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SPHERE SOVEREIGNTY OF RELIGIOUS INSTITUTIONS:

A CONTEMPORARY CALVINISTIC THEORY OF CHURCH-STATE RELATIONS

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The legal systems of the world represent a rich variety of constitutional arrangements pertinent to church-state relations. Classification of those arrangement in manageable categories is in itself no easy task.

Vernon van Dyke, in his seminal work on *Human Rights, Ethnicity and Discrimination*[1] distinguished between systems where religious communities are afforded representation in government, those where the government supports religious activities (recognizing, for example, the right of religious institutions to take care of education, or protecting religious communities against proselytization), theocracies (where religion is the central feature of political life), and systems that recognize the autonomy of religious groups.

Paul Mojzes distinguished, as a "theoretical framework" for various arrangements with a distinctly European origin and pertaining to religious human rights,

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1 *Vernen van Dyke*, Human Rights, Ethnicity and Discrimination, 53-77 (1985).

(a) ecclesiastical absolutism, where one particular religion is given preferential treatment;

(b) religious toleration, where the state is benign to all religions but affords preference to a particular dominant one;

(c) secular absolutism, where all religions are rejected by the state in favour of an a-religious world view; and

(d) pluralistic liberty, where the state is indifferent and neutral toward religion and non-religion alike.[2]

Dinah Shelton and Alexandre Kiss classified different arrangements as to the relationship between state and religion with a view to

(a) state control over religion;

(b) state neutrality toward religion;

(c) theocratic political perceptions, where a dominant religion controls the religious and secular sphere;

(d) state hostility toward religion; and

(e) division of authority between state and church by religious institutions being afforded autonomous control over certain activities.[3]

Cole Durham designed perhaps the most elaborate "comparative model for analysing religious liberty". Based on "threshold conditions for religious liberty" (minimal pluralism, economic stability, political legitimacy, and respect for the rights of those with different beliefs), he distinguished on a sliding scale between

(a) absolute theocracies;

(b) systems that afford recognition to an established church;

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2 *Paul Mojzes*, Religious Human Rights in Post-Communist Balkan Countries, in: Religious Human Rights in Global Perspective: Legal Perspectives 263, at 266-69 (eds.) *Johan D. van der Vyver/John Witte Jr.* (1996).

3 *Dinah Shelton/Alexandre Kiss*, A Draft Model Law on Freedom of Religion, With Commentary, in: Religious Human Rights in Global Perspective, supra note 2, 559, at 578.

(c) those shying away from establishment but which nevertheless entail state endorsement of a particular church;

(d) cooperationist regimes, where the state, without granting a special status to dominant churches, cooperate closely with religious institutions in various ways;

(e) separationist regimes, which insist on a more rigid separation of church and state;

(f) instances of inadvertent insensitivity, where the political authorities, though not inspired by deliberate anti-religious sentiments, remain unaware of the religious implications of their regulations; and

(g) cases where the repositories of political power display hostility toward religion and embark upon overt persecution of particularly smaller religions.[4]

These classifications reveal in themselves the complicated intertwinement of church and state, on the one hand, and religion and law, on the other – without perhaps adequate differentiation, at least for purposes of the present survey, between the institutional relationships (church and state) and the confusion of functional modalities in political societies (religion and law). Admittedly, the one cannot be separated from the other. State control of the free exercise of religion will evidently also have an impact on the sovereign competence of church institutions to perform their appropriate functions in the political community. The South African Constitution, for example, has a free exercise but not an establishment clause,[5] but it has been decided that endorsement of a religion or religious belief by the state could contravene the free exercise guarantee if, namely, the state should coerce people, directly or indirectly, to observe the practices of a particular religion.[6]

From the perspective of church autonomy, the institutions of church and state, rather than the modalities of religion and law, is of special importance, and here the extreme positions on the peripheral of the institutional divide are represented by the American notion of the impermeable wall of

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4 *Cole Durham*, Perspectives on Religious Liberty: A Comparative Framework, in: Religious Human Rights in Global Perspective, supra note 2, 1, at 12-25.

5 See sec. 15(1) of the Republic of South Africa Constitution Act, Act 108 of 1996 (guaranteeing freedom of religion, belief and opinion).

6 S. v. Lawrence; S. v. Negal; S. v. Solberg, 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC), par. 104.

separation between church and state, on the one hand, and establishment of a preferred ecclesiastical institution, on the other; and somewhere in between, socio-political thought has come up with the scholastic notion of subsidiarity and the Calvinistic theory of sphere sovereignty. The Islamic doctrine proclaiming the identity of law and religion is deliberately excluded from the proposed categories because Islam does not profess to manifest itself in a formally constituted institution with a particular organizational structure. Islam is a way of life, not a church, and it is founded on a normative decree in which religion and law blend into a single conglomerate. In Islam the question as to the autonomy of the church does not arise, and in Muslim states founded on Shari'a religious liberty is an anachronism.[7]

I. JOHN CALVIN ON CHURCH AND STATE

The social theory of John Calvin (1509-1564) was not founded on the principle of sphere sovereignty of the church vis-à-vis the exercise of governmental and legislative powers by the repositories of political authority. Calvin's jurisprudence represented a synthesis between the concept of natural law of Greek philosophy and certain Biblical directives of the Old Testament.[8] Natural law to him signified norms of what the law ought to be – he spoke of the "moral law" – and he derived the substance of those norms from the Mosaic laws. Not all the laws of Moses, though, were seen by him as setting universal standards. Calvin classified all the laws of God promulgated by Moses into the categories of moral, ceremonial and juridical laws.[9] Ceremonial laws were of temporary significance only, and founded on the very special condition and circumstances pertaining to the

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7 Abdullahi An-Na'im pointed out that constitutions which elevate Shari'a as a source of law in effect sanction discrimination against religious minorities. *Abdulllahi A. An-Na'im*, Religious Minorities under Islamic Law and the Limits of Cultural Relativism, 9 Hum. Rts. Q. 1, at 1 (1987). Ann Mayer compared the status in Islamic countries of non-Muslims who have not accepted the official state ideology with that of a non-communist [in bygone days] in a communist country. *Ann Elizabeth Mayer*, Law and Religion in the Muslim Middle East, 35 Am. J. Comp. L. 127, at 130 (1987).

8 See, for example, Institutio Christianae Religionis (1568) (translated by John Allen) 4.20.16. (1813): "Now, as it is certain that the law of God, which we call the moral law, is no other than a declaration of natural law, and of that conscience which has been engraved by God on the minds of men, the whole rule of this enquiry, of which we now speak, is prescribed in it."

9 *Id*., at 4.20.4.

Jews at the time of their promulgation.[10] Juridical laws, on the other hand, are of general application and founded on universal rules of equity (*aequitas*) and justice (*iustitia*): they may indeed have a variable substance according to the needs and circumstances of different political communities, but the principle of equity and justice embodied in those laws must at all times, in all places and under all circumstances remain intact.[11] The moral law, "the true and eternal rule of righteousness",[12] must be the scope, and rule, and end of all juridical laws.[13]

In his *Commentaries on the Decalogue*,[14] Calvin extracted from the Ten Commandments juridical principles which in his opinion ought to be embodied in every system of positive law – except, that is, the Fourth and Tenth Commandments dealing, respectively, with observance of the Sabbath and with human desires.[15] Calvin argued that the honouring of the Sabbath, as a particular "ceremonial" decree, had been abrogated by the coming of Jesus Christ;[16] and as to the Tenth Commandment, he maintained that the law concerns itself with external or outward acts only and not with a person's inner desires.

The important point here is that the First Table of the Decalogue, which governs the relationships between God and the human person, was also seen by Calvin as embracing, in its juridical application, norms of the moral law that ought to be enforced by the state. Not only, therefore, was the state under a religiously-based obligation to impose punishment for every kind of rebellion against parental power, and for manslaughter, infidelity, theft, or false testimony – as dictated by the relevant commandments (numbers five through nine) of the Second Table of the Decalogue, it was also charged with promoting the Christian faith, with placing a ban on idolatry, and with meeting out punishment for blasphemy and perjury. The First

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10 Ibid.; and see also *Id*., at 4.20.16.

11 *Id*., at 4.20.4; 4.20.15; and see *Jochen Bohn*, Der Mensch im calvinistischen Staat, 61 (1995).

12 Institutio Christianae Religionis, supra note 8, at 4.20.4.

13 *Id*., at 4.20.16.

14 See in particular *id*., at 2.8.

15 *Id*., at 2.8.6.

16 *Id*., at 2.8.31; and see also Calvin's Tracts and Treaties on the Doctrine and Worship of the Church (translated by Henry Beveridge), 61-62 (1949).

Commandment in its juridical application, according to Calvin, involves a duty on the part of the state to sanction punishment for all forms of heresy![17]

These Calvinistic sentiments were echoed in Article 36 of the *Belgic Confession of Faith*, which proclaims that God "has placed the sword in the hands of the government, to punish evil people and protect the good". It then goes on to state:

> And the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere, to the end that God may be honoured and served by everyone, as He requires in his Word.[18]

In 1898, a leading figure in the Calvinist community of The Netherlands, Abraham Kuyper (1837-1920), was invited to deliver a series of lectures (in the Stone lecturing series) on Calvinism at Princeton University in the United States.[19] In his *Stone Lectures*, Kuyper praised the American constitutional guarantees pertaining to "freedom of public worship and the juxtaposition of church and state".[20] However, he had much to explain. If – as proclaimed by John Calvin – the state had to take upon itself the responsibility of separating religious truths from falsehood, was that not precisely the basis on which the persecution of the faithful during the early history of Christianity and of Protestants at the time of the Reformation could be legitimized? In the *Stone Lectures*, Kuyper emphasized the practice of the free exercise of religion in Calvinistic countries; and this empirical tradition, rather than the theoretical assumptions to be found in Calvin's

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17 See his letter of 9 Sept. 1553 to Antistes Sulzer of Basel, reprinted in 14 Ioannis Calvini Opera Quae Supersuntomnia, 1793 (at 614); and for a German translation of the letter, see *Rudolf Schwarz*, 2 Johannes Calvin's Lebenswerke in seiner Briefen, 655 (1962).

18 Ecclesiarum Belgicarum Confessio, art. 36 (1516): "... Horum autem officium est, ut non modo curam gerant et pro conservanda politia excubent, verum etiam ut sacrum tueantur Ministerium, omnemque idololatriam, et adulterinum Dei cultum submoveant et evertant: regnum Antichristi diruant, Christi vero regnum promoveant, operamque dent, ut verbum Evangelii ubique praedicetur, quo Deus ab unoquoque, prout verbo suo exigit, honoretur et calatur."

19 *A. Kuyper*, Het Calvinisme: Zes Stone-Lezingen in October 1898 te Princeton, N.J. Gehouden.

20 *Id*., at 87.

Commentaries, represented the true spirit of Calvinism. That empirical tradition was encapsulated in a doctrine proclaiming the sovereignty of social entities – including church and state – within the enclave of their own internal sphere of functions.

II. THE DOCTRINE OF SPHERE SOVEREIGNTY

The Dutch expression "*souvereiniteit in eigen sfeer*" was first used in 1862 by a politician of The Netherlands, Guillaume Groen van Prinsterer (1801-1876), to designate the range of competencies of the church over against those of the state.[21] The idea itself, however, preceded this descriptive phrase by approximately 300 years. According to Herman Dooyeweerd, "the first modern formulation of the principle of internal sphere-sovereignty in the societal relationship" is to be found in a statement of the medieval Calvinistic jurist, John Althusius (1557-1638).[22] Althusius proclaimed that all distinct social entities are governed by their own laws, and that those laws differ in every instance according to the typical nature of the social institution concerned.[23]

In the 300 years that separated Althusius and Groen van Prinsterer, the concept of the internal sovereign authority of social entities surfaced from time to time, mostly in the ranks of Lutheran political scientists and by and large confined to church-state relations. Georg Friedrich Puchta (1798-1846), for example, spoke of the "*Selbstständigkeit*" (independence) of the church as "an institution alongside the state",[24] and of the church distinguishing itself "through the different nature of its essence".[25] Although this clearly indicated sphere sovereignty in church-state relations,[26] Puchta did not extend the principle to apply to other social entities.

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21 G. Groen van Prinsterer, Ter Nagedachtenis van Stahl, 30-31 (1862).

22 *Herman Dooyeweerd*, 3 A New Critique of Theoretical Thought (translated by David H. Freeman & H. de Jongste), 663 (1984); and see also *Dooyeweerd*, De Strijd om het Souvereiniteitsbegrip in de Moderne Rechts- en Staatsleer, 7-8 (1950).

23 *J. Althusius*, Politica Methodiae Digesta (3rd ed.) l.19. (at 7) (1614): "Propriae leges sunt cujusque consociationis peculiares, quibus illa regitur. Atque hae in singulis speciebus consociationis iliae atque diversae sunt, prout natura cujusque postulat."

24 *G.F. Puchta*, Cursus der Institutionen, l.l.14. (at 31) (6ed. by A.E. Rudorff, 1865).

25 (". . . durch die Ungleichartigkeit ihres Wesens.") *Id*., at 1.2.25. (at 65).

26 *J.D. Dengerink*, Critisch-Historisch Onderzoek naar de Sociologische Ontwikkeling der Beginsel der "Souvereiniteit in Eigen Kring" in de 19e en 20e Eeuw, 60 (1948).

Georg Beseler (1809-1888), again, insisted on "sovereign" legislative powers of local authorities,[27] which sovereignty he went on to define as "the power belonging to certain corporations to enact, in their own discretion, their own law (decrees, statutes, options) within the district governed by them or in any event in respect of their own affairs".[28]

Friedrich Julius Stahl (1802-1861), the man who had a decisive influence on Groen van Prinsterer, again confined sovereign powers in the strict sense to state and church only, proclaiming that these two institutions occupied places independent of one another,[29] that the church was "an institution of an altogether different kind",[30] and that "ecclesiastical authority . . . is to be strictly distinguished from secular authority".[31]

Groen van Prinsterer also referred to sphere sovereignty in the context of church-state relations only. He often spoke of "the independence of the state over against the church in consequence of its direct submission to God",[32] and defined the church as a community of faith with its own characteristics, of which a confession was an indispensable ingredient.[33] In one of his earlier

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27 *G. Beseler*, System des Gemeinen Deutschen Privatrechts, l.l.17 (at 49) (4ed., 1885) (claiming that the *ius particulare* of local and regional authorities does not originate from the central legislature or from custom, but stems "in dem zur Rechtserzeugung befugten Willen (der Autonomie) einer Corporation, welche sich ähnlich, wie die Gesetzgebung es thut, in einem bestimmten, die Rechtsregel constituierenden Act offenbar").

28 (". . . die gewissen Corporationen zustehende Befugnis, sich innerhalb des von ihnen beherrschten Kreises oder doch für ihre besonderen Angelegenheiten nach freiem Ermessen ihr eigenes Recht (Willküren, Statute, Beliebungen) zu setzen.") *Id*., at 1.2.1.1.B26. (at 76-77):

29 *F.J. Stahl*, Der Protestantismus als politisches Prinzip (2e Aufl.) 16 and 18 (1853).

30 ("... eine Institution ganz anderer Art.") *F.J. Stahl*, Die Kirchenverfassung nach Lehre und Recht der Protestanten (2e Aufl.) 72 (1862).

31 ("... das Kirchenregiment ... vom weltlichen Regiment strenge zu sondern [ist].") *Id*., at 13; and see also *id*., at 8, 47, and 184.

32 *G. Groen van Prinsterer*, Ongeloof en Revolutie (bewerkt door *H. Smitskamp*) 130 note 21 (1845/46) ("... de zelfstandigheid van den staat tegenover de kerk ten gevolge van eigen onmiddelijke onderwerping aan God"). This footnote was added to the original text in 1868.

33 *G. Groen van Prinsterer*, Het Recht der Hervormde Gezindheid, 45 and 68 (1849); and see also Ter Nagedachtenis van *Stahl*, supra note 21, at 15, where he spoke of the "eigenaardige werkkring" (the peculiar sphere of activity) of the church.

works he proclaimed: "The state is not subject to the church, but together with the church it is subject to God's commandments."[34]

Within Calvinist circles in The Netherlands, Abraham Kuyper must be singles out as the person who expanded the notion of sphere sovereignty beyond the enclave of church-state relations to embrace the relationship between all social institutions. In every community, he said, one finds many different social entities, and each distinct social entity has within itself a supreme authority. "And this supreme authority, now", he went on to say, "we deliberately designate by the name of *sovereignty within its own sphere* to sharply and decidedly put the case that this supreme authority within every group has *nothing but God above itself*, and that the state cannot force itself between the two and cannot here on its own authority give any orders".[35] In the context of church-state relations, this meant, among other things, "nothing less and also nothing more than freedom for the development of faith".[36] In the broader context of community relations, he defined and legitimized sphere sovereignty in compelling terms:

> God established institutions of various kinds, and to each of these He awarded a certain measure of power. He thus *divided* the power that He had available for distribution. He did not give all his power to one single institution but gave to every one of these institution the power that coincided with its nature and calling.[37]

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[34] *G. Groen van Prinsterer*, Handboek der Geschiedenis van het Vaderland (3e druk) 679 (1872) ("De staat is niet aan de kerk, maar, met de kerk, aan de geboden Gods ondergeschikt"). Groen van Prinsterer added that the state needed to exercise a measure of control over the church. It was only after he subsequently abandoned this idea of "a measure of control" that his theory regarding church-state relations reached maturity. See also in the present context, *Groen van Prinsterer*, Proeve over de Middelen Waardoor de Waarheid Wordt Gekend en Gestaafd (2e druk) 91 (1858): "Onderwerping van overheden en onderdanen, niet aan de geestelijkheid, maar aan de goddelijke wet, is de beste waarborg tegen verdrukking" ("Subjection of persons in authority and their subordinates, not to the clergy, but to the law of God, is the best guarantee against repression"); and further *Groen van Prinsterer*, Narede van Vijfjarigen Strijd, 14 (1855).

[35] *Kuyper*, supra note 19, at 79; and see also *id*., at 82, and *Kuyper*, Ons Program (met Bijlagen), 301 (1879).

[36] *Kuyper*, Ons Program, supra note 35, at 193.

[37] *Id*., at 198: "God riep instellingen van allerlei orde in het leven, en aan elk van die schonk Hij een zekere mate van macht. Hij heeft alzoo de macht, die Hij uit te reiken hat, verdeelt. Hij gaf niet aan een enkele instelling al zijn macht, maar aan elk dier

The problem with Kuyper was that, once having grasped the notion of sphere sovereignty, he became so obsessed with the idea that he proclaimed all and sundry to be "circles" that could, *vis-à vis* the state, lay claim to internal sovereign powers.[38] For example, he once singled out as components of society that "do not derive their impulse from the state", the family, church, local population (of a town or city), trade, industry, science, and art.[39] These categories are not of a kind: the family and church are indeed social entities; a population is merely a collection of people without a distinct organizational structure; and trade, industry, science and art are no more than aspects of society that could of course be exercised in particular organizations but do not constitute the organization as such.

The doctrine of sphere sovereignty, as currently defined, received its final touches through the Philosophy of the Cosmonomic Idea of Herman Dooyeweerd (1894-1977).[40]

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instellingen die macht, die met haar aard en roeping overeenkwam".

38 See *J. Dengerink*, supra note 26, at 112-13 (1948); *J.D. van der Vyver*, Die Juridiese Funksie van Staat en Kerk: 'n Kritiese Analise van die Beginsel van Soewereiniteit in Eie Kring, 32-34 (1972).

39 *Kuyper*, Ons Program, supra note 35, at 30: "... die zijn impuls niet van den Staat ontvangt." See also his Stone Lectures, supra note 19, at 79, where he mentioned the family, business, science, art, "en zooveel meer, maatschappelijke kringen vormen, die niet aan den Staat hun aanzijn danken, noch ook aan de hoogheid van den Staat hun levenswet ontleenen, maar gehoorzamen aan een hoog gezag in eigen boezem, dat evenals de Staatsouvereiniteit heerscht bij de gratie Gods" ("... and as many others that constitute community circles, which do not derive the law that gives them life from the state, but answer to a supreme authority in their own enclave, which – like state sovereignty – governs by the grace of God"); Souvereiniteit in Eigen Kring, Rede ter Inwijding van de Vrije Universiteit (3e druk) 11 (1930), where he, in the same context, mentioned the ethical, matrimonial, and community life, each with its own domain and sovereignty; or then again, the personal, domestic, scientific, community, and ecclesiastical life, each with its own "levenswet" (law that gives it life).

40 See, in general, *Dooyeweerd*, New Critique, supra note 22, at 169-70; *Dooyeweerd*, Het Souvereiniteitsbegrip, supra note 22, at 51; and see also *Dooyeweerd*, Verkenningen in de Wijsbegeerte, De Sociologie en de Rechtsgeschiedenis, 80 (1962); *J. Dengerink,* supra note 26, at 11; *G. Spykman*, Sphere Sovereignty in Calvin and Calvinist Tradition, in Exploring the Tradition of John Calvin, 163 *D. Holwerda* (ed.) (1976); *J.D. van der Vyver*, supra note 38, at 76-78, 91-99; *J.D. van der Vyver*, Sovereignty and Human Rights in Constitutional and International Law, in 5 Emory Int'l L. Rev. 321, at 342-55 (1991); *J.D. van der Vyver*, Legal Dimensions of Religious Human Rights: Constitutional Texts, in Religious Human Rights in:

The doctrine of sphere sovereignty implicates much more than merely church-state relations. It indeed seeks to strike a balance between the living space of all social entities that exist and function within the body politic. Individuals – as we all know – have several group-related affiliations and participate in all kinds of social institutions. Each one of those social structures have, and may be identified by, a certain leading function: Religious communities are essentially charged with fostering one's faith; the family circle is centered upon mutual love and affection founded on biological ties; business enterprises are conditioned by the economic objective of profit-making; cultural organizations exist for the purpose of promoting all manifestations of the historical heritage of a people; educational institutions go about their business by enhancing the acquisition and development of scholarly knowledge; sports clubs function in the area of physical recreation, and so on. The doctrine of sphere sovereignty recognizes the existence and importance of such group entities in human society, but is equally adamant in its condemnation of all endeavours to afford to group interests a pertinence that would exceed the confines of its structural leading or qualifying function. Ethnicity, for example, is a distinctly cultural concept, and its relevance in human society should be kept in check with a view to its typically cultural designation. The same applies in principle to communities united by a common religious commitment. The possession and exercise of civil and political rights are not determined by either ethnic or religious qualities, and ought therefore also not to be conditioned by such cultural or religious determinants. The doctrine of sphere sovereignty thus requires of every social entity to focus its activities on its characteristic function, and – negatively stated – not to indulge in, or obstruct the exercise of, functions that essentially belong to social entities of a different type.

The notion of sphere sovereignty finds expression in various forms in some of the constitutions of the world. Singapore confines the internal sovereignty of religious groups to managing their own religious affairs.[41] Ireland more generously proclaims the right of every religious denomination to manage its own affairs.[42] Italy affords independence and sovereignty, “each within its own ambit”, to the State and the Roman Catholic Church only.[43] Romania permits the organization of religious sects “in accordance with their own

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Global Perspective, supra note 2, ix, at xli-xliv.

41 Article 15(3) of the Constitution of the Republic of Singapore (1963).

42 Article 44.2.5. of the Constitution of Ireland (1937).

43 Article 7 of the Constitution of Italy (1948).

statutes" but "under the conditions of the law".[44] In the Czech Republic, "[c]hurches and religious societies administer their own affairs, appoint their organs and their spiritual leaders, and establish religious orders and other church institutions, independently from organs of the State".[45] Poland defines the relationship between state and church and other religious organizations on the basis of "the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as ... the principle of cooperation for the individual and the common good".[46]

There is, of course, more to sphere sovereignty than just that. As against the scholastic notion of subsidiarity, it stipulates in essence that social entities of different kinds, including church and state, do not derive their respective competencies from one another, but are in each instance endowed with an internal enclave of domestic powers that emanate from the typical structure of the social entity concerned and as conditioned by the particular function that constitutes the special destiny of that social entity. Sphere sovereignty is also not on a par with the separation of church and state. As we shall see later on, the doctrine of sphere sovereignty is sensitive to, and is in fact based upon, the intertwinement of different social entities, including church and state, within human society .

Not every manifestation of authority being exercised within a social institution would qualify as a matter of sovereignty in the sense of "sphere sovereignty". Sovereign powers relate to the *inter*-relationships of structurally *different* kinds of social entities only. In the *intra*-relations of a social entity toward an assemblage of its own kind and constituting an integral component of itself, sovereignty would be out of the question. It is possible, of course, for such components of a community structure to be given authority to deal with matters falling within the domain of their domestic affairs. Such authority would then be a matter of delegated powers, emanating from the inner ties of a whole and its parts and being conditioned by a relationship of dominion and subordination, and constituted by a grant or concession of the superior social entity. In order to distinguish this kind of (delegated) authority from the sovereign powers as of right of a societal

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44 Article 29(3) of the Constitution of Romania (1991).

45 Article 16(2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic (1992).

46 Article 25(3) of The Constitution of the Republic of Poland (1997).

institution, the former might be called "autonomy". Dooyeweerd distinguished autonomy and sphere sovereignty as follows:[47]

> But autonomy is not identical with sphere-sovereignty of the different types of societal relationships. The fundamental difference between the two is that autonomy only occurs in the relation of a whole to its parts, whereas sphere-sovereignty pertains to the relation between social structures of a different radical or geno-type, which in principle lacks the character of a part-whole relation.

The relationship between regional and local authorities of a state toward the central government, or between a particular congregation and the denomination of which it is part, would in this sense be a question of autonomy and not of sovereignty.

The sphere sovereignty of a religious community denotes the inherent competence of members of a particular faith:

to establish institutions as a means of uniting their number and to facilitate the execution of their calling;

to decide upon and organize the internal structures of such institutions; and

to contrive and to proclaim rules of behaviour and exercise authority for the sake of order within their own ranks.

Sphere sovereignty is thus a matter of existence, organization and power of social institutions. The question will next be considered in what respects sphere sovereignty differs from comparable arrangements of church-state relations.

III. SPHERE SOVEREIGNTY AND SUBSIDIARITY

Traditionally, the typical Roman Catholic perception of religious freedom was founded on the scholastic doctrine of subsidiarity, which in turn emanated from the dualistic division of reality into the realms of nature and grace. In the natural order of things, the state was regarded as the *societas perfecta*, while the church constituted the perfect society in the supra-natural sphere of grace; and whereas in the realm of nature the church was seen to

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[47] *Dooyeweerd*, New Critique, supra note 22, at 221-22.

be subordinate to the state, so, again, was the state perceived to be subordinate to the church in the realm of grace.[48]

Constitutional arrangements evidently regulate the affairs of state within the realm of nature, and here, as we have seen, the church was said to be subordinate to the state. As against the state, the church enjoyed no more than autonomous authority and competencies in the sense – as explained above – of such authority and competences having been allocated to the church institution by the repositories of political power within the state structure.[49]

The notion of sphere sovereignty did occasionally crop up – perhaps inadvertently – in Catholic social theories. It is interesting to note, for example, that while Pope Leo XIII (1878-1903) in the encyclical *Rerum Novarum* (1891) defined the relationship between the state and trade unions on the basis of subsidiarity – noting, for example, that private societies, including workmen's associations, "exist within the State, and are each part of the State"[50] – he afforded to Christian or Catholic trade unions greater powers of self-determination which seemingly come close to the notion of internal sphere sovereignty: referring to the analogy of ecclesiastical institutions – "[t]he administration of the State ... have no rights over them"[51] – he said of Catholic workmen's societies: "Let the State watch over these societies of citizens united together in the exercise of their rights; but let it not thrust itself into their peculiar concerns and their organization; for things move and live by the soul within them, and they may be killed by the grasp of a hand from without."[52]

Today, there is seemingly also a shift in Roman Catholic social theory toward recognizing a greater measure of sovereignty of church and state. Ronald Minnerath (Vatican Representative Professor in the University of Strasbourg) almost said it in so many words. According to him, church-state relationships ought to be based on

(a) the autonomy of each of the two parties, and

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48 See *id*., at 220-22.

49 *Id*, at 220.

50 Rerum Novarum, 1891: Encyclical of Leo XIII on the Rights and Duties of Capital and Labour, par. 55 (reprinted in *Henry George*, The Conditions of Labour, 163-95 (1934)).

51 *Id*., at par. 57.

52 *Id*., at par. 59.

(b) co-operation in areas of common interest;[53] and he went on to explain: "Recognition of the autonomy of church and state requires that each shall be sovereign and independent in its own sphere."[54]

It is also important to note that although, according to traditional scholastic teaching, the church owes its very existence as a legal entity, and its autonomous juridical functions and powers within the sphere of nature, to the state, Roman Catholicism nevertheless values the principle of religious freedom. Jacques Maritain (1882-1973) thus included in the category of rights that belong to human persons as such (natural rights), the right to existence, to personal freedom, to pursue a natural and moral life, and to seek eternal life.[55] Roland Minnerath defined religious freedom as "a right to immunity against any constraint in religious matter",[56] and more in particular:

> ... freedom of conscience and worship, freedom to teach and witness to the faith (in public and private), freedom to communicate with coreligionists, including those outside one's own country, freedom to engage in mission by acceptable means, and freedom of association and organization in an autonomous community.[57]

The scholastic theme of nature and grace filters through in the teaching of Minnerath where he explains that the state, in regulating religious freedom, must place emphasis on individual conscience in the sense of every person being afforded freedom from outside constraints in the acceptance of a particular belief, whereas in a community of faith (the church), revealed truth is paramount and individual conscience must there be subordinated to a communal confession.[58]

The emphasis in contemporary Roman Catholic dogma upon religious freedom within the realm of nature derived special impetus from the Second Vatican Council (1962-65), and in particular from the Declaration on Religious Liberty (*Dignitatis Humanae Personae*). Here, the Vatican Synod declared "that the human person has a right to religious freedom" and that

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53 *R. Minnerath*, The Doctrine of the Catholic Church, in: Proceedings of the Third World Conference on Religious Liberty 49, at 51 (IRLA, 1989).

54 Ibid.

55 *Jacques Maritain*, Les Droits de l'Homme et la Loi Naturelle, 110-13 (1942).

56 *Minnerath*, supra note 53, at 50.

57 *Id*., at 49.

58 *Id*., at 50.

"the right to religious freedom has its foundation in the very dignity of the human person",[59] which the Declaration proclaims to be revealed in the Word of God and by reason itself.[60] Religious freedom, the encyclical goes on to assert, has its foundation, "not in the subjective disposition of the person, but in his very nature";[61] and its protection "devolves upon the people as a whole, upon social groups, upon governments, and upon the Church and other religious communities".[62]

In response, several states that had proclaimed Roman Catholicism to be a state religion amended their constitutions to abandon the established status of the Church.[63]

The Roman Catholic Church is still an established church, or is afforded special constitutional recognition, in Argentina,[64] Bolivia,[65] Costa Rica;[66] El Salvador,[67] Guatemala,[68] Liechtenstein,[69] Malta,[70] Monaco,[71] Panama,[72] Paraguay,[73] and Peru.[74] The traditional Thomistic view designating to the

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59 Human dignity constituted the foundation of Roman Catholic social doctrine since the landmark encyclical, Pacem in Terris (1961). See *Robert Traer*, Faith in Human Rights, 36 (1991). According to David Hollenbach, the principle of human dignity as the foundation of all human rights derives, first, from its accessibility to all human beings, whether they are religious or not, by virtue of "the person's transcendence over the world of things", and, secondly, as a matter of Christian faith, the belief that "all persons are created in the image of God, that they are redeemed by Jesus Christ, and that they are summoned by God to a destiny beyond history ..." *David Hollenbach*, Justice, Peace, and Human Rights: American Catholic Social Ethics in a Pluralistic Context, 95-96 (1988).

60 Dignitatis Humanae, no. 2.

61 Ibid.

62 *Id*., no. 6.

63 See *Minnerath*, supra note 53, at 51.

64 Article 2 of the Constitution of the Argentine People (1994).

65 Article 3 of the Constitution of Bolivia (1967).

66 Article 75 of the Constitution of the Republic of Costa Rica (1949).

67 Article 26 of the Constitution of El Salvador (1983).

68 Article 37 of the Political Constitution of the Republic of Guatemala (1985).

69 Article 37 of the Constitution of Liechtenstein (1921).

70 Article 2 of the Constitution of the Republic of Malta (1964).

71 Article 9 of the Constitution of the Principality of Monaco (1962).

72 Article 35 of the Political Constitution of the Republic of Panama (1972) (recognizing that the Catholic religion is that of the majority of Panamanians); and see also *id*., art. 103 (providing for Catholicism to be taught in schools).

73 Article 24 of the Constitution of Paraguay (1992) (proclaiming that relations between the state and the Roman Catholic Church are based on "independence, cooperation,

state the primary function of promoting the common good[75] is expressly recognized in the Constitution of Guatemala.[76]

A particular constitutional manifestation of the autonomous subordination of the church to the powers of state authority may be gleaned from juridical provisions affording legal personality to the established church while in some instances denying the legal personality of non-established church institutions. El Salvador and Guatemala may be singled out as examples of countries where Roman Catholicism is recognized as the established religion and legal personality of the Roman Catholic Church has been constitutionally regulated as a *sine qua non* of that preferred status of the Church.[77] Uruguay no longer recognizes the Roman Catholic Church as an established church of the state but nevertheless still affords special constitutional recognition to property rights of that Church.[78] Spain also no longer afford "a state character" to any religion, but nevertheless promises in its Constitution to "maintain the appropriate relations of cooperation with the Catholic Church and other denominations".[79]

Further rather crude remnants of the principle of subsidiarity that still obtains in countries with a constitutional commitment to Roman Catholicism include the following arrangements:

In Bolivia[80] and Liechtenstein,[81] recognition of the property rights of religious institutions are specially regulated as a constitutional matter; and in Panama similar constitutional recognition is afforded to the legal capacity of religious organizations.[82]

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and autonomy"); and see also *id*., art 82 (recognizing "[t]he role played by the Roman Catholic Church in the historical and cultural formation of the Republic").

74 Article 50 of the Political Constitution of Peru (1993) (recognizing the Catholic Church as "an important element in the historical, cultural, and moral development of Peru" and promising cooperation with the Church).

75 *Thomas Aquinas*, Summa Theologica, 1, II, 21, 4, reply 3.

76 Preamble to the Political Constitution of the Republic of Guatemala (1985).

77 See art. 26 of the Constitution of El Salvador (1983), and art. 37 of the Political Constitution of the Republic of Guatemala (1985).

78 Article 5 of the Constitution of Uruguay (1967).

79 Article 16(3) of the Constitution of Spain (1978).

80 Article 28 of the Constitution of Bolivia (1967).

81 Article 38 of the Constitution of Liechtenstein (1921).

82 Article 36 of the Political Constitution of the Republic of Panama (1972).

In Argentina,[83] El Salvador,[84] Guatemala,[85] Panama[86] and Paraguay,[87] members of the clergy may not hold certain specified public offices.

In Guatemala, religious processions outside churches are regulated by state-imposed law.[88]

In Liechtenstein, the protection of religion is stipulated in the Constitution to be a function of the state.[89]

In Panama, teaching of the Catholic religion in public schools is guaranteed in the Constitution, subject though to the proviso that parents or guardians may demand that their children or wards be excused from attending religious classes or participating in religious services.[90]

In conformity with the emphasis on religious freedom within the Roman Catholic communion, all the countries singled out above as the ones that continue to uphold special links with Roman Catholicism contain in their constitutions stipulations upholding the principle of religious freedom within the body politic.[91] These provisions are in many instances attended by reservations. For example, in Guatemala the right to practice freedom of religion is subject to limitations dictated by the public order and "the respect due to the dignity of the hierarchy and the faithful of other beliefs";[92] in Malta, freedom of conscience is subordinate to limitations "reasonably required in the interests of public safety, public order, public morality or

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83 Article 73 of the Constitution of the Argentine People (1994).

84 Article 82 of the Constitution of El Salvador (1983).

85 Articles 186, 197 and 207 of the Political Constitution of the Republic of Guatemala (1985).

86 Article 42 of the Political Constitution of the Republic of Panama (1972).

87 Articles 197(5) and 235(5) of the Constitution of the Republic of Paraguay (1992).

88 Article 33 of the Political Constitution of the Republic of Guatemala (1985).

89 Article 14 of the Constitution of Liechtenstein (1921).

90 Article 103 of the Political Constitution of the Republic of Panama (1972).

91 Article 14 of the Constitution of the Argentine People (1994); art. 3 of the Constitution of Bolivia (1967); art. 75 of the Constitution of the Republic of Costa Rica (1949); art. 25 of the Constitution of El Salvador (1983); art. 36 of the Political Constitution of the Republic of Guatemala (1985); art. 21 of the Constitution of Liechtenstein (1921); art. 40 of the Constitution of Malta (1964), and see also *id*., art. 32; art. 23 of the Constitution of the Principality of Monaco (1962); art. 35 of the Political Constitution of the Republic of Panama (1972); art. 24 of the Constitution of the Republic of Paraguay (1992); art. 2(3) and (18) of the Political Constitution of Peru (1993).

92 Article 36 of the Political Constitution of the Republic of Guatemala (1985).

decency, public health, or the protection of the rights and freedoms of others" and provided the restriction "is shown to be reasonably justifiable in a democratic society".[93] In Panama, freedom to profess any religion is subject to "respect for Christian morality and public order".[94] In Paraguay, freedom of religion, worship and ideology must be exercised subject to "this Constitution and the law".[95]

IV. SPHERE SOVEREIGNTY AND SEPARATISM

The doctrine of sphere sovereignty does not profess that different social entities can be isolated from one another. Sphere sovereignty goes hand in hand with, and is in fact based upon, the encaptic intertwinement of fundamentally different social structures.[96] Herman Dooyeweerd classified the different manifestations of such intertwinement into several categories.[97] He spoke of *unifying encapsis*, which occurs when one social entity takes over the functions of another (for example in the case of a church state – like the Vatican – or an established church); *unilateral foundation*, which designates that a particular social entity is founded upon another without the latter one presupposing the first (for example in the case of a family of parents and children, which presupposes the union between husband and wife); *correlative encapsis*, which occurs when different social entities mutually presuppose one another (for example in the case of a society founded upon agreement, which presupposes the contractual relationship between its members, and *vice versa*); and *territorial encapsis*, which occurs by virtue of the fact that different social entities function within the same territory. To these instances of social intertwinement might be added the phenomenon of *personal encapsis*, which is brought about when one and the same person is a member of different social entities.

The type of conflict situations that might arise from the complicated intertwinement of individuals and social entities, and between different social structures, are numerous and indeed difficult to resolve. For example, social entities such as a church – being in most Western jurisdictions a

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93 Article 40(3) of the Constitution of Malta (1964).

94 Article 35 of the Political Constitution of the Republic of Panama (1972).

95 Article 24 of the Constitution of the Republic of Paraguay (1992).

96 *Dooyeweerd*, Verkenningen, supra note 40, at 102-03 (defining "encapsis" as "an intertwinement of intrinsically different structures").

97 *Id*. at 102-03; and see also *Dooyeweerd*, A Christian Theory of Social Institutions, 67-68 (translated by *M. Verbrugge* and edited by *J. Witte Jr.*) (1986).

corporate body with legal personality – not only perform acts within the compass of their own sovereign sphere of religious activity, but also operate within the juridical sphere of the state, for example when they buy and sell, own property, or through their organs vicariously commit a tort; and the government of a state, on the other hand, might also act within the enclave of religious activity, for example when it participates in religious observances. Furthermore, the same individual who as a member of a particular denomination is subject to the tenets of that church would invariably, as a citizen, also be required to obey the decrees embodied in the national legal system of his country. Consider in this regard the predicament in relation to conscription of a conscientious objector: while his convictions direct him not to do military service, the laws of the country may compel him to serve in the armed forces. Nor could his problem be resolved, as some might suggest, by means of compartmentalization of a person's so-called capacities: the conscientious objector simply cannot in his capacity as citizen do military service and at the same time, in his capacity as member of a denomination that proscribes participation in activities associated with armed conflict, abstain from doing the same.

The encaptic intertwinement of social entities, and the interests that might attend such intertwinement, do not detract from the peculiarity in the structure, and the sovereignty within their own distinct spheres of competencies, of different kinds of social entities. A church, for example, remains a church and does not derive its authority in ecclesiastical matters from the state; and the state retains the essential characteristics of the body politic and exercises political power on account of its own sovereign competence.

The very real and unavoidable encapsis of church and state, and a certain symbiosis between religion and law, makes a mockery of the separationist assumptions of interpreters of the American Constitution. The Constitution of the United States of America succinctly proclaims in its First Amendment:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.

The combined meaning of the two fundamental components of this provision, the Establishment Clause and the Free Exercise Clause, was held

to create "a wall of separation between state and church",[98] which – in the celebrated words of Mr. Justice Black – "must be kept high and impregnable".[99]

It is probably true to say that separatism in the strict sense took the religion clauses of the First Amendment well beyond the simple meaning and historical context of their wording.[100] It is also evident that American jurisprudence thus far failed to come to terms with the seemingly simple directives of the religion clauses. Conflicts between the Establishment Clause and the Free Exercise Clause, inconsistencies in the final outcome of cases under either of these headings, and failure of the courts to maintain absolute neutrality in relation to religion, lead one to conclude – in the words of John Witte – that "[t]he U.S. Supreme Court has ensnared the First Amendment religion clauses in a network of antinomies".[101]

Many reasons have been tendered to explain the difficulties experienced by American courts in producing a clear principle for defining the impact of the religion clauses when applied to empirical contingencies and to achieve consistency in their application in practice. Historical analysis will show that from the outset, conflicting views prevailed amongst the personalities who, according to popular belief, constituted the key figures in the struggle of the Seventeenth and Eighteenth Centuries for religious freedom in North America: the one view, represented by Roger Williams and James Madison, holding that the internal sovereignty of religious institutions ought to be respected by the state and that the government should abstain from enforcing religious scruples; and the other, represented by Thomas Jefferson, placing the emphasis upon protecting the state from religious influences.

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98 The metaphor of "a wall of separation" is commonly attributed to Thomas Jefferson. See Reynolds v. United States, 98 U.S. 145, 164 (1879) (quoting Jefferson's letter of January 1, 1802 to the Danbury Baptist Association); *A.P. Stokes*, Church and State in the United States, 335 (1964). It actually originated from a letter of Roger Williams to John Cotton, in which he referred to the "wall of separation between the garden of the Church and the wilderness of the world". See 1 The Complete Writings of Roger Williams, 392 (1963); and see also, in general, as to the origin and subsequent interpolations of the paradigm of "a wall of separation", *Mark D. Howe*, The Garden and the Wilderness: Religion and Government in American Constitutional Law (1965).

99 Everson v. Board of Education, 330 U.S. 1, at 18 (1947).

100 See *Robert L. Cord*, Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment, 9.1 Harv. J. L. & Pub. Pol'y, 129 (1986).

101 *John Witte*, The Integration of Religious Liberty, 90 Mich. L. Rev. 1363, at 1363 (1992).

John Witte thus attributed the dichotomy in American jurisprudence pertaining to the religion clauses to the influence of the separatist position of the evangelical and enlightenment traditions respectively.[102] Evangelical separatists, according to his testimony, "sought to free religion and the church from the intrusion of politics and the state",[103] without wanting to sacrifice the influence of religion and the church upon politics; and, furthermore, not professing to forfeit the kind of state protection and privileges that had been afforded to the established church, but claiming such protection and privileges for all churches on an equal basis.[104] Enlightenment separatists, on the other hand, "sought to free religion and the church from the intrusions of politics and the state", while at the same time also seeking "to free politics and the state from intrusions of religion and the church".[105]

It is more important to note, though, that the Jeffersonian adage proceeds on the fallacious assumption that church and state, and law and religion, can indeed be isolated from one another in watertight compartments. That is not at all the case. Harold Berman (1918) on many occasions emphasized the religious, and in particular Christian, base of law in general and of specific legal standards, including those that obtain in the United States.[106] He argued convincingly that

> our [the American] Constitution, while requiring a high degree of separation of religious institutions from political and legal institutions, also presupposes a high degree of interaction between religious values and political and legal values. It presupposes that an important purpose of the guarantee of religious freedom is to help create conditions in which religious faith can be purified and strengthened; it presupposes further that such purified and strengthened religious faith will help to give motivation and direction to the political and legal system. These presuppositions, or postulates, are part of a jurisprudence that conceives of law all together as a

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102 *John Witte*, The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay, 40 Emory L.J. 489, 494-95 (1990).

103 *Id*., at 494.

104 *Id*., at 494-95.

105 *Id*., at 495.

106 *Harold J. Berman*, The Interaction of Law and Religion, 8 Capital U. L. Rev. 346 (1979); Berman, Religious Foundations of Law in the West: An Historical Perspective, 1 J. L. & Rel. 1 (1983).

> manifestation of something beyond itself, a witness to something greater, a guide to some historical destiny.[107]

Chief Justice Burger, in *Lynch v. Donnelly*,[108] pointed out that "the metaphor [of a wall between state and church] itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state";[109] and in *Aquilar v. Felton*[110] he proclaimed:

> We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable.[111]

The intertwinement of church and state, and the inner cohesion of religion and law, constitute an undeniable and inescapable fact of actual reality. The neutrality option still requires of the state to decide what is religion and what is not.[112] Any constitutional arrangement that attempts to escape the implications of this *de facto* state of affairs will inevitably result in all kinds of anomalies.

Which brings one back to the roots of the American dilemma: Failure to appreciate and/or to accommodate the empirical symbiosis, or – as Hal Berman prefers to call it – the "dialectical interdependence", of law and religion.[113]

The entanglement test, first enunciated in *Walz v. Tax Commissioner*,[114] indeed signifies acknowledgement by the Court of the intertwinement of church and state. In *Lemon v. Kurtzman*, the Court accordingly recognized that the "wall of separation" between state and church had become a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship".[115] It stated that when called upon to decide whether the entanglement in any given case was excessive, the courts must

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107 *Harold J. Berman*, Faith and Order: The Reconciliation of Law and Religion, 217-18 (1993).
108 Lynch v. Donelly, 465 U.S. 668 (1984).
109 *Id*., at 673.
110 Aquilar v. Fulton, 473 U.S. 402 (1985).
111 *Id*., at 420.
112 See *John T. Noonen Jr*., The Tensions and the Ideals, in: Religious Human Rights in Global Perspective, supra note 2, 593, at 596 and 599.
113 *Harold J. Berman*, The Interaction of Law and Religion, 78 (1974).
114 Waltz v. Tax Commissioner, 397 U.S. 664 (1970).
115 Lemon v. Kurtzman, 403 U.S. 602, at 614 (1971).

take into account the "character and purpose of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority".[116]

The U.S. Supreme Court could thus far find no fixed or principle-bound criterion for identifying excessiveness in the entanglement of church and state. In *Roemer v. Board of Public Works of Maryland*[117] it was said in this regard: "There is no exact science in gauging the entanglement of church and state."[118] However, in order to uphold the pretences of a wall of separation, the U.S Supreme Court at times stubbornly denied that something essentially religious was in fact religious. The notion of "ceremonial deism" was often invoked to serve the purpose. The Court thus dismissed references to "God" in legislation or as a component of state action as no more than "a time-honoured means of adding solemnity" to, for example, a national motto, or the pledge of allegiance.[119] Needless to say, degrading references to "God" to the "ceremonial" level where it has no meaning is blasphemy in probably all theistic religions of the world.

The dilemma that faces American protagonists of separationism neatly appears from the recently enacted International Religious Freedom Act of 1998.[120] The Act established the office of Ambassador at Large for International Religious Freedom[121] and a Commission on International Religious Freedom,[122] whose functions include submitting regular reports on the state of religious freedom in countries other than the United States that appear from Country Reports on Human Rights Practices, and to submit recommendations to the President, The Secretary of State, and Congress with respect to matters involving international religious freedom.[123] In the

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116 *Id*., at 615.

117 Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

118 *Id*., at 766.

119 See, for example, March v. Chambers, 463 U.S. 783, at 818 (1983) (Brennan, J., dissenting, suggesting that phrases such as "God save the United States and this Honorable Court", "In God We Trust", "One Nation Under God" and the like "have lost any true religious significance"); and see also Abington School District v. Schempp, 374 U.S. 203, at 303-04 (1963) (per Brennan, J., concurring); Lynch v. Donelly, supra note 108, at 716 (per Brennan, J., dissenting).

120 PL 105-292 (HR 2431) (Oct. 28, 1998).

121 22 USCA § 6412, sec. 101. The first incumbent of this office is Robert Seiple.

122 22 USCA § 6417, sec. 201.

123 22 USCA § 6433, sec. 203.

case of violation of religious freedom,[124] the President of the United States is authorized to impose all kinds of punitive measures,[125] including in the case of "particularly severe violations of religious freedom" as defined in the Act,[126] economic sanctions of various kinds.[127] A certain flexibility was built into the Act reflecting, among other things, "the status of the relations of the United States with different nations",[128] and making allowance for the President to waive the application of economic sanctions if he has determined that "the important national interest of the United States requires the exercise of such waiver authority".[129] On the occasion of signing the Act into law, President Clinton made special mention of the flexibility provisions as being a specially commendable feature of the Act.[130]

The International Religious Freedom Act is problematic from the point of view of separationism as well as sphere sovereignty. Through its "entanglement" with matters of religion in virtue of the Act, the American

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[124] Violations of religious freedom include: "(A) arbitrary prohibitions on, restrictions of, or punishment for – (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one's religious beliefs; (iii) changing one's religious beliefs and affiliation; (iv) possessing and distributing of religious literature, including Bibles; or (v) raising one's children in the religious teachings and practices of one's choice; or (B) any of the following acts committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution." See 22 USCA § 6402, sec. 3(13).

[125] 22 USCA § 6441, sec. 401, read with 22 USCA § 6445, sec. 405.

[126] 22 USCA § 6402, sec. 3(11): "... systematic, ongoing, egregious violations of religious freedom, including violations such as – (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or security of persons."

[127] 22 USCA § 6442, sec. 402, read with 22 USCA § 6445, sec. 405 par. (9) through (15). Economic sanctions specified in these paragraphs can also be imposed in cases of violation of religious freedom that do not meet the threshold requirements of "particularly severe violations of religious freedom", but in the case of the latter category of violations, the punitive measures are to be confined to the economic sanctions specified in par. (9) through (15).

[128] 22 USCA § 6401, sec. 2(b)(3).

[129] 22 USCA § 6447, sec. 407(a)(3).

[130] Statement by President William J. Clinton upon Signing H.R. 2431, 34 Weekly Compilation of Presidential Documents, 2149 (Nov. 2, 1998 to Oct. 27, 1998).

government will be required to engage in conduct on the international level which it is constitutionally prohibited from doing domestically. The political institutions entrusted with the obligation of nominating the Ambassador at Large and selecting members to the Commission on International Religious Freedom are prohibited by the Constitution of the United States to apply a "religious test" when performing that function,[131] yet the Act gives instructions that members of the Commission are to be selected from amongst "distinguished individuals noted for their knowledge and experience in fields relevant to the issues of international religious freedom, ...".[132]

From the perspective of sphere sovereignty, the Act is censurable for affording to a *political* institution the competence to evaluate and to judge the propriety of *religious* dogma and practices. The focus of the legislation on the *religious* base of unbecoming conduct in any event seems unduly restrictive and highly undesirable. Sphere sovereignty concerns as well as entanglement could have been avoided by addressing the repression of sections of a population irrespective of the religious motivation of such repression.

For a political institution to engage in a dialogue with foreign government regarding practices founded on religious scruples will be no easy task. Religious convictions and the conduct emanating from such convictions are not susceptible to rational discourse. Faith in the religious sense is the acceptance without question of phenomena that cannot reasonably be demonstrated, and the norms that underpin religious practices require blind obedience from all persons belonging to the particular faith community. Religious scruples are based on conviction and can best be addressed by adversaries through the medium of persuasion. In the domain of religious conviction, sanctions are not the answer and could in fact be counter productive. Sanctions can at best become a tool of reform in cases of human rights violations if their sponsors patently occupy the moral high ground. In matters of religion, there is no clearly identifiable moral high ground beyond the one claimed by every religious sect in adversarial argument.

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[131] Constitution of the United States of America, art. VI par. [3]: "... no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[132] 22 USCA § 6431, sec. 201(b)(2).

The flexibility component of the Act – at least insofar as flexibility was designed to accommodate the "national interests" of the United States – is also highly questionable from the perspective of the basic principles of justice in politics and in jurisprudence. In international relations there is little scope for, or indeed evidence of, true altruism. Political action is almost always informed by considerations of self-interest. As Louis Sohn once observed: "Although law ideally treats all parties equally, it is well known that the legal enforcement system is less effective against those who are powerful than with respect to those who are poor and weak."[133] Treating equals unequally will inevitably disrupts the balance of distributive justice in the application of the Act.

Jurisprudentially, religious persecution ought not to escape punitive action – if punitive action is to be the norm – at the pleasure of the agency of enforcement. In penology, the dispensation of the target state, and the interests of victims, could be perceived as valid considerations for treating unequals unequally, but for the interests of the sentencing authority to prevail in this regard, would constitute an affront to every conceivable nuance of the principle of retributive justice.

The doctrine of sphere sovereignty does not preclude religious institutions from considering and assessing governmental action – but as a *religious* institution it ought to confine its judgment to the *religious* component of state action: that is, religious institutions have the right, and indeed the duty, to monitor the policies and practices of government with a view to their compatibility with religiously based moral standards. Persons engaged in government similarly has the right and an obligation to scrutinize the conduct of their subjects, including those engaged in religion, from the perspective of the state's sovereign enclave of functions, identifying for example behavior that disrupts the legal order and if needs be to inflict punishment upon perpetrators of criminal acts. Unbecoming conduct should not escape the power of the sword simply because it was committed in the name of religion.

This also applies to criminal conduct that attracts the concerns of the international community. As noted by Lord Millett in the recent judgment of the British House of Lords in the *Pinochet Case*: "The way in which a state treated its own citizens within its own borders had become a matter of

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[133] *Louis B. Sohn*, The New International Law: Protection of Individuals rather than States, in 32 Am. U. L. Rev. 1, at 12 (1982).

legitimate concern to the international community."[134] Earlier, the International Criminal Tribunal for the Former Yugoslavia observed in the appeal of *Dusko Tadic*: "It would be a travesty of law and betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights."[135]

These citations also brings to light the platform on which repressive practices of states founded on religious predilections ought to be addressed: that is, the international arena. International human rights law has come to recognize that the enforcement mechanisms of its regime must be preceded by a so-called declaration phase: one that invites debate, negotiations, scholarly discourse and publication with a view, essentially, to norm creation or refinement, and – most importantly – consensus building through persuasion and compromise. This process might be time-consuming and demanding. It is essential, though, for the meaningful implementation at the convention-level of the values which the system seeks to promote and to protect. The end of the declaration phase of international religious liberty is not yet in sight. That is the battle-field where international efforts to secure religious freedom throughout the world should be concentrated

V. SPHERE SOVEREIGNTY AND POLITICAL TOTALITARIANISM

The doctrine of sphere sovereignty proclaims that church and state each governs over a distinct enclave of functions that must be kept separate, and that the sovereign powers of political and religious institutions must be confined to their respective spheres of competencies, without the one interfering in the sovereign domain of the other. Political totalitarianism manifests itself when the repositories of state authority take it upon themselves to unduly regulate the private lives of persons under their control, or to interfere in the internal affairs of institutions other than organs of state. In church-state relations, political totalitarianism is exemplified by:

establishment or preferential treatment of certain religions by the state;

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[134] R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No. 3), [1999] 2 All E.R. 97, at 177 (H.L).

[135] Prosecutor v. Tadic (Jurisdiction) (Appeals Chamber), 105 Int'l L. Rep. 453, par. 58 (at 483) (1997).

registration requirements imposed by the state as a condition of legal subjectivity of a church;

selective repression of politically defined maverick religions.

1. ESTABLISHMENT

The Roman Catholic Church is not the only denomination with establishment status in some countries. The Evangelical Lutheran Church is an established church in Denmark,[136] Iceland,[137] and Norway.[138] The Eastern Orthodox Church of Christ is singled out as "[t]he prevailing religion" in Greece,[139] and the "traditional religion" of Bulgaria.[140] The Church of England is the established church in England,[141] and the Presbyterian Church enjoys the same status in Scotland.[142] Buddhism is the established religion of Laos[143] and Sri Lanka.[144] Nepal proclaimed itself to be a Hindu State.[145] The people of Papua New Guinea constitutionally proclaimed "our noble traditions and the Christian principles that are ours now";[146] and in 1996 a preambular provision was inserted in the Constitution of Zambia proclaiming "the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience and religion".[147] The Constitution of Tonga contains the extraordinary commandment that "[t]he Sabbath Day shall be kept holy".[148]

It stands to reason that preferential treatment by the state of a particular church institution or any religion or group of religions violates the essential

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136 Section 4 of the Constitution of the Kingdom of Denmark (1953).
137 Article 62 of the Constitution of Iceland (1944).
138 Article 2 of the Constitution of the Kingdom of Norway (1814).
139 Article 3 of the Constitution of Greece (1975).
140 Article 13(3) of the Constitution of the Republic of Bulgaria (1991).
141 See Submission of the Clergy Act, 25 Hen. 8, c. 19 (1533); Act of Supremacy, 1 Eliz. I, c. 1 (1558); and see *J.D. van der Vyver*, supra note 38, at 134-40.
142 See the Union with Scotland Act, 5 Ann, c. 8 (1706); and see also *J.D. van der Vyver*, supra note 38, at 140-42.
143 Article 9 of the Constitution of the Lao People's Democratic Republic (1992).
144 Article 9 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978); and see also art. 9 of the Constitution of the Kingdom of Thailand (1991) (mandating the King to be "a Buddhist and upholder of religions").
145 Article 4 of the Constitution of Nepal (1990).
146 Preamble to the Constitution of Papua New Guinea (1975).
147 Preamble to the Constitution of Zambia (Act 200 of 1993).
148 Article 6 of the Constitution of Tonga (1875, as amended in 1971).

components of equal protection and the norm against discrimination. Nor would toleration toward church institutions and religions not singled out for preferential treatment discount these injustices. Toleration entails within itself condescending attitudes, necessitates entanglement, and countervails sphere sovereignty.

Establishment might be seen by some as a means of protection of the state-sponsored religious institution. Sphere sovereignty condemns establishment for what it really is: state interference in the internal management of the church. Lutheran Archbishop K.G. Hamman of Uppsala in a recent statement therefore rightly praised the imminent disestablishment of his church in Sweden after 400 years of state control. Terminating appointment of church officials by political authorities was specially mentioned as a practice that is no longer acceptable in this day and age.

2. REGISTRATION AS A MEANS OF POLITICAL CONTROL

The mandatory registration of religious institutions is required by, among others, many Eastern European states, combined in several instances with the requirement of a minimum number of adherents to the religion applying for registration. In Russia, a local religious organization may only be established by no fewer than ten citizens of the Russian Federation.[149] In Poland, the Law of May 17, 1989 *On Guarantees of Freedom of Conscience and Belief*[150] requires the endorsement of an application for registration as a prerequisite for "[t]he right to create churches and other religious unions"[151] by at least fifteen Polish citizens.[152] In Hungary, the registration of churches is conditional upon their being founded by at least 100 natural persons.[153] In Slovakia, at least 20 000 signatures must endorse the application for registration of a church.[154]

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149 Arts. 8.3 and 9.1 of the Law on Freedom of Conscience and Religious Associations, 1997 (transl. by Lawrence Uzzell), reprinted in 12 Emory Int'l L. Rev. 656-714 (1998).

150 J.L. of 1989 No. 29, Item 155.

151 *Id*., art. 30.

152 *Id*., art. 31.

153 Act No. IV of 1990 On the Freedom of Conscience and Religion as well as the Churches, art. 9(1)(a).

154 Collection of Laws of the Czech and Slovak Federative Republic, Law No. 192/1992 (Law of the Slovak National Council); and see also Law No. 308/1991 regulating the registration procedures.

The constitutionality of the Hungarian provision requiring a minimum number of founding members of a church was contested in the Constitutional Court in 1993.[155] The application was based on art. 60(2) of the Hungarian Constitution, which guarantees the common exercise of religion, and on art. 90(3), which makes provision for the separation of church and state. The Court rejected the application because the requirement in question applied equally to all religious denominations. As far as the separation of church and state is concerned, the Court pointed out that registered churches enjoyed a greater measure of internal autonomy than other social entities in the country, and it was therefore within the (political) domain of the state to establish conditions to be satisfied by religious institutions in order to qualify for official "church" status; and churches with a smaller membership can in any event still exercise *religious* (in contradistinction to the privileged civil) functions within the body politic. In another matter, the Hungarian Constitutional Court stated that it was not for the state to decide which characteristics ought to be satisfies by any particular belief in order to qualify as a religion: that should be left to "self-interpretation by the churches."[156] The state „can only make appropriate general rules about religion and churches which can be used equally for all churches and religions".[157]

The Slovakian precondition for registration can of course be applied to stifle the activities of religious institutions with fairly substantial support in the country. In 1993, the Roman Catholic Church, with a membership of 3,187,383, represented the majority religion in Slovakia, followed by the

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[155] Decision No. 8/1993(II.27) AB, 1.1 Eastern European Case Reporter of Constitutional Law, 109 (1994).

[156] Decision No. 4/1993(II.12) AB, 1.1 Eastern European Case Reporter of Constitutional Law 57, at 62 (1994).

[157] Ibid. The Court in that case rejected an application contesting the constitutionality of the return of school buildings to churches from which those buildings had been taken during the communist regime. The argument founded on the separation of church and state (art. 60(3) of the Hungarian Constitution) was rejected since the return of the buildings to the concerned church institutions did not deprive Hungarian citizens of the right to attend secular schools; a submission that the Act sanctioning the return of the school buildings (Act No. XXXII of 1991) required adoption by a two-thirds majority, as required by art. 60(4) of the Constitution in respect of any law concerning freedom of conscience and religion, was dismissed since the Act in question did not fall within the confines of the constitutional provision; and the Court likewise rejected the applicant's contention that the Law in question conflicted with the Constitution and consequently amounted to a constitutional amendment.

Lutheran Church (Augsburg Confession) with 326,397 members, the Greek-Catholic Uniates Church with 178,733 members, the Reformed Calvinistic Church with 82,545 members, and the Orthodox Church with 34,376 members.[158] The Jehovah's Witnesses (10,501 members) and "other Churches and religious institutions" (3,625 members)[159] clearly fell short of the minimum support required for their registration with the political authorities of Slovakia.

In recent times, several Eastern European countries have enacted legislation requiring re-registration of religious institutions with a view, clearly, to enforce restrictions upon those perceived to be undesirable. In Bulgaria, for example, the Persons and Family Act, which requires the registration of non-profit associations, was amended in 1994 to mandate the re-registration of such associations and, in terms of the newly enacted Article 133a, to make consent of the Council of Ministers a prerequisite for registration. Acting pursuant to that provision, the Council of Ministers declined to approve the re-registration of, *inter alia*, the Jehovah's Witnesses.[160] In July 1997, following a decision of the Supreme Court of Bulgaria to uphold the Council's decision,[161] a complaint lodged with the European Commission of Human Rights by the Jehovah's Witnesses in this regard was held to be admissible by the Commission,[162] and subsequently a friendly settlement of the dispute was reached.

In September 1997, Russia enacted the Law on Freedom of Conscience and Religious Associations,[163] which mandates the re-registration of all religious organizations which have not been registered in the Russian Federation for a period of at least 15 years.[164] To avoid the impediments imposed upon this category of religious organizations,[165] the religious organization bears the

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158 See the Statistical Yearbook of the Slovak Republic, 437-40 (1993); and see also *Magdalena Forgačova/Paul R. Hinlicky*, Slovak Churches and Proselytism, in 36 J. Ecumenical Studies 116, at 125-26 (1999).

159 Ibid.

160 Decision No. 255 of June 28, 1994 of the Council of Ministers.

161 Case No. 733/94 of November 30, 1994.

162 See Christian Association Jehovah's Witnesses v. Bulgaria, KH/VS, Case No. 28626/95 (July 3, 1997).

163 Supra note 149; and see *W. Cole Durham, Jr./Lauren B. Homer*, Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal, in 12 Emory Int'l L. Rev. 101 (1998).

164 Law on Freedom of Conscious and Religious Associations, supra note 163, art. 27.3.

165 The infamous Article 27.3 spells out in sordid detail the restrictions imposed upon

onus of producing documentary evidence of its "existence on the corresponding territory" for the critical period of 15 years.[166] And such religious organizations must in fact re-register annually until they satisfy the 15 years criterion.

What is here forbidden for religious institutions without the 15 years registered tenure in the Russian Federation are included in the statutory entitlements of religious institutions complying with the 15 years requirement. Distinguishing between these two categories of religious institutions seems arbitrary and in any event lacks a reasonable base. The differentiations founded on this classification are clearly discriminatory.

In terms of a statute enacted by the Austrian Parliament on 10 December 1997, a religious association, if it is to enjoy the status of a "state recognized religion", must have existed in Austria for a period of at least twenty years, including a minimum period of ten years as one that was legally recognized by the Government, and it must also have a following of not less than 16 000

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this group of religious institutions:

- The members of those religious organizations entertaining conscientious objections to military service will not be allowed to do alternative service in lieu of military conscription, and their clergy will not qualify for deferment of conscription into military service and exemption from military training in peace time (art. 27.3, read with art. 3.4);
- They are not entitled to create educational institutions (art. 27.3, read with art. 5.3), or to teach religion to their children in municipal educational institutions (art. 27.3, read with art. 5.4);
- They may not attach to themselves the representative body in Russia of a foreign religious organization (art. 27.3, read with art. 13.5);
- They are not permitted to carry out religious rites in health centers and hospitals, in children's homes, in homes for the elderly and institutions for handicapped persons, or in prisons or similar institutions (art. 27.3, read with art. 16.3);
- It is forbidden for them to produce, acquire, export, import and distribute religious literature, printed, audio and video material, and other articles of religious significance (art. 27.3, read with art. 17.1), and they may not institute enterprises for producing liturgical literature and articles for religious services (art. 27.3, read with art. 17.2);
- They are precluded from the right to create educational organizations and institutions (art. 27.3, read with art. 18.2);
- They may not set up schools for professional religious education for the training of their clergy (art. 27.3, read with art. 19); and
- It is forbidden for them to invite foreign citizens for professional purposes, including preaching and religious activity (art. 27.3, read with art. 20.2).

166 *Id*. art. 27.3.

adherents (0.2% of the population). The legislation paved the way for reducing the state-recognized religions in Austria from the current number of twelve to no more than four. The religions not recognized by the Government are denied certain benefits, including the right to levy taxes, to conduct religious classes in public schools, to receive state subsidies for their private schools, and to broadcast radio services. Further legislation has been enacted to regulate the granting of legal personality to such (non-recognized) religious associations, subject to the condition that their application is supported by at least 300 residents of Austria who are not also members of an officially recognized religious association or of another registered (non-recognized) religious association.[167]

3. REPRESSION OF POLITICALLY DEFINED MAVERICK RELIGIONS

Political repression of religious institutions takes on many forms, including the listing of "dangerous cults", and political regulation of proselytization.

State control of missionary activities takes on many forms. A provision in the Constitution of Malawi, for example, limits property holdings in the country of foreign missionary institutions.[168] The Constitution of Ghana authorizes statutory limitations of "freedom of thought, conscience and belief" and the "freedom to practice any religion and to manifest such practice" for the purpose of, *inter alia*, "safeguarding the people of Ghana against teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community" – provided the limitations are "justifiable in terms of the spirit of the Constitution".[169] Proselytization by foreign missions is absolutely forbidden in Bulgaria.[170] A Greek Law prohibits proselytization that amounts to "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, either by any kind of inducement or promise of an inducement or moral support or material

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[167] 19. Bundesgesetz: Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften, in Bundesgesetzblatt für die Republik Österreich (9 Jan. 1998).
[168] Constitution of the Republic of Malawi, art. 22(c) (1994).
[169] Constitution of the Republic of Ghana, art. 21(4)(e) (1992).
[170] Law on Religion, art. 23 (1949).

assistance, or by fraudulent means or by taking advantage of the other persons's inexperience, trust, need, low intellect or naïvety".[171]

Not so long ago, the European Court of Human Rights, in the case of *Manoussakis & others v. Greece*,[172] had occasion to censure the government of Greece for applying state-imposed legislation to sanction rigid, or indeed prohibitive, conditions to restrict the activities of faiths outside the Greek Orthodox Church. The Court noted in that case that the right to freedom of religion as guaranteed under the European Convention of Human Rights and Fundamental Freedoms exclude any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate.

Earlier, the European Court of Human Rights was called upon to evaluate action taken in Greece against Jehovah's Witnesses,[173] and more recently against members of the Pentecostal Church,[174] based on the above statutory proscription of proselytization. In *Kokkinakis v. Greece*,[175] the Court found that the conviction of the applicant and his wife for having initiated a discussion of their religion with a certain Mrs. Kyriakaki constituted a violation of their right to religious freedom as guaranteed by the European Convention. The Court was not prepared, however, to condemn the proscription of proselytization as such, holding that there might be instances of "improper proselytism" consisting of "a corruption or deformation of [true evangelism]" and which may take on the form of "activities offering material or social advantages with a view to gaining new members of a Church or exerting improper pressure on people in distress or in need". Improper proselytization, the Court went on to say, "may even entail the use of violence or brain washing" and as such it would not be compatible with "respect for the freedom of thought, conscience and religion of others".[176]

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171 Section 4 of Law No. 1363/1938.

172 Judgment of the European Court of Human Rights, delivered on 26 September 1996.

173 Kokkinakis v. Greece, 260 Eur. Ct. Hum. Rts. (Series A) 1993; and for a discussion of the case, see *T. Jeremy Gunn*, Adjudicating Rights of Conscience under the European Convention of Human Rights, in: Religious Human Rights in Global Perspective, supra note 2, at 305; *Natan Lerner*, Proselytism, Change of Religion, and International Human Rights, in 12 Emory Int'l L. Rev. 477, at 547-56 (1998).

174 Judgment of the European Court of Human Rights in the case of Larissis & Others v. Greece, 24 February 1998.

175 Supra note 173.

176 *Id*., par. 48 (at 21).

The second Greek case on proselytism, *Larissis and others v. Greece*,[177] decided on 24 February 1998, upheld the conviction of military officers for proselytization of their subordinates in the air force, but upheld their complaint under the provision of the European Convention dealing with religious freedom as far as their conviction for proselytizing civilians was concerned. Due to the hierarchical structures in the armed forces, the Court held, subordinates could find it difficult to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by the superior officer; and this brought the missionary endeavors within the confines of "improper proselytism" under the rubric of "the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church". These considerations did not apply when a person holding military rank engaged civilians in religious talk. The Court confirmed in this regard that religious freedom as such implies freedom to manifest one's religion, including the right to try to convince others of the salience of one's belief.

It is perhaps worth noting that the Supreme Court of the Republic of Udmurt in the Russian Federation, in a decision handed own in the town of Izhevsk on March 5, 1997,[178] declared unconstitutional a Law of the Udmurt Republic *On Missionary Activity on the Territory of the Udmurt Republic*.[179] The Law placed severe restrictions on missionary activities and was held to violate Article 28 of the Constitution of the Russian Federation, which – as cited in the judgment – provides:

> Everyone is guaranteed freedom of conscience, freedom of confession, including the right individually and jointly with others to profess any religion or to profess none, freely to choose, to hold and to spread religious or other convictions and to act in accordance with them.

The current tendency in some European countries, including Austria, Belgium,[180] France[181] and Germany, to entrust the State with the competence

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177 Supra note 174.

178 In the case of Mashagatova Svetlana Pavlovna & Others. An English translation of the judgment was reprinted in 12 Emory Int'l L. Rev. 715-38 (1998).

179 Law No. 221-1 of the Udmurt Republic.

180 A Statute creating an Advisory and Information Center on Harmful and Dangerous Sectarian Movements was signed into law by the Belgian King on June 2, 1998. See F.98-3121 in Belgisch Staatsblad/Moniteur Belge of November 25, 1998. Thus far 189 movements have been identified as ones suspected of being harmful or

to identify and to outlaw so-called "dangerous sects" is exactly the kind of responses to unbecoming religious practices that could never find favour with protagonists of sphere sovereignty and ought to be discouraged. In 1992, the European Parliament adopted a Recommendation emphasizing the undesirability, in view of the freedom of conscience and religion, of major legislation on religious cults and noting that "such legislation might well interfere with this fundamental right and harm traditional religions".[182] A subsequent *Report on Cults in the European Union*, prepared by Maria Berger of Austria, also follows a particularly cautious approach, calling on Member States "to take action only on the problematic activities of cults and in connection with their specific activities if they affect people's physical and mental integrity or social and financial standing", and not to confine such action to religious organizations *per se*. Regrettably, this report has for all ends and purposes been shelved by the European Parliament.

An approach which thus emphasizes the (criminal) nature of the act rather than the actor seems to be a commendable way to go. It underscores a sound principle of criminal justice proclaiming that the law ought to criminalize the act (for what it is) and not the actor (in everything they do). It also demonstrates that the law is not always a feasible instrument for the curtailment of social evils.[183]

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dangerous cults.

181 After parliamentary reports prepared in 1996 and 1999 pertaining to "dangerous cults", and following the establishment in 1998 of a governmental "Mission to Fight Against Cults", the French Senate on December 16, 1999 unanimously approved a Bill amending the French Law of January 10, 1936 and certain other laws to include religious cults or sects in the category of organizations that can be banned and dissolved by executive decree. The banning of organizations and groups can follow upon a second conviction for a variety of offences, provided the organizations or groups are furthermore regarded as "a trouble for public order or a major danger for human personality".

182 Recommendation 1178 of 5 February 1992 on Sects and New Religious Movements, par. 5 (1992), in Council of Europe Parliamentary Assembly, Texts Adopted by the Assembly (1991-93). The Recommendation places emphasis on education and legislation, where this does not already exist, to afford corporate status to all sects and new religions "which have been registered".

183 See *J.D. van der Vyver*, Law and Morality, in: Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner, 350 (ed.) *Ellison Kahn*, (1983); *Van der Vyver*, The Function of Legislation as an Instrument of Social Reform, 93 Sou. Afr. L.J. 56, at 62-67 (1976); *Van der Vyver*, The State, the Individual and Society, 94 Sou. Afr. L.J. 291, at 303-05 (1977).

VII. Concluding Remarks

State intervention to protect a preferred religion or to repress the unfavored ones is – from the perspective of sphere sovereignty – reprehensible in itself; repression of certain religions is aggravated when religious affiliation and ethnic identity or even national specificity are merged.

There is a compelling lesson in all of this – one that has dawned upon Protestant Christianity in the period of the Enlightenment, which after Vatican II is slowly filtering through in the political philosophy of Roman Catholicism, and which Orthodoxy, Judaism and Islam have not even begun to comprehend: confusion of the functions of church and state, of law and religion, and of coercive political authority and the power of persuasion in matters of religious conviction, essentially entails totalitarianism in one way or another that will inevitably result in repression. Interference by the state in the institutional structures and doctrinal fabric of religious communities is the recipe for political domination and conflict. It is not the function of the state to enforce religious values *per se*, or to maintain the privileged status of a dominant religion, or to apply political power as a means of creating a pious national society.

Nor would majoritarian considerations make any difference in this regard. Human rights are based on moral values and not on the predilections of any number in a political society; and the human rights paradigm primarily concerns itself with the interests of individuals and minorities and not so much with the disposition of a majority of the population.

The truth is that there simply are no religiously homogenous political communities left in the world. Nor is it possible to create such communities through the disintegration of or secession from existing national states – unless the uniformitists resort to ethnic cleansing. And even then, ethno-religious conformity will remain a myth – as we can see in the recent history of the former Yugoslavia. The civil war in Algeria again serves as a reminder that fundamentalist efforts to establish a religiously defined state almost invariably culminates in strife between different factions of the religion that is to be the one. For alas, almost all religions are deeply divided within their own ranks. And when people with close national or ethnic, cultural or religious ties fall out with one another, the combat of ideas tends to become particularly vicious and quite often culminates in bloodshed.

The state has a special calling to maintain law and order within a political community, and its legitimate duties include taking action to protect the community against criminal action. The laws of most countries do criminalize unbecoming acts irrespective of the motives that might have prompted those acts, and the emphasis should remain on law enforcement in the individual cases that merit prosecution under existing proscriptions: fiscal fraud, extortion, and false advertizing ought not to escape the power of the sword simply because such criminal conduct emanates from, or is legitimized by their perpetrators under the guise of, religion. The state must boldly accept the responsibility of regulating medical or psychological therapeutic procedures with a view to disqualifying persons not academically and professionally equipped to practice medicine or psychiatry, and should not avoid enforcing such administrative regulations where transgressions are conducted in the name of religion. Refusal of parents or guardians to submit the children in their care to medical treatment, or to afford assistance to persons in danger, calls for protective state intervention and cannot be excused simply because such omissions were prompted by religious scruples.

The criminal component of dubious religious practices are not always easy to identify. It is undoubtedly true that financial gain rather than spiritual concerns may inspire the missionary practices of those religious sects that promise a place in heaven to converts in exchange for their personal life savings and selfless (money-collecting) services – but who is to say? Many cults only use the guise of religion to entice a prestige- or profit-rendering following into their fold – but how can one tell? Insidious means of proselytization (creating a relationship of dependency through the deprivation of food and sleep, or down-right brainwashing) has become standard practice of several religious sects – but where exactly does one draw the line? Many self-professed “evangelists” shamelessly exploit the miseries of persons in distress, through poverty or illness, in order to secure their subservience – but what can one do?

Here, legal proscription may not be the answer, lest juridical protection were to become the tool of political repression. Let me conclude with two final observations:

A set of values that requires the backing or protective intervention of political authority – one that cannot survive or flourish on account of the persuasive force of its inherent appeal – is probably not worth preserving; and

The moral attribute of human behaviour is conditioned by the state of mind that inspires one's good conduct, and values that are upheld by virtue of state-imposed coercion instead of personal conviction or individual persuasion consequently forfeit their ethical quality; by transforming the norms of morality and religion into rules of law, the repositories of power do not enhance the spiritual kingdom they might seek to establish but, on the contrary, deprive the society of its moral fabric.