

Introduction

The freedom of religion is one of the oldest and most controversial of the claims that are now recognized as forming part of the corpus of human rights. Individuals may themselves make a claim for religious freedom against their own State. The response by the State to such a claim is, ultimately, a matter of domestic policy and law. States themselves may seek to ensure that their own nationals living in other countries are free to practise their religion. Historically, this has been an aspect of the treatment of aliens but is now increasingly subsumed within the ability of States to seek to ensure that other States allow religious freedoms to all within their jurisdiction, including their own nationals. This is the area now embraced by international law under the language of 'human rights'.

Although not couched in the language of 'human rights', much of the earliest writing from which international law has grown was concerned with the relationship between God and mankind. Whereas the modern focus is upon the freedom of man to act in relation to God as he (man) feels is appropriate, the original focus was upon the capacity of God to limit the range of temporal actions permitted by man. Thus while we today are concerned with the freedom of worship and the manifestation of religious beliefs, earlier writers were concerned with the limits to the power which the secular authorities could legitimately wield with regard to their subjects, or, indeed, their enemies.

Early societies identified themselves with their deity in such a way as to make the concept of freedom of religion an irrelevance. Each people worshipped its own god(s) and those who questioned the existence and power of the titular deity questioned the authority and power of the State. The followers of one god did not generally dispute the existence of the gods of other peoples, but to worship a 'foreign' god was akin to

'treason' against the State. Individuals were free to worship those gods 'recognized' and 'adopted' by the State – but not others. It was the Jews who, perversely, adopted a different approach. They believed in a universal God and denied the existence of all others. This approach would have remained a mild eccentricity if it were not for the growth of Christianity as a 'proselytizing' and 'evangelizing' religion which sought to convert all peoples to the same brand of monotheism.

When Christianity was adopted as the official religion of the Roman Empire, religious freedom was replaced by religious oppression as enemies of the Church and enemies of the State became more or less interchangeable. Moreover, since many 'enemies of the State' were also Christian, this resulted in wars which pitted believers against believers. This provided a conundrum from which the writers of the later Middle Ages and Renaissance attempted to extricate themselves by means of the 'just war' concept. The crucial step came with the recognition that not all wars fought against non-Christian powers could automatically be considered legitimate. This marked the beginning of the end of the temporal manifestation of the spiritual claim of Christian universalism since it demonstrated that non-Christians could benefit from the application of 'just war' rules and that the 'law of nations' was not limited to 'Christian' nations. This marched hand in hand with the emergence of the growth of the sovereign State in Western Europe and combined to produce the proposition that each sovereign was entitled, under the law of nations, to regulate religious affairs within its own jurisdiction as it saw fit.

In essence, the last 300 years have seen the international community attempting to resile upon this settlement. States (or individuals) have become increasingly aware and distressed at the restrictions placed by other States upon the freedom of individuals, including the practice of their religion, and a variety of mechanisms have been used to attempt to address this. In particular, several nineteenth century treaties making territorial settlements were conditional upon the State in question respecting the religious freedoms of particular groups. Particularly noticeable in this regard was the Treaty of Berlin (1878) which, *inter alia*, obliged the newly established Romanian State,¹ as a condition of its recognition, to respect the religious liberties of its citizens, and in particular, of the Jews.

There was a direct link between the failure of this treaty and the

¹ As a general rule, the spelling of countries, places and people(s) in the text has been regularized to conform to current usage.

creation of the minorities treaty system following the First World War. At the Paris Peace Conference, Jewish lobbyists applied immense pressure to ensure that Jewish minorities were given special protection in the newly created States of Central and Eastern Europe and that these obligations be subject to an international guarantee. Although they expanded to take account of other aspects of minority protection, the original purpose of the minorities treaties was to protect the religious liberties of Jews. It need hardly be said that they proved disastrously inadequate and their failure contributed towards the adoption of an 'individual rights' approach to the protection of human rights following the Second World War. It is not entirely fanciful to observe that it is the failure of the current 'individualistic' approach to the protection of the rights of religious minorities in the Balkans which is, once again, occasioning a reassessment of the merits of the discarded minority treaty approach.

Like it or not (and many will not) it is in Europe that the formative developments have taken place. It is, then, appropriate to consider the European experience in attempting to balance the freedom of each State to regulate its internal affairs with the desire of the wider community to ensure that individuals enjoy religious freedom. Moreover, Europe enjoys a highly developed regional system of human rights protection and a sophisticated jurisprudence has developed. Rightly or wrongly, it is probable that the European experience is likely to be of greater significance to the evolution of other regional or global enforcement mechanisms than the development of these others is to be to the European. In sum, the European experience is unique, both in terms of its historical and contemporary significance, its diversity, its documentation and its development.

It is possible to protect religious liberties in a number of different ways. First, almost all international human rights instruments contain a non-discrimination clause which bars discrimination on the grounds of religion. The 'non-discrimination' question, however, does not address the issue of the substantive rights which must be enjoyed on a non-discriminatory basis. The major division is between direct and indirect guarantees. The 'freedom of religion' is the sum of many different parts, many of which are 'standard' civil and political rights, such as the freedom of assembly, the freedom of movement and the freedom of expression, and it is possible to consider the extent to which religious freedom is in fact protected by these separate heads. Religion is also a 'social' right (religious education); an 'economic' right (from the money changers in the Temple at Jerusalem, via St Paul and the silversmiths at Ephesus, the Jewish

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bankers at York and Sabbath working, through to the opening of supermarkets on a Sunday); a 'cultural' right; a 'collective' right; a 'peoples' right; an indigenous peoples' right; a right to self-determination . . . In short, it touches upon aspects of almost any individual and collective right possible to imagine. However, no matter what 'indirect' avenues are pursued, some fundamental facet of religious well-being is likely to be outside of its scope. Moreover, the freedom of religion is merely an aspect of the broader right in question and, in consequence, runs the risk of being marginalized within it.

On the other hand, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the regional human rights conventions all contain a basic provision in substantially similar terms which confers a direct guarantee of religious freedom. It is more rewarding to consider how this direct guarantee has been interpreted since this reveals more about the nature of religious freedom than does the indirect protection offered by other heads. For example, torture has been used to persuade 'heretics' to conform to 'orthodox' views. Thus outlawing torture might provide an indirect means of enhancing religious freedom. Yet it is clearly an inappropriate vehicle through which to consider the freedom of religion since it tells us nothing about the nature of religious freedom itself. This is true of all such indirect means of protection, and particularly true of the freedom of expression which, because of the nexus between them, is a right which is as likely to come into conflict with the freedom of religion as it is to protect it.

Of course, indirect means are a useful supplement – and may often prove an easier and less controversial form of protection, but that is not to point. The question under consideration concerns how the desire to protect 'religious liberty' has manifested itself under (or in) international law and how it is currently interpreted, particularly under the European Convention on Human Rights. Although this may seem a 'narrow question' in the contemporary context, that context is itself distorting. This book attempts to place the topic within a much broader historical perspective than that of the past fifty years and which is already showing signs of fraying at the edges.

To this end, chapters 1 and 2 provide an historical overview of developments up to the First World War. Chapter 3 examines the attempts made to place an obligation concerning religious liberty into the Covenant of the League of Nations, whilst chapters 4 and 5 examine the background to, and emergence of, the minorities treaty system. The workings of that system relative to religious liberty are considered in chapter 6. The

following three chapters then look at the emergence of international norms relating to the direct protection of religious liberty within the UN system: Article 18 of the Universal Declaration of Human Rights (chapter 7), Article 18 of the International Covenant on Civil and Political Rights, and its subsequent development by the Human Rights Committee (chapter 8), and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the work of the UN Special Rapporteur on Religious Intolerance (chapter 9). The remaining chapters turn to the work of the Council of Europe, where there has been something of a surge of recent cases raising difficult questions under Article 9 of the European Convention on Human Rights (ECHR). Chapter 10 looks at the background to that Article, whilst chapters 11 and 12 examine the jurisprudence of the European Commission and Court of Human Rights in relation to it and chapter 13 looks at Article 2 of the First Protocol to the ECHR, concerning parental rights over the religious education of their children. Finally, and by way of conclusion, chapter 14 outlines a number of developments which bear upon the direction that the search for the protection of religious liberty under international law might next take.

1 Early antecedents

The Ancient Near East

The idea that a State ought to tolerate the religious beliefs and practices of other communities would have appeared irrational to early civilizations. From earliest times, the institutions of what might be called 'secular' authority were so closely interwoven with religious authority as to be practically indistinguishable.

In Sumerian and Mesopotamian mythology, man was created in order to relieve the gods from the burdensome task of providing for themselves: men were created as the servants of the gods.¹ This was also reflected in the Akkadian and Babylonian myths which have come down to us² and which represent a continuation and transformation of the earlier Semitic material. It was also implicit within this understanding of the created order that each deity had its own particular dwelling place; and men living there were its servants. If the servants of one god (that is, the people

¹ See S. H. Hooke, *Middle Eastern Mythology*, (Harmondsworth: Penguin, 1963), p. 26 for the myth of Lahar and Ashnan, and also S. N. Kramer, *Sumerian Mythology: a Study of Spiritual and Literary Achievement in the Third Millennium BC*, (Philadelphia: American Philosophical Society, 1944), p. 61.

² Hooke, *Middle Eastern Mythology*, pp. 29–30, 45 and see *The Enuma Elish (The Babylonian Creation)*, Part VI, in which the god Marduk says:

Blood I will mass and cause bones to be.
 I will establish a savage, 'man' shall be his name
 Verily, savage man I will create.
 He shall be charged with the service of the gods
 That they might be at ease!

Trans. in J. B. Pritchard (ed.) *Ancient Near Eastern Texts relating to the Old Testament (ANET)* (Princeton, NJ: Princeton University Press, 1950), p. 68. See also N. K. Sanders (trans.), *Poems of Heaven and Hell from Ancient Mesopotamia*, (Harmondsworth: Penguin, 1971), p. 97.

of one city) fell under the sway of those of another, then this was perceived as having some connection with the relationship between the gods themselves. The physical destruction of a city or temple represented the final humiliation of the god.

The versions of the early creation myths that have come down to us reflect the shifts in political power between the warring powers of the region. The written version of the Babylonian creation myth derives from a period of Babylonian supremacy, so it is Bel-Marduk, the god of Babylon, who is invested with supremacy over the other gods of the region. When Assyrian power rose in the north of Akkad and threatened Babylonian supremacy, local versions of the creation myths were varied and Bel-Marduk replaced with the local titular deity.³ Religion was to be understood in terms of political events: if Babylon fell, then Bel-Marduk was vanquished; if Bel-Marduk is portrayed as supreme, then Babylon has reasserted her political supremacy. If this was the case as between peoples sharing the same pantheon, it is hardly surprising that there was little room for the idea that the religious practices of those who believed in an entirely different cosmology were entitled to respect or toleration.

The correlation between State and deity went deeper than mythological reconstructions of creation. The relationship between god and man was mirrored in the relationship between the king and the people under his dominion. This was often reflected in the king being portrayed – in literature or art – fulfilling the role assigned by the religious myths to the titular god of the State, or, indeed, to that of a rival, or defeated, State.⁴ The ruler sought to be identified with the deity. The interrelationship between the State and its gods was also reflected by the very structure of authority.

In parts of the ancient Middle East, such as Egypt, the ruler was considered divine.⁵ In others, the high priest of the god was ‘king’ by virtue of his special relationship, as priest, with the deity. In time the relationship became inverted and the king assumed the function of high priest.⁶ No matter what the order of relationship, however, the resulting

³ Hooke, *Middle Eastern Mythology*, p. 42; Sanders, *Poems*, pp. 34–35.

⁴ This practice continues down to more modern eras: the allegorical paintings of the seventeenth and eighteenth centuries were intended to underscore the divine right of the monarch. The monumental statuary of Communism took on a not dissimilar function in the context of an atheistic society.

⁵ See, for example, the hymns expressing joy at the accession of various pharaohs to the throne in *ANET*, pp. 378–379.

⁶ This was also true of early Roman practice, where the kings also acted as high priests. Whereas the other powers of the king passed to the consuls under the Republic, the

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concept of 'priest-king' was very powerful. The obligation to serve the deity in a priestly function could be extremely onerous and so it is not surprising that, over time, the relationship between divinity and ruler was expressed by the anointing of the ruler by the high priest in the context of a liturgical rite. The Babylonian Creation formed a part of the liturgy associated with the annual rite in which the king 'took the hands' of Marduk, inaugurating the new year and renewing the relationship between god and the king; divine ruler and temporal ruler; king and subject.⁷ As a part of the ritual:

the urigallu-priest shall leave [the sanctuary] and take away the sceptre, the circle and the sword [from the king]. He shall bring them [before the god Bel] and place them [on] a chair . . . He shall accompany [the king] into the presence of the god Bel . . . he shall drag [him by] the ears and make him bow down on the ground.

After the king has made a petition to the god, the priest reassures the king of the god's favour and restores the symbols of authority to him.⁸

The Bible provides further examples of the manner in which the authority of rulers was derived from the authority of God. For example, Samuel was called by the God of the Israelites to be his prophet and, as such, 'Samuel's word had authority throughout Israel'.⁹ As he grew old, the Elders of Israel asked him to appoint a king over them, as other nations had. God instructed Samuel to appoint Saul, and he was duly anointed by him.¹⁰

Not only were rulers often seen as being either appointed by, or a

religious functions passed to the *Pontifex Maximus* whilst the concept of the 'priest-King' was preserved in the office of the *Rex Sacrorum*. See H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn, (Cambridge University Press, 1972), p. 45.

⁷ For the text of the New Year Festival ritual see *ANET*, pp. 331–334.

⁸ *Ibid.*, p. 334. ⁹ 1 Samuel 3 v. 19–4 v. 1.

¹⁰ 1 Samuel 8–10. It is hardly worth continuing to demonstrate the relationship between kingship and divine investiture. Whilst Napoleon Bonaparte might have seized the imperial crown from the hands of the bishop in order to demonstrate that he considered himself to have achieved his throne by his own efforts and not from the hands of God, the current monarch of the United Kingdom was still invested by her archbishop. Down the ages, the ideas of divine ordination and temporal authority have gone hand in hand, even if this now manifests itself in a ritual the theological significance of which is not universally acknowledged. Even when on Christmas Day AD 800 Charlemagne was crowned Emperor by Pope Leo III in Rome, this was more by way of reward for his help in reasserting the Pope's authority than as a moment of divine investment of temporal authority (graphically recounted by Einhard, *The Life of Charlemagne*, §28 and by Notker the Stammerer, *Charlemagne*, book I, §26 (trans. L. Thorpe, *Two Lives of Charlemagne* (Harmondsworth: Penguin, 1969)). Such acts are better

manifestation of, god, but the rules by which they governed were also seen as being of god. Some of the earliest legal codes were associated with divine revelation, such as the Ten Commandments given to Moses.¹¹ Others pointed to the divine authority and guidance given to the promulgator.¹² The Greeks also believed that their earliest legal codes were given to them by the gods, as did the Romans. Moreover, the sanctity of law derived from the sanctity of its source. To break the law was to commit an offence against god. Divine punishment would fall upon the law breaker¹³ and it was to god that reparation was due.¹⁴ This also took the form of tracing the establishment of some ancient courts of law to a divine origin.¹⁵

To the extent that the deity was seen as a source of secular authority, the idea of a power tolerating the religious practices of another power within the territories under its direct control¹⁶ would have potentially undermined its authority.¹⁷ All these factors combined to reinforce the

seen as symbolizing a relationship rather than as being invested with actual ritual significance.

- ¹¹ Exodus 34 and Deuteronomy 5. See also Leviticus, Numbers and Deuteronomy for further series of commands revealed by God to Moses and Aaron.
- ¹² E.g. the Law Code of Hammurabi (circa 1720 BC), which was inscribed on a stele which depicted Hammurabi receiving a commission to write his code from the god of justice, Shamash. See ANET, pp. 163–180. See also the earlier Code of Lipit-Ishtar: 'I, Lipit-Ishtar, . . . [estab]lished [jus]tice in [Su]mer and Akkad in accordance with the word of Enlil' (ANET, p. 159).
- ¹³ Thus the Law Codes of both Lipit-Ishtar and Hammurabi conclude with epilogues which call down the wrath of the gods upon any who desecrate the stele on which the laws were written or fail to honour the laws themselves (ANET, pp. 161; 177–180). The Mosaic laws also concluded with similar injunctions, promising the blessing of God on those who obey and the wrath of God on those who are disobedient. See Leviticus 26 vv. 3–39; Deuteronomy 28 and 29 vv. 15–20.
- ¹⁴ See C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol. I (London: MacMillan, 1911), p. 43.
- ¹⁵ The Court of the Areopagus in Athens, for example, was allegedly founded by Athena in order to try Orestes for the murder of Clytemnestra. See Aeschylus, *The Eumenides*, trans. by P. Vellacott, *The Oresteian Trilogy* (Harmondsworth: Penguin, 1956), p. 170.
- ¹⁶ This is to be contrasted with the situation of vassal States which were under the sway of neighbouring powers to which they paid tribute. Vassal States tended to retain their religious autonomy. The Assyrians, however, tended to implement a more militant imperialism which sought to bring vassal States (on which even the Assyrians did not impose their religion) within their Empire and subject them to direct control.
- ¹⁷ 'These are the statutes and laws that you shall be careful to observe in the land which the Lord the God of your fathers is giving you to occupy as long as you live on earth. You shall demolish all the sanctuaries where the nations whose place you are taking worship their gods . . . You shall pull down their altars and break their sacred pillars, burn their sacred poles and hack down the idols of their gods and thus blot out the name of them from that place' (Deuteronomy 12 vv. 1–3). 'When the Lord your God

single most important aspect of religious belief in the ancient world: the correlation between religion and place.¹⁸

Hence the idea of religious toleration was subsumed within the general policy of the authority. A war between two powers might be couched in the language of a conflict between the rival deities.¹⁹ Certainly, the triumph of one power over another would often be complemented by the destruction of the places of worship of the 'defeated' deity and, perhaps, the physical removal or destruction of the statue or symbol of the god. However, such acts were not aimed at the religious beliefs of the defeated peoples as such. Rather, they served to symbolize – and, indeed, realize – the destruction of the temporal power that was associated with its worship. Destroying the sacred places of a rival power was not so much an act of religious imperialism as an act intended to assert the authority of the conquering power over the defeated peoples by displacing their god – the source of authority – with another.

Nevertheless, the power of place and the religious traditions associated with it often proved overwhelming²⁰ and a conquest might soon be

exterminates, as you advance, the nations whose country you are entering to occupy, you shall take their place and settle in the land. After they have been destroyed, take care that you are not ensnared in their ways. Do not inquire about their gods and say, "How do these nations worship their gods? I will too do the same" (Deuteronomy 12 vv. 29–30).

This is graphically illustrated by the laws delivered by Yahweh to Moses: 'When you hear that miscreants have appeared in any of the cities which the Lord your God is giving you to occupy, and have led its inhabitants astray by calling on them to serve other gods . . . you shall put the inhabitants of that city to the sword' (Deuteronomy 13 vv. 12–15).

These laws were to apply to the areas granted by God to the Israelites. Thus when Jehu, who had been anointed King of Israel by one of the prophets of God, succeeded in wresting the Northern Kingdom from the descendants of the house of Ahab (who had forsaken Yahweh and had introduced the worship of Baal) he 'brought out the sacred pole from the Temple of Baal and burnt it: and they pulled down the sacred pillar of the Baal and the temple itself and made a privy of it' (2 Kings 10 vv. 26–28).

¹⁸ See generally N. Bentwich, *The Religious Foundations of Internationalism*, 2nd edn, (London: George Allen & Unwin, 1959), chapters 2 and 3; also D. J. Bederman, 'Religious Sources of International Law in Antiquity', in M. W. Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht: Martinus Nijhoff, 1991), pp. 3, 12–14.

¹⁹ For example, during the revolt of Hezekiah, King of Judah, the Assyrian King Sennacherib taunted the inhabitants of Jerusalem by saying that his God had told him to 'Attack this land and destroy it' and that their God would not save them, for 'Among all the gods of the nations is there one who saved his land from me?' (2 Kings 18 vv. 25 and 35; 2 Chronicles 32 vv. 13–15).

²⁰ The history of Israel is rich in stories of attempts by prophets of Yahweh to prevent the population from lapsing into the worship of Baal, the local Canaanite deity in whose former lands the tribes of Israel had come to reside.