From Silver to Gold: The Next 25 Years of Law and Religion

The Future of Religious Liberty
“The Future Challenges of International Religious Liberty”
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In order to sketch a way forward in regard to the international protection of religious freedom, it’s important, I think, to take stock of where things are. According to Malcolm Evans, in his important volume, *Religious Liberty and International Law in Europe*, published in 1997 and briefly reaffirmed in Malcolm’s contribution to this large desk book, *Facilitating Freedom of Religion or Belief*, things do not stand in a very good position. In that desk book, he says, “The last 50 years of the 20th century have seen a diminution in the importance attached to the achievement of freedom of religion or belief both by its incorporation into the human rights canon and by the manner in which it has fared as a human right.”

And he goes on, in the book I mentioned, to speak again critically about not only the lack of accomplishment on the part of the system, but the fact that many of its fundamental commitments – he speaks of secular commitments, universalist commitments – lead in the wrong direction, from his point of view. Basically, he says at one point, there is a problem that the human rights system, as it endeavors to protect religious freedom or belief, is likely to become an oppressor of the believer rather than a protector of the persecuted.

Well, Malcolm Evans raises, I think, some very important questions. He is, after all, a specialist, not a casual outside critic of the human rights system, from whom you hear many of the similar complaints. But his comments, in my view, are unsettling. Because he is a specialist, I think it’s important to respond to him as thoughtfully as one can. Most specialists in the field, of whom I’m aware, do not attack the very foundations of the system and the premises on which it rests, but rather, they attack this or that feature – this or that failing – of the system as it tries to protect religious freedom.

I respond by arguing that it is important to see international protection of religion or belief in the context of the content and purpose of the human rights system as a whole as it emerged after World War II. And the best way, I go on to argue, to understand the content and purpose of the human rights system as a whole is to view it as an example of a revised or adjusted version of John Rawls’ idea of public reason. Seen in this way, I will suggest, we can appreciate the
continuing contribution of the human rights system to the protection of religion or belief. That’s my argument. The rest is simply explanation and elaboration.

Let me begin by reminding you of the critical features of Rawls’ idea of public reason. Public reason, according to Rawls, provides common terms of discourse in a society made up of citizens espousing a variety of different comprehensive doctrines, as he says; and a comprehensive doctrine is things we’ve been talking about in this session so far – a set of basic fundamental ideals and values that are understood to apply to all aspects of human life. They can be religious or philosophical, but they are comprehensive in that sense.

Secondly, public reason is framed, according to Rawls, solely to apply to the basic structure of society, particularly its constitutional essentials – that is, the “basic rights, liberties, opportunities” that are, as Rawls says, characteristic of constitutionally democratic regimes. These basic essentials frame the concept of public good, and public good will be understood, on Rawls’ account, as anything that is consistent – publicly expressed – consistent with the constitutional essentials.

Rawls adds this very important point: no reason why, he says, any citizen should have the right to use state power to decide constitutional essentials in keeping with that person’s particular comprehensive doctrine. I think I should emphasize that, for Rawls, it’s the setting of the essentials that’s the key point. That’s where religious contributions are disallowed.

Outside of that – as best I can understand Rawls – religious language and discourse is perfectly permissible in the public arena. In fact, as we will see, it’s hard to avoid religious discourse in trying to draw the lines between what an acceptable religious exemption is and an unacceptable one. It’s very hard to imagine a public arena in which religion isn’t rather directly addressed.

Next, public reason for Rawls is supported by the idea of an overlapping consensus. This is not an accidental coincidence of views, but the convergence of views of people representing very different comprehensive doctrines around a common notion of public reason and it’s, furthermore, Rawls says, based upon a shared moral commitment to the basic terms; that is, Rawls even uses the term a “duty of civility” is understood in the notion of public reason.

Next, it’s self-confined or limited discourse. That is, it’s independent of comprehensive doctrines, but it makes room for these doctrines within the constitutional essentials so long as the comprehensive doctrines are consistent with those fundamental core essential, they are not only tolerated but encouraged.

In short, public reason is a common framework of communications based upon values each citizen can reasonably expect others to endorse, including tolerating diverse comprehensive doctrines in keeping with the basic terms of public reason.

And finally, public reason for Rawls is fundamentally bounded by the constitutional essentials and therefore is fundamentally legal or judicial. The Supreme Court, in any constitutional democracy, says Rawls, “is the exemplar of public reason.”
Now, in certain respects, the human rights system matches John Rawls’ idea of public reason very closely. First, if you read the documents, these are common terms of discourse where citizens espouse a huge variety of different comprehensive doctrines and no particular comprehensive doctrine gets to set or determine the constitutional essentials.

Second, it is a system (that is, the human rights system) is a system of “constitutional essentials” – basic rights, liberties, opportunities – framing the limits of the idea of public order.

Third, it supposes an idea of overlapping consensus in Rawls’ sense – that is, moral commitment to some kind of notion of civic duty, and I can’t exemplify all this, but the documents are, in my view, dripping with comments to this effect.

Four, the discourse of the human rights material is limited or self-confining in the way Rawls recommends; that is, the discourse is taken to be independent of comprehensive doctrines, and yet respectful of them within the limits of the constitutional essentials. I should note in passing, as Johannes Morsink makes clear in his – in my view – indispensable book of the drafting and meaning of the Universal Declaration of Human Rights – he makes clear in that book, among other things that I am going to cite, that the efforts to include references to metaphysics or specifically religious doctrines in the preamble to the universal declaration were eventually omitted and excluded; and thus, Morsink comes to the conclusion – I think correctly – that this is, properly understood, a secular document – that is to say it does not refer to matters that comprehensive doctrines refer to. It refers only to that shared common – if you like, “this worldly” set of concerns that the participants in public reason are committed to.

And finally, its legal or judicial language; one thinks, of course, of the European Court of Human Rights now. There is only a court. No longer is there a commission. There used to be a commission and a court, collapsed into one European court in 1998. But one thinks also of the UN Office of Special Rapporteur, occupied now – as many of you know – by Asma Jahangir, and one thinks of the Human Rights Committee, which is that quasi legal body that is designated by the International Covenant on Civil and Political Rights to interpret and apply the International Covenant on Civil and Political Rights.

I say that Rawls’ view of public reason and human rights matches rather closely, but there is one critical exception. Rawls’ idea of public reason does not fit exactly with the international human rights system, nor with the provisions for freedom of religion or belief in particular. Some important adjustments, I’m going to suggest, must be made between the system and Rawls’ position. Rawls’ idea is tailored for established sovereign nation-states that already understand themselves to be constitutional democracies. He emphatically does not mean his theory to apply to all individuals universally in the way that the human rights documents do. Since Rawls’ theory, when applied internationally in his book called *The Law of Peoples*, he starts with the idea of sovereign peoples, not with individuals and the representatives of those sovereign peoples. And any reasonable international agreement, Rawls argues, would permit significant deviations from human rights norms, in particular, the right to non-discrimination based on religion or belief.
Accordingly, Rawls’ idea of rights – fundamental rights – is derivative. Rights for him are – and this is a very important point, I think – are post-political and not pre-political. In a well-ordered constitutional democracy, provisions for basic rights come only *after* the founding agreements of the society have been accepted. Moreover, the founding agreements, that is, the fundamental terms of cooperation, are determined by, in Rawls’ words, “reciprocal advantage,” the reciprocal advantage represented to the contracting parties, and that notion does not explicitly, in my interpretation, rest upon prior moral claims or entitlements.

In contrast to John Rawls, the vocabulary of the human rights documents and the interpretive setting in which that vocabulary was worked out is inescapably universalist and pre-political. Human rights apply to all human beings and are understood to precede various international agreements and covenants, and the vocabulary depends, in my interpretation, on an important idea of prior moral entitlement. Phrases like this from the preamble to the Universal Declaration make that clear: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,” etcetera, that seems to me to make clear this moral point. We might call this, I suggest, a non-comprehensive moral commitment to the constitutional essentials that are elaborated in the documents. It allows for, but does not depend on, various religious or philosophical comprehensive commitments, and these are, as a matter of fact, protected under Article 18 of the ICCPR and the Universal Declaration, as well as Article 9 of the European Convention.

But I’m suggesting that this is a *moral* understanding. I think this is very much in the tradition of the natural rights, and I wanted to add here that in relation to the work of this Center, the contribution to the recovery of and rediscovery of the natural rights tradition is very important. First, Brian Tierney’s work, I’ve just been told by John Witte that the very book by Tierney, *The Idea of Natural Rights*, came out of a series of lectures given on these very premises. And then secondly, we have John Witte’s very eminently forthcoming book in a couple of weeks, John tells me, on Calvinist notions of natural rights. These are very exciting contributions, it seems to me, and this Center can take a great deal of credit for reinvigorating this tradition. My point is that the human rights system very much is to be understood in that tradition, and we need to rethink all that accordingly.

But there is a problem. I concede that. Malcolm Evans, if he were here, would say all very well; so you’ve shown that human rights and Rawls’ notion of public reason are compatible. Well, I have a problem with Rawls’ notion of public reason; therefore, I have a problem with human rights. What do you say to that? And I must respond. The way I would respond is to cite Morsink’s basic conclusions about the context, let’s say the provenance, in which the human rights language was formulated.

Morsink shows, first and foremost, that the idea of human rights is grounded in a feeling of “shared moral revulsion” against “the absolutely crucial factor of the Holocaust,” encompassing as it did the array of atrocities perpetrated so widely in the 20s, 30s, and 40s. Without that shared revulsion – moral revulsion – “the Declaration would never have been written,” says Morsink. In diametrical opposition to Hitler’s outlook, the drafters “believed that any morally healthy human being would have been similarly outraged when placed in similar circumstances. [Moreover,] this shared outrage explains why the declaration has found such widespread
support,” and we may go on to add why it has found its way into the preambles and early articles of many constitutions around the world, as well as why the human rights system has resonated as it does so palpably in so many cultures, inside so many cultures, around the world. The assumption here Morsink makes, not unreasonable in my view, is that expressing moral outrage in response to Hitler’s atrocities is itself a critical, if minimal, defining characteristic of what it means to be a healthy, “morally healthy,” human being.

These reactions that Morsink describes involve three critical inter-related convictions. One, assuming that the use of force defined as the infliction of death, impairment, severe pain, injury, or confinement begs strong moral justification wherever it occurs. No human being could reasonably doubt that Hitler’s grounds for the kind and amount of force used at his command appeals to a preposterous theory of racial superiority, to unsubstantiated claims of imminent external threat. All these were grossly in error and led to forms of arbitrary abuse that must be called atrocities.

Two, Hitler’s atrocities rested, note, on a “comprehensive doctrine” of collective domination; namely, the right of a government to treat citizens in any way it saw fit, and given the dramatic imbalance, universally, between the technology of force and the institutions of restraint, this remains an abiding threat.

And three, an indispensable means of inhibiting the recurrence of atrocities of the kind witnessed in World War II would be the articulation and enforcement of individual human rights laid out in the human rights documents.

Well, this brings us to the central point of this paper, namely, the protection of religious freedom or belief. Here, I simply want to make the point that Hitler’s attack on the state of affairs during the Second World War was fundamentally an attack, along with other things, on freedom of religion or belief. In other words, the attempt by Hitler to impose a comprehensive doctrine – to enforce that at great cost to the victims – was precisely to deny the very things that have since been enumerated in the international documents as the fundamental rights of religious freedom, freedom of religion or belief, the rights not to be discriminated against based on religion or belief, the rights of minorities to have their fundamental cultural, linguistic, and religious concerns protected, and so on.

Now a major point that I wish to make, and try to make in this paper, is that the coercive imposition of one comprehensive doctrine or another is still an urgent problem around the globe, and the human rights system, in its fundaments at least, provides the kind of protection for freedom of religion or belief against that widespread threat. Here, much of my work at the U.S. Institute of Peace on ethno-religious conflict – places like Sri Lanka, Sudan, Bosnia, also now Iraq, and so on – seem to me to manifest the point that I am trying to make.

And finally, in the part of my paper where I devote fairly extended attention to what’s going on in the case law and in the interpretation of the law by the European court, and by the international U.N. quasi legal bodies, I draw the following three conclusions.
Particularly in the European system, there has until recently been a strong reticence to protect minority beliefs, the individual and peculiar or unfamiliar and – Kent Greenawalt’s term – religions or beliefs. However, there seems to be a change. A recent book by Paul Taylor on *Freedom of Religion: UN and European Human Rights Law and Practice*, a book by Carolyn Evans, many of the interpreters in the desk book that I have referred to conclude, convincingly in my view, that there is a movement within the European court now, and certainly at the level of the U.N. bodies to restrict the interests of the state and make much greater room for the practices of conscience, fundamentally held beliefs, to go a much greater distance towards resisting the kind of encroachment of comprehensive doctrines that have, until the present, been too extensively imposed. That’s the first conclusion.

The second one is that by expanding the domain of free exercise, the European Court and the UN institutions are exemplifying the self-confining character of public reason. That is to say in interacting now with more and more of the minority groups, the unfamiliar groups, giving them more protection, they are confining the reach of the public order. They’re admitting that religion does have a restraining influence upon the shape of public order, and that is being admitted; very encouraging development, in my view.

And finally, and lastly, I conclude that – as I said earlier – religious language is not being excluded from the public discussion. In fact, it’s being more and more welcomed, more and more addressed, more and more considered in the deliberations of these judicial and quasi judicial bodies in coping with how far we go in exempting or limiting freedom of religion or belief.

What is the way forward? It’s to acknowledge and embrace these tendencies, as I’ve described them, and to carry forward with them.

Thanks very much.