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From marginalization to martyrdom

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Nick Bendor-Samuel, Touching Glory

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Nick Bendor-Samuel painted this piece as prophetic art. Those who face persecution and martyrdom reach out in ultimate hope of heaven.

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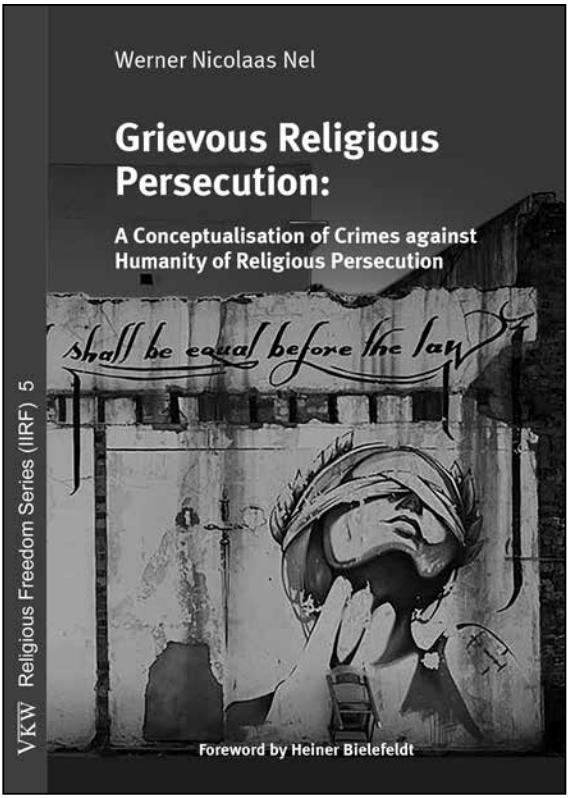

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Editorial: From marginalization to martyrdom

We are glad that IJRF is continuing to catch up on its backlog. Although this volume is labelled as 2018, its publication occurs in early 2021. Some of the articles had their genesis in papers presented at the Second International Researchers Consultation on Freedom of Religion or Belief, held at Mackenzie Presbyterian University, São Paulo, Brazil, on 17-18 September 2020 by IIRF and its partners. Many papers are current to 2018 but some have been updated to 2020.

This issue covers a wide variety of topics from a truly global array of authors. Several authors show that Christians face marginalization, particularly in the West, for their faith. Christians can even be marginalized within their religious communities. But we are also aware that Christians face death for their faith and we honour those who have been martyred for their faith.

We are very pleased to include an opinion piece by former Canadian MP David Anderson about the founding of the International Panel of Parliamentarians for Freedom of Religion or Belief (IPPFoRB). Anderson was one of the founding parliamentarians in this organization and still plays an active role in it.

Dennis Petri provides a literature review on some of the current important theoretical frameworks for observing violations of the religious freedom of religious minorities. He evaluates these frameworks and explains why a more comprehensive framework is necessary.

Leah Farish writes on the origins of the US Bill of Rights' provision on religious freedom, arguing that it has its genesis in the Westminster Confession. The US is often seen as a model of religious freedom, and understanding the origins of the peculiar wording in the First Amendment may prove helpful to ensure its robust interpretation.

André Fagundes and Eugenia Relaño Pastor have both contributed articles analysing religious freedom in Europe, where Christians experience marginalization for their faith. Fagundes focuses on a ruling by the European Court of Human Rights in the case of a Christian denomination in Moldova that was denied recognition. Pastor considers judgements addressing the autonomy of religious organizations in the light of employees' right to be free of discrimination on religious grounds.

Sindy Oliveira Nobre Santiago and Fernanda Bezerra Martins Feitoza analyse the law relating to religious education in Brazil. They apply international law to argue for a broad interpretation of the freedom to learn and teach in the context of one's faith.

Father Mishek Mudyiwa examines apostasy claims against the first indigenous Catholic priest in Zimbabwe. He argues that this was a situation of persecution within the Roman Catholic Church and that it carries overtones of colonization.

Finally, Marisol Lopez Menendez documents martyrs for their faith in Latin America from the 1920s to the present. These martyrs have paid the ultimate price for their faith and we honour their memory.

The "Noteworthy" section was compiled by student researcher Monica Rawlek Elizondo and me, but we continue to search for an editor dedicated specifically to this valuable section. Our new book review editor, Werner Nel, and I collaborated on the book reviews in this issue.

We welcome papers from a wide variety of disciplines that relate to religious freedom. These can include academic articles, opinion pieces, reports, interviews and book reviews. Please see www.iirf.eu for submission guidelines and deadlines. The journal is available online at no charge or by subscription in hard copy format.

Yours for religious freedom,
Prof Dr Janet Epp Buckingham
Executive Editor

International Institute for Religious Freedom opens Latin American office

The International Institute for Legal Studies and Research on Fundamental Civil Liberties (IILSRFCL), run under the oversight of the Brazilian lawyers association Anajure, has officially become the Latin American branch of the International Institute for Religious Freedom (IIRF).

Both organizations have worked together in the past – organizing international conferences, on major publication projects, and acting as experts for the International Platform of Parliamentarians for Freedom of Religion and Belief (IPPFoRB). There have been several reciprocal delegation visits between São Paulo and Berlin. The cooperation was agreed upon in a meeting held at the German Bundestag at the last IPPFoRB summit in Berlin 2016.

The signing of the Memorandum of Understanding took place on 4 September 2017 near the parliament of Brazil, in the office of IILSRFCL. Signers were the president and vice-president of Anajure, Prof Dr Uziel Santana and Dr Jonas Moreno, respectively, and the directors of IIRF, Prof Dr Christof Sauer from South Africa and Prof Dr Thomas Schirrmacher from Germany. Uziel Santana, the new director of IIRF for Latin America, is Law Professor at Mackenzie Presbyterian University, The Federal University of Sergipe and Visiting Professor at Faculty of Law of the University of Buenos Aires (FD-UBA), as well as President of the Federación Inter Americana de Juristas Cristianos (FIAJC).

IJRF founding editor takes inaugural professorial chair in religious freedom

Lena Ohm and Janet Epp Buckingham

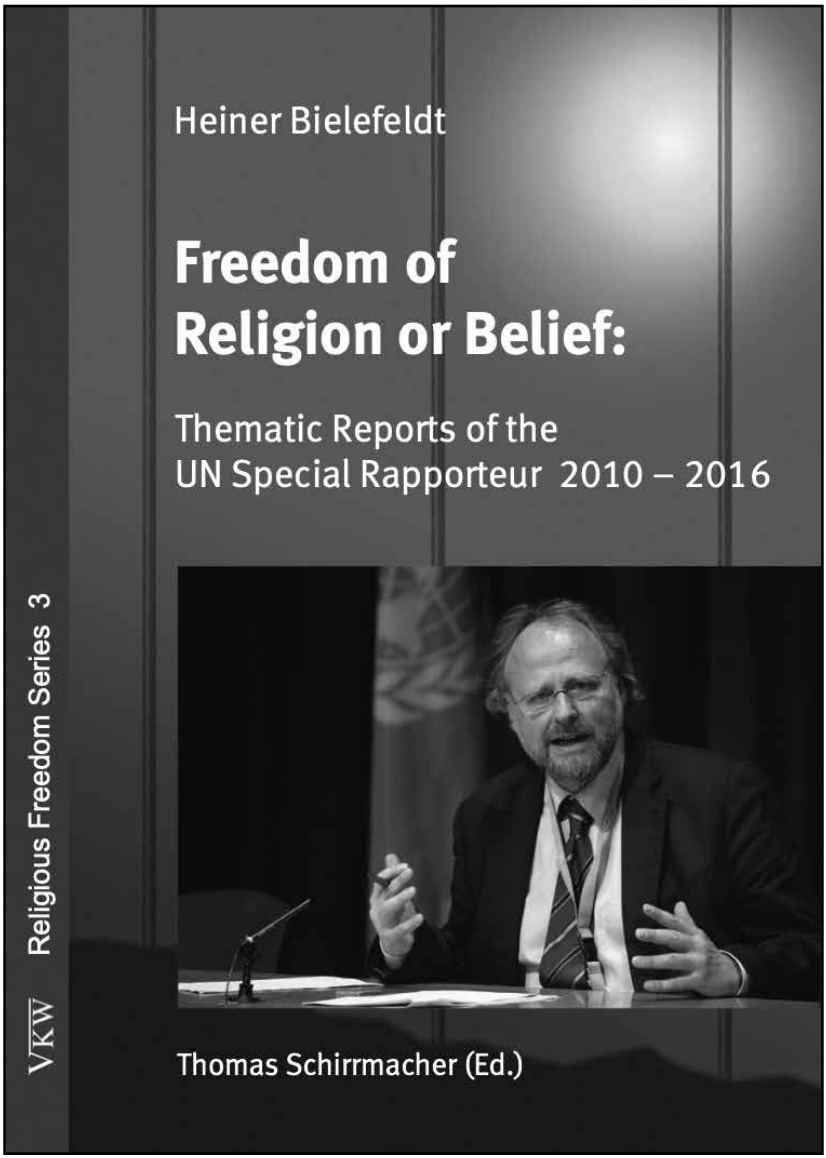
The International Journal for Religious Freedom offers warm congratulations to founding editor Christof Sauer as he takes a new professorial chair at Giessen School of Theology (FTH), dedicated to the topic of religious freedom and research on persecution of Christians. At the inauguration ceremony on 18 May 2018, special emphasis was placed on the universality of the human right to freedom of religion or belief and its positive implications.

Stephan Holthaus, Rector of FTH regards this appointment as a signal to the scholarly community that these issues not only belong on pulpits, but also need to be studied at universities. He emphasized that not only Christians but also members of other religious communities experience persecution because of their faith and that their situations would also be amongst the subjects of research. "Freedom of religion applies to everybody, and therefore this professorship will stand up for general religious freedom in all countries of the world, and not just for Christians," Holthaus stated.

The specification "research on persecution of Christians," however, was added deliberately, he said, because, as a theological college, "we have a special interest in issues relating to the propagation of the Christian faith." Moreover, Sauer added, the term "religious freedom," which covers primarily the human rights concept, does not include all phenomena one must deal with in this field. Sauer explained, "If, for instance, a girl in India turns to the Christian faith and her Hindu parents therefore disinherit her, this is no violation of human rights – as long as no violence is used – but, of course, it is a form of religious discrimination."

Such issues require, according to Sauer, a perspective specific to the church that is Christian and theological and therefore, in his opinion, the topic is in good hands at a place of theological education.

Speakers at the inauguration included Heiner Bielefeldt, previously UN Special Rapporteur for freedom of religion or belief; Herman Gröhe, deputy caucus leader and commissioner for churches and religious communities of the CDU/CSU parliamentary group; and Thomas Schirrmacher, Deputy Secretary General of the World Evangelical Alliance.



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ISBN: 978-3-86269-117-3, € 20 **Free online at: www.iirf.eu**

Legislators lead the way to freedom of religion and belief

David Anderson and Joycelin Mosey[1]

In late June 2014, a meeting of legislators from around the globe took place on the fringes of the Oxford Journal of Law and Religion Conference. Baroness Berridge of the Vale of Catmouse, in her capacity as chair of the British All Party Parliamentary Group on International Freedom of Religion or Belief (APPG), extended an invitation to a number of parliamentarians who had previously been active in defending the right to freedom of religion and belief (FoRB). This group discussed the deteriorating international climate for FoRB and brainstormed about how they might best support these fundamental rights.

The participants decided to initiate a network of like-minded parliamentarians from around the world, with the purpose of sharing information, coordinating activity and initiating joint responses on issues of religious freedom. The network would cross political and religious lines and would be focussed narrowly on FoRB issues. The goal of this new proposed network was to promote freedom of religion or belief as a human right, including the right to believe as one chooses, to change one's beliefs, and to live out those beliefs.

The language adopted was similar to that found in Article 18 of both the United Nations' Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights, which asserts that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include freedom to have or to adopt a religion or belief of one's choice and to manifest, either individually or in community with others and in public or private, that religion or belief in worship, observance, practice and teaching.

Legislators were to be the primary focus of the new network. Although other groups, such as the APPG, the US Commission on International Religious Freedom (USCIRF), and the EU Parliament's Working Group on Freedom of Religion or Belief had been doing exceptional work, there was no entity designed specifically to encourage legislators to work cooperatively and internationally on this issue.

The meeting ended with an invitation from Norwegian MP Abid Raja to meet again in fall 2014 in Oslo.

[1] David Anderson was a founding member of the International Panel of Parliamentarians for Freedom of Religion or Belief. He served as a member of Canada's Parliament from 2000 to 2019. Joycelin Mosey served as a Parliamentary Assistant to Mr. Anderson for eight years. Their ongoing work is available online at http://www.davidanderson.ca/category/religious-freedom/ippforb/.

On 8 November 2014, the International Panel of Parliamentarians for Freedom of Religion or Belief (IPPFoRB) was launched at the Nobel Peace Centre in Oslo. In the intervening months, a charter was written, a 'Steering Group' leadership structure was put in place, and a strategy was formulated. The Oslo Charter (see Appendix) is the founding declaration of IPPFoRB. It is an expression of common goals and a declaration of commitment to FoRB for everyone, everywhere. Over 30 parliamentarians from around the globe came to Oslo to witness the unveiling of the Charter and to sign on to it. Norwegian political parties expressed their support for the Charter's principles and the network was born.

The early strategy was simply to welcome and provide an informal resource for all legislators who had an interest in FoRB issues. Work was guided by the volunteer Steering Group and carried out by a volunteer Secretariat, consisting of interested support staff. The intent was never to put a centralized 'command and control' bureaucracy in place but rather to assist local parliamentarians in establishing networks in their own nations or regions and then to connect them to the expertise of other legislators to assist and strengthen them. One early initiative offered 'advocacy' letters to be signed by interested network participants, addressing urgent issues of religious persecution in Myanmar and Pakistan.

One of the results of the Oslo launch was the initiation of new partnerships. The International Contact Working Group, USCIRF, the Norwegian government, the Church of England and the Konrad Adenauer Foundation (KAF) from Germany all indicated a desire to work with IPPFoRB. A proposal was made to host a joint conference of parliamentarians in New York. Planning throughout 2015 resulted in an unprecedented gathering of nearly 100 parliamentarians from 45 countries in New York City in November 2015.

This First International Parliamentarians Conference, titled "Multinational Efforts to Promote Freedom of Religion or Belief," focussed on finding concrete actions that could create an atmosphere of change. Participants were encouraged to sign the following items:

- the New York Resolution on Freedom of Religion or Belief, which committed signatories to take action to promote religious freedom;
- one or more of three advocacy letters, highlighting the growing threat of religious persecution in Myanmar, Iran and Vietnam, respectively; and
- a letter calling for the release of American pastor Saeed Abedini, who had been jailed in Iran since 2012. Sixty-seven Parliamentarians signed the letter after hearing directly from Aedine Naghmeh Abedini, pastor Abedini's wife.

Panel discussions examined various issues including the threat posed by ISIS repression and authoritarian governments. Religious leaders from Iran, Nigeria and Japan spoke on the present state of FoRB in their countries.

The meeting saw a drafting of recommendations for civil society, as part of an attempt to bridge the gap between IPPFoRB and civil society and to encourage consultation and collaboration on FoRB issues.

In early 2016, the IPPFoRB Steering Group and Secretariat established a three-year plan for network participants. The plan envisioned growing IPPFoRB as an international network of parliamentarians who would become agents of change at home and internationally.

One part of the plan involved broadening partnerships, so in August 2016 IPPFoRB partnered with the ASEAN Parliamentarians for Human Rights (APHR) in Bangkok, Thailand for a "school" on FoRB. That was followed up by IPPFoRB's first fact-finding and solidarity visit to Myanmar (Burma), in partnership with USCIRF. IPPFoRB members and USCIRF staff met with government officials, religious groups and civil society to address threats to FoRB as well as lasting solutions. Constitutional reform and changes to so-called race and religion protection laws that restrict FoRB were the delegation's primary interests.

September 2016 saw approximately 130 parliamentarians gather in Berlin, Germany for the Second International Parliamentarians Conference, titled "An Embattled Right: Protecting and Promoting Freedom of Religion or Belief." In partnership with the KAF, the conference featured a symposium of parliamentarians, with workshops and seminars aimed at strengthening participants' ability to defend FoRB. The focus was on strengthening linkages, developing relationships, increasing cooperation, improving resources and the fostering of new FORB legislative initiatives.

Examples of multilateral challenges to FoRB and regional dimensions of IPPFoRB's work were presented, and once again parliamentarians had the opportunity to sign letters that addressed specific concerns in Eritrea, Pakistan, Sudan, Myanmar and Vietnam.

This conference also featured a high-level political session hosted by the German Bundestag's Christian Democratic Union/Christian Social Union (CDU/CSU) group, opened by Federal Chancellor Angela Merkel and featuring real-world advice from Pakistani, Burmese, and Yazidi religious minority parliamentarians. Discussion built on practical ways to create and operate regional networks of parliamentarians.

In 2017, the annual Trygve Lie Symposium, held in New York, looked specifically at Article 18 of the UDHR. The symposium brought together UN and government officials, experts, and civil-society representatives to share best practices and discuss how to encourage nations to uphold FoRB.

In conjunction with the symposium in New York, IPPFoRB brought together ten female MPs from around the globe to meet with experts, UN officials, and representatives of NGOs. The goal was to discuss synergies between religious freedoms

and women's rights, and to consider how best to promote both rights. It was unusual for a group of female leaders to speak so clearly about the need for leaders to understand the positive correlation between freedom of religion and women's rights.

In 2017, IPPFoRB received three-year funding commitments from the Norwegian Parliament and Ministry of Foreign Affairs. This enabled the hiring of a full-time coordinator and support for several smaller regional projects. A group from IPPFoRB visited Nepal in October 2017 to support MPs and the local Secretariat, who had established a FoRB chapter. They met with a small group of concerned parliamentarians, Nepal's Human Rights Commission, and members of religious and civil-society groups who had grave concerns over legislation that could negatively affect freedoms promised in Nepal's new constitution. Together, they urged Nepal's government to take steps to avoid religiously driven anti-conversion legislation.

By 2017, 150 parliamentarians from more than 45 countries were actively participating in the IPPFoRB network, and regional and national networks were also being formed.

Unfortunately, persecution on the basis of religion has continued to rise since then. Abusive governments continue to prevent individuals from practicing their faith through violent and repressive means. They are becoming much bolder in using 'national security' laws and regulations to persecute religious minorities. Examples abound, but Russia's Yarovaya Law is one case in point, as a law designed to penalize terrorists has been used primarily to punish religious minorities who share their beliefs in public places. Jehovah's Witnesses, in particular, have been targeted by Russian authorities. In response, IPPFoRB has initiated a "prisoner of conscience" project in which network participants can "adopt" a prisoner of conscience and lobby for his or her freedom.

To inform and educate parliamentarians, IPPFoRB has launched the IPPFoRB Academy, which enables up to about a dozen parliamentarians to gather in one location to learn about and to discuss RF issues. The intent is to encourage MPs to create connections so that they are not isolated as they return to their countries with a commitment to change and, hopefully, to establishing their own national network. At the conclusion of the Academy, learners are expected to take the initiative in a specific way – starting a FoRB group, setting up a support Secretariat or proposing a piece of legislation.

With global and local religious restrictions on the rise, why continue to fight for FoRB? The effort is based on the same motivation upon which IPPFoRB was established initially – that all people are of equal value and have the basic right to believe as they choose and to practice that belief. The struggle to protect this right

continues, as perpetrators of severe violations of religious freedom are increasingly well-networked. Religious repression is changing and becoming much more sophisticated.

Extremist groups are developing transnational linkages, such as groups pledging allegiance to ISIS or religious leaders sharing their tactics with fellow extremists in other countries. China's leaders, in particular, are perfecting means to restrict FoRB, steadily placing new limitations on online discussions, gatherings, financing and construction of religious buildings through President Xi's "Sinicization" policy and revised regulations on religious minorities. The pervasive use of electronic land-based and online surveillance is an easy way for abusive governments to control both religious minorities and political dissent. They are currently exporting these tactics around the globe.

As Dr. Heiner Bielefeldt, former UN Special Rapporteur on Freedom of Religion or Belief, stated in October 2016:

> The situation of freedom of religion or belief has dramatically deteriorated in many parts of the world, and countless people suffer harassment, intimidation, discrimination and persecution. One of the silver linings in these gloomy days is the IPPFoRB, which has brought together Parliamentarians from all over the world who are committed to using their influence on behalf of religious freedom for all. This new dimension of advocacy is a source of hope, which is so urgently needed today.

Bielefeldt is right; there is still hope. IPPFoRB has made a commitment to finding leaders who will stand up to oppression and to standing alongside them. In two and a half years, IPPFoRB has progressed from a handful of like-minded parliamentarians with a budding vision to a global, internationally recognized body that continues to grow – not only in numbers, but in its determination to place the promotion and protection of FoRB at the centre of every government's agenda.

As German Chancellor Merkel stated in September 2016, "Within a very short time, the International Panel of Parliamentarians for Freedom of Religion or Belief has established itself as the central actor for this essential fundamental right. The fact that there is now such a strong network gives strength, courage and confidence."

The Oslo Charter for Freedom of Religion or Belief

International Panel of Parliamentarians for Freedom of Religion or Belief (IPPFoRB)

Whereas severe violations of freedom of religion or belief continue to occur around the world, perpetrated by both governments and non-state actors;

Whereas studies indicate an increase in restrictions on the free practice of religion or belief, with the majority of the global population living in countries where their freedom to peacefully practice their faith could be restricted;

Whereas an increasing number of governments, international institutions, and non-governmental organizations are recognizing this emerging crisis and committing resources to ensure greater respect for this fundamental freedom;

Whereas the freedom of thought, conscience and religion is a universal, established, and non-derogable human right, enshrined in international treaties at the United Nations, binding conventions of regional bodies, and domestic constitutions;

The signatories reaffirm Article 18 of the Universal Declaration of Human Rights, which declares:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Freedom of thought, conscience and religion is an inalienable human right, encompassing the right to hold or not hold any faith or belief, to change belief, and to be free from coercion to adopt a different belief.

Freedom of religion or belief is a unique human right, in that to be fully enjoyed other incorporated rights must also be respected, such as the freedoms of expression, assembly, education, and movement.

The signatories commit to:

Promote freedom of religion or belief for all persons through their work and respective institutions.

Enhance global cooperation by endeavouring to work across geographical, political, and religious lines.

Undertake efforts to jointly promote freedom of religion or belief, share information, and mobilize effective responses.

(Parliamentarians support this declaration of principles in their personal capacity and not as representatives of their government, political party or any other body.)

The vulnerability of religious minorities

A literature review

Dennis P. Petri[1]

Abstract

In this study, I review some of the most relevant theoretical and analytical frameworks in terms of their value to assess the specific vulnerability of religious minorities. My presentation is organized not by discipline but by theme. First, I present a selection of ways to understand the reasons behind the vulnerability of religious minorities. After that, I consider the contributions of conflict theory toward understanding ethno-religious conflict. I conclude that each of these interpretive models offers valuable pieces to address the vulnerability of religious minorities yet fails to detect important threats.

Keywords Religious freedom, religious persecution, vulnerability, conflict theory, ethno-religious conflict, religious minorities.

1. Introduction

Although religion has been a neglected topic in the social sciences (Wald and Wilcox 2006; Fink 2009), this does not mean that scholarship has nothing relevant to say about the vulnerability of religious minorities. On the contrary, numerous contributions in a wide range of disciplines have directly or indirectly touched on this topic. These include various philosophical reflections on the notion of vulnerability and the role of religion in society. Some of the analytical concepts concerning minority and ethnic groups developed in the broad field known as conflict theory are also applicable to observing the vulnerability of religious groups (among others, see Toft 2007; Marsden 2012; Vüllers, Pfeiffer and Basedau 2015; Basedau et al. 2017; Henne 2019).

In this study I review some of the most relevant theoretical and analytical frameworks in terms of their value to assess the specific vulnerability of religious minorities. Section 2 surveys classic theories of how people or groups become vulnerable to mistreatment in their society, such as Durkheim on deviance, Weber on chal-

[1] Dennis P. Petri is scholar-at-large at the Observatory of Religious Freedom in Latin America, lecturer at The Hague University of Applied Sciences and the Universidad Latinoamericana de Ciencia y Tecnología, and director of the Foundation Platform for Social Transformation (www.platformforsocialtransformation.org). This article is taken from sections of his PhD dissertation, The Specific Vulnerability of Religious Minorities (Vrije Universiteit Amsterdam, 2020). Article received 2 July 2020; accepted 28 July 2020. This article uses American English. Email: dp.petri@gmail.com.

lenging the state's authority, and Girard on the psychological need for a scapegoat. Section 3 examines conflict theory and its three main types of explanation (grievance, greed, and opportunity). Section 4 evaluates the various theories and notes a tendency to rely too heavily on the power of a single explanatory factor whereas a more comprehensive framework is needed to interpret religious vulnerability.

2. Ways to understand the reasons behind the vulnerability of religious minorities

In this section I discuss various types of theories that provide micro- and macro-level interpretations of the vulnerability of religious minorities. These theories cover the relation between religious identity and vulnerability, vulnerability as a result of deviant social behavior, and the specific vulnerability of commitment to justice. Some of these theories have explanatory pretensions, whereas others have a normative character. Because I am primarily concerned with observing the vulnerability of religious minorities, I will view the theories simply as complementary interpretations that guide our observation.

2.1 The relation between religious identity and vulnerability

The deterministic claim that differences of identity, whether cultural, religious, or racial, unavoidably lead to conflict has been contested by numerous authors due to lack of empirical evidence (Fox 1999; Stewart 2008; Grim and Finke 2011). However, identity, in particular religious identity, does play a role in explaining conflicts. In this section, I present the contributions of several scholars who describe religious identity as an explanatory factor in conflict.

In *Identity and Violence*, Amartya Sen explains the dangers of what he calls the "assumption of singular affiliation," by which a person's identity is reduced to a single marker. Sen instead emphasizes that "identities are robustly plural, and that the importance of one identity need not obliterate the importance of others." In his view, the reductionist approach to identity is prone to violence for a number of reasons. One of them is that identity-based thinking is susceptible to manipulation, of which Sen offers ample empirical evidence in his book. For example, he establishes a link between the reductionist characterization of India as a "Hindu nation" and sectarian violence against Muslim and Christian minorities (Sen 2006:46).

The manipulation of identity is also a central theme in the work of Gurr (1993, 2000), Horowitz (2000), and Schlee (2008). In *How Enemies Are Made: Towards a Theory of Ethnic and Religious Conflicts* (2008), Schlee explains that "virtuosi in identity manipulation" implement different strategies to broaden or narrow identities based on rational cost-benefit calculations regarding the inclusion or exclusion of particular groups of people. For example, "within the religious dimension

one can identify with Christianity as a whole or with just one small elect sect." (Schlee 2008:25). A broad definition of identity may be useful to obtain certain benefits (such as a larger army), but a narrow definition may be preferred when it comes to sharing these benefits.

Another reason why identity-based thinking is prone to violence, according to Sen, is that it removes individual's capacity to identify with others. By downplaying their other affiliations as well as their belonging to a nation, one can make it easier to single out a minority, including a religious minority, as different. That which is different can then be viewed as having less worth or as a threat to the social cohesion of the community, causing the minority group to be viewed as a scapegoat. I will return to this concept later.

Making a slightly different point, Buijs (2013) warns against "the danger of unity," referring to the "unitarian" conception of what a well-functioning political community should be like. According to this conception, all citizens in a society are expected to share the same language, traditions, dress, lifestyle, and convictions, in opposition to pluralism, which seeks to maximize freedom and diversity as ingredients of a successful society. Rigid insistence upon unity is often a recipe for violence.

To summarize, religious identity can evidently be a factor causing vulnerability, but it should be properly understood. As Sen asserts, differences of identity are not an automatic cause of conflict; rather, perspectives that reduce individuals to a single identity – that is, reductionist and manipulative interpretations of identity – can increase the vulnerability of religious minorities.

2.2 Vulnerability as a result of deviant social behavior

References to the vulnerability of people who display what is considered deviant social behavior, including religious minorities, can be found in the work of Émile Durkheim, Martha Nussbaum, René Girard, and Max Weber. In many if not almost all societies, these authors note, some form of religion is an essential element that provides unity and cohesion. Under some scenarios, religious minorities can be perceived as deviant and therefore as a threat to social cohesion, resulting in vulnerability for the minority group.

Durkheim's work on deviance in *De la division du travail social* (1893) is particularly illustrative in this respect. He argues that shared norms and values, including religious beliefs, constitute the glue that holds a human society together by providing a sense of "collective consciousness," which, at least in premodern societies, was viewed as essential to its preservation. When individuals within a society question its shared norms and values – for instance, because they adhere to a different religion – they risk becoming viewed as a threat to social cohesion. Schlee's

(2008) analysis of exclusion dynamics as a result of a striving for "ritual purity" in both Muslim and non-Muslim communities in Africa can also be interpreted in terms of vulnerability as a result of deviant behavior. A modern-day illustration of this dynamic appears in communist and post-communist countries where religious organizations are labeled as "foreign agents" by the government.

The idea of religious minorities being a threat to social cohesion connects with Martha Nussbaum's reflection on how "irrational" and "misguided" fear leads people to imagine alleged faults in a minority group. Examples include the historically common fear of a Jewish world conspiracy – as laid out in the "Rabbi's Speech" (1872) and the *Protocols of the Elders of Zion* (1902) (collected in Mendes-Flohr 2011:336-343). More recently, Muslims have been widely perceived as a security threat to Western society. In both examples, a similar pattern is at play:

> Fear typically starts from some real problem. … Fear is easily displaced onto something that may have little to do with the underlying problem but that serves as a handy surrogate for it, often because the new target is already disliked. … Fear is nourished by the idea of a disguised enemy. (Nussbaum 2013:31)

This process can lead to severe consequences for religious minorities. In Nussbaum's example, the unfounded and amplified fear of Muslims in Western society has translated into political reactions against certain forms of religious expression, leading to bans on burqas and minarets in Western countries, among other things. Her explanation of this trend is commonly referred to as securitization theory (see Cesari 2013).

René Girard's influential *The Scapegoat* (1989) resembles Nussbaum's perspective, with one qualitative difference: the vulnerability of religious minorities is explained not by fear but by frustration. Girard posits that humans are driven by "mimetic desire," or wanting what others have. Girard argues that in a human society, mimetic desire is contagious and inevitably leads to conflict at some point because the mimetic desire of all people can never be completely satisfied. At this point, the "scapegoat mechanism" is triggered, by which one person or one group is blamed for the discontent. All of society's frustration is directed to this scapegoat, thereby relieving social tensions.

Girard contends that the victims of social discontent may be totally random, but that stereotypes and prejudices generally play an important role. Some people or groups are particularly easy targets, however absurd the claim that they are responsible for a disaster. Religious minorities in particular are vulnerable to identification as scapegoats:

> The appetite for persecution readily focuses on religious minorities, especially during a time of crisis. … [Public] opinion is overexcited and ready to accept the most absurd rumors. (Girard 1989:6)
> Ethnic and religious minorities tend to polarize the majorities against themselves. In this we see one of the criteria by which victims are selected, which, though relative to the individual society, is transcultural in principle. There are very few societies that do not subject their minorities, all the poorly integrated or merely distinct groups, to certain forms of discrimination and even persecution. (Girard 1989:17)

Girard does not conclude that differences necessarily lead to conflict. He does argue, however, that differences increase the likelihood of persecution. Furthermore, he observes the importance in this process of behavioral aspects, particularly where groups (such as religious minorities) share a behavioral code:

> In any area of existence or behavior abnormality may function as the criterion for selecting those to be persecuted. For example, there is such a thing as social abnormality; here the average defines the norm. The further one is from normal social status of whatever kind, the greater the risk of persecution. (Girard 1989:18)

Religious differences do not always lead to divisions. In *American Grace: How Religion Divides and Unites Us*, Putnam and Campbell (2010:537) argue that religion can also perform a "bridging" function, as a source of social capital that "connects people of different backgrounds." For example, Putnam and Campbell find that religious Americans are more likely to be "good neighbors" than secular Americans, not because of their faith but because of their sense of community. Scenarios such as Nussbaum's "politics of fear" or Girard's scapegoat mechanism should therefore not be seen as inevitable in religiously diverse societies.

Religion can also be perceived as a political threat. In his essay *Politics as a Vocation* (1919), Max Weber depicts religion as a competing source of legitimacy that unavoidably enters into conflict with existing power structures. Such conflict is not necessarily violent, but there is always a tension between state authority and religion, which is "an all-encompassing normative system [that] poses an authority alternative to the state" (Scolnicov 2011:1). Other scholars have also viewed religion and the state as competing sources of legitimacy (Habermas 2006; Buijs, Sunier and Versteeg 2013). Similarly, Fox (2013) observes that religion can constitute either a source of legitimacy for the state and political institutions or a factor that undermines their legitimacy. The competition between the state and religion can be readily observed in classic communist countries, where the state wishes to be the only source of legitimacy and is therefore suspicious of religion.

The aforementioned authors all provide complementary interpretations of how so-called deviant behavior – in comparison to the norms of the majority – can translate into vulnerability of religious minorities when they are perceived as a threat to the cohesion of society (Durkheim), inspire an "irrational" fear (Nussbaum), become scapegoats for frustrations (Girard), or are viewed as a threat to the state authority, or by extension to other forms of authority (Weber). This set of theories underscores the importance of considering behavior as a cause of vulnerability alongside identity-based interpretations.

2.3 The specific vulnerability of commitment to justice

In *The New Religious Intolerance*, Martha Nussbaum makes an ontological claim about the intrinsic vulnerability of humanity. Her starting point for this claim is what she calls "the vulnerability premise," or the notion that the faculty of conscience, which is at the essence of human dignity and hence of humanity itself, "can be seriously impeded by bad worldly conditions. It can be stopped from becoming active, and it can even be violated or damaged within" (Nussbaum 2013:65). In other words, as Turner (2006) and Scruton (2017) agree, to be human means to have the faculty of conscience; indeed, for many people, religious convictions are a matter of conscience upon which they base certain life choices. In their experience, the faculty of conscience is closely connected to what can be called the religious faculty. But this faculty is always vulnerable to resistance by "the world," or everything surrounding a person.

The immediate normative implication of this claim is that religious freedom must be protected in the broadest possible way. It also implies that whenever social and political conditions do not sufficiently protect both "equal liberty" and "ample liberty," as Nussbaum contends, human dignity itself is vulnerable to being "coerced, oppressed, and manipulated" (Bock 2014:262). Therefore, it is important to understand the social and political conditions that impede the faculty of conscience – and, by extension, restrict religious freedom – and therefore directly violate human dignity (Turner 2006).

Although the vulnerability premise is universal, Nussbaum argues that the human dignity of people who are strongly committed to justice –many of whom are religiously motivated – is even more at risk of violation. In *The Fragility of Goodness* (1986), she argues that because vulnerability is an intrinsic aspect of the human condition, individuals who want to be good will inevitably be confronted with an ethical dilemma: a good human being will always want to be open to the world, but this very openness leaves people exposed to extreme circumstances beyond their control. In other words, to be good is to be fragile, and to be fragile is to risk being shattered (Verbrugge, Buijs, and van Baardewijk 2019).

Judith Butler, although she rejects Nussbaum's ontological claim about vulnerability, makes a similar point in *Vulnerability in Resistance* (2016), where she argues that "resistance" – that is, engaging injustice – increases risk. She gives the example of a street protest, in which all persons present are at risk of detention, arrest, and (in the most extreme cases) physical harm or death. Psychological research suggests that altruistic individuals, particularly those who adhere to strong moral convictions, tend to face general resentment (Monin, Sawyer, and Marquez 2008; Parks and Stone 2010). In the same vein, liberation theologians speak of "martyrdom" as something inevitable for anyone who responds to the Christian duty to promote justice. To promote justice, "oppressive social structures" must be confronted, and this inevitably exposes those pursuing justice to risks, of which martyrdom is the ultimate expression (Gutiérrez 1988; Ellacuría 2002; Sobrino 2005).

3. When vulnerability becomes conflict: understanding ethno-religious conflict by means of conflict theory

Within the field of conflict theory, three schools can be distinguished that offer concurrent interpretations for civil conflicts, including ethno-religious conflicts. The first explains conflicts as a result of grievance and the second as a result of greed; the third favors an approach in terms of opportunity. Notwithstanding the arguments both within and between these schools with regard to what is the best statistical predictor of civil conflicts, I interpret them as complementary interpretations that can shed light on the vulnerability of religious minorities, in agreement with Ballentine and Sherman (2003) and Weinstein (2007). Johan Galtung (1969) makes an alternative distinction between "value conflicts," which involve ideology, and "interest conflicts," which concern resource scarcity.

3.1 Grievance

Relative deprivation theory is probably the best-known motivational framework for interpreting conflict. Developed by Ted Gurr in his seminal work *Why Men Rebel* (2016 [1970]), this theory is one of the most influential political-science frameworks concerning political protest and rebellion. It postulates that relative deprivation, defined as the "perceived discrepancy between value expectations and value capabilities," is a strong determinant of the potential for collective violence. Drawing on social psychology, Gurr argues that relative deprivation – which Gurr and other scholars also refer to as "popular discontent," "sense of injustice," or "grievances" – leads to frustration and that frustration in turn leads to aggression, which is the "primary source of the human capacity for violence." Similar notions can be found in the work of other scholars: "rancor" (Galtung 1969), "rage" (Sloterdijk 2007), "rancor" (Schaap 2012), and "anger" and "resentment" (Nussbaum

2016). In Gurr's model, frustration will lead to rebellion if a number of conditions are met: the frustration must be sustained over time by a group that has a sufficient degree of organization, it needs to be supported by ideological justifications, and political action must be viewed as a pertinent solution. The discontented people must also believe that they have the capacity to act (Gurr 2015, 2016).

Frances Stewart (2008) favors an approach that uses "horizontal inequalities," defined as "inequalities in economic, social or political dimensions or cultural status between culturally defined groups," to determine the likelihood of conflict as well as their potential for mobilization. Using this concept, Cederman, Gleditsch, and Buhaug (2013) argue that grievances based on political and economic exclusion at the group level do cause civil war. They measure group exclusion through a dataset that they consider more suitable than the Minorities at Risk dataset used by Gurr, who had reached a similar conclusion in 1993. Among other things, these authors find that ethnic groups that are excluded from governmental influence or face group-level economic inequality are more likely to experience conflict.

In spite of their differences, the aforementioned scholars all agree on one thing: grievances, whether based on real or perceived injustice, are the primary explanatory factor of conflict between ethnic groups, and under suitable circumstances, such as widespread impunity or sufficient organizational capacity of the antagonistic groups, this can lead to violent mobilization.

Although it takes ideological justifications into account, the grievance-based approach says little about the role of religious convictions and generally focuses on material forms of grievance rather than immaterial ones such as religious disagreements. The only exception is Fox (1999), who developed a theory of ethnoreligious conflict by integrating religion into the Minorities at Risk dataset, but this theory holds explanatory power only in cases of inter-ethnic conflicts in which religion and ethnicity overlap.

3.2 Greed

Rejecting the grievance-based approach, a number of scholars have argued that greed (i.e., economic and political incentives), not grievance, is the primary explanation of conflict (Collier and Hoeffler 2004). The proponents of greed as the leading factor in conflict do not deny the importance of grievances but are skeptical of what they refer to as "self-serving explanations" that are employed to justify rebellion, urging that these narratives should not naively be taken at face value (Kalyvas 2006; Schlee 2008). In Collier's words, rebels should be viewed as "profiteers," rather than as "freedom fighters".

In agreement with this perspective, in *Terror in the Name of God: Why Religious Militants Kill* (2004), Jessica Stern unequivocally concludes that religious

terrorist organizations use religion as a motivation and a justification to recruit soldiers, but that the driving force behind such organizations is "power, money and attention". It is indeed a legitimate question whether insurgencies such as the FARC guerrillas in Colombia or Al-Shabaab in Somalia are really ideologically motivated (by communist ideals and by political Islam, respectively) or simply criminal elements making money off drug trafficking and piracy.

Apart from scenarios of rebels who use religious discourse as a mobilization tool or to conceal their actual intentions, applying the greed-based approach to interpret the vulnerability of religious minorities might seem counterintuitive, as religious conflicts are commonly understood as conflicts over values. However, the greed-based approach introduces the possibility of alternative interpretations to grievance-based accounts. Indeed, most accounts of religious persecution tend to focus on religious motives, misjudging conflicts in which the vulnerability of religious minorities is caused by the rational calculations of a group or organization driven by economic or political incentives (Toft 2011). In other words, even when religious grievances are absent, religious minorities can still be vulnerable.

This being said, the role of immaterial factors of conflict should not be ignored altogether, and both the grievance-based and the greed-based approaches tend to overemphasize material factors. A helpful typology is offered by Achterhuis and Koning in *De kunst van het vreedzaam vechten [The art of peaceful fighting]* (2017:111-137). They distinguish between conflicts over interests – which could be (a) competition for the same interest (Girard's "mimetic desire") or a (b) struggle over opposite interests – and (c) conflicts over value differences, such as identity, ideology, or religion. Achterhuis and Koning stress that, in practice, these three types of conflict can occur simultaneously and interact. They prefer a holistic approach to that considers different elements rather than singling out only the material ones. I will pick up on this point at the end of this section.

3.3 Opportunity

Collier, Hoeffler, and Rohner (2009) have set forth the concept of opportunity as a third explanatory option. This concept, which was already present in the work of Charles Tilly (1978, 1998, 1999), suggests that whenever a rebellion is feasible in financial and military terms, it will occur. It emphasizes that either a grievance-based or greed-based motivation is insufficient to explain conflict, or at least subordinate to the factor of feasibility, which is influenced by external factors such as a power vacuum. In the same vein, scholars have argued that state weakness, expressed by factors like political instability, bureaucratic weakness, and rough terrain (Fearon and Laitin 2003), or poor governance in combination with corruption, the failing rule of law, and a lack of property rights protection (Chayes 2015), is a particularly

relevant predictor of violent conflict. Similarly, Gibson (2005) and Giraudy (2012) show that peripheral areas with poor infrastructure are likely to be "subnational undemocratic regimes". Feasibility is also implicit in Gurr's work, because of his emphasis on the necessary conditions for frustration to turn into rebellion.

The value of the opportunity-based approach is that it points to the structural conditions under which violence against religious minorities can develop. It seems indeed sensible that contexts of lawlessness and impunity can increase the risks for religious minorities, both because religious freedom is not protected and because any violence committed by illegitimate groups that take advantage of weak political institutions is not punished. For example, in *Faith That Endures* (2006), Ronald Boyd-MacMillan describes how the power vacuum caused by the fragmentation of the ruling Congress Party in India due to corruption scandals and the collapse of left-wing ideology after the fall of the Berlin Wall were exploited by the extremist and sectarian Hindutva party, resulting in the persecution of Christian and Muslim minorities.

Although it seems logical that state weakness increases the risk of conflict and, by extension, the vulnerability of religious minorities, the opposite is also possible. In a strong state, political institutions may be used to create "structural violence," which Galtung (1969) defines as "avoidable impairment of fundamental human needs or, to put it in more general terms, the impairment of human life, which lowers the actual degree to which someone is able to meet their needs below that which would otherwise be possible." Structural violence occurs when social structures, such as elitism, racism, or sexism, harm people by preventing them from meeting their basic needs.

A related concept developed by Pierre Bourdieu and Jean-Claude Passeron (1970) that also recognizes how strong states can restrict religious freedom is "symbolic violence". Although this concept was developed initially to understand how social inequalities are reproduced, it also applies to limits on religious freedom. Essentially, symbolic violence is the imposition of habits of thought and perception upon dominated groups within society, who then accept the social order imposed on them as just and interpret their subservient position as "right" within the social order. In other words, the dominated people collude in their own subordination. Symbolic violence is in some sense more powerful than physical violence because it is indirect and embedded in different types of thought patterns, perceptions, and actions of individuals, thereby imbuing an unjust social order with a sense of legitimacy.

To summarize, although the different theories about the determinants of ethnoreligious conflict were developed in opposition to each other, they provide complementary explanations of the vulnerability of religious minorities. Both grievances

and greed can play a role in motivating the actors who create vulnerability for religious minorities. Opportunity-based interpretations related to either state weakness or, conversely, the state's power to regulate religion, emphasize the structural conditions that can increase (or decrease) the vulnerability of religious minorities. These theories should be viewed as complementary interpretations, as we should not expect to find a single factor explaining all cases (Owen 2003; Achterhuis and Koning 2017). They must also be broadened beyond ethno-religious conflicts to apply to conflicts involving religious minorities that do not follow ethnic lines.

4. Pieces in the puzzle of the vulnerability of religious minorities

In this study, I have explored a number of interpretive models, from a wide range of disciplines that offer complementary interpretations of the vulnerability of religious minorities. Taken together, they can be considered as pieces in the puzzle of the vulnerability of religious minorities; however, they can also obscure its proper observation.

Several theories stress the role of behavior inspired by religious convictions as a factor enhancing the vulnerability of religious minorities. This feature applies to people with a strong commitment to justice, but also to people who display socially deviant behavior that is perceived as threatening social cohesion or some vested interest. In both of these settings, the vulnerability of religious minorities can be seen as a direct consequence of their behavior. The role of religious identity, however, should not be dismissed, particularly when religious affiliation is manipulated to justify the social exclusion of religious minorities or when a visible religious minority becomes a scapegoat for frustrations. These models also suggest that it is possible to identify some degree of specificity in the vulnerability of religious minorities that is directly relatable to either their religious identity or their religious behavior.

The subtleties of religion's role in society can have important macro-level consequences. They can lead to civil conflicts, in which grievance-based and greed-based motivations, or a combination of them, can create vulnerability for religious minorities. Grievance-based motivations include not only frustrations over material conditions but also political ideologies that discriminate against all religions or minority religions. Greed-based motivations are relevant as well, as the vulnerability of religious minorities is often determined by economic and political incentives. Both can also lead to the placement of restrictions on the religious freedom of religious minorities, by the state or by other powerful interests. The risks for religious minorities further increase under unfavorable circumstances, such as either widespread impunity and lawlessness or a political system that encourages religious violence.

The theories presented in this paper have their limitations too. First, most interpretive models tend to place more emphasis on religious identity, thereby down-

playing behavioral aspects of religion. The exclusive focus on religious identity might explain why literature on religious conflict fails to observe religious freedom violations related to religious behavior. Indeed, focusing on the behavioral dimension of religion makes it possible to identify subsets of religious groups based on forms of religious behavior, beyond their religious identification – which would be statistically meaningless in Christian-majority countries – and consequently to observe their vulnerability to human rights abuses.

Second, the confounding of ethnicity and religion (which implies a neglect of intra-ethnic conflict) is a common feature in conflict theory. The literature on "ethno-religious conflict" is mainly concerned with inter-ethnic or inter-religious conflicts, not with conflicts within ethnic groups (including "minority-within-the-minority" conflicts).

Third, the focus on the state by some scholars implies a disregard for the sub-national level and thus tends to overlook local and regional empirical realities, including the position of vulnerable religious minorities in areas where the presence of the state can be much weaker, as observed by O'Donnell (1993). However, in recent years conflict studies have become increasingly sensitive to the limitations of methodological nationalism. For example, the Armed Conflict Location & Event Data Project (ACLED) "records the dates, actors, types of violence, locations, and fatalities of all reported political violence and protest events across Africa, South Asia, Southeast Asia, Central Asia, the Caucasus, the Middle East, Europe, and Latin America." (Raleigh C., Linke A., Hegre H. & Karlsen J. 2010)

Finally, the concern of conflict theory with identifying the single most important explanatory factor of conflict – the single cause fallacy – instead of acknowledging that conflicts are multifactorial can be misleading. As Owen (2003:113) observes:

> It is my opinion that the literature [on the root causes of conflict] has gone astray. [The] fact that no one condition will necessarily lead to conflict does not rule out the contributing role of each and says nothing to the implications of several conditions being present in one location. It is the aggregated effect of human insecurities that I feel may be the best possible indicator for potential conflict. Poverty in and of itself may not necessarily lead to conflict, but combined with political repression and a recent environmental disaster, may significantly increase the regional propensity for violence.

In all, the interpretive models discussed in the paper are useful in elucidating some aspects of the vulnerability of religious minorities, but in general they are insufficiently holistic. For these reasons, these models risk obscuring rather than facilitating the observation of the vulnerability of religious minorities. Specifically, for

conceptual and methodological reasons, they observe only a limited number of human security threats to which religious minorities are vulnerable. To properly identify and interpret the vulnerability of religious minorities, a more comprehensive framework is necessary.

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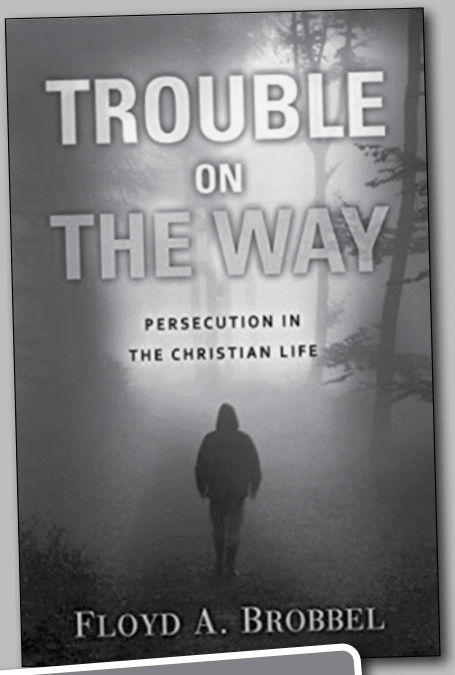

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Carrying ourselves back

How a religious document contributed to religious freedom

Leah Farish[1]

Abstract

The deepest source of religious rights in the United States is the First Amendment to its Constitution, which states in two clauses that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses are shown to derive from the American Westminster Confession of Faith, a connection that helps us recover the clauses' original intention and application. Through a Golden Rule ethic, government officials and many courts are exhibiting a new protectiveness and appreciation of religion without imposing doctrine on American citizens.

Keywords Constitution, church/state relations, U.S. Supreme Court, religious freedom, founding of America, U.S. President.

On every question of construction, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

– Thomas Jefferson, 12 June 1823

The First Amendment to the U.S. Constitution is one of the most venerable statements in any government document. Yet most people would be surprised to discover that part of it was derived from a religious document – the Westminster Confession of Faith. Now is a crucial time to examine this connection, because carrying ourselves back to the amendment's birthplace can shed light on our way forward.

The Religion Clauses of the First Amendment read like a promise *not* to do something: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Some have observed that this expression is appropriate because the Bill of Rights is "a charter of negative liberties" (Diaz 2011:3). We will see that the promise is not only to avoid establishing a religion in

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states, but to avoid disestablishing religions in the states that had them, which were a majority at the time.

It has been widely argued that Congress had to promise Americans that the federal government would be limited, or the public would not have supported ratification of the whole Constitution. "[A] number of states … expressed a desire … that further … restrictive clauses should be added … extending the ground of public confidence in the government" (Elliot 1789). But a less recognized reason for this formulation is that it echoes the language of the Westminster Confession of Faith. This echo will be more fully explained in section 1 of this article. In section 2, I examine the phrase "respecting an establishment of religion," showing that this was an efficient and ingenious way to bring together conflicting views of church and state. Sections 3 and 4 show how the United States is currently returning to a view of the First Amendment consistent with its original meaning.

1. The Westminster Confession as it appears in the U.S. Bill of Rights

In the text below, on the left is a paragraph from the 1646 Westminster Confession of Faith on the subject of church and state. On the right is the version that American Presbyterians wrote in 1788 to reflect the fact that they no longer had a king or a national, established religion. Note, for example, that the plural "magistrates" appears in the newer, democratic version rather than the singular "magistrate."

The language in italics on the right is clearly echoed in the vocabulary and syntax of the First Amendment, as the American Presbyterian wording promises noninterference in church life by the state. (The word "let" in that era meant to hinder, just as we now call a serve in tennis that grazes the net a "let.")

This new formulation, drafted just down the street from where the Constitutional Convention was gathered, would of course bear a connection to the First Amendment. It must have been thrilling to be among the founders of that new order. John Adams exclaimed, "How few of the human race have ever enjoyed an opportunity of making an election of government … for themselves or their children!" (Miller 1976:154). Yet they were cautious too. One writer of the time warned, "Men entrusted with the formation of civil constitutions, should remember they are painting for eternity: that the smallest defect … they frame may be the destruction of millions" (Miller 1976:184). On the issue of church and state, the efforts of both bodies would be in vain if they weren't in harmony. Both were free to invent, but it would have been senseless to invent a wrench to throw in the other's works. Fortunately, some men were able to knit the two bodies' thoughts together – well-known leaders like John Witherspoon and James Madison, but also Fisher Ames and Samuel Livermore.

Original Paragraph 3	**American** Paragraph 3
[20]The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven [1]: yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses of worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed [2]. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God [3].	[21]Civil magistrates may not assume to themselves the administration of the Word and sacraments [1]; or the power of the keys of the kingdom of heaven [2]; or, in the least, interfere in matters of faith [3]. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest in such a manner, that all ecclesiastical persons whatever shall enjoy the full, free, and unquestioned liberty of discharging, every part of their sacred functions, without violence or danger [4]. And, as Jesus Christ hath appointed a regular government and discipline in his church, *no law of any commonwealth, should interfere with, let, or hinder, the due exercise thereof,* among the voluntary members of *any* denomination of Christians, according to their own profession and belief [5]. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretence of religion or of infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever: and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance [6]. (emphases added)

Table 1: CONFESSION Section XXIII--Of Civil Magistrates (Irons 2002)

The main wording of the First Amendment's religion clauses was first suggested by Fisher Ames of Massachusetts, a man with a Presbyterian education (Arkin 1999:763-828; Annals of Congress, 796). A very popular orator (Dunn 2004:124), Ames would have known that the wording that had united England with Scotland in the previous century would have dramatic resonance with Americans. Once it appeared in this form, the Amendment was quickly agreed upon in final form (Dreisbach 1987:57).[2]

Would the public have really recognized or appreciated verbiage from the Westminster Confession? Without question. Presbyterians and others in colonial America

[2] For further description of the drafting and reasons why it is unlikely that James Madison had much to do with the final wording, see Farish (2010:18-26).

subscribed to the Westminster Confession; it was part of the public policy of Massachusetts and Connecticut (Davis 2000:28). American men and women studied it, and memorizing passages from it was common school assignment (Loetscher 1989:65). "The Reformed tradition was the religious heritage of three fourths of the American people in 1776 and the impact of the Confession both on the east coast and the frontier defied calculation" (Ahlstrom 1972:50). Presbyterian preaching had such attraction for the Founders that during the Constitutional Convention, the place chosen for the July 4th oration was "the Reformed Calvinistic Church" in Philadelphia (Morris 1864:254; Loetscher 1989:75). As Leopold von Ranke has said, "John Calvin was the virtual founder of America" (Carlson 1973:19).

Parallels between political history and Reformed history abound. For example, in both England and the United States, a religious document regarding civil rights was followed immediately by a similar secular one. The relevant parts of the British Westminster Confession were adopted by Parliament in 1648. In 1649, a secular document was issued, called the Agreement of the People, which scholar Bernard Schwartz (1971:22) has hailed as "a sketch of a republican Constitution, … [that] suggestively anticipated many of the fundamentals of later American Constitutions." It protected the "exercise of religion" and the support of "divines," but would treat Jews, "heathens, and dissenters … gently" (Schwartz 1971:22, 24, 28, 121-22). Thus, a year after the religious manifesto, the proclamation of civil liberties emerged. The same pattern would occur later in the United States: the Presbyterians revised their church-state allegiances, and soon afterwards the Constitutional Convention did so as well. John Witherspoon was "prominent" in both the religious and secular deliberations (Balmer and Fitzmier 1993:39), attending both assemblies in his "large Geneva collar" (Morrison 2005:28).

At their gathering, the Presbyterians drafted what they called a "constitution," which was sent around to the presbyteries (representative bodies elected by local bodies) "for consideration" (Klett 1787:628; 1788:626) and the required ratification by two-thirds of them. Then the American government founders drafted the Constitution, and the ratification process by the states began; nine approvals were needed for the nation to form as planned. The following chart summarizes the two parallel timelines.

Perhaps rebellion against European institutions was also in the DNA of the American Presbyterians. Minutes of one of the early meetings of the New York Synod contain a poignant complaint to its mother church in Scotland, much as the colonies later expressed dismay at neglect and oppression by the British king. The Synod said, "The young Daughter of the Church of Scotland, helpless, exposed, in this foreign Land cries to her tender and powerful Mother for Relief" (Klett:627). A little later they wrote, "Members being aggrieved & obtaining no Satisfying Redress,

Year	Presbyterians	U.S. Government
1787	May, Philadelphia: Drafted its Constitution and sent to churches for approval	May-September, Philadelphia: Drafted Constitution and sent to states for ratification
1788	May, Philadelphia: Last meeting of Synod adopted a Constitution, including new sections on church-state relations, ordering it printed	May, Philadelphia: Constitutional Convention is convened; no amendments yet. Ninth state ratifies in June 1788.
1789	May, Philadelphia: First General Assembly is convened.	March, New York: First Congress is convened; First Amendment is debated, mostly in August and September, and is adopted in September.

even in the highest Judicature, have a Right to protest & require the Same to be recorded" (303). They ultimately broke away from what they viewed as a corrupt and neglectful European parent institution, just as the colonies revolted from the Crown. Hence we see abundant justification for claims of "deliberate pattern[ing]" (Loetscher 1989:77) or "intentional parallels between Presbyterian polity and the federal system of government enshrined in the United States Constitution … [and of] extraordinary influence in the early national period of American history" (Balmer and Fitzmier 1993:39). And note that in the sequences above, the Presbyterian ideas are articulated first. "In sum, the Presbyterian contribution to the shaping of the intellectual culture of the new nation cannot be disputed" (Balmer and Fitzmier 1993:37).

2. "Respecting an establishment of religion"

One might wonder why the First Amendment promises not to make a congressional law "respecting" (that is, concerning) an establishment of religion rather than just saying, "Congress shall not establish a religion."

The briefest and most decisive answer to this question is that most of the states – nine of the thirteen, by one count – *had* established religions at the time they were debating the federal Bill of Rights (Balmer and Fitzmier 1993:39). In some cases, dual or multiple establishments (benefiting more than one denomination, but not all) existed in a given state (Levy 1986). Thus, the First Amendment merely promised not to touch existing state arrangements one way or the other. For example,

the opening volley on the subject, from representative Charles Pinckney of South Carolina, set the course: "The legislature of the United States shall pass no law on the subject of religion" (Pfeffer 1953:110, 145). By 1833, all states had voluntarily disestablished, but when founding a national government, the lawmakers could not take on both struggles at once. They could especially not afford to offend constituents by suggesting that they would have to surrender their state support of religion in order to launch a federal Constitution. Promising a status quo – a hands-off policy toward the states – was the best strategy to win acceptance from both ends of the spectrum (Library of Congress n.d.).

In all the states at this time – even those without established religions – the Christian Scriptures were taught and various prayers were led in public schools (in fact, this practice continued in some places until the 1960s). Oaths of office declared belief in God or Jesus Christ (Levy 1986), and public officials openly prayed and encouraged religious devotion. Criminal and civil law reflected, sometimes explicitly, moral restrictions from the Bible, including prohibitions on working on Sunday, fraud, adultery, polygamy, and sodomy. Public displays of the Ten Commandments and nativity scenes, as well as biblical mottos on coins and flags, were common from Massachusetts to Georgia. (All these things have, with various degrees of success, been attacked in later years as establishments of religion.)

Thus, we must acknowledge that the Founders did not view an establishment of religion at the state level as *inevitably* violating the First Amendment. There existed an array of state benefits and accommodations to religion that the Founders did not uniformly oppose.[3]

When it came to establishments, were the Founders concerned only to ensure that the federal government would favor no one sect over others? For most of them, the answer to this question is no (Levy 1986: ch. 1). The Appendix to this article presents the recorded debate in the recorded debate about religion in the House Committee (we have no record of the Senate's discussion), which can be summarized as expressing agreement that "No power is given to the general government

[3] Moreover, their legislative acts indicate a tolerant view of *federal* establishments. For example, the same Congress that adopted the religion clauses passed the Northwest Ordinance, which says that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *The Constitutions of the United States with the Latest Amendments* (Trenton: Moore and Lake, 1813, 364, Article III). And of other "surprising" legislative acts, the Supreme Court has said, "Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. … It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners these rights." (Abington v. Schempp, 296).

to interfere with it at all. Any act of Congress on this subject would be a usurpation" (Elliot 1789:208).

3. Recollecting the spirit

By recollecting the spirit of the debates over the religion clauses, we can gain insight into how to decide controversies today. I will suggest three principles and then propose three courses of future action implied by those principles.

First, the stance of the state toward religion is protective. In the new United States, the understanding was that since the church would never again take up arms, the state would protect it. The American version of the Confession refers to government as "nursing fathers" of faith, a phrase used in the British Confession's footnotes but now elevated to the main text. John Locke, Anglicans and Congregationalists had used the phrase, as had writers in every state that had an established religion (U.S. Library of Congress 1998).

Second, both religious individuals and religious institutions are protected. "The person and good name" of all individuals, regardless of their beliefs, are to be protected under the Westminster Confession's new wording. Individual practices such as respecting (or breaking) the Sabbath, dissenting from religious views, or attending seminary were not to be interfered with by the federal government, though some were addressed in state statutes. Nor could the federal government tax church property or dictate the doctrinal or personnel decisions of religious groups.

Third, the primary ethic of the Christian Scriptures – "Do unto others as you would have them do unto you" – remains a perfectly good guide for personal tolerance, public governance, and institutional behavior, as it was for the Confessors and our Founders. The First Amendment and the new Confession were written by people who saw themselves as living in a strongly Christian-majority nation, but who deliberately granted protection to people of other faiths or no faith. Interestingly, this Golden Rule, followed here by people of faith to protect people without faith, works just fine without regard to who is religious and who is not; non-religious people can extend protection to religious adherents by the same Rule.

4. Reviving protectiveness

The last few years have seen some indications that these principles are being revived in the United States after many years of confusion. In the executive branch, a new protectiveness is apparent. President Trump has said, "Faith is deeply embedded into the history of our country, the spirit of our founding and the soul of our nation. … [This administration] will not allow people of faith to be targeted, bullied, or silenced anymore." (U.S. Dept. of Justice 2017) Appointees to federal

judgeships appear to be recognizing the paramount importance of religious liberty and of carrying themselves back to original understandings and the rule of law.

The Trump administration's Department of Justice has issued guidance on Federal Law Protections for Religious Liberty (Office of Attorney General 2017). Here are some salient passages:

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law. …
4. … Although the application of the relevant protections may differ in different contexts, individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or healthcare; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants or contracts; or by otherwise interacting with federal, state, or local governments.
5. … The Free Exercise Clause of the Constitution protects against government actions that target religious conduct. Except in rare circumstances, government may not treat the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons.

In various sections, the Department of Justice has reiterated and broadly interpreted the Religious Freedom Restoration Act, Title VII's guarantee of reasonable accommodation of religion in the workplace, and President Clinton's Guidelines on Religious Exercise and Religious Expression, all of which are generally protective of religious practice. It closes by exhorting federal agencies to "pay keen attention, in everything they do, to [these principles]" (Office of Attorney General 2017).

Other new protections include a 2017 Department of Interior reversal of a three-year obstruction of equal access to the Grand Canyon for a study requested by a Christian scholar based on his religious beliefs about the creation of the earth (*Dr. Andrew Snelling v. United States Department of Interior* 2017).

The Supreme Court also ruled in favor of a Christian school, finding it equally entitled to state funds for playground resurfacing as secular schools. Justices Thomas and Gorsuch added that in such a case, a state could deny funds to religious entities only if the state could show a justification "of the highest order" (*Trinity Lutheran Church* 2017).

4.1 Religious individuals and religious groups

"In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right." In the judicial branch, the Court has now recognized the fundamental right of Hobby Lobby, an avowed Christian company, to resist federal health insurance requirements of

employers to provide contraception coverage in their healthcare plan (*Burwell v. Hobby Lobby Stores, Inc.*). It was unsuccessfully argued that only individuals had the right to free exercise of religion.

"The freedom of religion extends to persons and organizations." So says the new guidance from the Justice Department. And Chief Justice Roberts said it this way in the unanimous decision *Hosanna Tabor v. EEOC*:

> The interest of society in enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way. (*Hosanna Tabor*:21)

In other words, the existence of the First Amendment gives religious entities' autonomy preeminence over statutory, or even over the interests safeguarded by the Equal Protection Clause (14th Amendment of the United States Constitution).

4.2 The Golden Ethic

Finally, the U.S. government may be recovering a sense of the Golden Rule as it considers the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. In that case a Christian baker, Jack Phillips, refused to create an artistic "masterpiece cake" for a gay wedding, invoking his freedom from coercion to express approval for such a union. During lively oral arguments, certain justices hinted that doing unto others as one would be done by was no less than a constitutional principle.

> CHIEF JUSTICE ROBERTS: So Catholic Legal Services would be put to the choice of either not providing any pro bono legal services or providing those services in connection with the same-sex marriage? …
> JUSTICE GORSUCH: And what people are trying to do with exceptions is take … genuine, sincere religious views or whatever it is, and minimize the harm it does to the principle of the statute while making some kind of compromise for people of sincere beliefs on the other side. … And my impression of this is there wasn't much effort here in Colorado to do that. …
> JUSTICE ALITO: [This] appears to be a practice of discriminatory treatment based on viewpoint. The – the Commission had before it the example of three complaints filed by an individual whose creed includes the traditional Judeo-Christian opposition to same-sex marriage, and he requested cakes that expressed that point of view, and those – there were bakers who said no, we won't do that because it is offensive. And the Commission said: That's okay. It's okay for a baker who supports

> same-sex marriage to refuse to create a cake with a message that is opposed to same-sex marriage. But when the tables are turned and you have the baker who opposes same-sex marriage, that baker may be compelled to create a cake that expresses approval of same-sex marriage. . . .
> JUSTICE KENNEDY: Counselor, tolerance is essential in a free society. And tolerance is most meaningful when it's mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs.

The Court gave robust recognition to faith in *Town of Greece v. Galloway*, though in a 5-4 result. The justices said a predominantly Christian town may host religious invocations pursuant to a neutral policy, even though most of them are Christian invocations, at the openings of its board meetings and thus can "acknowledge" the value many private parties place on faith, and "in the general course, legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." Avoidance of Establishment Clause violations must not lead to "a brooding and pervasive devotion to the secular" (quoting *Abington v. Schempp*). The Court even noted the potential benefit of prayers to "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." Implied is an invitation to those in the seat of power to grant others in their position a resource that might facilitate their work (Horwitz 2013:248-250).

These acknowledgements of religion are in keeping with the Westminster Confession's paradigm of a government that is comfortable with its cultural heritage, and with welcoming expressions of faith without seeing them as government endorsement. As founder Samuel Adams said about public prayer from diverse participants, "I am no bigot, and can hear a prayer from a gentleman of piety and virtue who is at the same time a friend of his country" (Kimball 1893: 84). Chief Justice Roberts wrote in the recent church playground case, "The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." (*Trinity Lutheran Church* 2017)

5. Conclusion

The words of the Westminster Confession of Faith remind us of the landscape in which the religion clauses of the U.S. Constitution were written. In that context, a government and culture informed by Christian principles declined themselves exclusive power in matters of religion, choosing instead to treat all people, regardless of their religion, fairly under the guidance of the Golden Rule.

The religion clauses allow true freedom of conscience not because they were written by people who wanted to favor their own religious institutions, but because they were based on treating others as one would like to be treated. That standard functions equally well when applied by secularists as by religious people. This generous ethic persists in 2018 in the current appointees of President Trump, who is on his way to an anticipated 300 new federal judges who are originalists, and two or three possible Supreme Court appointments in the same vein.

Readers living in increasingly secular societies may ask: what becomes of the contextualism so prevalent in other jurisprudence? The answer is simple: The Golden Rule has context built in, because it has empathy and imagination built in, thus making it durable and resilient through the centuries.

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Appendix: Record of debate on First Amendment wording

[*15 August 1789, U.S. House of Representatives*]

The fourth proposition being under consideration, as follows:

Article 1. Section 9. Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether. …

Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out. …

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

Mr. Huntington said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. … If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was

introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore … thought it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. …

Mr. Madison withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one; the question was then taken on Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.

[17 August]

The committee then proceeded to the fifth proposition:

Article 1, section 10, between the first and second paragraph, insert "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."

Mr. Tucker. – This … goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; … I therefore move, sir, to strike out these words.

Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.

Mr. Livermore … wished to make it an affirmative proposition: "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."

This transposition being agreed to, and Mr. Tucker's motion being rejected, the clause was adopted.

[20 August]

On motion of Mr. Ames, the fourth amendment was altered so as to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This [was] adopted.

The state's duty of neutrality and freedom of religious association

Case law of the European Court of Human Rights

André Fagundes[1]

Abstract

This article begins by examining the European Court of Human Rights' judgement in a case originating from Moldova, where a particular denomination in the Orthodox tradition was denied government recognition. The decision is compared with other Court decisions as well as several declarations and international treaties on the matter. The article concludes that the state's duty of neutrality is incompatible with any role in assessing the legitimacy of religious convictions or their forms of manifestation. Moreover, mere government tolerance of a religious group cannot be considered an adequate substitute for official recognition. Therefore, refusal to recognise the legal personality of a religious community is a severe constraint on its ability to practise its faith, as secured by Article 9 of the European Convention on Human Rights.

Keywords religious freedom, duty of neutrality, Moldova Orthodox Church, religious organisation, freedom of association, European Court of Human Rights, Metropolitan Church of Bessarabia.

1. Summary of the case

The Metropolitan Church of Bessarabia is an autonomous Orthodox Church that functions under the authority of the Patriarchate of Bucharest (the Romanian Orthodox Church). To obtain official recognition in Moldova, in October 1992 it applied for registration in compliance with local law (the Religious Denominations Act, Law 979-XII of 24 March 1992), which requires that religious entities active in the country be recognised by government decision. However, no response to this request was received.

In 1995, following several reiterations of the request, the country's Religious Affairs Department denied the request for registration. In response, the Metropolitan

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Church of Bessarabia filed a lawsuit seeking to overturn the administrative decision. The local court upheld the request, ordering the recognition of the church.

The public prosecutor appealed to the Supreme Court of Justice, which reversed the local court decision, on the grounds that the courts have no jurisdiction to consider an applicant church's application for recognition.

Subsequently, the Metropolitan Church of Bessarabia resubmitted its administrative application for registration, receiving another rejection and once again appealing to the court. In the Court of Appeal, the government alleged that the case concerned an ecclesiastical conflict within the Orthodox Church in Moldova (the Metropolitan Church of Moldova), which could only be resolved between the Romanian and Russian Orthodox Churches. It was further argued that any recognition of the Metropolitan Church of Bessarabia would provoke conflicts in the Orthodox community.

However, the Court of Appeal dismissed these allegations and upheld the church's appeal on the grounds that paragraphs 1 and 2 of Article 31 of the Moldovan Constitution guarantee freedom of conscience, and that this freedom must be exercised with a spirit of tolerance and respect for all religious entities. Besides, the court noted that the different religions are free to organise themselves according to their own statutes, as long as they do not contravene the country's laws.

The government then appealed to the Supreme Court, which decided to set aside the judgement of the Court of Appeal, declaring that the church's appeal had been untimely. The Supreme Court further affirmed that, in any event, the refusal of the church's request did not violate its religious freedom; since the faithful could freely manifest their beliefs and gain access to the churches, no obstacle was posed to the practice of their religion.

Finally, the Supreme Court held that the case was simply an administrative dispute within a single church, which could be resolved only by the Moldovan Metropolitan Church, as any state intrusion into the matter could aggravate the situation. It also affirmed that the state's refusal to intervene in this conflict was compatible with Article 9(2) of the European Convention on Human Rights (ECHR).

In March 1999, the Metropolitan Church of Bessarabia again applied to the government for recognition. The Prime Minister refused the request on the grounds that the applicant church was not a religious denomination in the legal sense but merely a schismatic group within the Moldovan Metropolitan Church. The recognition of the applicant church, therefore, would represent state interference in the Metropolitan Church of Moldova and would thereby further aggravate the delicate situation of the church.

From the Metropolitan Church of Bessarabia's perspective, the claim that the denial of registration reflected no imposition on religious freedom was patently

false. On the contrary, various incidents across the country had infringed upon their free expression of their beliefs, including the arrest of some members and the destruction of their property. Accordingly, the Metropolitan Church of Bessarabia and twelve individual Moldovan believers filed a complaint with the European Court of Human Rights (ECtHR). They alleged that the Moldovan authorities' refusal to recognise the Metropolitan Church of Bessarabia violated their right to religious freedom and association, given that only religious denominations recognised by the government could function legally in Moldova.

The complainants further stated that the freedom to collectively manifest their religion was thwarted by the fact that they were prohibited from congregating for religious purposes, and also by the total absence of judicial protection of their assets.

In its defence, the Moldovan government argued that the applicant church, as a part of the Orthodox Church, was not a new denomination, since Orthodox Christianity was recognised in Moldova in February 1993, at the same time as the Moldovan Metropolitan Church. In the government's view, there was absolutely no religious difference between the applicant church and the Moldovan Metropolitan Church.

The government affirmed that the creation of the applicant church was, in fact, an attempt to create a new administrative body within the Metropolitan Church of Moldova and that the state could not intrude in an internal church conflict without violating its duty of neutrality in religious matters.

The government also noted that this seemingly administrative conflict concealed a political conflict between Romania and Russia. Accordingly, intervening and recognising the applicant church – which some view as a schismatic group – could have detrimental consequences for the independence and territorial integrity of the young Republic of Moldova.[2]

The ECtHR ruled unanimously that Article 9 of the ECHR had been violated. It observed that although state interference was prescribed by law for pursuit of a legitimate objective – namely the protection of order and public security – such interference was not proportionate and did not correspond to a pressing social need.

The ECtHR further noted that it is incompatible with the state's duty of neutrality to assess the legitimacy of religious beliefs. It would be up to the state, in such

[2] The Soviet Socialist Republic of Moldova had just declared its independence from the Soviet Union in 1991, during the process of dissolution of the USSR. For further discussion of historical, ethnic, religious and geopolitical issues in Moldova, see Lucian Turcescu and Lavinia Stan, 'Church-State Conflict in Moldova: the Bessarabian Metropolitanate', *Communist and Post-Communist Studies* 36, no. 4 (December 2003): 443-465.

cases, to ensure that conflicting groups tolerated each other, even if they came from the same organisation.

2. The state's duty of neutrality

In my opinion, the ECtHR has ruled properly, since the Moldovan government, by denying the registration of the applicant church on the basis that it was only a schismatic group within the Orthodox Church, failed to observe its duty of neutrality.

In a secular state such as Moldova, the refusal to recognise a particular religious confession and the requirement that it instead meet under unified leadership, against its aspirations, undoubtedly constitutes arbitrary interference with the religious freedom of its members.[3]

Although the government has the power to regulate the various religions in its territory – and although it may even impose certain restrictions on the exercise of religious freedom, as we shall see below – it must remain neutral concerning the *merit* of religious beliefs.

In other words, the right to freedom of religion, as guaranteed under the ECHR, removes from the state any discretionary power to define whether particular religious beliefs are correct. As the ECtHR appropriately emphasised in *Lautsi v. Italy*, the state's duty of neutrality is incompatible with any action that serves to assess the legitimacy of religious convictions and their forms of manifestation.[4] Otherwise, the government could function as an arbiter of religious dogmas.

In the case at hand, when the registration was refused, the local authorities made a value judgement about the merit of the religious doctrine itself, when in fact they should have been focusing only on analysing the fulfilment of the legal requirements.

In a similar judgement that concerned the state's duty of neutrality regarding the administrative registration of religious communities, the ECtHR stated that in democratic societies the state should not require that divided religious entities all be submitted to the direction of the same oversight body.[5]

Therefore, the role of the authorities in these circumstances is not to eliminate the cause of tension by suppressing religious pluralism. The state must, in all its spheres, take measures that promote tolerance, peaceful coexistence and effective respect among the various religious organisations.

In this sense, the Declaration of Principles on Tolerance[6] states, "Tolerance at the State level requires just and impartial legislation, law enforcement and judicial

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3 *Hasan and Chaush v. Bulgaria,* ECtHR, App. No. 30.985/96, § 78.

4 *Lautsi v. Italy,* ECtHR, App. No. 30.814/06, § 47.

5 *Hasan and Chaush v. Bulgaria,* § 78.

6 Approved by the UNESCO General Conference at its 28th meeting, 16 November 1995.

and administrative process" (Article 2.1). In the present case, both the Moldovan executive branch and its judiciary failed to respect religious diversity by denying the registration of the Metropolitan Church of Bessarabia.[7]

The acceptance of different religious beliefs is not just a relevant principle or an ethical duty but a political and legal necessity, indispensable for the consolidation of peace and the economic and social progress of all peoples.[8] Indeed, the harmonious interaction between people and groups with varying identities is essential to achieve social cohesion.[9]

One crucial foundation of religious freedom is the guarantee that people can follow their religion, even if it is different from predominant or prevailing practices. It is precisely the accommodation of minority beliefs that distinguishes a democracy from a totalitarian state.[10]

To effectively respect pluriconfessionality, the state shall not determine what does or does not constitute a religion or belief, as the ECtHR noted in another significant judgement on the subject.[11]

It should be noted that the right to religious freedom protects only the sincere practices of religion. Any religious manifestation being protected under the cloak of religious freedom must correspond to a sincere feeling. In other words, the beliefs for which one seeks protection must be honestly held. Although this is a delicate matter,[12] the court is responsible for ensuring that the stated belief is held in good faith and does not serve as a device to enable non-compliance with the law.[13]

Moreover, for a given personal or collective conviction to avail itself of the right to freedom of thought, conscience and religion as guaranteed by the ECHR, it must achieve a certain level of seriousness, cogency, cohesion and importance.[14] Pro-

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[7] This duty also derives from the provisions of Article 22 of the Charter of Fundamental Rights of the European Union (CFREU).

[8] See the preamble and paragraph 1 of the Declaration of Principles on Tolerance.

[9] *Moscow Branch of the Salvation Army v. Russia,* ECtHR, App. No. 72.881/01, § 61.

[10] Roger Trigg, *Equality, Freedom, and Religion* (Oxford: Oxford University Press, 2012), 146.

[11] *Moscow Branch of the Salvation Army v. Russia,* §§ 57-58.

[12] On the difficulties involved in assessing sincerity and the possibility of discrimination against minority beliefs, see Jónatas Eduardo Mendes Machado, *Liberdade religiosa numa comunidade constitucional inclusiva: dos direitos da verdade aos direitos dos cidadãos* (Coimbra: Coimbra Editora, 1996), 215.

[13] As the Canadian Supreme Court has ruled, the assessment of the sincerity of a belief is a matter of fact that can be based on such criteria as the credibility of the statement and the consistency of the alleged belief with other religious practices. See *Syndicat Northcrest v. Amselem,* 2004 SCC 47, [2004] 2 SCR 577.

[14] In New Zealand, the Church of the Flying Spaghetti Monster, or Pastafarianism, is officially recognized as religion. See *In New Zealand, the Church of the Flying Spaghetti Monster is an approved religion now. Here's its first wedding.* Available at: https://wapo.st/3lRLSs7. In my opinion, however, the claim for official recognition should have been rejected, given the entity's clearly satirical origin.

vided that these conditions are met, the state's duty of neutrality is incompatible with any assessment of the legitimacy of particular religious beliefs or how they are expressed.[15]

Similarly, it follows from the protection granted by ECHR Article 9[16] that the state is prohibited from interfering with the doctrines professed by religious groups.[17] Religious convictions are essentially personal and subjective. Thus, it is not a state responsibility, lest the state breaches its duty of neutrality, to impose, directly or indirectly, its interpretation or judgement on the doctrinal precepts adopted, even if they are contrary to a dominant understanding. Indeed, a commitment to neutrality renders the state incompetent to make any statements concerning the truth or falsity of religious tenets or dogmas.[18]

This conclusion stems from the principle of separation of religious confessions from the state, which, among other objectives, aims to "protect the majority and minority religious confessions from State interference in their reserve of self-definition, self-determination and self-organisation."[19]

A secular state, therefore, is prevented from passing judgement on the theological understandings adopted by a religious institution, or from branding them as heretical or in disagreement with the canons of a traditional religion.

Otherwise, we would be regressing to the age of the Inquisition, when states placed unacceptable controls on ecclesiastical interpretations and suppressed understandings that differed from those established by the dominant church. The right to religious freedom, which is so necessary for the preservation of human dignity, would be undermined by the return of an inquisitorial State. This issue becomes even more sensitive – and therefore deserves greater attention – when religious minorities are involved, as they are particularly vulnerable to state abuse.[20]

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[15] *Eweida and others v. United Kingdom,* ECtHR, App. No. 48.420/10, 59.842/10, 51.671/10 and 36.516/10, § 81; *Manoussakis and others v. Greece,* ECtHR, App. No. 18.748/91, § 47.

[16] The right provided in Article 9 of the ECHR corresponds to Article 10 of the Charter of Fundamental Rights of the European Union, including its scope and meaning, as expressly provided for in Article 52(3) of the Charter.

[17] Of course, this does not include demonstrations that include propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as stipulated by Article 20 of the International Covenant on Civil and Political Rights.

[18] Javier Martínez-Torrón, 'Freedom of Religion in the European Convention on Human Rights under the Influence of Different European Traditions', in *Universal Rights in a World of Diversity: The Case of Religious Freedom,* (Pontifical Academy of Social Sciences, 2012): 334. In the same vein, the Supreme Court of United States has stated, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *United States v. Ballard,* 322 U.S. 78 (1944) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872).

[19] Jonatas E. M. Machado, 'A liberdade religiosa na perspectiva dos direitos fundamentais', *Revista Portuguesa de Ciência das Religiões* 1 (2002): 151.

[20] The International Covenant on Civil and Political Rights contains a special guarantee to religious mi-

For this reason, a public agency cannot deny the registration of a religious organisation based on a misunderstanding of its teachings, even under the justification of verifying the congruence and verisimilitude of the professed doctrine.

Accordingly, respect for the principle of secularism – from which the principles of state neutrality, self-determination and doctrinal self-understanding of religious confessions arise – it is not lawful for the state to engage in substantive considerations of any group's proclaimed religious teachings, or to deem it incompatible with or in disagreement with conventional understandings that are treated as the only legitimate and acceptable ones. For instance, the rejection of an application for registration by a minority religious confession, on the grounds that it is not possible to claim to be Christian and also profess the existence of reincarnation, constitutes a flagrant violation of the principle of state neutrality, as well as an offence against freedom of self-understanding and doctrinal and institutional self-definition.[21]

In fact, by inspecting the canonicity of interpretations given by religious confessions, even if they are contrary to a majority understanding, the state doubtless violates its duty of neutrality. After all, any form of coercion, as would be implied by an effort to determine the orthodoxy of the professed doctrine of faith, is the death of religious freedom.[22] Furthermore, as pointed out by Professor Jónatas Machado, the "truth" of a religious doctrine is irrelevant, from a constitutional law perspective.[23]

Consequently, the state cannot fail to safeguard a particular religious confession or deny its recognition by considering it theologically incorrect, false or unacceptable.[24] In fact, the right to define and interpret one's doctrine principles is unquestionably within the sphere of religious faith. This is a fundamental element of religious conviction. It constitutes a true *absolute domain of religious confession*, functioning as a norm that limits the competencies of the state.[25]

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norities against State interference: "Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities *shall not be denied the right,* in community with the other members of their group, to enjoy their own culture, *to profess and practise their own religion,* or to use their own language" (emphasis added).

[21] Even though Portuguese legislation expressly affirms that the state "does not comment on religious issues" (Article 4, paragraph 1 of the Religious Freedom Law), the Portuguese National Registry of Collective Persons (RNPC) denied recognition of the religious denomination called Beneficent Spiritist Center União do Vegetal, under the argument that the reincarnationist doctrine adopted by this religious confession "is absolutely contrary to Christian tradition." Opinion No. 16/2012, adopted by the Committee on Religious Freedom, in plenary session on 21 May 2012.

[22] Trigg, *Equality, Freedom, and Religion,* 71.

[23] Jónatas E. M. Machado, 'Freedom of Religion: A View from Europe', *Roger Williams University Law Review* 10, no. 2 (2005): 479.

[24] Pieter van Dojk et al, *Theory and Practice of the European Convention on Human Rights,* 4th ed. (Intersentia: Antwerpen-Oxford, 2006), 760.

[25] Machado, *Liberdade religiosa numa comunidade,* 247.

As the state is not, and should not be, in the position of arbiter of religious dogmas,[26] establishing an understanding as to what is theologically right clearly infringes its duty of neutrality imposed by the principle of separation, and consequently violates the right to freedom of religion, as occurs when there is any state imposition on the rituals by which belief manifests itself.[27]

3. Necessary restrictions in a democratic society

In explaining the grounds of its judgement, the ECtHR reinforced its understanding that freedom of thought, conscience and religion is one of the foundations of a democratic society. This is one of the most vital elements of the identity not only of religious believers and their conceptions of life, but also of atheists, agnostics, sceptics and the unconcerned. Thus, pluralism, as it has been established over the centuries, is inseparable from a democratic society.[28]

Article 9 of the ECHR states that a restriction on religious freedom is authorised only when it is "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."

The state does have the power to verify whether an entity, under the cloak of its apparent religious purposes, is engaged in activities that are detrimental to the population or that may endanger public safety. Indeed, one cannot rule out *a priori* the possibility that an organisation's program may conceal unlawful goals and intentions different from which it proclaims.[29]

For example, the ECtHR has considered that a religious entity's unwillingness to provide the authorities with a description of its fundamental precepts may be sufficient grounds for refusal of membership, as it may pose a risk to a democratic society and the fundamental interests enumerated in Article 9(2) of the ECHR.[30]

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[26] *Syndicat Northcrest v. Amselem,* cited above.

[27] One implication of the affirmation of the republican principle is the establishment of a separation between the state and the churches, with the consecration of a non-denominational state and a regime of religious freedom. See José Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada,* 4th ed., vol. 1 (Coimbra: Coimbra, 2007), 201.

[28] *Kokkinakis v. Greece,* ECtHR, App. No. 14.307/88, § 31. In this regard, Robert Audi points out that where there is freedom, there must be room for pluralism. In societies where sociocultural life is complex, freedom practically safeguards pluralism. Audi, "Natural Reason, Religious Conviction," in Lorenzo Zucca and Camil Ungureanu (eds.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge: Cambridge University Press, 2012), 66.

[29] *Manoussakis and others v. Greece,* ECtHR, § 40; *Stankov and the Macedonian-United Organization Ilinden v. Bulgaria,* ECtHR, App. No. 29.221/95 and 29.225/95, § 84; *Sidiropoulos and others v. Greece,* ECtHR, App. No. 26.695/95, § 46.

[30] *Cârmuirea Spirituală a Musulmanilor of the Republic of Moldova v. Moldavia,* ECtHR, App. No. 12.282/02; *Moscow Church of Scientology v. Russia,* ECtHR, App. No. 18.147/02, § 93; *Lajda and others v. Czech Republic,* App. No. 20.984/05, § 2.3.

The court has also pointed out that in a democratic society in which different religions co-exist, restrictions on religious freedom may be necessary to reconcile the interests of the various groups and to ensure that all beliefs are respected. However, oversight of activities and restrictions on religious freedom should be applied sparingly and in a manner consistent with the obligations imposed by the ECHR.[31]

While acknowledging these possible exceptions to the general rule, state power must be narrowly interpreted, such that the justifications for limiting people's fundamental rights to freedom of religion and association must be precisely indicated in an exhaustive list and the definition of them must be necessarily restrictive.[32] Only compelling and persuasive reasons can justify such limitations. Any intervention must correspond to a "pressing social need" and must be "proportionate to the legitimate aim pursued." Therefore, the characterisation of what is "necessary" cannot contain vague and flexible notions such as "useful" or "desirable."[33]

In addition to being consistent with the law and serving a legitimate purpose, state interference must satisfy the requirement of proportionality. In situations such as this one, proportionality is closely linked with the need to maintain the genuine religious pluralism inherent in the concept of a democratic society. Since no measure restricting the exercise of a right should be allowed if it is not aimed at promoting another right or general interest,[34] the decision by the Moldovan government could not be sustained. Attempting to resolve existing conflicts between religious organisations by preventing the registration of one of them is clearly disproportionate and contrary to the notion of a democratic society, in which the pluralism of ideas and beliefs is accepted.

Another point that deserves attention is the government's argument that the request of the applicant church was undermining the territorial integrity and social stability of the country. Contrary to this claim by the government, the preamble of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[35] rightly states that "the promotion and protection of the rights of persons belonging to national or ethnic, *religious* and linguistic *minorities contribute to the political and social stability* of States in which they live" (emphasis added).

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[31] *Jehovah's Witnesses from Moscow and others v. Russia,* ECtHR, App. No. 302/02, § 100.

[32] *Sidiropoulos and others v. Greece,* § 38.

[33] *Moscow Branch of the Salvation Army v. Russia,* § 62; *Gorzelik et al. v. Poland,* ECtHR, App. No. 44.158/98, § 95.

[34] Suzana Tavares da Silva, *Direitos fundamentais na arena global,* 2nd ed. (Coimbra: Imprensa da Universidade de Coimbra, 2014), 53.

[35] This declaration was adopted by the United Nations General Assembly in its resolution 47/135 of 18 December 1992.

Indeed, the existence of a peaceful and democratic society is possible only in the presence of pluriconfessionality, in which individuals can freely practice their faith.[36] A democratic society is always a plural society, and the diversity of religions and beliefs is as necessary for humanity as biodiversity is for nature.[37]

In view of this consideration, although it is legitimate for the state to act in defence of order and national security, in the present case such concerns were manifestly unfounded since no element in the proceedings showed that the applicant church performed any activities other than those provided for in its by-laws, or that it was engaged in any activity unlawful or contrary to public policy.

As a result, believers' right to freedom of religion as guaranteed by the ECHR also encompasses the expectation that a religious community will be allowed to function peacefully and profess its convictions without any unjustified state intervention (including that by a national department of religious affairs or the judiciary, evidently).[38]

4. Freedom of religious association

Although the ECtHR has indicated that it was unnecessary to determine in this case whether a violation of Article 11 of the ECHR – which guarantees freedom of assembly and association – had occurred, the judgement raises relevant issues about the right to register a religious entity.

In its defence, the government argued that the refusal of registration did not violate the applicants' right to religious freedom, since, as Orthodox Christians, they could manifest their beliefs within another state-recognised Orthodox denomination, namely the Metropolitan Church of Moldova.

However, as noted by the ECtHR, the problem with the Moldova case was not only that the state has no competency to assess the legitimacy of this religious organisation. In addition, local law allowed only those religions recognised by government decision to be practised in Moldova. Therefore, refusal to register the applicant Church was equivalent to a prohibition from operating, either as a liturgical body or as an association.

That is to say, without legal recognition, the exercise of the activities of the Church applicant was impracticable, as its priests could not celebrate services and

[36] Roger Trigg, academic director at the Centre for the Study of Religion in Public Life, Kellogg College, Oxford, notes that the question of freedom of conscience and freedom of religion arises in its most intense form when "unpopular, or unfashionable, minority positions are in question. Freedom is safeguarded only when the majority allows the beliefs to be manifested of which it disapproves," Trigg, *Equality, Freedom, and Religion,* 8.

[37] This sentence paraphrases the provision in Article 1 of the Universal Declaration on Cultural Diversity.

[38] See *Moscow Branch of the Salvation Army v. Russia,* § 71; *Hasan and Chaush v. Bulgaria,* § 62.

its members were prevented from meeting to express their faith. Besides, not having legal personality, the entity had no right to judicial protection of its assets or status to defend itself against acts of intimidation.

Although religious belief is essentially personal and subjective, its manifestation is traditionally carried out together through organised structures. This is why Article 9(1) of the ECHR guarantees the right to manifest religion collectively within religious communities. Therefore, the refusal to recognise the legal personality of a religious society or grant it such personality constitutes an interference with the exercise of the rights guaranteed by Article 9, in their external and collective dimension, regarding not only the religious society itself but also its members.[39]

Along this line, ECtHR case law has established that refusal to grant the status of a legal entity to a particular religious organisation represents a severe constraint on its ability to practice religion, even where the absence of legal personality may be partly offset by the creation of auxiliary associations. Thus, even if there is no demonstration of prejudice or harm to the religious community – an issue that is relevant only in the context of Article 41 of the ECHR – blocking its registration constitutes unjustified discrimination.[40]

Indeed, the tolerance allegedly shown by the government towards the faithful cannot be considered a substitute for the recognition of their religious institution, which alone is capable of ensuring the transmission of its doctrine to future generations. This position has influenced several other judgements by the ECtHR, such as in *Izzettin Doğan and others v. Turkey*.[41]

Thus, the right to official recognition of a church is a logical corollary of respect for religious freedom. After all, this right not only covers freedom of conscience and belief but also protects institutions.[42] It is a natural development, an integral facet of the right to freedom of religion, that broad recognition of this right must be accompanied by equally broad recognition of association and religious associations.[43]

Thus, in its collective dimension, religious freedom comprises the right of each community to gather, express their faith and associate with others in accordance with their convictions on religious matters. As observed, the denial of a church's registration leads, in practice, to stripping – significantly or even entirely – the content of the law under analysis. Indeed, guaranteeing the liberty of association

[39] *Religious Community of Jehovah's Witnesses and others v. Austria,* ECtHR, App. No. 40.825/98, § 62; *Kimlya and others v. Russia,* ECtHR, App. Nos. 76.836/01 and 32.782/03, § 84.

[40] *Religious Community of Jehovah's Witnesses and others v. Austria,* § 67.

[41] *Izzettin Doğan and others v. Turkey,* ECtHR, App. No. 62.649/10, § 127.

[42] Trigg, *Equality, Freedom, and Religion,* 44.

[43] Machado, *Liberdade religiosa numa comunidade,* 236.

for religious purposes "has become a necessary guaranty against the tyranny of the majority".[44]

Accordingly, General Comment No. 18 (Non-Discrimination) on the International Covenant on Civil and Political Rights and the Article 2(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief clarify that intolerance and discrimination based on religion or belief, *inter alia*, take place whenever measures are adopted that have as its *purpose* or *effect* the suppression or limitation of the recognition or exercise of all rights and freedoms on an equal basis, i.e. when the restriction on the freedom to assemble for religious purposes is as much a goal as a consequence of the governmental act.

Moreover, Article 11 of the ECHR ensures that citizens must be able to form a legal person[45] and that they can then act collectively in a field of mutual interest – including, of course, religious purposes – without arbitrary state interference. Otherwise, such a right would be devoid of any significance.[46]

Last but not least, it should be noted that although the applicant church had access to national courts, the appeals were not effective as the final decision of Moldova's Supreme Court failed to respond to its main claims, namely the desire to practise its religion in its own organisation, as well as to gain judicial protection of its assets. In addition, local law did not provide any means to settle disputes over the registration procedure, which is why the ECtHR found a violation of Article 13 of the ECHR.[47]

We can conclude that the ECHR was very successful in addressing the issue since the refusal to register the Metropolitan Church of Bessarabia, based on mere assumptions of danger to public order and national security, is unjustified and therefore constitutes a violation of the right to freedom of religion as enshrined in Article 9 of the ECHR.

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[44] Lance S. Lehnhof, 'Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status under the European Convention', *Brigham Young University Law Review* 2002, no. 2 (2002): 561.

[45] Such a guarantee is also provided by Article 20(1) of the Universal Declaration of Human Rights; Article 22(1) of the International Covenant on Civil and Political Rights; Article 2(4) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and Article 6(b) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

[46] *Moscow Branch of the Salvation Army v. Russia,* §§ 58-59.

[47] Article 13, 'Right to an Effective Remedy', states that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

Combating religious discrimination in the workplace

Approaches by the EU Court of Justice and the European Court of Human Rights

Eugenia Relaño Pastor[1]

Abstract

The European Commission, the European Union Agency for Fundamental Rights and the European Network Against Racism agree that religious discrimination in workplaces is becoming a widespread concern for many believers. The Court of Justice of the European Union and the European Court of Human Rights have addressed religious discrimination in employment. A comparison of the two courts' judgements identifies commonalities and differences in weighing the autonomy of religious organizations versus employees' right to be free of discrimination on religious grounds.

Keywords Non-discrimination, religious freedom, religious attire, autonomy of the religious groups, Court of Justice of the European Union, European Court of Human Rights.

1. Introduction

According to the latest Eurobarometer survey, *Discrimination in the European Union in 2019*, discrimination (on various grounds) has been decreasing since the previous Eurobarometer in 2015.[2] However almost half of the respondents think discrimination based on religion or belief is widespread in their country.[3] The European Union Agency for Fundamental Rights (FRA) and the European Network Against Racism (ENAR) have both indicated that religious discrimination in Europe is a widespread problem for many believers, notably Muslims, in the workplace or looking for a job, particularly women who wear visible religious symbols.[4] Other

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[2] European Commission, *Special Eurobarometer 493: Discrimination in the EU in 2019* (Directorate-General for Communication, 2019).

[3] Almost seven in ten respondents in France (69%), 65% in Belgium and 61% in United Kingdom say discrimination on religion or beliefs is widespread, compared to 12% in Latvia. Ibid, 8.

[4] European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimina-*

religious groups and faith communities have experienced religious-based discrimination, as well. Dismissals of workers due to their Christian beliefs have also been reported by the Vienna-based Observatory on Intolerance and Discrimination against Christians in Europe.[5]

Conflicts dealing with religious discrimination at the workplace have escalated into legal disputes in the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), which are the focus of this article.

2. Religious discrimination in EU Law

2.1 European anti-discrimination law

European anti-discrimination law builds on the provisions of the Treaties of the European Union (the Treaties) – particularly the former Article 13 TEU introduced by the Amsterdam Treaty in 1997, now Article 19 of the Treaty on the Functioning of the European Union (TFEU)[6] – and has been further extended through the interplay of jurisprudence on general principles of EU law and on the Equality Directives.[7] Two Directives adopted in 2000, the Racial Equality Directive and the Employment Equality Framework Directive (hereafter Employment Equality Directive), ban discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability or sexual orientation.[8] The European Union's commitment to the principle of non-discrimination was reaffirmed in the Charter of Fundamental Rights (the Charter) in December 2000 and, since the entry into force of the Lisbon Treaty in December 2009, the Charter has gained the same binding legal value as the Treaties.[9] Four articles of the Charter should be taken into consideration as a

tion Survey: Muslims – Selected Findings (2017). Available at: https://bit.ly/2KBABgY; and Đermana Šeta, "Forgotten Women: The Impact of Islamophobia on Muslim Women" (European Network Against Racism, 2016). Available at: https://bit.ly/3p1PQyH.

5 Observatory on Intolerance and Discrimination against Christians in Europe, "Report 2018" (2018), 14. Available at: https://bit.ly/3gVKWR4f.

6 The Treaty on the Functioning of the European Union (TFEU), also called the Lisbon Treaty, amended the Treaty on Establishing the European Community (TEC) and changed its name to the TFEU. Article 19 TFEU was previously Article 13 TEC.

7 The two Directives relating to equality and non-discrimination are the Racial Equality Directive: Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, and the Employment Equality Framework Directive: Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Employment Equality Directive). The Directives presented profound challenges to the existing approaches to combatting discrimination based on these grounds across Europe. They aimed to ensure that all individuals living in the EU, regardless of their nationality, could benefit from effective legal protection against such discrimination. See Isabelle Chopin, Catharina Germaine-Sahl, and European Commission, *Developing Anti-Discrimination Law in Europe* (Publications Office of the European Union, 2013), 8.

8 Racial Equality Directive and Employment Equality Directive, ibid.

9 Lucia Serena Rossi, "Same Legal Values as the Treaties? Rank, Primacy, and Direct Effect of the EU

framework for analysis. Article 21 prohibits any discrimination based on multiple grounds; Article 22 includes a mandate to respect "cultural, religious, and linguistic diversity" in the EU; Article 16 covers freedom to conduct business; and Article 31 guarantees every worker "the right to working conditions which respect his/her health, safety and dignity."[10]

In addition to this 'pro-diversity' framework, another important step to eradicate discrimination between men and women in the workplace was the Employment Equality Directive 2006/54/EC, implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (also known as the Recast Directive).[11] The Employment Equality Directive prohibits direct and indirect discrimination, harassment, and instructions in the workplace that discriminate against or victimize employees on grounds of religion and belief.[12] Direct discrimination occurs when a person is treated less favourably than others on the grounds of religion or belief; it includes situations in which employers either refuse to employ religious (or non-religious) staff altogether or employ people of one religion on more favourable terms than those of a different religion. It also covers discrimination based on assumptions made about a person's religion (regardless of whether or not this assumption is mistaken) or based on a person's association with people of a particular religion.[13] This kind of discrimination is known as "discrimination by association" and it was first introduced into the EU legal order by the Court of Justice of the European Union (CJEU) in the *Coleman* case.[14] Later, in *Feryn*,[15] the CJEU further expanded its understanding of direct discrimination by shifting away from a comparison of a concrete person in a concrete, real-world situation to the consideration of a hypothetical situation. In its decision in this case, the CJEU stated that direct discrimination also occurs when people *could have* been discriminated against, even when no individual has been identified as a victim of discrimination.[16]

Charter of Fundamental Rights," *German Law Journal* 18, no. 4 (2017):771.

[10] Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Articles 21, 22, and 31(1).

[11] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[12] Employment Equality Directive, Article 2.

[13] Lucy Vickers, "European Network of Legal Experts in the Non-discrimination Field, Religion and Belief Discrimination in Employment – the EU Law, European Commission" (Publications Office of the European Union 2007) 12. Available at: http://bit.ly/3be3tpq.

[14] Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603, para 38.

[15] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187.

[16] Ibid, paras 25-28.

Indirect discrimination occurs where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons.[17] Such discrimination can, however, be justified when the requirement has a legitimate aim and the means of achieving the aim are deemed appropriate and necessary. Some factors that might be taken into account when making a proportionality judgement in religion or belief cases include whether the employer's requirement would have the effect of limiting employees' religious freedom, whether the accommodation would inhibit the type of business activity (either public or private), and whether the employee's request can be implemented in practice.[18]

Some domestic courts have allowed the prohibition of religious signs in private employment, especially based on the arguments of commercial imperative and so-called neutrality.[19]

2.2 The Court of Justice of the European Union and religious discrimination

The CJEU first addressed discrimination on grounds of religion in *Prais* in 1976.[20] The CJEU carried out a balancing exercise, weighing the interest of the candidate's religious practices against the principle of equality in accessing public administrative jobs. Three landmark cases that fully addressed the balancing of interests and rights when religious discrimination occurs at work were decided in 2017 and 2018. Two of them dealt with religious clothing at the workplace and the third touched on the reconciliation of the autonomy rights of religious organizations with employees' right to be free of discrimination on religious grounds.

3. Religious clothing in the workplace

In *Achbita*[21] and *Bougnaoui*,[22] the CJEU was asked to interpret the Employment Equality Directive,[23] which prohibits discrimination on grounds of religion. In both

[17] Employment Equality Directive, Article 2(2)(b).

[18] Peter Edge and Lucy Vickers, *Research Report 97: Review of Equality and Human Rights Law Relating to Religion or Belief* (Equality and Human Rights Commission, 2015), 27.

[19] See Equinet, European Network of Equality Bodies, *Equality Law in Practice: A Question of Faith: Religion and Belief in Europe* (Equinet, 2011). Available at: https://bit.ly/39gqjML. This report analyses religious discrimination on Article 9 issues in the sectors of employment, education, the provision of goods and services and public spaces. It also analyses conflicts that can arise between the rights of religious persons and the rights of other groups defined by sexual orientation, gender or age.

[20] Case 130/75, *Vivien Prais v Council of the European Communities* [1976] ECR 1589.

[21] Case C-157/15, *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV,* EU:C:2017:203 [2017] (Achbita v G4S).

[22] Case C-188/15, A*sma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* EU:C:2017:204 [2017] (Bougnaoui v Micropole).

[23] Employment Equality Directive, note 7. A reference for a preliminary ruling allows the courts and tri-

cases, the applicants were Muslim women who wear the hijab. They worked for private companies and their respective employers dismissed them for refusing to remove their hijabs, viewing the headscarf as in conflict with the organization's neutrality policy. In both cases, the CJEU interpreted the Directive to imply that limitations on employees wearing religious headscarves can be acceptable if they are based on an internal policy of political, philosophical or religious neutrality set by the employer. These two cases raise fundamental questions about the right to manifest one's religion and belief in the workplace, particularly in light of the divergent views of the Advocates General as to the type of discrimination that occurred.

3.1 Achbita v. G4S Secure Solutions NV

In *Achbita*, the CJEU gave a preliminary ruling that under Article 2(2)(a) of the Employment Equality Directive 2000/78/EC, an internal policy of a private undertaking that prohibits the visible wearing of any political, philosophical or religious signs in the workplace did not constitute direct discrimination based on religion or belief. By contrast, such an internal rule may constitute indirect discrimination within the meaning of Article 2(2)(b) of the Directive if the apparently neutral provision causes persons of a particular religion or belief to be placed at a particular disadvantage – in this case, a Muslim woman who wore a hijab. The rule may be objectively justified, however, by the employer's pursuit of a legitimate aim in his or her relations with customers and when the means of achieving that aim are appropriate and necessary. Those matters are for the referring court to ascertain.[24]

The CJEU noted several points:

> 1. Although the Employment Equality Directive does not include a definition of the concept of religion, it should be interpreted and understood in accordance with the ECHR – that is, as an expression that includes both the fact of having religious beliefs and the manifestation of those beliefs in public.[25]
> 2. The company's internal rule refers only to the wearing of visible signs indicating political, philosophical or religious beliefs, so it does not justify a difference in treatment that is directly based on religion or belief.[26]

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bunals of the Member States, in disputes which have been brought before them, to refer questions to the CJEU about the interpretation of European Union law or the validity of a European Union act. The CJEU does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

[24] Case C-157/15, *Samira Achbita* (note 21), 34.

[25] *Achbita v G4S,* ibid., paras 25-26.

[26] Ibid, para 30.

3. The CJEU found that such a difference in treatment does not amount to indirect discrimination if it is "objectively justified by a legitimate aim and if the means of achieving that aim [are] appropriate and necessary."[27] Therefore, such a ban is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that the policy is genuinely pursued in a consistent and systematic manner.'[28]

4. The CJEU stated that an employer's desire to "project an image of neutrality" towards both its public and private sector customers is legitimate, as long as the only employees affected are those who come into direct contact with customers. This desire to project an image of neutrality is part of the freedom to conduct a business, which is recognized in the Charter (Article 16).[29]

3.2 Bougnaoui v. Micropole

In *Bougnaoui*, the CJEU gave a preliminary ruling interpreting Article 4(1) of the Employment Equality Directive. In contrast to *Achbita*, the dismissal of the employee in this case, Ms Bougnaoui, was not based on the existence of an internal company rule. Rather, her employer took into account the wishes of a customer who no longer wished to have the employer's services provided by a worker wearing an Islamic headscarf.[30] According to EU law, in limited cases a difference in treatment normally prohibited by the Directive may be justified if the "objective is legitimate and the requirement is proportionate".[31] The requirement must be linked to "the nature of the occupational activities concerned or of the context in which they are carried out."[32] The company's decision in this case could not be considered a genuine and determining occupational requirement within the meaning of the Employment Equality Directive.

4. Autonomy rights of religious organizations

According to Article 4(2) of the Employment Equality Directive, in cases of occupational activities within religious organizations, Member States may allow for difference of treatment based on a person's religion or belief. The same provision affirms that the directive does not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, to require individuals working for them to act in good faith and with loyalty to the

[27] Ibid, para 35.
[28] Ibid, para 40.
[29] Ibid, para 38.
[30] Case C-188/15, *Asma Bougnaoui* (note 22), 40.
[31] Employment Equality Directive (note 7), para 23.
[32] *Bougnaoui v Micropole* (note 22), paras 38-39.

organization's ethos. The core issue is to determine the nature of the activities and the context in which they are performed.

4.1 Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.

In 2018, the CJEU issued a significant ruling, *Vera Egenberger*, on the balancing of autonomy rights of religious organizations and the rights of workers to be free from discrimination.[33] Vera Egenberger applied for a job advertised by an organization of the Protestant Church in Germany which required membership in a particular type of church. Egenberger was not selected for the job. She lodged a claim with the German Labour Courts, arguing that she had been discriminated against on the basis of belief. The Federal Labour Court asked the CJEU to indicate whether the occupational requirement imposed by the organization, by reason of the nature of the activities concerned or the context in which they are carried out, was genuine, legitimate and justified in view of the organization's ethos. The CJEU also considered whether German law governing religious organisations was compatible with Directive 2000/78.[34]

The CJEU ruled that German law went too far by allowing a wide margin for religious employers to determine whether a job should be reserved for those of a particular religion. It highlighted that the aim of Directive 2000/78, Article 4(2) was to ensure a fair balance between the autonomy rights of religious organizations and the rights of workers, and it provided a guidance to apply a test of proportionality. Specifically, the Court adopted an objective approach, holding that religious organizations should show objectively verifiable "existence of a direct link between the occupational requirement imposed by the employer and the activity concerned."[35] Although a proportionality requirement is not included in Article 4(2), the Court stated that religious organization may impose discriminatory conditions on employees only when it is proportionate to do so.[36] Further, national courts should change their established case law when necessary to ensure that religious employers do not exercise their right to discriminate in a disproportionate way.[37]

5. Religious discrimination in the European Court of Human Rights

The European Convention on Human Rights (ECHR) is considered part of the general principles of EU law, which the CJEU applies pursuant to its task of ensuring

[33] *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.,* C-414/16, 17 April 2018, ECLI:EU:C:2018:257.
[34] Ibid, para 31.
[35] Ibid, para 63.
[36] Ibid, para 68.
[37] Ibid, para 82.

that EU law is properly applied.[38] The ECHR is in force in all EU Member States and also binds them in situations where they are implementing EU law.[39] The case law of the ECtHR in the non-discrimination field could increasingly influence the position of the CJEU in its interpretation of instruments adopted by the EU.[40] Indeed, the CJEU has already taken into account ECtHR jurisprudence related to the provisions of the Charter that correspond to the rights and freedoms listed in the ECHR.[41]

The ECtHR's case law has established that a difference of treatment is discriminatory within the meaning of Article 14 of the ECHR if it has no objective and reasonable justification.[42] The examination of a discrimination claim requires a two-tiered analysis, focusing first on the aim pursued and second on the relationship between the impugned difference in treatment and the realization of that aim. How this two-part test should be applied may depend on the nature of the criterion on which the difference in treatment is based. If differential treatment is based on a 'suspect' ground, it must be justified by very weighty reasons and the difference in treatment must appear both suitable and necessary for realizing the legitimate aim pursued.[43]

The ECtHR's case law has also distinguished between direct and indirect discrimination. More than twenty years ago, the Court recognized that failure to treat members of certain categories differently could constitute a form of discrimination. In the well-known case of *Thlimmenos v. Greece*, the ECtHR identified a violation

[38] Opinion 2/94, Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759 para 33; Case C-274/99 P, *Connolly v Commission* (2001), ECR I-1611 para 37; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003), ECR I-5659 para 71; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (2004), ECR I-9609, para 33.

[39] Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU Non-Discrimination Directives – an Update* (European Commission, Directorate-General for Justice, 2011), 14.

[40] The CJEU, in interpreting the Charter of Fundamental Rights, has already considered the case law of the ECtHR related to the provisions of the Charter that correspond to rights and freedoms listed in the ECHR. See Article 6(1) of the Treaty on European Union, as amended by the Treaty of Lisbon. Article 52, para 3 of the Charter establishes the rule that, insofar as the rights of the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the ECHR. Denis Martin, "Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?" [2007], *Revue trimestrielle des droits de l'homme,* 107-109.

[41] Article 52(3) of the Charter establishes the rule that, insofar as the rights of the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the ECHR.

[42] Article 14 of the ECHR states, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[43] *Kozak v Poland,* App no 13102/02 (ECtHR, 2 March 2010), para 92.

of Article 14 of the ECHR in the failure to provide effective accommodation for the specific needs of certain categories of people.[44] In the context of employment, if an employer imposes regulations which are apparently neutral, three factors must be taken into account to assess the balance between the freedom of religion of the employees and the interests of the employer:

1. The centrality of a particular religious manifestation to the religious belief in question;[45]
2. The burden of providing an exception to the general rule to accommodate that religious manifestation; and
3. Whether an employee has voluntarily accepted the regulation imposing the restriction upon his or her religious manifestation.[46]

6. Religious attire in the workplace

In January 2013, the ECtHR ruled on four combined cases about religious rights in the workplace, not all of which involved religious attire: *Eweida and Chaplin v the United Kingdom and Ladele and McFarlane v the United Kingdom*.[47] The four cases were brought by Christian applicants who complained that they had suffered religious discrimination at work. Ms Eweida, who worked for British Airways, and Ms Chaplin, who worked as a nurse, both wanted to wear a cross in a visible way with their uniforms.[48] Ms Ladele, a registrar of births, deaths, and marriages, and Mr McFarlane, a counsellor, both of whom believed homosexual relationships are contrary to God's law, complained that they had been dismissed for refusing to carry out certain parts of their duties which they considered to condone homosexuality.[49]

The Court offered a clear analysis of what qualifies as a manifestation of religion or belief for the purposes of Article 9. The applicant does not have "to establish that he or she acted in fulfilment of a duty mandated by the religion in question" in order to have the manifestation of his or her beliefs protected under the ECHR. It is sufficient to establish the existence of a sufficiently close and direct nexus between the act and the underlying belief.[50]

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[44] *Thlimmenos v Greece,* App no 34369/97 (ECHR, 6 April 2000), paras 46-49.

[45] *Eweida and Others v the United Kingdom,* Apps no 48420/10, 59842/10, 51671/10, 36516/10 and 59842/10 (ECHR, 15 January 2013), para 94.

[46] *Ahmad v the United Kingdom,* App no 8160/78 (Commission Decision, 12 March 1981, D.R. 22), 27 (schoolteacher having converted to Islam when already employed, and then requesting permission from his employer to attend Friday prayers); a similar reasoning was followed by the CJEU in Case 130/75, *Prais v Council,* ECLI:EU:C:1976:142 [1976], paras 15-19.

[47] *Eweida and Others v the United Kingdom.*

[48] Ibid, para 12.

[49] Ibid, para 3.

[50] Ibid, para 82.

The ECtHR in *Eweida* departed from its previous case law regarding the freedom to resign – according to which the availability of this option was sufficient to demonstrate that there was no violation of Article 9.[51] In this case, it recognized that choosing between one's religious principles and one's job can be an unreasonable situation. Therefore, a serious test of proportionality should be carried out in similar cases.[52]

When balancing the competing interests, one needs to consider the applicant's desire to manifest his or her religious belief, on the one hand, and the employer's wish to project a certain corporate image, on the other. For the ECtHR, the company's desire, while certainly legitimate, was given too much weight.[53]

The reasoning in *Eweida* means that another step has been taken in the effective protection of religious freedom at the workplace. The ECtHR grounds reasonable accommodation for religion in the ECHR's framework and reinforces the need for a strict proportionality test when various rights are at stake. Thus, any rule or policy must have a legitimate aim and the means used to achieve this aim must be proportionate. The ECtHR found in *Eweida* that a fair balance had not been struck between Ms Eweida's right to freely manifest her religion and her employer's wish to protect its corporate image; it ruled that the domestic courts had given too much weight to the latter.[54] As the ECtHR concluded, "A healthy democratic society needs to tolerate and sustain pluralism and diversity."[55] One essential part of the fundamental right of religious freedom is "the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others."[56]

The reasoning in *Eweida* was set aside in *Ebrahimian v France,*[57] a case involving the wearing of a headscarf in public institutions. The Court strongly relied on its previous case law on headscarf bans, in particular in *Leyla Şahin*, which dealt with

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[51] *Konttinen v Finland,* App no. 24949/94 (ECHR, 3 December 1996); *Stedman v the United Kingdom,* App no. 24875/94 (ECHR, 6 September 1996); *Sessa v Italy,* App no. 28790/08 (ECtHR, 3 April 2012). This doctrine meant that if an individual could escape the restriction by resigning from the job and finding another one, there was no interference with his or her freedom of religion.

[52] *Eweida v United Kingdom* (n 49), paras 89-95.

[53] Ibid, para 99.

[54] Ibid, para 94.

[55] Ibid.

[56] Ibid. See Eugenia Relaño Pastor, "The European Court of Human Rights: Fundamental Assumptions That Have a Chilling Effect on the Protection of Religious Diversity" in Katayoun Alidadi and Marie-Claire Foblets (eds.), *Public Commissions on Ethnic, Cultural and Religious Diversity: National Narratives, Multiple Identities and Minorities* (Routledge, 2018), 266-287.

[57] *Ebrahimian v France,* App no. 64846/11, judgement 26 November 2015. See Peter Cumper and Tom Lewis, "'Taking Religion Seriously'? Human Rights and Hijab in Europe – Some Problems of Adjudication," *Journal of Law and Religion* 24, no. 2 (2008-2009):599-627.

religious clothing in public educational institutions.[58] The ECtHR has often emphasized that States enjoy a very extensive margin of appreciation in public education and has made a distinction between religious clothing worn by teachers and that worn by students.[59] Concerning the realm of public services, the general rule is that users of public services are free to express their religious beliefs through clothing when dealing with public authorities, even in courtrooms.[60] However, the situation of officials (civil servants or contractual employees) in the public-service sector is completely different. States may rely on the principles of State secularism and neutrality to justify restrictions on the wearing of religious symbols by civil servants at the workplace.[61]

7. Autonomy of religious groups in employment

Religious organizations enjoy the right to administer their own internal religious affairs and to have their ethos respected by their members.[62] However, this right may be limited so as to protect the rights of others (specifically, employees). In three judgements, *Obst v Germany*,[63] *Schüth v Germany*[64] and *Siebenhaar v Germany*,[65] the ECtHR held that Germany interfered with the applicants' private life and freedom of religion. Such interference was deemed to be proportional in *Obst*

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58 *Leyla Sahin v Turkey,* App no. 44774/98, judgement of 10 November 2005. See Ivana Radacic, "Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights," *Religion and Human Rights* 7, no. 2 (2012):133-150; Marcella Ferri, "The Freedom to Wear Religious Clothing in the Case Law of the European Court of Human Rights: An Appraisal in the Light of States' Positive Obligations," *Religion, State and Society* 45, nos. 3-4 (2017):186-202.

59 For teachers, see ECtHR, *Dahlab v. Switzerland,* Admissibility Decision, 15 February 2001; *Kurtulmuş v. Turkey,* App. no. 65500/01, 24 January 2006; Karaduman v. Turkey, Commission decision of 3 May 1993. For students, see *Leyla Şahin v. Turkey* and *Köse and Others v. Turkey,* 24 January 2006 (decision on the admissibility); *Dogru v. France,* App. no. 27058/06, 4 December 2008; *Kervanci v. France,* App. no. 31645/04, 9 December 2009; *Gamaleddyn v. France,* App. no.18527/08, 30 June 2009; *Aktas v. France,* App. no. 43563/08, 30 June 2009; *Ranjit Singh v. France,* App. no. 27561/08, 30 June 2009; *Jasvir Singh v. France,* App. no. 25463/09, 30 June 2009.

60 In two ECtHR cases, *Hamidović v. Bosnia and Herzegovina,* App. no. 57792/15, judgement of 5 December 2017 and *Lachiri v. Belgium,* App. no. 3413/09, judgement of 18 September 2018, the Court found a violation of Article 9 with regard to Muslim women obliged to remove the headscarf in the courtroom.

61 *Ebrahimian v. France* (note 57), para 64.

62 See Carolyn Evans, "Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture," *Journal of Law and Religion* 26 (2010):321-343; Ian Leigh, "Balancing Religious Autonomy and Other Human Rights under the European Convention," *Oxford Journal of Law and Religion* 1, no. 1 (2012):109-125.

63 *Obst v Germany,* App. no. 425/03, judgement of 23 September 2010. On the German cases, see Gerhard Robbers, "Church Autonomy in the European Court of Human Rights: Recent Developments in Germany," *Journal of Law and Religion* 26, no. 1 (2010-2011):281-320.

64 *Schüth v Germany,* App. no. 425/03, judgement of 23 September 2010.

65 *Siebenhaar v Germany,* App. no. 18136/02, judgement of 20 June 2011.

and *Siebenhaar,* because national judges acknowledged the need for a balancing of religious autonomy against the employees' rights. On the contrary, the interference was not found to be proportional in *Schüth,* because the German judge had failed to balance the interests at stake in detail.[66]

This approach appears to have been challenged in two later ECtHR judgments: *Sindicatul Pastorul Cel Bun v. Romania*[67] and *Fernández Martínez v. Spain.*[68] The deviation from the balancing approach may be more apparent in the latter case than in the former.[69] The *Fernández Martínez* case originated from the non-renewal of a teacher of religion, a married priest, by the Catholic Church. The Church argued that the applicant had incurred a scandal, since he rendered his personal situation as a married priest "public and manifest"[70] and was part of a Movement for the optional celibacy of priests. According to the Court, this case was different from *Obst, Siebenhaar* and *Schüth* because the applicant was a priest and, therefore, his status required increased loyalty on his part. The Court did not apply a proportional balancing or weigh the competing interests in a detailed and comprehensive manner; instead, it relied on the fact that the Spanish courts had sufficiently taken into account all the relevant factors that favoured the autonomy of the Catholic Church.[71]

Several years after *Fernández Martínez*, the ECtHR applied a similar approach in a case brought by a Croatian religious education teacher in *Travas v. Croatia.*[72] The applicant, a layman and not a priest, had been dismissed when he remarried, having obtained a civil divorce but without seeking or obtaining an annulment of his first marriage by the religious authorities. Following a similar approach to *Fernández Martínez,* the Court found that there had been interference with the applicant's private life but that this interference had been prescribed by law, for the protection of rights and freedoms of others, and was thus necessary in a democratic society.

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66 In a similar case to the three already mentioned, in *Lombardi Vallauri v Italy,* the European Court took a different approach and found a violation of Articles 6 and 10 of the ECHR, arising from the refusal to re-employ a lecturer in legal philosophy at a Catholic university, because the lack of reasons given for the non-renewal impaired the applicant's effective access to a court.

67 *Pastorul Cel Bun v. Romania,* App. no. 2330/09, judgement of 31 January 2012.

68 *Fernández Martínez v. Spain,* App. no. 56030/07, judgement of 15 May 2012. See Ian Leigh, "Reversibility, Proportionality and Conflicting Rights: *Fernández Martínez v. Spain,"* in Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University Press), 218-241.

69 Merilin Kiviorg, "Collective Religious Autonomy versus Individual Rights: A Challenge for the ECtHR?" *Review of Central and East European Law* 39 (2014):315-341.

70 *Fernández Martínez v. Spain,* para 17.

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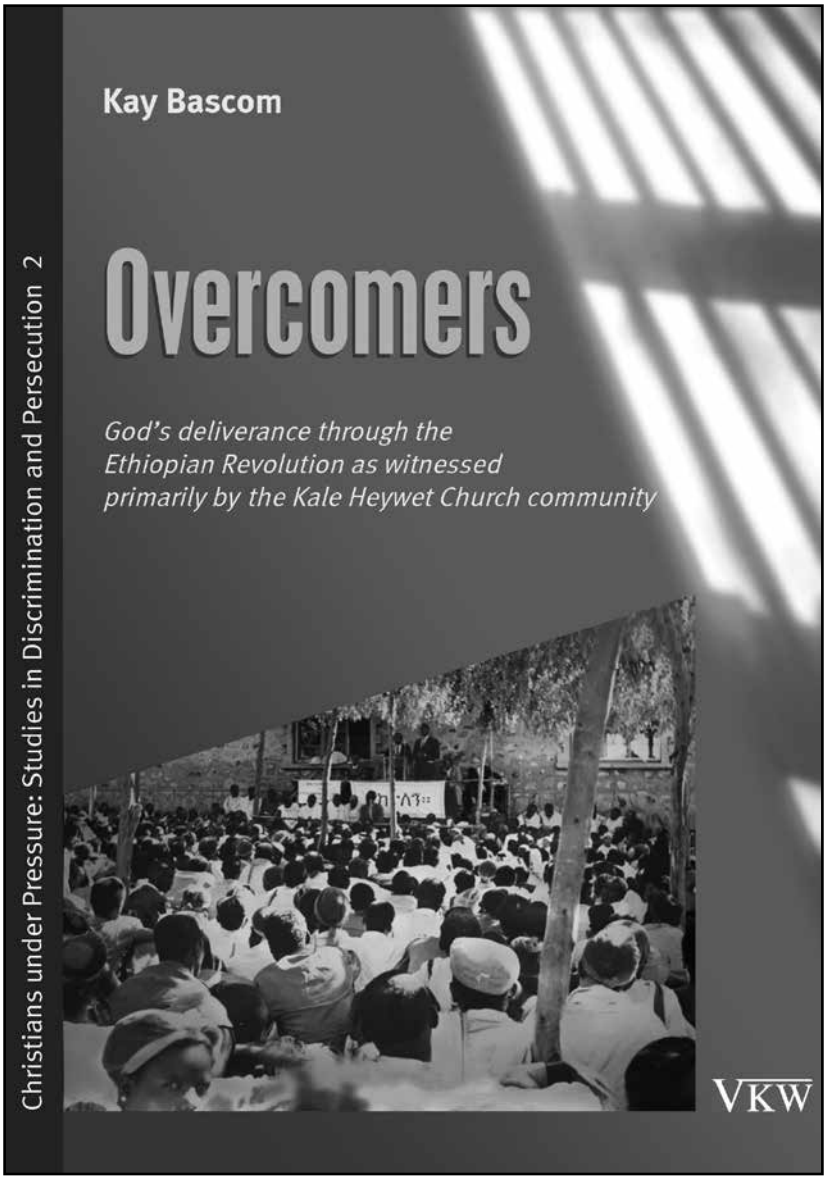
8. Concluding observations

The EU anti-discrimination law framework in the labour market seems to be theoretically solid from a formal and theoretical point of view. However, several factors prevent religious discrimination from being completely eradicated in Europe:

1. the disparate implementation of the EU anti-discrimination law in domestic jurisdictions (*Egenberger*);
2. the uncertainty of concepts such as belief or religion (*Achbita* and *Bougnaoui*);
3. the disputed meaning of the expression 'indirect discrimination' (*Achbita*);
4. the narrow judicial interpretation of "secularism"' or "neutrality" (*Achbita* and *Bougnaoui*, *Ebrahimian v France* and *Leyla Sahin v Turkey*);
5. the lack of a "reasonable accommodation duty" as a complementary legal technique in the EU equality legal framework; and
6. an inconsistent approach to the protection of religious manifestation through clothing at work by the ECtHR and the CJEU.

The analysis of the rulings and judgements from the CJEU and ECtHR show the difficulty entailed in providing common standards in a religiously diverse Europe. In view of this fact, the CJEU judgements are very important because of their impact on national case law. Unfortunately, with regard to religious clothing cases, the CJEU leaves a dangerous door open by allowing private companies to ban the wearing of religious signs in the workplace, particularly for employees who interact directly with customers, whereas the ECtHR seems to protect – but only in private employment – the manifestation of religion from supposedly neutral but discriminatory rules. The level of protection in the two courts seems to be reversed in cases dealing with religious autonomy and the right to be free from discrimination. Whereas the CJEU shows a willingness to apply a meticulous balance of rights and interests on a case-by-case basis to resolve disputes between employees and their churches, the ECtHR has not yet developed a consistent trend of jurisprudence in instances of clashes between religious conscience and the right to private life and religious autonomy. Nevertheless, there are reasons to remain optimistic. A duty of reasonable religious accommodation seems to be slowly finding its way into CJEU and ECtHR legal reasoning. Real and effective equality requires adjustment to circumstances and contexts, and resolving these conflicts is an important and delicate task.



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Freedom of learning and teaching

The importance of denominational schools in the realization of the right of choice of parents in the education of their children

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Abstract

This work addresses the theme of freedom to learn and teach and the importance of confessional schools to guarantee the exercise of the right of parents in the moral and religious education of their children. Based on Article 12.4 of the American Convention on Human Rights, this paper highlights national and international legislation on this topic, which was the subject of a trial by the Brazilian Supreme Court in 2017. On that occasion, the Brazilian Federal Supreme Court ruled that religious teaching in public schools must be confessional.

Keywords Brazil, confessional schools, religious education, parental rights.

1. Introduction

Education is widely acknowledged as a fundamental right. Both the Universal Declaration of Human Rights and Brazilian legislation recognize that every person is entitled to instruction, culture and information as means to reach their full personal development and contribute to their social context.

Furthermore, international doctrine has generally affirmed the right of choice amongst various types of education – for example, secular or confessional, public or private. This is what the Universal Declaration of Human Rights (UDHR) states, when it states that "Parents have the right of priority in choosing the type of edu-

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cation that will be given to their children" (Art. 26.3). This choice is usually in the hands of the students themselves, or their parents or guardians in the case of underage children.

In stating that education is "everyone's right and the State's duty", the Brazilian Federal Constitution points to the primacy of the public, secular education system and stipulates that education is mandatory, but it also allows for the existence of private schools as laid down in the Law of Directives and Foundations of Education (LDB in Portuguese). Nevertheless, the Brazilian Ministry of Education has worked on developing a National Curricular Common Basis, which seeks to stipulate the instructional content covered by every school in the country.

The danger in this model is the possibility of an improper restriction of the plurality of ideas and pedagogical conceptions, impairing private schools' possibilities and preventing cultural progress. In this scenario, appreciating the role played by private schools, especially confessional ones, in the maintenance of a pluralistic educational environment is an important safeguard of parents' and students' rights to choose quality education that is in accord with their personal values and beliefs.

2. The right to education in the federal Constitution and in the international treaties signed by Brazil

The right to education was established in the Brazilian Federal Constitution of 1988 (CF/88) as a social right (Article 6). This means that it is a subjective public right which is entirely claimable before the State, and one that can be translated into material and moral damages when the public sector fails to provide it.

Minister Gilmar Mendes stated in his work *Curso de Direito Constitucional* (Course of Constitutional Rights):

> The character of subjective right given by the constituent to these judicial situations paints itself as unequivocal, bearing no doubt as to the possibility of trial in the occurrence of incomplete or deficient correspondence to the referred rights. (Mendes 2016:676)

CF/88 also refers to this theme in Articles 205 and 206 on education, culture and sport. Article 205 states that education is a right to all and a duty of the State and the family; moreover, in Article 206, the principles that guide teaching are listed, among which the following stand out: (a) equality in the conditions governing access to and ability to stay in school; (b) freedom to teach, learn, research and divulge thought, art and knowledge; (c) plurality of ideas and pedagogical conceptions, and coexistence of public and private schooling institutions; and (d) a guarantee of a quality standard.

The constitutional text assigns primacy in the educational function to the State, as reflected in the preferential order in which the State is mentioned (before the family) in Article 205. However, in view of the low quality of education offered by many public schools, most parents who have the requisite financial resources opt to enroll their children in private schools that respect the family's ethical, moral and religious values. In some situations, the parents prefer homeschooling, a method not yet regulated in Brazil.

So whose duty or right is it to educate children: that of the State or the family?

It is possible to find within the law a complementarity between the educational functions of the family, society and school, as each of these institutions contribute to the formation of young people. However, especially while still underage, individuals are subject to a family's authority, suggesting that the family should be able to choose the type of education they want their children to receive.

As Paulo Pulido Adragão affirmed:

> The freedom of teaching appears as a right that goes far beyond some of its partial or "technical" aspectqs … it is essentially attributed to the person and the family as a way to shape their own personalities and their children's through education, as naturally inseparable from family and personal relations as the right to procreate: raising your children is to birth and educate them. (1995:3)

In Adragão's view, education belongs to the family, even if the family delegates the actual teaching itself to a school system.

The Universal Declaration of Human Rights states that every human being has a right to instruction, and that it shall be oriented towards the full development of human personality and the strengthening of respect for human rights and fundamental liberties. It also states that "parents have a priority of right in the choice of the type of instruction ministered to their children" (Article 26.3).

The American Convention of Human Rights (also called *Pact of San José of Costa Rica*) declares, in Article 12.4, that the parents retain the right for their children to receive religious and moral education that is conforming to their own convictions. The same right is established by the Pact of Civil and Political Rights, in Article 18.4, as well as by the International Covenant on Economic, Social and Cultural Rights, in its Article 13.3, which holds as follows:

> The States Parties to the present Covenant undertake to have *respect for the liberty of parents* and, when applicable, legal guardians *to choose for their children schools, other than those established by the public authorities*, which conform to such minimum educational standards as may be laid down or approved by the

> State and *to ensure the religious and moral education of their children in conformity with their own convictions.* (emphasis added)

Truly, "every time international society refers to the right to free and generalized education, it does so safeguarding the respect to the parents' decisions … who opt for a different educational system." (2004:182).

In sub-constitutional Brazilian law, many legal statutes support the right to free choice in education, and to a quality education that is consonant with a family's values. The LDB states (in Article 2) that education is both a family duty and a State duty, being inspired by the principles of liberty and the ideals of human solidarity, having as a goal the full development of the student and his or her preparation for the practice of citizenship and qualification for work.

Moreover, Article 3 of the LDB, ratifying the provisions of Article 206 of CF/88, addresses equality in access to education, opportunity to stay in school, the liberty to teach, learn, research and divulge culture, thought, art and knowledge, the plurality of ideas and pedagogical conceptions, and the guarantee of a quality standard.

The LDB also grants legal permission for confessional schools to exist in Brazil. Article 19, § 1º, states:

> § 1 The educational institutions referred to in items II and III of the caput of this article may qualify as confessionals, given specific confessional guidance and ideology.

Items II and III referred to define what private and community schools are in the following terms:

> II - private, understood as those maintained and administered by individuals or legal entities under private law.
> III - community, according to the law.

In summary, the right to education is guaranteed by the Federal Constitution of 1988, by international treaties of which Brazil is a party, and by sub-constitutional Brazilian laws. These provisions suggest that education belongs to the family, who typically delegates the actual delivery of instructional content to schools. Therefore, the state must offer schooling that respects families' values, especially their moral and religious values, which contribute to the formation process of human beings.

That being said, we cannot consider it appropriate to provide education by means of a large, impersonal school that does not consider a student's particularities, family background or beliefs and values. The dignity of a human person urges that a student must not be treated as simply a number in the school envi-

ronment, but as a unique individual with distinctive characteristics, and that each student must be respected with regard to the ways in which he or she differs from others.

3. From the right to education to freedom of choice: the dangers of implementing state-owned unified education

Brazil is a secular republic, but its citizens are not. Some are Catholic Christians, some are Evangelical, some are Spiritists and some follow African religions such as Candomblé. Agnostics believe only that there is some superior being, and atheists acknowledge no deity at all. Therefore, the State is secular so as to respect religious pluralism.

The tendency, however, to go beyond being secular towards implementing a secularist or even anti-religious State is not anything new; France being a notable example of this when it prohibits the use of hijab in schools and universities demonstrating the growth of what has been called by Guylain Chevrier [3] "radical secularism".

According to Jónatas Machado, the very discussion as to what is the best model to support social conviviality is itself something derived from Judeo-Christian principles that prize human dignity, free will and democracy. As the illustrious professor teaches:

> The defense of the primacy of the Constitutional State is only possible from a theistic vision of the world and of life that corresponds, essentially, to the Judeo-Christian matrix. The defense of fundamental human rights before autocratic and democratic public powers is only possible through the recognition of its transcendent origins. A naturalistic, atheistic worldview founded in millions of years of amoral physical processes of predatory cruelty, pain, suffering and death cannot identify the values that must guide life on the bosom of a political community, or rationally justify its normative primacy and universality. (Machado 2013:123)

There have been many discussions of the legitimacy of the National Curricular Common Basis (BNCC), which seeks to ensure that students in all regions of Brazil will be taught the same basic knowledge, as a way to ensure that fundamental education is comparable for all Brazilian students. This system comes from a long-established yearning to diminish regional inequality, fighting what some call "elite schooling" or schools that favor social disparities in the country.

However, within this reasonably noble motivation, a tendency to implant unified, homogeneous and state-operated education has been growing in Brazil. This tendency is not only recent but has appeared at earlier points in Brazil's history. In 1932, the

[3] [1] Guylain Chevrier is a doctor in history, teacher, trainer and consultant. Member of the think tank on secularism at the High Council for Integration. BBC News interview in November 2020. Available at: https://www.bbc.com/portuguese/internacional-54946499.

"Manifest of the Pioneers of New Education," a document written by 26 educators led by Fernando de Azevedo and Anisio Teixeira, advocated for unified schooling, defending the position that education should be an essentially state-regulated function. The following excerpt from the Manifest provides a good example of the mindset of these educators:

> Education, which is one of the functions that the family has been disposing of in advantage of the political society, has torn the pictures of family conviviality and of specific groups (private institutions), to incorporate itself definitively as one of the primal and essential functions of the State. … Secularity, which puts the school environment above beliefs and religious disputes, an outsider to all sectarian dogmatism, subtracts the student, respecting the integrity of his forming personality, of the disturbing pressure the school exerts when utilized as an instrument of propaganda of cults and doctrines. (Teixeira and Azevedo, 2014:51, 53-54)

As a way to respect pluralism of ideas and of pedagogical conceptions, as well as the parents' right to choose the type of education their children will receive, Brazilian law must evolve from the simple right to education to the right of choice in education, as a logical consequence of the judicial guidelines adopted in Brazil. This right is incompatible with a unified model of mandatory, state-operated, secular education, as some are seeking to establish.

Jurisprudence has not yet evolved to the point of clearly recognizing parents' right of choice in their children's education. In fact, the tendency of the Brazilian judicial system has been to guarantee only access to education, a fundamental right that is still denied to many families, as is shown by the precedent case transcribed below. This case was resolved in the city of São Paulo in 2010:

> Security warrant. Finding vacancy in nursery. Considerations on the right to education and to the obligation of the City to provide openings in primary schools. Articles 208, IV, 211, 2nd Paragraph and 227 of the Federal Constitution and 54 of the Teenager and Children's Statute (ECA). The City's immediate obligation, corresponding to a certain and liquid right of the child, judicially claimable. Jurisprudence on this Distinguished Court of Law of São Paulo (TJ/SP). Not harming the equality principle, as *the only recognized right is that of the minor's enrollment in a primary school and not that of the parents' choice.* Settled decision. Appeal not granted. (Brazil –TJSP, 2010) (emphasis added)

In a ruling that went in a completely opposite direction, the U.S. Supreme Court, in its 1925 decision in *Pierce v. Society of Sisters*, declared that "the State did not own any general power to establish a uniform type of education for the youth, forcing it to receive instruction only in public schools" and that "children are no mere

creatures of the State; those who provide for and guide them have the right, along with the high duty, to educate and prepare them for the fulfilment of their duties."

Freedom of learning and the pluralism of ideas and pedagogical conceptions, which are addressed within Article 206 of CF/88 as noted above, are impaired when the students have no educational alternatives; that is, the monopoly of education by the state does not generate authentic democracy and limits parents' freedom of choice.

In contrast, to respect the pluralism of ideas, it is necessary for multiple pedagogical options must exist, so that parents and students can choose the one among them that is most aligned with their own values and beliefs.

In fact, the idea of implementing a unified and state-operated educational system points back to authoritarian government practices, such as Italian fascism and German Nazism. As Paulo Adragão stated, "Like fascism, Nazism also advocated for a strict ideological functionality of the educational system, at the State's service. Therefore, it is not surprising that its domination in Germany led to the establishment of a complete monopoly of schooling by the State" (1995:54).

It is the legitimate responsibility of the State to review and monitor the implementation of these multiple pedagogical systems, requiring minimum quality criteria when prescribing the contents necessary for instruction. It will not be legitimate, however, to eliminate pluralism of ideas by unifying thoughts in disrespect to the rights of parents and students.

4. Religious freedom, parents' rights to determine their children's education, and confessional schools

Throughout human history, religion and education have always been deeply connected. In fact, Martin Luther declared that next to every church there should be a school. Jónatas Machado had an interesting comment on this topic:

> The Constitutional State's material and cultural assumptions, designed to structure a free and democratic constitutional order, are, far from being self-evident truths, inseparable from the history of religious, philosophical and political ideas in Europe, or from the multi-traditional course of sedimentation the fundamental elements of which can be found in Christianity, the Renaissance, the Reformation, the Enlightenment and Liberalism some of their fundamental structuring elements. (Machado 2013:132)

Freedom of teaching and learning is closely related to other fundamental rights enumerated in Federal Constitution of 1988, such as religious freedom, freedom of speech, respect for families' values and cultural progress.

Brazil's regulatory system guarantees private individuals or legal entities the right to create schools that differ from those established by the State. In this context,

the importance of private schools, both confessional and non-confessional ones, is essential for the realization of parents' right of choice. To be effective, the liberty granted to private schools must encompass freedom to select their teaching staff, students, administration and teaching methods.

Contrary to the interpretation that some may propose of Article 205 of CF/88, the existence of private schools should not serve purely as a supplement to the insufficiency of the public system's reach, but as a way to ensure a plurality of educational options.

For freedom in education to be guaranteed, beyond simply the possibility of creating private schools, these schools must have latitude as to how they structure and administer their educational programme, as long as minimum legally established standards are respected. Some appropriate standards that the State may require are (a) the school's sanitary conditions, (b) the hiring of appropriately trained teachers and (c) the teaching of content that ensures the formation of good citizens.

Furthermore, public and private systems should have equal opportunities across their educational programmes, especially with regard to teacher selection, student examinations and graduation requirements.

There has been considerable controversy regarding the possibility of private schools, especially religious schools, receiving government subsidies. Facilitating access to private institutions by reducing the cost of enrolment helps to ensure equality of opportunity for students of any socio-economic status. Programs such as the Fund for Student Financing (FIES) in Brazil have already been granting this increased access at the university level.

On this theme, Professor Machado offers some considerations about the question of state funding of private religious schools:

> From this financing may come a greater range of educational options for the parents, and a wider competition between teaching institutions in a way that will favor improved quality and a greater social and ideological pluralism. Beyond that, the financing would justify itself through the fact that private religious schools would serve the public interest by providing education to individuals, as a way to compensate for the positive externalities produced by these schools. In the opposite direction, dangers include greater social and economic stratification and a diminished intensity of transmission of civil and democratic values such as pluralism and political, religious and racial tolerance. (Machado 1996:377)

Funding for private religious schools is conceivable with appropriate legal provisions – for example, forbidding the reduction of investments in public education or discrimination against confessional schools of minority religions.

We know that many parents, as a way to ensure that their children's education in school is fully consistent with the one they are receiving at home, have been opting for private confessional schooling, enrolling their children in schools that adopted their professed creeds in their statutes.

Brazil does not have a Statute that specifically addresses the regulation of confessional education, the federal government office that oversees education has, on many occasions, imposed rules that disrespect the parents' right to a confessional schooling option.

Confessional schools hold historical and cultural importance in Brazil. Available data indicates that the country has at least 2,400 confessional schools, representing about 7 percent of all private schools. According to Cida Mattar, executive director of AECEP (Association of Christian Schools for Principles), in an interview with the *Revista Educação* (Education Magazine) website, many parents choose religious schools for their children because they "believe the confessional school will supply the need for a religious formation, whether or not it is in resonance with the family's religion." Those parents' choice must be legally protected. The State must provide the means to make this option effective and widely available, guaranteeing that organizations that propose to materialize these parents' choices are protected from unjust interference.

If confessional schools have no legal assurance that they will be treated in the same way as other teaching institutions, there will be indirect injury to the parents' rights, and subsequently to the children's rights to be educated under the principles which their families hold.

5. Freedom of learning and teaching in Brazilian courts

Freedom of learning and teaching has been a hotly debated topic in both private and public settings in Brazil. National courts are frequently called upon to rule on cases that involve education, and not a few of these cases have involved matters related to confessional schools.

The theme reappeared recently when, in 2017, a case that intended to declare the unconstitutionality of the religious teaching model to be applied in public schools was heard in the Federal Supreme Court (Ação Direta de inconstitucionalidade (ADI) 4493). The lawsuit was filed by the Attorney General's Office, which required interpretation of the Federal Constitution, the LDB, other federal laws and a 2010 agreement between Brazil and the Roman Catholic Church (Decreto Nº 7.107), through their ecclesiastical jurisdiction, called the Holy See, to decide whether confessional religious teachings, as they were being done in public school, were unconstitutional. According to the Attorney General's Office, religious education in public schools would fulfill the obligation of state secularism only if the content

adopted was restricted to the "doctrines, practices, history and social dimensions of different religions, including non-religious positions, without decision-making position of the educator", within the application of a non-denominational model.

After four sessions of heated debate, the Plenary of the Supreme Federal Court ruled against ADI by a margin of 6 to 5. Therefore, it concluded that confessional religious teaching in public schools was constitutional.

The judge, Luís Roberto Barroso, was in the minority who favoured the ADI. To him "that religious education in public schools can only be of a non-religious nature confessional, with the prohibition of admission of teachers as representatives of religious confessions" (ADI 4493:25).

Judges Marco Aurélio and Celso de Mello agreed with Barroso, contending that the secular State is not authorized to interfere on the religious choices of people who may not have confessional preferences. Aurelio claimed that the secular State would not be incentivizing skepticism nor annihilating of religion, but that it should limit itself to enabling the healthy coexistence of the various confessions. Celso de Mello said that the law clearly forbids the public school from acting as an ideological apparatus or promoting a given confession. Celso de Mello argued that the State's duty was to safeguard neutrality in religion, and that its only objectives were to guarantee the exercise of religious freedom and stop fundamentalist groups from taking state power.

Judge Alexandre de Moraes disagreed, stating that if one treats religious phenomena only sociologically, as an historical and cultural fact, based on the justification of respecting the State's secularity, what actually happens is the violation of freedom of belief. He wrote:

> Therefore, starting from a point of respect to the secular State, an interpretation of the singularity of the constitutional envisioning of religious teaching and in respect to religious freedom, the definition of the nucleus of your own concept based on the "dogmas of the faith", unmistakable for other fields of scientific knowledge, such as history, philosophy, religious sciences … (ADI 4493:4)

De Moraes continued to affirm that the dogmas of the faith are the nucleus of the concept of religious teaching. Therefore, the State would violate freedom of belief by replacing the dogmas of the faith, which are diverse in every different belief, with something neutral. Neutrality does not exist in religious teaching. What should exist is respect for differences in religious teaching.

De Moraes considered that confessional teaching is a subjective right of the student and of the parents or guardians who wish to enroll their child in a school course consistent with their own confession. He stated that the State should respect the autonomy and self-sufficiency of religious organizations as they offer subjects

according to the student's religious confession, consistent with the student's or their parent's choice:

We can agree or disagree with one or more religious conceptions, but there is no denying that the request in the present action intends to limit the legitimate subjective constitutional right of a student who already has a religion, or of their parent or legal guardian, to enrol in religious schooling of their own confession. This would be a significant limitation of the free manifestation of citizens' will, and a consequent restriction of religious freedom, given that (a) the Federal Constitution, in its original text, determines the implementation of religious schooling; (b) 92 percent of the Brazilian population (IBGE census, 2010) has a given religious belief; (c) enrolment is optional, so as to protect not only the remaining 8 percent, but also that part of the 92 percent who may not be interested in such enrolment. (ADI 4493:3)

Supreme Federal Court President, judge Cármen Lúcia, in her decisive vote, also rejected the action. In her vote, she said, "The secularism of the Brazilian State did not prevent the recognition that religious freedom imposes duties upon the State, one of which is the offer of religious studies as an optional choice." (ADI 4493:2) She stressed that even if all agreed on the condition of the secular State of Brazil, one cannot ignore religious intolerance, such as the fundamental importance of freedom of belief, expression, and ideas.

The decision covered only public schools and did not impose any requirements on private educational institutions. The majority considered that the request of the Attorney General's Office violated their interpretation of the Constitution. According to this decision, the Constitution should be interpreted to allow and regulate the freedom of worship – without subsidies – because it was the intention of the drafters, reflecting the will of the people, to guarantee and enable religious education as an indispensable element of the formation of human persons and of citizen, in ways that go beyond simply recognizing religion as a cultural and sociological phenomenon.

The presumption that such religious teaching happens exclusively through the exposition of "practices, doctrines, history, etc. of religions", as stated by the Attorney General in his claim, overlooks the fact that setting aside the transcendent elements of the creed would result in denying religion itself, since it is precisely this transcendent nature of religion that characterizes its value. Therefore, the deviation by the Attorney General's Office from the will of the original writers of the constitutional text is evident, and it runs counter to the right to learn and teach as guaranteed by the accepted norms of the country.

6. Conclusion

This paper has considered what international agreements and Brazilian law say regarding the right to religious freedom in education. It has noted that international

legal ordinances guarantee this right as a logical consequence to the principle of dignity of a human person.

The importance given to the primacy of the family in the education of children is emphasized, with the description of a case in which this prerogative was questioned in order to limit the subjective right of students and parents to enroll in the religious teaching of their confession in Brazil.

A judgement involving the right to religious freedom in education was analysed. The majority of judges indicated that state secularity cannot by utilized as a basis for imposing regulations that violate individuals' religious convictions.

The existence of an educational system that embraces all Brazilian citizens, along with their cultural, regional, religious and social identities, is necessary. In a country so wide and diverse, it is improper to talk about the possibility of requiring all students to receive a uniform education, even though the education system needs to be cohesive.

Tolerance is the main principle that should guide legislation in the realm of education, given that the right to education is an inalienable right. The type of education everyone wishes to receive is, above all, a quality formation that contemplates the ethical values inculcated by the family and develops citizens committed to the common good.

An educational model in a regime of State monopoly cannot be allowed; rather, a variety of models must be encouraged, including confessional ones, that guarantee parents continuity with the values they are transmitting to their children at home. The confessional school as an instrument of education, being the ideology-based organization that it is, should receive from the State the protection that ensures its functionality in the form for which it was created; otherwise, its existence is made impossible.

The suppression of the right to religious freedom points to the presence of covert discrimination against this guarantee, although the Brazilian Constitution gave it the same level as other fundamental rights, such as privacy and freedom of expression.

It is necessary, for the full exercise of religious freedom, to ensure State neutrality in the evaluation of rights, taking into consideration that the right discussed is fundamental for humanity, the true origin of fundamental rights.

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Panic, persecutions and penalties

The impact of Fr. Augustine Urayai's new theology of original sin on the Roman Catholic Church in Zimbabwe

Misheck Mudyiwa[1]

Abstract

This article critically examines the impact of Fr. Augustine Urayai's alternative theory of original sin in the Roman Catholic Dioceses of Masvingo and Gweru. Persecutions and penalties have been imposed on those who sympathize with his new theology. Fr. Urayai held that the fall of Satan and the rebel angels described in the book of Revelation is the actual original sin, not the traditionally accepted biblical Adamic guilt recorded in Genesis. This article provides both the milieu and context within which Fr. Urayai's theory emerged and developed, and examines the impact on the Zimbabwe Roman Catholic Church.

Keywords Original sin, rebel angels, Zimbabwe Catholic Church, persecution.

1. Introduction

Both the *Catechism of the Catholic Church* (1994) and the *Code of Canon Law* (1983) stipulate that official Catholic doctrines embody the authoritative understanding of the faith taught by Jesus Christ and that the Holy Spirit protects the Church from falling into error when teaching these doctrines. To deny one or more of these beliefs, therefore, is to deny the faith of Christ. Accordingly, throughout history, the Catholic Church has not hesitated to deal decisively with any theological view or teaching that threatened her traditional position. Over time, the Catholic Church has thus condemned numerous beliefs which she considered heretical and contrary to official Catholic teaching: Adoptionism (second and third century), Montanism (late second century), Arianism (fourth century), Nestorianism (fifth century), Pelagianism (fifth century), Protestantism (sixteenth century) and Jansenism (seventeenth century), among many others (Morrow 1966:152-153).

Recently, the theology of Father Augustine Urayai of Zimbabwe posed a new threat to traditional Catholic theology. Fr. Urayai (1931-2003) abandoned the view

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that the state of sin in which humanity has existed since the fall of man stems from Adam and Eve's rebellion in the Garden of Eden. Instead, he clung resolutely to the belief that the sin of apostasy committed by the fallen angels and described in Revelation 12:7-17 is the true and actual representation of the original sin.

In the early 21st century, this deliberate deviation by Fr. Urayai put the entire Zimbabwe Catholic disciplinary system on edge as it feared a potential secession from the church. This article relies heavily on personal interviews to capture the impact of Fr. Urayai's new theology on the Zimbabwe Christian landscape. Rural parishes where Fr. Urayai worked as a Catholic priest and self-proclaimed exorcist, including Mutero (1967-1971, 1980-1990), Zhombe (1976-1977) and Chinyuni (1990-2003), proved essentially critical in providing information about Fr. Urayai's priestly ministry and the impact of his teachings. However, urban parishes such as St Paul's in Redcliff and St Edward's in Gweru Diocese, where followers of Fr. Urayai's new theology are more noticeable, were equally important primary sources of information.

Before describing and analyzing Fr. Urayai's theology, I will briefly summarize the history of his priestly ministry and the environment in which his theology emerged and developed.

2. The priestly ministry of Father Urayai[2]

The priestly ministry of Fr. Augustine Urayai has been well documented by Sibanda (1999), Shoko (2006) and Mudyiwa (2016). Augustine Paradza Urayai was born on 10 August 1931 in Homera village, under chief Chirumhanzu, in the Midlands province of Zimbabwe. He was among the first African boys to study for the priesthood in the Diocese of Gweru. Having displayed superior capacities during more than eight years of philosophical and theological studies, Augustine and two other seminarians, Kizito Mavima and Francis Mugadzi,[3] were ordained priests on 12 December 1964 at Gokomere Mission in Masvingo province (Nyatsanza 1995:17).

As a young priest, Fr. Augustine was passionate about exorcism (Sibanda 1999). About five years into his priestly ministry, in 1969, he had his inaugural case of healing when he cast out alien spirits (*mashavi*) from a parishioner named Ignatius Munyongani (Mudyiwa 2016:32). Beginning from this event, Fr. Urayai's healing sessions became very popular and he became the best-known exorcist in the Roman Catholic Church of Zimbabwe. In an interview conducted by this author, Fr. Urayai stated that his healing ministry took on a new dimension on 12 June 1970 when, during a routine

[2] This section is adapted from a report to the Vatican on the ramifications of Fr. Urayai's healing ministry (2015). It also expands on the content of my unpublished MA thesis (University of Zimbabwe, 2016).

[3] Francis Mugadzi became the second locally born black bishop in the Diocese of Gweru after Tobias Chiginya.

healing session, he encountered an angel who spoke through his catechist Sylvester Madanhire (1940-1981). The angel who communicated through Sylvester as a deep-trance medium identified himself only as Archangel Cherubim, one of God's seven archangels, alongside six others: Lucifer, Christ, Michael, Gabriel, Raphael and Seraphim.[4] This dramatic episode left an indelible impression on the otherwise skeptical, cautious and very Roman Catholic Fr. Urayai. It and subsequent similar encounters radicalized him and altered his entire metaphysical and cosmological thought. Furthermore, the *ganz andere* (manifestation of the sacred) also awakened him from the slumber of dogmatic parochialism and caused him to embrace a new theology of creation, original sin and the entire economy of salvation. Thus, Fr. Urayai's theology of original sin was not presented as his own intellectual achievement but ostensibly as the result of his numerous encounters with celestial beings who communicated through mediums (Fr. Urayai, interview, 30 August 1994).

3. Fr. Urayai's theory of original sin[5]

The logic and link between Adam's guilt (described in Genesis 3:1-24) committed so long ago and humanity who seemingly had no part in it has preoccupied scholars for centuries. Renowned philosophers and earnest theologians have laboured to explain why humanity remains in need of divine rescue, even though the human race was originally created sinless by an all-powerful, merciful and loving God.

In what could be described as "extreme religious liberty" (Hamilton 2007: para 1) and in sharp contrast to orthodox Christian belief that original sin was contracted from humanity's progenitors (Adam and Eve), Fr. Urayai held that the "sin of the world" (John 1:29) derives from sin committed by apostate angels in a world of spirits, long before the events described in the Genesis creation accounts. According to Fr. Urayai, the disobedient angels, together with Lucifer their ringleader, were sequestered into temporary spiritual spheres of punishment and correctional services for rehabilitation. These temporary rehabilitation settings are referred to as hell or Gehenna (Matt 10:28), the lake of fire (Rev 20:14; 21:8), Sheol (Ps 89:48), the underworld (Is 14:9-14), the nether world (Ezek 32:21) or Hades (Matt 11:23), amongst many other names. Fr. Urayai stated that Lucifer was sequestered together with one-third of heaven's total population (Rev 12:3-4). Adam and Eve were part of

[4] Traditional Christian theology acknowledges the existence of three archangels: Michael, Raphael and Gabriel.

[5] Whilst Fr. Urayai's theory of creation and the Fall is ostensibly a recitation from Archangel Cherubim, to a greater extent his narration closely follows the position articulated by a German priest, Father Greber, who also claimed to have received communication from celestial beings at his parish in 1923, some forty-seven years before Fr. Urayai's dramatic encounter. Also, within Fr. Urayai's new religious movement, his theology is regarded as classified information. It has never been taught in public since the movement's birth in 1970.

this disobedient one-third; the other two-thirds remained loyal to Christ during the revolt. For him, the pre-existence of humanity as angels, humanity's full participation in original sin, the angelic revolt and humanity's subsequent eviction from heaven by Archangel Michael (Rev 12:7) constitute the most basic religious truth underlying all knowledge of the beyond. Ironically, according to Fr. Urayai, this basic knowledge has been overlooked by all Christian denominations, including the Catholic Church. Thus, he insisted, humans on planet Earth are essentially incarnations of the same fallen angels (one-third) currently participating in God's great plan of salvation to effect their gradual ascent and repatriation. Whereas hell continues to serve as a temporary warehouse where spirits awaiting a human body are kept, the material world (Earth) also functions as a temporary school or training centre where fallen angels (mortals) would be prepared through suffering for a life to come. Fr. Urayai often referred to the material world as a "testing ground" (interview, 30 August 1994).

For Fr. Urayai, the coming of Christ two thousand years ago constituted a critical turning point in the history of humankind (fallen angels). As both he (in 1994) and Greber (1970:215) stated, when the testing ground was finally created, none of the fallen angels (including Adam and Eve) being lawfully Lucifer's subjects, could escape from his rule, since he was unwilling to waive his right of sovereignty even in the case of those spirits who had repented of their misdeeds while in hell and longed to return to God's kingdom. Rather, the surrender of this right was forced upon Lucifer by a Redeemer, namely Christ (Eph 1:7; 1 John 2:2). Christ's redemptive act brought with it numerous advantages, chief among them being the nullification of original sin. Hence, Jesus told the parable of the lost sheep (Luke 15:3-7) in reference to the fallen angels. In fact, the coming of Christ signaled God's eternal love, mercy and willingness to reconcile and re-engage his lost sheep (Fr. Urayai, interview, 30 August 1994).

By dying on the cross, Jesus bridged the gap that had separated heaven and earth for ages. However, Fr. Urayai believed that since human nature is still inclined to choose evil and sin, each individual shall one day face judgement for his or her sins upon exiting the testing ground. For humans living on Earth, the greatest commandment taught by Christ (Matt 22:36-40) remains the only guiding principle. Thus, those who love God and neighbour will pass the judgement test when they die. Subsequently, such victorious spirits will be reunited with the two-thirds of the angels who remained loyal to Christ during the revolt and the Great Fall. On the contrary, those who fail to love God and neighbour on the testing ground will also fail the judgement test when they die and will be sent back to hell or Hades, where they will continue to writhe in excruciating pain until another life is planned for them by God's angels.[6]

[6] Although Fr. Urayai taught that spirits that fail to make it to heaven go back to hell, he did not believe in perennial or everlasting punishment in hell. Instead, like most adherents of Eastern religions, he believed strongly in reincarnation.

4. The reception of Fr. Urayai's theory

Fr. Urayai's theory of original sin was received with mixed feelings in the Zimbabwe Christian landscape. Based on the evidence gathered through interviews, his alternative interpretation of original sin has enjoyed rapid and appreciable growth and acceptability, particularly amongst his acolytes and secret admirers in both the Masvingo and Gweru Dioceses. To date, his new religious movement has attracted more than two thousand followers in Zimbabwe (Patrick Chagwiza, interview, 10 October 2018). The combination of his role as an ordained minister, the availability of other catholic priests who secretly backed his ideas and the divine revelation on which his theology was purportedly anchored all favoured the spread of his theology.

A few weeks after Fr. Urayai's initial mystical experience and the manifestation of the "hierophany" (Eliade 1957:12), a small group of interested Roman Catholics who previously followed traditional Catholic theology regarding original sin gathered at Fr. Urayai's Chinyika Parish in Gutu to deepen their prayer life and knowledge of the Scriptures. A small circle or community formed around Sylvester the deep trance medium, under the guidance and leadership of Archangel Cherubim who always spoke through the catechist. The prayer group met every weekend to receive instruction on good moral behavior and Bible lessons. They later changed to meeting once a month, mostly in believers' homes, since they had no temple of their own. Initially, those who subscribed to the new theology brought with them a highly skeptical mind, a desire for new teachings and an inner readiness and willingness to transform their lives as new spiritual insights flowed out to them. This culture of curiosity did not lead to a cry for the rewriting of the Bible or a rearrangement of the ecclesiastical hierarchy, but it did create a passion and thirst for more answers to fundamental questions about the beyond. Because of this thirst for new information, many of the participants were open to exploring or revisiting issues related to the development of the biblical canon and the translation of the Scriptures, for the sake of becoming more informed spiritually.

Over time, the new religious movement grew like the biblical mustard seed (Luke 13:18-19) and later assumed the name of the Light of Life Christian Group (LLCG). Within the Catholic Church circles, the LLCG is nicknamed "Super Roma" (Kugwa 2004; Shoko 2006), perhaps implying that Fr. Urayai's teachings were above and beyond what the traditional Catholic Church believed in. In the early 1980s, the LLCG grew steadily to include people coming from other Christian denominations, including the Methodists, Anglicans, Salvation Army and Baptists, amongst many others. Those who affiliated with the LLCG were urged by Fr. Urayai not to give up membership in their various denominations but simply to regard the lessons they received from the LLCG as extra spiritual training. By the time Fr. Urayai died in 2003, the LLCG had attained such a magnitude that it could no longer be ignored by

the world around it. By then, Fr. Urayai had recruited a handful of nuns and priests to join him, mainly from dioceses such as Gweru, Masvingo, Harare and Mutare (Charles Marumisa, interview, 15 October 2019). However, to date the LLCG has indicated no plans to secede from the church and become an independent movement. Rather, it has settled on a unique 'stay and reform from within' strategy as opposed to the general trend of reform through separation (Mudyiwa 2016).

As an ordained Catholic priest, Fr. Urayai was well positioned to cross denominational boundaries and spread his new theology of original sin. Most of the Christians who came into contact with him did not doubt his credentials or his ability to replicate the qualities of Jesus Christ whom he represented. As a result, scores of Christians from different denominations – academics, medical practitioners, teachers, nurses and farmers – secretly affiliated with the LLCG. Initially, the responsible authorities employed a policy of watchful waiting. They were cautious and disengaged to the operations of the new religious movement. They simply observed the movement without approving or disapproving it. However, over time, the influx triggered a response from the Roman Catholic disciplinary system (Emmanuel Mupure, interview, 27 July 2017).

5. The Catholic response: panic, persecutions and penalties

Throughout the eight Roman Catholic dioceses in Zimbabwe, the Catholic response to Fr. Urayai's new theology and the subsequent formation and development of his prayer movement has been generally sporadic and spasmodic, ranging from sanctions, interdictions and suspensions of real and imaginary followers of Fr. Urayai to a collective response by the Zimbabwe Catholic Bishops' Conference. In an interview I conducted at a parish in Gweru Diocese, one interviewee stated:

> At my parish in Redcliff … from 2005, being a member of the LLCG then became punishable by an ecclesiastical sanction or interdict. However, throughout Zimbabwe, most Catholic bishops and priests did not generally hunt out LLCG members. The majority simply ignored them unless someone formally accused a member of being LLCG. Consequently, punishment was intermittent in most parishes, especially Redcliff and St Edward's. Like during the time of the persecutions of Christians, LLCG members at one parish would suffer untold suffering while their counterparts in a nearby parish or centre would be untouched. By and large, the imposition of sanctions was completely unpredictable … yet most LLCG particularly within the towns of Kwekwe and Redcliff lived daily with an ecclesiastical sanction hanging over their heads but they were undeterred by such threats. (P. Christina, interview, 12 October 2019)

Whilst a handful of urban parishes within Gweru Diocese panicked and denied sacraments such as baptism, the eucharist and matrimony to suspected LLCG mem-

bers, perhaps the action with the greatest impact was the suspension of seven clergymen from the Diocese of Masvingo in 2005 due to their alleged connection to Fr. Urayai's new theology and their involvement in LLCG operations (Mudyiwa 2016). An unpublished report to the Vatican (2015) on the ramifications of Fr. Urayai's healing ministry in Zimbabwe, compiled by the accused and disgruntled Catholic priests themselves, also contains a detailed and unabridged account of the historic suspensions. Whereas 'persecution' of followers of Fr. Urayai's ideology has hit the headlines of some national and diocesan Catholic periodicals (Kugwa 2004; Mashonganyika 2005), the increasing incidence of clergy persecution has received little attention both nationally and internationally. Following media attention to Fr. Urayai's LLCG movement in 2004, the response from the Catholic Diocese of Masvingo was immediate and decisive. With a view to stamping out and mitigating the spread of Fr. Urayai's theology, the diocese dismissed from active priestly ministry those believed to be its disseminators. Among them were the Vicar General, the Bishop's secretary, the Bishop's advisor and the priest in charge of the lay apostolate (Report to the Vatican 2015:3). According to interviews conducted with some of the suspended priests, the suspension was carried out on 12 October 2005 and targeted five active priests and two deacons. The period of the suspension, however, varied according to the guilt of each individual priest. Whereas those suspected of being the chief culprits and LLCG protagonists were given a ten-year ban, others believed to have simply jumped on the bandwagon were suspended for eight years (Report to the Vatican 2015:3).

What shocked the Christian populace in Zimbabwe regarding the reaction by the Diocese of Masvingo was not just the number of priests and the length of the suspensions, but rather the canonical procedures undertaken before and after the suspensions. According to the detailed Vatican Suspension Report, the first canonical step taken by the Local Ordinary of the Diocese of Masvingo was to demote and transfer all the accused priests to some rural peripheral parishes and to withdraw their vehicles for "safe keeping". The accused were to stay at their new mission stations with no parish of their own and no vehicle to use. For the demoted priests, this was more like a house arrest or 'spiritual detention' than a routine transfer (Report to the Vatican 2015:13). Following their demotion and abrupt transfers, the accused clergy were asked to provide written statements confirming or retracting their involvement with Fr. Urayai's prayer movement and theology. Thereafter, comprehensive late-night interviews took place at a remote parish (St Luke's Catholic Church) in Chivi District to determine the accused's involvement and participation in the LLCG. The nocturnal interviews began at 23:30 hours (11:30 p.m.) and continued for four hours. What worried the interviewees most was not the physical or psychological trauma that they faced on the night of the interviews, but rather

the composition of the incompetent panel that had been hand-picked to handle a case of such great magnitude. After the nocturnal interviews, all the accused were banned from attending any public church gathering in the diocese or receiving Holy Communion (Report to the Vatican 2015:13-15).

Having tried in vain several times to gain an audience with the Bishop, the accused priests were later summoned to the bishop's house on 11 October 2005, where they were issued their suspension letters and asked to surrender their prayer books or any remaining church property. Soon after their suspension, contrary to what the Bishop's inner circle expected, the suspended men of God collectively made arrangements to rent a house in Midlands province, where they came together for purposes of prayer and spiritual edification while awaiting the church's final decision on their fate (anonymous priest, interview, 20 October 2019). They hoped to make an appeal to the bishops of other dioceses, but their situation was further worsened by the collective response of the Zimbabwe Catholic Bishops' Conference (ZCBC), which declared categorically that since Fr. Urayai's LLCG was not a Catholic association, no baptized Catholic should associate with the new religious movement or uphold its theology. In their collective wisdom, the Catholic shepherds accused the LLCG of being out of conformity with the Catholic Church, practically and doctrinally (ZCBC Pastoral Statement 2005). However, undeterred by the bishops' statement, in 2015 the seven clergymen finally appealed for upkeep to both their Bishop and the Apostolic Nunciature in Zimbabwe. To their great disappointment, the appeal was rejected (Report to the Vatican 2015).

Meanwhile, the suspended clergy lived in abject poverty and survived on handouts. They faced ridicule and shame not befitting ecclesiastical officers ordained by the one, holy, catholic and apostolic church. They even appealed directly to the Vatican, citing serious violations of fundamental human rights and freedoms in the handling of their case. In its response, the Holy See, whilst sympathizing with the situation and the condition of the suspended priests, requested that they first denounce any wrong theology that they upheld in order to return to true priestly and ecclesial communion (anonymous priest, interview, 15 October 2017).

In their most recent communication with their local ordinary, dated 4 April 2018, the accused priests emphasized that every person has the right to be tried within a reasonable time frame and by a tribunal capable of dispensing objective justice. They felt their case was long overdue for a proper hearing. For that reason, they requested that if the matter could not be handled and resolved by the Vatican, it should instead be placed before the relevant civil or ecclesiastical tribunal for adjudication. To date, they continue clinging resolutely to the principle of innocence until proven guilty, hoping that one day the rule of God would prevail over the rule of canon law (anonymous priest, interview, 10 August 2014).

Fr. Urayai's new and alternative theology is slowly but steadily infiltrating Zimbabwe's mainline churches and continuing to create heated controversy. The stigma associated with his theology has caused Christians in Zimbabwe either to follow it with heightened enthusiasm or to resent it deeply. For that reason, since the doctrine of the original sin has been such a bone of contention in Christian history and thought, perhaps it is critical to examine the same theology of the original sin in order to situate Fr. Urayai's new theology.

6. A critical appraisal of Fr. Urayai's theology

Unlike the concept of immortality of the soul, which is shared among different religions and cultures, the doctrine of original sin is essentially peculiar to the Christian faith. A quick scan of the history of Christian theology reveals that this doctrine is derived from Scripture, particularly Romans 5 (Porter 2001:22). Paul wrote, "Therefore as sin entered the world through one man, and through sin death, thus death has spread through the whole human race because everyone has sinned" (Rom 5:12). The doctrine gained further support from two of the greatest theologians of Western Christianity, Augustine (ca. 354-430, perhaps the most influential Christian thinker after the apostle Paul) and Thomas Aquinas (1225-1275), whom Catholics regard as 'Doctor of the Church'.

Both Catholics and Protestants have traced original sin to the guilt of Adam, which was subsequently passed by inheritance to Adam's descendants (Murphy 2013).[7] Accepted traditional mainstream Christian theology holds that evil resulted from Adam's transgression in Eden[8] (Gen 3:1-24). The sin that Adam and Eve committed did not just become the root of all evil (*radix mali*) but also made humanity a mass of perdition and a condemned crowd (*massa damnata*) who owes a debt of punishment to the most divine and supreme justice (*Oxford Dictionary of the Christian Church* 2005). Thus, for traditional theologians, there is no affinity between humanity and the fallen angels as Fr. Urayai has suggested, and his position would be considered heretical and a direct attack on traditional Catholic core teachings.

From the early Christian centuries through the Renaissance and the Protestant Reformation, theologians such as Irenaeus of Lyons (ca. 125-202), Origen (ca. 185-215), Augustine, Anselm of Canterbury (1033-1109), Thomas Aquinas, and Martin Luther (1483-1546), among others, have agreed on the core traditional teachings about original sin and the need for Christ's atonement (Murphy 2013).

[7] Murphy (2013) states that the doctrine of the original sin was developed in the second century.

[8] Accepted traditional theology also holds that the tempter must have already somehow been possessed by evil.

However, they have proposed somewhat different theories[9] about how human nature was damaged by the Adamic guilt and how sin is passed from generation to generation. Similarly, there are competing theories of atonement which seek to delineate how and why Christ (the new Adam) solved the problem of evil and original sin. Not every proposed theory was accepted; many were subjected to analysis, seriously debated and ultimately rejected. Nevertheless, a number of such theories, even though rejected as antithetical to accepted traditional Christian theology, left indelible marks on the face of Christian theology (Murphy 2013).

Augustine's formulation of the Adamic guilt was popular among Protestant reformers, such as Luther and John Calvin. Algermissen (1945:898) observed that all Christian creeds agree that humanity's first parents fell into sin through their own fault, based on their own free will, as a result of the devil's seductions. They believe that the first sin of Adam was passed on to the whole human race in the form of the consequence of original sin. The most fundamental differences exist with regard to the nature of the original sin.

As noted above, the concept of original sin is not found in non-Christian faith traditions, including African traditional religions and cultures. Other religions (particularly Islam) teach that a person is born in a state of purity, but that upbringing and the allure of worldly pleasures may corrupt him or her. Thus, for them, sin is not inherited. The doctrine is also rejected by some Restoration Movement Churches such as the Churches of Christ, Christian Churches and Disciples of Christ, among others. These, like Muslims and Latter-Day Saints, believe only in the sin for which men and women are personally and directly responsible. As noted by Williams (1927), considering the fact that other religions and Christian communities do not subscribe to the theory of original sin, the fact that Genesis 1-2 contains two versions of the creation story confirms the confusion and conclusion that neither is the real basis of the doctrine of original sin. Williams further argues that the two Genesis creation stories upon which traditional Christianity finds its anchorage are, therefore, portrayed simply as symbolic facades, clothing a conceptual structure which rests upon spiritual experience and introspection. Following the same argument, the unending discussion about original sin then leaves room for other alternative or perhaps more credible and laudable theories about the biblical sin of apostasy. Whilst Williams (1927) on the one hand suggests that no complete solution to the problem of the first sin or evil is possible, on the other hand, he is optimistic that at least religion ought to contain some indication of the direction in which the solution to the age-old paradox lies.

[9] Among the many theories put forward to explain the sacrificial act of Jesus were the ransom, satisfaction and moral influence theories. However, none of them attempted to make any logical link between humanity and the biblical fallen angels.

Alongside Fr. Urayai's theology of original sin, which seems to contradict traditional Christian theology, several other LLCG concepts also appear to deviate from orthodox Catholic teachings. These include the concept of the creation and pre-existence of souls, spiritism, re-incarnation and the doctrine of angels and archangels, among many others. Thus, in view of the fact that Fr. Urayai's new theology has not been celebrated in Christian history and thought, the same theology may, therefore, struggle to find a niche in Catholic theology today. However, there remains a lingering possibility that the Mother Church may have had an inadequate grasp of the most central Christian teaching on the topic of the original sin.

Kierkegaard (1813-1855) warned about two ways in which devotees are often fooled: they believe what isn't true and they refuse to believe what is true. Whilst Fr. Urayai's new theology of original sin may be viewed as confrontational and heretical, I maintain that Urayai has departed considerably from traditional theological views.

7. Conclusion

This article has examined the impact and implications of Fr. Urayai's theory of the original sin and unmasked the dangers posed to the church by deviant teaching and vice versa. Among other things, the article has established that Fr. Urayai's new theory of the original sin has resulted in persecutions and penalties imposed upon the upholders of his theology. In spite of the impact of his new theology, Fr. Urayai was, however, among the first African theologians to link humanity with the fallen angels recorded in the Scriptures. Caught between conscience and obedience, or "God versus Gavel" (Hamilton 2007), he was also among the first to induce African Christian theologians (in Zimbabwe in particular) to rethink and rationalize the theology of original sin, in a bid to shake off what might be considered irrelevant theology on the African Christian landscape. Whilst his theory may be useful in the unending debates and discussions on the character and ramifications of original sin, it is, however, more akin to non-canonical works that have for a long time remained in the periphery and boundaries of Christian theology. For that reason, his complementary theory of original sin has been labelled as antithetical to accepted traditional Christian theology. As a Catholic minister of religion, by articulating a liberal theory that is seemingly unbiblical and essentially incompatible with Christian doctrine, Fr. Urayai has minimized not just the *Code of Canon Law* and the *Catechism of the Catholic Church* but also the doctrine of papal infallibility. By fearlessly shaking off a Christian theological view that he considered obsolete for the 21st century, he has created a unique and perfect opportunity for Christians in Zimbabwe to observe how African Christianity handles Christian theology and the gospel, "outside the immediate spheres of the Western-oriented historical church-

es, particularly the Vatican" (Shorter 1998). Fr. Uravai's theology also resulted in severe repercussions for his followers, particularly those who were clergymen. Mother Church does not tolerate deviations.

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Religion, politics, and death

Martyrdom and persecution in twentieth-century Latin America

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Abstract

The paper recounts the stories of Christian martyrs in Latin America from the 1920s to the present, so as to illustrate the causes of the killings of both Protestants and Catholics. The review of cases reveals the differences over time, with the Second Vatican Council marking the primary dividing point, as it produced a complex transformation of faith-based social movements in Latin America. The impact of liberation theology recurs in many cases of clergy and lay believers targeted by civil wars and dictatorships.

Keywords Latin America, martyrdom, dictatorship, Civil War, Vatican II.

1. Introduction

In contemporary Christian thought, most discussion of martyrs concerns people who lived either in the first few centuries of the church or during the years after the Protestant Reformation. The term is rarely used for people living in liberal, pluralistic and secular societies today.

However, the reality of martyrdom continues, and not only in countries typically associated with religious persecution. It has evolved in modern times and appeared in novel shapes, sometimes transfiguring partisan struggles and broad political landscapes. Latin American countries in particular have demonstrated a tendency both to create and to memorialize martyrs.

This essay collects and interprets stories of Christians who died for practicing their beliefs. Priests, seminary students, former priests, nuns and laypeople lost their lives while attempting to change the reality surrounding them. Twentieth-century Latin American countries experienced a rapid secularization process in which martyrdom and persecution bore specific features. In the case of Catholics, this experience was associated with transnational church policies. Persecution among Protestants remained constant but was in general more associated with their political stances in a variety of countries and circumstances.

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All the examples presented in this essay were selected attending to two criteria: the death occurred in a Latin American country and the person manifestly belonged to a church, community or religious congregation. I left out cases such as the 1936 death of the Cuban Blessed José López Piteira, long considered a martyr by Catholics, who perished in the Spanish Civil War and was beatified by Pope Benedict XVI along with 497 other people who perished then (Catholic News Agency 2007).

A further consideration in the selection of cases was that these persons' demises all occurred in the twentieth century and stirred up political controversy. Taken together, these stories offer an unusual but revealing way to look at how the political and religious spheres interrelate in modern Western societies.

I treat the accounts of martyrdoms as social facts, in a very Durkheimian fashion. I am following the well-known Thomas theorem inasmuch[2] as Christian communities have defined these martyrdoms as real and, yes, they are real in their social consequences. Here I do not investigate whether the accounts are completely factual or not, since the pressing issue is the meaning placed on the stories. Thus, narratives of martyrdom are at the center of this essay not because all the specific details of the accounts are necessarily true, but because they have been passed down as a sort of mnemonic device, infusing with meaning the recollection of those who died.

One clarification is important for this analysis. The first thirty years of the twentieth century remain part of the pre-Concordat times period of church-state relations in the Catholic Church, and it bears specific features. Militant Catholics, social enterprises derived from the encyclical letter *Rerum Novarum* (Avila Espinosa 2005), and strong anti-Protestant movements erupted in some countries, particularly in Mexico after the 1910 revolution. These developments contributed to a confrontational climate, which often led to armed struggles; the most significant case is the 1926-1929 church-state conflict in Mexico, or the so-called "Cristero war" (Quirk 1973; Meyer 2005). At the time, martyrdom and persecution were usually portrayed following the classic early Christian pattern: priests, bishops and lay Catholics were being persecuted for opposing an anti-Christian, impious government (Lopez-Menendez 2016). Thus- the "Mexican martyrdom" (Parsons 2012) became one of the most conspicuous episodes of the time, to be replicated in Spain during the 1936-1939 civil war. Catholics of Mexico and Spain vindicated the cult of Christ the King, originally formulated by Pope Pius XI in *Ubi Arcano Dei Consilio* (1922) and *Quas Primas* (1925). This understanding of Catholicism rejected nationalism and emphasized the notion that Catholics around the world

[2] The Thomas theorem was formulated in 1928 by William Isaac Thomas and Dorothy Swaine Thomas (1899-1977): If men define situations as real, they are real in their consequences.

must first be subjects of their spiritual ruler (Christ) before giving their allegiance to human ones.

In organizing this essay, I attempted to identify the causes beyond Christian victims' assassinations, torture or disappearances. However, the Chilean, Argentinian, Brazilian and Paraguayan cases make such distinctions murky since Christian militancy – by Catholics and Protestants alike – led many of the faithful to become involved in social movements opposing their governments, sometimes resorting to armed means.

The first half of the twentieth century was, religiously speaking, completely different from the second half. The main issue generating martyrs in the period before the Second Vatican Council (1962-1965) was the conflict between churches and states, followed by the consolidation of Protestant communities in most Latin American countries (Bastian 1994). The killings were mostly perpetrated against those who sought to restore a Christian social order. Catholic militancy in the context of conflicting positions on church-state issues was particularly extreme in Roman Catholic countries with secular governments, such as Mexico (Carpio 2015; Lopez-Menendez 2016).

The situation changed significantly after Vatican II and the follow-up Second Episcopal Conference of Latin America (CELAM II, held in Medellin, Colombia in 1968), which introduced a different relationship between the Catholic Church and dictatorships and coups d'état in the region. An immense number of people died or disappeared in the context of political persecution derived from dictatorial regimes. Given the importance of liberation theology, grey areas are frequent and unavoidable with regard to the cause of such actions, since priests, bishops, archbishops and lay people were murdered or disappeared due to their political *and* religious beliefs at the same time.

In spite of the evident differences between these two varieties of martyrdom, a similar trend must be highlighted: Just as *Quas primas* stated in 1925, most Christians in the second half of the century who testified to their faith did so in the belief that heavenly laws should prevail over human ones. We have Salvadoran Archbishop Oscar Romero's last homily (of 23 March 1980) to remind us:

> I would like to make a special appeal to the men of the army, and specifically to the ranks of the National Guard, the police and the military. Brothers, you come from our own people. You are killing your own brother peasants when any human order to kill must be subordinate to the law of God which says, "Thou shalt not kill." … In the name of God, in the name of this suffering people whose cries rise to heaven more loudly each day, I implore you, I beg you, I order you in the name of God: Stop the repression.

2. Martyrdom in pre-conciliar Roman Catholicism

Until the late 1930s, Latin American martyrdoms were related to attempts to restore a Christian social and political order. One of the best examples is the death of Miguel Pro, S.J., the most famous of Latin American pre-conciliar martyrs. Foremost among the so-called Martyrs of Christ the King, Father Pro became an exemplary figure whose influence stretched as far as Guatemala, Brazil, Belize, Ecuador, Panama and the United States (mainly Texas and Colorado). Father Pro's martyrdom neatly fits the classic tenets: arrested for his alleged participation in an assassination attempt against Mexican President-elect Alvaro Obregon, he faced a firing squad without a proper trial, kneeled and prayed before his death, and faced the squad holding a rosary in his hand and crying "Long live Christ the King!"

National newspapers publicized his execution and he became an instant example of militant anti-Catholicism in secular governments. Pro was not the only priest to die in Mexico (scholars calculate between 80 and 100 priestly victims in the 1926-1929 conflict) (Lopez-Menendez 2016), but his martyrdom remains one of the most telling ones due to the lack of a proper legal procedure and his evident willingness to die for his faith.

In the meantime, the Catholic Church and conservative groups in many countries defended the 'Hispanic and Catholic tradition' of Latin America against Protestant missionaries and communities. They argued that Protestant associations were in fact part of an imperialist (United States) plot to undermine and conquer unions, indigenous communities and youth. This led to confrontations between Catholic groups and communities and Protestant missionaries. Several missionaries died in their efforts to evangelize, such as Jim Elliot (1927-1956), one of five missionaries killed while participating in Operation Auca, an attempt to evangelize the Huaorani people of Ecuador. His death had a strong impact on future evangelistic missions (Long 2019).

3. Protestant martyrs in Latin American democratic struggles, 1916-1962

Moreover, a large number of Protestants from many denominations participated fervently in democratic struggles in their countries: Methodist Pastor Ruben Jaramillo (México, d. 1962), in El Salvador, Evangelical pastor Pedro Bonito and Eulalio Rivera, and the congregation of Nahuizaco, involved in the 1932 insurrection in that country are among the best examples of this pattern. Their deaths, however, are seldom linked to their religious affiliation.

Between 1916 and 1929, nationalism also erupted in the Latin American Protestant milieu and weakened the dependence of Anglo-Saxon support in many countries. This led to the strengthening of national Protestant churches and the creation

of new ones among what Jean Pierre Bastian named the historical Protestant movements and churches, while Pentecostal and Evangelical groups grew in importance, number and influence.

4. Martyrdom and persecution after the Second Vatican Council

If Vatican II paved the way for liberation theology, CELAM II of 1968 strongly supported it and introduced a new strand of martyrdom in the region. Christians and revolutionaries at the same time, people from all walks of life have been referred to as martyrs. Many of them were priests or catechists, pastors or members of religious orders; many others were lay Christians, politicians, members of indigenous communities, human rights advocates and social workers who began to perceive in their worldly vocation a need to reflect their deeply felt religious beliefs. This was particularly so in the case of Catholics. The Vatican Council and CELAM II had created a climate that allowed Catholic faithful to move beyond intimist piety and devotional Catholicism, both features of the 1930-1960 period (Dussell 1979).

Moreover, ecumenism became trendier among Christian militants on the left, while conservatism tended to subside and remained at the margins of these new apostolic demands (Dussel 1981). The preferential option for the poor soon became embodied in the demand for justice; while the Catholic Church renovated itself and the Protestant denominations struggled for democracy, the ferocious wave of dictatorships that swept across Latin America between 1960 and 1994 entangled economic justice, human rights and basic freedoms (CEPLA editors 1977; Arroyo 1996).

Camilo Torres Restrepo is an early example of the conflicting, agonistic experience of Christian militants in the post-conciliar Catholic milieu. Considered a predecessor of liberation theology, he was a Colombian Catholic priest and a member of the National Liberation Army (ELN). His attempts to reconcile Catholicism and Marxist views resulted in his leaving the priesthood to join the armed struggle in his country. He died in his first combat on 15 February 1966. Torres' appeal for the vindication of solidarity and justice was among the first of many that marked a reawakening of the militant Catholic Church (Theisen 1974; Funk 2002).

Latin American 'new' martyrs started proliferating in the 1970s. In Chile, the coup d'état led by Augusto Pinochet claimed its first Christian victims almost immediately, as Fathers Joan Alsina and Gerardo Poblete were detained and killed a few days later (Jorda 2001). Many others disappeared or were tortured and executed between 1973 and 1990. Chilean Christians such as Germán Cortés, lay student of theology and strong proponent of liberation theology (d. 1978 in Villa Grimaldi) and siblings Eduardo and Rafael Vergara Toledo (d. 1985) were militants in the Young Catholic Workers Movement (JOC). The Chilean Catholic Church was very active in the registration, denunciation and litigation of human rights violations in

the country. The Vicaría de la Solidaridad, founded by Bishop Raúl Silva Henriquez in 1976, had an immense impact in the struggle for justice and democracy in Chile and in the region at large. The Vicaría was preceded by the Comité de Cooperación para la Paz (also known as Comité Pro Paz), an ecumenical organization founded in October 1973 by an inter-religious group and led by the Archdiocese of Santiago. Comité Pro Paz was the first active human rights organization in Chile and arguably the first on the continent (Gutiérrez Fuente 1986).

Comité Pro Paz was founded and operated by Christian activists from Lutheran, Pentecostal, Methodist, Orthodox and Catholic communities, along with some Jews. Its members were targeted by the Chilean dictatorship, and the organization was dissolved in response to a demand by Pinochet's government in December 1975. The Vicaría was born the next day (Aranda 2004).

Argentina's situation was somewhat different since the Catholic church took the opposite stance regarding the 1976 coup against President Maria Estela Martinez de Perón and the dictatorship that followed. Scholars agree that the majority of the Catholic hierarchy supported the coup and the junta (the so-called Proceso of 1976-1983). However, this stance was far from unanimous.

In May 1976, only two months after the coup, Fathers Orlando Yorio and Francisco Jalics were arrested (Mallimaci 2013), while French priest Santiago Renevot was expelled from the country. Repression at the time was strong against priests, bishops and members of religious orders, as well as against militants of Catholic organizations, namely the Catholic University Youth and the Young Catholic Workers. Ten of its members disappeared at that time. Later, Ascensionist Fathers Carlos di Pietro and Raúl Rodriguez were arrested in an episode that produced diplomatic tensions between the Argentinian government and the Vatican (Monumento a las víctimas del terrorismo de Estado. Parque de la memoria, 2020). Just a few weeks later, the killing of Bishop Enrique Angelelli in a fake car accident became a major political event. Three of his collaborators had been recently killed in La Rioja. Father Angelelli is now a Servant of God[3], although there seems to be still some opposition to this honour (Siwak 2000). Conservative sectors in Argentina consider him unworthy of the title that Pope Francis gave him in 2015.

Another significant group was the Movement of Priests of the Third World, a group of priests who were also workers and peasants. Many of them abandoned their priestly condition, as Camilo Torres had done in the 1960s, to join armed movements. Such was the case of Saletian Father José Tedeschi (d. 1976), who joined the Revolutionary People´s Army and was killed in Buenos Aires (MIEC-JECL 1976).

[3] A Servant of God is the title given to a candidate for sainthood whose cause is still under investigation, prior to being declared Venerable. It makes part of the Catholic canonization process. (United States Conference of Catholic Bishops n.d.)

The website Mártires Cristianos en Argentina (Gravet 2019) lists some victims of the repression unleashed by the junta. Along these conspicuous names there are those of people who were arrested, disappeared or were assassinated due to their Christian faith and their participation in religious activities. Among those listed are Zulma Zingaretti, a Methodist arrested in 1976 and still missing, and Silvia Wollert (d. 1977), an Evangelical whose remains were identified in 1999 by the Argentinean Forensic Anthropology Team (EAAF in Spanish) (EAAF 1999). Many other names vindicate the Christian faith of victims, although not many show direct links between the persecution they suffered and their participation in popular movements against the regime. One such example is Father Francisco Soares (d. 1976), vicar at Our Lady of Carupá in Buenos Aires. Father Soares was arrested along with two workers who belonged to the Navy Union and the wife of one of them, a catechist herself. Father Soares, also a shoemaker, is widely remembered as one of the first ecclesial victims of the junta in Argentina (Morello 2015). He was known among conservative circles as "communist" and "anti-Catholic" because of his open preferential option for the poor. Father Soares' case, along with many others, highlights the difficulty of distinguishing between religious martyrdom and other causes of death after Vatican II.

Other dictatorships in the region exhibited similar patterns of repression. In Paraguay, the long military government of President Alfredo Stroessner (1954-1989) did not have a smooth relationship with the Catholic hierarchy. Bishop Ismael Rolón (d. 2010) became one of the greatest symbols of resistance to the repressive regime which, like most of the countries in the region, participated in the infamous Condor Operation. A particularly gruesome case was that of Albino Amarilla (d. 1981), a peasant catechist in Caazapá and father of nine, who was assassinated by the army because he refused to name some of his companions (Instituto Histórco Centroamericano 1983).

Brazil's situation is somewhat special because of this country's strong connections with the liberation theology, mainly through Bishop Hélder Cámara and theologian Leonardo Boff. Peruvian Gustavo Gutiérrez wrote *Teología de la Liberación* in 1971, but the Brazilian movement was arguably one of the most progressive in the world (Romero 2014). During the military regime of 1964-1985, the Catholic Church took a progressive stance and organized the faithful into Base Ecclesial Communities (CEBs), a decentralized model that encouraged political resistance and action against the consequences of the military regime. CEBs created a different kind of persecution, since the church leadership was more diverse and in close proximity with unions, student organizations and lay Catholics (Romero 2014).

One of the most notorious instances of persecution was that of Father Antonio Henrique Pereira da Silva Nieto (d. 1969). He headed the Catholic University Youth in Recife, in the northern part of Brazil, and was close to Bishop Cámara, who had

received frequent death threats. Father Henrique was kidnapped on 29 May 1969 by police officers of Pernambuco and an anti-Communist police unit. His body was found the next morning; he had been tortured and executed. The case is among those researched by the National Truth Commission, which produced its final report in 2014, long after the rest of the Latin American countries had come to terms with their pasts. Other victims of the military regime whose deaths seem to have been directly linked to their faith are Rodolfo Lunkenbein and Simao Bororo (d. 1976). Lunkenbein was a Salesian priest and Bororo was a lay volunteer working on the indigenous reservation of Meruri; both were killed in the courtyard of the Salesian mission (Brites 2020). Another internationally relevant case was the death of lawyer Franz de Castro Holzwarth (d. 1981), a Dehonian priest who passed as one of the casualties of a shooting. However, his death seems to have been orchestrated to stop him from providing legal aid for prisoners in Jacarei.

5. Civil wars and Christian martyrs in Central America

Civil war and authoritarian regimes were intertwined in most Central American countries. Guatemala, El Salvador, Nicaragua and Honduras all experienced bloody conflicts from the 1960s onwards. Central America stands out for its dire poverty, violence and rooted, systemic inequality (Dussel 1981; Berryman 1984).

In El Salvador, the smallest country in the region, a ferocious civil war erupted after a series of military-led governments took power starting with the 1932 insurrection cited above. The 1960s and 1970s saw mounting concern about human rights abuses, and starting in 1979, the umbrella organization Frente Farabundo Marti de Liberación Nacional (FMLN) started a civil war in which Christians became deeply involved, mainly attempting to protect human rights victims and refugees, but also on the battle lines.

Some of the most conspicuous cases of martyrdom in Latin America occurred in El Salvador. Among Catholics, there is the death of Father Rutilio Grande, S. J. (d. 1977). He was assassinated by security forces in the small town of Aguilares, fully two years before the war officially started. Three young children witnessed the episode, so his death has been well documented (Cardenal 1985). His canonization process began in March 2014. Grande was a close friend to Archbishop Oscar Romero, and his martyrdom deeply affected the attitudes of the Archbishop, who had been quiet and obedient up to that point. After listening over and over again to stories of poverty, violence and injustice following his longtime friend's execution, Romero started vigorously defending human rights and documenting and denouncing abuses. Romero found in Socorro Jurídico Cristiano (Cristian Legal Aid of El Salvador, founded in 1975) a helping hand. By 1977 it was working at full speed and in 1982 it had over 50,000 open cases.

Socorro Jurídico moved to Mexico after Romero's slaying (1980), and Salvadoran Archbishop Rivera y Damas created his own legal aid organization, Tutela Legal del Arzobispado. Romero's death is probably the most relevant of all martyrdom instances in Latin America since it neatly fits classical martyrial patterns. Moreover, the Archbishop's personal conversion to radical opposition also mirrors that of the Catholic Church in the second half of the century and exemplifies the flourishing of liberation theology (Sobrino 1981).

Romero's strong advocacy for human rights and against violence, social injustice and poverty in the context of civil war put him at odds with the Salvadoran government. The pressure mounted against him until, on 24 March 1980 he was killed while conducting a mass in the chapel of the Hospital of Divine Providence, in San Salvador. He was beatified in 2015 and canonized in 2018.

Salvadoran martyrs fit neatly into the Tertullian canon of martyrs begetting more Christian martyrs, as Grande's and Romero's fates inspired many others to follow. One such case was Lutheran pastor Ernesto Fernandez Espino (d. 1985), killed by the National Salvadoran Army in an attack linked to his work on behalf of refugees and displaced people.

By 1989, the civil war was at its height. Governmental agencies regarded most religious activities with suspicion, and among the leading targets were the Jesuits in charge of Universidad Centroamericana José Simeón Cañas (UCA). Early in the morning on 15 November 1989, a military command broke into the University premises and attacked the Jesuit residence. Fathers Ignacio Ellacuría (rector), Ignacio Martin-Baró (vice-rector), Segundo Montes, Juan Ramón Moreno, Amando López and Joaquín López y López were all murdered. Elba and Celina Ramos, two women who worked and lived there, died as well in one of the most atrocious crimes in the history of the Latin American Catholic Church (Tojeira 2005; Tamez 2005).

Ellacuría, Martin-Baró and Montes had frequently taken public stands against Salvadoran governmental policies regarding human rights, systemic injustice and poverty. Ellacuría in particular was very vocal about the need to achieve a peace agreement with full respect for victims of violence and to make structural changes to promote true peace. All three were powerful thinkers who left behind a prominent theological legacy (Tojeira 2005). The UCA priests' murders became probably the most contentious case in El Salvador and one of the most difficult in the Inter-American Human Rights system, involving both the Commission and the Inter-American Court. In his final report, the Truth Commission for El Salvador (1993) attributed responsibility for the crimes to high-ranking military officers. However, no individuals were ever identified as the perpetrators. In March 2019, the case was reopened in the Salvadoran courts.

One last case to mention from El Salvador is the rape, torture and execution of three Ursuline nuns and one lay volunteer. Dorothy Kassel, Ita Catherine Ford,

Maura Clark and Jean Donovan were kidnapped, tortured and killed by security personnel in December 1980 (Brett 2018).

Taken together, the five Salvadoran cases mentioned here constitute a compelling portrait of Christian martyrdom in the country. They illustrated the idea of "collective martyrdom," a term often used in reference to the cruel persecution through which El Salvador suffered.

Guatemala has also its share of Christian martyrs in the context of the long civil war that bled the country from 1960 to 1996 (Manewal 2007). In June 1980, members of the National Army executed Father José María Gran Cirera and Domingo del Barrio in Chajul, Quiché. They had been threatened and were accused of collaborating with guerrilla groups.

Stanley Francis Rother (d. 1981) was a priest from Oklahoma City until 1968, when he was assigned to a mission in Guatemala. During the late 1970s, many of his catechists and parishioners died, disappeared or fled the country due to the brutal governmental repression against suspected left-wing supporters. Father Rother received death threats, and then on 28 July 1981, a group of gunmen broke into the rectory of his church in Santiago Atitlán and executed him. He was beatified in 2016. A similar story is that of La Sallian Brother James Miller (d. 1981), killed in Huehuetenango. His teaching among the poor made him a target in a context of appalling violence against Mayan communities (Ruiz Scaperlanda, 2017).

Franciscan Father Tullio Merluzzo and layman Obdulio Arroyo (who belonged to the Third Order of St. Francis) were also victims of the pattern of violence against church workers who endorsed the preferential option for the poor. Like Cirera and Barrio, Father Merluzzo and Arroyo had been accused of collaborating with guerrilla groups – an accusation that would become quite typical in Central America. They were ambushed and killed in early July 1981 (Brett 2018).

In Guatemala, Evangelical Protestantism was seen as counteracting Catholic efforts to advance liberation theology. In general, Evangelicals were much more conservative than in other countries. This trend became even more noticeable during the administration of Efraín Ríos Montt (1982-1983) (Manewal 2017).

Nicaragua holds a special place among the Central American countries for several reasons. Liberation theology was especially strong there and CEBs became an active part of the Sandinista movement which was able to take power in 1979. The Catholic Church in Nicaragua was transformed after the Medellin Conference, and by 1978 the Bishops' Conference in the country took a stance against the Somoza government. Many of the bishops sided with the Frente Sandinista, and most Catholics in the country celebrated the dictator's departure. Catholics then divided into a more progressive wing that helped the Sandinistas win the 1984 elections and a conservative one more aligned with traditional views. In the meantime, the

Ortega regime evolved to reject popular protest. Claims of religious persecution in the country piled up and mass attendants were kidnapped by police agents. In one such instance, Abelardo Mata, Bishop of Esteli, served as mediator helping to win the freedom of Ramón Alcides Peña Silva, parish priest of the church of Jicaro. Alcides had been arrested by the police on 7 December 2019, while returning from a celebration in the church of Nueva Segovia. Many other claims about police abuses against Christians have been in the press during 2018 and 2019, making Nicaragua the only Latin American country where notable persecution continues.

6. Conclusions

In Latin America, the impact of Vatican II cannot be underestimated. Martyrial patterns emerging from the late 1960s that continued until the 1990s in most countries of the region show the importance of liberation theology as one of the novelties encouraged by the results of the Council. Military rule, violence, poverty, inequality and structural injustices in the region all motivated many Catholic clergy and leaders in other Christian denominations to take a stand and defend those in need. The shift in theological point of view remains one of the key factors explaining the large number of violent deaths suffered by Christians during this time period, thus "extending" the concept of martyrdom into new debates and characters (Cattagio 2020, 446).

Latin America remains one of the most violent regions of the world. According to the lay Catholic website *Aleteia*, the increase in delinquency on the continent poses significant challenges to missionary work. Although dictatorships and civil wars have subsided, in 2017 alone eleven missionaries died (eight priests, a religious brother and two lay volunteers), representing the tragic cost of the insecurity experienced by many. In Mexico, four priests were killed in 2017, along with three in Colombia; one in Brazil and one more in Haiti.

There may be no more official persecution and no martyrdom, but Latin America has become the world's most dangerous continent for missionaries. Most of the victims of violence against Christian believers knew the risks and voluntarily embraced their calling anyhow.

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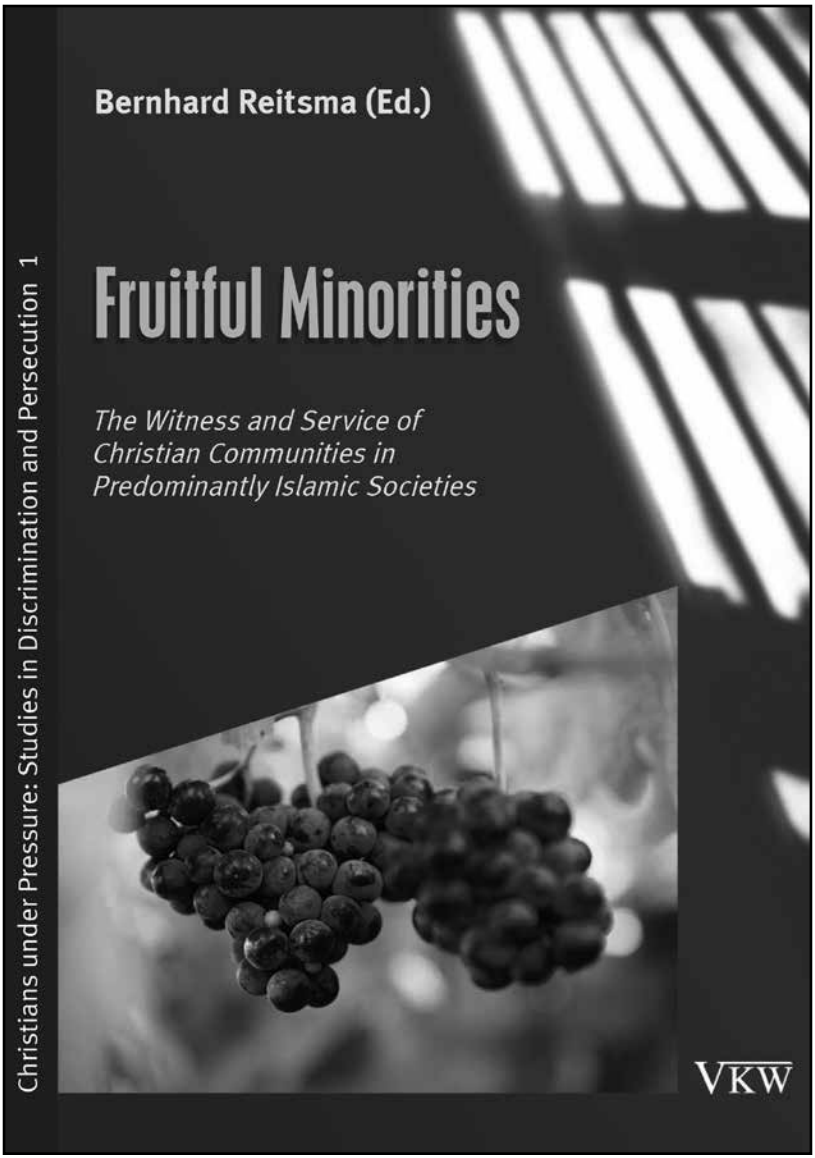


Religious Freedom Series 3, 2nd edition, VKW: Bonn 2017, 364 pp,
ISBN: 978-3-86269-117-3, € 20 **Free online at: www.iirf.eu**

Noteworthy

The noteworthy items are structured in three groups: annual reports and global surveys, regional and country reports, and specific issues. Though we apply serious criteria in the selection of items noted, it is beyond our capacity to scrutinize the accuracy of every statement made. We therefore disclaim responsibility for the contents of the items noted. The compilation was produced by Janet Epp Buckingham and Monica Rawlek Elizondo.

Annual reports and global surveys

Religious Freedom Report 2018
Aid to the Church in Need, August 2018

https://religious-freedom-report.org/

The ACN includes a map of countries that face discrimination and persecution, ranking them by persecution or discrimination and indicating either their decline or improvement from previous years, along with a detailed summary of their findings.

Commentary on the Current State of Freedom of Religion or Belief
All Party Parliamentary Group for International Freedom of Religion or Belief (APPGFORB), December 2018

https://bit.ly/3qw9XGC

This report provides an overview, by country, regarding violations made against religious freedom. Although not comprehensive, the report places an emphasis on those countries in which freedom of religion is most at stake.

Global Uptick in Government Restrictions on Religion
Pew Forum, 14 August 2018

http://pewrsr.ch/3baBLK6

A study of 198 countries, tracking government restrictions on religion and social hostilities against religion and their growth since 2016.

Prisoners Database
Human Rights Without Frontiers, 2018

https://hrwf.eu/forb-and-blasphemy-prisoners-database-archive/

Human Rights Without Frontiers compiles a list by country of people who have been imprisoned for seeking to practice their rights to freedom of religion or belief.

United Nations Special Rapporteur reports

Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, 28 February 2018

https://undocs.org/A/HRC/37/49

The UN Special Rapporteur on freedom of religion or belief issued a report focused on "Relationships between State and religion and their impact on freedom of religion or belief".

Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, 5 September 2018

https://undocs.org/A/73/362

The UN Special Rapporteur on freedom of religion or belief issued a report focused on the relationship between freedom of religion or belief and national security.

2018 Report on international religious freedom

US Department of State, 21 June 2019

https://bit.ly/2ZneFKK

The US Department of State produces a comprehensive annual report on international religious freedom.

USCIRF Victims List

United States Commission for International Religious Freedom (USCIRF)

https://www.uscirf.gov/victims-list/

The USCIRF maintains a list of victims of religious persecution.

USCIRF Annual Report

United States Commission for International Religious Freedom (USCIRF), 25 April 2018

https://www.uscirf.gov/sites/default/files/2018USCIRFAR.pdf

USCIRF outlines 16 countries of particular concern (CPC) regarding religious freedoms. Also included in this report is an examination of entities that pose a particular threat to religious freedoms.

World Watch List 2018 Compilation Volume 1: All main documents excluding country profiles

Open Doors International, January 2018

https://bit.ly/3s2u53h

This detailed report includes all main documents, excluding country profiles, for the World Watch List. Specifics of this report include 2018 statistics regarding countries facing the greatest religious persecution, analyses of violence, and an examination of the trends related to religious persecution.

World Watch List 2018 Compilation Volume 2: Top 50 short and simple persecution profiles

Open Doors International/World Watch Research Unit, January 2018

https://bit.ly/2ZoUV9N

This document analyzes the persecution in the fifty most dangerous countries to be a Christian with specific attention to where persecution comes from, how Christians are suffering, and case examples in each of the fifty countries.

Regional and country reports

Algeria: Submission to the United Nations Human Rights Committee

Amnesty International, 28 May 2018

https://www.amnesty.org/en/documents/mde28/8455/2018/en/

This country review of Algeria presented by the Human Rights Committee outlines the key areas within Algerian law and government that conflict with the Universal Declaration of Human Rights. The purpose of this report is to promote a change in domestic legislation as well as to highlight key areas in which authorities within Algeria regularly undermine rights, including but not limited to, freedom of religion and peaceful assembly.

Azerbaijan: Religious Freedom Survey

Forum 18, 7 November 2018

https://www.forum18.org/analyses.php?region=23

Information provided in this survey includes exploitation of the rule of law, human rights violations permitted by state law, and the total state control of Islamic communities.

China: NGOs Unite Against Religious Freedom Oppression in China

Human Rights Without Frontiers, 2018

https://bit.ly/2PxnDDx

The Church of Almighty God is a Chinese Christian religious movement that has amassed wide popularity in China since its formation in 1991. Although not partaking in politics or advocating for revolution, the church has attracted widespread persecution by the Chinese Communist Party. This report compiles submissions from numerous NGOs as well as reports from the United Nations Universal Periodic Review.

Cuba: Freedom of Religion or Belief

Christian Solidarity Worldwide, 13 December 2018

https://www.csw.org.uk/2018/12/13/report/4173/article.htm

This report deals with negative developments in the government's approach to freedom of religion.

Europe: Report 2018
Observatory on Intolerance and Discrimination against Christians in Europe
https://bit.ly/3gVKWR4
The Observatory's report provides descriptions of over 500 incidents in 2016 and 2017 affecting Christians and Christian institutions from across Europe. It also explains the terminology used by the Observatory.

Iran: Rights Denied: Violations Against Ethnic and Religious Minorities in Iran
Minority Rights Group International, 13 March 2018
http://bit.ly/3qpROdr
Iran's constitution recognizes religious freedom, but this right is extended only to Islam, historical Christianity, Judaism and Zoroastrianism. Practitioners of other religions, and at times these religions as well, face a denial of their rights, opportunities, and freedoms promised by law.

Kazakhstan: Religious Freedom Survey
Forum 18, 4 September 2018
https://www.forum18.org/archive.php?article_id=2409
The report documents Kazakhstan's violations of freedom of religion or belief coupled with violations of freedom of expression.

Middle East/North Africa: Annual Report 2017
Middle East Concern, 5 April 2018
https://bit.ly/3bhvE6K
MEC advocates on behalf of people in the Middle East and North Africa who are persecuted and/or imprisoned for their Christian faith. In this annual report, MEC analyzes trends, documents major events, and provides tools for readers to fight for justice within these countries.

Nigeria: Freedom of Religion or Belief
Christian Solidarity Worldwide, 9 July 2018
https://www.csw.org.uk/2018/07/09/report/4036/article.htm
This report documents the worsening situation for religious freedom in central Nigeria since 2015.

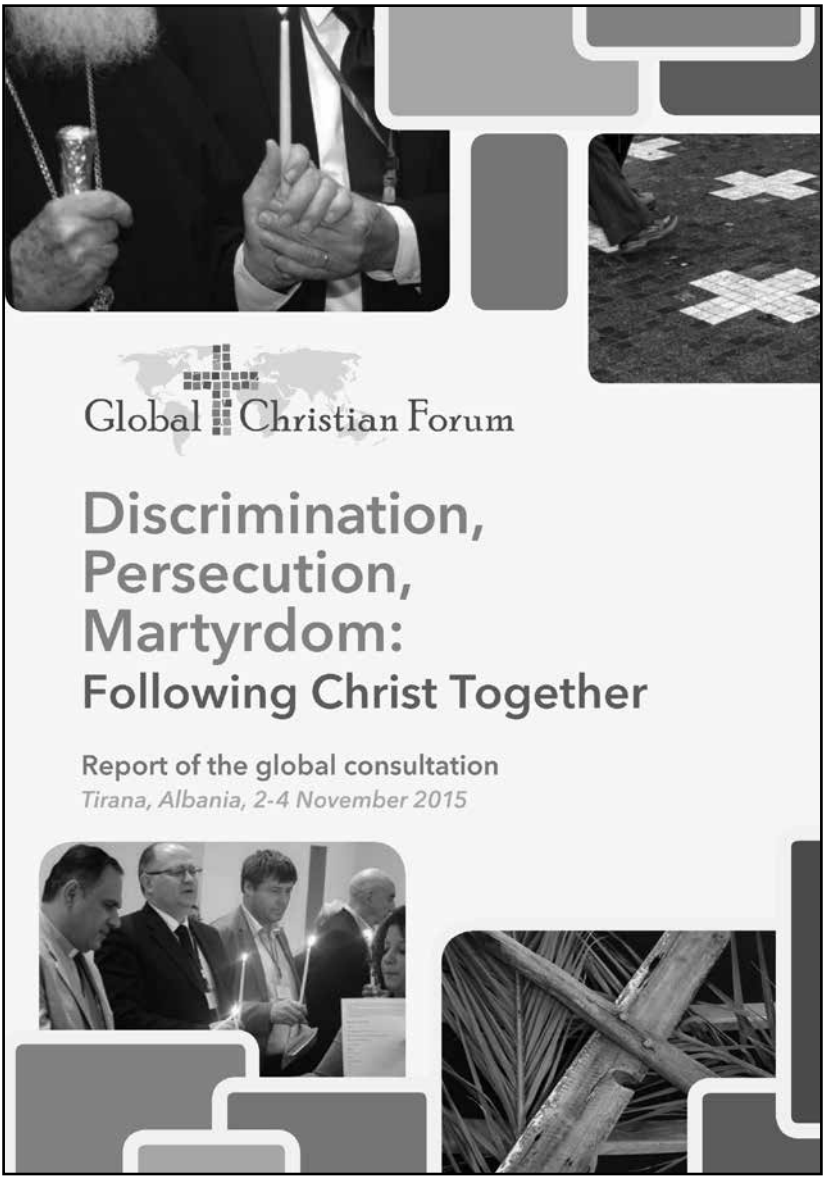
Turkey: 2017 human rights violation report
International Institute for Religious Freedom, 2017
https://www.iirf.eu/journal-books/iirf-reports-english/iirf-reports-2018-1/
The Association of Protestant Churches' in Turkey annual report on religious freedom violations.

Special issues

2018 Ministerial to Advance Religious Freedoms
United States Government, 2018
https://2017-2021.state.gov/2018-ministerial-to-advance-religious-freedom/index.html
The US government hosted the first-ever Ministerial to advance religious freedom around the world in Washington DC, held 24-26 July 2018.

Minority and Indigenous Trends 2018
Minority Rights Group International, 12 September 2018
https://bit.ly/3ssKY88
Focusing on migration and displacement, Minority Rights Group International notes in this report that religious discrimination and prejudice can often play a role in the migration and displacement of minority groups.

Peoples Under Threat 2018
Minority Rights Group International, 13 June 2018
https://minorityrights.org/publications/peoplesunderthreat2018/
Peoples Under Threat highlights countries and situations around the world in which people are at the greatest risk for genocide, mass killings, and systematic violent repression. Many of the groups documented as being at the greatest risk of threat are religious minorities in various countries.



Bonn: VKW, 2018, 294 pp., Paperback ISBN 978-3-86269-155-5
Eugene, OR: Wipf & Stock, 2018, ISBN 9781532653650, US$32.
Free: https://globalchristianforum.org/important-papers/

Newly rising urban churches in China and their relationship to the party state

A review of recent publications

Meiken Buchholz[1]

Surviving the State, Remaking the Church:
A Sociological Portrait of Christians in Mainland China
Li Ma and Jin Li

Eugene, Oregon: Pickwick Publications (Studies in Chinese Christianity), 2017, 187 pp., ISBN 1532634609, US$21.60 (paperback).

Authoritarian Containment:
Public Security Bureaus and Protestant House Churches in Urban China
Marie-Eve Reny

New York, NY: Oxford University Press, 2018, 184 pp., ISBN 019069808X, US$74.00 (hardcover).

The Politics of Protestant Churches and the Party-State in China:
God above Party?
Carsten T. Vala

London, New York: Routledge Taylor & Francis (Routledge research on the politics and sociology of China), 2019, x + 231 pp., ISBN 0367209284, GB£38.99 (paperback).

Since early 2000, the growth of unregistered Protestant churches in urban milieus in the People's Republic of China (PRC) has attracted increasing attention among researchers in the sociology of religion as well as from theologians with special interest in China. Although these unregistered churches are illegal and exposed to repressive measures by the government, they do not conform to the common image of 'house churches' or 'underground churches'. These new churches share several characteristics, including a large membership (from several hundred to more than a thousand), public visibility and the claim to be good citizens who are doing nothing illegal. On the other hand, they insist on remaining independent from the

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structures of the Three-Self Patriotic Movement (TSPM), the network of churches under governmental control. Therefore, these churches represent a so called third way of church-government relations in China and are designated by the umbrella term "newly rising urban churches".

Two earlier empirical studies have thoroughly described the self-understanding of urban churches and their pastors.[2] The relationship of these churches to the authoritarian Chinese government is the focus of three monographs, all published in 2018, that are the subject of the present review. All three investigations are based on empirical field studies and contain valuable insider information about prominent churches and leaders in the Christian urban milieu. In addition, they outline the historical development of Christianity's relationship to the communist government since 1949, and they provide in-depth information on legal and administrative regulations and practices. Since each of the three publications includes an index, they can be easily used to find information about specific persons, churches and incidents.

In view of the rapid developments occurring in China, I must point out that the data referenced in these books were collected three to eight years before publication (in some cases, even earlier; see Vala: 215). In general, newer developments in the era of Xi Jinping are only rudimentarily taken into consideration and some topical documents published between 2015 and 2017 are not included.

For readers who are less acquainted with the situation in China, some background will be helpful. First, all governmental regulations and restrictions concerning Christian churches apply to all religions in general. Second, the particular use of the term "Christian" needs a short explanation. In the Chinese language, "Christianity" (*jidujiao*, or literally "teaching of Christ") means "Protestantism" and is distinguished from the term "Catholicism" (*tianzhujiao*, literally "teaching of the Heavenly Lord"), which originates from the translation of "God" used in Catholic Bible translations.

1. One topic – three approaches

Whereas the empirical study by Ma and Li provides an easily readable, sociological narrative portrait of Chinese urban Christianity, Reny and Vala contribute to academic discourse in political science, based on elaborate methodology. I will briefly introduce each book, its methodological approach, and its particularities.

1.1 Ma and Li: The development of Christian social identity

Ma Li, a researcher in the sociology of religion, and Li Jin, a theologian, collected narrative material from Protestant Christians in the PRC, ranging from the 1950s to

[2] These books are Nanlai Cao, *Constructing China's Jerusalem. Christians, Power, and Place in Contemporary Wenzhou* (Stanford, CA: Stanford University Press, 2011) and Jie Kang, *House Church Christianity in China. From Rural Preachers to City Pastors* (Basel: Springer International Publishing, 2016).

the present. Among the three publications, Ma and Li's fieldwork provides the most recent data. Their interviews were conducted between 2010 and 2015 in several major cities and offer vivid insights into the lives of individual Christians and the dynamics of Christian networks. The authors refer to developments up to 2017.

Ma and Li's 12 topical chapters correspond to different factors that have been at work in the development of Christian group identities over the course of six decades. Since the chapters are largely arranged in chronological order, the book can also be read as a contemporary history of the Protestant church in China. The authors' thesis, which pervades all the chapters with various degrees of prominence, is clearly stated in their conclusion. Ma and Li assume a "loss of collective memory" in China, which has been caused by the politicization of the national narrative and the lack of "freedom to discuss publicly past wounds". In such a context, the memories of Christians manifest the ability to heal and to reconcile "individuals and classes" (178). Because Chinese patriotic identity propagated by the government is so distant from daily communal life, Christian faith is experienced as a source of desperately needed moral identity (105).

1.2 Reny: "Authoritarian containment"

The question underlying the volume by Marie-Eve Reny (a political scientist at the Université de Montréal) concerns the apparent contradiction between restrictive religious policy by the Chinese government, on one hand, and de facto tolerance of illegal Christian activities by many local authorities, on the other hand.

According to Reny, the reason for this phenomenon is not simple arbitrariness but a deliberate strategy of "authoritarian containment," which she defines as "the conditional and bounded toleration of a group outside state-sanctioned institutions" (6), based on a tacit agreement between government agencies and groups without legal status. Reny seeks to show that unregistered churches benefit to a certain degree from this strategy of containment. However, since the conditions and limits of tolerance are dictated in a one-sided manner by the authoritarian regime, this form of tolerance is ultimately a means to enforce and stabilize the regime (14).

Reny's investigation draws on comprehensive data from her fieldwork in five cities, including more than 100 interviews. Besides representatives of registered and unregistered churches, Reny also interviewed local government officials.

To validate her findings, Reny applies the concept of authoritarian containment to how authoritarian regimes in Egypt and Jordan handled Muslim movements which were on the verge of legality. The reasons for choosing two regimes from the Middle East and two Muslim movements as objects of comparison are not identified. Therefore, this shorter, second part of the publication is of more limited value. However, this deficiency does not impair the value of Reny's discussion of the situation in China.

1.3 Vala: "Public transcript" and the balance between power and negotiation

Carsten Vala (Loyola University, Maryland, US) is a political scientist who has studied the Protestant church in China for many years. His book is based on 15 months of fieldwork in several Chinese cities between 2002 and 2014 (16). Besides the introduction and conclusion, the content is divided into seven topical chapters, each of which starts with a comprehensive research overview.

Vala begins by describing three factors that have shaped church-government relationships in China: weak implementation of religious policy by government agencies, the role of the TSPM leadership, and the affinity of Christians in registered and unregistered churches at the grassroots level (chapters 2 to 4). He then provides a comparative analysis of the growth, suppression, and resilience of newly rising urban churches based on empirical data. In his conclusion, Vala briefly discusses possible generalizations of his findings to other religious movements in China.

Although its scope is similar to Reny's, Vala's analysis goes further in two regards. First, in addition to investigating the reasons for tolerating illegal churches, Vala considers the limits of toleration. Second, Vala extends the bipolar juxtaposition of government authorities versus unregistered churches to examine the triangular relationship in which the TSPM is also an important player.

Vala rejects the popular thesis that the space of freedom allowing illegal groups to grow is created by "cracks" of authoritarian power. Instead, he explains this space of freedom by invoking James Scott's model of "public transcript."[3] Vala uses this concept to refer to the government's expectations about how subordinates should display their submission to and confirm the legitimacy of the regime. Though these expectations stay unspoken, they are known by both sides (11-15).

2. Consistent traits within a multi-faceted picture

Though the three publications approach the topic in different ways, their findings are consistent in large part. All warn against a stereotyped view of church-state relationships in China and point to a complex interplay of several factors, which can be summarized as follows.

2.1 Historical and structural factors

The development of religious policy from the founding of the PRC by Mao in 1949 to the growth of informal Protestantism in the 1990s (Reny:45-46) can be described as a transition from a domination-resistance paradigm in the Mao era to the contemporary domination-negotiation paradigm (Vala:27-46).

[3] Vala refers to James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (London: Yale University Press, 1990).

Vala demonstrates how this change can be explained by the tension between the official Chinese Communist Party (CCP) ideology – which predicts the end of religion due to the blessings of socialism – on one hand and the actual handling of religious affairs by government agencies on the other hand. The authorities' main concern is no longer to oppress Christianity but to gain control over this rapidly growing movement (31-34). The ambiguous phrasing of religious regulations leaves much open to interpretation in the course of implementation. One important example of this kind of continuing ambiguity is the permission given to "normal religious activity" without any further clarification of "normal," with regard to either content or form (35-36).

According to Vala, the persistent mismatch between policy governing religion and actual practice has reinforced the importance of informal arrangements – i.e. public transcripts – which give the authorities at least the appearance of being in control over religious life. Lack of manpower and competence on the part of local Religious Affairs Bureaus is an important yet often underestimated factor in the increasing discrepancy between the official agenda and the public transcript of religious policy (41). Subsequently, Vala analyses the growth of urban churches in terms of a negotiation about an enlarged public transcript, in which both unregistered and TSPM churches are involved.

For Reny as well, the discrepancy between the official purpose of government regulations on religious affairs and their local implementation is decisive for understanding the dynamics of church-state relations in China. By reference to document analysis and interviews, she provides instructive insight into official regulations and practices – and how they are evaded (56-67). She explains the often-overlooked fact that unregistered churches, because of their illegal status, are not subject to supervision by the State Administration for Religious Affairs, but by Public Security Bureaus (chapter 3), whose priority is political and social order (69).

Reny identifies three areas where local implementation often differs decisively from official regulations: obligatory registration of religious sites, the prohibition of religious activities outside registered religious sites or addressed to minors, and the obligation to report international contacts (56). Building on the theory of authoritarian containment, she concludes that unregistered churches are attracted by the possibility of informal toleration, because it gives them more liberties and benefits than are enjoyed even by TSPM churches (59-61). Reny points out some decisive factors that have led to the growth of unregistered churches since the 1990s: structural flexibility, active recruiting of members, focusing on strategic target groups, and their association with modernity (50-51).

Ma and Li, meanwhile, provide valuable insights into the rapidly emerging Christian campus fellowships that arose in the late 1990s (chapter 4). Interviews convey

the perspective of Chinese converts on these student fellowships, which were often launched by foreign Christian students or university staff. These groups of Chinese converts remained for a long time at the level of Bible groups and basic discipleship training, but they stayed disconnected from Christian churches and theological thinking. According to the authors, this left the emerging urban Christian congregations fragmented and vulnerable in their early stages. At the same time, it made Christians receptive to the rise of urban churches that emphasize a clear theological profile.

2.2 The role of the Three-Self Patriotic Movement and its Theological Construction Movement

As Vala elaborates, an appropriate understanding of the emergence of unregistered urban churches and their relationship to Chinese authorities must also take the TSPM's role into consideration.

Ambiguous regulations shift the practical responsibility for handling religious groups to local officials, who often lack competence and motivation. Therefore, according to Vala, the authorities rely on the TSPM and the closely connected China Christian Council for assistance in the implementation of government regulations at the local level. The TSPM thus obtains a key role in creating forms of public practice in line with the public agenda. This puts TSPM leaders in a position to negotiate on behalf of their own interests against state domination (chapter 3).

TSPM enacts a CCP-conforming public transcript in three arenas. First, TSPM leadership must express support for the CCP and the state in public settings. This includes the responsibility to impart the party's political agenda to the next generation of Christian leaders in theological seminaries (63-64). On the other hand, in its contact with foreigners, the TSPM is expected to impart a picture of China as a nation with religious freedom. The third arena is the most challenging one and concerns the implementation of government regulations at the grassroots level (66-71). Vala's fieldwork provides concrete insight concerning the mechanisms used to control local parishes in the TSPM, such as a centralization of the appointment of church workers and of financial administration, as well as rotating preaching assignments among pastors to prevent churches and pastors from building strong relationships with each other and no longer depending on the TSPM leadership structures (71-74).

However, Vala's comparative research in two cities reveals that the efficiency of these control mechanisms should not be overestimated (74-77). Even in places where TSPM leadership is strong, some TSPM churches and pastors still manage to act quite autonomously and assert their self-interest against official restrictions and control.

Using the example of the Theological Construction Movement (TCM), which was initiated with the aim of establishing a contextual theology for Chinese socialist society, Vala demonstrates that TSPM leadership failed to enforce a CCP-conforming public transcript at the grassroots level (chapter 4). It may be questioned whether Vala's short presentation does full justice to the actual concerns of TCM. It does present an accurate picture of later developments, particularly since this kind of "patriotic theology" is directly demanded by the communist government itself as a contribution by Protestant churches to a harmonious socialist society.[4]

Vala's finding that the TCM effort failed because of the conservative theological stance of Chinese Christians is nothing new. But he goes on to show that it actually backfired. It revealed the tension between the public transcript desired by the CCP and the values held at the grassroots level (85). Originally, the TCM was intended to abolish the dividing line between Christian and non-Christian society and to define a theological demarcation between "patriotic" registered churches and unregistered (and allegedly "unpatriotic") churches (87-89). However, because of its broad rejection at the TSPM's grassroots level, the TCM had the opposite effect. It helped to tone down the demarcation between Christians in registered churches and unregistered churches; in several cases it even led to cooperation between them (105). Ma and Li, too, emphasize the "blurry line" (169) between registered and unregistered churches. Through their interviews, they paint a picture of pastors who manoeuvre between both structures and of Christians who float back and forth, similar to the description given by Vala (Ma and Li:169-73; Vala:95-96).

Vala points out that unregistered churches particularly depend on good relations with TSPM pastors when they want to prove to the government that they are not heretical sects. To assess the theological "normality" of an independent Christian group, government officials rely on the evaluations provided by TSPM pastors. In actual practice, this means that TSPM pastors are given the responsibility to supervise those unregistered churches which they recommend (Vala:130-131).

2.3 The relationship of newly rising urban churches to the society and the party-state

According to Vala, the decreasing demarcation between Christians in registered and unregistered churches and a growing consciousness of shared theological values have been important preconditions for the emergence of a "third way" of church-

[4] For example, the white paper "China's Policies and Practices on Protecting Freedom of Religious Belief," published by the Information Office of the State Council of China in April 2018, states explicitly that the "development of theological thinking" is the particular contribution of Protestant Christianity towards the establishment of a harmonious socialist society (paragraph IV.1.; for the English text, see https://bit.ly/2NZS70H).

government relationships, which characterizes the newly rising urban churches (95-103). He shows convincingly that the extent to which these new churches can operate in public can be explained only by the particular backgrounds of their pastors: Some are familiar with TSPM structures because they studied at TSPM seminaries or have worked in TSPM churches (133-140); others have personal relationships with high-level officials because of their former secular careers (141). This background gives them a "strategic capacity" in their negotiations with government authorities (133). Vala's examples illustrate the astonishing self-confidence and skill of Christian leaders in unregistered churches who have established constructive, direct connections with government officials (137-142).

Like Reny (50), Vala also regards independence from TSPM structures as a strategic advance in comparison to TSPM churches: Because pastors of unregistered urban churches distance themselves from TSPM leadership and the TCM, Chinese Christians trust them as "true Christians" (94). Thereby, they also attract many members of registered churches who share the same theological and moral values. Close relationships among church members in newly rising urban churches, nourished in small-group gatherings, and strong affinity between the members and their pastor create a firm identity and provide social capital that facilitates stability and growth. This social capital becomes even stronger through shared experiences of repression (110-111).

By comparing the developmental paths of two prominent churches that became targets of government repression (Shanghai All Nations Missionary Church and Shouwang Church in Beijing), Vala analyses factors that make churches resilient in the face of oppression (chapters 7 and 8). Whereas Shouwang Church continues to exist, though with fewer members, All Nations Missionary Church dispersed into small groups. According to Vala's analysis, the key factors sustaining Shouwang Church are leadership ability, including social networks and insights into political affairs, and stable organizational structures, created through theological education of its membership and well-established communication mechanisms. In addition, the local religious context must be considered. Since TSPM leadership in Shanghai is strong and most unregistered churches are rather small, Shanghai All Nations Missionary Church did not get the same level of support from local Christians as Shouwang Church received in Beijing.

With regard to moral values, the data confirm a broad consistency between Christians in TSPM and unregistered churches. They also share a cautious attitude towards the influence of foreign Christians (Vala:96-98) and a similar view of contemporary Chinese society, including harsh criticism of overall moral decline, dishonesty, loss of sexual morality, and unrestrained materialism (98-101). On the other hand, newly rising urban churches no longer correspond to the distorted pic-

ture of world-negating sectarians that is depicted by some TSPM leaders. Instead, they engage with the surrounding society and stress Christian civic ethics (103-105). Ma and Li dedicate their whole chapter 8 to the impressive wave of charity work initiated by Christians from unregistered churches in the wake of the Sichuan earthquake in 2008.

Ma and Li also elaborate on an influential theological factor that has shaped the attitude of many newly rising urban churches towards society and state: neo-Calvinism (chapter 9). Based on their interviews, they conclude that Calvinism in China is less about theological denominationalism and "more about Christian worldview" and an "empowering call for Christians to live out their faith in all spheres of life." (124). The influence of Calvinism on urban Christian leaders has been the topic of several recent publications, but Ma and Li's unique contribution is to convey the grassroots perspectives of church members and the multi-faceted currents within this theological movement. In general, the Calvinist influence leads to a stress on family ethics and education. Ma and Li offer unique insight into issues of daily life that concern modern Chinese urban Christians in chapters 10 ("Marriage") and 11 ("Education"). It becomes obvious that the conflicts Christians in unregistered urban churches experience in their daily lives are caused mostly by opposing values and practices in society at large, rather than by direct political confrontations. Sources of potential political conflicts include the question of CCP membership and the kind of nationalism propagated by the government (Ma and Li: chapters 6 and 7).

According to Ma and Li, people in urban China have become accustomed to a pluralistic society and to living with plural, even conflicting identities. In this context, Ma and Li refer to a 2007 study that found that more than 80 percent of CCP members identified themselves as having religious beliefs, even though the party officially prohibits its members from following any kind of religion (89 and 91). Here, the authors should have added updated information, because more recently the CCP has worked actively to oppose religious belief among its members, announcing sanctions spanning from ideological education to exclusion from the party. Ma and Li make some remarkable critical comments regarding an unbalanced "China-centrism" within some unregistered Christian groups, which they regard to be a result of an uncritical adoption of political nationalism (103-104).

The freedom of space enjoyed by unregistered churches is determined by certain "red lines," as Vala's and Reny's investigations show consistently. First, churches must keep a low profile and membership must be "fewer than a few dozen"; second, the organizational structure must remain local and not spread across provincial borders; and third, no cooperation with foreigners is allowed (Vala:132; cf. Reny:80-84, 88-90). In addition, churches must keep away from heretical teaching

and political issues – e.g. contacts with the democracy movement, talking about freedom of religion, or publicly criticizing the government (Reny:86-87, 97-99). Reny's interviews illustrate how Christian leaders work within these red lines in daily life (chapter 4). Pastors comply with the expectations of local government officials by informing them about their activities, through either personal conversations or comprehensive information on the churches' websites. At the same time, direct contact with officials helps pastors to assess their scope of movement. If they cross certain "red lines," authorities react immediately with an overt increase of surveillance and threats. Since leaders are held responsible for the group, they are particularly targeted (Vala:132). Yet the severity of government reaction depends on the local context (cf. the comparison of churches in Shanghai and Chengdu by Ma and Li: chapter 5) and the type of red line crossed. Particularly with regard to the size of membership, local authorities have been quite permissive (Vala:137; Reny:87).

Some newly rising urban churches tried to obtain legal status and considered registration with local authorities by making use of the 2005 Regulations on Religious Affairs (Vala:130-131). On one hand, these regulations facilitate government control over religious movements outside official structures and convey an impression of the rule of law. On the other hand, pastors of new urban churches manage to obtain a certain legality without losing their independence via personal contacts with the authorities (Vala:131-142). The author should have mentioned that the 2005 regulations were revised and significantly extended in August 2017.[5]

3. The different explanatory approaches: an evaluation

On a descriptive level, the three books present consistent, complementary pictures of newly rising urban churches' relationship to the government. Whereas Ma and Li essentially restrict themselves to the interpretation of data, Reny and Vala propose two different conceptualizations drawn from the field of political science and derive general causal relations. To some degree, these lead to different assessments of the role of newly rising urban churches in relation to government authorities. As a consequence, the three publications conclude with different projections about future developments.

3.1 Stakeholders and degree of agency

The concept of authoritarian containment, by definition, focuses on government actions and applies only to groups outside state-sanctioned institutions. Accord-

[5] For the English text of the 2017 revision of the Regulation on Religious Affairs, see http://www.lawinfochina.com/display.aspx?id=26379&lib=law.

ingly, Reny's interpretation of the data considers only the bipolar relations between unregistered churches and the authorities, and it presupposes that the conditions of their relationship are unilaterally determined by the government. She describes, for example, how the Public Security Bureaus choose those churches that qualify for conditional tolerance. On one hand, tolerated churches must be apolitical, keep away from heretical teaching, and keep a low profile. On the other hand, officials look for churches that, due to their size, have strong local influence and cannot simply be ignored (chapter 4). Church leaders can choose only between agreeing to conditional toleration and suffering oppression; they are not in a position to negotiate. Nevertheless, the offer of conditional tolerance is attractive for unregistered churches, because they obtain a certain degree of freedom and safety for their actions. However, according to Reny, by accepting this kind of informal, tacit agreement, they renounce the option to pursue formal legalization (29 and 106).

Reny presents Shouwang Church in Beijing as an example of how a church managed to transcend the limitations of authoritarian containment. This urban church started in the early 1990s and made full use of the space provided by the authorities' strategy of informal, conditional tolerance. It developed into a congregation with reflective viewpoints on theology and civic ethics. According to Reny's analysis, the church's self-interest changed in the course of this development, with the result that it is now willing to give up the benefits of informal toleration and has instead worked towards formal legalization as an independent organization within the framework of civil society. Reny paints an optimistic picture of Shouwang Church's success in "questioning the existing institutional status quo" (113). Yet, for the sake of a more complete picture, the author should have extended her presentation of Shouwang Church beyond the "early stage of conflict" when the government "kept a low profile" and did not use coercion, because the situation has changed dramatically since Reny's interviews in 2010 (cf. Vala: chapter 8).

The fact that the vast majority of newly rising urban churches did not follow the example of Shouwang Church proves to Reny the efficacy of the government's containment strategy. Most pastors of unregistered churches still assess the benefits of informal, conditional toleration as greater than its costs.

Reny concludes that a policy of authoritarian containment is crucial for maintaining the status quo with regard to the government's dealings with religious actors. Tolerated churches are discouraged from engaging in politically undesired behaviour because they have benefits to lose; moreover, tolerating some churches divides Christians on the issue of how to handle government relations,[6] and the

[6] Reny's evaluation should be reconsidered in the light of newer developments. In July 2018, a group of 34 unregistered churches in Beijing wrote an open letter to the government, claiming the legality of their activities under the constitution. At the end of August 2018, Early Rain Covenant Church pu-

authorities get convenient access to information about the tolerated congregations (38, 102-107). Reny's interpretation implies that churches never have real agency in their negotiations with the government. Though illegal churches ostensibly enjoy some security and freedom, this comes at the price of accepting self-censorship and abandoning any demand for religious rights or legalization.

Vala, in contrast, regards Christian leaders as agentic participants in the process of negotiation, who actually influence the dimensions of the space of freedom by strategically building and using social capital. Since the concept of a public transcript applies to registered and unregistered churches alike, Vala's analysis takes into account the multi-level interactions between unregistered churches and the TSPM. On one hand, the CCP assigns to the TSPM the lead role in maintaining a CCP-conforming public transcript, stressing clear-cut dissociation from any Christian activity outside governmental regulations. On the other hand, attempts by the TSPM leadership to put this kind of public transcript into practice, such as through the TCM, have failed because of theological opposition at the grassroots level. The decreasing demarcation between Christians in registered and unregistered churches and a growing consciousness of shared theological values have made a new public transcript necessary. Accordingly, Vala interprets the relationship between the authorities and newly rising urban churches in terms of the churches' striving for an enlarged public transcript. Well-equipped Christian leaders make use of their strategic capacity in direct negotiations with government authorities, who in turn benefit from direct communication because it helps them to avert public conflicts, troublesome surveillance, and having to write long reports to their superiors. In this way, according to Vala, government authorities and urban churches together have rewritten and significantly enlarged the public transcript. The documented severe harassment of some prominent urban churches by the authorities is explained in terms of the government's defence of certain "red lines" against attempts to push beyond the enlarged public transcript.

3.2 The future outlook

Vala concludes with three possible scenarios regarding future relations between the government and Protestant churches in the PRC. Most probably, he says, the combination of domination and negotiation that he describes will continue as long as neither the central government nor local authorities launch special campaigns against Christians at the grassroots level. Two other possible scenarios – systematic

blished a declaration, protesting against the increasing harassment of unregistered churches by the government and interference in matters of faith, which has been signed by more than 270 leaders of churches. See K. Wenzel-Teuber et al., "Chronik zu Religion und Kirche in China 26. Juni bis 3. Oktober 2018," *China Heute* 37, no. 3 (2018):153-165.

suppression of all unregistered churches and official legalizing of churches outside the TSPM structure – would involve high costs for the government. The latter would require not only ideological change but also immense bureaucratic efforts. Systematic suppression of all churches refusing registration under TSPM structures would provoke resistance by many Christians and would destabilize society. Though Vala refers to the latest tightening of religious regulations under president Xi Jinping, he thinks a systematic implementation is unlikely to happen because local officials lack the needed resources.

Reny's reflections on future developments express the hope that China's government may liberalize its religious policy in conjunction with its impressive economic liberalization. This optimism is quite surprising in the light of the success of authoritarian containment in stabilizing the status quo, which stands out throughout her book. Sadly, new government regulations on religious affairs, mentioned by Reny herself (141-142), and their rigid implementation give little reason for Reny's hope.

When compared to the works of Reny and Vala, Ma and Li's outlook for religious politics in China is less optimistic but, in my opinion, most convincing and realistic. They describe the growing control and repression but are not overly pessimistic, especially since their field studies confirm the "life-changing effects" of the Christian message despite persecution, marginalization and "materialistic temptations" (178).

4. Conclusion

By depicting in detail the struggles of China's newly rising urban churches, these three publications convey a vivid impression of the multifaceted factors which Christian leaders in this context must manoeuvre. The investigations reveal why church-government relations are by far more complex and dynamic than the stereotypical notion of politically controlled churches on one hand and persecuted churches on the other hand. By letting Chinese Christians speak in their own words, the authors convey a picture of them that corresponds to their own self-understanding as skilfully negotiating the political space to promote their own interest. Thereby, the reader receives a realistic picture of Chinese Christians, instead of idealizing them as helpless victims or immaculate martyrs.

The concepts of authoritarian containment and public transcript help to interpret the apparent contradictions between the official agenda of religious policy and the actual practice of local officials. With regard to the role of TSPM churches in the negotiation process, public transcript proves to be the better analytical tool. It enables a convincing description of the dynamics in the triangular relationship between the government, the TSPM and unregistered churches. Both concepts describe the formation of a certain space of negotiation that exceeds the limitations stated in official regulations and is based on informal agreements. However, they lead to dif-

ferent evaluations regarding the degree of agency granted to unregistered churches. Vala's description of Christian leaders as self-determined participants in the process of negotiation seems to correspond better with the narrative portraits provided by Ma and Li. However, we must remember that all three authors' fieldwork took place prior to 2015. Because of rapid changes in religious policy in the era of Xi Jinping, some findings have already been overtaken by more recent events.

Beyond their focus on a specific group of churches in China, the three publications also impart general insights that can be useful for a better understanding of church-government relations in other restrictive contexts. Above all, the significance of informal negotiation processes and the self-perception of suppressed Christians as skilfully manoeuvring actors, not as helpless victims, can be relevant in similar political constellations. In any case, the publications impressively illustrate the multiplicity of aspects involved in government-church relations in authoritarian regimes and help to steer us away from simplifications and hasty evaluations.

Book reviews

Research handbook on law and religion

Rex Ahdar (ed.)

Cheltenham, UK: Elgar, 2018, xvii + 493 pp., ISBN 978-178812468, £190.00

Part of a series of research handbooks published by Edward Elgar, this volume provides an excellent review of recent scholarship in key areas of law and religion. The editor, Professor Rex Ahdar from Otago University in New Zealand, is a leading expert in this area, and the volume features valuable contributions from other world-class scholars, as well as from emerging stars on the topic.

An important foreword by John Witte Jr. of Emory University, the dean of law and religion scholars, provides a brilliant short review of the nature of the discipline and its development in recent years from a subset of US First Amendment studies to a wide-reaching, interdisciplinary field with engagement from scholars all over the world.

Part I offers two survey articles. First, Ahdar uses nautical metaphors to note the "familiar waterways" still being explored (church-state relations, the nature of secularism in the modern state, the meaning of "establishment," religious freedom rights and their intersection with discrimination laws) and then boldly suggests some uncharted waters where further exploration may prove fruitful (such as the place of indigenous religions, the rise of "neo-paganism," and the implications of emerging artificial intelligence technology). In chapter 2, Russell Sandberg explores connections between law, religion and sociology. He notes, for example, the possible synergy between legal and sociological perspectives on the thorny question of defining religion, as each discipline supplies perspectives that the other needs.

Part II dives into some of the deep jurisprudential waters that surround the area. Steven D. Smith provides a challenging critique of the concept of "equality" and how it has come (unhelpfully) to be assumed (but rarely analysed or argued for) as the "new orthodoxy" by many secular commentators. Jonathan Burnside, best known for his detailed analysis of biblical law, offers a stimulating analysis of philosopher Jeremy Bentham's little-discussed view of law and religion. Emerging Australian scholar Joel Harrison analyses the infamous suggestion by Ronald Dworkin that we can have "religion without God," comparing it to the classical model presented by Augustine. Finally in this part, Andrew Koppelman explores how religious liberty is dealt with as a "human right," along with the implications of seeing it, in Charles Taylor's terminology, as a "hypergood" (though not thereby always trumping other deeply important rights).

Part III turns to the long-contested realm of "religion-state relations." Perry Dane notes how dependent models of "establishment" are present within the specific constitutional arrangements in place in different nations. He notes various metaphors that have been used for the relationship: wall of separation, interlocking jigsaw, separate spheres, and *laicité* in the French context (where in some sense "the Church is *in* the State" and subject to it). Richard Albert and Yaniv Roznai discuss the phenomenon of constitutions in which religious declarations are formally unamendable. Jaclyn Neo discusses the challenges of regulation in a multi-cultural society and notes the differing focus of governance between Western cultures (where religion is regarded as a mostly private matter) and other cultures where it is a more communal concern.

In chapter 10, Benjamin Berger suggests that the usual approach to secularism in liberal constitutions may need to be rethought in light of the persisting importance of religion in the lives of many citizens. Next, Hans-Martien ten Nepal provides a helpful description of a range of faith-based organisations operating in Europe, in the context of considering whether religious freedom is a "natural" or "positive" (i.e. state-endowed) right. Farrah Ahmed surveys how the obligations of "religious law" are enforced in a society (such as India) which adopts the "personal law" model of allowing certain legal rights and duties to be determined according to the religious community to which a person belongs. (Table 12.1 within this chapter is a very helpful resource on how these laws operate in relation to five different religious communities.)

Part IV surveys issues surrounding the adjudication of religious rights in Western societies. Michael Helfand offers a stimulating revision of the established view that judges cannot adjudicate religious questions, noting that, despite this oft-stated principle, US courts often do this in specific contexts, especially where "private rights" are at stake. Francis Venter also reviews the law in this area and examines a number of examples where disputes arise between state and church, between churches, and within church communities.

Part V, on issues in international law, begins with Paul Taylor's essay on similarities and differences between the major international instruments (the UDHR, ICCPR and ECHR), which discusses when the content of religious doctrine or practice may conflict with rights conferred by these instruments. In particular, he notes the different approaches in recent years to cases involving the right to wear a head scarf. Merilin Kiviorg looks at the thorny question of when national security issues override religious freedom, with particular and fascinating analysis of some cases involving the Jehovah's Witnesses in Russia.

Finally, part VI encompasses several well-known areas where freedom of religion issues arise and offers important further insights into classic dilemmas. Mark

Hill explores matters of employment, including when clergy are classified as employees, and issues that arise when ordinary believers face challenges in being true to their faith while working in secular workplaces. Ian Leigh revisits the familiar problem of conscientious objection but moves on from the issues raised by military objectors to those that arise in the context of provision of medical services. Renae Barker provides a comprehensive overview of cases on whether a Muslim woman can decline to remove a face covering when testifying in court. Janet Epp Buckingham reviews the litigation involving Trinity Western University in Canada and the impact of professional objections to a religious stance taken by educators at a private, faith-based institution. Keith Thompson revisits the area of "religious confession privilege" in light of recommendations made since his seminal work on the topic was published in 2011. He notes that although the privilege has generally been retained, there are increasing pressures to abolish or modify it in light of revelations of child abuse in churches.

This collection provides a worthy overview of key topics in this area and is an excellent starting point for further research on any of the issues covered. The editor is to be congratulated for bringing together such a high-quality collection from a wide range of brilliant scholars.

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Human rights in thick and thin societies: Universality without uniformity

Seth D. Kaplan

Cambridge: Cambridge University Press, 2018, 249 pp. ISBN 978-1108471213, US$110.00.

Seth Kaplan examines the challenges of developing a truly universal human rights system in a culturally diverse world. The book covers well-trodden terrain, reiterating some familiar critiques of international human rights that centre on the gap between the Western culture of individual rights and the non-Western (i.e. everyone else) cultures that feature deeper social and communal ties. Kaplan quite helpfully recasts some of the key terms of these debates, reviving the possibility of a renewed approach to human rights that is universal, flexible and inclusive of different sociocultural perspectives.

Kaplan begins by re-introducing us to the Universal Declaration of Human Rights (UDHR), which he considers an incredible achievement in knitting together a di-

verse range of philosophical perspectives and articulating common goods to be pursued in all human societies. He explores the troubles that have afflicted this original vision of human rights, in particular how it was coopted by a particular moral and theoretical perspective, creating division and polarization between societies. Kaplan then applies his analysis to two case studies: male circumcision in Europe and Rwanda's post-genocide *gacaca* courts. In the final chapter, Kaplan presents a four-step path to restoring a flexible, universal system of human rights, which he believes would emulate the same kind of approach, and generate similar global consensus, as the UDHR.

The central problem that Kaplan identifies is already well known: the global (as opposed to regional) international human rights system is dominated by a particular perspective, a set of concerns, and a group of actors often (and unaffectionately) referred to as "the West." Kaplan borrows a more innovative (and mocking) moniker from the field of cultural psychology to describe the perspective of the dominant group: it is WEIRD (Western, educated, industrialized, rich and democratic). This highly individualistic perspective is weird because it is at odds with the more socio-centric perspective of most of the world's population.

Kaplan links the WEIRD perspective to "thin" social organization. A thin society is one oriented around the autonomy of the individual. Social institutions and their influence in regulating people's lives and behaviours are downplayed and displaced in favour of a more state-centric form of behavioural regulation. A thin perspective on human rights privileges individual choice and political freedoms while downplaying collective and economic integrity. Kaplan describes a thick society, on the other hand, as sociocentric. A much smaller state is required in a thick society because individual behaviour is regulated, and various goods are distributed, through non-state social institutions. Thick societies, contrary to thin ones, take a posture toward human rights that focuses on economic integrity, protection of the family, and support for other cultural and social institutions.

Kaplan argues that the international human rights regime has been co-opted by the thin or WEIRD perspective. The heart of the problem, he says, is that the WEIRD perspective is monistic and universalizing, engendering intolerance of different moral positions within the human rights framework. Consequently, the human rights regime aggressively promotes a uniform, thin organization of social and political goods and institutions. Only one approach to human rights is considered appropriate, and all others are denigrated. The resulting effect is that the international human rights regime now operates as a cultural force, pushing the perspective into socio-cultural contexts that are naturally thick. This is experienced by thick societies as intrusive and has generated a resistance and bitterness that undermine global support for human rights in many parts of the world.

Kaplan argues that we can recover a broad consensus on human rights if we recover the original flexible, universalist vision of the UDHR and re-establish its underlying liberal pluralist philosophy as the theoretical foundation for international human rights. The key ingredient that Kaplan marshals to advance the pluralist view of human rights is the study of cultural psychology, which he believes "can help shift the unsatisfying dynamics that characterise human rights debates because it helps explain why differences are so embedded. It can help construct a framework, based on empirical research, for understanding these differences and how they impact the interpretation, prioritization, and even acceptance of various rights" (9).

Drawing on cultural psychology, Kaplan describes a reciprocal relationship between our inherited socio-cultural reality, our moral conceptual framework, and our psychological make-up. His basic idea is that humans have a certain number of "moral receptors," which can be engaged differently to produce different forms of moral expression. Cultural frameworks reflect – both shaping and being influenced by – these different forms of moral expression. Kaplan argues that the cultural psychological explanations of different moral perspectives – thin/WEIRD and thick/non-WEIRD forms of social organization – are connected to the different approaches taken to human rights throughout the world. This is a fascinating proposition which, despite my own misgivings about cultural psychology, offers some very important food for thought in the human rights debate. It is particularly helpful in turning our attention to the possibility that different, socio-centric approaches to human rights may be just as morally defensible as the dominant Western individualistic approach.

Framing human rights as a matter of morality, rather than as political and legal theory, also brings the value and latent potential of the UDHR into high relief. The current tension regarding human rights is at odds with what Kaplan describes as an earlier consensus that existed when the UDHR was passed. The consensus that surrounded the UDHR was made possible by a text that avoided controversies and used general or vague phraseology. The UDHR represented an agreement on basic principles of human rights that did not offer reasons for why those rights should be valued. This created space for various moral matrices to be engaged in understanding and assenting to the rights outlined. Standing between the plurality of moral matrices throughout the world and the crystallization of rights in various legal instruments, the UDHR is a moral document that does not call for moral consensus. Rather, it provides a point of reference to direct various moral perspectives toward the foundational human rights treaties, offering a way to approach the acknowledgement and fulfilment of legal obligations related to universal human rights from a local moral point of view.

According to Kaplan, the flexible-universalist approach of the UDHR is grounded in liberal pluralism, which recognizes that goods are ultimately incommensurable while also asserting moral agreement on certain core matters that are right and wrong. This provides a path to return the human rights regime to an older, thinner vision of rights, which can act as the skeleton that local actors flesh out in their own terms. Our aspiration should not be to close the gaps between different cultural approaches to human rights, but rather to develop a language that can be used productively by every culture. The goal is to create a "supra-cultural human rights framework that transcend[s] culture and reache[s] into some natural essence of humanity" (214). Dislodging the privilege enjoyed by the thin/WEIRD perspective, along with its monistic universalism, is key to developing greater global consensus regarding human rights.

Kaplan's book certainly contributes to an important and ongoing conversation around human rights and social and cultural diversity. He offers valuable insights into the descriptive and normative value of moral and liberal pluralism to the human rights debate. His description of the global tension in international human rights as the manifestation of a dominant individualist and monistic universalist perspective is compelling, as is his call to dethrone it. Kaplan also exhibits a laudable aspiration to develop greater humility with regard to how human rights are understood and applied (which may be relevant to how we think about domestic human rights laws). This includes recognizing the multiple ways of conceptualizing the good and organizing society in its pursuit. It also includes acknowledging that the human rights regime is only one cog in the wheel of moral thought and action.

On the other hand, I am much less convinced by Kaplan's advocacy of cultural psychology and I suspect that he overstates its importance. To his credit, Kaplan admits that the connection between the cultural-psychological moral matrices, political theories and forms of social organization is not always neat. Undoubtedly, cultural psychology is one way of articulating the idea of moral pluralism. But Kaplan does not make clear what cultural psychology can offer to really advance the pluralist agenda, other than gesturing towards a socio-cultural-psychological basis for acknowledging the possibility of different approaches to human rights.

Great risks accompany over-investing in a theory that biologizes cultural difference, though. One risk is that we might burn the bridges of rational understanding and discussion across differences in speech, thought and other forms of social meaning. Another risk is the possible rise of a socio-cultural "survival of the fittest," which would question why cultural difference should be respected at all. If cultural differences and related moral attitudes are merely the product of socialization – a social accident of time and place – then why prevent a global process of acculturating to the WEIRD perspective? It may be possible to answer these challenges while

still defending cultural psychology's importance. But I feel that it is better to view cultural psychology as a heuristic tool rather than a core part of the social-political-legal theory of human rights. This would relieve Kaplan of the burden of addressing these issues more fulsomely (which he does not do in the book), as well as allowing the reader easier access to the value that his argument offers (by not having to decide whether to support a wholesale acceptance of cultural psychology).

Kaplan's argument does not, in my view, hang on cultural psychology. His basic message is that different societies will have a different relationship to human rights, and that this is okay. He hopes we will come to accept that human rights can be legitimately worked out in different ways and from different points of view in these different social contexts. Ultimately, Kaplan argues, human rights will be more effective, and will enjoy greater global (and pan-cultural) support, if the language of human rights is scaled back and greater attention is paid to thick social factors. That's the whole basis of the UDHR, and I believe this idea is worth recovering today.

Overall, Kaplan provides a useful contribution to the ongoing discussion about human rights and cultural diversity. The reader will get the most out of this book by approaching it with an eye to understand what a renewed human rights system, based on global consensus, might look like. Kaplan takes a step back and finds a different line of sight into some well-developed questions. The book is sure to spark further conversation, as it does not offer definitive answers to some of the big questions it grapples with. Instead, Kaplan invites us to take a fresh look and consider what the future of human rights might look like if we do. He leaves it up to us to decide where things will go from there.

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Articles of faith: Religion, secularism and the Indian Supreme Court (expanded edition)

Ronojoy Sen

New Delhi: Oxford University Press, 2019, 304 pp., ISBN 978-0199489367, US$25.00.

This book presents a careful analysis of Indian Supreme Court judgements on religion. It sets out to understand the jurisprudence on religion in the context of Indian secularism, highlighting the influence of high modernism and rationalism on judicial discourse concerning religious matters in India. According to Sen, examining the constitutional and legal foundations of the place of religion in India is an effective way to study its relationship with the state.

Sen ventures into complex and controversial issues concerning the judicial interpretation of religion. He examines court rulings on the definition of Hinduism, the use of religion to appeal for votes in elections, essential religious practices, minority rights and anti-conversion laws.

Sen quotes the view of Rajeev Dhavan and Fali Nariman that the judges of the Indian Supreme Court wield power greater than that of a high priest, as they have virtually assumed the theological authority to determine which tenets of a faith are "essential" to any faith. Sen also notes that the court is probably the only one in the history of humankind to have asserted the power of judicial review over amendments to the Constitution. Sen establishes that popular faith in the judiciary is higher than that in other state institutions, based on various recent surveys.

Sen observes that the landmark *Bommai* judgement challenging the power of the central government and the president to dismiss a state government contains the most detailed explication of the Supreme Court's views on secularism. In this judgement six of the nine judges deciding the case had varied views on the concept of secularism, reflecting a lack of consensus within the court on what secularism entails. Sen then examines Dhavan's description of secularism, the reformist agenda, and the Constituent Assembly debates, and he then considers how India should be imagined: as a culturally homogeneous political community of equal but unmarked citizens or as a culturally diverse political community of equal but marked citizens?

Sen briefly discusses the genealogy of Hinduism and two of its strands: "inclusivist Hinduism" propounded by Swami Vivekananda and "exclusivist Hinduism" associated with Sarvakar, the founder of contemporary Hindu nationalism and the notion of Hindutva (Hinduness). He highlights the 1966 *Satsangi* case where the Supreme Court ruled that if Hinduism does not appear to satisfy the narrow traditional feature of a religion or creed, then it may broadly be described as a way of life and nothing more. Sen touches on the impact of this case and its way-of-life metaphor on the judiciary, which lasted for several years, including the notable Hindutva rulings in 1997 by Justice Verma, on the legitimacy of appealing to Hindutva during election campaigns. Verma conflated an inclusivist discourse on Hinduism with the exclusivist version propounded by Hindu nationalists to conclude that Hindutva could be understood as a synonym for "Indianisation," or the development of a uniform culture by obliterating the differences between all cultures co-existing in the country. The Hindu nationalists were jubilant with the Hindutva ruling, and the RSS, a Hindu nationalist organization, claimed that the Supreme Court had fully endorsed the concept of Hindutva, which the nationalist Bharatiya Janata Party (BJP) has been propounding since its inception. In fact, the BJP referred to this judgement in its election manifesto in 1999.

According to Sen, the court has become an inadvertent ally of the Hindu nationalists in their aggressive demand for homogenization and uniformity. This has become an illustration of the influence of values and ideology on judicial decision-making and of the displacement of the idea of law as a "body of immutable principles" by an emphasis on the role of the judge.

The court's uneasiness with legal pluralism comes across clearly in personal law cases. For example, its rulings on Muslim personal law have almost always been premised on legal universalism.

Sen refers to the *Stanislaus* judgement of 1977, saying that the Supreme Court came up with a peculiar, impoverished version of the right to propagate one's faith which interpreted precluded conversion as an infringement on freedom of conscience. The *Stanislaus* decision, which upheld acts limiting freedom of religion that had been passed in two Indian states, is described as "clearly wrong" and a travesty. Sen acknowledges the upsurge in violence against Christians, pinpointing the ghastly killing of Australian missionary Graham Staines and his two sons in Odisha in 1999 as reflecting the rise in violence aimed at preventing conversions to Christianity. Less than a decade later, the 2008 Kandhamal violence in Odisha showed the growing hatred and intolerance against Christians. According to Sen, the court rulings give Hindus considerable disincentives to exit from Hinduism, whereas it is easier for converts to re-enter the fold of Hinduism. Appeals for reservation[1] of Dalit Christian and Muslims were rejected by courts citing the Constitution (Scheduled Castes) Order of 1950, which expressly prohibits reservation benefits for anyone other than Hindus, Sikhs and Buddhists. In this regard, Sen quotes Dhavan and Nariman again: "The Supreme Court's approach to minority rights and institutions has been far from consistent."

Regarding the Uniform Civil Code, Sen relies on Rudolph's view that the code has no single meaning but can be characterised as a "multivalent signifier." For Hindu nationalists, it is a way to eliminate cultural difference. Sen concludes that it is time for the court to realize, in the words of Professor Werner Menski, that "The one-sided political motivated quest for truly uniform family law for India is, several decades after the Constitution was promulgated, perhaps no longer a realistic aim. It has been defeated by the persistence of traditional Indian preferences for diversity and flexibility, and by the mere size of the land and the diversity within its population."

Sen discusses the role of law and judges by evaluating court decisions from a rationalist perspective and also by applying the standards set by jurists such as Oliver Wendell Holmes.

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[1] Reservation is a concession in law for the benefit of socially and economically backward classes in matters of admission to educational institutions and government jobs. The castes and tribes are mentioned in two schedules to the Constitution and are often referred to as Scheduled Castes and Scheduled Tribes.

The book focuses on Articles 25 to 30 of the Indian Constitution on religious freedom and minority rights, which Sen aptly calls "articles of faith." Sen's critical analysis of court judgements appropriately takes into account historical and socio-political factors and makes complex issues understandable for the reader. The book is comprehensively researched and relevant to our times, particularly as the question of the constitutional validity of the Constitution (Scheduled Castes) Order of 1950 is pending adjudication. On 11 May 2020, the Supreme Court of India ruled that a nine-judge bench should be constituted to decide on the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and the right to equality, among other questions. In this context, understanding jurisprudence on religion in the context of Indian secularism is indeed a relevant and hotly disputed issue.

Robin Ratnakar David, an advocate who has practised before the Supreme Court of India and the Delhi High Court for the last 31 years

Corporate spirit: Religion and the rise of the modern corporation

Amanda Porterfield

New York, NY: Oxford University Press, 2018, 204 pp., ISBN 978-0199372652, US$36.95.

It takes both courage and confidence to tackle a thesis as broad as the one which Professor Porterfield frames in *Corporate Spirit*, and the author lacks neither. She sets out to write the history of the parallel developments of Christianity and corporate law over twenty centuries, finding what she calls a corporate spirit in Christianity as early as the apostle Paul.

In the hands of a less able scholar, this topic would require a multi-volume account filling a thousand pages or more. Porterfield manages a brisk but unhurried work of barely 200 pages. Even at that, it reads more like an extended essay than a monograph.

The book is divided into two parts. Part one (about one-third of the total text) discusses the twinned evolution of churches and corporate entities from Paul's time through the British Civil War. Part two sketches the development of corporate organization alongside religious evolution in colonial and post-colonial America.

Part one, which emphasizes Christianity and the evolution of the corporate form in Roman antiquity and medieval Europe, identifies the clearest linkages between church and corporations. First Corinthians explicitly depicts the church in corporate terms: many members, each with their own purpose and operating in coopera-

tion with the others to form the body of Christ. The image of society as a body did not originate with Paul, but his influence was singular: "In its aspiration to holistic perfection, the Pauline body offered a model for social cooperation as well as individual discipline" (10). The effect of corporate cooperation and discipline served as an important impetus for the expansion of the early church organized under episcopal authority, Porterfield argues.

Later, Paul's theology of the mystical body gained additional vitality in association with the Eucharist, stimulating new legal thinking about the nature of corporate membership. In the Middle Ages, charters were granted to cities, churches and monastic communities and the rights of members began to be defined. Membership in guilds, too, gave rise to particular rights and civil liberties. When corruption and abuse became problematic, doctrines of corporate accountability were introduced in response. These developments underscored both commerce and church. Indeed, the secular and religious aspects of community life were much more unified during the centuries in which their developments paralleled one another. Canon law informed civil law and vice versa.

Part two transports the reader across the Atlantic and the development of churches and companies becomes a little less parallel. Porterfield shifts her focus away from the evolution of corporate and church law and considers Christianity and commerce, more broadly defined, in America. In this section, the cross-pollination between faith entities and commercial ones declines, but can still be observed from time to time.

Porterfield follows an outline of the early role of chartered corporations, such as the Massachusetts Bay Company, with a narration of the expansion of slavery in the nineteenth century. As is well known, slavery proponents deployed Pauline corporatism to claim biblical support for the ownership of human beings: "Pro-slavery Christians invoked Pauline teachings about the trust that bound unequal persons together in the body of Christ" (110). Slavery opponents, meanwhile, made their own biblical allusions. The concept of personhood ultimately prevailed with the abolition of slavery and the Thirteenth Amendment to the U.S. Constitution.

The sanctification and elevation of personhood also drove responses to unrestrained mechanization and unsafe workplace conditions. Gradually, the safety of workers began to receive attention. Yet personhood simultaneously fuelled corporate expansion. Corporations themselves began to gain civil rights of their own as legal persons. Personhood as a moral centrepiece therefore underscored civil and worker rights as well as corporate augmentation.

The final chapter of *Corporate Spirit* unpacks television evangelists and the Rev. Billy Graham in opposition to two corporations (Enron and AIG) marked by infamous scandals Here, Porterfield identifies a new "free-market fundamentalism"

(179) which cultivates faith (of a sort) in the business drive to dominate the marketplace and maximize shareholder value. Government responses to widespread corporate dysfunction aim to restore faith in markets. Enron failed, the narrative contends, "only when investors, analysts, and employees finally lost faith" (176). Meanwhile, contemporary theology often recharacterizes God not so much as governor and judge, but as life coach. Today, Porterfield concludes, megachurches and televangelists engender "a gestalt of aggressive confidence-building that complemented the ascendance of consumer choice, shareholder value, and bold financial schemes" (172).

Porterfield's book is readable in the best sense of the word. Given its impressive scope, it necessarily skims over a number of historical themes. However, her prose is judicious and her conclusions are reasoned and measured. This is an exceptional book.

Prof Thomas E. Simmons, School of Law, University of South Dakota

Guidelines for authors

Version 2021-1 (February 2021)

This document combines essential elements of the editorial policy and the house style of IJRF which can be viewed on www.iirf.eu.

Aims of the journal

The IJRF aims to provide a platform for scholarly discourse on religious freedom in general and the persecution of Christians in particular. The term persecution is understood broadly and inclusively by the editors. The IJRF is an interdisciplinary, international, peer reviewed journal, serving the dissemination of new research on religious freedom and is envisaged to become a premier publishing location for research articles, documentation, book reviews, academic news and other relevant items on the issue.

Editorial policy

The editors welcome the submission of any contribution to the journal. All manuscripts submitted for publication are assessed by a panel of referees and the decision to publish is dependent on their reports. The IJRF subscribes to the Code of Best Practice in Scholarly Journal Publishing, Editing and Peer Review of 2018 (https://sites.google.com/view/assaf-nsef-best-practice) as well as the National Code of Best Practice in Editorial Discretion and Peer Review for South African Scholarly Journals (http://tinyurl.com/NCBP-2008) and tthe supplementary Guidelines for Best Practice of the Forum of Editors of Academic Law Journals in South Africa. As IJRF is listed on the South Africa Department of Higher Education and Training (DoHET) "Approved list of South African journals", authors linked to South African universities can claim subsidies and are therefore charged page fees.

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- Book reviews or suggestion of books for review: bookreviews@iirf.eu
- Noteworthy items and academic news: noteworthy@iirf.eu
- All other contributions: research or review articles, opinion pieces, documentation, event reports, letters, reader's response, etc.:
  editor@iirf.eu
  IJRF, POBox 1336, Sun Valley 7985, Rep South Africa

Selection criteria

All research articles are expected to conform to the following requirements, which authors should use as a checklist before submission:

- **Focus:** Does the article have a clear focus on religious freedom / religious persecution / suffering because of religious persecution? These terms are understood broadly and inclusively by the editors of IJRF, but these terms clearly do not include everything.

- **Scholarly standard:** Is the scholarly standard of a research article acceptable? Does it contribute something substantially new to the debate?
- **Clarity of argument:** Is it well structured, including subheadings where appropriate?
- **Language usage:** Does it have the international reader, specialists and non-specialists in mind and avoid bias and parochialism?
- **Substantiation/Literature consulted:** Does the author consult sufficient and most current literature? Are claims thoroughly substantiated throughout and reference to sources and documentation made?

Submission procedure

1. Submissions must be complete (see no.6), conform to the formal criteria (see no. 8-10) and must be accompanied by a cover letter (see no.3-4).
2. The standard deadlines for the submission of academic articles are 1 February and 1 August respectively for the next issue and a month later for smaller items such as book reviews, noteworthy items, event reports, etc.
3. A statement whether an item is being submitted elsewhere or has been previously published must accompany the article.
4. Research articles will be sent to up to three independent referees. Authors are encouraged to submit the contact details of 4 potential referees with whom they have not recently co-published. The choice of referees is at the discretion of the editors. The referee process is a double blind process. This means that you should not consult with or inform your referees at any point in the process. Your paper will be anonymized so that the referee does not know that you are the author. Upon receiving the reports from the referees, authors will be notified of the decision of the editorial committee, which may include a statement indicating changes or improvements that are required before publication. You will not be informed which referees were consulted and any feedback from them will be anonymized.
5. Should the article be accepted for publication, the author will be expected to submit a finalized electronic version of the article.
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   - Brief biographical details of the author in the first footnote, linked to the name of the author, indicating, among others, year of birth, the institutional affiliation, special connection to the topic, choice of UK or American spelling, date of submission, full contact details including e-mail address.
7. Authors are encouraged to also engage with prior relevant articles in IJRF, the Religious Freedom Series, and IIRF Reports (www.iirf.eu) to an appropriate degree. So check for relevant articles.

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10. Research articles should have an ideal length of 4 000 words and a maximum of 6 000 words. Articles longer than that are not normally accepted, but may be published if, in the views of the referees, it makes an exceptionally important contribution to religious freedom.
11. Research articles are honoured with two complimentary printed copies.
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6. Always give full first names of authors in the list of references, as this simplifies the retrieval of entries in databases. Keep publisher names short.

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