RELIGION, RELIGIOUS MINORITIES AND HUMAN RIGHTS: AN INTRODUCTION

Peter G. Danchin

The collapse of communism following the events of 1989 set in motion an economic, political, and social transformation throughout Central and Eastern Europe as the newly independent states began the precarious transition from totalitarian to democratic rule. In doing so, reformers looked to the values of liberalism, free market economics, and human rights to supplant the old, imposed, collectivist ideology which had been so hostile to liberal commitments. At the time Francis Fukuyama went so far as to declare the end of history itself, proclaiming that:

As mankind approaches the end of the millenium, the twin crises of authoritarianism and socialist central planning have left only one competitor standing in the ring as an ideology of potentially universal validity: liberal democracy, the doctrine of individual freedom and popular sovereignty. Two hundred years after they first animated the French and American revolutions, the principles of liberty and equality have proven not just durable but resurgent.

During this period of profound and rapid change, however, it was soon realized that the ousting of unpopular communist regimes, while a necessary condition for transformation, would not be sufficient per se to guarantee sustainable eco-
nomic reform and the effective protection of human rights. One of the reasons asserted at the time for the need to entrench human rights protections in the new Eastern European constitutions was the fragility of the democracy-building process in post-Communist countries. 3

As Vernon Bognadov has observed, in virtually every one of the new democracies, there are large national and religious minorities:

Even Poland, normally thought of as a homogenous state, contains around 250,000 Germans, while roughly the same number of Poles live in Lithuania. In every state bordering Hungary, except for Austria, there is a large Hungarian minority, amounting to two million in Rumanian Transylvania. Indeed, almost 30 percent of the Hungarian speaking population of central Europe live outside Hungary. Similarly, 1.8 million Albanians live in Kosovo, a region of Yugoslavia, while Bulgaria contains around one million Turkish speaking Muslims, amounting to 10 per cent of the population. The Baltic states contain large Russian minorities, and indeed there are 25 million Russians living outside Russia, while Bulgaria, the Czech Republic, Hungary, Rumania and Slovakia contain large gypsy populations, and Hungary has a substantial Jewish minority. The internal divisions within the states formed from the former Yugoslavia are too painfully obvious to need recital. 4

These ethnic and religious divisions created a range of dangers for democratic stability. The historical reality is that discrimination against minority religious and ethnic groups is often part of a broader monolithic nationalism. In the formation of national identity, preferences to a majority religion are an integral component of the nation-building process. In the ideological vacuum that existed at the end of socialism, the alignment of nationality with the dominant religion clearly played a “mobilizing role” in aiding the new leaderships in Eastern Europe to build their fledgling democracies under severe economic conditions. 5 The danger, however, was that in societies with renewed polycentricity, religious intolerance, especially when reinforced with cultural and ethnic diversity, would quickly generate severe tensions at every level of society and spur the reemergence of ancient cultural divides with devastating effects. 6 As “cultural fault lines” and “differences as the product of centuries” fermented the seeds of conflict across the Eastern bloc, 7 Samuel Huntington’s well-known thesis appeared to many to be frighteningly prescient. 8

Huntington has argued that some of the deepest rifts driving these conflicts derive from long-held religious traditions and beliefs, and from the divisions between western Christian civilization and eastern Islam and Orthodoxy. 9 While the end of the Cold War removed official atheism as a world force and “liber-
ated” religions and churches in formerly repressive countries, these changes have not proved to be necessarily conducive to the protection of human rights. Established churches across Eastern Europe have expressed little concern for human rights, at home or in neighboring states, and state-based violations of the rights of religious minorities, as attested to by many of the essays in this collection, have been widespread. This seeming paradox is explained by Cole Durham’s thesis that both strong positive identification of church and state (for example, in absolute theocracies or in states with established or endorsed churches) and strong negative identification of church and state (for example, in states that are hostile to or persecute religious groups) correlate with low levels of religious freedom. This is because, in both situations, “the state adopts a sharply defined attitude toward one or more religions, leaving little room for dissenting views.” 10 Accordingly, as the nation-building process has lurched hesitantly forward, and official atheism has been replaced by varying models of church-state arrangements, there has been uncertainty regarding the extent to which core liberal democratic principles of constitutionalism, human rights, and the rule of law will prevail against resurgent nationalism and intolerance directed toward religious minorities.

Each of the essays in this collection addresses specific aspects of this question: How are the rights of religious minorities to be protected in the particular conditions of post-communist Central and Eastern Europe? This inquiry necessarily requires consideration of church-state arrangements throughout the region and the relationship between religion—or specific religions—and the idea of human rights, both in terms of political morality, and in terms of constitutional and international legal institutions and regimes. The essays are divided into four parts. Part I—Theoretical Perspectives—defines the scope and complexity of the barriers faced by religious minorities in post-communist societies and seeks to analyze those findings in the context of human rights ideas, norms, and principles. Part II—International Legal Perspectives—critically assesses the array of international human rights mechanisms and instruments that may be employed to protect the rights of religious minorities. Part III—Case Studies—gathers together a number of portraits of how these complex factors have evolved in differing historical, social, political, and cultural settings in the region. Also included in this part are three additional case studies drawn from Western Europe that provide illuminating points of comparison. Finally, Part IV—Non-Legal Approaches—considers the position of religious minorities from a variety of extra-legal perspectives.

Before turning to these issues, however, it may be useful to make some preliminary comments on the relationship between “religion” and “human rights,” and between these two concepts and the question of “religious minorities.”
I. RELIGION AND HUMAN RIGHTS

The relationship between law and religion, and between church and state, has been an area of study that has fascinated scholars for centuries. Law and religion have traditionally been seen as “two distinct, but interrelated spheres of ideas and institutions, two overlapping methods and forms of study—legal science and religious science, jurisprudence and theology.”¹¹ The relationship has been regarded as one of “dialectical interaction/harmony,” two spheres of thought crossing over and cross-fertilizing each other and thus creating two great interlocking systems of value and belief that are related conceptually, methodologically, institutionally, and professionally.

Since the end of the Second World War, the nature of international relations has been fundamentally changed by the dramatic rise in prominence of the idea of human rights. Our age is said to be one of “rights;” indeed, human rights are now heralded as “the idea of our time, the only political-moral idea that has received universal acceptance.”¹² Perhaps as an indirect result of the extensive geopolitical changes occurring across Eastern Europe and, following Huntington’s thesis, the role that religion is playing in the extensive and systematic violation of human rights—particularly of minority groups—the relationship between religion and human rights has assumed increased prominence over the last decade in political, legal, and scholarly circles.¹³ In considering this relationship, and the challenges posed for religious traditions by the international human rights movement, it is perhaps first necessary to identify the main features of the cluster of ideas, norms, and traditions encompassed within the terms “religion” and “human rights.”

Attempts to define the term “religion” are notoriously difficult. For present purposes, I intend to rely on the definition proposed by the 1993 Project on Religion and Human Rights which defined “religion” as broadly encompassing a world view or set of beliefs, along with a value system and a way of life embodying and expressing these beliefs.¹⁴ Religion derives its values and practices from some authority, often beyond or underlying ordinary reality. Religious traditions provide their adherents with a comprehensive understanding of the world and identify the place and role of human beings and other sentient beings within that world. They attempt to provide answers to the most basic questions of existence: the origin and meaning of existence; the nature of life and death; the meaning of suffering and the ways to overcome it; the nature of evil and ways to overcome it; the ultimate destiny of human life and of all life. Religions call on their adherents to live according to their values through a prescribed set of practices and relationships that may affect many aspects of personal and social life. They are not merely a matter of belief or doctrine, but actually constitute an integral culture which can form personal and social identity and can influence experience and behavior significantly.¹⁵
Religion has been historically one of the most powerful forces in shaping the mores of humanity. In many parts of the world today, religious revivalism is playing an increasingly determinant role in society and politics. This phenomenon has the capacity to challenge the basis of pluralism and secular society within the framework of many modern nation states. Thus, fundamentalism and secularism have been said to pose the two challenges that people of all religions and beliefs face.¹⁶

The “rights idea,” by contrast, is of comparatively recent origin, although it too has a history tracing back a number of centuries. Religious freedom itself is arguably the oldest and the deepest of the rights embedded in the modern constellations of liberty.¹⁷ In recent times, human rights have come to be considered as an integral part of modern democratic constitutionalism and, at least since the 1989 revolutions, issues of constitutionalism and human rights in post-Communist Central and Eastern Europe have attracted a wealth of scholarly attention.¹⁸ Constitutional and international human rights theorists alike have devoted great attention to the old issue of how religion, human rights, and religious freedom can best be actualized in any given society. While the core of the concept of “religious freedom” has achieved remarkable consensus in international and constitutional instruments, significant variations persist in the ways in which regimes structure the relations between religious and political institutions.¹⁹ In all constitutional systems, questions continue to arise about the precise limits of religious freedom and about the relationship, or degree of separation, between church and state.

The difficult task of identifying which religious practices and issues are most pertinent to human rights norms has been greatly advanced by the pioneering work of Arcot Krishnaswami. As the first United Nations Special Rapporteur on the issue, Krishnaswami’s 1960 Study of Discrimination in the Matter of Religious Rights and Practices²⁰ is the first comprehensive study on human rights related to religion and belief and provides a useful analytical framework for scholars in the field. The 1960 Study provides a historical analysis of the development of the ideas of tolerance and religious freedom in both theological thought and in national laws and constitutions, and attempts to identify the root causes and incidences of intolerance and discrimination based on religion or belief.²¹

Today, it is widely accepted that international human rights norms and standards provide the most appropriate means by which to analyze these conflicting concepts. The reason for this approach is evidenced by the Krishnaswami Study itself: international recognition of the concept of religious freedom is today seen as one of the major ways of addressing discrimination and intolerance in all states. Even before the concept was recognized in national laws, the practice gradually evolved of making treaty stipulations ensuring rights to individuals or groups professing a religion or belief that differed from that of the majority of the country.²²
The starting point for consideration of “international human rights” norms and standards in the modern era is the Charter of the United Nations, drafted in 1945 following the end of the Second World War. “Human rights,” as commonly understood today, are those sets of rights articulated in the thirty articles of the Universal Declaration of Human Rights (the UDHR) adopted by the General Assembly in 1948. Subsequently, these rights were more fully articulated in two international human rights covenants which the United Nations adopted in 1966 and which gave legal form to the Universal Declaration—the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). Together, these three documents are collectively referred to as the “International Bill of Rights.” It is these rights that states parties are required to respect, ensure, or progressively implement in their domestic legal systems, and it is these rights that must be considered in relation to religion and belief.

Beyond the “universal” human rights system, mention must also be made of “regional human rights” and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has immediate relevance to the newly independent states of Central and Eastern Europe. This Convention remains the most developed of the three regional systems and has generated a more extensive jurisprudence than any other mechanism of the international human rights system.

II. RELIGIOUS MINORITIES AND HUMAN RIGHTS

How do these concepts of “international human rights” and “religious liberty” relate to the specific issue of “religious minorities”? One of the strongest challenges to the current international human rights regime derives from an argument that human rights are a manifestation of the western liberal interest in the rights of the individual and that this emphasis neglects the needs and rights of minority groups, including religious minority groups. Communitarian critics of liberalism have attempted to advance theories by which the rights of minority groups can be reconciled with traditional liberal approaches to human rights. While much of this discourse has concerned the rights of ethnic and cultural minorities, the communitarian critique is equally pertinent in the context of religious minorities.

Nathan Glazer and Michael Walzer have distinguished between two “models” that can be used to accommodate ethno-cultural (and I would add, religious) diversity in a free and democratic society. The first model is based on the “nondiscrimination principle,” which draws upon the way that religious minorities are treated in liberal states. As Kymlicka explains:

In the sixteenth century, European states were being torn apart by conflict between Catholics and Protestants over the question of which religion
should rule the land. These conflicts were finally resolved, not by granting special rights to particular religious minorities, but by separating church and state, and entrenching each’s individual freedom of religion. Religious minorities are protected indirectly, by guaranteeing individual freedom of worship, so that people can freely associate with other co-religionists, without fear of state discrimination or disapproval.\textsuperscript{38}

Under this model, members of religious groups are protected against discrimination and prejudice, and they are free to maintain their religion as they wish, consistent with the rights of others. Religion is, however, “privatized” and while the state does not oppose the freedom of people to express their particular culture or religion, neither does it nurture such expression. Rather, in the words of Glazer, it responds with “benign neglect.” The United States is perhaps the clearest example of this approach (although the communitarians question the asserted “neutrality” of the U.S., arguing instead that it embodies a system of, in effect, “group rights” that supports the majority’s religion, language, history, and culture).

The second model is based on a different principle—that of “group rights”—and its central premise is the use of public measures to promote or protect the religious or cultural beliefs and identities of specific minority groups. It is argued that this model constitutes a more robust form of nondiscrimination as it requires that state to provide the same sort of rights to minorities that are taken for granted by the majority.

The choice between these two models goes to the heart of the purpose of the state itself. For Glazer, the choice is between forming a common national culture, or accepting the permanent existence of two or more national cultures within a single state. . . . [T]he United States has firmly adopted the former as its goal, and indeed it has had enormous success in integrating people of many different races and religions into its common culture. Yet in many parts of the world, this sort of integration seems unthinkable, and minority groups are insistent on viewing the larger state as a ‘confederation of groups’.\textsuperscript{39}

In rebuilding their political and civil societies following the collapse of communism, the new democracies across the Eastern bloc are now confronting the tensions inherent in these two models of protecting minority rights. In this regard, it is interesting to observe that Walzer distinguishes between “New World” and “Old World” pluralism. For Walzer, the nondiscrimination model has succeeded in the U.S. because minorities there are, by and large, immigrant groups. New World pluralism is therefore the result of religious and cultural diversity arising from voluntary decisions of people to uproot themselves and
join another society. This can be juxtaposed with Old World pluralism where minorities are territorially concentrated and settled in historic territories that may, at some point in time, have been incorporated within the boundaries of a larger state. This incorporation

is usually involuntary, resulting from conquest, or colonization, or the ceding of territory from one imperial power to another. Under these circumstances, minorities are rarely satisfied with non-discrimination and eventual integration. What they desire . . . is 'national liberation'—that is, some form of collective self-government, in order to ensure the continued development of their distinct culture.30

This dimension of the history of ethnic and religious minorities in Eastern Europe creates some important differences with the position of minority groups in many western liberal democracies. In particular, competing views on historic injustices often animate the ways in which majority and minority groups regard each other. Whereas in most western democracies, historic injustice is usually a claim asserted by a minority against the state in an effort to secure greater substantive equality against the majority, in Eastern Europe the situation is more often one where historic injustice is invoked by the majority in an effort to delegitimize the relevant religious or ethnic minority. Here, the majority group claims to have been subject to unfair treatment under an earlier empire and further claims that these injustices occurred with the collaboration or acquiescence of the group that is now in the minority. For example, such claims of historic injustice are made by the Orthodox Bulgarians about their treatment by Muslim Turks in the nineteenth century, by Orthodox Serbs of oppression under the Ottomans, and by the Catholic Slovaks about their treatment under the Austro-Hungarian Empire.

As Kymlicka has recently observed, it is this historical memory that often generates fear in the majority that minority groups will once again collaborate with their kin-states in an effort to retrieve minority territories or to secede.31 The prospect of a Greater Albania has been one of the predominant sources of tension between Orthodox Serbs and Muslim Albanians in Kosovo. As a result, minority questions are perceived as raising overwhelming security concerns as opposed to ordinary claims of freedom and equality. By securitizing issues concerning the rights of ethnic and religious minorities, the majority in power thereby seeks to trump ordinary debates on questions of justice. This sets the threshold extremely low on the rights that minorities are able to assert against the majority without activating the police power of the state for disloyalty or seditious intent.

The response of the international community to this problem has been to encourage the new East and Central European democracies to guarantee basic
minority rights, but not to the point of permitting "democratic secession." The suggestion has been that, despite the prevalence of Old World pluralism in many East European states—and corresponding tendencies toward separatism—the omnipresent forces of globalization, pervasive free trade, and global communications networks have made the myth of a culturally homogenous state even more unrealistic, and this requires the majority in these states to be more receptive to genuine religious pluralism and diversity. Correspondingly, in exercising their rights of self-determination under international law, ethnic and religious minorities do not have a right to secede from the state, a topic that is explored in chapter 7 of this collection by Johan van der Vyver. Instead, they must fully assert their minority rights to profess and practice their own religion, enjoy their own culture, and use their own language within existing state boundaries.

In attempting to devise the optimum model for the protection of the rights of religious minorities, Central and East European states are thus confronting an issue that continues to divide political theorists. Once some form of group rights model is adopted, a distinction must be drawn between two situations. The first case is where a minority group demands rights against the larger society to protect it from the economic or political decisions of the majority. Here, the concern is the relationship between groups and the claim is that justice between the majority and the various minorities requires certain group rights which reduce the vulnerability of the minorities to the decisions of the majority. The second case is where a minority religious group demands rights against its own members, most often to protect its own historic and established traditions and practices against individual dissent. Here, the concern is the relationship between the group and its members and the claim is that survival of the religious group itself requires certain group rights which limit the freedom of individual members to reject or rebel against traditional religious norms.

Kymlicka calls the first sort of claim "external protections" and the second "internal restrictions." In his view, external protections for minority groups need not conflict with the liberal theory of individual freedom that characterizes international human rights law, but a liberal theory of minority rights is highly skeptical about internal restrictions. These ideas—including the tension between the values of "tolerance" and "autonomy" in liberal theory—are discussed further below in the context of Article 27 of the ICCPR.

A. HUMAN RIGHTS AND RELIGIOUS MINORITIES—THEORETICAL PERSPECTIVES

The three chapters in part 1—Theoretical Perspectives—each build upon and amplify these themes concerning the relationship between religious minorities and human rights norms and regimes. The first essay by David Little provides
a general overview of the relationship between religious minorities and religious freedom and considers why religious minorities have become such an intractable problem in the aftermath of the Cold War. He proposes a definition of “religious minorities” that distinguishes between “belief groups” and “ethnoreligious groups,” the first group being said to include so-called “sects” or “cults,” and the second group being said to correspond to some extent with Walzer’s notion of “Old World” pluralism. Having defined “religious freedom” under international human rights law, Little proceeds to question why religious minorities have continued to face mistreatment under the “liberated” conditions following the collapse of communist domination in Eastern Europe and the former Soviet Union. He notes the recent proliferation and general rise of minority faiths in these countries and seeks to identify the obstacles to religious freedom that these minorities are now encountering. He identifies issues that resonate in many of the ensuing chapters—prejudicial treatment at the hands of parliamentary inquiry commissions (an issue later discussed in detail by Carolyn Wahl in chapter 11); administrative discrimination by enforcing unfair religious registration laws (a common feature of many of the countries discussed in part 3 and discussed by Tad Stahnke in chapter 3); restrictions on conscientious objection and proselytism by minority religious groups; seizure of property; forcible dispersal of religious gatherings; and even short term detention.

The second essay by Eileen Barker traces in a sociological perspective the factors operating in post-communist Central and Eastern Europe that serve to construct along religious lines various versions of “us” and “them,” that exert pressure toward “something to be done” about those who fall into the “them” category, and that determine the methods used to address the “problem.” Barker analyzes the effects of these factors on the rights of religious minorities—particularly foreign “sects” and “new religious movements”—and the fraught development of a social consensus on the existence of a multi-faith society. She observes that it is not in the least surprising that the national churches should be fighting back. Having survived the communist attempt at anti-religious socialization of the population, the traditional churches now face a myriad of serious problems including demographic imbalances, limited expertise in developing a “practical theology,” and, in many instances, crippling poverty. In response, many churches now seek special constitutional protections and preferences for themselves while at the same time requesting strict control over “other” religions, particularly those that are considered to be foreign and well-resourced. For example, the following comment was made by Patriarch Aleksii II in December of 1996:

It is our obligation to battle for people’s souls by all legal means available, rather than allowing them to perish. [We must] react to the continuing intense proselytising activity by some Catholic circles and various Prot-
stant groups . . . [and] to the growing activity of sects, including those of a totalitarian nature . . . [for] it is largely our own brothers and sisters who fall victim to these sects.\textsuperscript{35}

Agreeing with Little, Barker concludes that the traditional churches have also been utilizing nationalist sentiments to bolster their attempts to regain their former ascendancy.

How does this approach square with the theoretical critique raised by the communitarians? In terms of the two models of "nondiscrimination" and "group rights," the national churches have been seeking what can perhaps best be described as a modified form of groups rights structure—one that allows the state positively to protect and support the dominant faith while at the same time providing only limited recognition and protection to minority faiths. The degree of limitation and restriction would then depend on various factors, including the identity and historical acceptance of the minority group in question. The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations epitomizes this approach.\textsuperscript{37}

In terms of Kymlicka's dichotomy between external protections and internal restrictions, the claimed position of the national churches will be seen as problematic in both spheres. Virtually all religions support the argument that the right to freedom of religion itself justifies internal restrictions on the rights of its adherents, for example, restrictions on the ordination of women and gays and lesbians. This creates a tension between the state's obligation to respect and ensure human rights norms of equality and nondiscrimination and the churches' asserted right to internally restrict the rights of their members.\textsuperscript{38} On the question of external protections, any argument for a privileged position of one or more religious groups over others also arguably infringes the norms of equality and nondiscrimination that are foundational to the international human rights system. If a group rights model is to comply with Articles 2.1 and 26 of the ICCPR, there need to be compelling reasons advanced to show why the state should favor one religion or church over another.

On this last point, it is necessary to note an important difference between United States and international human rights conceptions of freedom of religion. Neither Article 18 of the UDHR nor Article 18 of the ICCPR contains an anti-establishment requirement such as that contained in the First Amendment to the U.S. Constitution. Accordingly, a state whose constitution provides for an established or national church does not necessarily thereby infringe international human rights law.\textsuperscript{39} Nevertheless, those arrangements must still comply with the equality and nondiscrimination provisions (Articles 2 and 7 of the UDHR; Articles 2.1 and 26 of the ICCPR) enshrined in international human rights instruments.

In the final essay in part 1, Tad Stahnke addresses this very question of
whether any constitutional arrangement that provides for differential treatment of religious organizations in the process of recognition by the state (for the purposes of securing the ability of the organization to function or granting special exemptions, benefits, or privileges) is able to be consistent with the principles of equality and nondiscrimination in international human rights law. Stahnke identifies a crucial distinction between state recognition for the purposes of granting the essential elements of religious freedom and state recognition for the purposes of state support or privileges. In the specific context of post-communist European religious institutions, he thereby delineates both the discrimination problems resulting from, and the legitimate public purposes for, treating religious groups differently.

B. INTERNATIONAL HUMAN RIGHTS AND RELIGIOUS MINORITIES

In considering the extent to which the international human rights system may protect the rights of religious minorities, the first question to be asked is whether the primary contention of the communitarians is correct: does international human rights law, with its orientation toward the protection of the rights of the individual, neglect the rights of minority groups?

International concern for the protection of minorities, and in particular the protection of religious minorities, can be traced back well before the modern state system. During the sixteenth and seventeenth centuries, European peace treaties and treaties between European states and the Ottoman Empire included limited protections for religious minorities. Following the First World War, a series of minority treaties were signed by European powers that were monitored by the League of Nations. It is now a matter of history that the League and its minority treaties system failed to guarantee minority rights with devastating consequences. Emerging from the ashes of the Second World War, there was a general consensus among the main powers to replace the minority protection treaties with a human rights regime more directly centered on individual rights. It was thought that one reason for the failure of the League system was its emphasis on the differences between minorities, and the use of “special protections” for different groups, which ultimately led to greater tension and opposition between groups. The prevailing sentiment in 1945 was well captured by Under Secretary of State, Sumner Welles when he stated that:

in the kind of world for which we fight, there must cease to exist any need for the use of that accursed term “racial or religious minority.”... Is it conceivable that the peoples of the United Nations can consent to the
reestablishment of any system where human beings will still be regarded as belonging to such “minorities.”

Accordingly, neither the Charter of the United Nations nor the UDHR contains express provisions providing for minority protections. Article 27 of the ICCPR, however, provides as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 is arguably the most important global treaty standard dealing with the rights of minorities. According to the Human Rights Committee, one of the primary goals of this article is to protect the identity of minorities. States are required to take “positive measures” to protect the rights of members of a minority group, inter alia, to practice their religion in community with the other members of the group (subject to such measures respecting Articles 2.1 and 26 of the ICCPR). A considerable corpus of human rights jurisprudence and scholarly comment has now been generated under this provision. For present purposes, it is sufficient to make two observations on Article 27 as it relates to the protection of religious minorities.

First, Article 27 does not protect “group rights” as such; rather, it speaks of rights for “persons belonging to . . . minorities.” Ermacora has described Article 27 as a right of individuals premised on the existence of a community, or as an individual right collectively exercised—a “group protection provision.” In this respect, the article reflects the general concern of the ICCPR for individual rights while simultaneously recognizing the importance of community to the realization of individual human rights.

Second, as alluded to in the previous section, Article 27 treads a narrow line between the foundational liberal values of “tolerance” and “autonomy.” On the one hand, the article may provide some justification for restrictions imposed by groups on their own members on the grounds of religious beliefs or practices, including toleration of “nonliberal” groups (presumably provided there is an adequate right to exit). On the other hand, the article may alternatively be premised on the basic liberal value of “autonomy,” which requires the state to ensure that all persons have “the liberties and resources needed to make informed decisions about the good life, including the right to question and revise traditional . . . practices.” Kymlicka argues in favor of “tolerance” as the best basis for liberal theory on the grounds that it avoids alienating groups within
liberal states that do not value personal autonomy and that restrict the ability of their members to dissent from traditional practices. While this approach may provide a wider basis for the legitimacy of government, it necessarily abandons individual freedom of choice and consigns individuals within minority groups to traditional roles.  

To the extent that Article 27 is capable of being interpreted on the basis of the underlying value of “tolerance,” therefore, the communitarian critique of the shortcomings of human rights law may be accommodated. Indeed, even to the extent that autonomy is the foundational value of Article 27, there remains a strong argument that human rights law does in fact protect the rights of religious minorities, including the requirement of positive state measures to do so—but subject to the limitations of equality norms in the area of external protections and full realization of civil and political rights in the area of internal restrictions. A similar conclusion appears to have been reached by Special Rapporteur Asbjorn Eide in his report on how to accommodate the diverse needs and aspirations of minority groups in a pluralistic society with due respect for fundamental human rights and freedoms:

The best way to counter the threat posed by ethnic conflict is an appropriate and effective policy of minority or group protection, combined with a quest for national confidence-building and co-operation within existing, sovereign states in full respect for their territorial integrity; in essence, to form out of the territorial nation a civic nation that allows for double identity and loyalty: to the civic nation as a whole, respecting the common legal code with particular emphasis on equality and non-discrimination in the common domain, and at the same time to maintain one’s identity to the separate ethnic, religious or linguistic group.  

In addition to Article 27, there have been a number of subsequent international instruments and declarations that deal with the rights of religious minorities. Most important among these are the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the 1993 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1995 Council of Europe Framework Convention for the Protection of National Minorities, the 1990 Conference on Security and Cooperation in Europe Document on the Copenhagen Meeting of the Conference on the Human Dimension, and the 1991 Report of the Conference on Security and Co-operation in Europe on the Meeting of Experts on National Minorities.  

The four essays in part 2—International Legal Protection—each explore different dimensions of the way these international human rights conventions and declarations operate together to provide protection for the rights of religious
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minorities. Chapter 4 opens the discussion by examining the crucial function of external monitoring mechanisms in the area of religious freedom and the practical utilization and comparative effectiveness of UN, regional and bilateral institutions and processes. Having first set out the nature and scope of the problem and the possible range of responses available at the international level, the chapter proceeds to consider the legitimacy of external monitoring in a world of declining adherence to statist conceptions of sovereignty and increasing penetration of international human rights law in the internal conduct of states. It is argued that regional and multilateral mechanisms are preferable to bilateral approaches in an ideal world, but that, in addition, both NGOs and religious institutions are important actors that need to be fostered and developed in protecting belief-related human rights. Given the diversity and complexity of the barriers faced by religious minorities in many parts of post-communist Central and Eastern Europe, it is also suggested that evolving UN ad hoc mechanisms should be expanded and the capacity of individuals to take communications to treaty bodies such as the Human Rights Committee under the Optional Protocol to the ICCPR should be augmented.

Chapter 5 then provides an overview of the protection afforded to religious minorities by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the most sophisticated and effective of the regional human rights regimes. The authors review a number of recent rulings of the European Court of Human Rights under Article 9 of the Convention and suggest that while the Court is showing an increased willingness to criticize state conduct inconsistent with the Convention, it has maintained a comparatively conservative approach in decisions affecting minority religions. In a number of cases since 1993, the Court has accepted as neutral, and therefore acceptable, laws which serve social goals asserted to be legitimate yet which impact negatively on members of minority religious groups. The Court has also demonstrated a tendency in its reasoning to substitute its own objective determination of the impact of alleged violations on religious practices in place of the actual convictions of affected minorities. If the rights of religious minorities are to be better protected under the European Convention, the authors argue that the Court's jurisprudence needs to change in two significant ways. First, the Court should seek progressively to narrow the margin of appreciation it currently allows to state parties to enforce varying national standards which privilege the majority religious view. In those cases where state action impacts negatively on the rights of religious minorities, the Court should therefore be more critical and rigorous in assessing the justifications advanced by state parties. Second, the Court should be careful to avoid substituting its objective assessment of the impact of state action for the actual experience of affected minorities and should pay more attention to the harm caused to the values of autonomy and human dignity by limitations on religious freedom.
In chapter 6, Jeremy Gunn analyzes the methods and processes which the Organization for Security and Co-operation in Europe (OSCE) and related regional European bodies have developed to protect the rights of religious minorities. Following the recommendations of the OSCE's Human Dimension Seminar on Freedom of Religion, which was held in Warsaw in April 1996, and the two subsequent meetings of an Advisory Panel of Experts to develop further recommendations, Gunn considers the prospects of the OSCE and the Office of Democratic Institutions and Human Rights in Warsaw (ODIHR) in assisting European countries to resolve concrete problems faced by religious groups through their own constitutional, legal, and administrative structures. Gunn’s conclusion is that one noticeable effect of the OSCE’s efforts in this area has been the unintended result of improving communications and coalitions among religious minorities.

The final essay in part 2 by Johan van der Vyver confronts the vexing question concerning the right to self-determination of religious minorities under international law. The UN Charter itself embodies an inherent tension in this area between Article 1, which declares that there should be “respect for the principle of . . . self-determination of peoples,” and Article 2.4, which defends the “territorial integrity or political independence of any state.” To what extent are these aims compatible, especially where, as in much of Central and Eastern Europe, minorities and majorities are inextricably intermingled? Van der Vyver concludes that this right does not generally encompass the right to secede from a state. Rather, he introduces the concept of “sphere sovereignty” that would allow minority groups more control over their activities and futures and would therefore help to transform the drive toward secession into the pursuit of goals within the competency of the particular religious group without state interference.

C. HUMAN RIGHTS AND RELIGIOUS MINORITIES—
CASE STUDIES, EAST AND WEST

Across Central and Eastern Europe during the communist era the conditions for different religions varied according to the distinct histories, cultures, levels of social and economic development, and political systems of the different states. The range of church-state models and differing levels of religious freedom are almost impossible to classify in a systematic fashion. The following descriptions—which overlap and are intended as selected examples rather than as rigid “models”—describe some of the variants that existed:

- “secular absolutism,” as in Albania where thousands of mosques, churches, and monasteries were forcibly closed in an attempt to create a totally atheist state;
• “hostile separation and persecution,” as in the former Soviet Union where religious dissidents were severely repressed, some religious groups, such as the Greek Orthodox (or Uniates) of Western Ukraine were forced underground, and religious institutions were closely controlled by government officials and the state security services;

• “relative accommodation,” as in the former Czechoslovakia, Hungary, Poland, and some of the constituent parts of the former Yugoslavia where Catholicism and the major Protestant groups continued to enjoy relative freedom and privileges in comparison with churches in the Soviet Union; in Poland it is noteworthy that the historical position and prominence of the Catholic Church contributed to strong resistance to state power during the communist era; and

• “endorsed and established churches,” as in Romania and republics in the former Yugoslavia such as Serbia and Macedonia, and to a partial extent Bulgaria, where it was acknowledged that Eastern Orthodoxy had a special position in the different country’s history and traditions (and at the extreme end, was granted an enforced monopoly in religious matters) and thereby was used as a means to galvanize the power of the ruling regime and to strengthen nationalist sentiments, while at the same time being closely controlled by the government, as in the former Soviet Union.

Following the collapse of communism beginning in the late 1980s, the conditions for religions changed dramatically in these countries. Each of the essays in part 3 examine how various issues and tensions in relation to the rights of religious minorities, and religious freedom more generally, evolved and continue to develop in the region. In section B, the positions of religious minorities in a number of Western European countries are also considered in order to assist the reader to place these changes in a comparative European context.

1. CENTRAL AND EASTERN EUROPE

Tamás Foldesi has observed that there are two general features, besides geographic proximity, that unite the countries in Eastern Europe. The first is the large-scale ethnic and religious heterogeneity of the region.

Although Christianity generally dominates in this region (Muslims and Jews are an insignificant minority), individual countries embrace significantly different forms of Christianity. Those more to the East, including Ukraine, Romania, Bulgaria and Serbia, are predominantly Eastern Orthodox. In Poland, Slovakia, Hungary, Croatia, and Slovenia, the Catholic religion is predominant. In the Czech Republic and the former Ger-
man Democratic Republic, Protestantism is strong, and the number of Protestant believers is also high in portions of Hungary, Western Romania, and Slovakia.\textsuperscript{58}

The second feature is that, until recently, each country had for at least four decades belonged to the Soviet bloc. Thus, the entire region inherited from the communist era certain common attitudes and actions regarding human rights and religious freedom. Each of the chapters in this section addresses the ways in which these ideas have evolved and have been influenced by the divergent historical, social, political, and cultural forces in different parts of the region.

Chapter 8, by Serhii Plokhy, considers the protection of religious minorities in two major successor-states of the former Soviet Union, Russia and Ukraine. These two states provide an interesting contrast: Ukraine, with three major churches (the Greek-Catholic and three separate Orthodox, plus a historically strong Protestant community), does not have a single dominant church, unlike Russia, in which Orthodoxy is intertwined with the definition of being Russian and the Orthodox Church has traditionally had a close relationship with the state. Plokhy analyzes the divergences in religious pluralism in Russia and Ukraine by analyzing contrasting models of state-building in the two countries, and concludes by noting that the weakness of Ukrainian nationalism has resulted in more flexible positions by the country’s major churches and the state in negotiating the role of the state in religious affairs, as well as in greater tolerance for religious pluralism than in Russia.

Chapter 9 considers Bulgaria, one of the most ethnically and religiously heterogeneous nations in post-communist Europe: in addition to Orthodox ethnic Bulgarians, there are the Roma, among whom there are both Orthodox and Muslims, Pomaks, who are both Slavic and Muslim, and a large minority of Muslim Turks. While the forced name-changing and emigration campaign against the Turks in 1984–85 was quite brutal, it is noteworthy that since 1989 Bulgaria has been one of the most stable nations in Southeastern Europe, especially in regards to the sizeable Muslim minority (in stark contrast to the Yugoslav successor states.) In his essay, Krassimir Kanev explores the turbulent history of the relationship between Muslims and Bulgarians, and the constitutional position of the Muslim minority under Bulgarian law from the nineteenth century to the present. Kanev describes how the treatment of Muslims in Bulgaria has improved since the end of communism. Muslims, and especially Turks, are no longer subject to the forced emigration, name-changing campaigns, or other egregious forms of human rights violations they had suffered under communism. But while religious rights and freedoms are generally being restored or newly established, some concerns over the legal position of the Muslim minority remain. The issue of restoration of religious property remains
unresolved, and the first post-communist Bulgarian Constitution allows for the banning of ethnic or religious political parties (although this has not been enforced in practice). Kanev concludes by observing that although the very notion of "rights of religious minorities" remains highly contentious in Bulgaria, a recent decision on a case in the European Court of Human Rights, Hasan & Chaush v. Bulgaria, recognized as discriminatory the existing legal basis for church-state relations in Bulgaria, and may well provide for more equality of recognition and incorporation of minority religious groups in the future.

In chapter 10, Hungarian constitutional law scholar Balázs Schanda discusses the legal situation of religious minorities in Hungary, a country which arguably has the oldest tradition of constitutionalism in Europe. The sociological background to post-communist Hungary's development of new constitutional standards for church-state relations is the decreased religious heterogeneity of the country since the two world wars, although in the post-communist period there has been an increase of small religious groups wholly new to the region. Against the backdrop of the tension between the increasingly universal acceptance of fundamental human rights and the strongly historical determination of church-state relations, Schanda provides an insight into the reality of legal protections for minority religions in Hungary. He points out that certain privileges, such as sponsoring of army chaplains, is reserved for the four "historic" religious communities of Hungary (Roman Catholicism, Judaism, the Lutheran Church, and the Reformed Church.) Schanda argues that this represents not a violation of equality or a restriction of religious freedom, but the institutionalization of social reality reflected in number of adherents. In this regard, his analysis echoes the sentiments of Harold Berman who, in the context of the Russian experience, has warned that it is necessary to evaluate human rights related to religion or belief with a view to the law, moral, and political theory, and historical particularities of the place where those rights are to be realized:

[Russia] is undergoing an unprecedented historical experience of tumultuous and even catastrophic transition from one type of political system to another, from one type of economic system to another, and from one type of belief system to another. It is entirely inappropriate, in my view, to apply to Russia today the broad provisions on religious freedom of the international human rights covenants without taking into consideration Russia's present situation viewed in the light of Russia's historical experience. Rights may properly be declared in universal terms, but their application in specific cases must always take into account the specific circumstances of those cases.59
2. WESTERN EUROPE — COMPARATIVE PERSPECTIVES

Building upon the earlier analysis of Little and Barker in part 1, in chapter 11 Carolyn Wah considers the role of European Parliamentary “Enquete” Commissions in various Western European states in redefining “religions” in order to protect citizens from the influence and control of alleged destructive “sects” and “sects.” Focusing primarily on the German Enquete Commission originally assembled on June 12, 1996, Wah explores how this process may impact upon constitutional and statutory protections for minority religions throughout Europe. She argues that the tendency toward stratification of religious organizations into different “tiers” is a dangerous incursion into liberties presently identified in European democratic societies as fundamental freedoms. Several examples of discrimination encountered by a minority religion in Germany, the Jehovah’s Witnesses, illustrate her argument.

In chapter 12, Rosa María Martínez de Codes examines the contemporary model of relations between the state and religious minorities in Spain. This is a model she refers to as “concordation,” that is, one based on a system of agreements between church and state, and she contrasts it to the other two models found in the European Union—state churches (such as the United Kingdom and Greece) and separation of church and state (France and the Netherlands, for example.) Comparing this model to the systems operating in Italy and Germany, de Codes considers the virtues of a model based on the signing of bilateral agreements which derives from the “concordat” tradition that has evolved in countries with a Catholic majority. She concludes by questioning the wisdom of attempting to export the Spanish model to other countries in Europe.

The final essay in part 3 by Willy Fautré examines the relationship between religions and the state in Belgium. Like Wah, Fautré considers the dangers to religious freedom posed by parliamentary commissions, which single out certain new and minority religious groups as “sects” and “sects.” Fautré expresses his concern with what he sees as a two-tiered system that is not limited to Belgium but is found throughout Europe, resulting in significant discrimination against minority faiths and excessive power for the state in church-state affairs. However, despite these concerns, it is interesting to note that Fautré concludes by rejecting the wholesale adoption of the American system of strict separation of church and state. Like Harold Berman, cited earlier, he acknowledges both the historical specificity of each European state’s church-state arrangements and expresses the belief that European nations can adjust their systems to offer minority religions more equal access in order to meet the challenges of a new, more open Europe and a globalizing world where ideas and people move much more freely than in the past.
D. NON-LEGAL APPROACHES

In confronting the relationship between religion and human rights, theologian Donald Shriver poses the following question:

Does your vision of human rights concepts, justifications, and enforcement do justice to both the dignity and corruptibility of us humans? It is quite possible that religious systems have accented the corruption to the neglect of the dignity, while secular human rights thinking has accented the reverse. The latter may not agree that the democratic system of government requires advocates who take good and evil with equal seriousness, but it is hard to avoid the balance of wisdom in Reinhold Niebuhr’s famous aphorism: “The human capacity for justice makes democracy possible; the human inclination to injustice makes democracy necessary.”

The first three sections of this book describe how human rights, defined as a legal project, can in theory and do in practice protect religious minorities. However, Shriver reminds us that a legally based approach to human rights has limits, and challenges us to consider how other approaches, particularly religious ones—institutionally, through the churches, and theologically—may protect religious minorities.

All of the preceding essays consider legal issues in the protection of religious minorities. The last four essays consider the potential of alternative approaches to the protection of religious minorities, which hinge essentially on the functioning of what is referred to loosely and fashionably as civil society, that is, non-state, non-commercial actors. One, Chris Hann’s essay, specifically takes on the question of whether the hopes for human rights protection pinned on civil society understood in the classical sense—that is, voluntary associations of citizens, which blossomed in Poland after the fall of communism—are justified. Tim Byrne’s and Robert Goeckel’s essays consider the role in religious minorities protection of the churches as transnational actors: although churches are sometimes less clearly defined as civil society actors because of their potential closeness to the state where strict separation of church and state does not exist, nonetheless the churches are generally considered within the sphere of civil society when mentioned as an additional potential source of support for human rights in general and those of minorities in particular. Finally, Krajewski’s essay considers the project of interfaith dialogue, also a civil society activity in that it is not sponsored by the state but entered into freely by believers from different faiths, and its potential to affect the relations of majority and minority faiths and hence the protection of religious minorities.
Hann describes the post-communist situation of the Greek Catholic Ukrainian minority in Eastern Poland in the area around the border-city of Przemysl: paradoxically, the difficulties they encounter as a religious minority have increased, not lessened, with the end of communism, the rise of political decentralization, and the proliferation of civil society organizations, which in Przemysl frequently take on a stridently nationalist agenda. The increase in economic insecurity with the end of the communist-style welfare state has also contributed to tensions between Roman Catholic Poles and Greek Catholic Ukrainians, particularly as greatly increased poverty in nearby Ukraine has sharpened the stereotype of all Ukrainians as impoverished and despised petty traders. The tensions between the Roman Catholic majority and the Greek Catholic minority are particularly ironic, given that both groups, despite different rites, recognize the religious leadership of the Pope and are thus very close as faiths. Although the contemporary picture for Przemysl’s Ukrainian minority is not entirely bleak, particularly in regard to religious education and public celebration of Greek Catholic rituals, Hann’s judicious study of this little-known polyethnic corner of East-Central Europe offers an important corrective to the popular belief that the rise of democracy, a market economy, and civil society institutions, both religious and secular, inevitably functions to protect human rights.

Byrnes contrasts the promise of the post-Vatican II Catholic Church, its stated commitment to human rights and tolerance, with the post-communist reality in two nations in particular, Slovakia and Romania, both countries with ethno-religious minorities and ongoing tensions not only between majority and minority groups, but frequently between minorities as well. These two examples present an interesting contrast: in Slovakia, Roman Catholic religious identity is shared by two very distinct ethnic groups with a history of conflict, the majority Slovaks and the minority Hungarians. In Romania, a majority Orthodox country, there are two important minorities in the sensitive Transylvania region: the Roman Catholic Hungarians and the Greek Orthodox Romanians, who follow the directives of the Pope and are thus considered to be Catholics as well.

In untangling the role of the Church in these complex intergroup relations, Byrnes notes the contradiction between the rhetoric of upper Church echelons—that is, the Pope and Vatican-level officials—with reality at the national and local levels, where, in Slovakia, for example, the Church functions much more as a microcosm of the ethnic tensions in the nation at large than as an agent of ethno-religious reconciliation or protector of ethno-religious minorities. In Romania, the Catholic Church’s larger political agenda of working for the reunification of Western and Eastern Churches has led it to ignore its two minority communities in Transylvania. Byrnes’ final assessment of the role the Catholic Church as a transnational actor has played in the protection of religious minorities is as qualified as Hann’s assessment of the contribution of
eastern Poland’s nascent civil society to the protection of religious minorities and the development of inter-group trust and tolerance.

Goeckel, in Chapter 16, examines the involvement of religious nongovernmental international organizations (such as the World Council of Churches and the Lutheran World Federation) in East Germany. He notes these organizations’ quiescence on human rights issues during the communist period, which grew out of their own political agendas. While these international religious bodies occasionally acted to protect individuals in mainstream East German churches related to their own group members, these actions did not extend to members of new or minority religious groups, nor to entire persecuted congregations. In addition, he identifies lack of unity among the western churches as a chronic problem which hampered their ability or willingness to speak out on behalf of persecuted religious minorities in the East, as well as an imbalance between loyalty to eastern co-nationals (such as West German Lutheran support for Germans in the former Soviet Union, which was strong) and to co-religionists (which was weaker than co-national loyalty.) Finally, he notes, in a conclusion which strongly resembles Byrnes’, that the ability of western-based transnational religious groups to protect minority faiths was limited because “like the Catholic church, national subunits have not been able to avoid the power of ethnicity and nationalism.” These past failures continue to haunt western Protestant and interfaith nongovernmental international organizations today, as their credibility in the East remains seriously weakened.

Krajewski’s concluding chapter departs from the rest of the essays in the book both in tone and content: it is more discursive, reflective, and descriptive than academic and analytical, but fulfills an important function in this volume. Krajewski gives us an insight into Polish Catholic-Jewish dialogue, an ongoing, challenging and ultimately promising if little-known project in interfaith reconciliation, a project in which he himself is a major player, not an observer. It is this challenge, developed in a country where Polish Catholic-Jewish relations are ancient, deep, and tension-filled, which inspires as well Polish-born Pope John Paul II, during whose papacy there have been astonishing developments in Catholic-Jewish relations, resulting recently in the Pope’s visits to the Great Synagogue of Rome, to Israel, the Wailing Wall, and Yad Vashem, and a discussion of unprecedented candor regarding the history of Church anti-Semitism and failure to act with sufficient strength to protect the Jews during World War II. Krajewski argues that interfaith dialogue of the kind he describes is essential to the reduction of prejudice (anti-Semitism, in this case), and of practical use in dealing civilly with the many contentious and potentially inflammatory issues which have arisen with the end of communism, from the restitution of Church and Jewish property to the recent, disturbing discovery of a massacre of Jews in the eastern Polish village of Jedwabne during World War II perpetrated not by Germans but by Poles. Krajewski summarizes the potential of the process lie
describes as follows: "Above all, I believe that Christian-Jewish dialogue is an essential fragment of a variety of dialogues needed for a better future of our planet." As he describes it, the progress of Polish Catholic-Jewish dialogue in recent decades provides an interesting alternative, or more correctly, complement, to the legal regulation of relations between majority and minority faiths and the legal protection of the latter. As Shriver says in his Afterword to the volume, "Far back in the Jewish and Christian traditions is divine respect for 'the stranger' . . . religion and human rights need each other."

ENDNOTES


6. For a discussion of the relationship between the assertion of ethnic and national identity and intolerance and discrimination in regard to religious and other forms of fundamental belief, see David Little, Belief, Ethnicity, and Nationalism, 1(2) NATIONALISM AND ETHNIC POLITICS 284-301 (1995).


9. In attempting to draw Europe's eastern boundary post-Cold War, Huntington suggests that Europe ends where Western Christianity ends and Islam and Orthodoxy begin: ibid. 158. He refers to the "great historical line that has existed for centuries separating Western Christian peoples from Muslim and Orthodox peoples. This line dates back to the division of the Roman Empire in the fourth century and to the creation of the Holy Roman Empire in the tenth century. It has been roughly in its current place for at least five hundred years. Beginning in the north, it runs along what are now the borders between Finland and Russia and the Baltic states (Estonia, Latvia and Lithuania) and Russia, through western Belarus, through Ukraine separat-
ing the Uniate west from the Orthodox east, through Romania between Transylvania with its Catholic Hungarian population and the rest of the country, and through the former Yugoslavia along the border separating Slovenia and Croatia from the other republics. In the Balkans, of course, this line coincides with the historical division between the Austro-Hungarian and Ottoman empires. It is the cultural border of Europe, and in the post-Cold War world it is also the political and economic border of Europe and the West.”


13. Hilary Charlesworth has argued that the “major religious traditions have not engaged adequately with the international law of human rights. These standards offer an understanding of the ‘rock-bottom of human existence’ that needs to be reckoned with further rather than ignored or undermined.” Hilary Charlesworth, No Principled Reason, Final Centenary Lecture at St. Patrick’s Cathedral, Melbourne, October, 1997, published in 7(9) Eureka Street 24, 25 (1997).

14. These are the main features of the definition of “religion” suggested by The Project on Religion and Human Rights in John Kelsay and Sumner B. Twiss (eds.), Religion and Human Rights iv (New York: The Project on Religion and Human Rights, 1994). See also the definitions proposed by U.N. Special Rapporteur Elizabeth Odio Benito, Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, United Nations, Geneva (1989) at 4 (“an explanation of the meaning of life and how to live accordingly”); Yoram Dinstein, Freedom of Religion and the Protection of Religious Minorities in Y. Dinstein and M. Tabor (eds.), The Protection of Minorities and Human Rights 146 (1993) (“relates to faith in God as a Supreme Being, or in multiple deities, or at least in some supernatural powers or spirits capable of influencing human affairs”).

15. Ibid.

16. To fundamentalists, the borders of religious certainty are strictly defined; there is a demand for absolutes within that unique religious tradition; to pluralists, the borders are good fences where one meets the neighbor. To fundamentalists, secularism, or the denial of religious claims, is the enemy; to pluralists, secularism, seen as the separation of the government from the domination of a single religion, is essential for religious diversity and the protection of religious freedom: see Bahiyyih G. Tabheer, Freedom of Religion or Belief—Ensuring Effective International Legal Protection 12 (The Hague: Martinus Nijhoff Publishers, 1996).


18. See, e.g., Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliveira, and
20 PETER G. DANCHIN


19. For an excellent analysis of the different models of protection of religious liberty, see Durham, Perspectives on Religious Liberty: A Comparative Framework in van der Vyver and Witte, above n. 10, 1–44.


21. These include: (i) ignorance and lack of understanding (which characterizes much of the history between Islam and Christianity over the last fourteen centuries); (ii) the idea of a sole repository or monopoly of truth (and therefore a duty to combat other religions and beliefs leading ultimately to holy, divine or just wars); (iii) legal, social and economic inequalities (particularly where a religion is perceived to threaten the existing power structure within the dominant religion); (iv) exploitation of religion for political or other ends; and (v) developments of history: see further Tahzhib, above n. 16.

22. For example, the treaty in 1536 signed by Francis I of France and Suleiman I of the Ottoman Empire allowed the establishment of French merchants in Turkey and granted them individual religious freedom. See also the Treaty of Osnabruck of 1648, the Treaty of Berlin of 1878 and the Paris Peace conference after the First World War and the various peace treaties dealing with the rights of religious minorities.

23. UDHR, Adopted and proclaimed by United Nations General Assembly resolution 217 A (III) on 10 December 1948; ICCPR, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200 A (XXI) on 16 December 1966; Entered into force on 23 March 1976 in accordance with Article 49; ICESCR, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200 A (XXI) on 16 December 1966; Entered into force on 3 January 1976 in accordance with Article 27. These three treaties are contained in TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 6–29 (New York: Center for the Study of Human Rights, Columbia University, 1994). States that ratify the Covenants are legally bound to observe treaty provisions and it is the responsibility of the international community to hold governments accountable to these treaty obligations.


25. Opened for Signature by the Council of Europe on 4 November 1950; Entered into Force on 3 September 1953. See TWENTY-FIVE HUMAN RIGHTS DOCUMENTS, above n. 23, 140. See further Danchin and Forman, chapter 5 in this volume.

26. For an excellent recent discussion of the challenges posed by communitarians such as Michael Sandel, Alasdair MacIntyre, Charles Taylor and Michael Walzer to liberal political theory, see Stephen Mulhall and Adam Swift, LIBERALS AND COMMUNITARIANS (1992).


29. Ibid. 11.

30. Ibid. Note also Iris Marion Young’s “relational” theory of difference. Young sees the discussion of multietnic states as too often oscillating between two extremes—assimilation (which is associated with liberal individualism) and separatism (which is associated with xenophobic nationalism). Instead, she advances an account that attempts to accommodate the reality of cultural differences, while still encouraging independence: see ibid. 12, referring to Iris Marion Young, Together in Difference: Transforming the Logic of Group Political Conflict in ibid. 155.


32. Kymlicka suggests that experience in Western liberal democracies teaches us that this position is inherently unstable because secessionist parties will arise sooner or later as a normal and expected part of a multi-national federal state.


34. Kymlicka (ed.), The Rights of Minority Cultures, above n. 27, 14.

35. Kymlicka (ed.), Multicultural Citizenship, above n. 33, 7. Note, however, that some minority rights theorists, for example Chandran Kukathas, have argued in favor of internal restrictions (subject to an adequately defined right of exit from the group) but against external protections (which artificially fix the constantly changing boundaries between groups and also the power relations within each group): Chandran Kukathas, Are There Any Cultural Rights? in Kymlicka (ed.), The Rights of Minority Cultures, above n. 27, 228 (discussed in the Introduction at 14). See also Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. Mich. L. Rev. 751 (1992) (discussing the relationship between pluralism and communitarianism).


39. The 1967 UN Draft Convention that was the precursor to the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief stated in Article I(d) that “neither the establishment of a religion nor the recognition of a religion or belief by a State nor the separation of Church from State
shall by itself be considered religious intolerance or discrimination.”: see Note by the Secretary-General: Elimination of All Forms of Religious Intolerance, UN Doc. A/8330, Ann. III (1971).


41. For the relevant provisions of these various agreements, see Protection of Linguistic, Racial and Religious Minorities by the League of Nations, League of Nations C. L. 110 1927 I. B. 2 (1927). See also Inis L. Claude, Jr., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM (1955).

42. Address by the Under Secretary of State, 8 DEP'T ST. BULL. 479, 482 (5 June 1943) quoted in Oestreich, above n. 40, 113.

43. ICCPR, Article 27, above n. 23, 23.

44. See General Comment 23(50) of the Human Rights Committee, para 6.2 in Stahnke and Martin (eds.), above n. 20, 97, 99.


47. Kymlicka, The Rights of Minority Cultures, above n. 27, 15. Kymlicka notes that the debate within liberal theory as to which between “autonomy” and “tolerance” is the fundamental value can also be described as a contrast between “Enlightenment” and “Reformation” liberalism, or between “comprehensive” and “political liberalism, or between “Kantian” and “modus vivendi” liberalism.

48. Ibid.


52. Opened for Signature by the Council of Europe on 1 February 1995; European Treaty Series No. 157: see ibid. 165.

53. Adopted in Copenhagen on 29 June 1995: see ibid. 172.

54. Adopted in Geneva on 19 July 1991: see ibid. 175.

55. Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200 A (XXI) on 16 December 1966; Entered into force
on 23 March 1976 in accordance with Article 9, in Twenty-Five Human Rights Documents, above n. 23, 30.

56. Opened for signature by the Council of Europe on 4 November 1959; Entered into force on 3 September 1953, in Twenty-Five Human Rights Documents, above n. 23, 147.

57. See Durham, above n. 19, 23, for a useful discussion of various “models” of relations between religion and the state.

