wording “. . . most perfect and

⁴² Treaty with Chile on Peace, Amity, Commerce and Navigation, May 16, 1832, art. XI, 8 Stat. 434 (1834), T.S. No. 40 (effective Apr. 29, 1834). For identical clauses see Treaty with Tonga on Amity, Commerce and Navigation, Oct. 2, 1886, art. XIII, 25 Stat. 1440 (1888), T.S. No. 357 (effective Aug. 1, 1888) (All articles except Article VI terminated July 28, 1920.); Treaty with Bolivia on Peace, Friendship, Commerce and Navigation, May 13, 1858, art. XIV, 12 Stat. 1003 (1862), T.S. No. 32 (effective Nov. 9, 1862); Treaty with Guatemala on Peace, Amity, Commerce and Navigation, March 3, 1849, art. XIII, 10 Stat. 873 (1849), T.S. No. 149 (effective May 13, 1852) (Articles relating to commerce and navigation terminated November 4, 1874. TREATIES IN FORCE, *supra* note 39, at 102.); Treaty with Ecuador on Peace, Friendship, Navigation and Commerce, June 13, 1839, art. XIV, 8 Stat. 534 (1842), T.S. No. 76 (effective Apr. 19, 1842) (All articles with respect to commerce and navigation terminated August 25, 1892.); Treaty with Brazil on Peace, Friendship, Commerce and Navigation, Dec. 12, 1828, art. XIII, 8 Stat. 390 (1829), T.S. No. 34 (effective Dec. 12, 1828) (All articles except those of peace and friendship terminated December 12, 1841. TREATIES IN FORCE, *supra* note 39, at 23).

A similar treaty clause may be found in the 1860 FCN treaty with Paraguay. Treaty with Paraguay on Friendship, Commerce and Navigation, Feb. 4, 1859, art. XIV, 12 Stat. 1091 (1860), T.S. No. 272 (effective Mar. 7, 1860). However, the inclusion of an additional modifying clause allowing the free exercise of religion distinguishes the Paraguayan treaty.

The Spanish FCN Treaty is also a “general clause” treaty, but uses the following language:

The citizens or subjects of each of the High Contracting Parties shall enjoy in the territories of the other the right to exercise their worship . . . subject to the Constitution, Laws and Regulations of the respective countries.

Treaty with Spain on Friendship and General Relations, July 3, 1902, art. IV, 33 Stat. 2105 (1903), T.S. 422 (effective Apr. 14, 1903).

entire security of conscience . . ."⁴³ which describes the scope of the freedom to be enjoyed. However, there is no mention of a right to worship or publicly practice one's religion. The only clause arguably protecting conduct is the nebulous provision that nationals of the treaty parties shall not be ". . . disturbed or molested on account of their religious belief. . . ." In addition, the limiting phrase ". . . so long as they respect the laws and established usages of the country . . ." can be viewed as disallowing any religious practice deviating from that prescribed by the state religion. Thus, the extent to which religious freedom is protected by this type of clause seemingly depends entirely on the internal laws of the respective States. "Established usages" is a sufficiently amorphous term to allow the application of almost any restriction on freedom of religion, especially if the "usage" is reinforced by tradition. Reliance on a clause of this type allows party States ample discretion to impose serious restrictions on the free exercise of religion.

C. Detailed Clauses

In contradistinction to treaties lacking a specific religious freedom clause or granting protection in general terms, some treaties embody guarantees of religious freedom in very detailed form. Most detailed clauses are found in the FCN treaties concluded in the nineteenth century. One reason for United States insistence on such detailed clauses was the desire to protect the interests of American missionaries abroad.⁴⁴ The treaties containing detailed clauses can be broken down by the format of the clause. The initial "one paragraph" clause format is exemplified by the 1853 FCN treaty between the United States and Argentina.

They [nationals of either contracting party] shall not be disturbed, molested nor annoyed in any manner on account of their religious belief, nor in the proper exercise of their peculiar worship, either within their own houses, or in their own churches or chapels, which they shall be at liberty to build and maintain, in convenient situations, to be approved of by the local government, interfering in no way with, but respecting the religion and customs of, the country in which they reside. . . .⁴⁵

⁴³ Similar wording may be found in the 1782 treaty with the Netherlands and the 1785 treaty with Prussia. Treaty with the Netherlands on Peace and Commerce, Oct. 8, 1782, art. IV, 8 Stat. 32 (1789), T.S. No. 249 (effective Jan. 22, 1783); Treaty with Prussia on Amity and Commerce, Sept. 10, 1785, art. XI, 8 Stat. 84 (1789), T.S. No. 292 (effective Oct., 1786). Both treaties are no longer in force. See W. MALLOY, 2 TREATIES, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1776-1909) 1233, 1477 (1910).

⁴⁴ R. WILSON, *supra* note 7, at 244, 276.

⁴⁵ Treaty with Argentina on Friendship, Commerce and Navigation, July 27, 1853, art. XIII, para. 2, 10 Stat. 1005 (1853), T.S. No. 4 (effective Dec. 20, 1854). See also Treaty with Costa Rica on Friendship, Commerce and Navigation, July 10, 1851, art. XII, 10 Stat. 916, (1852), T.S. No. 62 (effective May 26, 1852); Treaty with Colombia on Peace, Amity, Navigation and Commerce, Dec. 12, 1846, art. XIV, 9 Stat. 881 (1846), T.S. No. 54 (effective June 10, 1846); Treaty with Venezuela on Peace, Friend-

This provision basically allows nationals of each State to freely exercise their beliefs while within each other's territory. The clause is detailed in the sense that it goes further than merely granting religious freedom in the abstract by specifying that religious groups are guaranteed certain rights.⁴⁶ The only limitations placed on the practice of religion are that buildings constructed for religious purposes be approved by the local government⁴⁷ and that participants in worship services respect the "religion and customs" of the State in which they reside. Clauses in the treaties with Venezuela,⁴⁸ Costa Rica,⁴⁹ Colombia,⁵⁰ and Mexico⁵¹ also require religious adherents to respect the local laws and constitution of their host State.

More recent detailed religious freedom clauses have been expressed in a "two-paragraph" format. Articles I and V of the 1932 FCN treaty with Norway are representative.

Article I

The nationals of each of the High Contracting Parties shall be permitted; . . . to exercise liberty of conscience and freedom of worship; to engage in . . . religious . . . work of every kind without interference; and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

Article V

The nationals of each of the High Contracting Parties in the exercise of the right of freedom of worship, within the territories of the other, as hereinabove provided, may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their

ship, Navigation and Commerce, Jan. 20, 1836, art. XIV, 8 Stat. 466 (1836), T.S. No. 366 (effective May 31, 1836); Treaty with Mexico on Amity, Commerce and Navigation, art. XV, Apr. 5, 1831, 8 Stat. 410 (1832), T.S. No. 203 (effective Apr. 5, 1832). This treaty is no longer in force. W. MALLOY, 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1776-1909) 1085 (1910).

⁴⁶ Although many of these treaties also contain provisions on the religious burial of the dead, this activity will not be dealt with here since the thrust of this paper is freedom of conscience and religious worship.

⁴⁷ This limitation contemplates that such structures shall be subject to housing codes and other local regulations.

⁴⁸ Treaty with Venezuela on Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, art. XIV, 8 Stat. 466 (1836), T.S. No. 366 (effective May 31, 1836).

⁴⁹ Treaty with Costa Rica on Friendship, Commerce and Navigation, July 10, 1851, art. XII, 10 Stat. 916 (1852) T.S. No. 62 (effective May 26 1852).

⁵⁰ Treaty with Columbia on Peace, Amity, Navigation and Commerce, Dec. 12, 1846, art. XIV, 9 Stat. 881 (1846), T.S. No. 54 (effective June 10, 1846).

⁵¹ Treaty with Mexico on Amity, Commerce and Navigation, Apr. 5, 1831, art. XV, 8 Stat. 410, (1832), T.S. No. 203 (effective Apr. 5, 1832).

own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public morals; . . .⁵²

Treaties employing this two-paragraph format were generally concluded within a period of thirteen years during this century.⁵³ Typically, the first article mentions religious rights in connection with the other civil rights that may be exercised by the nationals of one State in the territories of the other. The right to religious freedom is guaranteed, and any incidental privileges or rights "necessary for the enjoyment" of religious freedom are allowed on the basis of national or most-favored-nation treatment. The clause requires submission to local laws and regulations "duly established," a phrase which conveys a concept akin to due process, though seemingly more amorphous.⁵⁴ The use of buildings for religious purposes is allowed, either through ownership or lease.⁵⁵

The second article is the specific "religious worship" clause.⁵⁶ Liberty to worship is accorded nationals of a treaty party in the territories of the contracting host state. Both public and private worship services are permitted. Additional reference is made to the right to erect and maintain

⁵² Treaty with Norway on Friendship, Commerce and Consular Rights, June 5, 1924, arts. I & V, 47 Stat. 2135 (1932), T.S. No. 852 (effective Sept. 13, 1927); Treaty with Liberia on Friendship, Commerce and Navigation, Aug. 8, 1938, arts. I & V, 54 Stat. 1739 (1939), T.S. No. 956 (effective Nov. 21, 1939); Treaty with Finland on Friendship, Commerce and Consular Rights, Feb. 13, 1934, arts. I & V, 49 Stat. 2659 (1934), T.S. No. 868 (effective Aug. 10, 1934); Treaty with Austria on Friendship, Commerce and Consular Relations, June 19, 1928, arts. I & V, 47 Stat. 1899 (1931), T.S. No. 839 (effective May 27, 1931); Treaty with Latvia on Friendship, Commerce and Consular Rights, Apr. 20, 1928, arts. I & V, 45 Stat. 2641 (1928), T.S. No. 765, (effective July 25, 1928). This treaty, as well as the one with Estonia, is still considered in force by the United States. TREATIES IN FORCE, *supra* note 39 at 148; Treaty with Honduras on Friendship, Commerce and Consular Rights, Dec. 7, 1927, arts. I & V, 45 Stat. 2618 (1928), T.S. No. 764 (effective July 19, 1928); Treaty with Estonia on Friendship, Commerce and Consular Relations, Dec. 23, 1925, arts. I & V, 44 Stat. 2379 (1926), T.S. No. 736 (effective May 22, 1926); Treaty with Germany on Friendship, Commerce and Consular Rights, Dec. 8, 1923, 44 Stat. 2132 (1925), T.S. No. 725 (effective Oct. 14, 1925). This treaty has been superseded by the 1954 agreement. See Treaty with Germany on Friendship, Commerce and Navigation, Oct. 29, 1954, [1956] art. II, para. 3, 7 U.S.T. 1839, T.I.A.S. No. 3593.

⁵³ These treaties were concluded in the period from 1925 to 1938. If the Chinese and Italian treaties of 1946 and 1948 are included, the period is increased to 23 years. Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, art. XII, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 effective Nov. 30, 1948; Treaty with Italy on Friendship, Commerce and Navigation, Feb. 2, 1948, art. I, para. 2, & art. XI, 63 Stat. 2255 (1949), T.I.A.S. No. 1965 effective July 26, 1949.

⁵⁴ The Finnish treaty is the only treaty that omits the phrase "duly established." Treaty with Finland on Friendship, Commerce and Consular Rights, Feb. 13, 1934, arts. I & V, 49 Stat. 2659, (1934), T.S. No. 868 (effective Aug. 10, 1934).

⁵⁵ The Austrian clause establishes the right on a "national treatment" basis. Treaty with Austria on Friendship, Commerce and Consular Relations, June 19, 1928, arts. I & V, 47 Stat. 1876 (1931), T.S. No. 839 (effective May 27, 1931).

⁵⁶ The Finnish treaty adds "liberty of conscience" to this clause. Treaty with Finland on Friendship, Commerce and Consular Rights, Feb. 13, 1934, arts. I & V, 49 Stat. 2659 (1934), T.S. No. 868 (effective Aug. 10, 1934).

buildings for religious purposes. The only limitation imposed on religious practices is that they may not be "contrary to public order or public morals."⁵⁷

Two recent treaties are worth noting because of their incorporation of additional significant wording into the basic detailed clause. Such a clause is found in the 1946 FCN treaty with China:

The nationals of either High Contracting Party shall, throughout the territories of the other High Contracting Party, be permitted to exercise liberty of conscience and freedom of worship and to establish schools for the education of their children, and they may, whether individually, collectively or in religious or educational corporations or associations, and without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct religious services and give religious or other instruction, either within their own houses or within any other appropriate buildings, provided that their religious and educational activities are not contrary to public morals and that their educational activities are conducted in conformity with the applicable laws and regulations, if any, which are or may hereafter be enforced by the duly constituted authorities.⁵⁸

⁵⁷ The treaties with Estonia and Latvia employ both terms. Treaty with Estonia on Friendship, Commerce and Consular Relations, Dec. 23, 1925, arts. I & V, 44 Stat. 2379 (1926), T.S. No. 736 (effective May 22, 1926); Treaty with Latvia on Friendship, Commerce and Consular Rights, Apr. 20, 1928, arts. I & V, 45 Stat. 2641 (1928), T.S. No. 765, (effective July 25, 1928). The Austrian treaty uses both terms and the phrase ". . . provided further [that] they conform to all laws and regulations duly established in these territories; . . ." Treaty with Austria on Friendship, Commerce and Consular Relations, June 19, 1928, arts. I & V, 47 Stat. 1876 (1931), T.S. No. 839 (effective May 27, 1931).

⁵⁸ Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, art. XII, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1948). A similar clause is found in the 1948 treaty with Italy:

Article I

2. The nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted, without interference, to exercise, in conformity with the applicable laws and regulations, the following rights and privileges upon terms no less favorable than those now or hereafter accorded to nationals of such other High Contracting Party:

- (a) to engage in . . . religious . . . activities . . .
- (b) to acquire, own, erect or lease, and occupy appropriate buildings, and to lease appropriate lands, for . . . religious . . . purposes; . . .

Article XI

1. The nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted to exercise liberty of conscience and freedom of worship, and they may, whether individually, collectively or in religious corporations or associations, and without annoyance or molestation of any kind by reason of their religious belief, conduct services, either within their own houses or within any other appropriate buildings, provided that their teachings or practices are not contrary to public morals or public order.

Treaty with Italy on Friendship, Commerce and Navigation, Feb. 2, 1948, art. I, para. 2, & art. XI, para. 1, 63 Stat. 2255 (1949), T.I.A.S. No. 1965 effective July 26, 1949.

Although similar in detail to the one and two paragraph formats, these new treaties protect collective as well as individual worship, thus avoiding right of assembly problems arising from large group meetings. The Chinese treaty also addresses the idea of religious education. The addition of these concepts makes the Chinese treaty clause somewhat aberrational. Yet, viewed in the context of the other detailed clauses, it represents another facet of the effort to specify the nature and scope of protected religious freedom.

D. Recent Abbreviated Clauses

Since 1950, the prevalent language of religious freedom clauses in FCN treaties has become more abbreviated.⁵⁹ The nature of the articulated protection falls in between the general and the detailed coverage in other treaties. These "abbreviated" clauses take two forms. Since both forms provide essentially the same coverage, only the two-paragraph format is considered here.⁶⁰ This type of clause is incorporated in the 1962 FCN treaty with Belgium:

Article II

3. Nationals of either Party, within the territories of the other Party, shall enjoy freedom of conscience; and they shall be at liberty to hold religious services, both public and private, at suitable places of their choice.

....

5. The provisions of the present Article shall be subject to the right of either party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.⁶¹

⁵⁹ Wilson, *supra* note 12, at 930. This brevity can perhaps be traced to the desire to avoid any undue interpretive difficulties should a negotiation situation arise.

⁶⁰ Examples of the "one-clause" format are found in the following treaties. Treaty with Thailand on Amity and Economic Relations, May 29, 1966, [1968] art. I, para. 3, 19 U.S.T. 5843, T.I.A.S. No. 6540; Treaty with Togo on Amity and Economic Relations, Feb. 8, 1966, [1967] art. II, para. 2, 18 U.S.T. 1, T.I.A.S. No. 6193; Treaty with Vietnam on Amity and Economic Relations, Apr. 3, 1961, [1961] art. I, para. 3, 12 U.S.T. 1703, T.I.A.S. 4890; Treaty with Oman on Amity, Economic Relations and Consular Rights, Dec. 20, 1958, [1960] art. II, para. 3, 11 U.S.T. 1835, T.I.A.S. No. 4530; Treaty with Germany on Friendship, Commerce and Navigation, Oct. 29, 1954, [1956] art. II, para. 3, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty with Ethiopia on Amity and Economic Relations, Sept. 7, 1951, [1953] art. VI, para. 3, 4 U.S.T. 2134, T.I.A.S. No. 2864.

⁶¹ Treaty with Belgium on Friendship, Establishment and Navigation, May 23, 1962, [1962] art. II, paras. 3 & 5, 14 U.S.T. 1284, T.I.A.S. No. 5432. Similar provisions may be found in the following treaties. Treaty with Luxembourg on Friendship, Establishment and Navigation, Feb. 23, 1962, [1963] art. II, paras. 3 & 5, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty with Pakistan on Friendship and Commerce, Nov. 12, 1959, [1961] art. II, paras. 2 & 3, 12 U.S.T. 110, T.I.A.S. No. 4683; Treaty with Denmark on Friendship, Commerce and Navigation, Oct. 1, 1951, [1961] art. II, paras. 2 & 3, 12 U.S.T. 908, T.I.A.S. No. 4797; Convention with France on Establishment, Protocol and Declaration, Nov. 25, 1959, [1960] art. II, paras. 2 & 3, 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty with Nicaragua on Friendship, Commerce,

In essence, these provisions allow religious liberty with respect to freedom of conscience and the right to hold religious services in public and private. The only limitation placed on these rights is that they may be regulated so as not to contravene public order or the interests of public health, morals, and safety. The FCN treaties with Belgium⁶² and Luxembourg⁶³ are the only ones to use the phrase "... at suitable places of their choice..." in describing where religion may be practiced.⁶⁴

This examination of the history of United States FCN treaty practice reveals a governmental inclination to insert clauses guaranteeing religious freedom to United States nationals traveling or residing in a foreign state. The grant of protection may be either general or specific, and in recently concluded treaties a synthesis of the two approaches may have come about. The efficacy of the United States' treaty policy must be evaluated in this historical setting.

III. POLICIES SHAPING THE USE OF RELIGIOUS FREEDOM CLAUSES

The policy of the Department of State is to negotiate FCN treaties containing clauses guaranteeing the right of religious freedom to U.S. nationals abroad.⁶⁵ Yet, as has been demonstrated, the specificity of the guarantee may differ from treaty to treaty.⁶⁶ This nonuniformity of language is attributable to the necessity for compromise in treaty negotiations. Compromise is required because deference must be given to the interests of the other contracting party. A state may resist granting a broad right of religious freedom, fearing that condonation of other religious practices

Navigation and Protocol, Jan. 21, 1956, [1958] art. II, paras. 2 & 4, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty with Korea on Friendship, Commerce and Navigation, Nov. 28, 1956, [1957] art. II, paras. 2 & 3, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty with the Netherlands on Friendship, Commerce and Navigation, Mar. 27, 1946, [1957] art. II, paras. 3 & 4, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty with Iran on Amity, Economic Relations and Consular Rights, Aug. 15, 1955, [1957] art. II, paras. 2 & 3, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty with Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, [1954] art. II, paras. 2 & 3, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty with Greece on Friendship, Commerce and Navigation, Aug. 3, 1951, [1954] art. III, paras. 2 & 3, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty with Japan on Friendship, Commerce and Navigation, Apr. 2, 1953, [1953] art. I, paras. 1 & 3, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty with Ireland on Friendship, Commerce and Navigation, Jan. 21, 1950, [1950] art. I, paras. 2 & 3, 1 U.S.T. 785, T.I.A.S. No. 2155.

⁶² Treaty with Belgium on Friendship, Establishment, and Navigation, May 23, 1962, [1963] art. II, paras. 3 & 5, 14 U.S.T. 1284, T.I.A.S. No. 5432.

⁶³ Treaty with Luxembourg on Friendship, Establishment and Navigation, Feb. 23, 1962, [1963] art. II, paras. 3 & 5, 14 U.S.T. 251, T.I.A.S. No. 5306.

⁶⁴ The other clauses listed do not mention this aspect of the right to worship. The treaty with Greece uses the phrase "... to hold religious ceremonies under the protection of law." Treaty with Greece on Friendship, Commerce and Navigation, Aug. 3, 1951, [1954] art. III, para. 1, 5 U.S.T. 1829, T.I.A.S. No. 3057.

⁶⁵ G. HACKWORTH, *supra* note 8, at 149-50, quoting a 1911 letter from the Department of State to its Chargé d'Affaires in Venezuela.

⁶⁶ See part II *supra*.

will lead to adulteration of established religions. In addition, the grant of such a treaty right could conceivably threaten state security by authorizing undue foreign intervention in internal affairs.⁶⁷ The practice of proselytizing is particularly suspect, since it raises the specter of colonialist intervention.⁶⁸ Fear of foreign intervention is especially prevalent in developing nations because these countries have borne the brunt of missionary activity in the past and are still not sufficiently stable, economically or politically, to permit extensive outside interference in their internal affairs.

More developed nations argue that no religious freedom clause is needed if the host country provides for such a right by custom, law, or constitution. In these cases, insistence upon the inclusion of a religious freedom clause in an FCN treaty would be an affront to the integrity of the other State. Regardless of the status of the contracting party, the treaty drafters must decide whether the right to religious freedom should encompass more than the right to hold beliefs and practice them privately.

Treaties concluded after 1950 seem to abandon any sort of detailed construction in favor of a general statement characterizing religious liberty as a fundamental right. This pattern may evidence recognition by the party states that the majority of nations allow religious freedom, thus obviating the need for specific protective wording.⁶⁹ The limitation of regulations to those “. . . measures that are necessary to maintain public order and protect the public health, morals and safety . . .”⁷⁰ seems more consonant with American constitutional guidelines⁷¹ than does the former language which subjected religious practices to “laws and established usages.”⁷² Finally, there is increased use of language permitting religious worship “. . . either individually or through associations . . .”,⁷³ which may be construed to demonstrate the United States’ desire to protect the associational rights of religious freedom. Thus, the United States now seems to be advancing a treaty standard designed to guarantee Americans religious freedom abroad, but the operative language is more general than that contained in prior treaties.

⁶⁷ This is the Indian position. It has been said that the extensive clauses found in the Treaty of Berlin of 1879 presented the opportunity for other powers to intervene in Balkan affairs on numerous occasions. Padelford, *supra* note 4, at 410.

⁶⁸ 4 U.N. MONTHLY CHRONICLE, Dec., 1967, at 84. This is the expressed attitude of Dahomey, Sierra Leone, Lesotho, Ghana, and Pakistan as of 1967. *Id.* at 84-85.

⁶⁹ Conspicuously absent is specific mention of such practices as owning or leasing religious buildings and terms allowing religious practice “. . . without annoyance or molestation of any kind” See also Treaty with Norway on Friendship, Commerce and Consular Rights, June 5, 1924, arts. I & V, 47 Stat. 2135, T.S. No. 852 (effective Sept. 13, 1927).

⁷⁰ Treaty with Japan on Friendship, Commerce and Navigation, Apr. 2, 1953, [1953] art. I, para. 3, 4 U.S.T. 2063, T.I.A.S. No. 2863.

⁷¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁷² Treaty with Chile on Peace, Amity, Commerce and Navigation, May 16, 1832, art. XI, 8 Stat. 434 (1839), T.S. No. 40 (effective Apr. 29, 1834).

⁷³ Treaty with Oman on Amity, Economic Relations and Consular Rights, Dec. 20, 1958, [1960] art. II, para. 3, 11 U.S.T. 1835, T.I.A.S. No. 4530.

The problem with this standard is that the wording may at times be too general to offer viable protection to American nationals in the event of specific attempts to restrict their right of religious freedom. For example, the 1966 FCN treaty with Thailand allows religious practices "... subject to applicable laws, ordinances and regulations..."⁷⁴ This phrasing does not convey the idea that religious freedom is a fundamental right as strongly as would wording subjecting religious exercise to "... measures that are *necessary* to protect..." the public weal.⁷⁵ Although the Thai treaty does assert the right to worship in public and private,⁷⁶ questions remain about the permissible types of regulations and the limits to the freedoms guaranteed. The wording of the religious freedom clause would apparently not comport with the reasoning of *Cantwell v. Connecticut*,⁷⁷ in which the Supreme Court refused to allow regulation of religious practices to fall within the unfettered discretion of public officials.

The use of national or most-favored-nation treatment in religion clauses has been abandoned in post-1950 treaties.⁷⁸ The lack of a national treatment standard permits the host state to apply different standards to aliens than to its own nationals, conceivably discriminating against the former, especially in the licensing of religious buildings or associations.⁷⁹ The lack of a most-favored-nation standard eliminates the possibility that a subsequent treaty with a third party could grant additional rights under an existing clause. Also lost is the additional pressure that could be brought to bear by another State if negotiations should arise concerning treaty interpretation or application.

Despite the post-1950 trend toward use of general wording in religious freedom clauses, American policy with regard to obtaining such treaty guarantees has purportedly remained unchanged. Yet, active pursuance of that policy has been tempered by the realization that potential party states have valid interests to protect in limiting the scope of the right ex-

⁷⁴ Treaty with Thailand on Amity and Economic Relations, May 29, 1966, [1968] art. I, para. 3, 19 U.S.T. 5843, T.I.A.S. No. 6540.

⁷⁵ Treaty with Luxembourg on Friendship, Establishment and Navigation, Feb. 23, 1962, [1963] art. II, paras. 3 & 5, 14 U.S.T. 251, T.I.A.S. No. 5306 (emphasis added). Indeed, the Uruguay treaty of 1949, which never entered into force, used the phrase "... *necessary* to maintain public order and *necessary* to protect the public health, morals and safety." (emphasis added). R. WILSON, *supra* note 7, at 271. See also treaty with Belgium on Friendship, Establishment and Navigation, May 23, 1962, [1962] art. II, paras. 3 & 5, 14 U.S.T. 1284, T.I.A.S. No. 5432.

⁷⁶ Treaty with Thailand on Amity and Economic Relations, May 29, 1966, [1968] art. I, para. 3, 19 U.S.T. 5843, T.I.A.S. No. 6540.

⁷⁷ 310 U.S. 296 (1940).

⁷⁸ Treaty with Norway on Friendship, Commerce and Consular Rights, June 5, 1924, arts. I & V, 47 Stat. 2135 (1932), T.S. No. 852 (effective Sept. 13, 1927). A "most favored nation" clause may be conditional or unconditional. In 1923, the United States adopted the latter for commercial treaties. W. BISHOP, *supra* note 13, at 159. This clause grants a privilege to the treaty party to the same extent to which the privilege is granted to any third State. National treatment, on the other hand, allows privileges to the extent nationals of the host country enjoy them.

⁷⁹ *Cf. Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage a suspect classification).

tended. Thus, even though the United States desires full religious liberties for its nationals, the State Department recognizes that it can not always insist upon religious freedom as a specifically delineated right and realizes that, in some instances, it must be content with the protection afforded by existing local and international law. Also, in treaty negotiation, trade-offs can occur between proposed provisions. Often a religious freedom clause must be sacrificed in order for the treaty to be accepted or to obtain other desirable provisions.⁸⁰ Because of these factors the United States will, at times, have no choice but to drop its insistence on the inclusion of a religious freedom clause or to compromise and accept a provision with loose wording.

IV. MULTINATIONAL AGREEMENTS

Despite the difficulties in drafting bilateral agreements containing effective religious freedom clauses, multinational efforts at providing some sort of international protection have continued. As a result, various multinational declarations, agreements, and conventions proclaim a right to freedom of religious belief and exercise for nationals of the party states.⁸¹ Perhaps the most famous of these conventions is the Universal Declaration of Human Rights of 1948, enacted by the United Nations.⁸² The following articles of this convention are pertinent to the protection of religious freedom.

Article 18

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 and private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 29

....
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

⁸⁰ Currently, the Department of State seeks to obtain the right to hold religious services and most-favored-nation treatment in FCN treaties. Failure to obtain a provision on religious freedom, however, will not necessarily prevent the conclusion of an otherwise advantageous treaty. Though the United States is desirous of assuring its nationals full religious liberty, it feels it cannot always insist on this as a strict right. See letter from the Department of State to Senator George, *supra* note 15. See also C. HYDE, *supra* note 4, at 704.

⁸¹ See note 19 *supra*.

⁸² The Universal Declaration of Human Rights, 3 U.N. GAOR, I, at 71, U.N. Doc. A/810 (1948). W. BISHOP, *supra* note 13, at 469.

Article 30

Nothing in this declaration may be interpreted as employing for any states, groups or persons 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.

The Covenant on Human Rights⁸³ also contains a provision declaring religious freedom to be a fundamental right. Even though these instruments are not binding,⁸⁴ they form excellent evidence of a customary right of international law.⁸⁵

A slightly later convention on human rights, with binding⁸⁶ force between the signatory States, is the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁷ Article 9 deals with freedom of religion.⁸⁸ Although the Convention uses unusual wording and is very expansive as to activities covered, its major importance lies in the fact that it is a binding document. Thus, the Convention provides evidence that a group of nations feel religious freedom is a right that must be made the subject of international agreement on a grander scale than a bilateral treaty. So great is its evidentiary effect that, in comparing the force of the European Convention to that of the nonbinding Universal Declaration, it has been said that to abandon the former for the latter "... would be tantamount to dropping the substance for the shadow."⁸⁹

In 1969, a third multinational effort to codify international human rights was undertaken by the Organization of American States. The pro-

⁸³ Annex to G.A. Res. 2200 (XXI).

⁸⁴ W. BISHOP, *supra* note 13, at 471.

⁸⁵ Claydon, *The Treaty Protection of Religious Rights; U.N. Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 12 SANTA CLARA LAWYER 403, 406 (1972). Robertson, *United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, 43 BRIT. Y.B. INT'L L. 21 (1969). Indeed, one writer seems to feel that freedom of religion is already a fundamental international precept. A. KRISHNASWAMI, *supra* note 4, at 24. This conclusion is based upon that author's Conference Room Papers which embody his study of many practices in countries around the world.

⁸⁶ See note 20 *supra*.

⁸⁷ See note 20 *supra*.

⁸⁸ Article 9 reads:

(1) 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 worship, teaching, practice or observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, text at 45 AM. J. INT'L L. SUPP. 24 (1951).

⁸⁹ M. Eissen, *European Convention on Human Rights and the U.N. Covenant on Civil and Political Rights: Problems of Co-Existence*, 22 BUFFALO L. REV. 181, 183 (1972).

posal was termed the American Convention on Human Rights.⁹⁰ Protection of religious freedom is covered in Article 12.⁹¹ Also of interest in this Convention is Article 27(2), which states that freedom of religion is one of the rights to be especially protected against derogation.⁹² The Convention was signed by twelve States and requires eleven ratifications to be effective.⁹³

The latest attempt to deal with the problem of establishing religious freedom as an international right is the United Nations Draft Convention on the Elimination of All Forms of Religious Intolerance.⁹⁴ This instrument speaks mainly to the elimination of domestic religious restrictions within various countries.

All of these conventions and declarations provide evidence of a customary right and general principle of international law protecting freedom of religion. In light of several statements that the right to religious freedom is currently recognized in the majority of States,⁹⁵ it might be tempting to conclude that this right represents a general principle of law recognized by all nations. It must be realized, however, that the scope and binding effect of multinational agreements, in their various forms, is still open to question. The mere fact that such documents are still being concluded demonstrates that the right to religious freedom is not yet established as international custom. Further, one must not rule out the possibility that, in the future, this right could be abridged by an adverse change of circumstances within a State.⁹⁶ It is this apprehension and the fact that the right to religious freedom is not yet accepted international

⁹⁰ American Convention on Human Rights, text at 65 AM. J. INT'L L. 679 (1971).

⁹¹ Article 12 reads:

1. Everyone has the right to freedom of conscience and of religion.

This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights of freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Id.

⁹² Burgenthal, *American Convention on Human Rights; Illusions and Hopes*, 21 BUFFALO L. REV. 121, 128 (1971).

⁹³ The United States was not a signatory. *Id.* at 121. Burgenthal states that Latin America is a breeding ground for regimes opposed to human rights. *Id.* at 123.

⁹⁴ Note by the Secretary-General, Elimination of All Forms of Religious Intolerance, U.N. Doc. A/7930 (1970).

⁹⁵ A. KRISHNASWAMI, *supra* note 4, at 24.

⁹⁶ For example, it was not until 1966 that an appreciable amount of religious freedom was allowed in Spain. Krishnaswami, in his 1959 report, noted that there were trends toward recognition of the right to religious freedom, but did not rule out the unfortunate possibility of a reversal in such trends. A. KRISHNASWAMI, *supra* note 4, at 81. See also *Elimination of All Forms of Religious Intolerance*, 89 CHRISTIAN CENTURY, Aug. 30, 1972, at 856.

custom that spur the continued drive to establish freedom of religion as a human right in the international sphere. Given this goal, the bilateral FCN treaties concluded by the United States provide additional evidence of religious rights at international law. With the present state of international law clearly in mind, the specific proposals can be advanced.

V. PROPOSAL

The problem with the religious freedom treaty clauses currently used by the United States is that they may not, in all cases, be sufficient to fulfill both their protective and evidentiary functions. Although the policy behind the clauses has consistently been to favor a strong protective guarantee, the phraseology employed to implement this policy has sometimes failed to convey the idea of religious freedom as a fundamental and inalienable right. This failure is evident when the detailed phrasing in some past treaties is compared with the arguably less concrete language contained in recent clauses. Of course, it can be argued that circumstances have changed sufficiently that extensive and detailed freedom of religion clauses are no longer necessary. As previously noted, this may be true in many cases.⁹⁷ However, international law must be developed to meet unexpected contingencies and to provide protection against as many foreseeable difficulties as possible. While interpretative problems may increase as wording becomes more detailed, treaty drafters should not shrink from attempting to carve out specific rights simply because they fear that the words may create unforeseen avenues of escape from obligations. Indeed, avoidance of contractual duty may be easier when more general phraseology is employed. It is, therefore, proposed that the United States take the following steps, where possible, to strengthen its FCN treaty position on the right to religious freedom.

First, where existing treaties contain wording insufficiently conveying the idea that religious freedom is a fundamental right, the United States should adopt a treaty protocol explicitly setting forth the fundamental character of this right. Apparently the idea of using protocols to guarantee religious freedom is not new. Robert Wilson has noted⁹⁸ that the first of the post-1945 treaties⁹⁹ contained an interpretive protocol which stated that the power to regulate a right in the treaty was not the power to take away that right.¹⁰⁰ Wilson cites paragraph 2(b) of the protocol accompanying the 1946 FCN treaty with China.¹⁰¹ Of the pre-1957 treaties to

⁹⁷ See note 4 and accompanying text, *supra*.

⁹⁸ See Wilson, *supra* note 12.

⁹⁹ Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, art. XII, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1943).

¹⁰⁰ Wilson, *supra* note 12, at 930.

¹⁰¹ Paragraph 2(b) of the Protocol reads:

The words "not forbidden by the laws and regulations enforced by the duly constituted authorities" as used in Article II, ¶ 2, [which refers to the general rights to engage in religious activities] shall be

which Wilson addresses himself, only the one with China has a protocol applying to an interpretation of the breadth of religious freedom.¹⁰² Wilson's observation is perhaps overbroad, because the provision in the protocol to the Chinese treaty seems to grant only a national treatment standard.¹⁰³ Therefore, while the idea of using an interpretive protocol has been suggested before,¹⁰⁴ no real use has been made of that device. With respect to existing treaties containing religious freedom language, a new protocol could be used to create greater certainty regarding the nature of the protected right. Such a protocol should attempt to recognize a fundamental international right of religious freedom and could read as follows:

The provisions of this treaty relating to the freedom of nationals of either High Contracting Party to have liberty of conscience and of religious worship are recognized by both High Contracting Parties to be in accord with the international standard of religious freedom as expressed in the Universal Declaration of Human Rights. Therefore, such measures as are taken to restrict religious practices in the interest of the public health, morals, safety or welfare shall be only those as are absolutely necessary and shall not be undertaken to deprive anyone of his or her fundamental right of religious freedom at international law.

This language could be made applicable to other fundamental rights found in the treaty or could be confined to the stated right of religious freedom. Such a protocol would prevent the use of egregious licensing or regulatory requirements to restrict a religious practice that is part of a valid ceremony or belief. This wording would also show that both States regard religious freedom as a fundamental international right. The reference to the Universal Declaration of Human Rights may facilitate agreement among nations as to proper wording.

Negotiations concerning existing treaties that lack a religious freedom clause should be treated in the same manner as any future FCN treaty

construed to mean such prohibitory laws and regulations as are applicable alike to nationals of the country and to nationals of the other High Contracting Party.

Treaty with China on Friendship, Commerce and Navigation, Nov. 4, 1946, Protocol, 63 Stat. 1299 (1949), T.I.A.S. No. 1871 (effective Nov. 30, 1948).

¹⁰² In treaties subsequent to 1956, protocols dealing with this point were lacking.

¹⁰³ Indeed, Wilson's next sentence seems implicitly to recognize this:

If provisions are in a national or most-favored-nation treatment context, this explanation would seem to be unnecessary when the treaties contain, as all of the recent ones do, a definition of national treatment and a definition of most-favored-nation treatment.

Wilson, *supra* note 12, at 930.

¹⁰⁴ Note that Whiteman feels that Article I of the United States-Italy treaty of 1948 declares that religious activities can not be regulated so as to destroy the entire practice of religion under this treaty. M. WHITEMAN, *supra* note 10, at 400. See also Treaty with Italy on Friendship, Commerce and Navigation, Feb. 2, 1948, art. I, para. 2, & art. XI, 63 Stat. 2255 (1949). T.I.A.S. No. 1965 (effective July 26, 1949).

that may be concluded. In all such cases, the United States should attempt to negotiate a modified freedom of religion clause. The clause would be brief and yet still convey the fundamental aspect of this religious guarantee. The proposed clause might read as follows:

Nationals of either High Contracting Party shall enjoy, within the territories of the other Party, freedom of conscience and religious worship; and they shall be at liberty to hold religious services, both private and public, at suitable places of their choice, which they shall be allowed to erect, maintain, and own or to lease. The activities here mentioned shall be subject only to regulations that are absolutely necessary for the protection of the public health, safety, morals or welfare and such regulation shall not be imposed so as to deprive anyone of his or her fundamental right of religious freedom at international law, as expressed in the Universal Declaration of Human Rights.

The initial language of the clause is based on wording contained in many of the most recent FCN treaty provisions. Additional wording, requiring that public regulations be based on necessity and that recognition be given to religious freedom, is included to further the United States' expressed policy goals. Thus, use of the proposed protocol and modified treaty clause can further the protection of Americans abroad while serving as evidence of a customary right and general principle of religious freedom in international law.

VI. CONCLUSION

This article has advanced means by which the United States can adequately protect the religious beliefs of its nationals while strengthening the position of religious freedom in the world. The freedom of a person to believe or disbelieve in any supreme power and the right to follow the dictates and practices of whatever belief he or she chooses have always been important. These rights should be accorded legal protection because of their close relationship to the free exercise of opinion and the expression of an implicit recognition of a force higher than the State.¹⁰⁵ The exercise of religious freedom is, therefore, a seminal right. The spectrum of human rights is such that each right depends on the other. All are bound together by the common thread of respect for individual dignity. It is hoped that the creation of a right to free religious belief and practice at international law will have the additional benefit of advancing the cause of human rights.

—Bruce F. Howell

¹⁰⁵ H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 105 (1945).