

FREEDOM OF RELIGION AND RELIGIOUS HERITAGE¹

William Sweet

St. Francis Xavier University, Canada

Abstract

What is freedom of religion? What is its relation to other values in society? How do we respect religious heritage in democracies - particularly in multi-cultural democracies that contain many potentially conflicting - values? How far can one express one's religious heritage? In what follows, I want to discuss these issues with a view to determining whether some kind of secularism is the best public policy to pursue in order to respect and promote freedom of religion and one's religious heritage, particularly in contemporary liberal democracies.

Introduction

One of the most basic rights in national constitutions and in international declarations and related documents is freedom of religion. It is a cornerstone of liberal democracies, and it is formally recognised by all the states that are members of the United Nations. Freedom of religion is a freedom of individuals, but it is also recognised as a freedom of collectivities in the sense that not only individuals but communities have a right to the respect of their religious heritage and traditions. Religious freedom was one of the motives for emigration to the 'new world', and calls for it today are part of the democratic reforms taking place in much of the 'old world'.

Yet freedom of religion has been at the centre of much recent debate; in India, it comes up in discussions concerning restrictions on

'conversion'²; in Iran, such freedom has been said not to include what some call 'apostasy'; and in the United States, it has been involved in a number of legal cases, such as having Christmas trees or depictions of the Ten Commandments on public property, or having prayer in publicly-funded schools. This freedom has also been accused of being incompatible with other values - with the value of human equality (for those religions where this is allegedly not emphasized or respected), with the value of public security, with the value of government neutrality, and so on.

What is freedom of religion? What is its relation to other values in society? How do we respect religious heritage in democracies - particularly in multi-cultural democracies - that contain many potentially conflicting values? How far can one express one's religious heritage?

In what follows, I want to discuss these issues with a view to determining whether some kind of secularism is the best public policy to pursue in order to respect and promote freedom of religion and one's religious heritage, particularly in contemporary liberal democracies.

Cases

Cases where we find a tension or apparent conflict between religious heritage or religious freedom and other values are all too common.

One case familiar to many is that of the wearing of the Islamic hijab or headscarf in western Europe. For example, in France, a law banning Islamic headscarves in public schools was adopted on March 3, 2004. On that date, the French Senate voted 276 to 20 in favor of the law, following a similar vote by the National Assembly on February 10 (where it won with a vote of 494 to 36). In Germany, the Bundesgerichtshof - Germany's highest court - decided in September 2003 that there could be restrictions on the wearing of religious dress for those employed in public service occupations in the *Länder* (states), as long as there were no state laws against it³ - and on December 9, 2003, the government of Bavaria unveiled a draft law restricting such attire. In Belgium, in December 2003, two senators proposed a law prohibiting the wearing of the hijab and other overt religious symbols in state schools. And, on June 29, 2004, the European Court of Human Rights allowed that "Banning Muslim

headscarves in state schools does not violate the freedom of religion and is a valid way to counter Islamic fundamentalism⁴."

The arguments against such bans often appeal to the value of one's religious heritage and to freedom of religion. Some say that not only does wearing the hijab help to preserve a woman's modesty, but the right to wear the hijab is "part of one's identity" as a Muslim and even a religious duty. And they would say that any society that respects individual freedom should not restrict the expression of a person's beliefs and particularly of one's identity.

Nevertheless, those who defend such bans claim that limiting the wearing of the hijab - and thereby restricting the expression of one's religious heritage - are consistent with fundamental democratic values, such as equality and security. For example, it is claimed that very few women wear the head scarf voluntarily; that not allowing girls to wear it to school in fact respects the wishes of the majority of parents who are afraid to openly resist the fundamentalist elements in their communities, and that forbidding it serves to protect pupils against fundamentalist influences. Others have argued that banning the hijab reflects basic social values such as the principle of state neutrality (or secularism); thus, in Belgium, the proposed law states that "[t]he government should remain neutral...in all circumstances and be represented as such...that means no distinctive religious symbols or veils for police officers, judges, clerks or teachers at public schools."⁵ In short, while a person has the right to wear a hijab or headscarf in public, it does not mean that she has the right to do so as a public employee, or that her freedom to express her religious heritage is limited if, in applying for, or obtaining a teaching position, she is prohibited from wearing attire that identifies oneself as a member of a religious group.

A second kind of case of conflict that may be familiar to some is that between parental rights to preserve the family's religious heritage and children's rights - particularly concerning the mental and physical health and education of children. In a recent case in Toronto, Ontario, Canada, the one-month old daughter of Jehovah's Witness parents required a blood transfusion to treat the girl's potentially life-threatening congestive heart failure.⁶ The parents claimed the transfusion was unnecessary, but principally objected that, because of their religious beliefs against blood transfusions, the medical personnel should not carry out the procedure. On the other

side, the Ontario Children's Aid Society argued that they had an obligation to a "child in need of protection" under the Ontario Child Welfare Act - and courts in Canada subsequently held that "freedom of religion, guaranteed under s. 2(a) of the Charter [i.e., the Canadian Charter of Rights and Freedoms], does not include the imposition of religious practices which threaten the safety, health or life of the child." The courts determined that, "although the freedom of belief is broad, the freedom to act upon those beliefs is narrower, because it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others."⁷ A similar example is that of a 1972 United States Supreme Court case. The defendants, who were members of the Amish faith, refused to send their children, aged 14 and 15, to public school after the children had completed the eighth grade. They claimed that the US Constitution's guarantee of freedom of religion "protects a community's right to live in accordance with its tradition and beliefs, even if this limits the individual freedom of children."⁸ On the other hand, the state argued that the freedom of religion does not extend so far as to deprive children of basic goods, such as education.⁹

Another kind of case focuses on freedoms of speech and of expression of one's religious beliefs, and the prohibition of comments that are deemed to be hurtful to members of certain identifiable groups. A recent example in Canada concerned a small advertisement in a local newspaper, the *Saskatoon Star Phoenix*. On June 30, 1997, Mr Hugh Owens, an evangelical Protestant, placed an advertisement in that newspaper that "consisted of a pictograph of two men holding hands superimposed with a circle and slash - the symbol of something forbidden - and a list of Bible verses condemning the practice of homosexuality."¹⁰ Three gay men filed a complaint with the Saskatchewan Human Rights Board, claiming that, as a result of the ad, they "were exposed to hatred, ridicule and their dignity was affronted on the basis of their sexual orientation."¹¹

There are many other cases where one can see potential - or actual - tensions or conflicts between freedom of religion or professing one's religious heritage and other social values. Such conflicts may be even more dramatic in countries where there is an explicit policy of multiculturalism or of pluralism.

Democratic Values

Many of the countries in the world today express - or claim to express - 'democratic values.' What are these 'democratic values'? (Here, I am simply being descriptive; I am making no judgement about whether these values are essential to democracies, or whether all of these values ought to be present.)

Perhaps the first, and most fundamental of these values is "human rights." The history of human rights is a lengthy one, and need not be recounted here.¹² In general, however, these rights began to come to prominence in eighteenth-century Europe, largely as a way of restricting or limiting the arbitrary authority of monarchical regimes.

Today, such rights are enshrined in national constitutions and bills of rights (e.g., in Canada, Australia, France, India, and United States), and we see them as well in international documents such as the Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations in 1948. These rights serve as "a common standard of achievement for all peoples and all nations," and the UDHR refers to "the inherent dignity and of the equal and inalienable rights of all members of the human family" (Preamble). Among the rights enumerated in this Declaration are "life, liberty and the security of the person" (Art. 3), dignity and the free development of [human] personality (Art. 27), peaceful assembly and association (Art. 20), and fundamental equality and cultural rights (e.g., to participate in the building of culture). But also present is the right to freedom of religion (Art. 18).

In many countries, of course, there are other important - and fundamental - values in addition to human rights (though these values may be in, or be implied by, articles in the UDHR). These values include: the rule of law; individual autonomy (i.e., the pursuit of one's good in one's own way); social harmony and stability - and, more broadly, peace and security; values of character (such as loyalty, self-control, independence, and the like); the obligation to protect the weak (especially children) and those who are not able to claim their rights; the commitment to truth and to the pursuit of truth (so that one's activities and exercise of one's freedoms

are more than just acting on whim); the commitment to the community in which one lives, grows, works, and participates; one's national, religious, and ethnic heritage; and so on.

Yet we also find another important value - that of *diversity* or cultural, ethical, religious (and other) plurality. Many believe that not only is this diversity a good thing, but that it is related to each person's dignity and autonomy. And thus, in some nations, we find another value - a value that has become a key element of public policy. This is multiculturalism. What is 'multiculturalism'? "Multiculturalism or cultural pluralism is a policy, ideal, or reality that emphasizes the unique characteristics of different cultures in the world," that holds that "several different cultures (rather than one national culture) can co-exist peacefully and equitably in a single country," and "supports policies of maintaining ethnic identities, values and lifestyles within an overarching framework of common laws and shared institutions."¹³ (Emphases mine). The intent of such a policy is to ensure genuine pluralism - not a 'melting pot' (a term that is sometimes used to describe the mixing of cultures and the development of a 'new' culture in the United States).

Is multiculturalism implied by other democratic values? It is possible that a state may be democratic without being multicultural, though now it is less and less likely. Even though equality, autonomy, and the emphasis of diversity over unity may often seem to lead to a thin, legal and purely formal social unity, it is clear that multiculturalism is a value that has a broad recognition, and which has been officially adopted in a number of democratic states.

Religious Heritage and Freedom of Religion¹⁴

Appeals for the respect of religious heritage have often drawn on the right to freedom of religion. In his message of September 1, 1980, for example, Pope John Paul II wrote of "The Freedom of Conscience and of Religion," and on the celebration of the World Day of Peace (January 1) in 1991, he wrote "If You Want Peace, Respect the Conscience of Every Person." Freedom of religion is a freedom that is recognized (and, presumably,

guaranteed) in various Declarations, Charters and Bills of Rights, and it is often listed as among the most basic or fundamental of these human rights.

Thus, in the UDHR we read: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" (Art. 18). (And this is closely connected with the following article: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" [Article 19].) Similarly, in the first amendment to the Constitution of the United States we read: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*; or abridging the freedom of speech" (emphasis mine).

This freedom or right is found in a number of international documents and protocols which expand on the UDHR. For example, the *United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief* (General Assembly resolution 36/55 of 25 November 1981) sets out the minimum international standards for the elimination of such discrimination. Its description of freedom of religion is virtually identical to that found in the UDHR (Art. 18). But notice how far it extends!

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The importance of preserving one's religious heritage is an essential part of this freedom. For example, the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* (1992) provides that 'States shall protect the existence and the... religious... identity of minorities within their respective territories' (Art. 1). Further, it provides that minorities have the '*right to enjoy their own culture*, to profess and practise their own religion... freely and without any interference or any form of discrimination' (Art. 2, emphasis mine).

What does it mean to have such a right to freedom of religion, and to enjoy, profess, and practice it? How does this recognize the value of religious heritage? By such a freedom or right, here, those who have drafted and approved these documents do not mean to refer just to "tolerance" or to "freedom of opinion" - for religious freedom is a special kind of freedom that goes beyond freedom of opinion or belief or speech. It is not just a freedom to choose, but more like a freedom to commit oneself, and it presumes that one is seeking the truth - how to lead one's life - and not adopting a belief for some other purpose (e.g., to avoid military service). Thus, freedom of religion is not just freedom of opinion or belief; it is a freedom to act on one's beliefs in shaping one's life.

Freedom of religion - including engaging in and preserving one's religious heritage - is a basic right in these documents. It is, perhaps first and foremost, an individual right. It is usually taken to entail that each person has a right to choose his or her own religion and religious tradition, and to practice what one has chosen - but also to protect those who do not want to practice religion at all. Some would also say that it is a 'collective right' - a right of collectivities - which involves "the right of the members of any religion to maintain the beliefs, practices and symbols of their religion." Such individual and group rights are related. It would seem that the individual's right would be empty if there were not also a corresponding "right of the group as a collective entity"; there could not be an individual freedom of religion unless there were the sets of institutions and practices found in communities.

Given the focus on religious heritage and the respect for religious freedom in the context of other, basic, values, one must ask how far these rights extend.

At first glance, the value of religious heritage and the freedom to participate in it are very great, for both seem to be part and parcel of a basic principle to pursue one's own good in one's own way. Thus we see, in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981), that, "In accordance with article I of the present Declaration" the following freedoms are included:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Nor does this "freedom" ignore the rights of parents in determining and passing on religious heritage to their children: Article 5 of this *Declaration* reads:

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with

their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

Clearly, the extent of freedom of religion, described in these documents, is very broad; each person can pursue "whatever belief of his choice" and "manifest [it] in worship, observance, etc." As John Paul II writes, "It is essential that the right to express one's own religious convictions publicly and in all domains of civil life be ensured if human beings are to live together in peace."¹⁵

In short, then, freedom of religion and the supports necessary to maintaining one's religious heritage are guaranteed by international documents as well as by many of the charters and declarations of rights that we find in nation states.

Nevertheless, such a freedom is not absolute. In the constitutional documents, and in the recent debate, freedom of religion and the respect of one's religious heritage are to be allowed - but, many insist, only to the extent that they do not provide "undue hardship" on others in the community and/or can be given "reasonable accommodation." Thus, the freedom of religion and respect of religious heritage can be limited in a variety of ways; they are subject to like, and larger, values.

In the UDHR, freedoms seem to exist only within a context of duties. According to the UDHR, Article 29, "Everyone has duties to the community in which alone the free and full development of his personality is possible." (Art. 29, section 1). Moreover, such freedom and values must respect other values - the rights of others. They must not harm the physical or mental health of others (i.e., they are subject to the 'harm principle'), they must respect "public order", and they must respect "the just requirements of morality" - which includes 'the natural law.' Article 29 continues by stating that

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (Art. 29, section 2)

Similarly, in his *Message for the XXIV World Day of Peace* (1991) (section 3), John Paul II writes: "To claim that one has a right to act according to conscience, but without at the same time *acknowledging the duty to conform one's conscience to the truth and to the law* which God himself has written on our hearts, in the end means nothing more than imposing one's limited personal opinion" (emphasis mine).

We see such 'limits' stated in a number of international documents. In the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) Art. 5, section 5, we read: "Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration." In the Canadian Charter of Rights and Freedoms, section 1, we are reminded that such rights exist, but are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Indeed, in some national laws 'harmfulness to oneself' is a limitation (where there are restrictions on such religious practices as 'snake-handling'); offensiveness may be as well.

Nevertheless, despite the recognition of such limitations, it is generally acknowledged that religious freedom should be allowed, at least to the extent that it does not provide "undue hardship" and/or can be given "reasonable accommodation."

Sources of Tension between Religious Heritage and Other Values

The reasons why religious heritage (including freedom of religion) and other values are in tension in many democracies - and particularly democracies that are multiculturalist - are, perhaps, obvious. Nevertheless, it will be useful to signal just a few of them.

First, it is difficult to determine what counts as a 'religion' - and what the heritage is that a believer may wish to appeal to or draw on. The number of 'religions' is increasing exponentially - according to a recent news report, there are two new religions in the world each day¹⁶ - and the specific character of what counts as a religion is far from settled. So how can one non-arbitrarily determine when such a freedom may properly be claimed?

Second, we must take account of the special status of religion (in light of other values) - as well as the special status accorded to 'freedom of religion', in the way described above. For example, in the Canadian Charter of Rights and Freedom, section 2, where the most fundamental rights and freedoms are articulated, we see - first, "freedom of conscience and religion," and, second, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." But the order here is not necessarily a ranking, and it is difficult (if not impossible) to say, in advance, how much weight these freedoms actually have relative to one another and in relation to other values - particularly in light of the article in that Charter that states that all rights are "subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The specific weight of freedom of religion and of these other values is all the more unsettled and unstable - both from case to case and overall - because any assessment may reflect varying public opinion. Nor are laws and constitutions a firm guarantee of the weight of such values - particularly since democracies are subject to wide swings in public opinion.

Third, the above-mentioned limitations on freedom of religion are vague and potentially problematic. We have seen above that one of the 'limits' on this freedom is 'harm to others' (i.e., where the exercise of the religion threatens or harms public order, general welfare, or 'the just requirements of morality'). But what these rights or interests are vary from country to country, and religious groups themselves may understand harm rather differently (for example, when it concerns initiation rites into religious communities¹⁷). Other limits on religion may be 'harmfulness to oneself' or 'offensiveness,' or the "falsity" of the belief. (While the latter appears infrequently in legal documents in the west, it is clearly involved where apostasy is a violation of national law.¹⁸) But can such limits be justified?

Fourth, there are more and more calls by believers for respect of religious heritage and freedom of religion, and it is increasingly difficult to determine when and how to respond and, if there are conflicts, how to adjudicate among them. In multicultural environments, for example, not only is there a diversity in values, but there are significant differences concerning which values people rank highest and how they are understood. There is also no clear answer to how to respond to 'competing' values (such as the priority of the private over the public; the individualisation of society; the integration of different cultural groups within a larger community; the value of diversity; the value - and the possibility - of the integration of other values into those of the dominant cultures and traditions; and the value of the policy of tolerance and reasonable accommodation of diversity).

Related to this is the fact that the expectations of what equality rights involve - what one has an equal entitlement to - have increased; and that such expectations are not just to toleration, but to support. If so, and if law is to maintain equality among religious groups, how far must it guarantee support?

Yet another - a fifth - concern is that there are few, if any, overriding principles in a democratic, and particularly a multicultural, society - and less and less of a sense of a common culture or allegiance or common good. Indeed, one sometimes detects a fear of any appeal to an overriding common good or overarching principle, and a suspicion of anyone promoting such a good.

It may be true that respect for religious heritage and freedom of religion is unproblematic in itself, but that it brings with it other values - anti-liberal or anti-democratic values - that may disrupt (such as ethnic or tribal nationalism) or may even challenge the most dominant values of a society.¹⁹

Therefore, some critics question whether, how, and how far respect for religious heritage, and freedom of religion, does or should have a place in multi-cultural and multi-religious democracies.

Responses

What responses to these tensions are open to us? It seems that there are at least three.

First, there is simply staying with the status quo - to let courts and parliaments decide (drawing on philosophical discussions, perhaps, but standing independent of them). That is, we continue much as we have been in recent years. Yet this option is unsatisfactory.

To begin with, such an option is unstable. It seems fairly clear that governments - and democratic institutions in general - have failed so far in achieving a comfortable balance between respect for religious heritage and religious freedom, on the one hand, and respect for other values, on the other. (This is not to attack these institutions, but simply to remind ourselves of their vulnerability to various pressures.) Parliaments and even courts are susceptible to shifts in public opinion or changing ideologies, and sometimes judges 'make law' rather than simply interpret and apply it. (Here, we can see something of why A.R. Lord saw democracy as tending to intolerance.²⁰)

Moreover, if we simply continue the status quo, we will likely accept values and priorities that seem to weigh against any clear resolution of conflicts or diminution of tensions. Consider, for example, the priority of freedom over responsibility; the emphasis of private goods over the public good; the individualisation of society; and the refusal to address, in many cases, whether, how and to what extent, to integrate or coordinate the various systems of values that we find in modern communities. These will serve only to perpetuate the existing tensions and problems.

Finally, the status quo leaves unanswered the question of what are the legitimate limits on freedom of religion, and it leaves unanswered whether the limits that we have now (e.g., in law) are in fact legitimate. Staying with the status quo is, then, no option.

A second option that might be considered to address current conflicts and tensions, is a paternalistic or directive one - i.e., that the state provide an overriding principle or direction in how to solve conflicts between freedom of religion and other values. Such direction could involve the imposition of a broad common good - or even the institution of an established religion. But this solution would clearly not be acceptable to many in a democratic society - for they would argue that a hallmark of a liberal democratic society is the right to pursue one's own conception of

the good in one's own way (providing it does not harm others), which precludes having or imposing any overriding conception of the good. And even if one could find a dominant conception of the good that people happen to agree on, it is far from clear that it would be one that could last over time.

One might revise this view slightly by proposing that the state could argue for or promote a (larger) common good, but not impose it - as it does, on a much smaller scale, in promoting healthy lifestyles - though this, too, I suggest is impracticable and at best something that can be successful only over a long term. Alternately, one might propose that, while there cannot be - for reasons of practicality - a broad-based common good, states might nevertheless consider imposing limits, beyond those described above, on religious practices and religious expression, to ensure that appeals to religious freedom are authentic and made sincerely. States might insist that, if there is to be freedom of religion, then those making appeals to it must accept corresponding religious (or non-religious) responsibilities. These statements of corresponding responsibilities might come from within the faith traditions themselves, or the state might attempt to define responsibilities to one's (religious and ethnic) heritage or to one's presently existing religious community. (Thus, those who wish the benefit of religious exemptions from certain obligations, such as military service, must clearly be practicing members 'in good standing' of their faith.) But the perennial, practical challenge here is, who is competent - and who can be trusted - to decide fairly what such limits or responsibilities are?

Attempting to introduce overriding principles or values to help to resolve these competing and conflicting values, then, does not seem to be a promising option either.

Now, a third option that has been proposed is secularism - i.e., an explicit state policy of neutrality with regard to religion. It is an option more or less endorsed by most democratic states, and, interestingly, it is an option that is embraced by some religious groups. I wish to briefly consider some of the ways in which we might understand this view, to see whether it might contain at least the seeds of a viable solution to conflicts between freedom of religion (including respect for religious heritage) and (other) democratic values.

Secularism

Secularism is a vague term, and states which have endorsed a policy of secularism vary widely in how they understand and apply the policy.

One standard definition of "secularism" is that it is "indifference to or rejection or exclusion of religion and religious considerations"²¹; the term is derived from "secular", which means "concerned with affairs of this world, worldly, not sacred, not monastic, not ecclesiastical, temporal, profane, lay, skeptical of religious truth or opposed to religious education, etc."²² The attitude towards religion here is, we should note, ambiguous; secularism is not necessarily opposed to religion. In fact, as noted above, a public policy of secularism has sometimes been embraced by religious believers. How is it, then, that certain religious groups challenge secularism? One explanation for this is that there are different kinds of secularism.

There is, to begin with, a 'negative' secularism (such as that which one not only seems to find in the United States, but found in many communist countries in the 20th century), which may be close to John Rawls' position on religious tolerance as described in *Political Liberalism*. This kind of secularism envisages that, in the state, there is a freedom *from* religion - that is, religion is properly in the private, not the public sphere (because it allegedly is - as Richard Rorty puts it - a "conversation stopper").²³

To be fair, this freedom from religion can admit of degrees. A 'weak' version - such as that of Rawls, for example - would seem to allow that one can publicly argue for values that may happen to be present in religion (e.g., as based, for example, on natural law), but not as religious values. A 'stronger' version - perhaps as was found under communism - holds that any action on or out of religious conviction must be justified - that it must be on balance, a social good, or at least not harmful. But in no way is religion to be introduced into public discourse.

An advantage to either version of 'negative' secularism is that, as far as it is a freedom from religion, it provides a barrier to 'bogus' religious claims to social benefits - though of course it is a barrier to all religious claims. But it is likely to be ineffective (for it is not clear that those having religious beliefs could 'privatise' their values; it would simply drive religious beliefs underground), and it puts the state in the position of imposing values,

i.e., preferring one group of freedoms over another (traditionally basic) freedom.

A second kind of secularism is 'mitigated' secularism. This seems to be the one that we find in some Asian countries. Freedom of religion and expression of one's religious heritage exist, but restrictions on that freedom are allowed, providing that they do not impose undue hardship on the adherents.

In such cases, in addition to the recognition of freedom of religion as a human right, states may also recognize the social value of the transmission of a religious heritage, or that providing opportunities for religious expression and worship is a service for at least some of its citizens. Thus, the state guarantees freedoms of religion and religious practice providing that i) they do not violate the rights of others; ii) they do not reasonably risk violating the rights of others; and iii) they do not risk harming the legitimate interests of others.

Because the state recognizes that providing opportunities for religious expression is a service, it can ensure reasonable accommodation of religion, and can even support religion (e.g., through allowing donations to religious groups to be tax deductible; through subsidizing some of the expenses of religious institutions and organizations; by providing land or space to construct a place of worship, and so on.)

Nevertheless, freedom of religion can still be compared with, and weighed against, other values (e.g., national or international security, values that deal with equality of women or of alternative lifestyles, etc.). Moreover, while the expression of religious belief does not deprive one of the right to some basic social goods (e.g., the equal administration of justice), it does not follow that all will have equal opportunities to enjoy all non-basic social goods (e.g., employment in certain occupations). (For example, if my holy day is Wednesday, my employer does not discriminate if he nevertheless expects me to work on that day.)

Both negative and mitigated secularism allow, justify, and - in the case of negative secularism - require the state limiting or restricting religious expression and related freedoms. But one may well be concerned about this. For, after all, what are the other rights or interests that the state pays heed to, in imposing limits on religious freedom? Are such rights (just) legal rights - i.e., the rights that happen to exist on the law books of a given

state? And what exactly is the moral weight of a (mere) legal right? Are such rights sufficient to limit what are generally recognized as fundamental rights? And even if we allow that there can be legitimate limits on freedom of religion, based on the legal rights of others, how far do such limits extend? Do such 'legal' rights justify the state in determining how adherents of a religious tradition can show their religious commitment, e.g., determining even the size of the religious symbols that may be worn? And can the state be an impartial or neutral party in determining the nature and limits of freedom of religion and the expression of religious heritage?

It is, of course, unavoidable that there be some limits on the freedom of religion, and that states (specifically, legislatures and the courts) will properly be called on to determine what these limits are. But this also effectively places the state in the position of being an arbiter of religious belief - i.e., of determining which beliefs are fundamental, and which may be expressed or practiced. For this reason, I would argue that the state should be involved in such a practice as rarely as possible. Mitigated secularism, like negative secularism, puts the state in the position of making 'religious' decisions - i.e., decisions about the value of religious heritage and of certain religious beliefs and practices (e.g., whether some aspects of religion are more central or important than others, or whether they need to be allowed to be expressed). But determining the content of belief is clearly beyond the jurisdiction of authorities of a democratic state.

If secularism is to be a solution to the conflicts and tensions that arise between the right to freedom of religion and other democratic values, we need another model of secularism. I would argue that there is another such model - what I will call 'positive secularism' - though I can provide only a sketch of this view here.

Positive secularism is a kind of secularism where the state intervenes as little as possible in how freedom of religion, including the expression of religious heritage, is respected in relation to other values, and it would reflect three primary considerations:

1. Legislatures and the courts should have as little as possible to do with religion.
2. The state - and public institutions in general - should (thereby) allow for a reasonable presence and accommodation of religion - e.g.,

that religious believers have access on a par with everyone else to public goods - but the state needn't (and shouldn't?) provide positive support. (In other words, since the state normally stands apart from religion, public institutions cannot restrict the presence of religion in the public sphere, but they have no positive obligation to ensure that religion be present.)

3. When there are conflicts between freedom of religion and other values, and when the courts must intervene, the burden of proof should be shared; where there is a proposal to limit freedom of religion, both sides should justify their views, but not just by constitutional appeals to 'freedom of religion' or 'equality rights', but also by referring to other, fundamental values. (In other words, appeals to freedom of religion, or the right to equal treatment or the right to non-discrimination would be, by themselves, insufficient.)

There can, then, be restrictions of freedom of religion, but such restrictions would be rare. I would add, however, that this does not mean that the restrictions on the exercise of the right to freedom of religion (including religious expression) would be primarily or solely those determined by the state. In fact, I would argue that religious groups should establish limits themselves - recognizing that there are other values and other groups with values in the state - and that, as far as possible, they should respect other values without obliging the state to intercede or interfere by having to determine the relative weight of religious freedom against other democratic and multiculturalist values. For, once the state is involved, there is the possibility - or probability - of interference in religious expression and practice.

What the specific mechanics of such a secularism will be will, obviously, vary from state to state - but the preceding considerations would constitute a minimum that must be respected. Such a secularism is compatible with religious, ethnic, and social diversity, though it does not require - and in fact may involve abstaining from - a policy of multiculturalism. This 'positive' secularism is also compatible with a genuine right to freedom of religion and the free expression of religion without allowing any religious group to claim a particular political right or privilege over minority religions or over those without any (particular) religious faith.

Conclusion

Freedom of religion is a basic human right, and the expression of one's religious freedom is part and parcel of it. Not only is this freedom a part of the liberty that is necessary for the development of human personhood, but it is recognized in national and international declarations and bills of rights, constitutions, and the like. Yet, in multicultural societies - and especially in democratic societies that adopt a policy of multiculturalism - the tensions and conflicts between the right to freedom of religion and other values are not negligible. And they show no signs of diminishing.

This situation arguably has led - or, at the very least, may lead - to the violation of rights. It may also constitute a real threat to social unity, and challenge even the thin, formal social unity that such societies have in part because of the emphasis on the equality of different cultural groups. Diversity and plurality of religion, ethnicity, culture, and the like, are facts of life in many of the nations of the world, and they reflect values that democratic societies rightly defend. But to respond to problems of tension or conflict by imposing rigid or excessive limits on freedom of religion or the expression of religious heritage or on other fundamental values risks running counter to the foundational principles of modern democratic states.

So, when we consider how we can best respect and preserve religious and cultural heritages, and how we can allow the broadest range of religious freedom - and limit abuses of it - secularism offers a fruitful option. Nevertheless, it must be a secularism that does not marginalize freedom of religion or religious expression - i.e., it must be what I have called 'positive secularism.' At the practical level, a society that adopts other forms of secularism - what I have called 'negative' and 'mitigated' secularism - will be the worse for it, for it divides not only societies but believers against themselves. Those with religious convictions will try to avoid being involved in these conflicts by withdrawing from the public sphere, leaving their views unheard and their talents underused. Moreover, at the theoretical level, 'negative' and 'mitigated' secularism run the risk of establishing themselves as arbiters of religious doctrine and of violating basic rights of its citizens.

A 'positive' secularism aims at avoiding these results. It is a secularism that is compatible with the value of diversity and of a multicultural

society - though we should note that, despite the way in which modern democratic societies have evolved, the recognition of this value of diversity does not logically require multiculturalism. Indeed, support for a multicultural society is consistent with working for the direct or indirect recognition of broad cultural values, a common good, or even natural law.

It is here that philosophers can make a particular contribution. They can serve to prepare the intellectual and social ground for a policy of positive secularism that includes freedom of religion and the expression of religious heritage, in the short term, but also to defend the necessity of broad cultural values - and even a common good - in the long term. This task will undoubtedly be an arduous one, particularly as it challenges some of the dominant ideas of our times. But not to take on such a task is to risk abandoning the recognition and respect of one of humanity's most fundamental rights.

ENDNOTES

¹ This paper was presented at the conference of the Asian Association of Catholic Philosophers on *Asian Heritage in a Global Society*, in co-operation with Assumption University, Bangkok, Thailand, 18-20 August 2004.

² See "Religious freedom - legal restrictions on conversions," *The Hindu*, July 8, 2003. <http://www.hinduonnet.com/thehindu/op/stories/2003070800080200.htm>.

³ "Scarf ruling in Germany can't cloak ongoing debate," Mark Landler, *New York Times*, Thursday, September 25, 2003, <http://www.iht.com/cgi-bin/generic.cgi?template=articleprint.tpl&ArticleId=111184>.

⁴ Gilbert Reilhac, "Euro rights court backs Muslim scarves ban," Reuters News Service, Tues. June 29, 2004, <http://www.reuters.co.uk/newsPackageArticle.jhtml?type=topNews&storyID=537910§ion=news>.

⁵ Deputy Prime Minister of Belgium, M. Patrick Dewael. See "Belgium too planning hijab ban," *AlJazeera.net*, Sat. 10 Jan. 2004, <http://english.aljazeera.net/NR/exeres/20AF07F7-6AFE-4D19-BB0F-AD116F02A2F4.htm>.

⁶ *B (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315; For the text of the judgement, see http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol1/html/1995scr1_0315.html.

⁷ See http://www.educ.sfu.ca/cels/past_art26.html "The Provincial Court temporarily removed parental authority and made the baby a ward of the Children's Aid Society for the duration of the medical treatment required." The District Court, the Court of Appeal and the Supreme Court of Canada later dismissed the parents' appeals.

⁸ people.brandeis.edu/~teuber/justicepaptop3.html. See *Wisconsin V. Yoder Et Al.*, No. 70-110 Supreme Court of the United States - 406 U.S. 205; 92 S. Ct. 1526; 32 L. Ed. 2d 15; 1972 U.S. LEXIS 144 - December 8, 1971, Argued - May 15, 1972, Decided. See <http://people.brandeis.edu/~teuber/yoder.html>

⁹ The Supreme Court upheld the Amish claim.

¹⁰ "Religious Persecution in Canada," John Pacheco, in *The Catholic Legate*, on line at <http://catholic-legate.com/articles/persecution.html>.

¹¹ "Homosexual Rights Trump Religious Rights Provincial Rights Court Rules - Bible Verses Regarding Homosexuality Ruled Unpublishable," *LSN.ca*, June 19, 2001. See <http://www.lsn.ca/ldn/2001/june/010619.html>. On June 15th, 2001, the Saskatchewan Human Rights Board of Inquiry fined Owens and the Saskatoon Star Phoenix \$1,500 for the offense. The decision was appealed to the Court of Queen's Bench. Justice J. Barclay upheld the ruling on 2002 December 11.

¹² A short account may be found in my "Theories of Rights and Political and Legal Instruments," in *Philosophical Theory and the United Nations Declaration of Human Rights*, (ed. William Sweet), Ottawa: University of Ottawa Press, 2003, pp. 1-14.

¹³ See Canadian Multiculturalism Act (R.S., 1985, c. 24 (4th Supp.) [C-18.7] An Act for the preservation and enhancement of multiculturalism in Canada [1988, c. 31, assented to 21st July, 1988].

¹⁴ In my remarks here I am focusing on the rights already explicitly defined in charters, declarations, protocols, and that like. Justification of this right has been discussed by John Rawls, Will Kymlicka, Charles Taylor, and Jürgen Habermas. See the recent debate on multiculturalism among John Rawls, Will Kymlicka, Charles Taylor, and Jürgen Habermas. See, for example, John Rawls's *Political Liberalism* (New York: Columbia University Press, 1993), 190-200, on political neutrality, and Will Kymlicka's criticism in *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), chapter 8 (on toleration). See, as well, Charles Taylor "The Politics of Recognition," in Amy Gutmann, ed. *Multiculturalism* [with commentary by K. Anthony Appiah, Jürgen Habermas, Steven C. Rockefeller, Michael Walzer, and Susan Wolf (Princeton: Princeton University Press, 1994)], and Jürgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy*, Vol. 92, No. 3. (1995): 109-131, and Habermas's "Struggles for Recognition in the Democratic Constitutional State," in Gutmann, *Multiculturalism*, 107-148.

¹⁵ *Message for the XXIV World Day of Peace* (1991), section 1; cf. his message of 1988.

¹⁶ "Bad moon on the rise," National Post, Tuesday, July 20, 2004 "Nearly 10,000 religions have been identified worldwide. Sociologists estimate new ones spring up at the rate of two per day. The majority of governments in Canada - federal and provincial - list upwards of 60 as protected creeds, from Christianity, Judaism and Islam, through Buddhism, native spiritualism, Sikhism and Unitarian-Universalism. Even Neo-Paganism and Wicca are protected in most provinces. Ontario goes so far as to safeguard "non-deistic bodies of faith" provided the "beliefs and practices" they maintain "are sincerely held and/or observed." <http://www.canada.com/national/nationalpost/news/comment/story.html?id=b990cbe4-0284-4fbc-a062-7621b49a7961>.

¹⁷ "Section 31(2) [of the Constitution and the Bill of Rights] ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices, which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. [A purpose of this qualification] is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally *offensive* group practices and thereby immunise them from external legislative regulation or judicial control..." This was the decision of the court in "Christian Education SA v Minister of Education 2000 (10) BCLR 1051 (CC)13 at para 24 & 26." See South African Human Rights Commission Report Into Initiation Practices At Educational Institutions And A Preliminary Report On Cultural Initiations, October 2001 - http://www.sahrc.org.za/final_initiations_report.PDF.

¹⁸ Anh Nga Longva (University of Bergen), "The apostasy law in the age of universal human rights and citizenship: Some legal and political implications," The fourth Nordic conference on Middle Eastern Studies: The Middle East in globalizing world, Oslo, 13-16 August 1998. See <http://www.hf.uib.no/smi/pao/longva.html> and the author's account of the case of Hussein Ali Qambar, a shi'a

Kuwaiti businessman.

¹⁹ See Mary Searle-Chatterjee, "'World Religions' and 'Ethnic Groups': Do These Paradigms Lend Themselves to the Cause of Hindu Nationalism": *Ethnic and Racial Studies*, Vol. 23, no. 3 (2000). See Peter Beyer, "Defining Religion in Cross-National Perspective: Identity and Difference in Official Conceptions," in A.L. Greil and D. Bromley, eds., *Defining Religion: Investigating the Boundaries between Sacred and Secular*. Religion and the Social Order, Vol. 10. London: Elsevier Scientific, 2003. Pp. 163-188.

²⁰ See A.R. Lord, "The Problem of Modern Democracy", in William Sweet and Errol E. Harris, eds. *Philosophical Lectures and Remains of Arthur Ritchie Lord*, 3 vols., Vol. 1, (Lewiston, NY: Mellen Press, 2005). See also William Sweet, "A.R. Lord and Later British Idealist Political Philosophy," *British Journal of Politics & International Relations*, Vol. 7, No. 1 (2005): 48-66.

²¹ *Merriam-Webster Dictionary*.

²² *The Concise Oxford Dictionary of Current English*.

²³ Richard Rorty, "Religion as Conversation-Stopper," *Common Knowledge*, 3 (1994): 1-6.