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An Interdisciplinary Roundtable Discussion held in Vouliagmeni, Greece October 1999

Organized by the

HARVARD LAW SCHOOL

HUMAN RIGHTS PROGRAM

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The Harvard Law School Human Rights Program, founded in 1984, fosters coursework; the participation of students in human rights activities through scholarly research and writing as well as practical engagement; and assistance to the worldwide human rights community. The Program forges cooperative links with human rights scholars, activists and organizations worldwide through its student summer internships, visiting fellows (scholars and activists), speakers, applied research and extensive clinical work. HRP also plans and directs roundtables and conferences on human rights issues and publishes the resulting reports and analyses. These publications, together with a description of HRP's many activities, its newsletter and other related documents, are available at the HRP website (indicated below) or upon request.

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Preface

In developing this project, the Harvard Law School Human Rights Program sought to bring together for a discussion a small number of people who had given sustained thought from different perspectives to issues of relationships between religion and state. The eighteen participants noted in the Annex come from nine countries with widely varying experiences and structures in this field of inquiry.

The format and process for this meeting in Vouliagmeni, Greece in October 1999 followed the pattern of prior meetings arranged by the Human Rights Program. Edited readings on this subject were prepared by the Program and distributed to all participants. No formal papers were presented. The participants engaged in an interdisciplinary roundtable discussion about the issues that were outlined in advance of the meeting. Peter Rosenblum, then associate director of the Program, did most of the work in editing the transcript. The published text considerably shortens the original transcript and occasionally revises the order of remarks, in order to present a readable and cogent exchange of ideas. Each participant had the opportunity to review and correct a draft of this publication, to be certain that its text accurately reflects the views expressed during the discussions.

The Program and the Israel Democracy Institute provided the funds for the meeting, and the Program covered the costs of this publication.

Henry Steiner
Director, Harvard Law School
Human Rights Program

Introduction

Two interrelated themes inform the discussion at this roundtable. Each has its great complexity. (1) Religion has been a source and inspiration for basic human rights ideas and ideals. But religion, or perhaps more accurately its faithful or a leader acting in its name, has also shown great cruelty and done great violence over time and cultures to those ideals and to believers as well as non-believers. Is then the relationship between religion and human rights entirely dependent on context, contingent on given circumstances—so that we can better speak of a myriad of historical and possible relationships?

(2) The many types of relationships between religion and state that historical and comparative analysis reveals have an evident bearing on the meaning, significance and power of religious institutions and thought, and hence on relationships between religion and human rights. Those relationships range from one or another type of institutionalization in the state of religious belief or practice, to a state's benign neglect of organized religions in civil society or overt hostility to all religious thought and practice. In the American legal-constitutional idiom, they raise questions both of establishment of religion and freedom of religion. They pose issues of both freedom of religion and freedom from religion. They surely suggest the difficulty of defining where state conduct ends and "nonstate" conduct of authorities or mass adherents of a dominant religious tradition and institution begins.

The discussion below about these interrelated themes is a broad one, dealing mostly with the contemporary period but embracing different religious traditions and different types of states from the liberal to the authoritarian and theocratic. The discussants themselves come from or have had experience with such different traditions and states.

These questions are spread among the five sessions of this roundtable. The opening session explores comparatively the different meanings of establishment and their bearing on both freedoms of and from religion. For example, does any form of establishment necessarily impair to some degree freedom of religion for members of non-established communities of faith? Session 2 examines some

special problems posed by fundamentalism, problems illustrated by the experiences of several countries. The third session looks particularly at relationships between norms about religion expressed in the reigning international human rights instruments and notions of liberalism. To what degree do we have a general consensus, and what are the characteristics of dissents from such a consensus, about basic notions like establishment or freedom of religion? Session 4 looks at a problem of growing significance in recent decades, proselytism. How can we understand the debate about its consistency with or violation of international human rights, and about the issues that it evokes about community preservation and group as opposed to individual rights? The roundtable concludes with a brief case study on religion and state in Israel and Palestine.

Session One:
Establishment of Religion, Religious Freedom and the State

Henry Steiner (chair)

I would like to suggest a framework for the discussion in this first session. There are at least three sets of variables that we will be working with. One is the link that we identify in any given state at any given time between the state and religious communities or formal religious institutions. Americans tend to think of that link under the rubric of "establishment," the term used in the First Amendment of the United States Constitution. The second is how different actors may organize a spectrum of relationships between the state and religion. For example, one possible way is to place unity and distance at the poles. But as scholars such as Cole Durham[1] have emphasized, maintaining a distance between the state and religion can constitute either neutrality or indeed repression of religion in general. Indeed, a person of faith who translates that faith into individual and communal practice may locate a state's repression of religious freedom at one end of the spectrum, but may entertain any of a number of views about which state attitude and policy to foster freedom of religion should constitute the other end.

The third variable, related to the first two, concerns the notion of equal protection or non-discrimination. Here the range of state conduct extends from neutrality—not favoring or disfavoring any particular faith but treating all equally, which may amount to benign neglect or may involve similar support for all—to differences in the rights, privileges or capacities of religions and their adherents.

We will likely consider variations among and within these three factors. For example, are some forms of discrimination or unequal protection consistent with religious freedom? Does establishment of a given religion produce discrimination that inevitably will impinge seriously on freedom of religion, or must the broad notion of establishment be refined and decomposed to yield different answers to this question depending on the type of establishment?

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[1] *See*, *e.g.*, Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 12 (Johan D. van der Vyver & John Witte, Jr. eds. 1996).

Finally, I would like to comment on the singular and conflicted role of religion in the international human rights movement. From one perspective, religious beliefs, values and practices can be understood to inform deeply and even to underlie that movement (by which term I refer to the governmental, intergovernmental and nongovernmental institutions and norms concerned with human rights that developed after World War II). From another perspective those beliefs and practices can be viewed as potent and dangerous challengers to basic human rights norms. At one and the same time, religion may nourish and challenge human rights. Much of the human rights corpus, which may indeed constitute a kind of secular religion, derives from or is consistent with deep beliefs in many religious traditions. At the same time, we know that historically, religious faith and practice have led to violent and cruel conduct and to the systematic repression of what today are viewed as basic rights.

The two lead-off speakers for this session, Gerhard Robbers and Moshe Halbertal, will address themes that roughly correspond to the variables that I outlined: the connections between "establishment" and freedom of religion.

Gerhard Robbers

The term "establishment" has many different meanings as applied to the relationship between religion and state around the world. Even translating the word into the languages with which I am familiar yields different nuances and shades.

As I understand the usage in the United States, the prohibition on "establishment" is very broad, applied by the U.S. Supreme Court to a wide range of relations between church and state. There is thought to be a close association between "establishment" and freedom of religion. In Europe, this asserted link is not necessarily present in legal and political thought. There are wide varieties of "established" churches. Without knowledge of the country or a feeling for history, the word doesn't tell us very much. The Church of England is the "established" church of the United Kingdom, as is the *Kirk* of Scotland, with many significant distinctions. In my view, the Catholic Church in France—a state that is emphatically secular—is far more "established" than the *Kirk* of Scotland. Then there is a country like

Norway, with an established Lutheran church, which funds each and every faith community according to the number of its adherents.

There will be gradations in the relationship between a church and the state. In Germany, we would not say there is an established church. Under the Constitution, for example, there is no state church. Nevertheless, the status of different churches varies under law. Some, like traditional western religions, are public corporations with a legally-defined relationship to the state that limits the state's intrusion. This is true of Catholicism, Lutheranism and the Reformed Church, but it is also true of the Orthodox churches, Mormons, Adventists, and even some atheist groups.

Is there a relationship between the degree of "establishment" and the degree of religious freedom, tolerance and non-discrimination? That depends on how we understand religious freedom. Is freedom of religion only a "negative" right—a hands-off approach to religion? Or should it be viewed more positively as the state's obligation to create an environment that enables religious existence to flourish. In the United States, there is more of a free-market philosophy that leaves each religion to its own devices. In practice, this might mean that more missionary, active or wealthy churches prevail against the more contemplative, quiet and inwardly-oriented churches. In Europe, I perceive more governmental attention to the specific social needs of religious groups to enable them to function on an equal plane.

We also need to explore the function of religion in forging the identity of a people within a state. It seems that people cannot live without believing in something. It is hard to view the evolution of state institutions separately from the religious movements in the population. We cannot, for example, understand the structure of the German state without understanding the historical role of the state in balancing the two major religious denominations. A devastating thirty-year war was fought to create this balance. More recently, many Germans believed in the National Socialist ideology. In the search for a new moral legitimacy after World War II, there was a turn towards religion and particularly towards Catholic religious teaching. A similar turn to the church has been going on in Eastern European states with the end of communism.

Finally, I would like to raise the question of democracy and religion. What conditions does democracy *need* to survive? In other words, how much separation of church and state is necessary? Is it a mark of democracy that the religious sympathies of the majority are introduced into the management of the society? Obviously many laws in many countries are dependent on religious ideas. Is that legitimate in light of human rights? How does it relate to the question of minority protection?

Moshe Halbertal

My introductory comments concern the similarities and differences between Western conceptions of establishment and those that emerge from Islam and Judaism. I will focus primarily on Jewish conceptions, though they are relevant in many ways to Islam as well. And I will speak more broadly about religion and "politics," rather than simply religion and the state.

In any discussion of religion and politics, we need to consider the nature of the religion or religions that must be accommodated. The American conception of religion is deeply supported by Protestant assumptions about religion, one of the principal features of which is voluntariness: for a religious act to have any meaning it must be done freely, out of conscious choice. So freedom itself—this great legal idea—is actually a condition for genuine religion. Tolerance follows. Another assumption of the American—perhaps also the larger Western—conception of religion is that the realm of intense religious experience is private. Religion is a matter of the spirit, of inwardness.

These two ideas, voluntariness and inwardness, help to shape a certain conception of separation and guide the debate over establishment of religion. The state guarantees a certain kind of freedom to enable genuine religious moments. Freedom does not contradict religion. Rather, it is separation of the private from the public, the creation and maintenance of a neutral public space—the very neutrality of the state vis-à-vis any form of religion or religious expression—that is a condition for the flourishing of this type of religious sensibility.

This is a very particular attitude and it permeates the relationship between religion and the state inAmerica. For Judaism and

Islam, I think both underlying assumptions are deeply questioned. As a result, we need a more complex model to understand the relationship of "establishment" to religion. Consider first the issue of voluntarism. In the United States, education is intended to produce a chooser who can make the voluntaristic act that renders religion meaningful. This is alien to both Islam and Judaism, which see education as the reproduction of a certain tradition, of a certain conscience. Your identity is prior to any choice. To say that a religiously-coerced act is empty of meaning may be a very straightforward Protestant statement, but it is complicated in the Jewish and Islamic traditions. These are very historically-oriented religions; they have very high stakes in politics. In the Jewish faith, for example, there is an eschatology of political salvation; redemption is not a matter of the individual overcoming sin so much, but a dramatic change in the very political structure. I don't think either Judaism or Islam permits privatization in a simple way.

Another aspect of this theme is that both religions are law-oriented religions. For them, a very important part of religion consists in setting norms and applying them to human activity; restructuring human behavior. As law-oriented religions, they seek to be manifested in the public sphere. Religious ideas and religious vision infuse political debate and affect the conduct of the community as a whole.

There is also the question of the demarcation between public and private spheres. It is not enough for the state to remain neutral vis-à-vis religious faiths that require their own public space. The issue raises complicated questions of community rights versus individual rights. Jerusalem provides excellent examples. It is at once the most international city in the world and the least cosmopolitan, separated into balkanized groups with little willful interaction. There is the problem of the Sabbath, which is not perceived by religious Jews to be a private matter. People want to have a public *Shabbat* experience, which they see as a fulfillment of their religious expression, rather than simply a right to observe *Shabbat* in the public space. There is the issue of sexuality, which leads to a clash between secular ideas of eroticism and religious conceptions of modesty.

Here we are addressing the issues of how different communities establish a public sphere of their own. Once we accept the concept, we are faced with questions of governmental regulation

and coercion, questions of exit. For example, what levels of force can the dominant communities use within those spheres against individuals who do not conform?

There are other conflicts with human rights—for example, on the issue of gender. Can a state subsidize synagogues where women play a secondary role? Does it matter that the women are there by choice? But, then, what constitutes genuine choice? Do they have to be exposed to other states' different solutions to state-religion relationships before genuine choice is possible?

These are all issues that arise out of traditions that do not maintain a distinction between the public and private sphere.

[Startingpoints: What is the state? What do we mean when we speak of religion?]

Mordechai Kremnitzer

Moshe Halbertal's comments challenge us to look at the issues from the perspective of religion rather than the state. Most of us take the liberal state as a given, and we look at the issue of religion from its political point of view. But Moshe's comments challenge us to start with religion; then the state becomes the question rather than the given. Religion has a say about the existence of the state, its identity and structure. We cannot do justice to the topic of religion and state if we always assume the existence of a liberal, democratic state.

Ruth Gavison

I would add a number of other factors, including the number of religions and the nature of the problems in the society itself. There are factors that depend on the very specific facts of a particular case. For example, is there a single dominant religion or a plurality of religions. Is the conflict principally religious or, in fact, a conflict over land resources or physical control of the land?

We can't prescribe solutions to the relationship between religion and the state without understanding the particular threat and the problem that society is struggling to solve. In the end, I think we will find that the universalist element in the solution is going to be very thin.

Alain Garay
We know what the state is, but do we have a clear idea of what we mean by a religion? What is Islam? It is entirely different depending, for example, on whether you are in the Sudan or France or Algeria. The Catholic Church is not the same in Latvia as it is in Rome.

Durgham Maraee
I think we can separate religion into two inter-related aspects. One concerns the morality, spirituality and even the laws that Moshe Halbertal referred to. The other is the social and communal side. Often religion is a symbol of national identity or ethnic identity. It is this aspect of religion that is often problematic, especially in this age of nationalism.

[meaning of an "established church;" relationship between "establishment" and religious freedom]

Cole Durham
I wonder if "establishment" is the right word to use in this discussion or whether it diverts attention from the real issues. At the international level, at least, the concept is largely absent. The treaties speak of freedom of religion or belief, and equality. The concept of "establishment" comes across as distinctively American. There are certainly analogs in other countries, for example the idea of secularism, which is upheld in countries ranging from France to Turkey. But conceptually, the analysis starts from a different perspective—that of the individual. There can be a whole range of religious institutions and institutional arrangements without encroaching on the individual's freedom of religion.

On the other hand, one of the profound questions is whether religious freedom—which has been a largely successful, if flawed, strategy for peace in the Protestant and Catholic cultures of Western Europe—works for Jewish and Islamic cultures. It strikes me that this is one of the major issues that should inform our discussion. Can religious liberty be translated or is there something integral to these religions that would render it impracticable?

Two questions are: (i) does establishment mislead or divert attention from where it should be; and (ii) to what extent can it be translated into other settings?

Durgham Maraee
I don't think the "establishment" model can be easily translated. In the European experience, religion is institutionalized—there is the church and there is the state; there is a necessity to organize the relationship between them. Can you transpose that discourse onto states where religion is decentralized, as in the example of *Sunni* Islam where there is no organized clergy? Consider the situation where a fundamentalist party wins elections in a Muslim country and legislates religious laws. Is that "establishment?" It isn't the religious institutions that control the state, but a democratically elected party relying on its conception of religion.

Nur Vergin
I am no expert in *Sunni* Islam. But as far as Turkey is concerned, I would say that it is certainly the established religion. Though the state is secular, it informs us five times a day—at prayer times—that Turks are Muslims. At the same time, it largely ignores the approximately twenty million Turks who are *Alevite*, rather than *Sunni* Muslims. Of course, there is no established church on the Christian model, since there is no clergy in *Sunni* Islam, but there is a Directorate of Religious Affairs, a state organization with an enormous budget that employs more than 100,000 people, all of whom are civil servants. The Directorate addresses the affairs of *Sunnis* without there being any equivalent for the *Alevites*. A similar situation prevails in the schools where religious instruction is compulsory, but only *Sunni Islam* is taught.

Henry Steiner
Can you speculate on what impact this has on freedom of religion for non-Muslims or non-*Sunni* Muslims?

Nur Vergin
The main problem—and the most vocal protest—concerns non-*Sunni* Muslims. The Jewish, Roman Catholic and Orthodox populations of

Turkey were granted religious freedom by the Lausanne Treaty of 1923 that founded the modern Republic. There is no discrimination against them in everyday life. Mixed marriages are increasingly common and create little stigma. Of course, some non-Muslims object to their exclusion from the public sphere—there are effectively no non-Muslims in the military or civil bureaucracy and few at the universities. But there is no complaint when it comes to freedom of worship.

The *Alevite* Muslims also have freedom of worship, but they want recognition. They complain loudly and publicly that the state favors *Sunnis* and ignores their identity. As a first and very modest step, for example, they want to be represented in the Directorate of Religious Affairs.

Bernard Sabella

There is certainly a clergy in Islam—not like the Vatican, not like the Greek Orthodox Church, but it exists. Who else runs the prayer? It is not simply left to the faithful.

Nur Vergin

The clergy you speak of is *de facto,* since there no formal clergy except in Shi'a. As a rule, any male Muslim can—and does, in fact—run the prayers.

Khalid Al Mubarak Mustafa

This discussion already points to one of the most important pitfalls that affect Western discussions of Islam: There are many interpretations of Islam, each with its own tradition depending on the country and place where it developed. Turkey is one example; another is Saudi Arabia, which has raised one version of Islam to the position of official religion. The state is officially allied with the *Hanbali* clerics, who follow an interpretation of Islam that is conservative, anti-minority and anti-women. They are unusually centralized and unusually cut off from other cultural influences. What they say in the mosques is agreed upon in advance. What they study is limited to texts in Arabic and the books provided by Sheik Ibn Baz until his recent death. Although promoted by the state, this is not the only Islam practiced by the people. Religious development over 1,400 years in different

regions has left its mark on Islam, including the mark of contact with Greek and Persian cultures—ancient civilizations that existed before Islam—and of course with Christianity and Judaism.

["establishment" and discrimination]

David Little
Cole Durham correctly notes that the term "establishment" does not appear in the international instruments. But it does appear in authoritative comments on the treaties. In 1993, the Human Rights Committee issued its General Comment No. 22 on Article 18 of the ICCPR (recognizing freedom of religion). The Comment said in part:

> The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.

I think this provides a good starting point. It may well be necessary to make adjustments in light of particular traditions, but the limits are fairly unequivocal and clear. You can pretty easily track whether the majority people are being given special privileges in government or education. In my work in places like Sri Lanka and Sudan, the conflict often comes down to that. The unfair exclusion of minority groups generated a good deal of hostility and antagonism. One thing led to another and eventually to civil war.

Henry Steiner
The particular salience of this quoted provision is that it doesn't prohibit "establishment"—a fact which is itself remarkable for an American looking freshly at international human rights instruments.

Nancy Bakir
In the Jordanian constitution, Islam is declared to be the religion of Jordan. Is that the case for other countries and constitutions? In Europe, for example?

Gerhard Robbers
Constitutions are very diverse on this question. Especially in Western Europe, some declare the "religion of the people" or something to that effect. For example, the Constitution of Denmark states that the people's religion is Lutheran, which certainly does not exclude members of other religions from equal participation. The same applies to Norway. In Finland, the Lutheran and Orthodox churches are state churches. In France, the constitution declares the country to be secular (*laic*). In Spain, Italy, Portugal, Germany, and most other countries, there is a special status—I would avoid the term privilege—accorded to the dominant religious communities.

Henry Steiner
Would the identification of the state with a particular religious denomination have a negative effect on religious freedom, or would that identification by itself be almost meaningless as an indicator until we flesh out the larger context? For example, can we make meaningful comments about the difference between France and Denmark based on the constitutional declaration?

Ruth Gavison
I don't think we can reduce the question of "establishment" to issues like freedom of religion or equality. Whatever we call it, the place of the state on the spectrum of involvement in support of religion and religious dogma is crucial to broad relationships in society. We cannot reduce it to the concrete issues noted.

I would add another right for consideration as well, and that is freedom from religion. What is important is not just the freedom of the believer to believe, but the freedom of those who don't believe to not believe—freedom from religious coercion.

Cole Durham
In my view, there is symbolic weight to the declared establishment of a religion, but it has no bearing on the smaller religions that are concerned with survival. They face basic questions of law like whether they can register, own property or have a place to worship. Then there are issues of gross discrimination. In tax matters, for example, which religions get tax-exempt status? In France, a small, unregistered religion gets hit with a sixty-percent tax. That is what is currently happening with the Jehovah's Witnesses.

In Europe, there is great religious diversity, but it is largely concentrated within a small minority of the population. I am told that within the ten percent of the European population that does not share in the major religions, there is more pluralism than in the United States. It suggests that we have to consider the distinction between large and small religions and not just established vs. non-established religions.

[establishment vs. political or social dominance]

Charalambos Papastathis
From the point of view of the society itself, there is an "established" religion in almost any region. In Bavaria, it is the Catholic Church. In Utah, it is the Mormons. Issues seem to arise when the law favors the established religion. Then we have the problem of discrimination.

Henry Steiner
There will always be a dominant group that will influence state policies and action. Perhaps Charalambos Papastathis' point supports Moshe Halbertal's argument for relating religion to "politics" rather than to the "state." In that way, we focus on the informal play of political forces that determine state policy—including the role of a dominant religious group—rather than on the formal institutions of the state.

Marc Tushnet
It is essential that we retain the distinction between society and the state. Cole Durham shook his head when Charalambos Papastathis said that the Mormon Church was the established religion of Utah,

but the society of Utah is Mormon. The society in the United States is Christian. That doesn't mean that the state is Christian or Mormon in those instances.

Khalid Al Mubarak Mustafa

When I came to the United States, I was stunned by the pervasiveness of religious sentiment and action. If the founding fathers wanted to keep religion at bay, they failed. Though the state maintains the letter of the law when it comes to separation, armies of religions leave their fingerprint on all aspects of the American polity—through the institutions of civil society, religious organizations, clubs and charities. Whenever I touch the button on the television, I find someone preaching. I am curious how Americans respond to this.

David Little

Khalid Mustafa raises a good point. I think Moshe Halbertal, in his opening comments, went too far in his characterization of the Protestant tradition. Although there is some debate, I would agree that voluntariness is essential, but not inwardness. We, too, have our experience of religiously-inspired efforts to transform society. In fact, it wouldn't be right to say that all Americans agree that religion should be a private affair or are even happy with separation of church and state. There are deep cross-currents in the American experience on a lot of these very problems.

The tensions are present in both the progressive and fundamentalist trends in Protestantism. As I understand the Protestant tradition in the U.S., there is a strong sense of social activism, including the movement to abolish slavery. The tradition of Martin Luther King, Jr. goes back very far. Protestants understand their voluntarily-derived religion to impel them to systematic social involvement, indeed transformation. The problem is that this creates conflict - the belief that the state should not coerce religious belief on the one hand, and what you might call Protestant "transformationism" directed to the state and society, on the other.

There is also the religious right, which is very influential in the U.S. Congress these days. Representatives are elected with a very clear religious agenda. In 1998, the U.S. adopted the International

Religious Freedom Act,[2] but that's only the beginning. There is a long list of religiously-inspired laws that these representatives are very comfortable advocating—for example, restraints on homosexuality and abortion, or promotion of the family. These laws represent a vision of reorganizing society in legal and political terms that is resonant within the American tradition.

Henry Steiner

Religious beliefs and feelings may enter mainstream politics, just as other belief systems do—for example, secular humanism or nationalism. You can reach an opinion on whether abortion is good or bad out of religious conviction, or independently of it. Religious ideas permeate the body politic whether or not they are seen as emanating directly from, for example, Catholic or Jewish pressure groups.

David Little

But there is a difference if the ideas are articulated in explicitly religious terms. In connection with the International Religious Freedom Act, the Senate was explicitly discussing the role of the government in stopping the persecution of Christians. Consider other contemporary examples. The President invited Billy Graham to give the benediction at his inauguration; the benediction made explicit reference to the Trinity.

Cole Durham

In my experience, Europeans tend to view church-state separation through the historical experience of anti-clericalism. The U.S. experience has been radically different. After all, the establishment clause was intended to protect the established churches of the various colonies. We tend to forget that part of the history. The interpretation of the establishment clause has been reversed to mean that no state can have an established church. But, in fact, American society has never

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[2][ed.] A controversial law promoted by religious rights groups in the United States. The promoters singled out countries with Christian minorities and threatened economic sanctions. The law that was eventually adopted established an ambassadorial-level position and advisory committee to advise the President and Secretary of State on the promotion and protection of international religious freedom. International Religious Freedom Act, P.L. 105-292 Sec. 2; 112 Stat. 2788, adopted October 27, 1998.

been hostile to religion. Indeed, it has promoted a vibrant religious society. That often surprises outsiders, as it did Khalid Mustapha.

David Little
Even for Thomas Jefferson, who was deeply influenced by the French Enlightenment, the purpose of separation was to enliven and embolden religion.

Ruth Gavison
We tend to think of religion as a victim of the state, but as this discussion demonstrates, religion—as the ultimate source of normative authority and mobilization in a particular society—may undermine the democratic decision making of the state. Iran is one example. Israel may be another. The murder of Prime Minister Yitzhak Rabin was supported by people who claimed that he did not have the legitimacy to pursue the process that he had initiated. Most of the religious establishment did not endorse this view, but the claim was structured in religious terms and in these terms it defined actions that were impermissible for the elected government of Israel.

Henry Steiner
From what has been said so far, I would identify three different levels of church-state relations, in all of which religious values permeate the state. At the extreme, we can speak of a pervasive identification of state and religion, as in the case of Iran where the authority and powers of the religious Supreme Leader formally trump those of the elected president. At another level, religious belief may seriously threaten state authority; it offers a program and normative justification for it that competes with the state. An apt example would be the religious groups challenging the legitimacy of democratic leadership in Israel. At a third level, religious views associated with a broad religious tradition or family of related religions may permeate state structures through the workings of a political process that relies on other normative grounds for its legitimacy—for example, democracy. At that level, the United States might in some respects be viewed as a religion-related government.

Bernard Sabella

I would like to note another relationship that is essential to a context-sensitive understanding of religion and the state—the relationship and the strains between religious and non-religious sensibilities.

In the Middle East, we have the struggle between religious or traditional thinking and universalist, rationalist thinking. It is a debate that is taking place within the society and concerns the role that the state should play in terms of protecting my freedom—not only to practice religion but, for example, to view what I want on television, to access the internet, or even to receive pornographic material. Yes, there is a strong religious inclination in Muslim societies, and it determines to a large degree what governments end up doing. But, at the same time, there are other groups—in Iran, in Jordan, in Palestine, in Syria, in Turkey—that want to make choices that contravene not only the state, but also religion.

Alain Garay

In discussing the concept of established religion, I think we are confusing the legal perspective and the sociological perspective. Much of what we have been discussing concerns the sociological dimension and perhaps that is most significant. Legal recognition is just one small part.

Session Two:
The Special Problems Posed by Fundamentalism

Bernard Sabella (chair)

Whether perceived or real, the threat of fundamentalism raises complex challenges for human rights and the democratic state. It is a threat that many of us are currently experiencing in our states. How far must the state go in tolerating the intolerant? Is a democratic state required to accept the political participation of a movement that, if it were able, would change the nature of the state?

In some ways, this is an old problem that does not apply only to religious fundamentalism. Fascist parties have risen to power through elections, as have communist parties. In some cases, they have modified their tone and have been drawn towards democratic participation. In other cases, they have taken over the state and ended the democratic process that brought them to power. Does the element of religion change the nature of the conflict? Or is it simply another tool of taking power?

First, it is important to be clear about the phenomenon or phenomena that we are discussing. Is there such thing as "fundamentalism" or are there "fundamentalisms?" Jewish, Islamic and even Christian fundamentalists seem to have their commonalities; but isn't it necessary to look at each state and each movement separately to determine the correct response? Fundamentalists in many parts of the Islamic world were initially cultivated by the state or outside powers in order to counter local political movements. They bear a heavy responsibility for the outcome.

If we acknowledge that fundamentalism constitutes a threat, what is the appropriate response and, perhaps more importantly, when should it come? Must the state first seek inclusion, or accommodation as in Turkey, before using more belligerent means? How does the state justify the interference with religion, not to mention denials of freedom of speech and association that often serve as means to quash a fundamentalist challenge? Are there softer, more effective means? Does the state have the right to intrude into the religious sphere to eliminate the extremes, or to combat directly with a secular ideology of its own?

The themes of our discussion will be introduced by Cole Durham and Khalid Mustafa.

Cole Durham

I would like to explore three questions concerning primarily Muslim states, in which fundamentalist groups represent a significant political force. First, are we using the right language? The word "fundamentalism" descends from now dated descriptions of certain brands of Protestantism. Are we assuming inappropriate or culturally inapt analogies through our use of language? Is there a more satisfactory terminology that can be used to describe the distinctive issues at stake? Second, are there cultural limits on the extent to which religious freedom can function as an effective strategy for social peace? Finally, going more to the core of classical liberalism, to what extent must a liberal regime tolerate intolerance?

I have no answer to the first question, but I have the sense that we are missing something. From experts on Islam, I understand that the word "fundamentalism" does not capture the nature of movements like the *Muslim Brotherhood*. I hear Roy Mottahedeh using the term "rigorous," which we might want to explore further. In United Nations circles, one hears talk of religious extremists as though this were a neatly defined category apparent to everyone. In Europe, there is a disturbing tendency for governments to focus on "dangerous sects." The French have listed more than 170 such "sects." Such a list must be very troubling for those on it. The list constitutes destructive stereotyping of a religious group, discounts the rationality of its adherents, and ascribes to them often unspecified dangers. Pejorative vocabulary is often unfair and may indeed contribute to polarization and radicalization of the intended groups

Secondly, is religious freedom likely to be an option in regions facing the challenge of theocratic regimes or rigid enforcement of religious norms in the social and public sphere? Religious freedom may be an anathema. In the human rights debate over universal norms, one frequently stated position in the Arab world is that religious freedom reflects Western values, that it constitutes an arm of Western imperialism and runs counter to local religious norms. I may suffer from the stereotyped Western misunderstanding about Islam, but there does seem to be a divide between the perception

of religious freedom in Islamic states and in Western States. It is helpful to have the nuanced writings of Abdullahi An-Na'im[3] or Roy Mottahedeh, laying out the variations within Islam that leave more room for something that could look like a liberal state. But how far can one go? Religious freedom, as we know it in the West, grew out of efforts to solve an earlier "clash of civilizations"—the one between Catholicism and Protestantism. It grew as a strategy to solve religious warfare in Europe. While this has been largely successful in the west, it is not clear whether it works for other regions and religions, even Eastern Orthodoxy, not to mention Islam.

My third question concerns the extent to which a liberal regime must tolerate intolerance. John Locke had the great insight that religious difference could lead to greater political stability. It was clear to Locke that tolerance for religious diversity—rather than efforts to stamp it out—could generate loyalty and appreciation. (Political theory prior to Locke assumed that stability depended on a religiously homogenous state.) But it was also clear to Locke that there were limits on who should be tolerated. He said: tolerate everyone but the intolerant, by which he meant Catholics, Muslims, atheists—I think Jews didn't make his list. But, though he got the particulars wrong, I think the idea is fundamentally right: a group that is bound and determined—and has means—to destroy the liberal, tolerant society does not need to be tolerated.

Still, how do you determine the limits in practice? I am very wary of any legislation that specifically targets religious groups. If the issue is a threat to public order, I prefer to let the criminal justice system sort out the dangers. Criminal laws can be more general, and thus neutral, than targeting particular religions.

Having said this, I recognize that I am a relatively naïve Westerner when it comes to the events in the Middle East. We might consider the empirical questions about the dangers posed by some of the religious groups—whether, for example, they would respond positively to more tolerant treatment or would exploit the situation to promote their interests.

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[3] Professor of Law, Emory University, and noted author of works on Islam and human rights. *See*, *e.g.*, Abdullahi A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry,* 3 HARV. HUM. RTS. J. 13 (1990).

Khalid Al Mubarak Mustafa

I would like to situate fundamentalism in the context of Islamic theology and history. There is a misunderstanding about Islam and the state that is promoted by certain Muslim theologians and widely accepted in the West. It springs from the argument that, unlike Jesus and the prophets of the Old Testament, the prophet Mohammed actually took power and held it as ruler and prophet until his death. But the story is not so simple. During the lifetime of the prophet there were many occasions in which his followers challenged his decisions as ruler. His disciples would ask whether the ruling came from him or from God. If it came from him, they could offer alternatives that he might accept.

In practice, as well, there has been a separation between religion and the state. With historical variations, the ruler—king, sultan, whoever—ruled over the treasury, the army and the affairs of state, but the jurists and men of religion oversaw religious life.

Since the colonial period, in particular, there have been many Western or colonial inroads that have had an impact on Islamic societies—for example, the introduction of the *millet* system of personal law. It was introduced by the Turkish and fully appropriated by the British. In British Sudan, for example, there was a court for Muslims and one for Christians. (The state took care of the others.) In a question of family inheritance, a Muslim would go to the Sharia court, which would render a final judgment; a Christian would go to a Christian court. This was true for all private law; criminal law remained unitary.

This system was largely effective in meeting the needs of minorities—Copts and other Christians. I understand that in other Muslim countries the situation was similar; the *millet* system was a shock absorber for many problems. Minorities in these respects felt at home, although they were alienated in many other ways.

Fundamentalists have challenged the relegation of Islam to the private realm. (I use the word "fundamentalist" despite the controversy that Cole Durham referred to. I find the common alternative, "Islamists," even more problematic and personally disturbing. It accords extremists the badge of authenticity and denies it to moderate Muslims who are the standard bearers for Islam in many societies.) The Ayatollah Khomeni, who was an accomplished poet,

put the criticism very succinctly when he referred to the moderate clerics as clerics of "menstruation and maternity;" they spent their time determining what women should or should not do. His scathing and well-publicized attack was intended to dismiss any version of Islam but the most militant.

Other essential elements establish the context for the growth of extremist Islamic groups. Certainly, the modern defeats played a role—colonialism, the defeat of the Arab states in 1948, the establishment of Israel and the aftermath for the Palestinians. They raised questions that nationalists and communists could not adequately answer. Fundamentalism rose as an expression of national frustration. But at the same time, it is important to point out the extent to which fundamentalist movements were actively promoted in response to Soviet expansion and the communist support, especially after the Soviet occupation of Afghanistan. The Taliban, the Sudanese fundamentalists, Bin Laden and others were financed, organized, and advised by the West. Sadat said it openly: the only way to control the communists was to unleash the fundamentalists. He advised the leaders of Sudan to follow the same course. Khartoum was a major transit point for support. A bank was established there to finance the extremist religious movement. Eventually, the movement undermined the established middle class and commercial classes that had developed over the preceding century, and created the atmosphere for the coup that followed several years later.

Finally, I believe that compromising with fundamentalists is pointless. Some Westerners think it is necessary to give political space to the fundamentalists. If you absorb them into the political process, they argue, you will disarm them. They will be drawn into the compromise. This is a fallacy. In 1998, Muslim extremists in Sudan held a conference. The secret conference paper was leaked and we obtained a copy. It is clear that for them, power is an all-or-nothing proposition. Everything else is merely an interim measure. Meanwhile, however, they will use the appearance of compromise to convince Western journalists, political scientists and diplomats.

[appropriate terminology, appropriate state responses; whether inclusion leads to pragmatism]

Nur Vergin

On the topic of terminology, I agree with Khalid Mustapha's criticism of the use of the word "Islamists." Religious extremists in Turkey have objected to the use of the label, "fundamentalist"—objecting to its Christian connotations and arguing that there is no fundamentalism in Islam. We, the non-Islamists and "non-fundamentalists," have conferred on them the honor of calling them "Islamists." This has been a serious political mistake because it gives the false impression that they represent the true Islam and the majority of Muslims in Turkey.

As regards Khalid Mustafa's description of the rise of fundamentalism, he could have been describing Turkey. There, too, the threat of communism was countered by appeals to religion, and deliberate policies aimed at enhancing the role of religion in social life. Since the military *coup* in 1980, we have witnessed the revival of religious communities and the proliferation of Koranic schools. I can also attest to the link between fundamentalists in Sudan and Turkey; Hassan el-Tourabi came to Turkey several times as a guest of the Islamist party, which tried to present him as a moderate, liberal Islamic leader. He and the Islamist party were planning to create a common monetary system and treasury. During one of his visits, they even unveiled a coin that they called the *Islamic dinar* and which they hoped to introduce as a common currency to unite all *Sunni* Muslims.

Durgham Maraee

Active engagement of the state is necessary in order to counter the forces of fundamentalism. We seem to assume that neutrality is good and that more neutrality is better. Thus far in our discussions, we have even criticized neutrality that could be perceived as "anti-religious," because it fails to provide sufficient encouragement and space for autonomous religious communities. But the state may need to engage religion directly in order to transform it. Neutrality is inherently passive, allowing the dominant religion to continue even where, for example, it might undermine the modernizing project of the state.

Suppose a state legislates for protection of women's rights, but does nothing to transform the traditional version of Islam practiced and enforced in the private sphere. If the state is serious about fulfilling its obligations, it may be compelled to introduce or encourage a more liberal version of Islam. Where fundamentalist groups are operating in civil society, state neutrality might facilitate their consolidation and growth. Perhaps the appropriate response would be to control religious services, for example, in order to prevent fundamentalists from controlling them; there might be a need to control or provide religious education to prevent the fundamentalists from appropriating that vital medium of change.

Henry Steiner

I see the dilemma that Durgham Maraee is presenting. Cole Durham raised it in another way by asking whether a liberal state should tolerate an intolerant religion. But I am disturbed by Durgham's suggestions that the state intervene directly in religious ritual, dogma, or process so as to contain the threat. The alternative is for the state to initiate other programs that may be founded in a variant of the religion, or perhaps in secular, humanistic thought, but that doesn't interfere with the religious process. I'm not comfortable crossing that line.

Nur Vergin

I would like to pursue Henry Steiner's concern. Turkey's neo-colonial program of intervention would appear to fit Durgham Maraee's prescription admirably. The Turkish state is actively engaged in the modernization of society. Its leaders contend that it would be dangerous to let the multiplicity of fundamentalist organizations be free to intervene in the public sphere. I am not willing to go as far as the Turkish state. It hurts me, for example, to see hundreds of college students banned from the university because they wear Islamic scarves. But as a secular Turkish citizen, I feel threatened by the rise of fundamentalism. At times, it seems truly to be a case of their rights against mine.

Roy Mottahadeh

I think history has demonstrated that what Durgham Maraee is calling for—the benevolent intervention of a "nanny" government

to prevent fundamentalism from taking control—doesn't work. Iran is one example of a state that has adopted an "Islamist" government. Its constitution is profoundly self-contradictory. (It has elements of theocracy, but that is certainly not its dominant theme.) And, today, its leaders are taking responsibility for their own mess. It is true in other countries where fundamentalists have been included in parliament, in contrast to what Khalid Mustapha was suggesting.

The fact ofthe matter is that once allowed to take responsibility for their own government, Islamist groups have made pragmatic compromises. In Jordan, it is true of the *Muslim Brotherhood* and in Lebanon it was true of *Hezbollah*, once they became members of parliament. Over practical issues, such as whether to establish private radio stations, there were alliances between the *Phalangists* and *Hezbollah*. The counter example is Algeria. There we saw that intervention drives the majority into the extremist camp.

Of course there are going to be horrors committed. I am only too aware of my family's suffering in Iran after my great grandfather became a Baha'i. But I sense that the Iranian people recognize their responsibility for their mess.

Recent history teaches us that it is best to seek the democratic inclusion of fundamentalists, at least those elements that are not "for" the overthrow of the state.

Nancy Bakir

Where there is no democracy or democracy is very weak, as in Jordan, we have to be very cautious about the rise of religious parties. In Jordan, we gave an opportunity to the Islamic Brotherhood party. They were initially allowed into parliament, but the law was eventually changed when it looked as if they would gain more seats. It was a change that ran counter to the slogan of "one man, one vote." It is true that the Islamic Brotherhood, the very first party established in Jordan, was created with support from the outside in order to counter the influence of communism from the Soviet Union. But, though the government was involved in its creation, it wasn't able to maintain control.

Alain Garay

We are talking about religious fundamentalism, but Durgham Maraee's comments raise the specter of state fundamentalism as well. When the state seeks to control religious groups and discriminate among them in the name of the social contract, it is exhibiting another kind of fundamentalism, and one that can be equally dangerous.

Durgham Maraee

Whenever you allow the state to interfere in the private sector, there is a risk—especially in such a sensitive matter as religion. There are difficulties in drawing lines and possibilities of abuse. But that is not a reason to stay away. What I'm advocating is engagement; the state should engage religion. Now, what is the level and kind of engagement? That depends on the circumstances, the history, the context that many people have raised so far.

When I talk about state intervention in the religious sphere, I am making certain assumptions. My first assumption is that religion is a social construct, like any other. I'm not hostile to it; religion can be good or bad. I'm saying that we should engage religion, transform it and improve it. In this regard, I distinguish my position from *Kemalism* in Turkey.[4] As I understand it, *Kemalism* was anti religion. It failed, in part, because it tried to wipe out religion, rather than trying to work with it.

[state intervention against "intolerant groups:" political and human rights concerns]

Marc Tushnet

I have a comment regarding prohibition of intolerant groups and a suggestion about criteria that we might consider in each case.

From the point of view of U.S. constitutional law and, generally, of comparative constitutional law, the issue of toleration is not distinctive to religion. U.S. constitutional law is currently predicated on the view that the threat posed by religious—or

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[4] The state ideology of the Republic, named for its founder, Mustafa Kemal Ataturk.

political—opposition is regularly overestimated by political authorities. Constitutional law seeks to redress the balance.

I take it from our discussion, that many around the table are saying that the threat is not exaggerated in this case. Of course, in U.S. history, when people sought to regulate religious sects or political opposition, they also argued that the threat was not exaggerated, which makes it difficult to determine the proper balance.

Nevertheless, I propose three criteria to consider as we disaggregate the threat posed by so-called "fundamentalist" groups. First, we have to be clear about the specific normative claims about religion and the state that are being made. Pietistic fundamentalists are different from "totalizing"—I do not know if that is the right word—fundamentalists. Their claims have very different ramifications regarding the state. Second, there is the actual role and force of religion in the state and society concerned. Where fundamentalists exist on the fringes—where they make nationalist claims that they have little possibility of fulfilling—the appropriate state response might be very different. Finally, what value of the state is threatened? In the history of Western constitutionalism, the threat was to social order and peace. That is where Locke and toleration come in. Here we have been discussing threats to other normative goals—like equality or nation building. There are also the sentimental ties to the nation that I understood Roy Mottahadeh to be talking about.

Ruth Gavison

I would like to elaborate on the Israeli experience. It is misleading to think only in terms of rights and freedoms. It may be more fruitful to talk about the problems that are not solved. I believe that problems of religion and state start when basic needs of individuals or groups are not being met. We should look to the relative ability, position and power of different groups in different types of states—liberal, modern, secularized, capitalist states, semi-welfare states—to contest, address or ameliorate these problems. In my view, we are now seeing religions as a threat because rather than asking for tolerance—for freedom—they are competing for power. The new rise of religion draws strength from the fact that liberal democracies do not effectively address the concerns of their populations.

In Israel, for instance, one of the most fascinating political phenomena is the rise of *Shas,* a political party that sends ultra-religious—in that sense, "fundamentalist"—Jews to Parliament. They are anti-modern and anti-Western. Their voters come from the *Sephardic* or oriental community that was not subject to the secular, anti-clerical ways of the West. They are traditional, though not themselves truly orthodox. Among the *Sephardic* Jews, religious Jews might constitute 2% of the population. But the party now has 15% of the electorate and 17 members in Parliament. Clearly its supporters are responding to the issues of social justice, solidarity and "Jewishness"—issues where its supporters found the state inadequate. In general, *Sephardic* Jews have occupied a lower socio-economic stratum in our society. They are under-educated, excluded from the Zionist and secular elites and the center of politics. *Shas* is built on their grievances.

The group is perceived as a threat by the Western (and Westernized) elites. They have tried to stop them, to undermine them, but the party is a hit and continues to grow.

We cannot talk about this in terms of freedom of religion—though there is a religious element. It would be a displacement of the issues. The issue is the ability and will of the state to address the concerns of the people. We can't exclude them because it will simply exacerbate the problem. It was exclusion that triggered their rise in the first place.

It is similar to the issue faced by Israel when confronted with Meir Kahane, whose extreme anti-Arab rhetoric was channeled into a political party. Eventually, his party was banned, but only after he was elected to Parliament. The decision was very controversial among civil libertarians, but the ban insured that his party remained marginal.

Henry Steiner

I would like to make two points.

It is interesting how much similarity there is among the fundamentalist groups in the Middle East and in their appeal to the population. There is an analogy to the tactics of *Shas* to which Ruth Gavison referred in the activities of other fundamentalist parties, like the *Muslim Brotherhood* in Egypt or the NIF in Sudan. As I

understand it, they were the only parties willing to go into the slums, to address the acute problems of social disintegration, unemployment and misery. It took a while for the Egyptian government to wake up to the need to compete and provide an alternative to the social programs of the fundamentalists.

The human rights movement has encountered similar problems of how to react to groups that challenge basic principles of the social and moral system. Article 20 of the ICCPR *requires* countries to criminalize what we would call "hate speech." The case of Kahane, including the legislation ultimately adopted in Israel to ban a political party that is effectively based on racist policies, would not then amount to a violation of human rights. There are other related policies where basic human rights principles like free speech and association give way to concerns of public order and national security—to be sure very flexible concepts. It is important to note that the ambivalence about freedom of religion or association was and remains present in the basic human rights corpus itself.

David Little

As I understand Ruth Gavison's comments, I sense an inconsistency. On the one hand, Ruth agrees with Roy Mottahedeh that we should bring the "extremists" into the political process, and subject them to the pressures of political adjustment and compromise. On the other hand—in the case of Kahane, for example—you argue for exclusion, as if inclusion can only make matters worse. How do we distinguish? I would go with inclusion. I would second Roy's comments to Durgham Maraee about "nanny" governments. My understanding of the Egypt case, for example, is that government intervention only exacerbated the problem. I think we need to explore other examples to determine if the Kahane case is really an exception.

Moshe Halbertal

I agree with Ruth Gavison that the central issue is not an abstract one of rights and freedoms, but very concrete. We are facing challenges from religious forces who believe in what Nietzsche called "slave morality"—democracy is good only as long as those forces are in the minority. In other words, democracy is only a means of achieving power, not a form of government that represents a good in itself.

In this light, let me suggest a narrow definition of "fundamentalism" as a religious force that would use the state to enforce its program and beliefs. Let's leave out the issue of religious intensity or religious certainty. In Israel, we have quite a number of such groups participating in the democratic process. We can't trust them; we believe that if they were to achieve a majority, democracy would be finished.

I am not very optimistic about the prospects of cooperating with fundamentalist forces by bringing them into the process. The differences are too basic. This is a war of culture. With all my respect for Ovadia Yosef, the spiritual leader of the *Shas* movement, I am convinced that if *Shas* took power, I would not be allowed to teach at the university.

The problem with the liberal state is that it believes that it has to remain neutral in this war. If it does so, it will lose. It can't win from a perspective of neutrality or through the workings of a market economy. The state has to take sides if it wants to maintain democratic institutions. In Israel, the secular state doesn't have the moral, collective mobilizing force to fight this war effectively. It has lost a clear national vision that could have competed with the religious groups.

The modern democratic state—in Israel, as elsewhere—is constantly using religion for different objectives and, in turn, being used by religious groups. For example, a majority of Israelis are divided on territorial issues—how to resolve the Israeli-Arab conflict. Elections turn on that question. But what happens is that to form a government, the winning party makes a deal with religious parties. The deal is roughly the same each time, "You give us your consent on the borders of the country," says Labor or Likud, "and we will give you essentially everything that goes on within those borders. So, you give us the security portfolio and foreign affairs. We give you welfare, education, housing, health, interior and so on." It is the same formula being used by religious movements elsewhere. The majority eventually becomes a slave to the religious movement. The settler movement is an excellent example. The Israeli political establishment—right wing and left wing at different times—thought they could use the religiously motivated settlers for short-term political gain. But now they are hostages of the movement.

When a state becomes only a procedural mechanism for distributing power and resources, it has lost this struggle. The state has to attack the problem at the root.

[constructing an alternative vision to combat fundamentalism]

Bernard Sabella
Moshe Halbertal has raised an interesting point. Others, like Durgham Maraee, have also suggested that the state compete directly with fundamentalists. But Moshe seems to assume that the state has the right to define and give vision to what constitutes civil society. What about the fundamentalist movements like *Shas* ? Don't they have the right to participate in that process, even if it will eventually exclude people like Moshe? What is the role of the state in redefining the public political terrain?

David Little
I think it comes back to a question of rights and, perhaps, the suspension of rights. Surely, if there is a domineering religious group likely to take over, it threatens the rights of those who are going to be dominated. It may represent a threat to the existence of the state, certainly a matter of rights. In that case, the human rights treaties offer a solution: a state of emergency, suspending some rights in order to protect everyone's rights in the long term.

Henry Steiner
I'm not sure how much in the way of justification for repressing fundamentalism you can draw out of the human rights treaties. In the case of hate propaganda experienced in Nazi Germany, Bosnia or Rwanda, the response is clear. If fundamentalists are engaging in such speech, or calling for a ban on political parties or the imposition of religious law on the entire population, their success in such actions may constitute a plausible threat to the state. But, as Moshe Halbertal was suggesting, many programs of religious parties can challenge the democratic aspect of the state while stopping far shy of the extreme of Nazi propaganda and Rwandan hate radio, or of calling for authoritarian rule unhampered by political party opposition. Here lie the dilemmas from a human rights perspective of states responding

to what they may perceive as serious challenges from outside the framework of democratic processes.

Mordechai Kremnitzer

I think we should be concerned about the nearly uniform, high status that is given to religious expression. In Israel, we have rabbis expressing their opinions on peace, and on the territories. Much of what they say is political, not religious. That is legitimate, but it has nothing to do with religion. If rabbis are cloaking extremist political positions in the language of religion, the state has to respond. When religious expression becomes an incitement to violence—and it may, for example, when a rabbi says it is legitimate to kill Arabs—then, of course, it is justified for the state to send this rabbi to jail. Religious expression can be preaching for hate or preaching for discrimination, in which case it is essential for the state to take a stand against it. Not everything that comes under the cloak of religion is acceptable.

I would not favor repressing everything that sounds undemocratic or anti-democratic. This takes it too far, but I would also say that the American concept of protecting speech goes too far. For instance, I would not insist on the risk of "imminent harm" before intervening. For me, "go and kill Arabs" is something that should be penalized, even if it cannot be proved that there is an immediate danger that somebody will go now and kill an Arab. Someone may do it in a year, after the cumulative effect of all such utterances has affected him.

Marc Tushnet

I understand Mordechai Kremnitzer to be saying that religious expression should not be given distinctive protection in rights documents, and I agree with that. It is simply expression. What we are saying about hate speech applies whether it is political or religious. Sometimes religious expression will be more effective, but from the rights perspective, both are expression.

Henry Steiner

Nonetheless, there is a certain ambivalence in the international human rights corpus about the status of religious speech. When it comes to proselytizing, for example, we seem willing to give religious faith

special protection. I can attack your belief in communism, socialism or capitalism, though such theories or ideologies may constitute the very core of your social existence and faith. My speech as critic and challenger should be protected. But it is not as clear that I can do the same when it comes to criticizing and challenging your religious faith and urging you to accept the true faith—say, mine.

[civic religion and education to support alternative visions of the state]

Roy Mottahedeh

This brings us back to the question of civic religion and the particular place of education in the state's program. Ruth Gavison mentioned the need for states to project a vision that engages large numbers of people. I agree that this is a failing of the state at the current time. It shows a lack of courage and creativity. There have been times when the state has been able to do just that. I am old enough to remember Franklin Roosevelt and his four freedoms, including "freedom from want," which assumed that the state would be an active, non-neutral participant in satisfying the needs of the people.

One place to look for a state's role in building a shared social vision is in the history books. American history is constructed and taught in such a way as to inculcate a positive image of the contribution made by each religion to the American destiny. It largely succeeds. We learn, for example, that a Jewish banker helped support the American Revolution and that Catholics in Baltimore supported that Revolution. The question is how to get from the silly, bombastic style of the history books written in Saddam Hussein's Iraq to the plausible products taught in American schools. Education should be a principal means for inculcating both a civil religion and toleration, even admiration, for the varieties of religion extant in any state.

Henry Steiner

We come to the question of what constitutes neutrality. Certainly the United States perspective, when it comes to religion, is instructive. Some would attack the American system as hostile to religion because of its broad abstention from financial or other support, while others would counter that it is possible for the state to be pro-religion

without giving material support. Rather than avoidance of any state association with religious institutions, neutrality could mean giving equivalent assistance to all, not favoring one religion over another.

Education poses an interesting challenge. The state is hardly neutral. The socializing role of education and government's responsibility for it are well known. For example, the content of a standard account of American history has recently been changing rapidly. The grand achievements of Blacks and Jews and women in American history are only now appearing in the curriculum. One has to do extensive research to develop the material on their historical roles.

Closer to the themes of this discussion, the state is actively involved in spreading the message about human rights, but there is nothing neutral about that subject. It is a political and moral theory and ideology like many others. Under the human rights corpus, the state has an obligation to promote its views, not to be "neutral" about, say the basic notion of equal human dignity. The human rights conventions, for example, obligate governments to intervene pro-actively in social life and processes to transform attitudes—exactly the idea that we are discussing here—rather than simply sit back and accept whatever attitudes history, tradition, civil society and culture have deposited on the current population. The state must intervene in non-state, private relationships to change popular attitudes hostile to broad human rights principles like equal protection.

Ruth Gavison

Clearly the state should not be neutral about human rights, but can human rights, on their own, do the work that we are talking about here? I am afraid that human rights rhetoric, by necessity, is limited to some general constraints. But the particular content of public norms, political commitments, and social solidarity, cannot be confused with human rights norms. Human rights are the framework, but within that framework there are competing conceptions of good. Human rights doesn't take a position. The liberal state cannot be both arbiter and competing vehicle for the good life.

Nur Vergin
Turkey is an interesting example for its struggles with fundamentalism. The state believes that *Kemalism* offers a strong secular alternative to fundamentalism and, in the end, it was able to ban the Islamist party without major repercussions. But it waited to act until the point when the political classes were disorganized and the fundamentalists had come to represent a genuine threat to national unity. I was one of those secular Muslims—and I now regret it—who supported the Islamist-led government coalition. I argued that they would become more moderate by integration into secular politics and society. I thought, as many of us did, that they would become "Muslim-Democrats," analogous to the "Christian-Democrats" in Germany or Italy.

Now I think that position was naïve. In coalition, the Islamists became even more virulent and hostile to those who did not accept their vision of Islam. The leader of the Welfare Party declared that all those who did not vote for his party—78% of the electorate—were adherents of the "religion of the potato." In other words, they were not Muslims. He called on the people to fill the mosques in order to fight "the enemy," without saying who the enemy was, but obviously meaning those who were not true Muslims. As a consequence of this experience, I do not believe that it is anti-human rights to ban such anti-human rights parties and organizations.

Ruth Gavison
Besides insults, did the fundamentalists take any action to further their agenda?

Nur Vergin
Not exactly. Their battle was primarily over symbols. They argued for the formation of an Islamist Republic that would include Muslims of the whole region. They occupied our minds and our political agenda with questions like whether to build a monumental mosque in front of the President's house. But they also provided a cover to terrorist organizations like the Turkish *Hizbullah*. When *Hizbullah* committed acts of violence, the Islamist party dismissed them as a reaction to unpopular secularist policies.

Gerhard Robbers

A strong undercurrent of today's discussion is to view religion as a threat. Perhaps that follows from a discussion of fundamentalism, but it worries me. We are discussing what we have to fear from religion. Religious freedom is seen as a means of containing the threat. Shouldn't we also scrutinize the different religions to elicit the positive and common themes from which we might draw, such as universal themes of peace, co-operation and living in harmony? I see these themes in every religion I know of. Threats of a religion to peace seem to emerge from a misreading of its own sources.

Cole Durham

As Marc Tushnet suggested, we often risk overestimating the dangers, particularly in the midst of a heated and polarized political environment. And the response of the state, as Alain Garay said, may also be fundamentalist. I agree with him that secular fundamentalism is equally hazardous to social health. And it is hazardous precisely because it doesn't take religion seriously enough.

One of the powers of religion is its staying power. Religion is one of few social organizations that knows how to endure longer than a generation; religions last for ages. That also makes religions dangerous. They are seeking the "good;" they are concerned with immortality.

In some ways, religion can't be reduced just to freedom of speech, equality, or other things, because it captures all of those things and it captures something more that needs special sensitivity.

Khalid Al Mubarak Mustafa

I spoke from life-long experience with extremist organizations. I was the liberal politician who believed that we needed to protect the democratic rights of the extremists. I did that until they took over power. The litmus test for us, in Sudan, is the Southern Sudan question. In order to abort an agreement between the North and South, there was a coup. It dispersed the communities. The army committed atrocities against them. And all this I see as the result of people like me having sought to uphold the rights of religious people. The result is that thousands were killed. To cut a long story short, I think it is necessary to intervene in order to undermine these movements—

through education, and through political reforms. It is essential to the relationship between religion and the society. Consider what is happening in Egypt or Sudan where religious groups are controlling the education system. They are free to turn the educational system into a party system. This should not be allowed, even in a democracy.

Another point I'd like to raise is about Islam. In Islam, there is the maxim that is ascribed sometimes to the prophet, Mohammed, that this religion can lend itself to many interpretations. This is true. Roy Mottahedeh has selected a number of positive examples. There are others like the *Abu Hanifa*, who was very progressive about women, discretion and the translation of the Koran. But Roy could equally have selected a set of other examples unacceptable in light of human rights as we understand them today.

I was very demoralized the other day when I read about the agreement made by Mr. Barak with the leaders of the settlers to dismantle certain outposts in Palestinian lands. When soldiers went to fulfill the agreement, young zealots among the settlers confronted them and said, we represent God's will; you only represent the leaders. And the soldiers did not intervene. The process was stopped. I think there is a real danger that when the state is there but fears to act, the zealots truly feel they have a free hand.

Session Three: International Human Rights Perspectives and Notions of Liberalism

David Little (chair)

In this session, we address the international human rights perspective on religion and the state. What is that perspective? In what ways do the various international instruments—the International Covenant on Civil and Political Rights (ICCPR), the Declaration on Intolerance, and other instruments—differ among themselves? As a group, are these instruments more cautious regarding religion than other basic rights? Do the international prescriptions stress some aspects of religious freedom while ignoring others? For example, does human rights have something to say about the range of possible relationships between religion and the state—from a wall of separation to total fusion?

In general, how do the international human rights instruments' provisions on religion correspond with or depart from current tenets of the liberal political tradition? Finally, are there basic premises that unify and make coherent international human rights provisions on religious and other matters—for example tolerance, free choice and the inherent value of diversity?

When I consider the relevance of the human rights instruments and liberal discourse, I am struck by how both religious extremists and those who worry about them speak as if a state of emergency justifies extraordinary action. The religious extremists see their way of life threatened by the state, by culture and by the West. Thus they have the right to respond with extreme measures. Ultimate survival is at stake, giving them the privilege to respond with tactics that would not otherwise be acceptable—with violence, for example. Similarly, the state argues that it is threatened by the same groups. We have already heard a number of examples—the government of Sudan, the suppression of elections in Algeria. Extreme actions are taken against religious groups in order to preserve normal rights. This parallelism is interesting to track. I read the liberal tradition to require a narrowly tailored response to an emergency, so that the state does not become the mirror image of groups that seek to undermine it.

In this connection, there is a wonderful little vignette regarding a *Dukabor* religious sect in Russia. As some of you know, the *Dukabors* engage in extreme forms of religious expression. In this vignette, a *Dukabor* was going naked in public, and a policeman tried to apprehend him and arrest him for indecency. A chase ensued and in order to run faster and catch him, the policemen progressively shed his own clothing. By the time the policeman apprehended him, he was completely naked, as was the *Dukabor*. In other words, there was no way to tell them apart.

Liberalism tries to answer the question by saying you use force against force and belief against belief, and try to keep that equation as clear as you possibly can. You may have to allow some deviation or some exceptions to the equation, but you'd better be very careful. When you reach the point of using force against belief, you are doing the very thing that was supposed to be ruled out.

Alain Garay and Ruth Gavison will introduce the themes for our discussion.

Alain Garay

International human rights is one tool in the effort to resolve the conflicts between religion and the state. But it is only one of the tools. I would like to make a few basic points about the European Convention on Human Rights (ECHR) and the issues that it is addressing. I start with five basic points about the European system. The Convention is based on the involvement of forty-one member-states with a fairly wide range of religious diversity.[5] We have Christianity, Islam, Buddhism, and Hinduism—there is a mosaic of religions. Secondly, the system includes one international court to adjudicate disputes under the Convention. It is one of the principal international tribunals in the world—if not *the* principal tribunal—addressing matters of human rights. Third, the European Convention has broad guarantees, not only as concerns religious freedom, but other human rights that relate to religion—for example, torture (Article 3), discrimination (Article 14), and fair trial. Fourth, the main underlying principle of the Convention is democracy. A state can limit the right to manifest

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[5] As of July 2004, the Council of Europe included 45 member states, all party to the ECHR.

religious faith, for example, but according to Article 9 (2), only in a manner consistent with a democratic society. I don't know of any similar provisions in texts from the Arab world.

Currently, in Europe, we are facing major problems of political integration. The Council of Europe, the body that oversees the European Convention, includes most of the formerly communist countries of Eastern Europe and has to address the wide variety of problems from the social transformation in each of them. The key issues for freedom of religion in Article 9 of the ECHR—nearly identical to Art. 18 of the ICCPR—are freedom to manifest and freedom to change. There is nothing in the Convention about the legal structure of the church or the rights of religious associations. Only manifestations of religion (rather than belief itself) are subject to regulation or restriction, and only for limited purposes. The European Court has held that any restriction must be motivated by a "pressing social need" and must be a legitimate response to the threatened harm.

There are many sources of potential friction between religious freedom and the rights regime under the Convention. Religion itself can be a source of conflict. Though discrimination is prohibited, it continues to be practiced by the state and by religious groups themselves. The struggle between freedom of religion and freedom from religion can also be a source of conflict.

One of the major problems we are facing in Europe is the evolution away from a rights perspective about religion in the law and politics of member-states. It is not just an Eastern European phenomenon. Some of the worst offenders are in the West. In France, the issue of religious freedom is becoming increasingly politicized. The very concept is condemned as American and inconsistent with the principles of secular France. (It doesn't help that the Americans are usually heard complaining about freedom of religion in a context like Cuba, Vietnam or China, when ulterior political objectives are evident.) Parliamentary commissions work to define cults. In France, if you fit ten criteria, you are classified as a cult rather than a legitimate religion (and your protection diminishes).

Ruth Gavison

I would like to recall a few basic ideas about what we mean when we speak in the discourse of human rights. We speak of human rights as claims that are universal, peremptory and, in law, at least, subject to enforcement.

Democracy itself may be seen as constricted by human rights. Democracy is about self-authorship. As soon as rights are invoked, we are limiting the possibilities of self-authorship from the outside.

Since World War II, there has been a massive expansion in the conception of human rights. But with it, there has been considerable tension. Many of the current issues in human rights—relativism vs. universalism, cultural dependence—are related to this tension between expansion and the need for human rights to be limited if they are to maintain their moral and peremptory force.

How does all this come to bear on religious freedom? It is not an accident that "establishment" is not part of human rights documents. It is too contentious. The international community did not recognize non-"establishment" as a universal right. There is a right to religious freedom. But even within that notion, there is conflict. For some religions, freedom may imply the power to ensure that everyone born into the religion observes its dictates. This is at odds with the freedom *not* to practice or to change a religion. My religious freedom may conflict with the state's allocation of resources in public education. Religious freedom is also interesting because it applies to individuals, but religions are really a phenomenon of the group.

In varied respects, human rights fails to respond to the current conflict between religion and the state. It has nothing to say about the problems of joining or escaping religious groups. For there to be religious freedom, religious groups must have the right to choose whom to include and whom to exclude. There are religions with an affirmative duty to convert others; and religions that consider it an offense to undergo conversion. Human rights can't respond. It doesn't have a solution to the problem of people persecuted, prosecuted, killed, excluded or excommunicated for their religious beliefs, at least insofar as the persecution is not committed in the name of the state. None of the interesting problems that we have raised until now will be solved by human rights rhetoric. They can be discussed within the constraints of emergencies, conflicts among rights and the like.

The language may be helpful, but it will not resolve the problem. We don't, for example, want courts, whether national or international, to make these decisions.

Cole Durham

I want to build on what Alain Garay said about the meaning of the international norms. I worry about the way in which these norms may be construed to legitimize state action. Our last discussion showed that it is easy to conceive of religious groups as a threat. There is a great tendency, for example, in Eastern Europe today, to read the limitation clauses (for example, curtailing a right because of considerations of public order or national security) in an overly broad way. As Alain said, manifestations of religion are all that can be regulated. In theory, everything like belief that is not covered by manifestation is off-limits for state regulation—including holding and adopting beliefs. I would argue that changing beliefs is also immune from regulation, but there seems to be some dispute about that view.

The treaties offer a long list of justifications for state action that limit rights, including the protection of rights and freedoms of others, as well as classic limitations like public order or health. Though discrimination is prohibited, it continues to be practiced by the state and by religious groups themselves. And so on. I have often challenged students to try to imagine regulations on religious bodies that could not be justified by at least one of those limitations. I want to emphasize that the limitations are not enough. In order to be legitimate under the Convention, the restriction has to be necessary, or necessary in a democratic society. That is what really makes these rights protections very strong.

[human rights and democracy: limits, conflicts, and ramifications of the discourse]

Henry Steiner

I would like Ruth Gavison to suggest concrete instances of contemporary conflicts where solutions, in her view, lie outside the scope and purposes of human rights norms.

Ruth Gavison

Take, for example, female genital mutilation (FGM). That is certainly a violation of rights. But human rights can mislead you into thinking that the solution would be to make declarations, impose pressure and condemn the violation. What you need is for society itself to feel responsible for changing what happens to its daughters and wives. When you reach that stage, you can make progress. At that point, you face the strategic problems of working within a society and a culture in order to address the structural problems leading to human rights violations.

Democracy suggests that the effective solution must come from within. You have a conflict between democracy and human rights when you have a large majority that is opposed to a particular right. At the very least, you then have a serious problem in enforcing that right. You may call that a strategic problem of enforcement rather than a problem of democracy, but it is the same thing.

David Little

You seem to suggest that we simply have to wait for the society to develop its own strategy. Can't there be multiple strategies, some of which would involve outside groups helping the society to find a new direction?

Ruth Gavison

I am all for helping, but not for the contempt and superiority of declaring from the outside that the practice is unacceptable, without awareness of the predicament. Women are in a no-win situation. If they oppose the practice they risk exclusion from their communities. I don't want the outsider to tell them about the progressive life without giving them a real option. Sensitive outside pressure might help, but it can also be counter-productive. If portrayed by local forces who oppose it as the work of Western colonizers, they may see it as imposing foreign values. But the point is that these are women's values. Noise from the outside doesn't help and usually obstructs.

Peter Rosenblum

I thought Ruth Gavison was going to say that FGM was a contentious case for international human rights, something that many people including myself believe. But, in fact, Ruth says that FGM is clearly a violation of human rights. The problem appears to be one of strategy and response. That is quite different. We often presume that human rights violations require a particular response—a legal sanction or a campaign for abolition by Amnesty International—but that is not dictated by treaty (except in the rarest of circumstances). There are a host of other possible responses, including a campaign by local women to change the law. I think we have to distinguish between cases where there is no clear violation under human rights law and cases where human rights law condemns the practice but does not provide a prescription for redress.

Mordechai Kremnitzer

Ruth Gavison reduces human rights to a very small corpus. If you restrict human rights only to those areas of agreed, universal solutions, there is almost nothing left—torture, fair trial and a few other things.

The fact that the human rights discourse does not provide us with one definite point of balance (between conflicting human rights or between a human right and another interest) does not exclude many issues from human rights discourse. Relating an issue to human rights discourse does not exclude other normative or pragmatic considerations. I find the international human rights discourse very relevant, for instance, to the fact that within Israel people may marry and divorce only according to religious laws.

When the *Knesset* in Israel forbids exposing bread for sale in shops during *Pesach* (Passover) or the Municipality of Jerusalem closes a main street in a religious neighborhood during *Shabbat*, I do not see a valid argument against judicial intervention. Such intervention is especially necessary and justified when religion plays a significant role in politics, to the extent that the rights of the secular majority and of weak religious groups (such as the Reform Movement and the Conservatives in Israel) are jeopardized.

[nature of human rights discourse, distinctions between human rights arguments and other normative arguments]

Henry Steiner

The human rights corpus is very spacious in the rights, freedoms and liberties that it embraces. Yet, at its core, where the vast percentage of human rights work takes place, it is very simple and benefits from a worldwide consensus. There is the taking of life without justification—writ large it is genocide; on an individual scale, it is murder. There is torture, arbitrary detention and other phenomena that are violations of physical security. Such norms express what one could call the "anti-catastrophe" goal or dimension of the human rights movement: stopping the massive disasters that have plagued humanity. That goal is complemented by another, related but distinct utopian dimension to human rights: giving people the freedom and capacity to develop their lives and the world. But for most people and actors around the world, it is the anti-catastrophe dimension that attracts. The human rights corpus is designed to arrest the worst of abominations from systemic discriminations like apartheid to physical violence and killing—evidenced not only by the norms that are most cited and relied on, but also by the very great percentage of their time and energy that IGOs and NGOs devote to such gross violations.

When you get past the core, the absolute "no's," there is inevitable ambiguity and outright conflict. Religion provides a rich example. The human rights corpus condemns the dominant historical violations like slaughter of heretics and forced conversion. Whatever else they say, human rights norms stress that you cannot force or compel someone to hold or reject religious beliefs and related practices. This prohibition is consistent with the anti-catastrophe purpose of the human rights movement. If the clear condemnations went further, they would trespass on all kinds of cultural variety and opposition—within Europe alone, not to mention the Middle East. There is no uniform solution for complex issues like establishment of religion, the religious influence on education, or proselytizing.

Norms declaring rights are written in broad, constitutional language. In the United States or Europe, we can discuss how condemnatory or insistent those norms are, often by reference to judicial opinions. Most countries with such serious and systematic

violations don't have the luxury of assigning resolution of these issues to courts settling conflicts and expounding constitutions. The courts are weak, perhaps manipulated or controlled, perhaps completely irrelevant. Civil society may be weak. The issues are argued and debated and perhaps resolved in raw political processes. The institutional context may be national or an intergovernmental organization. Ultimately, the content of the right may become clearer without judicial resolution. Some consensus may develop as to what is necessary; there may be some allowance for cultural diversity. This is the character of rights rhetoric. It is contentious, it will be the subject of inevitable political and legal fights and, surely, its content will change over time.

David Little

Wouldn't you want to make proposals of a jurisprudential sort to respond to the political process? It sounds as though you are just waiting on politics to decide, and that doesn't sound right to me.

Peter Rosenblum

Responding to Henry Steiner, I would distinguish between debates within the human rights discourse—in other words, over the content of a recognized right—and those that set a human rights argument against some other kind of normative discourse, religious or moral. Rights of homosexuals are a case in point. If the rights of homosexuals are recognized, it will represent a triumph over arguments based on faith or tradition that stigmatize them.

In the case of freedom of religion, I wonder whether the debate takes place within the discourse or between human rights and something else. We know from what Cole Durham told us that the rights in the treaties do not add up to a full protection of religion as religions conceive themselves. And from Moshe Halbertal, we know that freedom of religion conforms to a Protestant notion of voluntariness in religious faith that is not integral to Judaism or Islam.

I think there is an implicit compromise or compact that underlies the liberal vision of the rights instruments: It says, "yes" to religion on our terms. "Yes" to religion that is primarily private, that does not contest the public space or political power in its own

name. Anything else—fundamentalists, as Moshe Halbertal defined them—is functioning according to a different normative logic. This wouldn't be unusual for rights culture. The same could be said for freedom of speech: we accept freedom of speech by creating a radical separation between speech and action, particularly in the United States. We can tolerate extreme speech because, as a society, we have de-linked speech from action. Philosophically they could be linked, but we have separated them.

Henry Steiner

I think the political battle is to convince people that the cause that you are urging deserves the mantle of rights. That is a political contest to which many types of argument are relevant, as in the present conflict over the right to sexual orientation. With few exceptions—the South African Constitution, for example, or judicial decisions within the European human rights system—homosexuals are not explicitly granted equal protection rights or rights to specific practices. Or consider the case of gender discrimination and the remarkable progress made over two decades by the women's human rights movement. Was gender at the start a bad candidate for rights discourse? At first, perhaps, it was. But the women's movement, and in some important respects the gay rights movement today in the West, have changed public awareness and consciousness of gender and gay issues. Such movements must work through the courts where they can, but even in liberal democracies, that is only one approach. These movements mobilize opinion, influence elections, and develop moral and political arguments in academic and public life. They enlist the support of governments to promote equal protection and curb violence. They help to shift public opinion and place gay rights or gender rights in the rights mainstream.

Peter Rosenblum

The opposition is not an argument based on rights. It relies on other normative arguments. Ultimately, it is a debate over the dominant discourse that will be used to conceptualize a problem, one where the rights discourse may or may not triumph over something else. But it is not primarily a debate over the content of the right.

Moshe Halbertal
I'm not sure I understand what people mean by a "rights discourse." It is like saying the "good" discourse. I don't think that claiming a right is making an argument. You must produce something more. For example, you say this relationship is "valuable," it is "meaningful," it is a family like every family. When you call it a "right," as Ruth Gavison said, you say that we all deserve it as humans. This is not a claim. This is a description of what you say when you say you have a human right.

You can add the idea of "right" to any claim. You have the right to a ticket when you stand in line, but you don't put that into an international treaty. It is not that I'm opposed to rights, but I'm not sure that rights are arguments in any sense that I understand them.

Nur Vergin
In other words, rights are conclusions of arguments.

Mordechai Kremnitzer
I think that there is something close to religion in the arguments over rights.

Peter Rosenblum
Whatever you call it, there are differences between making a rights argument and, for example, a utility argument or argument premised on religious faith. Although there are times when they overlap, the rhetoric typically will be different, as will the ultimate source of persuasion. As a matter of utility, I can argue for the exclusion of blacks from my neighborhood to reduce crime. The response might be an argument for rights—freedom of movement, freedom from discrimination. I can argue for torture on the basis of utility. Again the response may be a rights argument; or a religious argument. Perhaps the religious argument would be premised on notions of duty, *mitzvah*.

David Little
What's puzzling about your example for me is that in the American context, everyone argues about rights, even the fundamentalists. I've heard the evangelical preacher, Jerry Falwell, talk about rights

of homosexuals, for example. He argues that they don't have rights, because they are to be understood as violators of criminal law, or at least biblical law. He gives reasons to suggest that they have no right to be respected on a basis equivalent to heterosexuals.

Peter Rosenblum
I would say that Jerry Falwell is fighting against a rights perspective on homosexuals. He is saying that the issues are biblical and moral, and in doing so, he is making an appeal to draw on a different normative sphere.

Cole Durham
I'm not sure I agree with Peter Rosenblum's idea about a human rights compromise with religion. Perhaps you can draw that out of the American setting: There is free exercise, but no "establishment." But I'm not sure that I would interpret it that way. Rights protection is fairly absolute. I suppose you could construe it as a social contract: religious groups are drawn into society and the embrace of human rights, in exchange for a kind of reservation clause which ensures that they are not forced to violate their consciences.

Many traditional religious believers are uncomfortable with rights talk. That is part of what is at stake in the relativist versus universalistic debate. Some religious groups really don't identify with the rights corpus and feel threatened in various ways by the human rights movement. I'm not sure that instruments themselves really offer a compromise.

Peter Rosenblum
In response to Cole Durham, I would recall Moshe Halbertal's insights from the previous session. The rights regime protects a certain kind of religion, one that is voluntarist and private, and perhaps it transforms other religions to meet those criteria. I would argue, for example, that American Judaism has largely adopted the Protestant model in this regard. The rights regime does not protect the right of a religion to coerce.

Henry Steiner
Human rights discourse in the public domain doesn't always rest on foundations that are distinct from utilitarian argument. Many rights set forth in the instruments find support and have been supported in consequentialist arguments. Justifications for basic rights like free speech may stress that free speech is essential for the full realization of the human being. But free speech may also be justified because it enriches the "marketplace of ideas" and gives society a greater range of choices. Many human rights norms have this shared consequentialist and naturalist base to them. Once a prohibition or a requirement of the state is informed by or deeply associated with the notion of rights, it stands a little independent of its origins in different systems of thought. It takes on, or at least aspires to, the special weight of a right, the aura of unassailability of rights, although of course this is chimerical because many rights continue to be part of a process of evolution and change, in ongoing communication with other rights, trends in moral and political thought, and a range of state or international interests.

/violent religious movements and the political struggle for rights]

Bernard Sabella
We are scratching the surface of some extremely serious questions, including the right of religious movements to organize, win support, and even to take power. How should would we treat fundamentalist movements in the Muslim and Arab world? If *Hamas* or *Jihad* Islam in Palestine win popular support, must we recognize their claims as rights? Is this the price that we have to pay if we play the game of democratic rights?

Nur Vergin
Perhaps I was misinformed. I would view *Hamas*, or *Hezbollah*—in its Lebanese or Turkish versions—as well as other organizations like them, not simply as religious communities, but as terrorists.

Bernard Sabella
It depends on how you look at them. I would characterize them as organizations that in particular contexts, such as Israel, will use

violence and terrorism to achieve and advance their political goals. That is only part of the equation.

Ruth Gavison
You wouldn't mind including in the political process a group that uses force in its political struggles?

Bernard Sabella
That is a dilemma. In the case of violence against Israel, for example, the Palestinian majority may oppose it, though a sizeable minority—perhaps 20%—supports it. Even without majority support, a group in Palestine can legitimize its political agenda through violence. Its members are not necessarily perceived as terrorists and not easily banned.

Roy Mottahedeh
I think we have gone too far in identifying democracy with popular sovereignty, and fail to recall that democracy also implies liberty and rights for minorities.

Henry Steiner
I agree with Roy Mottahedeh. The notion of a democracy unconstrained by rights is a notion whose time has long passed. In the prevailing understanding, the majority must be curbed through the defense of rights given to all citizens. To put the point simply, a majority vote can't legitimate human rights violations.

Let me contrast other instances of a legislative declaration of rights that might be influenced by a democratic consensus. Recognition, for example, of a right to equal protection of women or homosexuals does not violate other groups' rights—though it may violate their sense of social or moral order. You may be violating a majority's belief system, but members of that majority have no right to a society ordered fully in their own image. Roy Mottahedeh, on the other hand, is talking about a situation where a group searching for popular support intends to violate the fundamental rights of others, like freedom of religion or democratic expression. That's where deep conflict settles in, and where it becomes necessary to consider a range of responses of a democratic polity to those who would end

democracy. That issue doesn't arise in our discussion of homosexuals' rights.

Durgham Maraee
I agree with Henry Steiner that the significance we attribute to rights, and much of the content, is largely a political question. In fact, I would argue that the whole question of whether the corpus of human rights will be accepted as normatively binding in certain societies is a political question. We should consider the conditions under which a society will accept human rights. Are there practical steps necessary to induce a society to accept rights? What are the underlying economic and socio-economic conditions that need to exist?

[religious attitudes to human rights; whether society should concern itself with practice inside the religion]

Yossi David
The fact that religious communities are not familiar with rights discourse is not likely to change, for there are deep conceptual conflicts. In Orthodox Judaism, for example, duty is central to the religious experience. The basic notion of "mitzvah" means obeying the law. It does not create sensitivity to rights.

Ruth Gavison
I disagree with Yossi David if he is saying that there is a contradiction between talk of rights and of duties. Rights talk is different and, it is true, religions do not generally talk of rights. But that doesn't mean that religions lack concern for individual dignity. The Jewish tradition of concern for the social and economic plight of its members has been far greater than that of many peoples deeply committed to civil and political rights in the Western tradition. Such concerns are as readily embraced within duties as rights. Rights talk has a lot of advantages, but also real costs. It is weak on solidarity and community, indeed on many social phenomena that are discussed in religious traditions.

I would like to return to the problem of religious groups restricting, or violating, the rights of their own members. For instance, Jewish divorce laws are seen by many people to be terribly discriminatory against women. We could change this by introducing

civil marriage and divorce. But this won't solve the problem for women who prefer marriage within the tradition.

The question is whether we can make Jewish law change its law of divorce. Now, clearly, this is a question of freedom of religion. Jewish law will say that it is autonomous, and it will decide whether to change its own law of divorce. But if we live in a society in which many people are religious, we want to deal with their plight also, not only with those who can exit from religion. It presents a vexing conflict between human rights and freedom of religion.

Marc Tushnet

Following up on Ruth Gavison's comment, I would make an analytical distinction between religions that use their social power to impose certain behavior on would-be dissenters, on the one hand, and those that act through the state, on the other. As I understand the affirmative obligations of states in international human rights, states would be obliged to intervene, in the former case, to protect people against the dominant religion. But I think the latter case—that of deploying state power to limit the religious freedom of others, particularly in a democratic state—poses a real problem for democratic theory.

It seems to me that it is this possibility that makes some form of non-establishment norm a natural complement to religious freedom under conditions of democracy. But I would add that it is unlikely that a non-establishment norm is going to be sufficient to deal with the problem we discussed in the previous session—enabling the state to develop a thick civil identity that complements or offsets the religious commitments that generate these problems in the first place.

Henry Steiner

The religious system should go its own way and resolve its internal conflicts over time. I don't think the government should trespass on its internal sense of beliefs on an issue like discrimination. People may choose to remain within the group with its present belief system, or urge change, or leave.

Marc Tushnet

You could take the position that civil divorce is a good thing, but that does not respond to Ruth Gavison's dilemma: many women will

desire to follow tradition, and their rights matter as well. I think it is important to acknowledge that, for most religious traditions, there are resources internal to the tradition to justify changes in the law. You needn't rely on an external process of coercion. (This is also one of the implications of Roy Mottahedeh's writing on Iran.) We have an image of religion as unchanging and without resources for legal reform, but that seems inaccurate to me.

But one point that I draw out of the U.S. experience is that we shouldn't rule out the coercive impact of state authority on religious law. One good example is that of the Mormons. I understand that Mormon insiders contest this, but the outsiders' understanding is that the severe repression of the church in the late nineteenth century led to a change in the Mormon belief system. The break with polygamy is the clearest example. It is not necessarily an attractive story, but it indicates that you cannot rule out the impact of external coercion.

David Little

I agree with Marc Tushnet. We don't want to lose sight of the role of the state in shaping religious perspectives—in good and bad ways. Ann Mayer has given examples from Pakistan, Sudan and Iran, of how the state has manipulated religious traditions.[6] Out of a variety of different traditions and interpretations of Islam, they have selected those that serve their very special purposes. The same is true of the former Yugoslavia. Political manipulators like Milosevic have mobilized certain interpretations of religion for political purposes. It is a very important factor in a number of current conflicts.

Cole Durham

While it is true that coercion can have effects, it is not something that you want to do lightly. Suppose the state tried to impose on orthodox Jewry a woman's right to a religious divorce. For many, the coerced change would not be meaningful. It has to come from the inside. At the same time, changing doctrine does not come easily to most religious groups. Consider the Jehovah's Witnesses and the advisability of blood transfusions. You can discuss the doctrine; I suppose that many

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[6] Ann Elizabeth Mayer, *The Fundamentalist Impact on Law, Politics, and Constitutions in Iran, Pakistan, and the Sudan*, *in* FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE 117 (Martin E. Marty and R. Scott Appleby eds., 1993).

of them feel they have no real choice in viewing transfusions as a violation of religious doctrine. On the one hand, social pressures build up against many "unpopular" religious doctrines. If you add state coercion, it may create a crisis that you don't want.

Mordechai Kemnitzer

Social forces are very effective on religious leaders. We had several experiences in Israel where religious leaders changed their positions—not because of state intervention but because of broad public dissatisfaction. I'm thinking mainly about the case of the Ethiopian Jews. Initially, the rabbis put up barriers to recognizing them as Jews, but they dropped the barriers following public pressure.

Ruth Gavison

Much earlier, there was discussion about civil marriage and divorce in Israel. When the British came in after the Second World War, they asked the communities whether they wanted to prolong that system—the *millet* system Khalid Mustapha recounted as offering interesting possibilities for negotiating differences between communities. The Jewish community said it didn't want that, and the Arab community said that it did. If Israel is going to decide on having civil marriage, probably it will not consult the Israeli Arabs, because that is usually how decisions are made in Israel. But I suspect that the Arabs are going to object, because the absence of civil marriage is one of the mechanisms that Israeli Arabs use in order to maintain their sense of distinct communities. So even this is a very complicated situation.

David Little

Several people have alluded to the rights argument within religions, like Islam. There are thinkers like Abdullahi An-Na'im and others proposing an Islamic basis for international human rights.[7] My question is, how deep does that viewpoint reach in ordinary Islamic discourse or discussion? Is there a debate below the level of a few elite academic types or not?

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[7] See, e.g., *supra* note 3.

Roy Mottahedeh

It is correct to say that in the Islamic world the vocabulary is different, and the issues are seen differently. But there are significant changes underway. I think that there is a different language that Muslims use, much to the same purpose. Some of it has come out of traditionalist language—the progressive *Muslim Brotherhood* talks about the "dignity of man" rather than rights of man. But the important fact is that such language is developing; it is being used more and more, partly because these groups have found themselves in an adversarial relationship with the state. There are also tensions within so-called fundamentalism itself. As fundamentalists enter into power, expectations are created among the masses of people. They start to make claims on the state. They do not express themselves exactly in a rights discourse, but the criticisms and claims do take a related form. For example, they demand that the state respond to the need to respect human dignity.

Mass education and political participation have created expectations. At the same time, there is a strong current of argument among intellectuals that one has to search for the spirit of law, rather than to be bound by its letter. Here liberal Islam strikes back, and provokes a discussion that fits well with the expectation of the masses. It all comes together into something that starts to sound like the Western human rights discourse.

[tolerance and the majority religion]

Bernard Sabella

There have been excellent historical relations between Christians and Muslims across the Middle East—in countries like Jordan, Palestine, Syria and Iraq. But all this occurs in contexts that assume the superior position of Islam over other religions. We in the Arab world are not courageous enough to start a discussion that assumes three or four religions to be on the same level. Therefore, the idea of tolerance by the majority religion becomes the predominant basis for the relationship. The non-Muslims accept their secondary position. I say this without any resentment. We have had peace with inequality. But the inequality is certainly real and that is true with a secular

government. If *Hamas* were in power, I would have zero chance of coming into government, except to fill a token position.

That affects the way that I identify with the state. I want to be a citizen of my state. As a Christian, I represent 1.8% of the population, but I am as Palestinian as Yassir Arafat. How do I explain to my children that we have a secondary position as non-Muslims or members of the non-majority religion. When you talk about human rights, it is not solely a question of legal or constitutional ideas—it has living consequences. Irrespective of the love I have for my Muslim neighbors, I am learning now to talk critically in front of my colleagues and students. I can no longer simply accommodate the majority when I feel it does not accept me as an equal.

Khalid Mustafa

I hear the same argument from Southern Sudanese vis-à-vis the fundamentalist rulers in the North. I think it will take time before the minority point of view becomes the majority view. But even in the short term, the fundamentalists are losing because they are alienating the population. They are losing sympathy and ground because they can't respond to the logic of equality.

Nur Vergin

Bernard Sabella said that as a Christian Arab he had little chance of being a minister. In the "secular" state of Turkey, it is also inconceivable for a Jew or a Christian—whether Catholic, Armenian or Greek Orthodox—to be named minister. With the exception of Jews, they are suspected of being anti-national. It is not simply that they are a different nationality. In fact, non-ethnic Turks are welcome, so long as they are Muslim. But Christian Turks are viewed as historical traitors: their ancestors were Muslims who collaborated with the West during the war of independence. As a result, they are entirely excluded from the state.

Nancy Bakir

The inequality that Bernard Sabella mentioned is increasingly felt among Muslims themselves who don't observe all the rules of behavior. When I was a school girl, there was only one girl in the school who covered her head. Today, most women in the street are

covered. Even as a Muslim, you can feel excluded as society becomes more religious. In Jordan, a Christian can be a minister, but not, for example, Minister of Education; that position belongs to a Muslim, according to Jordanian tradition. In fact, the Islamic parties always try to gain that ministry and have succeeded twice in the past twenty years. I am facing a related problem now. I have a Committee on Human Rights and Education in which I have members from the Islamic Brotherhood who somehow view human rights as a new religion opposed to Islam.

Session Four:
Proselytism, Community Preservation and the Issue of Individual Rights vs. Group Rights

Mordechai Kremnitzer (chair)

The subject of proselytism raises several issues. For some, proselytism may be a religious duty. Limiting it would thus infringe religious freedom. Others may regard proselytism as offensive, particularly the targeted individuals or group. The position that we take may depend on our underlying assumptions about religious speech, feelings and convictions. To what extent are they special or even unique? To what extent does their special nature require or justify special treatment?

On the other hand, do communities have a right to self-preservation, especially minority communities which perceive themselves as threatened? Is such an interest a valid justification for limiting speech? How do we balance the interest of the group in self-preservation with the right of individuals in that group, including their right to hear others and to leave the religious community?

As we consider proselytism, we might also consider whether there are different types that are more or less legitimate. Is it possible to distinguish between religious speech and religious coercion when "coercion" could mean using material assistance to attract converts, exploiting weaknesses or even committing fraud?

Charalambos Papastathis will lead off the discussion.

Charalambos Papastathis

At one time or another in history, most European states had provisions in their laws to protect the established church from efforts to undermine it. Today, Greece is the only country in Europe that seeks to enforce such legal provisions. Since the first penal code in 1834, proselytism has been a crime. It has survived a new criminal code and seven constitutions. The newest law was adopted in 1938.

Under the law, proselytism is defined to be any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs, by material assistance, fraud or taking advantage of a person's weakness. It is immaterial whether the desired effect is achieved. It is likewise immaterial whether the persons involved are related (even

as closely related as parents and children); in other words, there is no exception even for family. The penalty is a suspended sentence of one month to five years incarceration and a fine. If the perpetrator is a Greek citizen, fines may be imposed, while a foreigner may be deported.

The only significant development concerns the current constitution of 1975, which in its Article 15 prohibits the practice of proselytism *for* or *against* any religion. The constitution of 1952 prohibited only proselytizing against the prevailing Orthodox religion. The European Court of Human Rights has been involved two times with proselytism in Greece up until 1998. In each case,[8] the European Court has found the practice of the Greek administration and justice (not the law on proselytism itself) to violate Article 9 of the European Convention on the free manifestation of beliefs.

Alain Garay

The decision of the Court in one of these cases, *Kokkinakis,* was a landmark. It protects the proselytizing practices of the Jehovah's Witnesses. The court considered the Greek law to be too severe in its application to the facts of the case, but the court didn't say that the law itself was a violation of the European Convention. As Charalambos Papastathis said, the relevant law is still in force. On the other hand, the government of Greece did send a circular to all the prosecutors and police stations to forbid local authorities from prosecuting and sentencing proselytizers. This was quite significant.

Mordechai Kremnitzer

Proselytizing poses a potential clash of religious faith and practice. For one religion, there may be a duty to proselytize, while for another it may be an intrusion. There is also the tension between freedom of religion and freedom of speech. One solution may be to distinguish between proselytizing that is simply speech and that which involves something more. It seems the Greek law seeks to do that, for example, with reference to fraud, financial inducements, influence on minors, manipulation and so on. In Israeli law, there is a penal provision that

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[8] Kokkinakis v. Greece, 17 Eur. Ct. H.R. (Ser A No 260-A) 397 (1993); Larissis and Others v. Greece, App. Nos. 23372/94, 26377/95, and 26378/95, 27 Eur. H.R. Rep. 329 (1999) (Court Report).

to my knowledge has never been used, which prohibits proselytism where money or other consideration is used. Proselytizing without material inducement is not a crime. On the other hand, the state looks very negatively on any such activity.

Ruth Gavison
It is not as much the state as the society.

Mordechai Kremnitzer
I think it is both. We see it in the question of visas, for example. The monks of the Mormon University on Mount Scopus would never get permission to stay in Jerusalem without agreeing not to proselytize.

David Little
What would the reaction be to a religious group that wants to perform a service, some kind of welfare activity that is not, in itself, considered proselytizing. For example, many religious groups start hospitals or schools, which are themselves a kind of inducement to join the faith.

Ruth Gavison
In Israel, for example, there is a Mormon University program, but it is only allowed to serve overseas students, not Israelis.

Henry Steiner
From the American perspective and the perspective ofthe human rights corpus, I find this very confusing. There are so many contradictions. Parents are given the right, under most conventions, to raise children in their particular tradition. One could call that an intense form of proselytism, I suppose. In other words, it is the fundamental human right of a parent to use every possible technique to persuade a child to observe the family religion. But numerous states place severe limits on anyone who might later seek to change the views of that child, even after maturity.

Consider situations that do not involve religion and that are analogous to proselytizing. Take people who come to the house to promote social causes or candidates. We don't prohibit someone from using speech and argument to try to get your vote. We don't

say the person may not insult your deepest ideological beliefs. We typically don't penalize deception or a considerable range of practical inducements. Politicians give inducements all the time to get people to vote or join their party. We may draw the line at pay-offs, but we accept advocacy that strikes at our deepest fears or envisions the worst possibilities. We allow people to attack the most sacred secular beliefs—communism, socialism, capitalism, any "ism" that is distinct from religion, any body of moral belief, all of which may rest on as deep and compelling a faith.

As for taking advantage ofpeople's weaknesses and strengths, that is the nature of the universe. We are constantly preying on others' weaknesses and taking advantage of them—politically, commercially, and indeed religiously.

Why do we view such deep belief by others differently from the way we view religion?

Gerhard Robbers

I understand Henry Steiner's concerns, but I don't see the problem in terms of contradictions. Religion is quite different from politics or shopping. It is experienced in a different way. Politics, in our societies, is meant to change every few years. Religion is meant for eternity. Also, as Ruth Gavison said in an earlier session, religion is a group phenomenon. I agree with this despite some American authors who characterize it as primarily individual. That affects how you perceive proselytizing: it is an effort to influence an individual or assault a group. If you live within a set of group traditions—and not in a modern individualistic manner—you may feel the intrusion even if you are not individually affected.

I wonder whether minorities are particularly affected. For those of you who come from minority communities, do you perceive proselytizing as a particular threat and infringement on the rights of minorities?

Cole Durham

Let me present a defense of proselytizing. It is important to understand that bearing witness is a significant part of some religions—as significant as engaging in the Eucharist. It is indeed central to some

religious practice. There is a general consensus that manipulation and coercion are inappropriate, but it has been complicated to draw and gain consensus over even a legal distinction between "religious witness" and manipulative or coercive practices. I think there is some sympathy for the *Kokkinakis* decision, which says that the missionary work or "religious witnessing" of the Jehovah's Witnesses is consistent with human rights. But it leaves open the possibility that there are other practices that are not.

The argument is often made that it is the small religious groups seeking to build their community who engage in coercive or manipulative practices. But one rarely looks at what the dominant culture is doing to such groups. One of the reasons that outreach and witness is so important to them is that they are constantly suffering attrition to the dominant culture. No one ever charges the dominant society or culture with being coercive or engaging in proselytism, but believe me, it happens all the time. Economic and material "inducements" operate in support of the dominant religion. In addition, controlling access to information may be seen as a form of proselytism. You can't coerce authentic conversions, but it may be effective to deny people access to information about other religions. The issue is seldom addressed in such terms.

I would also like to address a word to the issues that Gerhard Robbers raised about group and individual experience. In general, religion is both an individual and a group right, and these have to be balanced in some way. It is most desirable, in my view, to protect religion as a group right, but to allow the right of exit. The right to have and adopt a belief should be accompanied by the right to change beliefs.

The right to engage in religious persuasion, so long as this is done in non-coercive and non-manipulative ways, stands at the core of human rights beliefs. It is parallel to freedom of expression. The fact that it is made in religious contexts should not be a demerit or ground for discrimination.

Henry Steiner

It would be interesting to compare what we have been saying with an article by Makau Mutua that addresses proselytizing by Christians

in Africa.[9] He takes a view of religion close to Gerhard Robbers' description—as something close to the bone of a culture, perhaps the dominant force in socialization. I don't know whether he is right or wrong about African tribal religion and tribal unity, but certainly religious belief and practice are a deeply integrated part of the whole. To attack that belief is less a matter of challenging a sacred faith than of imperiling the survival of an entire culture, says Mutua. Western proselytizing amounts to a rape of African culture by the imperialist Westerners, particularly when one recognizes that much proselytizing is accompanied by the offer of material benefits—for example, attending superior schools run by the church.

The same argument comes from other quarters—the Russian church, for example. Being weak in the aftermath of communism, its members may fall prey to the well crafted campaigns of proselytizing churches, primarily Protestant churches. Protectors of the national faith perceive such proselytizing as an assault from the West.

The ICCPR recognizes an explicit right of cultures to try and protect themselves against threats to cultural survival. Mutua argues that preservation is a "good" in itself. The Russians seem to be stating something more like the "relativists" of East Asia—they seek a temporary refuge from proselytizing until they can achieve the same strength as the West. These are two cultural preservation arguments that take us away from the sacredness of the belief and back to the broader culture.

Marc Tushnet

It is hard for me to understand why governments try to prevent proselytizing. I see it as simply a form of expression. If expression is impermissibly manipulative in other contexts, then it is impermissibly manipulative in this context. Otherwise, it should be permitted.

Why not allow belief to compete with belief? One response is that religious stability is important for social peace. Unlike politics, people are not supposed to change their religions. But I am puzzled about why stability matters particularly in this area. I heard two reasons—one is cultural preservation. That seems important to me,

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[9] Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, *in* Vyver & Witte supra note 1, at 417.

though I don't know how religion is necessarily distinctive. The other is simply that stability is a public good—my continued membership in a religious group provides support to those who do not want to change. With ongoing migration from a religious community, there is a tipping point at which it can't sustain itself. That is a bad thing for those people who want the community to be sustained. One might respond to that by prohibiting immigration rather than increasing efforts to retain members.

Even assuming that stability is important for these reasons of social preservation and public good, it is also the case that stability doesn't mean stasis. I think everybody concedes that internal change—change of belief systems in the community—is clearly permissible as leaders and members rethink their own commitment. If change generated from within is permissible, why isn't change generated from outside by proselytizing also permissible?

Bernard Sabella

What Gerard Robbers has said applies beautifully to the Palestinian context. Religion, in our context, is not perceived as an individual right. It is a collective phenomenon, and, therefore, the right of an individual to move in and out is highly restricted. When the Europeans and Americans say, "Bernard wants to become a Muslim. Please respect his rights," it is not acceptable. That may be shocking to some of you, but I want to emphasize the dramatic difference between your perceptions and our world.

There are many examples. We have Christian emigration from Palestine. I have written on this topic, undertaken research, published and propagandized, saying, "For goodness sake, let's keep the Christians in Palestine." As a result of this phenomenon, there are fewer and fewer young Christian men. With the coming of the universities, our young women, often liberal, very naturally meet Muslim men and fall in love. Praise the Lord—whichever Lord you want. They get married. What happens in the Christian community? We ring the bells of mourning. In fact, in Jerusalem one Christian family put a death notice in the newspaper for their daughter. I looked at it and said, "This is a living, young woman." They said, "No. Consider her dead." These are compassionate Christians, but to them she is basically dead.

Another example came when I was lecturing at a small Christian institution in Palestine. There was a student named "Ahmed" in the class. I asked him what he was doing at a Christian university, and he said, "I have seen the light. I got the Bible and read it. I find it beautiful; it responded to my heart." His family and community didn't know. If they did, he said, it would be the end of him. The community would not accept it. They would have to kill him if they knew.

Last April, I was attending the Catholic Synod for Asia at the Vatican. There were 180 Bishops, 20 Cardinals, and the Pope, saying that the Catholic Church in Asia is a minority church. Again and again, the need to witness for the people of Asia came up—the need to proselytize. There are Protestant groups that are proselytizing in Palestine, but they don't have the courage to do it among the Muslims or Jews, so they proselytize other Christians.

I don't know what the solution is. Do we regulate the right of religions to bear witness? As Cole Durham said, there is a lot at stake. A minority church is under constant threat of losing adherents all the time. If we proselytize, it is to prevent further losses.

Khalid Mustafa

In Sudan, we have a clear situation in which the Muslim, Arab-speaking North is trying to Islamize and Arabize the South through force. The response creates its own problems. The Southerners turn to evangelical Christian organizations for help. They get it at a cost. Instead of Arab Islamists, they get Western Christians equally opposed to their culture.

About sixty percent of the Southern Sudanese are actually animists. Most of the intellectuals who are guiding the rebellion against the North are missionary-educated. They have already lost their language and original religion to become agents in a war to spread Christianity, rather than Islam. For the man in the street or in the countryside in the South, it is a lost battle. In either case, language and religion are doomed.

Roy Mottahedeh

There is a beautiful book by Wilfred Cantwell Smith[10] in which he says that religion, as we now use it, is a late-medieval European construct. Even outside Europe, the European influence is pronounced. In its older sense, religiosity is an aspect of culture, an integral one. Often there is no word to separate culture from religion. We have seen among Native Americans how proselytizing breaks down culture. Many are now searching to reclaim their pre-Christian roots. But it may be too late.

I would like to speak from the perspective of a little known minority. According to Muslim law, I am a *murtadd fitri,* which is an amazing term for those of you who know Arabic. That is, I am an "apostate by internal nature." My great grandfather became Baha'i. Apparently, I still have Muslim DNA, so though my family has been Baha'i for four generations, I am still subject to the penalty of death for apostasy. Baha'is are rarely killed these days, but the threat hangs over them.

This is deeply troubling from a human rights perspective. As Cantwell Smith's insight suggests, religion has been disaggregated from culture. In all these discussions we should remember that "religion" is not a fixed or even self-explicable term, when considered historically or inter-culturally.

Moshe Halbertal

Henry Steiner raised the question of what distinguishes the marketing of political ideas and programs from the marketing of religion. I want to make a distinction between choosing and converting. When we say someone made a choice—opting for this or that community—we say that he has certain criteria, for example, cost, comfort, or location. There is a reasonable comparison to be made and marketed. Converting, unlike choosing, involves an attack on the criteria themselves. The proselytizer says you have to change the set of criteria by which you evaluate the situation. This is not only true of religion; it might be true of culture. This is why it is actually very

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[10] Wilfred Cantwell Smith, The Meaning and End of Religion (Minneapolis: Fortress Press, 1991).

difficult to give a serious account of what happens when someone converts; it involves changing the scale.

Proselytizing has a past to it. In the Jewish experience, it constitutes betrayal. It is not changing the party, it is moving to the enemy camp. We cannot separate the issue of proselytization from its concrete, historical situation, which is a condition of war. My intuition is actually for very little state intervention with issues of proselytization, but I think we have to understand the deep distinctions in the kind of commitment that is made in conversion.

Cole Durham

Moshe Halberthal's distinction between choice and conversion resonates with me. Conversion really means changing your whole worldview. Perhaps it is a "meta-choice" as opposed to a choice. But what follows from that? I would argue that it requires even greater protection than normal choice. It is precisely the kind of fundamental, existential decision that human rights are not conflicted about. It is not about the manifestation of religion, but about religion's very core. I sense that Moshe would go in the opposite direction, suggesting that it does not deserve the normal protection for free choice.

Moshe Halbertal

I didn't mean that. In some ways, I meant to support what Gerhard Robbers said previously about the special needs of minority cultures. He was speaking about preservation of identity. How do you preserve identity but also protect the right to choose? You might need a special balance when there is a strong and dominant majority with enormous advantages in terms of persuasion. The balance might depend on historical factors of persecution or coercion. That is what is being implicated by the distinction that I drew.

[the importance of individual rights to protect against domination: right of exit, right to convert]

David Little

I would like to put in a special plea for rights discourse in addressing these issues. Here, I take issue with some of what Ruth Gavison has said in the previous session.

I am impressed that more groups seem to be coming to informal agreements about the appropriate degree of conversion, persuasion, and so forth in different cultural settings. These are "nonlegal," "non-human rights" agreements that attempt to respond to the sensitivities that we have been discussing. An example is a new code of ethics worked out recently by a large number of American missionaries in Russia.[11] I think such experiments are important and should continue.

Nevertheless, the rights discourse retains its great significance. It is important to recall that the rights struggle and discourse have emerged from situations of communal domination. We don't have to rehearse the history of fascism to recall how closely linked human rights are to the history of one community imposing its values on another and refusing it the possibility of exit. Regardless of their philosophical perspective, people in many cultures come to the belief that individuals must be given a claim of right against tyrannical groups or governments. You can't torture or enslave people because of a communal interest. This helps to explain the force of the rights language.

If that is true, it seems to me that we need to continue to think about the fallacies or flaws of communal domination. I was very moved by Bernard Sabella's comments in the last session about living as a minority in Palestine. You are unable to assume the rights of full, equal citizenship by virtue of your minority status. Bernard suggested that this situation today is a reality for many minorities. There isn't much that can be done. I'm curious how you reconcile the rights of the individual with communal domination.

Exclusion of minorities has a negative effect on many levels. At the social level alone, it prevents people from achieving full citizenship. At the political level, it is extremely destructive. Take the example of Sri Lanka. The *Sinhala* majority has been using the arguments of continuity and tradition to prosecute its war against the *Tamils*. They see the *Tamils* as a threat from the outside, from Southern India. Therefore, they argue, we must be strong and use the majoritarian democratic system to assert dominant ethnic,

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[11] See, Proselytism and Orthodoxy in Russia: the New War for Souls (John Witte, Jr. & Michael Bourdeaux, eds. 1999).

linguistic, and religious traditions. The *Tamil* community inherits the inequalities in terms of lesser citizenship and participation in political and legal life. That leads to ongoing, insuperable conflict of the kind that currently exists in that society.

We should not lose sight of the rights emphasis, including the rights of exit and equal treatment—particularly as concerns access to public and political opportunities. Such rights are often a critical feature of protection against the insidious notions of communal domination.

Durgham Maraee

I will take David Little's argument even further. For me, the question is whether it is justified in the name of a collective right of cultural survival to impose restrictions on individual rights. My answer is "absolutely not." There is no justification for restrictions. First, I agree with David's argument that liberty of the individual in the face of communal oppression is at the core of the human rights corpus. Secondly, I am not convinced that cultural survival alone is a worthy value. I understand that culture is important, and that cultural context is important for the individual to function. But I don't understand why any specific culture has a strong claim for survival. It is a free market. Fine if a belief and related community survives; equally so if it does not. That applies to culture, religion, nation, ethnicity and so on.

I would indeed encourage inter-marriage as an effective way to break social and cultural barriers. The system in Israel and many Islamic countries is designed to preserve these social boundaries. Usually it is designed for the benefit of the majority, so, in my view, it should be abolished. In Israel, there are various mechanisms which are designed to preserve the demographic position of the majority—most importantly, the right of return which is given to Jews, but not to Arabs.

I can see that there might be some circumstances when social peace is at serious risk as a result of proselytization. In these exceptional circumstances, I can understand the need for some form of restrictive legislation.

Ruth Gavison

Clearly, I agree with what David Little and Durgham Maraee said about the power of individual rights versus collective domination. It is interesting that in a society in which there is a group conflict, for instance Israel and Palestine, the group that uses individual rights rhetoric is usually the group whose group rights are violated.

Moshe Halbertal

There is no free market of culture. It is all a myth. What you have are different national states and societies seeking to create homogenous societies through education, migration and other interventions. Once they have succeeded, they say the public sphere is free and open, which works against the minority. That is why we have to think in terms of protection of the minority culture. With language, for example, you cannot simply leave it to the free market. There are languages that were disadvantaged after a majority created linguistic homogeneity.

Cole Durham

I have the sense that the international instruments are sensitive to this issue of group vs. individual rights in various ways. They make a balancing possible. As I understand the discussion, those arguing against proselytizing are evoking communal authority, power and legitimacy. I am troubled by that, particularly where the state is involved.

I am sensitive to the historical setting, which makes a difference. The coercive context of imperialism or the opposition of powerful forces, each of which has a destructive effect on culture—as in Sudan—should affect our judgment. Where force is used, there may be a real problem. I say "may" because I'm not sure how it works out in each situation. I've thought a lot about the Russian charge—"We have the right to be left alone." We have been hearing that for ten years, and I suspect nothing has changed. It makes one skeptical about the genuineness of their arguments.

I understand the questions about the coercive role of family, but I also think there are good empirical reasons to believe that families will do their best to give their children the best life they

can imagine. Obviously, different families are going to be different, but the family is very important, and, in general, better than other imaginable alternatives.

As we try to reach a balance between the individual and the group, I think we all recognize that at some point the individual must have the right to choose. However we structure these rules and whatever we should be sensitive to, we don't ultimately want to abolish the right of the individual to find out about other ways of life and to be able to choose them.

Henry Steiner

The human rights corpus is full of tensions between individual rights and empowered groups, though it is, in fact, weighted enormously toward the individual. There is barely a reference to the group. Article 27 of the ICCPR is the most explicit. It says that every member of a religious, ethnic, or other community has the right to preserve the culture of that community in communion with others. Obviously, unless you are speaking to yourself, you've got to be in communion with others. But the vital characteristic of Article 27 is that it is not phrased as a group right but rather as a right of each member. This it likely does for some basic reasons, including not only state-perceived threats to their sovereignty if groups within them are collectively empowered, but more important, the fear of grave coercion of group members that lies just behind the text. As Moshe Halbertal and others have suggested, this may be a naïve and inadequate view of history and culture, of the deep and essential bonds between individuals and different kinds of groups or communities, all of which bear on the complex issues of individual identity.

I think there are strong arguments for group cohesion and separate group organizations and competencies expressed by law. I agree, for example, with much of what David Little said about the power of communities and family. That power is awesome, even leaving the state itself out. Others here have also talked of the family in its ideal and, often, well-founded sense. It is difficult to imagine life without the family as a basic social and human unit.

On the other hand, we know the family to be the seat of substantial abuse. This other side of the family is a terrifying one. The state has to intervene to prevent everything from incest and

beatings to psychological abuse. We are aware of religious tyranny within the family that has been demanding and life threatening. Earlier discussions have referred to Christian and Muslim notions of treating the apostate child as dead. These terrible forms of control may lacerate the individual for life.

I don't mean to deny the need for the family and for so much that is essential in family life. I mean only to say it is a complex phenomenon which has its very destructive as well as beneficent, nurturing and essential sides. We should be aware of both when we talk of the great power of the family in giving us our starts in life and shaping our beliefs on such fundamental matters as religion.

All this, in my view, is relevant to our views of proselytization. I agree with Cole Durham's observation that we must recognize the capacity of human beings to change themselves. We are not forever what we are born. Underlying the liberal human rights vision is the belief that individuals have the capacity for evolution, growth and change. Ossification of culture and surrender of believers to authoritarian control may well be the consequence of legal protection against outside influences that states may grant to a given belief community.

Surely the arguments for a right to proselytize, to try to persuade, are radically distinct from arguments for consumer choice in commerce or individual choice in careers. But we are aware that people hold political beliefs that may be as deep as religious faiths. Those beliefs may be structured by deep intuitions about life and society, about stability and change, about one or another system of ethical beliefs and our mission in life. Nonetheless human rights and many states protect political advocacy to change these beliefs. Such openness to advocacy and change is the very cornerstone of democracy. These views require fuller consideration, but all the more reason, I would say, to give individuals the capacity to rethink who they are and what kind of a world or belief or cosmology they wish to live in and with.

Session Five:
Case Study: Religion and State in Israel and Palestine

Henry Steiner (chair)

We have discussed the role of religion in different states, and religion's role in culture. This session will focus on Israel and Palestine. Roy Mottahedeh has raised some of the underlying issues that we might here revisit: If religion is embedded in culture, is all of culture religion? If culture consists also of other distinct traditions, beliefs, language and indeed cuisine, can we unpack this notion of culture so that religion becomes a vital ingredient, discrete even if related to much else?

When we talk of a state with clear links to religious aspects of the dominant culture, as in Israel—or, potentially in Palestine—do we understand those links as inhibiting freedom of religion itself? Do they generally or necessarily curtail the possibilities of religious minorities? Or would such minorities be as likely to suffer from specific disadvantages? In a previous session, Bernard Sabella mentioned that a Christian could never be elected president of Palestine, and Nur Vergin added that the same was true for a Christian or Jew in Turkey. How different is it in the United States?

It intrigues me that Israel—a democratic state, in principle—has so many symbols and official practices linking the state to Jews, and Jewish religion and culture. Is this in itself a form of linkage of state and religion? Or is it rather a linkage of state and culture, of which religion is an important ingredient, but nonetheless with the effect that minorities within the state are being denied some degree of freedom of religion?

Or is Israel no different from many European states, which identified themselves through Christian symbols for many centuries? Is there something distinctive in the complex set of arrangements in Israel, which, of course, stop shy of the more pervasive bond between state and religion in countries like Iran or Saudi Arabia?

Ruth Gavison

To the two categories that already are on the table—religion and culture—we should add the famously problematic category of

nationalism. In Israel there is a combination of an ethnic, cultural and religious nationalistic unity of Judaism.

It is interesting to note that on a formal, legal level Israel does not have an established religion. There is no Israeli law that gives Judaism, as such, a preferred situation. The *millet* system, rather, accommodates a plurality of religions without giving any one among them any privilege. Structurally, then, Israel is a multi-religious country. But such a conclusion is obviously superficial and wrong, because many of the state symbols are both national and religious, and religious institutions are central national institutions in Israel financed by the state. Clearly, there is an institutional infrastructure supporting Judaism.

The main problem for non-Jews in Israel is not a lack of religious autonomy. More problematic are issues such as cultural homogeneity, language, land dispossession, resources control, and the exclusion of Arabs from the decision-making mechanisms within Israel. In Israel, for example, Jews who are not Israeli citizens have considerable decision-making input, yet Arabs who are Israeli citizens are excluded. The concerns, issues, interests and culture of the Arabs are largely absent from Israeli public debate—despite the fact that the Arabs constitute almost 20% of the population. In this sense, Israel is an extremely nationalist Jewish culture.

This was not always so. At one time, the Israeli elites were secularists. Some of them were even anti-clerical. Today, this has changed. Zionist religious groups and traditional—not necessarily Zionist—religious groups, make up the majority of the Israeli-Jewish leadership.

Henry Steiner

The argument that there is not a question of freedom of religion in Israel seems counter-intuitive. Extensive authority is delegated to thirteen different religious communities that have exclusive control over their members on varying family issues. Does that not raise serious issues of religious freedom? The position seems ambiguous. Israel is (let us assume) totally even-handed: each religious community can govern itself; no tyranny of the state over any community. Yet, does this system not amount to a denial of individual choice and equal protection, since each community is restricted to its own law,

each individual is restricted to the relevant community and there is no national, uniform Israeli law? Is that freedom of religion, or denial of freedom of religion?

Bernard Sabella
Let me clarify the *millet* system. Even in the Christian communities, the religious courts are not so powerful that the individual Christian would not have any choice. If I were a Roman Catholic and wished to divorce my wife, I could change my denomination to Greek Orthodox or, in the last resort, become a Muslim. So, I have a choice. It is not a hermetically-sealed system.

I am concerned that the system, as it stands in many Arab countries, is based too narrowly on the beneficence of the ruler. Syria and Jordan are good examples. That Arafat comes to midnight mass in Bethlehem is great. But that is no guarantee for me as a Christian, or for him as a Muslim, that the system is workable. Religious tolerance that rests on the predilection of one person is too insecure. Arab countries need a system to ensure the inclusion of diverse religious and secular elements.

Durgham Maraee
I take issue with Ruth Gavison's characterization of the personal law regime in Israel—or in Muslim countries for that matter—as amounting to a system of autonomy. It is a system for segregation and preservation of communal boundaries. In Israel, the Muslim community, for example, does not control the appointment of judges. And there is great dissatisfaction with the performance of the judges who are appointed by the state. The Muslim community does not control the law that is applied in these courts. In theory, it is Islamic law. But we do not have the mechanisms or the power to influence what law is actually being applied.

Of course, this does not mean that the community has no interest in this system. Both the Jews and Arabs in Israel are interested in the segregation it imposes—in strengthening and preserving it. Here is where I agree with Ruth that the fundamental problem in Israel is nationalism. But regrettably, the focus of discussion is almost always exclusively on the religious dimensions and related

intra-Jewish problems, and only sporadically are the implications for the Arabs from the Jewish character of the state considered.

First, we need a dialogue about the ways in which the Jewish character of the state poses problems for the Arab minority, the types of problems, and how they can be solved. We need Israeli-Jewish members of the legal academic community to start raising these questions, and we need Israeli-Arabs to join the legal academic community. We also need to raise public consciousness.

Second, in Israel we must push the notions of equality. What are the limits of achieving equality in terms of education or job opportunities? Will it be possible, at some stage, to redefine Israel as a state which recognizes all of its citizens? This would in turn require redefining the symbols of the state, the national anthem, and so on and so forth.

Henry Steiner

But do you distinguish Israel from European countries, which frequently will have St. George and the cross or other Christian symbols identified with their nationalism? Or which perhaps require that the monarch be a member of a particular church?

Durgham Maraee

To the extent that those symbols are exclusionary, and there is a substantial group in the state which is not attached to the symbols, I would not distinguish Israel. Where the flag or the national anthem is a message of exclusion, there should be reform. When the national anthem in Israel is being sung, I cannot sing it, because it speaks about Jews, it does not speak about Israelis. So Israel must become a state of all its citizens, rather than a Jewish state.

Khalid Mustafa

Whenever many of the world religions are represented, the only fair solution for all citizens is a secular constitution. There are several European examples and the American example. But in one form or another, only a secular constitution that accommodates all groups is the solution.

Bernard Sabella
How would Muslims in Palestine, who are 98% of the population, respond to that? For me, as a Christian, I would welcome a secular constitution. But if I were a Muslim, I might say, "Why should I adopt a secular constitution in order to please the two percent?"

Khalid Mustafa
Because you want peace and harmony in your society. That example is extreme, but in our society, we have civil war. For you, the potential is there. Maybe your organization is non-confrontational, but who knows in years to come?

Henry Steiner
Does "secular" mean total innocence of all religious imposition identified with the state?

Gerhard Robbers
The secular state is at first blush a convincing way of getting out of the conundrum. But you will never have a really secular state if you define secularism—as you have here—as total innocence towards religion. The United States demonstrates that statehood is never completely innocent of religion. You can get rid of a flag or certain signs, perhaps, but you will never get rid of the symbolism of language and law.

I would ask whether the other way out of this dilemma is the neutral state? Rather than keep religions out, formally include all of them in the sphere of political life. This is a much more difficult—and perhaps dangerous—task.

Moshe Halbertal
The way that Henry Steiner presented secularism suggested moving beyond the sphere of freedom of religion. Maybe we should consider the general sphere of culture: secularism is, after all, a form of culture. So, if the state is a mechanism for promoting a particular culture—mainly through its centralized education system—then every state uses its resources to reproduce a particular culture. If it claims it has a neutral education, it is either naïve or hypocritical. The question is then the following: does the idea of the state as reproducer of culture

run counter to the notion either of other cultural rights or of individual rights?

I don't believe that claiming the neutrality of the state is a solution. So, what are the alternatives? First, we must guarantee the rights of those who don't belong to the dominant culture. Second, minority cultures must be provided with a cultural mechanism by which to reproduce their culture through the agencies and resources of that state. The third possibility—at least in Israel—is to enable the minority culture to have a sovereign state of its own—Palestine—to reproduce their national culture the way we do ours. The way I see it, a state with a dominant culture would violate the cultural rights or individual rights of others where, a) it does not allow resources for the maintenance of the other culture in the public sphere, or b) it does not allow that culture the means of reproduction that it has for its own culture.

Ruth Gavison

The solution of separation of church and state is advocated only by secular Jews. The Jews who advocate separation want an end to theocracy—control by religious dogma, religious establishment, and religious leaders. But the Israeli enterprise is still a Jewish enterprise. The Israeli state is built on a particularistic notion. It is not a univeralist state. So, in this sense, the Jewish state poses a basic contradiction for its non-Jewish citizens. Unless massive demographic, cultural, or political changes appear, this contradiction will persist.

For non-Jewish Israeli citizens there is systemic discrimination and inequality. Some of the systemic inequality can be mitigated and will be mitigated. But many of the systemic, cultural problems are going to remain as long as Israel remains a place that uses Hebrew as a language; uses Jewish holy days as the defining holy days; uses Jewish analogies and proverbs as the language; has legal opinions written by mostly Jewish judges who invoke their Jewish culture in various ways; and where the debate is about both the relevance and scope of *halachic* sources within the state.

The "Jewish" nature of the state of Israel raises not just cultural rights, but the right to political and national self-determination. It is a political right to create a space which provides self-determination to a particular nation. The historic General Assembly resolution

recognized that in Palestine there are two nations, and there should be two states because both nations are entitled to self-determination. If a state is going to be a Jewish state, in this sense, it was perhaps inevitable that it would have Jewish cultural expression. Its day of independence, however, is a problem for the Arabs, because it is their day of disaster. But I am not sure how it can be changed without eradicating the nature of Israel and really making it a different kind of a society from the one it was meant to be.

David Little

I think we need to refer back to paragraph 9 of General Comment No. 22 of the UN Human Rights Committee on Article 18 of the ICCPR. It says in effect that state religion or establishment of some sort is tolerable so long as that system does not actively discriminate against, or give special preference to, one religion or another.

One has to continue to raise questions about the privilege of Judaism in Israel, its establishment in an informal sense. One can say that there are reasons why a dominant culture continues to discriminate against minorities, but even when you state the case you are still left with the problem—which I think is enunciated so sharply in paragraph nine.

Rather than think about a "secular" state, I would recommend that the term *impartiality* rather than *neutrality* be substituted. Ideally, a state should be sensitive to religious variance, to the inequities in the social system that may occur, and give special consideration to those things; yet the state is still impartial in the sense that it does not offend against paragraph nine. It does not give special economic and political opportunities and privileges to one group over others.

The Sri Lankan case provides an interesting example. The proposal to end the conflict is this: the northern and eastern provinces of the country would be turned over to the *Tamil* minority for autonomous control, although not total control. The *Tamil* people would feel that they have some space where their political, economic, and cultural rights are able to be exercised, while remaining part of a larger, federal state system. Still there are problems. One problem is within the proposed autonomy arrangement; there are non-*Tamil* groups who feel that their own rights may suffer in a *Tamil* political arrangement. What will be the guarantee for those minorities within a

new *Tamil* section, what will be the guarantees of paragraph nine for them? The other problem is what will happen in the new arrangement for *Tamils* living in the non-*Tamil* autonomous areas. Nonetheless, this arrangement shows both the possibility of recognizing ethno-national, linguistic, and religious particularity and giving real expression to the human rights that attach therein, while ensuring non-discrimination as paragraph nine so sharply underscores.

Henry Steiner
Is paragraph 9 of General Comment 22 at all relevant to the Sri Lankan situation?

David Little
While it is true that not every single person in Sri Lanka invokes the Buddhist tradition, it is also true that in the formative period, that is, in the1950's when the *Sinhala* parties were coming to power, the invocation of Buddhist legitimacy was indispensable to their cause, and the monastic traditions played a disproportionately important role in helping to legitimate and mobilize. Religion, nationality and language were deeply intertwined. I agree it does not make much sense to single out religion. On the other hand, religion is factored into the equation, and it is not an insignificant question for the *Tamils* that the constitution states that Buddhism is the foremost religion of Sri Lanka.

Annex I:
Terms Used in Course of Discussion

Abu Hanif	Muslim legal and religious scholar of the eighth century.
Al Jihad	Small Islamic group based in Egypt and engaged in armed attacks against high level government officials.
Ashkenazi Jews	Jews who trace their traditions to Northern Europe (from the Hebrew word for Germany). Ashkenazi Jews dominate elite positions in Israeli society.
Baha'i	Religious faith that originated in Iran in the 1840s as a reformist movement within Shi'a Islam. Currently number 300,000 to 350,000 in Iran and denied status as a legitimate religious group.
Halacha	Jewish law.
Hamas	"Islamic resistance movement" concentrated in the Gaza strip, formed in 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood.
Hizbullah (Hezbollah)	"Party of God," refers primarily to Lebanese-based armed resistance. Also movement allied with and supported by Iran.
Jihad	An Arabic word literally meaning "combat" or "striving." Considered a mandatory and fundamental principle of Islam, although its interpretation varies widely. Two meanings of Jihad are: a personal, internal struggle, and an external

struggle against aggressors. Jihad is also sometimes used to mean holy war in Islam.

Kahane, Meir	Founder, leader of and, after his death, inspiration to anti-Arab political movements in Israel.
Kemalism	Political ideology of Turkish Republic, characterized by democratic secularism. Named after Mustafa Kemal ("Ataturk"), founder of the Republic in 1923, who died in 1938.
Knesset	Israeli Parliament.
Millet System	A system of relative legal autonomy accorded to certain non-Muslim minorities, originally instituted by the Ottoman Empire and later adapted by colonial powers like Britain to apply to all religious communities, primarily in matters of family law.
Mitzvah	A duty, or obligation in Jewish law.
Muslim Brotherhood	A political organization founded in Egypt in 1928 to advocate Islamic values. Operated as an underground political organization during the 1950s and emerged in Egypt and Jordan in the 1980s to compete in legislative elections.
Phalangists	Armed Lebanese Christian movement.
Sephardic Jews	Jews who trace their traditions to Spain and who lived primarily in the Arab world and southern Europe until the creation of Israel (from the Hebrew word for Spain).

Shas	Israeli political party characterized as "extreme orthodox." Founded in 1984 and headed by Rabbi Ovadiah Yoseph, it is supported primarily by Sephardic Jews.
Shi'ah Islam	Principal minority movement in Islam, arising out of a split between Ali, the son-in law of the prophet Mohammed and the Umayyad dynasty (661-750). Official religion of Iran.
Sinhala	Majority ethnic group in Sri Lanka, primarily Buddhist.
Sunni Islam	Majority movement in Islam, originating in the tenth Century.
Taliban	Islamic political movement that controlled most of Afghanistan from 1998 to 2001; composed of ethnic Pashtun, one of the principal communities in Afghanistan.
Tamil	One of the principal ethnic and linguistic groups in South Asia; minority community in Sri Lanka, primarily Hindu.
Welfare Party	Turkish Islamic political party that came to power in 1995. Banned in 1997.

Annex II:
The Participants

All biographical information is as of the time of the roundtable unless otherwise noted.

Nancy Bakir heads the human rights bureau in the Office of the Prime Minister of Jordan.

Joseph (Yossi) David specializes in Halakha in the Jewish Thought Department of Hebrew University, where he was a Ph.D. student in philosophy and Jewish Thought. He is also a research fellow at the Israel Democracy Institute.

W. Cole Durham, Jr. is a University Professor of Law and Religion Studies at the Law School of Brigham Young University. He is a Member of the Advisory Panel on Freedom of Religion, Organization for Security and Co-operation in Europe (OSCE) and the Editor (with Noel Reynolds) of *Religious Liberty in Western Thought* (1996).

Alain Garay is a lawyer in private practice in France. He has represented petitioners in major religious rights cases, challenging state practice by Greece, Bulgaria, Austria and France before the European Court of Human Rights and other tribunals.

Ruth Gavison is the Haim H. Cohn Professor of Human Rights at Hebrew University, and a senior fellow at the Israel Democracy Institute. Her publications include Israel: A Jewish and Democratic State (1999, Hebrew), and State and Religion: Separation and Privatization (1993, Hebrew). Her most recent book (co-authored with Rav Medan) is *Foundations to a New Covenant between Religious and Secural Jews in Israel* (2003, Hebrew).

Moshe Halbertal teaches Jewish Thought and Philosophy at Hebrew University in Jerusalem, and is a fellow at the Hartman Institute. He has published several books, including (co-authored with Avishai Margalit) *Idolatry* (1992), and *People of the Book* (1997).

Mordechai Kremnitzer is Ivan C. Rand Professor of Criminal Law at Hebrew University in Jerusalem, and was formerly Dean of the Law Faculty. His publications, some co-authored, include *Judicial Activism—For and Against* (1999, Hebrew), *Incitement, Not Sedition* (1997, Hebrew), and *Basic Law-The Army* (2000, Hebrew).

David Little is T J. Dermot Dunphy Professor of the Practice in Religion, Ethnicity, and International Conflict at Harvard Divinity School and Faculty Associate at the Weatherhead Center for International Affairs. He has published extensively in the field of religion, including (co-authored with Scott Hibbard) *Islamic Activism and U.S. Foreign Policy* (1997).

Durgham Nimir Mara'ee was, at the time of the Roundtable, a graduate student at Harvard Law School, writing a doctoral thesis on religion, state, and minorities with particular attention to Israeli Palestinians. He also served as a legal advisor to the Palestinian negotiating team in Israeli-Palestinian Negotiations. He has now received his S.J.D. degree.

Roy Mottahedeh is Gurney Professor of History, and chair of the Committee on Islamic Studies in the Center for Middle Eastern Studies at Harvard University. He is the author of *Loyalty and Leadership in an Early Islamic Society* (1980), and *Mantle of the Prophet: Religion and Politics in Iran* (1985).

Khalid Al Mubarak Mustafa was, at the time of the Roundtable, a public policy scholar at the Woodrow Wilson Institute in Washington, D.C. He was formerly Associate Professor at the Universities of Khartoum (Sudan) and Kuwait. He is a founding member of Amnesty International in Sudan and author of *Religion and Human Rights in Sudan* (1992).

Charalambos Papastathis is a professor at the Faculty of Law of Aristotle University in Thessaloniki, Greece, where he specializes in Ecclesiastic law.

Peter Rosenblum was at the time of the Roundtable Associate Director of the Harvard Law School Human Rights Program. He was formerly Program Director for the International Human Rights Law Group and Human Rights Officer for the United Nations Centre for Human Rights. Rosenblum is now Associate Clinical Professor of Human Rights Law at Columbia Law School.

Gerhard Robbers is Professor for Public Law at the University of Trier, Germany, and Director of the Institute for European Constitutional Law. He is also a judge of the administrative court of appeals. He has written *Staat und Religion* (2000) and has edited *State and Church in the European Union* (1997).

Bernard Sabella is Associate Professor of Sociology at Bethlehem University, West Bank. He heads the Department of Service to Palestinian Refugees for the Middle East Council of Churches. He has co-authored *A Date with Democracy: Palestinians on Society and Politics* (1996).

Henry Steiner is Jeremiah Smith, Jr. Professor of Law at Harvard Law School. He is the founder and director of the Human Rights Program, has written on a range of human rights topics, and taught and lectured on human rights in over 20 countries.

Mark Tushnet is Carmack Waterhouse Professor of Constitutional Law at Georgetown University, United States. He is the author of *Taking the Constitution Away from the Courts* (1999). He has co-authored the course book, *Comparative Constitutional Law* (1999). His most recent book is *The New Constitutional* Order (2003).

Nur Vergin is Professor of Political Sociology in the Faculty of Political Sciences at the University of Istanbul, Turkey, where she has pursued research on *raison d'etat* in Turkey.