

Religious Freedom and International Law

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The gradual abandonment of the purely theological basis for religious persecution in favour of a secular posture, based on social and political stability, inevitably led to the emergence of the basic modern premise of freedom of religious worship. The outcome of this long and painful interlude in the history of man becomes apparent when we look at certain recent developments in international law. The unfolding of the modern conception of human rights owes much to the philosophy of such men as Locke. The natural law rights of states produced their distinct natural law echo in the fundamental rights of man. Such ideas played a large part in American and French revolutionary thinking. The right to believe and worship as one likes is now based on natural law conceptions derived from a purely fictitious state of nature and reason. We are prone to say with Sir Henry Maine that natural law theories gave us international law. It is a legitimate extension to go on and say that 18th century natural law theories gave us the idea of fundamental human rights. Among these came, ultimately, freedom in the exercise of religion. It is this parentage that accounts for the provision in the First Amendment to the U.S. Constitution of 1776: 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof'. A like idea translated into law appears in the French Declaration of the Rights of Man of 1789 in providing for freedom from harassment on account of one's religious opinions.

With the establishment of the United Nations Charter in 1945 the modern régime of human rights was born. It is not always realised that in the recital of purposes in the preamble to that basic international law instrument, immediately after 'the saving of mankind from the scourge of war,' appears: 'to reaffirm faith in fundamental human rights.' The denial of human dignity and human rights had been not only intimately associated with the scourge of war, as seen in the recent mass extermination of the Jews in Europe, but had also been a contributing factor to the cause of wars. Modern German historians are now contending, on the evidence of documents, that Hitler's purpose in occupying territories was to carry out Nazi social ideology, e.g., exterminating Jews. Throughout the Charter of the U.N. the reference to human rights is persistent and clear. What the Charter failed to do was to define these rights and, worse, to provide any machinery for their enforcement.

The U.N. adopted, by a resolution of the General Assembly in 1948, The Universal Declaration of Human Rights. This resolution had no binding legal effect, nor was it established by treaty, but it had considerable moral effect. It started some important international law-making in the field of human rights. Among the provisions in the Universal Declaration there was one article (18) which provided for freedom of thought, conscience and religion and also the freedom to practise and change one's religion. In 1950 under the auspices and initiative of the Council of Europe, the Convention for the Protection of Human Rights and Fundamental Freedom was concluded. This came into legal force on 3rd September, 1953. Some seventeen States including the U.K. are bound by it. It does not bind Spain, Portugal or France, but does bind such countries as Turkey, Greece and Cyprus. The Convention lists and defines with some precision the rights guaranteed by it. In Article 9 it restates the provision relating to freedom of religion to be found in Article 18 of the U.N. Universal Declaration of Human Rights. What is more, the Convention establishes a Commission to ascertain whether or not these rights have been violated in any country bound by the Convention. The States bound thereby undertake to 'secure to everyone within their jurisdiction the rights and freedoms defined in' the Convention. There is also a European Court of Human Rights to which cases of violation may be referred by the Commission or by Governments. States accept the Court's jurisdiction by a separate act of declaration. Further, the Commission may receive petitions from individual persons claiming to be victims of violations by one of the States bound by the Convention provided that that State has declared that it recognises the competence of the Commission to receive such petitions. This country, which was the first State to ratify the Convention has, in January 1966, accepted the jurisdiction of the European Court of Human Rights and the right of individual petition.

The relevant Article 9 provides: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' Then comes the type of limitation which one might imagine, having seen the way modern municipal law approaches religious freedom. Article 9 provides in para. 2: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.'

We have come a long way from the purely theological bases of repression of religious deviations. The recognition of uncertainty in matters of religion has merged with the modern dictates of public and social order. It is now a bad social, and even moral, situation in which

a man may be prohibited from practising the religion of his choice within the limits of public and social order and the reasonable needs of other men to do the same. The legal approach is to make no value judgment as between religions except that it implicitly denies the truth of any of them. The law is part indifferent, part neutral but determined to see that the needs of society are dominant. One of those needs is that men should practice the religion of their choice as long as it does not disturb strictly secular priorities and the freedom of others. It is an emphasis upon the value of freedom as an essential part of man's dignity and mode of fulfilment. Part of that fulfilment lies in the pursuit of man's religious inclinations. Once religion becomes the object of a social, and hence legal freedom, then it must take its turn with the other freedoms and be subject to the values of social cohesion. To the law all religions are equally to be protected and equally to be limited. The extent to which any particular religion becomes inhibited by this balancing arrangement is a matter for that religion and about which the law is not prepared to do anything. Should any particular religion claim that it is the truth and all others are error, the law has already, in the terms of the Article cited above, rejected that premise. It is, perhaps, the natural and logical development from the time when persecutions departed from the posture of theological purity.

Among the reservations made to the Convention we find a strange relic of the hostility to the Society of Jesus. Norway made a reservation to this Article 9 of the Convention in terms that 'Since Article 2 of the Norwegian Constitution of 1814 contains a provision according to which Jesuits are banned, a corresponding reservation is made as regards the application of Article 9 of the Convention.' One must add that in December 1956 Norway withdrew this reservation, having amended its Constitution so that the safety of Norway was no longer considered imperilled by the presence of Jesuits.

The social approach and the neutrality of the law in matters of religion can be seen even more strikingly in the Protocol to the Convention which came into force in May, 1954. Article 2 of the Protocol, which has already been the cause of some trouble and reservations by States, provides: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' This is more than the equation of religions. It is the equation of agnosticism, atheism, humanism, etc., to all religions, in the context of the right to education.

Already a jurisprudence is emerging in the Commission of Human Rights in the application of these two provisions. The attitude displayed so far by the Commission in its handling of the cases relating to Article 9 of the Convention may be thus described:

'The ability to think and to express thoughts is influenced by many forces, social and personal. Therefore, the guarantee of *freedom* of

religious thought forbids only those social and educational policies which deliberately aim at influencing this ability so as to restrict it.' In relation to Article 2 of the Protocol the Commission's approach may be put thus:

"Philosophical" is to be equated with non-religions, viz., humanist, agnostic positions, and therefore religious and non-religious parents are to be given equal claims, in the context of education. Of course it may well be that a particular State assumes no functions at all in relation to education.'

Over and above these defined freedoms the Convention has a provision of general application designed to ensure non-discrimination in the securing of enjoyment of the various freedoms. The relevant Article, (14), provides:

'The enjoyment of the rights . . . in the Convention shall be secured without discrimination on any ground such as colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status.'

In the context of Article 9 of the Convention the cases have been mainly concerned, to date, with the application of the second paragraph, the exceptive part of the freedom. Thus it has been held by the Dutch Supreme Court that the Dutch Constitution, in forbidding new religious processions outside buildings is no infringement of Article 9 (2). A first-time Catholic outdoor religious procession took place in Arnheim in 1962. The priest responsible was convicted. It was held by the Court that the Law of Holland was not contravening Article 9 of the Convention as such law was designed to prevent public tension and demonstrations and was, therefore made in the interest of public order. Again, a Law of Greece provided that permission had to be sought from the Minister of Public Worship for the building of churches. Such a law did not contravene Article 9 of the Convention.

The European Convention of Human Rights is a very salutary step forward. It represents the attempt to hold the balance between religion as an engine of repression against non-believers and the claims of the State to conduct repressive acts against people on account of their religious faith. Though unwilling to give one religion any place of preference over another religion and willing, in the context of education, to treat religious and non-religious schemes of thought on a parity, the Convention has admitted that the free practice, and change, of man's religion has a social value that ought to be preserved in the law. It is committed to restrain one religion from interfering with another and is determined that no religion shall impede the basic essential for state solidarity. It has, in a sense, elevated the needs of State security to an absolute undeniable value. To that extent it may be urged that it has taken a definite stance in relation to the claims of any transcendental religion, and that stance is a negative one. The Convention truly reflects the attitude of the majority of States today, namely, that religious freedom is a social and individual value that

must not be denied, but must be contained within the limits of social needs. How can religious freedom be enjoyed unless society is preserved and the like freedom is accorded to all other religions and non-religions? If there be a philosophy underlying these legal provision it is that man is a social and a rational creature, first and foremost. He may be a spiritual one but that is a secondary consideration. On the negative side, the claim of religious truth is denied. What may not be denied is the social values implicit in the provisions. The freedoms are essentially residuary in the sense that they emerge when the executive arm of the state has had its extensive share of social needs allocated to it.

The municipal law of Spain precludes it from being a Party to the European Convention on Human Rights. By Article 1 of the Law of Succession of 1st June, 1947, 'Spain as a political unit, is a Catholic State.' By the Law on the Principles of the National Movement of 17th May, 1958, Article 2: 'The Spanish nation considers it a rule of honour to respect the law of God according to the doctrine of the Holy Apostolic Roman Church, the sole depository of truth. Faith is inseparable from the national conscience. That Faith shall inspire the nation's law.' In the Charter of the Spanish People, Article 6: 'The profession and practice of the Catholic religion which is that of the Spanish State, will enjoy official protection. Nobody will be molested because of his religious beliefs in the formal exercise of his creed. No external ceremonies or manifestations will be permitted except those of the Catholic religion.' This municipal law is strengthened by the Concordat of 27th August, 1953, whereby 'in all places (of education) of every sort whether State institutions or not, instruction shall conform to the principles laid down by the dogma and morality of the Catholic Church. The ordinaries may demand that books, publications, or educational materials be barred or withdrawn from circulation, if they are contrary to Catholic dogma and morality.'

The provision about non-molestation, in Article 6 of the Charter of the Spanish people, preserves a freedom of *public* worship only for the Catholic religion. Thus, in 1961, the police and the Revd. Father Sanchez de Leon caused to be removed from the offices of the *Sociedad Biblica*, a branch of the London Bible Society, about 5,000 Bibles, 9,000 New Testaments and 5,000 Hymnals. These were pulped. The Minister of the Interior confirmed the legality of this action on the grounds that the *Sociedad* was part of the institution of a seminary operating clandestinely and without authorisation. In fact the *Sociedad* had been founded about 80 years ago when such authorisation was not required by contemporary Spanish law. Various diplomatic protests were made against this action. An approach was made by Bishop Dibelius to Cardinal Franks and Pope John XXIII. The Spanish Minister of Foreign Affairs reiterated the position of the Minister of Interior.

It was reported in August of 1965 that the new Bill on the Status of

Protestants in Spain has been held up in the Cortes. This proposed law would give legal recognition to non-Catholic Christian faiths, their right to own property, run schools, and publish books, but they would not be allowed to proselytize. It would also legalise the marriage of Catholics and non-Catholics. This would seek to undo the relevant part of the Concordat of 27th August, 1953. It must not be forgotten that the Church has used its legal freedom of expression enshrined in Spanish law to criticise to some effect the social policies of the State, especially in matters such as strike action by workers.

In another area of the world, namely Tibet, religious persecution has now taken, and is taking, such extreme forms that allegations have been made that China is in danger of being exposed to a charge of genocide under the Genocide Convention of 1948. In a report made in 1964 it was stated that there is 'a continuance of ill-treatment of many monks, lamas, and other religious figures, resulting in death through excessive torture, beatings, starvation and forced labour, and a continuance of the forcible transfer of children to China, against the wishes of their parents with the consequence of having them indoctrinated in Communist beliefs and depriving them of a religious upbringing'. Such conduct may bring China within the ambit of the prohibition of genocide as defined in Article 2 of the Genocide Convention, namely: '... any of the following acts committed with intent to destroy, in whole or in part, a . . . religious group as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group.

Communist China is not a Party to this Convention, although it is bound by the customary law relating to genocide. Tibet is now an integral part of the state territory of China.

We are perhaps witnessing two opposing, but related, processes in operation. Within the régime of human rights, which has now gained a substantial measure of acceptance in Europe and elsewhere, the practice of a man's religion is seen as one of those essential freedoms necessary for the full life of the individual in society. It is a form of social and psychological good that man should be free to practice his religion without harassment. For this purpose all religions must be treated equally and all must be subject to the overriding dictates of public order, sociability and reasonableness in their manifestations. Freedom under the law for the practice of religion means a like freedom for all, irrespective of their faith. The modern international law, which requires compliance in the municipal law sector attempts a form of social balancing between the needs of men of religious faith, men without much faith, and society. If there be a clash there can be no doubt that the law is weighed in favour of state safety and public internal order. This approach seems to me to be the lawful and logical lineal descendant of the English Reformation law directed against Catholics, Anabaptists and Lutherans. The public and social concept

has remained throughout, although its precise content has shifted as external and internal threats to the State have changed.

In another area we discern a singling out of religion, whether Christian or not, as the especial danger to a certain collection of political, economic and social ideas, compendiously called communism. There the approach is more complicated. In part it also derives from the non-theological bases for persecution that marked the Reformation legislation, e.g. the idea that the practice of certain religions is an anti-social act that a good citizen will not do. But in part there is a retrogression to that posture of theological purity, this time marked by the assumption of certain immutable, unchallengeable dogmas in the political, economic and social sector, outside of which all is not merely socially undesirable but doctrinally wrong. In fact these are, under the communist system, social and economic heresies. The precise canon of social and economic orthodoxy may shift from time to time. Religious freedom, or the denial of it, shifts accordingly in response. It is significant that the Soviet States, though eager to accept the Genocide Convention of 1948, have taken no steps to buttress the frail legal structure of human rights outlined in the Charter of the United Nations. Even within the régime of the Genocide Convention the Soviet States carefully blocked the jurisdiction of the International Court of Justice designed to determine State responsibility for its breach. It is possible to see, however, in the USSR, certain symptoms that the ratio of the denial of religious freedom, where it occurs, is based upon the political and social safety of the 'workers revolution' rather than doctrinal infallibility. That we should welcome, for it cannot be seen in China.

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