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Introduction

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SYMPOSIUM

***CAN GOD AND CAESAR COEXIST?
BALANCING RELIGIOUS FREEDOM AND
INTERNATIONAL LAW***

INTRODUCTION

BY

ROBERT F. DRINAN, S.J.†

Any author of a book would feel honored to have three knowledgeable scholars write extensive comments on his book. I feel deeply honored and grateful for the perceptive articles collected here. Indeed the thought occurred to me that these three wonderful articles should be added to any edition or editions of a book on religious freedom!

Professor Christopher Borgen ingeniously put together this trilogy of articles which explore in depth the possibility of making the right to religious freedom somehow enforceable at the regional and/or world level. His trenchant comments explore the difficulties inherent in enforcing the religious freedom made available to everyone in several United Nations documents. This right is particularly spelled out in the 1981 United Nations Declaration on Religious Freedom. Professor Borgen raises penetrating questions about the feasibility of any juridical body—especially one with global jurisdiction—in elucidating and enforcing the right to religious freedom which has been affirmed and reaffirmed in the last fifty years in every human rights covenant promulgated by the United Nations.

Professor Borgen raises almost every question about the feasibility of juridical machinery to enforce religious freedom. He notes the vast differences between the appearances and

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understanding of religious freedom in the west, the Muslim world, and Asia. But he also concedes the intolerance and even persecution of some religious dissidents as an evil contrary to world law that needs and deserves a remedy. His skepticism about a court-oriented solution is well taken but one can raise the question of whether Professor Borgen gives full consideration to the instances in national and international law where courts have proclaimed a new and bold vision which, against the greatest odds, has prevailed and eventually changed the way in which the world thinks about a particular topic.

The rapid rise in opposition to all of the forms of torture is an example of how courts, legislatures, and world opinion have coalesced to condemn and punish torture in all of its manifestations.

The right to religious freedom is different from every other right proclaimed in international law over the last five decades. Rights are generally based on concepts of human dignity that go back to Magna Carta or at least the rights proclaimed during the Enlightenment in Europe. The right to religious freedom is very new on the world scene. It is probably more difficult to enforce than the more traditional rights such as freedom of speech and freedom of the press.

Professor Borgen rightly raises the question of the feasibility and enforceability of international court decrees related to religious freedom. That of course is one of the major issues today. It is the central issue why members of the United Nations in 1981 settled on a mere declaration on religious freedom and not an enforceable covenant.

Underlying all of the endless discussion is a deep desire on the part of almost everyone to protect and enhance religious freedom whenever and wherever that is possible. That is the aspiration of political and religious leaders almost everywhere in the world. Professor Borgen asserts that the formal recognition of the right to religious freedom that has been agreed to by all the nations may "take time . . . to flower into consistent state practice." He adds that "while such flowering can be encouraged it cannot be rushed."

The defenders of religious freedom for everyone in the world will properly ask whether all of the other human rights now guaranteed by world law were "rushed." The moral aspirations of one generation sometimes become the legal rights of the next

generation. The right to religious freedom may well be on the brink of the becoming guaranteed by world law.

Professor Mark W. Janis has become a well-known and respected advocate of international human rights—especially the right of religious freedom. His misgivings about the workability of a world court on religious freedom are entitled to deep respect. He points out that belief in religion and the sovereign state are “two of the strongest human emotional attachments.” Can international law, which Professor Janis calls the “Cinderella of the tale,” rise up to curb the claims of religious faith or the state?

Professor Janis perceptively points out that there are now eighteen functioning international courts or tribunals. He wonders whether a nineteenth court devoted to religious freedom could be useful or effective. Professor Janis correctly points out that the proposed international court on religious freedom would have problems to resolve that are more complex than any of the policies related to human rights of all of the other international tribunals. He notes that it seems highly unlikely that countries like Ireland, Israel, Saudi Arabia, and China would submit disputes about the practice of religion or religious tolerance to a panel of international judges or arbitrators.

The skepticism of Professor Janis about the feasibility of a world juridical body with jurisdiction over religious freedom is well taken. But is there any other proposal that might bring relief to non-Muslims in Muslim countries or non-believers in Christian or post-Christian nations? He points out that even the highly-developed European Court of Human Rights seems to be very timid in its resolution of disputes related to religious freedom in Europe.

Professor Janis raises excellent points about the frailty of international law as an instrument of justice in the world. But one can wonder whether he undervalues, for example, the issuance of the six United Nations committees that monitor compliance of the vast majority of the nations of the Earth that have subscribed to the six major human rights treaties approved by the United Nations.

Professor Elizabeth Defeis has written a thorough and cogent analysis of religious freedom as defined by the European Court of Human Rights (“ECHR”). This tribunal, which is regarded as the most sophisticated and developed human rights court in the world, has not advanced, in any impressive way,

priorities related to religious freedom. Professor Defeis attributes this in part to the increasing secularization of Europe. She asserts that the ECHR has found secularism to be consistent with values underlying the European Convention on Human Rights.

Some may feel that this generalization is too broad. But it is clear that the ECHR has tended to extend a wide margin of appreciation to infringements on religious freedom in various countries. In Turkey, for example, the ECHR allowed that very secular nation to expel a medical student because as a woman and a Muslim she insisted on wearing the scarf as a religious headdress.

The sole dissent in the case, filed by Judge Françoise Tulkens of Belgium, objected to the ban on headscarves which she called a violation of the rights of women and a form of paternalism.

The ban on headdresses by the European court was vigorously protested by Human Rights Watch, an American based human rights nongovernmental organization. It seems safe to predict that the European Court of Human Rights and other tribunals around the world will be re-litigating the question of the wearing of the headscarf for religious purposes. Over 1,000 women in Turkey and elsewhere have filed applications to reverse the ban by the ECHR. The issue will continue to be raised by Muslims and by women. It is now a question filled with meaning in the 48 Islamic nations, and women and others are insisting on full equality for religious convictions.

Professor Defeis also describes the negative attitudes which France and other nations have toward religious "cults."

Professor Defeis is sympathetic to those who complain that their religious freedom has been infringed but she wonders whether the international court on religious freedom proposed by some is the optimum method to resolve disputes concerning religious liberty in Europe. She points to the flexibility of the court on non-religious issues which, she asserts, has made it "the most effective court for the protection of human rights."

None of the three commentators on my book desires to narrow the reaches of religious freedom. Realistically they wonder about the workability or even the possibility of having a commission or tribunal issuing rulings on the way by which

international law has called for the enlargement of the right of freedom of worship.

One very important issue in the whole area of religious freedom was mentioned but not elaborated in my book. This is the notion of freedom of conscience. It is really incredible that in some of the international covenants on human rights—and especially in the U.N. Declaration on Religious Freedom—the concept of the supremacy of the voice of conscience is asserted. Elaboration of this expansive notion is not prominent in the escalating literature on the contours of religious freedom. Some commentators assert the obvious that no one's claim to be following their conscience can justify murder or any other serious crime.

The law with respect to those who are conscientiously opposed to participating in all forms of warfare has not been particularly generous in recognizing that claim. But it is possible that conscientious objectors may become more assertive and aggressive and that their claim will be recognized in national and international law.

But it is astonishing that in all of the international research about religious freedom, the right of a person to follow conscience is asserted continuously and vigorously. The right to follow one's conscience is given the same status as the right to assert that a person is religious or irreligious.

Could the right to follow one's conscience grow into a broad and widely recognized claim under international law? The claim may sound fanciful but the right to follow one's conscience is asserted vigorously and repeatedly in most of the declarations and covenants on human rights agreed to by the international community over the last fifty years.

The three thoughtful articles on my book reflect the implications of the worldwide claims by those who have religious faith and those who do not. Countless observers are understandably still afraid of religion because of the wars and persecutions started at the instigation of religious groups through the centuries. At the same time there is a profound, worldwide empathy for those who, because of their deepest convictions and their conscience, want to fulfill in their lives what they conceive to be the will of God.

The endless struggles between God and Caesar will probably go on in some form until the end of time. It is the solemn duty of

those with faith and those without faith to make it possible for every human being to claim the rights that he or she feels are the dictates of his or her conscience. That is the lesson of the United Nations, the teaching of international law, and the aspiration of every person with or without religious faith.