

DRAFT

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Rights talk has become a dominant mode of political, legal, and moral discourse, and human rights protections and violations have become increasingly important issues in international relations and diplomacy. The United Nations, regional organizations, and various religious, cultural, and ideological groups have developed detailed catalogues of rights, some set out in binding treaties and others in non-binding declarations. Most rights and liberties have millennia-long roots in legal systems shaped by religious and philosophical systems. Particularly in light of the global resurgence of religion in recent years, these religious rights norms have become important considerations for international human rights discussions aimed at avoiding a “clash of civilizations” and building a culture of human rights.

This chapter focuses on the comparative development of human rights beliefs and norms in Hinduism, Confucianism, Buddhism, Judaism, Islam, and Christianity. Our focus is on the religious sources of human rights and religious contributions to human rights, but we also attend to the ambivalences and tensions around religion and human rights that remain the subject of ongoing debate. The concluding section argues both that human rights need the resources of all religious traditions to survive and flourish, and that religions themselves must attend to human rights in order to do justice and affirm human dignity.¹

¹ This chapter draws and distills the following books that also include detailed citations to the literature: John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (New York: Cambridge University Press, 2007); John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2011); John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights* (New York: Cambridge University Press, 2010); John Witte, Jr., and Johan D. van der Vyver, eds. *Religious Human Rights in Global Perspective*, 2 vols. (The Hague: Martinus Nijhoff 1996).

Religion and Human Rights in the East

Hinduism. Inquiry into the sources and development of human rights in Eastern religions must begin with Hinduism, which emerged out of the cultures and practices of the peoples of the Indus Valley prior to 2000 B.C.E. Unlike most other world religions, Hinduism has neither origins in a particular leader or historical event, nor a set of determinate doctrines. Over time and across the Indian subcontinent, it has embraced a diversity of religious practices, texts, and rituals. The tradition's mystical quality and spiritual objective of each person attaining freedom from material existence has sometimes caused it to seem otherworldly and unconcerned with such worldly matters as the realization of human rights.² The association of Hinduism with the ethically-suspect caste system, the widow-sacrifice known as *sati* and other forms of gender inequality, and the ongoing tensions with Muslims, Christians, and other inhabitants of the subcontinent have all been black marks against the Hindu record of human rights. But Hinduism's respect for tolerance, diversity, and harmony, and the timeless example of Mahatma Gandhi's legendary ethic of nonviolence, also suggest important sources and resources for human rights in the Hindu tradition.

The Hindu concern for harmony amid the diversity of its forms is captured in the early texts known as the Vedas, particularly in the emphasis on *Brahman*, a concept of a transcendent, eternal, and absolute reality beyond the plurality, diversity, and contingency of the material world. The subset of Vedas known as the Upanishads contain the elements of what would come to be identified as Hindu philosophy. In light of the diversity of its deities, practices, and beliefs, Hinduism has often been considered to be more philosophical than theological in its conception. Key Hindu ideas include the concept of reincarnation through which believers eventually escape

² Exemplary of this stereotype is Max Weber, *The Religion of India: The Sociology of Hinduism and Buddhism*, trans. and ed. Hans H. Gerth and Don Martindale (Glencoe, IL: Free Press, 1958).

the cycle of death and rebirth (*samsara*), and the moral force of causation and consequence (*karma*) flowing from their actions within those cycles. Various schools of Indian philosophy and practice focus on the cultivation of physical, spiritual, and intellectual discipline for attaining liberation (*moksha*) from these cycles of earthly existence. This goal of transcendence does not take away from the joy and reverence for life (*ahimsa*) apparent in colorful and ornate Hindu rituals and practices. This reverence extends famously not only to human life, but also the lives of animals, some of which are designated sacred, and more generally to life in all its forms.

The divinity that Hindus see as resting in every human being is inseparable from the divinity manifest throughout creation. This expansive sense of the divine includes a number of deities, alongside a more over-arching sense of the divine, identified with the concept of *Brahman*. This theistic diversity is accompanied by understanding of history as occurring cycles of activity rather than a simply linear progression. Within the Hindu tradition, the human self (*atman*) is conceived in a certain sense as transcending historical time and space, existing as an eternal soul without beginning or end. These multiple and diverse senses of divinity and temporality, along with the plurality of rituals and beliefs that make up the Hindu tradition are suggestive of a profound concern for both universality and particularity, two concepts that are central, but often in tension, in human rights today.

The emphasis on individual spiritual development in Hinduism can seem purely individualistic, and with no obvious connection to broader notions of human rights or social justice. But the fundamentals of a Hindu social ethic are encapsulated in the notion of duty (*dharma*) as a principle of social organization, particularly as outlined in the *dharma-shastra* manuals of rules and right conduct practiced in the Vedic schools. The framing of many of these *dharma* discussions in terms of the Hindu concept of the needs of different stages of life

(*ashramas*) (studenthood, householdership, retirement and renunciation) connects *dharma* duties to specific rights to material sustenance (*kama*), adequate legal, political, and economic structures (*artha*), the pursuit of law and justice (*dharma*), and the quest for liberation (*moksha*).³ These protections of social, economic, and cultural rights to *kama* and *artha*, and of civil and political rights, including religious rights, to *dharma* and *moksha*, has resonance with modern conventions for protecting these human rights in international law.

In light of India's extensive interaction with the West through the presence of British and other colonial authorities, it is not surprising that ongoing tensions around human rights in Hinduism have roots in how the tradition was constructed in the minds of missionaries and colonizers. As Werner Menski, a scholar of Hindu law and religion, has observed, "Well before the Christian era, Vedic Hindus, Buddhists, and Jains battled over the right way to lead a good life for all humans, and even other creatures. It is here that the literate Brahmin elite of ancient India allegedly first began to assert its privileged position and built an elaborate empire of ritual precision, higher consciousness and ultimately right knowledge and action, to claim privilege and power to the exclusion, potentially, of all other humans. This led many analysts to claim that the Brahmins did not develop human rights, but elaborated only their own caste-based interests."⁴

In Menski's analysis, the missionaries of yore may, in some respects, have developed a more positive view of Hinduism and human rights than today's human rights scholars and advocates. The missionaries "focused eventually less on conversion as a means to rescue lost

³ See Arvind Sharma, *Hinduism and Human Rights: A Conceptual Approach* (New York: Oxford University Press, 2004).

⁴ Werner Menski, "Hinduism and Human Rights," in *Religion and Human Rights*, 77. For a more expansive discussion of the relationship between traditional and modern interpretations of Hinduism in the law, see Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2009).

Indian souls and turned themselves into social workers and virtual anthropologists,” Menski maintains, in a way that “led them to acknowledge a common humanity with Hindus, and even more positive attitudes towards Hinduism,” in contrast to the situation today, in which “many so-called human rights activists today myopically treat anything Hindu as incapable of addressing human rights concepts.”⁵ Thus, Menski argues, “Hindu religion and customs are viewed as tainted by irrationality and to backward customs such as *sati* (the burning of widows on the husband’s funeral pyre), forced marriages, dowry demands, frantic killings of non-believers in communal riots, and, of course, multiple caste-based discriminations.”⁶ These human rights concerns about matters of caste and gender are far from resolved. There was recently much debate about a proposal to include a question on caste in the Indian Census of 2011.⁷ The rates of sex-selective abortion, female infanticide, child marriage, and dowry murders continue to raise concerns about the status of women in Indian and Hindu culture.⁸

In recent years, Hinduism has been intertwined with Indian politics and culture in ways that raise additional human rights concerns. The rise of the Hindu nationalist Bharatiya Janata Party (BJP) in the 1990s drew international attention to the implications of religious nationalism for tolerance and pluralism. The BJP challenged both India’s constitutional secularism and what they perceived as negative depictions of Hinduism at home and abroad. Incidents of communal violence with BJP connections have also drawn international attention. In 2002, Muslim mobs in the Indian state of Gujarat attacked a train carrying Hindu activists returning from a Hindu

⁵ Menski, “Hinduism and Human Rights,” 79.

⁶ *Ibid.*

⁷ See “Census 2011 to Include Caste,” *The Hindustan Times* (New Delhi) May 7, 2010; Jason Overdorf, “Don’t Ask, Don’t Tell, Don’t Count,” *Global Post* (Boston), June 5, 2010; D’Vera Cohn “India’s Census and the Caste Question,” Pew Research Center, June 9, 2010; “India Approves Caste-Based Census,” BBC News, August 10, 2010.

⁸ For further analysis of the status of women in India and the Hindu tradition, see Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000).

religious site at Ayodhya, previously the site of the 500-year-old Babri mosque that was demolished by a Hindu mob in 1992. In a tenth-anniversary attack, the Muslim mobs set two train cars on fire, sending fifty-eight passengers to horrific deaths. In response, Hindu mobs destroyed Muslim businesses, reportedly raped Muslim women, and killed nearly a thousand Indian Muslims.⁹ These incidents have raised concerns about the capacity of Hinduism, in its recent nationalist and political iterations, to support policies of toleration and religious pluralism that many see as necessary supports for human rights, particularly human rights pertaining to religion.

Scholars and practitioners of non-Western religions are right to point out, as Menski has, that the human rights community, reflecting a Western presumption of air-tight separation of religion from law and politics, often overlooks the more subtle relationships among religion, culture, and society—including the potential for religion to be not just a negative hindrance to the realization of human rights, but also a positive source of support. The Hindu tolerance of a multiplicity and diversity of beliefs, deities, practices, and rituals—along with the over-arching ethical principle of *dharma*--is suggestive of a concern for both universality and harmony of rights and duties that can be the basis for Hindu understanding of human rights. As leading Hindu scholar Arvind Sharma has explained, “Hinduism is conscious of its universalism because it considers consciousness to be the most universal dimension of existence.”¹⁰ What this means, Sharma adds, is that “Hinduism’s *raison d’être* should continue to be tolerance . . . the acceptance of all the religions of the world by all human beings as the inalienable religious

⁹ For analysis of these and other aspects of Hindu nationalism, see Martha C. Nussbaum, *The Clash Within: Democracy, Religious Violence, and India’s Future* (Cambridge, MA: Belknap Press of Harvard University, 2007).

¹⁰ Arvind Sharma, *Are Human Rights Western?: A Contribution to the Dialogue of Civilizations* (New York: Oxford University Press, 2006), 62

heritage of every human being.”¹¹ In other words, as Gandhi put it, “Christ can save, and Hindus can still be Hindus.”¹²

Buddhism. Buddhism, like Hinduism and for some of the same reasons, has also often suffered from misunderstanding and mischaracterization in the West when it comes to human rights and social ethics. Buddhism emerged as an alternative offshoot from Hinduism in the sixth century B.C.E., when Prince Siddhartha Gautama, the son of a powerful ruler of a small Indian kingdom defied his father, left his wife and children behind, and set out to experience the real world in his twenty-ninth year. A sage had foretold that the prince would become either an ascetic or a monarch. His father had sought to prevent asceticism from taking hold by raising his son in a life of royal luxury. Having never experienced human suffering, Gautama found the hardships of the world to be a rude awakening. On his journey, he encountered a holy man who appeared to embody perfect happiness and serenity as a result of attaining complete liberation (*nirvana*) from worldly suffering through enlightenment. The shock of the experience would eventually lead to Gautama’s awakening to compassion and benevolence, such that he would come to be known as Gautama Buddha, or more simply the Buddha, meaning the “enlightened one.” The aim of Buddhist practice is for each person, in the manner of the Buddha to realize through enlightenment the Buddha nature that exists within all sentient beings, but is concealed by the distortions of desire, anger, and ignorance.

Buddhism shares with Hinduism the notions of *dharma*, *karma*, and liberation from the material world, but with a somewhat more unified doctrinal sense of how to manage these along a path toward enlightenment. Central among these principles are the Four Noble Truths, namely that: (1) life is suffering, (2) suffering is caused by craving and attachment, (3) craving and

¹¹ Ibid., 94.

¹² Ibid., 113.

attachment can be overcome, (4) and that the road to this overcoming is the Eightfold Path. The Eightfold Path includes: (1) right understanding, (2) right purpose, (3) right speech, (4) right conduct, (5) right livelihood, (6) right effort, (7) right alertness, and (8) right concentration. There are important correlations between certain of these “rights”—for example, speech and livelihood—and the rights that have been protected in international human rights conventions. The concern for alertness and concentration might be the basis of educational and labor rights, or political rights of thought, conscience, and belief. The ability to act in accordance with right understanding, purpose, conduct, and effort might be seen as the basis of political rights or broader rights of development. Indeed, there are important resonances between the Buddhist Eightfold Path and human rights philosopher Martha Nussbaum’s list of basic human capabilities as a basis for human rights and development.¹³

The mystical qualities of Buddhist enlightenment and emphasis on individual practice have caused Buddhism, like Hinduism, often to be perceived as disengaged from the worldly realm of human rights. This perception of disengagement, however, has changed in recent decades, largely through the efforts of the contemporary social and political activist movements known as “Engaged Buddhism.” Sallie B. King, a leading scholar of Engaged Buddhism, describes these movements as having “deeply incorporated the language of human rights into their campaigns to bring about fundamental political changes in their home countries.”¹⁴ These activists include such estimable human rights advocates as Thich Nhat Hanh of Vietnam, Aung San Suu Kyi in Burma, and the Dalai Lama in Tibet. Indeed, King maintains, “While there is

¹³ See Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Belknap Press of Harvard University, 2011), 33-34.

¹⁴ King, 105. See also Sallie B. King, *Socially Engaged Buddhism* (Honolulu, HI: University of Hawaii Press, 2009); Sallie B. King, *Being Benevolence: Social Ethics of Engaged Buddhism* (Honolulu, HI: University of Hawaii Press, 2006); Christopher S. Queen, *Engaged Buddhism in the West* (Somerville, MA: Wisdom Publications, 2000); Christopher S. Queen, *Engaged Buddhism: Buddhist Liberation Movements in Asia* (Albany, NY: State University of New York Press, 1996).

debate among Buddhist intellectuals about the extent to which the concept of human rights is compatible with Buddhist culture, Buddhist activists continue to rely heavily upon the language of human rights as an integral part of their work.”¹⁵ Admitting that “working out a properly Buddhist framework for understanding and justifying the use of human rights language is a complex business,” King maintains that “Buddhist intellectuals who embrace the notion of human rights have given thoughtful explanations of how they are able to ground this embrace of human rights in properly Buddhist concepts, principles, and values.”¹⁶

The pursuit of this Buddhist foundation is complicated, King observes, by Buddhism’s formal lack of a concept of “rights.” Nonetheless, she argues, “Buddhism does assign a high value to human beings, proclaims the inherent equality of human beings, and advocates for moral behavior, nonviolence, and human freedom. These traditional values form the foundation of Buddhist justifications for embracing human rights.”¹⁷ King identifies five sources of Buddhist justification of human rights.¹⁸ First, Buddhism recognizes the inherent dignity of the human being in the teachings on the “preciousness of human birth” and innate and universal capacity for “human enlightenability” in all sentient beings. All human beings possess this Buddha Nature. Second, the Five Lay Precepts of Buddhism against killing, theft, lies, sexual misconduct, and the ingestion of intoxicants set forth a moral code that gives “negative claim-rights” to those who might be harmed by these practices. Third, the Buddhist tradition has a strong commitment to human equality, as manifest in the Buddha’s willingness to teach all who would listen and his principled rejection of the caste system. Fourth, Buddhism is strongly committed to an ethic of

¹⁵ Ibid., 103.

¹⁶ Ibid., 106.

¹⁷ Ibid., 107.

¹⁸ Ibid., 106-09.

nonviolence and, more positively, to benevolence and compassion toward others. Finally, Buddhism is committed to human freedom, particularly by individuals in their decisions about their own spiritual path as determined by their own experience, rather than external sources. The Buddha's dying words about this matter--with apologies to the later John Donne--are reported to have included the recommendation, "Be islands unto yourselves. . . . Be a refuge to yourselves."¹⁹ This freedom principle, according to King, constitutes "one of the most thoroughly Buddhist of all potential Buddhist justifications for human rights: the freedom to pursue Buddhahood, or self-perfection, is our innate right as human beings, based upon the deepest level of our identity as human beings."²⁰ The principle of freedom could give rise to a "full list of human rights," King maintains, on the basis of the recognition that they are important supports for "the pursuit of spiritual self-development."²¹ Extrapolating from self-development to social development, there is again resonance with Nussbaum's basic human capabilities and related international human rights. The Buddhist tradition, through its core principles, the contemporary Engaged Buddhist movement, and such recent engagement as the "Saffron Revolution" uprising of Burmese monks against the authoritarian Myanmar government, is a repository of human rights wisdom and practice.

Confucianism. In China, roughly contemporary with the development of Buddhism in India in the sixth-century B.C.E., a new ethical and philosophical system emerged in connection with the philosopher Confucius. After Confucius' death, the tradition was further developed in the fourth century B.C.E. by the philosophers Mencius and Xunzi. More of a moral and ethical philosophy than a religion, Confucianism sought to elaborate principles of ethical and humane

¹⁹ Ibid., 108.

²⁰ Ibid., 109.

²¹ Ibid.

administration of government as a means of political and social reform. It emphasized personal moral development along with obedience to forms of proper conduct (*li*) dictated by different social relationships. The six relationships that are the focus of Confucianism are: (1) parent and child, (2) ruler and minister, (3) government officials, (4) husband and wife, (5) older and younger siblings, and (6) friend to friend. All of these relationships are understood to be founded upon a profound principle of benevolence, compassion, and love (*jen*). The profound emphasis on filial piety of children toward parents is a distinctive feature of Confucianism that has sometimes been grafted onto other relationships, particularly the political relationships between rulers and the ruled. Family structures and virtues have, thus, been extended to other realms.²² But right relations in each of the six realms are thought to conduce to a general social harmony.

Confucianism shares with Hinduism, Buddhism, and other Eastern religions an emphasis on humaneness, compassion, tolerance, harmony, and duty—all of which can contribute to a culture of human rights. The notion of love (*jen*) that is properly manifest in relational conduct (*li*) incorporates an understanding of reciprocity that is often described as the Confucian “Golden Rule”—translated as “do not impose on others what you yourself do not desire.”²³ Joseph Chan, a scholar of Confucian political thought, notes that this reciprocal aspect of the tradition extends beyond the conventional relationships in observing, “To be sure, Confucianism does place significant ethical constraints upon human action and a good number of these have to do with social roles. But it would be a mistake to think that Confucianism sees all duties, or rights if any, as arising solely from social relationships. . . . Although Confucianism does place great emphasis

²² For more on Confucian understandings of the family and society, see Patricia Buckley Ebrey, “Confucianism,” in *Sex, Marriage, and World Religions*, ed. Don S. Browning, M. Christian Green, and John Witte, Jr. (New York: Columbia University Press, 2006).

²³ Joseph C. W. Chan, “Confucianism and Human Rights,” in *Religion and Human Rights: An Invitation* (New York: Oxford University Press, 2011), 92.

on relationships, it is not a purely role-based or relation-based ethics. Confucian ethics of benevolence is ultimately based upon a common humanity rather than differentiated social roles—it carries ethical implications beyond these roles. . . .Confucianism can accept non-role-based moral claims.”²⁴

In a related observation, Chan also debunks the stereotype of Confucianism as having an inescapably collectivist ethic. “I think it is fair to say that Confucianism does not give importance to the idea of individuals freely choosing their own ends, whatever these ends may be,” Chan argues. “The emphasis is more on acting rightly than freely, and to act rightly is to act in accordance with one’s best understanding of the requirement of Confucian morality. But Confucianism never denounces or belittles individual interests understood as the needs and legitimate desires of individuals.”²⁵ As for the implications for international human rights, Chan maintains, “In light of this understanding, we may conclude not only that Confucian thought would not oppose basic individual interests as constituting the common good, but rather that it would take them as a basis for a legitimate social and political order. So Confucianism would not reject human rights on the ground that they protect fundamental individual interests. . . . Social order and harmony can only be affirming and protecting people’s interests in security, material goods, social relationships, and fair treatment. On these issues, at least, there is no incompatibility between Confucianism and the concept of human rights.”²⁶

The main incompatibility that Chan sees between the Confucian tradition and human rights has to do with the difference between an instrumental function of human rights as an “important device to protect people’s fundamental interests” and a non-instrumental function as

²⁴ Ibid., 91-92.

²⁵ Ibid., 92.

²⁶ Ibid., 93.

“necessary expressions of human dignity or worth.”²⁷ Confucianism, Chan argues would agree with the former, but not the latter, accepting human rights in a “fallback-instrumental role,” rather than as an “abstract ideal” of human dignity, and resisting “any view that tightly links human dignity with rights as the capacity to make rights claims.”²⁸ Thus, in Chan’s view, “Confucians would regard human rights as . . . important when virtuous relationships break down and mediation fails to reconcile conflicts. However, human rights are not necessary for human dignity or constitutive of human virtues. To avoid the rise of rights talk, Confucians would prefer to keep the list of human rights short. They would restrict it to civil and political rights, not because social and economic needs are less important, but because these rights are more suitable for legal implementation.”²⁹

Religion and Human Rights in the West

Judaism. Parallel to these developments in religion and human rights in the East, new understandings of rights were emerging in the deserts of the Middle East that would inform later rights understandings in the West. The first of these, chronologically, was Judaism, which grew out of the Noahide Covenant with the Jews as the chosen people after the great flood and was reinforced with the Mosaic Covenant that included the Decalogue, or Ten Commandments. For David Novak, a scholar of Jewish religion and philosophy, the Jewish tradition raises the question “of whether a ‘human’ right can only be exercised by an individual or whether a human collective can exercise a right too,” particularly when it comes to “specifically Jewish duties,” that “only members of the covenant between God and Israel can exercise because they alone are

²⁷ Ibid., 94.

²⁸ Ibid., 97, 94.

²⁹ Ibid., 99.

the people obligated by the full Torah.”³⁰ There are three kinds of rights in Judaism, Novak points out: “(1) those rights that God justifiably claims for himself, (2) natural rights that all humans justifiably claim for themselves, individually or collectively, and (3) Torah rights that Jews justifiably claim for themselves, individually or collectively.”³¹ Along with this third set of rights flowing from the covenant (*ha-berit*), the Jewish understanding of rights emphasizes normative commandments (*mitsvot*) as required by the covenant and by normative law (*halakhah*) as interpreted by Jewish rabbinical and legal authorities. The Jewish understanding of duty (*mitsvah*) is one in which “a right engenders a duty instead of a duty engendering a right.”³²

These rights and duties are manifest in relations between humans and God and between humans and other humans, including the relationship between the individual and the community. That humans are created in the image of God (*be-tselem elohim*) is the basis for both the dignity of the human being in which “humans share with God the personal attributes of intellect and will” and the basis rights, including the specific right of religious freedom by which humans are “capable of being addressed by God” and possessed of the “capacity freely to accept or reject what God has commanded one to do.”³³ In this way, religious freedom in Judaism is construed less as freedom choice, than as freedom to assent to the invitation and command of God. In relations between humans, Jews are to observe the biblical commandment “you shall love your neighbor as yourself” (Leviticus 19:18). This rendering of the Golden Rule in the Jewish tradition is the foundation of the moral law, sometimes also encountered in the negative

³⁰ David Novak, “Jewish Theory of Human Rights,” in *Religion and Human Rights: An Invitation*, ed. John Witte, Jr. and M. Christian Green (New York: Oxford University Press, 2011), 27.

³¹ *Ibid.*, 28.

³² *Ibid.*, 30.

³³ *Ibid.*, 31.

formulation of Rabbi Hillel the Elder: “What is hateful to you, do not do to your fellow.”³⁴

Relations with fellow Jews are lived out under the understanding that they are both created in the image of God and fellow members of a covenant community. Relations with non-Jews are governed by the principle pertaining to “resident sojourners” (*ger toshav*) under which non-Jews who accept the basic moral law can “enjoy the same civil rights and be obligated by the same duties as a full-fledged Jewish citizen of that polity.”³⁵ Jews living in foreign lands, as many have in the course of various Jewish diasporas, are expected to adhere to the principle of *dina d’malkhuta dina*—“the law of the land is the law”—a principle of political obedience to the law, except where it conflicts with *halakhah*. Orthodox Jewish communities around the world retain rabbinical courts (*bet din*) charged with adjudicating matters of ritual law and personal status, including the issuance of bills of divorce.

Islam. A second Middle Eastern religion, developing millennia later in the seventh century C.E., was Islam. Muslim understandings of human rights have been a major topic of debate in international human rights circles since the inception of the modern human rights regime in the 1948 signing of the UDHR, but particularly in recent decades through vocal challenges to Western human rights norms and the proposal of Islamic declarations of human rights.³⁶ Islam is also an extremely diverse and fast-growing religion, extending through large swaths of Africa and Asia, from Morocco to Indonesia, with sizeable immigrant communities in Europe and North America, in a way that does not admit easy generalization. Recent debates over Islam and human rights have focused significantly on matters of gender and the status of

³⁴ *Ibid.*, 35.

³⁵ *Ibid.*, 36.

³⁶ See Universal Islamic Declaration of Human Rights (Paris and London, September 19, 1981), accessible at: http://www1.umn.edu/humanrts/instree/islamic_declaration_HR.html; Cairo Declaration on Human Rights in Islam (Cairo, 1990) U.N. Doc. A/CONF. 157/PC/62/Add. 18 (June 9, 1993); Arab Charter on Human Rights (Cairo: League of Arab States, 1994), accessible at: <http://www.unhcr.org/refworld/docid/3ae6b38540.html>.

women, with attention, as well, to Islamic views of war and peace in the aftermath of recent terrorist incidents, including the September 11, 2001, attacks on New York and Washington, by al-Qaeda and other Islamic terrorist groups.

Abdullahi An-Na'im, an Islamic law scholar, argues that the framing of the discussion in terms of the compatibility of human rights with Islam is both problematic and counterproductive. This "assumes that there is a verifiably identifiable monolithic 'Islam' to be contrasted with a definitively settled preconceived notion of 'human rights,'" when in light of the diversity and decentralized leadership structure of Islam, the "most anyone can legitimately speak of is his or her view of Islam, never Islam as such, and of human rights as they are accepted around the world, including by Muslims."³⁷ "[The] empirical assertion, that these human rights are actually accepted by the vast majority of people around the world, cannot be true if it is rejected by Muslims, an estimated quarter of humanity today."³⁸ The counter-productivity of the universality assumption, An-Na'im argues, lies in the reality that "a believer will not voluntarily accept that claim if it is incompatible with her religious beliefs."³⁹ Indeed, he further argues, "To attempt to impose this notion on Muslims is not only imperialist, which is by definition a total negation of the concept of human rights itself, but also unsustainable in practice because it cannot be coercively enforced."⁴⁰ Instead, he argues, the principle should be that, "Believers have the right to found their commitment to human rights on their own religious beliefs, provided that they are willing to concede the same right to others, each according to their own religious or philosophical convictions."⁴¹

³⁷ Abdullahi Ahmed An-Na'im, "Islam and Human Rights," in *Religion and Human Rights: An Invitation*, ed. John Witte and M. Christian Green (New York: Oxford University Press, 2011), 56.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

But beyond these necessary caveats about Muslim diversity and human rights universality, there are principles within Islam that can be seen as providing certain core commitments to human rights analogous to those of other world religions. As Islamic legal scholars, Azizah Y. Al-Hibri and Raja M. El Habti have pointed out, “The Qur’an states that God created all humanity from a single *nafs* (soul or spirit), created from like nature its mate, and from the two made humanity into nations and tribes so that they may get to know each other, that is, to enjoy and learn from each other’s diversity. (Q. 4:1, 49:13) The only proper criterion for preference among people is that of piety, a quality achievable by anyone (Q. 49:13).”⁴² This principle has been interpreted as both an affirmation of Muslim diversity and a basis for gender equality.⁴³ In interpreting these Qur’anic passages on diversity, they further note that “Muslim scholars permitted Muslims in various countries to import into their laws cultural norms that do not contradict Muslim law.”⁴⁴ This principle allowed such practices as polygamy to exist in the Muslim world, though with limits on the number of wives and expectations of that also reflect Muslim ambivalence about the justice of the marital relationships that may result, particularly for women. Other practices, such as “honor killings” for the crime of extramarital sex (*zina*) have been more widely proscribed under Islamic law. Other passages in the Qur’an suggest a basis for educational (Q. 39:9) and economic (Q. 4:32) rights for both men and women,⁴⁵ a reflection of the concern for intellectual and social development in Islam that sustained centuries of Islamic scholarship and exchange of ideas with the West, along with economic development through the interest-free system of Islamic finance under Sharia. Islam also contains a principle of religious

⁴² Azizah Y. Al-Hibri and Raja’ M. El Habti, “Islam,” in *Sex, Marriage, and Family in World Religions*, 151.

⁴³ For more on the status of women in Islam, see Riffat Hassan, “Rights of Women in Islamic Communities,” in *Religious Human Rights in Global Perspective: Religious Perspectives*, ed. John Witte, Jr. and Johan D. Van der Vyver (The Hague: Martinus Nijhoff, 1996), 361-86.

⁴⁴ Al-Hibri and El Habti, “Islam,” 156.

⁴⁵ See *ibid.* 218-222.

freedom in the Qur’anic injunction that there can be “no compulsion in religion” (Q. 2:256), as well as principles protecting the religious rights of non-Muslims (*dhimmi*) residing in Muslim lands.⁴⁶

The question of Sharia has been a prominent one in international human debates in recent decades, particularly around the common practice of Muslim nations inserting reservations into international human rights agreements pledging adherence only insofar as the content does not contradict Sharia. Sharia is both a system of religious law and a moral code, including criminal and economic law and political and civil liberties, as well as areas of personal law dealing with sexuality, marriage, and family, and ritual laws addressing procedures for religious observance. The comprehensiveness with which Sharia governs Muslim life, sometimes to the severe qualification—and sometimes abrogation—of human rights is a topic of particular concern. As the Islamic scholar Hisham Hellyer has observed, “Religion in the Islamic sense ‘does not concede the dichotomy of the sacred and the profane’; it includes both the temporal and material world (*al-dunya*), and the world beyond (*al-akhirah*). . . . A rights discourse sustainable within Islam flows from metaphysical and spiritual considerations that at the very least do not contradict religion, and ideally derive from it.”⁴⁷ Indeed, in the same vein as An-Na’im, Hellyer maintains, “If religion is not relevant for all spheres of activity, it is simply not religion, as far as believers are concerned.”⁴⁸ Hellyer further observes that, in contradistinction to Islam, “Rights discourse has different points of departure and remains a

⁴⁶ For a discussion of this principle against religious compulsion and related themes of tolerance and democracy in Islam, see Irene Oh, *The Rights of God: Islam, Human Rights, and Comparative Ethics* (Washington, DC: Georgetown University Press, 2007), esp. ch. 4. For discussion of the religious rights of dissidents and non-Muslims in Islam, see Donna E. Arz, “The Treatment of Religious Dissidents Under Classical and Contemporary Islamic Law,” in *Religious Human Rights*, 387-454.

⁴⁷ Hisham A. Hellyer, “Worldviews and Universalisms: Islam and the West,” in *Religion and Rights: The Oxford Amnesty Lectures*, ed. Wes Williams (Manchester, U.K.: Manchester University Press, 2011), 88.

⁴⁸ *Ibid.*, 89.

secular discourse at least in its origins. Rights accorded to the individual in Islam do not find their authenticity or authority by claiming interpretations of rationality or reason, even though reason and the rational may indeed be brought to bear on the issue in deeply influential ways.”⁴⁹ The heart of the human being in Islam is thought to contain the divine, Hellyer notes, in a way that makes the individual human being a “representative of God Himself on earth (*khalifat-l-Allah fi-l’ard*)”⁵⁰ and demands a purity and comprehensiveness of submission in most, if not all, areas of life in a way that is challenging for secular conceptions of human rights.

Christianity. The development of human rights in the Western Christian⁵¹ tradition that has been so influential in the modern development of human rights at the United Nations and other fora has its origins both in Jewish law and in classical Roman understandings of rights and liberties, particularly as elaborated in the medieval and early modern period. These Roman understandings form an intricate latticework of arguments about individual and group rights and liberties which were eventually informed and transformed by Stoic and Christian ideas. Both before and after the Christianization of Rome in the fourth century C.E., classical Roman jurists sometimes used the Latin term “*ius*” to identify a subjective “right” in the sense of a person, a subject, “having a right” against another that could be defended and vindicated. These ideas would later be developed by medieval Catholic canonists and moralists and expanded by later neo-scholastic writers.

The rediscovery of the ancient texts of Roman law in the late eleventh and twelfth centuries—made available to Western Christian scholars in Latin translations from the Arabic

⁴⁹ Ibid., 90.

⁵⁰ Ibid.

⁵¹For reasons of space we omit here a discussion of human rights principles in the smaller, but very diverse, tradition of the Orthodox Churches of Eastern Christianity. For this see John McGuckin, “The Issue of Human Rights in Byzantium and the Orthodox Tradition,” in *Christianity and Human Rights*, 173-89; John Witte, Jr. and Michael Bourdeaux, eds. *Proselytism and Orthodoxy in Russia: The New War for Souls* (Eugene, OR: Wipf & Stock, 2009).

versions in use by Muslim scholars in the Middle East and in such polyglot and interreligious centers as Cordoba the Andalusia region of Spain⁵²--helped to trigger a renaissance of subjective rights talk in the West. Medieval jurists differentiated all manner of rights and liberties. They grounded these rights and liberties in the law of nature (*lex naturae*) or natural law (*ius naturale*), and associated them variously with a power (*facultas*) inhering in rational human nature and with the property (*dominium*) of a person or the power (*potestas*) of an office of authority (*officium*). Medieval jurists repeated and glossed many of the subjective rights and liberties set out in Roman law--especially the public rights and powers of rulers, the private rights and liberties of property. They also set out what they called the "rights of liberty" (*iura libertatis*), which comprised a whole series of freedoms, powers, immunities, protections, and capacities for different groups and persons.⁵³ Among the most important of these were the rights protecting the "freedom of the church" from secular authorities. These early formulations of religious group rights against secular authorities would become axiomatic for the later Western tradition -- and now figure prominently in modern concepts of religious autonomy, corporate free exercise rights, and the rights of legal personality for religious groups. In the twelfth and thirteenth centuries, canon law jurists refined the rights further, promulgating rules and rights that are still at the heart of the modern *Code of Canon Law* that governs Catholicism worldwide.

These rights set out at medieval Catholic canon law were, in practice, often narrowly defined in scope and limited in application. Medieval Christendom was no liberal democracy--as the blood of too many martyrs can attest. But a great number of the basic public, private,

⁵² See Maria Rosa Menocal, *The Ornament of the World: How Muslims, Jews, and Christians Created a Culture of Tolerance in Medieval Spain* (Boston: Little, Brown, and Company, 2002); Richard Rubenstein, *Aristotle's Children: How Christians, Muslims, and Jews Rediscovered Ancient Wisdom and Illuminated the Dark Ages* (Boston: Houghton Mifflin, 2003).

⁵³ Quoted in Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Wm. B. Eerdmans, 1997), 57.

penal, and procedural rights that are recognized by state and international political authorities today were prototypically formed in this medieval period. These basic rights formulations came to be seen as “natural rights”—rights inhering in a person’s human nature—regardless of that person’s status within church, state, or society. This natural rights theory was greatly expanded in the later Middle Ages and early modern periods through the work of such scholars as William of Ockham, Bartolomé de las Casas, Francisco de Vitoria, Fernando Vázquez, Francisco Suarez, and others. Vitoria was especially prescient in pressing for the rights of indigenous peoples as well as the rights of soldiers and prisoners of war – both critical topics in the budding international law of the day.

This development of human rights within the medieval and early modern Catholic tradition gave way in subsequent centuries to contestation around the notion of human rights in general, and of religious human rights in particular. Much of this was reaction to the rise of a modernity in which principles of Enlightenment liberalism seemed to be winning the day in ways that threatened Church authority and autonomy and which seemed inadequate buffers against the rise of forces of communism, fascism, and revolution. As Catholic theologian Charles Curran has observed, the Church “staunchly opposed human rights in the eighteenth and nineteenth centuries and well into the twentieth century,” resisting both “modern liberties and the human rights associated with them.”⁵⁴ Pope Leo XIII, author of the papal social encyclicals that laid the groundwork for the tradition of Catholic social thought that subsequently led the articulation of all manner of rights and duties in the name of social justice and the common good, was also opposed to religious liberty and the freedom of worship as contraventions of “the chiefest and

⁵⁴ Charles E. Curran, “Human Rights in the Roman Catholic Tradition,” in *Religion and Rights: The Oxford Amnesty Lectures*, Wes Williams, ed. (Manchester, U.K.: Manchester University Press, 2011), 73.

holiest human duty”⁵⁵ to the one true God in the one true religion. It would be seven-five years before Pope John XXIII would support the concept of human rights in the encyclical *Pacem in terris* and two more years before the Second Vatican Council in 1965, under the influence of the American Jesuit theologian John Courtney Murray would embrace the right to religious freedom for all human beings. In recounting these developments, Curran argues that the more recent teachings of Pope John Paul II and Pope Benedict XVI have returned in ways, to the earlier privileging of truth over freedom when it comes to religion and human rights.⁵⁶

While “freedom of the church” was the initial manifesto of the twelfth-century Papal Revolution, “freedom of the Christian” was the initial manifesto of the sixteenth-century Protestant Reformation. Martin Luther, Thomas Cranmer, Menno Simons, John Calvin, and other leading sixteenth-century Protestant reformers all turned to Biblical texts to press for rights. They were particularly drawn to the many New Testament aphorisms on freedom. They were also drawn to the Bible’s radical calls to equality.⁵⁷ These and other biblical passages inspired Luther and his colleagues to demand freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privileges, and freedom of the local clergy from central papal rule and oppressive princely controls.

One important Protestant contribution to Western rights talk was to link human rights with biblical duties. Early Protestants believed that God had given each human the freedom needed to choose to follow the commandments of the faith. Freedoms and commandments, rights and duties belonged together in their view. To speak of one without the other was ultimately destructive. Rights without duties to guide them quickly became claims of self-

⁵⁵ Ibid. 73, quoting Pope Leo XIII, *Libertas praestantissimum* (1888).

⁵⁶ See *ibid.*, 78-81.

⁵⁷ Galatians 3:28, 5:1,13; 2 Corinthians 3:17; John 8:32,36; Romans 8:21 (Revised Standard Version).;

indulgence. Duties without rights to exercise them quickly became sources of deep guilt. Protestants thus translated the moral duties set out in the Bible into reciprocal rights. Protestants focused first on the duties set out in the Decalogue, or Ten Commandments, which they took to be the most pristine summary of the natural law. The First Table of the Decalogue, they noted, prescribes duties of love that each person owes to God—to honor God and God’s name, to observe the Sabbath day of rest and holy worship, to avoid false gods and false swearing. The Second Table prescribes duties of love that each person owes to neighbors—to honor one’s parents and other authorities, not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet. A person’s duties toward God can be cast as the rights of religion. Each person’s duties towards a neighbor, in turn, can be cast as a neighbor’s right to have that duty discharged. Starting with this biblical logic, Protestant writers spun out endless elaborations of rights based on other biblical duties toward the poor and needy, widows and orphans, slaves and sojourners, the persecuted and imprisoned, the sick and the grieving, and other vulnerable parties to food, shelter, support, nurture, comfort, education, housing, and more.

Another major Protestant contribution to the religious foundation of rights was its emphasis on the role of the individual believer in the economy of salvation. The Protestant Reformation did not invent the individual or individual rights. But sixteenth-century Protestant reformers gave new emphasis to the (religious) rights and liberties of individuals at both religious law and civil law. The Anabaptist doctrine of adult baptism, in particular, built on a voluntarist understanding of religion in which believers were called to make a conscientious choice to accept the faith—metaphorically, to scale the wall of separation between the fallen world and the perfection of Christ in the realm of religion. Later Free Church followers converted this cardinal image into a powerful platform of liberty of conscience, free exercise of

religion, and separation of church and state—not only for Christians but eventually for all peaceable believers. Their views had a great influence on the formation protections of religious liberty in the American Constitution. They would later come to expression in international human rights instruments that guaranteed the right freely to choose and change one’s religion.

An important contribution to Western rights talk was the Protestant logic of revolution against tyrants who persistently and pervasively violated the people’s “fundamental rights.” Protestant jurists and theologians developed a theory of political revolution that was based effectively on a Christian government contract or covenant theory. Every political government, they argued, is formed by a tacit or explicit covenant or contract sworn between the rulers and their subjects before God. If any of the people violate the terms of this political covenant and become criminals, God empowers the rulers to prosecute and punish them, up to and including the death penalty in extreme cases. In turn, if any of the rulers violate the terms of the political covenant and become tyrants, God empowers the people to resist and to remove them from office, through lethal force if necessary.

The issue that remained for early modern Protestant political theorists was how to determine which rights were so “fundamental,” so “inalienable,” that, if chronically and pervasively breached by a tyrant, triggered the foundational right to organized resistance and revolt against the tyrant. The first and most important rights, they reasoned, had to be the people’s religious rights. Christians, after all, are first and foremost the subjects of God and called to honor and worship God above all else. If the magistrate breaches these religious rights, then nothing can be sacred and secure any longer. By 1650, Protestants had used this logic to develop and defend almost every one of the “fundamental rights and liberties” that would appear, a century and a half later, in the United States Bill of Rights of 1791. They set out these

fundamental rights in detailed constitutions and bills of rights written for the Netherlands, Scotland, England, and the American colonies in the seventeenth century.

A third major Protestant contribution to Western rights talk was its development of new understandings of the relationship of church and state, and new ways of constructing the rights of the church. The Protestant Reformation permanently broke the unity of Western Christendom under central papal rule, and thereby laid the foundations for the modern constitutional system of confessional pluralism. Particularly prescient was the Anabaptist Reformation idea of building a “*Scheidingsmaurer*,” a “wall of separation” between the redeemed realm of religion and the fallen realm of the world. Anabaptist religious communities were ascetically withdrawn from the world into small, self-sufficient, intensely democratic communities, governed internally by biblical principles of discipleship, simplicity, charity, and Christian obedience.

Also influential was the Calvinist model of governing the church as a democratically-elected consistory of pastors, elders, and deacons. These consistories featured separation among the offices of preaching, discipline, and charity, and a fluid, dialogical form of religious polity and policing centered around collective worship, the congregational meeting, and the democratic election of religious officials with term limits. Later Calvinists in Europe and North America would use these democratic church polities as prototypes for democratic state polities with separation of powers, democratic election, term limits, and town hall meetings with the right of all members to petition the political authorities. Both Calvinists and Anabaptists were critical in the development of the logic of separation of religion and the state that dominates modern Western constitutionalism.

Religion and the Modern International Human Rights Framework

The rights and liberties guaranteed in contemporary international and national legal systems, although having roots developed over millennia in various religious, philosophical, and cultural traditions, owe their definitive modern formulation to the promulgation of the Universal Declaration of Human Rights (UDHR) (1948), which protects rights of “thought, conscience, and belief” and guarantees freedom from religious discrimination. Four subsequent international instruments have refined these and elaborated additional protections of religious rights and liberties: (1) the International Covenant on Civil and Political Rights (the “ICCPR”) (1966),⁵⁸ (2) the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (the “Declaration on Religion or Belief”) (1981),⁵⁹ (3) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (the “Vienna Concluding Document”) (1989),⁶⁰ and (4) the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (the “Minorities Declaration”) (1992).⁶¹

The ICCPR distinguishes between the right to freedom of religion or belief and the freedom to manifest one’s religion or belief. The right to freedom of religion (the freedom to have, to alter, or to adopt a religion of one’s choice) is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner. This is a contested issue today among some Muslim groups who recognize the right to enter Islam, but not

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⁵⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. (Dec. 16, 1966), Arts. 18, 20/2, 2, 26.

⁵⁹ Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR Supp. (no. 151), U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

⁶⁰ Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, 28 I.L.M. 527.

⁶¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/Res/47/135/Annex, 18 December 1992.

to exit it; those who choose to leave the Muslim faith are apostates who deserve death. Freedom to manifest or exercise one's religion (individually or collectively, publicly or privately) may be 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. The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect any of the listed state interests.⁶² The ICCPR also calls for States Parties to prohibit "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence" and provides that the principles of equal treatment and nondiscrimination should apply to religion or belief.

The Declaration on Religion or Belief elaborates the religious liberty provisions adumbrated in the ICCPR. Like the ICCPR, the Declaration on its face applies to believers both "individually or in community," and "in public or in private." The Declaration catalogues a number of specific rights to "freedom of thought, conscience, and religion," including the rights to worship or assemble and to establish and maintain places for these purposes; to establish and maintain appropriate charitable or humanitarian institutions; to make, acquire, and use articles and materials related to religious rites or customs; to write, issue, and disseminate relevant publications in these areas; to teach a religion or belief in suitable places; to solicit and receive voluntary financial and other contributions; to train, appoint, elect, and designate appropriate leaders; to observe days of rest and celebrate holy days; and to establish and maintain communications with individuals and communities, both nationally and internationally, on matters of religion and belief.⁶³ Additional provisions detail the religious rights of parents and

⁶² See Symposium, "The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief," *Emory International Law Review* 19 (2005): 465-1320.

⁶³ The 1990 Copenhagen Document adds to the 1981 Declaration "the right of everyone to have conscientious objection to military service" and calls for "various forms of alternative service ... in combatant or civilian service"

children. The Declaration also includes more elaborate prohibitions than the ICCPR on religious discrimination and intolerance, barring religious “discrimination by any State, institution, group of persons, or person.” Accordingly, the Declaration calls on all States Parties “to take effective measures to prevent and eliminate” such discrimination “in all fields of civil, economic, political, social, and cultural life.” The Vienna Concluding Document expands the religious liberty norms of the 1981 Declaration. It provides an elaborate catalogue of the rights of religious groups to govern their own polity, property, and personnel, to establish charities, schools, and seminaries, to have access to literature, media, and religious worship items.

The refinement and articulation of these religious group rights coincides with the development in international human rights law of the “right to self-determination” of religious, cultural, or linguistic communities. The 1992 Minorities Declaration clearly spells out the government’s obligation to each of these groups to protect and encourage conditions for the promotion of the concerned group identities of minorities, afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong, not discriminate in any way against any person on the basis of his or her group identity, and take actions to secure their equal treatment at law. The Minorities Declaration further provides that: “States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”⁶⁴ The recent 2007 United Nations Declaration on the Rights

“which are compatible with the reasons for conscientious objections to military service.” Document of the Copenhagen Meeting of Representatives of the Participating States of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1990), Principle 18, reprinted in OSCE/ODIHR, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (June, 2004), p. 45.

⁶⁴ 1992 Minorities Declaration, art. 4.2.

of Indigenous Peoples elaborates these rights of self-determination even further for indigenous, aboriginal, or first peoples and their distinctive sites and rites of religious identity and practice.⁶⁵

These international instruments on religion and human highlight the hottest religion and human issues that now regularly confront national and international tribunals: How to protect religious and cultural minorities within a majoritarian religious culture—particularly controversial groups like Muslims, Mormons, Baha'is, Jehovah's Witnesses, Scientologists, Unification Church members, and indigenous peoples who often bring charges of religious and cultural discrimination. How to define limits on religious and anti-religious exercises and expressions that cause offense or harm to others or elicit charge of blasphemy, defamation, or sacrilege. How to adjudicate challenges that a state's proscriptions or prescriptions run directly counter to a party's core claims of conscience or cardinal commandments of the faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to balance conflicts between the rights of parents to bring up their children in the faith and the duties of the state to protect the best interest of the child. How to protect the distinct religious needs of prisoners, soldiers, refugees, and others who don't enjoy ready access to traditional forms and forums of religious worship and expression. These issues, individually and severally, all highlight important dimensions of the right to religious freedom in a religiously pluralistic and globalized world.

Many religion and human rights issues involve religious groups, whose right to self-determination free from unwarranted state intrusion is itself often a critical issue. How to

⁶⁵ United Nations Declaration on the Rights of Indigenous Peoples, UN GAOR, A/61/L.67/Annex (2007). For a discussion of the challenges that consideration of indigenous religion poses to contemporary human rights discourse, see Ronald Niezen, "Indigenous Religion and Human Rights," in *Religion and Human Rights*, ___.

negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members or their members too little relief from secular courts. How to balance the rights of religious groups to self-determination and self-governance and the guarantees of freedom from discrimination based on religion, gender, culture, and sexual orientation. How to balance competing religious groups who each claim access to a common holy site, or a single religious or cultural group whose sacred site is threatened with desecration, development, or disaster. How to protect the relations between local religious communities and their foreign co-religionists. How to adjudicate intra- or interreligious disputes that come before secular tribunals for resolution. How to determine the proper levels of state cooperation with and support of religious officials and institutions in the delivery of vital social services – child care, education, charity, medical services, disaster relief, among others. These concerns typically arise in the context of the official registration process that many states require religion to undertake in order to be allowed to resist, in cases of interreligious competition and prestige, and in cases in which believers invoke the protection of the state from human rights abuses perpetrated by other members and institutions of their faith.

The Place of Religion in Human Rights Today

A number of distinguished commentators have argued that religion should have no place in a modern regime of human rights. Religions may well have been the sources of human rights in earlier eras, and may even have helped to inspire the modern human rights revolution. Nonetheless, these skeptics argue, religion has now outlived its utility. Religion is, by its nature, too expansionistic and monopolistic, too patriarchal and hierarchical, too antithetical to the very ideals of pluralism, toleration, and equality inherent in a human rights regime. Religion is also

too dangerous, divisive, and diverse in its demands to be accorded special protection. Religion is better viewed as just one another category of liberty and expression and given no more preference than its secular counterparts. Indeed, to accord religion special human rights treatment is in effect to establish it and to discriminate against non-religious parties in the same position. Purge religion entirely from special consideration, this argument concludes, and the human rights paradigm will thrive.

It is undeniable that religion has been, and still is, a formidable force for both political good and political evil, and that it has fostered both benevolence and belligerence, peace and pathos of untold dimensions. But the proper response to religious belligerence and pathos cannot be to deny that religion exists or to dismiss it to the private sphere and sanctuary. The proper response is to castigate the vices and to cultivate the virtues of religion, to confirm those religious teachings and practices that are most conducive to human rights, democracy, and rule of law.

Human rights culture needs religion--its ideas, institutions, norms, and rights claims--to survive and thrive. First, without religion, many rights are cut from their roots. For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, evangelize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to exist invariably involves rights to corporate property, collective worship, organized charity, parochial education, freedom of press, and autonomy of governance. To ignore religious rights is to overlook the conceptual, and often the historical, source of many other vital individual and associational rights.

Second, without religion, the regime of human rights becomes infinitely expandable. Many religious communities adopt and advocate human rights in order to protect religious

duties. A religious individual or association has rights to exist and act, not in the abstract, but in order to discharge discrete religious duties. Religious rights provide the best example of the organic linkage between rights and duties. Without them, rights become abstract, with no obvious limit on their exercise or their expansion, with no ontological grounding that keeps them from becoming a simple wish list of individual preferences.

Third, without religion, human rights become too captive to Western libertarian ideals. Many religious traditions cannot conceive of, nor accept, a system of rights that excludes, deprecates, or privatizes religion. Religion is for these traditions inextricably integrated into every facet of life. Religious rights are, for them, an inherent part of rights of speech, press, assembly, and other individual rights as well as ethnic, cultural, linguistic, and similar associational rights. No system of rights that ignores or deprecates this cardinal place of religion can be respected or adopted.

Fourth, without religion, the state is given an exaggerated role to play as the guarantor of human rights. The simple state versus individual dialectic of many modern human rights theories leaves it to the state to protect and provide rights of all sorts. In reality, the state is not, and cannot be, so omniscient, as is painfully demonstrated by the failed socialist experiments of the twentieth century and the fraying social welfare state of the twenty-first century. Numerous “mediating structures” stand between the state and the individual, religious institutions prominently among them. Religious institutions, among others, play a vital role in the cultivation and realization of rights. They can create the conditions (sometimes the prototypes) for the realization of first generation civil and political rights. They can provide a critical (sometimes the principal) means to meet second generation rights of education, health care, child care, labor organizations, employment, artistic opportunities, among others. They can

offer some of the deepest insights into norms of stewardship, solidarity, and servanthood that lie at the heart of third generation rights.

Finally, without religion, human rights norms have no enduring narratives to ground them. There is, of course, some value in simply declaring human rights norms of “liberty, equality, and fraternity” or “life, liberty, and property”—if for no other reason than to pose an ideal against which a person or community might measure itself, to preserve a normative totem for later generations to make real. But, ultimately, these abstract human rights ideals of the good life and the good society depend on the visions and values of human communities and institutions to give them content and coherence—to provide what Jacques Maritain once called “the scale of values governing [their] exercise and concrete manifestation.”⁶⁶ It is here that religion must play a vital role. Religion is an ineradicable condition of human lives and human communities.

Conversely, religions need human rights--both to protect them and to challenge them. There is, of course, some merit in religious believers and groups quietly accepting the current protections of a modern human rights regime—the guarantees of liberty of conscience, freedom of exercise, rights to religious self-determination, and the like. But passive acquiescence in a secular scheme of human rights ultimately will not prove effective. And failure to press the unique rights claims of religious believers and communities will eventually leave many religious beliefs, practices, and communities too vulnerable. Religious communities must reclaim their own voices within the secular human rights dialogue, and reclaim the human rights voices within their own internal religious dialogues. Religious communities must also find humane and respectful ways to attend to claims of oppression and voices of dissent coming from within their

⁶⁶ Jacques Maritain, “Introduction,” to UNESCO, *Human Rights: Comments and Interpretations* (New York: Columbia University Press, New York 1949), 1.

own houses, else risk schism or require state intervention. Religions must be both progenitors and practitioners of human rights.

Contrary to conventional wisdom, the theory and law of human rights are neither new nor secular in origin. Human rights are, in no small part, the modern political fruits of ancient religious beliefs and practices. Religious communities must be open to a new human rights hermeneutic—fresh methods of interpreting their sacred texts and traditions that will allow them to reclaim their essential roots and roles in the cultivation of human rights. Religious traditions cannot allow secular human rights norms to be imposed on them from without; they must (re)discover them from within.