

[A lecture delivered at the opening session of the 22nd Annual Symposium on Religion and International Law, October 4, 2015 at the BYU Law School.]

Religion, Law, and Social Stability

Human Rights, Religious Freedom, and Peace

David Little

Preface

Bestowing on me one of the Distinguished Service Awards for 2015 and inviting me to deliver a keynote address here at the 22nd Annual BYU Symposium on Religion and International Law are both enormous honors for which I am profoundly grateful. I have long admired the work of the International Center for Law and Religion Studies and of one of its central figures, Cole Durham, as I have the contribution of this symposium in which I had the privilege to participate two years ago. Cole is indisputably one of the foremost scholars and educators as regards the intersection of law and religion, and particularly the theory and practice of freedom of conscience, religion, or belief. The volume and quality of Cole's output, in collaboration with his associates, is remarkable, and we are all greatly in his and their debt. Moreover, the Center's capacity to bring together in this symposium such a broad and distinguished collection of scholars and legal practitioners from around the world is unrivaled. I am very gratified to be a part of it.

Introduction

In what I hope will be a contribution to considering the general topic of our symposium—"Religion, Law, and Social Stability," I am going to say some things about human rights and religious freedom in relation to the subject of peace. I shall assume that at least one indispensable feature of social stability is peace, namely the absence of widespread deadly force, although peace of course means more than that. I shall also assume that whatever else it is, human rights is about law, and, further, that particularly when coupled with freedom of conscience, religion, or belief, human rights directly addresses, among other things, the issue of religion. I intend, then, to pin down a bit the terms of the general topic, and show, or try to show, how they relate to each other.

I must add that what I am going to say faces strong criticism. There are several scholars who, in the spirit of Michel Foucault, regard human rights as a "a discourse of pseudo-emancipation that serves to conceal [various] entanglement[s]"

with power.”¹ Two books, one just published, apply this criticism to the subject of religious freedom. Other studies represent related challenges about various efforts to promote peace around the world by institutionalizing human rights along with democracy and the rule of law.

After providing some general comments about human rights, religious freedom, and peace, I shall get back to dealing with three of these critics. Whatever one may think of their arguments, they do raise some objections that need to be considered.

Human Rights, Religious Freedom, and Peace

The opening lines of the Preamble to the Universal Declaration of Human Rights [UDHR] say this: “[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” The Preamble to the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief says something similar: “[T]he disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought directly or indirectly wars and great suffering to [human]kind...The freedom of religion and belief should...contribute to the attainment of the goals of world peace, social justice, and friendship among peoples....”

The references to peace are not incidental. Human rights in general and the right to conscience, religion, or belief in particular were explicitly designed as a set of legally enforceable rights and protections capable of preventing the reappearance of autocratic government and the exercise of arbitrary force, associated with Hitler and his fascist allies, that were in large part responsible for the “wars and great suffering” of the mid-twentieth century.

Speaking of autocratic government and the arbitrary exercise of force, we should recall that Hitler rose to power on the strength of Article 48—the emergency article—of the Weimar Constitution. It permitted the suspension of civil rights “with almost no limit,”² including extensive censorship, widespread searches and seizures, secret and unlimited detentions, the establishment of irregular tribunals to prosecute individuals suspected of threatening national security—in effect, authorizing Hitler to use police power to intimidate and suppress all opposition.

We could almost say that the whole human rights corpus (not to mention the corpus of humanitarian law) was a response to a massive abuse by Hitler and other

¹ Richard Wollin, *The Seduction of Unreason: The Intellectual Romance with Fascism From Nietzsche to Postmodernism* (Princeton: Princeton University Press, 2004), 22.

² Frederick Mundell Watkins, *Failure of Constitutional Emergency Powers under the German Republic* (Cambridge, MA: Harvard University Press, 1939) 15.

fascists of an appeal to public emergency. Think, for example, of Article 4 of the International Covenant of Civil and Political Rights [ICCPR], which imposes *both* stringent conditions of notification and authorization on states claiming a threat of public emergency *and* a set of nonderogable rights (rights that may not be suspended under any conditions). That set of rights prohibits, even during times of emergency, discrimination, extrajudicial killing, torture or cruel, inhuman or degrading treatment or punishment, enslavement, denials of due process and the freedom of conscience, religion, or belief. Both the conditions and the rights were systematically violated by the Hitler regime prior to and during World War II. In addition, the Hitler experience reinforced the conviction of the drafters that “the cluster of rights spelled out in articles...19, 20, and 21 of the UDHR [freedom of opinion and expression, of association, and participation in government] are universally the first ones dictators will seek to deny and destroy.”³

We ought also mention in passing the prohibition against “atrocities crimes,” namely, war crimes, crimes against humanity, genocide, and aggression, enshrined in the Statute of Rome, violations of which are further examples of arbitrary force that were seared into public memory during the middle of the 20th century. In addition, we should mention the human rights to survival—adequate sustenance, health, education, and cultural opportunity—embodied in the International Covenant of Economic, Social, and Cultural Rights [ICESCR], such that disregarding them or deliberately depriving people of them would amount to “arbitrary neglect,” a close relative of arbitrary force, and something also indelibly exhibited during the “Hitler time.”

It is of the greatest importance that Article 18 (of the UDHR and ICCPR)—the right to freedom of conscience, religion, or belief—is included among the list of nonderogable rights. A key feature of arbitrary force as practiced by the Hitler regime was the relentless imposition by force of a specific set of beliefs on everyone under its control, meaning the persecution of all religious and other expressions of dissent. Such actions were arbitrary because coercion is not a justification for believing the truth or rightness of anything. Since conscience, religion or belief involve, at bottom, convictions about truth and rightness, they are subject, in traditional language, to the “law of the spirit”—persuasive appeals to reason, emotion, and evidence—and not to the “law of the sword.”

This rationale underlies Article 18, para. 2 of the ICCPR which states that “no one shall be subject to coercion which would impair [one’s] freedom to have or to adopt a religion or belief of [one’s] choice.” According to the Human Rights Committee, authorized to exposit the terms of the ICCPR, Article 18 “protects

³ Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

theistic, nontheistic and atheistic belief, as well as the right not to profess any religion or belief.” Moreover, Article 18 distinguishes between belief and manifestation, such that holding or avowing a conviction may in no way be limited, while manifesting or acting it out is subject only to such limitations as are “prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

Finally, the Committee emphasizes that Article 18 “is not limited to traditional religions or to religions or beliefs with institutional characteristics.” It rules out “any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established or represent religious minorities.”⁴

There is strong empirical support for the proposition that human rights compliance in general, and religious freedom compliance in particular, increase the prospects for peace. As to human rights in general, the author of a careful comparative study concludes: “It appears that greater democracy and interdependence are associated empirically with a reduction of human rights violations and a reduction of inter-state conflict.”⁵ He emphasizes that “it is liberal democracy...that is essential for rights protection, where horizontal and vertical accountability are enshrined in constitutionalism and the rule of law, [and, therefore,] where rights abuses cannot take place with impunity.”⁶ He proceeds to cite an earlier study showing “convincingly” that liberal democracy, together with a high degree of inter-state commerce and active membership in international governmental institutions “significantly reduce[s] the probability of inter-state conflict.”⁷

The author is here invoking something known in political science circles as the Liberal Peace. It holds that the orderly and properly sequenced development of robust liberal political and economic institutions, including “a whole panoply of institutions to ensure the rule of law and [equal] rights,”⁸ is a critical condition of national and international peace, while illiberal or ethnically exclusivist institutions increase the probability of violence of either an institutionalized sort, as in autocratic systems, or outside institutional control, as in insurgencies and civil wars.

The most important claim of the Liberal Peace, based on a systematic investigation of thousands of paired or dyadic relationships between countries, is

⁴ UN Human Rights Committee General Comment No. 22 (Article 18), in Tad Stahnke and Paul Martin, eds., *Religion and Human Rights: Basic Documents* (Center for the Study of Human Rights, Columbia University, 1998), 92.

⁵ Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington, DC: Georgetown University Press, 2005), 170.

⁶ Ibid.

⁷ Ibid.

⁸ Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W.W. Norton and Co., 2000), 316-317.

that developed democracies, especially those with a high degree of inter-state commerce and membership in international organizations, do not fight each other. It does not say, please note, that developed democracies refrain from fighting nondemocracies. The whole history of colonialism, together with the experience of the Cold War, and the more current pattern of armed conflict between Western democracies and militant extremists, disproves that.

Rather, the more limited claim—of special interest to us, given that reaction to Hitler’s autocratic rule was the inspiration for human rights—is that “pairs of democracies are much more peaceful than either...pairs of autocracies or mixed democratic-autocratic pairs.” “Nothing comparable to the effect of democratic norms and institutions produces a generalized pattern of dispute-avoidance” among autocratic states, according to the authors of a well-known study of the Liberal Peace.⁹ In regard to intra-state, as opposed to inter-state, violence, democracies do better in general, though notice that “partial democracies experience violent state failures more often than either full democracies or autocracies do.” That suggests that political transitions are especially perilous, as confirmed by the fact that the “vast majority of civil wars in the twentieth century occurred neither in democracies nor in [autocratic] states able to repress opposition vigorously.”¹⁰

As to the connection between religious freedom and peace, there is an important study by Brian Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*.¹¹ Significantly, the authors indicate that 83% of countries with more than two million people have constitutions promising religious freedom, and 8% of countries without constitutions have laws to the same effect, while only 9%, or thirteen countries, offer no such promises.¹² Nevertheless, the study reveals some disturbing results on the part of governments around the world in regard to living up to the promises, and the effects of that failure on the incidence of violent conflict. The central conclusion is this: “violent religious persecution and conflict rise as government and social restrictions on religion increase.”¹³ The reverse is also true: “we have demonstrated the pacifying consequences of religious freedoms. We have found that when social and government restrictions on religion are reduced, violent religious persecution is reduced.”¹⁴

⁹ Bruce Russett and John R. Oneal, *Triangulating Peace: Democracy, Interdependence, and International Organizations* (New York: W.W. Norton, 2001), 115.

¹⁰ *Ibid.*, 70.

¹¹ Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge, MA: Cambridge University Press, 2011).

¹² *Ibid.*, 27.

¹³ *Ibid.*, 212.

¹⁴ *Ibid.*, 210.

Incidentally, the authors emphasize that the record of compliance with religious freedom standards is deeply intertwined with the record of compliance with other human rights, such that violation of religious freedom is strongly correlated with the violation of rights to freedom of speech and assembly. Religious freedoms, they say, “are embedded in a much larger bundle of civil liberties.”¹⁵ This conclusion ties the consideration of religious freedom back to the broader conclusions about human rights, democracy, and peace.

Challenges

There are, as we mentioned, strong objections to this picture of the positive connections among human rights, religious freedom, and peace. We first take up the criticisms of the Liberal Peace in general registered by Oliver Richmond in his volume, *A Post-Liberal Peace*.¹⁶ Richmond’s special focus is on the peacebuilding consequences that, he thinks, have followed from efforts to implement the conventional understanding of the Liberal Peace. He reviews a number of cases of internationally sponsored post-conflict reconstruction, like Cambodia, Bosnia-Herzegovina, Kosovo, and Timor Leste, and concludes that the going version of the Liberal Peace, which has guided these endeavors, has in large part failed to create conditions for a durable and just peace. In the name of fostering “liberal institutions” (constitutionalism, human rights, etc.) that are supposed to generate peace domestically and internationally, the effects, rather, have been to strengthen political and economic elites both inside and outside government at the expense of common people at the “everyday” local level. The special culprit, according to Richmond, are neoliberal economic policies that entrench extensive inequalities in wealth and opportunity, though he mentions other factors as well.

I do not dispute Richmond’s findings, particularly in the light of our own experience in developed democracies like the United States about growing social and economic inequality associated with the market economy, and the potential for deep frustration and serious conflict that appear to accompany it. I simply observe that when all is said and done Richmond does not forsake the Liberal Peace, but calls, instead, for it to live up to the full range of its assumptions. He does that by calling for efforts to expand the reach of civil and political rights to apply equally to all citizens, in the spirit of authentic democracy, and, interestingly, to make available to all the human rights to survival—adequate sustenance, health, education, and cultural opportunity—embodied in the ICESCR.

It must be admitted that such a policy contradicts some influential interpretations of the market economy, and thereby modifies significantly one

¹⁵ Ibid., 205.

¹⁶ Oliver P. Richmond, *Post Liberal Peace* (New York: Routledge, Taylor, Francis Group, 2011).

widespread reading of the Liberal Peace. At the same time, such a proposal is ultimately consistent with the full range of human rights—civil and political *and* economic, social, and cultural—that are inscribed in the existing code. If the Liberal Peace is taken, as it should be, to mean implementing all, and not just some, human rights, then Richmond is in accord, after all, with one—to me compelling—version of the Liberal Peace.

Winifred Sullivan and Elizabeth Shakman Hurd, authors, respectively, of *The Impossibility of Religious Freedom*¹⁷ and *Beyond Religious Freedom*,¹⁸ go further than Richmond. They believe that human rights language in general and religious freedom language in particular is, in reality, the language of oppression, discrimination, and violence. Sullivan doubts “it is possible to find any ground for the critique of law outside of legal systems controlled by nations and therefore subject to political manipulation....” Human rights guarantees, including religious freedom guarantees, are “undermined by the limitations of language” as well as by “the statist monopoly of law common in the modern nations of the West.”¹⁹

Elizabeth Hurd sharpens the point: As with human rights language generally, employing the vocabulary of religious freedom authorizes biased understandings “of what it means to be religious, and what it means for religion to be free.” Such an approach risks “exacerbating the social tensions, forms of discrimination, and intercommunal discord that [human rights language claims] to transcend.”²⁰

The underlying argument is that *all* universalistic language, such as we find in the human rights code, is mistaken, and not recognizing that leads to serious abuse and victimization. In regard to religious freedom, for example, there is no one thing called “religion” that applies all over the world. People in different cultures have very different understandings of the term, and therefore deciding what makes for “religious freedom” is bound to vary accordingly. The upshot is that proponents of a universal human right to religious freedom wind up imposing coercively and arbitrarily their own ideas and their own biases on others who have very different notions. The undertaking is, as we mentioned, an exercise in oppression and discrimination, and, as such, a cause of “intercommunal discord,” and, likely, of increased violence. The particular culprits are national governments, who in the name of advancing “freedom, justice, and peace in the world,” actually advance their own parochial ideas and interests, something that makes for conflict, not peace. This

¹⁷ Winifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005).

¹⁸ Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton: Princeton University Press), 2015.

¹⁹ Sullivan, *Impossibility of Religious Freedom*, 156-157.

²⁰ Hurd, *Beyond Religious Freedom*, 63-64

approach is, as is clear, a direct and systematic assault on the idea of the Liberal Peace, even the revised view of it we suggested in our treatment of Oliver Richmond.

There are several problems with the approach. First, it fails to prove that the violations identified by Grim and Finke do not occur, and do not have the violent consequences they report. Nor do the proponents of this approach prove that the violations they describe amount to anything like the extent of oppression and violence Grim and Finke report.

Second, the two authors do not succeed in divorcing themselves completely from a human rights approach to religious freedom. For example, Elizabeth Hurd says there is no such thing as “religion” as such, and then proceeds to argue that something called “lived religion”—a fluid, loosely organized, nondoctrinaire experience “as practiced by everyday individuals and groups”—is regularly subverted round the world by what she calls “governed religion”—the religion sponsored and imposed by the state, and by “expert religion”—an understanding of religion invented by scholars and lawyers and forced upon people against their wishes. In effect, Hurd has simply substituted her own alternative definition of religion, together with an ambitious theory of religious freedom that is based on her account of how religion is supposed to function throughout the world.

The emphasis on “lived religion” is meant to show that the ideas enshrined in the human rights code are biased in favor of a Western, and especially American, notion of what religion “really” is. All the talk of “conscience” and “belief” in the code bears the stamp of “hyperprotestantism,” something that favors a voluntaristic, highly rationalized, tightly organized form of religion that ignores or plays down ritual and ceremony, as well as the kind of flexible, unreflective religious experience that is so much a part of the “everyday” lives of people around the world.

However, Sullivan and Hurt do not avoid using human rights concepts, after all. At one point, Winifred Sullivan states that “to be religious is, in some sense, to be obedient to a rule outside oneself and one’s government, whether the rule is understood as established by God, or otherwise. It is to do what must be done.”²¹ This is, in fact, a conventional description of freedom of conscience—a rule outside oneself *and one’s government* to which one is ultimately loyal. On her view, a religiously-informed conscience, or something like it, stands above and beyond the coercive power of the state, which is exactly the message of Article 18, para. 2 of the ICCPR.

My guess is that whenever fundamental commitments, whether religious or not, whether in the form of “lived religion” or not, come in conflict with the state, they quickly crystallize into what we would recognize as conscientious beliefs. It does not matter whether it is principles or doctrines or rituals or cherished

²¹ Sullivan, *Impossibility of Religious Freedom*, 156.

practices lived out in “everyday life,” committed persons in face of persecution are forced to give reasons—to *express beliefs*—as to why their commitments are of paramount importance to them, and why those commitments should be tolerated and not suppressed. It is this very predicament of *conscience versus state* that Grim and Finke report on in such distressing and extensive detail, and it is by no means clear how the practitioners of lived religion escape that predicament when confronted with state repression. In fact, Elizabeth Hurd repeatedly calls attention to the way “governed religion” and “expert religion” harm groups by disregarding what *they believe* about themselves!²²

Elizabeth Hurd and Winifred Sullivan do succeed in providing some egregious examples of the international religious freedom campaign gone wrong by discriminating against practitioners of lived religion. But what the two authors do not prove, despite Hurd’s protests to the contrary, is that the vocabulary of religious freedom is incapable of accommodating these troubling examples. The language and categories of religious freedom, as elaborated in the commentary of the Human Rights Committee cited earlier, are quite capacious, and are, I believe, able to supply remedies for the kind of oversight and mistaken judgment by governments and experts that Sullivan and Hurd identify.

As a contribution to our general theme, “Religion, Law, and Social Stability,” I have argued that human rights, religious freedom, and peace are positively related. Challenges to this conclusion do raise problems that need to be addressed, but they do not refute it.

²² Hurd invokes the example of what she thinks are abuses inflicted on the Alevis of Turkey by defining them officially as a homogenous “religious minority” in a way that seriously misrepresents the understanding of Alevism of some members. Classifying Alevism in accord with the categories of “governed” and “expert religion” “sanctifies particular understandings of Alevism as orthodox while marginalizing others.” “Dissenters and those making claims on behalf of Alevism deemed unorthodox or threatening by ‘leading Alevi men of faith’ are disenfranchised” (Hurd, *Beyond Religious Freedom*, 105-107). According to Hurd, this is done in part by disregarding the fact that some of the convictions in question are not thought of as “religious” at all.

It is hard to see this description (if accurate) as anything other than a case of unwarranted government (and “expert”) interference with the conscientious beliefs of some Alevis—those “*making claims on behalf of Alevism deemed unorthodox...*” (italics added). (The idea of “lived religion” as something indifferent to belief seems to have been forgotten.) On a human rights understanding, the critical question is not whether the beliefs in question are “religious” or not, but whether they are “conscientious,” that is, whether they are of paramount importance and considered worth defending at substantial cost. If they are, governments (and experts) are bound to find ways to respect those beliefs, subject to specified limitations. That is the meaning of “religion or belief.”