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COMMISSION ON HUMAN RIGHTS  
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DRAFT PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION IN THE  
MATTER OF RELIGIOUS RIGHTS AND PRACTICES

Note by the Secretary-General

As requested in the first operative paragraph of resolution 4 (XVI), which the Commission adopted at its sixteenth session, the Secretary-General transmitted to the Governments of States Members of the United Nations and of the specialized agencies the text of the draft principles on freedom and non-discrimination in the matter of religious rights and practices drawn up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/800, para. 160, resolution 1 (XII), annex), so that they could submit their comments on the substance of the draft principles and the form in which such principles should be embodied.

The comments received from the Governments of Afghanistan, Australia, India and Poland are transmitted to the Commission herewith.

AFGHANISTAN

1. The Afghan Government is in agreement with the principles laid down in this draft.
2. The Afghan Government considers it essential to bring the text of this draft into agreement with the text of article 18 of the Covenant on Civil and Political Rights concerning the freedom of thought, conscience and religion, as adopted by the Third Committee of the General Assembly during its fifteenth session, particularly as follows:
  - (a) Part 1 of the draft has to be revised according to paragraphs 1, 2 and 4 of the above-mentioned article 18,
  - (b) Part 3 of the draft should be revised in accordance with paragraph 3 of article 18.
3. Sub-paragraph c of article 5 of Part II of the draft puts too much emphasis on the incompatibility of the "law applicable" and religious law, while in many countries the applicable law is inspired by the religious background of its population.
4. The Afghan Government reserves its right to present further observations when the principles are discussed in the Commission on Human Rights, the Economic and Social Council and the General Assembly.

AUSTRALIA

Commonwealth Legislation  
(other than Territorial  
legislation)

General Comments

There are constitutional and statutory provisions which safeguard or respect religious rights or convictions. Thus, section 116 of the Commonwealth Constitution provides:

"116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The prohibitions in this section operate not only to protect the freedom of religion, but also to protect the right of a man to have no religion. "Religion" does not apply to one specific religion, but to all religions, including minority religions.

2. In view of the provision in section 116, there are no Commonwealth Acts or Regulations governing religious organizations or observances. However, certain provisions are contained in Commonwealth Acts which are clearly an expression of the principle of religious non-interference as envisaged by section 116.

3. There is no safeguard in the Constitution of any State similar to section 116. Accordingly, the comments that follow should be read in this light.

Particular Comments

Part II

The introductory words, to the extent that they authorize modifications of the freedom to comply with the prescriptions of religion in the "interests of society as a whole", are consistent with the prohibitions of section 116.

In Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth (1943)

67 C.L.R. 116, the High Court held that section 116 does not prevent Parliament

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from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged; the solution adopted to reconcile religious freedom with ordered government was that it is for the Court to determine whether a law is one for the protection of the community or for "prohibiting the free exercise of any religion". A subversive organization cannot, therefore, secure protection under section 116 by organizing and declaring its principles in a form of religious faith.

Clause 2. There is no Commonwealth law that expressly prevents people from going to sacred places, whether inside or outside Australia, for devotional purposes. However, the usual passport and quarantine requirements would need to be complied with although quarantine concession has been granted to persons making the Pilgrimage to the Holy Places in Hedjaz (Mecca) and returning to Australia by aircraft. The vaccination of such a pilgrim against cholera must have taken place not more than six months before his arrival in Australia, the minimum period of six days before his arrival in Australia within which he must have been vaccinated, as provided for any other person, is not applicable to such a pilgrim (regulation 74(3.) of the Quarantine (General) Regulations).

Clause 4. The Sales Tax (Exemptions and Classifications) Act 1935-1959 expressly exempts from sales tax "equipment for use in churches and church services and articles for use in religious devotion" or as well as memorial boards etc. in memory of deceased persons (section 5 and items Nos. 65 and 66 of the First Schedule). No import restrictions exist with regard to these objects under the Customs Act 1901-1959 or the Customs (Prohibited Imports) Regulations.

Clause 5. Sub-clauses (a) and (b) as to marriage are presently dealt with for the most part in State and territorial law. There is a Marriage Bill now before the Commonwealth Parliament but nothing in it would be contrary to the principles proposed in these sub-clauses.

Sub-clause (c) relates to divorce. The new Commonwealth Matrimonial Causes Act which will come into force on 1 February 1961 contains no adverse distinction based on religion.

Clause 9(a). (a) The admission of religious teachers from abroad depends only upon their ability to satisfy the usual criteria as to health and character, such as are applicable in the case of immigrants seeking admission for any other purpose, e.g., as tourists, business visitors or prospective settlers.

(b) Neither Australian citizens nor foreigners resident in Australia are subject to any restriction on departure for overseas for the purpose of undergoing religious training.

Clause 10. The Constitution provides in section 42 for the taking of an oath or affirmation of allegiance by every senator and every member of the House of Representatives before he takes his seat in Parliament. While the oath contains an invocation of the Deity, ending with the words "So help me God!", the affirmation is a solemn affirmation and declaration, omitting the invocation of the Deity. Members of Parliament who object to be sworn on the ground that the taking of an oath is contrary to their religious belief may, therefore, make a solemn declaration, in lieu of an oath, having the same purpose and effect. It is the general practice in Commonwealth Acts, where statements have to be sworn or solemn promises have to be made, to provide the alternative of making a solemn declaration.

Clause 11. Sections 61, 61A of the Defence Act 1903-1956, and section 29A of the National Service Act 1951-1957 are the relevant provisions relating to conscientious objection. Current Australian practice in the Defence Forces is to grant exemption to conscientious objectors. As the Navy is composed entirely of volunteers, the question of conscientious objection to service in the Navy does not arise.

Clause 12. There is no Commonwealth law relating to participation at public ceremonies. Section 123B of the Defence Act 1903-1956 provides that no regulation or other order shall compel attendance by a member of the Defence Forces at any religious service.

Clause 13. This paragraph relates to confidential communications made to spiritual advisers and its purpose is to grant "professional privilege" to such communications.

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The disclosure of confidential communications in a court of law and the question whether and how far they are privileged belong to the law of evidence. The principles of the law of evidence consist in general of rules of the common law. The statute law consists mainly of provisions supplementing or modifying those principles.

At common law, confidential communications with spiritual advisers are, in contrast to those between legal adviser and client, not necessarily privileged. Whilst judges have in some cases expressed their reluctance to force spiritual advisers to disclose confidential communications made to them, in others they have said that no privilege exists. It appears, therefore, that the existence of the privilege at common law is still an open question.

There is, of course, the possibility of statutory provisions dealing with this particular privilege. In Australia, only Victoria and Tasmania have made appropriate provisions relating to the privilege. The Evidence Act 1958 of Victoria contains the following provision:

"28. No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs."

The Evidence Act 1910, as amended, of Tasmania has in section 96 a similar provision.

Courts exercising federal jurisdiction have to apply the laws, including the laws relating to evidence, of each State, which is binding on those Courts in that State where they are exercising their jurisdiction in civil and criminal matters (see sections 79, 80 of the Judiciary Act 1903-1955). For example, the High Court sitting in Sydney would have to apply the common law with regard to privilege of clergymen unmodified by statute law, while, when sitting in Melbourne, section 28 of the Evidence Act of Victoria would have to be applied which provides for privilege of confessions made to clergymen.

The Evidence Act 1905-1956 of the Commonwealth does not contain any provisions relating to privilege of this kind.

Part III

Clause 2. See comments above on the introductory words of Part II.

Part IV

Introductory Words: No Commonwealth law exists where discrimination or preference is made against or for individuals or groups of individuals with respect to the right of freedom of thought, conscience and religion. The Commonwealth Public Service is open to all irrespective of their religious beliefs. The Australian National University Act 1946-1960 provides in section 32 as follows:

"32. No religious test shall be administered to any person in order to entitle him to be admitted as a student of the University, or to hold office therein, or to graduate thereat, or to enjoy any benefit, advantage or privilege thereof."

The Census and Statistics Act 1905-1959 provides in section 21 as follows:

"21. No person shall be liable to any penalty for omitting or refusing to state the religious denomination or sect to which he belongs or adheres."

Clause 1. An example of a means of settling conflicting "demands" of two or more religious organizations may be found in the Church Lands Leases Ordinance 1924-1932 of the Australian Capital Territory. The privilege of acquiring land for church purposes from the Crown by way of a lease in perpetuity for a nominal rental of One Shilling per annum "payable if and when demanded by the Minister" is given to all denominations alike. If, however, applications for leases are received in respect of the same land, section 4 of the Ordinance provides as follows:

"4. Where more than one application is made for a lease under this Ordinance in respect of the same land, preference shall be given to the application on behalf of the denomination having in the Commonwealth the greatest number of adherents as shown by the latest census."

Clause 2. Section 23(e) of the Income Tax and Social Services Contribution Assessment Act 1936-1960 exempts the income of religious institutions from income tax. See also Gift Duty Assessment Act 1941-1957, section 14(d), whereby "any

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gift to, or wholly for the benefit of, an institution, organization or body of persons, whether corporate or incorporate, not formed or carried on for the profit of any individuals" is exempted from gift duty. A religious body would fall under this paragraph.

There is no Commonwealth law relating to the preservation of "religious structure recognized as monuments of historic or artistic value". So far as the Commonwealth might acquire property from a religious organization, the acquisition would need to be on "just terms" (Constitution, section 51(xxxi.)).

With regard to the granting of subsidies from public funds to religious organizations, section 116 of the Constitution prohibits the Commonwealth from making any law "for establishing any religion". The words "establishing any religion" have been explained by Quick and Garran, "Annotated Constitution of the Australian Commonwealth", as follows (at p. 951):

"By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others."

The Commonwealth has, however, made grants of financial assistance to Church organizations performing functions which would fall under its own legislative competence or responsibilities, as, for example, the erection and purchase of approved homes for aged people (social services power); providing buildings and other facilities for migrant children (immigration power); grants to church missions in the Northern Territory who care for aged, infirm and child aborigines on behalf of the Commonwealth (territories power).

#### Conclusion

4. Summing-up, there are no Commonwealth Acts or Regulations that restrict in any way religious organizations or the free observance and exercise of religious beliefs either by those organizations or by individuals. So far as the Commonwealth has power to legislate in this respect (namely, for the Territories), the provisions of section 116 of the Constitution would need to be observed.

5. It may be concluded that the draft principles are not in conflict with Commonwealth legislation and the interpretation given to it by the High Court is not, in any way, repugnant to or inconsistent with those principles.



INDIA

Form in which principles should be adopted

In view of the nature of the subject matter, a legally binding convention will not be a suitable form. As the principles are meant to be a guide for Governments, a declaration adopted by the General Assembly should be appropriate.

Part III, para. 2(a) of draft principles

The freedom and rights set out in the other paragraphs 1 to 9, 11 and 12 of part II shall be subject only to the limitations prescribed by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, health, public order. It may be noted that the freedom of religious practice would extend only to those rites and observances which are of the essence of religion and would not cover secular activities which go by the name of religion and are no part of true religion. Therefore, the state may by law prescribe limitations on the freedom of religion not only in the interests of morality, health and public order, but also with a view to regulating the activities which are economic, commercial or political in their character though they are associated with religious practices. It is suggested, that a provision to the above effect may be included in this paragraph.

Part IV of draft principles

In connexion with para. 1, it may be noted that in order to make social equality a reality, the State may have, for a temporary period, to resort to discrimination in favour of certain individuals or classes of individuals. The constitution of a country itself may provide for such types of "protective" discrimination for the purpose of levelling up a highly heterogenous society. The prohibition discrimination mentioned in para. 2 of this part should, therefore, be made subject to the above qualifications.

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POLAND

The principles presented concord both with the provisions of the Constitution of the Polish People's Republic of 22 July 1952, and with the practice of non-discrimination applied in Poland in the field of rights and freedoms.

The Government of the Polish People's Republic offers however the following comments with a view to improving the draft principles and render them more precise.

1. As a matter of principle, the terminology used throughout the text of the draft and in its title should be consistently uniform. This terminology should show unambiguously that the stipulations contained in the draft refer to non-discrimination not only with regard to definite religious creeds but also with regard to rationalist convictions, including atheism.

(a) In the English text of the draft principles, there is used the expression: "Religion or Belief",

(b) In the French text of the draft principles, there is used the expression: "Religions et Convictions".

Mr. Krishnaswami used in his report on which the elaboration of the draft principles was based, the French expression "Religions et Convictions". This may be interpreted as relating to religious convictions as well as to rationalist, atheist convictions.

In the English text of the draft principles it is not clearly stated how the word "belief" is to be interpreted,

(c) In item 8b, Part II of the draft principles, where atheism is mentioned, the term used is "convictions" in other items the term used is "belief". This indicates that the authors of the draft principles do not consistently use a uniform terminology.

2. The Government of the Polish People's Republic considers that item 2, Part II, of the draft principles should, in accordance with the spirit of Mr. Krishnaswami's report, read as follows: "In countries where a journey to sacred places constitutes an integral part of the religion, everyone shall have the freedom, as acts of devotion, to journey to such places, whether inside or outside his country."

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The wording of item 2, Part II of the draft principles is somewhat vague. A restriction of the freedom of pilgrimage to places abroad cannot always be regarded as a discrimination in religious matters, especially when such pilgrimage does not constitute an obligation imposed by a given religion.

Item 9, Part II of the draft principles should include a provision that teachers of religion (missionaries) employed in the country or coming from abroad for the purpose of training religious personnel and dissemination of respective religion shall refrain from taking advantage of their mission (position) in order to engage in activities contrary to the Constitution and the public order of that country.

3. Item 2, Part III of the draft principles is of fundamental significance to the principles as a whole. Its careful drafting is, therefore, of the greatest importance. The item in question enumerates the motives for which the freedoms mentioned in Part II of the draft principles may be restricted.

These motives include, on one hand, the respect for the rights and freedoms of the others, and on the other hand, the public order and the general welfare in a democratic community.

The text of the draft principles is not clear whether these motives are to be considered jointly (the conjunction used is "and") or whether they are to be treated separately (in which case the conjunction "or" should be used).

In the opinion of the Government of the Polish People's Republic item 2a, Part III of the draft principles should enumerate each of the mentioned motives as a separate motive for which the freedoms defined in Part I and in items 10 and 13 of Part II may be restricted.

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