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Bond University

School of Humanities and Social Sciences

Part A

***Religious Liberty as a Paradigm
For the Development of Human Rights***

by Alexandra Merrett

Abstract

This paper examines the development of religious liberty as a paradigm of human rights. It will be argued that the development of the concept "freedom of religion" is in fact fundamental to modern notions of human rights. Examining the emergence of religious tolerance and then liberty through the era of the religious wars and subsequently the Enlightenment, it will be further argued that religious tolerance evolved due to political expediency as opposed to rational discourse. Liberal philosophy then established the rhetoric of religious liberty within popular consciousness, but itself lacked coherency. As such, modern notions of religious liberty, particularly as elucidated in International Law, lack a coherent philosophical foundation.

Introduction

The role of human rights has attained unforeseen significance since World War II and the formation of the United Nations. The underlying rationale for these rights, however, has rarely been made explicit. Indeed, it has been stated that, "as the doctrine of rights has become more and more widely accepted, its very foundations seem increasingly open to question". (1) This paper therefore proposes to examine the development of religious liberty as a human right - both its historical aspects and supporting philosophy.

After a brief exploration of general concepts, three distinct historical periods will be examined. The first of these will be (pre-Reformation) Christendom - the receptiveness of religious diversity will be detailed and the process of dealing with dissent briefly discussed. Following this there will be an examination of the emergence of religious tolerance, and subsequently, freedom from the time of the Reformation to the emergence of liberal philosophy. Case studies of France (largely during the sixteenth century) and England (largely during the seventeenth century) will be proposed, before an examination of the thought of both Locke and Paine is undertaken. Finally this paper will conclude with a review of the modern human rights structure, particularly with respect to religious liberty.

Following the discussion of Part II, an analysis of two case studies will be undertaken to support the concluding proposition that the modern formulation of religious liberty has severe shortcomings, due largely to the manner of its emergence.

The Significance of Religious Liberty

Religion, for various reasons, had held a special place in every culture in every historical age.

Religions are, and remain, the resource and the inspiration of almost all the greatest achievements of human creativity, whether in art, architecture, agriculture, music, poetry, drama, spiritual exploration, or even, in origin, the development of the natural sciences. This creative resourcefulness of religions remains as vital now as it has been in the past. (2)

For a community, religion is one of the significant contributors to the core of cultural identity, while in today's era of religious diversity, it is central to the personal identity of many: "religion is a unique dimension of human personhood and community. While it may share similarities with other forms of human conduct, it is essentially a phenomenon *sui generis* and without secular analogy". (3) It is also for this reason that religion has been central to innumerable conflicts across ages and cultures. (4) "[I]t is religious and moral beliefs that are both most controversial and most important to the very structure of an individual's life." (5)

As such, many regard religious liberty as one of the most important human rights of the modern era: "An essential element in a good international order is freedom of religion". (6) More than just important, however, many are prepared to argue that it is *the* fundamental right of modern human rights doctrine. It has been described as "[t]he most dearly won of liberties", (7) "the first liberty, the foundation, the *fons et origo* of all the other rights and liberties". (8) Littell states, "[a]mong the basic human rights, religious liberty has priority of place". (9)

There are a variety of reasons given for this primacy, but most commentators tend to agree that religious liberty is fundamental to a free and democratic society. As early as 1831, it was noted:

Each day one understands more and more that political liberty is bound inseparably to religious liberty. It has its root in it and cannot be affirmed and developed other than through it. All parties who have sought to give it another base have failed in their attempts and have come to destruction through tyranny. (10)

Recognition of the special link between religious liberty and fundamental freedoms is by no means isolated to this observation. More than 150 years later, Audi categorically stated:

It is plain that a society without religious liberty is simply not adequately free. Moreover, freedom is required for democracy... Thus, if one's ideal is a free and democratic society, one wants a social (presumably constitutional) framework to guarantee at least this: (1) freedom of religious belief, understood to prohibit the state or anyone else from inculcating religious beliefs in the general population, where this is taken to exclude or restrict cultivation of competing religious beliefs; (2) freedom of worship involving, minimally, a right of peaceable religious assembly, as well as a right to offer prayers by oneself; and (3) freedom to engage in (and to teach one's children) the rites and rituals of one's religion, provided these practices do not violate certain basic moral rights.... (11)

The support for this basic proposition in the philosophical and religious literature is very strong. (12)

Liberty as distinct from toleration

It is widely accepted that religious liberty was preceded by the recognition of religious tolerance: "the evolution from persecution of dissidents to quest for conciliation to a provisional tolerance (and from there, over long decades, to a de facto acceptance of a right to freedom) occurred repeatedly". (13) Therefore, it is necessary to fully comprehend the distinction between liberty and tolerance. Even within sixteenth-century France, for example, this was a distinction readily apparent, reflected within common usage: "'*liberté*' had positive connotations, suggesting respect for the individual conscience [while] '*tolérance*' designated the temporary acceptance of something intrinsically undesirable". (14) Within the modern context, little has changed. Lecler, for example, states that toleration is "a permission, a concession touching upon religious liberty", while Kamen says it is "a concession of liberty of those who dissent in religion". (15) The characteristics of tolerance include the fact that it is generally an unwilling - "grudging" (16) - concession of the state, intended to be a temporary concession often granted for expediency: "Tolerance... was always limited temporally and spatially....". (17) Religious freedom or liberty, however, encompasses far more than this; the Second Vatican Council, for example, argued that,

[R]eligious freedom is not simply a negative immunity, a freedom from interference with one's religious convictions by the state or by other groups in society. It is also a positive empowerment to express one's religious convictions in public and to seek to influence the public life of society in accord with these convictions. (18)

Thus the distinction between these two concepts may be summarised as the difference between the grudging willingness of the state to allow diversity in religious belief, as opposed to the state which declares itself incompetent with respect to religious pronouncements. (19) This distinction is fundamental to an understanding of the development of the modern conception of religious liberty. (20)

- I -

Religious Tolerance and Liberty in Christendom

With the effective union of religious and civil authority throughout Europe in the fourth century c.e. and the establishment of "Christendom", (21) religious tolerance, let alone religious liberty, was not a significant issue (22) until the time of the Reformation. Religion itself was regarded as a public good. (23) Thomas Aquinas, for example, "thought that unity of religious belief and practices were crucial to the harmony and strength of political society". (24) Thus, any breaches to this social unity threatened the well-being of all: calls for religious freedom were accordingly considered "identical with rebellion against divine truth and hostility toward the Church". (25) As such, "[t]oleration of diversity had not been

counted as a virtue since the time of Constantine....". (26) Indeed, it was quite the opposite. Littell states, "[f]or centuries, obedience to constituted authority had been praised as a religious virtue". (27) The Christian West during the High Middle Ages has thus been described as a "persecuting society", (28) a "gross and habitual violator of human rights". (29)

Christian - Jewish relations

While it is well beyond the scope of this paper to examine the history of Christian-Jewish relations during this period, (30) it is nonetheless instructive to take a fleeting glance at the official Roman Catholic position on Jews. This exemplifies the "persecution of dissidents" (31) mentioned earlier. Nonetheless, despite the Church's hostile dogma, Innocent III (1189-1216) consistently denounced violence against the Jewish people:

We decree that no Christian shall use violence to compel the Jews to accept baptism... No Christian shall do the Jews any personal injury... During the celebration of their festivals, no one shall disturb them by beating them with clubs or by throwing stones at them.... (32)

A similar stance was adopted by Innocent IV (1243-1254) and Gregory X (1271-1276) and later Martin V (1417-1431). (33) These "defences", in addition to reflecting the degree of Jewish persecution at the time, also indicate the extent of discrimination receiving *official* sanction. For example, in Gregory's *Letter Against the Blood Libel* - apparently produced following an appeal from the Jewish community - he states:

Inasmuch as the Jews are not able to bear witness against the Christians, we decree furthermore that the testimony of Christians against Jews shall not be valid unless there is among these Christians some Jew who is there for the purpose of offering testimony. (34)

Furthermore, there is Canon 68 of the Fourth Lateran Council which decreed that "at all time [Jews] shall be marked off in the eyes of the public from other peoples through the character of their dress". (35) In the same document, Jews were banned from going out in public at all during the last three days before Easter, most particularly Good Friday.

For the most part, however, modern liberal notions emerged more from the conflux of religious conflict which developed at the time of the Reformation: "The issue of freedom of religion first arose between Catholics and Protestants in the seventeenth century". (36) Jews, as a people, were too few (and dispersed), and therefore lacked the power to bring the matter to a head. It was not until significant numbers of adherents from opposing - and importantly, State (or State-sanctioned) - religions clashed that the issue of religious tolerance and then liberty necessitated serious consideration.

Academic freedom as a precursor to religious tolerance

Nonetheless the roots of modern Western concepts of religious tolerance, and later liberty, are faintly discernible in the mediæval era. The burgeoning university structure raised issues of *academic* heresy hitherto unseen. Courtenay makes the point, however, that "[r]arely was the *person* condemned, only his ideas were, and those more as examples of the type of statements that were heretical, ill-sounding, or offensive to pious ears". (37) Indeed, he submits that censures of academic errors were "almost routine" (38) after 1345 - and in all cases those censured were students, never masters. In large part, this arose due to the fact that students' orthodoxy was examined during their time at university: "propositions that

sounded heretical had been viewed as perfect training tools to test the dialectal skills of young theologians to find an orthodox truth beneath a seemingly false or heretical statement". (39)

At this time, the consequences in the event of academic heresy were rarely drastic: "The issue was whether the scholar knowingly and willingly maintained views contrary to the faith (which most did not), whether his views were disseminated outside the university and, if so, whether or not he could rely on political protection....". (40) In part, this liberal approach to academic heresy arose from the second point - heretical statements were generally contained within the university. As such, from the time of the thirteenth century, the papacy - directly or indirectly - only ever became involved in the condemnation process on appeal. In the early stages of the fifteenth century, however, this changed - at the instigation of the theological masters themselves, "when the perceived dangers to faith and piety exceeded the benefits of open debate and free expression". (41) Following the return to centralised involvement in these matters, for the first time in 200 years a scholar - Jan Hus - was sentenced to death on account of heresy. (42)

Spinoza on toleration

It is interesting to note, therefore, that when Spinoza was calling for religious tolerance 250 years later, his stance is seen more in the context of academic rather than religious freedom. In 1670, he published (anonymously) his *Theologico-Political Treatise*, described as "the first philosophy of democratic liberalism". (43) In it, he called for religious tolerance, praising the city of Amsterdam as a place where "men of every nation and religion live together in the greater harmony", and where a person's "religion and sect [before the judges] is considered of no importance". (44) Shell states, however, that Spinoza's object was not,

[A]n ideal of limited freedom of religion based on theological principles but rather a separation of philosophy from theology. This break would mark an end to the terrors of religious inquisition and guarantee a safe place in the world for freedom of philosophical inquiry. (45)

Thus he states that Spinoza's "larger political purpose... was the support of free philosophical inquiry". (46)

Spain: an alternative paradigm

In stark contrast to the rest of Europe, however, Spain had to deal with religious conflict on a massive scale well before Martin Luther ever nailed his 95 theses to the door of the Castle Church of Wittenburg. Neighbouring the relatively homogenised Europe - mirroring more than half a millennium of Christendom - Spain had three large faith communities: Christian, Jewish and Islamic. Until the Christian Reconquest, Spain - under Muslim control - was "the most tolerant place in Europe". (47) Scholars generally credit the Muslim division between People of the Book and pagans with the prevailing *convivencia* (co-existence). (48) Nonetheless, it must be remembered that this was a relative tolerance:

[T]he reality of *convivencia* should not be exaggerated or idealised. Though the three cultures of Spain accepted the need to coexist, within that relationship, they gave vent at times to astonishing excesses of religious ferocity and cultural intolerance, and even at the best of times it would be misleading to claim that minority groups were treated as equals. (49)

There is little doubt that the Reconquest signalled a regression for the politics of tolerance.

Significant events heralded the new Christian era: the great enforced conversion of Jews in 1391; the Inquisition, established in 1480; twelve years later, the Jews were expelled and in 1502, the same fate befell the Muslims. Furthermore, there were the Statutes of the Purity of the Blood [*limpieza de sangre*] - first introduced in Toledo in 1449, then throughout the country, distinguishing between original Christians and those who had ancestors who were (or were themselves) converts [*conversos*]. Although they were initially denounced, by the time Philip came to the throne these laws were strictly enforced. "One drop of 'Jewish blood' might make a person non-Christian in Spain just as, in parts of the United States in the 1800s, one drop of 'black blood' made a person nonwhite." (50)

Nonetheless, there is some evidence to suggest that the spirit of *convivencia* remained:

A concern for coexistence continued... to survive, and though under Ferdinand and Isabella the society of *convivencia* was giving way to a society of conflict, both at elite and popular levels, the Spanish community remained remarkably open to dissenting opinions, so much so that Fray Felipe de Meneses in 1554 complained of Spain that 'I find more inclination to liberty there than in Germany or any other nation....'. (51)

Although these dissenters could not be truly called radical, the degree of diversity existing in Spain was unique in Europe. There were the three faiths to begin with, as well as schismatic elements within those faiths:

Not only were significant proportions of the population Islamic and Jewish in faith, there were moreover by the fifteenth century tens of thousands of *conversos* who had been converted from these faiths but continued to practice their old religion in secret... Within Jewish ranks the recurrence of messianism and mysticism, with regular defections to the Christian religion, caused grave concern... In Islam, too, the history of the faith is full of conflict between rigorists and laxists, while the victory of the Christians made more widespread among Christianised Muslims the practice of *taqiya* [dissimulation], and brought into existence a symbiotic Islam... rejected by the sterner North Africans in 1609. This complex religious picture made tolerance necessary, and fostered the cultural syncretism which was so obvious a part of Spanish life in the Later Middle Ages. (52)

Thus Kamen concludes that while "[i]t may be excessive to call this multi-cultural Spanish society 'tolerant'... the interests of accuracy might favor us calling it simply a 'society of dissent'". (53)

The Spanish society of the time, therefore, was clearly open to some degree of discord. While, for example, since 1255 and possibly earlier, (54) there had been laws forbidding the conversion of Christians to other faiths - the penalty being death - Kamen reports that these laws were rarely enforced. For example, "after the great enforced conversion of Jews in 1391 there were virtually no prosecutions of the converts for over eighty years". (55) Furthermore it is known that there was wide disagreement with both the expulsion of the Jews and the Inquisition itself. (56)

Indeed, while Spain is considered by many to be the "flag-bearer" of the persecutions undertaken in the name of the Counter Reformation, many Spaniards adopted a more moderate position. In 1530, for example, Charles' confessor, Fray Garcia de Loaysas wrote "my advice is that Your Majesty should make a compromise in Germany and excuse their heresies and let them live in the way that best suits them". (57) Charles' successor, Philip II, was the recipient of similar advice:

[I]n the whole world there are only two nations: that of the good and that of the bad. All the good, whether Jews, Moors, Gentiles, Christians, or some other sect, are of the same nation, family

and blood; and all the bad likewise. (58)

Philip even went so far as to consider the issue of freedom of conscience - well before this was seriously discussed in other parts of Europe.

The leading doctors and theologians met in the king's presence and were asked what they thought of the 'liberty of conscience' asked for insistently by some cities in Flanders; whereupon the majority stated that in view of the situation of those provinces and in order to avoid the greater evil that could be feared from a rebellion of the cities, His Majesty could, without offence to God, grant those peoples freedom of religious worship. He replied, that he had not summoned them to tell him whether he *could*, but whether in conscience he *should* permit it. (59)

Thus Kamen concludes "[t]he duality between coercion and tolerance was a permanent feature of peninsular history". (60)

Conclusion

The dichotomy between the Spanish situation and the remainder of Europe clearly reflects the extent to which political concessions as to religious tolerance or liberty depended upon the degree of minorities' political clout, be it within the country concerned or from afar. If a religious community was substantially marginalised socially and politically - such as the Jews - it simply lacked the influence to press the issue of religious tolerance against a homogenous majority. In the remainder of Europe, however, this homogeneity was shattered with the Reformation.

- II -

The Development of Religious Tolerance: The Reformation and Beyond

It is widely agreed that the issue of religious freedom arose amidst the turmoil of the Reformation, born "in a crucible of violence". (61) When examining religious dissent during this period, it must be remembered that what was essentially at stake was public order: "The issue of religious tolerance and intolerance always concerned the civil authority... the question of religion involved the issue of law and order". (62) The concept of a central religious authority, however, was shattered by the Reformation. The refusal to accept that doctrinal power rested with the Pope created a dilemma: it seemed that either there was a power vacuum due to a lack of centralised authority, or this power to establish and enforce doctrine lay with the individual (liberty of conscience). Both these positions were deemed unacceptable by the reformers, so the authority structure of the reformed churches had to be established.

In examining this period, two case studies will be considered: that of England and France. These countries illustrate a pattern followed across Europe throughout the Reformation: initial persecution of the dissenting party (defined in opposition to the ruling régime), ensuing violence and/ or political disturbance, followed by the grudging concession of

increasing degrees of tolerance by the government of the day for largely pragmatic reasons.

The establishment of Protestant authority

The issue of tolerance, however, would not have taken a significant foothold without political support, backed up by authority to enforce religious doctrine. A defining point in the assertion of this authority was the burning at the stake of Michael Servetus in the Calvinist city of Geneva in 1553. Pettegree describes this as "one of the formative events of the Reformation century". (63) Servetus' anti-trinitarian teachings were the catalyst for the resolution of two significant issues: what was the definitive dogma of the reformed religion; and, who held the authority to determine this dogma.

This was a matter on which the otherwise divided reformers could agree, for they shared a common problem, one that went right to the heart of Luther's reformation. Having thrown off the power of the pope, where now did the authority to establish true doctrine lie? What was the irreducible core of belief on which no debate could be tolerated? All the reformers were acutely sensitive to the charge that in rejecting Rome they had introduced anarchy... The defence of their Church thus demanded restraints.... (64)

Thus Pettegree concludes that "in putting to death a man whose views posed no direct threat to public order, the Church and State of Geneva asserted an important principle, the right of the Protestant churches to determine the limits of dissent". (65) Servetus was subsequently held up as "a symbol of Protestant intolerance". (66) The ensuing violence of this period thus arose from the political ramifications of two established authority structures clashing, as distinct from isolated pockets of dissent. The different allegiances of the various European régimes, and the increased splintering of the reformers meant that the crisis of religious dissent would have to be resolved eventually.

England

In England, the conflict brought on by the Reformation was exacerbated. The State Church - the Church of England - was neither Catholic nor Protestant and within a short time of the Protestant Reformation, there was a strong dissenting movement, as well as more radical minority elements such as Anabaptists and Anti-Trinitarians. Initially the Protestant nonconformists - who, in varying degrees, advocated liberty of conscience (67) - were targeted just as pointedly as other religious minorities. The ultimate objective of this persecution was to regain religious unity with the Church of England - "a quest for conciliation" (68) - ideally by the comprehension of the dissenting voices into the established church.

The laws designed to bring dissenters back into the fold typically targeted the clergy, not lay people. Primarily there was the *Act of Uniformity* (1662), with which a minister had to comply in order to obtain or retain any benefice with the Church of England. It required a preacher or lecturer, in order to be a minister "of sound religion," to declare, *inter alia*, his unfeigned assent to the Thirty-Nine Articles of the Church of England. (69) A further example is the *Five Mile Act* (1665). This again targeted preachers, not lay people, providing, *inter alia*, that, "[p]ersons preaching in conventicles [are] not to come within Five Miles of any Corporation sending Members of Parliament". (70) Not specifically targeting dissenters, other penal laws prescribed church attendance. (71)

As the seventeenth century went on, however, the perceived "papist threat" to stability and

good governance was such that the sporadic persecution of dissenters was interspersed by increasingly longer periods of toleration - the dissenters were granted temporary acceptance in an effort to target Roman Catholics more effectively. Davis notes that during the 1640s-50s, "[l]iberty of conscience was a temporary second-best [to comprehension], to be extended - with varying limitations, until unity was achieved". (72) Throughout this period, Catholics remained the primary target of penal statutes. (73) As was the case throughout Protestant Europe, "Roman Catholics were regarded as a subversive force because they owed allegiance to a foreign power, the pope....". (74)

The need to define who came within the established church thus became increasingly important. The definition of "us" was a flexible concept, expanded or contracted in relation to "them". Thus the first significant period of relaxation of the penal statutes for both dissenters *and* Catholics occurred during the "Catholic Experiment" - an alliance with France against Holland. (75) A declaration suspending "all manner of penal law in matters ecclesiastical" (76) was issued by Parliament just days before war was declared in 1672. Charles II had initially tried to issue this Declaration of Indulgence by means of his prerogative powers years earlier but was defeated by Parliament. The impending war, however, was impetus enough to convince Parliament, temporarily at least, to grant a brief remission of the penal laws to Catholics and Protestant dissenters alike. (77) The protracted war against the Dutch, however, tested the Parliament's patience. The Declaration failed to endure, and dissenters and Catholics were once again targeted.

Nonetheless, a widely held belief that Catholics would go so far as to kill the king in order to reconvert the country - notably in 1678, with the rumour of a "Popish Plot" - prompted another review of the laws: "The idea of Protestant reconciliation in the face of popery gained momentum through the late 1670s, and led to renewed attempts to broaden the English church in the aftermath of the Popish Plot allegations". (78) There were several failed attempts to pass a Comprehension Bill, (79) designed to bring the dissenters within the official fold of the English Church. The Nonconformist clergy, however, regarded the *Act of Uniformity* (80) as a major obstacle to any comprehension, while the established church did not wish to accommodate potentially schismatic elements. (81) Given the failure of comprehension, the tried and true strategy of relaxing the penal laws was again tried. This time, however, Catholics were clearly not intended to benefit:

From the 1670s onwards parliamentary efforts were... made to ease the plight of Nonconformists by securing them from prosecution under laws intended against the Romans Catholics. (82)

Statutes in point included the Test and Corporations Acts, designed to preclude Catholics from office, but with dissenters as incidental targets. The *Test Act* (1673), for example, "was intended to exclude popish recusants from all civil and military office under the crown", (83) while the *Test Act* of 1678 was concerned with regulating both houses of parliament. The *Corporation Act* achieved the same design with respect to local government. The means by which these acts did so was essentially through the requirement of visible adherence to the Church of England. The 1673 *Test Act* for example, provided for a sacramental test, (84) while the *Corporation Act* required that "every member... have received the sacrament of the Established Church within the previous twelve months". (85)

These statutes were amongst those targeted in the bid to promote unity in the face of the Catholic threat. Thus, for example, in 1680, the Commons "voted against the persecution of Protestant dissenters under statutes aimed at Catholic recusants and ordered the

preparation of a bill repealing one of the most frequently used such statutes". (86) After the "panic and paranoia" (87) of the "Popish Plot" died down, however, the dissenters were again the subject of persecution. Speck notes that in Cheshire, for example, the number of prosecutions for absence from church services more than doubled between 1681 and 1684, while indictments of conventicles rose from just eight in 1681, to 144 in 1683. (88)

In 1685, however, James II ascended the throne. The reality of a Catholic king, and the potential of a Catholic heir, led to an "Anglican alliance with dissent against a Catholic king". (89) James had introduced Declarations of Indulgence in 1687 and 1688, providing "freedom from prosecution under the penal laws to all Christians in theory, including Catholics, and even to non-Christians in practice....". (90) It was noted the Declaration of 1688 "pleases the Quakers, and independents and anabaptists and some of the Presbytery very well". (91) This was entirely too broad for Parliament and the established church, and in 1689, the *Act of Toleration* was introduced, severely restricting the freedom granted under the Indulgences. (92)

The Toleration Act of 1689

The *Act of Toleration*, despite its name, resulted in - as indeed was its design - a restriction of the religious liberty of the day. "The virtual universal toleration introduced by James II was severely curtailed." (93) It removed altogether the right of Catholics and Unitarians to worship, recognising in the words of Macaulay, "persecution as the rule, [granting] liberty of conscience only as the exception". (94) He adds, however, that "it is equally true that the rule remained in force only against a few hundreds [sic] of Protestant dissenters, and that the benefit of the exceptions extended to hundreds of thousands". (95) Amongst the many recipients, for example, were Quakers. (96) As such, at the time it was regarded "to have achieved as wide a measure of liberty of conscience as was practicable in the circumstances". (97) In signalling the cessation of the dissenters' persecution, the *Toleration Act* therefore, in some ways, marks the "partial dis-establishment" (98) of the Church of England.

By no stretch of the imagination, however, could the *Toleration Act* be regarded as ending the issue of religious freedom. For a start, it merely suspended the operation of the penal laws against the dissenters, it did not remove them. (99) And the dissenters were not entirely left to their own devices. For example, in 1714 the *Schism Act* was passed, preventing dissenters from educating their own ministers and laity. (100) The Test and Corporations Acts, furthermore, were still in operation; although these need not have necessarily disturbed the eligibility of one for office, the sacramental requirements were problematic for the conscientious dissenter: "Most Independents, Baptists, Quakers, rejecting any communion with Church of England, found the practice unacceptable....". (101) In addition, those who did not fall within its operation, most obviously Catholics, but also Unitarians, (102) were, of course, subject to continued persecution.

As should be apparent from the preceding, the religious reforms associated with the latter half of the seventeenth century in England were not motivated by philosophical or religious concern but rather political design. "Tolerance of dissent could only come about through political rather than through religious convictions." (103) Nonetheless, the concessions granted through the *Toleration Act* and the relaxation of the penal laws were never revoked.

Ecclesiastically, the [Glorious] Revolution introduced a limited measure of toleration which broke the monopoly of the established Churches of England and Scotland. (104) The conditions under

which dissenting churches were permitted to assemble and to maintain a way of life outside the established Churches were still far from full toleration and did not extend to cover the Roman Catholic Church, but they were a clear break with the tradition that all citizens were expected to conform to the practice of the established Churches and be subject to their discipline. (105)

France

France, by contrast, appeared to come to terms with diversity of religions earlier than most countries and is a fascinating example of virtually all arguments for and against tolerance and freedom. After initial persecution of the Reformers during the early years of the sixteenth-century, France moved reasonably quickly to a more liberal policy. (106) Thus within 100 years of the Reformation's commencement, France had adopted a relatively tolerant position. Such a position, however, was an anathema to the prevailing political structure which was premised on the doctrine of national unity.

Across Europe, Protestants had themselves been trying to attain some degree of unity and a multitude of doctrinal statements were drafted to this effect. (107) There were, however, calls for a broader approach - one that embraced both Catholics and Protestants:

[T]here were those who wanted a wider ranging concord, between Catholics and Protestants, concord in the strict sense of the word. Its advocates wished for the traditional Church to be reformed from within and the 'lost brethren' reunited within that Church at the expense of certain doctrinal and above all disciplinary concessions. (108)

Several colloquies were held to this effect, including Leipzig (1534, 1539), Jaguenau (1540), Worms (1541, 1557), Tarsbonne (1541, 1546) and Augsburg (1548). (109)

As a Catholic stronghold, however, France had a very strong national church. Its first interconfessional colloquy was not held until 1561 - the Colloquy of Poissy. This had very little in the way of positive outcomes: "each party tried to convert the other to its own faith; the Catholics wanted to reconstitute Roman Catholic unity while the Calvinists wanted to convert the entire kingdom". (110) Indeed the issue of religious unity was a driving force in France. The slogan, "*Une roy, une foy, une loy*" (one king, one faith, one law [realm]) - dating to mediæval times - had long been the axiomatic principle of French government. (111) "In the Kingdom of France... the safeguarding of religious unity was, from the very beginning, one of the chief duties of all kings, who at their consecration swore solemnly to 'keep the peace of the Church', and to exterminate all those whom the Church considered as heretics." (112)

As such, the Reformers were initially met with much opposition. Indeed, until 1561, practice of the Reformed faith was banned in France:

The prohibitions cost many hundreds (possibly thousands) of lives. Henry II sought to exterminate the 'infamous Lutheran mob'. After his death in 1559, the policy of repression was continued for some months... But a series of edicts issued in 1560 and 1561 abated the repression, and after April 1561 the practice of the Reformed faith was tacitly condoned, before being legalized in the Edict of January 17, 1562. (113)

Legislative activity

The *Edict of January 1562* is indeed viewed as a turning point. Smith states that it was "the

first piece of legislation in Europe that permitted nationwide religious dissidence". (114) Nonetheless, it was by no means comprehensive. Calvinist worship, for example, was not afforded legal status until the eighteenth century. Nor was the edict accepted without difficulty. (116) When issued, it was justified on clearly pragmatic grounds. Indeed it included a clause stating that the concessions within were granted, "due to the pressing urgency of circumstances, obeying the Royal will; but without approbation of the new religion; everything is to be temporary until such time as another royal order is issued". (117)

The temporary nature of the edict is emphasised when one examines the legislative activity of the era. There was the *Toleration Edict of Amboise* (1563) signalling the end of the first War of Religion, yet abrogated by the various declarations of the December of the same year and the following June limiting places of worship and forbidding all Protestant activity in the royal residences. In 1568, there was another toleration edict (the *Edict of Longjumeau* - again signalling the end to a War of Religion, this time the second). This was revoked within six months, and replaced by the *Edict of Saint-Maureles-Faussés*, which imposed upon all subjects the confession of one religion: Roman Catholic apostolic. This edict proclaimed itself to be "perpetual and irrevocable". (118)

Yet within two years, the press of religious unity was eased by the *Edict of Saint-Germain* (the end of the third War of Religion). Again, however, this was quickly countered; within two months Protestant schools were prohibited, and then in 1572 all Protestant religious gatherings were forbidden - temporarily at least. Later in the same year, Huguenots were specifically targeted by an edict against those "who blaspheme the name of the Virgin and the saints". (119) Again, tolerance gained favour following the end of the fourth War of Religion in 1574, but the next year laws against blasphemers were strengthened. This pattern continued, with Turchetti describing the period between 1576-1580 as one generally supporting tolerance, while between 1585-1588, once again unity was the general goal. (120)

Finally, however, there was the *Edict of Nantes*, which afforded France, "a large measure of religious tolerance". (121) Again intended to be a temporary measure, it is widely regarded to be the turning point in the French history of tolerance. (122) Whilst the civil wars continued, this edict reflects a distinct - and never to be reversed - move towards the increased acceptance of religious diversity. Indeed Henry IV's attempts to reinstate religious unity in 1593 and 1607 (123) indicate the extent to which tolerance had gained widespread acceptance.

Arguments for and against tolerance

Behind these incessant fluctuations, there was vigorous intellectual activity voicing the arguments supporting the various alternatives. The reasons given for the stances varied greatly. They ranged from the extraordinary statement of Michel de L'Hôpital, (124) who opined "L'excommunié ne cesse pas d'estre citoyen", (125) as opposed to the classic argument based upon skepticism: "no moral man, whoever he may be, can through any human argument or reasoning judge with certainty what is true". (126) Even within the more conservative ranks there was a prominent push (particularly during the 1560s) for religious freedom, or at least tolerance, as the means of returning to religious, and more pointedly, social unity. (127)

Apart from national religious unity, a significant point of contention was the logic, or lack thereof, of having two or more religions - "the existence of two religions cannot be inherently right". (128) Tolerance was seen to offer legitimacy to (at least) two religions, yet logic demanded that the true religion be embraced while the false was effaced from the nation. Nonetheless, the violence of the period motivated even those who held this position to call for tolerance, and in some instances, freedom. The anonymous *Exhortation aux princes* (1561), for example, recognises the illogicality of two religions, but states that the quickest way to peace is the permission of freedom of conscience. The author states that it is the will of God that we live "in peace of conscience, without threatening other people's lives, and in the religion to which we consider we have been called". (129)

Although there were several prominent advocates of tolerance or freedom, both lay and clergy, (130) few were in favour of either position for its own sake. Indeed Turchetti describes Sebastian Castellio - author of *Conseil à la France désolé* (October 1562) - as "the lone voice proclaiming the true open-minded and definitive tolerance, which both the Catholics and the Protestants detested". (131) For the most part, however, largely pragmatic reasons - primarily the desire to bring an end to the overwhelming devastation caused by years of civil wars - were the principles underlying "liberal" positions.

The Revolution and beyond

It is interesting to note that during the French Revolution - despite its strong anti-clerical overtones - the rhetoric of freedom was prevalent. Prior to the Revolution, the relationship between (the Catholic) Church and State was one of mutual support. The Church, however, was a major target of the Revolution - within five years, church lands had been nationalised, churches had been closed across the county, and clergy was subject to widespread persecution. As such religious practice was largely curtailed: measures included the denial of access to churches and the prohibition of ringing of bells, as well as the performance of outdoor festivals, processions and funerals. (132)

Nonetheless, article 10 of the *Declaration of the Rights of Man* stated, "No one should be disturbed on account of his opinions, even religious, provided their manifestation does not derange the public order established by law". This (albeit grudging) allowance of freedom (134) was taken to heart by the people. This is illustrated by the rhetoric of the Catholic revival, commencing in the latter part of 1794. (135) Contrary to the popular view of this revival as a "counterrevolutionary reaction", (136) Desan states that "many Catholic revivalists... not only consistently supported the Revolution but also turned its promises and ideology to their own advantage". (137) Thus those demanding freedom of worship relied on the rhetoric of the Revolution: (138) villagers in the town of Auxerre in 1795, for example, presented their demands for the use of their church with cries of, "Glory to God! Respect for the Convention and the constitutional authorities! Viva la République!". (139)

Such demands were generally based upon the widespread belief that the Revolution was in fact the source of a guaranteed right to religious freedom:

The notion that the Revolution itself was the basis of popular sovereignty, religious liberty and freedom of belief and expression was more than a rhetorical tactic to appeal to authorities: it was a deep-rooted conviction among people newly educated and formed in the heat of revolution. (140)

Despite a brief experiment with a separation of Church and State, (141) the Revolution,

however, did not remove the close ties between the French State and the Catholic Church. Nonetheless, it evinces the extent to which freedom of religion had become entrenched in the national psyche.

Conclusions

Thus, while the rhetoric of the Revolution illustrates the extent to which religious tolerance had entered into the ideology of ordinary people, the actual granting of tolerance was always motivated by (most often, political) expediency, as opposed to ideology. While this is clearly illustrated in the case studies above, it was a trend that occurred across Europe. Immediate issues included the need to boost army recruitment, (142) the accommodation of refugees (notably Catholics following the French Revolution), (143) the general inability to enforce laws against dissenters due to their sheer numbers, (144) and various political alliances. (145) In Austria, for example, Joseph II (selectively) granted citizenship in 1781 to non-Catholics in order that they might "be free to engage in agriculture or in a craft to the greater benefit of the state". (146) Earlier his mother had signalled a slight separation between church and state by limiting the number of religious holidays - all in the interests of productivity. (147)

Those campaigning for greater freedom or at least tolerance, were not unaware of these considerations. Thus Alexander Hay, a prominent Scottish Catholic, "blatantly offered to trade Highland troops [during the time of the American War of Independence] for toleration". (148) During the same period of time but across the Atlantic, the Roman Catholic bishop (and later, archbishop) of Baltimore, John Carroll, used a similar argument. He noted the extent to which Catholics had supported the Revolution, despite the disregard with which they were held by their fellow countrymen: (149)

[H]e stressed repeatedly that since Catholics had proven the social utility of their faith, 'it is not only contradictory to the advanced principle of equality in Religious rights, but a flagrant act of injustice to deprive them of those advantages', which they had worked so hard to procure for the nation. (150)

It is to be noted that religious freedom was indeed the first amendment made to the American Constitution. James Madison, author of the *Bill of Rights*, for example, considered the free exercise of religion as a right, "precedent both in order of time and degree of obligation to the claims of Civil Society". (151)

Thus, the politics of dissent and toleration clearly preceded its philosophical underpinnings: "the main cause of toleration was its increasing need... itself a function of increasing religious diversity". (152) The enormous impact of the liberal tradition - as enshrined in documents such as the *Declaration of the Rights of Man*, the American Constitution and the *Bill of Rights* (153) - however, meant that religious tolerance quickly came to be seen as fundamental to a free and democratic society, not merely an instrument of political expediency.

Philosophical Underpinnings

John Locke

The emerging rationale underlying toleration, and later expanded to advocate freedom of

religious diversity, was fundamentally liberal. (154) Hobbes and Locke are the two philosophers seen to exemplify the birth of the "liberal tradition" (155) and its far-reaching consequences. "It is truly the case that Hobbes and Locke inaugurated the tradition of human rights thinking which we associated with them." (156) Although Hobbes did not focus a great deal upon religious tolerance, (157) Locke addressed this issue specifically.

In his early advocacy of liberty, Locke often pursued what were then held to be quite radical positions. Although he never moved beyond advocacy of tolerance (and even then, a limited tolerance), the arguments proffered rested not so much on the futility of enforcing religious unity or the pragmatic concerns of army enlistments, but rather philosophical, even spiritual bases for such a position. His advocacy of tolerance, however, had its own inherent contradictions; once overcome, however, they led inevitably to a conclusion in support of religious freedom. Thus, while the ideology of the free exercise of religion was certainly not Locke's goal, it was his legacy.

By no means, however, had even tolerance always been his position. Indeed, with the publication of his *Two Tracts on Government* in 1660, he gives a strong rebuttal to the notion of conscience and notably, the separation of religious and civil authority which was later to become his dominant paradigm. Indeed, his position as stated in the *Two Tracts* has been described as "decidedly intolerant". (158) Locke initially responded to decades of religious war throughout Europe by advocating centralised authority in the form of strong government. In like manner to Hobbes, he states "a *general freedom* is a *general bondage*". (159)

Snyder identifies the fundamental question of religious tolerance during the seventeenth century to be "broached in terms of whether a civil magistrate had the authority to make law concerning indifferent matters of religious worship or practice, an indifferent matter being one on which God has not explicitly ruled in the Scriptures". (160) Locke's unequivocal answer to this question was in the affirmative: "[T]he supreme magistrate of every nation what way soever created, must necessarily have an *absolute* and *arbitrary* power over all the indifferent actions of his people". (161) Indeed not only did the magistrate have the power to decide indifferent matters such as liturgical issues and even dietary observances, Locke argued that, in the interests of social harmony, he should. (162) Although he clearly regarded liberty as important even at this stage, (163) it was to be subordinated to the interests of civil unity and peace:

Grant the people once free and unlimited in the exercise of their religion and where will they stop, where will they themselves bound it, and will it not be religious to destroy all that are not of their profession? (164)

Scholars tend to characterise this response in the context of the religious wars of the early seventeenth century: "Locke was clearly haunted by the spectre of civil war which had plagued much of Europe... during the first half of the century...". (165) As such, Locke's conferral of such broad power upon the civil magistrate was firstly, the identification of religious diversity as the source of civil strife; secondly, it was an attempt to remove the potential for such disorder - manifested in such a tragic manner throughout his lifetime - by a strong central government: (166) "The specter of disorder, anarchy, and chaos pervade this work". (167)

Letter Concerning Toleration

In his *Letter Concerning Toleration*, however, Locke clearly adopts a different approach. Written in 1685 and published anonymously in 1689 as *Epistola de tolerantia*, it was the first of three (in addition to a fourth fragment) letters he wrote on this issue. Famously, he asserts, "the care of each Mans Salvation belongs only to himself", (168) going on to state:

No private Person has any Right, in any manner, to prejudice another Person in his Civil Enjoyment, because he is of another Church or Religion. All the Rights and Franchises that belong to him as a Man, or as a Denison, are inviolably to be preserved to him... What I say concerning the mutual Toleration of private Persons differing from one another in Religion, I understand also of Particular Churches; which stand as it were in the same Relation to each other as private Persons among themselves.... (169)

Creppell identifies five discrete reasons given by Locke in defence of toleration:

Christian doctrine upholds it;

It denies public justification of conflict by self-serving leaders;

One cannot know for certain if one particular doctrine is correct; (170)

Persecution by the sovereign is irrational;

Individual persons must have the liberty to choose of their own way to salvation. (171)

These, of course, are closely related, and thus one finds that his position on the separation of the religious and civil spheres, wherein Locke states, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religions, and to settle the just bounds that lie between the one and the other", (172) is heavily grounded in theological argument. (173) This is sometimes stated in terms of the dichotomy between interior/ exterior or private/ public realms - and was to have immense and long-standing influence. Upon Montesquieu's addition of the judiciary as a further distinct sphere, for example, there is the foundation of the doctrine of separation of powers, axiomatic to the constitutional structures of both the United States of America and Australia.

It is this separation which forms the crux of Locke's argument - Mitchell describes it as "the cornerstone of Locke's call for toleration". (174) Considering the public and private realms, Locke considered that the human actions, experiences and ideas associated with both to be so "radically dichotomous" that "[t]oleration was shown to be natural or self-evident". (175) Thus the separate sphere of the individual - both with respect to expression and experience - is inviolable. (176)

This separation, in small part, rests on the very notion of liberty of conscience previously rejected by Locke. As "liberty of conscience is every... [person's] natural right", the church must be viewed as "a thing absolutely separate and distinct from the Commonwealth". (177) Fundamentally, however, the separation of Church and civil authority is grounded in Locke's reading of the New Testament: "toleration is made necessary by the New Dispensation". (178) While Israel was founded upon a theocracy, created by the Covenant, Christ clearly states his kingdom is not of this world. Thus Locke argues,

[T]he commonwealth of the Jews, different in that from all others, was an absolute theocracy; nor was there, or could there be any difference between that commonwealth and the Church... But there is no such thing under the Gospel as a Christian commonwealth... [Christ] indeed taught men how, by faith and good works, they can obtain eternal life; but He instituted no commonwealth. (179)

In a complete reversal of his views as stated in the *Two Tracts*, Locke then argues that tolerance will enhance social harmony:

"[If the commonwealth and church would each] contain itself within its own bounds - the one attending to the worldly welfare of the commonwealth, the other to the salvation of souls - it is impossible that any discord should ever have happened between them. (180)

Indeed, he submits that lack of tolerance lies at the heart of previous conflicts:

It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted), that has produced all the bustles and wars that have been in the Christian world upon the account of religion. (181)

The fact that society must tolerate religious and moral diversity simply because they are so fundamental to individual identity - things not to be quibbled with - is, according to Baird, a lesson Locke drew from his earlier incursions into public debate and passed onto the Enlightenment. (182)

The very foundation of such tolerance - the delineation of church and civil authority, also provided boundaries which further protected from civil strife:

Locke now saw that toleration, as the establishment of boundaries, particularly that between public and private, constituted a way in which the individual freedoms and expression that he had always valued could be channeled, thereby making their chaotic tendencies less inevitable. (183)

As such, Locke came to see that the separation of church and state - essentially, for him, theologically grounded - led to a philosophical commitment to toleration, with the happy consequence of social harmony. Thus his pragmatic arguments against toleration are overturned with a new pragmatism, (184) the validity of which history appears to bear out.

It must be remembered, however, that the limits imposed by Locke on the extension of tolerance extend well beyond the separation of public from private. Despite his position being described as one of "radical toleration", (185) Catholics and atheists were never accorded this "natural" (186) and inviolable (187) right. While he urged freedom of worship for dissenters, (188) Jews (189) and even "the heathen Indians of the New World", (190) at no stage did he relax his position with respect to Roman Catholics. Indeed, Goldie states, "Locke was always deeply hostile to catholicism and utterly inflexible in the face of it". (191) Although Locke had some quite radical views with respect to naturalisation of citizens and arising questions of loyalty, (192) the question of Catholic loyalty to a foreign power again seems to be the source of intransigence. (193)

Given that Locke asserts that freedom of conscience is a natural and inviolable right for all, this does seem a radical inconsistency lacking adequate foundation. Nonetheless, Hill notes:

The persistence of anti-Catholic sentiments among the English and Scottish intelligentsia should cause little surprise. For well into the eighteenth century the standard church histories in Britain were written by Protestants, and there was little opportunity for correctives to the orthodox view that the history of the papacy was one of 'total depravity and corruption of doctrine and moral', while the Pretender's Catholicism and his dependence on France and Spain helped maintain the perceived association between Catholicism and arbitrary government.... (194)

Ultimately, Locke appears to justify his position by holding that the Catholic issue is one of foreign allegiance and as such, a public matter. His line between public and private,

however, is - as would surprise no-one - very difficult to draw. My private conscience may demand that I abide by the teachings of the Pope (or, alternatively, the Ayatollah Khomeini), yet the public good may require that my loyalties be undivided. Yet if through my own processes, I arrive at the same moral conclusions as the Pope, without declaring myself Catholic, Locke will defend my freedom of conscience. Furthermore, it should be noted that, perhaps unsurprisingly given Locke's earlier treatises, in "borderline" cases, he will err on the side of civil unity.

This problem ultimately reflects the dawning of the modern debate as to how far a liberal, or for that matter, any system should encompass beliefs antithetical to its own:

The pluralist will tolerate all other views, except those which deny such universal human rights and the doctrine of pluralism itself. Here we arrive at one of the fundamental problems for 'open' democratic societies: are there real limits to what can be tolerated? (195)

Contemporary examples of this problem include the United States' banning of the Communist Party, the Rushdie affair (196), and again, Catholic allegiance to the Vatican, this time in China. (197)

Thomas Paine

Paine, as opposed to Locke, reflects a more general stance. He is notable as being one of just two people to play significant roles in both the French and American revolutions - the point at which the right of religious *freedom* was formalised and institutionalised. (198) Thomas Paine's impact on this issue was more immediate than Locke's. Whereas the latter's legacy is fundamental to the emergence of arguments underlying religious liberty, Paine exerted direct influence upon the constitutional structure of France and America during the revolutionary era. He assisted, for example, in the drafting of the new French Constitution and was even conferred honorary citizenship by the French National Assembly. (199) The axiomatic belief - all men are born equal - is the "basis [upon which] the sentiments found in Thomas Paine's *The Rights of Man* and in the French and American revolutions, can be largely reformulated and then declared universal in the U.N. charters of human rights". (200) Thus, Fitzsimons describes the United Nations as "an organization founded on the Paineite ideal of abstract and universal rights". (201)

In like manner to Locke, Paine places great value on liberty - "[it shines] as the human goal". (202) Thus, "every man, Paine presumes with Locke, is naturally free to order his actions as he sees fit without depending on the will of others, a freedom constrained only by every other person's natural right". (203) His doctrine is based on natural law principles, and Paine argues,

The principle of an equality for rights is clear and simple. Every man can understand it, and it is by understanding his rights that he learns his duties; for where the rights of men are equal, every man must finally see the necessity of protecting the rights of others as the most effectual security for his own. (204)

His view of a social contract, however, stands in stark contrast to that of Hobbes: "Man did not enter into society to become worse than he was before, not to have fewer rights than he had before, but to have those rights better secured". (205)

Paine is of course well known for his polemic against institutionalised religion. In the *Age of*

Reason, both Christianity and Judaism are portrayed as "corrupted creeds, the good aspects of which - monotheism and benevolence - have been fatally marred by pagan accretions and residues". (206) Although Paine affirmed his belief in "a single God and Creator", (207) his distaste for religious institutions is profound:

My own mind is my church. All national institutions of Churches, whether Jewish, Christian, or Turkish, appear to me no other than human inventions set up to terrify and enslave mankind, and monopolise power and profit. (208)

Furthermore, he viewed the Christian religion in particular as a threat to the social spirit: "the ethic of redemption undermines civil morals". (209)

Nonetheless, Paine's defence of natural rights is such that religious liberty is well protected. His advocacy of freedom of speech (and implicitly, conscience) necessarily encompasses freedom of religion:

The unrestrained communications of thought and opinions being one of the most precious Rights of Man, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty, in cases determined by the law.... (210)

Specifically with reference to matters spiritual, he states,

The key to Heaven is not in the keeping of any sect, nor ought the road to it be constructed by any. Our relation to each other in the *world* is as *men*, and the man whose is a friend to *man*, and to his rights, let his religious opinions be what they may, is a good citizen. (211)

Thus, while Paine was not as concerned directly with the issue of religious freedom (or tolerance) as was Locke, his broader defence of natural rights means that the protection he advocates is necessarily more encompassing. Nonetheless, his profound impact is often overlooked. Alfred Owen Aldridge argues that this is due to the very fact that his ideas are now so widely accepted:

In the political realm, his principles are now considered axiomatic - and for that reason, no longer associated with him. The universal acceptance of his principles has paradoxically meant the decline of his popularity, for the degree to which they have been accepted and applied in society, they have lost the aura of novelty and individuality. (212)

The wide acceptance of these principles is such that their influence on modern human rights doctrine is clearly discernible.

Conclusions

Thus while the period of the Reformation provided the political impetus for the granting of tolerance, it is the liberal tradition which underscores much of its ideology. The extent to which the rhetoric of liberalism entered the popular consciousness is clearly demonstrated by the calls for religious freedom during the time of the French Revolution, and the prime position granted to it within the Constitution of the United States. (213) It is this liberal tradition which largely underlies our present understanding of human rights.

The Modern paradigm

Within the modern context, human rights are firmly entrenched, attaining hitherto unseen status at both a legal and moral level. Although religious liberty was recognised between nations as early as 1648, (214) it is really only this century that human rights, as a more general concept, have received international acceptance. "[O]ur contemporary notions of human rights have been influenced and affected by the developments [this century] in international law." (215) As such, today "in sharp contrast to the situation that prevailed in 1789 - almost everyone pays lip service to the rhetoric of human rights". The protection and promotion of human rights is considered one of the prime objectives of the supreme international body, the United Nations.

The means by which human rights have now become so entrenched constitute a rare moment in history - effectively the human rights documents of the United Nations are a vignette embodying the culmination of Western political and philosophical activity to the time of their creation. (216) Van Boven identifies four critical landmarks in the formulation of modern human rights doctrine at an international level. (217) The first is the Covenant of the League of Nations, drafted by then president of the United States, Woodrow Wilson. This was the first attempt to reach multi-lateral agreement on the substance of human rights, but was based upon the antiquated concept of such rights subsisting only in civilised (for that, read Christian) nations. (218) A second point of significance was Roosevelt's speech to the American congress in 1941 on the "Four Freedoms" - the "four essential human freedoms" upon which the world should be founded. (219) In the first two of these freedoms lies the immediate predecessors - albeit in extremely abbreviated form - of the human rights recognised by the United Nations in its charter, and subsequent documents. The third and fourth landmarks are the *Universal Declaration on Human Rights* and the Human Rights Covenants, to be discussed in detail below.

The groundwork for these documents was laid by the formative document of the United Nations, the *Charter of the United Nations*, which repeatedly asserts that the United Nations and its subsidiary organs are to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". (220) Coming into being on June 26, 1945, the Charter commences:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small

...

AND FOR THESE ENDS

to practise tolerance and live together in peace with one another as good neighbours

...

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS. (221)

Of the four stated purposes of the United Nations, the third states that it is a purpose of the United Nations,

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. (222)

U.D.H.R. & subsidiary documents

These 'human rights and fundamental freedoms' were more concretely formulated in the *Universal Declaration of Human Rights* [the U.D.H.R.], passed as an ordinary resolution of the General Assembly in 1948. (223) Amongst the rights recognised within this document, there is the right to life, liberty and security of person, (224) the right to a nationality, (225) protection from slavery (226) and arbitrary arrest. (227)

The Covenants

The U.D.H.R., however, was in effect merely a preliminary step towards a more elaborate formulation of the rights stated. (228) In accordance with its role as stated in the Charter, (229) the Economic and Social Council submitted drafts to the General Assembly, which were adopted on December 16, 1966 as the *International Covenant on Economic, Social and Cultural Rights* [the First Covenant] and the *International Covenant of Civil and Political Rights* [the Second Covenant]. (230) These Covenants are explicitly attached to Article 55 and its ancillary, Article 56, of the Charter.

The recognition of religious rights

There is significant recognition of religious freedom within the U.D.H.R. and the Second Covenant. Several churches were heavily involved in the drafting of the U.D.H.R., and their influence is apparent. (231) In addition to the specific formulation of religious liberty within these documents, there are several points at which religious rights are emphasised. Article 18 of the U.D.H.R. provides,

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. (232)

It should be noted that article 29, paragraph 2 of the U.D.H.R. is a limitation clause of broad scope, providing that for reasons of public order, health or significantly, morality, the rights affirmed within may be abrogated. (233) The last ground may be a cause for concern, given that a fundamental aspect of religion is the establishment of codes of conduct. (234)

All rights stated in the U.D.H.R. are broadly drafted, affirming the rights of "everyone" - a stark contrast to the rights accorded by the *Magna Carta* to, for example, the heir of "any of our earls or barons, or others holding of us in chief by military service". (235) Nonetheless, article 2 emphasises that "all rights and freedoms set forth in this Declaration [are recognised] without distinction of any kind", (236) referring explicitly to, *inter alia*, religion. Furthermore, it should be noted that the only other time in the U.D.H.R. when a similar

assertion is made - article 16 (237) - religion is again specified. (238) Indeed it is one of just three grounds common to both these articles.

The Second Covenant contains the rights more commonly called human or civil rights. (239) Relevant for present purposes, article 18 seeks to protect religious freedom in similar, although substantially expanded, terms to the U.D.H.R. (240) Again, as in the U.D.H.R., religion is amongst the rights particularly emphasised throughout the Covenant. (242) Furthermore, it is entrenched. Article 4 allows a State to take measures derogating from its duties pursuant to the Covenant in time of "public emergency". Paragraph 1 of this article adds the proviso, however, that such measures "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". (242) Despite this reservation, the Covenant goes on to quarantine explicitly article 18 from interference - one of just seven articles so reserved. (243)

Declaration on Religious Intolerance and Discrimination

In 1981, the U.D.H.R. and Covenants were supplemented by the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* [D.R.I.D.]. It is the "first UN instrument proclaiming, in comprehensive form, a catalogue of rights, freedoms and principles" (244) pertaining specifically to religion. It provides a more in depth espousal of the right to religious freedom than either the U.D.H.R. or the Second Covenant, and arguably its scope is wider. For example, Kolodner argues that as the right to derogate from the D.R.I.D. is more limited than in previous international agreements, "[t]he D.R.I.D. is even more protective of religion than the I.C.C.P.R.". (245) Alternatively, it may be seen as less encompassing given that explicit references to the freedom to change religion or belief and the freedom to adopt a belief of one's own in the Covenant (an expanded form of the U.D.H.R.) were deleted, "in view of the sensitivities of Islamic countries and [in order] to achieve a consensus". (246) Nonetheless, as the very last article (article 8) expressly states that nothing within the D.R.I.D. shall be construed as derogating from the rights set out in the U.D.H.R. and the Covenants, one would tend to conclude that the D.R.I.D. is at least as comprehensive, if not more so, than its predecessors.

Binding nature of these documents

There are specific ways in which international documents may become binding. (247) In most cases, it requires agreement on behalf of the states involved, i.e. they must be signatories. Although member states of the United Nations (248) are bound by the Charter, this is not necessarily the case for the U.D.H.R. and the Covenants. All these states, however, are bound by Article 55 and 56 of the Charter - expressing the United Nations' general commitment to human rights.

The U.D.H.R. is not a document of legal force, even for signatories. Nonetheless, its importance in international law is not to be understated:

The Declaration is not a legally binding instrument as such... Nevertheless some of its provisions either constitute general principles of law, or represent elementary considerations of humanity. More important is its status as an authoritative guide... to the interpretation of the Charter. (249)

It has been argued that the U.D.H.R. has passed into customary international law, making it binding on all states whether signatories or not. This is the stance of the United Nations

itself, (250) and is supported by several jurists and decisions in some (mostly American) municipal (252) cases. (253) The International Court of Justice has even alluded to this position. (254)

The Covenants, on the other hand, function fundamentally as treaties - thus a state is bound only upon its signature and ratification. Once again, however,

The nature of the subject matter is such that even for non-parties the content of the Covenants represents authoritative evidence of the concept of human rights as it appears in the Charter of the United Nations.... (256)

Nonetheless, although a strong case may be mounted that a right such as freedom of religion - particularly given its entrenchment in the Second Covenant - is part of customary international law, and therefore binding upon all states, (257) Sullivan concludes, "[t]here is no consensus on whether the prohibition of discrimination on grounds of religion or belief already constitutes a norm of customary law". (258)

With respect to the D.R.I.D., the circumstances surrounding its adoption again mean there is uncertainty as to its binding force in international law. It was passed by consent by the General Assembly, thereby holding an equivocal position:

On the one hand, it can be argued that international declarations are traditionally non-binding. On the other hand, the United Nations General Assembly unanimously adopted the D.R.I.D., and it contains strong language requiring governments to 'enact or rescind' (259) legislation which fosters discrimination or restricts religious liberties. (260)

Ultimately, however, it is not the legal status of these documents which is critical, (261) so much as the regard in which they are held, particularly the U.D.H.R:

During the past three decades, the Declaration has played a more prominent and dynamic role at the various national and international levels than its drafters expected. Many scholars and politicians - and, perhaps more important, many common citizens - look upon the Universal Declaration as a moral and legal document that can legitimately be invoked before political and judicial forums at national and international levels. (262)

Despite the moral authority which the human rights documents and the concepts generally bear, there are significant underlying issues. These emerge fundamentally, it will be argued, from the source and manner of the development of human rights, and may be well illustrated by the example of religious liberty. The origin of human rights - as distinct from its justification - is undeniably European, emerging from distinctively European experiences. (263) Thus, for example, an examination of religious liberty cannot be removed from the context of inter-religious conflict throughout Europe during the seventeenth and eighteenth centuries. As we have seen, however, the political acknowledgment of religious tolerance, then liberty first emerged due to reasons of political expediency, while the philosophical underpinnings bear their own inherent inconsistencies. It will be thus argued that the short-comings of religious liberty in its present formulation may be directly linked to the source and manner of its emergence.

Points of tension

There are several points of conflict which indicate some of the difficulties inherent in the protection afforded to religious freedom in the Universal Declaration and subsidiary documents. These include, for example, laws instituted in religious states: the freedom

advocated in article 18 is to a large extent premised on an institutional separation or at least distancing of church and state. (264) Significantly, however, tenets of, until recently Catholicism (265) and more pointedly Islam, (266) advocate the establishment of a religious state. This can create an internal conflict in the concept of religious liberty where, for example, the proselytising of various religions is banned in accordance with the *religious* agenda of the government of the day. (267)

Furthermore, some may consider religious freedom, as it is enshrined in various constitutions, as offering unfair protection to those holding religious beliefs. This issue is hinted at in the following excerpt from a report on the status of religion in American public schools:

Religious or anti-religious remarks made in the ordinary course of classroom discussion or student presentations are permissible and constitute a protected right. If in a sex education class a student remarks that abortion should be illegal because God has prohibited it, a teacher should not silence the remark, ridicule it, rule it out of bounds or endorse it, any more than a teacher may silence a student's religiously-based comment in favor of choice. (268)

This statement may be construed as offering special protection to beliefs held on religious grounds. Is a child's advocacy of abortion on environmental grounds (i.e. as a form of population control) offered similar protection as an opinion held on religious bases? Such a construction is not beyond comprehension - thus for example the status of a conscientious objector citing religious reasons may be different to a fellow objector who cites non-religious reasons. (269) While there are several instances in point indicating the difficulties associated with religious liberty, two will be presented as studies in an attempt to exemplify problematic areas. These are: the definition of the right; and its recipient.

Definitions of religion

A significant point of contention arises from the very issue of what is a religion. Frequently when the liberties of an apparent religious minority have been violated, the official justification for such violation is that the minority in question does not constitute a religion. This indeed has been the position of the German government in the light of accusations of discrimination - at both a popular and institutionalised level - against members of the Church of Scientology.

Such incidents of discrimination have been documented in various U.S. Department of State Human Rights Reports, (270) as well as the Report of the Special Rapporteur on the implementation of the D.R.I.D. (271) Cited violations include:

- economic boycott, at a civil and governmental level, of organisations/ companies with known links to Scientology; (272)
- a special commission established by parliament to investigate the church's activities; (273) and
- the screening of applicants for Scientology membership for state civil service positions. (274)

The major political parties also exclude Scientologists from membership on the ground that the church's "goals and principles are undemocratic and thus inconsistent with those of the political parties". (275) These and further incidents have led to Germany being accused of conducting a campaign of "government-condoned and societal harassment" (276) against Scientologists. Indeed, Scientologists have lodged complaints with the U.N. (277) and the

European Commission of Human Rights, as well as filing numerous civil suits.

The success or failure of such civil suits has invariably depended upon whether the court (or administrative body) accepts that Scientology is a religion. A significant number of cases has determined that it is indeed so, (278) offering various criteria for what constitutes a religion. A sample of the criteria offered is as follows.

As stated in an Australian court decision:

[F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.... (279)

In France:

[A] religion having a body of doctrine and ceremonies, with a hierarchical and disciplined structure. The religion of Scientology has adopted the juridical form of a religious association based on French Law. (280)

And, in Germany itself:

Three characteristics of a religion can be stated: 1) it must be a voluntary association of not less than two persons with a minimum of organizational structure that does not depend on legal or civil status as per public or civil law and does not depend on its numerical strength or social relevance. 2) There must be some consensus about the purpose of human existence (origin, purpose, goal, transcendence) as well as about basic principles of individual conduct. It is not required that this consensus be inferred from a dogmatically fixated, systematically conclusive creed or ideological denomination. 3) A religious or ideological community strives for and practices its purposes and dogma (consensus) and this is visible to the outside world. The Church of Scientology fulfills these requirements. (281)

Given the above statements - a mere sample of decisions in favour of the Church of Scientology - the extent to which the church is discriminated against by various governments (282) may appear perplexing. Former "cult-members", however, attest to extensive criminal activity on behalf of Scientology while the expensive fees for participation in the church's prolonged education programme (283) have led to it being dubbed, most politely a "for-profit organization". (284) More pointedly, it has been described at an official level in Germany as "one of the most aggressive groups in our society". (285) The following excerpt from the sentencing statement of an American judge upon the conviction of eleven Scientology leaders (286) including the wife of L. Ron Hubbard (the church's founder) exemplifies the concerns held with respect to the church.

The United States initiated the investigation which resulted in instant indictment in view of the brazen, systematic and persistent burglaries of United States government offices in Washington, D.C., and Los Angeles, California, over an extended period of at least some two years. Additionally, the United States was confronted with the pervasive conduct of the defendants in this case in thwarting a federal Grand Jury investigation by harboring a fugitive, in effect forcefully kidnapping a witness who had decided to surrender to the federal authorities, submitting false evidence to the Grand Jury, destroying other evidence which might have been of valuable aid to its investigation, preparing a cover-up story, and encouraging and drilling a crucial witness to give false testimony under oath to that Grand Jury... a review of the documents seized in the... searches... shows the incredible and sweeping nature of the criminal conduct of the defendants and of *the organization which they led*. These crimes include infiltration and theft of documents from a number of prominent private national and world organizations, law firms and newspapers; the execution of smear campaigns and baseless law suits to destroy private individuals who had attempted to exercise their... right to freedom of expression; the framing of private citizens who had been critical of Scientology, including the forging of documents which led to the indictment of at least one innocent person; violation of the civil rights of prominent private figures and public

officials. These are but a few of the criminal acts not covered in the 'uncontested' stipulation of evidence... *The evidence in this case... establish[es] beyond peradventure that the Church and its leadership had, over the years, approved, condoned and engaged in gross and widespread illegality.* One, indeed, wonders how it can even be suggested that the defendants and their organization did not make illegal activities part and parcel of their daily work. (287)

Ultimately, even the most strident advocate of religious liberty would not condone the consistent and arbitrary undermining of a country's legal and political structure in the name of religion. Indeed, this is clear in the wording of article 18, paragraph 3 of the Second Covenant: "Freedom to manifest one's religion or beliefs 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 case of Scientology should therefore be relatively clear: if there is evidence to support the contention that the activities of the church are more accurately characterised as primarily of a criminal as opposed to religious nature, then it cannot be considered to be a religion. If not, then it should be afforded the protection enjoyed by other religious bodies. (288) If the former is the case, then the many innocent members of the Church of Scientology, considered even by the church's opponents to be the majority (289), are more victims of fraud than of interference with their religious freedom.

The case of Scientology provides a specific example of a more general issue concerning the definition of religion: the recognition of new and alternative religious movements. Such recognition is notoriously slow in being forthcoming, and even when granted, these religions continue to be regarded with suspicion. This reflects the nature of the granting of religious tolerance, and then liberty: it was afforded to those with sufficient significance, be it financial or numerical, to either:

1. cause undue agitation, or
2. offer considerable advantage to the ruling power.

As such, it has traditionally been offered to minorities wielding a degree of political power, with other smaller communities generally included as unintended beneficiaries. As such, the public acceptance of these religious movements is frequently low; any discomfort felt at the discrimination of such groups is generally outweighed by the outrage felt at the alleged excesses - most frequently, sexual or financial - of these "cults" (a term used, it is suggested, to distance the organisation from any notion of "religion" and its accompanying freedoms):

Regarded by many with distrust or hostility and counting few vocal allies within mainstream religion, NRMs [New Religious Movements]... appear to be the groups most vulnerable to any retrenchment of constitutional guarantees of free exercise proposed in the name of preventing future 'Wacos'. In addition to the greater suspicion with which NRMs are viewed generally in the wake of the Koresh controversy, charges of 'brainwashing', corruption, and intimidation of critics against specific NRMs further alienate these groups from the large segment of the American populace who would blanch at the thought of any circumscription of the First Amendment right of adherents of major religions. (290)

It is suggested that the total silence in international human rights documents - including even the D.R.I.D - of the nature of a religion merely reflects the nebulous nature of the concept. The failure to clarify it, however, has led to assumptions going unchallenged. The acknowledgment of religious liberty - and even tolerance - at both a political and importantly, a *public* level, remains based upon traditional criteria. The significance of the latter has increased substantially as political responses frequently tend to *follow* popular

opinion (at least in the West) as opposed to leading it.

As has been adequately demonstrated by philosophers as diverse as Thomas Aquinas (291) and John Stuart Mill (292), however, the acknowledgment of rights should not rest on the criterion of public acceptance. The purpose of the human rights charters - and a purpose of the United Nations itself - was to formulate these rights such that individual governments, tyrannical or otherwise, and municipal courts would no longer be left to determine the basic rights of individuals. In the absence of a definition of religion, the freedom thereof is at best a nebulous, arguably even a vacuous, concept (293) other than for those falling within the traditionally recognised churches. (294)

The bearer of the right to religious liberty

The apparent contradiction between religious freedom as defined in the U.D.H.R. and subsidiary documents, as set out above, and the strict rule against apostasy in Islam is a fundamental indication of the inherent tensions within the present formulation of religious liberty. Indeed often the political and historical context of its recognition appears to dominate its philosophical underpinnings, particularly with respect to notions of community rights as against rights of the individual. While the issues of religious freedom within the context of Islam are many and varied, an interesting aspect of the dilemma is illustrated by the case of Shah Bano.

Shah Bano, an Islamic woman from India, was married in accordance with Islamic law before her lawyer-husband "drove [her] out of the matrimonial home". (295) Given her illiterate status, her sons assisted her in applying for maintenance under the *Code of Criminal Procedure* [C.C.P.], requiring the proper maintenance of indigent family members. (296) India in the formation of its constitution had enabled the self-regulation of religious minorities such as Muslims of matters including marriage, divorce and inheritance. Thus upon her application, her husband Mohammed Ahmed Khan divorced her in accordance with Islamic law (297) claiming that a husband was required - again under Islamic law - to support his former wife only for the *iddat* period (three months) following their divorce.

At first instance, the court decided the case in accordance with the C.C.P., as opposed to the *Shari'a*, whereupon Khan appealed the case to the Supreme Court. At issue here was the religious freedom of a community to self-regulate. The Indian Constitution (1950),

[S]ought to create a secular state that guaranteed religious freedom for all; it committed succeeding governments to the eradication of the vestiges of caste; and it directed the government to create a Uniform Civil Code that would place men and women on an equal legal footing in domestic matters, regardless of the religious tradition that had governed them in earlier times. (298)

Despite moves to create this Uniform Civil Code, Christians and Muslims remain governed by separate laws. (299) Moves to institute uniformity are seen as "interfering in the internal affairs of minority religious groups". (300) Thus when the Supreme Court held that the C.C.P. overrode (although it did not displace) any conflicting religious laws and further supported Shah Bano's claim to maintenance by appealing to the Qu'ran, there was uproar. The court was accused of interfering with the Muslim Personal Law Board's "rightful administration of Muslim law", and further "trying to interpret the Qu'ran". (301)

What followed was a concerted effort to establish the authority of internal Islamic Law, even

to the extent of it prevailing over the criminal code. Eventually, a bill entitled, *The Muslim Women (Protection of Rights on Divorce) Bill* was passed, effectively, "limit[ing] payment of maintenance to the iddat period... [and] insulat[ing] the former husband from any further obligations....". (302) Moreover, a father's duty to support children after a divorce was limited to two years. (303)

This case reflects not merely the difficulty of delineating the Lockean notions of public and private spheres - at what point are religious beliefs encroaching illegitimately on public life and vice versa - but also the difficulty of determining the holder of a right. The second human rights covenant specifically affirms the right of minorities, e.g. religious minorities, to establish and regulate their own communities, (304) while at the same time recognising the rights of individuals. Thus Everett states with respect to the Shah Bano case that, "[h]ere religious freedom does not mean individual freedom of conscience and association, but the autonomy of religious communities governed by traditions mediated through the elders". (305)

The present situation in India suggests that although individual rights initially won out, the religious freedom of the community prevailed with the end result being that Shah Bano *suffered discrimination on the very basis of her religion* (306) - an anathema to the doctrine of religious liberty as enshrined in the U.D.H.R. (307) and a direct contradiction to articles 2, 3 and 4 of the D.R.I.D.

IV Conclusions

These two examples illustrate just some of the difficulties inherent in one human right; the issue of *conflicting* rights has not even been considered, although it is clearly relevant, particularly in the case of Shah Bano. There are many other issues which lie beyond the scope of this paper. Nonetheless, these examples hold special significance: it is clear that the bearer of the right of religious freedom cannot even be clearly identified - issues as fundamental as what is a religion and whether religious rights belong to a community or an individual have yet to be resolved, and in some cases, even addressed.

In the haste to establish a human rights régime following the horrific incidents of World War II, the international community has adopted a European-based system of rights complete with European assumptions as to what constitutes, for example, a religion. (308) Until the assumptions inherent within the rights as presently formulated are challenged, the protections offered remain at the mercy of ruling régimes - fundamentally the right to religious freedom of even a recognised religion may be overridden on a ground as nebulous as "public morality". (309) It appears, however, that the concept of human rights finds far greater moral authority within the general community (particularly in the West) than it does with international governments. As such, governments are content to have rights poorly defined and ascribed, enabling the greater convenience of alternatively proclaiming rights violations in accord with political and economic concerns, or denying them for equally

pragmatic reasons. Thus, until the cynical use of human rights - and the emotivism attached - ceases, and the international community, *as a community*, attaches real value to them, the notion of human rights will be only slightly less arbitrary than the rights afforded by a reluctant King John in 1215. Such a move requires a return to the philosophical underpinnings of the rights concerned, ensuring that the gaps and inconsistencies are addressed with a coherent rationale formulated to underlie our modern doctrine.

For Footnotes and References, see Part B

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