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RELIGIOWEST

FREEDOM OF RELIGION OR BELIEF IN FOREIGN POLICY. WHICH ONE?

Edited by PASQUALE ANNICCHINO

ReligioWest is a four year research project funded by the European Research Council and based at the European University Institute, Florence, Italy. It aims at studying how different western states in Europe and North America are redefining their relationship to religions, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements and with Islam.

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Introduction[1]

PASQUALE ANNICCHINO[2]

The right to freedom of religion or belief (FORB) is one of the most discussed and debated in the international and national arena. This is even truer when FORB meets foreign policy. When States advance FORB through foreign policy, what exactly do they aim to protect and to promote? When states "engage" religion through foreign policy, what, and who, exactly are they engaging? These questions might seem tautological, but they are central both to academic and policy debates today. This is not only a problem in the United States, though it has served as a model in many instances. The European Union, Canada Italy and other states are all considering – and some are already implementing – specific policies aimed at fostering the protection and the promotion of FORB and other forms of engagement in their foreign policies.

These actions, and the interests that they reflect, raise important questions. In some sense, as Lorenzo Zucca has argued: "The most obvious problem is that action is guided not by an international-universal understanding of the Human Right to Freedom of Religion, but rather by a very domestic one"[3]. This may not be peculiar to freedom or religion or belief, of course. More importantly, as Thomas Farr has recognized, in the case of the United States: "Notwithstanding the hard, creative work of the State Department's Office of International Religious Freedom, it would be difficult to name a single country in the world over the past fifteen years where American religious freedom policy has helped to reduce religious persecution or to increase religious freedom in any substantial or sustained way"[4]. If this is the case – and coming from one of the most vocal advocates of U.S. religious freedom – then what exactly is this global trend to protect religious freedom and engage religion about? What exactly is being protected, and engaged, by whom, and with what consequences? While there is no shortage of immediate action in this policy domain, we really don't know what the long-run consequences of these initiatives will be. And it remains to be seen how our conception of the right itself, as well as what it means to protect it through law, will change over time. The contributions collected in this work represent the result of an exchange between academics and policy-makers on this important topic. In the first part, Lorenzo Zucca, Frederick Mark Gedicks, and Hegumen Philip Ryabykh offer three distinct and different theoretical reflections on the understanding of the right to freedom of religion or belief at a general level and also in the crucial distinction between the right understood as an individual right and as a collective one. In the second part Elizabeth Shakman Hurd, Jeremy Gunn, and Matt Nelson deal with the political implication of the protection and promotion of religious freedom in foreign policy. The third part collects the contribution of policy-makers both from the United States and Europe. The recent initiatives of the European Union are analyzed through the contribution of Jean Bernard Bolvin – from the

1. Part of this introduction is taken from my contribution to "The Immanent Frame" post "Engaging Religion at the Department of State", 30/07/2013, available at: http://blogs.ssrc.org/tif/2013/07/30/engaging-religion-at-the-department-of-state/. The workshop took place at the EUI on November 17th 2012.
2. Research Fellow, Robert Schuman Centre for Advanced Studies, European University Institute.
3. See Lorenzo Zucca, *Prince or Pariah? The Place of Freedom of Religion in a System of International Human Rights*, ReligioWest working papers, RSCAS 2013/26, p. 15.
4. Thomas F. Farr, *Examining the Government's record on Implementing the International Religious Freedom Act,* Testimony before the House Committee on Oversight and Government Reform-SubCommittee on National Security, June 13th, 2013, p. 3 available at: http://repository.berkleycenter.georgetown.edu/1306-13FarrTestimonyExaminingGovernmentsRecordImplementingInternationalReligiousFreedomAct.pdf

European External Action Service – and Denis De Jong, which deals with the role of the European Parliament in the development of an EU foreign policy on freedom of religion or belief. Elizabeth K. Cassidy reviews the United States' approach to the promotion of international religious freedom, and Pasquale Ferrara deals with the recent Italian initiative in the field.

The contributions offer material for reflection on a topic that has recently gained international relevance, a trend that is also illustrated by the recent approval by the Council of the European Union of the EU Guidelines on the promotion and protection of freedom of religion or belief[5] and by the establishment of a new State Department office of Faith-Based Community Initiatives in the United States[6]. Knowing that establishing dialogue between academics and policy makers is not an easy task, we hope to continue along the road we have begun with this initiative.

5. EU Foreign Affairs Council, *EU Guidelines on the promotion and protection of freedom of religion or belief*, 24 June 2013.

6. See http://www.state.gov/s/fbci/

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The Protection and Promotion of Freedom of Religion or Belief in Foreign Policy: Three Puzzles.

LORENZO ZUCCA[7]

Introduction

The human right to freedom of religion is interpreted in radically different ways in the West. Some insist that religious people should be protected from external interferences, while others insist that non-religious people should be protected from the interference of religion in public affairs. Perhaps the problem is that it is impossible to accurately define the human right to freedom of religion (HRFR). Some call this problem – in my view, correctly – the 'impossibility' of the human right to freedom of religion.[8] If this is correct, then the practical implication is immense: no international action is justified in the name of the HRFR, since every action is bound to amount to the unilateral imposition of a conception of freedom of religion which does not meet with the understanding of the people who are supposed to be rescued in the name of the HRFR.

The first interesting thing to note is that the impossibility of HRFR is true both in secular states and in Theocracies. So for example, the Iranian Constitution entrenches the immutable establishment of Islam (Art. 12),[9] and only recognizes a handful of other religions as official minorities who have a qualified freedom to perform their rites and ceremonies (Art. 13).[10] Interestingly, the Iranian Constitution recognizes that other non-Muslims are owed respect for their human rights (art. 14).[11] But if one reads Articles 13 and 14 together, one may conclude that only a few official religious minorities have a qualified freedom of religion. Other non-Muslims may see their human rights respected, but amongst these human rights, we must infer that there is no HRFR.

The HRFR, more importantly, is not univocally recognized in western secular states. Some constitutions accord it a prominent place (US), while

7. Reader in Jurisprudence, King's College London

8. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom,* (Princeton: Princeton University Press, 2007).

9. Art. 12: The official religion of Iran is Islam and the Twelver Ja'fari school [in usual al-Din and fiqh], and this principle will remain eternally immutable. […]

10. Art. 13: Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

11. Art. 14: In accordance with the sacred verse; ("God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes" [60:8]), the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.

others give it a very limited position: the French Declaration of the Rights of the Man and the Citizen (DRMC), for example, contains a very limited recognition.[12]

The first amendment of the American Constitution accords a much more generous place to freedom of religion, and attaches to it a very articulated protection via the first amendment.[13] While the American Constitution carves out a clear place in its text, the French Declaration laconically acknowledges that opinions, even religious ones, benefit from the protection against prosecution. And it is only by way of analogy that we can infer that freedom of expression of thought and opinions also covers religious people. It is important to stress that this freedom of opinion is very important, but that it in no way amounts to an independent HRFR.

If it is already complicated to determine the nature of human rights, the question becomes even more challenging in relation to the HRFR. A judge or a policy-maker who attempts to apply this right, will need to understand the whole system of human rights and how it ranks different interests within it, the proper meaning of a freedom and how to limit it, and finally, will have to specify the object of that freedom, which is particularly difficult in relation to religion. If the core case of the right to life is a prohibition of killing, then it is not as straightforward to determine the central correlative duty in relation to the protection of a human right to freedom of religion.

Moreover, the question: 'what is religion?' for the purpose of determining the right holders and the content of the right is an altogether different question from 'what is speech?' Secular institutions are notoriously ill-equipped to answer the former question. This is partly because secular institutions do not have the theological training required to examine the problem. Partly, it is because secular law encapsulates an understanding of evidence that is not compatible with the proofs that religious people may advance in order to establish the genuine nature of their beliefs. Further, the question: 'what is religion?' can be broken down in many difficult quandaries. The broadest underlying problem concerns the kind of object that religion is, that is, its nature, or its ontology, so to speak.

I am not going to attempt an answer to the broad question here, but I will highlight three puzzles that flow from this general quandary. Firstly, I deal with the problem of scope of the HRFR: how do we determine its extent, and what does it cover? Secondly, I deal with the problem of strength: is the interest protected more or less important than other interests that are constitutionally protected? Thirdly, what happens when this interest clashes with other interests protected by other rights?

I. Scope

To determine the scope of the protection afforded by a human right, one must engage in several different steps. Firstly, one must translate the broad statement of principle into deontic modalities (prohibitions/permissions/obligations).[14] So, for example, the US Constitution prohibits, on one hand, the making of laws that establish one religion, and on the other, the making of laws prohib-

12. Art. X: Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi. Article XI La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté, dans les cas déterminés par la Loi.

13. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

14. Goerg H. von Wright, *Deontic Logic*, Mind, New Series, Vol. 60, No. 237. (Jan. 1951) 1-15.

iting the free exercise of one's own religion (here the prohibition of a prohibition must be read as a broad permission).

Secondly, one must establish the correlative duty imposed on other people by virtue of the existence of a right.[15] At the constitutional level, generally speaking, a liberty-right is correlated with the absence of the right on the part of other persons. This means very blandly that if I have a right to exercise my religion in the private sphere, nobody possesses a right to curtail my right by violating my private space. Surely the HRFR also implies a more general immunity on the part of the right-holder, which corresponds with a disability on the part of the state. For example, the American legislator is the prime duty-bearer of the HRFR, and this entails a constitutional disability to make laws that prohibit free exercise of religion.

Thirdly, and much more controversially, in order to decide the actual scope of prohibitions and the extent to which the legislator is disabled, one must work out what kind of beliefs and behaviors are classified as religious. Looking at both the US and French texts, we can readily see that there is great difference as to the religiously-inspired behavior that is covered by constitutional articles. In the US, free exercise forms the core of the protection, while in France it is religious belief that is protected. If we compare the two, there is a striking difference between protection of religious thought and protection of acts based upon religious beliefs. So, the distinction between speech and acts is an important dividing line between the regime of protection in America and that in France.

Another possible dividing line, perhaps even more important, is between freedom of religion understood as an individual or as a collective-group- right. The idea of free exercise has been interpreted as leaning towards the protection of individual conscience rather than the protection of religious groups. In fact, on this point, it is clear that the American state attempts to avoid supporting any religious group as far as possible, even if they obviously have the freedom to gather to celebrate religious rituals. However, the basis of religious assembly can still be found in the individual act of conscience, rather than being derived from a special status accorded to religious organizations. Thus in the US, religious conscience is the basic element for the recognition and protection of some religious beliefs and acts.

In revolutionary France, the text only mentions opinions. In both cases, there seems to be an accent on the individual experience, but we must draw an important distinction between conscience on one side, and thought and opinion on the other. Conscience clearly covers both belief and action, while opinions can hardly be stretched to cover actions.

There is a big difference between conscience and thought: the former functions in the manner of a sword, whereas thought (or opinion) is more of a shield. In other words, once the existence of a religious claim of conscience can be established it seems as if an exemption from ordinary law might be requested. In the case of religious opinion, the only concern seems to center around the creation of a private space shielded from the interference of ordinary law, but in no way does religious opinion seem to be entitled to claim an exemption from ordinary law based on religious opinion alone.

It is only with more recent human rights treaties that the scope of the right to freedom of religion covers a collective aspect. In particular the European Convention of Human Rights, article 9 prescribes:

> *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and*

15. Wesley N. Hohfeld, *Fundamental Legal Conceptions*, (Dartmouth: Aldershot, 2001).

freedom, either alone or in community with others and in public or private to manifest his religion or belief, in worship, teaching, practice and observance.

The European formulation goes well beyond conscience and thought, and spans from that individual dimension to a much more collective one. It also moves beyond the private sphere to cover the public aspect of religion.

II. Strenght

In determining the strength of HRFR, one must compare the strength of other rights in *abstracto*; it is also necessary to single out the importance of religious practices within a society; and finally one must compare the freedom of different religious groups between themselves.

Some American commentators see a paradoxical treatment of religion.[16] Free exercise receives special protection, and thus religious conscience has special force in comparison to other claims of conscience, whereas establishment is the object of special burdens, and therefore religion as a collective enterprise has less strength than other collective activities. In France, according to the DRMC, religious opinions are protected at the same level as other opinions, but certainly not more extensively. So, in this sense, religious opinions receive equal treatment. As far as religious groups are concerned, France allows itself the possibility to interfere with them whenever it deems it suitable. In both cases we talk about separation between church and state, though in fact in America it is bilateral separation, while in France it is unilateral separation.

The ECHR admits of systems of separation and establishment, so the strength of the interest protected by freedom of religion should be evaluated in different contexts. However, it is important to note one thing at the outset: if one religion is established *de jure,* then it goes without saying that there is a presumption of more favorable treatment of that religion vis-à-vis others. Establishment does not promote equality between religions, and can easily undermine the freedom of all other religions.

So another interesting problem is the following: when a state establishes one religion, it may very well undermine the freedom of other religions. Kokkinakis, the first case to reach the Strasbourg court, asserts the freedom of religion of Jehovah's Witnesses in Greece, where the Orthodox Church is constitutionally established and, as a result of that, had made proselytism of other religions a criminal offence.[17]

De jure establishment, however, does not automatically entail that only one religion enjoys the benefit of constitutional protection. In the UK, *de jure* establishment goes hand in hand with a constant concern for offering equal benefits to a vast array of other religions.[18] Conversely, *de jure* separation does not altogether prevent the possibility of *de facto* establishment, or at least a strict collaboration between state and one church, as is the case in Italy between the state and the Vatican. This means that one religion enjoys very special benefits, while others may be treated comparatively much worse. For example, freedom of religion for Muslims in Italy does not involve great legal protection, or public enthusiasm, which results in a series of administrative burdens to prevent Muslims from building religious places of worship.[19]

16. Christopher L. Eisgruber and Lawrence G. Sager, *Religion and the Constitution,* (Cambridge: Harvard Univ. Press, 2007).

17. Kokkinakis v. Greece, ECtHR, 25/5/1993, (14307/88).

18. Julian Rivers, *The Law of Organized Religion. Between Establishment and Secularism*, (Oxford: OUP, 2010).

19. The ECtHR is going to hear the Swiss case soon on the administrative prohibition to build minarets.

Table 1: this table summarizes various possible combinations showing the protean nature of freedom of religion

Strenght/Scope	Individual	Collective
High Strenght	Conscience (e.g. USA)	Group R (ECHR para. 1)
Low Strenght	Thought (France DRMC)	Group R with limitations (ECHR para. 2)

An important concern one faces when determining the strength of the interest protected by religious freedom is the issue of whether or not we are talking about equal freedom for all religions or whether one religion is treated better than others.[20] The main concern, though, is about the strength of the interest of religious freedom within a system of plural rights. Religious freedom in the US seems at first glance a central concern of the Constitution since it is placed at the very front of the bill of rights and is the object of an elaborated set of norms. In the French DRMC, however, there is no article devoted to religious freedom, and religion is only mentioned in passing, so it is clear that its status, and the strength of the interest resulting from it, are much less important.

In the ECHR, freedom of religion has an independent place amongst derogable rights. We know that other rights such as freedom from torture, and the right to life have a greater strength at least insofar that they are to be considered non-derogable, that is to say, there is no interest that can prevail over them. *A contrario*, it is clear that there may be a number of interests that can prevail over the interests protected by freedom of religion, and paragraph 2 of Art. 9 ECHR confirms this:

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

Freedom of religion as embedded in the ECHR has a very broad scope, since it covers thought, conscience and religion. Thus, it covers both individual and collective beliefs and behavior based on those beliefs. However, the strength of the right is limited and limitable on the grounds of paragraph 2 of the same Article 9. The strength of the interest protected by freedom of religion can be limited on the basis of interests of public safety, for the protection of public order, health or morality, and finally – last but not least – for the protection of the rights and freedoms of others.

It is also important to note at this stage, that scope and strength are linked in a relationship of inverse proportionality: the wider the scope of protection, the lesser the strength, and vice-versa. If the scope was very narrow, then one could always argue that it was a matter of preserving the very core of the right.

III. Conflicts

The most difficult cases of limitations are those of conflicts between the right to freedom of religion and other rights. As pointed out above, and as a matter of law, freedom of religion can be limited in order to guarantee the promotion and protection of other rights. Examples of such conflicts are multiple, but we cannot discuss them all. Here we can only present a few examples.

Freedom of religion can conflict with other freedoms, such as, for example, freedom of expression. It may be argued that in plural democratic societ-

20. Christopher L. Eisgruber and Lawrence G. Sager, *Religion and the Constitution,* see supra at 16.

ies, people are free to express negative judgments about religious practices, including judgments that are offensive. After all, if protected expression was only positive expression, then there would not be any need to proclaim such freedom. However, it can also be argued that offensive opinions concerning religious minorities can undermine the respect of the whole community towards religious minorities as well as undermining the status of that minority within a wider society. In other words, offensive speech can easily polarize societies and create widespread social tensions within and outside the national territory. A common example of this scenario is the Mohammed cartoon saga.

This issue is, I think, exacerbated all the more if we look at the case law of the ECtHR that limited the artistic expression of a movie director in the Otto Preminger case on the grounds that the movie could offend the religious majority in the Tyrol region.[21] The court reasoned that the interference with the applicant association's freedom of expression was prescribed by law, but the seizure and forfeiture of the film were aimed at 'the protection of the rights of others', or more precisely, the right to respect for one's religious feelings, and to ensure religious peace. The Court assessed the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention and concluded that the Austrian authorities did not overstep their margin of appreciation. It is not clear whether the same protection would be afforded to religious feelings of a minority as in the case of Mohammed cartoons.

In any event, what matters here is to highlight that we have two specific problems: first, one has to determine whether the right to respect for one's religious feelings is within the scope of freedom of religion. Secondly, whether that right is strong enough to prevail over freedom of expression. Both questions are determined by the judge, who can only rely on her own cultural assumptions about the nature and value of religion.

Another set of conflicts more closely concerns the very nature of freedom of religion. It is a matter of knowing whether religion as an established societal practice of institutions can discriminate between some categories of people who are normally protected against discrimination. The abstract conflict is between equality and liberty.

This conflict is particularly difficult, as it may put a great pressure on religions to adapt to societal standards, which some religions are desperately trying to resist. The conflict takes place in many different settings. However, the workplace is a perfect example of a domain where the fight against discrimination has been strong in recent times, at least in Europe.[22] So, if religion enters the workplace, the tension between non-discrimination and liberty of religion is more visible.

There are, in fact, various tensions. The employer may be secular, and employees may ask for the possibility of wearing religious symbols;[23] in this case the discrimination is against religious people. The employer may also be the state or a public authority, and the employee may be in a situation in which she refuses to carry out basic public functions that are at odds with some religious precepts, which themselves are discriminatory.[24] Or, the employer may be religious and dismiss the employee who does not meet some religious

21. Otto-Preminger-Institut v. Austria, ECtHR, 20/9/1994, (13470/87)

22. In the USA, the doctrine of ministerial exception bars the possibility of applying anti-discrimination laws.

23. The cases of Eweida (Eweida v. the United Kingdom – no. 48420/10) and Chaplin (Chaplin v. the United Kingdom – application no. 59842/10), pending before the ECtHR, deal with the restriction on wearing Christian crosses in the working environment.

24. The case of Ladele (Ladele v. the United Kingdom – no. 51671/10), also pending before the ECtHR, deals with the dismissal of Ladele following her refusal to register civil unions for homosexual people.

standards.[25] Assuming that churches can employ whomsoever they want, is it possible to fire people who no longer meet some religious precepts that would normally be seen as discriminatory?

In other words, when religion engages in secular employment contract, does that make the religious workplace free from the constraints applicable to the non-religious workplace? Again we have a problem of scope: to what extent does freedom of religion color the activities in which religion engages? Further, there is a problem of strength: to what extent does the special protection of freedom of religion prevail over other constitutionally entrenched interests such as non-discrimination? The answers to these questions are not written in stone, and depend heavily on very contingent and local understandings of the nature and value of religion in a discrete society. This simple fact must caution us against the temptation of acting abroad in the name of our own contingent and local convictions about the human right to freedom of religion.

Conclusion

These brief considerations highlight the puzzles that judges and policy-makers necessarily face when trying to pin down the meaning of the HRFR. This is not to mention the difficulties related to conceptions of freedom of religion in non-Western states, which are even greater. Those puzzles do not have straightforward answers, and are dealt with by reference to highly contingent and local conceptions of religion that are not likely to be universalized.

When a policy-maker has to grapple with problems of religious freedom, she is bound to face two extraordinarily complicated problems:

1. What is the nature of the right to freedom of religion?

2. How does one know what counts as religion across the world if one begins from the starting point of one's local conception of religion?

The second problem is possibly even greater than the first. For, if we simply assume that freedom of religion deserves international protection, the problems begin when policy-makers have to assess whether to intervene or not. In light of previous considerations, one may wonder whether it is advisable to single out freedom of religion as worthy of special international protection. I hope it is clear by now that humility and prudence militate against intervening abroad in the name of the HRFR. Perhaps, it is high time to abandon moralizing crusades.

25. Several cases have reached the ECtHR in the last 5 years. I cite here Lombardi Vallauri, 20/10/2009 (39128/05), whose employment contract at the catholic university of Milan was terminated on the ground that the Congregation of Catholic Education refused its approval after 20 years of employment.

2

Religious Group Rights: Four Analytic Touchstones

FREDERICK MARK GEDICKS[26]

Introduction

A group right creates a zone of group autonomy within the boundary marked by the right: It walls the state out from "internal" group affairs that fall within the boundaries of the right, and in that sense creates a space within which the group may act free of government supervision and control. Like individual rights, group rights preserve individual liberty by rebuffing government oppression.

But if the state is itself an instrument of liberty rather than oppression,[27] what then? The group right that walls the state out, necessarily walls members in, leaving them without the liberating protections of the state "outside the walls." Individual group members are then left to the uncertain mercies of the group, without the protections against group oppression that the state would otherwise provide. The group right that enables *group liberty*, in other words, also enables *individual oppression*.

After elaborating this paradox and examining it in the context of religious groups, I discuss and apply four possible dimensions of a potential doctrine of religious group rights. I conclude by suggesting that the threat to individual liberty calls for caution rather than enthusiasm in recognizing religious group rights.

I. The Paradox of (Religious) Groups

Groups simultaneously serve liberty-conferring and liberty-depriving functions in liberal democracy. Groups are crucial to the creation and maintenance of personal meaning and identity; most people define who they are by reference to groups to which they belong or with which they identify. Groups also protect individuals from excesses of the contemporary liberal state, before which single individuals are largely powerless. And finally, groups are an important source of social values, which the liberal state is largely constrained from developing and promoting itself.

But if the liberal state may excessively intrude upon individual liberty, so may private groups. The dependence of individuals on group norms and narratives for personal meaning leaves them vulnerable to group coercion: Individuals whose identity is psychologically embedded in a group culture often feel group pressure to behave in ways they otherwise wouldn't, to avoid the existential crisis of expulsion. When government intervention in group matters would enhance individual autonomy, as in the enforcement of antidiscrimination laws against racist or sexist group norms, group rights that block such intervention subvert individual autonomy. Finally, while groups are

26. Guy Anderson Chair & Professor of Law, Brigham Young University Law School, Provo, Utah USA. I am grateful to Olivier Roy and Pasquale Annicchino for the invitation to deliver this paper at the Workshop.

27. *See generally* Isaiah Berlin, *Two Concepts of Liberty* (1958), *in* Isaiah Berlin, Four Essays on Liberty (Oxford: Oxford University Press, 1969).

important sources of social values, group values are often not those endorsed by political majorities, and may actually undermine majoritarian values. Gender equality, for example, is both enforced by contemporary liberal democracies and rejected by much of Christianity, Islam, and Judaism.

Religious groups present an especially intense instance of the general paradox of groups. Religious groups supply complex explanations and thick narratives of the meaning of human life, and in the name of "religious freedom" often claim special exemption from laws that bind everyone else. Religious groups are thus an especially important source of the personal identities of their believers who, in turn, are thus especially vulnerable to the unregulated pressure and oppression by the religious group. These connections to individual autonomy and vulnerability are heightened when the member is employed by the religious group, which adds economic dependence into the mix of vulnerabilities.

It bears emphasis that the religious character of a group does not immunize it from antisocial behavior—current and past events bear witness that religions do bad things. Religious groups can be racist, they can be sexist, and they can be cruel, bureaucratic, and vindictive. Stereotypical thinking assumes that churches engage in bad behavior at lower rates than secular groups, but recent events suggest otherwise. Instances of clergy abuse and sex discrimination, for example, seem as common in churches as in society generally, if not more so.

II. Analytic Touchstones

The paradoxical quality of groups in liberal democracy makes it challenging to construct a doctrine of religious group freedom, and liberal theory consequently lacks well developed doctrines of religious group rights. Let me suggest four touchstones for thinking about the content of such a doctrine: Whether the religious group has an ontological status independent of that of its members, the extent to which it externalizes the costs of membership, the viability of exit from the group, and whether the group right is conceptualized as a classic "right" or instead as an "immunity."[28]

a. Status

Are religious group rights independent or derivative of individual rights? Put another way, is protection of religious group autonomy an end in itself, or is the rationale for protecting religious groups rooted in their protection of their individual members? As Professor Zucca suggested in this workshop, the U.S. tradition has been hostile to a group status independent of the rights and members of individual group members,[29] though as I explain below, this may be changing. The answer to this question determines whether a religious group right properly protects the group regardless of how it treats its members, or whether group protection is called for only when such protection would also shelter individual group members.

Religious groups tend to react to external threats and internal dissent like all organizations, by placing the survival and well-being of the group above the best interests of any individual member or of members generally. The sex-abuse scandals, again, vividly illustrate this. If a group's rights are merely the derivative aggregate of rights held by their members, it would be difficult to justify rights that protect the group at the expense of its members. Only if the group has a doctrinal status independent of that of its members is such a result justifiable.

28. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

29. Lorenzo Zucca, *The Protection and Promotion of Freedom of Religion or Belief in Foreign Policy: Three Puzzles,* in this volume.

b. External Costs

What costs do religious group rights impose on persons who do not belong to the group? This is the problem of negative externalities, which arises when the full costs of some particular behavior are not borne by the actor, but instead are "externalized" onto others who do not receive its compensating benefits. The classic example of an externalized cost is air and water pollution generated by a manufacturing plant: The plant and its owners benefits from the increased profits from not having to bear the expense of environmental safeguards, but the costs of the pollution are born by all those who use the water and air, and not just by the owners who receive the plant's increased profits.

It is axiomatic that religious groups cannot be permitted to act in ways that impose the costs of conformity to religious group norms on those who do not belong to the religious group. Religions are free, for example, to discriminate on the basis of race or sex in choosing their leaders. Members impliedly consent to such discriminatory norms, but nonmembers have not, and cannot be forced to bear their costs.

c. Exit

How easy is it to leave the religious group? Since a theory of implied consent derived from voluntary religious group membership underwrites the power of the group to impose its norms on members, it is appropriate that groups enforce religious conformity on their members only so long as the members are free to leave the group. This is both a legal and a social or cultural question. Even when no legal barriers exist to a member's exit from the group, other factors may raise barriers to exit. For example, when a family with children belongs to the group, one spouse may feel that he or she cannot leave the group if doing so would restrict access to children or substantially impair parent-child relations. Similarly, when the group supplies a major component of member identity, as is the case with many religious groups, members may find it psychologically impossible to leave, for abandoning the group is tantamount to abandoning one's identity. Financially dependent members lacking employment and education risk poverty and homelessness if they leave the group.

d. Conceptualization

Is the religious group right part of a classic right-duty relation, or is it rather an immunity correlated to a disability on the government's power to act with respect to certain subject-matters? Religious group rights are most defensible when (i) the group is conceptualized as having an ontological status independent of that of its members, thereby justifying group autonomy even when it conflicts with the well-being of group members; (ii) recognition of a religious group right does not externalize the costs of membership on nonmembers or on society as a whole; and (iii) it is legally and otherwise viable for members to leave the group. Even when a religious group right is *prima facie* cognizable, however, the effect of the right when it is deployed depends on whether it is conceptualized as a classic "right" or instead as an immunity.

Commentators sympathetic to religious group autonomy are fond of describing religious group rights in terms of "jurisdiction" and even "sovereignty," as if religious groups were separate countries whose sovereign status immunizes them from laws and actions of the country wherein they and their members reside. This is, at best, an exaggeration. No private group residing in a liberal democracy enjoys sovereign immunity from the actions of government, even for its internal affairs. Given a sufficiently important reason, government can and does intervene in "internal" religious group matters as, yet again, the child abuse scandals demonstrate. Theories of how and when the government may intervene, however, vary considerably, depending on whether they conceptualize

religious group rights as "rights" which the government is duty-bound to observe in exercising its legitimate powers, or instead as "immunities" correlated with structural disabilities that withhold sovereign power from government and preclude if from acting in the first place.

There is a lot at stake in the answer to this question. Professor Zucca, for example, discusses the right to freedom of belief as if it were both a right which government has a duty to observe, and an immunity with which government is disabled from interfering. But these jurisprudential concepts are distinct, and lead to distinct doctrinal outcomes.

The Free Exercise Clause of the U.S First Amendment is such a right: It imposes a general duty of religious equality on government, requiring it to avoid targeting religion overtly or covertly. Because a right conditions or limits the exercise of power that the government legitimately possesses and could properly exercise in absence of the right, the right-holder may waive the right if he or she freely chooses to do so, and protection of the right is properly balanced against government interests that conflict with such protection. Thus, a religious group right may be waived or otherwise lost by group action or inaction not consistent with assertion of the right, and may also be overridden by an important government interest.

Structural immunities, on the other hand, allocate sovereign power in the first place, granting or withholding such power from government, for the benefit of society as a whole. When a constitution affirmatively denies sovereign power to the government, the government is absolutely disabled from exercising the power so denied. So structural immunities may not be waived, because they are imposed for the benefit of the whole society, and not just for those whose personal liberty might be threatened in a particular instance. Nor does it matter that the government has an important or even "compelling" reason for exercising the power: There is no justification sufficient to invest the government with sovereign power that its constituting document withholds from it. The U.S. Establishment Clause is such a structural disability: Federal and state governments are absolutely prohibited from establishing religion, regardless of the importance of the government's reasons for doing so, and even if no one objects. Government action which exceeds the structural limits marked by the Establishment Clause is not, and cannot ever be, constitutionally legitimate.

When religious group rights are conceptualized as structural disabilities, the focus is necessarily on the breadth or subject-matter of the disability—that is, the field of action the government is barred from entering by the disability. For example, the Establishment Clause disables government from making theological decisions on behalf of a church, as when, for example, courts are called upon to allocate church property between two factions in the membership by awarding the property to the faction that has most faithfully adhered to church doctrine. But courts remain free to decide such factional disputes on nontheological grounds—"neutral principles of secular law"—by looking at deeds, trust, and other secular evidence of property ownership. Government is free to intervene in internal religious group affairs, in other words, so long as the intervention falls outside the bounds of the subject-matter definition which sets the limits of the Establishment Clause disability.

When a religious group right is conceptualized as a "right," the analytic focus is on the group's actions—did it expressly forego the protections of the right, or act in a manner that would be inconsistent with an intention to claim such protections?—and the government's interests in regulating the religious group—are these sufficiently weighty to justify setting the right aside in the

particular circumstance? Such considerations are irrelevant, however, if the religious group right is conceptualized as an immunity—that is, as a structural disability on government's power to act; there the focus is on the definition of the subject-matter as to which the government is disabled from acting—is the government action within or without the bounds of the disability?

III. An Example: The U.S. Contraception-Coverage Mandate

The current controversy in the United States over mandated contraception coverage by health insurance plans provides a useful example of how these doctrinal religious group-rights touchstones might function in actual application. Many religious groups have asserted a group free exercise right not to comply with the so-called "contraception mandate" of the U.S. Patient Protection and Affordable Care Act (the "ACA"), President Obama's signature legislative accomplishment during his first term. The ACA seeks to expand health-insurance coverage and covered healthcare services in the United States. Accordingly, the ACA mandates that all "preventive healthcare services" be covered by private health insurance plans without additional co-payments, coinsurance, deductibles, or other cost beyond the monthly insurance premium. However, the regulations promulgated by the Obama administration define all FDA-approved methods of contraception (including "emergency contraception" like the "morning-after" and "week-after" pills and intrauterine devices, which avoid pregnancy by preventing a fertilized egg from implanting in the womb) as "preventive healthcare services"—hence the term, "contraception mandate." Churches and their "integrated auxiliaries" are exempt from complying with the mandate, but most religious hospitals, colleges, charities, and other religious nonprofits are subject to it, as are all for-profit businesses.

A number of religious nonprofits and for-profit businesses have challenged the mandate as a violation of their group right to freely exercise anti-contraception religious beliefs. Many of these plaintiffs are affiliated with the Roman Catholic church, whose teachings prohibiting use of "artificial" contraception have been rejected by most American Catholics; others are conservative Protestants who conscientiously object to emergency contraception as equivalent to abortion. All of the plaintiffs employ and/or serve large numbers of persons who do not share their anti-contraception beliefs.

How should one think about a group free exercise right in this context? One can begin with an examination of religious group status, externalized costs, possibilities of exit, and how the right might be conceptualized.

In the wake of the Supreme Court's recent decisions in *Citizens United* and *Hosanna-Tabor*,[30] there is a powerful argument that religious and certain other groups have an ontological status in U.S. constitutional law that is wholly independent of the individual interests of their members. Thus, the fact that the interests and beliefs of employees and other members of the plaintiff groups diverge from those of the group itself is not highly relevant—although it is at the least ironic that the vast majority of Roman Catholics in the United States have rejected their church's anti-contraception teachings. If the plaintiff groups hold a free exercise right, the group's status as a right-holder is

30. Hosanna-Tabor Ch. & Sch. v. EEOC, 132 S.Ct. 694 (2012) (recognizing unconditional right of religious group to terminate schoolteacher in ministerial calling); Citizens United v. FEC, 558 U.S. 310 (2010) (recognizing corporation as person whose speech rights were unconstitutionally infringed by campaign finance regulation).

organic rather than derivative of the right-holding status of its members.

Externalized costs and possibilities for exit, however, cut the other way. Exempting the plaintiff groups from the mandate would allow those groups to impose the costs of their anti-contraception beliefs on employees who do not share them, many of whom do not even belong to the group's affiliated religion. Such employees would be denied the statutory benefits of no-cost contraception to which they are otherwise entitled under the ACA. Employees who desire these benefits may quit their jobs, but the practical obstacles are high: They may be required to take a cut in salary or to relocate, they may forfeit unvested employee benefits available at the plaintiff group, and in a weak economy they may not find alternative employment at all. Here one sees an illustration of Professor Zucca's insight that conscience exemptions can sometimes function offensively, as a sword against society, and not as a mere defense to government action.[31]

On balance, the two of the first three doctrinal touchstones weigh against recognition of a group right. But even if a group right of exemption from the mandate were recognized, its strength and reach would depend on whether it is a right or instead an immunity from government action. If a group right, an exemption from the mandate might still be expressly or impliedly waived—say, by a religious group's voluntary entrance into employment and service markets governed by public values that condemn the imposition of one's religious beliefs on others. The exemption would also be liable to override by a compelling government interest—say, the need to equalize currently gender-disparate healthcare costs borne by men and women, or the need to improve gender equity in the workplace by affording women greater control over child-bearing. On the other hand, if the right is conceptualized as an immunity correlated with a structural disability preventing government from burdening religious group practices, as much pro-religion jurisdiction/sovereignty rhetoric implies, then the group right is absolute, with neither waiver nor balancing available to mitigate its effects on employees who do not share their employer's anti-contraception beliefs.

* * *

Religious group rights seem normatively attractive, but they do not come without sobering costs to individual liberty, which ought to be carefully weighed against benefits before such rights are irretrievably embedded in Western jurisprudence.

31. Lorenzo Zucca, see supra at 29.

3

New Challenges To Religious Freedom In Europe

HEGUMEN PHILIP RYABYKH[32]

Introduction

The understanding and the interpretation of religious freedom today depends on the role that religion plays in society. To my mind, at least, three factors make religion important from this perspective: first, the "new visibility" of religions in the public sphere; second, the normative positions of religions on issues of social life; and third, the various ways in which religions try to achieve these positions, especially extremist forms. In this paper, I will make five points in order to substantiate this claim.

I. New visibility of religions

The thesis of the growing religious presence in societies is contested from time to time. Discussions take place about the exact numbers of the faithful, the "quality" of their faith or their links with religious institutions. It is also obvious that the religious landscape, or more generally the "worldview landscape", in each country is dynamic. The principle of religious freedom is called upon in a democratic society to regulate the relations between different religions and beliefs in a changing situation.

32. Dr. of theology, Dr. of political sciences, representative of Russian Orthodox Church in Strasbourg to the Council of Europe

However, we are aware of examples of times when religious groups have strived to radically change the religious situation in a country. Religious freedom has sometimes been misused by various governments or non-governmental forces as an instrument to promote "their" religions in other countries. For example, on April 15 2012, Muslim Salafists distributed one million copies of the Koran on the streets of Germany and planned to distribute 25 million more in Austria and Switzerland. Some Western Christian organizations act in the same manner in Muslim countries. Such actions are motivated by the understanding that relations between religions function as a market of supply and demand. But such an approach leads to the establishment of the right of the stronger, and may result in conflicts and instability in society.

From my point of view, religious freedom must not be misused to protect missionary strategies that aim to achieve radical change in the religious landscape of a country. The just approach to the protection of religious freedom cannot accept the ambitions of different religious or non-religious groups which try to expand within a society at the expense of other groups, or indeed human rights.

II. Balanced protection of religious minorities and majorities

It is also unjust when international religious freedom advocacy refers to religious freedom only in the sense of the protection of religious minorities. Religious freedom does not exist in the abstract and pure form. It is always embodied in a particular individual way. In Europe, Christianity has historically represented the main religious belief. People's choices in favor of traditional Christianity as already rooted in Europe should also be protected by religious freedom, and not just the freedom of religions which have appeared relatively recently. That is why the Russian Church calls for the preservation and development of a

worthy Christian presence in the private and public spheres of European countries. This concerns not only religious symbols, but also the presence of Christian content in education and training, media, culture and social projects.

This explains why the Russian Orthodox Church has expressed disagreement with the decision of the European Court of Human Rights in 2009 on the removal of crucifixes from classrooms in Italy (the *Lautsi*-case)[33] and why Russia supported Italy in its appeal to the Grand Chamber of the Strasbourg Court. One cannot but express satisfaction at the fact that the Court changed its decision. Now the Court is considering two new cases, this time from the United Kingdom (Shirley Chaplin and Nady Eveyda)[34], which are very closely related to the Italian case. These two women were forbidden from wearing a baptismal cross in the workplace.

The protection of the rights of Christians in Europe or of Muslims in Asia must not mean discrimination against other religions or secular philosophical beliefs, especially if they have been present in these countries for a long time. Today there are instances of severe violence and crime against Christians in some Muslim countries. We also see examples of injustice and offenses against Muslims in Europe and in the United States of America.

Of course, increasing diversity requires a special effort to maintain a just balance and mutual respect between different communities in manifesting their religions. In each case, it requires great effort to fairly distribute public space between religions, and to create a new balance between religious and secular symbols, holidays and clothes. This is possible only when every religious community voluntarily accepts the level of public and government attention which corresponds to its size and impact on society and the rights of others.

In modern dynamic societies, it is just not only to protect religious minorities at some selective choice but to consider the complexity of different (historical and cultural) factors and build a balanced system of protection of rights for religious majorities and minorities.

III. Religious freedom and morality

Modern society is becoming more and more pluralistic in its approaches to anthropology and, as a result, to morality too. If in the past 'pluralism' referred to different visions of changes in societies on the same anthropological basis, pluralism today concerns the understanding of the very nature of what the human being actually is: what life and death are (the questions of euthanasia and abortion); what family is (the questions of surrogate motherhood, artificial insemination and adoption of children by same-sex couples); what gender is (the interpretation of trans-sexuality). All these notions are dealt with in religious teachings.

For religions, the adoption of general norms which contradict religious views in a society is a real challenge. Sometimes there are serious clashes between different values or their interpretations. Unfortunately, today's international and national institutions tend to accept a vision of 'what a person is' based on attitudes and perceptions supported by only one section of society. Intentionally or not, this leads to discrimination against supporters of other approaches, including religious ones. This trend is particularly evident in respect of questions relating to gender and family relations, and could lead to a breach of peace in society and to societal destabilization.

33. Lautsi v. Italy, ECtHR 3/11/2009 (30814/06) and 18/03/2011 (Grand Chamber)

34. Eweida and others v. United Kingdom, ECtHR 15/01/2013 (48420/10; 59842/10; 51671/10; and 36516/10)

As to the Russian Orthodox Church, it adopted a set of documents concerning social life and anthropology – *The Basis of Social Conception* (2000), the *Document on Human Dignity, Freedom and Rights* (2008) and others.[35] In these documents, the Russian Church's point of view has been expressed clearly: "The Christian law is fundamentally supra-social. It cannot be part of the civil law, though in Christian societies it can make a favorable influence on it as its moral foundation". This does not refer to the conquest of secular space, because the document continues: "any attempt to develop civil, criminal and public law based on the Gospel alone cannot be efficient, for without the full churching of life, that is without complete victory over sin, the law of the Church cannot become the law of the world. This victory is possible, however, only in the eschatological perspective" (5.IV).

Today religions try to preserve their freedom not only in an exclusive way, claiming for themselves the right that some norms may not apply to religious communities, but they also insist on their right to contribute to the shaping of the general norms that apply to the whole of society. It is real challenge for international religious freedom advocacy to create a mechanism that satisfies the legal expectations of religious people and to protect their anthropological views stemming directly from their religious convictions. This does not mean that the principle of the secular state is rejected as such. The presence of religious arguments in public debates does not mean that legal texts should make reference to sacred texts. But religious views and a religious agenda can legally be a part of society through democratic procedures and can be freely supported by citizens. This principle is reflected in Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "freedom, either alone or in community with others and in public or private, to manifest his religion or belief". So religion can legally participate in society life, with its agenda, through the democratic procedures.

I should stress that this right to practice religion is a personal right, but one which can also be realized through collective forms, such as that of a religious community. On the basis of individual religious choice, a person can arrange his or her entire life, including professional and social aspects, and give voice to his or her convictions through democratic procedures. A religious world-view should again be recognized as a source of social principles and political norms for individuals and for groups of people. This is what could be called a new or "post-secular" understanding of secularism.

IV. Need for a new interpretation of "secular state"

Today, we are also aware of claims that the internal rules of a religious community should be in accordance with the general democratic order. However, let me recall again Article 9: "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 interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". What happens when morals change in a society and become increasingly pluralistic? How should religious freedom, which also extends to freedom of religious teaching and self-organization, be protected in this case? Christian churches usually rely on canon law to define their internal life. In the *Social Conception* of the Russian Church, we read: "In the Church founded by the Lord Jesus, there is special law based on the Divine Revelation. It is the canon law" (IV. 5).

35. Russian Orthodox Church, *The Bases of the Social Concept of the Russian Orthodox Church*, Moscow, 2000, availiable at: http://www.mospat.ru/en/documents/social-concepts/; Russian Orthodox Church, *The Russian Orthodox's Church Basic Teaching on Human Dignity, Freedom and Rights,* Moscow, 2008). http://www.mospat.ru/en/documents/dignity-freedom-rights/.

There are a number of cases before the European Court of Human Rights concerning relations between the internal regulations of church communities and secular legislation. On January 31 2012, for example, the court ruled in the case of the "*Good Shepherd*" union against Romania.[36] In this decision, the court took the side of a group of people who wanted to create a trade union of clergy, on the basis of civil law, within the Romanian Orthodox Church in order to engage in dialogue with Church leadership. This idea, which was supported by the Court, strongly contradicts canon law. Another decision, which violated the internal regulations of the Bulgarian Orthodox Church, was adopted by the European Court of Human Rights in 2008 in the case of "Metropolitan Innocent against Bulgaria"[37]. In our view, in such cases the Court should seek to respect internal rules and regulations and should refrain from interfering in religious affairs.

There is also a risk of substituting spiritual and moral values with social principles. At an annual meeting of the Committee of Ministers dedicated to the religious dimension of intercultural dialogue, which took place in Luxembourg in 2011, a member of the Parliamentary Assembly of the Council of Europe said that the values of the Council of Europe should be higher than religious values. Indeed, sometimes political authorities seek to define values of the spiritual and moral order which are beyond their competence. To my mind, the legal system should not make decisions on spiritual or moral issues, such as paternal behavior or human sexual behavior. Spiritual and moral standards must exist freely in society, as the source for legislation.

36. Sindicatul Păstorul cel Bun v. Romania, ECtHR, 31/01/2012, (2330/99).

37. Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria, ECtHR, 16/9/2010, (412/03; 35677/04)

The preamble to the Statute of the Council of Europe in 1949 reads: "stating its commitment to the spiritual and moral values, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Thus in the preamble, the different spheres ("spiritual and moral values" and "principles of liberty"; "rule of law" and "democracy") were distinguished. Religious communities exist within the first sphere, and the second sphere is more characteristic of states and intergovernmental organizations. But there is no mention in the preamble to the Statute of a barrier existing between the spheres; on the contrary, the document emphasizes the connection between the two spheres, calling the spiritual and moral values "the common heritage" and "the true source".

So there is a need for a new interpretation of the notion of a "secular state", in order to eliminate discrimination against religious communities in the shaping of norms in societies. The principle of secularity applies only to functions and forms of state activities and not to all areas of societal life. Good practice of religious freedom occurs when the state ensures the freedom to join or to leave a religious group and does not intervene in the internal affairs of religious organizations.

V. Raising hostility against religious communities and believers

Dialogue and interaction between different religions and worldviews are very important aspects of religious freedom. In a multicultural society, it is necessary to maintain respectful standards of dialogue and discussion, especially in light of the rapid developments in electronic communication and the need to protect freedom of speech. The report of the Eminent Persons Group of the Council of Europe, "Living together - diversity and

freedom in Europe of the XXI century"[38], which was prepared in 2011, was designated to work out mechanisms to balance religious freedom and freedom of expression and assembly.

The report is a call to refrain from distortion and inaccurate statements concerning religious beliefs, including ridicule or disparagement of religions, their founders, or sacred symbols. However, this call is followed by the remark: "It is not the province of the law or the public authorities to enforce such consideration".[39] Now, in our view, it is obvious that a multicultural society cannot accept special laws on blasphemy, but insults to the religious feelings of citizens and slander against the activities of the religious associations to which they belong should be stopped by law in order to protect the dignity and rights of religious citizens and to prevent the exhibitions of hatred in speeches against them. This position is expressed in the document "*The attitude of the Russian Orthodox Church to publicly deliberate blasphemy and slander against the Church*", which was adopted in 2011.[40] In this context, it seems important to note that the European Court of Human Rights, in practice, does not accept that for example ethnic minorities should have special rights, but accepts the right to preserve ethnic identity as an element of human dignity. It seems that the same approach could be applied to freedom of expression and religious freedom.

Over the last few years in Europe, we have often witnessed public regular performances and other actions which have targeted religious communities with various forms of aggressive, humiliating and offensive behavior. Such events have taken place time and again in France, Italy, Spain, Norway, Russia and other countries. The point is not the existence of mass media, or organizations or institutions which are anti-religious, or critical of religious organizations or religious teachings. This kind of realization of freedom of conscience has long been present in Europe. There is a new wave of what we consider to be an invasion into precisely the private space of believers which should be protected by laws on freedom of conscience. The objects of this violation include religious symbols installed in public places, buildings of worship, religious cemeteries and holy places. For many religious citizens in European countries, religious life is integral to their individual dignity. When the private space of believers is violated by someone in order to impose a political position or commit actions which insult or humiliate believers' dignity, it is no longer freedom of speech or self-expression. It is an elementary violation of the rights of believers.

In relation to the methods used by religious organizations to promote their positions in society, there can also be very different forms: from spiritual practices, argumentation and social work to extremism and terrorism. According to the Russian Church's *Social Doctrine,* the most radical civil method permitted is that of "disobedience" in case of "an indisputable violation committed by society or state against the statutes and commandments of God" (IV.9). It is beyond the Church's duties to prepare revolutions or to take over political power.

In these new circumstances, religious freedom remains a very important value, but at the same time is very fragile; this is why it needs to be protected in the consideration of new challenges.

38. Group of Eminent Persons of the Council of Europe, *Living together. Combining diversity and freedom in 21st-century Europe*, Strasbourg, 2011.

39. Ibid., p. 36.

40. Russian Orthodox Church, *The attitude of the Russian Orthodox Church to publicly deliberate blasphemy and slander against the Church,* Moscow, 2011, availiable at: http://mospat.ru/en/documents/otnoshenie-russkojj-pravoslavnojj-cerkvi-k-namerennomu-publichnomu-bogokhulstvu-i-klevete-v-adres-cerkvi/

4

Rethinking religious freedom

ELIZABETH SHAKMAN HURD[41]

I. The 'first freedom'[42]

Like a good movie, the story of international religious freedom offers something for everyone. It is a battle between cowardly oppressors and the undaunted and heroic saviors of the downtrodden.[43] It is a story of the triumph of international law and the policing of those who fail to adhere to global norms and standards.[44] It is a story of the secular tolerance of plural beliefs as a remedy for religious beliefs that would otherwise lead to violence.[45] And today especially, it is a story of the need for the U.S. government and others to "convince" people in other countries—and particularly Muslims—that they should endorse a model, the model, of religious liberty as a template for organizing and democratizing their politics and societies.[46] It is also a story of human progress and emancipation, of transforming conditions of religious oppression to liberate individuals—particularly women—from their primitive, discriminatory ways. Working alone and in tandem, these narratives justify intervention to save, shape, and sanctify individual and collective lives.

A rapidly escalating number of actors are promoting religious freedom across state borders. There is great excitement about the potential of formalizing and bureaucratizing religious freedom. Legal guarantees of religious freedom are embedded as riders in trade agreements, in aid packages, and in humanitarian projects around the world. The European Union (EU) is promoting religious freedom in its external affairs programming, adding clauses to trade agreements with North African and Central Asian trading partners that guarantee a commitment to religious freedom. In Brussels, initiatives to train EU diplomats in religious freedom promotion are in the works, and the EU is drafting official guidelines the subject. At the UN, the Human Rights office (OHCHR) is in its third decade of promoting religious freedom, and recently initiated a campaign to combat incitement to religious hatred.

State foreign policy establishments are also promoting religious freedom. The most recent example is Canada, where Prime Minister Harper announced in Spring 2011 that his government intends to create an Office of Religious Freedom at the Department of Foreign Affairs and International Trade (DFAIT), modeled on the American office in the State Department that has been promoting religious freedom abroad for 14 years. In the US religious freedom is described as the "first freedom," a fundamental human right, and a *sine*

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42. This working paper draws on my book manuscript *The Secular Establishment: Religion, Law and Authority in International Politics* (in progress), and on E.S. Hurd, 'Believing in religious freedom,' *The Immanent Frame* (March 1, 2012). http://bit.ly/wqmRWT. That post is part a series, guest edited by Winnifred Fallers Sullivan and myself, in conjunction with a joint research project on religious freedom. The series (http://blogs.ssrc.org/tif/the-politics-of-religious-freedom/) considers the multiple histories and genealogies of religious freedom—and the multiple contexts in which those histories and genealogies are salient today.

43. See http://www.opendoorsusa.org

44. See http://www.uscirf.gov

45. See http://www.tonyblairfaithfoundation.org

46. See Thomas F. Farr, "Religious Freedom Abroad," *First Things* (March 2012): 21-23.

qua non of modern democratic politics, if not of civilization itself. Americans, we are told, invented and perfected religious freedom. Americans are so devoted to religious freedom that we have become official evangelists on its behalf. The International Religious Freedom Act of 1998 established a State Department Office of International Religious Freedom, which prepares an annual report on the status of religious freedom in every country in the world except the US, along with a bipartisan oversight committee called the Commission on International Religious Freedom. A recent tweet from Hillary Clinton—a real one, not the spoof "texts from Hillary"-described religious freedom as "a bedrock priority of our foreign policy."

The promotion of religious freedom is ubiquitous. And it is not only evangelicals. An impressive array of institutions and public authorities across the political spectrum, both secular and religious, has taken up the cause. Like human rights, religious freedom stands in for the good and the right in many difficult and often violent situations. In all of the excitement surrounding religious freedom as a universal norm—who can be against religious freedom?—it is easy to forget that these are political projects, situated in history, and implemented by powerful state and international authorities. It is easy to be swept up in the common sense that guaranteeing religious freedom is what keeps at bay pre-modern political orders based on tyrannical forms of religious authority that leave women and minorities in the dust. When religious freedom is positioned as the antidote to such unappealing options, it is not surprising that it has gathered so much momentum.

As the European Union and others stand poised to join the religious freedom bandwagon, however, there is a need to step back from the excitement and the anxiety surrounding the international promotion of religious freedom. The promotion of religious freedom is not simply about the spread of a beneficent universal norm and legal standard. It is a site of politics, and it is a site of religious politics. This paper will argue that religious freedom advocacy—and religious freedom as a discursive frame that is used to orient action in the world—actively politicizes religious difference, masks complex political realities on the ground, and obscures mixed and multiform religious realities as they are lived and experienced. The legalization and top-down promotion of religious freedom helps to create a world in which official religious difference becomes *more* salient politically, not less. It draws lines between communities, horizontally and hierarchically. It helps to define what it means to be religious, and to be free.

The promotion of religious freedom shapes and constrains political realities, and religious possibilities, on the ground. It obscures local ways of living with religious difference. This leads to a question: what would it look like to be skeptical of the promise of religious freedom, while also strongly opposing all forms of religious persecution and other forms of injustice and domination?

But why even be skeptical? How can anyone object to official promotion of religious freedom when religious minorities suffer so much official persecution? In Maspero last October, the Egyptian military establishment attacked peaceful protesters demanding rights for Coptic Christian citizens. At least 25 were killed and 300 injured. Deplorable oppression and murder are suffered by the Rohingya, a Muslim people living in the state of Rakhine in western Myanmar, who are denied rights or legal representation by their government. Governments in Saudi Arabia and Bahrain, where the Arab spring was never allowed to get off the ground, repress local Shi'a minorities on a daily basis.

These groups deserve international and local support, but not in the guise of religious freedom promotion.

When the United States uses its authority to promote religious freedom, the government is weighing in on which forms of religion should be legally protected. The US sets standards that effectively bolster the sects, denominations, and religious authorities that it has defined as authentic and benevolent, while marginalizing less desirable counterparts. This does not solve the complex challenges posed by everyday life in religiously diverse societies. Rather, in practice, outsider promotion of religious freedom turns religion into a matter for law and politics. Instead of calming tensions, it hardens lines of division between communities by enforcing the interests of particular groups *defined in religious terms*. The current crisis in Syria is an example.

II. Crisis in Syria

Calls for the protection of persecuted Christians in Syria and around the Middle East have been a cornerstone of US-based religious freedom advocacy in the wake of the uprisings. Joe Eibner of Christian Solidarity International has lobbied President Obama to urge Ban Ki-moon to declare a genocide warning for Christians across the Middle East. Howard Berman of the House Foreign Affairs Committee says that the future of minorities is "on our agenda as we figure out how to help these countries" and their treatment of Christians and other minorities is a "'red line' that will affect future aid." Habib Malik of Lebanese American University calls for Western nations to stand up for the rights of Christians, who he says may be cleansed from lands where democratic elections are used to oppress minorities rather than empower them. While this must be done "in a way that is not misperceived on the other end," Malik says, "the West should not be cowed." *USA Today* reports that according to Christian rights groups, "Christians in Syria, where Muslims have risen up against President Bashar Assad, have been subjected to murder, rape and kidnappings in Damascus and rebellious towns."[47]

The momentum builds. The apparent logic of the story is clear: when "Muslims rise up against Assad," (in other words, when the Muslim-majority populations of the Middle East are left to their own devices and no longer repressed by secular autocrats), the result is Christian persecution. But the problem is that the Syrian protests are not captured by the notion of "Muslims rising up against Assad." This is how the *regime* wants us to see the story. For decades, the Assads have relied on the threat of sectarian anarchy lurking just below the surface to justify their autocratic rule. When religious freedom advocates, the media, government officials and other public figures reinforce the regime's framing of the war as a sectarian conflict pitting Sunnis against Alawites and their Shiite allies, it makes sectarian violence *more* likely. It energizes divides between Christian, Alawite and Sunni. It brings these identities to the surface, accentuates, and aggravates them. When religious difference becomes the primary lens through which this complex social, economic and political conflict is framed, sectarian conflict worsens. Categories of religious difference (Christian, Alawite, Sunni) that might not otherwise necessarily define what began as a popular uprising against a secular autocracy become newly salient.

Many Syrians, like people everywhere, hold multiple allegiances, celebrate diverse traditions, are of mixed backgrounds, and do not fit into the rubrics of religious identity marketed by religious freedom advocates. Left out in the cold, these 'in-between' individuals find themselves in the impossible position of having to make political claims on religious grounds, or having no grounds from which to speak.[48] This situation pressures dissenters,

47. http://www.usatoday.com/news/religion/story/2012-01-30/arab-spring-christians/52894182/1

48. Elizabeth A. Castelli, "Theologizing Human Rights:

doubters, and families that include multiple religious affiliations to choose a side and define their identities in religious terms: "are you this *or* are you that?" In emphasizing these differences, religious freedom advocacy activates and politicizes religious difference. It also systematically ignores the widespread existence of anti-Assad Alawites and Syrians who do not identify with a single religious tradition.

In Syria, then, religious freedom promotion adds fuel to the fire of the very sectarian conflict that religious freedom claims to be uniquely equipped to transcend. It also masks complex political and religious realities on the ground. To suggest that the conflict stems from a failure to acknowledge the rights of certain believers conceals the ways in which social divisions cut across sectarian divides. It obscures the ways forward when the focus is not on beliefs or communities of believers, but on shared human needs and visions.

Of course, the mobilization of the logic of sectarianism for political ends extends far beyond Syria, and exceeds the language of religious freedom. For example, this logic has come to dominate media coverage of the uprising in Bahrain, where an embattled regime, challenged by both Shi'a and Sunni dissenters, has largely succeeded in framing the conflict as sectarian by mobilizing Sunni against Shi'a on the claim that the latter are controlled by a predatory Iran.[49] As Joost Hiltermann argues, "by whipping up sectarian sentiments, the [Bahraini] government hopes to change the perception of the conflict from one that pits a popular pro-democracy movement against an authoritarian regime to one of a sectarian struggle between Sunni and Shia, with the strong government needed to maintain order."[50] Religious freedom taps into and feeds this logic, but it does not generate it by itself. It is part of a broader complex.

My point is that in Syria, Bahrain and elsewhere, the complex histories, experiences and uncertainties that shape religious identification cannot be squeezed into the rigid categories imposed by the logic of religious freedom. They just don't fit. Recent scholarship in the study of religion is helpful in developing this point. As Noah Salomon and Jeremy Walton write:

> *What makes someone a believer or a member of a faith community and what makes someone not so? What life experiences, confessional commitments, and ritual practices qualify one as an insider, and which prohibit an individual from inclusion? Are 'insider' and 'outsider' categories that we must inhabit permanent or can we move creatively between them? Most importantly, should scholars [or governments?] attempt to adjudicate these questions of religious identity and belonging, thereby becoming arbiters of orthodoxy?*[51]

Salomon and Walton point to the complexities of religious affiliation and practice. They explain the difficulties of assigning individuals to the category of believer or non-believer. They speak of the structures of power—what they call the 'arbiters of orthodoxy'—that are implicated in deciding who is officially in, and who's out.

The logic of religious freedom, on the other hand, does not question the power of established author-

Christian Activism and the Limits of Religious Freedom," in Michel Feher with Gaëlle Krikorian and Yates McKee, eds. *Non-Governmental Politics* (New York: Zone Books, 2007), p. 684.

49. Joost Hiltermann, "Bahrain: A New Sectarian Conflict?" *The New York Review of Books Blog* (May 8, 2012). Hiltermann observes that, "Sunni-Shia interaction is what defines daily life at the workplace and in many neighborhoods."

50. Ibid.

51. Noah Salomon and Jeremy F. Walton, "Religious criticism, secular criticism, and the 'critical study of religion': lessons from the study of Islam," in Robert A. Orsi (ed.) *The Cambridge Companion to Religious Studies* (Cambridge: Cambridge University Press, 2012), p. 406.

ities to make these designations. It does not interrogate the ability and willingness of individuals to live according to them. Instead, these projects funnel people into one community or another, authorizing and relying on boundaries that might not otherwise have enjoyed as much political traction. Families with multiple religious affiliations under the same roof must choose a side when religious identity is politicized. For example, the Syrian child of a mixed marriage between a Sunni and an Alawite is pressured to choose between the two identities because officially promoted "religious freedom" leaves so little room to be both. Identity takes on an exclusivist religious tinge: "are you this *or* are you that?"

This aggravates sectarian tensions, drawing a line under one's religious identity as the factor that trumps others. Being a Christian or a Muslim becomes more important than being pro- or anti-regime. We saw these dynamics in Bosnia in the 1990s, when people who described themselves as atheists before the war suddenly woke up to find themselves identified publically and politically by a newly salient religious identity. This also brings to mind the old joke about the tourist in Belfast who, asked by a local whether he was Catholic or Protestant, stated that he was atheist. "But are you a Catholic atheist or a Protestant atheist?" queried the local.

III. Whose religion? Whose freedom?

By promoting official religious identities, the US State Department and its kin discount the possibility of mixed, blurred, indistinct religious identities and, in so doing, help perpetuate the very conflicts they claim to resolve. In the process, Western governments are also deciding what counts as religion (as opposed to tradition, culture or superstition, for example), and which forms of religion should be legally protected. Religion requires protection, but superstition does not.

For instance, the 2010 State Department's Report on the Central African Republic notes that as many as 60 percent of the imprisoned women in the country had been charged with "witchcraft," which the government considers a criminal offense—and yet concludes that the government "generally respected religious freedom in practice" in CAR, and gives the country a good ranking overall.[52]

This model of religious freedom has no room for African Traditional Religions (ATRs, in the jargon) like this one. Women imprisoned for witchcraft cannot suffer from violations of religious freedom because, in Western eyes, they have no religion. ATRs fall out of the picture when religious freedom comes to town. Practitioners languish in jail as a result.

But the problem runs still deeper. The process of legally defining religious freedom also transforms religion itself. The urge to locate individuals in single faith communities makes religious life hard for people who identify with several traditions, or perhaps none at all, leading to polarization between traditions in the place of hybrid religious practice. As Noah Salomon, an expert on Sudan, describes the situation there: "to think of such 'traditional' practices as distinct confessions does not represent the reality of South Sudanese who may identify as Christians and at the same time see no contradiction in maintaining these rites and rituals."[53] In other words, the religious lives of people who practice multiple traditions are rendered illegible by the logic of religious freedom, even as official religions gain newfound political standing. In the new South Sudan, the government's Bureau of Religious Affairs registers "Faith-Based Organizations," rejecting those Christian

52. http://www.state.gov/j/drl/rls/irf/2010/148671.htm

53. Noah Salomon, "Freeing religion at the birth of South Sudan," *The Immanent Frame*, April 12, 2012, available at: http://blogs.ssrc.org/tif/2012/04/12/freeing-religion-at-the-birth-of-south-sudan/

organizations whose constitutions "do not line up with Biblical chapters or verses," according to an Inspector in the Bureau interviewed by Salomon.

And there's the rub. In these circumstances it is far too easy for the religion of the majority, the religion of those in power, or the particular version of a religion supported by the US or other power brokers to carry more weight, politically, than others. This is occurring in South Sudan, as groups that the South Sudanese government disfavors are classified as 'cults' while others are registered and protected as orthodox.

This suggests a different perspective on official US religious freedom promotion efforts, and potentially those of the EU as well. Let's call these efforts what they are: political and religious strategies to promote US interests--and, since 9/11 if not before, weapons in the 'war on terror.' Modeled on US Cold War efforts to combat secularism and communism by promoting 'global spiritual health,' the Office of Religious Freedom is part of a US effort to break off moderate Muslims from hard-core Islamists overseas. The government intervenes in the complex religious landscapes of other countries to identify the kind of religion that aligns with US interests. That religion is bolstered. That religion is freed—or coopted. For instance, as *The New York Times* has reported, in 2005 the Pentagon paid the Lincoln Group to "identify religious leaders who could help produce messages that would persuade Sunnis in violence-ridden Anbar Province to participate in national elections and reject the insurgency." [54] That's not religious freedom. That's the U.S. government promoting a particular set of policy options in another country, using religion as its cloak.

Americans are proud of the concept of religious freedom. Questioning the concept makes one vulnerable to accusations of defiling something sacred. The US office reassures Americans that the US is and will remain the leader of a religiously free world. It allows Americans to feel morally superior to benighted and oppressed foreigners at a time of economic uncertainty. It deflects attention from suffering religious minorities at home, such as the victims of the massacre at a Sikh temple near Milwaukee in August 2012, and other domestic casualties of the 'war on terror.'[55] And it fits with a widely held, if rarely discussed, tenet among US foreign policy-makers: promoting US secular national security interests often *requires* the US to socially engineer religious affairs abroad.

Some will defend this religious interventionism in the name of national security and the war on terror, human rights, or both. This now, apparently, includes many Europeans.

But is this really—and could it ever be—about religious freedom?

Is *religious* freedom something that can be promoted by powerful arbiters of orthodoxy, whether religious or political? If not, then what *are* all these authorities promoting? In whose name do they speak? Are those empowered by the spread of religious freedom capable of assessing and judging the lives of those they seek to redeem?[56] Is it possible to respond to the seemingly unstoppable onslaught of religious freedom in the name of alternate ways of being religious, and being human, now being swept away, ironically, by a single-minded focus on religious freedom?

54. David S. Cloud, & Jeff Gerth, "Muslim Scholars Were Paid to Aid U.S. Propaganda," *The New York Times* (January 2, 2006).

55. The day after the shootings in Wisconsin a mosque in Joplin, Missouri was burned to the ground. http://www.nytimes.com/2012/08/11/us/if-the-sikh-temple-had-been-a-muslim-mosque-on-religion.html?_r=0

56. Lila Abu-Lughod, "Anthropology in the Territory of Rights, Islamic, Human, and Otherwise . . ." *Proceedings of the British Academy* 167 (2010), p. 255.

5

The Politics of Religious Freedom: Competing Claims in the United States (and Other Places)

T. JEREMY GUNN[57]

Introduction

In his most famous work, *Walden; Or, Life in the Woods*, Henry David Thoreau wrote that "I should not talk so much about myself if there were anybody else whom I knew so well."[58] In this Thoreavian spirit, I will largely focus on my own experiences with regard to the "politics of religious freedom" not because of any importance of myself, but because they are the experiences that I know best.[59] I will secondarily focus on the United States, not because it is the most important country in the world with regard to the politics of promoting religious freedom internationally (though I believe that it is) nor because it has done the most good (which may or may not be the case), but because it too is the country I know best. I should also add, from the beginning, that I do not attribute any failings in how the United States handles the intersection of religion and politics to any peculiar characteristics of the American people, to the makeup of their DNA, nor chemicals in American water (though there are many), but rather to failings that can be found more generally with human beings throughout the world who use religion to advance political beliefs.

I. The Politics of Religious Freedom

Religious freedom, and the politics of religious freedom, was largely absent from the international agenda prior to the late 1990s. I personally was involved with U.S. constitutional law regarding religion both academically (the topic of my Ph.D. dissertation) and professionally (as an attorney in pro bono cases) in the late 1980s and early 1990s. My first encounter with religious freedom as an international subject came in the early 1990s when I received a query as to whether I might be willing to represent the Bulgarian Orthodox Church in a case before the European Court of Human Rights. Though I had no international human rights experience, I thought that this was an opportunity I should not miss. I began looking for the first time into decisions of the European Court and the European Commission on Human Rights, and started my historical inquiry into the situation of the Bulgarian church. A few weeks later, when I learned that the Church would be interested in my representing them only if I could guarantee a victory, my enthusiasm dissipated and I guaranteed the Church only that I could not guarantee a victory. But my interest in the international law of religious freedom had been piqued.

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58. Henry David Thoreau, *Walden and Civil Disobedience* (New York: Barnes & Noble Classics, 2003), p. 7.

59. For an earlier treatment of many of the following issues, see T. Jeremy Gunn, "The United States and the Promotion of Freedom of Religion and Belief," in *Facilitating Freedom of Religion or Belief: A Deskbook*, Tore Lindholm, et al., eds. (Leiden: Martinus Nijhoff Publishers, 2004), pp. 721-46.

My preliminary research forays into international freedom of religion or belief in the early 1990s were not encouraging. I learned, for example, that Amnesty International and Human Rights Watch did not have any particular interest in religion. Amnesty International seemed to report on religion only incidentally when another issue was present, such as when a Catholic priest in Latin America had been arrested for opposing governmental corruption. I was, frankly, dismayed to learn that the European Court of Human Rights had issued no decision interpreting Article 9 of the 1950 European Convention on Human Rights, and every decision of the European Commission on Article 9 had held that there was no violation of the rights of freedom of religion or belief. The absence of NGO interest in the issue and the absence of action from the United Nations and the Council of Europe did not suggest to me that all was well in the world, but that the issue was not being taken sufficiently seriously.

In 1993, finally, the European Court issued its first Article 9 decision, *Kokkinakis v. Greece*.[60] Although Kokkinakis, a Jehovah's Witness, won his religious freedom case overturning his conviction for the *crime* of proselytism, the decision of the European Court was based not upon the robust grounds that preaching one's religion to an adult cannot possibly be a crime, but on the rather limited grounds that the Greek state prosecutor had failed to prove all of the elements of the "crime of proselytism." In that same year, 1993, the U.N. Committee on Human Rights issued its first guidance on interpreting Art. 18 of the International Covenant on Civil and Political Rights (General Comment 22).[61] It was as if the human rights world was slowly, yet haltingly, awakening.

I attended the 1993 World Conference on Human Rights in Vienna and I participated in the small NGO session on freedom of religion. It was there that I first met several future colleagues – including the omnipresent Cole Durham – for the first time. Bahia Tahzib was the rapporteur for the session and was then working on her doctoral dissertation on the United Nations and freedom of religion or belief (subsequently published in 1996).[62] Johan van der Vyver was there from Emory University and he announced that he and John Witte were preparing a conference (ultimately held in October 1994) that led to the publication of a two-volume work in 1996.[63] I wrote a chapter for that work on the freedom of religion or belief within the European human rights system.[64] At that that time it is was very difficult to obtain decisions of the European Commission on Human Rights, and I even made a trip to the Council of Europe library in Strasbourg so that I could make sure that I found them all. (My study was, to the best of my knowledge, the first comprehensive review of all decisions regarding religion from the Court and Commission). I argued that the European Court and European Commission had largely failed to take religious freedom seriously.

In 1996, the Organization for Security and Cooperation in Europe (OSCE) held in Warsaw, Poland, its first seminar (i.e., conference) on the freedom of religion or belief entitled "Constitutional, Legal and Administrative Aspects of Freedom of

60. Kokkinakis v. Greece, ECtHR, 25/5/1993, (14307/88).

61. General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 07/30/1993. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments).

62. Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection,* (The Hague: Martinus Nijhoff Publishers, 1996).

63. See Johan D. van der Vyver and John Witte, Jr., eds., *Religious Human Rights in Global Perspective*, 2 vols. (The Hague: Martinus Nijhoff Publishers, 1996).

64. T. Jeremy Gunn, "Adjudicating Rights of Conscience Under the European Convention on Human Rights," in Johan D. van der Vyver and John Witte, Jr., eds., *Religious Human Rights in Global Perspective,* (Legal Perspectives), (The Hague: Martinus Nijhoff Publishers, 1996), pp. 305-330.

Religion."[65] The following year the OSCE established a Panel of Experts to give ongoing guidance on the issue to OSCE participating states. Since that time, religion and belief has become a regular part of the OSCE activities. The issue of freedom of religion or belief was, gradually, becoming a part of the international agenda.

II. The role of the United States

Prior to 1996, the United States played only a modest role in the promotion of freedom of religion internationally. In 1986, it had been, for example, one of the countries to sponsor the creation of the position of U.N. Special Rapporteur on religious intolerance (now the U.N. Special Rapporteur on Freedom of Religion or Belief). The United States had supported cases of religious freedom involving the Soviet Union and Warsaw Pact countries. It had led a movement to "free Soviet Jewry" in the 1960s and 1970s. Public pressure ultimately contributed to the U.S. Congress enacting the so-called "Jackson-Vanik amendment" in 1974, which was designed to apply sanctions to the Soviet Union if it did not open its emigration policies to Jews. The United States began publishing annual reports on human rights in 1978 that modestly included religious freedom issues, though the first reports were rather sketchy. The first country report on Saudi Arabia contained only one sentence: "Islam is the established religion of Saudi Arabia and Saudis are not permitted to practice other religions, although non-Muslim foreigners have been able to hold private and discreet religious services."[66]

65. T. Jeremy Gunn, "The United States and the Promotion of Freedom of Religion and Belief", see supra at 59, p. 726.

66. U.S. Department of State, Report Submitted to the Committee on International Relations U.S. House of Representatives and Committee on Foreign Relations (Washington, D.C.: U.S. Government Printing Office, 1978), 404.

In 1996, during the first Clinton administration (1993-1997), a collection of conservative activists held a conference under the auspices of Freedom House entitled "Global Persecution of Christians."[67] The conference led to the development of a movement that drew attention to the persecution of Christians in the world. The following year, people associated with this conference encouraged the U.S. Congress to enact legislation that would require the U.S. government to take steps to put pressure on countries that persecute Christians. Over time, the proposed legislation expanded somewhat beyond the persecution of Christians, with the emphasis nevertheless focusing on persecution by Muslim-majority countries and communist countries (particularly China). A bill entitled the "Freedom from Religious Persecution Act" (generally known as "Wolf-Specter" following the names of its legislative sponsors) was introduced in 1997 that reflected an emphasis on imposing sanctions against states that tolerated persecution of specified groups (particularly Christians and Tibetan Buddhists).[68] This so-called Wolf-Specter bill did not propose "neutral" criteria for identifying persecution against any religion, but was focused instead on the nature of the regime of the country engaged in persecuting (Communist or Muslim-majority) and the groups that were particularly subject to abuse (Christians and Tibetan Buddhists). The bill proposed that automatic sanctions be imposed on countries once their abuses had been identified.

While the Wolf-Specter bill was slowly working its way through the legislative process, an alternate bill named the "International Religious Freedom Act" was being drafted in the Senate.[69] Its focus was less on identifying specific countries involved

67. T. Jeremy Gunn, "The United States and the Promotion of Freedom of Religion and Belief," see supra at 59, p. 727.

68. Ibid., 728-29.

69. Ibid., 729-30.

in persecution or particular groups suffering from persecution, introducing instead relatively neutral criteria for identifying both persecuting countries as well as persecuted groups. It also proposed a range of responses that might be taken by the U.S. government when it found religious persecution. The responses proposed by the draft Senate bill ranged from issuing a diplomatic demarche to imposing economic sanctions. The Senate bill ultimately included a provision that created an independent agency named the U.S. Commission on International Religious Freedom (USCIRF). After a difficult and often antagonistic legislative process, the Senate bill was finally adopted, unanimously, by both the Senate and the House of Representatives as the International Religious Freedom Act of 1998 (IRFA).[70] President Clinton immediately signed the bill into law.

I worked at the Office of International Religious Freedom at the U.S. Department of State during the time that IRFA was being negotiated and during its first year of implementation. I subsequently worked for one year – before resigning in protest because of the politicization of issues – as the Director of Research at the USCIRF. Although I played no role in the legislative process, I was involved in the implementation of IRFA both at the State Department and at USCIRF.

In my opinion, most of the individuals in the State Department and USCIRF who were involved in implementing the law and in promoting internationally the freedom of religion and belief were serious, well-meaning, committed, and reasonably objective in how they conducted their research and how they attempted to implement IRFA. I will offer below some counterexamples to illustrate some of the problems. In identifying these counterexamples I would like to be clear that, in my opinion, they were exceptions to the rule, but they were important and significant exceptions. They reveal, in my opinion, just how easy it was to politicize "religious freedom."

First, in my opinion, one of the important motivations behind the IRFA legislation and the underlying interest in promoting freedom of religion in the late 1990s was the partisan effort by some conservative Republicans to undermine politically the position of President Clinton. The Wolf-Specter and IRFA legislation were being debated at exactly the same time that the Republican-dominated Congress was investigating President Clinton on several issues, including most notably the Monica Lewinsky scandal. Many Republicans were searching for issues on which to attack President Clinton as he headed toward his campaign for re-election in 1996. It was decided that the Clinton administration had been less than active in its support for religious freedom abroad. In my personal opinion this was to some extent true – but not at all for the reasons that were advanced. Although the Clinton administration had not placed a priority on religious freedom internationally, neither had any prior American presidential administration, from George Washington to George H.W. Bush. Indeed, the entire international community, as I described above, had not focused on the importance of the freedom of religion and belief. Under mounting pressure from conservatives and Republicans in Congress, the Clinton State Department finally began to take the issue more seriously during the late 1990s. Thus I believe it is fair to say *both* that the Clinton administration had not focused on the issue until it was subjected to pressure from conservatives, and, at the same time, the issue had never galvanized conservatives prior to the mid-1990s when they sought a way to attack a president whom they did not like for reasons completely unrelated to religious freedom. In short, the Clinton administration began to take the issue seriously because of right-wing political

70. The International Religious Freedom Act of 1998, 22 USC 6401 (Public Law No. 105-292 112 State 2787) (subsequently amended).

pressure, but the right-wing pressure was a result of an "invented" political issue designed to undermine a Democratic president.

Second, I witnessed a revealing example of the partisan politicization of the process while I was at the State Department. The new IRFA law required President Clinton to nominate individuals to serve as some of the members of the new U.S. Commission on International Religious Freedom (USCIRF). The President (through the Secretary of State) reasonably promptly identified the potential presidential appointments for the Commission. Under standard procedures, the potential presidential nominees were, prior to a public announcement, subjected to the standard clearing and vetting process. The process was not swift, but it had been launched reasonably quickly by the Clinton administration. While it was underway, I heard a "conversation" wherein Congressman Frank Wolf, a conservative Republican who played a significant role in promoting the legislation, shouted – I repeat "*shouted*" – at a State Department official condemning the delay in President Clinton's nominating of Commission members. He told that official that he should "resign immediately" because Clinton was obviously attempting to sabotage the new law by maliciously delaying the process. It was not proper at that time for the State Department to respond to the irate Congressman about the status of potential nominees. Congressman Wolf, in my judgment, was not only overreacting, he lost control of himself and made partisan and irrational assumptions based upon some type of conspiratorial belief that President Clinton was opposed to religious freedom. I noted with interest that when President George W. Bush, a Republican whose political beliefs were closer to those of Congressman Wolf, took almost a year before naming his Ambassador for International Religious Freedom, that Congressman Wolf offered no public condemnation of his fellow-Republican.

Third, in my opinion, many of the decisions and actions of the USCIRF during its first term were based on American politics rather than a principled approach to religious freedom. The partisan and ill-informed actions of some Commission members led me to believe that the USCIRF was doing more harm than good. As a result, I resigned my position after its first year. I will give a few examples.

III. The Politicization of Religious Freedom

As the Director of Research at USCIRF, it was one of my responsibilities to oversee the preparation of the first draft of the USCIRF's annual report. The final draft would be that adopted by the Commission members themselves. In my draft I included references to decisions of the European Court of Human Rights (whose decisions, in my opinion, were slowly improving). I included such references in order to support the position that the United States was not promoting internationally its own particular constitutional understanding of the meaning of religious freedom, but was promoting an increasingly accepted international standard. I believed it would be more effective to suggest that what the United States was promoting was part of an international consensus rather than the peculiar and particular beliefs of Americans. One of the Commission members, John Bolton – later the George W. Bush administration's ambassador to the United Nations – denounced this particular reference in the draft report and demanded that it be removed from the Commission's draft. What I had intended as a way of suggesting international support was attacked *because* it was *international*. Bolton said, in words that I remember distinctly, "if Jeremy wants to politicize this report then I will go to my friends on Capitol Hill and we will have a fight about it." (Although he did not identify who his friends were, I assumed that he was referring particularly to Senator Jesse Helms.) I

had not intended to politicize the report or the discussion; Bolton in fact politicized it in no uncertain terms. The tame reference to the European Court of Human Rights was removed on Bolton's insistence.

Similar occurrences took place with regard to the draft report on Sudan and China. I had intended that the draft, which was very critical of the governments of Sudan and China, nevertheless explain the conflicts in a way that attempted to explain the positions of those two governments before responding to them. I am of the opinion that simple denunciations of other governments are not particularly effective – and the goal should have been to be persuasive. John Bolton (again) and some other Commission members proceeded through the draft and slashed and burned what one Commission member (who happened to be a Republican) said was "a sophisticated and nuanced" analysis. Bolton baldly asserted that China's resistance to western pressures in part because of the ugly legacy of European interventions in China, but in his view, because they are (and I quote him exactly) "fucking Communists." Nuance did not prevail; conservative anger triumphed. Although I was not present when the following action occurred, it was reported to me after I had left that when the Commission later came to discuss the religious-freedom policies of United States ally Saudi Arabia, the same conservatives who wished to attack Sudan and China in unnuanced terms suddenly came to the position that it would be best to moderate any criticism of America's oil-rich ally, Saudi Arabia. (The USCIRF later began to condemn Saudi Arabia.)

Fourth, one U.S. Senator whom I had long admired, Richard Lugar, a Republican of Indiana, nevertheless fell victim to a double standard. When newly elected President Barak Obama nominated his first Ambassador for International Religious Freedom, Senator Lugar, then-Chairman of the Senate Foreign Relations Committee, sent a long list of sharp questions to the nominee about what she would do about a series of violations of religious freedom across the world, from China, to Sudan, to Vietnam, to Laos, to Russia, and elsewhere. The clear thrust of his letter was to make sure that she would be a valiant promoter of religious freedom wherever it might be under threat anywhere in the world. By coincidence, at the same time that he sent that letter, there was a controversy in New York City about the construction of what came to be called the "Ground Zero Mosque," even though it was not a mosque (it was a community center) and it was not at "ground zero" (the location of the World Trade Center), but a few blocks away. There was sharp opposition from many parts of the American community to Muslims erecting such a building near the sacred site where many had lost their lives. (In my personal opinion, the opposition was principally due to bias and irrational hostility against Islam.) When asked about his position on the propriety of erecting the Muslim building in New York City, Senator Lugar – the same man who courageously insisted that the Obama administration promote religious freedom throughout the entire world – said that the New York facility was a "local decision" and that he had no comment.[71] He demanded religious freedom for Chinese Christians living in Nanjing but not for his fellow-Americans living in New York City.

Conclusion

Underlying many aspects of this issue, and deserving of much more nuance than I can provide here, is what I believe to be a presumption from part of the American community that religious freedom should not be understood as being a neutral standard to be uniformly applied, but as a tactical weapon to be used to advance both religious and political agenda.

71. Greg Sargent, "Senator Lugar won't take position on 'mosque,' *Washington Post,* Aug. 27, 2010, availiable at: http://voices.washingtonpost.com/plum-line/2010/08/senator_lugar_wont_take_positi.html

6

Supporting Subversion? International Organisations and 'Freedom of Conscience' in Islamic States

MATTHEW J. NELSON[72]

If you are a Muslim in Negeri Sembilan—a state in peninsular Malaysia—you may appear before a state-level shari'ah court judge to renounce Islam. Initially, the judge will refer you to an Islamic Faith Rehabilitation Centre for up to three months of remedial counseling regarding the fate of your soul, your community, and perhaps the state as a whole. After this, if you fail to 'repent', your case will be adjourned for a year. However, if you insist on leaving Islam even after this year, you will be permitted to do so.[73]

Some see Negeri Sembilan's period of mandatory counseling as a period of mandatory detention. Their concerns often prompt them to favour Singapore's approach, in which obligatory counseling is not combined with any detention.

Occasionally, Muslim scholars insist that such 'concessions' to global human rights norms (regarding freedom of religion) should be avoided—that, within an Islamic state like Malaysia, apostates should be killed. Others note that 'there is no compulsion in religion' (including rehabilitative detention)—indeed, that Islamic states have no objection to apostasy so long as it is not combined with seditious forms of evangelism targeting the constitutional status of Islam itself.

My question is this: Is it possible to read Negeri Sembilan's approach to the regulation of apostasy as part of a wider effort to 'translate' global human rights norms—in this case, freedom of religion—into contexts framed by Islam? Before I address this question, I will turn to a second case in which shifting ties with religion are read through deeply contextualized political lenses.

During the final years of the Cold War education specialists at the University of Nebraska (Omaha) received U.S. government funding to prepare textbooks for Afghan refugee children living in Pakistan. Training would-be mujahideen to fight the Soviets, the textbooks were saturated with religious content: 'A' is for Allah; 'J' is for Jihad; and so on.[74]

After 9/11, U.S. funding poured back into Pakistan to support various types of education reform. Religious education was a source of particular concern, but this time some American officials insisted that the U.S. Constitution prohibited any meddling in religious affairs. U.S. funding could be used to buy computers for local schools and

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73. Islamic law is a state-level (provincial) law in Malaysia. In some parts of Malaysia detention in the Islamic Faith Rehabilitation Centre is extended to as much as thirty-six months. In other parts detention is followed by a fine (and, in one case, six lashes). See Mohamed Azam Mohamed Adil, 'Restrictions on Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy', *Muslim World Journal of Human Rights* 4:2 (2007), 1-24.

74. See Craig Davis, '"A" is for Allah, "J" is for Jihad', *World Policy Journal* 19:1 (2002), pp. 90-94.

madrasas, but for these officials curricular matters involving an alternative interpretation of Islam were off-limits.

These American debates about the reach of the First Amendment (abroad) point to a wider struggle regarding the translation of specific principles pertaining to 'official engagements with religion'. Does the U.S. constitution's First Amendment imply that U.S. officials are allergic to religion (in general), or does it imply that U.S. constitutional allergies pertain to religious 'establishment' *within* the United States? How should U.S. foreign policy engagements engage religion without prompting concerns about a risk of constitutional subversion 'at home'?

The Politics of Subversion in Establishment and Non-Establishment States

Within these two vignettes I perceive a global struggle surrounding efforts to translate a universal freedom of religion within two very different types of states, namely, 'establishment' and 'non-establishment' states. In both cases the struggle unfolds on two levels simultaneously: one concerning apostasy (as a matter of human rights pertaining to individual belief); the other concerning sedition (as a political matter related to the preservation of a particular constitutional order). Small shifts involving *individual* actors in Malaysia and public funding decisions in the U.S. are often seen as the first step on a slippery slope to mass conversion or political subversion.

When a Muslim in Malaysia leaves Islam, some argue that he threatens the Islamic con-stitutional order of Malaysia. (At the very least, some argue that he threatens Malaysia's demographic-cum-political balance—not unlike a convert in a fragile 'consociational' context like Lebanon.) When a U.S. government official spends money on 'Islamic' education in Pakistan, some argue that she threatens the secular constitutional order of American 'non-establishment'. In effect, Malaysian apostates and U.S. government funders of Islamic education are said to be engage in transgressive political acts with allegedly existential (constitutional) implications.

The key issue concerns the link between efforts to engage religion (or leave it) and the protection of a given constitutional order. Why does the 'established' Islamic state of Malaysia care whether the Muslims living within its borders leave Islam? Why does the 'non-established' constitution of the United States care whether its President spends money in support of religious actors abroad? It is not difficult to see that, in Malaysia and the U.S., the issue of *religious* affiliation is closely tied to concerns about *political* subversion. Indeed, only the most naïve human rights observers are prepared to suggest that apostasy is actually limited to simple questions of private freedom.

For centuries, Muslim scholars have been particularly astute in tying questions of conscience to questions of political order. They have noted, in particular, that, when it comes to questions of conscience, the question is never 'how should freedom be protected as an absolute value', but rather, focusing on the shifting interplay of competing *domestic* forces (often in collaboration with various allies abroad), 'how should freedom of conscience be *regulated* as an expression of constitutional control'?[75]

Some argue that would-be apostates must be 'monitored' to prevent destabilizing forms of conversion. More relaxed observers argue that consciences should be free to roam so long as the prevailing constitutional order—say, establishment or non-establishment—is preserved. In fact these

75. Frank Griffel, 'Toleration and Exclusion: Al-Shafi'i and al-Ghazali on the Treatment of Apostates', *Bulletin of the School of Oriental and African Studies* 84:3 (2001), pp. 339-354.

two options work together: small shifts involving individual apostates and tiny adjustments in funding for actors abroad are often monitored in a bid to protect (or advance) a particular constitutional order.

The question is: What is the process whereby individual freedom might be protected, as a *universal* value, within *both* 'establishment' *and* 'non-establishment' contexts?

Indeed, returning to the question I posed at the outset: Would it be fair to say that Negeri Sembilan's Faith Rehabilitation Centres *combine* international support for individual freedom of conscience with a clear acknowledgment of 'sovereign' constitutional orders? And, turning to the U.S., could the U.S. government endorse these centres *without*, at the same time, violating its own commitment to 'domestic' non-establishment?

These are the questions that interest me: What does it mean for U.S. officials to protect 'freedom of religion' abroad (for example, with reference to Malaysia) while, at the same time, noting that 'non-establishment' is *not* a universal constitutional principle? What are the issues that 'international' efforts to protect freedom of conscience should consider *within* an explicitly 'Islamic' state? Indeed, turning to Malaysia, how should an explicitly 'Islamic' state deal with 'freedom of conscience' in a set of domestic laws (regarding subversion) that are, nevertheless, influenced by international human rights norms? How should Malaysia 'translate' its commitment to religious establishment when speaking with its international partners?

If, properly understood, *both* establishment *and* non-establishment boil down to dom-estic constitutional orders that address the relationship between *religion* and *sedition*, how do they travel abroad?

'International' Americans in 'Muslim' Asia

This past September I was in Kuala Lumpur attending a workshop led by an American organisation that funds governance and development projects in Asia. The workshop sought to chart the future of an innovative human rights and development programme working with Muslim *religious* leaders in various Asian countries. During the workshop two issues broadly related to the themes of this brief essay stood out.

The first issue concerned the value of working with religious leaders—in this case, thousands of mullahs—to enhance the organisation's access to local communities and, thus, to improve its ability to deliver various projects related to the rights of women. (The organisation acknowledged that, over the years, its close relationships with secular human rights organizations, including many feminist organizations, had tied it to a smaller and smaller proportion of the local population. In fact, by engaging local mullahs, the organisation explicitly hoped to correct its expanding lack of access.)

Even as its work with local mullahs expanded, however, its relations with donor agencies became more complicated. In fact the organisation found itself on the horns of a dilemma: access to local communities *versus* access to international resources. Indeed, precisely insofar as this was the case, the workshop developed a somewhat 'existential' tone. What defined the mission of the organisation: *was its push to engage local mullahs as religious partners a form of (secular) constitutional betrayal?* Indeed, how would they sell a project delivered by thousands of local mullahs to an audience framed by notions of domestic accountability in the centre of Washington, D.C.?

Resolving that its primary commitments lay with local communities, the second issue concerned

the quality of its engagement with local mullahs. Did its own human rights orientation converge with the religious orientation of its local partners? And, if not, should the organisation attempt to access the mullahs' grassroots *networks* while, at the same time, securing greater control over the details of their programmatic *message*? Eventually, the organisation managed to convince itself that its core values did not conflict with those of its religious partners—that, notwithstanding certain forms of gendered differentiation, there was nothing in the Qur'anic language preferred by its partners that cut against the organisation's core understanding of basic human rights.

Still, the leaders of the organisation lamented their loss of control over the mode of articulating those rights. While it appreciated the ways in which local mullahs set about using religious references to challenge discriminatory local customs, it lamented the fact that its partners did *not* discuss (a) 'freedom of conscience' as a principle or (b) the 'principle' of religious non-establishment. Instead, local mullahs began from a position of 'establishment', accusing custom-bound 'sinners' of straying from the path of Islam *in order to* enhance women's rights.

For the Americans, the price of local 'access' was not defined in terms of specific programmatic objectives; that price unfolded at the level of local language and direct discursive control. Briefly stated, the Americans found that, in their bid to make local mullahs the foundation of their programme—indeed, in their bid to 'translate' a particular set of rights provisions into a more persuasive local idiom—they were involved in funding the women's-rights equivalent of Malaysia's Faith Rehabilitation Centres: 'translating' a particular understanding of rights *via* Islamic institutions and Muslim partners.

In the end the American organisation managed to convince itself that its programmatic objectives were being met, even as the mullahs came to believe that collaborating with a secular human rights organisation did *not* amount to an existential constitutional threat.

Conclusion

Malaysia's Faith Rehabilitation Centres are vilified, both by human rights advocates (who see them as an obnoxious constraint on private religious belief) and by con-servative Muslim clerics (who see them as encouraging, or at least allowing, apostasy). The American programme described above has also faced pointed criticism, both on the part of secular donors (who object to the role of mullahs in delivering a women's rights agenda) and on the part of Muslim clerics (who worry that a 'foreign' organization is using local mullahs to dismantle gendered Muslim norms).

Moving away from its *non-establishment* principles in the direction of its partners' *establishment* principles, however, the American organisation discovered that, even in the case of women's rights, it may be possible to have its human rights 'content' *without* direct control over the language adopted by local mullahs. And, of course, lawmakers in Negeri Sembilan found that it may be possible to 'Islamise' the process of apostasy in ways that 'permit' individual freedom of conscience.

In both cases, the most important risk—namely, the risk of existential political subversion—was avoided.

Apostasy is interesting because, although it appears to unfold at the level of individual belief, it is, in fact, closely related to the possibility of mass conversion and, thus, the possibility of political subversion. Apostasy is interesting because,

politically, individual consciences *always* stand in for domestic (and international) pressures that threaten an existing constitutional order. The existing constitutional order may involve specific forms of 'establishment'. It may involve principles of 'non-establishment'. The question is never *whether* subversion will be regulated. *The question is simply how.*

It may be that refusing to work with religious groups in established religious states illicits greater concerns about U.S. involvement in those places—concerns about 'subversion' that limit America's ability to press for the advancement of human rights.

7

The role of the European Parliament in helping to protect freedom of religion or belief via the EU's external relations

DR. CORNELIS (DENNIS) DE JONG[76]

Introduction

Before my election as a Member of the European Parliament, in 2009, I worked in the Netherlands Ministry of Foreign Affairs as Special Advisor on Human Rights and Good Governance. One of my main responsibilities was to help in addressing issues relating to religion or belief. This concerned not only the protection of freedom of religion or belief as part of the Netherlands' external human rights policies, but also the formulation of policies addressing religious tensions in the world, either through specific diplomatic initiatives, or as part of development co-operation. This meant, for example, that I was fully involved in the diplomatic efforts to reduce tensions in the Islamic world following the issuing of the film Fitna by the Dutch MP Geert Wilders. I also set up the Knowledge Forum on Religion and Belief and Development, which was aimed at bringing together the expertise of NGOs and the ministry concerning the actual and potential role of religious and belief institutions in development and peace-building.

During my time at the Foreign Office, I noticed that it is sometimes difficult for diplomats to remain objective in matters relating to religion or belief. This is the case for those who adhere to a specific religious belief and may be tempted to focus on violations of the freedom to manifest that belief, whilst ignoring violations against members of other religions or beliefs. It is also true of those who view religion as something of the past and have adopted non-theistic or even atheistic beliefs. They are entitled to their point of view, but they will have to bear in mind that according to the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[77], 'religion or belief for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed'. In both instances it is important to realise that, according to the UN Human Rights Committee[78], freedom of religion or belief protects the freedom to manifest theistic, non-theistic and atheistic beliefs. Thus, international human rights standards

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77. Proclaimed by GA Res. 36/55 of 25 November 1981.

78. Paragraph 2 of General Comment No. 22 (CCPR/C/21/Rev.1/Add.4).

prescribe even-handedness, while leaving no room for bias based on any personal views or beliefs.

In the context of classical human rights policies, the principle of even-handedness is perhaps still generally accepted within the various ministries of Foreign Affairs. It becomes more complicated when the question is raised as to whether religious institutions should be seen as important partners for the promotion of human rights, good governance and development more generally. Many fear privileged treatment of religious institutions or stereotyping groups in societies along religious lines. However, religious institutions tend to have wide, long-standing networks covering regions that are less accessible for embassies, and thus they can provide embassies, especially in developing countries, with important information on development issues especially regarding these less accessible regions. It is also well known that after a peace settlement has been negotiated, the international community often leaves the country entirely or at least partially. Religious institutions can then provide for the necessary follow-up action, in particular through targeted reconciliation efforts. Thus, it is important to keep relations open, not in order to privilege religious institutions, but rather to take advantage when partnerships can bring mutual benefits. That is precisely what we tried to establish with the Knowledge Forum on Religion and Belief and Development.

The first steps towards a group of like-minded MEPs

I. *Role of the European Parliament with respect to the EU's external relations*

Although with the entry into force of the Lisbon Treaty, the European Parliament obtained many new powers, this did not apply to the EU's external policies, which remain largely the prerogative of Member States. However, in the same manner that co-operation between Member States has steadily increased in this area, so too has the dialogue between the Council, the European External Action Service, and the Commission and the European Parliament.

The European Parliament has adopted numerous resolutions with regard to external human rights policies. Moreover, the Parliament must agree to the budget lines relating to co-operation with third countries, and does not hesitate to make its support conditional upon specific requirements regarding, inter alia, the human rights dialogue with these countries. Finally, the Parliament also maintains its own external relations with parliaments in third countries.

Although – also for me personally – there are many other competing policy areas requiring attention, I have always held the view that the combination of the, albeit limited instruments for the Parliament to exert influence over the EU's external relations, and my own expertise could perhaps make it possible to build on the Dutch practices and especially make the EEAS fully prepared for dealing with issues of religion or belief in the context of foreign and development policies.

II. *Building a coalition of like-minded MEPs*

Within the European Parliament, there already existed several groups dealing with religion or belief. A number of MEPs were working on initiatives focusing in particular on the protection of Christians world-wide. Another group of MEPs developed itself as a watchdog to promote separation of Church and State at EU level. However, in 2009 no group of MEPs existed yet concentrating on the protection of all religions or beliefs.

Against this background, I started with the organisation, in 2009, of a special 'event' on freedom of religion or belief and the EU's external policies. With the help of the Spanish Presidency and a

number of other representatives from Member States' Foreign Offices, we engaged in a lively debate on the need for EU guidelines on the protection of the freedom of religion or belief. Such guidelines could help in defining when the EU should take action in the case of violations of this freedom. It was a useful and constructive debate, in which not only many NGO-representatives participated, but also a number of interested MEPs.

By organising such an event and by carefully noting which MEPs are taking part either themselves or through their assistants, one gets to know one's potential allies. Of course, I continued to organise special events, either on specific aspects of freedom of religion or belief, or on particular country situations. There were always NGOs which were able to provide me with essential information, including on useful speakers during the events.

Eventually, it was possible to find MEPs in all main groups who want to spend part of their time and energy, as well as (human) resources working on the protection of freedom of religion or belief. With this group, we developed our contacts with the EEAS and had a couple of meetings with, inter alia, the Deputy Secretary-General of the EEAS, Maciej Popowski. These meetings were constructive and provided us with better insights as to how the EEAS was dealing with the issue.

Part of this process was the elaboration of a working paper by the group of like-minded MEPs to be transmitted to the EEAS. It contained a number of recommendations for the working methods of the EEAS, as well as an Annex with the main areas or developments of concern. In that respect, our paper was, to an extent, comparable to the annual reports of the US Commission on International Religious Freedom. However, that is also where the comparison comes to a halt: unlike the USCIRF, our group did not have the capacity for thorough analyses, and all we could manage to do was to collect existing material and select a number of concrete themes that struck us as particularly worrisome.

III. *The transition from informal network to 'working group'*

We discovered that, although the relations with the EEAS remained very positive, there were limitations to what an informal dialogue can achieve. The response from the EEAS to our working document remained rather general and although we sent a follow-up request trying to get more definite answers, all we received back was the promise that the EEAS would participate in a further meeting. I can understand this: after all, our document was not officially approved by the EP, and therefore the EEAS could not do more than keep the dialogue informal and its responses less formal than might otherwise have been the case.

This year, I consulted all members of the group, trying to find common ground for a certain degree of formalisation of our work. In this respect, it was important that, during his visit to the EP, the then-chair of the USCIRF, Mr. Leonard Leo, told me that USCIRF was looking to networks like ours. For example, in the German Bundestag a similar network exists and USCIRF considers this to be one of their counterparts, as an official Commission like in the USA does not exist anywhere in Europe. It would only be logical to liaise in a comparable manner as EP-network with USCIRF.

On 17 December 2012, the 'working group on the protection of freedom of religion or belief' was launched in presence of the EU Special Representative on Human Rights, Mr. Stavros Lambrinidis. In this way, the network has become more visible, both inside and outside the Parliament, and already many MEPs and NGOs have indicated their interest in working with the network. In order to embed our work in the EP's general work on human rights, it is important that the network contributes to the work of the Sub-Committee on

Human Rights (DROI), which is responsible for the (external) human rights reports of the EP. After a very positive meeting with the chair of DROI, we concluded that it is possible to contribute to the EP's annual reports on human rights. By collecting information throughout the year and submitting this to the Rapporteur, preferably when s/he is still in the process of drafting the report, it should be possible to include in these reports a specific chapter on the protection of freedom of religion or belief. This way, the dialogue with the EEAS will become more formal, as we can refer back to a text adopted by the EP as a whole. Finally, we shall also try to incorporate specific declarations to be added to the budget lines on external relations. For example, in the context of an external agreement with a specific country, we can emphasize that the human rights dialogue should concentrate on certain concerns we may have regarding the protection of the freedom of religion or belief.

In January 2013, we shall present a working programme for 2013, which will consist of a range of events, of submissions to DROI, as well as of contributions to the discussions on the budget of the EU.

Guidelines

From the very beginning, the network recommended to the EEAS to write draft guidelines on the protection of freedom of religion or belief. One of the main characteristics of this freedom is its many possible forms of manifestation. In a way, one could argue that freedom of religion or belief can be seen as the litmus test for the protection of all human rights, since, for example, freedom of expression, and freedom of assembly and of association are in a specific way part of the freedom of religion or belief, as are many other individual human rights. The international human rights treaties recognise not only the right to have or to change one's religion or belief, but also the right to manifest it both in public and in private. The right to build a church, temple or mosque are just as much part of the freedom of religion or belief, as the right to write and acquire materials relating to one's religion or belief, and the right to wear religious apparel. Unlike the forum internum (the right to have or to change one's religion or belief), the external manifestations (the forum externum) are not absolute rights. They may be limited, but only in accordance with the strictly worded limitation clauses of these treaties.

There are therefore two main challenges for diplomats who want to be active in protecting the freedom of religion or belief: the rich variety of manifestations, and the fact that certain limitations of the freedom to manifest may be legitimate, whereas others are clear violations of international human rights law. For the European Union to take action, a certain degree of seriousness must exist. This requires (1) evidence that the freedom has been limited, (2) that this was not in conformity with the requirements laid down in the grounds of limitation, and (3) that it does not concern an isolated case, but that there is a pattern of violations, for which the government can be held responsible, either because it is involved in the violations itself, or because it has been negligent in preventing them, in protecting the believers and in prosecuting the perpetrators.

Guidelines are essential in setting priorities. It is possible to describe the type of violation and the type of pattern that must lead to EU action. It will be more difficult to describe in detail which limitations will be permissible. This depends very much on the specific circumstances and even amongst Member States there are differences: for example, some Member States see no harm in prohibiting the wearing of a burqa in public, while other Member States are of the opinion that such a general prohibition would constitute a violation of the right to wear religious apparel. It is clear that EU actions should not concern cases in which one can

have differing opinions on their permissibility. The guidelines should concentrate on serious and persisting violations of the freedom of religion or belief. For example, the systematic discrimination against certain religious minorities calls for EU action, as does the deliberate destruction of religious buildings and sites.

Although originally, the draft guidelines were to be published for consultation in 2012, this has not yet happened. A previous version had been informally shared by the EEAS with the Parliament's Secretariat and members of the working group had already been asked to prepare their comments by the Bureau of DROI. However, it soon transpired that this version had been considered overly-long and that the EEAS was already working on a shorter version. Although the working group was impressed with the efforts undertaken, it also noted that the guidelines failed to indicate 'red lines' for embassies and delegations, i.e. the type of violations which require immediate diplomatic action. In an even shorter version this may become yet more difficult, but without such clear markers, the guidelines risk having no practical effect. As soon as the draft guidelines are available, the working group will draw up comments, specifically focusing on this question.

Focal point

Apart from the call for guidelines, the network has also asked EEAS to make at least one of their officials responsible for matters relating to religion or belief. Such a focal point could help in co-ordinating the various activities, not only in respect of human rights policies, but also as far as the role of religious institutions in third countries are concerned. As pointed out above, the role of such institutions in reconciliation efforts, in the promotion of good governance (anti-corruption) and in development as a whole cannot be overestimated.

Although originally we were seriously concerned with the fact that it took a long time before a crucial vacancy within the EEAS was filled and desk work could be stepped up within that service, more recent developments are promising. The vacancy has been filled, the EEAS has become much more active and the Special Representative for Human Rights of the EEAS takes a personal interest in the matter. Thus, the working group is confident that under his guidance, the idea of a focal point may be further explored.

We also hope that the inclusion of a special chapter on freedom of religion or belief in the EP's annual report on human rights will lead to a permanent dialogue with the EEAS on our main concerns. Now that the structure is in place, we must move on to the work on the ground. By collecting information in an ever more professional manner, we should, like the USCIRF, be in a position to have a meaningful dialogue on country situations and on developments of concern.

Conclusion

It always takes a long time to master the procedures in Brussels. However, by building a non-partisan coalition, individual MEPs can exert sufficient influence to make things move. Within the EP, the various tendencies described above will continue to exist. Some MEPs will remain especially concerned with the plight of Christians, and considering the ever more difficult situation for these groups in parts of the world, it is legitimate to include their concerns in our work. However, we shall have to remain even-handed, as has also been expressed by DROI as one of its main concerns. Persecution of religious minorities needs to be dealt with, irrespective of the religion or belief concerned. On this basis, the network is convinced that it will be possible to continue to find common ground and to make progress in furthering the protection of freedom of religion or belief world-wide.

8

The European External Action Service and Freedom of Religion or Belief

JEAN BERNARD BOLVIN[79]

Introduction

It is not that often that scholars, diplomats, members of parliament, religious leaders and practitioners are able to share views on Freedom of Religion or Belief (FoRB). I welcome this opportunity which is a perfect occasion to have a look at FoRB from different angles. The EEAS has developed activities in the field of FoRB, in line with the overall EU engagement on this issue. As regards to some of the views expressed earlier during this workshop, even though not directly linked to the EU's action, I would like to make the point that the EU is not promoting any "hidden agenda" in defending and promoting FoRB worldwide. And I am really confident that the EU, while enhancing work on this fundamental right, is far from being engaged in any "self-satisfactory exercise".

79. Desk Officier, Human Rights Policy Instruments Unit, European External Action Service. This presentation was made in a personal capacity of the author and does not reflect the position of the European Union, the European Commission or the European External Action Service

The rise of religious intolerance and the EU action

Over the last few years, as the world witnessed a surge of acts of religious intolerance and discrimination, as epitomised by violence and terrorist attacks in various countries, such as Egypt, Iraq, Nigeria, or many other countries, the EU has been increasingly dedicated to the promotion and protection of FoRB. This freedom protects the right to have theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion. It also covers the right to adopt, change or abandon one's religion or belief of one's own free will. The EU takes the view that freedom of religion or belief is a fundamental right to which everyone is entitled, outside and within the EU, and that the defence of such universal principles is essential to the development of free societies. It has to be made clear though that the EU does not associate itself with any specific religion or belief: all must be treated in an indiscriminate manner, everywhere.

Discrimination based on religion or belief is a long-lasting concern in all regions of the world, and persons belonging to particular religious communities continue to be targeted in many countries. Moreover, legislation on defamation of religions has often been used to mistreat religious minorities and to limit freedom of opinion and expression as well as freedom of religion or belief itself, two fundamental freedoms which are intrinsically linked. Freedom of expression also plays an important role in the fight against intolerance.

In line with previous Council conclusions of 16 November 2009[80], the Foreign Affairs Council adopted conclusions on 21 February 2011[81] reaf-

80. See 2973rd General Affairs Council meeting *Council conclusions on freedom of religion or belief,* , Brussels, 16 November 2009, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/111190.pdf

81. See 3069th Foreign Affairs Council meeting, *Council conclusions on intolerance, discrimination and violence*

firming the EU's strong commitment on FoRB, and recalled that it needed to be protected everywhere and for everyone. They stressed the fact that it is the primary duty of States to protect their citizens, including persons belonging to religious minorities, as well as all people living in their jurisdiction, and safeguard their rights. All persons belonging to religious minorities should be able to practice their religion and worship freely, individually or in community with others, without fear of intolerance and attacks.

Subsequently, the EU reminded all EU Delegations that they had, alongside with Member States diplomatic missions, a crucial role to play in making tangible positive impact as regard respect for FoRB in third countries where this fundamental human right is violated or challenged.

EU Delegations were therefore formally asked to conduct actions to raise awareness among EU diplomats on the issue, to engage with the authorities of partner countries on a systematic manner on FoRB, especially those where it is seen as a major issue, and to develop contacts with local human rights defenders working on such rights. Delegations have since then been engaged in close monitoring of restrictions to FoRB in their respective host countries. Their assessments of the local situations, provided on more than 100 countries, are being currently updated under the Human Rights Country Strategies framework.

Over the last years, the EU also made an increased use of existing tools at bilateral and multilateral levels to more effectively promote and protect freedom of religion or belief. The ad hoc Council Working Group on Human Rights Task Force on FoRB carried on supporting the implementation of the EU's enhanced actions and helped to develop guidance for the use of the EU diplomats.

on the basis of religion or belief, Brussels, 21 February 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/119404.pdf

The topic has been included in the human rights training provided to the EU staff.

In relations with non-EU countries, freedom of thought, conscience and religion has been systematically raised with a high number of interlocutors at different levels of political dialogue, including in human rights dialogues and consultations.

The EU has engaged bilaterally with various countries on the crucial importance of this universal human right, and explored possibilities of further cooperation, including at the multilateral fora. Under these dialogues the EU has voiced its concerns regarding the implementation of this right and the situation of religious minorities. Whenever prompted by serious violations and concerns regarding religious freedom and related intolerance and discrimination, the EU has expressed its views via diplomatic channels, public statements and Council Conclusions. It has continued to advocate full respect for the freedom of thought and conscience, in line with international standards. Furthermore, the current process of establishing country human rights strategies will allow to focus EU action and attention in countries where FoRB is a priority.

EU action has also concerned the multilateral level, notably in the Human Rights Council in Geneva and at the United Nations General Assembly in New York. Priority was given to the consolidation of the consensus on the need to fight religious intolerance, whilst avoiding the concept of defamation of religion to be claimed as a human rights standard. Such a notion, which aims at protecting religion in itself rather than persons discriminated because of their religion or belief is detrimental to other core human rights, such as freedom of expression.

At the 16th session of the Human Rights Council, in march 2011, an important breakthrough was achieved with the adoption by consensus of reso-

lution 16/18: for the first time, the Organization of Islamic Cooperation (OIC) did not include the concept of defamation of religion in its resolution, now entitled "*Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against persons based on religion or belief*"[82]. Efforts by Pakistan and the United States of America, with active EU support, were instrumental in achieving this result. The traditional EU resolution on freedom of religion or belief was also adopted without a vote (resolution 16/13)[83].

High Representative and Vice-President of the Commission Catherine Ashton and several Foreign Affairs ministers from EU Member States joined the Istanbul meeting (launching the so called "Istanbul process") convened in June 2011 by the OIC and the USA on the fight against religious intolerance, whose objective was to consolidate the gains obtained in Geneva in view of the forthcoming 66th session of the United Nations General Assembly. The OIC/USA Co-Chairs communiqué called for implementation of resolution 16/18 whilst referring also to the other resolutions on FoRB adopted by consensus.

At the UNGA 66th session, the EU aimed at consolidating achievements of previous years regarding its own resolution on the elimination of all forms of intolerance and of discrimination based on religion or belief and, at the same time, ensuring confirmation of the consensual approach taken by the OIC in Geneva. Such objectives were met with the adoption without vote on 19 December 2011, of EU sponsored resolution 66/168, and of OIC sponsored resolution 66/197 on combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief[84].

Last but not least, the Foreign Affairs Council adopted on 25 June 2012 the EU Strategic Framework on Human Rights[85], along with its Action Plan: the elaboration of EU guidelines on freedom of religion or belief is one of its early deliverables. Such guidelines, which should be adopted in the course of 2013, are not legally binding, but they represent a strong political signal that these issues are priorities for the Union. They will consist in messages, practical instructions and guidance to EU and Member States staff in diplomatic postings and in headquarters on how to assess situations and to engage in the most pragmatic way.

EEAS action from an "American perspective"

I would like to address a few points made by Knox Thames in his working paper published by ReligioWest[86]. The observations he made "from an American perspective" on the EU approach, notably regarding advancing FoRB through the new set of EU guidelines, are highly valuable. On the "Czar" on religious freedom within the EEAS that he is calling for, I would like to point out that, with the recent nomination of Stavros Lam-

82. UN Human Rights Council, *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief : resolution / adopted by the Human Rights Council*, 12 April 2011, A/HRC/RES/16/18, available at: http://www.unhcr.org/refworld/docid/4db960f92.html

83. UN Human Rights Council, *Freedom of religion or belief : resolution / adopted by the Human Rights Council*, 12 April 2011, A/HRC/RES/16/13, available at: http://www.unhcr.org/refworld/docid/4db95c7c2.html

84. This approach was upheld in March 2012 in the 19th session of the Human Rights Council and in December 2012 in the 67th session of the UNGA.

85. The full text of the EU Strategic Framework on Human Rights is available here: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

86. See Knox Thames, *Making Freedom of Religion or Belief a True EU Priority*, EUI Working Papers, RSCAS 2012/41, July 2012, available at: http://www.eui.eu/Projects/ReligioWest/Documents/workingpaper/RSCAS2012-41.pdf

brinidis as EU Special Representative on Human Rights (EUSR), such an expectation might have been fulfilled, even though the EUSR's mandate covers a wide range of issues, including FoRB. On the "clear strategy" regarding the guidelines and their content, work is underway within the EEAS to make sure that the guidelines are as inclusive as possible. They will of course address both aspects of FoRB (*forum internum* and *forum externum*). On the funding, I have to say that it is the EU's intention to enhance support to projects promoting tolerance and dialogue through training and awareness raising on FoRB, notably through the European Instrument for Democracy and Human Rights (EIDHR). The EIDHR already funds projects related to FoRB worldwide. A specific call for proposals will be launched in spring 2013, on projects related to the promotion and defence of this fundamental freedom. The new draft EIDHR Regulation for 2014-2020 includes specifically the issue of Freedom of religion or belief as a priority issue to be referred to in the answers to calls for proposals.

Conclusion

The work conducted by the EEAS over the last month on the elaboration of FoRB guidelines is definitely in line with the EU's dedication to the defense and promotion of FoRB over the last years. It is a clear sign of the crucial importance that the EU attaches to upholding such a fundamental freedom. In doing so, the EU is not promoting "occidental" values, but emphasizes the universality of such a right, which should be equally enjoyed in all parts of the world.

NB: The EU guidelines on the promotion and protection of freedom for religion or belief have been adopted by the EU Foreign Affairs Council on 24 June 2013, after a consultation process which involved relevant civil society organisations, including religious, philosophical and non confessional ones. The guidelines have also been discussed with the European Parliament and with international organisations (OSCE/CoE/UN).

9

The United States' Approach to Promoting International Religious Freedom: the 1998 International Religious Freedom Act

ELIZABETH K. CASSIDY[87]

Introduction

In October 1998, the U.S. Congress passed and President Bill Clinton signed into law the International Religious Freedom Act, or IRFA, which seeks to make religious freedom a higher priority in U.S. human rights policy. As more fully described below, the law established an official and office in the U.S. State Department to focus on religious freedom abroad; mandated the State Department to report annually on the issue; required the executive branch to designate egregious religious freedom violators and seek improvements in those countries; and created an independent, bipartisan advisory commission on the issue, the U.S. Commission on International Religious Freedom (USCIRF).

Congress ultimately adopted IRFA nearly unanimously, but there were serious divisions during its drafting and consideration, and the law that emerged was not what originally was proposed. One major issue involved how much discretion the law should afford the executive branch. One side of this dispute feared too much legislative interference in the executive branch's foreign policy power, while the other believed the executive branch, particularly the State Department, would not address religious freedom without outside pressure. USCIRF's creation was an effort to reconcile these two views: the Commission was created to be a watchdog over the executive branch's implementation of IRFA (which provided more discretion than the second camp wanted), as well as a think tank to develop new, but non-binding, policy ideas.

Some critics of IRFA incorrectly claim that it favors Christians and seeks to promote Christianity. This misperception is based on the role of Christian activists in seeking legislation and the fact that the initial, House bill – commonly referred to as "Wolf-Specter," and which would have been called "the Freedom from Religious Persecution Act" – focused on the persecution of certain specified groups, particularly Christians, Tibetan Buddhists, and Baha'is, by Islamic and Communist governments. However, the bill that Congress passed, President Clinton signed, and the U.S. government has been implementing for the past 14 years was not Wolf-Specter, but rather a Senate bill – "Nickels-Lieberman," or "the International Religious Freedom Act" – which focuses on the internationally-guaranteed right to freedom of religion or belief for everyone, everywhere.[88]

87. Deputy Director of Policy and Research, U.S. Commission on International Religious Freedom. The views expressed here are my own and may or may not reflect the views of the Commission.

88. For a detailed description of the legislative history of IRFA, see T. Jeremy Gunn, "The United States and

I. IRFA's Principal Provisions

Within the executive branch, IRFA created the position of Ambassador at Large for International Religious Freedom (a political appointee nominated by the President and confirmed by the Senate), to head an international religious freedom office at the State Department. It mandated the State Department to prepare an annual report on religious freedom conditions in each foreign country, in addition to the department's annual human rights report. And it required the President – who has delegated this power to the Secretary of State – to designate as "countries of particular concern," or CPCs, those countries whose governments either engage in or tolerate "systematic, ongoing, egregious" violations of religious freedom, and to take action to encourage improvements in those countries. A variety of actions is available from which to choose, from negotiating a bilateral agreement to imposing sanctions to issuing a waiver. It also mandated training on religious freedom for State Department foreign service officers and U.S. immigration officials, and included religious freedom as an element of U.S. foreign assistance, cultural exchange, and international broadcasting programs.

Outside the executive branch, IRFA created USCIRF, an independent advisory body mandated to review religious freedom conditions globally and make recommendations for U.S. policy to the President, Secretary of State, and Congress, including recommending countries for CPC designation. Although a government entity, USCIRF has no policy-making power. All USCIRF policy recommendations, including CPC recommendations, are non-binding, though over the years the executive branch and Congress have chosen to adopt some of them.

USCIRF is led by nine part-time Commissioners appointed by the President and the leadership of both political parties in both houses of Congress. Three Commissioners are appointed by the White House (with no requirement of Senate confirmation), three by House leaders, and three by Senate leaders, under a formula such that five Commissioners are appointed by the President's party and four by the other party. The State Department's Ambassador at Large for International Religious Freedom also serves *ex-officio* as a non-voting Commissioner. USCIRF has a full-time, nonpartisan professional staff of 14, of whom 7 are responsible for research and policy analysis.

USCIRF Commissioners are private citizens who serve as volunteers. They are appointed for two years and can be reappointed – subject to, as of 2012, a two-term limit. According to IRFA, Commissioners are to be "selected among distinguished individuals noted for their knowledge and experience in fields relevant to the issue of international religious freedom, including foreign affairs, direct experience abroad, human rights, and international law." Over USCIRF's life, Commissioners have come from a wide range of professional and religious backgrounds.

To carry out its work, USCIRF Commissioners and staff travel, hold hearings and events, meet with a variety of interlocutors, conduct research, testify before Congress, speak to the public and the press, and issue written reports and other documents. We gather information from a wide range of sources including U.S. and foreign officials, international and regional organizations, human rights organizations, religious organizations, and academic and policy experts.

USCIRF presents its findings and recommendations in an annual report, which is issued by May 1 of each year, and in other publications through-

the Promotion of Freedom of Religion or Belief", see supra at 59.

out the year, all of which are available at www.uscirf.gov. USCIRF's annual reports focus on the countries it recommends for CPC designation or believes are close to the statutory CPC threshold, as well as the U.S. executive branch's implementation of IRFA, U.S. asylum policy, and religious freedom issues at the United Nations and Organization of Security and Cooperation in Europe (OSCE).

To ensure bipartisanship, IRFA requires a quorum of six voting Commissioners to conduct USCIRF business. This includes determining countries and issues to address, approving travel, and approving recommendations, reports, and other publications. Commissioners generally have sought to reach their decisions by consensus, knowing that USCIRF's recommendations will be more persuasive with bipartisan support. In the event of disagreements, IRFA expressly allows any Commissioner(s) to issue individual or dissenting statements, which are designated as such.

II. Religious Freedom Violations under IRFA

IRFA defines violations of religious freedom as "violations of the internationally recognized right to freedom of religion and religious belief and practice" as articulated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Helsinki Accords, and other international instruments. Under these instruments, respecting religious freedom is not only a matter of protecting the freedom of religious communities, as groups, to engage in worship and other collective activities. It also encompasses the freedom of every individual to hold, or not to hold, any religion or belief, as well as the freedom to manifest such a religion or belief through worship, practice, teaching, and observance, broadly construed, subject to only specified, narrow limitations. Religious freedom also is closely related to the freedoms of expression, association, and assembly, as well as protections of equality and against discrimination.

The meaning of "religion or belief" is broad, and includes theistic, non-theistic, atheistic, agnostic, syncretic, "traditional," "new," favored, and disfavored beliefs alike, as well as no religion or belief at all. USCIRF's reporting reflects this broad scope. For example, we have documented violations against and advocated for the religious freedom rights of Muslims, Christians, Buddhists, Hindus, Sikhs, Baha'is, Jews, Mandaeans, Yazidis, Falun Gong, Hoa Hao, Cao Dai, Scientologists, adherents of folk religions, atheists, and secular individuals, among others, in the various countries on which we report.

As previously mentioned, IRFA requires USCIRF to recommend and the U.S. executive branch to designate "countries of particular concern," or CPCs. CPCs are those countries whose governments either engage in or tolerate "systematic, ongoing, egregious" violations of religious freedom, which IRFA further defines as including "(A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons." In determining whether to recommend CPC designation for a particular country, we first collect information as to the religious freedom violations that are occurring in that country, and then assess whether those violations meet the "systematic, ongoing, egregious" standard. This is an exercise of legal, not scientific, analysis, and different individuals sometimes come to different conclusions.

There currently are eight CPCs designated by the Secretary of State on behalf of the President; the most recent designations were made in September

2011. USCIRF agrees with these designations, and in its 2012 annual report recommended that eight other countries also should be CPCs. Table 1 at the end of this paper show the State Department's CPC designations, USCIRF's CPC recommendations, and the countries on USCIRF's "Watch List," where the violations engaged in or tolerated by the government approach, but do not meet, the CPC standard. Table 2 shows the actions that the State Department has taken pursuant to IRFA in the countries that it has designated as CPCs.

Thus far, the impact of the CPC mechanism has been mixed, with the most progress occurring the first time a country receives a designation or recommendation. The State Department's initial CPC designations of Saudi Arabia and Vietnam and USCIRF's initial CPC recommendations for Turkmenistan and Nigeria did produce some positive changes in those countries. Yet Saudi Arabia remains a State Department CPC, and all four remain among USCIRF's CPC recommendations. The eight countries currently on the State Department's CPC list have been so designated for years.[89] The U.S. Government Accountability Office, another Congressionally-created watchdog agency, currently is conducting a study into the IRFA mechanisms' effectiveness. It will be interesting to see their conclusions regarding IRFA's impact.

Of course, countries on the State Department's and USCIRF's lists are not the only countries in the world where religious freedom violations occur, and a country's absence from USCIRF's annual reports does not mean that it has no religious freedom problems. With USCIRF's current size and structure, we have been able to address some 25 to 30 countries in each of the past few years' annual reports (a large increase from USCIRF's first several annual reports, which covered fewer than 10). The State Department's annual international religious freedom report does include all countries.[90]

III. Examples of USCIRF's Work

The following are some examples of USCIRF's work on a range of countries and issues:

- USCIRF worked for a number of years with the State Department, members of Congress, and NGOs to increase opposition to the flawed "defamation of religions" resolutions at the UN.[91] In March 2011, the "defamation" resolutions were replaced with UNHRC Resolution 16/18, a positive approach that focuses on fighting religious intolerance, discrimination, and violence without restricting speech.
- USCIRF also has worked to raise awareness among non-governmental organizations (NGOs) about UN mechanisms that provide venues for civil society advocacy on religious freedom issues, such as the Universal Periodic Review process and the mandate of the Special Rapporteur on Freedom of Religion or Belief, including by holding roundtables with and briefings for interested NGOs.
- For years, USCIRF called attention, including at high levels of the U.S. and Saudi governments, to the plight of Hadi al-Mutif, an Ismaili Muslim jailed for apostasy in 1994. He was finally pardoned by King Abdullah and released in early 2012. Over the years, USCIRF also has helped

89. Burma, China, Iran, and Sudan have been State Department CPCs since 1999; North Korea since 2002; Eritrea and Saudi Arabia since 2004; and Uzbekistan since 2006. Since IRFA's inception, two countries have been placed on the State Department's CPC list and later removed: Iraq (1999-2002) and Vietnam (2004-2005). In addition, the Taliban regime of Afghanistan and the Milosevic regime of the Serbian Republic of Yugoslavia were designated by the State Department as "particularly severe violators" for several years but removed after those regimes fell (1999-2002 for the Taliban regime, and 1999-2000 for the Milosevic regime).

90. See http://www.state.gov/j/drl/irf/rpt/index.htm.

91. See http://www.uscirf.gov/issues/defamation-of-religions.html

secure the release of other religious prisoners, including in Turkmenistan, Pakistan, Afghanistan, and Vietnam, sometimes through public advocacy and sometimes through behind-the-scenes work.

- Based on a USCIRF recommendation, Congress included language imposing targeted sanctions on human rights and religious freedom violators in the 2010 Iran sanctions act. This was the first time Iran sanctions ever specifically included human rights violators. President Obama has now imposed such sanctions (visa bans and asset freezes) by executive order on 13 Iranian officials, including 8 identified as egregious religious freedom violators by USCIRF.
- Also based on a USCIRF recommendation, the Senate included Chechen President Ramzan Kadyrov on the list of gross human rights violators in the Sergei Magnitsky Rule of Law Accountability Act, which imposes U.S. visa bans and asset freezes on designated Russian officials. Kadyrov has engaged in abuses against Muslims and has been linked to politically-motivated killings.
- USCIRF successfully urged the State Department to revoke a tourist visa it had granted to Narendra Modi, Chief Minister of the Indian state of Gujarat, in 2005. A provision that IRFA added to the U.S. Immigration and Nationality Act makes inadmissible to the United States foreign government officials who were responsible for or carried out particularly severe violations of religious freedom. Modi has been implicated for failing to act to stop Hindu mob violence in his province in 2002 that killed thousands, mostly Muslims.
- USCIRF has highlighted the problem of religious intolerance in several countries' education systems. After a USCIRF report documenting hateful language in Saudi government textbooks,[92] some of the passages that promoted intolerance and incited violence were removed. More recently, USCIRF issued a study examining how Pakistan's secular and religious education systems teach about religious minorities.[93] The study examined textbooks in all four provinces and leading madrassas, as well as conducted teacher and student interviews, and found that intolerance is taught in Pakistani schools. It has become a frequently-cited reference documenting this problem.
- USCIRF produced a study compiling and analyzing the constitutional provisions regarding religious freedom and the religion-state relationship in countries that are members of the Organization of Islamic Cooperation – first issued in 2005 and updated this year – as part of efforts to advocate for strong religious freedom protections in the new constitutions of Afghanistan, Iraq, and now the Arab Awakening countries.[94]
- USCIRF conducted a major research study into the U.S. government's treatment of asylum seekers that found serious flaws placing asylum seekers at risk of being returned to countries where they could face persecution, as well as concerns about detention conditions.[95] The

92. See press release available at: http://www.uscirf.gov/news-room/press-releases/2206.html.
93. See USCIRF, *Connecting the dots: Education and Religious Discrimination in Pakistan. A Study of Public Schools and Madrassas*, 2011, availiable at: http://www.uscirf.gov/reports-and-briefs/special-reports/3660.html
94. See http://www.uscirf.gov/issues/muslim-constitutions.html
95. See http://www.uscirf.gov/issues/asylum-a-refugees.html Under a process called "Expedited Removal," U.S. immigration officials are empowered to summarily return people arriving in the United States without proper documentation to their country of origin. As part of this process, asylum seekers (who often do not have proper documents) are detained while a determination is made if they have a "credible fear" of persecution. If credible fear is found, the case is sent to an immigration judge, and the asylum seeker may be

study, which was issued in 2005, made a series of recommendations to the responsible agencies in the Departments of Homeland Security and Justice. The Department of Justice promptly implemented the recommendations, but the Department of Homeland Security (DHS) did not. USCIRF continues to engage with DHS agencies regarding recommended reforms. In early 2009, DHS announced detention reforms that would address some of USCIRF's concerns, and we are now working on a report assessing the implementation of those reforms.

- USCIRF also has funded innovative research through a fellowship program.[96]

paroled while the case is pending. However, if credible fear of persecution is not found, the asylum seeker is put back in the Expedited Removal process and removed promptly.

96. See http://www.uscirf.gov/about-uscirf/fellowships.html

Table 1: 2012 CPC and Watch List Countries

Countries Designated as CPCs by the Department of State	USCIRF Recommendations for CPC Designation	USCIRF Watch List Countries
Burma	Burma	Afghanistan
China	China	Belarus
Eritrea	Eritrea	Cuba
Iran	Iran	India
North Korea	North Korea	Indonesia
Saudi Arabia	Saudi Arabia	Laos
Sudan	Sudan	Russia
Uzbekistan	Uzbekistan	Somalia
	Egypt	Venezuela
	Iraq	
	Nigeria	
	Pakistan	
	Tajikistan	
	Turkey	
	Turkmenistan	
	Vietnam	

Table 2: Actions Taken Under IRFA

The following Presidential actions under section 402(c)(1) of IRFA were approved by Secretary Clinton on August 18, 2011

Burma	The existing, ongoing arms embargo referenced in 22 CFR 126.1(a).
China	The existing, ongoing restrictions on exports to China of crime control and detection instruments and equipment, under P.L. 101-246 and the Foreign Relations Authorization Act of 1990 and 1991.
Eritrea	The existing, ongoing arms embargo referenced in 22 CFR 126.1(a).
Iran	The existing, ongoing restrictions on certain imports from and exports to Iran, in accordance with section 103(b) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (P.L. 111-195).
North Korea	The existing, ongoing restrictions to which North Korea is subject, pursuant to sections 402 and 209 of the Trade Act of 1974 (the Jackson-Vanik Amendment).
Sudan	The restriction on making certain appropriated funds available for assistance to the Government of Sudan in the annual Department of State, Foreign Operations, and Related Programs Appropriations Act, currently set forth in section 7070(f) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Div. F, P.L. 111-117), as carried forward by the Full-Year Continuing Appropriations Act, 2011 (Div. B, P.L. 112-10) and any provision of law that is the same or substantially the same as this provision.
Saudi Arabia & Uzbekistan	Waived the requirements of section 405(a) of the IRF Act with respect to Saudi Arabia, and Uzbekistan, to further the purposes of the IRFA.

10

Reporting on religious freedom: the "governmental" approach and the issue of legitimacy

PASQUALE FERRARA[97]

Introduction

In the general context of a growing attention devoted to religion in world politics, religious freedom is becoming increasingly relevant. Governments are being made more and more accountable vis-à-vis the respect of religious minorities, and international organisations are more reactive than in the recent past to the obstacles and restrictions that limit the enjoyment of this fundamental freedom. If religious freedom clearly constitutes a new defining field for the advancement of human rights in relation to state behaviour, it is also becoming, with increasing saliency, an issue that challenges the traditional diplomatic manner of implementing inter-state diplomacy.

In particular, a plethora of "reports" on religious freedom are released regularly by governments, international institutions, special rapporteurs and religious bodies. In several cases, such reporting activity is realised via documents specifically and exclusively addressing religious freedom; more often, religious freedom is included in the monitoring of human rights regulations and practices at the international level. In this latter case, religious freedom is not the only and exclusive subject of the monitoring activity and it represents a sub-set of a broader reporting activity regarding human rights in general.

I. Standards, actors, legitimacy, policy

In general, there are four major issues related to reporting on religious freedom: the definition of *standards*, the nature of the *actors* involved (both as *observers* and *observed*), *legitimacy*, and the policy *consequences* (changes in bilateral and multilateral relations, "reciprocity", sanctions, travel advice).

The definition of *standards* is not an easy task. Some standards can be set against the general "codex" of human rights; other standards have a more limited focus, and relate to the respect of freedom of religion from the point of view of one specific faith. In the reporting activity on freedom of religion, the most common standard should be the principle of equality (the same set of basic rights granted to any religious organisation operating in a given *State*); in practice, what often seems to be implemented, especially in reporting activities performed by national governments or religious non-governmental organisations is what we could call the "principle of proportionality", meaning the evaluation of the distinct place and impact of the different religions and religious institutions in a *given* society.

97. Secretary General European University Institute

As far as the "observers" are involved, it is not always easy to identify them with a *specialised institution*; more often, one rather finds a set of *institutionalised practices* of monitoring religious freedom. Such practices, "institutionalised" through reiteration and internal or external legitimacy, are performed by different agencies (governments, international organisations, private or non-governmental organisations).

Legitimacy is the crucial test that most reporting activities on religious freedom fail to pass. In particular, "national" or "confessional" reports are strongly contested, whereas reporting initiatives performed by international organisations receive broader acceptance. Governmental reports are often rejected by the states considered incompliant on the grounds that the monitoring activity at the source of the criticism is unilateral, incomplete, or somewhat biased. Moreover, governmental reports on religious freedom feed a more fundamental questioning of the credibility of the observers, especially in cases where there are records of intolerance in the territory of the country responsible for the "international" reporting activity.

II. Current practices

As far as state-based monitoring is concerned, the most famous case is that of the US Commission on Religious Freedom. Under Section 102 (b) of the International Religious Freedom Act (IRFA) of 1998 the State Department Office of International Religious Freedom and its global network of Embassies have an obligation to produce an annual report on religious freedom throughout the world. The results lead to a classification of states under scrutiny. According to the categories currently used, a government may have "generally respected" the right of religious freedom or may have engaged in or tolerated "particularly severe violations" of religious freedoms (in which case it falls within the category of "countries of particular concern"). From its side, the Organisation of the Islamic Conference (an inter-governmental organisation[98]), though its "Observatory" compiles yearly a report on Islamophobia[99] covering issues such as "Incidents Related to Mosques", "Qur'an Burning" in the US, and, more generally, "manifestations of Islamophobia" in USA and in Europe. However, the report includes mentions of "constructive developments with regard to combating Islamophobia" and a direct reference to the international human rights "codex".

With regard to the engagement of private organisations and NGOs, in the "Christian" camp many agencies are active in reporting activities: for instance, "Aid to the Church in Need" (ACN)[100] regularly publishes a Report on Religious Freedom[101] and a specialised survey on the situation of Christians in the Middle East.

In the field of Hebraism, the Anti-Defamation League[102] publishes an Annual Report, the purpose of which is "combating anti-Semitism, hatred and bigotry". The mission statement of the ADL includes the following passages: "We monitor and expose online hate and anti-Semitism to make everyone aware of hidden threats. We keep government out of religion and religion out of government— and religion flourishes. Our partnerships with law enforcement help us protect against violent extremists. (….) We help combat

98. See http://www.oic-oci.org
99. Organization of the Islamic Cooperation, *Fifth OIC Observatory Report on Islamophobia*, May 2011 to September 2012, available at: http://www.oic-oci.org/uploads/file/islamphobia/reports/english/islamphobia-report-2012.pdf
100. See International website www.acn-intl.org
101. Aid to the Church in Need, *Christians and the Struggle for Religious Freedom*, 2012, available at: http://www.acnuk.org/data/files/ACN_Christians_and_the_Struggle_for_Religious_Freedom.pdf
102. See http://www.adl.org/about-adl/

global terror by connecting American and Israeli law enforcement." [103]

Legitimacy is far more accepted as a natural attribute when it comes to the monitoring activities performed by international organisations.

At international level, a UN Special Rapporteur on freedom of religion or belief[104] has been appointed by the UN Human Rights Council. His/her mandate is "to identify existing or emerging obstacles to the enjoyment of the right of freedom of religion or belief and present recommendations on ways and means to overcome such obstacles".[105]

The working method of the Special Rapporteur relies fundamentally on the cooperation of State governments, which are also his/her main interlocutors for addressing cases of violations of the right to religious freedom. In practice, the Special Rapporteur transmits appeals and letters of allegation to States with regard to cases that represent infringements of or impediments to the exercise of the right of religion and belief; he/she also undertakes fact-finding country visits and submits annual reports to the Human Rights Council and to the General Assembly.

In the EU Report on Human Rights[106] prepared by the EEAS, one paragraph of the section "Thematic Issues" is devoted to the Freedom of thought, conscience and religion or belief. However, the topic is present in several EU Parliament Resolutions, in EU Council "Conclusions" and in important speeches delivered by prominent EU institutional leaders.

In terms of policy consequences, it seems that reports originating from governmental monitoring activities are more effective. However, such a result comes at the expenses of legitimacy; one may argue that there is a clear trade-off between the wide acceptance of a report on religious freedom and the policy implications built on its conclusions. This is due, however, more to the limited supra-national powers of the international institution concerned than to the "credibility" of the report itself. In a way, "national" or intergovernmental reports are "documents with teeth", whereas international reports are "documents with trust".

III. A case study: The Italian "Observatory on Religious Freedom"

Traditionally the Italian Foreign Policy after World War II, during the Christian-Democrat led governments, has not articulated in an explicit manner the issue of religious freedom as a leading topic of international relations. This does not mean, however, that Italian foreign policy ignored the issue; rather, religious freedom was "embedded" in the Italian approach to North Africa and the Middle East, as one of the many aspects of the Italian "projection" in the Mediterranean. In this domain, Italian foreign policy was more the

103. Anti Defamation League Annual Report, *From Problem to Solutions*, 2011, available at: http://archive.adl.org/annual_report/Annual_Report_2011.pdf

104. See http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx

105. According to the Human Rights Council Resolution n.6/37, the Special Rapporteur must fulfil, among other duties, the following general goals: " (a) To promote the adoption of measures at the national, regional and international levels to ensure the promotion and protection of the right to freedom of religion or belief; (b) To identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles; (c) To continue her/his efforts to examine incidents and governmental actions that are incompatible with the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and to recommend remedial measures as appropriate; (d) To continue to apply a gender perspective, inter alia, through the identification of gender-specific abuses, in the reporting process, including in information collection and in recommendations".

106. See 2011 edition, available at: http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf

expression of complex domestic dynamics than the result of the influence of the Cold War.

At any rate, there was a mediated rather than a direct approach to religious freedom. The issue was considered a political one, to be dealt with through the traditional channels of foreign policy, rather than a subject relevant to the framework of the increasing "globalisation" and sometimes "multilateralisation" of human rights. Rather than a matter of principle, it was a question of political realism, prudent foreign policy and responsible attitude. Religious freedom was not seen as a normative question, but rather as the result of pragmatic and subtle initiatives in the bilateral relations of Italy with Middle Eastern Countries. A very different model was followed by the Italian foreign policy with the Eastern European Countries in the Warsaw Pact bloc, where the issue was considered intractable, at least until the election of Pope John Paul II.

In Africa, religious freedom often took the form of protecting Catholic Missionaries and their initiatives.

This approach was implemented rather forcefully under the Christian Democratic Governments, in particular during the era of Andreotti (who was Prime Minister, Minister of Defense, and Minister of Foreign Affairs several times from the early '70s until the early '90s).

With the end of the Cold War, religious freedom surfaced in a different way as a specific subject of foreign policy. However, within the Italian Ministry of Foreign Affairs, religions were not seen as part of the fundamental challenges of international relations until recent times. The Catholic religion was long considered an asset for the Italian Foreign Policy, since the country was inevitably regarded abroad as the host of the Vatican and home for the Holy Father. The presence of old and strong Catholic "minorities" in the Middle East and North Africa, in particular, was seen as an important tool for strengthening the role of the country in the region.

A fundamental change occurred after 9/11 and the launching of the so-called "global war on terror" during the first Presidential term of George W. Bush. The political turn to the right taken by the Italian politics with the Premiership of Silvio Berlusconi seemed to encourage a sort of neo-conservative interpretation of religion as a problem rather than as a part of the solution, with a special emphasis on radical Islam and its more violent and intolerant expressions. However, this particular approach regarding the place of religion in foreign policy was never endorsed, as such, by the Italian diplomatic service, which maintained a more realistic and concerned attitude based on the pursuit of the fundamental interests of the country in the area. The assertive tone on religious freedom often used by the Minister of Foreign Affairs Franco Frattini was, consequently, a combination of an internal and legitimate ideological agenda, a genuine concern for the respect of a fundamental human rights and an issue related to the role of Italy in the region. In this context, the narrative on religious freedom was fundamentally based upon the concept of "protecting" Christian minorities, although officially the rationale was the advancement of religious freedom as a universal value. The issue of protection was also viewed with some concern in the Vatican, since it seemed to give some foundation to the accusation that the Christians in the Middle East were acting as "foreigners", despite the fact that they had been living on the land for centuries and well before the birth of Islam. Moreover, the emphasis on religious freedom ran the risk of being counterproductive and self-defeating, insofar as there were parties in the Coalition of the centre-right (such as *Lega Nord*) that showed forms of intolerance against Muslims

and their religious practices, especially when the construction of Mosques on Italian soil was at stake. In particular, the argument of "reciprocity" (freedom of religion for the Christians in the Middle East in exchange of freedom of religion for the Muslim minorities in Europe and Italy) undermined the universality of the claim in favour of freedom of religion as a fundamental right (and, as such, not subject, by definition, to conditionality and pre-conditions).

In this context, the role played by professional diplomats was crucial to keeping the issue of religious freedom on track as a new field of the Italian foreign policy, without yielding to a faith-based diplomatic approach. The role of the Directorate for Political and Security Affairs was relevant and diplomats contributed in an intelligent manner to the aim of crafting an Italian approach to the topic in the broader framework of global human rights advocacy. Several initiatives were also taken in international fora (such as the United Nations), in cooperation with relevant partners (for instance, Spain, Jordan, and Indonesia). A good opportunity was provided by the creation, in the French Ministry of Foreign Affairs, of a special unit ("Pôle Religions") in charge of religious issues[107]. The Policy Planning Unit of the *Farnesina* decided, in turn, with the support of the leadership of the Ministry, to launch in 2009 a new domain of policy-oriented research, the general goal of which was to analyse the role of religions in international relations. It was in this broader context that the issue of religious freedom was to be addressed by Italian (professional) diplomacy, leaving the more vocal advocacy of "protection" of Christians in the Middle East to politicians. The Policy Planning Unit organizes, together with the Milan-based Italian think tank "ISPI" and the Province of Trento, an annual seminar on this topic, held in October, hosting activists, policy makers, academics and diplomats. Other events were created in cooperation with "Religions for Peace" and the European University Institute in Florence, which hosted a conference on religious freedom co-sponsored by the Italian and Spanish Foreign Ministries, with the participation of the Ministers of both countries (Franco Frattini and Trinidad Jiménez)[108]. An international workshop on "Promoting Religious Freedom and Peaceful Coexistence" was recently organised by the Italian Ministry of Foreign Affairs and ISPI[109].

Those initiatives ran in parallel with more symbolic actions sponsored by the Minister of Foreign Affairs himself. For instance, Foreign Minister Franco Frattini received on 26 January 2011 the "Italy for Asia Bibi: freedom, justice and human rights" Committee, an informal grouping of associations that has sprung up to defend Asia Bibi, the Christian Pakistani woman condemned to death for blasphemy and to the release of whom Minister Frattini was strongly committed. After the cruel assassination of the Pakistani Minister Shahbaz Bhatti, a huge banner with Bhatti's image and name was placed outside of the Italian Foreign Ministry in March 2011, to commemorate the man and to affirm the commitment of Italian diplomacy to the defence of religious freedom in the world.

For his part, Minister Terzi was very vocal in condemning the series of "hate-driven attacks" against Christians at worship in Nigeria.[110] On 27 September 2012 Minister Terzi, together with the Jordanian foreign minister Nasser Judeh, co-

107. Joseph Maïla, *Pourquoi un pôle "Religions" au Quai d'Orsay*, available at: http://www.delegfrance-conseil-europe.org/spip.php?article431

108. See Franco Frattini and Trinidad Jiménez, Frattini: "La Libertà Religiosa come questione di cittadinanza", *Avvenire*, 18/06/2011, available at: http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Interviste/2011/06/20110620_liberta_religiosa.htm

109. In Rome, 11.2.2013.

110. Press release, available at: http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Comunicati/2012/10/20121029_attentatoNigeria.htm

chaired an international conference "on civil society and human rights education as a tool for disseminating religious tolerance", in the margins of the UN General Assembly. The event aimed "to foster religious tolerance and the defence of freedom of religion and beliefs (FORB) and religious minorities". [111] 15 foreign ministers and high-level delegates participated, including the High Commissioner for Human rights, Mr. Pillay, along with 39 civil society delegations.

A more structural approach to the freedom of religion in terms of reporting activities has been recently attempted by the Italian Ministry of Foreign Affairs with the creation of an "Observatory on Religious Freedom". According to the official statement released on the day of the presentation of the initiative, "following the lead of the United States, Canada and other countries, Italy too has set up an Observatory on Religious Freedom to monitor and combat violations of religious freedom around the world, beginning with the areas at risk where religious minorities are being persecuted."[112] The Observatory was established by the Italian Minister of Foreign Affairs and the City of Rome and is run by a coordinator, the sociologist Massimo Introvigne, and four other members: two diplomats specialised in the field of Human Rights, and two representatives from NGOs. Minister Terzi and Mayor Alemanno signed a *Protocol of Understanding* at the Foreign Ministry in January 2012 to establish the Observatory.

> *"The Observatory – according to the official mission statement - was conceived in 2011 after the wave of attacks against Christian communities in the Middle East. Its aim was to create – together with our Representation to the Holy See – a body dedicated to intensifying the efforts of Italy and the international community in protecting religious minorities."*[113] *The rationale provided for the establishment of the Observatory is the following: "The promotion of religious freedom in all its forms, and the protection of religious minorities throughout the world, are a priority of Italy's foreign policy and its ethical dimension. This key strand of our country's international activities has recently gained an even higher profile in the wake of the horrific episodes of violence against Christian communities in the African continent. (…) The world looks to our capital city as a beacon of dialogue and tolerance among religious faiths; as the seat of Christianity's greatest basilica and the biggest mosque in Europe; and as the home of the world's oldest Jewish community."*[114]

However, the mission of the Observatory remains unclear. The new body is expected to collect, check and release information on violations of religious freedom in the world, but no precise indication thus far exists regarding the possible compilation of an official and public report based on input received by the Italian diplomatic network. Moreover, no direct policy consequences seem to be attached to the violation of religious freedoms, other than those possibly taken through diplomatic channels and at EU or UN level. Apparently, according to a recent statement by the coordinator, Massimo Introvigne, the role of Italy should be that of "coalition building" in order to intervene "sometimes in public, sometimes discretely" in cases where the freedom of religion

111. Press release, available at: http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2012/09/20120928_AssembleaGeneraleOnu.htm

112. Press release, available at: http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2012/06/20120622_Roma.htm

113. Press release, available at: http://www.esteri.it/MAE/EN/Sala_Stampa/AreaGiornalisti/NoteStampa/2012/07/20120717_NotaServizioNigeria.htm

114. Ibid.

is threatened.[115] The very nature of the Observatory therefore needs to be clarified. The presence of professional diplomats on the Board makes if very different, for instance, from the US Commission on International Religious Freedom, since the latter is composed of independent commissioners appointed by Congress and by the President. Diplomats should deal with religion as a fundamental matter in international relations and for the advancement of human rights; they should not be directly involved, however, in reporting activities sponsored by their governments rather than those backed by international organisations, since it is almost impossible to separate such activities from a national foreign policy agenda based both on values *and* interests.

115. Press release, available at: http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Approfondimenti/2012/06/20120622_Roma.htm

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