DEVELOPMENTS

Book Review - Robert F. Drinan, S.F., Can God and Caesar Coexist? Balancing Religious Freedom & International Law (2004)

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Robert F. Drinan, S.F., *Can God and Caesar Coexist? Balancing Religious Freedom & International Law*, Yale University Press: New Haven (2004), ISBN: 0300100868

In a post 9/11 world divided along ideological lines, the issue of freedom of religion has found its way to the forefront of global debates. From discussions in Europe about the acceptability of traditional Muslim head coverings for women in public schools,[1] to issues right here at home regarding faith based arbitration in the family context, the limits and parameters of a right to freedom of religion has become a highly contested subject.[2] On the one hand, we as a global society recognize the need to protect one's right to freely practice one's religion and follow the compulsions of one's conscience. In contrast, we are faced with the issue of determining where freedom of religion ends and encroachment on other basic rights, such as gender equality, begins. The late Robert F. Drinan, S.F., an acclaimed human rights activist, former politician, professor of law at Georgetown University and a firm believer in the need for promotion of the right to freedom of religion and conscience, seeks to determine where the balance lies in "Can God and Caesar Coexist? Balancing Religious Freedom and International Law."

His 2004 book, "Can God and Caesar Coexist?", is an extensive survey of the issues surrounding the development, implementation, enforcement and interpretation of international and domestic laws that seek to protect freedom of religion. It seeks to

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[1] *See* Matthias Mahlmann, *Constitutional Identity and the Politics of Homogeneity*, 6 GERMAN LAW JOURNAL 2 (2005), available at http://www.germanlawjournal.com/article.php?id=558, accessed on 19 March 2007.

[2] *See* Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The relationship between state and religion in the face of new challenges*, 8 GERMAN LAW JOURNAL 2 (2007), available at http://www.germanlawjournal.com/article.php?id=795, accessed on 19 March 2007.

address the challenges of protecting such a freedom in both secular regimes where diversity reigns and religious pluralism abounds, and in those regimes where the distinction between State and Church are less obvious. Freedom of religion encompasses the ability to follow one's own conscientious beliefs and the ability to change religions without punishment or interference by the state. Particularly since the end of World War II, freedom of religion has become and important focus of international discussions on human rights.

Although freedom of religion and conscience might seem like a basic right – however contested and litigated[3] – to those living in Western democracies, it continues to be elusive in many other parts of the globe. Drinan takes a careful look at the importance of this freedom and the challenges it faces in becoming a covenant of international law. Currently, freedom of religion and conscience is recognized in many international declarations, such as the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[4] but it has yet to be firmly entrenched in the international legal regime through a covenant or an equally formal and binding international instrument. Ultimately, Drinan believes that what is required in order to achieve global acceptance and enforcement of this right is an international tribunal, overseen by the United Nations, which would act as a forum wherein citizens of the world could bring complaints regarding infringements on their freedom of conscience and religion. Drinan weaves this proposal into every chapter of the book, emphasizing that, from his perspective, it is the most reasonable and realistic solution to the issue.

An international tribunal to protect freedom of religion is a lofty goal, primarily as a result of the nature of the right itself, but even more problematic are questions of legitimacy and the waning power of the United Nations. Even if the United Nations were able to develop a binding covenant regarding religious freedom, how would it ever enforce it? Religious freedom imports a particularly thick lens of cultural subjectivity to its interpretation, which in addition to enforcement challenges, also implies difficulty with interpretation about what this right should mean, what it should encompass and where its limitations are.

Drinan begins by introducing his readers to the considerable complexities of the issue. Although many nations around the world recognize freedom of religion and conscience as a basic human right in their constitutions and domestic laws,

[3] *See* Mahlmann, *supra* note 1.

[4] GA Res. 36/55 of 25 November 1981, available at http://www.un.org/documents/ga/res/36/a36r055.htm, accessed on 19 March 2007.

acknowledgement and protection of this right on an international scale is much more complex than it would seem. There is an inherent tension for governments between becoming involved in the regulation of religious practices in order to protect other fundamental freedoms and the encouragement of freely following one's conscientious beliefs through religious practices and the like. At what point is a government no longer protecting a right, but rather involving themselves directly in the regulation of religion? The distinction is not clear. This issue was commented on by Ladeur and Augsberg in a thoughtful article recently published in the German Law Journal.[5] In their opinion, state neutrality cannot be sustained where freedom of religion is to be promoted. Drinan ultimately agrees with this concept, noting "How to curb potentially ruthless government restrictions is at the core of the struggle to maximize religious freedom."[6] This statement is indicative of Drinan's view that minimizing government restrictions or regulation in the area of religious practices is one of the key components to maximizing religious freedoms.

In order to demonstrate how the issue of protection of religious freedom is being addressed around the world, Drinan takes a critical look at religious freedom as it exists in the United States, Europe (with respect to the European Court of Human Rights), China, the Muslim world and within the global Jewish Community. Drinan is particularly critical of the "protection" or promotion of religious freedom in the United States, the self-proclaimed "best" example of respect for religious freedom in the world. He makes a fundamentally important point by arguing that each country has its own distinct history, particularly with respect to both human rights generally and religion more specifically, so how can one claim that the United States is the "best" model. He advocates that a 'one size fits all' solution is simply not possible, and although the United States might be a good example of a more neutral church-state relationship, it's particular approach to the issue should not be accepted as more than simply an example of a relatively successful model. However, Drinan does note that the role of the United States in the development and expansion of religious freedom throughout the world is critically important given their hegemonic influence in the global arena. As a result, participation of the United States in an international initiative to solidify freedom of religion into a covenant of international law is crucial.

In Drinan's opinion, the Council of Europe's European Convention on Human Rights[7] is ground breaking with respect to its language regarding religious

[5] *See* Ladeur & Augsberg, *supra* note 2.

[6] DRINAN, 214.

[7] Rome 4 November 1950.

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freedom, in particular, Article 9. Furthermore, the European Court of Human Right (ECHR) is held out by Drinan as an example of the type of advancement that could be achieved by an international tribunal designed to protect religious freedom. He cites the court's 1978 decision in *Arrowsmith v. United Kingdom*[8] as a characteristic example of the narrow approach that the ECHR often takes in interpreting religious freedom, wherein actions can only be justified where they were required by one's religion. Creating such a subjective test does not go very far in clarifying the issue, but rather enhances the ambiguity of Article 9. This is troubling considering this is the best example of how an international tribunal could work to assist in promoting and protecting religious freedom. It does little to foster confidence in the creation of such a mechanism.

Drinan does not shy away from the even the most controversial topics, providing an inspiringly candid purview of the issues. As a devout Catholic priest, one might assume that his writings would be favoring a particular faith-based approach over alternatives, eventually perhaps even justifying abuses of the church's position of power. But, Drinan writes very openly about the sordid history of Christians in this area and the challenges that protecting religion can mean for other rights, such as the right to choose to abort a fetus or the right to marriage for same sex couples. Drinan does, however, give extensive treatment (an entire chapter) to the steps that the Vatican has taken with respect to recognition and preservation of the right to freedom of religion and conscience. In particular, his focus is on the work of the Second Vatican Council (Vatican II) regarding the adoption of the Church's Declaration on Religious Freedom[9] in 1965. Drinan highlights a particularly fascinating passage in the Declaration which dictates that although there is a right to "give witness" to faith, this does not intrinsically imply a right to pursue or spread faith in any manner that "might seem to carry a hint of coercion or of a kind of persuasion that would be dishonourable or unworthy."[10] Coming from the leaders of the Catholic Church, this is a particularly interesting comment, which ultimately shows how much the right to freedom of religion has evolved over the last century.

Let us consider for a moment the way in which the issue that Drinan describes is being played out within domestic contexts, here for example in Canada. In 2006, the tension between freedom of religion and other fundamental human rights and freedoms was most drastically illustrated by the faith based arbitration debate in

[8] *Arrowsmith v. United Kingdom,* no 7050/75, Comm. rep of 12 October 1978, 5 DR 19.

[9] Declaration on Religious Freedom, *Dignitatis Humanae,* 7 December 1965.

[10] DRINAN, 102.

Ontario. In 2003, the Canadian Society of Muslims, based out of Toronto, announced their intention to create the Islamic Institute of Civil Justice where Muslim arbitrators would have the ability to make legally binding decisions, in most cases, related to family law issues.[11] What ensued was a heated debate about what freedom of religion really means and how and where it intersects with other fundamental rights (as guaranteed by the *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982).[12] Concerns about the enforcement of decisions made in accordance with Shar'ia teachings in Ontario Courts prompted serious discussion from all sides. Apprehensions regarding power imbalances between men and women under Shar'ia law were particularly prevalent. Ontarians became deeply divided on the issue and the consequence was a major change to the *Arbitration Act*, 1991[13], which ultimately resulted in the removal of legal enforceability for any family arbitration conducted in accordance with religious laws. This change meant that other religious tribunals, such as the Rabbinical Courts, could no longer have their decisions upheld in a Court of law in Ontario, even though they had been doing so for many years.

The Attorney General of Ontario, the Honourable Michael Bryant, discussed the issue in his address to attendees at this year's Raoul Wallenberg International Human Rights Symposium[14] and stated that, in this particular situation, freedom of religion came second in priority to the protection of other fundamental rights, such as gender equality. This is a perfect illustration of the tension that Drinan discusses; surely Muslims have an equal right to arbitrate disputes according to their religious values and have those decisions enforced in Court in the same way that Jews and Mennonites have been doing for years, but at what cost to the other rights and freedoms that we have fought so hard to protect. The changes to the *Arbitration Act* demonstrate that the Government of Ontario is not prepared to uphold the right to religious freedom where there are concerns that it might infringe on other fundamental human rights. This is a clear example of the parameters being drawn by secular states regarding religious freedom.

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[11] *See Shari'a Law :FAQs, CBC News Indepth*, 26 May 2005, available at http://www.cbc.ca/news background/slam shariah-law.html, accessed on 19 March 2007.

[12] *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, Part I, available at: http://laws.justice. gc.ca/en/Charter/index.html, accessed on 19 March 2007.

[13] *Arbitration Act*, 1991, S.O. 1991, c.17, available at http://www.e-laws.gov.on.ca/DBLaws /Statutes/ English/91a17_e.htm, accessed on 19 March 2007.

[14] The Raoul Wallenberg International Human Rights Symposium is an annual forum on developments and current issues in international human rights. *See Symposium Examined the Balance between Liberty and Security*, 22 January 2007, available at http://www.yorku.ca/ylife/2007/01-Jan/01-22/wallenberg-012207.htm, accessed on 19 March 2007.

At the heart of the matter, and the thread that weaves throughout the book connecting each chapter, is the question of whether or not 'God and Caesar' can coexist peacefully. Drinan references "A Draft Model Law on Freedom of Religion with Commentary"[15] by scholars Dinah Shelton and Alexander Kiss, presented at an international conference on "Religious Human Rights in the World Today: Legal and Religious Perspectives" convened by the Law and Religion Program, Emory University, 6-9 October 1994 in Atlanta, Georgia, as an example of how the relationship between religion and the state could be managed. This draft law includes articles pertaining to the separation of church and state, the right to change one's religion and a prohibition on the state bestowing privileges or exercising political authority over any religious organization, among other things. According to Drinan, although a strong effort to advance the cause and produce a set of norms that could be turned into customary international law, this draft law also has many weaknesses. In particular, Drinan is critical of the breadth and depth of the demands that the draft law would impose on all nations, wondering if it would ever stand a chance at being adopted by any significant number of states. This is a testament to the sheer magnitude and complexity of the issue, again demonstrating that there is no simple solution.

In many ways, Drinan appears to be the eternal optimist. Although he regularly acknowledges the complexity of the issue, on many occasions he seems to over-simplify the tension between protecting basic human rights and the right to freedom of religion and conscience simultaneously. In his last chapter, Drinan notes, "Many of the efforts of the human rights revolution are directed toward harmonizing the legislative needs of the state with the demands of sincere people of faith whose views collide with the government's demands. It is probably correct to note that these differences are inevitable, severe and possibly irresolvable…. If international law does not make a sustained effort to resolve these clashes, they will only grow worse."[16] It is unclear how it is that the answer lies solely within the control of international law. One might consider that relying on international law to solve what is ultimately a conflict between the government and the people of a particular state is at the very least problematic given the issues of enforceability and legitimacy. It is true that in particular with respect to human rights, the standard must be set in the international arena in order to apply pressure to those states where the human condition is less than adequate. However, it is not clear that such an international campaign will be effective where the issue is so culturally sensitive. State sovereignty over domestic decision making remains a value deeply

[15] DRINAN, 216.

[16] DRINAN, 214.

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entrenched in the international legal framework, further enhancing the delicate nature of any international effort to enforce a right to freedom of conscience and religion in a domestic context.

Criticisms aside, Drinan makes a strong case for the need for a more formal international legal instrument to protect and promote freedom of religion. Universal recognition of the most basic rights associated with freedom of religion and conscience may be a lofty goal, but it is nonetheless appealing to think that each individual might someday be able to practice their faith without fear of persecution or state interference. What is certain is that this debate is far from over and is undoubtedly an issue that will be at the forefront of international legal discussions for many years to come.