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Religious Human Rights in Global Perspective: Legal Perspectives

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Book Note

Religious Human Rights in Global Perspective: Legal Perspectives

(John Witte, Jr. & Johan D. van der Vyver eds., 1996).

I. INTRODUCTION

Religious Human Rights in Global Perspective: Legal Perspectives (Legal Perspectives),¹ a comprehensive volume of essays on the global state of religious liberty, is the companion book to an equally thorough volume by the same editors, *Religious Human Rights in Global Perspective: Religious Perspectives (Religious Perspectives)*.² The *Religious Perspectives* volume addresses the religious sources and dimensions of religious rights, while the *Legal Perspectives* volume addresses the legal sources and dimensions of these same freedoms.³ These volumes are the product of an ongoing project on religion, democracy, and human rights undertaken by the Law and Religion Program of Emory University. After being assured by one of the books' editors that each volume stands alone in its individual contribution to understanding the state of religious freedom in the world today,⁴ this Book Note undertakes the nonetheless daunting task of reviewing only the *Legal Perspectives* half of this impressive two volume collection of essays.

Before a full review of the collection can be discussed, some background information is needed. *Legal Perspectives* contains more than twenty contributions. Sandwiched between a short

1. RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: LEGAL PERSPECTIVES (John Witte, Jr. & Johan D. van der Vyver eds., 1996) [hereinafter LEGAL PERSPECTIVES].

2. RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: RELIGIOUS PERSPECTIVES (John Witte, Jr. & Johan D. van der Vyver eds., 1996) [hereinafter RELIGIOUS PERSPECTIVES].

3. See John Witte, Jr., *Introduction*, in RELIGIOUS PERSPECTIVES, *supra* note 2, at xix.

4. Interview with John Witte, Jr., Jonas Robitscher Professor of Law and Emory University Law & Religion Program Director, in Atlanta, Ga. (Apr. 5, 1997).

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preface by former President Jimmy Carter and a closing essay by Judge John T. Noonan of the United States Court of Appeals for the Ninth Circuit⁵ are individual chapters authored by a distinguished group of international scholars, jurists, and activists. The authors, all specialists in the field of religious freedom, are mostly engaged in analyzing religious liberty regimes in specific countries or regions, while a few authors contribute chapters addressing broader issues of international religious liberty such as United Nations standards.

In the only other American legal commentary on this book to date, a review essay, Professor Marci Hamilton concludes that *Legal Perspectives* poses a direct challenge to the presuppositions of federalism, popular sovereignty, and separation of powers that are fundamental in American constitutional jurisprudence. Hamilton contends that the goal of achieving a universal standard of religious liberty through the adoption everywhere of norms distilled from international legal culture renders obsolete some of the founding principles of American freedom.⁶ It is true that international human rights instruments implicitly reject principles like federalism in favor of universal standards of religious liberty.⁷ However, this Book Note contests Professor Hamilton's suggestion that *Legal Perspectives* counsels such a rejection.⁸

5. See Jimmy Carter, *Preface*, in LEGAL PERSPECTIVES, *supra* note 1, at ix; John T. Noonan, Jr., *The Tensions and the Ideals*, in LEGAL PERSPECTIVES, *supra* note 1, at 593.

6. See Marci A. Hamilton, *Slouching Towards Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307, 311 (1997). Professor Hamilton's essay goes on to express reservations about abandoning these precepts which stand in contrast to the universalist approach that *Religious Perspectives* arguably favors. See *id.*

7. See, e.g., THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 377 (Louis Henkin ed., 1981) [hereinafter INTERNATIONAL BILL OF RIGHTS].

8. See Hamilton, *supra* note 6, at 311 ("I conclude that these volumes are a challenge to precepts held most dearly by the Framers . . ."). Of course, in her essay, Hamilton focuses especially on one chapter included in *Legal Perspectives*: Dinah Shelton & Alexandre Kiss, *A Draft Model Law on Freedom of Religion, With Commentary*, in LEGAL PERSPECTIVES, *supra* note 1, at 559. She uses this chapter in the volume, the express aim of which is liberty standardization, as a springboard for an exegesis on the continuing saliency of the fundamental constitutional principles of federalism, popular sovereignty, and separation of powers.

II. RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES—A REVIEW

A. *Organization of the Volume*

Worthwhile review of such a far-reaching work requires an effort to compartmentalize the essays and careful attention to the editors' organization of the volume as a whole. For the most part, the organization of the book is praiseworthy. While each chapter stands alone as an intriguing and significant work, the volume also provides the reader with a structure that facilitates broad recognition and contemplation of issues presented by the compilation. Unfortunately, individual assessment of every chapter in the volume is beyond the scope of this Book Note.⁹

In *Legal Perspectives*, the authors have included pieces that roughly fall into one of three categories:¹⁰ (1) four pieces that provide analytical frameworks to aid the reader struggling with the difficult issue of religious liberty internationally;¹¹ (2) two essays that analyze and portray the role of important actors in the international sphere: nongovernmental organizations (NGOs) and the media;¹² and (3) the majority of the volume that includes individual essays analyzing the religious liberty regimes in specific countries or regions. This third category of

9. Contributions to the volume which are not discussed or cited elsewhere in this Book Note include: Said Amir Arjomand, *Religious Human Rights and the Principle of Legal Pluralism in the Middle East*, in LEGAL PERSPECTIVES, *supra* note 1, at 331; Carter, *supra* note 5; Lourens M. du Plessis, *Religious Human Rights in South Africa*, in LEGAL PERSPECTIVES, *supra* note 1, at 441; Tamás Földesi, *The Main Problems of Religious Freedom in Eastern Europe*, in LEGAL PERSPECTIVES, *supra* note 1, at 243; Stanley Muschett Ibarra, *Religious Human Rights in Central America*, in LEGAL PERSPECTIVES, *supra* note 1, at 483; Paul Mojzes, *Religious Human Rights in Post-Communist Balkan Countries*, in LEGAL PERSPECTIVES, *supra* note 1, at 263; Noonan, *supra* note 5; Paul E. Sigmund, *Religious Human Rights in Latin America*, in LEGAL PERSPECTIVES, *supra* note 1, at 467.

10. *Cf.* Hamilton, *supra* note 6, at 308-09 (Hamilton's slightly different categorization of the essays in the volume).

11. *See* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in LEGAL PERSPECTIVES, *supra* note 1, at 1; Natan Lerner, *Religious Human Rights Under the United Nations*, in LEGAL PERSPECTIVES, *supra* note 1, at 79; David Little, *Studying "Religious Human Rights": Methodological Foundations*, in LEGAL PERSPECTIVES, *supra* note 1, at 45; Shelton & Kiss, *supra* note 8, at 559.

12. *See* James Finn, *The Cultivation and Protection of Religious Human Rights: The Role of the Media*, in LEGAL PERSPECTIVES, *supra* note 1, at 161; Michael Roan, *The Role of Secular Non-Governmental Organizations in the Cultivation and Understanding of Religious Human Rights*, in LEGAL PERSPECTIVES, *supra* note 1, at 135.

essays, each written by an author with expertise on religious liberty issues in the subject country (often their own), makes the volume stand out as a commendable tool for comparative legal research.

The essays in categories one and three drive the entire volume's tension-filled search for a way to reconcile broad comparative frameworks and universal principles with the unique cultures and historical anomalies that affect religious liberty protection in specific countries. While the two essays included in the second category fail to contribute significantly to this highly edifying dialogue between the first and third types of chapters, they are still independently informative and provocative. After discussing them briefly, the analytical framework chapters will be reviewed with an eye toward their pronouncements on universal standards. Finally, selected essays will be examined in so far as they inform the underlying tension between universal principles and the differing practices in particular regimes.

B. Universalism vs. Relativism

While discussing the American constitutional experiment with religious liberty in their contribution to the *Legal Perspectives* volume, John Witte, Jr. and M. Christian Green write, "[T]he *eventual resolution* of the international debate between 'universalism versus relativism' in human rights has enormous implications for the distinctive American debate over federal and state jurisdiction over religious rights."¹³ Thus, where Hamilton might suggest the *Legal Perspectives* volume lends weight to the universalist cause, editor Witte seems unwilling to offer more than simple recognition of the linkage between the two debates.

The idea that the adoption of universal religious liberty norms is appropriate may be supported by individual contributions to the *Legal Perspectives* volume, and even, perhaps, by the introduction to the volume by its other editor Johan D. van der Vyver.¹⁴ However, as a whole, the book does

13. John Witte, Jr. & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in LEGAL PERSPECTIVES, *supra* note 1, at 556-57 (emphasis added) (footnote omitted).

14. See Johan D. van der Vyver, *Introduction*, in LEGAL PERSPECTIVES, *supra*

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not explicitly advance the universalist cause, because “[l]urking within each of the contributions [to the book] is the question whether we can, or should, achieve universal standards of religious liberty.”¹⁵ While the book by no means challenges the generally accepted premise that religious freedom should be protected, it does question attempts to impose requisite universal norms for achieving such protection.

The volume’s careful juxtaposition of the incredibly diverse religious liberty regimes in different countries against proposed and existing “universal norms” forces the reader to question the very notion of universality in practice. It may be that the title phrase “global perspective” connotes a book whose aim is worldwide liberty standardization,¹⁶ but after grappling with the difficult questions posed by the work, *Legal Perspectives* does not hold universality to be the only acceptable goal. Rather, the volume is a successful attempt to inform the debate over universality versus relativity of human rights in the religious rights context. Indeed, by gaining the valuable perspective offered in this book, the latent relativist might be awakened in even the staunchest proponents of universal religious freedom standards.

C. Important Actors in the International Sphere

Notwithstanding the independent value of the two successive chapters comprising the second category of essays described above,¹⁷ their contribution to the overall effect of the volume is limited. In fact, inclusion of these chapters may distract the reader from the volume’s primary course of ascertaining whether broad analytical frameworks and prescriptions of universal principles can be reconciled with the law of religious liberty in specific countries having unique histories and cultures with distinct concerns.

note 1, at xiv-xv.

15. Hamilton, *supra* note 6, at 310. Hamilton recognizes that many of the contributions to the book question the desirability and practicality of universal religious liberty norms, but the approach of her essay emphasizes the contributions that endorse universality.

16. *See id.*

17. *See* articles cited *supra* note 12.

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Of course, Michael Roan's chapter on NGOs¹⁸ is useful to any student of international law because of its detailed commentary on the growing role of this diverse group of international actors. More importantly, Roan convincingly imposes a responsibility on secular NGOs to recognize their unique position and employ practical humanist approaches to contribute to a global ethic of tolerance for religious *and* nonreligious beliefs.¹⁹

Like the Roan article on NGOs, Finn's examination of the media appears to be an unnecessary diversion from the important juxtaposition of the analytic framework chapters and those dealing with country-specific regimes and the religious liberty concerns of those regimes. In his chapter, Finn reminds the reader of historical instances where the Western media was manipulated by oppressive regimes and where media insensitivity to religious liberty issues may have resulted in distorted news coverage, "a disservice to the truth."²⁰ After making clear the crucial role that the media can play in the cultivation and protection of human rights, Finn ultimately provides a scathing critique of the major media for what he terms "secular indifference."²¹ In support of his claim that the major media repeatedly neglect and misunderstand issues of religious human rights, Finn references studies that evidently uncover the media's general disregard and disdain for religion and religious topics.²² Overall, it is a provocative article that raises questions about the operation of the massive machinery of worldwide news coverage.

D. The Analytical Framework Chapters

Although the chapters in the second category are of marginal utility, the chapters in the analytical framework category are illuminating. Four such chapters will be discussed in this Note. Undoubtedly, each of the first three chapters provides the reader with background on the general content and bases of universal principles of religious liberty and supply

18. Roan, *supra* note 12, at 135.

19. *See id.* at 146-47, 158.

20. Finn, *supra* note 12, at 181.

21. *Id.* at 183.

22. *See id.* at 184-88.

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useful analytical paradigms to address generally recurring issues.

While the United Nations' regime permits "a 'margin of appreciation' in the practical application of human rights principles so as to accommodate ethnic, cultural and religious peculiarities, it does so only within the boundaries of basic human rights values."²³ On the other hand, "[r]elativism assumes that there is no one culture whose customs and beliefs dominate all others in a moral sense."²⁴ Perhaps in no other area of human rights norms do relativists more staunchly oppose the "margin" and the domination of particular beliefs, than when matters of faith and religious tradition are threatened by the prescription of universal norms.

Nevertheless, in his introduction to the volume, Professor van der Vyver asserts the international recognition of the principle of the universality of human rights, saying, "[i]t censures 'adaptations' of human rights to suit non-libertarian practices founded on customs within indigenous, ethnic or religious communities."²⁵ Unwavering reiteration of the principle of universality may not provide the international community with solutions to the challenge of "how to develop and implement meaningful human rights standards in the face of profound diversity."²⁶ Clearly though, as T. Jeremy Gunn illustrates in his contribution to the volume, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, the broad language of international legal documents is not always capable of dictating satisfactory resolutions to specific conflicts between individual religious adherents and state practices.²⁷

23. Van der Vyver, *supra* note 14, at xiv-xv (footnote omitted).

24. Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 317 (1993).

25. Van der Vyver, *supra* note 14, at xiv (citing *Vienna Declaration and Programme of Action*, at pt. I, para. 5, U.N. Doc. A/CONF/157/23 (1993)).

26. Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 346 (1991).

27. See T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in LEGAL PERSPECTIVES, *supra* note 1, at 328-30 (criticizing the extent to which the European Court of Human Rights has protected state-established religions in its interpretation and application of the European Convention on Human Rights).

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The chapter entitled, *A Draft Model Law on Freedom of Religion, With Commentary*, on the other hand, is part of an effort to *implement* specific “international guarantees of religious liberty.”²⁸ Nevertheless, because the Draft Model Law exemplifies the end goal of universality, and because universal principles naturally provide a launching point for critical reflection on state practices, this Book Note groups it into the first category of analytical framework chapters. The location of the Draft Model Law chapter as the next to last chapter in the volume does not discount its placement in the first category of chapters. In fact, this placement is commendable for its thought-provoking impact. The early framework chapters are on the reader’s mind throughout the country-specific chapters of the volume as he or she questions the applicability of universal norms to nations such as Russia, Israel, and Bolivia. By the time the reader reaches the Draft Model Law, the very goal of a universally adopted model statute seems a difficult solution for the now-discovered unique religious liberty concerns of the countries addressed throughout the volume.

International human rights law is a valuable source of universal principles of religious liberty that, apart from embodying, for some, the minimum protections to be afforded all people universally, is also useful as a model against which individual state practice can be compared.²⁹ Thus, Natan Lerner’s chapter, *Religious Human Rights Under the United Nations*,³⁰ is logically included in the first category of analytical or comparative framework chapters.

In his contribution to the volume, Lerner surveys international human rights documents that proclaim universal standards of religious liberty.³¹ Lerner outlines what he discerns to be the international minimum standards of religious freedom and asserts that the protection of religious rights has

28. Shelton & Kiss, *supra* note 8, at 559-60.

29. See John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 433; see also Comment, *The United States Supreme Court’s Anomalous Approach to Discriminatory Alienage Classification: International, Canadian, and Domestic Law Compared*, 11 EMORY INT’L L. REV. 697, 702 (1997) (discussing the validity of using international human rights law as an informative source or an analytical framework against which the United States and Canadian Constitutions can be compared).

30. Lerner, *supra* note 11, at 79.

31. See *id.* at 81-82.

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been strengthened during the United Nations era.³² Within his contribution, Lerner highlights the difficulty the international community encounters when defining universal standards and implicitly questions the effectiveness of the practice.

For example, Professor Lerner discusses international legal treatment of one of the more contentious issues in religious liberty protection: the right to change one's religion.³³ According to Lerner, provisions dealing with this issue in the International Covenant on Civil and Political Rights and in the Declaration on Intolerance Based on Religion or Belief were adopted as the result of negotiation and legislative compromise between proponents of universality and relativism.³⁴ Thus, while it is conceded that many relativist states can claim under the adopted language that the specific right to change religions is not part of international customary law, universalists consider their position to have been recognized in that a universal right to change religion exists under international law.³⁵ Such legislative compromises seem to foil any consensus broad enough to be called universal. At the least, they raise doubt about the continuing effectiveness of universal norms to solve increasingly complex questions of religious rights in varying cultures. Nevertheless, despite the absence of a specific obligatory treaty regarding religious human rights, Lerner provides a comprehensive review of international declarations, conventions, and covenants that address the protection of religious liberty and generally comprise international norms.³⁶

In his chapter, *Studying "Religious Human Rights": Methodological Foundations*,³⁷ David Little also references international religious liberty standards. Little discusses both the liberty of conscience and the freedom to manifest one's beliefs, as well as the universal prohibition of discrimination

32. *See id.* at 81.

33. *See id.* at 115-16. Indeed, commentators have suggested that religious human rights in general "have been neglected by the world community, probably as a consequence of the basic disagreement on the nature and extent of some religious freedoms." *Id.* at 79.

34. *See id.* at 116; *see also* Natan Lerner, *Proselytism, Change of Religion and International Human Rights*, 12 EMORY INT'L L. REV. 477, 507-8 (1998).

35. *See* Lerner, *supra* note 11, at 116.

36. *See id.* at 79-80.

37. Little, *supra* note 11, at 45.

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based on religious beliefs.³⁸ Little draws several astute distinctions that are important when considering this unique set of individual liberties.

First, he distinguishes between the two types of discrimination based on religion or belief. People can be targeted for discrimination because of their beliefs, or people, because of their own religious beliefs, may target others for discriminatory treatment.³⁹ This latter form of discrimination based on religion or belief provides the perpetrators of discrimination with justification for their intolerance, which, as Little points out, can intensify conflicts between groups of peoples and fan the flames of nationalistic or ethnic conflict.⁴⁰ Perhaps a more important distinction though is raised in Little's opposition to the phrase "religious human rights."⁴¹ This characterization of the protected rights is underinclusive because, as Little reminds us, international instruments include the protection of beliefs that are explicitly not religious.⁴²

W. Cole Durham, Jr.'s contribution to the volume is most notable for its detailed analysis of church-state arrangements and their effect on religious liberty.⁴³ The reader is unavoidably drawn into his development of a diagram, or religious freedom continuum, that attempts to correlate different degrees of religious liberty with different church-state arrangements.⁴⁴ The basic point illustrated by the figures is "the fact that both strong positive and strong negative identification of church and state correlate with low levels of religious freedom."⁴⁵ Durham depicts a range of church-state arrangements: absolute theocracies, established churches, endorsed churches,

38. *See id.* at 47-48.

39. *See id.* at 54.

40. *See id.* at 54-55.

41. *See id.* at 49-50.

42. *See id.*; *cf.* Board of Educ. v. Grumet, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion favoring neither one religion over others nor religious adherents collectively over nonadherents.") (citations omitted); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.").

43. *See* Durham, *supra* note 11, at 1.

44. *See id.* at 17, 18, 23, 36.

45. *Id.* at 18.

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cooperationist regimes, accommodationist regimes, separationism (with differing degrees of sensitivity to religion), hostility, and overt persecution.⁴⁶

While it is easy to accept that absolute theocracies and regimes hostile toward religion provide the least religious freedom, the degree of liberty afforded by the other forms of church-state regimes is less certain. The model indicates that because various church-state arrangements can operate without suppressing religious freedom, individual countries may vary their methods of securing a degree of religious freedom consistent with universal norms. In fact, as Lerner and Little both point out, established religions are not forbidden by international law so long as the rights of free exercise and nondiscrimination are protected.⁴⁷ Thus, while suggesting that religious rights are inevitably compromised by certain types of church-state regimes, Durham's continuum affirms the flexibility of universal norms affecting church-state relations. Therefore, only regimes hostile toward religion or absolute theocracies can be deemed categorically violative of universal norms, because of the inevitably related infringement of other religious human rights.

As the country-specific chapters of the book unfold, it becomes apparent that Durham's model, intensely helpful as a theoretical framework for conceptualizing church-state issues, is necessarily subject to individual exceptions based on the history and culture of specific societies and their regimes. Again, the question posed throughout the volume is whether international universal standards must similarly make such exceptions. This review now examines several country-specific chapters that, it is thought, are particularly appropriate for probing the tension that is created when universal liberty standards are compared to individual state practice.

E. The Unique "Perspectives"

46. *See id.* at 19-23.

47. *See* Lerner, *supra* note 11, at 97; Little, *supra* note 11, at 59; *see also* Gunn, *supra* note 27, at 312 (discussing the European Commission of Human Rights' holding that a "State Church system can not in itself be considered" a violation of the European Convention of Human Rights).

I. Germany

The German example, depicted by Martin Heckel in his contribution to the volume, does not raise significant challenges to either Durham's church-state model or the goal of implementing universal liberty standards.⁴⁸ Germany's church-state arrangement is based on the "principles of non-identification," "neutrality in religious and ideological matters," and "parity."⁴⁹ Most likely a "cooperationist" regime for the purposes of Durham's model, Germany holds true to that model by ensuring religious freedom to a great extent. In his description of the cooperationist regime, Durham asserts that the principle threat to religious freedom is the difficulty of ensuring the state's equal treatment of religious communities and the corresponding potential for government endorsement of certain religions over others.⁵⁰

Accordingly, Heckel spends a good deal of time discussing how Germany upholds the separation between church and state while still finding ways to cooperate with religious communities in an even-handed fashion.⁵¹ Heckel states, "All religious communities are treated equally, are subject to the same secular legislation, and, whenever public funds are given to them, this is done according to secular, cultural, and sociological criteria"⁵² Heckel asserts that this arrangement has replaced the "*traditional liberal* program of strict separation"⁵³ in favor of cooperation between church and state with respect to common issues, like social welfare. Unfortunately, Heckel fails to address the effects of extensive cooperation between the state and religious communities upon the liberty of nonbelieving citizens.

As Heckel describes it, the secular treatment of a religious group that the state cooperates with, for example, to build a hospital, is confined to the social and cultural aspects of the hospital's organization.⁵⁴ However, religious communities

48. See Martin Heckel, *The Impact of Religious Rules on Public Life in Germany*, in LEGAL PERSPECTIVES, *supra* note 1, at 191.

49. *Id.* at 194.

50. See Durham, *supra* note 11, at 21.

51. See Heckel, *supra* note 48, at 198-99.

52. *Id.* at 202 (footnote omitted).

53. *Id.* at 200.

54. See *id.* at 204.

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independently administer the religious aspects of the project to “protect[] the transcendent aspects of religious life” from state interference.⁵⁵ Thus, the question is raised whether the risk of religious coercion of nonbelievers in such arrangements based on neutrality and equality between religions might render the traditional liberal program of state separation more effective for protecting individual rights.⁵⁶

2. *United Kingdom*

In his chapter entitled *Religious Liberty in the United Kingdom*, Peter Cumper, without neglecting the historical repression of faith by the established church,⁵⁷ makes clear that “[i]n Britain, all religions are guaranteed freedom of worship and the right to manifest publicly their beliefs.”⁵⁸ However, these freedoms are protected by simple statutes.⁵⁹ Not only is religious freedom not enshrined in a constitution, but the international instruments that protect these rights have not been incorporated into British law.⁶⁰ Nevertheless, as Cumper points out, international treaties can influence the judicial interpretation of statutes by virtue of the presumption that Parliament intends to legislate consistently with unincorporated treaties.⁶¹

Cumper’s chapter portrays the *de jure* and *de facto* advantages enjoyed by the majority religion to show the

55. *Id.*

56. *Cf. Lee v. Weisman*, 505 U.S. 577, 616 (1992) (Souter, J., concurring) (“[T]he Establishment Clause forbids support for religion in general no less than support for one religion or some. . . . [Moreover,] nonpreferentialism requires some distinction between ‘sectarian’ religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. . . . [Thus,] nonpreferentialists invite the courts to engage in [inappropriate] comparative theology.”); see also Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 920 (1986) (“No aid is nonpreferential.”).

57. See Peter Cumper, *Religious Liberty in the United Kingdom*, in LEGAL PERSPECTIVES, *supra* note 1, at 206-11.

58. *Id.* at 206.

59. See *id.* at 211.

60. See *id.* at 212.

61. See *id.* at 213; see also Maxwell Cohen & Anne F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. B. REV. 265, 268 (1983) (discussing the Canadian rule of law that, in the absence of a clear signal to the contrary, judges must give domestic law a meaning in accordance with the customary or treaty norms of international law).

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detrimental effects of establishment on minority faith adherents. The Church of England enjoys unique *de jure* advantages over other faiths. For example, the Anglican Church has twenty-six seats in the House of Lords (Parliament's Upper Chamber) reserved for its most senior Bishops.⁶² The Anglican Church is also uniquely covered by the law of blasphemy.⁶³ Cumper's discussion of "voluntary aided (that is, state-funded) religious schools"⁶⁴ provides an example of the *de facto* advantages provided the established and traditional churches. While all religious groups are free to establish their own private schools, ninety-nine percent of the 4,500 voluntary aided schools are controlled by the Anglican and Roman Catholic Churches.⁶⁵ The teaching of religious education in state-funded schools also seems to afford an advantage to the established church, as the model curriculum calls for the most time to be devoted to the study of Christianity.⁶⁶ Thus, owing to historical or continued religious favoritism, minority faiths are disadvantaged in the face of the establishment.

However, whether Britain is meeting universal religious liberty standards may depend on how the right of minority faith adherents to manifest their beliefs is protected and whether the principle of nondiscrimination is enforced.⁶⁷ Cumper reviews the British courts' necessary weighing of individual minority faith adherents' rights to manifest their faith against "social harmony" factors.⁶⁸ Of course, this weighing process is in conformity with international human rights instruments and bills of rights from around the world, which generally allow restrictions of freedoms if the restrictions are "necessary in a democratic society" or necessary "for the protection of public health."⁶⁹

62. See Cumper, *supra* note 57, at 217.

63. See *id.* at 225 (citing *R v. Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All E.R. 306 (U.K. L. Comm. Div'l Ct. 1991)).

64. *Id.* at 235.

65. See *id.* at 235-36.

66. See *id.* at 238.

67. See *supra* note 47 and accompanying text.

68. See Cumper, *supra* note 57, at 227.

69. *Id.* at 228 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(2), 213 U.N.T.S. 222); see, e.g., Canadian Charter of Rights and Freedoms § 1, reprinted in IV CONSTITUTIONS OF THE

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Thus, while a Sikh woman was entitled to wear religiously mandated trousers despite a contrary employment dress code, male Sikh food handlers may be required to shave their religiously inspired beards.⁷⁰ Railway worker Sikhs may be required to remove their turbans and wear safety helmets, and Rastafarian use of marijuana is not exempted from generally applicable criminal laws dealing with the drug.⁷¹ After discussing one problematic case where the manifestation of individual belief was not given exemption from a general policy, Cumper links the issue of free exercise with that of indirect discrimination disproportionately affecting certain religious believers.⁷² Ultimately, he makes a bold call for the enactment in Great Britain of legislation outlawing religious discrimination.⁷³

Cumper does not spend time criticizing or commenting on the difficulties of determining reasonable limitations to individuals' right to manifest their beliefs. Perhaps this is because the application of limitations clauses may vary slightly between cases, countries, and tribunals. After all, might not a judicial conception of what is necessary in a democratic society or justifiable for health and safety reasons vary according to the cultural norms of specific countries? Overall, Great Britain appears to protect liberty more than its blind placement as an establishment regime on the Durham religious freedom continuum might suggest. Moreover, the constitutional significance of the Church of England provides a reasonable defense of British establishment.⁷⁴

COUNTRIES OF THE WORLD, (Albert P. Blaustein & Gisbert H. Flanz eds., 1991) (stating that "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

70. See Cumper, *supra* note 57, at 227-28.

71. See *id.* at 228-29.

72. See *id.* at 231 ("Indirect discrimination occurs where a condition or requirement is applied and the proportion of a particular racial [or religious] group . . . who are justifiably able to comply with it is 'considerably smaller' than those of individuals of a different racial [or religious] group who are able to comply with it." (quoting Race Relation Act 1976, § 1(1)(b))).

73. See *id.* at 233.

74. See *id.* at 240 ("[D]isestablishment of the Church of England would have a significant impact on the unwritten British constitution. Constitutional questions would remain as to who would replace the Bishops in the House [of Lords] and who would crown the Sovereign.").

3. *Israel*

Israel presents an altogether unique laboratory for examining the saliency of universal norms of religious liberty. Asher Maoz explains that although Israel was established as a Jewish state, the country “does not fit easily into any common category of religion-state relations.”⁷⁵ Maoz discusses the difficulty posed by the confluence of religion and culture in a democratic society dedicated to equality. He writes that “Judaism is a national religion. National and religious components of Judaism are inseparable.”⁷⁶

The education system in Israel is “a classic example of the non-separation between state and religion in Israel.”⁷⁷ While two education systems exist, one “religious” and one “general,” even the general schools teach Jewish culture and devote time to Bible lessons for the purpose of discovering “cultural, historical, and aesthetic values.”⁷⁸ The curriculum of the general state schools and the fact that up to twenty-five percent of the students in the state “religious” schools are from nonobservant families⁷⁹ demonstrates the strong link between the Jewish religion and Israeli society. Another example of this natural intermingling and its manifestation in law is the continued enforcement of Shabbat laws.⁸⁰ No work is permitted on the weekly day of rest unless individual exception is made by the Minister of Labor.⁸¹ The Shabbat laws impose observance of this religious day of rest in the public arena by, for example, restricting public transportation.⁸²

75. Asher Maoz, *Religious Human Rights in the State of Israel*, in *LEGAL PERSPECTIVES*, *supra* note 1, at 349, 358-59.

76. *Id.* at 358.

77. *Id.* at 373.

78. *Id.* at 373-74.

79. *See id.* at 374.

80. *See id.* at 377 (“Unlike America’s Sunday blue laws, which must be justified on non-religious grounds to survive establishment clause scrutiny, Israeli Sunday laws are explicitly rooted in religious national elements of the days of rest.”); *cf.* *McGowan v. Maryland*, 366 U.S. 420, 444 (1961) (“[A]s presently written and administered, most of [the Sunday Closing Laws], at least, are of a secular rather than a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.”).

81. *See* Maoz, *supra* note 75, at 377-78.

82. *See id.* at 379.

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Further, freedom of religion has been interpreted “to include freedom of worship and not merely the freedom of belief.”⁸³ According to Maoz: “Freedom of religion may be curtailed on the grounds of pressing public interest.” For example, while proselytism is permitted, using material inducement to conversion is a criminal offense, and the religion of minors may not be changed against the wish of either parent.⁸⁴ Freedom of religion has also been interpreted to require the government to accommodate believers when administering otherwise general schemes, such as supplying special gas masks to men who grow beards out of religious conviction.⁸⁵

However, in the Israeli legal system, “[f]reedom *from* religion” is afforded much less protection.⁸⁶ This is likely a deviation from international standards of religious liberty which afford protection of belief and nonbelief alike.⁸⁷ Maoz uncovers the root of this deviation: “From a Jewish religious point of view, even demanding this freedom may be regarded as illegitimate. . . . It must be stressed that the beliefs of Ultra Orthodox Jews may require them to attempt to impose religious norms upon the non-observant.”⁸⁸ Though religiously motivated legislation that imposes a religious way of life in the public arena is common, the courts sometimes “soften the effect of religious legislation by giving maximum interpretation to civil liberties.”⁸⁹ One example of infringement of the nonobserver’s right to be free from religion can be seen in the military’s pervasive regulations and practices based on the precepts of Orthodox Judaism.⁹⁰ Although religiously motivated restrictions and requirements can sometimes be justified as being part of Israeli culture or contributing to national identification,⁹¹ the element of universal norms that aims to

83. *Id.* at 360 (quoting *Peretz v. Head of Local Council of Kfar Shmaryahu*, 17 P.D. 2101 (1963)).

84. *See id.*; *see also* Lerner, *supra* note 34, at 37 (citing International Covenant on Civil and Political Rights, art. 18(2), *found in* INTERNATIONAL BILL OF RIGHTS, *supra* note 7, at 377).

85. *See* Maoz, *supra* note 75, at 360.

86. *Id.* at 361.

87. *See supra* notes 39-42 and accompanying text.

88. Maoz, *supra* note 75, at 361-62.

89. *Id.* at 361.

90. *See id.* at 365-66.

91. *See id.* at 365.

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protect nonbelievers is often unobserved in Israel because it is at odds with the deep religious beliefs of a significant and powerful segment of the Israeli population.⁹²

4. *Russia*

In his contribution to the volume, Harold Berman immediately highlights the tension that this Book Note suggests permeates the entire book—the tension between universal applicable norms and the unique circumstances of individual countries.⁹³ Berman states: “[W]e confront the question whether rights to hold and propagate religious beliefs, declared to be applicable always and everywhere, should be, and must be, in their application, adapted and even modified in the light of the particular circumstances of particular cultures.”⁹⁴ Through application of the historical theory of law, which recognizes historical traditions as a source of law, Berman takes the reader on a trip through history: from the days of Tsarist rule over the Russian Orthodox Church, to the reforms of the early twentieth century (which extended rights to other denominations and allowed Russians to depart from Orthodoxy), to the Communist declaration of an atheist state and the ensuing struggle of believers to quietly overcome the oppression of conscience, and finally to freedom’s birth with its roots in Gorbachev’s Soviet reforms and its culmination in the 1993 Russian Constitution’s rhetorical championing of international human rights standards.⁹⁵

But Berman’s history lesson is aimed at understanding law. He notes, “A law must reflect . . . the historical experience of the society whose law it is—its past and its future.”⁹⁶ Indeed, by marshalling the history and culture of the Russian people and the Russian Orthodox church, the final section of this chapter provides an important challenge to universality in the context of specific national legislation affecting religious liberty that

92. Compare *supra* notes 39-42 and accompanying text, with *supra* note 88 and accompanying text.

93. See Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in *LEGAL PERSPECTIVES*, *supra* note 1, at 285.

94. *Id.*

95. See *id.* at 286-300; see also Berman, *Religious Freedom in Russia: An Amicus Brief for the Defendant*, 12 *EMORY INT’L L. REV.* 313, 315-27, 333 (1998).

96. Berman, *supra* note 93, at 300.

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has been condemned as violative of international norms.⁹⁷ While not openly defending the content of the Russian law, which limits the activities of nontraditional religious groups and affords special privileges to Russian Orthodoxy, Berman provides an understanding of its origins, and like the volume as a whole, causes the thoughtful reader to question the limited “margin of appreciation” allowed under international law.

Berman also discusses the collective faith of an ethnic culture like that of the Russians, and offers Judaism as a parallel example.⁹⁸ The Russian Orthodox Church is a part of Russian ethnicity; therefore, while many Russians have fallen away from faith during the Communist era, they still belong to the Russian Orthodox Church by virtue of their heritage, culture, and history.⁹⁹ The opposition of the Church to the influx of foreign missionaries is based on the vulnerability of the Church to many of the foreign evangelists, and the belief that to preserve the vitality of the Church is to preserve Russian culture.¹⁰⁰ Berman recounts his dialogue with a representative of the Moscow patriarchate who describes the Church’s support of the law as being based on an immediate spiritual crisis and the corresponding need to rebuild the Church before being subjected to the tumultuous forces of rampant religious pluralism.¹⁰¹ The representative tellingly professes, “[W]e do not want to violate international law or our own constitution or principles of human rights. But we hope that those legal and moral norms can be adapted to enable us to meet the acute spiritual crisis that now confronts us.”¹⁰²

97. See T. Jeremy Gunn, *Caesar’s Sword: The 1997 Law of the Russian Federation on Freedom of Conscience and Religious Associations*, 12 EMORY INT’L L. REV. 43, 46-7 (1998) (condemning the Russian law as violative of international law). For more on the antecedents of the Russian legislation, of which Professor Berman is explaining the historical source, see generally Lauren B. Homer & Lawrence A. Uzzell, *Federal and Provincial Religious Freedom Laws in Russia: A Struggle for and Against Federalism and the Rule of Law*, 12 EMORY INT’L L. REV. 247, 255 (1998).

98. See Berman, *supra* note 93, at 301-02.

99. See *id.* at 302-03.

100. See *id.*

101. See *id.*

102. *Id.* at 303.

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5. *Africa*

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If Professor Berman's historical analysis of Russia's struggle to comply with universal standards respecting the rights of free exercise of the messianic faiths does not trouble a reader concerned with the challenge of "how to develop and implement meaningful human rights standards in the face of profound diversity,"¹⁰³ Makau Wa Mutua's contribution to the volume on Africa certainly should.¹⁰⁴ Professor Mutua provides a point of view not commonly heard, which the editors should be commended for including in the volume. He analyzes the free exercise right of proselytism and its destruction of indigenous African cultures and religious traditions.¹⁰⁵ Mutua provides a survey of the Islamic and Christian conquests of the African continent, focusing on the conquerors' ignorance of African religions, presumption of superiority, and their paternalistic and forced methods of conversion.¹⁰⁶

Professor Mutua assesses international human rights law and its emphasis on creating and maintaining a diverse society through the free exchange of ideas across traditional divides such as race, ethnicity, religion, and national origin.¹⁰⁷ However, Mutua asserts that this emphasis is based on "an assumption that is still being tested—that there is inherent benefit in cross-fertilization"¹⁰⁸ Having already provided the reader with the history and effects of "cross-fertilization" in Africa, Mutua succeeds in his reasoned critique of international law, but his assault is not without an alternative vision. Mutua advances a novel argument that "the most fundamental of all human rights is that of self-determination," and that "[a]ny right which directly conflicts with this right ought to be void to the extent of that conflict."¹⁰⁹ He would expand the self-

103. Donoho, *supra* note 26, at 346; *see also supra* note 14 and accompanying text.

104. See Makau Wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in LEGAL PERSPECTIVES, *supra* note 1, at 417.

105. *See id.* at 417.

106. *See id.* at 426-31.

107. *See id.* at 435-36.

108. *Id.* at 436.

109. *Id.* at 437; *see* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, *reprinted in* INTERNATIONAL BILL OF RIGHTS, *supra* note 7. ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). For more on the history and development of the international right

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determination right “to disallow cultural and religious imperialism or imposition by external agencies through acculturation,” and include within the ambit of self-determination the right of a people to “cultural survival.”¹¹⁰

Unwilling to discard the basic ideal of the human rights corpus, Mutua instead calls for a human rights movement that discourages the imposition of uniformity.¹¹¹ Specifically, he argues for a treaty outlawing the kind of proselytism that unfairly imposes dominant cultures on indigenous religions and has had a destructive effect in Africa.¹¹² However, in its basest form, Mutua’s self-determination argument poses a real challenge to the notion of the universality of human rights and to the assumptions upon which those universal principles are based. If the free exercise rights of adherents of the messianic faiths must be limited to protect the rights of individuals and their unique religions or cultures,¹¹³ what other international human rights might be adapted or curtailed to account for the self-determination rights of members of a specific society or culture? Perhaps Professor Mutua’s challenge is not a new one, but he successfully uses the history of religious and cultural imperialism in Africa to argue for a tempered universality *for the sake of human rights*.

III. CONCLUSION

In his chapter of the volume, John S. Pabee asserts, “*We need to revisit the contours of the origins of the concept of human rights for the purpose of updating and renewing it for this time and this place. We may not assume that the traditional statements of it are the last word, high sounding as they may be.*”¹¹⁴ The volume’s editors have heeded this advice by including a range of opinions and uncovering varying regimes of religious liberty protection. As this Book Note has demonstrated, the unique perspectives of individual countries

of self-determination, see Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT’L L. REV. 321, 407-16 (1991).

110. Wa Mutua, *supra* note 104, at 437.

111. *See id.* at 439-40.

112. *See id.* at 440.

113. *See id.* at 422, 439-40.

114. John S. Pabee, *Africa’s Search for Religious Human Rights Through Returning to Wells of Living Water*, in LEGAL PERSPECTIVES, *supra* note 1, at 393.

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and regions challenge the traditional statements of universal religious human rights. Indeed, the volume forces the reader to constantly grapple with the meaning and effectiveness of universal standards for protecting religious liberty in unique social and cultural contexts.¹¹⁵ And therein lies its wisdom.

As Professor Abdullahi A. An-Na'im has suggested, "the assumption of universality should be substantiated through internal discourse within cultures, and cross-cultural dialogue between cultures . . . to broaden and deepen genuine consensus on the global validity and application of human rights standards."¹¹⁶ This Book Note has also demonstrated that *Religious Human Rights in Global Perspective: Legal Perspectives* is a solid foundation for beginning such a dialogue. While the broad analytical framework chapters provide comfort with their methodical analysis of seemingly justifiable universal liberty norms, the country-specific chapters offer individualized retorts to the assumption of universality. May the future purveyors of this constructive discourse and cultural dialogue be as effective as the editors of this mammoth contribution to understanding human rights have been.

Jason M. Waite*

115. See *supra* notes 14-15 and accompanying text.

116. Abdullahi A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 41 (1997).

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