

Human Rights as Civil Religion: The Glue for Global Governance?

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The concept of human rights is often discussed in religious terms, although in and of themselves, human rights are hardly transcendental. It is possible to discern a movement on the part of the United Nations and academics, among others, toward making human rights the moral foundation of global order. A similar move can be observed in the European Union with the debate about the status of the Fundamental Charter of Rights, which was intended in part to solidify and encourage a sense of European citizenship. Human rights are to be the tie that binds in the face of linguistic, religious and cultural diversity. The same movement is underway in the context of global governance.

Describing human rights in religious terms as universal imperatives suggests a desire to have them demand loyalty above and beyond the state. Does that make them a global civil religion in the sense suggested by Rousseau or Robert Bellah? Atheistic Marxism-Leninism has been described as civil religion. It is in that sense that human rights, too, may be characterized as seeking to perform the function of civil religion. Giorgio Sacerdoti, a member of the Appellate Body of the World Trade Organization, has asserted that: “The ‘religion’ of human rights and fundamental freedoms has replaced other religions and beliefs as the underpinning of social life in contemporary societies.”¹

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¹ Giorgio Sacerdoti, “The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe”, 8 Colum. J. Eur. L. 37, 52 (2002).

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Is Sacerdoti correct? If so, then what place is left for freedom of religion? One might infer from his comments about freedom of religion that it is limited to the right freely to practice one's religion and the right to have places of worship.² That would keep it comfortably within the confines of a private space where other people need not be bothered by it. Although it is not strictly necessary that proponents of the position taken by Sacerdoti also take a strongly secular view of society, it is often the case. This correlates with the assertion that a secular liberal democratic state is the necessary concomitant of globalization and freedom. Such an approach takes an impoverished view of freedom of religion and of the significance of religion in peoples' lives. In addition to failing to recognize the reality of the existing system of state sovereignty, in which religious views are part of the international debate (whether through UN members with varying degrees of religious affiliation, through religious NGOs, or through transnational religions themselves), the secular approach to global governance overlooks the multiple dimensions of religious freedom. Unlike some other human rights, freedom of religion has an individual aspect (freedom of conscience and religion of the individual), a group identity aspect, and an institutional aspect. Moreover, religious liberty often raises the tension between the "public" and the "private": is there a place for religious views in public debate?

The argument advanced here is that respect for freedom of religion requires that human rights not be given the "status" of civil religion or something analogous to religion, nor that they be expected to serve a religious function, but rather that religious views be respected and welcomed as part of the debate about the content of rights and the shape of global governance. The possibility that some form of public theology is a necessary foundation for universal human

² Sacerdoti at 47.

rights remains open. That question is not tackled here. Of more immediate concern is the inappropriateness of the separation of church and state model of secularism for a form of global governance that recognizes freedom of religion. Excluding or dismissing religious perspectives from the international public square would seriously undercut freedom of religion, one of the stones on which the edifice of human rights has been built.

After briefly defining human rights and civil religion, I suggest that human rights is being advanced as a civil religion or, at a minimum, as performing a religious function in the ordering of global society. While the motives for advancing human rights as a “global ethic” are laudatory, the dangers to specific human rights inherent in such an approach should be considered. Neither the content of human rights nor the relationship of competing rights is settled.³ In this paper, the complexity of freedom of religion is used to demonstrate the inadequacy of human rights as a civil religion or replacement for religion. I conclude that freedom and human flourishing, and consequently global governance, require a richer moral foundation than “human rights” itself can offer.

I. Is human rights a civil religion?

To answer this question requires definition of the concepts of “human rights” and “civil religion.”

(a) Human Rights

Human rights can cover a wide array of rights, from the civil and political to the economic, social and cultural and beyond. The broad concept encompasses rights as embodied in the

³ Meron et al. cite re hierarchy of rights.

International Bill of Rights,⁴ other human rights treaties and instruments (including regional accords), and domestic constitutions and legislation. One of the most salient points to be appreciated about human rights is that their content is not universally agreed, although their proponents, especially in the West, assert their universality.⁵ The cultural relativism critique of the universality of human rights demonstrates the need for a moral foundation for human rights based in human dignity and the nature of the human person. That debate is ongoing.

As the subject of the workshop is global governance as a response to globalization, human rights for present purposes would seem to mean international human rights. Generally they are set out in treaties. But they may also evolve in the jurisprudence of the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. It remains to be seen whether the Appellate Body of the World Trade Organization and the International Court of Justice will have the opportunity to elaborate on human rights questions (or whether they have a desire to do so). As a result of litigation under the *Alien Tort Claims Act*,⁶ U.S. courts are also contributing to the development of international human rights as matters of customary international law.⁷ Certain fundamental principles that constitute *jus cogens* may also be described as international human rights.

But to focus only on international human rights oversimplifies matters. Comparative approaches to constitutional rights interpretation (e.g., borrowing and cross-referencing between the

⁴ The term has been used to refer to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights [cites].

⁵ Vienna Declaration [cite].

⁶ [cite]

⁷ For example, *Kadic v. Karadic*.

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European Court of Human Rights and the Supreme Court of Canada or the South African Constitutional Court) are important aspects of global governance and the mythology of human rights. Justice Scalia of the U.S. Supreme Court has admonished members of the judiciary that they are not part of an “international priesthood.”⁸ Despite the connection between human rights and liberal democracy, serious questions may be raised as to the democratic legitimacy of comparative judicial approaches. Because of the borrowing that goes on, and with the increasing development of customary international law in domestic courts, domestic constitutional rights are also part of the human rights picture.

(b) Civil Religion

In the fifth century, St. Augustine critiqued the Roman notion of civil religion.⁹ In the more recent past, Rousseau used the concept of civil religion to describe a religious sense of purpose that would motivate citizens to act in a way that would be good for society and the state. He recognized the need for religion to provide a sense of meaning beyond the state. Yet he sought to distance civil religion from any particular Christian denomination.¹⁰ In political philosophy, the term has been used in efforts to address the tension between the authority of church and of state. In that respect, it has close ties to sovereignty and the development of the nation-state in the period following the Enlightenment. Even more recently, the term civil religion has taken on new meaning in the United States, with its 1968 revival by Robert Bellah.¹¹

⁸ [cite]

⁹ Augustine, *City of God*; Maureen Henry book.

¹⁰ Jean Jacques Rousseau, *The Social Contract*, citation

¹¹ Bellah, American Civil Religion

The claim is made that not every State has a civil religion but that it is a good and necessary thing in a liberal democracy. It has also been suggested that civil religion in the United States has to some degree been the product of protecting freedom of religion. That appeared to work well when the majority of the population shared a Judeo-Christian worldview. But in the face of the Vietnam War and an American society characterized by growing atheism, agnosticism, Oriental spirituality and, generally, greater diversity of religious traditions, in 1968 Bellah was mourning the decline of American civil religion.

While a variety of concepts (public philosophy, global ethic, public theology) address similar concerns, civil religion is the term I use because historically it has been more explicitly linked to the relations between church and state than the other concepts. The term civil religion is also fluid enough to capture Marxism-Leninism and twentieth century nationalism. That is, it can describe ideologies which purport to function as religions but without necessarily requiring belief in and relationship to a deity. The existence or positing of a civil religion also raises questions about how to allow space for religious views in a pluralistic society and about who makes the decision that something is a legitimate exercise of freedom of religion.

Marxism, for example, has been described as a faith and “in essence, a secularised version of the primary features of Judaeo-Christian religion.”¹² Thrower has advanced the view that Marxism-Leninism was not a religion but was a form of civil religion, or the functional equivalent of religion.¹³ He cites Hinduism and the Christian Church to illustrate religion’s function in

¹² James Thrower, *Marxism-Leninism as the Civil Religion of Soviet Society: God’s Commissar* (The Edwin Mellen Press: Lewiston, NY, 1992) at 16-17.

¹³ Thrower at 107 and 111.

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legitimizing the existing social order.¹⁴

As Thrower puts it, the primary purpose of Rousseau’s civil religion was not to mediate between the state and existing churches but “to provide an authoritative locus – acceptable to all citizens – of the core values needed if the rational state was to survive and flourish.”¹⁵ The secular nationalisms of the twentieth century have similarly been described as civil religions.¹⁶

To describe human rights or any other secular ideology, such as nationalism or socialism, as religion is to diminish the meaning of religion. Michael Perry describes a “religious” worldview as etymologically understood:

a vision of final and radical reconciliation, a set of beliefs about how one is or can be bound or connected to the world – to the “other” and to “nature” – and, above all, to Ultimate Reality in a profoundly intimate way. If a worldview is not grounded or embedded in a vision of the finally or ultimately meaningful nature of the world and of our place in it, it is a confusion, on the understanding of religion [he presents], to think of that worldview as “religious” – even if the worldview, like Marxism, is all-encompassing.¹⁷

Therefore I use the term civil religion with reference to human rights.

(c) Can human rights be described as a civil religion in the context of global governance?

Here I seek to address both how and why human rights can be described as a civil religion. In the next Part, I explain why I reject the position that “human rights” is or should be the civil

¹⁴ Thrower at 135-6.

¹⁵ Thrower at 149. See Jean Jacques Rousseau, *The Social Contract*, Book IV, Chapter 8.

¹⁶ Thrower at 153; John A. Coleman, “Civil Religion” in *Sociological Analysis* 31, Summer 1970, 67 at 72-3; Martin E. Marty, “Two Kinds of Civil Religion” in Richey, R.E. and Jones, D.J., eds., *American Civil Religion* (New York: Harper and Rowe, 1974) 140. Voegelin [cite].

¹⁷ Michael Perry, *The Idea of Human Rights*, 14-15.

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religion of international civil society.

The question whether human rights can be described as a civil religion in the context of global governance – whether human rights is the glue for global governance – relates to the diminishing sovereignty of the nation-state and the desire for a sense of global citizenship and common purpose. Michael Sandel has said:

If the global character of the economy suggests the need for transnational forms of governance, however, it remains to be seen whether such political units can inspire the identification and allegiance – the moral and civic culture – on which democratic authority ultimately depends. In fact there is reason to doubt that they can.¹⁸

Again, Sandel observes:

We cannot hope to govern the global economy without transnational political institutions, and we cannot expect to sustain such institutions without cultivating more expansive civic identities. This is the moment of truth in the cosmopolitan vision. Human rights conventions, global environmental accords, and world bodies governing trade, finance, and economic development are among the undertakings that will depend for public support on inspiring a greater sense of engagement in a shared global destiny.¹⁹

As he notes, self-government requires a sense of community and civic engagement. “Even the European Community, one of the most successful experiments in supranational governance, has so far failed to cultivate a common European identity sufficient to support its mechanisms of economic and political integration.”²⁰ Vaclav Havel has also commented on the absence of an ethos in European integration.²¹

Ian Ward has lamented the EU’s weak notion of citizenship, citing the lack of common purpose:

¹⁸ Sandel at 339.

¹⁹ Sandel at 345.

²⁰ Sandel at 339.

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Nonetheless [the notion of citizenship] is significant, because it reinforces the Union's pretensions to a citizenry. It is also significant because the establishment of citizenship is a necessary component of any liberal democratic polity. As Neil MacCormick convincingly argues, without a real conception of citizenship, it is impossible to envisage a "European civic demos," or indeed a "civic identity." Citizenship seals political affinity and inscribes it, to use Habermas's phrase, on the "collective memory." As Joseph Weiler has suggested, citizenship can bridge the deteriorating jurisprudence of rights and the potentially more inspiring politics of cultural identity what Weiler terms "our existential yearning" for "meaning."

But citizens are not defined by laws or treaties. A citizen is defined by a common aspiration, a "shared political culture." In the classical tradition, the tradition that was revisited by the likes of Rousseau and Madison during the Enlightenment, citizenship attaches to common purpose. And it is this notion which is presently deployed, by Habermas and others, in the cause of describing a putative global citizenship based upon a new humanism. Cast in this light, the Union's feeble attempt to prescribe citizenship is pitiful.²²

Compare Sacerdoti's ringing endorsement of the European Charter of Fundamental Rights as providing the common ethos necessary for a sense of European citizenship:

With its own Charter of Rights, embracing rights which have developed with the evolution of the European Union, the Union intends to manifest a sharing of values which lie at the base of European integration, justifying common institutions and the transfer of jurisdiction and sovereignty to institutions which are accountable, first of all, to European citizens. The ECHR does not suffice for the Union. The Union seeks to legitimately affirm its own identity in relation to the Council of Europe in the field of human rights, in addition to the foundation of its own supranational democratic order.²³

It has been suggested that national citizenship will become less and less important in the postnational age.²⁴ Governmental institutions require a sense of common purpose. Citizenship helps provide the sense of identity and common purpose necessary to encourage allegiance to

²¹ Sandel at 339 and n. 56.

²² Ward, Ian, "An Ever Closer Union?: The Continuing Travails of the Peoples of Europe" 15 *Temp. Int'l and Comp. L. J.* 247, 261 (2001).

²³ Sacerdoti, Giorgio, "The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe" 8 *Colum. J. Eur. L.* 37, 40.

²⁴ Linda Bosniak, "Denationalizing Citizenship" in Aleinikoff, Alexander and Klusmeyer, Douglas (eds.), *Citizenship Today: Global Perspectives and Practices* (Washington DC: Carnegie Endowment for International Peace, 2001).

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transnational institutions. The notion is not a new one but is reflected in the notion of civil religion itself. Citizenship and human rights, then, are inextricably linked in forming the foundation of a supranational democratic order.

Civil religion, or at least related elements of it, may come in other guises. The corporate mission statement performs a similar role to human rights instruments for the corporation, seeking to give employees a sense of common purpose. Dwight Hopkins has gone so far as to suggest that globalization itself is a form of religion:

Not only [are] there religion and globalization, or a globalized religion, or religion in globalization, or global religions coming inward to the center; in fact, globalization itself is a form of religion. . . . God in this religion is the concentration of monopoly finance wealth, which functions both transcendently and immanently.²⁵

Sociologist Richard Roberts has expressed concern with managerialism, an aspect of globalization, as an ideology. His concern is with “the placement and analysis of the exploitation of the human experience of ultimacy and identity-creation in ‘spirituality’ as a resource for and tool to be used in promoting organisational change.”²⁶

Closer to the concept of civil religion discussed here are calls for a sense of public morality in international order,²⁷ a public theology underpinning world order,²⁸ and a global ethic.²⁹ The

²⁵ Dwight N. Hopkins, “The Religion of Globalization” in Hopkins, Dwight N. et al. eds., *Religions/Globalizations: Theories and Cases* (Durham: Duke University Press, 2001) 28.

²⁶ Richard Roberts, *Religion, Theology and the Human Sciences* (____, 2001) 62-3.

²⁷ Vaughan Lowe, ASIL Proceedings, 2002 Annual Meeting.

²⁸ Maxwell Stackhouse [cite]

²⁹ *Our Global Neighborhood*; Hans Küng, *Yes to a Global Ethic*. For a critique of Küng’s global ethic, see Falk, *Religion and Humane Global Governance*.

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lament for an American public philosophy³⁰ echoes in discussions of globalization, particularly in light of the renewed hegemony of the United States since 1989. In 1993, the Parliament of the World's Religions affirmed "that a common set of core values is found in the teachings of the religions, and that these form the basis of a global ethic."³¹ And:

We are convinced of the fundamental unity of the human family on Earth. We recall the 1948 Universal Declaration of Human Rights of the United Nations. What it formally proclaimed on the level of *rights* we wish to confirm and deepen from the perspective of an *ethic*: the full realization of the intrinsic dignity of the human person, the inalienable freedom and equality in principle of all humans, and the necessary solidarity and interdependence of all humans with each other.

On the basis of personal experiences and the burdensome history of our planet we have learned

- that a better global order cannot be created or enforced by laws, prescriptions and conventions alone;
- that the realization of peace, justice, and the protection of earth depends on the insight and readiness of men and women to act justly;
- that action in favour of rights and freedoms presumes a consciousness of responsibility and duty, and that therefore both the minds and hearts of women and men must be addressed;
- that rights without morality cannot long endure, and that there will be *no better global order without a global ethic*.

By a global ethic we do not mean a global ideology or a *single unified religion* beyond all existing religions, and certainly not the domination of one religion over all others. By a global ethic we mean a *fundamental consensus on binding values, irrevocable standards, and personal attitudes*.³²

The call for a common moral purpose as a necessary underpinning for world order is not new. In 1947, A.C. Ewing noted that "the fact that we have no sentiment for Humanity as a whole"

³⁰ Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Belknap Press, 1996).

³¹ "Declaration toward a Global Ethic" in Hans Küng ed., *Yes to a Global Ethic* (New York: The Continuum Publishing Company, 1996) 10.

³² Declaration toward a Global Ethic, Küng, 14-5.

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makes successful international government more difficult but not impossible.³³

Till this sentiment has developed, no league of nations or world federation can be a unity in the sense in which a single modern state is. But this is not to say that it cannot perform a very valuable function, though it may mean that it has to act mainly through pre-existing states. The experience of religious movements, and of communism too, shows that ordinary men can be moved, not only to show ordinary decent loyalty, but even to give their lives for an idea, and surely the idea of a new world free from war and want with all the positive capacities that these evils hinder in full play is, more than most causes, worth the sacrifice even of life. At any rate the sentiment of a super-national unity can be acquired only by working together, and if you wait till this sentiment has developed before starting a supernational organisation of government you will never start at all.³⁴

Although Ewing did not use the term civil religion, note the analogy of both religion and communism to the sentiment for Humanity as a collective whole. Arguably, the quest for such a sentiment has been a driving force behind international human rights.

Johan van der Vyver has noted that Jacques Maritain sought to identify a certain public morality within a democratically constructed body politic, which he depicted as a kind of ‘civic or *secular* faith.’ Van der Vyver suggests that perhaps “a similar communal ethos, founded on the principle of human rights, has come to signify an international ‘secular faith.’”³⁵ John Witte, Jr. describes the human rights movement as “born out of desperation in the aftermath of World War II”, as “an attempt to harvest from the traditions of Christianity and the Enlightenment the rudimentary elements of a new faith and a new law that would unite a badly broken world order.”³⁶

³³ A.C. Ewing, *The Individual, the State, and World Government* (New York: The Macmillan Company, 1947) 262. [?]

³⁴ A.C. Ewing, *The Individual, the State, and World Government* (New York: The Macmillan Company, 1947) 263. [?]

³⁵ Johan D. van der Vyver, “Legal Dimensions of Religious Human Rights: Constitutional Texts” in Johan van der Vyver and John Witte, Jr. eds., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff Publishers, 1996) xi.

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As David Kennedy puts it: “Among well-meaning legal professionals in the United States and Europe – humanist, internationalist, liberal, compassionate in all the best senses of these terms – the human rights movement has become a central object of devotion.”³⁷ Michael Ignatieff has called human rights “the lingua franca of global moral thought.”³⁸ Ignatieff rejects the notion that human rights is a “secular religion,” arguing that to make it so is idolatry (humanity worshipping itself). Instead, he describes human rights as a “secular article of faith . . . [whose] metaphysical underpinnings are anything but clear.”³⁹

Louis Henkin has considered religion as a competing ideology with human rights, concluding that the two are not in competition. “Religion explains and comforts, tradition supports, socialism cares, development builds; the human rights idea does none of these.”⁴⁰ Mutua has criticized Henkin for failing to admit that human rights is itself politics or a particular ideology, suggesting that Henkin “underlines his belief in the omnipotence of human rights by elevating them to a near-mythical, almost biblical plateau.”⁴¹ To the extent that human rights requires a particular brand of secularism, it is in competition with religion. Human rights may not be an all-encompassing or metaphysical ideology, but the concept is being called upon to serve a religious function in global order. The concept of human rights purports to speak not only as morality but also as law. Respect for human rights reflects respect for the rule of law. Shades of Ewing are evident in Berman’s contention that people will not respect the rule of law “unless it

³⁶ John Witte, Jr. “Law, Religion, and Human Rights” 9.

³⁷ “The International Human Rights Movement: Part of the Problem?” 15 Harv. Hum.Rts. J. 101, 101 (2002).

³⁸ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) 53.

³⁹ Ignatieff, 77.

⁴⁰ Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) 192/3?.

⁴¹ Makau Wa Mutua, “The Ideology of Human Rights” 36 Va. J. Int’l L. 589 (1996) 627, 629.

represents for them a higher, sacred truth.”⁴² Human rights law defines the process by which all-encompassing ideologies or religions (higher, sacred truths) may be expressed or pursued and purports to be a higher truth in itself. In that respect, it is being advanced as the civil religion supportive of global citizenship.

II. Why the notion of human rights as civil religion should be rejected

(a) Dangers of human rights as civil religion

What is wrong with a secular liberal approach to human rights performing a religious function?

Perhaps nothing – if one has complete faith in human ability to know and do good. But a number of problems are apparent and should give us pause. Assertions of human rights as religion – or even as serving a religious function – may limit debate about the unsettled content and meaning of specific rights and freedoms. As a result, the search for a foundation for human rights may be hampered.

The religious nature of the human rights vocabulary may also serve to limit freedom of religion. Religious metaphors abound in human rights discourse. Equality rights, for example, have been described as “the central altar in the modern cathedral of international human rights.”⁴³ If equality rights are the altar, then freedom of religion is the corner-stone. If transnational or global religions are competing with international human rights as a secular civil religion, which is given the force of law, what does freedom of religion mean?⁴⁴ Malcolm Evans argues that the

⁴² H.J. Berman, *The Interaction of Law and Religion* (New York: Abingdon, 1974) 74. [?]

⁴³ Maxwell Cohen, “Towards a Paradigm of Theory and Practice: The Canadian *Charter* of Rights and Freedoms – International Law Influences and Interactions”, [1986] Can. H.R. Ybk at p. 67.

⁴⁴ For different legal approaches to religious freedom, see Johan D. van der Vyver and John Witte, Jr., eds., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Martinus Nijhoff Publishers, 1996).

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time is not ripe for an international convention protecting religious freedom (such as exists for race and women's rights) "because of the reluctance of the international community to accept that in the religious beliefs of others the dogmas of human rights are met with an equally powerful force which must be respected, not overcome."⁴⁵

Is there room for pluralism and a place for mediating institutions like the family and the church? Sandel has criticized the cosmopolitan ethic reflected in the Commission on Global Governance, Falk and Nussbaum as having a moral defect, not for asserting that we have obligations to humanity as a whole but for insisting that the more universal communities we inhabit must always take precedence over more particular ones.⁴⁶ He argues that: "the cosmopolitan vision is wrong to suggest that we can restore self-government simply by pushing sovereignty and citizenship upward. The hope for self-government lies not in relocating sovereignty but in dispersing it."⁴⁷

Malcolm Evans has explicitly criticized the human rights as religion approach. Referring to the Interim Report of the Special Rapporteur, which cited the need for a 'culture of tolerance,' Evans suggests:

If this means anything, it means that the freedom of religion does not include the right to adhere to a religion which is intolerant of the beliefs of others. On this view, 'Human Rights' has itself become a 'religion or belief' which is itself as intolerant of other forms of value systems which may stand in opposition to its own central tenets as any of those it seeks to address.⁴⁸

⁴⁵ Evans, 261.

⁴⁶ Sandel at 343.

⁴⁷ Sandel at 345.

⁴⁸ Malcom Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 260, citing McDougal, Lasswell and Chen, *Human Rights and World Public Order* at 662.

Evans indicates that such views are not restricted to the UN. As he points out, the Parliamentary Assembly of the Council of Europe has recognized a crisis of values or lack thereof in Europe: “The pure market society is revealed as inadequate as communism for individual well-being and social responsibility. The recourse to religion as an alternative has, however, to be reconciled with the principles of democracy and human rights.”⁴⁹ More recently, the European Parliament has expressed a similar view of religious tolerance in adopting a Report on Women and Fundamentalism.⁵⁰ The aim of the Report appears to be to relegate the influence of religions to the private sphere and to subject them to state control, using phrases like the “normalisation of religious pluralism”, “exercising the right of religious freedom in a satisfactory way”, and the “normal development” of religious organizations.⁵¹ Its token references to religious freedom are belied by the general tenor of the Report, which contemplates religious freedom only in so far as “religious precepts are compatible with national legislation, the rule of law, and international conventions.”⁵²

A similar theme is apparent in the writing of Michael Ignatieff, who suggests that rights “are worth having only if they can be enforced against institutions like the family, the state and the church.”⁵³ Among other things, this approach gives short shrift to Article 16.3 of the Universal Declaration of Human Rights, which states that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Despite his contention that human rights is not a secular religion but a language for deliberation, Ignatieff fails to recognize

⁴⁹ Parliamentary Assembly of the Council of Europe, Recommendation 1202 of 2 February 1993, on religious tolerance in a democratic society, para. 9, cited in Evans at 261.

⁵⁰ 13 March 2002.

⁵¹ Explanatory Note 3.1.

⁵² Article 29. See also Explanatory Notes 2.5 and 3.3.

⁵³ Ignatieff, *Human Rights as Politics and Idolatry*, 66-7.

mediating institutions like religion and the family between the individual and the state. As Diane Orentlicher points out, his belief that the “fundamental moral commitment entailed by rights is . . . to deliberation” is perplexing in light of his dismissal of reasoned deliberation of claims that ground human rights in religious or ultimate terms.⁵⁴ In rejecting a non-individualistic, communitarian framework for rights,⁵⁵ he leaves little room for freedom of religion.

To similar effect we find Abdullahi Ahmed An-Na`im arguing that “every state has the responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state, on the other.”⁵⁶ He fails to mention religious freedom or any international human right in connection with religion as part of that analysis.

Religion is a moral, social and political force with which governments have to reckon not only domestically in mediating competing claims in the arena of religious pluralism but also on the international plane. The ongoing “war on terrorism” has huge religious overtones.⁵⁷ Religious “fundamentalism” or “traditionalism” has gained a bad reputation, not only from the events of September 11, 2001 but, among other things, from the Taliban government’s treatment of women in Afghanistan. Issues such as proselytism, blasphemy, and the rights of women and children raise complex questions as to the place of religion and the reconciliation of religious

⁵⁴ Diane F. Orentlicher, “Relativism and Religion” in *Human Rights as Politics and Idolatry*, 155.

⁵⁵ Ignatieff, 53.

⁵⁶ Abdullahi Ahmed An-Na`im, ‘State Responsibility Under International Human Rights Law to Change Religious and Customary Laws’, in *Human Rights of Women: National and International Perspectives*, R Cook (ed), (U of Pennsylvania Press Philadelphia 1994) at 167.

⁵⁷ Andrew Sullivan, This is a Religious War, *New York Times* [cite]

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freedom with other rights. It would be a mistake to suggest that there are easy answers to these questions. The fact that there are not is part of the pain and the beauty of the human condition.

Religion is not defined in the United Nations instruments dealing with religious human rights. It is generally agreed, however, that protections of religious belief cover “theistic convictions, involving a transcendental view of the universe and a normative code of behaviour, as well as atheistic, agnostic, rationalistic, and other views in which both elements may be absent.”⁵⁸ Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights protect freedom of religion.⁵⁹ As well as being protected in many domestic constitutions, freedom of religion is a basic freedom in several regional human rights treaties, protected in varying forms.⁶⁰ It encompasses an individual aspect (freedom of conscience and religion of the individual), a group identity aspect, and an institutional aspect. In global terms, however, even with regional protections, freedom of religion is far from secure. Religion can also be confused with tribalism and long-running disputes that are based on tribal loyalties can sometimes give religion a bad name.

Premising human rights on a secular international civil society reflects a deeper liberal concern with religion and truth claims. A secularized concept of human rights as a tool of governance

⁵⁸ Natan Lerner, *Religion, Beliefs, and International Human Rights* (Maryknoll, New York: Orbis Books, 2000) 37. Generally see Baniyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, *International Studies in Human Rights*, (The Hague: Martinus Nijhoff Publishers, 1996) and Malcolm Evans, *Religious Liberty and International Law in Europe*. Relevant documents are contained in Stahnke and Martin eds., *Religion and Human Rights: Basic Documents*.

⁵⁹ Freedom of religion is protected in Article 18 in each of the respective documents. The United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981) is also worth noting.

⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 9; American Convention on Human Rights (1969), art. 12; African Charter on Human and Peoples’ Rights (1969), art. 8;

has particular difficulty with the monotheistic religions, which posit the existence of objective truth and the concept of sin. Freedom of religion also means accepting the concept of sin. Liberalism has trouble reconciling not only the notions of duties and freedoms, but also the concepts of sin and tolerance.⁶¹

Another danger of human rights as civil religion is that may be used to advance the notion that human rights are universal in a way that may hide moral imperialism possible in that assertion. The religious nature of human rights language has also been criticized for obscuring the ties of “universal” human rights to Western liberal democracy. As Makau Mutua puts it:

The human rights movement must not be closed to the idea of change or believe that it is the “final” answer. It is not. This belief, which is religious in the evangelical sense, invites “end of history”-type conclusions and leaves humanity stuck at the doors of liberalism, unable to go forward or imagine a post-liberal society. It is an assertion of a final truth. It must be rejected.⁶²

Does human rights as civil religion depend upon an underlying secular liberal democratic philosophy being at work? Or does globalization “not promise the end of religion, not even its sublimation, but its reinvention, and reinception”?⁶³

Human rights as civil religion is also problematic because the concept of human rights presently lacks a foundation in transcendent authority. Thrower suggest that the greatest difference between Marxism-Leninism and the great world religions was the assumption of a *magisterium* in the interpretation of Marxism-Leninism such that there was no transcendent authority or

Fundamental Charter of Human Rights, art. __; The Cairo Declaration on Human Rights in Islam (1990), art. 10; and the Arab Charter on Human Rights, art. __ [?].

⁶¹ The tension is evident in Ignatieff, *Human Rights as Politics and Idolatry*.

⁶² Mutua, “The Ideology of Human Rights” 653.

criterion in the Soviet Union to which appeal could be made and by which the State or the Communist Party could be judged or called to account.⁶⁴ The danger of such an approach lurks in the notion of human rights as civil religion – if a transcendent authority is denied. The universality of human rights depends upon the recognition of a transcendent human dignity, not simply the text of a constitution or human rights convention. Michael Perry asserts that there is “no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious . . . and the idea of human rights, therefore, ineliminably religious.”⁶⁵

Finally, there is a danger that human rights as civil religion will require that public discourse about the morality of particular conduct only be framed in terms of human rights violations. That may be seen as a requirement of tolerance in liberal societies.

III. What is the alternative?

(a) International civil society

It is useful in diagnosing the fate of the sovereign nation-state to consider the circumstances of its formation. Modern State sovereignty and the “separation of Church and State” that is presumed to go with it (at least in Western liberal democracies) have their roots in the struggle for power between the State and the Church. This is reflected in Rousseau’s prescription of civil religion. The temporal authority of the State has always struggled with

⁶³ Eduardo Mendieta, “Society’s Religion: The Rise of Social Theory, Globalization, and the Invention of Religion” in Hopkins, Dwight N. et al. eds., *Religions/Globalizations: Theories and Cases* (Durham: Duke University Press, 2001) 46-7.

⁶⁴ Thrower at 167.

⁶⁵ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press, 1998) at 5, 11.

the limits on its power inherent in the existence of an authority that concerns itself not only with this world, but with what happens after death. The degree of secularization throughout the world varies widely.⁶⁶

I suggest that “separation of Church and State” is a misnomer and that “independence of Church and State” is more apt. As Laski observed: “The Reformation had decided the battle in favour of the State, but it had secured rather independence than sovereignty for the State and sovereignty the Church could still, and does still, challenge.”⁶⁷ It is a separation in the sense that the Church as an institution is separate from the State, not in the sense that religion and religious beliefs have no place in public discourse. The words of Laski in 1917 are as apt today:

The Church, intelligibly enough, is compelled to seek the protection of its liberties lest it become no more than the religious department of an otherwise secular organisation. The main problem, in fact, for the political theorist is still that which lies at the root of medieval conflict. What is sovereignty?⁶⁸

The question of reconciling religious and state sovereignty, which contributed to the development of the modern state, remains a pressing one. If transnational or global forms of governance are to replace state sovereignty, then the role of religious organizations needs to be addressed. Challenges to sovereignty are not limited to the transnational, but have been observed to come from below as well with the growth of the city-state.⁶⁹

⁶⁶ Cole Durham, “Perspectives on Religious Liberty: A Comparative Framework” in Johan van der Vyver and Witte eds., *Religious Human Rights in Global Perspective*.

⁶⁷ Laski at 116.

⁶⁸ Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917) 27-8.

⁶⁹ Richard T. Ford, “City-States and Citizenship” in *Citizenship Today: Global Perspectives and Practices* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) 209, Carnegie Endowment for International Peace, Washington, D.C.

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Benedict Kingsbury argues persuasively that “an operational code resembling [U.S.] First Amendment liberalism has been the de facto guide in the construction of international civil society, and second that this code encourages voluntaristic non-governmental organizations (“NGOs”) but is not well suited to the circumstances of ascriptive groups exercising governmental powers.”⁷⁰ He uses “ascriptive groups” to mean groups in which membership is based more on birth than volition. Kingsbury argues in the context of indigenous peoples, but the same argument could be made about churches and religious organizations. Membership in a religious group is not strictly voluntary in the way that membership in Greenpeace or Amnesty International is. A religious liberty perspective supports Kingsbury’s call for a “richer international constitutionalism.”

His concern is reflected in a UN Commission on Global Governance statement: “Global governance . . . now involves not only governments and intergovernmental organizations, citizens’ movements, transnational corporations, academia, and the mass media.”⁷¹ Religions are left out of this picture. Consonant with Kingsbury’s approach, Bob Deacon has expressed a healthy skepticism toward the empowerment of international civil society consisting in a greater role being given to international NGOs. As he observes, the “assumption that NGOs are representative of international civil society raises questions about which elements of civil society are being ‘represented’ and which other ones effectively disempowered.”⁷²

⁷⁰ Benedict Kingsbury, “First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and Problems of the Liberal NGO Model of International Civil Society,” 3 *Chicago J. Int’l L.* 183 (2002).

⁷¹ Commission on Global Governance, *Our Global Neighborhood*, 335.

⁷² Bob Deacon, “Social Policy in a Global Context” in Andrew Hurrell and Ngaire Woods eds., *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 1999) 245.

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Kingsbury says:

It is plausible that NGOs operating in this US [First Amendment legal] environment seek to transpose to international civil society, *mutates mutandis*, the constraints on governmental regulation of the content of any group's advocacy or beliefs, and the requirement that states respect freedom of religion and maintain the public sphere as formally secular.⁷³

Kingsbury concludes that the “First Amendment liberalism that currently prevails is insufficient” to meet the challenges of “a fully satisfactory theory of the roles and responsibilities of international civil society actors. . .”⁷⁴ Academic work is also being done by non-lawyers, too, seeking to create a space for religious groups and movements in the consideration of transnational solidarities such as environmentalists, development professionals, human rights activists, and information specialists.⁷⁵

(b) Secularism and the international order

Globalization may give transnational religions new opportunities to participate in the global system, and transnational religions may offer insights into the direction of processes of global governance.⁷⁶ Casanova suggests that Catholicism and Islam are similarly situated in this respect.⁷⁷

⁷³ Kingsbury, “First Amendment Liberalism” 185.

⁷⁴ Kingsbury, “First Amendment Liberalism” 195.

⁷⁵ Susanne Hoerber Rudolph and James Piscatori eds., *Transnational Religion and Fading States* (Boulder, Colorado: Westview Press, 1997).

⁷⁶ “Ongoing processes of globalization offer a transnational religious regime like Catholicism, which never felt fully at home in a system of sovereign territorial nation-states, unique opportunities to expand, to adapt rapidly to the newly emerging global system, and perhaps even to assume a proactive role in shaping some aspects of the new system. Conversely, an analysis of the contemporary transformation of Catholicism may offer some clues as to the direction of contemporary processes of globalization.” José Casanova, “Globalizing Catholicism and the Return to a ‘Universal’ Church” in Rudolph and Piscatori eds., *Transnational Religion and Fading States* (Boulder, Colorado: Westview Press, 1997) 121-143 at 121-122.

⁷⁷ Casanova at 138 and n. 44.

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International human rights “law” is a field of legal inquiry but at the same time international human rights is an area of moral and political philosophy. The time is ripe for a reinvigorated legal, moral and political discourse that seeks to engage religious thought. The footsteps of Martin Luther King, Jr. provide an example of how to view law, politics, religion and morality as interwoven.⁷⁸ Consider, for example, King’s use of universal moral principles to give meaning to rights enunciated in the U.S. Constitution and statements in the Declaration of Independence such as “all men are created equal.”⁷⁹ The language was there in 1776, but slavery continued until 1865. Words in a human rights document or constitution alone are not enough. In the U.S. civil rights movement, it was in part King’s call for justice and action consistent with the moral principles underlying those words that led to change.

Religion has a key role to play in the debate about the universality of human rights. I agree with Orentlicher’s claim that “universal acceptance of the human rights idea depends upon its legitimation *within* diverse religious traditions, and not just *alongside* them.”⁸⁰ Jeremy Waldron puts it rather more bluntly:

But precisely because relativism in general is false, we are not entitled to assume the right to enforce whatever tentative conclusions happen to have emerged from our particular inbred set of debates about free speech, the division of church and state, or individual autonomy. Until those debates are enriched, in a cosmopolitan way, with an awareness of what is to be said about them and around them and against them, from all the variety of cultural and religious and ethical perspectives that there are in the world, they remain parochial; and we should stand accused of the stupidest, most arrogant form of moral imperialism if we were to swagger around trying to impose our way of life without sensitively confronting the basis of other people's and other cultures' resistance to it. Certainly if we try to dismiss

⁷⁸ Holmes, Barbara A., and Holmes Winfield, Susan, “King, the Constitution and the Courts: Remaining Awake through a Great Revolution” in (Baldwin, Lewis V. et al.) *The Legacy of Martin Luther King, Jr.: The Boundaries of Law, Politics and Religion* (University of Notre Dame Press: Notre Dame, Indiana, 2002) at ___.

⁷⁹ *Id* at 173 *et seq.*

⁸⁰ Orentlicher, 155.

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all such resistance as relativism, we will end up consigning human rights discourse to a rather unpleasant, obtuse, and morally impervious relativism of its own.⁸¹

An-Na'im has suggested that human rights advocates in the Muslim world must work within the framework of Islam to be effective.⁸² He suggests that, because religious texts are open to a variety of interpretations, human rights advocates in the Muslim world should struggle to have their interpretations adopted as the new Islamic scriptural imperatives for the contemporary world.⁸³

As John Witte, Jr. has observed:

Modern human rights laws will provide no panacea to the world crisis in the next century, but they will be a critical part of any solution. Religions will not be easy allies to engage, but the struggle for human rights cannot be won without them. For human rights laws are inherently abstract ideals – universal statements of the good life and the good society. They depend upon the visions of human communities and institutions to give them content and coherence, to provide “the scale of values governing their exercise and concrete manifestation.” Religion is an ineradicable condition of human lives and communities. Religions invariably provide universal sources and “scales of values” by which many persons and communities govern themselves. Religions must thus be seen as indispensable allies in the modern struggle for human rights. Their faith and works must be adduced to give meaning and measure to the abstract claims of human rights norms, to give spirit and sanctity to the legal ideas and institutions of a human rights regime.⁸⁴

Falk argues that “religious awakening can contribute to the formation of identities that link past and future, that bridge differences of civilizational belief, and above all, that can foster from positions of deep rootedness an understanding and celebration of a transcendent common

⁸¹ Jeremy Waldron, “How to Argue for a Universal Claim”, 30 *Col. H.R.L.R.* 305 (Spring 1999) 313-4.

⁸² Abdullahi Ahmed An-Na'im, “Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry,” 3 *Harvard Human Rights L.J.* 13 (1990) at 15. [Perry at p. 77]

⁸³ Abdullahi Ahmed An-Na'im, “Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry,” 3 *Harvard Human Rights L.J.* 13 (1990) at 15.

⁸⁴ John Witte, Jr. “Law, Religion, and Human Rights” 28 *Colum. Human Rights L. Rev.* 1 (1996) 2-3.

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humanity. The humanizing of the Westphalian framework is integral to the project of humane global governance.”⁸⁵ Similarly, Rudolph notes that “Identities and the esteem conferred by them are at stake. Religion is one of the prime sources of identity. Its significance has intensified in a post-rationalist world threatened by disenchantment, impersonality, and loss of meaning.”⁸⁶ Secularism has no claim to universality and therefore cannot provide the legitimacy necessary for international human rights. Religion has a necessary place in international civil society.⁸⁷

Conclusion

Part of the ethos we need in international civil society is a sense of personal responsibility. Community is not built by pitching individuals against the nation-state and against each other but rather by acknowledging the importance to the human person of interpersonal encounter and relationship. Richard Falk claims that the economic forces of globalization have reoriented government, making it more accountable to the market and less to citizens.⁸⁸ This may be another way of describing the “democratic deficit” of global order. But the accountability of governments needs to be joined with a renewed sense of personal accountability.

Falk suggests that only with “a rediscovered religious consciousness can a series of responsive political initiatives unfold. Such a future for humanity would be postsecular without being

⁸⁵ Richard Falk, *Religion and Humane Global Governance* (Palgrave: New York, 2001) 8.

⁸⁶ Rudolph at 5.

⁸⁷ For perspectives on the potential contributions of Hinduism, Jainism, Buddhism, Confucianism, Judaism, Christianity, Islam, the Baha’i Faith and African traditions to world order, see Patricia M. Mische and Melissa Merklung, eds., *Toward a Global Civilization? The Contribution of Religions* (New York: Peter Lang, 2001).

⁸⁸ Falk at 141.

antiseccular, postnationalist without being antinationalist.”⁸⁹

“The price of liberty is exactly divergence of opinion on fundamental questions.”⁹⁰ If human rights as a religious mantra denies the freedom to disagree on fundamental questions, then it is nothing more than a pretender to a global ethic. Any form of global governance that seeks to facilitate human flourishing (by which I mean more than peace and wealth creation) must think of the human person as more than matter, more than a cog in the managerial bureaucracy, more than a unit of production, a collection of atoms or genes. It requires at a minimum openness to – if not acceptance and affirmation of – the transcendental. Human rights alone cannot meet this challenge.

The idea of human rights in itself does not take account of the capacity to love and be loved, an essential part of human nature. A sense of the importance not only of not harming each other, but of loving each other in the *agape* sense of love, is necessary for human flourishing. Human rights, or any ideology which purports to provide the moral foundation for social and political life on this planet, will need to allow for freedom and love. Then, perhaps, it may come to pass that in “building a true culture of freedom . . . we shall see that the tears of [the 20th] century have prepared the ground for a new springtime of the human spirit.”⁹¹

⁸⁹ Falk at 164-5.

⁹⁰ Laski at 274.

⁹¹ Pope John Paul II, Address to the Fiftieth Session of the General Assembly of the United Nations, October 5, 1995.

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