



Should God and Caesar Litigate?

ROBERT F. DRINAN, S.J.

CAN GOD AND CAESAR COEXIST?

BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW

YALE 2004

Elena A. Baylis

IT SEEMS A BIT mean-spirited even to consider deprecating the work of a man like Robert Drinan. After all, Father Drinan has devoted himself to promoting international peace, social justice, and other worthy causes over the course of a long and distinguished career in the priesthood, politics, and academia.

It may even verge on being downright silly to criticize Father Drinan's latest book, *Can God and Caesar Coexist?*, for being unduly optimistic about international law and human rights. One would not, of course, take issue with a bishop for being too credulous about the prospect of eternal salvation, nor lambaste the Commissioner of Baseball for focusing so much on what is only a game. Being optimistic about the role of international law in securing human rights is exactly what Father Drinan has made his career of, and *Can God and Caesar Coexist?* continues in the tradition of his earlier work.

In this latest book, Father Drinan advocates the development of a human rights treaty and an international tribunal dedicat-

ed to protecting religious freedom. And although it may not be good sport to take potshots at an eighty-four-year-old priest with twenty-one honorary degrees to his name, I nonetheless find myself here in the role of a decided, if reluctant, critic of his vision.

But Father Drinan has made my job an easy one. He has not only written the book on this subject but, in a true act of charity, he has also laid out a template for critiquing it. In the final chapter of his book, Father Drinan highlights two concerns that an imaginary future critic might raise:

Concern #1: "This book will undoubtedly be criticized for apparent contradictions, omissions, and ambiguities."
(p. 233)

I must concede that I found a few of each. Of these, perhaps the most jarring is Father Drinan's inconsistent and at times inaccurate position on a fundamental question: does international law currently protect religious freedom or not? On page 13, Father Drinan introduces the idea that international law, as

it stands, is inadequate to protect people of faith from hostile governments: "The abdication, or at least the silence, of international law on the subject of religious freedom allows nations to feel certain that they will not be punished for doing dreadful things to persons who practice a religious faith of which the government disapproves."

The claim that international law is silent on the subject of religious freedom will be a bit startling to any reader who is familiar with the UN Charter, the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (the "ICCPR"), the International Covenant on Economic and Social Rights, and the other human rights treaties that include provisions forbidding discrimination on the basis of religion, guaranteeing individual freedom of religion, or both. While one might reasonably debate whether international law in fact succeeds in protecting religious freedom effectively, that it does by its terms forbid states to interfere with their citizens' free exercise of their religious beliefs is surely beyond dispute.

But Father Drinan himself quickly comes around to this point of view. On page 14, he writes: "the architects of the moral revolution that created the new international reign of human rights have consistently sought to maximize the thrust and scope of religious freedom around the world." And by page 15 a complete reversal has taken place: "it may seem surprising that the documents and teachings of international law are so favorable to freedom in the exercise of religion. Almost every international document allows for the exercise of religion in the most generous terms." Chapter III is then dedicated to discussing the protections for religious freedom within the United Nations structure, beginning with the statement:

The reverence for religious freedom in all of the documents issued by the international community, both before and after the drafting of the United Nations Charter, has been astonishing. The right to worship God has now been granted a place equal to, if not superior to, the high place given to the right to a free press, the right to vote, and the right to due process in criminal proceedings. (p. 30)

This contradiction, while basic, would not be so important if it were a one-off slip of the pen, but it is not. Rather, Father Drinan's discussion of the protections currently offered by international law is marked by such discrepancies. Consider, for example, a related ambiguity in Father Drinan's discussion of the international enforcement mechanisms available for religious claims. In spite of having explained that the UN Human Rights Committee has asserted that the ICCPR "prohibits almost every restriction on religion," (p. 36) and that the Committee has heard complaints from individuals asserting violations of their religious rights (also p. 36), Father Drinan nonetheless rails against the lack of any entity to hear religious claims:

If the citizens of nations that are signatories of the ICCPR, the treaty against racial discrimination, or the CEDAW [the Convention to Eliminate Discrimination Against Women] can bring their complaints to transnational bodies, why should individuals who feel that they are discriminated against on the basis of their religious faith be denied a comparable forum? (p. 41)

The punctuation of the book with non sequiturs of this kind is a shame, because they distract the reader from Father Drinan's provocative views on the substantive issues of religious freedom. I am not at all in accord with Father Drinan's imaginary critic's

second concern, which is:

Concern #2: "This book will also trouble some readers because at the age of twenty-three its author took the vows of poverty, chastity and obedience as a Jesuit. Some will point out that I can hardly claim to be an objective observer of the state of religion in the world." (p. 233)

To the contrary, Father Drinan's grounding in his Catholic faith is one of the strengths of his book. From holy sites to homosexuality, polygamy to pregnancy, taxes to the ten commandments, Drinan is in a position to consider not only the challenges that religion poses for the law, but also the tensions and ambiguities embedded in churches' own understandings of their relationships with the state and with other faiths. Of course, Father Drinan is operating from within his own belief system, but on matters of religion, neither believer nor unbeliever can lay claim to being an "objective observer." Indeed, the points at which Father Drinan's beliefs do seem to hamper his analysis occur not when he is immersed in and arguing for them, but when he forgets to take account of the effect of his experience on his point of view. He remarks, for example, that analyzing church-state relationships in Europe and Latin America is "much easier" than in Africa, Asia, and India, a claim that seems to speak more clearly of his American Catholic identity than of the nature of the relationships at issue.

Father Drinan's views on the roles Christian churches and believers should play when participating in public life offer some of the book's most intriguing claims. Father Drinan does not hesitate to ask tough questions about both legal and religious characterizations of these relationships: Can a state's interest in preserving its religious heritage through public expressions of faith be reconciled with minorities' religious freedom? What is the religious meaning of such ex-

pressions: are they acts of conscience, of piety, or something else? And what relevance does this religious meaning have to the standards that the state and the international community maintain on this issue? (p. 56) At the moments when he grapples with these issues, Drinan reveals himself to be a thoughtful commentator with unconventional views. Unfortunately, those moments are fewer than they ought to be.

Instead, again and again, Drinan offers the same easy answer to every troubling question: a world court or other international tribunal dedicated exclusively to religious disputes should hear the issue and offer a binding decision based on an international treaty dedicated to preserving religious freedom. Public expressions of faith (p. 57), government-funded vouchers for private schools (p. 58), proselytizing (p. 106), gay rights (p. 150) – after tantalizing the reader with some initial remarks demonstrating persuasively that these are indeed difficult conundrums for any state, Drinan repeatedly punts by summing up with his usual "treaty and tribunal" solution.

Do not misunderstand: I would not criticize Father Drinan merely for suggesting that the law may be able to take on and resolve some complex social conflicts. But here, Father Drinan seems to regard the very fact that the complexity of religious disputes defies present legal categories and tests as providing an argument that a court ought to address them. For the uncertain or skeptical reader, the fact that these conflicts are not immediately susceptible to being parsed through legal analysis seems to hint that they are not really legal issues at all, but political, social, or moral ones. Father Drinan's proposal that a court could and should address these issues through legal methodology would be more persuasive if he himself had demonstrated that it is possible to do so.

Of all the questions that Father Drinan raises in his book, perhaps the most troublesome to his purpose of promoting world law and a world court on religious freedom is defining the content and scope of that religious liberty. As Father Drinan himself is well aware, fully ensuring the liberty of all religious organizations and individuals would catalyze the development of inherent, enduring, and perhaps irreducible conflicts among them. On page 149, for example, Drinan asks, "If some individuals are convinced in their conscience that they were born homosexual and must live in the way that God created them, should there be some international guarantee that prohibits nations from discriminating against them? The answer has to be yes, but how?" And on page 183, following inexorably upon that expansive definition of individual religious liberty, Drinan asserts an equally expansive and fundamentally incompatible group claim: if the question is whether "a nation has a right to follow religious practices directly forbidden by global standards that arguably rise to the level of customary international law," likewise, "the answer has to be yes."

In Father Drinan's world, some unfortunate court would have to find a method of resolving this inevitable second order conflict between group and individual liberties that have both been defined and guaranteed in their broadest possible sense by international law. Can God and Caesar coexist? Father's Drinan's solution seems to be: Perhaps they won't have the chance to fight if they spend all their time in court.

One possible solution to this problem would be to limit the scope of the protected freedoms to only the most basic: the right, for example, to be free from arrest or other sanctions merely for holding certain religious beliefs. And Father Drinan at times tries to soft sell his purpose as limited to ending this sort

of religious persecution: "Every law curbing discrimination and intolerance changes the world climate. Like civil rights laws in the United States, a world law protecting religious freedom would make discriminatory conduct less acceptable and eventually, it is hoped, make such conduct unthinkable." (pp. 240-41)

But ultimately, Father Drinan's true vision of religious liberty is far more robust and participatory, accruing, as suggested above, to groups as well as to individuals: "Granting and guaranteeing religious freedom in its fullness means allowing religious organizations to use the full power of their considerable strength to attempt to fashion national and global societies into cultures compatible with their views of what is good." (p. 61)

At the core of the adage "render unto Caesar the things that are Caesar's and unto God the things that are God's" to which Drinan's title refers is the presumption that it is obvious what does in fact belong to Caesar (in the Biblical story, a coin imprinted with Caesar's image) and what, in fact, belongs to God. But Drinan seems to be claiming for the Church what in modern political life is designated either for individuals or for governments representing the people as a whole: the power to define and pursue their vision of the good life.

When sub-state or trans-state entities claim this authority, whether they be churches, ethnic groups, or other organizations, they present a challenge to the established order that is not now cognizable under the provisions or in the institutions of international law. In this, I found Father Drinan's limitless faith in the capacity of an international legal system not only to protect basic religious beliefs but also to open up new vistas of religious expression and influence to be both audacious and alarming – but ultimately unpersuasive. *GB*