BETWEEN ROGUES AND LIBERALS: TOWARDS VALUE PLURALISM AS A THEORY OF FREEDOM OF RELIGION IN INTERNATIONAL LAW

By Peter Danchin[*]

How are we to think about the seemingly endless series of antinomies and contradictions to which the relationship between religion and human rights gives rise, and to what extent accordingly do we have a coherent notion of religious freedom in international law? Drawing on recent women's rights scholarship in the areas of culture and religion,[1] I believe that a central problem in our understanding of the relationship between religion and human rights is how international human rights law *itself* constructs and imagines the category of "religion" and the right to "religious freedom" according to certain problematic—perhaps even *fundamentalist*—conceptions of public reason and individual freedom. The result has been two interrelated distorting effects in rights discourse.

The first concerns the identity of the *subject* of international law—the abstract category of "the state," or perhaps the "nation-state." To the extent that religious and cultural forms are embedded in the (public) laws and practices of non-Western states, any attempt to justify these norms against the international legal norms of equality and nondiscrimination has been axiomatically viewed as constituting a disreputable form of cultural relativism justifying patriarchal and pre-modern hierarchies and power relations. The universal claims of equality and nondiscrimination, however—even in the most "liberal" of societies—raise difficult and complex questions in their relationship to religion and culture. If a plurality of conflicting values is to be mutually respected (rather than uncritically dominated by a single value), conflicts between equality norms and collective identities must be interpreted and negotiated intersubjectively in continuity with each society's historic traditions and reference points. Indeed, there is growing evidence to suggest that "fundamentalist" resistance to the redefinition of cultural and religious forms can be correlated with the extent to which outside

[*] Lecturer and Director, Human Rights Program, School of International and Public Affairs, Columbia University.

[1] For example, Madhavi Sunder's *Piercing the Veil*, 112 YALE L.J. 1399 (2003), and the work of transnational solidarity networks such as Women Living Under Muslim Laws.

portrayals or attempts to influence a tradition are made in condemnatory or contemptuous terms, in a kind of vicious circle.

The second aspect concerns how to understand and define the *freedom* of legal subjects, in one case the "human rights" of individuals and certain specified groups, in another case the "sovereignty" of states. To the extent that religious traditions themselves (independent of any state laws and practices) are the source of unequal and discriminatory treatment, the public-private distinction has operated in liberal accounts of human rights and international law—under the banner of "freedom of religion"—completely to shield religions from the claims of the equality norm. Human rights law in this way has deferred to religious despotism in the private sphere through the definition of religion as a "sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected." As Sunder puts it "law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the 'other' of international law."[2]

In all societies, however, religious communities are internally contested, heterogeneous, and constantly evolving through internal debate and interaction with outsiders. In questioning the traditional liberal construction of this category, human rights groups (especially in non-Western contexts) are seeking today to find ways to realize the values of reason, equality, and liberty, not just in the public sphere, but also in the private spheres of religion, culture, and family. They are thus challenging directly religious and cultural authorities and seeking to re-imagine religious community on more egalitarian and democratic terms. As Sunder has argued, these efforts are in many respects different to the women's rights movement in the West, which offers women a right to religious freedom (on patriarchal, religious leaders' terms) or a right to equality (within the public sphere and without normative community), but not a comprehensive right to both.

My argument is that any such claims raise complex and difficult conflicts between equality norms on the one hand, and religious and cultural freedom norms on the other. In my view, we need to move away from traditional liberal accounts of religious freedom in international law and towards a more value pluralist approach that allows the possibility of new forms of hermeneutic circle and diverse forms of fusion of horizons. This in turn may open the way to a less dogmatic and binary account of reason and religion in viewing both as human institutions and social practices requiring modes of justification and accountability. Such an approach requires the constant search for forms of accommodation, mutual understanding, and overlapping consensus between actual religious communities and the normative claims of rights discourse understood in value pluralist and philosophically hermeneutic terms. In order for this to occur, however, one of the primary obstacles remains the inability of many Western rights theorists to see their culture (of liberal individualism and autonomy) as one among others.

The divergent claims and interests of majorities and minorities, and the different conceptions of individual and collective goods from which they arise, are inseparably related to individual claims of right. The "liberal algebra" of rights regimes is unable to resolve such conflicts without considering different conceptions of the collective good in the historical context of particular political communities. It is today more apparent than ever that the purported neutrality and separation of the right from the good has none of the simplicity that John

[2] Sunder, *supra* note 1, at 1402.

Rawls and other Kantian rights theorists might have imagined. The importance of the collective aspects of claims to religious freedom thus requires us squarely to confront a generally under-theorized and contested area of international human rights law known broadly as "group rights." In particular, we need to consider two types of communal claim—the first of so-called "peoples" or "nations," and the second of so-called "religious, cultural or linguistic minorities."

While a great deal of further argument is needed, I wish to suggest that together these group rights claims point to the need for a theory of value and legal pluralism in international law (whether "liberal" or otherwise) and away from more classical liberal theories premised exclusively on the idea of individual rights. Indeed, it is only by including in the analysis these two sets of group rights and considering their conceptual interrelationship to individual rights that contested issues of free exercise such as the wearing of religious symbols becomes comprehensible, and the need to move beyond traditional liberal accounts of human rights becomes apparent. Indeed, as many theorists today recognize, the need to accord public recognition of group differences and identities requires us to rethink two central tenets of the liberal rights tradition: first, the idea that comprehensive conceptions of religious and moral value are "private" matters to be excluded from the public sphere; and second, the idea that religious freedom requires no more than noninterference with the individual's imagined sphere of liberty as opposed to public recognition of a plurality of different religious and cultural groups and ways of life.