

Freedom from Religion

Strengthening the human right to freedom of religion
and belief by securing freedom from religion

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Table of Contents

ABSTRACT.....	8
STATEMENT OF ORIGINALITY	10
INTRODUCTION	11
CHAPTER 1: FREEDOM OF RELIGION OR BELIEF.....	17
1.1. Introduction	17
1.1(a) A brief history of religious persecution	17
1.1(b) The emergence of freedom of religion (and belief) as a right	29
1.2. The meaning of religion and belief	32
1.2(a) Religion.....	33
1.2(b) Belief	37
1.3. Freedom of thought, conscience and religion.....	41
1.4. Freedom to manifest religion or belief	46
1.4(a) Worship	49
1.4(b) Observance	50
1.4(c) Practice.....	52
1.4(d) Teaching.....	54
1.4(e) Manifestation of freedom of expression.....	55
1.4(f) Conclusions on manifestation of religion and belief.....	56
1.5. Freedom from Coercion (Article 18(2)).....	57
1.6. Limitations on Manifestation of Religion	59
1.6(a) Prescribed by law	60
1.6(b) Limitations must be “necessary”	61
1.6(c) Permissible grounds of limitation.....	63
1.6(c)(i) <i>Public Safety and Public health</i>	63
1.6(c)(ii) <i>Public Order</i>	66
1.6(c)(iii) <i>Public Morals</i>	68
1.6(c)(iv) <i>Rights and Freedoms of Others</i>	71
1.6(c)(v) <i>Absence of National Security</i>	73
1.6(d) Conclusion on limitations.....	74
1.6(d)(i) <i>Malleability of limitations allows bias</i>	75
1.6(d)(ii) <i>Fewer limits apply to article 18</i>	77
1.7. Non-derogability of Article 18.....	78
1.7(a) Conditions for derogation.....	78
1.7(b) Non-derogability of article 18	79
1.7(c) Conclusions on the non-derogability of article 18	83
1.8. Freedom to Change Religion or Belief	84
1.9. Conclusions on Freedom of Religion or Belief	90
CHAPTER 2: THE COMPATIBILITY OF RIGHTS AND RELIGION	93
2.1. Introduction	93
2.2. Human rights and religion are compatible because human rights derive from God	94

2.3. Religious precepts can be interpreted as compatible with rights.....	97
2.3(a) Rejecting 'Islamic' human rights instruments.....	98
2.3(b) Interpreting Islam in accordance with Rights	100
2.3(c) Interpreting Rights in accordance with Islam	105
2.3(d) Conclusions	107
2.4. Manifestations of religion can clash with other human rights.....	110
2.5. Resolving clashes of rights	114
2.5(a) Secularism	114
2.5(b) Pluralism	119
2.6. Conclusion.....	126
CHAPTER 3: FREEDOM OF RELIGION AND NON-STATE ACTORS	128
3.1. Introduction	128
3.2. Harms to human rights from religious actors.....	131
3.3. Direct human rights duties of non-state actors	139
3.3(a) State-centric view	143
3.3(b) Considerations in determining obligations of non-state actors.....	146
3.3(b)(i) <i>Personality Consideration</i>	148
3.3(b)(ii) <i>Capacity Consideration</i>	149
3.3(b)(iii) <i>Function Consideration</i>	151
3.3(c) Conclusion on direct duties of non-state actors	153
3.4. Horizontal implementation of human rights by states	154
3.4(a) Horizontality in international law	154
3.4(b) Due diligence: determining the point at which duties are evoked	157
3.4(c) Horizontality in Case Law	159
3.4(d) Relationship between religious non-state actors and the state.....	164
3.5. Conclusion.....	167
CHAPTER 4: HIERARCHY OF RELIGION AND BELIEF.....	169
4.1. Introduction	169
4.2. Established religions on top	170
4.3. New, unusual or emerging religions or beliefs	174
4.3(a) High persecution of Scientologists	177
4.3(b) Low protection of Scientologists.....	179
4.4. Atheists at the bottom.....	185
4.4(a) High persecution of atheists	186
4.4(b) Low protection of atheists	189
4.5. Conclusion.....	196
CHAPTER 5: CASE STUDY - PROSELYTISM.....	199
5.1. Introduction	199
5.1(a) Religious Perspectives on Proselytism	200
5.2. Proselytism as a religious freedom	203
5.2(a) Proselytism as a manifestation of religious freedom	203

5.2(b) Proselytism as Freedom of Expression	205
5.2(c) Conclusions on proselytism as a protected manifestation.....	206
5.3. Proselytism as ‘improper’ coercion	207
5.3(a) Jurisprudence on ‘improper’ proselytism.....	208
5.3(a)(i) <i>Kokkinakis v Greece</i>	209
5.3(a)(ii) <i>Larissis v Greece</i>	214
5.3(a)(iii) <i>Summation of Kokkinakis v Greece and Larissis v Greece</i>	217
5.3(b) Proselytism through threats or violence	218
5.3(b)(i) <i>Case study: Catholicism</i>	220
5.3(b)(ii) <i>Case study: Islam</i>	223
5.3(c) Proselytism through exploitation of circumstance	225
5.3(c)(i) <i>Missionary and humanitarian activity</i>	225
5.3(c)(ii) <i>Imposing conditions on benefits</i>	229
5.3(d) Proselytism through exposure to religious symbols.....	232
5.3(d)(i) <i>Dahlab v Switzerland</i>	232
5.3(d)(ii) <i>Lautsi and others v Italy</i>	233
5.3(d)(iii) <i>Summation of Lautsi and Others v Italy and Dahlab v Switzerland</i>	234
5.3(e) Conclusions on ‘improper’ proselytism.....	236
5.4. Determining where coercion undermines choice.....	238
5.4(a) Attributes of the source of proselytism.....	239
5.4(b) Attributes of the target of proselytism.....	241
5.4(c) Attributes of the location of the proselytism	245
5.4(d) Nature of the proselytism.....	247
5.4(e) Context of the proselytism.....	248
5.4(f) Application to ‘belief’	250
5.5. Conclusion: Freedom from coercion.....	253
CHAPTER 6: CASE STUDY – FREEDOM FROM HATE	256
6.1. Introduction	256
6.2. Article 20 and hate speech.....	257
6.2(a) Advocacy of hatred: the jurisprudence so far	259
6.3. Religious hatred	266
6.3(a) Hatred in the name of religion	269
6.3(b) Homophobia: prohibited discrimination or a religious right?	274
6.3(c) Hatred of atheists and non-believers	280
6.3(d) Hatred by atheists and non-believers	283
6.4. Conclusion.....	285
6.4(a) Religious bias of article 20.....	286
6.4(b) The need to strengthen article 20	287
CHAPTER 7: CASE STUDY – CHILDREN VS PARENTS.....	289
7.1. Introduction	289
7.2. The primacy of parents’ rights.....	291
7.2(a) Relevant human rights provisions.....	292
7.2(a)(i) <i>ICCPR and ICESCR</i>	292
7.2(a)(ii) <i>1981 Declaration</i>	293
7.2(a)(iii) <i>CRC</i>	295

7.2(b) The role of religion.....	296
7.2(c) Resolving conflict between parents and children	299
7.2(c)(i) <i>Evolving capacities</i>	301
7.2(c)(ii) <i>Participation Rights</i>	306
7.2(c)(iii) <i>Best interests of the child</i>	308
7.2(d) Conclusion: freedom from coercion.....	316
7.3. Religious education.....	319
7.3(a) Human rights perspective of education.....	320
7.3(b) Parents' rights in respect of children's education.....	323
7.3(b)(i) <i>Potential conflict with children's education rights</i>	324
7.3(b)(ii) <i>Potential conflict with children's religious rights</i>	329
7.3(b)(iii) <i>Education and 'belief'</i>	330
7.4. Male Circumcision.....	332
7.4(a) Cultural, religious or health practice	333
7.4(b) Relevant parents' rights	336
7.4(c) Child's countervailing rights	340
7.4(c)(i) <i>Right to Health</i>	340
7.4(c)(ii) <i>Right to Freedom of Religion and Belief</i>	344
7.5. Conclusion: Children's rights to be free from parental coercion.....	345
CHAPTER 8: IS THE HEIRARCHY OF RELIGION AND BELIEF JUSTIFIED? 349	
8.1. Introduction	349
8.2. Recaps of findings	349
8.2(a) Biased approach in deciding what is coercive proselytism.....	350
8.2(b) Hierarchy of hate speech.....	351
8.2(c) Religious rights of parents trump the rights of others	353
8.3. Is the hierarchy of religion and belief justified?	355
8.3(a) Inherent value of some religions or beliefs over others	355
8.3(a)(i) <i>Longevity of religion or belief</i>	355
8.3(a)(ii) <i>Popularity of religion or belief</i>	356
8.3(a)(iii) <i>Content or plausibility of religion or belief</i>	358
8.3(a)(iv) <i>Purpose of religion or belief</i>	360
8.3(b) Relevance of role of religion or belief in social life.....	362
8.3(b)(i) <i>Extent to which religion or belief influences community</i>	362
8.3(b)(ii) <i>Extent to which religion or belief benefits society or its members</i>	365
8.3(b)(iii) <i>Extent to which religion or belief unite people into a 'group' of 'minorities'</i>	366
8.4. Conclusion: Hierarchy is not justified	368
8.4(a) <i>Conclusions on inherent value of religion and belief</i>	369
8.4(b) <i>Conclusions on the role of religion and belief in society</i>	370
CHAPTER 9: FREEDOM FROM RELIGION.....	372
9.1. Introduction	372
9.2. Equal and pluralistic application of horizontality	374
9.2(a) Where religious manifestations are excessively limited	374
9.2(b) Where religious manifestations are not adequately limited	375
9.2(c) Conclusion: horizontality must be applied equally and pluralistically	375
9.3. Levelling the hierarchy with freedom from religion.....	376

9.3(a) <i>Pluralism</i>	377
9.3(b) <i>Equality</i>	378
9.4. Relevant cases involving freedom <i>from</i> religion	379
9.4(a) Protecting rights holders from the religion of the state	379
9.4(b) Protecting rights holders from the religion of others.....	380
9.4(c) Freedom from religion and the domestic level	384
9.5. Conclusion: Freedom from religion as a measure of freedom of religion and belief	387
BIBLIOGRAPHY	390
Articles / Books / Reports	390
Treaties	411
Other sources.....	412
Jurisprudence	419

ABSTRACT

Freedom of religion and belief is one of the strongest rights contained in the International Covenant on Civil and Political Rights (ICCPR), but simultaneously one of the most elusive. Article 18 of the ICCPR protects “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.” And yet jurisprudence is yet to fully explore the capacity of this right to stand up to the challenge of meaningfully protecting freedom of religion and belief across the spectrum of worldviews.

At the outset of this thesis, a brief history of religious persecution is offered as a backdrop to the emergence of the human right to freedom of religion and belief, before that human right in its present form is unpacked. The compatibility and incompatibility of freedom of religion and belief and other human rights is explored, with reference to some religious approaches to understanding rights. Pluralism is ultimately identified as a key value in balancing conflicts that may arise between different approaches. The human rights obligations of non-state religious actors are then discussed, before asserting that there is a hierarchy of religion and belief in the practice of international human rights law. Despite the fact that article 18 provides for the equal protection of those who believe in one God, those who believe in many gods and those who believe in no god, monotheists are asserted to occupy the highest rung of the hierarchy, with new religions that have not yet become entrenched in history and atheists below them. This assertion is further explored through case study chapters.

A case study on proselytism determines the point at which proselytism, as a manifestation of a person’s religion or beliefs, becomes coercion of another person that should be limited. In the following case study chapter on hate speech, it is found that persons who are hated *for* their religion are more likely to be protected than those who are hated *by* the religious. The beliefs and traits of parties concerned are thus found to have more bearing on legal decisions than whether or not the hate speech at issue incites violence. The third and final case study chapter considers the conflict between a child’s right to enjoy religious freedom with the right of her

parent to impose a religion or belief upon her. By exploring this tension through analysis of education and the religious circumcision of infants, it is asserted that international human rights law protects parents' religious rights vis-à-vis their child, above the child's own rights and freedoms.

It is then considered whether the hierarchy of religion and belief is justified. From a rights-based perspective premised on the value of individual freedoms above ideology, the conclusion reached is that such a hierarchy is indefensible and may serve to entrench the vulnerability of people on the basis of their religion or belief. In order to level the hierarchy at play, freedom *from* religion is ultimately offered as the measure of freedom of religion and belief. Freedom of religion and belief is only meaningful when an individual is free to choose, change, maintain or reject any religion or belief or even profess atheism, and when the rights of people around him are protected from harmful manifestations of his choice.

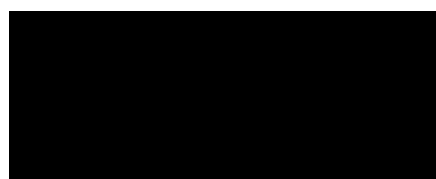
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Marika McAdam

INTRODUCTION

"It has often been noted that the struggle for freedom of belief precedes every other in the history of human rights protection"¹

Freedom of religion and belief is one of the strongest human rights contained in the International Covenant on Civil and Political Rights, and simultaneously one of the most elusive.² Religious freedom is essential for humans to lead rich and meaningful lives, but it is clear that some manifestations of religion and belief can also compromise the human rights of others. Murderers have cited religious doctrine as their inspiration or motivation, ideological conversion has been demanded in exchange for food, hatred has been preached against gays, and children have suffered physical and mental abuse all in the name of religion. The challenge from a human rights perspective is how to objectively protect the enjoyment of freedom of religion and belief, while also protecting the rights of others to be free from harmful manifestations of it.

This thesis does not contain speculation on the evidential verisimilitude of various religious beliefs in a bid to resolve the conflicts between them. Though atrocities have been and continue to be committed in defending or imposing versions of God or gods who may or may not exist, deciding which version of beliefs is more 'right' than the next or determining whether any versions are in fact 'wrong' is not a question which legal scholarship can answer. Human faith and spirituality transcend human reason. Where legal scholars are called to adjudicate on actions that have been religiously inspired, universal human rights norms require them to do so impartially. Yet it is argued in this thesis that legal objectivity has been muddled by bias in favour of some rights holders on the basis of their religious beliefs over others on the basis of theirs, or their lack of them. While justice may be blind for instance, when the person standing before her wears a crucifix in honour of Christ, a

¹ Brice Dickson, 'The United Nations and Freedom of Religion' (1995) 44 *International and Comparative Law Quarterly* 327, 330.

² Unless otherwise stated, terms such as 'religious freedom' and 'freedom of religion' throughout this thesis refer to freedom of religion and belief.

headscarf in submission to Islam, or a kippah in devotion to Judaism, can she be expected not to see the spaghetti strainer on the head of the Pastafarian?³

Despite the incompatibility of religious belief and legal reasoning, religiosity is intertwined with legality in complex ways. In some societies, the two concepts are inextricable, while in other societies there is keen separation between them. Yet even in secular jurisdictions, religion is often present in the sphere of the state. Lawyers for instance may be invited to swear an oath on the bible or other holy book as they are admitted into practice. The implication of this scenario is not only that a person's belief that a virgin can have a baby or that a man can rise from the dead is of consequence to a secular court, but also that it vouches for his or her trustworthiness to practice law. Would the court be just as convinced of his fitness to practice law if he did not profess belief in God, but in the Flying Spaghetti Monster? Meanwhile, that same court is likely to question the mental fitness of a person who claims to have acted upon the instructions of the voices of angels in her head, or believes that Jesus has returned and is living in her garage. Indeed, while some beliefs are considered a testament to the believer's good character, others cast doubt on it. In the relationship between religion and the law then, it seems that some beliefs are more equal than others.

Chapter 1 commences with a necessarily brief history of religious persecution that has preceded the current international framework for upholding freedom of religion and belief. The meaning of religion and belief at the international level is also explored, along with the various components of the human right to freedom of religion and belief and limitations to its manifestation. The special nature of religion and the fraught process of arriving at universal agreement on the extent to which religion (and belief) are to be upheld in the international human rights framework, speak to the special place of freedom of religion and belief at international law.

³ Pastafarianism is a satirical religion, whose worship of 'The Flying Spaghetti Monster' is intended to emphasise that positive aspects of religion, including community, can exist even in the absence of literal belief. Pastafarians have been chosen here to illustrate the challenge of approaching all religions impartially, while avoiding the need to single out a non-satirical religion in place of this one. Doing so would be to fall prey to this very partiality and risk offending followers of whichever religion was chosen. More information about Pastafarianism is available at <http://www.venganza.org/about/>.

Chapter 2 explores different understandings of the relationship between religious rights and other human rights. The idea that rights originate in religious ideology is first posited, but ultimately set aside for its limited universal resonance. More valuable are the interpretative approaches common in human rights and religious discourse today, whereby religious doctrines are read so as to be rights-compatible. This approach is praised for the legitimacy it lends human rights discourse in specific contexts. The chapter finally explores the undoubted fact that some manifestations of religion can interfere with the rights of others, including their freedom of religion and belief. Two concepts that are commonly applied in mediating between clashes of rights are considered, namely secularism and pluralism. The latter is ultimately offered as essential to freedom of religion and belief, and as a core underlying value guiding the thesis.

Chapter 3 discusses non-state actors. Religious non-state actors occupy a unique position in society, capable of both helping and harming the individuals within it. Despite their capacity and the impunity with which many of its agents act, human rights discourse has thus far not given religious non-state actors the same attention as it has other private actors such as corporations. This chapter addresses two issues: firstly, the possible existence of human rights obligations for religious bodies, and secondly, the obligation of states to protect people from infringements of their rights by religious actors. The conclusion is that states' obligations to protect human rights from the actions of non-state actors are clear for human rights would be nonsensical if it were otherwise. Yet the lack of cases brought by those who have been victims of human rights violations by religious actors may represent a failing of, or at least a perceived lacuna in, the international human rights framework. As an initial step towards building momentum in this direction, it is argued that the current discourse and debate about the human rights responsibilities of non-state actors such as multinational corporations should be extended to include discussion of the rights and responsibilities of religious organisations.

Chapter 4 asserts that there is a hierarchy of religion and belief at international law. It is argued that limitations are often imposed in ways that do not objectively consider the activity in question, but rather consider the religion or belief on which

the activity is based. Certain established religions are posited to enjoy the most privileged position in this hierarchy, evidenced through the failure to criticise them at the level of international human rights discourse, and the high concern shown towards followers of established religions relative to holders of other religions. Below them are followers of relatively new or 'unusual' religions and beliefs (such as Scientology) who experience higher persecution met with lower concern. Finally, atheists are argued to occupy the lowest rung on the hierarchy of religion and belief; being heavily persecuted for their rejection of religion but often overlooked even at the level of an ostensibly neutral international human rights framework.

The following three case study chapters (reflecting past and current material up to September 2013) test the hypothesis that there is a hierarchy of religion and belief at international law.

Chapter 5 explores proselytism as a case study to illustrate the existence of a hierarchy of religion and belief. Proselytism is both a protected manifestation of religious freedom and a prohibited form of coercion. The challenge for human rights law is to determine the point at which a manifestation of one person's religion becomes coercion of another of the type that should be limited. The argument made in this chapter is that *prima facie* proselytism should be protected as a manifestation of religion or belief, irrespective of the content of the views asserted by the source and the manner in which those views are asserted. Where proselytism involves improper coercion such that the target's choice to maintain or change his or her religion or belief is impaired, it should be limited. Beyond this it is asserted that the same considerations should apply to the rights of non-believers and atheists; if a person is not free to choose to adopt or maintain non-belief or atheism, then he has been coerced. Despite these considerations, the chapter concludes that a bias is evident, favouring proselytism of some religions over others.

Chapter 6 considers the extent to which religious manifestations can be limited to protect rights-holders from 'hate speech'. Of particular interest here is not only the situation of rights holders who are hated *for* their religion or belief, but also of those who are hated *by* the religious. It is argued that hatred that is directed at the religious is likely to be prohibited hate speech, what that coming from a religious

perspective directed at persons for reason of their lack of religion, their different religion, or their homosexuality for instance, is less likely to be prohibited. Ultimately it is asserted that hate speech should be construed as broadly as possible so as to limit manifestations of religion and belief through considerations that weigh religion and belief, including theistic and atheistic convictions, equally. The point of interference with expressions should be determined by the point that hate speech incites violence rather than by the religion of its source or the hated traits of its target.

Chapter 7, the final case study chapter, looks to the rights of children and potential violations of their rights in the name of the religion of their parents. The tension between these two rights-holders poses challenges even for the state that aspires in good faith to protect the human rights of the parent and the child, while simultaneously respecting religious tenets concerning the religious upbringing of children. Such issues are explored in the context of the child's right to an education, versus her parents' right to bring her up in accordance with their own religion, and parents' rights to circumcise their child versus the child's countervailing rights to health and freedom of religion and belief. The conclusion reached is that human rights law inadequately protects children from interferences and coercion by their parents, owing to the hierarchy of religion and belief that elevates some religions and beliefs over others.

Having established that a hierarchy of religion and belief exists, **Chapter 8** asks whether such a hierarchy is justified. It is considered whether some religions or beliefs may have inherent value, shown by their longevity, their popularity, their content or their purpose. The chapter also considers the role that religion and belief play in social life as a possible justification for ranking some religions and beliefs above others, noting the tendency of some to foster community and enhance society, over others that may tend towards weakening or destabilising society. The extent to which religion and belief unite people into a 'group' is also considered in this context as a possible ground for elevating some religions and beliefs over others. Ultimately the conclusion reached is that the hierarchy is not justified. The human right to freedom of religion and belief aspires to neutrality for good reason, being the

fact that rights attach to individual rights holders irrespective of their religion and beliefs. Were it otherwise, human rights would risk entrenching the vulnerability and persecution that some rights holders experience on the basis of their religion and belief rather than protecting them from it. In short, rights-holders should not be defended on the basis of their religion or belief, but on the basis of their humanity.

Finally, **Chapter 9** concludes that the hierarchy of religion and belief can be levelled, by ensuring that freedom *from* religion is protected equally alongside freedom *of* religion. The horizontal application of human rights cannot be too strongly applied in a way that too intrusively limits manifestations of religion or belief. But nor can it be too weakly applied, by failing to limit such manifestations of religion and belief where it ought to. Rather, horizontality must be applied equally and pluralistically. Equality and pluralism determine that the meanings of religion and belief should be a secondary consideration to how manifestations of either are to be limited by clear legal criteria that are driven by rights considerations rather than religious ones. The ultimate test to determine how well equality and pluralism are served in the pursuit of freedom of religion and belief is through consideration of how well approaches to limiting manifestations protect the right not only to enjoy freedom of religion and belief, but also the right to be free *from* it. Only if a rights holder is free to reject the religion around him and even profess atheism, can she be said to enjoying true freedom of religion and belief.

* * * * *

CHAPTER 1: FREEDOM OF RELIGION OR BELIEF

1.1. Introduction

It is necessary to offer some background to the history of religious persecution that foreshadowed the recognition of the right to freedom of religion and belief. What follows is a broad snapshot of the long and ongoing saga of religious persecution. The point to emerge from this necessarily brief view of past persecution is a simple one, being the enduring importance of religion and belief throughout human history, and the necessity for and challenge of protecting freedom of religion and belief.

1.1(a) A brief history of religious persecution

The history of religious persecution mirrors the history of religion. People have been persecuted on the basis of their religion or belief for as long as they have practiced religions and held beliefs. Persecution, defined as “hostility and ill-treatment, especially because of race or political or religious beliefs,”¹ has been experienced by almost every group of believers at some point. Indeed, history is populated with martyrs who have died in defence of their beliefs. The survival of religions in the face of such persecution has been an integral part of their establishment; some religions have continued to thrive all the more for having withstood efforts to decimate them. Tertullian, an early Christian scholar, wrote in c.197 that ‘the blood of the martyrs is the seed of the Church’.²

The three Abrahamic religions, Judaism, Christianity and Islam, are built on the determination of their pioneers to spread their messages in the face of great oppression. The history of the Jewish people has been one of expulsion and dispersal following pogroms against them, first when their monotheistic convictions prevented them from worshipping ‘official’ Roman Gods.³ Christians have likewise

¹ See Oxford Dictionary Online, <http://oxforddictionaries.com/definition/english/persecution>, accessed on 7 February 2013.

² John Bowker (ed), *Concise Dictionary of World Religion*, (Oxford University Press, 2005) 587.

³ Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 14. Russel Blackford, *Freedom of Religion and the Secular State*, (John Wiley and Sons, 2012) 22.

been persecuted since their existence; missionaries, apostles and saints were martyred by unrelenting Roman attempts to enforce waning paganism.⁴ Mohammed, the Prophet of Islam, was persecuted in Mecca for his campaign to assert the existence of one God.⁵ Indeed, the history of persecution shared by the three major monotheistic religions is symbolised by the Exodus of God's people from Egypt in search of asylum from persecution: the Jewish people through Passover, the Christians in Easter and the Eucharist, and the Muslims on *Ashura*, the day designated by the Prophet Mohammed as a day of fasting all echo that symbolism.⁶

There is some logic in the persecution of monotheistic religions, owing to the fact that they are necessarily missionary religions charged to unify the polytheists who preceded them under the idea that there is one God.⁷ The diversity of beliefs inherent in the belief in several gods was challenged when monotheists refused to participate officially in this system. As Russel Blackford has suggested,

When Jews and Christians suffered persecution, it stemmed from what seemed, from a Roman point of view, their own intolerance: their insistence on worshipping just one deity, and their claim that other gods either did not exist at all or were actually demonic powers.⁸

When Christianity gained dominance in the Roman world under the rule of Constantine and Theodosius I in the 300s, it morphed from being a persecuted religion to a persecutor of others, including Jews and Pagans, under a brutal era of Christianisation.⁹ A missionary religion with an agenda to do God's will on earth, Christianity sought to dominate the societies in which it appeared, with Christians

⁴ Blackford, above n 3, 22-23

⁵ Bowker (ed), above n 2, 589.

⁶ Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-first Century* (Cambridge University Press, 2011), preface, ix.

⁷ Malcolm D. Evans, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 2. See however Evans, above n 3, 15-20 in which he explains that religious persecution was less a manifestation of religious intolerance than it was a response to concerns that religious proselytism was tantamount to sedition and threatened the stability of the Roman Empire

⁸ Blackford, above n 3, 31.

⁹ Ibid 25, and Bowker (ed), above n 2, 126. Also see Evans, above n 7, 2.

being called by Christ to 'Go forth therefore and make all nations my disciples'.¹⁰ From the 4th Century onwards, Church leaders continued persecuting non-Christians and heretics, enjoying increasing immunity from secular authority. As Christianity became more organised over the centuries it was empowered in its persecution.

In this sense it can be understood that religious persecution begets persecution: the three great monotheistic religions, in their struggle to survive and prosper, sought to propagate their ideology through varying means, oftentimes by persecuting dissidents and converting conquered communities by force.¹¹

Meanwhile in polytheistic Mecca, Mohammed (570 – 632 CE), a member of the powerful Quraysh tribe, received divine revelation in 610 on Mount Hira. Overcoming his initial fear that he had gone insane, he became convinced that the divine instruction he received evidenced the existence of only one God, and that the idolatry of Mecca must be expunged.¹² Mohammed set about to unify Christians and Jews under this idea.¹³ Mohammed and his followers in Mecca were persecuted by Quraysh leaders who feared that their power was being undermined, and eventually fled to Medina in 622. Medina's Jewish population refused to accept Mohammed as a Prophet, but he obtained power and defended it from an army from Mecca in 630. Before he died in 632, he banished polytheism and idol worship. Through the leaders (Caliphs) who followed him upon his death, Islam spread throughout the world: Muslim armies made conquests in central Asia and Spain, and Islam spread along trade routes in the Middle East and North Africa.¹⁴ At the same time, the lack of an obvious successor resulted in a split between the Sunni and the Shi'a Muslims within a generation of Mohammed's death, foreshadowing the sectarian violence that would mar the spread of Islam thereafter.¹⁵ A major Islamic state was

¹⁰ Evans, above n 3, 17, referring to The Bible, Matthew 28:19.

¹¹ Blackford, above n 3, 23.

¹² See Bowker (ed), above n 2, 389 and Wilkinson, above n 14, 126.

¹³ Diarmaid MacCulloch, *A History of Christianity*, (Penguin, 2010), 258.

¹⁴ Philip Wilkinson, *Religions* (Dorling Kindersley, 2008), 127-129, and Bowker (ed), above n 2, 389.

¹⁵ Bowker (ed), above n 2, 389

established in 1299; this Ottoman Empire launched its own campaign to expand Islam.¹⁶

In the 14th Century, the Ottoman Empire moved into the Balkans.¹⁷ The early Islamic system of *dhimma* classified people into Muslims entitled to full membership in the political community, and *dhimmi*, being 'People of the Book' (primarily Jews and Christians) who were entitled to enjoy a range of rights including freedom to worship in private. Outside of these categories were unbelievers, who were not entitled to any legal recognition or protection, nor allowed to propagate their own ideology. This system was elaborated under the Ottoman Empire, with the *millet* system of Islamic law affording Jews and Christians a significant level of religious and civil freedoms.¹⁸ Though forced conversion is contrary to Islam, more and more Orthodox Christians found themselves under Islamic rule. Increasing intolerance of their religious beliefs, and the disadvantages that flowed from maintaining them relative to the privileges enjoyed by the Islamic ruling class, resulted in many conversions to Islam.¹⁹

The Catholic bishops of the 12th Century had launched crusades in a bid to purge society of Jews, Muslims, freethinking philosophers, and anyone else who questioned Orthodoxy.²⁰ Subsequently, in Catholic Western Europe in the 1400s, thousands of people were victims of witch-hunts, tortured into confessing their use of magic and devil worship.²¹ It was also during this time that Christendom was exported elsewhere: the rounding of Cape Bojador in Morocco in 1434 by the seafaring Portuguese marked the beginning of their conquests in Africa. They reached India by 1498 and in 1500 landed on what would become their Brazilian colony. The religious intolerance of the Portuguese crusaders was extreme; some six thousand Muslims were massacred in the tiny Indian state of Goa alone, and by the

¹⁶ Jan Palmowski (ed), *Oxford Dictionary of Contemporary World History* (Oxford University Press, 2004) 489.

¹⁷ Bülent Özdemir, 9 *Journal for the Study of Religions and Ideologies* 27 (Winter 2010) 261, 267-289.

¹⁸ Evans, above n 3, 59-60. Also see Blackford, above n 6, 23; Bowker (ed), above n 2, 157, MacCulloch, above n 13, 262; and Berdal Aral, 'The Idea of Human Rights as Perceived in the Ottoman Empire, 26 *Human Rights Quarterly* (2004) 454.

¹⁹ See Özdemir, above n 17, 267-289 and MacCulloch, above n 13, 483.

²⁰ Blackford, above n 3, 27.

²¹ *Ibid* 28.

middle of the century Hinduism had also been forbidden.²² While the Portuguese focussed on Africa and Asia, the Spanish explorer Christopher Columbus was making headway in the Caribbean, opening new territory for conversion throughout the Americas. Indigenous people in the Americas succumbed not only to diseases their conquerors brought with them, but also were persecuted for the gods they worshipped.²³ Indigenous people revolted in a bid to defend their faiths, and continued to practice them in secret, some even burying figures of their own gods next to crosses so they could clandestinely worship.²⁴ One estimate suggests that by 1550, around ten million people had been baptized as Christians in the Americas.²⁵

In the turbulent 16th Century, the Ottoman Empire reached the height of its power, extending from what is today Hungary to Iran in the East, Saudi Arabia in the South and Algiers in the West.²⁶ This same era in Western Europe saw movements for reform in the form of protests against Roman orthodoxy and Catholic supremacy; participants in this bid towards reform become known as 'Protestants'.²⁷ In 1555, the Peace of Augsburg marked a positive turning point in Europe, recognising the equal status of Lutheran rulers with Catholic ones.²⁸ Yet this century and the next was an era of immense violence and religious persecution by the Reformation (Protestants) and Counter-Reformation (Catholics); the French Wars cost millions of lives until the Catholic Church was reinstated throughout the country in 1598. Though Protestantism was given some concessions, religious persecution continued with further conflicts until the Peace of Alais in 1629. The Thirty Year War that began in 1618 and ended with the Peace of Westphalia in 1648 resulted in widespread loss of life but galvanised religious resolve throughout Europe.

The Peace of Westphalia did not result in freedom of religion; the right of rule given to local leaders in effect gave them licence to persecute religious minorities.²⁹ The Reformation in Britain similarly took its toll with political leaders seizing upon

²² MacCulloch, above n 13, 689.

²³ Ibid 696. MacCulloch notes that by 1800, indigenous populations had declined to a tenth of their number from three centuries before.

²⁴ Ibid 700.

²⁵ Ibid 696.

²⁶ Palmowski (ed), above n 16, 489.

²⁷ Bowker (ed), above n 2, 459, 479.

²⁸ Evans, above n 7, 4, and Evans, above n 3, 45-7.

²⁹ Blackford, above n 3, 28 – 29.

religion as a basis for persecuting dissidents. In his bid to annul his marriage to Catherine of Aragon, Henry VIII hardened his persecution of Roman Catholics and those he deemed heretics.³⁰ His daughter, the Catholic Queen Mary I then executed Protestants in an attempt to reinstate Catholicism, but her successor Elizabeth I, herself the product of her father Henry VIII's repudiation of Rome, reinstated the Church of England.³¹ Pope Pius VI declared Elizabeth a heretic. Civil War broke out in 1642. Parliamentary forces came to be led by Oliver Cromwell, who invaded Ireland and massacred thousands of its people for religious and political reasons. When Anglicans gained control of Parliament after 1660, they imposed several statutes persecuting dissenters, including Baptists, Presbyterians, Quakers and others. The repressive Test Acts were implemented in 1672 and 1678, prescribing the religious affiliation of public officials. King Charles II imprisoned, transported and executed thousands of Quakers during his reign. Catholic James II succeeded him and was eventually overthrown by Protestant rebels.

In short, Europe was for hundreds of years ravaged by wars waged in the name of God and despotic rulers' efforts to impose their preferred versions of theology, murdering dissenters or sending them into exile. Hundreds of thousands of people were driven from Europe in search of asylum from religious persecution.³² Many of them chose to settle new frontiers, and in deference to the persecution they had fled vehemently defended religious freedom in their adopted homelands.³³ However, religious persecution soon found its way to the new world: in 1692 in North America, persecution by Protestants resulted in executions of people declared 'witches'.³⁴ The 'Great Awakenings' in 1720 to 1750 in North America revived Christianity, making way for Evangelical ministers and leading to the growth of the Baptists in the south. Evangelising of enslaved Africans gave rise to African-American Christian culture; by 1800, slaves constituted one fifth of American

³⁰ Bowker (ed), above n 2, 481.

³¹ Ibid.

³² Blackford, above n 3, 29-31.

³³ The Mayflower set sail to 'New England' (Plymouth, Massachusetts, USA) in 1620.

³⁴ MacCulloch, above n 13, 755.

Methodists.³⁵ The scourge of the enslavement of non-Christians from Africa and the Americas finally came to an end in the late 1800s.

In the East, colonisers and their different versions of Christianity and Islam had strongholds in Asia. The Muslim Mughals eventually crushed Sikh rule in 1716 in India and continued persecuting them; several thousand were massacred for their opposition to religious persecution. In 1737, Bhai Mani Singh, the Sikh priest of the Golden Temple, was brutally tortured and executed after refusing to renounce his faith and embrace Islam, an event still marked by Diwali.³⁶ The power of the Sultans of the Ottoman Empire diminished in the seventeenth century, and in the late 1800s the rise of nationalism resulted in resistance to Ottoman rule in the Balkans, giving way to Christian Orthodoxy. Tensions rose when non-Muslims began asserting their equality with Muslims following the dismantling of the Ottoman *millet* system of separating religious communities. Meanwhile religious intolerance in Russia resulted in hundreds of thousands of Muslims seeking refuge in Ottoman territories. In 1843 a series of massacres of Christians by Kurds in what is now Azerbaijan took place, and thousands of Armenians were massacred in the Caucasus in the 1890s.³⁷

It was also in the 1800s that Charles Darwin, a Christian scientist, posited the then dangerous idea that humankind was not created by God but had ‘evolved’ through a process of ‘natural selection’.³⁸ The result of his work, as one scholar expresses it, was that “[r]eason was served her notice as the handmaid of Christian revelation.”³⁹ Many people were conflicted between their religious beliefs and the possibilities of science, calling themselves ‘agnostics’ in acknowledgement of the fact that divinity was neither provable nor unprovable.⁴⁰

Despite scriptural underpinnings being shaken, religion continued to spread throughout the world: the British continued to repress Hindu resistance in India with British Protestantism introduced in 1842, and missionaries swept through East Asia. In the New World, the ‘Second Awakenings’ in North America gave rise to

³⁵ Ibid 761.

³⁶ Grim and Finke, above n 6, preface, x. Also see Wilkinson, above n 14, 212-213.

³⁷ MacCulloch, above n 13, 855.

³⁸ Charles Darwin, *On the Origin of Species*, (John Murray, 1959).

³⁹ MacCulloch, above n 13, 857.

⁴⁰ Ibid 861. Also see Bowker (ed), above n 2, 17.

new Christian movements, including Joseph Smith's Mormonism, the far-right Christianity of the Ku Klux Klan, Seventh-Day Adventists, the Church of Christ, Jehovah's Witnesses, and Pentecostals among many, many others. These new religious movements experienced persecution in their struggle for acceptance that some never achieved or only achieved much later; Joseph Smith, the Prophet of Mormonism, was persecuted as an imposter when he first began preaching in the 1800s.⁴¹

The 20th century was the most extensively and vividly documented era in human history, but was no less marred with religious violence and persecution than the centuries before. In the early 1900s, revolts weakened Ottoman rule further and following the Balkan Wars it had lost most of its European territory by 1914 and lost its Arab empires in World War I. The Ottoman government ordered the persecution and massacre of Armenians, resulting in an estimated 800,000 deaths in the genocide of 1915.⁴² Finally, the Young Turks brought an end to the empire, abolishing the Sultan and the unity between the state and Islam, proclaiming the Republic of Turkey in 1923.⁴³ The weakening of British rule in India in the 1930s resulted in escalated tensions between Hindus and Muslims in the lead up to Independence, culminating in extreme violence and the eventual partition of India, with the birth of Islamic Pakistan in 1947. The Sikhs, who were too few in number to demand their own state, were caught in the middle of divided Punjab and suffered particularly high casualties in the wake of violence.⁴⁴

It was also in this century, following incessant anti-Semitism through the ages, that the persecution of Jews culminated in the 1930s and 1940s with a holocaust on a scale never seen before. 20th century technology was mobilised by the Nazis to kill and dispose of humans on an industrial scale in death factories that murdered

⁴¹ See for instance, Orma Linford, 'Mormons, the Law, and the Territory of Utah' (1979) 23 *American Journal of Legal History* 213, 216.

⁴² See Richard Overy (ed), *20th Century*, (DK, 2012), 74 and Geoffrey Robertson, *Crimes against Humanity* (Penguin, 2006), 20.

⁴³ Palmowski (ed), above n 16, 489. Also see Selim Deringil, 'There is no compulsion in religion: On Conversion and Apostasy in the Late Ottoman Empire: 1839 – 1856,' *Comparative Studies in Society and History*, Vol 42, No. 3, 2000, 547-575

⁴⁴ Overy (ed), above n 42, 83, 137, and Wilkinson, above n 14, 213.

millions, including some 5.7 million Jews.⁴⁵ Chastened by this horror, the world convened to form the United Nations on the rubble of the League of Nations that had failed to prevent WWII.⁴⁶ In 1948, the General Assembly of the United Nations passed the Universal Declaration of Human Rights, guaranteeing basic freedoms and human rights that all humans are entitled to enjoy, regardless of their religion or belief.

Following WWII, the international community partitioned Palestine into Jewish and Arab states in a bid to find displaced Jews a homeland; many Jews considered Palestine the land promised to them by God and a return to the land they had been scattered from since 70 AD.⁴⁷ Arab Palestinians disagreed, and bitter conflict ensued beginning the day after the creation of the state of Israel.⁴⁸

At the same time, atheistic Communism in Stalin's Soviet Union had already resulted in the persecution of many religious movements, with as many as 700,000 people executed, and millions sent to labour camps.⁴⁹ Following WWII, Stalin's Soviet Union expanded, raising the 'iron curtain' between the west and the communist east. During this era, religious persecution in the Soviet bloc was acute, considered by one commentator to be "aggressively secular – to the point of serious harassment, and in some cases, outright persecution of anyone who displayed almost any form of religion except entirely private belief."⁵⁰

Similarly, the communist People's Liberation Army seized China, the most populated country in the world. The Communist campaign in the Himalaya particularly persecuted the Buddhists of Tibet (one of several attempts to expunge Buddhism from China, dating back to the 5th century), notably including the forced exile of the 14th Dalai Lama and 100,000 followers in 1959, following the Tibetan

⁴⁵ See Peter Hayes and John K Roth (eds), *The Oxford Handbook of Holocaust Studies*, (Oxford Handbooks in Religion and Theology, 2012), and Overy (ed), above n 42, 128.

⁴⁶ For more on the League of Nations, see Evans, above n 3, 84-92, 145-171.

⁴⁷ See Richard Overy (ed), above n 42, 142-143, and Wilkinson, above n 14, and Palmowski (ed), above n 16, 312-313.

⁴⁸ Overy (ed), above n 42, 142-143.

⁴⁹ Ibid 70-71.

⁵⁰ Grace Davie, 'Understanding religion in Europe: a continuing evolving mosaic' in Peter Cumper and Tom Lewis, *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar Publishing, 2012) 264.

uprising against the communist regime.⁵¹ Persecution escalated during the Chinese Cultural Revolution between 1966 and 1976, costing the lives of anyone espousing ideology the ruling party considered dangerous or antiquated, including religious ideology. Similarly, between 1970 and 1979, the Communist Khmer Rouge in Cambodia unleashed brutal repression of all dissidents and religious communities; thousands of Buddhist monks died in labour camps.⁵²

Back in Europe, Catholic Republicans and Protestant Unionists engaged in 30 years of violence between 1968 and 1998: the Catholic Republicans sought to unite Northern Ireland with the Irish Republic, while the Protestants sought to remain with the United Kingdom.⁵³ Sectarian violence was also at the heart of the Lebanese Civil War between 1975 and 1990: the Palestinian Liberation Army was welcomed into Lebanon by Muslims who believed they would aid their struggle against the Christian far-right Phalange party, resulting in a fifteen-year civil war.⁵⁴ The Iranian Revolution of 1977 to 1979 ended four decades of rule by the Shah, but ushered in a new era of religious repression; the Revolutionary Guard persecutes those who do not confirm to their brand of conservative Islamic law.⁵⁵ Throughout this era, tensions between Sikhs and Muslims in India continued, resulting in a massacre by Indian troops of Sikhs in the Golden Temple of Amritsar in 1984 and tensions and violence continuing into the late 1990s.⁵⁶ It was also this era that saw significant acceleration of migration to Europe, resulting in an increased presence of faiths different to the dominant faith in receiving states, promoting heady discussion about religious pluralism, minority and group rights and their religious persecution.⁵⁷

The Balkan war of the 1990s also had strong religious elements, with Orthodox Christians referring to historical conflicts against the Ottoman Empire in waging aggression against Muslim communities. The persecution of Muslims by Orthodox

⁵¹ Bowker (ed), above n 2, 101-102, and Palmowski (ed), above n 16, 638.

⁵² Overy (ed), above n 42, 234.

⁵³ Ibid 212-213.

⁵⁴ Overy (ed), above n 42, 228.

⁵⁵ Ibid 241.

⁵⁶ Wilkinson, above n 14, 213.

⁵⁷ See Davie, above n 50, 258-9; Jenny E. Goldschmidt and Titia Loenen, 'Religious Pluralism and Human Rights in Europe: Reflections for Future Research', in M.L.P Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 311, and Felice Dassetto 'The New European Islam' in Silvio Ferrari and Anthony Bradney, *Islam and European Legal Systems* (Ashgate, 2000) 32-4.

Serbs continued unabated for four years, marked by campaigns of ethnic cleansing through murder and rape of Bosnian women to produce Serbian offspring. The pinnacle of horror was the massacre in Srebrenica in eastern Bosnia on 1 July 1995; some perpetrators were blessed by Orthodox priests before participating in the execution of some 8000 people, the worst mass murder in Europe since WWII.⁵⁸

The 21st Century began with Islamist terrorist attacks on the United States in September of 2001, killing almost 3000 people and triggering a 'War on Terror'. Islamist terrorists attacked tourist districts in Indonesia in 2002, trains in Madrid in 2004, and tubes and buses in London in 2005, shining a light on the modern era of religious fundamentalism. Meanwhile global momentum gathered around the 'War on Terror' attracting comparisons with the religious crusades of the middle ages, when then US President George W. Bush evoked the term 'crusade' in declaring a war on terror,⁵⁹ and set out to win 'hearts and minds'.⁶⁰ Persecution of Muslims in the wake of terrorist attacks raised questions about rising Islamophobia.

The Arab Spring in the Middle East and North Africa beginning in December 2010 removed some authoritarian regimes and cleared the path for new leadership, but widening religious and sectarian divisions mean that the role religion will play in the new era of governance remains a subject of speculation. Meanwhile in Europe, a trend of growing secularism can be seen on one hand while debate about religion in public spheres becomes increasingly urgent on the other, as states juggle with concepts of freedom and with events that have brought religion into sharp focus.⁶¹

⁵⁸ See Beti Bilanzic, 'Serbs are stunned by videos of Srebrenica', *Washington Post*, 3 June 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/02/AR2005060201720.html>, accessed on 8 February 2012, and Overy (ed), above n 42, 283.

⁵⁹ See George W. Bush, statements made on the south lawn of the White House, 16 September 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>, accessed 8 February 2013.

⁶⁰ See for instance, Elizabeth Becker, 'A Nation Challenged: Hearts and Minds – A Special Report; in the War on Terrorism, A Battle to Shape Opinion', *New York Times*, 11 November 2001, <http://www.nytimes.com/2001/11/11/us/nation-challenged-hearts-minds-special-report-war-terrorism-battle-shape-opinion.html> and Elizabeth Dickinson, 'A Bright Shining Slogan', *Foreign Policy Magazine*, September / October 2009, http://www.foreignpolicy.com/articles/2009/08/13/a_bright_shining_slogan, both accessed 8 February 2013.

⁶¹ See: Davie, above n 50, 267-268. Among the examples that Davie raises, are the murder of Theo Van Gogh in the Netherlands and the threats made to Hirsi Ali, and the Dutch Cartoon controversy which are briefly discussed in this thesis.

In short, the history of religion and belief is a bloody one that continues into the present. Yet it would be too simple to derive a conclusion about the basal aspects of human nature that result in persecution. Rather, the relevant conclusion that emerges from the violent history of ideology is that despite efforts to repress religion and belief, they endure.⁶² Alongside this history of religious persecution is a parallel story of the pursuit of religious freedom.⁶³ It cannot be denied that history proves that even in a globalised, pluralist 21st century world, people are driven to hate, torture and murder in asserting or defending their religion, such that “religious persecution remains a part of daily life in all regions of the world”⁶⁴ and that religious differences “will continue to pose a significant threat to peace.”⁶⁵ But at the same time, increasing hope has also been placed in the idea that religion can be an enabler of peace.⁶⁶ Almost more remarkable than continued persecution is the fact that people continue to hold beliefs and practice religions in defiance of the hatred, torture and murder perpetrated against them because of it. Attempts by private persons, religious groups and even the state to stifle religious movements have continually failed, oftentimes fanning the flames of religious resolve, such that faith groups flourish rather than diminish.⁶⁷

In many instances of persecution meted out against people for their convictions by others on the basis of theirs, it is clear that political, cultural, ethnic and other dimensions were also at play. But to deny the relevance of religion and belief in these tragedies would be to devalue the convictions of the people who died holding fast to them. Ultimately, the fact that religious groups have resiliently survived centuries of persecution and continue to defy aggressors is proof of the tenacity of people and the importance of their beliefs.

⁶² See for instance, Grim and Finke, above n 6, 203.

⁶³ See for instance, Evans, above n 7.

⁶⁴ See generally, Derek H. Davis ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration of the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief’ (2002) *Brigham Young University Law Review* 217, 217-219.

⁶⁵ Evans, above n 7, 14.

⁶⁶ See for instance, Secretary General SG/SM/14675, Press Release, Secretary General stresses tolerance at the inauguration of the King Abdullah Bin Abdulaziz Centre for Interreligious and Intercultural Dialogue, 26 November 2012, <http://www.un.org/News/Press/docs/2012/sgsm14675.doc.htm>
<http://www.un.org/News/Press/docs/2012/sgsm14675.doc.htm>, accessed on 14 February 2013.

⁶⁷ See for instance, Grim and Finke, above n 6, 203-204, referring to studies conducted that show an increase in religiosity in around the world.

1.1(b) The emergence of freedom of religion (and belief) as a right

It was against the background of the turbulent events described above, that the human right to freedom of religion and belief was articulated and evolved. The most modern channel for exploring this freedom has been the international human rights framework.⁶⁸ The Universal Declaration of Human Rights (UDHR) emerged in 1948, and is considered a mammoth achievement of the 20th century by imposing moral obligations on UN member states, substantiated by legal obligations in subsequent instruments.⁶⁹ One of them, the 1966 International Covenant of Civil and Political Rights (ICCPR), contains the key global provision on freedom of religion and belief.

Article 18 of the ICCPR, states the following:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Similar guarantees are included in article 9 of the European Convention on Human Rights (hereinafter, the ECHR) concerning freedom of religion and belief. Article 19 of the ICCPR on freedom of expression is also similar in nature to article 18, and

⁶⁸ Evans, above n 7, 17.

⁶⁹ Davis, above n 64, 225.

indeed the manifestation of religion or belief falls within the realm of “expression”. In light of the relevance of these articles to the application and understanding of article 18, the human rights jurisprudence of both the European Court of Human Rights and the HRC on the ICCPR will be referred to in respect of both freedom of religion and freedom of expression, to the extent that interpretations therein are relevant to understanding freedom of religion and belief.

The most extensive articulation of freedom of religion or belief is contained in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁷⁰ (hereinafter, the 1981 Declaration), the first article of which is almost identical to article 18 of the ICCPR. The HRC evinces clear reliance on the 1981 Declaration for interpretative guidance on article 18 of the ICCPR.⁷¹ The Declaration, though ambitious in substance, is the product of tempered ambitions. In 1968, the UN deferred work on a Convention on Religious Intolerance which was proving too complicated and politically sensitive, shifting efforts instead to draft a non-binding declaration.⁷² In more than three decades that have elapsed since the 1981 Declaration came into existence, no treaty has yet emerged on the basis of it.

In 2011, the United Nations General Assembly adopted a resolution on ‘combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief.’⁷³ That resolution acutely captures the challenge of enlisting international human rights law against persecution on the basis of religion and belief. The resolution expresses concern that “the number of incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or

⁷⁰ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 55, 36 UN GAOR Supp (No. 51), UN Doc. A/Res/36/55 (18 January 1982).

⁷¹ See generally Brice Dickson, ‘The United Nations and Freedom of Religion’ (1995) 44 *International and Comparative Law Quarterly* 327, 345. Also see Donna Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 *American Journal of International Law* 487.

⁷² For more on the early drafting process that led to the 1981 Declaration, see Roger S. Clark, ‘The United Nations and Religious Freedom’ (1978) 11 *New York University Journal of International Law and Politics* 197, in which he says (at 220) “It is a tale punctuated by hypocrisy, procedural jockeying and false starts.”

⁷³ *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief* UN Doc. A/RES/66/167 (27 March 2012).

belief, continues to rise around the world.”⁷⁴ The resolution does not call for renewed efforts to bring about a binding Convention on freedom of religion and belief, but focusses instead on the need for interfaith and intercultural dialogue to build mutual understanding, and calls on states to foster global dialogue to promote tolerance and peace, based on respect and diversity of religions and beliefs.⁷⁵

In this framework, there are also mechanisms that substantiate the protection provided by the human right to freedom of religion and belief. A mechanism is provided for in the Optional Protocol to the ICCPR, allowing individuals to make complaints against states to the Human Rights Committee (HRC) that makes recommendations in response. The HRC also issues General Comments, including key General Comment 22 on article 18. The Human Rights Council monitors human rights violations and meets three times a year and reports to the General Assembly.⁷⁶ The Human Rights Council established the Universal Periodic Review (UPR) procedure to monitor compliance of member states with UN standards. The Human Rights Council also appoints Special Rapporteurs, including the Special Rapporteur on Religious Intolerance. That post was created in 1986 by the Council’s predecessor, the Commission on Human Rights, and its mandate is determined essentially by the 1981 Declaration.⁷⁷ The Rapporteur is an independent expert mandated to identify existing and emerging obstacles to the enjoyment of freedom of religion and belief and offer recommendations on ways and means to overcome such obstacles.⁷⁸ The Special Rapporteur offers the most authoritative interpretation of the Declaration.⁷⁹

In 2000, the Commission on Human Rights changed the mandate title to ‘Special Rapporteur on Freedom of Religion and Belief’; a decision subsequently endorsed by

⁷⁴ UN Doc. A/RES/66/167 (27 March 2012) [2].

⁷⁵ Ibid [4], [5].

⁷⁶ The Commission on Human Rights was mandated to monitor and report on human rights situations and violations around the world. The Commission was replaced by the United Nations Human Rights Council in 2006, an inter-governmental body comprised of 47 states parties elected by the General Assembly and created by GA Res 60/251, UN GAOR, 6th session, UN Doc A/RES/60/251 (3 April 2006).

⁷⁷ Theo Van Boven ‘The United Nations Commission on Human Rights and Freedom of Religion and Belief’ in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 177.

⁷⁸ For more information see United Nations Office for the High Commissioner of Human Rights, *Special Rapporteur on Freedom of Religion and Belief*, <http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx>, accessed on 25 January 2012.

⁷⁹ Evans, above n 7, 13.

ECOSOC decision 2000/261 and the General Assembly Resolution 55/97, in response to concerns expressed by the Special Rapporteur that the former title did not adequately entail 'belief' including non-religious belief.⁸⁰ The Special Rapporteur on Freedom of Religion and Belief receives information from NGOs, religious communities and others on potential or actual violations of freedom of religion and belief, and conducts country visits to directly consult with stakeholders. The Special Rapporteur communicates concerns directly to states themselves and can take measures including issuing urgent appeals and letters of allegation, as well as issuing reports to the Human Rights Council and the General Assembly.⁸¹ The reports issued by the Special Rapporteur, and the products of other mechanisms and procedures mentioned here, are drawn upon in the chapters to follow.

At the heart of this thesis is the idea that freedom of religion and belief is important to everyone; not only should the religious enjoy freedom to manifest their religion, but so too should non-religious rights holders enjoy freedom *not* to practice religion. On the basis of this consideration, it is therefore important to consider the extent to which non-religious or atheist rights-holders are included in dialogue and enjoy the same freedom of religion and belief as their religious counterparts. Against the backdrop of these considerations, the subject matter of the right to freedom of religion and belief is the subject matter of the remainder of this chapter.

1.2. The meaning of religion and belief

"I am a deeply religious nonbeliever"

Albert Einstein

Before unpacking the right to freedom of religion or belief, it is necessary to first consider the definition of 'religion' and 'belief'. 'Religion' remains deliberately undefined in international instruments. The reason for such an omission is clear; "if these terms were defined, states might be tempted routinely to label as spurious all expressions of belief and practices that do not conform to the details of the

⁸⁰ Van Boven, above n 77, 182, 187.

⁸¹ H. Knox Thames, Chris Seiple, and Amy Rowe, *International Religious Freedom Advocacy: A Guide to Organizations, Law and NGOs* (Baylor University Press, 2009) 24-36. Also see Special Rapporteur on Freedom of Religion and Belief, <http://www2.ohchr.org/english/issues/religion/>, accessed on 30 May 2013.

definitions.”⁸² It has been noted that while religious and philosophical scholars can enjoy the luxury of academic debate about the pros and cons of explicitly defining religion, judges and lawyers do not, when they are called upon to make decisions which have a real impact on peoples’ lives.⁸³

1.2(a) Religion

There are two underlying challenges involved in defining “religion”, as explained by Jeremy Gunn. These are firstly, the metaphysical assumptions about the nature of religion, and secondly the type of definition to be used in describing them.⁸⁴ In relation to the first of these, the challenge lies in the fact that there is no single understanding of the theoretical nature of religion. It can be construed in a metaphysical sense (e.g. truth of the existence of God), as a psychological experience (e.g. feelings of believers), or as a cultural or social force (e.g. binding or dividing communities).⁸⁵

The incongruities which can arise in attempts to define religion were evident in the South African case of *Wittmann v Deutscher Sulverein, Pretoria and Others* in which Judge Kees van Dijkhorst held that a religion denotes "a system of faith and worship... [as] the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship."⁸⁶ He further explained that

[Religion] cannot include the concept of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part [of the relevant 'freedom of religion, belief and opinion' section]. There is conceptually no

⁸² Sullivan, above n 71, 492.

⁸³ For example, a judge or other decision maker might have to determine whether there is a well-founded fear of persecution for reasons of religion under the UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, article 1(2). Also see Jeremy T Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International Law’ (2003) 189 *Harvard Human Rights Journal* 16, 191.

⁸⁴ Gunn, above n 83, 193.

⁸⁵ Ibid 193-194.

⁸⁶ *Wittmann v Deutscher Sulverein, Pretoria and Others*, 1998 (4) SA 423 (T), 449.

room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion...⁸⁷

Judge Kees van Dijkhorst went on to list Judaism, Christianity, Islam, Buddhism, Hinduism and other faiths, and to exclude practices "...where the Supreme Being is neither the God of Israel nor the Holy Trinity nor Allah the Merciful etc. but a vague nonentity."⁸⁸ The first fault in such a narrow definition of religion is revealed by the court itself; Buddhism is included as a religion despite the fact that it is a non-theistic religion. Hindus may also take offence at their many gods being overlooked in this list of authorised supreme beings. Similarly, indigenous religions that are anchored in respect for land, nature or for some notion of the 'other' would be excluded from protection by this rationale. Beyond these limitations, reliance on a 'list' of recognised religions fails to include those religions that may not be known outside the small group of its members, or those religions that may later emerge. Indeed, former Human Rights Committee member Ruth Wedgwood has commented that religious freedoms are "not limited to old and established religions, or to large congregations."⁸⁹

It is submitted that 'religion' should not be defined. To do so risks the biases and subjective opinions of those who would define it, potentially excluding from the ambit of protection various groups or individuals with particular beliefs or practices, especially supporters of non-established religions.⁹⁰ Members of religions that are not recognised as such may be in a particularly fraught position; some newer religions and beliefs may be considered underserving of the status of "religion" where the same is not true for established religions. Carolyn Evans offers *X v the United Kingdom* by way of example, in which the European Commission noted that the applicant did not present any facts to establish the existence of the Wiccan

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Human Rights Committee, Communication No 1207/2003, UN Doc CCPR/C/84/D/1207/2003 (26 July 2005) [7], (*Malakhovsky and Pikul v Belarus*) Individual opinion of Committee Member Ms Ruth Wedgwood (concurring).

⁹⁰ For further discussion on the risks and challenges inherent in attempts to define 'religion', see Peter Edge, *Religion and Law: An Introduction* (Ashgate, 2006), 27-30.

religion. The same evidentiary proof, Evans notes, would not be required to prove the existence of Catholicism or Hinduism.⁹¹

In the absence of a definition of religion, Jeremy Gunn advocates that there are three different 'facets' of religion that can assist in determining whether there has in fact been persecution or discrimination on the basis of religion. The facets that he offers are: religion as belief (the convictions a person holds, regardless of their knowledge of various doctrines), religion as identity (affiliation with a group, possibly even regardless of individual beliefs), and religion as a way of life (actions, rituals, customs and traditions).⁹² Even broken down thus, it must be noted that human rights law compels that these various facets must be construed broadly.

The question of what canons of conduct for instance could be considered 'religious' for the purposes of ICCPR article 18 arose in the complaint of *M.A.B, W.A.T and J-A.Y.T v Canada*⁹³ before the HRC. The authors⁹⁴ were members of the 'Assembly of the Church of the Universe', whose beliefs and practices involved the cultivation, possession, distribution and use of marijuana. The HRC found the complaint inadmissible given that "a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant."⁹⁵ However, in the more recent HRC decision of *Prince v South Africa*,⁹⁶ the HRC found that prohibitions on possession and use of cannabis constituted a limitation on the freedom to manifest the Rastafarian religion. In *Prince v South Africa*, the HRC distinguished the facts from those on *M.A.B, W.A.T and J-A.Y.T v Canada* on the grounds that in the earlier case, the activities at issue were those of a religious organisation whose belief consisted primarily in the worship and distribution of a narcotic drug, whereas the status of Rastafarianism as a religion within the meaning of article 18 was not at issue.⁹⁷

⁹¹ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001) 57-8, referring to *X v the United Kingdom*, App. No. 7291/75, 11 Eur. Comm'n H.R. Dec. & Rep. 56 (1977).

⁹² Gunn, above n 83, 200-204.

⁹³ *MAB and ors v Canada, Admissibility*, Human Rights Committee, UN Doc CCPR/C/50/D/570/1993 (1994).

⁹⁴ The term 'author' is used in accordance with the Human Rights Committee's terminology to denote the party bringing an individual complaint before the Committee.

⁹⁵ *MAB and ors v Canada*, UN Doc CCPR/C/50/D/570/1993, [4.2].

⁹⁶ *Prince v South Africa, Merits*, Human Rights Committee, UN Doc CCPR/C/91/D/1474/2006 (2007).

⁹⁷ *Ibid* [6.5].

The fact that Rastafarianism was found to enjoy the status of ‘religion’ was appropriate given that “it is perhaps unwise...to deny such groups the status of ‘religion’, especially if such denial is motivated by the Committee’s disapproval of a group’s activities.”⁹⁸ This is commensurate with what is noted by Ms. Asma Jahangir, when she was Special Rapporteur on Freedom of Religion or Belief, that

Due to the problem of finding a satisfactory definition of the “protected religion or belief”, the pertinent international human rights standards provide for a broad view of these concepts. Consequently freedom of religion or belief is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.⁹⁹

Against this reasoning, the HRC in *M.A.B, W.A.T and J-A.Y.T v Canada* could more appropriately have found the Assembly of the Church of the Universe to be a religion for the purposes of article 18 and gone on to find the restrictions placed on its activities justifiable under article 18(3), as it did in *Prince*.

General Comment 22 attempts to resolve definitional issues by advising that “article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed.”¹⁰⁰ Stated thus it is clear that the decision not to define religion or belief in international law is for the purpose of ensuring that protection is more inclusive than it is exclusive.¹⁰¹ Human rights law cannot anticipate the range and content of religions or beliefs which are held across the world or which will emerge and nor is it its function to do so. Rather, drafters of human rights norms must ensure the equal protection of all manner of religions and beliefs, where such religions and beliefs are sincerely professed and practiced by rights holders.

⁹⁸ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 503.

⁹⁹ Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/6/5 (20 July 2007), 6 [6].

¹⁰⁰ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [2].

¹⁰¹ See however Evans, above n 91, 51, who suggests that the level of controversy over the definition of religion and belief makes it difficult to claim that drafters had any common intention.

1.2(b) Belief

The substance of the protection offered by article 18 of the ICCPR applies equally to freedom of religion and freedom of belief, raising the question of whether all beliefs are protected.¹⁰² In the absence of a restrictive definition, how is the term 'belief' to be understood in the context of article 18 of the ICCPR? Some commentators, including Natan Lerner assert that the meaning of belief should be interpreted in connection with the term religion, such that

...the term *religion*, usually followed by the word *belief*, means theistic convictions, involving a transcendental view of the universe and a normative code of behaviour, as well as atheistic, agnostic, rationalistic, and other views in which both elements may be absent.¹⁰³

Similarly, Johan D. van der Vyver considers that the meaning of 'belief' is to be drawn from the meaning of 'religion'. He asserts that not every belief is afforded protection under article 18 but rather that;

[T]he concept of "religion" informs the meaning attributed to "belief." Since freedom of religion is regulated in international human rights instruments in conjunction with freedom of belief, the kind of beliefs that come within the protection of those instruments tend to be religious or have something in common with religious belief.¹⁰⁴

Van der Vyver asserts that protected religions and beliefs have in common the "acceptance of the existence of something without the backing of sensorial observation, scientific demonstration, or rational proof; that is, convictions founded on metaphysical assumptions."¹⁰⁵ The implication of accepting such an understanding would be that where a religious belief is proven by 'sensorial

¹⁰² Note however that some commentators have referred to the fact that 'belief' is not mentioned in the first phrase of article 18(1) of the ICCPR, which only refers to 'thought, conscience and religion' while the following phrase allows for the manifestation of both religion and belief. See for instance Evans, above n 3, 203 and Evans, above n 91, 52 referring to article 9 of the European Convention on Human Rights which also refers only to 'freedom of thought, conscience and religion'.

¹⁰³ Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 14, 49.

¹⁰⁴ Johan D. van der Vyver, 'Limitations on Freedom of Religion or Belief: International Law Perspectives' (2005) 19 *Emory International Law Review* 499, 506.

¹⁰⁵ van der Vyver, above n 104, 506.

observation, scientific demonstration, or rational proof', it would cease to enjoy the protection of article 18 of the ICCPR. In contrast, a sensorial observation of an apparition of the Virgin Mary or a blood-crying statue would surely have the affect of bolstering rather than detracting from the religiosity of the person who sees it. Similarly, it is difficult to determine whether the hallucinogenic effect of marijuana (which, according to the Rastafarianism religion is important in the facilitation of meditation and reflection on the word of God) is based on a metaphysical assumption or scientific demonstration. Is the theory of evolution scientifically rational enough to prove the error of creationism and so place the belief that God created man outside the ambit of protection? Is God's invisibility a sensorial observation which would render the atheist's 'belief' in his non-existence too rational to attract protection? What protection would be afforded to the rights of an atheist who defines his or her belief as a denial of metaphysical assumptions? These questions are offered to illustrate that attempts to define 'belief' could inappropriately exclude some believers from article 18 protection.

A more simplified approach is offered by Cornelis D. de Jong who notes that the word 'belief' has been deliberately translated in French to 'conviction' in order to include non-religious beliefs.¹⁰⁶ Similarly General Comment 22 states unambiguously that article 18 of the ICCPR also extends protection not only to theistic, non-theistic and atheistic beliefs, but also to the "right not to profess any religion at all" and is careful to state that both the terms 'belief' and 'religion' are to be broadly construed.¹⁰⁷ In her 2007 report to the General Assembly, Ms Jahangir offered only the following explanations of terms:

Theism is the belief in the existence of one supernatural being (monotheism) or several divinities (polytheism), whereas a non-theist is someone who does not accept a theistic understanding of deity. Atheism is the critique or denial of metaphysical beliefs in spiritual beings.¹⁰⁸

¹⁰⁶ Cornelis D. de Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946-1992)*, (Intersentia, 2000), School of Human Rights Research Series, Vol 5, 23-24.

¹⁰⁷ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [2].

¹⁰⁸ Asma Jahangir, *Elimination of all forms of religion intolerance: interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/62/280 (20 August 2007) [67].

Ms. Jahangir also highlights the fact that while atheists and non-theists are not as institutionalised as theists (for historical and cultural reasons, as well as the fact that they often take a more personal approach to their convictions), freedom of religion or belief applies equally to them.¹⁰⁹

The fact that the ambit of the protection extends to religious and non-religious beliefs is borne out in the history of the role of Special Rapporteur on Freedom of Religion or Belief.¹¹⁰ In 1998, the second appointee to that position, Mr. Abdelfattah Amor, recommended that the original title of the “Special Rapporteur on Religious Intolerance” be changed to the “Special Rapporteur on Freedom of Religion or Belief”, explicitly naming agnosticism, freethinking, atheism and rationalism as examples of the latter.¹¹¹ Subsequent Special Rapporteurs, Ms. Asma Jahangir and Mr. Heiner Bielefeldt, have followed this approach so as to also explicitly emphasise protection of the right to profess theistic, atheistic and non-theistic beliefs.¹¹²

Cornelis D de Jong reiterates that there is a tendency towards broadening the scope of what is meant by the term ‘religion or belief’ by the inclusion in the 1981 Declaration of the word ‘whatever’¹¹³ which is the result of an agreement between delegates (with the exception of the Islamic group of states) that the scope of the Declaration went beyond religious beliefs to include non-theistic and atheistic beliefs.¹¹⁴ An attempt to define ‘religion or belief’ and enumerate such beliefs (for instance, theistic, non-theistic, atheistic) would inevitably be incomplete; the word ‘whatever’ was therefore introduced as a catch-all compromise.¹¹⁵ Indeed, for freedom of religion or belief to offer the widest possible protection in a convention

¹⁰⁹ Ibid [75].

¹¹⁰ The Special Rapporteur on Freedom of Religion or Belief is an independent expert mandated to identify existing and emerging obstacles to the enjoyment of freedom of religion and belief and offer recommendations on ways and means to overcome such obstacles. For more information see United Nations Office for the High Commissioner of Human Rights, *Special Rapporteur on Freedom of Religion and Belief*, <http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx>, accessed on 25 January 2012.

¹¹¹ See Abdelfattah Amor, Special Rapporteur, *Implementation of the Declaration on the Elimination of all forms of intolerance and of discrimination based on religion or belief*, UN Doc E.CN.4/1998/6/Add.2 (22 December 1997) [105].

¹¹² See for instance, Jahangir, above n 108, and Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53/Add.1 (14 February 2011) [97 and 349].

¹¹³ Article 1 of the 1981 Declaration reads “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice.”

¹¹⁴ Also see Lerner, above n 103, 28-31.

¹¹⁵ de Jong, above n 106, 24 and 30-31.

on religious freedom, it is imperative that both concepts remain undefined and that any legislative attempt to codify article 18 be capable of protecting the rights of a person who passionately believes in a god or many gods, or passionately believes that there is no god.

In *Campbell and Cosans v UK*, the European Court held that the term *belief* means views that attain a certain level of cogency, seriousness, cohesion and importance.¹¹⁶ Thus, non-religious beliefs may fall within the domain of article 9 of the European Convention on Human Rights if it relates to a well-established school of thought such as atheism or pacifism.¹¹⁷

Beyond these understandings, it is clear that “religion” and “belief” remain undefined in human rights law, and must remain so in order to protect as broad a range of religions and beliefs as possible. However, a tension must be acknowledged between the need to broadly construe religion and belief so as to protect all manner of spiritual and a-spiritual ideas, while also narrowing the understanding of belief so that the ‘species’ of beliefs at issue does not morph beyond the realm of article 18 into the territory of article 19. In the context of this thesis, ‘belief’ in article 18(1) is understood as extending to atheism or anti-religious belief, while beliefs having nothing to do with this ideological ‘family’ of beliefs (for instance, democratic opinions or environmentalist convictions) are more appropriately allocated to the domain of article 19(1). If it were not so, there would be little value in the ICCPR articulating a right to freedom of thought, religion and belief (article 18), distinct from a right to hold opinions and to express them (article 19). In this sense, Johan D. van der Vyver’s explanation mentioned above, that the concept of ‘religion’ informs the meaning of ‘belief’¹¹⁸ is instructive; essentially the ‘beliefs’ anticipated by article 18 hang on their religiosity (such as a new sect of an old religion) or their non-religiosity (such as atheism), as opposed to vegetarianism which may be a manifestation of a religion or may be entirely unrelated to it; a Hindu, Muslim or atheist can be a vegetarian. By way of illustration, the answer “I am an atheist” is a

¹¹⁶ Case of *Campbell and Cosans v UK*, 48 Eur Ct HR (ser A) (1982), referred to in Natan Lerner, *Religion, Belief and International Human Rights* (Orbis Books, 2000) 43 and Evans, above n 3, 290.

¹¹⁷ Lerner, above n 103, 179.

¹¹⁸ van der Vyver, above n 104, 506.

sensible response to the question “what is your religion?” in the way that “I am a vegetarian” or “I am an democrat” is not.

The semantic compromise reached by adding ‘whatever belief’ alongside ‘religion’ in the drafting of the human right to freedom of religion and belief, did not necessarily clarify that equal weight is to be given to the right to profess a religion and the right to profess any belief.¹¹⁹ Nonetheless, this thesis proceeds on the basis that ‘belief’ is protected alongside ‘religion’ and deserving of equal protection.

Nevertheless, international jurisprudence is dominated by cases on religious belief rather than belief devoid of religion, as will be borne out in the analysis to follow. Though “belief” of a non-religious or a-religious nature has been explicitly flagged for protection, the less attention it receives in international rights discourse suggests that it is the poor cousin of supernatural belief. Such consideration gives rise to the contention to be discussed, that there is a hierarchy of religion and belief in the practice of international human rights law, with some religions being favoured over other religions, and all religions favoured over a-religiousness.

1.3. Freedom of thought, conscience and religion

The first statement of article 18(1) of the ICCPR is that “everyone shall have the right to freedom of thought, conscience and religion.” Cornelis D. de Jong notes that defining ‘thought’, ‘conscience’ and ‘religion’ is practically impossible, but that their different characters should be acknowledged.¹²⁰ He goes on to note that ‘religion’ may be the narrowest of all three in that all religions share a common feature, namely “that they centre around some entity or force, which, if not divine, is at least spiritual.”¹²¹ Freedom of religion therefore relates to the relationship that people have with such entities or forces, whereas freedom of ‘conscience’ requires no such connection to anything divine but may simply be a strong ethical or philosophical

¹¹⁹ Lerner, above n 103, 58-9. Also see Evans, above n 91, 60-1.

¹²⁰ de Jong, above n 106, 20-21.

¹²¹ Ibid 21.

belief as to how to lead one's life.¹²² By contrast, freedom of 'thought' could apply to just about any thought, even in the absence of a strong conviction.¹²³

The essential point of 'thought', 'conscience' and 'religion' in article 18 is not the nature or definition of these concepts, but the freedom accorded to them. Indeed, this freedom is considered to be the internal right of a person to think or believe what he or she will. As with thoughts, conscience and religious beliefs referred to in article 18(1), the "right to hold opinions without interference" as outlined in article 19(1) is absolutely unrestricted. The holding of an opinion or belief is passive conduct where it has not manifested into an expression. Its private nature means that it overlaps with freedom of thought, which will therefore be discussed below to the extent that it sheds light on article 18.

Manfred Nowak clarifies that article 19(1) requires that states refrain from impermissible interference with freedom of opinion and prevent others from doing so. But he also makes the point that distinguishing between impermissible and permissible interference can be difficult. In the former category, he offers examples of indoctrination, 'brainwashing', influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation. In the latter category of 'permissible daily influencing of the formation of our opinions', he offers propaganda, private advertising, personal conversations and other impressions, news, commentary and information disseminated by mass media.¹²⁴ For the purpose of this thesis, it is interesting to consider how impermissible interference is to be construed in the context of religious opinion. How is indoctrination and 'brainwashing' to be understood in the formation of religious opinions? Do cautions of posthumous corporeal punishment for not holding a particular belief constitute such manipulation?¹²⁵

In any case, the key point to be derived is that 'opinion', in the case of article 19, and 'thought' and 'belief' in the case of article 18, belong in the internal or passive sphere and as such should not be subjected to any interference. All religious or anti-

¹²² Ibid.

¹²³ Ibid 22.

¹²⁴ Manfred Nowak, *CCPR Commentary* (NP Engel Kehl, 2nd ed, 2005), 442.

¹²⁵ These issues will be discussed in Chapter 5 on Proselytism.

religious opinions are protected by article 19(1), no matter how far-fetched or controversial, even where they are racist, sexist, homophobic, sadistic or even homicidal. Intervention with a person's freedom of thought, conscience or belief can only be considered when he or she manifests those thoughts into actions. Brice Dickson suggests that "religion, first and foremost, is a collection of beliefs."¹²⁶ He also comments that "[t]he difficulties encountered in trying to prove a person's thoughts, especially when these are divorced from related actions, would make a 'thought' law unworkable",¹²⁷ but acknowledges that for most people religion is more than a simple set of beliefs, because often those who hold such beliefs feel the need to translate their beliefs into actions.¹²⁸ It is due to this right to manifest religion that conflicts between rights and right-holders emerge.

The Human Rights Committee's reasoning in *Atasoy and Sartuk v Turkey* provides rich insight into article 18(1).¹²⁹ In that case, both Mr Atasoy and Mr Sartuk claimed that as Jehovah's Witness they could not perform the military service compulsorily required of them.¹³⁰ The authors claimed that the state's failure to provide an alternative to military service, subject to criminal prosecution and imprisonment (and Mr Sartuk's subsequent loss of employment as a result of his imprisonment), breached their article 18(1) rights.¹³¹ The state party argued that article 18(1) did not protect any right to conscientious objection. The Committee found that although the Covenant does not explicitly refer to a right of conscientious objection,

...such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience. The Committee reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. A state party may, if it

¹²⁶ Dickson, above n 71, 327.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Human Rights Committee, UN Doc CCPR/C/104/D/1853-1854/2008, 19 June 2012 (*Atasoy and Sartuk v Turkey*)

¹³⁰ Ibid [2.4] and [2.8].

¹³¹ Ibid [3.1].

wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.¹³²

In this case it was not contested that the authors' religious beliefs were genuinely held, nor that the actions taken by the state amounted to interference with their article 18(1) rights. Ultimately it was found that "repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18, paragraph 1, of the Covenant."¹³³

Committee Members Neuman, O'Flaherty, Iwasawa and Kaelin concurred with the decision but not the way in which it was reached. Instead, they pointed to the state's failure to identify reasons as to why its refusal to accommodate conscientious objection to military service would be for a legitimate purpose listed in the Covenant.¹³⁴ These members considered that refusal to perform military service for reasons of conscience as being entailed

...among the broad range of acts encompassed by the freedom to manifest religion or belief in worship, observance, practice and teaching. Such a refusal involves not merely the right to hold a belief, but the right to manifest the belief by engaging in actions motivated by it.¹³⁵

They went on to explain that article 18 permits limitation of this freedom if the standard set by article 18(3) can be met, and noted that the majority did not provide any reasons for treating conscientious objection to military service as an absolute

¹³² Ibid [10.4] referring also to *Jeong et al v the Republic of Korea*, Communications Nos. 1642-1741/2007, adopted on 24 March 2011.

¹³³ Ibid [10.5].

¹³⁴ *Atasoy and Sartuk v Turkey*, UN Doc CCPR/C/104/D/1853-1854/2008 [Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin (concurring)], referring to *Yoon and Choi v. the Republic of Korea*, Human Rights Committee, Communication No. 1321-1322/2004, adopted on 3 November 2006, subsequently adopted by the European Court of Human Rights in the cases cited by the majority in *Bayatyan v. Armenia*, Application no. 23459/03, para. 112, and *Erçep v Turkey*, Application no. 43965/04, para. 49.

¹³⁵ *Atasoy and Sartuk v Turkey*, UN Doc CCPR/C/104/D/1853-1854/2008 [Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin (concurring)].

right to hold a belief, nor clarify how it could be distinguished from other claims to be exempt from legal obligations.¹³⁶

Committee Member Sir Nigel Rodley, jointly with Messrs Thelin and Flinterman did offer such a distinction. In expressing the view that freedom of thought, conscience and religion encompasses the right *not* to manifest as well as the right to manifest one's beliefs, they explained that:

Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to manifest his or her conscientiously held beliefs by being under a legal obligation, either to break the law or to act against those beliefs *within a context in which it may be necessary to deprive another human being of life*. [sic].¹³⁷

This risk of deprivation of another person's life makes military service (without the option of civil service in the alternative) distinguishable from payment of tax that could support military service, on the basis of the level of complicity in the involvement of the possible deprivation of life.¹³⁸

The result of the decision in *Atasoy* is that the HRC now considers freedom of religion and belief to include an absolute right to conscientious objection to military service, a departure from earlier decisions in which the right could be limited by application of article 18(3).¹³⁹

¹³⁶ Ibid.

¹³⁷ Ibid [Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr. Krister Thelin and Mr. Cornelis Flinterman (concurring)]. In his individual concurring opinion, Committee member Mr Fabian Omar Salvioli also agreed with this opinion.

¹³⁸ Ibid. On the issue of conscientious objection to tax payments, see Human Rights Committee Member Ruth Wedgwood, in her dissenting opinion in the case of Human Rights Committee, UN Doc CCPR/C/88/D/1321-1322/2004 (23 January 2007), (*Yoon and Choi v Republic of Korea*) expressed the view that "article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society" and raised the example of conscience objection to paying taxes. The example of taxes was also considered in the case of *JP v Canada*, UN Doc CCPR/C/43/D/446/1991 (7 November 1991) [4.2], in which the HRC held that the refusal to pay taxes on grounds of conscientious objection to the military use of such taxes, fell outside the scope of article 18 protection.

¹³⁹ For instance, in the earlier case of *Yoon and Choi v Republic of Korea*, UN Doc CCPR/C/88/D/1321-1322/2004 [8.3], the HRC explained that the right to manifestation of religion or belief does not imply a right to refuse all legal obligations, but provides protection against being forced to act against genuinely-held religious beliefs. The HRC in *Yoon* considered that forcing a person to perform military service would amount to a breach

In considering the Human Rights Committee's approach to conscientious objection, it is clear that freedom of thought, conscience and religion entails not merely a passive manifestation or manifestation through omission, but also protects the right to refuse to act in a way that compromises genuinely held beliefs.

1.4. Freedom to manifest religion or belief

Manifestation is the point where thoughts (which need never be limited) become actions (which sometimes have to be limited for the protection of people who are impacted by them). Freedom to manifest religion has been referred to as the 'active' component of religious freedom.¹⁴⁰

Manifestation of religion or belief is expressed identically in both article 18(1) of the ICCPR and article 1(1) of the 1981 Declaration as freedom "either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Substantiating article 1(1) of the 1981 Declaration is a list of such manifestations, including freedoms:

- (a) to worship or assemble in connection with a religion or belief, and to establish or maintain places for these purposes;
- (b) to establish and maintain appropriate charitable or humanitarian institutions;
- (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) to write, issue and disseminate relevant publications in these areas;
- (e) to teach a religion or belief in places suitable for these purposes;
- (f) to solicit and receive voluntary financial and other contributions from individuals and institutions.

Manifestation of religion or belief can also be achieved through the refusal to act in a particular way, as is evident in conscientious objection (as discussed in *Atasoy*

of rights, which could potentially be justified under article 18(3). See also the opinion of Mr Salvioli in *Atasoy and Sartuk*.

¹⁴⁰ See for instance Joseph, Schultz and Castan, above n 98, 506.

above), and in refusing to swear oaths. For instance, in the European Court of Human Rights case of *Alexandridis v Greece*¹⁴¹ the court found that obliging a person to swear an oath of office that required him or her to reveal any aspect of his or her religion or belief violates article 9.

Similarly in the case of *Sinan Isik v Turkey*,¹⁴² the European Court of Human Rights reiterated that freedom to manifest one's religion has a 'negative' aspect, in this case the right not to be obliged to disclose one's religion. The applicant had applied to a court to request that his national identity card feature the word 'Alevi' in accordance with his membership of the Alevi religious community, rather than the word 'Islam'. The Turkish court refused his request on the grounds that the term 'Islam' was appropriate as the Alevi community is a sub-group of Islam. The European Court held that the requirement of an indication of religion on a national identity card was in violation of article 9 of the ECHR. It stressed the 'negative aspect' of freedom of religion and belief, in this case "namely an individual's right not to be obliged to disclose his or her religion or to act in a manner that might enable conclusions to be drawn as to whether or not he or she held such beliefs."¹⁴³ The court held that the violation of Mr Isik's article 9 rights could be appropriately remedied by the removal of the 'religion' box on the identity card.¹⁴⁴

The fact that there is a 'negative' aspect to manifestation of religion or belief should not be assumed as implying that atheists or non-believers generally manifest their beliefs by simply not manifesting religion. Atheists are not necessary spiritually or ideologically ambivalent, they may positively refute the existence of supernatural beings and in this sense may manifest their atheism in very positive ways. Indeed, "[a]theists and other freethinkers may manifest their irreligious thoughts by speaking out, or by rejecting religious requirements, or by publicly seeking to identify as non-religious."¹⁴⁵

¹⁴¹ *Alexandridis v Greece* (Application no 19516/06), Press release issued by registrar, 21.02.2008.

¹⁴² *Sinan Isik v Turkey* (Application no 21924/05), Press release 2.02.2010 (original available only in French).

¹⁴³ Ibid 2.

¹⁴⁴ Ibid 3.

¹⁴⁵ International Humanists and Ethical Union (IHEU), *Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Non-Religious*, (IHEU, 2012), 9.

This positive manifestation of religion or belief according to article 18(1) includes worship, observance, practice and teaching. It is necessary to consider the meaning ascribed to each of these prescribed components of manifestation. In doing so, it becomes apparent that the prescribed components are intended to be broadly construed so as to subsume a broad range of actions. It is also clear that these listed components are not absolutely distinct from each other but overlap.

In *Boodoo v Trinidad and Tobago*,¹⁴⁶ the prisoner author was prohibited from worshipping at Islamic prayer service, and had his prayer clothes and books forcibly removed and his beard shaven on two occasions. In response to this scenario, the HRC found the author's article 18 rights to be violated, reaffirming that "freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts."¹⁴⁷

The outer limits of the 'broad range of acts' allowed for in *Boodoo v Trinidad in Tobago* were pushed by the HRC in *Prince v South Africa*, where it found that the use of cannabis could constitute a manifestation of the Rastafari religion (albeit justifiably limited).¹⁴⁸ As mentioned above, this ruling contradicted the HRC's earlier decision in *M.A.B. and Ors v Canada* where it held that a belief based upon the 'worship and distribution' of a prohibited substance could not fall within the operation of article 18.¹⁴⁹

It is also clear that such manifestation goes beyond that which takes place in private, by virtue of the words of article 18 'in public or private'. In *Malakhovsky and Pikul v Belarus*, public manifestation of article 18 has been explained by the HRC as including the establishment of educational entities, choosing leaders, priests and teachers and inviting foreign religious leaders.¹⁵⁰ Public manifestation also entails

¹⁴⁶ Human Rights Committee, UN Doc CCPR/C/74/D/721/1996 (2 April 2002) (*Boodoo v Trinidad and Tobago*)

¹⁴⁷ Ibid [6.6].

¹⁴⁸ *Prince v South Africa*, UN Doc CCPR/C/91/D/1474/2006 [7.2]

¹⁴⁹ *MAB and ors v Canada, Admissibility*, UN Doc CCPR/C/50/D/570/1993 [4.2].

¹⁵⁰ *Malakhovsky and Pikul v Belarus*, UN Doc CCPR/C/84/D/1207/2003 [7.2].

the right to wear clothes or attire in public in conformity with an individual's faith or religion.¹⁵¹

1.4(a) Worship

The HRC has appropriately opted for a broad understanding of the concept of worship. General Comment 22 paragraph 4 states that

The concept of *worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae, and objects, the display of symbols, and the observance of holidays and days of rest.

It has been observed that the European Court and the European Commission accept worship so readily as a form of manifestation “that claims based on restriction of the freedom to worship are generally accepted as such with little discussion.”¹⁵²

Article 6(a) of the 1981 Declaration explains that freedom of religion or belief includes freedom “[t]o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.” Respect for buildings and use of places of worship are included in the concept of worship by the HRC.¹⁵³ Further, the UN Commission on Human Rights urged states “[t]o exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights law, to ensure that religious places, sites, shrines and religious expressions are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction”¹⁵⁴ and “[t]o ensure, in particular, the right of all persons to worship or assemble in

¹⁵¹ Human Rights Committee, UN Doc CCPR/C/82/D/931/2000, 5 November 2004 (*Hudoyberganova v Uzbekistan*).

¹⁵² Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 241.

¹⁵³ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [4].

¹⁵⁴ Commission on Human Rights, *Resolution 2005/40 on Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, UN Doc E/CN.4/RES/2005/40, (19 April 2005) [4(b)].

connection with a religion or belief and to establish and maintain places for these purposes”.¹⁵⁵

Interferences and restrictions on these rights have been the subject of interest at both the European and global level, with registration requirements for places of worship attracting particular concern. In the European Court of Human Rights case of *Metropolitan Church of Bessarabia and others v Moldova*, the court emphasised that the use of registration and other formalities may interfere with the establishment of places of worship, and in this case found that the government’s refusal to register the applicant Church constituted a violation of article 9.¹⁵⁶ In the similar Human Rights Committee case of *Malakhovsky and Pikul v Belarus*, the Committee found that the refusal to register a religious association amounted to a violation of the right to manifest religion or belief in the absence of reasons why such interference may be necessary for the purposes of article 18(3).¹⁵⁷ Special Rapporteur Mr. Abdelfattah Amor also gave much attention to registration of places of worship in visiting China in November 1994, expressing concern about legislation requiring vague criteria for registration.¹⁵⁸

Paul Taylor has further noted that the HRC’s consideration of state reports has focussed on freedom to worship both individually and collectively, and inside and outside places designated for worship.¹⁵⁹

It is important to note that the concept of worship is arguably inherently ‘religious’ in nature in that non-religious beliefs would unlikely be manifested through any form of ‘worship’ as such.

1.4(b) Observance

General Comment 22 states that

¹⁵⁵ *Resolution 2005/40*, UN Doc E/CN.4/RES/2005/40 [4(d)].

¹⁵⁶ *Metropolitan Church of Bessarabia and others v Moldova*, (2002) 35 EHRR 306. Also see *Malakhovsky and Pikul v Belarus*, UN Doc CCPR/C/84/D/1207/2003.

¹⁵⁷ *Malakhovsky and Pikul v Belarus*, UN Doc CCPR/C/84/D/1207/2003 [7.5 – 7.6].

¹⁵⁸ Abdelfattah Amor, *Report of the Special Rapporteur on the implementation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, UN Doc E/CN.4/1995/91 (22 December 1994), 114, 117 and 132.

¹⁵⁹ Taylor, above n 152, 239, referring to UN GAOR, 38th sess, Supp No. 40, UN Doc A/38/40 (1983) 15 (Mexico).

The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language, customarily spoken by a group.¹⁶⁰

Manfred Nowak states that “observance” extends to such things as the wearing of religious clothing, as was confirmed by the HRC in *Singh Bhinder v Canada*,¹⁶¹ the wearing of beards, as was established in *Boodoo v Trinidad and Tobago*,¹⁶² prayer and all other customs and rites of the various religions,¹⁶³ and the practice of circumcision.¹⁶⁴ The Human Rights Committee also considers that “the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion” and that to prevent a person from doing so in public or in private may constitute a violation of article 18(2).¹⁶⁵ The European Court of Human Rights has similarly acknowledged that the wearing of religious attire can constitute a form of religious observance. In the HRC case of *Hudoyberganova v Uzbekistan* and the ECHR case of *Leyla Sahin v Turkey*, the respective tribunals proceeded on the assumption that the wearing the headscarf was in observation of a religious rule the applicants adhered to.¹⁶⁶

Cornelis D. de Jong considers the use of ritual objects, the display of symbols and the observance of holidays and days of rest as lying within the concept of observance.¹⁶⁷ Manifestation through observance he takes as relating to:

...religious as well as to non-religious beliefs, as long as there is a common set of values and precepts serving as guidance for Man’s way of living, and

¹⁶⁰ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [4].

¹⁶¹ *Singh Bhinder v Canada*, Human Rights Committee, UN Doc CCPR/C/37/D/208/1986 (1989).

¹⁶² *Boodoo v Trinidad and Tobago*, UN Doc CCPR/C/74/D/721/1996.

¹⁶³ Nowak, above n 124, 420.

¹⁶⁴ Human Rights and Equal Opportunity Commission, ‘Article 18 Freedom of Religion and Belief’ (Commonwealth of Australia 1998) 59. The issue of circumcision is discussed in Chapter 7.

¹⁶⁵ *Hudoyberganova v Uzbekistan, Merits*, Human Rights Committee, UN Doc CCPR/C/82/D/931/2000 (5 November 2004) [6.2].

¹⁶⁶ *Leyla Şahin v Turkey*, ECHR Application No. 44774/98, Judgment (10 November 2005) [115].

¹⁶⁷ de Jong, above n 106, 79.

protects the right to live up to the basic duties of one's religion or belief. Thus, it can be considered a corollary to the freedom of conscience.¹⁶⁸

Included in this concept of observance, de Jong adds the active and passive use of traditional or sacred languages.¹⁶⁹ He also adds pilgrimage (derived from but not explicit in article 6 of the 1981 Declaration), disposal of the dead, dietary practices, and the use of specific equipment and symbols.¹⁷⁰ Manifestation through observance is also taken to mean the right to refrain from any acts that are contrary to one's religion or belief.¹⁷¹

1.4(c) Practice

An act that is permitted by a religion or belief, or influenced by it, is not automatically a protected manifestation by mere virtue of that fact. It is evident though that a broad understanding is applied. In the HRC case of *Coeriel and Aurik v The Netherlands*, the authors sought to change their names in accordance with Hindu requirements to enter the priesthood.¹⁷² State authorities refused their applications to do so on the grounds that their applications did not meet requirements under Dutch law. The authors asserted that the state's refusal to allow them to change their names constituted a violation of their article 18 rights. The HRC rejected the authors' article 18 claims as inadmissible, noting that such restrictions were justified on the basis of public order,¹⁷³ though it ultimately found that the restrictions breached the authors' rights to privacy under article 17.

In dealing with the enormous potential scope of what can be considered 'practice' for the purposes of manifestation of religion and belief, the European Commission called for a nexus between the religion or belief and the actual manifestation. Such a 'test' was derived in *Arrowsmith v the United Kingdom* in which the Commission considered whether the applicant's distribution of leaflets among soldiers to inform them of options to avoid armed service was a manifestation of belief for the

¹⁶⁸ Ibid.

¹⁶⁹ This use of traditional or sacred language was also acknowledged as a protected manifestation of religion or belief by the HRC in *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4.

¹⁷⁰ de Jong, above n 103, 106-115.

¹⁷¹ Ibid 106-116.

¹⁷² Human Rights Committee, UN Doc CCPR/C/52/D/453/1991 (1994), (*Coeriel et al v The Netherlands*).

¹⁷³ Ibid [6.1].

purposes of article 9.¹⁷⁴ Though pacifism was readily accepted as a 'belief' for the purposes of that article,¹⁷⁵ the Commission reasoned that "when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected under article 9(1), even if they are influenced by it."¹⁷⁶ In this case therefore, while the applicant's actions were influenced by her beliefs as a pacifist, the pamphlets she was distributing were not promoting pacifism as such and therefore were not accepted as manifestations of her religion or belief. This decision clarified the understanding of 'practice' as requiring a strong connection between beliefs and their manifestation.¹⁷⁷

In the 2002 European Court case of *Pretty v United Kingdom*,¹⁷⁸ the applicant, suffering from an advanced form of motor neurone disease, applied to the Director of Public Prosecutions to not prosecute her husband for assisting her to commit suicide, which she sought to do in accordance with her convictions and beliefs under article 9.¹⁷⁹ The court, citing the principle established by *Arrowsmith*, stated that the applicant's claims

...do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph [of article 9 of the ECHR]... the term 'practice' as employed by in article 9 para. 1 does not cover each act which is motivated or influenced by a religion or belief.¹⁸⁰

The above cases establish that 'practice' requires a strong connection between a belief and its manifestation. In *Arrowsmith*, the distribution of pamphlets informing soldiers on how to avoid armed services was not considered a manifestation of the applicant's pacifism (which is understood to mean a commitment to peace and opposition to violence). This finding begs the question of what then could be

¹⁷⁴ *Arrowsmith v United Kingdom* (Application No 7050/75) Eur Comm HR (1981) EHRR 218.

¹⁷⁵ *Ibid* [68].

¹⁷⁶ *Ibid* [70].

¹⁷⁷ Also see Evans, above n 91, 111-5 and Evans, above n 3, 306-7.

¹⁷⁸ *Pretty v United Kingdom* (Application 2346/02) 35 EHRR 1 (29 April 2002).

¹⁷⁹ Under English law, committing suicide is not criminalised but assisting another person to commit suicide is illegal.

¹⁸⁰ *Pretty v United Kingdom*, 35 EHRR 1 [82].

considered a manifestation of pacifist views, if not the handing out of a pamphlet promoting such views.

Similarly in relation to *Pretty*, the court was unwilling to accept that a person could end her life for non-religious convictions. The point to emerge is that, unlike religious beliefs, non-religious beliefs do not comprise organised traditions and tenets. The lack of clear means by which non-religious believers 'practice' their beliefs highlights their weaker recourse to article 18(1) relative to that enjoyed by their religious counterparts.

1.4(d) Teaching

The teaching of religion and belief, as explained in General Comment 22, includes "acts integral to the conduct by religious groups of their basic affairs, such as freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."¹⁸¹ Article 6(e) of the 1981 Declaration sets out the freedom "[t]o teach a religion or belief in places suitable for these purposes." Jurisprudence at both global and European levels have shown that 'places suitable' for such purposes go beyond religious institutions to include educational institutions as well as the private sphere.¹⁸² Paul Taylor suggests that it is doubtful that the domestic upbringing of children within the home was intended to be included in the scope of article 6(e), and that teaching is reserved for expressions of the content and substance of a religion or belief.¹⁸³

There is a clear overlap between the concept of teaching a religion and those of disseminating, expressing and even proselytising a religion. The issue of proselytism is discussed in Chapter 5. The basic notion of 'teaching' in the context of religious freedom must logically extend to that meant to persuade or proselytise. Such

¹⁸¹ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [4].

¹⁸² For example, the HRC Special Rapporteur on Freedom of Religion and Belief has stressed that what is considered a 'suitable place' should be given a wide meaning. For instance, in the European Court case of *Seven Individuals v Sweden* (Application No. 8811/79 (1982) 29 D&R 104), the court found that restrictions on teaching religion or belief in the privacy of one's home may be justifiably restricted in certain circumstances, in this case involving the corporeal punishment of children in accordance with the traditional religious beliefs of their parents.

¹⁸³ Taylor, above n 152, 270-271.

teaching must also be in accordance with parental rights provided for in article 18(4) of the ICCPR.¹⁸⁴

The extent to which states are required to positively act in relation to the ‘teaching’ component of religious freedom is a matter which has arisen in relation to the issue of religious education at schools and other educational institutions. As HRC member Martin Scheinin explained in *Waldman v Canada*, some states prohibit religious instruction in schools, others allow religious education in the official or majority religion in public schools providing for exemptions for minorities, and other states provide instruction in a range of religions according to demand.¹⁸⁵ All of these models, Scheinin explains, are theoretically compliant with article 18 given that international law prescribes no specific relationship between religion and the state.¹⁸⁶

In *Waldman v Canada* the issue before the HRC was whether or not Ontario’s failure to fund non-secular schools other than Roman Catholic Schools was discriminatory.¹⁸⁷ Waldman claimed that Ontario’s preferential treatment of Roman Catholic Schools amounted to a breach of his freedom of religion under article 18(1) in light of his financial hardship in funding Jewish education for his children.¹⁸⁸ Having found a breach of article 26 (the guarantee of equal protection of the law), the HRC did not go on to consider alleged violations under article 18. However, the case offers interesting insight in emphasising the provision of choice of denominational schools where there is demand for them, though it does not suggest that there is a positive duty to create schools in the absence of discrimination.

1.4(e) Manifestation of freedom of expression

Freedom of expression is described in broad terms. Article 19(2) states that

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

¹⁸⁴ Nowak, above n 124, 420.

¹⁸⁵ Human Rights Committee, UN Doc CCPR/C/67/D/694/1996 (1999) (*Waldman v Canada*), individual opinion of Martin Scheinin [2].

¹⁸⁶ *Waldman v Canada*, UN Doc CCPR/C/67/D/694/1996, individual opinion of Martin Scheinin [2].

¹⁸⁷ Ibid.

¹⁸⁸ Ibid [3.2].

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19 allows for the expression of opinions to be manifested in any way, and the substance of what can be expressed is similarly wide. The inclusion of the words "of all kinds" removes doubt that every communicable type of idea and opinion, regardless of how critical or controversial, is protected by article 19(2), subject of course (as discussed below) to permissible limitations contained in article 19(3).

The HRC has said that freedom of expression includes expression and receipt of communications of every form of idea and opinion regardless of frontiers including religious discourse and even expressions that may be regarded as deeply offensive.¹⁸⁹ It is also clear that "...the right of freedom of expression does not depend on the mode of expression or on the contents of the message thus expressed."¹⁹⁰

Some cases have implied that religious expression can fall within the domain of both article 18 and article 19.¹⁹¹ Indeed, paragraph 4 of General Comment 22 clarifies that the 'manifestation' of freedom of religion encompasses a broad range of acts (worship, observance, practice and teaching), which could be construed as 'expressions' falling within the ambit of article 19. Similarly, a manifestation that cannot be considered an article 18 manifestation could still be captured as a broader article 19 expression.

1.4(f) Conclusions on manifestation of religion and belief

In 1956, Arcot Krishnaswami submitted his "Study of Discrimination in the matter of Religious Rights and Practices" to the Subcommittee on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights. That report was offered to advise the drafting of the ICCPR in a way that would support the goals set out in the UDHR. Despite the sixty-odd years that have elapsed since the report was first published, it remains a seminal work in this field,

¹⁸⁹ Human Rights Committee, *General Comment 34: Freedom of Opinion and Expression (Art 19)*, UN Doc CCPR/C/GC/34 (29 June 1983) [11].

¹⁹⁰ Human Rights Committee, UN Doc CCPR/C/50/2/412/1990 (1994) (*Kivenmaa v Finland*) [7.2].

¹⁹¹ See for instance Human Rights Committee, UN Doc CCPR/C/70/D/736/1997 (18 October 2000) (*Ross v Canada*) and *MAB and ors v Canada*, UN Doc CCPR/C/50/D/570/1993.

praised for its comprehensiveness and foresight in addressing a controversial area.¹⁹² Krishnaswami's interpretation of the substance of manifestation proves enlightening. He notes that;

Bearing in mind that on the one hand the Declaration was prepared with a view to bringing all religions or beliefs within its compass, and on the other hand that the forms of manifestation, and the weight attached to each of them, vary considerably from one religion or belief to another, it may be safely assumed that the intention was to embrace all possible manifestations of religion or belief within the terms "teaching, practice, worship and observance".¹⁹³

In deference to Krishnaswami's far-reaching approach to religion, religious manifestations should be conceived of as broadly as possible so as to include idiosyncratic views, such as those at issue in *M.A.B, W.A.T and J-A.Y.T v Canada* involving a narcotic 'tree of life'. An inclusive approach is to broadly construe manifestations of religion or belief, and then submit them to the limitations provided for in article 18(3). Indeed, "as the right to manifest a religion can be subjected to proportionate limitations under article 18(3), there seems to be no policy reason to deny even the most bizarre of religious fringe groups the status of 'religion'".¹⁹⁴

It is also important to note that the four named types of manifestation are not exhaustive. As Cornelis D. de Jong notes; manifestations that are not listed may still be protected.¹⁹⁵ Though this conclusion cannot be immediately reached from the wording of article 18(1), it is clear that all types of religious and belief manifestations are intended to come within the ambit of protection.

1.5. Freedom from Coercion (Article 18(2))

Article 18(2) of the ICCPR states that "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

¹⁹² Theo van Boven, 'Advances and Obstacles in Building Understanding and Respect Between People of Diverse Religions and Beliefs' (1991) 13 *Human Rights Quarterly* 437, 438.

¹⁹³ Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices*, UN Doc E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No 60.XIV.2, 17.

¹⁹⁴ Sarah Joseph, 'Human Rights Committee: Recent Cases' (2001) 1 *Human Rights Law Review* 83, 94.

¹⁹⁵ de Jong, above n 106, 79.

Article 1(2) of the 1981 Declaration omits the freedom 'to adopt', stating instead that "[n]o one shall be subject to coercion which would impair his freedom to have a religion or belief or his choice."

The HRC in General Comment 22 states:

Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat or physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.¹⁹⁶

Thus, the HRC did not define coercion but instead gave examples of it.

Prohibitions on inter-religious marriages, requirements that religious oaths be sworn before assuming public office,¹⁹⁷ and the disqualification of certain individuals from holding public office for reason of their membership of a religious group also constitute coercion.¹⁹⁸ Positive actions which amount to improper inducements may also amount to coercion, such as for instance, offering benefits to members of a certain religious group, or distribution of food or clothing.¹⁹⁹

In 2007, the then Special Rapporteur Asma Jahangir stressed that the term 'coercion' was to be broadly interpreted to include "the use or threat of physical force or penal sanctions by a state to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert as well as

¹⁹⁶ General Comment 22, UN Doc CCPR/C/21/Rev.1/Add.4 [5].

¹⁹⁷ See for instance *Buscari and Others v San Marino* (Application No. 24645/94), Grand Chamber judgment 18.02.1999, and *Alexandridis v Greece* (Application No. 19516/06), Chamber judgment 21.02.2008 discussed above at 2.3.

¹⁹⁸ See Joseph, Schultz and Castan, above n 98, 505. Also see Human Rights Committee, *Communication No 1138/2002*, UN Doc CCPR/C/80/D/1138/2002 (2004), (*Arenz v Germany*), discussed in Chapter 3 below.

¹⁹⁹ Krishnaswami, above n 193, 27.

policies or practices having the same intention or effect.”²⁰⁰ In ensuring this right, states must not adopt laws prohibiting conversion and also have a positive obligation to ensure that persons within their jurisdiction can practice a religion or belief of their choice, free of coercion and fear.

Manfred Nowak argues that articles 18(1) and 18(2) require states to prevent the private coercion by a person or entity of another to have or adopt a religion, belief, conscience, or opinion.²⁰¹ This view is verified by the fact that most ICCPR rights have been interpreted as having some ‘horizontal’ application. In addition to its ‘vertical’ obligations to ensure that its own authorities do not interfere with a person's enjoyment of religious freedom, the state also has a positive duty to impose obligations on non-governmental actors not to breach the rights of others.²⁰² The ‘freedom’ entailed in freedom of religion or belief contains both freedom to do certain things, and freedom from certain things. As a result, the state has both negative and positive duties to ensure the enjoyment of the right. In other words, upholding the right extends beyond a prohibition on states’ interference with individuals’ freedom of religion or belief, but also requires that states actively create conditions for the full enjoyment of it.²⁰³

In Chapter 5, proselytism is discussed as a potential form of “coercion”. Proselytism makes for a particularly insightful case study, because the act of proselytising can be considered to be a protected manifestation of religious freedom, or an interference with another’s rights which should be prohibited.

1.6. Limitations on Manifestation of Religion

ICCPR article 18(3) reads:

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

²⁰⁰ Jahangir, above n 99 [9].

²⁰¹ Nowak, above n 124, 411.

²⁰² Joseph, Schultz and Castan, above n 98, 36. The issue of horizontality is discussed further in Chapter 3 on Human Rights and Non-State Actors.

²⁰³ See for instance, Dickson, above n 71, 341.

Limitations imposed on article 18 rights must be prescribed by law, and serve one of the purposes listed in article 18(3). They must also be ‘necessary’ for attaining this purpose, such that the interference is ‘proportionate to the specific need upon which it is predicated.’²⁰⁴ These considerations are common to many ICCPR rights, but the differences between limitations of article 18 compared to those permitted for other ICCPR rights are revealing.

A key point of difference between the limitations prescribed in article 18 with those prescribed in most other ICCPR rights is the absence of national security and *ordre public* as permissible purposes for interference.²⁰⁵ Furthermore, limitations to protect the rights and freedoms of others are only permissible where “fundamental” rights and freedoms are at risk, whereas limitations to other rights, such as article 19, are permitted to protect simply the ‘rights’ of others.

1.6(a) Prescribed by law

Limitations of one’s right to manifest religion or belief must be prescribed by the municipal law of the state concerned. ‘Law’ can mean statute law, including law as interpreted by the judiciary, or common law.²⁰⁶ The law in question must be ‘adequately accessible’ to persons subject to it and formulated with ‘sufficient precision’ to enable them to foresee to a reasonable degree, the legal consequences which may result from a given action.²⁰⁷

For instance, in the European Court of Human Rights case of *Maestri v Italy* the applicant, a judge, was sanctioned for being a member of the Freemasons, which he alleged breached his article 9 religious rights, his article 10 freedom of expression and his article 11 freedom of assembly and association.²⁰⁸ The court determined that the complaint fell within article 11 and therefore considered the applicant’s complaints under that provision only.²⁰⁹ The court found that the applicant’s article 11 rights had been interfered with and was therefore required to determine whether

²⁰⁴ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [8].

²⁰⁵ Indeed, some rights provided for in the ICCPR are completely unqualified, such as article 7 freedom from torture.

²⁰⁶ Joseph, Schultz and Castan, above n 98, 525.

²⁰⁷ *The Sunday Times Case* (1979) No. 30 Eur Court HR (Ser. A) [49].

²⁰⁸ *Maestri v Italy* (Application 29748/98) (17 February 2004) 39 EHRR 28.

²⁰⁹ *Ibid* [24].

the interference was compatible with the ECHR in being ‘prescribed by law’, in pursuit of a legitimate aim and necessary. The relevant domestic laws at issue were certain provisions of the Constitution, article 18 of the 1946 Royal Legislative Decree No. 511, and two directives issued by the National Council of the Judiciary. The European Court of Human Rights agreed that the intervention had a basis in law and that the relevant laws were adequately accessible. However, the court considered the applicant initially could not have foreseen that his membership of a legal Masonic lodge could give rise to disciplinary actions.²¹⁰ Later a directive was passed titled ‘Report on the incompatibility of judicial office with membership of the Freemasons’, but despite this clear title, the court held that the wording of the directive did not make clear whether that membership would attract disciplinary action in each case.²¹¹ In short, though the law in question was found to be adequately accessible to the applicant (who was in fact a judge), it was not found to be sufficiently clear to enable the applicant (even one well-versed in law) to anticipate that his membership of the Freemasons could lead to sanctions.²¹² Accordingly, the interference was deemed not to be prescribed by law, resulting in a finding that article 11 had been breached.²¹³

Therefore, this case illustrates that in order to be ‘prescribed by law’, limitations to a person’s rights must not only be provided for in law, but be provided for in such a way that they are accessible and comprehensible to the person concerned, and be sufficiently precise and predictable to capture a given situation.

1.6(b) Limitations must be “necessary”

The requirement of ‘necessity’ imports the requirement of proportionality; where the state interferes with a persons’ right, such interference must be proportional to a legitimate purpose being sought.²¹⁴

²¹⁰ Ibid [37].

²¹¹ Ibid [40-41].

²¹² Ibid [41].

²¹³ See also *Association Les Témoins de Jéhovah v France* (Application 8916/05) Chamber judgment 30.06.2011.

²¹⁴ Nowak, above n 124, 425.

Wasmuth v Germany is an example of the application of the principle of proportionality by the European Court of Human Rights. The applicant argued that his freedom of religion and belief had been breached by the fact that in his wage-tax card, the entry "--" was made next to the "Church tax field" to signify that his employer did not have to deduct church tax for Mr Wasmuth. He argued that by being forced to provide information concerning his religious affiliation on his wage tax card made him a participant in the church tax system that he vehemently opposed. The court found that the interference with his rights was only minimal, and proportionate to the legitimate aim of ensuring the right of churches and religious societies to levy taxes, and in the case of Mr Wasmuth, served to ensure that he did not pay church taxes.²¹⁵ Therefore, no violation was found.

There have also been several European Court cases brought by parents of students wearing religious symbols (e.g. Islamic headscarfs and the Sikh 'keski'), which explore the notion of proportionality. In the cases of *Aktas v France*,²¹⁶ *Bayrak v France*,²¹⁷ *Gamaleddyn v France*,²¹⁸ *Ghazal v France*,²¹⁹ *J. Singh v France*²²⁰ and *R. Singh v France*,²²¹ the applicants asserted that prohibitions on religious clothing, which ultimately lead to their children's expulsion from school, amounted to a violation of the right to manifest religion. While the court consistently affirmed that the wearing of religious dress was a manifestation of religion under article 9, it found the complaints inadmissible, as it held that the interferences with the students' freedom of religion and belief were prescribed by law in pursuit of the legitimate aim of protecting the rights and freedoms of others and of public order. It further stressed that the punishment of expulsion was not disproportionate to those ends, given that the students were free to continue their schooling by correspondence courses. In these cases a guiding consideration was the role of the state to neutrally and

²¹⁵ *Wasmuth v Germany* (Application No 12884/03), Chamber judgment 17.02.11, [61-63].

²¹⁶ *Atkas v France* (43563/08) Declared inadmissible 30.06.2009.

²¹⁷ *Bayrak v France* (14308/08), Declared inadmissible 30.06.2009.

²¹⁸ *Gamaleddyn v France* (18527/08), Declared inadmissible 30.06.2009.

²¹⁹ *Ghazal v France* (29134/08), Declared inadmissible 30.06.2009.

²²⁰ *J Singh v France* (25463/08), Declared inadmissible 30.06.2009.

²²¹ *R Singh v France* (27561/08), Declared inadmissible 30.06.2009.

impartially organise various religions, faiths and beliefs, which in French society is based on the principle of secularism.²²²

In contrast to these European decisions is the recent HRC decision of *Bikramjit Singh v France* in which a Sikh student was ultimately expelled from his high school for refusing to remove his *keski*. France used the same line of reasoning it did in analogous cases to the ECHR, based on the principle of secularism. The HRC did not deny that upholding secularism in state schools was a legitimate aim serving to protect the rights and freedoms of others, and peace and order in public schools. However, it did not consider that the limitations imposed on the rights of Singh were necessary or proportionate. There was no evidence that his wearing of the *keski* posed any real threat to the rights of others, nor compromised public safety, order, health or morals and the measures taken against him were not in response to his personal conduct, but because of his membership in a wider group defined by their religious practices.²²³

It becomes clear that decisions over what is or what is not ‘necessary’ and ‘proportionate’ in a given situation are often value-driven. As a result, outcomes may vary from decision-maker to decision-maker, depending on what his or her values are, making the application of the proportionality requirement somewhat unpredictable. Further illustrations of the application of the principle of proportionality are contained in the following discussion.

1.6(c) Permissible grounds of limitation

1.6(c)(i) Public Safety and Public health

It is not entirely clear from the wording of article 18(3), whether the adjective ‘public’ refers only to safety, or also extends to order, health and morals.²²⁴ Here it is assumed that the clause intends to include public order, public health and public morals as permissible purposes, in line with other provisions of the ICCPR.

²²² Here it must be remembered that the European Court of Human Rights allows for a margin of appreciation that is not, apparently, allowed at the level of the HRC.

²²³ Human Rights Committee, UN Doc CCPR/C/106/D/1852/2008, 4 December 2012 (*Bikramjit Singh v France*) [8.7].

²²⁴ Nowak, above n 124, 426.

Interference with freedom of religion or belief on the ground of public safety is permissible, for instance, if “during a religious ceremony ...a specific danger arises threatening the security of persons (i.e., their life, physical integrity or health) or things.”²²⁵ Public safety and health have also been found as justified grounds for limiting the right of a religious association to carry out religious activities by making its use of premises conditional on the premises satisfying relevant public health and safety standards.²²⁶

A clear example of the freedom to manifest religion being limited in the interests of public safety arose in the European Court case of *El Morsli v France*. Ms El Morsi, a Moroccan national, alleged a violation of her rights under article 9 (and article 8) when she was denied entry to the French consulate and subsequently denied a visa to enter France after refusing to remove her headscarf for an identity check at the French consulate. She asserted her willingness to submit to a momentary identity check, but only in the presence of a female.²²⁷ The court found that identity checks imposed on persons seeking to enter the premises of a consulate are necessary for public safety, and in this case, the interference with her religious rights would have been of brief duration. The fact that a female official was not on hand to carry out such checks did not exceed the margin of appreciation of the state. The court therefore found that the applicant had not suffered a disproportionate interference with her freedom of religion and belief and rejected this part of her claim as manifestly ill-founded.²²⁸

In *Singh Bhinder v Canada*,²²⁹ the HRC found that the dismissal of a Sikh railway worker who refused to wear safety headgear, which would have required him to remove his turban, did not breach his freedom of religion. The HRC unfortunately

²²⁵ Ibid 427.

²²⁶ *Malakhovsky and Pikul v Belarus*, UN Doc CCPR/C/84/D/1207/2003 [7.5-7.6]. In this case, the court found the requirement that premises satisfy relevant public health and safety requirements was prescribed by law and proportional to the public safety limitation. However, it went on to decide that making such conditions a pre-condition for registration was not necessary, given that such premises could be found following registration, so a violation of article 18 was found.

²²⁷ *El Morsli v France* (15585/06), Declared inadmissible 04.03.2008 [1].

²²⁸ Ibid [2].

²²⁹ *Bhinder v Canada*, Human Rights Committee, UN Doc CCPR/C/37/D/208/1986 (9 November 1989)

failed to address how Singh Bhinder's non-compliance with helmet regulations impacted on public safety, rather than merely his own personal safety.²³⁰

Similar cases have appeared before the European Court, albeit distinguishable on the basis that the persons concerned were minors rather than adults as was the case in *Singh Bhinder v Canada*. In the European Court of Human Rights in *Dogru v France*²³¹ and *Kervanci v France*,²³² Ms. Dogru and Ms. Kervanci, then aged eleven and twelve respectively, refused to remove their Islamic headscarves in physical education and school sports classes as required by school rules, and were eventually expelled for their failure to participate in those classes. The court found no violation of article 9 given that the wearing of veils was incompatible with sports classes for reasons of health or safety and that the violation of their rights was based on this consideration, not on their religious convictions.²³³

Similar considerations apply to the concept of public health, which may be contrary to some religious convictions. For instance, religious customs such as female genital mutilation may be restricted on the basis that they endanger public health.²³⁴ However, complexity arises when the state must consider whether to protect an individual's health (and life) against his or her own religious convictions. A situation of a state having to decide when to protect an individual from his or her own religious beliefs would arise for instance, where a Jehovah's witnesses refuses a life-saving blood transfusion on religious grounds.

Public health and public safety should be construed exclusively in the context of the public domain. The decision of an individual, such as Singh Binder, to not wear a protective helmet, should not be misconstrued as having public implications. On the same rationale, an individual should have the right to refuse a life-saving blood

²³⁰ Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 151. See also Joseph, Schultz and Castan, above n 98, 509. The HRC's reasoning may have concerned the public health insurance costs though it did not expressly raise this point.

²³¹ *Dogru v France* (Application no 27058/05) Chamber judgment 04.12.2008.

²³² *Kervanci v France* (Application no 31645/04) Chamber judgment 04.12.2008.

²³³ See *Dogru v France* (Application no 27058/05) Chamber judgment 04.12.2008 and *Kervanci v France* (Application no 31645/04) Chamber judgment 04.12.2008, Press Release issued by Registrar 4.12.2008, Document 882.

²³⁴ Nowak, above n 124, 430.

transfusion given that that individual's death has only a minor implication for public health.

1.6(c)(ii) Public Order

Public order or *ordre public* as used in the Covenant has been defined in the Siracusa principles as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”, with respect for human rights being a part of this.²³⁵ Prevention of disorder is often illustrated by reference to the applicability of the public order limitation in prison settings. Prisoners are allowed to practice their religion in theory, but maintaining order requires certain practical restrictions.²³⁶

In the HRC case of *Singh v France*, the Sikh author complained that his freedom of religion and belief was violated by the requirement that he remove his turban for the purpose of the identity photo for his residence card. The Committee did not dispute the fact that the law required people to appear bareheaded in identity photographs to protect public safety and public order, namely to minimise the risk of fraud or falsification of residence permits. However, the Committee pointed to the fact that the state did not explain why wearing a turban covering only the top of the head and a portion of the forehead would make it more difficult to identify the author given that he wore his turban all the time, nor how bareheaded photos reduce the risk of falsification of residence permits. Furthermore, while the state asserted that the interference with the author would be a one-time requirement (namely, for the purpose of taking the photo), the Committee observed that the interference would potentially be ongoing as he might be required to continually remove his turban if his identity photograph showed him without it. The Committee therefore decided

²³⁵ Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) [22].

²³⁶ Various European Commission decisions illustrate this point. For examples, see those referred to in Taylor, above n 152, 324. One such example is prohibiting or restricting a prisoner's visits to the prison chapel where that prisoner has been convicted for violent murder as in the case of *Childs v United Kingdom* (App. No. 9813/82).

that there had been an interference with Singh's freedom of religion and belief that was not necessary within the meaning of article 18(3).²³⁷

Public order as contained in article 18(3) differs from other limitations clauses elsewhere in the ICCPR due to the absence of the term *ordre public*, which is contained in articles 12 (freedom of movement), 14 (right to a fair hearing), 19 (freedom of expression), 21 (freedom of assembly) and 22 (freedom of association). The fact that various limitations clauses in the ICCPR take the trouble to list both terms "makes it unmistakably clear that the term 'public order' in article 18(3) has a different meaning than in articles 12, 14, 19, 21 and 22", the consequence being that limitations can only be imposed narrowly to avoid disturbances to public order, rather than in the broader sense provided for under the civil law concept of *ordre public*.²³⁸

The civil law concept of 'l'ordre public' is explained as

...a legal concept used principally as a basis for negating or restricting private agreements, the exercise of police power or the application of foreign law. In common law countries the expression 'public order' is ordinarily used to mean the absence of public disorder. The common law counterpart of 'l'ordre public' is public policy rather than 'public order'.²³⁹

It was decided during the drafting process that the inclusion of the term 'l'ordre public' in the limitations clause of article 18 could potentially "create uncertainty and might constitute a basis for far-reaching derogations from the rights guaranteed."²⁴⁰

It is useful to speculate on whether the inclusion of *ordre public* as a ground of limitation in article 18 would result in any practical difference. Unfortunately there is a dearth of international cases addressing the distinction between public order and *ordre public*, which implies that the difference in international human rights law in practice is negligible. Perhaps the most light has been shed on the distinction by the

²³⁷ *Singh v France*, Human Rights Committee, *Communication No 1876/2000*, UN Doc CCPR/C/102/D/1876/2009 [8.4].

²³⁸ Nowak, above n 124, 428.

²³⁹ Marc J Bossuyt, *Guide to the Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987), 365-366.

²⁴⁰ Bossuyt, above n 239, 366.

Hong Kong case of *Hksar v Ng Kung Siu & Anor*²⁴¹ in which the limitation of freedom expression (in this case, section 7 of the National Flag Ordinance and section 7 of the Regional Ordinance prohibiting desecration of the national flag) was justified on the basis of *ordre public* rather than public order. In this case, three points were made in respect of *ordre public*;

First, the concept is an imprecise and elusive one. Its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc.). Thirdly, the concept must remain a function of time, place and circumstances.²⁴²

In relation to this third point, the relevant context concerned the resumption of Chinese sovereignty of Hong Kong, a long aspiration of the Chinese people. In this circumstance, “the legitimate societal interests in protecting the national flag and legitimate community interests in the protection of the regional flag interests” were considered to be within the scope of *ordre public*.²⁴³

It is doubtful that the exclusion of *ordre public* makes a significant practical difference to the enjoyment of article 18 rights. Nevertheless, the fact that it was omitted from article 18(3) logically indicates that there are fewer exceptions to article 18 rights as there are to other rights which can be limited on more numerous grounds.

1.6(c)(iii) Public Morals

Manifestations of religion or belief may be restricted by proportionate measures to protect public morals. General Comment 22 acknowledges that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving from a single

²⁴¹ *Hksar v Ng Kung Siu & Anor* [2000] 1 HKC 117.

²⁴² Ibid 139.

²⁴³ Ibid 139-140.

tradition."²⁴⁴ This interpretation avoids the situation of public morality in article 18(3) being interpreted in accordance with a state or popular religion. For instance, in the European Court of Human Rights case of *Manoussakis and others v Greece* the court determined that, for the purposes of article 9 of the ECHR, 'morals' should not be taken to be those dictated by the religious or moral precepts of the majority population.²⁴⁵

What is 'moral' will differ widely from one individual to the next; what is publicly moral will similarly differ from one state to the next. The enormous variety of moral perspectives throughout the international community of states and the individuals which comprise them is acknowledged to the extent that the HRC initially afforded a margin of discretion to states in this respect in its statement that

...public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.²⁴⁶

This statement, made in the case of *Hertzberg et al v Finland*²⁴⁷ mirrored the wide 'margin of appreciation' afforded to states parties to the ECHR in limiting freedom of expression for the purpose of protecting public morals.²⁴⁸ The HRC found in favour of the state party in this early case. The notion of the margin of appreciation has since been rejected in the ICCPR context.²⁴⁹

In *Delgado-Paez v Colombia*, the author was pressured to leave his teaching post as a religion and ethics teacher at a secondary school, as his advocacy of 'liberation theology' and views that differed from the Apostolic Prefect of Leticia in Colombia. He argued that the state's failure to intervene amounted to a violation of several of his rights, including those in article 18. The HRC found that there had been no violation of article 18 given that a state's religious authorities were permitted to

²⁴⁴ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [8].

²⁴⁵ *Manoussakis and others v Greece* (Application No 18748/91) Eur Court HR (1997) 23 EHRR 387.

²⁴⁶ Human Rights Committee, UN Doc CCPR/C/OP/1 (1985), (*Hertzberg et al v Finland*) 124 [10.3].

²⁴⁷ *Hertzberg et al v Finland*, Human Rights Committee, UN Doc CCPR/C/OP/1 (1985), 124.

²⁴⁸ Joseph, Schultz and Castan, above n 98, 527, referring to *Handyside Case*, Series A (1979-80) 1 EHRR 737 [48].

²⁴⁹ Joseph, Schultz and Castan, above n 98, 527, referring to *Länsman v Finland* (511/92) where the HRC rejected the application of the margin of appreciation.

circumscribe the rights of a teacher to teach religion and belief in schools in accordance with their own religions and beliefs.²⁵⁰ The HRC was explicitly influenced by the 'special relationship between church and state in Colombia.'²⁵¹ It is presumed that the restrictions to Delgado-Paez's rights were permitted in order to protect public morals, but the HRC should have clarified its reasoning in this respect. What is clear from this case however is that 'public morals' vary from state to state, and that permissible limitations to rights will also differ.²⁵²

In the later case of *Toonen v Australia*, the complainant alleged arbitrary interference with his privacy by the existence of Tasmanian laws that criminalised private consensual sex between adult men.²⁵³ The Tasmanian government, in arguments submitted via the state party, argued that the laws were necessary to preserve public morals. The HRC rejected Tasmania's argument on the basis that "there [was] now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation" and that "a complete prohibition on sexual activity between men [was] unnecessary to sustain the moral fabric of Australian society."²⁵⁴ The implication of *Toonen* was that if the author had come from a country where there was general intolerance of homosexuality, the public morals defence would have prevailed.²⁵⁵ However, the principle that states are required to protect individuals persecuted on the basis of their sexual orientation, and that laws criminalising consensual sex between consenting adults violate privacy, have since passed into international law, as evident from subsequent decisions,²⁵⁶ general comments,²⁵⁷ and concluding observations.²⁵⁸

²⁵⁰ Human Rights Committee, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) (*Delgado-Paez*) [5.6].

²⁵¹ *Delgado-Paez v Colombia*, UN Doc CCPR/C/39/D/195/1985 [5.8].

²⁵² Joseph, Schultz and Castan, above n 98, 529.

²⁵³ Human Rights Committee, UN Doc CCPR/C/5/D/488/1992 (1994) (*Toonen v Australia*)

²⁵⁴ *Toonen v Australia*, UN Doc CCPR/C/5/D/488/1992 [6.7]. Also see Human Rights Committee, UN Doc CCPR/C/89/D/1361/2005 (2007) (*X v Colombia*), in which the HRC found that the state was acting discriminatorily by denying a survivor's pension to the same-sex partner of a deceased partner.

²⁵⁵ See for instance, Sarah Joseph, 'Toonen v Australia: Gay Rights under the ICCPR' (1994) 13 *University of Tasmania Law Review* 392.

²⁵⁶ Also see Human Rights Committee, CCPR/C/78/D/941/2000 (*Young v Australia*) and *X v Colombia*, UN Doc CCPR/C/89/D/1361/2005.

²⁵⁷ See for instance, Committee on Economic, Social and Cultural Rights, general comment No. 20 (E/C.12/GC/20) [32] and Committee on the Rights of the Child, general comment No. 13 (CRC/C/GC/13), [60] confirming that "other status" includes sexual orientation.

²⁵⁸ Also see Human Rights Committee concluding observations on Togo (CCPR/C/TGO/CO/4), [14]; Uzbekistan (CCPR/C/UZB/CO/3) [22]; and Grenada (CCPR/C/GRD/CO/1), [21], as well as Committee on

It is nonetheless clear from the above cases that the challenge in limiting rights according to public morals is in reconciling subjective views of morality with an international human rights framework that strives to set universal standards. This challenge is an acute one where religion comes into play, given that many claim that their particular religion or belief represents the highest moral order.²⁵⁹

1.6(c)(iv) Rights and Freedoms of Others

Article 18(3) permits limitations to article 18 rights if those limitations are necessary to protect the 'fundamental rights and freedoms of others'. This limitation indicates that states parties may only restrict freedom of religion or belief, in order to protect the rights of others that have the character of fundamental rights and freedoms in their national legal system.²⁶⁰ Alternatively the term 'fundamental rights' could be interpreted as referring to an international minimum standard of human rights, perhaps that established under the UDHR and the two United Nations human rights covenants. It is submitted that this latter interpretation is preferable, as it provides for a more universal understanding of the notion of 'fundamental rights and freedoms' which is divorced from (naturally divergent) national laws. Interpreted thus, freedom of religion or belief would be permissibly restricted where a manifestation thereof interferes with another human's right or freedom. In this way, 'human rights' and 'fundamental rights' can be used interchangeably in arriving at grounds for the protection of the rights and freedoms of others.²⁶¹

In this respect, article 18 may be distinguished from other ICCPR rights which allow for restrictions where manifestation simply interfere with 'the rights and freedoms of

Economic, Social and Cultural Rights, concluding observations on Cyprus (E/C.12/1/Add.28) [7]; Committee on the Elimination of Discrimination against Women, concluding observations on Uganda (CEDAW/C/UGA/CO/7), [43-44]; and Kyrgyzstan (*Official Records of the General Assembly, Fifty-fourth session, Supplement No. 38 (A/54/38/Rev.1)*) [127-128]; and Committee on the Rights of the Child, concluding observations on Chile (CRC/C/CHL/CO/3) [29]. See generally Human Rights Council, 19th session, Agenda Items 2 and 8, *Discriminatory Laws and Practices and acts of violence against individuals based on their sexual orientation and gender identity*, Report of the United Nations High Commission for Human Rights, (17 November 2011), UN Doc A/HRC/19/41, [7], [14], [41], [55].

²⁵⁹ Nowak and Vospernik, above n 230, 159. Nowak and Vospernik refer to an Austrian case in which the government of Vorarlberg was called upon to balance the Jewish and Islamic religious morality of ritual slaughter of sheep against the moral value of protecting animals from unnecessary cruelty, deciding in this case in favour of the former.

²⁶⁰ Nowak, above n 124, 430.

²⁶¹ T Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process* (Clarendon Press, 1986), 181-2.

others' generally, or in the case of article 19(3)(a) the 'rights and reputations of others'. The limitation regarding article 18 seems narrower, referring to 'fundamental' rights rather than 'any' right. However, there is arguably little practical difference between this disparate phrasing. In the case of *Ross v Canada*, the assessment of whether the limitation to Ross's rights was permitted under articles 18(3) and 19(3) was treated as involving "substantially the same" issues.²⁶²

Furthermore, article 19(3) explicitly mentions that article 19 rights can be limited to protect the reputations of others, but reputation is not mentioned in article 18. If a person makes derogatory comments about another's sexuality to the point that it tarnishes the reputation of that person as well as the community of people with that particular sexuality, a case brought under article 19 could result in the legitimate limiting of this person's expression. The omission of 'reputation' from article 18 could mean that the same is not true if the derogatory comment is made in a religious context.

The European Court of Human Rights has construed the rights of others broadly to include the right of the public to proper administration of justice. In *Sessa v Italy*,²⁶³ the lawyer applicant requested an adjournment of a hearing given that both dates offered by the investigating judge fell on Jewish public holidays that he sought to observe given his membership of the Jewish faith. The applicant asserted that his article 9 rights had been violated by the judicial authority's failure to adjourn the hearing. The court found that there had been no violation of Mr Sessa's right to practice his religion and manifest his beliefs; he could have arranged to be replaced at the hearing so as to fulfil his professional obligations.²⁶⁴ The court went on to explain that even supposing that there had been an interference with his article 9 rights, such interference would have been justified on the grounds of the protection of the rights and freedoms of others, namely the public's right to the proper administration of justice and the principle that cases be heard within a reasonable time.²⁶⁵ However, three of the seven judges dissented. While the majority asserted

²⁶² *Ross v Canada*, UN Doc CCPR/C/70/D/736/1997 [11.8]

²⁶³ *Sessa Francesco v Italy*, Chamber Judgment 03.04.2012, ECHR 144 (2012) [34-39]

²⁶⁴ *Ibid* [37].

²⁶⁵ *Ibid* [38], [5-6]

that Mr Sessa could have arranged a substitute to attend the hearing in his place, dissenting Judges Tulkens, Popović and Keller pointed to article 401 of the Code of Criminal Procedure stating that defence counsel had a right to participate. Furthermore, they asserted that the interference with Mr. Sessa's rights was not proportionate to the legitimate aim of protecting the public right to proper administration of justice, which could have been served by scheduling an alternative date in accordance with the applicant's request, which he made four months in advance.²⁶⁶ The dissenting judges disagreed that the rights and freedoms of others (being the applicant's client) were at stake on the facts of this case, given that the hearing in question did not involve any deprivation of liberty of detained persons.²⁶⁷

1.6(c)(v) Absence of National Security

One of the notable features of article 18(3) (and article 1 of the 1981 Declaration) is the absence of 'national security' as a limiting purpose, in contrast to other ICCPR rights such as the freedoms of expression (article 19), assembly (article 21), and association (article 22).²⁶⁸ During the process of reviewing the draft civil and political rights covenant, the term 'national security' in the context of freedom of religion was deemed by the General Assembly in its Fifth Session in 1949 as 'not sufficiently precise to be used as a basis for the limitation of the exercise of the rights guaranteed.'²⁶⁹ Perhaps so, but the lack of precision of the term does not account for its inclusion in other articles and its exclusion in article 18.

Practically, with respect to religious freedom, some 'national security' objectives could potentially be met by justifying limitations on the basis of public safety or public order.²⁷⁰ Indeed, in the case of *Yoon and Choi v Republic of Korea*, the state party attempted to justify its prohibition on rights of conscientious objection to compulsory military service by reference to the need to protect national security.²⁷¹

²⁶⁶ Ibid, Judges Tulkens, Popović and Keller dissenting, [8-14]

²⁶⁷ Ibid Judges Tulkens, Popović and Keller dissenting [14].

²⁶⁸ Article 12(3), 14(1) and 19(3) allow interferences for the protection or reason of national security, while articles 21 and 22(2) provide restrictions in the interest of national security.

²⁶⁹ UN Secretary General, *Annotations on the text of the draft International Covenants on Human Rights*, UN GAOR, 10th Session, Agenda Item 28, Part II, Annexes, (1 July 1955) UN Doc A/2929, 49 [114].

²⁷⁰ Joseph, Schultz and Castan, above n 98, 508.

²⁷¹ *Yoon and Choi v Republic of Korea*, UN Doc CCPR/C/88/D/1321-1322/2004 [4.2]. Note that the issue of conscientious objection has since been found to be an absolute right, such that article 18(3) is no longer relevant.

Noting the state party's failure to identify which of the article 18(3) restrictions it involved, the HRC accepted "that the general import of the argument is on "public safety or order"". ²⁷² The HRC went on to find that the prohibition was not justified on those grounds. It noted that many states provided alternatives to compulsory military service that did not erode conscription or religious freedom, and that South Korea had failed to show why it could not do likewise. ²⁷³

The HRC's equating of national security with public safety and public order in *Yoon and Choi* is problematic. After all, General Comment 22 demands strict interpretation of limitations in article 18(3): "restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security." ²⁷⁴ Subsuming national security within concepts of public safety and order raises questions about the point of distinguishing between these grounds at all, or indeed omitting one of them from those provided for in article 18(3).

1.6(d) Conclusion on limitations

The Special Rapporteur on Freedom of Religion and Belief has stated that;

The relationship between freedom and its possible limitation is a relationship between rule and exception. In case of doubt, the rule prevails and exceptions always imply an extra burden of argumentation, including clear empirical evidence of their necessity and appropriateness. ²⁷⁵

Unfortunately, the HRC sometimes fails to share the Special Rapporteur's reasoning when considering limitations to article 18 and other rights. In *Prince v South Africa*, at issue was whether a law prohibiting Prince's use of cannabis as a key tenet of his Rastafarian faith, violated, *inter alia*, ICCPR article 18. ²⁷⁶ No violation was found. The HRC found that the interference with Mr. Prince's rights was based on reasonable

See *Atasoy and Sartuk v Turkey*, UN Doc CCPR/C/104/D/1853-1854/2008, discussed above at 1.3 and *Jeong et al v the Republic of Korea*, Communications Nos. 1642-1741/2007, adopted on 24 March 2011.

²⁷² *Yoon and Choi v Republic of Korea*, UN Doc CCPR/C/88/D/1321-1322/2004 [5.1].

²⁷³ *Ibid* [8.4].

²⁷⁴ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [8].

²⁷⁵ UN General Assembly, *Elimination of all forms of religious intolerance*, UN Doc A/67/303 (13 August 2012) [28].

²⁷⁶ *Prince v South Africa*, UN Doc CCPR/C/91/D/1474/2006.

and objective grounds provided for by article 18(3), and was not discriminatory given that the prohibition applied to all people of all faiths.²⁷⁷ The HRC determined that the interference with Mr. Prince's rights were based on reasonable and objective grounds, but failed to identify which limit or limits it applied in reaching its decision with respect to article 18. It could be speculated that public health and/or morals were a concern, for instance if cannabis use spread from the Rastafarian faith and entered into the public domain or if an increase of converts to Rastafarianism would result in more widespread cannabis use. Where reasoning is absent or opaque, the HRC's decisions are open to speculation that they are based on consideration of the nature of a particular religion or belief, rather than on the value of limiting manifestations of it.

Two conclusions are arrived at in relation to the limitations allowed (or not allowed) in respect of freedom of religion and belief. Firstly, the application of article 18(3) limitations in practice suggests that limitations are malleable. Secondly, the fewer limitations available in respect of freedom of religion and belief vis-à-vis other ICCPR rights reveal an intention to distinguish this particular right from others.

1.6(d)(i) Malleability of limitations allows bias

Several cases reveal that limitations to the freedom of religion and belief can be applied in a biased manner, whereby decision makers are in effect able to decide the outcome of the case depending on their approval or disapproval of the beliefs involved, and then reason their way to this outcome.

In the HRC case of *M.A. v Italy*,²⁷⁸ the author's claim was found to be inadmissible. M.A. was convicted for attempting to re-establish the dissolved fascist party; acts which the HRC stated "were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18(3), 19(3), 22(2) and 25 of the

²⁷⁷ Ibid [7.3, 7.4 and 7.5].

²⁷⁸ Human Rights Committee, Communication No. 117/1981, UN Doc Supp No 40 (A/39/40) at 190 (1984) (*M.A v Italy*).

Covenant."²⁷⁹ In its decision, the HRC neglected to address M.A.'s allegation that the law was applied in a discriminatory way against right-wing organisations rather than aimed at all 'anti-democratic' parties including those on the far left. The legal representative of M.A. noted that while the restrictions in the relevant domestic law imposed on the author were purportedly enacted to protect public safety, they also served to prohibit democratic and non-violent expression of particular ideologies; such a law was said to be inherently discriminatory as it was aimed solely at movements with fascist leanings as opposed to *all* anti-democratic movements (including anarchists and Leninists). The HRC responded by finding M.A.'s claim inadmissible on the grounds that it was not a violation of the ICCPR to continue to carry a sentence that was ordered before the ICCPR was in force in Italy, and that the interferences with M.A.'s freedom were likely to be justified anyway under the ICCPR.²⁸⁰ *Ross v Canada*²⁸¹ and *Faurisson v France*²⁸² are other cases in which the HRC can be seen to tolerate the suppression of right wing racist views.

Contrasted to these decisions are cases where the author has leant more to the left and the HRC has not found the interference with article 18 rights to be permissible. The HRC for example, took a sympathetic approach to the author in *Kim v Republic of Korea*,²⁸³ who was convicted under the National Security Laws of the Republic of Korea for expressing opinions sympathetic to the Democratic People's Republic of Korea (North Korea). The same sympathy was also shown in the case of *Hak-Chul Shin v Republic of Korea*,²⁸⁴ involving the conviction of an artist for a painting that the state interpreted as inciting the 'communisation' of the Republic of Korea through its idealised depiction of rural North Korea. The HRC found the arrest of the artist and the confiscation of his painting impermissibly interfered with his rights.²⁸⁵

A key question results from a comparison of these two cases with that of *M.A. v Italy*: "Is the HRC possibly more tolerant of left-wing anti-democratic views than of right-

²⁷⁹ *M.A v Italy*, UN Doc Supp No 40 (A/39/40) [13.3].

²⁸⁰ *Ibid* [13.1-13.4].

²⁸¹ *Ross v Canada*, UN Doc CCPR/C/70/D/736/1997.

²⁸² Human Rights Committee, UN Doc CCPR/C/58/D/550/1993 (1996) (*Faurisson v France*).

²⁸³ Human Rights Committee, UN Doc CCPR/C/64/D/574/1994 (3 November 1998) (*Kim v Republic of Korea*).

²⁸⁴ Human Rights Committee, UN Doc CCPR/C/80/D/926/2000 (19 March 2004) (*Hak-Chul Shin v Republic of Korea*).

²⁸⁵ Note that *Kim v Republic of Korea* and *Hak-Chul Shin v Republic of Korea* were article 19 cases.

wing fascist views?"²⁸⁶ If so, bias is revealed. The cases analysed here point to an affirmative answer as article 18(3) is applied in a way that displays more tolerance of interferences with some religions and beliefs over others.

1.6(d)(ii) Fewer limits apply to article 18

The grounds for limiting freedom of religion contained in article 18(3) of the ICCPR are ostensibly narrower than those for other rights in three key ways. Firstly, while public order is a permissible ground of limitation, *ordre public* is not. Secondly, interference to protect the rights of others is permitted only where the others' rights are 'fundamental' in contrast to most other ICCPR rights which can be interfered with to protect the mere 'rights and freedoms' of others, and in the case of freedom of expression, 'rights or reputations'. Finally, the absence of national security as a ground of limitation is notably absent.

It has been noted that some distinctions may not result in significant differences in practice. For instance, the absence of *ordre public* from article 18(3) has arguably not had any impact, national security concerns can be addressed by those of public order and public security, and 'fundamental rights' can be understood as being a euphemism for 'human rights'. The question is then begged, what purpose was served by making the right distinct in the ways enumerated above? Such differences would presumably not have been made between freedom of religion and freedom of expression if they were not intended to result in practical differences.

It is asserted that the intended result of framing limitations to freedom of religion differently vis-à-vis comparable rights, was to allow for fewer exceptions and to elevate it above other rights. The fact that this does not happen in practice due to the malleability of applicable limitations does not detract from the intention to distinguish and elevate freedom of religion and belief. Additional evidence for the priority that article 18 rights maintain over other rights is found in the fact of its non-derogable status.

²⁸⁶ Joseph, Schultz and Castan, above n 98, 536.

1.7. Non-derogability of Article 18

Article 4(1) of the ICCPR states that

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4(2) goes on to prohibit derogations from articles 6, 7, 8(1) and (2), 11, 15, 16 and 18. Therefore, even during times of public emergency, the freedom to have, adopt or manifest a religion or belief cannot be suspended.

The purpose served by the explicit non-derogability of article 18 must be considered in light of the fact that reasonable and proportionate exceptions are permissible. It is difficult to imagine circumstances in which derogations would be required, that are not already permitted by article 18(3). Nevertheless, the material point is that limitations beyond those specified could hypothetically be justified by virtue of article 4.²⁸⁷ Regardless of the difference its non-derogability may or may not make in practice, article 18 is officially elevated above derogable rights on the basis of this status.

1.7(a) Conditions for derogation

Five conditions must be met in order for states to derogate from their obligations under the ICCPR. Firstly, the derogation must relate to a state of public emergency that threatens the life of the nation. Secondly, the state of public emergency must be officially proclaimed. Thirdly, derogations must be strictly necessary. Fourthly, derogations must not discriminate on specified grounds. Finally, derogations must not jeopardise non-derogable rights.

²⁸⁷ See Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) *Human Rights Law Review*, Volume 2, Number 1, 90.

The definition of 'a threat to the life of the nation' has been narrowly construed. A 'public emergency' is conceived of as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed."²⁸⁸ The HRC has stated that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."²⁸⁹ In such situations, the measures should be necessary and legitimate in the circumstances and limited to the extent strictly required by the exigencies of the situation, thereby demanding proportionality.²⁹⁰ Therefore, states must justify not only their decision to proclaim a state of emergency, but also the specific measures taken on the basis of it.²⁹¹ The Paris Standards clarify that states of emergency must be temporary, not exceeding periods required to restore normal conditions.²⁹²

1.7(b) Non-derogability of article 18

The fact that article 18 cannot be derogated from even in the event of a 'public emergency threatening the life of the nation' indicates the privileged status of freedom of religion or belief. One reason for its non-derogability, in so far as the internal component of the right in article 18(1) is concerned, is that it is never practically necessary or possible to interfere with a private, internal thought. This explanation provides no answer however for the non-derogability of manifestation of freedom of religion or belief, or, for that matter, the derogability of article 19(1). General Comment 29 justifies this particular non-derogability, not "in recognition of the peremptory nature of some fundamental rights" (as with the right to life and the prohibition of torture or cruel, inhuman or degrading punishment) but because "it

²⁸⁸ Richard B Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' 79 *American Journal of International Law* 1072, 1073 [A(1)(b)].

²⁸⁹ Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [3].

²⁹⁰ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 [3-4].

²⁹¹ *Ibid* [5].

²⁹² Lillich, above n 288 [A(3)(a)]. The Paris Standards elaborate on minimum standards for derogations.

can never be necessary to derogate from [it] during a state of emergency.”²⁹³ In this category it offers the example of article 18 freedom of religion and article 11 prohibition of imprisonment because of inability to fulfil a contractual obligation.

Without doubt, it is difficult to suggest that a state of emergency would somehow justify the imprisonment of people owing debt (as is prohibited by article 11) but the same is not necessarily true in relation to the manifestation of article 18. Consider for instance that a state of emergency is declared in a hypothetical city faced with an imminent hurricane. Would it be justifiable in this situation to repress non-religious expressions advising people to independently flee the city because of the potential failure of state evacuation services (which might lead to a panicked and unruly exodus), and *not* be justifiable to curtail religious proclamations advising people to remain in the city to welcome the forthcoming disaster as the prophesised judgment day?²⁹⁴ In the hypothetical situation described, limitations on the manifestation of religion would likely be justified in practice on the basis of public safety or order, but this outcome still does not explain why article 18 is non-derogable where, for example, article 19 is not.

The fact that article 18 contains limitations at all is noteworthy given that, with the exception of article 6, other rights containing limitations provisions are not considered non-derogable.²⁹⁵ On this point, the HRC tells us that the inclusion of article 18 “indicates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, states that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3.”²⁹⁶ The

²⁹³ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 [11]. Human Rights Committee, *General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.6 (11 April 1994) [10] also notes that “[o]ne reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency.”

²⁹⁴ *Bible*, Psalm 107:25-33, “He raiseth the stormy wind which lifted up the waves of the sea... He turns rivers into a desert, and springs of water into thirsty ground; a fruitful land into a salt waste, because of the wickedness of those who dwell in it.”

²⁹⁵ Article 6 of the ICCPR protects against arbitrary deprivations of life, meaning that non-arbitrary deprivations (e.g. killing in proportionate self defence of one’s life) are allowed. Furthermore, capital punishment is allowed in some circumstances (see articles 6(2) – 6(6)).

²⁹⁶ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 [7].

absence of national security as a ground of limitation then would seem to take on greater significance.

Beyond the overlaps of their limitations provisions, article 18 and article 19 are analogous in that they both contain an active component (where the religion, belief, thought or opinion manifests) and a passive component that can never be interfered with. It is interesting to speculate on why the manifestation of article 18 rights is deemed to pose less threat to the nation than manifestations of article 19 rights. Indeed, the threat posed by contemporary terrorism could be raised as an argument that religious manifestations can pose certain danger. Professor Sarah Joseph raises this same question.

The right in article 18(3) to manifest one's religion or beliefs, seems as 'active' a right as any other Covenant right, and its exercise is certainly capable of impacting badly on others, especially when one considers the wide range of possible religions or beliefs, good and bad. Indeed, it is possible that the September 11 hijackers believed that they were manifesting their religion, apparently an extreme and distorted form of Islam, and/or manifesting their belief that the destruction of American targets and lives was a beneficial deed, when they 'martyred' themselves in their kamikaze missions.²⁹⁷

The very real danger of derogations in states of emergency being misused to curtail rights has increased in the current climate of terrorist threats. Former Special Rapporteur on freedom of religion or belief, Abdelfattah Amor is conscious that in response to such threats, states have increasingly used the pretext of security to limit the exercise of the right to freedom of religion or belief.²⁹⁸ He noted that "...many states have adopted legislation and other measures designed to fight against terrorism. Some of these laws and measures have, however, presented a simplistic link between terrorism and religion which, in turn, may have contributed to provoking even more acts of religious intolerance leading to violence."²⁹⁹ This

²⁹⁷ Joseph, above n 284, 90.

²⁹⁸ Abdelfattah Amor, Special Rapporteur, *Elimination of all forms of religious intolerance*, 58th session, agenda item 119(b), A/58/296 (19 August 2003), 23 [139].

²⁹⁹ Asma Jahangir, *Civil and Political Rights, Including the question of religious intolerance*, UNESCOR, 61st session, agenda item 11(e), UN Doc E/CN.4/2005/61 (20 December 2004) [59].

situation might be exacerbated were freedom of religion or belief to become a derogable right. Indeed, the Special Rapporteur stresses its non-derogable status as implying that states "should avoid equating certain religions with terrorism as this may have adverse consequences on the right to freedom of religion or belief of all members of the concerned religious communities or communities of belief."³⁰⁰

In response to the Special Rapporteur's caution that it is dangerous to make a simple link between terrorism and religion, it is also simplistic to dismiss the possibility that such a link may exist. The Ku Klux Klan historically used biblical ideology to justify its terrorism of blacks and others and continues to base its white supremacist ideology on its brand of Christian beliefs.³⁰¹ Another example of this link is the 1995 sarin gas attacks in the Tokyo subway perpetrated by members of Aum Shinrikyo, on the basis of doomsday teachings blending Hindu, Buddhist and Christian beliefs, preached by the group's leader, Shoko Asaraha.³⁰² Because of their beliefs about the evil of the world, death and the afterlife, members of the Aum believed that they could kill people in order to save them.³⁰³

Religious intolerance leading to violence must indeed be guarded against, for example, to protect the right to life and the right to security of the person of people threatened by such intolerance. Given that not all religions and beliefs manifest in peaceful ways, a necessary response is limitation of certain manifestations and derogation in states of emergency. The failure of the ICCPR to allow derogation to freedom of religion in states of emergency may reduce the capacity of states to protect human rights that are trespassed upon by the manifestation of religion by others, or at least it would were it not for the malleable application of limitations discussed above.

³⁰⁰ Jahangir, UN Doc E/CN.4/2005/61 [60].

³⁰¹ See for instance, <http://kkk.bz>, accessed on 21 February 2013.

³⁰² See for instance, 'Tokyo subway sarin gas attack doomsday cult fugitive arrested', The Telegraph, 3 June 2012, <http://www.telegraph.co.uk/news/worldnews/asia/japan/9309138/Tokyo-subway-sarin-gas-attack-doomsday-cult-fugitive-arrested.html>, and 'BBC Profile: Shoko Asaraha', <http://news.bbc.co.uk/2/hi/asia-pacific/3504237.stm>, both accessed on 4 February 2013.

³⁰³ Peter Edge, *Legal Responses to Religious Difference* (Kluwer, 2002) 396-7.

1.7(c) Conclusions on the non-derogability of article 18

Freedom of religion and belief should be a derogable right under the ICCPR as other similar rights are, and indeed as it is in the ECHR. There is no particular justification for singling out freedom of religion and belief as a non-derogable right over freedom of expression for instance. Other rights which are derogable cannot be argued to pose a higher risk to society and security than freedom of religion or belief; on the contrary it is submitted that the manifestation of religion or belief can pose particular threats that should be guarded against by allowing for derogation under exceptional circumstances. Indeed, limitations to religious manifestations are not even permissible on the grounds of national security.

While derogation could indeed be misused by a state to try to justify broadly discriminatory laws and measures which simplistically attach to certain minorities, the same risk is true with respect to all derogable rights and does not shed light on why article 18 should enjoy so privileged a position. Furthermore, a counterpoint to the risk posed by removing article 18 from the list of non-derogable rights is the risk posed by its non-derogable status; that is misuse of the privilege to the detriment of other human rights in states of emergency.

The manifestation of freedom of religion or belief can impinge upon the rights of others, or even threaten a nation because manifestation of religion is a necessarily broad concept, and must remain so if true freedom to determine one's religion and belief is to be upheld. The range of acts constituting manifestation of religion or belief must cater to an infinite spectrum of religion and beliefs, even encompassing those that are unfathomable or abhorrent. Allowing derogation from article 18 in 'exceptional and temporary'³⁰⁴ circumstances is potentially necessary so as to ensure similar respect for similarly important rights. At the very least, the non-derogable status of article 18 places freedom of religion on a pedestal above other rights that are ostensibly of equal importance.

³⁰⁴ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 [2].

1.8. Freedom to Change Religion or Belief

The freedom to change one's mind could be argued to be a basic requirement of individual human development. There is little question that the right to change one's religion can be inferred from article 18 of the ICCPR, but the omission of the word 'change' represents a dilution over time; from freedom to 'change' one's religion or belief in 1948 (and 1950) to freedom to 'have or adopt' a religion or belief of choice in 1966, to freedom simply to 'have' a religion or belief of choice in 1981.

An explicit right to change religion was expressed by drafters who first laid down what they considered to be basic universal aspirations. Article 18 of the UDHR from 1948 expressly states that the right "includes freedom to change his religion or belief."³⁰⁵ This phrase is repeated verbatim in article 9 of the ECHR in 1950. However, the absence of the word 'change' in the ICCPR is apparent. Ultimately article 18(1) of the ICCPR in 1966 came to express the right thus: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice."³⁰⁶

The point of controversy surrounding the freedom to 'change' religion was inherited and revisited by the drafters of the 1981 Declaration. The inclusion of the right to 'change one's religion' in the 1981 Declaration was strongly opposed, as was the wording 'or to adopt', which was argued to imply that 'change' had occurred. Therefore, in the 1981 Declaration, the term 'have or adopt' is softened further by expressing the right as 'freedom to have a religion or whatever belief of his choice.'³⁰⁷

The reason that explicit reference to "change" was removed from constructions of freedom of religion and belief was primarily due to concern among Islamic states. They had two grounds of opposition to the notion of change; firstly the idea that

³⁰⁵ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) article 18.

³⁰⁶ The Universal Declaration of Human Rights (1948) provides an explicit reference to the right to change religion. Article 18 of the UDHR states that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

³⁰⁷ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN GAOR, UN Doc A/Res/36/55 (25 November 1981), article 1(1).

providing freedom to change religion would unsettle the freedom to maintain it, and secondly, the fact that 'changing' religion was incompatible with Islamic prohibitions on heresy and apostasy.³⁰⁸

The emphasis on the right to maintain one's religion over the right to change religion or belief is borne out in comments from the Afghan delegate in the drafting process of the ICCPR. He explained that giving permission for an individual to change religion could be considered an interference with his belief;

If an individual who had freely accepted a certain religion was told that he was free to change it, the idea was put into his mind that he was believing in something which he could change if given the right to do so. Doubt would be instilled and his belief damaged.³⁰⁹

Mere knowledge of and exposure to alternative religions and beliefs cannot practicably be considered an interference with a person's maintenance of his/her religious freedom. What can be gleaned from the Afghan delegate's intervention is the subjectivity of religious beliefs and the potentially insurmountable conflict between the freedom to maintain a religion and the freedom to change it, or between religion and religious freedom.

The more ideologically blatant attitude against the right to change religion was expressed by the same delegate when he explained that "Moslems permitted non-Moslems to become Moslems but did not allow Moslems to leave Islam." [sic].³¹⁰ Yemen also raised concerns; where legislation was religious in origin an express right to change religion could not possibly be in compliance for "[i]t would be impossible to force a state to abandon traditional legislation which it had applied for centuries and which was known to be in conformity with the aspirations and needs of the people."³¹¹ The Organisation of Islamic Conference (OIC) declared that it could not subscribe to the requirement concerning the right to change one's religion,

³⁰⁸ See for instance, Roberta Aluffi Beck-Peccoz, 'Proselytism and the Right to Change Religion' in Silvio Ferrari and Rinaldo Cristofori, *Law and Religion in the 21st Century* (Ashgate, 2010), 253-260. Also see Davis, above n 64, 229-230; Evans, above n 91, 35-6 and Evans, above n 3, 188.

³⁰⁹ UN Doc A/C.3/9/SR.565 (1954) [12-13] (Afghanistan).

³¹⁰ Ibid [12] (Afghanistan). Please note that the spelling of Muslim as "Moslem" derives directly from this source.

³¹¹ UN Doc A/C.3/5/SR.289 (1950), 122 [63] (Yemen).

given that some in Islam consider changing or leaving religion to be apostasy. Indeed, although the Koran says "there is no compulsion in religion"³¹² several Islamic states are guided by the Hadith which instructs the killing of any Muslim who changes his religion.

Ultimately it was decided that the ICCPR text would not explicitly affirm an individual's right to change religion. The phrase 'to have or to adopt' was accepted after the alternative wording 'to maintain or to change' was rejected, as were the words, 'to have a religion or belief' (which was rejected on the basis that it could be construed as making the choice of religion or belief a permanent one). The words 'to have or to adopt a religion or belief of his choice' were ultimately accepted as overcoming concerns raised. The right to change religion can be inferred therein, as the phrase entails a non-stagnant notion of choice which anticipates that choices will be made by rights holders including having a religion which is perhaps non-traditional, adopting a religion where none was previously held, or even adopting a non-religious belief different to the religion previously held, thereby extending its ambit of concern to those who do not have religion.³¹³

The semantic complications regarding the right to change religion have been diplomatically addressed by the HRC. Its General Comment 22 falls short of using the word 'change', but unequivocally protects the concept. Paragraph 5 of that General Comment states that

The Committee observes that the freedom 'to have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.³¹⁴

While the word 'change' is not used in this paragraph, the concept itself has been reinstated with this broad construction of what is entailed in the freedom to choose one's religion or belief.

³¹² *Koran*, Surah 2:256

³¹³ Taylor, above n 152, 31. Also see Paul M Taylor, 'Religion and Freedom of Choice', in John Witte Jr. and M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012) 171-2.

³¹⁴ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [5].

During the process of drafting the ICCPR, concern was also expressed that freedom to change religion would encourage missionary proselytism and anti-religious propaganda; the compromise reached was that the freedom must protect a person's right to have or adopt a religion of his choice – logically including the choice of removing one's self from a particular religious denomination and choosing another or choosing none.³¹⁵

While there was much discussion during the drafting process about whether to explicitly include the right to change religion, there was little question as to whether or not such a right existed. Despite differences between the UDHR, the ICCPR and the 1981 Declaration, the point is that they "...all meant precisely the same thing: that everyone has the right to leave one religion or belief and to adopt another, or to remain without any at all."³¹⁶ And indeed, in practice the right to change religion or belief is certainly accorded practical protection; the HRC considers freedom to change religion when considering state reports, and has made inquiries of and raised concerns with several countries along these lines.³¹⁷ It has also become clear that over time human rights bodies no longer need to avoid using the word 'change'. In March 2011 the Human Rights Council explicitly stressed that freedom of religion and belief includes the right to change one's religion or belief.³¹⁸

This being the case, the continuing value of excluding the word "change" in rights provisions (and the reliance on awkward and ambiguous phrases in its place) is difficult to comprehend. The right to change religion is protected by international human rights law, but the exclusion of the word (despite its inclusion in previous documents) may allow anti-change advocates space to question this fact. Explicit

³¹⁵ Proselytism is the subject of Chapter 5.

³¹⁶ Elizabeth Odio Benito, *Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief* (United Nations Centre for Human Rights, 1989) 4 [21].

³¹⁷ Countries that have been questioned by the Human Rights Committee with regard to their protection of freedom to change religion include Jordan (UN Doc A/49/40 vol. 1 (1994) 43, [235]), Tunisia (UN Doc A/42/40 (1987) 36, [137]), Libya (UN Doc A/50/40 vol. 1 (1996) 29, [135]), Iran (UN Doc A/37/40 (1982), 71, [316]), Yemen (UN Doc A/57/40 vol. 1 (2002) 75, [83(20)]), Mauritania (UN Doc E/CN.4/1990/46 (1990), 26 [60]), Malaysia (UN Doc. E/CN.4/1990/46 (1990) 26 [59]), Indonesia (UN Doc E/CN.4/2000/65 (2000) [50]), Iran (UN Doc E/CN.4/1999/58 (1999) [66]), Sudan (UN Doc E/CN.4/1999/58 (1999) [96]), Kazakhstan (UN Doc E/CN.4/2000/65 (2000) [60]), Pakistan (UN Doc E/CN.4/2000/65 (2000) [79]), Algeria (UN Doc E/CN.4/2003/66/Add.1 (2003) 16, [81]) and non-Muslim countries such Mexico (UN Doc E/CN.4/1995/91 (1994) 62).

³¹⁸ Human Rights Council, *Freedom of Religion or Belief*, UN GAOR, 16th Session, Agenda Item 3, A/HRC/16/L.14 (18 March 2011) [1].

mention of this right is asserted as the more preferable formulation of meaningful religious freedom, such that no interpretational effort is required to establish the right to change or renounce a religion or belief. From a religious perspective, the right to change religion raises questions that go to the heart of maintaining a religion or belief; as many states suggested, allowing change of religion (to any other than Islam) undermines the inviolable nature of Islam. But from a rights perspective, a failure to explicitly protect the right to change religion undermines the nature of meaningful religious freedom. Though rights discourse asserts that the absence of the word 'change' makes no practical difference to the existence of the right, if this was in fact the case, it is unclear why religious agitators were appeased by its removal.

There are scores of examples from around the world of prosecution of 'apostates', suggesting that the right to 'change' religion is not a right that is universally recognised, particularly in the Islamic world. Indeed, analysis conducted in 2011 by the Pew Research Centre's Forum on Religion and Public Life found that some 20 countries in the world have laws penalising apostasy.³¹⁹ Examples of the implementation of such laws include the arrest of Raif Badawai in Jeddah in June of 2012 for alleged apostasy, a charge that carries the death penalty; the case against him was dismissed in January 2013.³²⁰ In Afghanistan in 2006, Abdul Rahman was taken to the police by his family following his conversion from Islam to Christianity, and arrested for possession of a Bible; he was released and eventually received asylum in Italy.³²¹ In February of 2012, Hamza Kashgari was deported from Malaysia to Saudi Arabia to face apostasy charges for comments he had made on

³¹⁹ Afghanistan, Comoros, Egypt, Iraq, Iran, Jordan, Kuwait, Malaysia, Maldives, Mauritius, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, United Arab Emirates, Yemen. See Brian J. Grim, *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread*, Pew Research Centre's Forum on Religion and Public Life, 21 November 2012, http://www.pewforum.org/Government/Laws-Penalizing-Blasphemy,-Apostasy-and-Defamation-of-Religion-are-Widespread.aspx#_ftn1, accessed on 6 February 2013.

³²⁰ See for instance Middle East Online, Saudi rights activist faces apostasy charge, 17 December 2012, <http://www.middle-east-online.com/english/?id=56110>, accessed 6 February 2013, and Riyadh Bureau, 'Apostasy Charge against Saudi Activist Dismissed', <http://riyadhbureau.com/blog/2013/1/apostasy-raif-badawi>, accessed 6 February 2013.

³²¹ See Abdul Waheed Wafa, 'Afghan Judge in Convert Case Vows to Resist Foreign Pressure', 23 March 2006, *New York Times*, http://www.nytimes.com/2006/03/23/international/asia/23cnd-convert.html?hp&ex=1143176400&en=f7d14b6f112a2c60&ei=5094&partner=homepage&_r=0 and Ian Fischer and Elisabetta Povoledo, 'Italy Grants Asylum to Afghan Christian Convert', *New York Times*, 30 March 2006, <http://www.nytimes.com/2006/03/30/international/asia/30afghan.html>, both accessed 7 February 2013.

Twitter.³²² Yousef Nadarkhani, the pastor of a Church in northern Iran, was sentenced to death for apostasy after being given three opportunities to renounce his faith and embrace Islam, which he refused to do.³²³ Mr Nadarkhani was acquitted and released from prison in September of 2012.³²⁴ In June 2010 at a large public event in the Maldives, Muhammad Nazim asked an Islamic preacher what Islam thought of people like himself, who tried to believe in Islam but could not. Police arrested Nazim as the crowd attempted to attack him. Nazim was given 'religious counselling' while it was determined whether he should be executed for apostasy. During his counselling, Nazim embraced Islam.³²⁵

The Malaysian case of *Lina Joy*³²⁶ offers a strong example of the continued opposition to change of religion. Ms Joy, who had converted to Christianity from Islam, applied to have her name and religion changed on her identity card, largely with a view to marrying her Christian fiancé. Her request to have her name changed was granted but the issuing authority refused to change her religion without first receiving a certificate of apostasy from the local Sharia court.³²⁷ Joy challenged this refusal on the basis that it violated her freedom of religion, as enshrined in article 11 of the Malaysian Constitution. Despite constitutional guarantees of freedom of religion, the High Court, Court of Appeal and Federal Courts all determined that they, as civil courts, lacked jurisdiction to decide on matters of apostasy, which fell within the domain of the Shari'a court.³²⁸ The decision sparked strong debate in Malaysia between Islamists, who supported the decision, and moderate Malaysians who

³²² Human Rights Watch, 'Saudi Arabia: Writer Faces Apostasy Trial,' 13 February 2012, <http://www.hrw.org/news/2012/02/13/saudi-arabia-writer-faces-apostasy-trial>, accessed 6 February 2013.

³²³ Human Rights Watch, *World Report 2012* (covering events from 2011), 558.

³²⁴ Christian Pastro Youcef Nadarkhani Acquitted of Apostasy, Released, 8 September 2012, <http://www.iranhumanrights.org/2012/09/nadarkhani-2/>, accessed on 6 February 2013.

³²⁵ International Humanists and Ethical Union (IHEU), above n 145, 48.

³²⁶ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 M.L.J. 585 (Lina Joy, Federal Court), affirming *Lina Joy v. Majlis Agama Islam Wilayah & Anor* [2004] 2 M.L.J. 119 (Lina Joy, High Court).

³²⁷ See for instance, Julia E Barry, 'Apostasy, Marriage and Jurisdiction in the Lina Joy: Where was CEDAW?' 41 New York University Journal of Law and Policy 407, 409. Carolyn Evans 'Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia', 23 Emory International Law Review 437, 461.

³²⁸ See for instance, Barry, above n 327, and Evans above n 327.

considered the case proof of Malaysia's move away from secularism towards Islamism.³²⁹

From an international human rights point of view, examples of apostasy cases such as that of Lina Joy and others mentioned above do not challenge the existence of the right to change religion at international law. The lack of consensus, particularly from Islamic states who continue to express their dissent, is evidence only of the fact that international human rights law continues to be breached, not that the right in question does not exist.³³⁰

1.9. Conclusions on Freedom of Religion or Belief

The concepts 'religion' and 'belief' are undefined at international law. They must remain so in order to ensure that they apply to the broadest range of religions and beliefs possible. In her interim report on freedom of religion and belief,³³¹ Special Rapporteur Asma Jahangir stressed that the term 'religion or belief' must include the various theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism.³³² Indeed, in order for freedom of religion or belief to offer the widest possible protection to the widest possible spectrum of rights-holders, both concepts must remain undefined so as to extend protection to the religious freedoms of people of any religion or belief, no matter how strange, implausible, 'good' or 'bad'.

The freedom to manifest religion or belief, that is, the point where internally held beliefs become actions that can impact on the rights of others, is construed (non-exhaustively) in terms of worship, observance, practice or teaching. Despite the fact that these concepts are intended to be broadly construed, subjective interpretations of what can or cannot constitute a manifestation of religion or belief have sometimes proven narrower.³³³ In the same way that it should be for the holder of a religion or belief to determine what his or her religion or belief is, so too should that person decide how his religion or belief manifests. Manifestations of religion, like the

³²⁹ See for instance, 'Lina Joy's despair', The Economist, 31 May 2007, <http://www.economist.com/node/9262452>, accessed on 6 February 2012.

³³⁰ Also see Evans, above n 3, 221.

³³¹ Jahangir, above n 111.

³³² Ibid [65], referring to Krishnaswami, above n 193,

³³³ Here, see for instance *MAB and ors v Canada*, UN Doc CCPR/C/50/D/570/1993.

meaning of religion, should ensure the widest possible protection for the widest spectrum of religions so as not to exclude manifestations of the unusual, the controversial, the indigenous, or the new. Any danger posed by such an approach would be mitigated by applying limitations across the breadth of manifestations that may emanate from such religions or beliefs. In this way, manifestations that result in 'bad' consequences for the human rights of other people for instance can be limited.

The limitations on freedom to manifest one's religion or belief contained in article 18(3) are narrower than those for most other rights. *Ordre public* is not included as a ground of limitation. Interference with the rights of others is permitted only where those rights are "fundamental"; interference with the reputations of others is no ground for limiting article 18 rights as it is for article 19. National security is missing as a ground of limitation. These factors add up to the result that less interference is apparently permitted with respect to a person's religious freedoms than it is with respect to other civil and political rights, such as their freedom of expression.

The privileged position of article 18 is further entrenched by its non-derogability. This status is particularly curious, given the absence of analogous rights (notably article 19) from the list of non-derogable rights, despite the fact that those other rights pose no more threat to society. The lack of protection offered to societies by potential abuse of the privileged position of religious freedom (especially during times of emergency) is exacerbated by the fact that national security is missing as a ground of limitation.

The HRC asserts that article 18 contains an implicit right to change religion, though the explicitness of the right has been removed over time. It is submitted that such a right should not have to be interpreted or inferred, but should be clearly prescribed in international human rights law so as to protect even the right to renounce a belief. The fact that the right to change religion is explicitly absent as a result of pressure from certain states suggests the existence of a possible escape route for the suppression by those states of nationals who wish to change or leave the religion of the state. Were this not so, there would have been no opposition raised to the use of the word 'change', nor consensus reached upon its removal.

Ultimately, the failure to bring freedom of religion and belief into stronger accord with comparable human rights evinces the special nature of religion and belief. It must be wondered whether the result in practice is to privilege the rights of persons espousing particular religions or beliefs on the one hand over those who reject such beliefs or espouse non-religious beliefs on the other. This broad question will constitute the basis for enquiry in the chapters to follow.

* * * * *

CHAPTER 2: THE COMPATIBILITY OF RIGHTS AND RELIGION

2.1. Introduction

"I could prove God statistically."

George Gallup

Human rights and religion have always been strange, sometimes passionate, sometimes paranoid bedfellows. By virtue of international and regional human rights instruments, rights-holders enjoy freedom of religion and belief. Yet the manifestation of religion and belief can and sometimes does clash with other human rights.

Three conflicting understandings of the relationship between rights and religion, which have long been vying for primacy, will be discussed below. The first approach asserts that religion and rights are entirely compatible, because religion is the foundation of human rights. This approach is dismissed for its lack of resonance with people who hold different beliefs. The second approach understands religion and human rights to be compatible where religion and rights are interpreted in accordance with each other. The power of this approach to legitimise rights in specific local contexts is compelling, though not without limitations. The third and final approach discussed, and the one favoured in this thesis, acknowledges that manifestations of religion can clash with other human rights, resulting in a conflict of competing rights that must be balanced.

Finally, the chapter considers which are the best systems for resolving clashes between manifestations of religion and belief with other human rights, and the challenges in doing so in a way that is not dependant on the religion or belief of the rights-holders concerned. To this end, pluralism is ultimately asserted as a key value at the heart of universal human rights, which acknowledges and protects the existence of an endless variety of religions and beliefs.

2.2. Human rights and religion are compatible because human rights derive from God

The first proposition explored suggests that human rights and religious precepts are compatible because human rights historically emerged from religious doctrines.¹ This approach draws on the historically important idea that human rights essentially derive from God, because it was God who imbued humans with inherent dignity.

This view was expressed by Renato Raffaele Cardinal Martino at a symposium on Pope John Paul II and the Law discussing the former Pope's view of human rights.² On discussing the inherent dignity of humankind, Cardinal Martino highlighted

...the reality that man is not a creation or creature of the state or of society but of God; moreover, it is God who is the author and grantor of fundamental rights. This gift of rights and obligations is given to each person who exercises individual free will with an inclination to accept personal responsibility for the exercise of these rights. In the thought of John Paul II, the ultimate freedom of the person is to elect God's way rather than a person's own ways, which can be misdirected away from God's desires for each person. [Fundamental human rights therefore] ...are a gift from God and no one else.³

Richard Harries, professor of theology at King's College in London and former Bishop of Oxford, also offers a theological perspective on human rights, stating that the dignity of the human person is basic to Judaism, Christianity and Islam for the pre-eminent reason that "human beings are made in the image of God, endowed with rationality, choice, a capacity to pray and love, and endowed with moral consciousness."⁴

In this viewpoint therefore, where the rights that are afforded to individuals within a given state are seemingly made conditional on religious criteria, those criteria can be

¹ See generally Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (Martinus Nijhoff Publishers, 1996) 352.

² Renato Raffaele Cardinal Martino, 'John Paul II and the International Order: Human Rights and the Nature of the Human Person' (2007) 21 *Notre Dame Journal of Law, Ethics and Public Policy* 51, 61.

³ Ibid 61 and 69.

⁴ Richard Harries, 'Secular and Religious Perspectives' in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 20.

construed as strengthening the guarantee of those rights. For instance, the Constitution of the Islamic Republic of Iran states that all citizens enjoy all human rights equally “in conformity with Islamic criteria”.⁵ While human rights advocates could argue that this reference to Islamic criteria subordinates human rights norms to Islamic qualifications thereto, the Islamic response may be that these words in fact affirm commitment to those norms; they *must* do so “in conformity with Islamic criteria”. To do otherwise would be to abandon their religion, which cannot reasonably be required by the international human rights community, in light of its recognition of freedom of religion.⁶

One counter argument to the rights-affirming power of religion suggests that rather than upholding the dignity of humankind which human rights are premised upon, “[s]ome religions emphasise the sinfulness or degraded nature of human beings. The point of some religions is not to protect human dignity, which they may deem to be impossible or undesirable, but to save souls or to unite with the cosmos.”⁷

Another, less theological argument against the assertion that human rights originate in religion is that an understanding of the origins of human rights fails to explain how we are to meaningfully and universally secure those rights. Indeed, the most seamless way of moving on from the argument of ‘divine origins’ is not to consider the foundations of human rights as deriving from God or from man, but rather to look at the modern-day relevance of religion in ensuring that human rights are as universal as they are intended to be. Considered thus, we are met with a pluralistic human race comprised of believers in God, believers in many gods and believers in no god or gods at all. The drafters of the UDHR acknowledged this enormous diversity of religion and belief. Indeed, a proposal to include a reference to God therein was rejected on the basis that such a notion was not universally acceptable; not only did it exclude those who did not believe in God, but those who do believe in God do not demand that religiosity be interlinked with the morality expressed in

⁵ Constitution of the Islamic Republic of Iran, Art 20.

⁶ Michael Freeman, ‘The Problem of Secularism in Human Rights Theory’ (2004) 26 *Human Rights Quarterly* 375, 377.

⁷ Ibid 385.

the Declaration.⁸ In a world of endless variety in understandings of the universe, “[t]he problem for human rights theory... is how to construct a universal theory that recognises the importance of diverse religions in the world, but is not itself religious.”⁹

In 1947, the UN Human Rights Commission, charged with the responsibility of drafting the UDHR, commissioned the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to conduct an inquiry into perspectives on human rights from around the world. Doing so, they called upon thinkers from several cultural, political and religious traditions with a view to arriving at a common language in which to articulate rights that could be considered universal to all.¹⁰ The outcome of the survey was to underline that human rights do not derive from one tradition but from several. The UNESCO Committee on the Philosophic Principles of the Rights of Man to the Commission of Human Rights of the United Nations concluded that “[t]he history of declarations of human rights, of the dignity and brotherhood of man, and of his common citizenship in a great society is long; it extends beyond the narrow limits of the Western tradition and its beginnings in the West as well as the East coincide with the beginnings of philosophy.”¹¹ The UNESCO Committee expressed its view that the philosophical challenge of creating a declaration of human rights was not achieving doctrinal consensus, but to achieve agreement on rights and their defence that may be achieved on divergent doctrinal grounds.¹²

Several contemporary scholars point to the deep but diverse religious origins of human rights, one even going so far as to assert that;

...the authors of the United Nations Charter were, in general, people of faith.
One cannot identify many open nonbelievers who were at the table when the

⁸ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 284-90.

⁹ Freeman, above n 6, 395.

¹⁰ See for instance, Micheline Ishay, *The History of Human Rights: From ancient times to the globalization era* (University of California Press, 2008), 16 – 17 and Micheline Ishay, *The Human Rights Reader* (2nd ed, Routledge, 2007), 2-5.

¹¹ UNESCO, ‘The Grounds of an International Declaration of Human Rights’, Report of the Unesco Committee on the Philosophic Principles of the Rights of Man to the Commission on Human Rights of the United Nations, UNESCO Doc. Phil/10, 31 July 1947, 2.

¹² Ibid 3-4.

modern world's human rights documents were hammered out. Even if some were there, they may well have been influenced by the hard-to-refute argument that persons who believe in religion are better citizens.¹³

However, to the extent that there are religious underpinnings to rights ideology, so too are there non-religious underpinnings. Peter Cumper for instance refers to the sacred texts of Buddhism, Confucianism, Christianity, Hinduism, Islam, Judaism and Taoism as contributing to the ideology of rights, but also cautions against overlooking secular origins of human rights, including humanism.¹⁴

In this sense a range of philosophical and ideological traditions may provide the justification for human rights. But ultimately, whatever spiritual ancestry human rights may or may not have is incidental to how rights are recognised today. Paul Seighart phrased the point thus: "To judge whether a national law is good or bad, just or unjust, recourse is no longer necessary to the Creator or to Nature, or to belief in either of them."¹⁵ In the words of Jack Donnelly: "[h]uman rights are the rights one has simply because one is a human being."¹⁶ Whether understood as religiously grounded or grounded in a secular fashion, it is for reason of the inherent dignity and worth of human beings that their rights must now be respected.

2.3. Religious precepts can be interpreted as compatible with rights

Another vocal school of thought attempts to harmonise religion and rights by arguing that religious precepts and human rights are compatible, where they are interpreted as such. This understanding has been offered as potentially providing a middle path between polarised religion and human rights, which can bring religious believers and contemporary secularists together on the universal application of human rights.¹⁷

¹³ Robert F. Drinan, S.J., *Can God and Caesar Coexist? Balancing Religious Freedom and International Law*, (Yale University Press, 2004) 116.

¹⁴ Peter Cumper 'Religious Organisations and the Human Rights Act 1998' in Peter W. Edge and Graham Harvey (eds.) *Law and Religion in Contemporary Society* (Ashgate, 2000) 69.

¹⁵ Paul Seighart, *The International Law of Human Rights* (Clarendon Press, 1995) 15, referred to in Natan Lerner, *Religion, Secular Beliefs and Human Rights* (2nd ed., Martinus Nijhoff Publishers) 64.

¹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1993), 1.

¹⁷ See for instance, Freeman, above n 6, 386.

There are examples of such compatible readings of texts from several religions, but scholars have particularly referred to monotheistic religions in exploring interpretative possibilities for increasing compatibility between religion and rights.¹⁸ Islam stands as a case in point.

2.3(a) Rejecting 'Islamic' human rights instruments

Ann Elizabeth Mayer offers an important conceptual starting point for understanding Islam alongside human rights. She explains that existing human rights schemes that claim to be Islamic are not representative of the possibilities of reconciling Islam with international human rights. Rather, her contention is that such instruments fall short of both international human rights standards and Islamic foundations for articulating those rights. Ultimately, she asserts that Islamic claims to human rights that fall short of international standards have more to do with politics than they do with religion.¹⁹

The particular sources of 'Islamic human rights' that Mayer takes issue with include the 1981 Universal Islamic Declaration of Human Rights, the 1990 Cairo Declaration on Human Rights in Islam, the 1992 Basic Law of Saudi Arabia, and the 1979 Iranian Constitution which she deconstructs to demonstrate the disservice they do to international human rights observance (particularly relating to women and religious and sexual minorities). She also challenges the claim that they are rooted in the religious beliefs or the prevailing culture of Muslims. Such instruments often have questionable philosophical roots, and lack any coherent human rights philosophy; in essence they do not, according to Mayer, represent good faith attempts to align international norms with Islamic law, but rather reveal resentment of 'Western' ideas and institutions.²⁰ Essentially she asserts that these instruments are products of

¹⁸ See for instance John Witte Jr and M Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012).

¹⁹ Ann Elizabeth Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' (1994) 15 *Michigan Journal of International Law* 307 – 404. Also see Ann Elizabeth Mayer, *Human Rights and Islam: Tradition and Politics* (Westview Press, 5th edition, 2013), 205 and Salah Eddine Ben Abid, 'The Shari'a Between Particularisms and Universality' in Silvio Ferrari and Anthony Bradney (eds.) *Islam and European Legal Systems* (Ashgate 2000) 19 in which the author notes that "...political Islam's position towards the Human Rights question is an undisguised attempt to deprive them of their universal dimension."

²⁰ Mayer (2013) above n 19, 57-63.

governments striving to maintain control over their populace by repressing any democratization that could potentially call the legitimacy of their power into question.²¹ Such instruments undermine the universalism assumed by international human rights and claim that such rights need to be contextualised within specific religious and cultural traditions.²² But Mayer asserts that such instruments have not been produced in consultation with the heterogeneous Muslim groups whose beliefs vis-à-vis international human rights they claim to represent.²³

This failing is the same as that committed by Samuel Huntington in his famous ‘Clash of Civilizations’, which homogenized the Islamic world and failed to consider pro-rights Muslims and beliefs.²⁴ This approach amounted to a continued form of ‘Orientalism’²⁵ in which the assertions made by oppressive Islamic governments are assumed to speak for the Islamic world.²⁶ Mayer takes issue with cultural relativists who dismiss Islamic reformers as being too ‘Westernised’ or somehow ‘less Islamic’ than those who reach more conservative rights-offensive conclusions, pointing to Muslims demanding that their governments be held to account for human rights violations. In light of this she asserts that “it has become harder to argue that the criticism of the deployment of Islamic rationales by governments for evading their obligations under international human rights law is equivalent to promoting the ideologies of Orientalism and serving the cause of Western imperialism.”²⁷ In short, while commentators have denied that rights activism emanates from Islam, repression of rights has been nonsensically attributed to it.

As further evidence of the fact that the rights-repressive devices of some governments (notably Iran and Saudi Arabia) are not ‘Islamic’, Mayer notes that these regimes repress dissent and silence demands that human rights be respected. While both governments claim that the Muslim populace willingly adheres to restrictions imposed because they are Islamic restrictions, in reality those

²¹ See Mayer (1994), above n 19, 327 – 364 and Mayer (2013), pp.28-33 and p.203.

²² Also see Abid, above n 19, 19.

²³ Mayer (2004), above n 19, 376.

²⁴ Ibid 313 – 315, referring to Samuel P. Huntington ‘The Clash of Civilizations?’ *Foreign Affairs*, (Summer 1992), at p.22.

²⁵ ‘Orientalism’ is a term coined by Edward W. Said to refer to the stereotypes attributed to the Eastern world, particularly the Arab Middle East, by the West. See generally Edward W. Said, *Orientalism* (Vintage, 1978).

²⁶ Mayer (2004), above n 19, 380 – 382, referring to Said, above n 25. Also see generally Mayer (2013) 7-8.

²⁷ Mayer (2013), above n 19, 8.

governments act to forcibly impose such restrictions (particularly against religious minorities and women) often on pain of torture by agents such as religious police.²⁸

Mayer additionally points to the independent NGOs in Muslim countries that have campaigned (often at great peril) for international human rights standards as proof that Islamic culture itself is not at odds with international human rights. She discusses government oppression of such efforts as being subversive to 'Islamic' human rights principles. The strategies of such governments then, has been to silence views that challenge the notion that Islamic culture is an impediment to rights aspirations, lest they discredit the 'official' constructs of Islamic rights on which both regimes rely for their continued legitimacy.²⁹

In short, the deficient Islamic human rights schemes with which Mayer takes issue are not deficient because of their religious basis, but because they have not been adequately grounded in human rights in the Islamic tradition.³⁰ Therefore, when embarking on a discussion of 'interpretation' one must be careful not to infer from inadequate 'Islamic human rights' instruments that all interpretations are wanting. Having rejected these instruments as being representative of Islamic human rights, a new starting point for interpretation becomes necessary.

2.3(b) Interpreting Islam in accordance with Rights

In rejecting current representations of 'Islamic human rights' as incompatible both with international human rights and with Islam, Ann Elizabeth Mayer stresses that alternative interpretive approaches to must be taken. She asserts that:

If the authors' aim had been to advance protection for human rights, they could have located ample raw material in the Islamic heritage, which is replete with values that complement human rights, such as concern for human welfare, compassion for the weak, social justice, tolerance, respect for diversity, and egalitarianism. These and other core principles could provide the basis for constructing a viable synthesis of Islam and international human

²⁸ Mayer (2004), above n 19, 389 – 402.

²⁹ Mayer (2004), above n 19, 365 – 371.

³⁰ Mayer (2013), above n 19, 204.

rights law, as the work of Muslim proponents of democratization and the philosophes of many Muslim human rights activities amply demonstrate.³¹

The examination of how Islamic theology, philosophy and ethics relate to the treatment of human rights is beyond Mayer's study; she admits that she cannot profess to know which interpretations are more authoritative than others.³² But she does reject views that consider Islamic ideas as static and the assumption that older interpretations are somehow more relevant than newer ones that tend to interpret Islamic law in accordance with International human rights law. She is not alone; several scholars *do* embark on such interpretative analysis, suggesting ways forward to interpret Islamic doctrines in accordance with or even foundational in international human rights law; or in the alternative, suggest that human rights be framed in accordance with Islamic beliefs, as is discussed below.³³

One such scholar is Abdullah Ahmed An-Na'im. An-Na'im explains that Muslims hold the Koran to be the literal and final word of God and Sunna (traditions of the Prophet), the second divinely inspired source of Islam. But both sources only have meaning and relevance through human understanding and experience of them, making interpretation integral to believers.³⁴

Another proponent of interpretation is Abdulaziz Sachedina who, like Mayer, is critical of cultural relativist claims being used by draconian governments to abrogate their human rights responsibilities. Instead, Sachedina offers an alternative basis for interpretation, arguing that Islamic tradition is concerned with "the preservation of freedom against any kind of legal or political authoritarianism."³⁵ Sachedina asserts that the only way to overcome cultural relativism is to engage in dialogue with proponents of diverse doctrines to achieve overlapping consensus between religious and secular norms about human dignity as deserving inalienable human rights.³⁶ In

³¹ Ibid.

³² See generally, Mayer, above n 19 (2013), preface xiii.

³³ See for instance, Abdullahi Ahmed An-Na'im, 'Islam and Human Rights' in John Witte Jr and M Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012) 57-8.

³⁴ Abdullah Ahmed An-Na'im, 'Global Citizenship and Human Rights: From Muslims in Europe to European Muslims', in M.L.P. Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 22.

³⁵ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press, 2009) 39.

³⁶ Sachedina, above n 35, 10 – 13.

bringing Islamic law and international human rights law into accord, Sachedina specifically recalls the story of Creation, which makes it impossible for any Muslim to deny the inherent dignity of all humans as children of Adam, divinely endowed with the ability to know right from wrong regardless of his or her race, gender or religious affiliation.³⁷

The key case study Sachedina engages in, calling on Islamic traditionalists to go back to the roots of Islamic ethics, concerns the treatment of women. Islamic texts have been interpreted to require the segregation of women from men, the concealment of their bodies and faces, and even the silencing of their voices.³⁸ Equal treatment of women as equal bearers of rights requires not only revision of accepted approaches to Islamic doctrines, but also necessitates outright rejection of past judicial decisions.³⁹ He asserts that the Koran testifies to the horrendous treatment women endured in the pre-Islamic Arab world, and is also the first means by which women's duties were balanced by rights on the basis of their human dignity.⁴⁰

Of course, acknowledging the equal dignity of women is not tantamount to respecting their rights on that basis. Mayer points to ambivalence in some Islamic approaches to the concept of equality and notes that for many, 'equality' does not translate as 'sameness' nor necessarily preclude differentiated treatment of those deemed 'equal'.⁴¹ Indeed, in some formulations of conservative Muslims, Sharia-based discrimination can be considered compatible with equality.⁴² But this fact only points to the importance of finding the principle of equal human dignity to be asserted in Islamic sources as a necessary starting point on which to revise Islamic legal sources that claim to be based on them. This is a necessary step given that several of those Islamic sources can *prima facie* be read to imply a hierarchy of worth between people, notably men and women. Sachedina argues that certain divine prescriptions concerning male-female relations were time bound, being offered in response to tribal culture in that period and open to interpretation for a different

³⁷ Ibid 46.

³⁸ Also see Mayer (2013) above n 19, 100-103 for examples of Islamic jurists use of Islamic treaties to justify oppression of women and girls.

³⁹ Sachedina, above n 35, 123.

⁴⁰ Ibid 124-125. Also see Mayer (2013), above n 19, 100.

⁴¹ Mayer (2013) above n 19, 85-97.

⁴² Ibid 86.

time and place; were it not so then international human rights law could find no relevance in Islamic societies today.⁴³

Mashood A. Baderin similarly rejects approaches that ignore the evolutionary nature of religion over time and criticises perceptions of Islam (or indeed any religion) that are suspended in the past. He stresses this point particularly with regard to the rights of women, stating that

...it is hypocritical if men on the one hand acquire and enjoy many rights and liberties of today's world, often through constructive and evolutionary interpretations of the *Shari'ah* but on the other hand consider the rights and liberties of women to be stagnated upon the juristic views of the classical schools of Islamic law.⁴⁴

Sachedina argues that while the order of nature is immutable, social laws were intended for adaptation to human conditions that Islamic revelation acknowledges to be in constant flux.⁴⁵ According to Sachedina, the Koran, as an invitation to reflect on the divine message bestowed by Prophets through time, is offered to complement the human reason that was given by God for the purpose of establishing an ideal society on earth. Violation of women's rights have continued in parts of the Muslim world because this immutability has been inappropriately extended to decisions inherited from Islamic jurists over time which have been unquestioningly accepted as expressions of a 'perfect' system.⁴⁶

Looking specifically to the Koran in defence of women's human rights, Sachedina again evokes the story of Creation to point to the irrefutable equality of men and women, and their equal responsibility for the future of humanity; the attribution of blame onto women for the 'fall' of mankind he says was the result of biblical

⁴³ Also see for instance, Norani Othman, 'Grounding Human Rights Arguments in Non-Western Culture: Shari'a and the Citizenship Rights of Women in a Modern Islamic State', in Joanne R. Baer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 173-177.

⁴⁴ Mashood A Baderin, 'Islam and the Realisation of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives' (2007) 4 *Muslim World Journal of Human Rights* 5, 5.

⁴⁵ Sachedina, above n 19, 126 – 128.

⁴⁶ Ibid 130-131.

narratives and Jewish and Christian commentaries.⁴⁷ He goes on to explain that essentialist interpretations of passages of the Koran that have been used to justify discrimination against women are often the simple result of missing the point. By way of example, the passage decreeing that two female witnesses may be used in lieu of one male witness is argued by Sachedina not as laying down any principle concerning the inferior capacity of women to serve as witnesses, but was meant simply as a statement that there should be no injustice in lending and borrowing money.⁴⁸ Islamic jurists today must therefore contextualise texts from the pre-Islamic age so women's dignity can be advanced within the Koranic teachings.⁴⁹

Concerning the notion of guardianship which has been referred to in justifying reduced rights of women and legal dependency on their male 'guardians', Sachedina notes that the relevant passages in the Koran are not concerned with relative biological capacity of the sexes, but simply with relative functions and obligations owed to the family.⁵⁰ Guardianship of women, in this sense, is to be interpreted not as 'rule' by men over women, but as governance and maintenance of the household under his care; it does not speak to any permanent trait of women⁵¹ (who one supposes, have the same capacity to fulfil that role when given the same opportunities to do so?). Sachedina ultimately finds that the rights of women will be more effectively asserted in Muslim societies through the language of capabilities rather than the language of rights.⁵²

In addition to considering the plight of Muslim women, Sachedina also explores the Islamic basis for respecting the rights of non-Muslims. Countering views that Islam is innately intolerant of non-Muslims, Sachedina notes that the death penalty for apostates is the result of tradition rather than Koranic text.⁵³ On his reading of the

⁴⁷ Ibid 132-133. Also see Riffat Hassan, 'Rights of Women within Islamic Communities', Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (Martinus Nijhoff Publishers, 1996) 382-4.

⁴⁸ Sachedina, above n 35, 133-135. The relevant passage of the Koran 2:282 concerns contracting for debts, with witnesses being only one of many conditions prescribed for ensuring debts are paid.

⁴⁹ Ibid 135. Referring to Koran 2:282.

⁵⁰ See for instance, Koran 4:34, 4:45 and 2:228.

⁵¹ Sachedina, above n 35, 140-144.

⁵² Ibid 145.

⁵³ Ibid 187. Also see Ann Elizabeth Mayer (2013), pp.169-170, referring to other contemporary scholars who note that justification for executing apostates is questionable; including Lebanese scholar Subhi Mahmassani who argues that the death penalty was not meant to apply to changing faith.

Koran, individuals must be allowed to exercise religious freedom given that any attempt to impose religious conviction results in its negation. His explanation for this interpretation is that, without freedom of religion, it is impossible to conceive of commitment to the human-divine relationship as fostering individual accountability for acceptance (or rejection) of faith in God.⁵⁴ In short, the regulation of the relationship between God and humans falls outside human jurisdiction.⁵⁵

2.3(c) Interpreting Rights in accordance with Islam

While convinced that Islamic doctrine can be read as complicit with human rights principles, Sachedina stresses that the success of doing so also depends on human rights being allowed to also be read in accordance with religion. He is of the view that the language of rights is deficient to allow the Muslim world to appropriate international human rights. He is also critical of the tendency of western rights advocates to measure rights accordance through their own worldview, for instance, by measuring the extent to which Muslim women enjoy rights by the extent to which they appear to live like Western women.⁵⁶ It is often not considered, for instance, that in the context of her religion and culture, a woman may be empowered by wearing a veil rather than oppressed by it.⁵⁷ A less culturally relative measure of the extent to which women's rights are respected is therefore to be found in emphasising her capacity rather than by attempting to universalise how she may choose to exercise such capacity.⁵⁸

Rather than simply saying that manifestations of religion can be interpreted as compatible with international human rights law, Sachedina asserts that international human rights law should also be given the space to be interpreted as compatible with Islam. Calling upon Islamic doctrines and traditions to demonstrate that Islam shares the universalism of human rights is necessary to lend credibility to international human rights for the Islamic world.⁵⁹ Indeed, to dismiss the

⁵⁴ Sachedina, above n 35, 73 – 74.

⁵⁵ Ibid 75 and 78.

⁵⁶ Ibid 145.

⁵⁷ Ibid 45 and 159-160.

⁵⁸ Ibid 145-146.

⁵⁹ Ibid 15 – 17.

foundations of the UDHR as non-religious he feels is to miss opportunities to legitimise the rights therein throughout the Islamic world:

[I]n advancing human rights discourse among different cultures and traditions, it is imperative to develop an inclusive discourse founded upon universal morality that does not deny religious premises their due position in deriving political conclusions that speak to all humanity. In searching for such premises that can engage public reason on its own turf, one can evoke notions like inherent human dignity, which is deeply rooted in religious reasons and which serves as an important backdrop for approaching the question of relevance of such norms in the pluralistic setting of the majority of Muslim countries today.⁶⁰

Sachedina concedes that Islamic juridical sources should be rigorously investigated for deficiencies vis-à-vis human rights standards, but asserts that the means of reforming these laws in compliance with international human rights law is the ethical underpinnings of revealed Islamic texts.⁶¹ In undertaking such interpretation, Sachedina admits that any interpretations of Islamic law made to reflect human rights doctrines cannot be claimed with certainty to bear the approval and reflect the intention of original Islamic revelation. And he concedes that liberal secularism has managed to convincingly argue for human justice with reasoning free of religion. But still he emphasises that in bringing modern human rights discourse to Islamic traditionalists, human rights discourse must be anchored on the foundational doctrine of natural law in Islamic ethics.⁶²

Mashood A. Baderin is another proponent of this 'local legitimacy' argument. He refers to the fact that many individuals want to enjoy the rights to which they are entitled, but want to do so in the context of Islam. To offer them human rights outside of their religion is to create a conflict between Islam and human rights discourse forcing individuals to 'choose' between them.⁶³ Other theorists have

⁶⁰ Ibid 49.

⁶¹ Ibid 52.

⁶² Ibid 112-113.

⁶³ Baderin, above n 44, 10.

argued that rights need religion in order to survive and thrive and not essentially be tethered to Western liberal ideals.⁶⁴

Baderin compellingly asserts a harmonisation principle, whereby the legitimising power of the Koran and Sharia are embraced to the end of strengthening human rights. In doing so, Baderin asserts that a top-down politico-legal approach must be simultaneously pursued alongside a bottom-up socio-cultural approach.⁶⁵ The former politico-legal approach relates to the human rights responsibilities and accountability of the state while the latter requires conditions of good governance, political will, good faith, judicial independence and justice.⁶⁶ Acknowledging that Muslim states are amongst the countries with the poorest human rights records in the world,⁶⁷ Baderin argues that the promotion and protection of human rights in the Muslim world must necessarily consider the role of Islam, be it positive or negative.⁶⁸ His simple advice is that while Islam is not necessarily the sole factor for ensuring human rights realisation, it is a significant factor that must be harnessed in states that recognise Islam as state religion or apply Islamic law.⁶⁹

2.3(d) Conclusions

There is a great deal of pragmatic power in interpretation and its capacity to legitimise rights at the local level. It has been asserted that “human rights activism must be grounded in local culture.”⁷⁰ In other words, as Baderin explains, where there are Islamic objections to various human rights, they must be met with Islamic responses. Or, as Abdullah Ahmed An-Na’im expresses it; “...if human rights are indeed universal, that universality cannot be claimed without taking into account religious perspectives and experiences.”⁷¹ When governments refer to Islam to justify their violations of human rights, it helps their case to propose that such arguments confirm that Islam and human rights are incompatible. The appropriate response, according to proponents of the interpretative approach, is to counter such

⁶⁴ Witte Jr and Green, above n 18, 15-16.

⁶⁵ Sachedina, above n 35, 5.

⁶⁶ Baderin, above n 43, 8.

⁶⁷ Ibid 4.

⁶⁸ Ibid 3.

⁶⁹ Ibid 4.

⁷⁰ Freeman, above n 6, 377.

⁷¹ An-Na’im, above n 34 19.

arguments by showing that Islam does not support human rights violations.⁷² In light of deep commitment to religion, Islamic responses are more likely to be effective in giving practical effect to the desired outcome of such responses than any direct appeals to international law could be. Aspiring to 'Islamicise' human rights in this way, it is argued, would in an Islamic society give Islamic legitimacy to human rights.⁷³ The crux of Baderin's harmonisation principle then involves "realising the ideals of human rights in Islam rather than perceiving the question of Islam and human rights as a competition of values."⁷⁴

Sachedina's approach is compatible with this harmonization approach, and he reminds us that the reverse is also true; that international human rights law, in order to resonate globally, must also allow the space for religious engagement with understandings of universal human rights. Evidence that such concession is being made is evident in the language of the Human Rights Council, which reaffirms "that all cultures and civilizations in their traditions, customs, religions and beliefs share a common set of values that belong to humankind in its entirety, and that those values have made an important contribution to the development of human rights norms and standards."⁷⁵

But while the case for allowing religious interpretations to give human rights local legitimacy is compelling, the limitations of this approach must also be acknowledged. As An-Na'im has noted, it can be demonstrated that the Islamic tradition is basically consistent with most human rights norms, "except for some specific, albeit very serious, aspects of the rights of women and freedom of religion and belief."⁷⁶ There are perhaps some human rights standards that religious interpretations will not reach, or interpretations of some religious texts that will not be conceded by all followers of those religions.⁷⁷ In light of the numerous religions

⁷² Baderin, above n 43, 11.

⁷³ Freeman, above n 6, 378. Also see Othman, above n 43, 173-177.

⁷⁴ Baderin, above n 43, 12.

⁷⁵ Human Rights Council, *Promoting human rights and fundamental freedoms through a better understanding of traditional values of human kind: best practices*, UN Human Rights Council, 21st Session, Agenda Item 3, A/HRC/21/L.2 (21 September 2012) 2.

⁷⁶ An-Na'im, above n 34, 20.

⁷⁷ See for instance Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001) 27-28, in which she cautions against too heavily relying on religious models as a basis for freedom of religion and belief given that the freedom may be limited in some religious constructions.

and beliefs in the world, it must be conceded that not all will positively contribute to respect for human rights. Some religious precepts are blatantly antithetical to human rights (for instance, those that assert racism or sexism as part of their ideology, or advocate corporal punishment for children). This fact is not only true of fringe religions, but also of major religions. Indeed, Ann Elizabeth Mayer is critical of governmental and ideological claims that irrefutable Islamic authority justifies denial of human rights, but does not deny that some individual Muslims and sections of the population may freely decide to accept interpretations of Islamic sources that place Islamic law at odds with international human rights law.⁷⁸ Mayer is optimistic, for instance, that there is no Islamic authority to justify punishment of gays and suggests that justification for harsh treatment is too casually attributed to Islamic authority. She points to the practical reasons for prohibitions against illicit sex between men and women which threatened the integrity of succession schemes, noting that same-sex relationships pose no such threat to offspring.⁷⁹ And yet she notes the lack of success there has been in having such interpretations adopted; draconian states (notably Iran and Saudi Arabia) make no pretences about respecting rights of gays and lesbians, in the way that they purport to respect rights of women, because they still feel unchallenged in proclaiming their unequivocal opposition to homosexuality.⁸⁰

On the issue of gay, lesbians and transgender rights, it must perhaps be conceded that there is little optimism that interpretation of religious teachings can stretch so far.⁸¹ The most recent evidence of this occurred during UN Human Rights Council panel discussions in March of 2012 about a report on human rights violations based on sexual orientation and gender identity. As an official protest, most members from the Organisation of Islamic Conference walked out of the conference hall during the discussions.⁸² They denounced the promotion of 'licentious behaviour' on the basis of sexual orientation as contrary to fundamental teachings in several religions

⁷⁸ Mayer (2013) above n 19, 17.

⁷⁹ Mayer (2013) above n 19, 59-160.

⁸⁰ Mayer (2013) above n 19, 153.

⁸¹ See for instance, Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 117, in which even he concedes that homosexuality is prohibited morally and legally in states that apply Islamic law.

⁸² Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 233.

including Islam, and stated that legitimising homosexuality was unacceptable to the OIC.⁸³

Beyond Islam, other religious authorities may feel unable to interpret their doctrines so as to lay the full gamut of rights before gays and lesbians (for example, a range of Christian denominations has struggled in this respect). In short, interpretation can only go so far. Even where interpretations succeed in bringing religious doctrines and rights instruments into accord, it is unlikely that *all* followers of the relevant religion will accept those interpretations. Finally, it must also be acknowledged that the more rights-compliant interpretation may not always be the most ecclesiastically valid interpretation.⁸⁴

Interpretation does go a long way toward contextualising universal human rights at the regional and local levels, bringing human rights to light where they would otherwise have no vehicle for doing so. The assertion that rights must be considered through the lens of religion as much as religion must be seen through the lens of rights, is a pragmatic acknowledgement of the essential role that religion plays in many societies and its capacity to improve the rights enjoyment of the individuals within them. But regardless of the extent to which the interpretation approach enhances or detracts from human rights, from a universal perspective religious justifications should not be required to assert the primacy of human rights. Human rights should not depend on the substance of any or all religions and beliefs.

2.4. Manifestations of religion can clash with other human rights

Though many religious people adhere to interpretations of their religious codes that are compatible with human rights, the same is not true of everyone. Irrespective of the fact that many manifestations of religion and belief are compatible with human rights, it must be acknowledged that some manifestations of some religions and

⁸³ See press release *Human Rights Council holds panel discussion on discrimination and violence based on sexual orientation and gender identity*, 7 March 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11920&LangID=E>, accessed 23 May 2013.

⁸⁴ See for instance, Malcolm D. Evans, 'Religion, Law and Human Rights: Locating the Debate' in Peter W. Edge and Graham Harvey (eds.) *Law and Religion in Contemporary Society* (Ashgate, 2000) 187-9

beliefs sometimes do clash with other human rights. Malcolm D. Evans states the point bluntly:

...human rights and religion do not mix very easily and attempts to make them do so are fraught with difficulties and dangers. It may well be possible for them to be brought together in a glorious symbiosis but the experience to date has not been encouraging and one ought not to be deceived by the superficial resonance between them.⁸⁵

Though cynical, Evans' approach may be partly justified. For instance, negative portrayals of women and their subordination to men in some Judaic rabbinic literature has resulted in the exclusion of women in some ultra-conservative Orthodox societies and their differential treatment on the basis of their sex.⁸⁶ Not only are women segregated in ultra-Orthodox religious services, but also in all aspects of daily life. Women in some communities have been denied education and employment opportunities, and been verbally and physically assaulted for their failure to conform to standards set out in religious doctrines. In the Israeli town of Beit Shemesh, one such incident in 2011 involved several Orthodox Jewish men spitting on an eight-year-old girl (whose parents are also Orthodox) and calling her a prostitute because the clothes she was wearing did not accord to their strict religious dress doctrines.⁸⁷ Signs have been displayed throughout that town requesting females not to linger outside certain buildings and women have been forced by fellow travellers to sit at the back of public buses.⁸⁸ In the neighbourhood of Mea Sha'arim in Jerusalem, some streets even have segregated sidewalks.⁸⁹ The Jewish organisation 'Women of the Wall' have been campaigning for the right to manifest their religion at the women's section of Jerusalem's Western Wall ever since the late 1980s when their first such service was disrupted by verbal and physical assaults by

⁸⁵ Evans, above n 84, 177.

⁸⁶ Yael Israel-Cohen, *Between Feminism and Orthodox Judaism: Resistance, Identity and Religious Change in Israel* (Brill, 2012), 18.

⁸⁷ See Isabel Kershner, 'Israeli girl, 8, at center of tension over religious extremism', 27 December 2011, The New York Times, <http://www.nytimes.com/2011/12/28/world/middleeast/israeli-girl-at-center-of-tension-over-religious-extremism.html>, accessed on 27 January 2013.

⁸⁸ See Ethan Bronner and Isabel Kershner, 'Israel facing a seismic rift over role of women', 14 January 2012, The New York Times, http://www.nytimes.com/2012/01/15/world/middleeast/israel-faces-crisis-over-role-of-ultra-orthodox-in-society.html?pagewanted=all&_r=0, accessed 27 January 2013.

⁸⁹ Israel-Cohen, above n 86, 19.

ultra-Orthodox Jews who consider the voice of women to be lewd.⁹⁰ Following a district court decision in April 2013, the Women of the Wall freely prayed out loud in May 2013 with police protecting them from some five thousand ultra-Orthodox men and women who verbally and physically assaulted them during their service.⁹¹

Segregation amounting to discrimination is not unique to some forms of Judaism but also occurs in some other religions. Beliefs concerning the innate sinfulness and impurity of women, and teachings that essentialise their nature so as to exclude them from performing certain roles in society, have manifested in their prohibition from certain decision-making positions. In many denominations of Islam, Christianity (notably Orthodox Christianity and Catholicism), Hinduism and Buddhism, females are not allowed to become religious leaders or, if they are permitted to, are not imbued with the same authority as their male counterparts.⁹²

Children's rights have also been breached through manifestations of religion; child marriage is a problem in many communities, including conservative pockets of the United States of America where fundamentalist beliefs of Latter Day Saints have manifested in girls being forced to enter 'celestial' (polygamist) marriages with men significantly older than themselves, and resulted in boys being 'excommunicated' from their church and families by senior men in the community in a bid to remove competition for women and girls with whom to enter into plural marriages.⁹³

Other examples of religious manifestations harming the enjoyment of other human rights can be found in tensions between different branches of the same religion. The tensions between the Jewish Women of the Wall and ultra-Orthodox Jews offer one such example. In the Orthodox neighbourhood of Mea Sha-arim in Jerusalem, the Jewish extremist group known as 'Sikrikim' has assaulted Jewish school students for

⁹⁰ See for instance, <http://womenofthewall.org.il/about/history/> accessed on 20 June 2013.

⁹¹ See for instance, <http://womenofthewall.org.il/about/legal-status/>, accessed on 20 June 2013. Women are still not free to bring in and read from the Torah at Kotel Plaza.

⁹² See John Bowker (ed.), *The Oxford Concise Dictionary of World Religions* (Oxford, 2005), pp.639-641. Also see Mayer (2013) above n 19, 128-130.

⁹³ See for instance, Eve D'Onofrio, 'Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States', 19 *International Journal of Law, Policy and the Family* 3, (December 2005), 373-394. Also see Jayne Lutwyche, 'Mormonism: When Jesus visited America and other beliefs', BBC, 7 November 2012, <http://www.bbc.co.uk/religion/0/20203949>, accessed on 1 February 2013 and 'Warren Jeffs, polygamist sect leader, gets life in jail', BBC News, 9 August 2011, <http://www.bbc.co.uk/news/world-us-canada-14468085>, accessed 1 February 2013.

dressing immodestly, defaced an ice-cream shop because it considered licking ice-cream in public to be indecent, and repeatedly vandalised a Jewish bookshop and threatened its owner for refusing to remove titles it considered contrary to its modesty standards.⁹⁴

On a more global scale, the persecution by extremist Muslims of non-Muslims and minority Muslims stand as strong examples of religious manifestations amounting to violations of rights. Some adherents of Islam consider 'jihad'⁹⁵ in defence of Islam a necessary response in accordance with their religious beliefs, which in non-religious terms can result in violations of the rights (both freedom of religion and belief as well as other rights to life and liberty) of the 'apostate' or 'infidel' concerned.⁹⁶ The persecution of non-Muslims and Sunni Muslims in Iran has manifested in several breaches of rights. For example, in 2011 a Christian pastor was sentenced to death for apostasy from Islam, even in the absence of such a crime in Iran's criminal code.⁹⁷ In Indonesia, there have been several attacks by Islamic militants on Ahmadhiya communities and places of worship, resulting in several deaths.⁹⁸ In Pakistan, religiously motivated shootings and suicide bombings by Islamic extremists have resulted in the deaths of Ahmadhi Muslims, Hazara Shia Muslims, Hindus and other religious minorities.⁹⁹

Elizabeth Mayer's view that repression by some governments claiming ideological legitimisation for their actions is more political than religious may be true, but it is not enough to explain away all rights violations arising from religious manifestations. Similarly it is not enough to suggest that rights violations that take place in private generally owe more to cultural reasons than religious ones. It must be acknowledged that some violations of rights occur as a result of manifestations of religion, rather

⁹⁴ See Luke Brown, 'Jerusalem bookshop targeted by 'mafia-like' extremists', The Guardian, 19 September 2011, <http://www.guardian.co.uk/world/2011/sep/19/jerusalem-bookshop-targeted-extremists>, and Israel Kasnett, 'Extreme or Mainstream', The Jerusalem Post, 16 December 2011, <http://www.jpost.com/Magazine/Opinion/Article.aspx?id=249611> accessed 27 January 2013.

⁹⁵ Jihad is defined by Ann Elizabeth Mayer as "...connoting a struggle on behalf of Islamic causes. It potentially could include actual warfare against infidels but could also signify the individual believer's struggle to follow the teachings of Islam and to serve the faith." See Mayer (2013) above n 19, 236.

⁹⁶ See for instance, John Bowker (ed.) above n 92, 288 and 392, and Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief: A World Report* (Routledge, 1997), pp.29-30, 419.

⁹⁷ Human Right Watch, *World Report 2012*, (Human Rights Watch, 2012), 558.

⁹⁸ Ibid 336.

⁹⁹ Ibid 362-365.

than politics or culture. The question that then remains to be asked is how a balance can be struck when manifestations of freedom of religion and belief clash with the enjoyment of other human rights.

2.5. Resolving clashes of rights

International law does not prescribe a particular state religious ‘model’ as a prerequisite for human rights. This is so because no conclusion can be made as to the sort of state-church relationship that best serves human rights. The preamble to the ICCPR requires that society be capable of providing conditions whereby everyone may enjoy his or her rights. But what conditions are these? The answer offered in this thesis is that freedom of religion and belief is only possible in a democratic society that respects and protects the value of pluralism so that individuals of all religions and beliefs enjoy equal freedoms in that respect. Beyond these conditions of meaningful democracy and diversity, it is not possible to prescribe a societal model which best permits enjoyment of religious or belief freedom, for different societies are best served by different models.

2.5(a) Secularism

Discussions along these lines have often been phrased in terms of ‘secularism’, a term which proves problematic and runs the risk of inadvertently alienating many of the people whose freedom would be served by some form of it. Definitions that whittle the concept down to mean “not religious or spiritual”¹⁰⁰ or “not pertaining to or connected with religion,”¹⁰¹ can fuel simplistic misconceptions that secularism denotes the demise of religious faith. From here stems the erroneous apprehension that greater separation between church and state can lead to less rather than more religious freedom, despite the fact that religious and spiritual beliefs can in fact flourish in the process of secularisation. By reducing pressures on people to

¹⁰⁰ *Oxford Mini Dictionary and Thesaurus & Wordpower Guide*, (Oxford University Press, 2002) 551.

¹⁰¹ See Dictionary.com, at <http://dictionary.reference.com/browse/secular>.

subscribe to one set of beliefs over others, they are free to form their own beliefs and fulfil their own spiritual needs.¹⁰²

In contrast, there are also findings that an increase in secularism may lead to an intensification of fundamental religious beliefs where individuals of strong religiosity respond to increased pluralism by endorsing politicians and policies which they feel will return society to their preferred religious principles.¹⁰³ This phenomenon was noted in the context of the United States of America. Studies of the 2000 presidential election showed that Evangelical Christians (who manifest high levels of religious fundamentalism) were more likely to vote for George W. Bush if they hypothetically lived in countries with a high percentage of adults claiming no religious affiliation than if they had lived in more religious countries (assuming George W. Bush was running for a political office in those countries). Social scientists explain this phenomenon as a response to a perceived 'religious threat' posed by less religious, more secular societies which could be guarded against by the evangelical leanings of George W. Bush.¹⁰⁴

For reason of this conceptual confusion, secularism is not asserted here as a necessary condition for religious freedom. Paul Weller has noted that the secular state is one that evinces one or a combination of the following elements with different consequences for human rights:

- religion is suppressed,
- religion is not given official recognition,
- there is freedom of worship,
- no religion is imposed on people or there is no state religion,
- advances in science and technology have limited the sphere of influence of religion,

¹⁰² Dennis De Jong, 'Freedom of Religion in Light of Recent Challenges', in Nazila Ghanema, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 182.

¹⁰³ Deborah Jones Merritt & Daniel C Merritt, 'The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause' (2007) 39 *Arizona State Law Journal* 895, 930.

¹⁰⁴ David E Campbell, 'Religious "Threat" in Contemporary Presidential Elections' (2006) 68 *Journal of Politics* 104, 109.

- institutional religion has waned or fewer people regularly attend religious services,
- there is separation of religious from political, legal, economic or other institutions.¹⁰⁵

With the net cast so broadly, it would seem that the majority of states in the world are to some extent 'secular', and yet we are not aided in our understanding of the relationship between secularism and enjoyment of religious freedom. It remains to be seen whether increased secularism equates to increased religious freedom.

Analysis of the interplay between secularism and religious freedom results in a flawed 'spectrum' of state models, beginning at one extreme with a system of 'established church' (in which one particular church is given a monopoly over religious affairs, while tolerating other beliefs to varying degrees).¹⁰⁶ Along from this system is that of the 'endorsed church', falling short of official recognition of a particular church, but acknowledging its special place in the country's context while ensuring the protection of others.¹⁰⁷ Roughly around the middle of the imperfect 'spectrum' would be the so-called 'cooperationist regimes' which do not officially recognise a particular church but may cooperate closely with it.¹⁰⁸ Around the middle of the spectrum would be 'accommodationist regimes' which evince clear separation between church and state as well as religious neutrality. Such regimes are capable of acknowledging religion as part of cultural life, and adapting their

¹⁰⁵ Paul Weller, 'Human Rights', 'Religion' and the 'Secular': Variant Configurations of Religion(s), State(s) and Society(ies)', in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 154, referring to Ade Dopamu's 'Religion in a Secular State'.

¹⁰⁶ Cole Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in Johan Van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspectives: Legal Perspectives* (Martinus Nijhoff Publishers, 1996) 12. As Cole Durham suggests, this category could include Spain and Italy at certain times. It also could encompass an Islamic country that tolerates 'people of the Book' (but not others), and a Christian country that tolerates major religions but disparages others. Great Britain can be considered an example of a country with an established religion while at the same time guaranteeing equal treatment for other religious beliefs. In the United Kingdom, the Test and Corporations Act excluded from public office all those not prepared to take the sacrament according to the rites of the Church of England, were only repealed in 1828. See 'Introduction', *Committees for Repeal of the Test and Corporation Acts: Minutes 1786-90 and 1827-8* (1978), pp. VII-XXVI, www.british-history.ac.uk/report.aspx?compid=38777, accessed on 28 January 2013.

¹⁰⁷ This model is common in countries where the majority of the population is Roman Catholic.

¹⁰⁸ Germany is offered here as an example for the state's role in withholding 'church tax'. Spain, Italy, Poland and several Latin American countries are also suggested by Cole Durham. Cooperationism has also been suggested as necessary during transition periods, such as in Central East Europe and the former USSR after the fall of communism.

accommodation of religion as the state expands.¹⁰⁹ At the far end of the spectrum are a broad range of 'separationist regimes'. In its most extreme form, a strongly separationist state is unable to show *any* support for religion and in its most undesirable form, will demand the absence of religion from any public domain, but remain unoffended by the intrusion of the state into religious affairs.¹¹⁰ As interesting as it is to consider the different forms that the state-church relationship can take, it is of limited use in teasing out conditions for religious freedom. These different regimes overlap and evolve, and the causal connection between any such regime with the human rights enjoyed by its citizens does not demonstrate a clear enough pattern from which instruction can be derived.

In short, it is clear that the interrelationship between state and religion cannot be accurately represented on a simple linear 'spectrum' where complete religious freedom correlates with complete separation between church and state institutions at one end, and complete religious repression at the other end of the continuum comes hand in hand with complete interrelationship of church-state institutions. The fact that rigid separation of church and state is not always tantamount to religious freedom is borne out in considering the debate over the wearing of conspicuous religious-symbols in France, which shows that at some point along the spectrum, strong separation may become hostile to religious freedom.¹¹¹

Which of these systems best supports religious freedom depends on the particular country context in question. To illustrate this point, Cole Durham notes that religious instruction in German schools may be important given that school secularisation is historically associated with religious persecution under fascism.¹¹² Religious instruction may also be rights-enabling in some states. For example, poor religious education can result in the disempowerment of women within an Islamic

¹⁰⁹ Australia may be cited as an example here.

¹¹⁰ China could be cited as an example here. John T. Noonan, Jr notes that "the French Terror, the Russian Revolution, the Chinese Cultural Revolution are proof enough that the atheist state can be as cruel or crueller than the church-dominated one" in 'The Tensions and the Ideals', in Johan Van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Publishers, 1996) 604. Also see Durham, above n 106, 12.

¹¹¹ Durham, above n 106, 12.

¹¹² Ibid.

context.¹¹³ A. al-Hibri has noted that the consequence of “patriarchal interpretations for Muslim women who do not have the benefit of a religious education is frightening”.¹¹⁴ Hence, in some states Muslim women must have religious education to deflect conservative and rights restrictive interpretations that they may be confronted with.

More broadly in the Islamic context, it has also been suggested that notions of secularism simply may not resonate in some Muslim political experiences. Abdulaziz Sachedina explains that in general Muslims cannot accept separation of religion and morality in the public domain, given that the Prophet’s political career set a precedent for integrating the religious with the political to establish a just public order.¹¹⁵ On this basis he asserts that rather than being aided by secular ideology, international human rights law will be more effectively globalised where a religious foundational model offers a more comprehensive understanding of human rights. He asserts that;

Religion cannot and will not confine itself to the private domain, where it will eventually lose its influence in nurturing human conscience. It needs a public space in the development of the international sense of a world community with a vision of creating an ideal society that cares and shares.¹¹⁶

Thus, in the final analysis, prescribing any particular church-state relationship over any other is ill-advised. This is a view supported by Arcot Krishnaswami who concluded in his landmark report on religious freedom in 1960 that it was impossible to recommend a particular relationship between the state and religion.¹¹⁷ This position has been maintained by the Special Rapporteurs of Freedom of Religion and Belief over the years, who have considered relationships between the state and religion on a case-by-case basis.¹¹⁸ Dickson too, in noting that international law does

¹¹³ Baderin, above n 43, 17.

¹¹⁴ A. al-Hibri, ‘Islam, Law and Custom: Refining Muslim Women’s Rights’ (1997) 12 *American University Journal of International Law and Policy* 1-44, 3.

¹¹⁵ Sachedina, above n 35, 58 - 59.

¹¹⁶ Ibid 39 and 64.

¹¹⁷ Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices*, UN. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No 60.XIV.2, 51.

¹¹⁸ For instance, Special Rapporteur Jahangir noted that selective and rigid interpretation of the principle of separation of church and state can operate at the expense of religious freedom as in the case of France’s ban on

not contain norms purporting to determine the nature of the relationship between the church and the state or churches within states, cautions against any attempt to do so, for it “would be to risk serious diplomatic disturbances, particularly in this era of rising fundamentalism in many parts of the world.”¹¹⁹ This is arguably more true in today’s post 9/11 era, several years after Dickson issued that caution.

In this thesis, it is asserted that the particular relationship between church and state should be considered from the perspective of the service it offers to the advancement of the freedom of religion and belief of all, even non-believers. General Comment 22 issued by the Human Rights Committee (hereinafter, HRC) on freedom of thought, conscience or religion clarifies that the official ‘establishment’ of a state religion does not offend against article 18 of the ICCPR, so long as it does not result in any discrimination against or impairment of the rights of those who do not adhere to that religion.¹²⁰ The Committee stated:

...a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognised under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.¹²¹

The inclusion of those persons who *oppose* the ‘official’ religion emphasises the broad protection offered by article 18 of the ICCPR to all persons of all beliefs, a theme which will be discussed later in considering the religious freedoms of non-believers.

2.5(b) Pluralism

“If there were only one religion... there would be danger of despotism, if there were two, they would

wearing of religious symbols. See Asma Jahangir, *Civil and Political Rights, Including the question of religious intolerance*, UNESCOR, 62nd session, agenda item 11(e), E/CN.4/2006/5/Add.4, (8 March 2006).

¹¹⁹ Brice Dickson, ‘The United Nations and Freedom of Religion’ (1995) 44 *International and Comparative Law Quarterly* 327, 351.

¹²⁰ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [9]. On this point, note that the Special Rapporteur expresses scepticism that an official state religion can be applied in a way that does not have adverse and discriminatory effects on religious minorities. See Heiner Bielefeldt, Report of the Special Rapporteur on freedom of religion or belief, UN Doc A/HRC/19/60/Add.2 (27 January 2012) 17 [64].

¹²¹ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [10].

*cut each other's throats, but there are thirty, and they live in peace and happiness."*¹²²

Voltaire

Given that secularism cannot be prescribed as a universal aspiration in protecting religious freedom, it is asserted here that pluralism should underpin religious freedom and guide limitations thereto. Pluralism is defined as "a condition or system in which two or more states, groups, principles, sources of authority, etc., coexist", or philosophically as being "a theory or system that recognizes more than one ultimate principle."¹²³ Pluralism, in which individuals and their multitude of religions and beliefs are valued equally, should serve as a priority human rights aspiration. Pluralism can facilitate the protection of freedom of religion and belief, even of non-believers and atheists.¹²⁴

Pluralism here denotes not merely the presence of a number of religions and beliefs, but also their equal respect by governments. Where all religions and beliefs enjoy practical equality, manifestations of those various religions and beliefs can be construed as a reflection of genuine pluralism, rather than as a threat to secularism. For instance, the wearing of the Islamic headscarf can be seen as a symbol of diversity and healthy pluralism in a secular society, while a ban on wearing it can be seen as a result of insecurity and weak secularism. A healthy society is one that is capable of sustaining diversity, and by extension, a healthy government is one that does not need to repress diversity to protect its political legitimacy, but is capable of supporting that diversity.

The Commission on Human Rights highlighted the rights-facilitative role that pluralism can play in its resolution reiterating "the obligation of all states and the international community to... [p]romote a culture conducive to promoting and

¹²² Voltaire, quoted in Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-first Century* (Cambridge University Press, 2011) 3.

¹²³ Oxford Dictionary Online, <http://oxforddictionaries.com/definition/english/pluralism>, accessed on 28 January 2013.

¹²⁴ The term 'pluralism' here refers to religious pluralism, contrasted to the 'legal pluralism.' See for instance Lerner, above n 15, 104-9; and Javid Gadirov, 'Freedom of Religion and Legal Pluralism' and Heiner Bielefeldt 'A Practical Priority of the Secular Legal Order: A Response to Javid Gadirov' in M.L.P Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 81-102.

protecting human rights, fundamental freedoms and tolerance, inter alia through education leading to genuine pluralism, a positive acceptance of diversity of opinion and belief, and respect for the dignity of the human person.”¹²⁵ Similarly (and more succinctly), Dickson notes that “for the sake of a healthy, pluralistic society the law should go out of its way to tolerate diversity and non-conformity.”¹²⁶ Indeed, not only does pluralism serve to protect individual diversity thereby strengthening the universality of human rights, but it also serves to promote that diversity as one of the outcomes of human freedom.¹²⁷ The notion of pluralism is offered here as both a necessary means of ensuring universal religious freedom and in some contexts, an end of that freedom in itself.

This respect for pluralism will underpin discussions in the remainder of this thesis. Such pluralism extends to the spectrum of religious diversity extending from major established religions, through newer less-accepted ones and to committed non-believers. It is not enough to decide that pluralism should be at the core of considerations about religious freedoms; it must also guide the process of limiting religious and belief manifestations where necessary. For not *all* religious manifestations are permissible, and decisions as to whether manifestations must be limited should consider the extent to which they trespass on the rights of others, rather than by consideration of the content or nature of the religion itself. The notion of pluralism should therefore assist the process of weighing competing rights and be upheld as a good that should come of limiting them.

Many (including Dickson) discuss pluralism in terms of tolerating diversity. But diversity should not merely be ‘tolerated’; it must be vehemently defended and actively supported. “Religious pluralism... demands more than bare tolerance... Genuine pluralism requires the state to treat all religious beliefs, including non-belief, evenhandedly.”¹²⁸ And yet at the same time it is argued that fierce protection of pluralism requires that certain manifestations of religious liberties be fiercely

¹²⁵ UN Commission on Human Rights, *Tolerance and pluralism as indivisible elements in the promotion and protection of human rights*, 9 April 1998, E/CN.4/RES/1998/21 [2(f)].

¹²⁶ Dickson, above n 119, 327.

¹²⁷ See for instance, John Rawls’ assertion that diversity of belief is the outcome of human freedom in John Rawls, *Political Liberalism*, (Columbia University Press, 1995), 36.

¹²⁸ Merritt and Merritt, above n 103, 896-897.

opposed. In pluralistic states that respect religious beliefs equally and contain pluralism of partially or significantly incompatible doctrines, tolerance of difference is only useful up to a point. For how indeed is it virtuous to 'tolerate' rape or sexual, racial or other hatred? For this reason, tolerance is effective only to the point that violations of human rights are not tolerated.¹²⁹

Clearly, where religion is allowed to enter the domain of rights, pluralism becomes more conceptually ambitious. Yet it is not impossible. Abdulaziz Sachedina states that rights advocates cannot expect religious people to surrender their belief that their religious tradition is the absolute truth. In view of the 'entrenched self-righteous attitudes' among adherents of major religious beliefs, it is not irrational or immoral that staunch believers consider their religion the only source of human salvation. The challenge then, is how to allow disagreements to foster respect for different versions of the truth while still allowing the belief that one is right and the other wrong.¹³⁰ He talks of an Islamic notion of pluralism in the form of the God-given right to determine his or her spiritual destiny without coercion as the cornerstone of interreligious and intra-religious relations.¹³¹ Sachedina stresses that the Koran allows for pluralism in matters of faith and law to exist in society; several paths to salvation have been provided for humanity which are united by pursuit of the common good. It is this common morality that Sachedina asserts as offering the foundation for the universalism of human rights.¹³² In addition to the need to identify religious morality alongside rational morality in public discourse, Sachedina stresses religious pluralism as a necessary condition to overcome violence and extremism.¹³³

Sachedina's God-centred pluralism is limited in that it extends only to monotheist religions that can be united under the same Creator and therefore be considered spiritually equal; nothing is said in this respect about polytheists or atheists beyond their innate human dignity.¹³⁴ Yet the essential point he makes is that human dignity

¹²⁹ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press, 1982).

¹³⁰ Sachedina, above n 35, 197-199.

¹³¹ Ibid 201.

¹³² Ibid 80, referring to Koran 5:48.

¹³³ Ibid 186.

¹³⁴ Ibid 206.

and moral ability to determine one's spiritual path without interference are values common to Islam and international human rights law.¹³⁵ In this way, Muslim rights and duty holders can be brought within the human rights framework without losing their own ideological framework. By implication, similar lines of religious reasoning can perhaps be found to do likewise for people professing other faiths.¹³⁶ But even if this is not the case, and some religious rights holders cannot be convinced of the claims of other rights holders to enjoy freedom of religion and belief equal to their own, from a rights-based viewpoint this is ultimately irrelevant. Ideological neutrality must be a non-negotiable in the administration of the human right to freedom of religion and belief.

The type of pluralism that is offered to this end is therefore one that does not consider the nature of the religion or belief in question, but considers the sincerity of the rights-holder in professing his or her belief. Such sincerity, or the extent to which beliefs are genuinely held, is crucial in distinguishing a religious leader of an emerging sect from a criminal whose sole motivation is to financially or sexually exploit brainwashed followers, while not penalising those followers for the sincerity of their beliefs. It would also serve to distinguish between a genuine practitioner of Rastafarianism for whom marijuana is a holy sacrament, and a stoner for whom marijuana is a hobby and Rastafarianism an excuse, and between a genuine albeit relatively new religion deserving respect as such, and a satirical religion invented to generate discourse rather than claiming a sincere version of divinity.

Clearly, the challenge for decision makers is how to establish this sincerity when faced with a person whose beliefs are unfamiliar and whose actions are questionable enough to have attracted the scrutiny of a court of law. A temptation is to measure the sincerity of beliefs against their plausibility, but this approach must be avoided at all costs so as to protect legal reasoning from being muddled by religious theorising. Indeed, even proving the sincerity of followers of widely known long-standing religions is a fraught task in the absence of objective measures; a Christian

¹³⁵ Ibid 208.

¹³⁶ This approach to defending human rights by appeal to an "overlapping consensus" of various religions and other systems of belief is developed in John Rawls, *Political Liberalism* (Columbia University Press, 1996).

may not literally believe in resurrection or a Hindu in reincarnation, but these doubts do not necessarily make them any less Christian or Hindu.

Special Rapporteur Heiner Bielefeldt adds to the criteria of sincerity (expressed by him as ‘earnestness’) the criteria of comprehensiveness, given that “[n]ot any opinion which I might just happen to have today can claim the status of a serious ‘belief’, and turning any coffee circle into a religious community would certainly go too far.”¹³⁷ Bielefeldt does not explain what he means by his criteria of ‘comprehensiveness’, but one can assume he refers to the extent to which a belief or belief set is fully formed and developed. Criteria of earnestness and comprehensiveness therefore, “can be used to ensure that the concepts of religion and belief keep their basic contours relating to *people’s deep and existential convictions and concomitant individual and communitarian ethical or ritualistic practices.*”¹³⁸ Comprehensiveness may raise questions similar to those raised by sincerity; is a person who does not have a comprehensive understanding of his own belief set (for instance, as a child or a poorly educated but devout adult) entitled to less protection than someone whose beliefs are more comprehensive? Or would a more established religion be considered more comprehensive for the weight of scholarship historically attached to it, relative to a less theologised newer religion? As with the ‘sincerity’ consideration it is perhaps impossible to prescribe a definitive threshold, but both sketch out the nature of belief and its significance to the person concerned, irrespective of how that belief is perceived by another.

Ultimately the criteria in upholding pluralism in matters of freedom of religion or belief should depend on the sincerity of beliefs held, regardless of what they are, and its comprehensiveness to the holder of the beliefs regardless of how it fares against other belief holders, or other beliefs. Whether or not the substance of a belief is genuine or plausible is irrelevant, as it must be to uphold the special nature of faith; what matters is that the belief is genuinely held regardless of what it is. A caution must also be flagged that consideration of the ‘sincerity’ of beliefs does not give way to invasive scrutiny; a person who is grappling with his religious or spiritual beliefs

¹³⁷ Heiner Bielefeldt, ‘Freedom of Religion or Belief – a Human Right under pressure’ (2012) 1 *Oxford Journal of Law and Religion* 1, 7.

¹³⁸ Ibid.

should not be penalised for his doubt. In short the line of inquiry should not extend beyond whether or not a person considers herself to have a belief, and whether or not she really believes it.

By extension, it becomes clear that when religions and rights clash, the same objectivity must be applied in limiting manifestations of religion and belief; deliberations should focus on the extent to which manifestations interfere with the rights of others, rather than engaging with the nature of the religions and beliefs being manifested. The complex understandings of the relationship between religion and rights were anticipated in the “Study of Discrimination in the matter of Religious Rights and Practices”.¹³⁹ Written before the text of the human rights Covenants had been finalised, its author, Arcot Krishnaswami, sought to issue guidance to legislators in the form of 16 ‘basic rules’ towards achieving the goals provided for in the UDHR. Relevant for present discussions, Rule 16(4)(c) states simply that;

In case of conflict between the requirements of two or more religions or beliefs, public authorities should endeavour to find a solution assuring the greatest measure of freedom to society as a whole, while giving preference to the freedom of everyone to maintain or to change his religion or belief over any practice or observance tending to restrict this freedom.¹⁴⁰

In this sense, valuing pluralism can be seen as a reply to Krishnaswami’s request for an approach that serves society as a whole. Where the religious freedoms of an individual or a group of persons must be limited in defence of the rights of others, the limitation is ultimately issued in service of the religious freedom of society as a whole.

Krishnaswami’s Rule 16 was a precursor to article 18(3) of the ICCPR which in the same spirit provides that “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of

¹³⁹ Krishnaswami, above n 117.

¹⁴⁰ Ibid 66.

others.” Article 18(3) is the key human rights mechanism to address clashes between religious manifestations and other rights, and is the bedrock for discussions in the chapters that follow.

2.6. Conclusion

“Give to Caesar what is Caesar’s, and to God what is God’s.”

Jesus, Matthew, 22:21

Different conceptions of the relationship between human rights and religion have been considered in this chapter. The first asserts that rights derive from religion; an approach that is true in so far as human rights derives from a range of traditions, cultures, philosophies and ideologies, but this truth does not necessarily answer to the universality of human rights. The second approach shows that religion and rights are compatible where they are interpreted as such; an approach that is valuable for the local legitimacy it can lend to human rights, but not one that will necessarily result in consensus that the interpretation that is rights-complicit is the ‘correct’ interpretation. Nor can rights-supporting interpretations resonate for all holders of rights and responsibilities beyond the religious context in which the interpretation is taking place. Indeed, some people will continue to subscribe to interpretations that conflict with human rights. On this basis, the third and final approach discussed acknowledges that religion and rights do occasionally clash, and that when they do the solution should favour human rights that attach to human members of a cosmopolitan global society irrespective of their religion or belief. In support of this approach, pluralism was offered as the model that best supports universal human rights, irrespective of the religions and beliefs that may be being manifested in the enjoyment of those rights. To echo the words of the UN High Commissioner for Human Rights, Ms Navi Pillay, “the balance between tradition and culture, on one hand, and universal human rights, on the other, must be struck in favour of rights” such that “[n]o personal opinion, no religious belief, no matter

how deeply held or widely shared, can ever justify depriving another human being of his or her basic rights.”¹⁴¹

The key question that will be addressed over the course of this thesis is how to reach a compromise when the exercise of freedom of religion and belief conflicts with other human rights. In addressing this question, manifestations of freedom of religion and belief will be considered from this pluralistic position of equally respecting all religions and beliefs, even when those religions are new or unusual or the beliefs concerned are atheistic. It will be considered whether limitations have been adequate to meaningfully protect true pluralism of religion and belief, by equally protecting rights of committed non-believers alongside those of devoted theists. The ultimate assertion will be that the limitations to manifestations of religious freedom as prescribed in article 18(3) of the ICCPR should ensure that religions and beliefs of individual right holders are valued equally, but also should result in the most universal enjoyment of religious freedom as possible. Pluralism should be a non-negotiable in reaching a compromise that best upholds human rights and least interferes with religion. In this way, freedom of religion is a universal human right to the extent that it respects all religions and beliefs equally.

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¹⁴¹ Statement by UN High Commissioner for Human Rights Navi Pillay to the Panel on ending violence, discrimination against people because of their sexual orientation, Geneva, 7 March 2012, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11917&LangID=E>, accessed on 23 May 2013.

CHAPTER 3: FREEDOM OF RELIGION AND NON-STATE ACTORS

"Men never do evil so completely and cheerfully as when they do it from religious conviction."

Blaise Pascal

3.1. Introduction

States can and often do repress freedom of religion and belief. Examples of such repression can be seen in secular states (such as Germany in the case of Scientology), in religious states (as in the persecution of the Baha'i in the Islamic Republic of Iran, or the Ahmadis in Pakistan and Indonesia), and in non-religious states (such as China and North Korea which actively discourage religious practice).¹ However, it is clear that state interference with freedom of religion and belief is unequivocally addressed by international human rights law, even if breaches are common. A more contentious issue that deserves more rigorous attention than it receives is the extent to which non-state actors can be held to account for their role in violating freedom of religion and belief.

Many acts that interfere with human rights are at the hand of non-state religious actors acting on the basis of their religious beliefs. The interplay between religion and rights raises questions of the extent to which the state can and should intervene in situations where individuals or other entities threaten the rights of others, and also raises questions concerning the extent to which non-state actors are held accountable under international human rights law.

This chapter addresses two key issues: firstly, the possible existence of human rights obligations for religious bodies, and secondly the obligation of states to protect people from infringements of their rights by entities attached to organised religions or others on the basis of their religious beliefs. In short, the chapter considers the

¹ See for instance, Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief: A World Report* (Routledge, 1997) and US State Department, '2010 International Religious Freedom Report' (online) http://www.state.gov/j/drl/rls/irf/2010_5/index.htm.

extent to which states are required to protect human rights from interferences *by* religious actors.

That states must protect individuals from infringements of their human rights by non-state actors is confirmed in various human rights instruments explored below.² Yet despite this clear principle of international law, there are numerous examples around the world in different contexts where religious practices should arguably be constrained and are not.

Professor Andrew Clapham, a leading scholar on the obligations of non-state actors, explains that there are four key phenomena that increase the relevant obligations of non-state actors. Firstly, globalisation emphasises the power that non-state actors, primarily corporations, have to commit human rights abuses while remaining largely unaccountable. Secondly, increased privatisation of various sectors means that services traditionally provided by the state are now in the private sphere. Thirdly, the fragmentation of states through internal armed conflicts highlights that the accountability of non-state armed groups must go beyond mere individual criminal responsibility. Finally, the human rights challenges faced by women have lead to reconsideration of the public / private divide, such that the state should intervene in the private sphere to protect women's rights.³

These four phenomena can be shown to be particularly pertinent in the context of religious non-state actors. In relation to the first, religious organisations have significant capacity to harness the power of globalisation to spread religious beliefs and attitudes throughout the world, and in many instances, have resources rivalling those of corporations which can be used to impact on human rights of people throughout the globe. Secondly, privatisation of various sectors can be relevant where the private entity that assumes responsibility for the provision of services (such as health, education, prisons, water, communications, security forces, and military training) is a religious organisation or an organisation with religious underpinnings.

² See 3.4(a).

³ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 3.

Thirdly, the fragmentation of states through internal conflicts often has strong religious roots, where offending armed groups are driven by religious beliefs or motives. For instance, the Lord's Resistance Army of northern Uganda, parts of Sudan and the Democratic Republic of Congo is a Christian militant group that commits its crimes against humanity in the name of God.⁴ The Taliban is an Islamist movement committing atrocious crimes in its quest to spread Sharia law throughout Afghanistan, Pakistan and beyond.⁵ Indeed, even the genocide perpetrated in Rwanda raised issues about the complicity of agents of the Roman Catholic Church.⁶ These extreme examples highlight the grievous role that religious ideology and its followers can play in failed states.⁷

Fourthly, the particular trials that women and girls face in respect of religious ideology that renders them subservient to their male counterparts, and the particular victimisation of women through the religiously-inspired actions of some groups, highlights the relevance of public / private discourse. Consider for instance, the gender-based violence suffered at the hands of the Lord's Resistance Army and the Taliban, as well as traditional practices that breach women's rights even in times of peace. Examples include the infliction of corporal punishments on women for certain acts or omissions to fulfil the gender role imposed upon them, or private decisions to provide male children with an education while denying the same right to female children. Additionally, the prohibition on women from holding certain positions within religious hierarchies raises issues of inequality.⁸ Some religious teachings can be argued to apply more pressure on women than men in respect of their sexual and

⁴ See for instance, 'Who are the LRA?' *LRA Crisis Tracker* (online), 16 December 2011, <http://www.lracrisistracker.com/#about>.

⁵ See for instance, 'Who are the Taliban?' *BBC* (online), 20 October 2009, <http://news.bbc.co.uk/2/hi/1549285.stm>, and Human Rights Watch, *Living with the Taliban* (2009), <http://www.hrw.org/en/news/2009/04/29/living-taliban29>, accessed on 5 March 2010.

⁶ See for instance, Martin Kimani, 'For Rwandans, the pope's apology must be unbearable', *The Guardian* (online), 29 March 2010, <http://www.guardian.co.uk/commentisfree/belief/2010/mar/29/pope-catholics-rwanda-genocide-church>, accessed on 28 March 2011.

⁷ See for instance, 'Rwanda's religious reflections', *BBC* (online), 1 April 2004, <http://news.bbc.co.uk/2/hi/africa/3561365.stm>, and 'UN, US, France and Catholic Church blamed for Rwanda genocide' *The Independent* (online), 8 July 2000, <http://www.independent.co.uk/news/world/africa/un-us-france-and-catholic-church-blamed-for-rwanda-genocide-707470.html>, accessed on 5 March 2010.

⁸ See for instance, *Ordinatio Sacerdotalis*, 'Pope John Paul II's Apostolic Letter to the Bishops of the Catholic Church on Reserving Priestly Ordination to Men Alone', 22 May 1994, http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html, accessed on 28 March 2011.

reproductive rights and freedoms.⁹ Some religious beliefs imbibe the notion that women should understand that their role is to support men, and aspire to reincarnate as men.¹⁰ In some orthodox branches of some religions, women do not have the same right to bear witness as men.¹¹ These considerations underline the gender dimensions of human rights in the religious context.

There are several other examples of non-state actors interfering with the rights of others on religious grounds, in respect of hate speech, proselytism and the rights of children. These issues will be specifically addressed in dedicated chapters. For present purposes the above brief considerations show that further inquiry must be made into the direct obligations owed by non-state actors where those actors are religious in nature, and into the obligations of states to regulate their actions in defence of human rights.

3.2. Harms to human rights from religious actors

Writer Ayaan Hirsi Ali is living with the daily threat of death for expressing her view that Islam is a violent religion.¹² Ali (a former Dutch-Somali member of the house of representatives), and Theo van Gogh made a short film, *Submission*, about violence against women in Islam. Van Gogh was violently murdered in Amsterdam as he cycled to work on the morning of 2 November 2004. Van Gogh's murderer, Mohammed Bouyeri, stated that his religious beliefs inspired him to shoot and repeatedly stab van Gogh before nearly decapitating him and impaling a note announcing holy war into van Gogh's body with a knife. The note also threatened Ayaan Hirsi Ali who was forced into hiding in the Netherlands, and subsequently moved to the United States. During his trial, Bouyeri told van Gogh's mother "I don't have any sympathy for you. I can't feel for you because I think you're a non-believer"

⁹ See for instance, John Bowker (ed), *Oxford Concise Dictionary of World Religions* (Oxford, 2005) 640, in which Judaism is noted to stress the chief duty of women to bear children (Genesis 3:16). See also 'Letter of Pope John Paul II to women' (29 June 1995), in which the important role of women as wives and mothers is stressed. http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html, accessed 28 March 2011.

¹⁰ Juree Vichit-Vadakan, 'Women and the family in Thailand in the Midst of Social Change' (1994) 28 *Law and Society Review* 515, 522.

¹¹ See for instance, Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge University Press, 2005) 12.

¹² 'Ayaan Hirsi Ali: Profile', *BBC News*, 29 June 2006, <http://news.bbc.co.uk/2/hi/europe/4985636.stm>, accessed on 25 January 2012.

and confirmed to the court that he would commit similar crimes if he was ever freed.¹³

Geert Wilders, a controversial right-leaning politician, also made a film about jihadists who want to Islamise the West by force if necessary. His film 'Fitna' was criticised for linking Islam with acts of terror and violence. After Dutch filmmakers refused to screen the film, the movie aired on the internet as the only remaining medium available to it. Even in the free space of the World Wide Web, several hosts removed the film from their site in response to violent threats.¹⁴ Protestors, both Muslim and non-Muslim, took to the streets to express outrage at the views Wilders expressed in the film.¹⁵ However, no comparable protests arose over the censorship of the film. Indeed, United Nations Secretary General Ban Ki-moon added his condemnation of the film, saying there was no justification for hate speech inciting violence, and that "the real fault line is not between Muslim and Western societies, as some would have us believe, but between small minorities of extremists on different sides with a vested interest in stirring hostility and conflict".¹⁶ Such criticism (expressed before the film was screened) was not aimed at people depicted in the film who were demanding death to non-Muslims, but at the filmmakers for making a film about them. The criticism also implies that causing offence to easily-offended people amounts to inciting violence, reasoning that is arguably as tenuous as the suggestion that wearing revealing clothing provokes rape.

Regardless of whether the film is considered to be anti-Islamic or perhaps has valid points to make (a subjective opinion that could only be arrived at by viewing it), its suppression from discourse is disconcerting. LiveLeak.com, upon removal of the

¹³ See Anthony Browne, 'Muslim radical confesses to Van Gogh killing in court tirade', *The Times* (online), 12 July 2005, <http://www.timesonline.co.uk/tol/news/world/article543212.ece>, accessed on 11 November 2009.

¹⁴ See for instance, Thomas Claburn, 'Anti-Islamic Film Taken Offline Following Threats', *InformationWeek* (online), 28 March 2008, <http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=207000505>, accessed on 11 November 2009. This article reports serious threats made to staff of LiveLeak.com which removed the film accessed on 11 November 2009.

¹⁵ See for instance Foo Yun Chee, 'Dutch Protest against Islam critic's Koran protest' *Reuters* (online), 22 March 2008, <http://uk.reuters.com/article/idUKL2243365220080322>, accessed on 11 November 2009.

¹⁶ UN Secretary General Statement 'No Justification for Hate Speech or Incitement, says Secretary-General in strong condemnation of Anti-Islamic Film' (28 March 2008), <http://www.un.org/News/Press/docs/2008/sgsm11483.doc.htm>, accessed 11 November 2009.

film from its website out of concern for the safety of its staff, aptly summarised the triumph of violent threats by religious zealots over free speech:

This is a sad day for freedom of speech on the net but we have to place the safety and well-being of our staff above all else. We would like to thank the thousands of people, from all backgrounds and religions, who gave us their support. They realise LiveLeak.com is a vehicle for many opinions and not just the support of one.

Perhaps there is still hope that this situation may produce a discussion that could benefit and educate all of us as to how we can accept one another's culture. We stood for what we believe in, the ability to be heard, but in the end the price was too high.¹⁷

Since releasing the film, Geert Wilders has been living with heavy security given the lesson learnt from the murder of Theo van Gogh. There have been calls for Wilders to be murdered, including from Australian cleric Feiz Mohammed known for calling on Muslims to kill non-believers, and specifically to behead Wilders for denigrating Islam.¹⁸

One of the most widely discussed controversies about the conflict between free speech and 'religious offence' concerns the Danish cartoons published in 2005, some of which depicted Mohammed as a violent terrorist.¹⁹ The response in many parts of the Muslim world led to enormous debate about the relationship between freedom of expression and freedom of religion; did the publication of these cartoons constitute incitement to hatred or was it legitimate expression? Whose hatred was incited by the cartoons, and towards whom? The implication of some of the cartoons (that Islam is a violent religion) was met with mass violence throughout the Islamic world and beyond. Protestors in London waved posters demanding that those who insulted Islam be beheaded. Death threats were issued to the people behind the cartoons; cartoonist Kurt Westergaard survived an axe attack by a revenge-seeking

¹⁷ Claburn, above n 14.

¹⁸ See 'Aussie cleric Feiz Mohammad calls for beheading of Dutch MP Geert Wilders', *The Australian* (online), 3 September 2010, <http://www.theaustralian.com.au/news/breaking-news/aussie-cleric-feiz-mohammad-calls-for-beheading-of-dutch-mp-geert-wilders/story-fn3dxity-1225914033334>, accessed on 11 June 2013.

¹⁹ The cartoons were first published in the Danish paper *Jyllands-Posten* in 30 September 2005.

Muslim in 2010 and remains under constant police protection.²⁰ Embassies of Denmark and other European countries were burnt and flags desecrated in Syria and Gaza.²¹ In these situations it seems that the controversial items did indeed incite hatred and violence, not against Muslims, but rather by them. Indeed, the reason that the cartoons flared so much anger and resulted in so many deaths around the world was because Danish imams disseminated the images to Cairo and other Middle Eastern capitals, and to the League of Arab Nations and the OIC, along with additional images degrading to Mohammad that had not in fact been published by the Danish newspaper in question.²²

Against this background, *The Jewel of Medina*, a romantic historical novel based on the relationship between the Prophet Mohammed and his young wife Aisha, was withdrawn from publication in late 2008 by Random House and other prominent publishers in fear of a similarly violent domino effect.²³ Following this, a smaller publisher named Gibson Square Books decided to publish the novel, resulting in a firebomb being thrown into the home of its director.²⁴ In this context it is interesting to consider the plight of Gregorius Nekschot, a Dutch cartoonist, who was arrested and his sketchbooks seized by Dutch authorities.²⁵ He was made to remove cartoons from his website on the basis that they discriminated against Muslims. It could be speculated, particularly given the difficulty the authorities had in disclosing which cartoons were deemed discriminatory and which not, that his freedom of expression was not curtailed out of concern for discrimination against Muslims so much as for

²⁰ See for instance, 'Muslim anger at Danish cartoons', *BBC* (online), 20 October 2005, <http://news.bbc.co.uk/2/hi/europe/4361260.stm>, accessed on 10 March 2009, and Marie Louis Sjølie, 'The Danish cartoonist who survived an axe attack', *Guardian* (online), 4 January 2010, <http://www.guardian.co.uk/world/2010/jan/04/danish-cartoonist-axe-attack>, accessed on 24 August 2011.

²¹ 'Arson and Death Threats as Muhammad Caricature Controversy Escalates', *Der Spiegel* (online), 2 April 2006, <http://www.spiegel.de/international/0,1518,399177,00.html>, accessed on 10 March 2009.

²² See David Rennie and Anton La Guardia, 'How clerics spread hatred over cartoons', *The Telegraph* (online), 7 February 2006, <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1509887/How-clerics-spread-hatred-over-cartoons.html>, accessed on 29 March 2011. Malise Ruthven, 'Why are the Muhammad Cartoons Still Inciting Violence?', *The New York Review of Books*, 9 February 2011, <http://www.nybooks.com/blogs/nyrblog/2011/feb/09/why-are-muhammad-cartoons-still-inciting-violence/>, accessed on 29 March 2011.

²³ Suzanne Goldenberg, 'Novel on prophet's wife pulled for fear of backlash', *The Guardian* (online), 9 August 2008, <http://www.guardian.co.uk/books/2008/aug/09/fiction.terrorism>, accessed on 10 March 2009.

²⁴ Christopher Hitchens, 'Assassins of the Mind', *Vanity Fair*, No 582, February 2009, 49.

²⁵ Thomas Landen, 'Dutch Police Arrest Cartoonist', *The Brussels Journal* (online), 16 May 2008, <http://www.brusselsjournal.com/node/3257>, accessed on 10 March 2009.

concern about the retaliation which could be meted out by offended Muslims in 'defence' of their religion.

In light of the above, it is perhaps true that "[w]e live now in a climate where every publisher and editor and politician has to weigh *in advance* the possibility of violent Muslim reprisal"²⁶ rather than permitting readers and viewers to judge expressions for themselves. This fear of reprisal seems to have infected the very discourse needed to address the issues at play. Discussing whether or not there is a link between Islam and violence remains controversial, partly because that discourse could be perceived as defamation of Islam which may be met with violent retaliation. Rather than interpreting this cycle as proof that the issue needs to be further explored, the call is instead made not to discuss the issue. As UN Secretary General Ban Ki-moon has said, there is no justification for hate speech inciting violence. This is true, but the freedom of speech of those who suggest that Islam is violent are arguably curtailed at least as much the freedoms of radical Muslims who advocate for violence to be meted out on those with different beliefs to their own.

The crucial point to be made is that private actors manifesting their religion and belief in incomprehensibly violent ways appear to be achieving their objectives and silencing expressions that they deem to be 'offensive' to their religion. When Theo van Gogh lay dying in the streets of Amsterdam, he is reported to have said to his murderer 'Can't we talk about this?'²⁷ The answer increasingly seems to be no.

The above examples are not meant to imply that threats to rights and freedoms only result from the manifestation of Islamic beliefs. Indeed, there are several examples of the threat posed by expressions and manifestations of other religious beliefs. An extreme example can be found in the Lord's Resistance Army, a Christian guerrilla group that has forced children into armed combat and sexual slavery as part of its agenda of imposing the Ten Commandments. Children who have escaped from the

²⁶ Hitchens, above n 24, 48.

²⁷ See Rebecca Leung, 'Creator of Dutch Film Vows Sequel despite Muslim Death Threats', *CBS News* (online), 11 February 2009, <http://www.cbsnews.com/stories/2005/03/11/60minutes/main679609.shtml>, accessed on 11 November 2009.

Lord's Resistance Army have reported that they have been forced to kill their own parents and cross themselves before entering into battle.²⁸

Radical Christian churches that promote a pro-life stance towards unborn foetuses, have proven less pro the lives of doctors who perform abortions. There have been several incidents of bombings, arson and even murder of doctors who perform abortions, with clinic staff also victimised. On May 31, 2009, Dr. George Tiller was shot and killed while he attended church in Kansas; his killer claimed an association with controversial pro-life group Operation Rescue (which denies this), while other extremist Christian organisations like the Army of God declare Tiller's murderer a national hero and saviour of unborn children.²⁹

In 2005 in New York, the Jewish practice performed by mohels of sucking the penises of circumcised baby boys, was found to have caused genital herpes to some boys and in some cases to have caused death.³⁰ Though physicians argued against the practice, New York's mayor (during election time) publicly defended freedom of religion (of the mohel and the child's parents) over the health and rights of children.³¹

Instructions issued from the Vatican and its representatives around the world have misled those who rely on them for guidance on issues including sexual morality and health. Putting aside warnings issued by Cardinal Alfonso Lopez de Trujillo (the Vatican's president of the Pontifical Council for the Family) that condoms are punctured to let the AIDS virus pass through, consider less conspiratorial views such as those of Cardinal Wamala who expressed the opinion that a woman who

²⁸ See for example, 'Profile: Joseph Kony' *BBC* (online), 7 October 2005, <http://news.bbc.co.uk/2/hi/africa/4320858.stm>, accessed 5 March 2010.

²⁹ See for instance, Roxana Hegemen, 'George Tiller Murder: Scott Roeder faces life sentence, but some argue abortion provider's killer got his way', *Huffington Post* (online), 31 March 2010. http://www.huffingtonpost.com/2010/03/31/george-tiller-murder-scot_n_520932.html, accessed on 14 April 2010.

³⁰ See for instance, Howard Markel, 'Circumcision, Religious Freedom, and Herpes Infections in New York City', *Medscape* (online), 17 October 2006, <http://www.medscape.com/viewarticle/545756>, and Andy Newman 'City Questions Circumcision Ritual after baby dies' *New York Times* (online), 26 August 2005, <http://www.nytimes.com/2005/08/26/nyregion/26circumcise.html>, both accessed on 30 March 2011.

³¹ Christopher Hitchens, *God is not great* (Allen & Unwin, 2007), 50. This issue is discussed further in Chapter 7, Children vs Parents.

dies of AIDS rather than choose to use a condom should be considered a martyr.³² The Vatican's in-depth interest in the sexual practices of its adherents is well-known. It has issued detailed Encyclicals on the issue, one of the most famed of which forbids

...any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation... [for] it is never lawful, even for the gravest reasons, to do evil that good may come of it – in other words, to intend directly something which of its very nature contradicts the moral order, and which must therefore be judged unworthy of man, even though the intention is to protect or promote the welfare of an individual, of a family or of a society in general...³³

Pope John Paul VI's 40-year-old Encyclical was upheld by Pope Benedict XVI who succeeded him.³⁴ Indeed, in its 'Statement of Interpretation of the Holy See on the adoption of the Declaration of Commitment on HIV/AIDS', the Holy See "emphasise[d] that, with regard to the use of condoms as a means of preventing HIV infection, it has in no way changed its moral position."³⁵ Beyond such implied suggestions that the work of secular inter-governmental organisations (IGOs) and non-governmental organisations (NGOs) attempting to curb the spread of AIDS is somehow immoral, the church has also said that such efforts are ineffective. Papal spokesman Father Federico Lombardi responded to criticisms that the church's position puts people's lives at risk by saying that "[t]he spread of AIDS is completely independent from the religious faith of populations and of the influence of the

³² 'African family values', *BBC News* (online), 27 June 2004, <http://news.bbc.co.uk/2/hi/programmes/panorama/3844959.stm>, accessed on 24 August 2011.

³³ Pope Paul VI, 'Humanae Vitae', *Encyclical on the Regulation of Birth Control* (1968) [14].

³⁴ Pope Francis, who was elected on 13 March 2013, is yet to make an official pronouncement on his view of the use of contraception, but has been reported to consider the use of condoms permissible to prevent the spread of disease but not to prevent pregnancy. See for instance, Mark Rice-Oakley, 'Pope Francis: the humble pontiff with practical approach to poverty' 13 March 2013, <http://www.theguardian.com/world/2013/mar/13/jorge-mario-bergoglio-pope-poverty> accessed on 28 August 2013.

³⁵ 'Statement of interpretation of the Holy See on the Adoption of the Declaration of Commitment on HIV/AIDS' 27 June 2001, http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010627_declaration-aids_en.html on 2 January 2009.

clergy, while policies against AIDS based on the distribution of condoms have largely failed."³⁶

Religious actors who campaign against the use of condoms and condemn those who choose to use them put the lives, health and safety of those who believe them at risk.³⁷ Where major and established religions (the Catholic Church among them) preach abstinence and unprotected sex within the context of a marriage as the sole means of preventing the spread of human immunodeficiency virus (HIV), they are neglecting to acknowledge that in many countries, married women are one of the groups most vulnerable to contracting the disease, even though their only sexual partner is their husband.³⁸ This approach also ignores the reality that in some contexts, the use of a female condom may be a woman's only defence against the contraction of a STD resulting from a sexual act she has no meaningful choice to abstain from.³⁹ Such expressions are examples of religious expressions potentially threatening the right to health (article 12, ICESCR) and the right to life (article 6, ICCPR).

Manfred Nowak suggests that the prohibition of misinformation about health-threatening activities and restrictions on the advertising of harmful substances such as tobacco are likely to be justified under the public health limitation provided in article 19(3).⁴⁰ Whether the teaching and dissemination of Catholic messages on sexual morality which compromise life and health could be prohibited by application of article 18(3) of the ICCPR on the grounds of the rights of others (to life and health) and public health remains to be tested. But it is clear that religious actors

³⁶ 'Vatican rejects criticism over its anti-condom stance', *EarthTimes* (online), 25 July 2008, www.wwrn.org, accessed on 2 January 2009.

³⁷ See for instance Jennifer Gold, 'Catholic condom ban is helping Aids spread in Latin America: UN', *Christian Today*, 23 October 2007.

³⁸ For instance, a study conducted in India showed that 90% of women infected with HIV were infected by their husbands. See UNAIDS, *HIV Transmission in Intimate Partner Relationships in India* (2009) http://www.unaids.org.in/Publications_HIVTransmissionInIntimatePartnerRelationshipsInIndia.pdf, accessed on 7 November 2011. UNFPA also highlights the feminisation of the HIV epidemic, noting that "Many women are very vulnerable to HIV even though they do not practise high-risk behaviour. In some places, marriage itself is a risk factor." See UNFPA <http://www.unfpa.org/hiv/women.htm>, accessed on 11 November 2009.

³⁹ See for instance, UNAIDS, 'Empowering women to protect themselves: Promoting the Female Condom in Zimbabwe', 29 October 2009, http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2009/20091021_UNFPA.asp accessed on 5 March 2010.

⁴⁰ Manfred Nowak, *CCPR Commentary* (NP Engel Kehl, 2nd ed, 2005), 358.

may threaten human rights, giving states grounds to limit their manifestation of religion.

3.3. Direct human rights duties of non-state actors

There is little question that rights can be and sometimes are interfered with by private actors motivated by their religious beliefs. However, the fact that non-state actors can harm the enjoyment of human rights does not mean that they have a corresponding duty not to do so under international human rights law.⁴¹ It must be asked whether international human rights law imposes obligations directly on non-state actors.⁴² A key point to note in this context is that "for the victims of human rights violations, the effects are the same whoever is responsible for atrocities."⁴³

The UDHR states in its preamble that;

...every individual and every organ of society... shall strive ...to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.⁴⁴

Article 29(1) of that same instrument notes that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible" but is silent as to what these duties are. Negotiators of the UDHR did not question the existence of duties owed by individuals to their societies, but decided that drafting such duties into international law would provide governments with excuses to limit rights, and therefore decided not to list private duties at all.⁴⁵ The notion of the duties owed by individuals to others also finds expression in the African Charter on Human and Peoples' Rights. Article 27 states that:

⁴¹ Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315, 321.

⁴² John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1, 2.

⁴³ Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing, 2001), 51.

⁴⁴ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), preamble.

⁴⁵ Knox, above n 42, 3.

1. Every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.⁴⁶

Article 28 goes on to state that “[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.” Article 29 provides specific duties, most of which would seem to be unenforceable.⁴⁷

Perhaps the nearest articulation of duties owed by rights-holders at the international level is that contained in the preamble to the ICCPR which realises “that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.”⁴⁸

An argument in favour of recognising the direct responsibility of individuals at international law, is found in the logical point that states are effectively organised collections of individuals. The practical need to hold individuals to account for breaches of human rights was affirmed in the Nuremberg Judgments. There it was noted

...that international law imposed duties and liabilities upon individuals as well as upon states has long been recognised... Crimes against international law are committed by men, not by abstract entities, and only by punishing

⁴⁶ Organisation of African Unity, *African Charter on Human and Peoples' Rights* (27 June 1981), article 27.

⁴⁷ Article 29(8) for instance, obligates rights-holders “To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.”

⁴⁸ *International Covenant for Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), preamble. A similar statement is included in the preamble to the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

individuals who commit such crimes can the provisions of international law be enforced.⁴⁹

The fact that non-state actors have some type of duty or obligation under international human rights law is arguably bolstered by the ICCPR's savings clause which states in article 5 that:

Nothing in the present Covenant may be interpreted as implying for any state, *group or person* any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein... [emphasis added].

Article 17 of the ECHR contains a similar savings clause.

These provisions stress that there is no right to harm the rights of others in either the ICCPR or the ECHR, but do not clarify whether there is a positive duty not to do so. The UN General Assembly's 1999 Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms⁵⁰ missed the opportunity to prescribe duties for non-state actors, paying more attention to rights than to responsibilities. The closest statement of duties is in article 10:

No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.⁵¹

Article 16 of that Declaration is explicitly concerned with the role of non-state actors:

Individuals, non-governmental organisations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through

⁴⁹ Jan Arno Hessbrügge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21, 29, quoting the Judgment of the Nuremburg Tribunal, 14 November 1945-1 October 1946, published at Nürnberg, Germany, 1947, 223.

⁵⁰ *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, GA Res 53/144, UN GAOR, 53rd sess, UN Doc A/RES/53/144 (8 March 1999), Annex, article 11.

⁵¹ *Ibid*, article 10.

activities such as education, training and research in these areas to strengthen further, *inter alia*, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities.⁵²

Further, article 19 on duties of non-state actors is broadly phrased:

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.
2. Individuals, groups, institutions and non-governmental organisations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.
3. Individuals, groups, institutions and non-governmental organisations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realised.

Ultimately, while the sentiment that non-state actors have roles and responsibilities to promote rights is widely expressed, the international human rights system emphasises that human rights duties are primarily held by states.

However, customary international law has been argued as a source of some direct duties of non-state actors. Clapham advocates a move away from the traditional narrow focus on states to suggest that non-state actors are bound by customary international law.⁵³ In this respect, he notes that crimes against humanity can be committed by individuals; indeed, article IV of the Convention on the Prevention and Punishment of the Crime of Genocide states that “Persons committing

⁵² Ibid, article 16.

⁵³ Clapham, above n 3, 28.

genocide... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁵⁴ Similarly, the Rome Statute of the International Criminal Court explicitly sets out the court’s jurisdiction over natural persons.⁵⁵

3.3(a) State-centric view

The international system is state-centric, founded by and comprised of states parties to international agreements. That states have obligations to uphold human rights in international law is therefore evident because it is states which are parties to international human rights conventions. State obligations are fundamentally recognised as vertical obligations, that is, obligations owed to the individual regarding the conduct of state actors.⁵⁶

A simplistic view of the international system stresses that states are the main actors in the international system and the only bearers of human rights obligations. Some posit that this simple view is adequate because states are clearly required to protect everyone from any abuse to their rights, and that the result of extending legal duties to non-state actors would bestow on such actors a legitimacy which would undermine the special status of states and dilute their responsibility with respect to human rights obligations.⁵⁷

States are clearly obliged to protect individuals from human rights abuses committed by non-state actors (discussed below) and have duties to create remedies at the national level to ensure that human rights can be claimed against non-state actors.⁵⁸ However when the state fails and its power is usurped by overtly violent (for instance, armed) groups or simply more powerful entities (for instance, some multinational corporations), what practical good are such duties and obligations for victims of human rights abuse in a state that lacks the capacity to prevent breaches

⁵⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277 (entry into force 12 January 1951)

⁵⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, article 25.

⁵⁶ Hessbrügge, above n 49, 25.

⁵⁷ Clapham, above n 3, 25. Clapham outlines this argument to refute it.

⁵⁸ *Ibid* 23.

or provide remedies?⁵⁹ This conundrum highlights the vital relevance of the obligations of non-state actors themselves.

Clapham acknowledges that international law has its origins in the law-making power of states but, rather than upholding a state-centric view, argues that some existing human rights obligations directly attach to non-state actors so that they may be held accountable for violations. In asserting this view, he points to the inherent strength of human rights law to flexibly adapt to changed circumstances.⁶⁰ Clapham's view acknowledges the fundamental place of non-state actors without elevating their status to law-makers.⁶¹

There are several arguments against Clapham's contention: the trivialisation argument, the legal impossibility argument, the policy tactical argument, the legitimisation of violence argument and the rights as barriers to social justice argument.

The 'trivialisation argument' holds that the fact that rights attach only to states is what distinguishes certain acts from mere breaches of criminal law, and that extending human rights obligations into the private sphere would undermine the special nature of human rights.⁶² Clapham responds that the victim of the human rights abuse should not be prejudiced by the 'private' nature of the violence perpetrated against him or her.⁶³ He also faults the premise of the trivialisation argument that would imply that political prisoners are worthy of human rights consideration while victims of domestic violence are not. What is "trivial", he notes, is a subjective decision. Rather than trivialising human rights, Clapham asserts that obligations can apply to non-state actors in such a way that transforms human rights from theoretical ideas into tools that can have practical impact on peoples' lives.⁶⁴

The second argument that Clapham deals with is the 'legal impossibility argument' which asserts that non-state actors simply cannot incur responsibilities under

⁵⁹ The significance of armed groups in respect of duties of non-state actors is discussed by Hessbrügge, above n 49.

⁶⁰ Clapham, above n 3, 32.

⁶¹ Ibid 28.

⁶² Ibid 33.

⁶³ See also Skogly, above n 43, 51.

⁶⁴ Clapham, above n 3, 35.

international law because treaties cannot bind entities which are not party to them.⁶⁵ This argument further stresses that customary international law evolves from the behaviour of states and no other actor.⁶⁶ Clapham responds that non-state actors, such as terrorist groups, armed opposition groups, inter-governmental organisations, non-governmental organisations and individuals, are clearly capable of harming human rights. Though Clapham does not definitely conclude that breaching human rights equates with the duty not to do so in law, he does stress that the term 'human rights' has generated discourse and accepted meanings and significance beyond the realm of states, and that rights carry with them corresponding responsibilities.⁶⁷ By extending Clapham's argument, it becomes clear that the continuing debate as to whether or not non-state actors have duties in human rights law must include religious non-state actors to the extent that they too are able to breach human rights.

The 'policy tactical argument' focusses on the fact that governments may highlight the human rights offences of armed opposition groups to draw attention away from the human rights offences they themselves perpetrate.⁶⁸ Clapham meets this policy argument with a policy response; it is necessary to weigh the risk of governments deflecting attention from themselves with the risk of excluding non-state actors from the ambit of accountability.⁶⁹ In accepting that governments are not the only entity capable of violating human rights, Clapham defends a wider rather than narrower definition of those who can be accused of violating human rights.⁷⁰

The 'legitimisation of violence argument' posits that when armed opposition groups or other rights-damaging actors are attributed with obligations under international law, their use of violence is somehow legitimised. Clapham logically asserts that attributing international legal obligations to such actors does not entitle them to use

⁶⁵ Ibid.

⁶⁶ See however Hessbrügge, above n 49, 34. Hessbrügge argues that obligations for non-state actors are emerging under customary international human rights law.

⁶⁷ Clapham, above n 3, 35-41.

⁶⁸ Ibid 41-42.

⁶⁹ Ibid 41-43.

⁷⁰ Ibid 44.

violence but simply provides grounds to limit their actions. Further, he argues that this legitimising effect is only perception-based and cannot be proved empirically.⁷¹

The final argument Clapham similarly takes issue with is the 'rights as barriers to social justice' argument which suggests that actors are 'legitimised' by being given human rights obligations. In response, Clapham points out that crimes against humanity have been attributed to non-state actors without implying any 'respectability, legitimacy or decency' and that the same can apply to other human rights.⁷² The fact that human rights have traditionally been used to defend the private sphere from public interference is not a defence in favour of keeping the system thus. Rather, Clapham argues that it must be acknowledged that human rights can be abused by non-state actors, and the capacity of human rights law to offer recourse must be harnessed.⁷³ In summary, he explains that once we accept that human rights obligations can apply to protect everyone from everyone, the legitimisation argument becomes nonsensical. Human rights obligations can therefore fall upon states, individuals and non-state actors.⁷⁴

3.3(b) Considerations in determining obligations of non-state actors

In determining whether or not non-state actors have obligations in international human rights law, several 'tests' or considerations have been offered. John Knox proposes a two-part test: "First, they should do no harm: they should be limited to correlative duties and should not provide a basis for converse duties. Second, they should do some good."⁷⁵

Andrew Clapham has suggested that there are three key approaches in the debate. The first, discussed above, underscores the importance of the state-centered system and suggests that it is only states that have human rights obligations in respect of international law. Those who hold this view, Clapham contends, believe that it is adequate for human rights law to demand that states protect everyone from non-state actors who may threaten their rights. To extend obligations beyond the state,

⁷¹ Ibid 46-53.

⁷² Ibid 53.

⁷³ Ibid 56.

⁷⁴ Ibid 58.

⁷⁵ Knox, above n 42, 2.

according to this view, would be to accord legitimacy to non-state actors thereby undermining the authority of the state and diluting its commensurate obligations in respect of human rights.⁷⁶ The second approach conversely argues that states are becoming increasingly irrelevant as the world globalises, and that the increased power of other actors such as corporations and international institutions such as the World Bank should be met with increased attention. While perhaps a practical reflection of reality, this approach is difficult to adhere to given the widely held belief that human rights norms are lent legitimacy by the process that goes towards creating them. According to this reasoning, this approach would also require consideration of whether non-state actors should also be given law-making powers.⁷⁷ Clapham himself offers a third view to balance these two approaches. He begins with the accepted premise that law-making power lies with states (as posited by the first approach), but argues that non-state actors have some human rights obligations. In this approach, Clapham accepts the impact that non-state actors have (as stressed in the second approach) without elevating them to law-making status. His key argument is that existing international human rights law attaches to non-state actors so that they may be held accountable, without giving them any law-making power.⁷⁸ His reasoning is that one can accept that international law is mostly created by processes between states, while also rejecting the assumptions that they are the only bearers of obligations or that public international law is inoperative outside established regimes and tribunals. Rather, public international law can apply in private non-state sectors, without reducing state responsibility or elevating non-state actors.⁷⁹

There are several key considerations overlapping with or touching upon those summarised above that are used in ascertaining the existence and extent of non-state actor obligations in international human rights law. These have been simplified and conceptualised below as the legal personality consideration, the capacity consideration and the role or function consideration respectively.

⁷⁶ Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press, 1993), 25.

⁷⁷ Ibid 26-27.

⁷⁸ Ibid 28.

⁷⁹ Ibid 28-29.

3.3(b)(i) Personality Consideration

Corporations are at the centre of the debate concerning non-state accountability for human rights abuse. Some commentators assert that multinational corporations as legal persons have the same rights and duties under customary international law as natural persons, but this has only been substantiated by limited international practice.⁸⁰ Corporations do enjoy a limited form of legal personality with commensurate rights, meaning that they also have the capacity to bear obligations in respect of them.⁸¹ This viewpoint is supported by Andrew Clapham in the European context who suggests that if an entity

...has sufficient personality and the capacity to enjoy rights under the European Convention on Human Rights, it might surely have enough personality and capacity to be subject to duties under international human rights law. Similarly, if non-governmental organisations can claim their internationally protected rights in multiple fora, they might also have the capacity to be the bearers of appropriate international obligations.⁸²

It should be noted here that this argument only has meaning in the European context given the rights held by certain non-state actors under the ECHR. In contrast, under the ICCPR, only individuals (or groups thereof) have standing to claim human rights.

The key point for Clapham on the personality issue is that there is nothing to suggest that certain obligations in international law cannot attach to non-state actors in the form of legal persons.⁸³ The fact that there is no particular international tribunal with jurisdiction to hear a human rights complaint against a given non-state actor (such as with a corporation) does not mean that that actor has no obligations.⁸⁴ For

⁸⁰ Hessbrügge, above n 49, 43.

⁸¹ Adam McBeth, 'Every Organ of Society: The Responsibility of Non-State Actors for the Realisation of Human Rights' (2008) 30 *Hamline Journal of Public Law and Policy* 33, 74.

⁸² Clapham, above n 3, 82.

⁸³ A legal person is "An entity on which a legal system confers rights and imposes duties. A legal person includes a natural person, and an artificial or statutory body such as a company, or partnership" according to the *Butterworths Concise Australian Legal Dictionary* (Butterworths, 1997) 238.

⁸⁴ Clapham, above n 3, 31.

example, piracy is undoubtedly an international crime but as yet there exists no international tribunal with jurisdiction to try pirates.⁸⁵

The legal personality consideration is tellingly explored in considering the expectations placed upon individuals in international human rights law. Individuals are recognised legal persons. Adam McBeth argues that as such, they are “capable of bearing responsibility under international law directly, without the intermediary of the state.”⁸⁶ In the context of religious organisations, the legal persons who are members of it would therefore bear responsibilities under international law, as would any overarching religious organisation which had established legal personality. The preamble of the ICCPR recognises individual responsibility, noting that the individual has “duties to other individuals and to the community to which he belongs [and] is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.”⁸⁷

In short, non-state actors should be held to account for breaching human rights because they are capable of breaching human rights. Where the individuals or legal persons at issue are acting for religious purposes, their accountability for any resulting breach of the rights and freedoms of others should be taken just as seriously.

3.3(b)(ii) Capacity Consideration

While a rights-holder may experience a breach of his or her human rights at the hands of a non-state actor, this does not necessarily equate to a breach of obligations held by that non-state actor. It has been suggested that whether or not the particular behaviour constitutes a human rights violation depends on the power balance between the actors.⁸⁸ The implication of this suggestion is that a duty or obligation is to be established in proportion to the power or capacity of the non-state entity to impact on human rights.

⁸⁵ Andrea Bottorff, ‘UN considers new international tribunal for piracy trials’, *Jurist* (online) 26 August 2010, <http://jurist.org/paperchase/2010/08/un-considers-new-international-tribunal-for-piracy-trials.php>, accessed on 24 August 2011.

⁸⁶ McBeth, above n 81, 69.

⁸⁷ ICCPR preamble.

⁸⁸ Hessbrügge, above n 49, 27 and 88.

While there is a lack of explicit obligations for non-state actors in international human rights law, Andrew Clapham argues that an alternative source of such obligations exists by virtue of 'general international law', suggesting that "[t]he obligations arise because the international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them."⁸⁹

The practical need to keep non-state actors in check is bolstered by simple consideration of the power that certain non-state entities have. Indeed, some multinational corporations are more powerful and have more resources at their disposal than some states do. Knox is adamant on this point when he says that:

Some private actors, such as multinational corporations and religious institutions, are powerful in their own right, even if they do not command armies. Small terrorist groups can perpetrate mass atrocities... Many human rights need protection from private actors as well as governments.⁹⁰

As an example, one can point to Wal-Mart, which has been the subject of controversy for issues ranging from labour rights to its environmental impact. Sales on a single day exceed the GDP of many countries, with sales of \$419 billion in 2011 alone exceeding the economies of all but the 24 richest nations in the world.⁹¹

An indication of the earning capacity of Christian Churches is evident in the National Council of Churches 2010 Yearbook of American and Canadian churches; financial reporting based on income reports of 64 churches determined that 45 million members contributed USD\$36 billion.⁹² It is interesting to note here that 11 of the 25 largest churches did not report and therefore are not accounted for.⁹³ As an

⁸⁹ Clapham, above n 3, 87.

⁹⁰ Knox, above n 42, 19.

⁹¹ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 1464. Knox points to Zimbabwe which has been a focus of much attention for its appalling human rights record; its annual gross domestic product is only four or five billion dollars, whereas ExxonMobil's profits in 2006 exceeded that figure by nearly ten times. See Knox, above n 42, 46.

⁹² 'Catholics, Mormons, Assemblies of God growing; Mainline churches report a continuing decline' *News from the National Council of Churches* (online), 12 February 2010, <http://www.nccusa.org/news/100204yearbook2010.html> accessed on 21 March 2010.

⁹³ *Ibid.*

indication of the financial assets that may be reflected in this figure, consider that in 2007, 1300 megachurches in the US achieved an annual income of USD\$8.5 billion.⁹⁴

The Church of Scientology is similarly famed for its significant wealth. The gross 'income' or profit margin of the Church of Scientology is not openly available (the Church being also famed for its secretiveness). However, the fact that its members pay significant sums of money for various services (such as auditing) and counselling sessions is well known,⁹⁵ as is the emphasis placed on recruiting celebrities into the Church and the lavish privileges afforded to them.⁹⁶

Money is not asserted here as the being sole source of power, but it is suggested to help. Given that a state's lack of money results in significant disempowerment to perform its functions, a significant amount of money (where managed well) must be acknowledged for its potential power to do good or bad. In as much as money then can be asserted as being necessary to have influence on societies and the individuals within it, the power of certain religious non-state actors can be said to be higher than that of certain state actors. In short, given that some non-state actors have power that exceeds that of some states, they are just as and sometimes more able to both breach human rights and to bear duties not to do so.

3.3(b)(iii) Function Consideration

Adam McBeth points to the expectations of a particular entity's function in according it obligations; "[i]ndividuals and corporations are not expected to act for the general betterment of society in the same way that a state is."⁹⁷ However, the practical realities of non-state actors vis-à-vis the state must be borne in mind. Indeed, Knox notes that in some situations "the nominally nongovernmental actor

⁹⁴ 'America's Biggest Megachurches' *Forbes* (online), 26 June 2009, <http://www.forbes.com/2009/06/26/americas-biggest-megachurches-business-megachurches.html>, accessed on 21 March 2010.

⁹⁵ See for instance 'Cults: Meddling with Minds' *Time Magazine*, 23 August 1968. The Church of Scientology has also been alleged to be related to various income fraud and money laundering activities of the church. Also see 'Scientologists convicted of fraud', *BBC News* (online), 27 October 2009, <http://news.bbc.co.uk/2/hi/8327569.stm> accessed on 20 March 2010.

⁹⁶ See for instance, Martin Bashir, Ethan Nelson and Maggie Burbank, 'How Scientology attracts celebrities' *ABC News* (online) 24 October 2009, <http://abcnews.go.com/Nightline/scientology/scientology-attracts-celebrities/story?id=8871475>. The homepage of the Celebrity Centre in Hollywood is http://www.scientology.cc/en_US/index.html, accessed 20 March 2010.

⁹⁷ McBeth, above n 81, 85.

may be acting so much like a government, or in such close complicity with it, that it should be treated according to the same standards that apply to governments.”⁹⁸

A related viewpoint comes from Robert McCorquodale who posits that the criteria for inclusion in the international system should be whether a given entity ‘participates’ in the international legal system, for in reality some actors have a “direct, influential, and independent participation in the international legal system.”⁹⁹ In exploring obligations of non-state actors, Clapham makes the point that it is often difficult to distinguish between the private and public sphere, leaving a potentially dangerous lacuna in human rights protection.¹⁰⁰ He ultimately argues that “it is dangerous to exclude private violators of rights from the theory and practice of human rights. Dangerous because it could leave victims unprotected and dangerous because it reinforces a deceptive separation of the public and private spheres.”¹⁰¹

Non-state actors such as religious institutions occupy a grey role in this space between the private sphere and public function. On the one hand it could be clearly argued that religious institutions are expected not to act according to self-interest or economic interests in the same way that individuals or corporations are. On the other hand, it is difficult to determine the extent to which the church (or mosque, synagogue or temple etc.) is expected to perform public functions. If religious actors are expected, like governments, to act for ‘the betterment of society’, subjective questions are raised about how their roles are defined given the subjective nature of what is for ‘the betterment of society’ to another. What one actor, may consider repression of women, may be for ‘the betterment of society’ to another. Some may view increased rights for gays and lesbians as a sign of societal advancement, while some religious institutions may view the same as a symptom of its degradation. How does one judge what is expected of the church which earns enormous profits for those who preach to ever-growing and increasingly-generous congregations? The expectations of a given actor to act for the general betterment of society proves not to

⁹⁸ Knox, above n 42, 20.

⁹⁹ Robert McCorquodale, ‘An Inclusive International Legal System’ (2004), 17 *Leiden Journal of International Law* 477, 497.

¹⁰⁰ Clapham, above n 76, 94.

¹⁰¹ *Ibid* 124.

be overly useful, particularly where considerations of the subjectivity of religious beliefs come into play.

3.3(c) Conclusion on direct duties of non-state actors

The current position at international law vis-à-vis non-state actors has not progressed significantly beyond direct duties borne in respect of international criminal law (for instance, for crimes against humanity), and discourse concerning multinational corporations. The issue at hand is the extent to which non-state religious actors have responsibilities in respect of human rights.

The practical obstacles to ensuring that non-state actors have direct human rights obligations are often raised as arguments against their existence. Indeed, a lack of resources undermines the practicality of any proposal for monitoring and enforcing duties on the vast numbers of non-state actors, especially in light of the existing challenge of dealing even with the comparably manageable number of states parties to the human rights conventions. If the mandate of international bodies were to be extended to monitoring private compliance with human rights obligations, the result would be that they would not do so efficiently, nor would they be able to continue carrying out their existing mandates.¹⁰² The practical result is that such monitoring and evaluation could only be performed by a limited number of governments rather than by international human rights bodies.¹⁰³

It is submitted that the administrative challenges or even the administrative impossibility of monitoring and evaluating the human rights duties of non-state actors, does not justify a finding that no such duties are owed. International human rights law is evolving in many directions to reflect the reality that rights are impacted by actors other than states. It is to be hoped that the discourse will widen to explicitly address religious non-state actors, in acknowledgement of the significant influence they can have on the enjoyment of human rights.

The HRC eschews the idea of direct human rights duties for non-state actors under the ICCPR when it says that ICCPR obligations to protect rights of individuals “...do

¹⁰² Knox, above n 42, 46.

¹⁰³ Ibid 47.

not, as such, have a direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.”¹⁰⁴

3.4. Horizontal implementation of human rights by states

3.4(a) Horizontality in international law

The HRC’s General Comment 31 confirms that at the domestic level the state is expected to hold non-state perpetrators of human rights harms responsible for their actions. Where a state fails to properly regulate non-state actors, it will be held accountable for a breach of its obligations at the international level.¹⁰⁵ The basis of a violation in respect of non-state conduct then “is not its complicity in the non-state conduct, but the failure to protect against it.”¹⁰⁶

It is clear that horizontality exists in the international human rights framework. Under the Convention on the Elimination of Discrimination against Women (CEDAW) states parties undertake to “take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.”¹⁰⁷ Article 6 of that same Convention requires states to take action to prevent trafficking in women or exploitation of the prostitution of others, while article 11 requires states to take action to prevent discrimination against women in employment. Similarly, article 4 of the International Convention on the Elimination of Racial Discrimination (ICERD) requires states parties to condemn “all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.”¹⁰⁸ These articles require states to constrain non-state actors, including religious actors, from harming the human rights protected in their respective instruments.

¹⁰⁴ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [8].

¹⁰⁵ McBeth, above n 81, 57.

¹⁰⁶ Hessbrügge, above n 49, 65.

¹⁰⁷ *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), article 2(e).

¹⁰⁸ *International Convention on the Elimination of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), article 4.

The requirement laid down by article 2 of the ICCPR “to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognised in the present Covenant”, and like provisions mentioned above, prescribes a due diligence standard under which a state’s obligation is of conduct not of result.¹⁰⁹ Where a non-state actor harms another’s human rights, the state is not automatically held responsible for that breach. However, it is responsible if it does nothing to prevent or address the resultant harm. To this end, it has been suggested that the state must take ‘reasonable steps’ to prevent violations.¹¹⁰

The HRC stresses that the state is obliged to offer reasonable protection to individuals against actions of non-state actors.¹¹¹ Such a duty is rooted in the state’s commitment to ‘ensure’ recognised rights as prescribed in article 2 of the ICCPR.¹¹² General Comment 31 states that

...the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹¹³

More specifically, article 2 sets out the obligations undertaken by states in adhering to the ICCPR, “[t]o ensure to all individuals within its territory and subject to its

¹⁰⁹ Knox, above n 42, 22-23. See also Human Rights Committee, *General Comment 3: Implementation at the National Level (Article 2)*, CCPR 13th Session (29 July 1981).

¹¹⁰ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 36.

¹¹¹ *General Comment 31*, UN Doc CCPR/C/21/Rev.1/Add.13 [8].

¹¹² *Ibid.*

¹¹³ *Ibid.*

jurisdiction the rights recognised in the... Covenant”¹¹⁴, “[t]o adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the... Covenant”,¹¹⁵ and “[t]o ensure that any person whose rights or freedoms...are violated shall have an effective remedy.”¹¹⁶

The duty to ‘ensure’ ICCPR rights in article 2 of the ICCPR prescribes a duty upon states to protect individuals against interference with their rights by non-state actors.¹¹⁷ Nowak argues that the duty requires positive steps to give effect to rights generally. These ‘duties of performance’, Nowak argues, include the obligation to protect non-state actors from one another in certain cases.¹¹⁸ In issuing General Comment 31, the HRC did not provide clear principles to reveal when such a duty arises. One suggestion is made by Hessbrügge: “to limit the protective ambit of a human right by balancing it with the countervailing human rights of the non-state actor against whom the states would protect.”¹¹⁹

Article 1 of the ECHR requires that states ‘secure’ Convention rights to those within their jurisdiction. This provision has also been interpreted as incorporating obligations to protect the human rights of individuals from harms caused by other non-state actors, including other people.¹²⁰

Similarly, in implementing the ICESCR, General Comments have alluded to states’ obligations to act to prevent breaches of human rights by non-state actors. For instance, the Committee on Economic, Social and Cultural rights in its General Comment 20 on the right of non-discrimination notes that states parties should adopt measures “to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.”¹²¹

¹¹⁴ ICCPR, article 2(1).

¹¹⁵ Ibid article 2(2).

¹¹⁶ Ibid article 2(3).

¹¹⁷ See among others, Joseph, Schultz and Castan, above n 110.

¹¹⁸ Nowak, above n 40, 36-37.

¹¹⁹ Hessbrügge, above n 49, 76.

¹²⁰ Ibid 71.

¹²¹ Committee on Economic, Cultural and Social Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art 2(2) of the International Covenant on Civil and Political Rights)*, UN Doc E/C.12/GC/20 (2 July 2009) [11].

3.4(b) Due diligence: determining the point at which duties are evoked

Having established that the state has obligations at international law to protect individuals from the actions of non-state actors, “the extent of a state’s ‘horizontal’ obligations under the ICCPR is however a much greyer area than the extent of a state’s ‘vertical’ obligations...”¹²² Before a state’s obligations in respect of controlling non-state actors can be addressed, it is necessary to consider the point at which horizontal breaches of rights have taken place. Indeed, the point at which interference is justified is a difficult one to grasp. As Jan Arno Hessbrügge asks; “[i]s one really dealing with a human rights issue if someone makes the conscious decision not to invite another person to dinner because the other person does not share his/her religion or gender?”¹²³ This question of the role of the state in controlling the interactions between non-state actors is discussed in this section.

This principle of due diligence was established by the Inter-American Court case of *Valesquez-Rodriguez*, involving the detention and torture of Manfredo Valesquez, in Tegucigalpa, Honduras, in violation of his right to life and right to liberty. The Court held that:

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹²⁴

It went on to clarify that the state:

...has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to

¹²² Joseph, Schultz and Castan, above n 110, 36.

¹²³ Hessbrügge, above n 49, 75.

¹²⁴ *Velasquez-Rodriguez Case*, Inter-Am Ct HR (Ser C) No 4 (1988), Inter-American Court of Human Rights (IACtHR), 29 July 1988 [172].

impose the appropriate punishment and to ensure the victim adequate compensation.¹²⁵

In this particular case, the Court found that the disappearance of Velasquez was carried out by agents whose actions were imputable to the state, but it stressed that even if this had not been the case, the failure of the state apparatus to act would itself have amounted to a failure to fulfil its duties under the American Convention on Human Rights.¹²⁶

Similarly, in *Osman v UK*, the European Court of Human Rights stated that

“...it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.”¹²⁷

In this case, the applicant’s husband Ali was killed and her son Ahmet was wounded by Paget-Lewis, a teacher at Ahmet’s school who was obsessed with the boy. The applicant claimed that police failed to offer protection despite several assurances that protection would be provided. The court in this case was not persuaded that the police knew or ought to have known that the lives of the applicants’ family were at real and immediate risk from Paget-Lewis, and found no violation of ECHR article 2 (right to life) or article 8 (right to respect for family and private life) in this respect. The court did not dispute that article 2 “enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction”¹²⁸ but the scope of the obligation was contested. The Court stated that “it must be established... that authorities knew or ought to have known at the time of existence of real and immediate risk to life of individual and failed to take measures which, judged

¹²⁵ Ibid [174].

¹²⁶ Ibid [182].

¹²⁷ *Osman v The United Kingdom* (App no 23452/94) ECHR 1998-VIII 3124 (28 October 1998) [116].

¹²⁸ Ibid [115].

reasonably, might have been expected to avoid said risk.”¹²⁹ In this case the Court was of the view that it would be sufficient for the applicant to show that authorities did not do all that they reasonably could be expected to do in the circumstance to avoid the risk. However, on the facts of the case, the Court was “not persuaded that police at any decisive stage knew or ought to have known that lives of applicant’s family at real and immediate risk from third party (Paget-Lewis).”¹³⁰

3.4(c) Horizontality in Case Law

Several cases before the HRC and the European Court of Human Rights support the idea that the human right to freedom of religion and belief has some horizontal effect, such that the state has a duty to protect rights holders from others in the area of their religious life, as opposed to simply being restricted in what it itself can do.¹³¹

The European Court of Human Rights case of *Ärzte für das Leben v Austria*¹³² involved anti-abortion protests in Upper Austria. The applicant association of doctors, ‘Ärzte für das Leben,’ held two demonstrations in 1980 and 1982 respectively to campaign against abortion and for reform of Austrian legislation on the matter. In the 1980 demonstration, the association was to march and hold a religious ceremony. The service was interrupted by pro-choice protestors using loud-speakers and in some incidents throwing eggs and grass at members of the congregation. Special riot-control police units were deployed to separate the opposing groups, allowing the anti-abortion demonstrators to return to the church. The anti-abortion protesters lodged a disciplinary complaint alleging that the police had failed to provide sufficient protection. The Austrian authorities responded that the conduct of the police was irreproachable and in this context highlighted the challenge of preventing verbal abuse and missiles unlikely to cause participants harm at an open-air event.¹³³

¹²⁹ Ibid Summary I(b).

¹³⁰ Ibid.

¹³¹ See for instance, David Robertson, ‘Neutrality between Religious or Neutrality between Religion and Non-Religion?’ in Peter W. Edge and Graham Harvey (eds.) *Law and Religion in Contemporary Society* (Ashgate, 2000) 46 referring to *Otto-Preminger v Austria* and *Kokkinakis v Greece*.

¹³² *Ärzte für das Leben v Austria* (1988) No. 139 Eur Ct H.R. (ser A).

¹³³ Ibid [1-16].

Another demonstration was held in a square in Salzburg in December 1982, due to be followed by prayer in the Cathedral on sight. One hundred policemen formed a barrier around the anti-abortionists to protect them and cleared the square to prevent disruption of the religious ceremonies.¹³⁴ The association again submitted that the Austrian government had provided insufficient protection. The European Court confirmed that Austria had positive obligations in respect of article 11 (freedom of assembly and association) but found no breach in this instance because “[w]hile it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used... In this area the obligation they enter into under article 11 (art. 11) of the Convention is an obligation as to measures to be taken and not as to results to be achieved.”¹³⁵ Austria was held to have taken ‘reasonable and appropriate measures.’¹³⁶

In the HRC case of *L.M.R. v Argentina*,¹³⁷ the author complained on behalf of her mentally disabled teenage daughter who fell pregnant as a result of a rape. After having sought an abortion (as was her right under Argentine law), an abortion was refused by a court as well as by a hospital. The author and her daughter were allegedly subjected to pressure and threats from fundamentalist Catholic groups and the conscientious objection of hospital doctors to performing the abortion, which authorities failed to prevent. Ultimately, a legal abortion did not take place and an illegal abortion was performed.

The author alleged that her daughter was *inter alia*, subject to a violation of article 18 rights, even though that claim concerned the actions of persons inspired by their religious beliefs rather than any interference with the daughter’s right to exercise her own religion or belief. The state party denied that article 18 had been violated, as it argued that the activities were unconnected to the actions of its officials, and that the

¹³⁴ Ibid [19-20].

¹³⁵ Ibid [34].

¹³⁶ Given that no violation of article 11 was found, the court did not need to consider whether a violation of article 13 had taken place.

¹³⁷ Human Rights Committee, Communication No. 1608/2007, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011), (*L.M.R. v Argentina*).

hospital's refusal to perform the procedure was based on medical rather than religious considerations.¹³⁸ On this basis, the HRC considered that the author had not substantiated that part of her complaint which was therefore inadmissible. Nevertheless, the case raises questions about the extent to which a state can and should intervene when the actions of private actors (in this case Catholic anti-abortion pressure groups and doctors) interfere with the rights of another private actor to be free from the manifestation of religious beliefs of non-state actors.

In the HRC case of *Arenz v Germany*, the three authors alleged that they needed protection from other private actors, in this case a political party that had expelled them on the basis of their religion.¹³⁹ The three authors were members of the Christian Democratic Union (CDU), a key political party chaired by German Chancellor Angela Merkel. Their membership was revoked (and their reputations slandered) following a CDU resolution stating that Scientology was incompatible with membership. The authors challenged their expulsion at German courts without success. The court of first instance and the Court of Appeal found in favour of the CDU, because the authors' ideology could be shown to be in conflict with the principles of the CDU and because the authors had violated CDU principles through the manifestation of their religious beliefs. The Court held that any suspension of the rights of the authors was therefore justified by reference to the constitutionally protected interests of the CDU in its proper functioning and the principle of party autonomy.¹⁴⁰

The authors subsequently claimed to the HRC that their expulsion breached several rights, including their article 18 freedom of religion. The state party responded that the 'Scientology Organisation' could not be considered a religious or philosophical community, but an organisation aimed at economic gains and acquisition of power.¹⁴¹ The authors responded that article 18 of the ICCPR applied to newly established religions and minority religions.¹⁴² The state further argued that it was

¹³⁸ Human Rights Committee, Communication No 1138/2002, UN Doc CCPR/C/80/D/1138/2002 (2004), (*Arenz v Germany*). [8.7].

¹³⁹ Ibid.

¹⁴⁰ Ibid [2.4 to 3.5]

¹⁴¹ Ibid [5.4]

¹⁴² Ibid [6.8].

not responsible for the actions of a political party. The HRC disagreed, finding that Germany had an obligation to protect “the practices of all religions or beliefs from infringement and to ensure that political parties, in their internal management, respected the applicable provisions of article 25 of the Covenant.” This reasoning applied to article 18 also.¹⁴³ However, the HRC found the communication inadmissible. It considered that the key issue was whether the state party had violated the authors’ ICCPR rights when its courts gave priority to the principle of autonomy of political parties, and their members’ rights of freedom of association, over the authors’ wish to participate in a political party that excluded them because of their religion. The HRC found the claim inadmissible because the authors had failed to substantiate that the conduct of the German courts amounted to arbitrariness or denial of justice.¹⁴⁴

Horizontality also arose in 2013 in *Eweida and Others v The United Kingdom* before the European Court of Human Rights. These cases involved four applicants whose complaints were joined in 2011, who argued that their employers placed restrictions on their manifestation of religion or belief.¹⁴⁵ Two of the cases concerned private sector employees.

Ms Eweida, a British Airways employee, was prohibited from wearing a crucifix necklace at work. While British Airways allowed dress code exemptions for Sikh turbans and Islamic hijab, it did not extend the same exemption to Ms Eweida’s Christian necklace. However, following significant media coverage of her case, British Airways revised its policies and allowed her to visibly wear her cross, though it refused to reimburse her for wages she had lost as a result of being sent home before the policy was amended. Eweida pursued domestic remedies without success.

Mr McFarlane was a psycho-sexual counsellor who had difficulty reconciling his Christian beliefs regarding homosexuality with his employer’s demand that he

¹⁴³ Ibid [8.5].

¹⁴⁴ Ibid [8.6].

¹⁴⁵ *Eweida and Others v The United Kingdom*, European Court of Human Rights (Nos. 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013.

provide sexual counselling to same-sex couples. He was ultimately dismissed. He also pursued domestic remedies without success.

The European Court of Human Rights found that there was a violation with respect of Ms Eweida; British Airways had accorded disproportionate weight to its corporate image over her religious rights.¹⁴⁶ Regarding Mr McFarlane, the Court found that the employers were trying to uphold non-discrimination policies in their provision of services (namely, the right not to be discriminated against on the grounds of sexual orientation, as is protected by the European Covenant on Human Rights). For this reason, no violation of article 9 rights was found.¹⁴⁷

Several religious and non-religious third parties submitted written comments to the European Court. Most took the approach that it was wrong to force people to choose between their employment and their religion, but the National Secular Society took another approach. It asserted that 'freedom to resign is the ultimate guarantee of freedom of conscience', suggesting that there existed no positive obligation on a state to protect employees against uniform or other requirements.¹⁴⁸

In the cases of Eweida and McFarlane, the acts were carried out by private companies and were therefore not directly attributable to the respondent state. Therefore, the Court had to consider the positive obligations of state authorities to secure rights under article 9 of those within their jurisdiction.¹⁴⁹ It noted that;

Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing

¹⁴⁶ Ibid [64-66] and [94-95].

¹⁴⁷ Ibid [70-74] and [102-110]. There were two other applicants in the case, involving state actors rather than non-state actors. In relation to Ms. Chaplin, a geriatrics nurse who was prohibited from wearing her crucifix necklace, the court found the restriction to be proportional to health and safety considerations. Similarly in the case of Ms. Ladele, a Registrar of Births, Deaths and Marriages who was dismissed for refusing to perform same sex civil unions, the court found no violation given that her workplace was acting in the interests of non-discrimination.

¹⁴⁸ Ibid [77].

¹⁴⁹ Ibid [84].

interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State.¹⁵⁰

The above cases are examples of state responsibility being alleged where religious rights-holders claimed that their freedom of religion and belief had been breached by private actors (as in *Arenz, Ärzte für das Leben* and *Eweida*), as well as cases in which a religious non-state actor had allegedly breached an individual's rights (as alleged in *L.M.R. v Argentina*).

3.4(d) Relationship between religious non-state actors and the state

Determining the point at which private actors trespass on human rights, and the point at which the state should intervene when they do, is further complicated by the fact that some non-state religious actors act in complicity with the state. There are numerous examples not only of religious non-state actors acting with the complicity of states, but also of states acting with the complicity of non-state religious actors. Governments may harness religious precepts (often the dominant one) and form allegiances with religious authorities to legitimise a political agenda or even exploit repression of the rights and freedoms of others for political gains.¹⁵¹

One such example can be found in respect of the Orthodox Church in Moldova. Following his country visit to the Republic of Moldova in September 2011, the Special Rapporteur on Freedom of Religion and Belief noted the privileged status of the Moldovan Orthodox Church. Though he did not fault the significance of the Orthodox Church, he raised concerns about the political influence wielded by it. Specifically he expressed concern about the negative consequences the state's relationship with the Church had on diversity, flagging the grave incompatibility between views expressed by some representatives of the Church and international human rights standards.¹⁵² He also noted that such views often filtered through to

¹⁵⁰ Ibid [84], also referring to *Palomo Sánchez and Others v Spain* [GC] Nos. 28955/06, 28957/06, 28959/06 and 28964/06, [58-61], ECHR 2011.

¹⁵¹ Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 147.

¹⁵² Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/19/60/Add.2 (27 January 2012), 10 [31-33].

state policies. The fact that state authorities would seek approval of the Orthodox Church, effectively gave Orthodox priests de facto powers to veto public gatherings of religious minorities. As examples, he pointed to restrictions imposed on peaceful protests and even non-Orthodox burials. The Special Rapporteur also noted that the state has repressed the rights of sexual minority groups as a result of objections raised by the Orthodox Church.¹⁵³ Indeed, concerns that the close relationship between the Orthodox Church and the state entrenches homophobia in Moldova have been widely raised.¹⁵⁴ From a political point of view it may be considered whether the state is using the non-state actor as a proxy to promote its own agenda or is rather being manipulated by non-state actors to serve theirs. Either way, it is clear that some religious entities enjoy a unique position in society, which they may abuse for rights-contrary ends.

Religious non-state actors may wield ideological influence so fundamental to national and spiritual identity in a given state that they shape government policy directly, or indirectly by swaying public opinion. This fact underlines the need to consider the specific nature of the relationship between a given state and a given religious actor in holding the latter to account. Often the relationship between the state and non-state religious actors may be so close that it is difficult to separate the two. A particularly complicating example can be found by looking to the Holy See, a state entity which is almost inextricable from the Catholic Church which it speaks for, wielding influence not only the 0.44 square kilometres it geographically occupies but also beyond, particularly in states with Christian histories or tendencies.

Religious instructions concerning the 'sin' of contraception have filtered into state policy in very real ways. Under the United States administration of George W. Bush for instance, financial aid was denied to any charity or group offering advice on safe sexual practices other than promoting abstinence, even though millions of deaths

¹⁵³ Ibid 10 [35-38, 46].

¹⁵⁴ See for instance, 'Moldova fails to adequately protect lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals from discrimination' (Amnesty International Public Statement, 29 March 2011) available at <http://www.amnesty.org/en/library/info/EUR59/004/2012/en>, accessed 22 June 2012.

had resulted from AIDS contracted through unsafe sexual practices.¹⁵⁵ A related example pertains to the human papilloma virus (HPV), a sexually transmitted disease which can cause cervical cancer. Certain members of the Bush administration opposed making immunisation for HPV widely available on the ground that doing so would encourage premarital sex.¹⁵⁶ The late Christopher Hitchens, enthusiastically critical of religion's "weird obsession with sex", believed that "[t]o accept the spread of cervical cancer in the name of god is no different, morally or intellectually, from sacrificing women on a stone altar and thanking the deity for giving us the sexual impulse and then condemning it."¹⁵⁷

Similarly, the role of religious non-state actors in dictating or at least endorsing government policies can be seen in the role played by Islamic clerics in issuing *fatwas*. As one example, in 2011 the grand mufti of Saudi Arabia issued a *fatwa* asserting that street protests were incompatible with Islam thereby quelling Arab Spring type uprisings from being replicated in Saudi Arabia, demonstrating the role that religious non-state actors can play in bolstering state legitimacy.¹⁵⁸

While the human rights obligations of non-state actors such as corporations have long been discussed at the level of international human rights law, the same discussion is yet to take place in respect of religious non-state actors. However, the potential impact of religious non-state actors on human rights arguably transcends that of non-religious non-state actors. While corporations generally impact on rights via readily identifiable agents in locations where they have tangible interests, religious actors can impact on human rights solely through the messages they convey to an indeterminate number of followers.

Discussions about holding religious actors to account may have to be couched in more careful terms; non-state religious actors assert a moral (and spiritual) authority that non-religious non-state actors (like corporations) have no pretensions to. Indeed, the *raison d'être* of religious non-state actors is to exercise a human right. The

¹⁵⁵ See Kaci Bishop, 'Politics before Policy: The Bush Administration, International Family Planning, and Foreign Policy' (2003 – 2004) 29 *North Carolina Journal of International and Commercial Law Regulation* 521, 521.

¹⁵⁶ Michael Specter, 'Political Science' *The New Yorker*, 13 March 2006, 58.

¹⁵⁷ Hitchens, above n 31, 48.

¹⁵⁸ Ann Elizabeth Mayer, 'Islam and Human Rights' (Westview Press, 2013), 2.

same is not true of most corporations, which can be scrutinised and regulated without the risk of abusing human rights in doing so. Therefore, it may be that extra caution should be exercised in regulating religious bodies compared to non-state actors such as corporations. But the fact that non-state religious actors exist to manifest freedom of religion and belief is not a reason to exempt them from scrutiny in the exercise of that right altogether.

Rights can be interfered with not only be the actions of religious leaders and representatives, but also by their followers. The determination of the extent to which religious actors should be considered complicit in any rights-violating actions of their followers requires that the action be directly imputable to the ideology that inspired it. Where such a link is too readily made, the result would be an unmanageable number of interventions in manifestations of religious beliefs and likely violations of freedom of religion in doing so. But where such a link is never made, the result is that non-state religious actors are not held to account when they should be under human rights law.

3.5. Conclusion

States' obligations to protect human rights from the actions of non-state actors are clear; human rights would be hampered if states had no power to intervene in the actions of non-state actors in protecting individuals from human rights abuses. For this reason, international human rights law expresses the obligation of states to intervene to protect rights holders from attacks on their rights perpetrated by non-state actors. Determining when that interference should take place, and adjudicating on conflicts between rights holders, requires a careful balancing act. As the cases above demonstrate, this balancing act is no easy task, including where manifestations of religion or belief are involved. This challenge is further complicated by the fact that religious non-state actors occupy a unique position in society, capable of both helping and harming the individuals within it. Despite their capacity and the impunity with which many of its agents act, human rights discourse has thus far not given religious non-state actors the same attention it has given other private actors such as corporations. The lack of cases brought by those

who have been victims of rights abuse at the hands of religious actors may perhaps represent a failing of the international human rights framework to present and promote itself as accessible to those whose rights have been violated by religious actors.

Additionally, the fact that horizontality remains a relatively underdeveloped area of international human rights law indicates that complaints about the lack of regulation of major religions are not facilitated. In ensuring due diligence in respect of horizontality, the unique position of some religious entities in some states should be acknowledged and scrutinised. As an initial step towards building momentum in this direction, the current discourse and debate about the human rights responsibilities of non-state actors such as multinational corporations should be extended to include the responsibilities of religious organisations. Increased attention to the issue of direct duties of non-state actors is necessary given the inadequacies of states in fulfilling their duties in relation to the conduct of non-state actors. Such a system requires that states have adequate strength and capacity relative to that of the religious powers that be. Furthermore, rights-holders must be facilitated and empowered to bring actions against the state for its failures to interfere where non-state actors, including religious entities and their agents, breach their human rights.

The doctrine of horizontality means that rights holders have the right to be free from the oppressive exercise of another's religious beliefs. This important right of freedom *from* religion is rarely articulated, and is the focus of the final chapter.

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CHAPTER 4: HIERARCHY OF RELIGION AND BELIEF

*"All animals are equal, but some animals
are more equal than others"*

George Orwell

4.1. Introduction

Here it is asserted that *prima face*, article 18 of the ICCPR is neutral in that it professes to apply to all religions and beliefs equally. This neutrality is essential in upholding the universality of human rights law and to ensure that rights holders are not distinguished between or discriminated against on the basis of their religion or belief. Human Rights Committee General Comment 22 offers a clear statement of this neutrality, expressing emphatically that "article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."¹

Neither 'religion' nor 'belief' has been defined within article 18. Hence, the concept of a 'religion' can stretch to include religions that are not widely recognised. The principle of 'pluralism' (discussed above at 2.5(b)) stands as the necessary check and balance in approaching religion and belief with neutrality. The emergence of new, unusual and confronting religions and beliefs has challenged tolerance throughout human history. Any attempt to classify and determine the legitimacy of old, new, monotheistic, polytheistic, atheistic, traditional, revisionist, animist, indigenous, popular or unpopular beliefs, would compromise the human rights enjoyment of some rights holders, begging the question of which group of believers would be left vulnerable next.

However, justice may not be entirely blind where religion and belief are concerned. International human rights mechanisms are essentially comprised of individuals who are not immune from the challenge of separating the rights that a person has from the beliefs that he or she holds, and whose own biases and beliefs may hamper the task of respecting religions or beliefs or ideas that they do not find respectable. It

¹ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [2].

is asserted in this chapter that, despite the apparent neutrality of article 18, there is a de facto hierarchy of religion and belief within international human rights practice (state practice and international adjudicative practice), with established mainstream religions at the top, new (and therefore currently ‘unusual’) religions below them, and atheists at the bottom. These assumptions are tested below and further explored in the following chapters.

4.2. Established religions on top

Religions that are well established are asserted as occupying the top rung of the hierarchy of freedom of religion and belief at the international level. By ‘well established’ it is loosely meant those religions whose establishment significantly predates living memory and whose numbers are significant enough to be considered ‘mainstream’. Examples include the three key monotheistic Abrahamic religions, Judaism, Christianity and Islam, which all comfortably occupy this level of the hierarchy.

A key reason why certain religions enjoy a high place in the hierarchy is because they often have the respect and support of states. Indeed, there are many states with Christian traditions or Islamic traditions, a few with Buddhist traditions, a couple with Hindu traditions and one country with Jewish traditions. The same is not true for religions that are not yet as established; as yet there are no states with Scientology, Baha’i or Wicca traditions, for instance.² Whether a religion is established is therefore more than a historical fact, and numbers of adherents are more than a reflection of popularity; at the level of international human rights law it is a political advantage. States lobby for recognition of rights for established religions, not only in implementing human rights at the domestic level but also in representing those rights at the international level. The same is not true for newer or less usual religions like Scientology, which has no representatives in international forums. Of course it is no surprise that state representatives throw the weight of

² See The Pew Forum on Religion and Public Life, ‘The Global Religious Landscape; A report on the size and distribution of the world’s major religious groups as of 2010’, December 2012, 12. It is noted that there is no country in the world in which Baha’is, Jains, Shintoists, Sikhs, Taoists, followers of Tenrikyo, Wiccans and Zoroastrians make up the majority of the population.

their support behind the demographic groups that support them; it stands to political reason that states are more often than not sanctioned for their treatment of followers of minority religions, rather than majority religions. What is of concern for present purposes is that the bias evident at the level of individual states is mirrored at the international level.³

At a theoretical, normative level, international human rights discourse intends to be neutral. Although the term 'neutral' is understood as being 'not helping or supporting',⁴ there is evidence to suggest that the international rights community actually tends to help and support major religions, firstly by its failure to criticise them. The same has been said of the European level, where courts have been observed to uphold the moral standards of the majority religion or religions with which the majority strongly sympathise, revealing discrimination against minority or 'unpopular' religions.⁵

By way of illustration, the relationship between international human rights bodies and the seat of the Catholic Church can be considered. Of the 2.2 billion people in the world who are Christian, approximately half of them are Catholics.⁶ The Holy See, comprised of the Pope and his curia, conducts the affairs of the Catholic Church. The Special Rapporteur, Mr Abdelfattah Amor undertook a country visit to the Holy See in 1999.⁷ Mr Amor's report discussed the respect and esteem with which the Vatican regarded non-Christian religious traditions including other monotheistic religions such as Islam and Judaism, as well as polytheistic religions such as Hinduism. The report also mentioned Buddhism and traditional religions, and non-Catholic Christian religions. However no such statement of respect was afforded to the 'sects' that the Vatican disapproves of, or to non-religious or atheist beliefs. But in the

³ See also Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001), 71-2. Evans has expressed concern that states have limited the rights of members of minorities, in deference to the religious sensibilities of majority religions who pressure them to do so.

⁴ See Oxford Dictionary online, <http://oxforddictionaries.com/definition/english/neutral>, accessed on 14 February 2013.

⁵ Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 163.

⁶ The Pew Forum on Religion and Public Life, above n 2, 17.

⁷ Mr. Abdelfattah Amor, Special Rapporteur, Report submitted in accordance with Commission on Human Rights resolution 1999/39, UN Doc E/CN.4/2000/65 (15 February 2000).

context of international human rights law, more relevant than any omission or lack of respect for human rights on the part of the Vatican, is the Special Rapporteur's failure to criticise it. Indeed, the Rapporteur's report of his in-country visit to the Vatican reads as a compilation of Vatican declarations and encyclicals on topics ranging from relations with other religions, proselytism, procreation, abortion, and the role of women, without any criticism from the Special Rapporteur for stances which contradict international human rights standards, such as its opposition to the use of condoms against HIV/AIDS, its failure to facilitate access to justice for child victims of abuse, and its views on homosexuality. Rather than highlighting the many points in which the Vatican can be said to be espousing views antithetical to human rights principles and recommending reforms accordingly, Amor instead provided the Vatican with a mouthpiece to convey its messages, failed to challenge them, and abstractly concluded that his visit "enhanced protection of freedom of religion and belief."⁸

In May 2013, a 25-year-old British soldier, Drummer Lee Rigby, was murdered and mutilated with knives and meat-cleavers by two assailants chanting 'Allah Akbar' who claimed to murder their victim for British activities in Muslim states. One of the murderers, still holding the knife he used to murder Rigby, told witnesses that they would never be safe and said 'We swear by almighty Allah we will never stop fighting you.'⁹ Islamic clerics and British Prime Minister David Cameron were quick to emphasise that such an act was un-Islamic. The same response generally occurs at the international level; the refusal to explore any link between Islam and Islamic terrorism is a particularly controversial example of the international community's failure to criticise certain religions. This represents not only a missed opportunity to potentially formulate evidence-based responses to a significant threat to peace and security, but for present purposes is symptomatic of a wider problem. While the United Nations expresses concern over crimes of intolerance and discrimination

⁸ Ibid [179].

⁹ 'Woolwich murder: The suspected attackers', *BBC News*, 23 May 2013, <http://www.bbc.co.uk/news/uk-22636624> accessed on 23 May 2013.

practiced in the name of religion,¹⁰ and has no hesitancy in labelling Muslim, Christian or Jewish victims, it will not label perpetrators according to major religions even where they voraciously label themselves thus. Questions are therefore raised as to the extent to which a person can self-identify according to his or her beliefs at the international level.

In the wake of the September 2011 terrorist attacks in the United States (in which self-identified Islamists killed some 3000 people), the subsequent Security Council Resolution expressed deep concern about terrorism motivated by intolerance and extremism and called upon states to take a range of broad-ranging measures to address linkages between terrorism and transnational crime and other phenomena, but nowhere in its resolution does it mention religion.¹¹ Since then, regardless of how emphatically Islamic terrorists claim to be committing their crimes in the name of Islam, the international community refuses to believe them.¹² This reticence to criticise (which is understandable in the interests of keeping the peace between different people around the globe) will be explored below in the context of hate speech. For present purposes, the fact that it is controversial to ask whether some religions may inspire terrorism may indicate that some religions may be beyond reproach at the level of international human rights law.

This failure to criticise major religions is evident when the relative criticism mounted at minor religious is considered. Scientology is offered below as an example of high persecution met with apparently low protection at the international level. The Church of Scientology is often ridiculed for the implausibility of its beliefs and vilified for its role in criminal activity, yet it is rarely defended. In contrast, the Catholic Church for a long time enjoyed far less scrutiny despite crimes perpetrated by its agents against children on a global scale over a period of time that exceeds the

¹⁰ Human Rights Council Resolution 6/37, Elimination of All Forms of intolerance and discrimination based on religion and belief, 14 December 2007, 3.

¹¹ United Nations Security Council Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, on 28 September 2001, UN. Doc. S/RES/1373 (2001).

¹² Security Council Resolution 1624, which emerged two months after the 2005 terrorist bombings in London, stressed the importance of religious society, condemned the 'indiscriminate targeting of different religions', and spoke of the need to 'prevent the subversion of educational, cultural and religious institutions by terrorists and their supporters'. However, it did not explicitly condemn terrorist acts committed in the name of religion. See United Nations Security Council Resolution 1624, Adopted by the Security Council at its 5261st Meeting, on 14 September 2005, UN. Doc S/RES/1624 (2005).

existence of the Church of Scientology.¹³ The complacency of the Catholic Church towards the Holocaust and the assistance it rendered to war criminals thereafter is yet to be entirely understood. The Catholic Church's labelling of homosexuality as sinful (and sometimes curable) is rife with discrimination. Its stubborn denial of the scientific evidence that condom use curtails the spread of HIV has a detrimental effect on individuals and communities who trust them.¹⁴ And yet there is seemingly more reticence to attribute these acts to Catholicism in the same way that the sins of Scientologists are attributed to Scientology.

Connected to its failure to criticise major religions is the high concern shown for adherents of those religions, which also indicates a bias at the international level. The Human Rights Council and the UN General Assembly, in expressing concern over increased intolerance and violence, only explicitly mention Islamophobia, anti-Semitism and Christianophobia.¹⁵ The present Special Rapporteur on freedom of religion and belief, Dr Heiner Bielefeldt, makes this same point by noting that several UN resolutions address 'phobias', typically including Islamophobia, Christianophobia and anti-Semitism (or Judeophobia), but make no mention of other phenomena, including 'Bahaiophobia' despite the extreme persecution faced by Baha'is.¹⁶

4.3. New, unusual or emerging religions or beliefs

New and emerging religions (or religions which fall on the 'fringe' of mainstream belief) have experienced high levels of persecution around the world, with members not only excluded from public life but even targeted for violent crime on the basis of

¹³ See for instance, Geoffrey Robertson QC, *The Case of the Pope: Vatican Accountability for Human Rights Abuse*, (Penguin 2010) 14, in which Robertson notes that the first child sex scandal occurred in 153 AD. The Church of Scientology was founded in 1954.

¹⁴ See for instance Geoffrey Robertson QC, *Crimes against Humanity* (3rd edition, Penguin, 2006), 340.

¹⁵ See Human Rights Council Resolution 6/37, Elimination of All Forms of intolerance and discrimination based on religion and belief, 14 December 2007, and UN General Assembly Resolution 66/168, Elimination of all forms of intolerance based on religion and belief, UN Doc. A/Res/66/168, 11 April 2012, 3. Also see UN General Assembly Resolution 65/224, preambular paragraph 9.

¹⁶ Heiner Bielefeldt, 'Freedom of Religion or Belief – a Human Right under pressure' (2012) 1 *Oxford Journal of Law and Religion* 1, 15.

their religion or belief.¹⁷ They often face opposition from the state that impedes their freedom to manifest religion and belief, as well as threats from the public and more established religions that fear losing members to them.¹⁸ Leaders of established religions have also reportedly participated in the kidnapping and forcible ‘deprogramming’ of members of new religious movements.¹⁹ New religions are often seen as having ‘wackier’ or more ‘unusual’ beliefs, whereas older religions are accredited with greater legitimacy, not because their precepts have been rationally substantiated but because the persistence of their own ‘unusual’ convictions has over time made them ‘usual’. This hierarchical approach is evident in the application of limitations by international bodies. In the same way that some belief sets are denied the status of ‘religion’, so too can limitations be applied so as to prevent manifestations of religions or beliefs that are considered by the adjudicating authority to be somehow ‘bad’.²⁰ This malleability of limitations has revealed for example the HRC’s bias against religions or beliefs that are founded on extreme right-wing ideologies, as will be noted in the case study chapter on hate speech below.²¹

The hesitancy of domestic, regional and international courts to limit what some may consider ‘normal’ or to accept what others may consider ‘strange’ entrenches a hierarchy of religion and belief. The result has been that high persecution of members of new religious movements has not been met with the same concern as the persecution of members of more established religions.

¹⁷ Eileen Barker, ‘Why the Cults? New religious movements and freedom of religion or belief’, in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 578-9.

¹⁸ Peter Cumper, ‘The Rights of Religious Minorities: The Legal Regulation of New Religious Movements’, in Peter Cumper and Steven Wheatley (eds), *Minority Rights in the ‘New Europe’* (Kluwer Law International, 1999) 166.

¹⁹ Barker, above n 17, 579-80.

²⁰ See for instance Human Rights Committee, *Communication No. 570/1993*, UN Doc CCPR/C/50/D/570/1993 (1994), (*MAB and ors v Canada, Admissibility*) [4.2] and Human Rights Committee, *Communication No. 117/1981*, UN Doc Supp No 40 (A/39/40) 190 (1984) (*M.A v Italy*).

²¹ See for instance *M.A. v Italy*, UN Doc Supp No 40 (A/39/40), at 190 (1984) (*M.A. v Italy*) and Human Rights Committee, *Communication No. 736/1997*, UN Doc CCPR/C/70/D/736/1997 (18 October 2000) (*Ross v Canada*).

The terminology used to differentiate established religions from new religious movements, including 'sect' and 'cult',²² has been acknowledged to have pejorative connotations, despite the originally intended neutrality of the term 'sect' at the level of international human rights law.²³ To avoid any stigmatisation, scholars now tend to use the less stigmatising term 'New Religious Movements'.²⁴ The measures taken by some governments to investigate and even curtail the activities of 'sects' and 'cults', in the absence of a definition of either to explain how they are to be differentiated from established, traditional religions, raises concern about the potential violation of freedom of religion and belief.²⁵ What is considered to be a 'cult' by some is to others (including those who follow it) a 'religion', and distinctions made between them in terms of perceived 'dangers' they pose to their members or others, are often not based on empirical evidence.²⁶

Scientology is an example of a 'new' and an 'unusual' religion. Scientology was founded in 1952 by science fiction author L. Ron Hubbard, and has the goal of spiritual enlightenment and freedom.²⁷ Through 'Dianetics', Scientology seeks to overcome early painful experiences through 'auditing' to allow humans to reach their full potential. Humans as spiritual 'thetans' are considered to be trillions of years old, meaning that painful experiences may have occurred in previous lifetimes. A Scientologist going through such a process can progress through several levels including 'clear' and on to 'Operating Thetan', being a state higher than a mortal human. Scientology claims to be compatible with other religious beliefs. It prescribes an ethical system and includes specific practices for significant occasions such as

²² See Human Rights Committee, UN Doc. CCPR/C/94/D/1746/2008 (30 October 2008) (*Goyet v France*) [6.3] in which the author claimed that the labeling of the Buddhist Soka Gokkai group to which she belonged as a 'cult' in Parliamentary reports triggered hostility towards her.

²³ Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 85; Lerner, N, *Religion, Beliefs and International Human Rights* (Orbis Books, 2000) 7, 120; and Peter Edge, *Legal Responses to Religious Difference* (Kluwer, 2002) 394. Also see Jeremy T Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003) 189 *Harvard Human Rights Journal* 16, 196, and U.N. Doc. E/CN.4/1996/6(1998), 28, in which former Special Rapporteur Abdelfattah Amor noted that the term 'sect' has a pejorative connotation despite its intended neutrality at international law.

²⁴ Barker, above n 17, 572.

²⁵ Lerner, N, *Religion, Beliefs and International Human Rights* (Orbis Books, 2000) 8.

²⁶ Barker, above n 17, 573.

²⁷ Church of Scientology, www.scientology.org, accessed on 14 April 2011.

weddings, christenings, and ordination into its ministry.²⁸ Scientology claims to be a bridge between Eastern and Western schools of thought, and to use science and technology to improve the lives of its practitioners.²⁹ The Church of Scientology is also known for its enthusiastic recruitment of celebrities and controversies over the secretive means by which it administers its finances and its ideology.³⁰

In 1965, the government of the state of Victoria, Australia, commissioned an official inquiry into Scientology. The report, conducted by Kevin Victor Anderson, Q.C., concluded that “Scientology is a delusional belief system, based on fiction and fallacies and propagated by falsehood and deception.”³¹ This conclusion seems contrary to pluralism, and begs the question of how other religions would have fared under the same scrutiny. Had Anderson been commissioned to inquire into Catholicism, for instance, objective consideration of evidence may not have allowed him to reach a different conclusion. The High Court of Australia took issue with the report in 1983 when it officially recognised Scientology as a religion for tax purposes, and in so doing explicitly defined ‘religion’ broadly.³²

4.3(a) High persecution of Scientologists

Despite its recognition by several states as a religion, Scientology remains an object of ridicule, scepticism and sometimes contempt.³³ Law enforcers have been reluctant to defend Scientologists from the efforts of their family members to forcibly ‘deprogramme’ them, a process aimed at countering indoctrination, sometimes with use of force. One wonders whether attempts by anti-religious families to forcibly deprogramme their loved-one from, for instance, Anglicanism, would be met with

²⁸ Peter Edge, *Legal Responses to Religious Differences* (Kluwer, 2002) 391-393.

²⁹ Church of Scientology, above n 27.

³⁰ See for instance Richard Behar, ‘The Thriving Cult of Greed and Power’, *Time Magazine* (online) 6 May 1991, <http://www.time.com/time/magazine/article/0,9171,972865,00.html>, accessed on 13 April 2011 and Jeremy Vine and John Sweeny, ‘*Scientology and me*’ for BBC Panorama, 14 May 2007.

³¹ Kevin Victor Anderson QC, *Report of the Board of Inquiry into Scientology* (State of Victoria, 1965), Chapter 30, Conclusions. The report is available at <http://www.cs.cmu.edu/~dst/Cowen/audit/andrhome.html>.

³² High Court of Australia, *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120. Recognition for the purposes of tax exemptions were granted to the Church of Scientology in 1980 in France, the United States in 1993, Italy and Germany in 1997, the United Kingdom in 2001, New Zealand in 2002, Taiwan in 2003, in addition to Australia in 1983.

³³ See for instance, Lawrence Wright ‘The Apostate: Paul Haggis v the Church of Scientology’ *The New Yorker* (online), 14 February 2011, http://www.newyorker.com/reporting/2011/02/14/110214fa_fact_wright, accessed on 15 June 2011.

the same indifference. Non-national members of the Church of Scientology were forbidden from entering the United Kingdom until 1980.³⁴ There have also been allegations of widespread and systemic discrimination against Scientologists in Germany, where followers are targeted and defamed by the media, and banned from political parties.³⁵ Some sectors of state government introduced requirements that applicants for positions with the civil service divulge any connection they had with the Church of Scientology.³⁶ The German government responded to growing recruitment of people into Scientology by distributing material in schools warning youth about becoming involved in sects and established a Commission on New Religious Movements which particularly focussed on Scientology. The Commission concluded that there was little danger associated with such groups but nonetheless recommended that legislation be enacted to curtail activities of sects.³⁷

The film 'Valkyrie' was initially banned from being filmed at military sites in Germany because its lead actor (Tom Cruise) was a Scientologist.³⁸ The performance of an American Jazz musician was cancelled in Germany in 2007 when the government learned that he was a Scientologist.³⁹ There have been reports of the use of 'sect filters' to prevent Scientologists from becoming members of many associations and organisations.⁴⁰ Further, authorities condoned the active discrimination against Scientologists, distributing lists of Scientologists who were trying to 'infiltrate' business. Trade associations and Chambers of Commerce distributed leaflets instructing how to 'spot' and exclude Scientologists.⁴¹ Defenders

³⁴ Peter Cumper, 'Religious Liberty in the United Kingdom' in Johan Van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Martinus Nijhoff Publishers, 1996) 221.

³⁵ Sue Taylor, Church of Scientology, International, 'Scientology' (paper presented at the International Coalition for Religious Freedom Conference on "Religious Freedom in Latin America and the New Millennium", Sheraton Mofarrej Hotel, Sao Paolo, Brazil, October 10-12, 1998). Paper available at <http://www.religiousfreedom.com/conference/brazil/taylor.htm>

³⁶ Cumper, above n 18, 171.

³⁷ James T Richardson and Valerie A Lukes, 'Legal considerations concerning new religious movements in the 'New Europe', in Peter Cumper and Tom Lewis, *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar Publishing, 2012) 295-296.

³⁸ See 'Germany imposes ban on Tom Cruise', *BBC* (online), 26 June 2007, <http://news.bbc.co.uk/2/hi/6240312.stm?lsm>, accessed on 16 June 2011.

³⁹ See for instance, Emine Saner, 'Germany 1, Scientology 0', *Guardian* (online), 27 June 2007, <http://www.guardian.co.uk/world/2007/jun/27/germany.features11>, accessed on 16 June 2011.

⁴⁰ See *Human Rights Report: Germany*, US Department of State 2008 (25 February 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119081.htm>, accessed on 16 June 2011.

⁴¹ Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief: A World Report* (Routledge, 1997), 312-313.

of the rights of Scientologists did not pass up the opportunity to highlight that in this particular state, such measures were once upon a time targeted not at Scientologists but at Jews.⁴²

The treatment of Scientologists at the domestic level does not imply that such treatment is condoned at the level of international human rights law. However, there is some evidence to suggest that it is. The three authors in *Arenz v Germany* (discussed above in Chapter 3) had their membership in the Christian Democratic Union (CDU) revoked when it became known to that political party that they were Scientologists.⁴³ Among the state party's challenges to the admissibility of the authors' subsequent complaint to the HRC was that their claim under article 18 of the ICCPR was inadmissible because the 'Scientology Organisation' could not be considered a religious or a philosophical community, but an organisation aimed at economic gains and acquisition of power.⁴⁴ The authors responded that article 18 of the ICCPR applied to newly established religions and minority religions.⁴⁵ The HRC found the case inadmissible. Effectively, the HRC's decision upheld the right of political parties to expel members on the basis of their religion (freedom *not* to associate), over the religious and other human rights of the three authors including their freedom to manifest their religion and belief. One wonders if the same decision would have been made had the authors been expelled from the CDU for being Jewish or Islamic, especially when one bears in mind the political power of the CDU which is not a fringe political party, but is part of Germany's coalition government.

4.3(b) Low protection of Scientologists

Like rights should be afforded to like individuals, and like responsibilities imposed on like entities. However, human rights bodies would seem to draw a large enough distinction between a Catholic individual (or Muslim or Jewish individual) and a Scientologist to the extent that the mistreatment of the latter seems to continue

⁴² See for instance, Frank Rich, 'Show me the money', *New York Times* (online), 25 January 1997, <http://www.nytimes.com/1997/01/25/opinion/show-me-the-money.html?ref=scientology> accessed on 16 June 2011.

⁴³ Human Rights Committee, *Communication No 1138/2002*, UN Doc CCPR/C/80/D/1138/2002 (2004), (*Arenz v Germany*).

⁴⁴ *Ibid* [5.4]

⁴⁵ *Ibid* [6.8].

relatively unchecked. The 'Thetan' (the everlasting spirit of Scientology) seems to be treated with more scepticism and ridicule than the Holy Ghost (the divine spirit of Catholicism). The wealth and power of the Church of Scientology seems to be viewed with more suspicion and disdain than the far larger fortune acquired by the Catholic Church. And significantly, the evils perpetrated by Scientologists seem to be considered to reflect on Scientology more than the crimes of Catholics are attributed to Catholicism.⁴⁶

The Universal Periodic Review database of recommendations and voluntary pledges contains no mentions of Scientology.⁴⁷ On the human rights website www.bayefsky.com,⁴⁸ a search of the word 'Christianity' reveals 133 documents which mention the word. The word 'Islam' appears in 436 documents. 'Judaism' appears in 50 documents, and Scientology in 6.⁴⁹ The first of these six documents is a state party report that mentions Scientology in the context of the religious affiliation of Canadian children (CRC/C/11/Add.3 (1994)), and the second is a summary of a meeting in which Australia's recognition of Scientology as a religion for tax purposes was noted (CCPR/C/SR.1858 (2000)). The third is a record of a summary meeting praising the Strasbourg Administrative Court ruling, according to which authorities can no longer refuse to register a religious association on grounds unconnected with the requirements of public order (CCPR/C/SR.1599 (1997)). In this context, enquiries were made about the practice in relation to new religions such as Scientology. France's interesting answer to this question is in the fourth document to mention Scientology;

With regard to the Church of Scientology, the national association which supported that church's activities in France had been put into compulsory liquidation following a tax inspection. However, the authorities knew that it had resumed its activities in another form. In any event, the Church of

⁴⁶ Eileen Barker makes a similar point when she notes that the suicide of a 'cult leader' is a more evocative media story than the suicide of an Anglican or Lutheran. See Barker, above n 17, 582.

⁴⁷ <http://www.upr-info.org/database/>, search conducted on 16 February 2013.

⁴⁸ The website www.bayefsky.com, founded by Professor A.F. Bayefsky of York University, Toronto, Canada, provides a range of data on the UN human rights treaty system by its monitoring treaty bodies since their inauguration in the 1970s.

⁴⁹ Search conducted of [ww.bayefsky.com](http://www.bayefsky.com) on 16 June 2011.

Scientology was in no way entitled to claim the status of a church or religious congregation by virtue - *inter alia* - of the Act of 9 December 1905 on the separation of church and State, and thus it enjoyed none of the benefits, notably tax benefits, attached to that status. Some of its members in France had been prosecuted and convicted for endangering other persons and for practising medicine illegally. More generally, sects as propagators of beliefs were not subject to prosecution by the authorities, but the latter could make use of all the legal means at their disposal in cases where a sect, or any of its members, was guilty of practices that were illegal or contrary to public order, for instance abduction of minors, unlawful confinement or acts of violence. In any event, it was clear that such procedures applied only to physical persons and not to organisations. In conclusion, he emphasised that the question of sects was a matter of concern both to French public opinion and to the authorities, and that an observation unit had been set up following a parliamentary report.⁵⁰

It is not clear whether Mr. Faugere intended this answer to appease the HRC's concerns with respect to France's adherence to human rights, or was merely attempting to show France's willingness to own up to its' areas of deficiency. And nor did the HRC seek clarification; it rather remained silent in response to his assertions, presumably tacitly accepting them. Other questions raised by this statement are: what is a 'sect', what is a religion and who determines which is which?

This question emerges in the fifth document to mention 'Scientology', in which Lord Colville of the HRC expressed concern that 'sects' and their followers were being discriminated against in Bavaria in Germany. He questioned the legitimacy of measures taken by the government in circulating an anti-sect policy among schools and requesting headmasters to report on measures they had taken. Further, Lord Colville expressed concern about the presence of 'sect commissioners' and for the fact that as of 1 November 1996, every applicant for a civil service position in Bavaria

⁵⁰ UN Human Rights Committee, *Summary Record of the 1600th meeting: France*, 60th sess., 1600th mtg, UN Doc CCPR/C/SR.1600, (11 November 1997) [29].

had to state whether or not he belonged to the Church of Scientology. While Lord Colville said that he would have no objection to Catholic or Lutheran Churches warning their own congregations about other beliefs, he expressed the view that it was dangerous to use government machinery to issue warnings against such groups, for 'who knew which group might be targeted later?'.⁵¹

The final mention of 'Scientology' concerns Ireland which is giving financial support to Islamic schools in accordance with its obligation to instruct children in the religion of their parents where parents wanted such instruction to be given, but has not done so with respect to new religions such as Scientology.⁵²

The rights of members of the Church of Scientology have been considered more often and more extensively at the European level, though its treatment again suggests differentiated treatment. In the relatively old case of *X and the Church of Scientology v Sweden*, the court permitted an injunction against advertising the E-Meter (an electronic device used in 'auditing' sessions), distinguishing

...between advertisements which are merely 'informational' or 'descriptive' in character and commercial advertisements offering objects for sale. Once an advertisement enters into the latter sphere, although it may concern religious objects central to a particular need, statements of religious content represent, in the Commission's view, the manifestation of a desire to market goods for profit more than the manifestation of a belief in practice.⁵³

The court found that the description of the E-meter as "an invaluable aid to measuring man's mental state and changes in it" fell outside the protection of article 9(1), so the state's injunction did not constitute any violation of those rights. In finding that this matter was one of commercial expression rather than manifestation of religious belief, it is interesting to consider whether an advertisement for the Bible

⁵¹ UN Human Rights Committee, *Summary record of the first part (public) of the 1553rd meeting: Germany*, 58th sess., 1553rd mtg, UN Doc CCPR/C/SR.1553, 23 January 1997 [3].

⁵² UN Human Rights Committee, *Summary record of the 1847th meeting of the Human Rights Committee: Ireland*, 69th sess., 1847th mtg, UN Doc CCPR/C/SR.1847 (12 November 2001) [46].

⁵³ *X and Church of Scientology v Sweden*, Application No. 7805/77, 5 May 1979, 72.

or another religious item of a mainstream religion would also have been viewed as commercial expression.⁵⁴

Since this decision, there have been several more interferences with the article 9 rights of Scientologists, which have been considered more objectively by the European Court of Human Rights. Many have concerned Russian authorities' impeding the practice of new religious movements including the Unification Church, Jehovah's Witnesses and the Church of Scientology. The result has been the European Court issuing staunch criticism of the state's treatment of such groups.⁵⁵ A notable example is *Church of Scientology Moscow v Russia*, concerning the repeated refusal by the state to register the applicant as a legal entity resulting in the court finding a violation of article 11 read in light of article 9.⁵⁶ The European Court criticised authorities in Moscow, explicitly stating "...in denying registration to the Church of Scientology of Moscow, the Moscow authorities did not act in good faith and neglected their duty of neutrality and impartiality vis-à-vis the applicant's religious community...".⁵⁷ Such cases possibly testify to increased application of neutrality towards new religious movements, at least at the European level.

Scientology is not the first religion to have endured ridicule and derision in its quest to be taken seriously. The history of many religions is marked by a parallel history of violence and persecution as its opponents have sought to oppress it, and its followers have killed or died in its defence. At one point or another, all religions are considered 'new' before they become mainstream and their 'unusual' practices become 'usual'. Mormonism is perhaps a good example of a religion that has been through a comparable journey. Joseph Smith published the Book of Mormon in 1830, a 'new revelation' with Christian roots. When Smith first began preaching, he was convicted of "being a disorderly person and an imposter" because of his

⁵⁴ Jeremy Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights', in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspective* (Martinus Nijhoff Publishers, 1996) 328. Also see Cumper, above n 18, 176.

⁵⁵ See Richardson and Lukes, above n 37, 317-8.

⁵⁶ *Church of Scientology Moscow v Russia*, Application No. 18147/02, Judgment 5.4.2007.

⁵⁷ *Ibid* [97].

“pretensions to supernatural powers.”⁵⁸ Smith and his followers relocated to Missouri where they were declared enemies who “must be exterminated or driven from the state if necessary for the public good.”⁵⁹ After mobs terrorised the group, killing several people including Smith himself, the group ultimately fled to Utah and has since grown to number 13 million followers.⁶⁰ In June 2011, Mormon Mitt Romney announced his 2012 United States presidential campaign. The Pew Research Centre found that there was little change in the public’s acceptance of Mormonism since Mr Romney’s earlier run at the Presidency; 25% of Americans would be less likely to support a Mormon presidential candidate in 2011 as opposed to 30% in 2008.⁶¹ However, a marked shift was evident in the 2012 election campaign in which the majority of people who were aware of Romney’s Mormonism were not bothered by it.⁶² The result of there being a Mormon Republican nominee saw an increased willingness among Republican voters with 90% willing to vote for a Mormon candidate, compared to 72% of Democrats.⁶³ Romney did not win the election, but his loss is rarely attributed to his religion. Rather, his candidacy and campaign is hailed as a triumph for mainstream Mormons and symbolic of the end of the discrimination and persecution they had historically faced.⁶⁴ Though the fundamentalist Mormon sects in the USA and Canada that continue to practice the plural (polygamist) marriage preached by Smith still consider themselves to be

⁵⁸ Orma Linford, ‘Mormons, the Law, and the Territory of Utah’ (1979) 23 *American Journal of Legal History* 213, 216.

⁵⁹ Elijah L. Milne, ‘Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion’ (2006) 28 *W. New England Law Review* 257, 263-264.

⁶⁰ Philip Wilkinson, *Religions* (Dorling Kindersley, 2008), 121

⁶¹ See Pew Research Centre, <http://people-press.org/2011/06/02/section-2-candidate-traits-and-experience/#mormon>, accessed on 15 June 2011. Also see ‘They’re here, they’re square, get used to it!’, *The Economist* (online), 15 June 2011, <http://www.economist.com/blogs/democracyinamerica/2011/06/mormons?fsrc=scn/tw/te/bl/theyreheretheyresqu> aregetusedtoit, accessed 16 June 2011.

⁶² See The Pew Forum on Religion & Public Life, ‘Little Voter Discomfort with Romney’s Mormon Religion’, 26 July 2012, <http://www.pewforum.org/Politics-and-Elections/2012-romney-mormonism-obamas-religion.aspx>, accessed on 13 February 2013.

⁶³ Gallup Poll of June 7 – 10, 2012, available at <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidates.aspx>.

⁶⁴ See for instance Sheryl Gay Stolberg, ‘For Mormons, a cautious step toward mainstream acceptance’, *New York Times*, 7 November 2012, http://www.nytimes.com/2012/11/08/us/politics/at-least-a-degree-of-validation-for-mormons.html?pagewanted=all&_r=0, accessed on 13 February 2013.

legally and socially persecuted,⁶⁵ mainstream Mormonism seems to have been 'normalised' and widely accepted and respected.

The same is not yet true of Scientology, perceptions of which are yet to be considered in polls and open adherents of which are yet to run for office. In the meantime at the international level, the persecution of and discrimination against its followers has not been met with the same concern that persecution and discrimination of followers of established religions has.

The above commentary is not intended as a defence of The Church of Scientology. That institution has apparently been embroiled in high-level crimes involving conspiracies to silence dissenters and repress information which indeed raise serious human right concerns.⁶⁶ However, it is asserted that its members have just as much entitlement to protection of their freedom of religion and belief as members of other religions and religious institutions, including those that may also be criminally culpable.

4.4. Atheists at the bottom

The 'heathens' and 'heretics' of history have long been persecuted by religious and political powers. Today, the plight of atheists (understood here as being persons who believe that there is no supreme being or beings) has abated since the days when they were widely persecuted and put to death more often than they are today.⁶⁷ However, it is contended that the international human rights community affords less freedom of religion and belief to those persons who believe that there is no higher power than it does to those who believe there is.

⁶⁵ See for instance Ben Winslow, 'Judge seems reluctant to toss 'Sister Wives lawsuit', 25 July 2012, <http://fox13now.com/2012/07/25/reality-tv-family-in-court-fighting-for-plural-marriage/>, 'Bountiful leader calls polygamy charge 'religious persecution', <http://www.cbc.ca/news/canada/british-columbia/story/2009/01/08/bc-polygamy-winston-blackmore.html>, 8 January 2009, and Jim Forsyth, 'Polygamist leader, in court outburst, says is persecuted', <http://www.reuters.com/article/2011/07/29/us-polygamy-trial-texas-idUSTRE76S5UR20110729>, 29 July 2011, both accessed on 15 February 2013.

⁶⁶ See Richard Behar, 'The Thriving Cult of Greed and Power', *Time Magazine* (online), 6 May 1991, <http://www.time.com/time/magazine/article/0,9171,972865,00.html>, accessed on 13 April 2011. For several additional resources documenting allegations of crimes committed by the Church of Scientology and its agents, see <http://www.scientology-lies.com/crimesindex.html>, accessed on 13 April 2011.

⁶⁷ Today there are seven countries where atheists can be put to death for expressing their beliefs or defecting from the mainstream religion of the state (Afghanistan, Iran, Maldives, Mauritania, Pakistan, Saudi Arabia and Sudan).

4.4(a) High persecution of atheists

As was noted more than a decade ago, “the position of non-believers becomes ever more perilous in a world of increasing religious fervour.”⁶⁸ Indeed, irrespective of whatever legislative protections may be in place to afford equal protection to the religious and the irreligious, many atheists around the world do not publicly admit their belief because they fear being negatively perceived by society.⁶⁹ In 2007, the then Special Rapporteur on freedom of religion and belief issued an Interim Report to the General Assembly on ‘Situations of persons with atheistic or non-theistic beliefs.’⁷⁰ That report considered whether religions or beliefs that are theistic, non-theistic and atheistic enjoy equal protection against discrimination and provides an overview of issues of concern to atheists and non-theists.⁷¹ In this context, the Special Rapporteur expressed concerns over legislation (concerning employment, provision of goods, facilities and services) which exempted certain religious or non-religious groups from equal entitlements, and government consultations which excluded non-religious representatives, thereby risking disproportionate influence of sometimes extreme ‘faith leaders’ in debate.⁷²

In 2012, the International Humanist and Ethical Union released a report titled ‘Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Non-religious’.⁷³ That report surveys the treatment of humanists, atheists and non-religious people in sixty countries around the world, notably by considering laws on apostasy and religious conversion, blasphemy and religious criticism, compulsory religious registration (usually with a list of permissible religions), religious tests for citizenship or participation in civil life, religious control

⁶⁸ Brice Dickson, ‘The United Nations and Freedom of Religion’ (1995) 44 *International and Comparative Law Quarterly* 327, 356.

⁶⁹ See UN Secretary General, *Elimination of All forms of religious intolerance*, UN GAOR, 55th sess., UN doc A/55/280/Add.2 (9 August 2000) [7] in relation to Bangladesh.

⁷⁰ Asma Jahangir, *Elimination of all forms of religion intolerance: interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/62/280 (20 August 2007).

⁷¹ It should be noted here that *equal* treatment is not intended to imply *uniform* treatment. As Arcot Krishnaswami understood in his 1956 report, “since the demands made by various religions upon their members are different and since varying degrees of importance are attached to different manifestations, uniformity of treatment may in reality lead to discrimination against some religions.” See Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices*, UN. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No 60.XIV.2, 49.

⁷² Jahangir, above n 70, [73 – 74].

⁷³ International Humanists and Ethical Union (IHEU), *Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Non-Religious*, (IHEU, 2012).

of family law, and religious control of public education.⁷⁴ In summary, the report finds that:

There are laws that deny atheists' right to exist, curtail their freedom of belief and expression, revoke their right to citizenship, restrict their right to marry, obstruct their access to public education, prohibit them from holding public office, prevent them from working for the state, criminalize their criticism of religion, and execute them for leaving the religion of their parents.⁷⁵

There is ample evidence of the negative perception of atheists in countries across the globe as diverse as Bangladesh and the United States.⁷⁶ In Indonesia, atheism is seen as synonymous with communism. Since the execution of all known communists involved in the attempted coup of 1965, there are few worse labels in that country.⁷⁷ After 1965, most people declared themselves to be either Christian or Islamic given that it "became generally accepted that to be a citizen, one needed to be a religious person."⁷⁸ Convergence of religious affiliation with political affiliation in some parts of the world has also meant that atheists are often reticent to openly admit their beliefs for fear that it will lead to particular perceptions about their political views.⁷⁹

It must be conceded that atheists are not universally disadvantaged. A former Prime Minister of Australia, Julia Gillard, was its first openly atheist head of state. In 'coming out' as an atheist, then Prime Minister Gillard made the following comment:

I am not going to pretend a faith I don't feel. I am what I am and people will judge that. For people of faith, I think the greatest compliment I could pay to them is to respect their genuinely held beliefs and not to engage in some pretence about mine.⁸⁰

⁷⁴ Ibid 10.

⁷⁵ Ibid 9.

⁷⁶ UN Secretary General, *Elimination of All forms of religious intolerance*, UN GAOR, 55th sess., UN doc A/55/280/Add.2 (9 August 2000) [7] in relation to Bangladesh.

⁷⁷ Boyle and Sheen, above n 41, 204.

⁷⁸ Ibid.

⁷⁹ Ibid 248.

⁸⁰ Prime Minister Julia Gillard, interview with Jon Faine, ABC Radio, quoted in John Warhurst, 'Reflections on Gillard's atheism', *Eureka Street*, 16 October 2011, <http://www.eurekastreet.com.au/article.aspx?aeid=28547>, accessed on 13 February 2013.

Gillard's atheism was ultimately not a barrier to her political ascent, which sits in marked contrast to the United States of America, where in 2012 only 54% of people would be prepared to vote for an atheist.⁸¹ Despite the fact that the United States is a country that professes strong tolerance of diversity and stoutly defends the non-establishment clause of its constitution, negative perceptions of atheists are particularly evident in domestic politics. In a Gallup poll held on 6-9 December 2007, respondents were asked whether they could elect a generally well-qualified person to president, who happened to be among a range of categories. Of those polled, 93% said that they would vote for a well-qualified Catholic, 93% for a black candidate, 86% for a woman, 86% for a Hispanic and 80% for a Mormon, and 56% said that they would vote for a homosexual. However, the least popular option was the hypothetical atheist candidate, whom only 46% of respondents could bring themselves to vote for.⁸² The same poll conducted on 25-30 May 2011 yielded similar results; 33% would be less likely to vote for a homosexual and 61% would be less likely to vote for someone who did not believe in God.⁸³ In 2012, though atheist popularity passed 50% for the first time in 2012, they remained the least popular group behind hypothetical black, female, Jewish, Mormon, gay, and Muslim candidates.⁸⁴ This point is not intended to suggest that others should be regarded as negatively as atheists, but is offered merely to show how poorly atheists fare alongside others.

Another illustration of the low opinion Americans tend to have of atheists is evident in the infamous comment of George Bush Senior; "No, I don't know that atheists should be considered as citizens, nor should they be considered as patriots. This is

⁸¹ Gallup Poll of June 7 – 10, 2012, available at <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidates.aspx>. Gillard herself acknowledges that she would be unlikely to have reached the highest echelon of American politics "being atheist, single and childless." See 'Lally Weymouth interviews Australian Prime Minister Julia Gillard', *Washington Post* (online), 8 March 2013, http://www.washingtonpost.com/opinions/lally-weymouth-interviews-australian-prime-minister-julia-gillard/2013/03/08/9d0035c0-8733-11e2-999e-5f8e0410cb9d_story_2.html, accessed 26 June 2013.

⁸² Gallup Poll of 1,027 adults nationwide (6-7 December 2007), 1,027 adults nationwide, available at: <http://www.pollingreport.com/politics.htm>.

⁸³ Pew Research Centre, poll of 1,509 adults nationwide (6-7 December 2007), available at: <http://www.pollingreport.com/politics.htm>.

⁸⁴ Gallup Poll of June 7 – 10, 2012, available at <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidates.aspx>.

one nation under God.”⁸⁵ Richard Dawkins proposed the experiment of replacing the word ‘atheists’ with ‘Jews’, ‘Muslims’ or ‘Blacks’.⁸⁶

These negative perceptions of atheists can translate into discrimination in practical terms. The 2012 Freedom of Thought report released by the International Humanist and Ethical Union found that

...while the rights of all Americans to freedom of religion and speech are protected, the U.S. has long been home to a social and political atmosphere in which atheists and the non-religious are made to feel like lesser Americans or non-Americans. A range of laws limit the role of atheists in regards to public duties, or else entangle the government with religion to the degree that being religious is equated with being an American, and vice versa.⁸⁷

The report goes on to cite several examples of discrimination against atheists in the United States, including bars in seven states on atheists holding public office (Arkansas even prohibits atheists from testifying as witnesses at trial), and discrimination against atheists in the military.⁸⁸

The fact of discrimination and even vilification against atheists of course proves nothing about the rights of atheists at international law; the material point is that it seems to happen with impunity. While international human rights law is concerned with issues such as the vilification of Islam in an age of terrorism and increasing intolerance against Muslims, comments against atheists are made without any apparent legal, political or social consequences at the domestic and international levels.

4.4(b) Low protection of atheists

The negative perception of atheists hails the need for proportionate protection of them, and yet non-believers seem easily forgotten by human rights bodies. A search of all recommendations and voluntary pledges in the UPR database yields 5 results

⁸⁵ George Bush Senior quoted by Robert I. Sherman, *Free Inquiry*, Volume 8, No. 4, Fall 1988, 16.

⁸⁶ Richard Dawkins, *The God Delusion* (Bantam Press, 2006), 43.

⁸⁷ IHEU, above n 73, 54.

⁸⁸ IHEU, above n 73, 55.

when the word 'Jewish' is searched, 7 results for the word 'Christian', 62 results for 'Muslim', no results for 'Scientology' or 'Scientologist' and no results for the word 'atheism' or 'atheist'.⁸⁹ A search of the word 'atheism' on the Universal Human Rights Index of United Nations Documents yields one result, being concluding observations of the Committee on the Convention on the Rights of the Child recommending that China let children choose whether to participate in classes on religion or atheism.⁹⁰ A search of www.bayefsky.com yields 20. The first arises in largely irrelevant asides in the HRC case of *Malcolm Ross v Canada*.⁹¹ The next seven documents are committee considerations of country reports dating from 1981 and before. In one document, Colombia assured the HRC that while Colombia was a Catholic country, it respected the right to atheism.⁹² In another, the CERD Committee asked the Islamic Republic of Iran whether atheism would be considered un-Islamic and therefore affect an individual's civil rights.⁹³ In the following document, the HRC was informed by a representative from Iraq that the choice to believe or not to believe in a religion was a personal matter, but that the law intervened during demonstrations in favour of atheism for the question of faith was "securely anchored in the Arab soul."⁹⁴ In another document, Morocco explained that legislation was in place to make overt acts of atheism criminal offences so as to protect against anarchy and civil war.⁹⁵ The final seven documents are Summary Records from both the HRC and the CERD Committee from 2001 and earlier. Notable among those is that concerning Algeria, in which a government representative acknowledged that people may have been afraid to publicly proclaim atheism in a contemporaneous crisis (a period of violent clashes between security

⁸⁹ See <http://www.upr-info.org/database/>, searched conducted on 13 February 2013.

⁹⁰ Universal Human Rights Index, <http://www.universalhumanrightsindex.org/en/index.html>, search conducted on 16 June 2011, resulted in UN Committee on the Rights of the Child, *Concluding Observations on China (including Hong Kong and Macau Special Administrative Regions)*, 40th sess., UN Doc CRC/C/CHN/CO/2 (24 November 2005) [44].

⁹¹ UN Human Rights Committee, *Report of the Human Rights Committee*, UN GAOR, 56th sess., UN Doc A/56/40 (Vol II, 2000) [5.4].

⁹² *Concluding Observations of the Human Rights Committee: Colombia*, UN Doc CCRP/A/35/40 (1980) [268].

⁹³ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Islamic Republic of Iran*, 26th sess, No.18, UN Doc CERD/A/8418), (1971) [294].

⁹⁴ *Concluding Observations of the Human Rights Committee: Iraq*, UN Doc CCPR A/35/40, (1980) [382].

⁹⁵ UN Committee on the Elimination of Racial Discrimination, *Eleventh Periodic Reports of States Parties due in 1992: Morocco*, UN Doc CERD/C/225/Add.1. (12 May 1993) [70 – 71].

forces and protestors).⁹⁶ In the fifth summary report, Iran explained its cultural policy of purifying the human environment to eliminate the causes of atheism, corruption, prostitution and despotism.⁹⁷

Finally, the last documents of the 20 are summary records for Morocco from 1994 that contain the most in-depth discussion of atheism. In the first of these documents, the CERD Committee acknowledged the delicacy of atheism and atheistic propaganda in a country where Islam was the state religion, but asked whether atheists had freedom of conscience and expression.⁹⁸ In response, the representative of Morocco failed to see any issue with criminalising overt acts of atheism given that states were required to criminalise overt acts of racism. He went on to explain that atheism as a belief was not criminalised but attempts to overthrow a regime by force were.⁹⁹ In response to Morocco's statements, Committee Member Mr. Yutzis expressed his views that while he was not in favour of militant atheism, he was of the belief that fundamentalists rather than atheists threatened stability and that the Moroccan law cast a veil of doubt over the relationship between pluralism and democracy.¹⁰⁰ In the penultimate document, representatives of Morocco explained that it was difficult for some countries to legislate to protect non-believers because of the need to be responsive to public opinion, and that it saw no relationship between 'secularism' and 'atheism'.¹⁰¹ Committee Member Mr. Sherifs raised concern about criminalisation of overt acts of atheism, to which Moroccan delegates responded that atheism, as the negation of Islam, was a threat to the foundations of the state and therefore naturally considered a criminal offence.¹⁰²

In response, Country Rapporteur Mr. Garvalov explained the drafting history of the 1981 Declaration which was elaborated without explicit mention of 'atheism' so as to

⁹⁶ UN Human Rights Committee, *Summary Record of the 1683rd meeting: Algeria*, UN Doc CCPR/C/SR.1683 (28 July 1998) [46].

⁹⁷ UN Committee on Economic, Cultural and Social Rights, *Summary Record of the 7th meeting: Iran (Islamic Republic of)*, UN Doc E/C.12/1993/SR.7 (3 June 1993) [13].

⁹⁸ UN Committee on the Elimination of Racial Discrimination, *Summary Record of the 1020th meeting: Morocco*, UN Doc CERD/C/SR.1020 (29 July 1996) [29].

⁹⁹ *Ibid* [53].

¹⁰⁰ *Ibid* [60-61].

¹⁰¹ UN Committee on the Elimination of Racial Discrimination, *Summary Record of the 1021st meeting: Morocco*, UN Doc CERD/C/SR.1021 (10 March 1994) [6].

¹⁰² *Ibid* [15 and 32].

secure consensus, but that the result was intended to include atheistic beliefs.¹⁰³ Committee Member Mr. de Gouttes asserted that criminalisation of atheism could not be justified by the opinion that it threatened the state and noted that the Committee would wish to further consider Morocco's protection only of Islam, Judaism and Christianity.¹⁰⁴ Mr. Yutzis asserted that Morocco's treatment of atheism as criminal was to invert former claims by other states that religion itself was a destabilising factor with equally negative human rights results. The result, he said, was to put a 'straight-jacket of fear' on those who experienced a crisis of faith.¹⁰⁵

In the final document, a Summary Record of the Committee on Economic, Cultural and Social Rights, Morocco again took the opportunity to explain that atheism was not an acceptable moral position in Morocco and was considered a grave violation of public order.¹⁰⁶

It is heartening to see, at least in the context of these summary reports of 1994, that Committee members expressed concern about the rights of atheists. Such concessions however must be viewed alongside the more frequent and arguably more vigorous defence of other religious beliefs, and in the context of the last decade which has apparently yielded no mentions of atheism.

The lack of discourse about atheism points to a factor that may compound the struggle of atheists to have their freedom of religion and belief recognised at the international level. Despite persistent persecution and discrimination against them, they do not have champions at the international level. Even those states that could be considered to be atheistic do not champion atheism or the rights of atheists as such, as they are generally more concerned with communist political values than they are with atheistic ideological values.

The report that then Special Rapporteur Mr. Abdelfattah Amor produced following his visit to the Holy See in 1999 is evidence of the neglect of atheists at the international level. In discussing the Vatican's respect for non-Christian religious

¹⁰³ Ibid [36 – 38].

¹⁰⁴ Ibid [40].

¹⁰⁵ Ibid [43].

¹⁰⁶ UN Committee on Economic, Cultural and Social Rights, *Summary Record of 8th meeting: Morocco*. 11/05/94, UN Doc E/C.12/1994/SR.8 (11 May 1994) [20].

traditions, no such statement of respect is offered to non-religious or atheistic beliefs. The Vatican's position on non-theistic beliefs is reflected in its opinion that the inclusion of freedom of belief alongside freedom of religion in the 1981 Declaration and in the ICCPR was the result of a political compromise and that the specificity of religion should be “preserved against the danger of it being reduced to culture and, more generally, against the danger of it being denatured.”¹⁰⁷ What is concerning about this report, is not the light it sheds on the Vatican's view that the right of freedom of religion and belief should be out of reach for atheists, but in the failure of the Special Rapporteur to criticise this viewpoint. The Special Rapporteur did not stress to the Holy See that making the enjoyment of the right conditional on the religion or belief of the right holder would be to ‘denature’ freedom of religion and belief in international human rights law.¹⁰⁸

Efforts at the international level to bridge chasms between cultures and ideologies also betray a pro-theistic bias to the exclusion of atheists. Indeed, the fact that the United Nations Alliance of Civilizations (UN AoC) itself does not include non-religious representation is a telling illustration of the low position of ‘atheists’ in the hierarchy of religion and belief.¹⁰⁹ Clearly named in deliberate contrast to Samuel Huntington's ‘Clash of Civilisations’,¹¹⁰ the omission of non-religious groups from the UN AoC undermines the Special Rapporteur's assertion that “[r]epresentatives of non-religious groups should not be deliberately excluded from official consultations where theistic views are prominently taken into account”, and runs the risk of religious bias due to the “numerical strength of religious representatives in

¹⁰⁷ Amor, above n 7, [127].

¹⁰⁸ Here it must be noted that at the time of writing the Vatican's position could change. Newly elected Pope Francis has publicly stated that even atheists can be redeemed by Jesus if they do good. See for instance, Steve Anderson, ‘Pope Francis: Being an atheist is alright as long as you do good’, *The Independent* (23 May 2013), <http://www.independent.co.uk/news/world/europe/pope-francis-being-an-atheist-is-alright-as-long-as-you-do-good-8629390.html>, accessed on 24 May 2013 and Andrew Brown, ‘Pope Francis invites atheists to the table’, *The Guardian* (12 September 2013), <http://www.theguardian.com/commentisfree/andrewbrown/2013/sep/12/pope-francis-invites-atheists-richard-dawkins>, accessed on 12 September 2013.

¹⁰⁹ United Nations Alliance of Civilisations, www.unaoc.org.

¹¹⁰ Samuel P Huntington's work *The Clash of Civilisations and the Remaking of World Order* (Simon & Schuster, 1996) asserted that conflict would increasingly be along religious and ideological lines as opposed to political and economic lines.

comparison to non-hierarchical and non-institutional perspectives from atheists or non-theists.”¹¹¹

In 2012, the King Abdullah Bin Abdulaziz International Centre for Interreligious and Intercultural Dialogue (KAICIID) was launched in Vienna. Primarily funded by the Kingdom of Saudi Arabia and co-founded with the Republic of Austria and the Kingdom of Spain, the Centre has high-level representatives of major world religions (Judaism, Christianity, Islam, Hinduism and Buddhism) on its board of Directors. The UN General Assembly welcomed the establishment of the KAICIID centre in a resolution acknowledging “the important role that the Centre is expected to play as a platform for the enhancement of interreligious and intercultural dialogue.”¹¹² KAICIID was inaugurated in Vienna on the 26 November 2012 with much fanfare, and also some controversy in response to the irony of Saudi Arabia’s enthusiasm to open an inter-religious Centre in Austria in light of its oppression of religious freedom and other human rights at home.¹¹³ The video played at the launch event opened with extracts of a 2008 speech given by King Abdullah Bin Abdulaziz, in which he stated:

Let our dialogue be pro-faith in the face of atheism, virtue in the face of vice, justice in the face of injustice, peace in the face of conflicts and wars, human brotherhood in the face of racism. In God’s name we started, and we seek strength from him.¹¹⁴

No comment was made about the video for its overt insult to atheists, which perhaps would not have been the case had a religion been mentioned in place of atheism, or even had King Abdullah Bin Abdulaziz overtly asserted pro-monotheism in the face of polytheism. Soon after the video was played, UN Secretary General Ban Ki-moon,

¹¹¹ Jahangir, above n 70, [79]. It must be noted that the Parliament of the Council of Europe has praised the UN for establishing the UN AoC, but added that ‘such an initiative should be enlarged to other religions and non-religious groups’ and made a recommendation to that effect. Parliamentary Assembly of the Council of Europe, *Resolution 1805 on Blasphemy, religious insults and hate speech against persons on grounds of their religion*, 27th sitting (29 June 2007) [7].

¹¹² Resolution adopted by the General Assembly, 66/167, Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief, UN Doc. A/Res/66/167, 2, 27 March 2012.

¹¹³ See for instance *Abdullah-Zentrum eröffnet*, ORF News, <http://wien.orf.at/news/stories/2560515/>, 26 November 2012, accessed 15 February 2013.

¹¹⁴ The video is available at the KAICIID homepage, <http://www.kaiciid.org>, accessed on 14 February 2013.

speaking at the launch stated, “I fully support your vision of religion as an enabler of respect and reconciliation.”¹¹⁵ The UN’s support of KAICIID, a clearly pro-faith, anti no-faith entity perhaps reveals a similar pro-religious bias at the international level, with the lower place of atheists relative to their religious counterparts often simply overlooked.

Four months later, also in Vienna, the UN AoC held its 2013 Global Forum from 26-29 February. The Declaration that emerged from that conference acknowledged the KAICIID Centre as a new participant in efforts to enable, empower and encourage dialogue among followers of different religions and cultures. The Declaration also emphasised freedom of religion and belief in the context of religious pluralism, as a key principle driving the UN AoC.¹¹⁶ Jorge Sampaio, the United Nations High Representative for the UN AoC from 2007 to 2013, explained that the UNAOC’s ‘new religious pluralism’ was necessary in shaping appropriate laws on freedom of religion and in guiding interreligious platforms for dialogue.¹¹⁷ Pluralism was emphasised in Chapter 2 as indeed being an essential principle in resolving clashes of rights which should guide an understanding of freedom of religion and belief.¹¹⁸ However, the UN AoC’s approach to pluralism unfortunately favours religious pluralism over pluralism of religion and belief. The resulting risk is that the non-religious and un-religious will continue to be overlooked and relegated to the lowest rung on the hierarchy of religion and belief in determining how that freedom is to be enjoyed. The UN system is of course to be praised for advocating pluralism in its approach to religious dialogue, but its emphasis on religious pluralism over pluralism of religion and belief is insufficiently pluralistic as far as atheists are concerned.

¹¹⁵ See Secretary General SG/SM/14675, Press Release, Secretary General stresses tolerance at the inauguration of the King Abdullah Bin Abdulaziz Centre for Interreligious and Intercultural Dialogue, 26 November 2012, <http://www.un.org/News/Press/docs/2012/sgsm14675.doc.htm>
<http://www.un.org/News/Press/docs/2012/sgsm14675.doc.htm>, accessed on 14 February 2013.

¹¹⁶ See Vienna Declaration on the Alliance of Civilizations, 27 February 2013, http://www.vienna5unaoc.org/fileadmin/user_upload/documents/Vienna_Declaration.pdf, accessed on 4 March 2013.

¹¹⁷ Jorge Sampaio, United Nations High Representative for the Alliance of Civilizations, 2007-2013, *A Journey across the alliance of civilizations* (Alliance of Civilizations, February 2013), p.32.

¹¹⁸ See 2.5(b).

4.5. Conclusion

In Chapter 2, pluralism was asserted as an essential value in the administration of human rights and a touchstone for decision makers to ensure that they value individuals and their multitude of religions and beliefs equally. However, though the aspiration is essential, the feasibility of achieving it in practice is questionable. A UN General Assembly Resolution on combating intolerance based on religion reaffirms principles of equality of religions and beliefs at international law, and recognises “the valuable contribution of people of *all* religions or beliefs to humanity” [emphasis added].¹¹⁹ It also “[s]tresses that the right of freedom of thought, conscience and religion or belief applies equally to all persons, regardless of their religion or belief and without any discrimination as to their equal protection by the law.”¹²⁰ However, it can be questioned whether such equality is truly possible where human decision makers are required to adjudicate on questions of law when complex and ephemeral religious and belief issues are involved. To illustrate this assertion, it is suggested that a court would be unlikely to treat as equal the rights of a Protestant Minister and a Wiccan high priest, or equally respect Jewish rituals of *bah mitzvah* alongside pagan fire-circles. Similarly, the confidentiality of a Scientological auditing session may not be considered akin to that of the Catholic confessional. The British Navy stood by its equal opportunity employment policies in 2004 with the recruitment of its first Satanist;¹²¹ but at the international level would the HRC be prepared to find in favour of a Satanist, where his religious rights conflicted for instance, with those of a Muslim or Catholic or Jew?

The enjoyment of freedom and religion and belief must not be expanded or contracted on the basis of the religion or belief of the rights-holder concerned. However, there is evidence that decision makers at the international level are not immune from the tendency to treat some religions and beliefs with respect and others with scepticism or disdain. Jeremy Gunn is of the view that legal systems explicitly or implicitly ‘rank’ religions, describing some as ‘good’, others as ‘bad’, or

¹¹⁹ General Assembly Resolution 66/167, UN Doc. A/RES/66/167, 27 March 2012, 2.

¹²⁰ General Assembly Resolution 66/168, Elimination of all forms of discrimination and intolerance and of discrimination based on religion or belief, UN. Doc A/RES/66/168, 2, [2].

¹²¹ ‘Navy approves first ever Satanist’, BBC News, <http://news.bbc.co.uk/2/hi/uk/3948329.stm>, 24 October 2004, accessed 15 February 2013.

even acknowledging some as 'religions' while others are 'non-religion'. The result is that monotheistic religions may be considered 'traditional' while polytheistic or non-theistic religions are considered 'primitive' or 'superstitious' while others again (such as the Falun Gong or Scientology) may be considered 'not really religions' but 'sects' or 'cults', benefiting the religions at the top of the ranking and discriminating against those at the bottom.¹²²

Throughout history, all religions have been 'new' at some point, and their beliefs and practices will always be considered 'unusual' for people whose own beliefs or communities offer the benchmark of what is 'usual'. Some have even involved practices that have been considered illegal or commercial. Indeed it was the history of religious and belief persecution that resulted in the human right to freedom of religion and belief. Yet the international human rights community is falling short of its responsibility to protect members of new and unusual religious movements. It is falling short by continuing to distinguish between religions and beliefs despite the absence of such a distinction in international law.

International law gives disproportionate attention to members of more established religions despite several examples of the persecution of members of some new religious movements. There is evident scepticism about their beliefs, despite those beliefs being no less easy to prove or disprove than is the case with mainstream religions. Similarly, the crimes of members of emerging religions are attributed to their religions in a way that does not happen when followers of established religions commit crimes, although "old religions too have been guilty of murder and child abuse."¹²³ Indeed, when some individuals commit heinous crimes in the name of their established religion, rather than attributing the crime to the religion of the criminal, the tendency is often to do the opposite and explicitly disassociate them.

Unlike some religious movements, atheism is not 'new'. For as long as religions and beliefs have emerged there have been those who have refused to adhere to them. And for as long as they have refused, so too have they been persecuted for their

¹²² Jeremy T Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law' (2003) 189 *Harvard Human Rights Journal* 16, 196.

¹²³ Barker, above n 17, 591.

refusal. Despite the extreme persecution and discrimination experienced by atheists (many of whom remain in the closet for fear of being persecuted, prosecuted and in some countries even sentenced to death) the human rights community is yet to give proportionate attention to their plight. In recent years, discrimination on the basis of race, discrimination against women, anti-Semitism, and Islamophobia have all been rigorously discussed at the international level, to the extent that these phenomena have become recognised phrases in rights parlance. As yet, despite the fact of 'discrimination against atheists', it has not received equivalent attention. In this context, Special Rapporteur Heiner Bielefeldt notes that there is too little awareness that freedom of religion and belief covers non-theists, atheists and agnostics.¹²⁴ It is recognised at international law that atheists and non-believers are entitled to equal enjoyment of freedom of religion and belief as their religious counterparts. But for the moment, in practical terms, non-believers are both particularly vulnerable to abuses by religious non-state and state actors, and at risk of being overlooked at the international level when their rights are violated.

The following chapters test the hypothesis that there is a hierarchy of religions and beliefs in the practice of international human rights law in the context of three specific case studies on proselytism, hate speech and the rights of children in relation to those of their parents.

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¹²⁴ Bielefeldt, above n 16, 15.

CHAPTER 5: CASE STUDY - PROSELYTISM

5.1. Introduction

Eskimo: "If I did not know about God and sin, would I go to hell?"

Priest: "No, not if you did not know."

Eskimo: "Then why did you tell me?"

Annie Dillard

Proselytism has been defined as "expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another."¹ To some, proselytism is reminiscent of colonialism and religious crusades;² to others it is an integral manifestation of religious freedom and an obligation deserving of protection.³ Some scholars have asserted that the 'freedom to have or to adopt a religion or belief of his choice' as contained in article 18(2) was intended to protect *against* proselytisers and missionaries.⁴ Alternatively it can be argued that not only are proselytisers enjoying their freedom of religion and belief by proselytising, but also that they are aiding in the enjoyment of others' freedoms by exposing them to a wider range of choices of religion or belief.

Proselytism makes for a particularly insightful case study in exploring the balance that must be achieved in situations of competing rights claims, because it can be considered both a protected manifestation of religious (and belief) freedom, or alternatively, as a prohibited form of coercion. Determining which of these is most accurate in a given situation depends upon the practical point at which coercion by

¹ Tad Stahnke, 'Proselytism and the Freedom to Change Religion in International Human Rights Law' (1999) *Brigham Young University Law Review* 251, 252.

² See for instance, Makau Mutua, 'Returning to my roots: African 'Religions' and the State', in Abdullahi Ahmed An-Na'im, *Proselytisation and Communal Self-Development in Africa*, (Orbis Books, 1999) 170 and Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 55.

³ See for instance, Peter G Danchin, 'Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law' (2008) 49 *Harvard International Law Review* 249, 256-7. Danchin raises the examples of the Catholic church which distinguishes between acts of 'Christian witness' and improper acts of 'proselytism', the Evangelical Lutheran Church in America which regards 'evangelistic outreach' as a religious obligation, Jehovah's Witness and Mormons evangelising and disseminating religious literature, and proselytism by Muslims to non-believers as a religious duty while proselytism aimed at Muslims is prohibited.

⁴ See for instance, K J Partsch, 'Freedom of Conscience and Expression, and Political Freedoms in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York / Guildford: Columbia University Press (1981) 211.

private entities should trigger intervention by the state. The question of how to strike the balance between freedom to manifest religion and belief and the right to be free from coercion is considered in this chapter.

In his 1960 *Study of Discrimination in the Matter of Religious Rights and Practices*, Arcot Krishnaswami foresaw the potential conflicts that could arise between one person's protected right to manifest his or her religion or belief and another person's right to maintain his or hers, a situation which may lead to clashes between various faiths "either because of the contents of the message or the methods used in spreading it."⁵ It is asserted in this chapter that *prima facie* proselytism is a protected manifestation of religion or belief, but that the contents of the message conveyed or the means used to convey it can and should be limited in certain circumstances.⁶ These circumstances are the subject of investigation here.

5.1(a) Religious Perspectives on Proselytism

Arriving at a universal understanding of proselytism is challenging. Religious perspectives on proselytism are as diverse as religions themselves, ranging from those religions that may require it of their adherents through to others which absolutely prohibit it. There are other perspectives that allow proselytism only in one direction, meaning it is acceptable from a particular religion but attracts punishment for proselytisers of other religions. At its most extreme, proselytism has even historically manifested in holy wars, religious crusades and forced conversion on pain of death.

The fact that proselytism continues as a widespread phenomenon today is evidenced by numerous media articles, including one printed by *The Economist* at the end of 2007. The article, titled 'The Battle of the Books' considers which of the "the world's two great missionary religions" – Christianity and Islam – is "winning the battle of the books".⁷ The article discusses the phenomenal spread of Holy Books throughout

⁵ Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices*, UN. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No 60.XIV.2, 39.

⁶ For more on the Krishnaswami study as it relates to proselytism, see Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 140-4.

⁷ 'The Battle of the Books', *The Economist* (online), 19 December 2007, http://www.economist.com/world/international/displaystory.cfm?story_id=10311317

the world through vehicles of globalisation, technology and growing wealth. It mentions that the Bible (a copy of which is given away every second) is available in the native language of 95% of the world's population, and that the Kingdom of Saudi Arabia gives away 30 million copies of the Koran every year. The article acknowledges that receiving a book does not necessarily mean receiving a religion; there is no guarantee that the book will be read, understood or accepted, particularly where factors of illiteracy play a role. Nevertheless, a key conclusion made by the author is that "the urge to spread the Word will spark some of the fiercest conflicts of the 21st century" and that both the Bible and the Koran "will continue to exercise a dramatic influence over human events, for both good and ill."⁸

Echoes of religious warfare are also evident in blatant acts of religiously motivated terrorism with attacks mounted by pious criminals against those who practice a different religion or even practice the same religion differently.⁹ Contrasted with these overtly violent acts are the more underhanded methods evident elsewhere, such as the distribution of counterfeit Korans produced by some Evangelicals in a bid to make Muslims (who value literal recitation of the Koran) doubt their faith.¹⁰ Proselytising tactics are also cultivated in the mainstream; in the United States a Masters Degree is offered at the Southwestern Baptist Theological Seminary in Texas, in which "Degree candidates will obtain more effective skills for reaching and making Christian disciples of people with an Islamic background."¹¹

Ultimately, proselytism must be understood in light of the fact that it is at the core of many major religions.¹² Matthew 28:19-20 instructs Christian readers to "...go and make disciples of all nations, baptising them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded

⁸ Ibid.

⁹ Consider for instance, the frequently reported violent conflicts between Sunni and Shi'ite Muslims, often involving suicide bombings at religious processions. See for instance, Alistair Lawson 'Pakistan's evolving sectarian schism', *BBC News* (online), 4 October 2011 <http://www.bbc.co.uk/news/world-south-asia-12278919>, accessed on 7 November 2011.

¹⁰ 'The Battle of the Books', above n 7.

¹¹ For more information visit the website of the Southwestern Baptist Theological Seminary at http://www.swbts.edu/catalog/page.cfm?id=47&open=4_area

¹² Also see Asher Maoz, 'Proselytism and the Right to Change Religion' in Silvio Ferrari and Rinaldo Cristofori, *Law and Religion in the 21st Century* (Ashgate, 2010) 243-252, for further discussion about types of proselytism, primarily in Christianity, Judaism and Islam.

you.”¹³ In following this instruction, at what point does human rights law protect activities carried out in accordance with this instruction, and at what point are such activities to be deemed to trespass on the rights of others? Rudimentary considerations of missionary activities illustrate the complexity here. Social activism is often an encouraged component of practicing religion, and indeed article 6(b) of the 1981 Declaration explicitly protects freedom “[t]o establish and maintain appropriate charitable or humanitarian institutions.”¹⁴ The active role of the Church in education, healthcare and poverty alleviation particularly in Africa is well recognised.¹⁵ Controversy arises when considering whether missionaries have rights to practice their religion in this way, and the competing rights of the people they are engaging with to be free from any coercive elements in accessing humanitarian services. Actively providing food and healthcare would seem an uncontroversial manifestation of a religious belief, but where such food and/or healthcare is withheld for religious reasons, the meaningful choice of persons in need is undermined.¹⁶

In light of the different understandings and consequences of proselytism, the international human rights community is called upon to distinguish between proselytism that is acceptable and deserving of protection, and proselytism that is ‘improper’ and should be subject to limitations. Thus far, distinctions have been made between acceptable and ‘improper’ proselytism without the dividing line between the two being clearly demarcated. For instance, the European Court of Human Rights in *Kokkinakis v Greece* (discussed below) made its judgment on the basis of this distinction, and yet failed to offer reasoning as to how such a distinction was made, missing a key opportunity to offer clarification.¹⁷

¹³ *Bible*, Matthew 28:19-20.

¹⁴ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN GAOR, UN Doc A/Res/36/55 (25 November 1981).

¹⁵ See for instance www.missionafrica.org.uk/History.html (accessed 16 September 2008).

¹⁶ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [5], makes the point that restricting access to education, medical care, employment or other rights would be tantamount to coercion.

¹⁷ *Kokkinakis v Greece* (1993) No. 260-A Eur Court HR (ser A). See partly concurring opinion of Judge Pettiti, in which he agrees with the court’s conclusion but considered that its’ reasoning could have been usefully expanded to describe the full scope of religious freedom, proselytism and improper proselytism.

5.2. Proselytism as a religious freedom

The fact that a state may have an official or dominant religion does not itself amount to proselytism. However, acts by the state aiming to proselytise that religion would almost always amount to violations of article 18(2), and raise issues with respect of discrimination among those who subscribe to the official or dominant religion and those who have other beliefs or no beliefs. Given that states are not rights holders, further discussion on improper proselytism by states is not entered into here.¹⁸ The issue to be addressed is the extent to which individual rights holders are permitted to proselytise as a manifestation of their freedom of religion and belief, and the extent to which such manifestation must be limited.

5.2(a) Proselytism as a manifestation of religious freedom

In Chapter 1 the nature of the right to manifest religion or belief through worship, observance, practice, teaching and manifestation of religious expression was explored. It is asserted here that proselytism is subsumed in such manifestations, such that *prima facie* it is a protected manifestation of religion and belief. The 1981 Declaration stipulates at article 6(d) that the right to freedom of thought, conscience and religion or belief includes the freedom “[t]o write, issue and disseminate relevant publications in these areas.” Further, article 6(e) adds that the right includes freedom “[t]o teach a religion or belief in places suitable for these purposes.” As early as 1947, Eleanor Roosevelt noted that ‘teaching’ could entail a right to endeavour to persuade others of a particular viewpoint.¹⁹ The HRC notes that “the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, ...the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”²⁰ That the notion of dissemination is also relevant to proselytism is

¹⁸ See however, discussion in Chapter 3(4)(d) on the complicity of the state with the actions of some religious actors. Proselytism by the state arose in the case of *Lautsi v Italy* (European Court of Human Rights, Application No. 30814/06, 3 November 2009), discussed below at 9.4(a).

¹⁹ Economic and Social Council, *Drafting Committee of the Commission on Human Rights, Summary Record of the Twenty-Sixth Meeting*, UN Doc E/CN.4/AC.1/SR.26 (10 May 1948) 4.

²⁰ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [4]. On this point it is interesting to note the dissenting opinion of Judges Foighel and Loizou in *Kokkinakis* (1993) No. 260-A Eur

clear; indeed “dissemination may be directed towards the persuasion of others: this may be either by way of a direct form of information, from person to person, or in a written form.”²¹ Further, in his *Study of Discrimination*, Arcot Krishnaswami understands proselytism simply as a form of “dissemination of religion or belief”.²²

Beyond the 1981 Declaration, article 18(1) of the ICCPR explicitly provides for the right “in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching.” The European Commission case of *Arrowsmith v United Kingdom*, which established a test to determine whether a particular action was a manifestation of a religious belief, was discussed in Chapter 1. That case required that there be a sufficient nexus between the act and the belief.²³ In that case it was found that while the applicant’s distribution of pamphlets was motivated by her beliefs, the pamphlets themselves did not express or promote that belief. Against this test, proselytism by a person whose religious beliefs dictate that he or she should proselytise constitutes a clear manifestation of religion or belief. However, where a person proselytises notwithstanding the fact that his religion does not require him to do so, the situation would still arguably constitute a manifestation of his or her beliefs. In other words, a manifestation is not limited to only those acts a person *must* do in accordance with her religious beliefs.

That proselytism is a feature of religious manifestation was succinctly explained in the case of *Sister Immaculate v Sri Lanka*²⁴ (discussed below) in which the HRC observed that

...for numerous religions... it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual’s manifestation of religion and free

Court HR (ser A), in which they expressed the view that the term ‘teach’ did not entail proselytising activity of Mr Kokkinakis.

²¹ Cornelis D. de Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946-1992)*, (Intersentia, 2000), School of Human Rights Research Series, Vol 5, 122.

²² Krishnaswami, above n 5, 39.

²³ *Arrowsmith v United Kingdom* (Application No 7050/75) Eur Comm HR (1981) EHRR 218.

²⁴ Human Rights Committee, *Communication No. 1249/2004*, UN Doc CCPR/C/85/D/1249/2004 (2005), (*Sister Immaculate v Sri Lanka*) [7.2].

expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.²⁵

5.2(b) Proselytism as Freedom of Expression

Additional to the protection that proselytism finds in article 18 of the ICCPR, there is also a basis for its protection under article 19 concerning freedom of expression. Though proselytism does not find explicit protection in article 19, interpretations of the protection afforded by that right suggest that it also protects missionary activities.²⁶ As discussed in Chapter 1, the inclusion of the words "of all kinds" in article 19(2) of the ICCPR removes doubt that every communicable type of idea and opinion is protected, regardless of how critical or controversial. The inclusion of the words "regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" also highlights the deliberately broad construction of the types and means of expression included in the ambit of article 19, which would suggest that a proselytiser's activities are intended to be subsumed in this paragraph. Indeed, the HRC explains that freedom of expression means freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers²⁷ and that "...the right to freedom of expression does not depend on the mode of expression or on the contents of the message thus expressed."²⁸

The act of proselytising has been claimed for the expression of non-religious ideas, in that "[a]ttempts to convince one's fellow citizens of the merit of a particular idea, such as global warming or the evils of war, is just as much proselytising as is persuasive religious speech [because both] involve an attempt at conversion from one perspective to another."²⁹ According to this rationale, imposition of restrictions on religious speech over other types of persuasive speech would amount to discrimination on the basis of the viewpoint that is being persuaded. The recourse that proselytisers have then to article 19 of the ICCPR is significant; the logic of free

²⁵ Ibid.

²⁶ See for example, Manfred Nowak, *CCPR Commentary* (NP Engel Kehl, 2nd ed, 2005), 450-452.

²⁷ Human Rights Committee, *General Comment 34: Freedom of Opinion and Expression (Art 19)*, UN Doc CCPR/C/GC/34 (29 June 1983), [11-12].

²⁸ Human Rights Committee, *Communication No. 412/1990*, UN Doc CCPR/C/50/2/412/1990 (1994), (*Kivenmaa v Finland*) [7.2].

²⁹ Kevin H. Theriot, Esq. 'Prince or Pauper? Religious Proselytising and the First Amendment' (2009) 3 *University of St. Thomas Journal of Law & Public Policy* 46, 47.

speech is that public discourse should be vigorous. Where it would be nonsensical to suggest that political views can be held but not expressed the same would arguably be true in respect of religious expression, meaning that there is no distinction to be drawn based on the content of the view being expressed. As such, “[t]he invocation by proselytisers of the right to freedom of expression creates tremendous pressure on the targets of proselytism to explain why religious speech should be treated differently from political speech.”³⁰ Indeed, as John Witte and Christian Green acknowledge; “...the religious expression inherent in proselytism is no more suspect than political, economic, artistic, or other forms of expression and should have, at minimum, the same rights.”³¹

The targets of proselytism, furthermore, have the right to ‘receive’ information and ideas of all kinds by virtue of article 19(2) of the ICCPR. The 2009 HRC case *Mavlonov and Sa’id v Uzbekistan*, reiterated that the right to receive information is a vital component of freedom of expression.³² In that case, concerning the failure of the Uzbek government to re-register an independent Tajik newspaper, the HRC found violations of the right of the newspaper’s editor, Mr Mavlonov to impart information, and the right of one of its readers Mr Sa’id, to receive information, the latter right being a corollary of the former.³³

5.2(c) Conclusions on proselytism as a protected manifestation

As was established in Chapter 1, manifestation of religion and belief should be construed as broadly as possible and then be subject to limitations where need be. Also discussed in that chapter was the assertion that international human rights law protects the right to change religion. In *Kokkinakis v Greece* (discussed below), the majority noted that the freedom to change religion (which is expressly protected in article 9 of the ECHR) would likely be a dead letter if the freedom to manifest religion did not include ‘the right to try to convince one’s neighbor’.³⁴ In his partly

³⁰ Danchin, above n 3, 269.

³¹ John Witte Jr and M. Christian Green, ‘Religious Freedom, Democracy, and International Human Rights’ (2009) 23 *Emory International Law Review*, 583, 596.

³² Human Rights Committee, *Communication No. 1334/2004*, UN Doc CCPR/C/95/D/1334/2004 (2009), (*Mavlonov and Sa’id v Uzbekistan*).

³³ *Ibid* [8.4].

³⁴ *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A) [31].

concurring opinion, Judge Pettiti noted that “[f]reedom of religion and conscience certainly entails accepting proselytism, even where it is not respectable. Believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing.”³⁵

Indeed, the second Special Rapporteur on Freedom of Religion and Belief, Abdelfattah Amor, succinctly stated that “proselytism is itself inherent in religion, which explains its legal status in international instruments and in the 1981 Declaration.”³⁶ More recently, the current Special Rapporteur has stressed that freedom of religion and belief entails the right to try to convert others by means of non-coercive persuasion.³⁷ The basis for proselytism in the 1981 Declaration and its manifestation (through teaching or dissemination) under article 18(2) of the ICCPR, as well as its basis as a form of expression under article 19, points to the clear conclusion that proselytism is protected under international human rights law. The more pressing issue to consider is the point at which such manifestation should be limited. In other words, to what extent can proselytisers proselytise?

5.3. Proselytism as ‘improper’ coercion

Special Rapporteur Jahangir notes that the presence of coercive proselytism should trigger criminal or civil action; “...any form of coercion by state and non-state actors aimed at religious conversion is prohibited under international human rights law, and any such acts have to be dealt with within the remit of criminal and civil law.”³⁸ Indeed, the presence of coercion is the point at which the exercise of a right should be limited, for “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”³⁹ The principle of freedom from

³⁵ Ibid, partly concurring Opinion of Judge Pettiti.

³⁶ UN General Assembly, *Implementation of the Declaration on the Elimination of all forms of Religious Intolerance and Discrimination based on Religion or Belief*, 51st Sess, Agenda Item 110(b), UN Doc A/51/542/Add.1 (23 October 1996) [12].

³⁷ UN General Assembly, *Elimination of all forms of religious intolerance*, UN Doc A/67/303 (13 August 2012) 10.

³⁸ UN General Assembly, *Elimination of all forms of religious intolerance*, 60th Sess, Agenda Item 71(b), UN Doc A/60/399 (30 September 2005) [67].

³⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 18(2).

coercion is clear enough, but how it is to be applied to the practice of proselytism is less certain.

As made clear in discussions above, proselytism is *prima facie* a protected manifestation of freedom of religion and belief. As with other protected rights, the freedom afforded to it is subject to exceptional limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Further, limitations can be “only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”⁴⁰ In practice then, certain actions aimed at converting people to a religion or belief should be limited when they cross a particular line in what can be considered acceptable conventional missionary activities or propagation or dissemination of religion or belief, and go beyond what can be protected. The unique nature of proselytism, sometimes as a required activity of a religion, makes the point where it crosses from being a protected religious practice into being coercion that must be limited, extremely difficult to determine. An attempt will be made in this section to draw a line between the two forms.

5.3(a) Jurisprudence on ‘improper’ proselytism

There remains much dispute over where the line should be drawn between acceptable, protected proselytism and forms of proselytism that must be restricted. Additionally, despite the fact that protection of proselytism is a universal standard as discussed above, there are still those who are uncomfortable with it being an acceptable, protectable, manifestation of religion and belief. The European Court of Human Rights offers some guidance, albeit limited, on the distinction between permissible proselytism and that which constitutes coercion that should be prohibited. The various judgments of the Court also reveal the range of viewpoints and the depth of discomfort that proselytism elicits even among jurists.

⁴⁰ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993), [4].

5.3(a)(i) *Kokkinakis v Greece*

The main case on proselytism remains the 1993 European Court of Human Rights case of *Kokkinakis v Greece*. In this case, retired businessman Mr. Kokkinakis and his wife called in at the home of Mrs. Kyriakaki, wife of the cantor at the local Orthodox Church, to engage her in discussion about religion. The pair were prosecuted for proselytising under section 4 of Law no. 1363/1938 which makes proselytism illegal in Greece, and makes offenders liable to a fine, imprisonment and police supervision. Mrs. Kokkinakis was acquitted on appeal but the Court of Appeal upheld the conviction of Mr. Kokkinakis, who had been arrested for proselytising sixty times. Mr. Kokkinakis appealed on points of law to the Court of Cassation without success.

At the European Court of Human Rights, Mr. Kokkinakis argued that Law no. 1363/1938 was incompatible with article 9 of the ECHR, pointing to the difficulty of drawing a line between proselytism that is prohibited by Greek law and permissible manifestations of religious freedom that are protected by the ECHR. Further, Mr. Kokkinakis stressed that such a law would be applied selectively, as it was unlikely to be used to prosecute a proselytiser of the dominant religion in Greece.⁴¹ The Greek government submitted that there was a marked difference between ‘Christian witness’, which is an acceptable form of proselytism and a duty of all Churches and Christians, and “proselytism that uses deceitful, unworthy and immoral means, such as exploiting the destitution, low intellect and inexperience of one’s fellow beings” and should be prohibited.⁴²

The majority of the European Court of Human Rights held that the government’s action vis-à-vis Mr. Kokkinakis was prescribed by law, specifically Law no. 1363/1938. Though the applicant asserted that the domestic law was couched in terms that would catch all non-Orthodox Christians and was too vague for citizens to regulate their conduct on the basis of, the court found that many statutes were not absolutely precise and needed to be vague to the extent that they could keep pace with changing circumstances. Criminal law provisions on proselytism fell into this

⁴¹ *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A) [29].

⁴² *Ibid* [30].

category. Therefore, the measure was ‘prescribed by law’ within the meaning of article 9(2).⁴³

The court also found that the law was ‘in pursuit of a legitimate aim’, namely, the protection of other peoples’ religious rights and freedoms under article 9(2). The court accepted the government’s rationale that if freedom of religion and belief was not protected from influence by ‘immoral and deceitful’ means, then article 9(2) would be rendered wholly nugatory.⁴⁴

However, the European Court did not find that the conviction of Mr Kokkinakis was ‘necessary in a democratic society’. In considering whether Greece’s actions were necessary and proportionate, the court weighed the requirements of the protection of the rights and liberties to hold and maintain a religion or belief against Mr Kokkinakis’ actions. In this regard, the court adopted the Greek court’s reasoning to draw a distinction between ‘bearing Christian witness’ and improper proselytism. The notion of bearing Christian witness, defined as “the continuous act by which a Christian or a Christian Community proclaims God’s acts in history and seeks to reveal Christ as the true light which shines for every man”,⁴⁵ is for some Christians, at the heart of their religious practice, whereas ‘improper proselytism’ was considered to be a corruption or deformation of it, which the court explained, could

...take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.⁴⁶

In the case of Mr Kokkinakis, the court held that calling upon neighbours to discuss religious issues constituted ‘bearing Christian witness’ and as such was protected by article 9 of the ECHR. Therefore, Mr Kokkinakis’ conviction was not found to be necessary in a democratic society for the protection of the rights and freedoms of

⁴³ Ibid [37 – 41].

⁴⁴ Ibid [42 – 44].

⁴⁵ Roman Catholic Church and the World Council of Churches ‘Common Witness and Proselytism’ (1971) 23 *Ecumenical Review* 9 [5.1], http://www.prounione.urbe.it/dia-int/jwg/doc/i_jwg-n3_06.html

⁴⁶ *Kokkinakis v Greece* (1993) No. 260-A Eur Court HR (ser A) [48].

others. The Greek courts referred simply to the wording of Law no. 1363/1938 as evidence of his guilt, but did not cite any facts as evidence that Mr Kokkinakis had used improper means to convince the target of his proselytism. The European Court of Human Rights held that the measures taken against Mr Kokkinakis were not proportionate nor in pursuit of a legitimate aim or necessary for the protection of the rights and freedoms of others, and that Mr Kokkinakis' freedom of religion had therefore been violated.⁴⁷

The individual judgments offered in *Kokkinakis* reveal a spectrum of viewpoints about the nature of proselytism. The most voracious dissent came from Judge Valticos, who expressed the view that proselytism, even that which was not forceful, could never be allowed. Judge Valticos, in asserting that there was no violation of the applicant's rights, went so far as to describe proselytism as "the rape of the beliefs of others," which should not receive the protection of article 9 and could constitute a criminal offence.⁴⁸

Judge Martens, in his partly dissenting view, felt that article 9 did not allow Member States to criminalise proselytism, which would create a particular danger in states where there was a dominant religion. Therefore, while Judge Martens agreed with the majority that article 9 had been breached, for him the issue was not that the law had been inappropriately applied to Kokkinakis, but that the very existence of the law was a violation of article 9. Judge Pettiti was of the same view, concurring with the majority that there had been a breach of article 9 but differing in his view that the relevant criminal legislation itself was contrary to article 9.⁴⁹ Judge Pettiti also expressed disappointment that the court had not seized the opportunity to define the permissible limits of proselytism.⁵⁰

The court's finding in *Kokkinakis v Greece* reinforces that there is a bias in favour of established religions. By anchoring its ultimate decision that article 9 had not been violated on the fact that it was not necessary in a democratic society for the

⁴⁷ Ibid [49].

⁴⁸ Ibid, dissenting Opinion of Judge Valticos.

⁴⁹ Ibid, partly concurring Opinion of Judge Pettiti and Partly dissenting opinion of Judge Martens, particularly [15].

⁵⁰ Ibid, partly concurring opinion of Judge Pettiti.

protection of the rights and freedoms of others, it avoided the need to consider the compatibility of the domestic law itself with Article 9. In doing so, Jeremy Gunn thinks that the court reasoned towards a predetermined result rather than carefully analysing the issues before it. The court's reasoning was disturbing to Gunn, as it treated the conviction of Kokkinakis as though it was something unusual, but, the law had not been applied to Kokkinakis in any unusual way. In fact, he had been convicted under it several times previously and the European Court itself acknowledged the widespread application of the law. The court's finding that the conviction of Kokkinakis was not 'necessary' was not based on the fallacy of the law itself. Rather the decision was individualised to Kokkinakis in that the state could not point to his use of improper means. For Gunn, the disturbing ramification of vindicating Kokkinakis on these grounds meant that the European Court ultimately failed to criticise the Greek anti-proselytism law at issue, which in effect, "had been repeatedly used to incarcerate minority believers".⁵¹

Peter Danchin points out that the reasoning in *Kokkinakis* showed the bias of the European Court towards traditional and established religions over non-traditional or unpopular religions, by tending to silence the latter.⁵² While proselytism laws can be framed in terms of the maintenance of an individual's right to maintain his religion, in actual fact the law is driven rather by a conception of the collective good of the dominant religion.⁵³ The reasoning of dissenting Judge Valticos is tendered as proof of this bias at the European level, as it upheld the religious freedoms of the target(s) who belong to the dominant religion with little regard for Kokkinakis' right to manifest his minority religion. Indeed, Judge Valticos referred to Kokkinakis as a "militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy."⁵⁴

⁵¹ Jeremy Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights', in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Publishers, 1996) 305, 318-325.

⁵² Danchin, above n 3, 275.

⁵³ Ibid.

⁵⁴ *Kokkinakis v Greece* (1993) No. 260-A Eur Court HR (ser A), dissenting opinion of Judge Valticos.

Setting aside the opinions of dissenting judges, a more significant and simple failing of the court can be pointed to. The relevant domestic law itself was not found incompatible with international law, as it was intended only to punish ‘improper proselytism’ and posed no threat to the accepted form of proselytism known as ‘bearing Christian witness.’ While ‘bearing Christian witness’ was explained by the court as ‘true evangelism’ and an essential mission of every Christian, improper proselytism was conversely considered a ‘corruption or deformation’ of evangelism, which may involve offering social or material advantage or even brainwashing and violence. The European Court’s authority for this distinction as to what is allowed and what is incompatible with freedom of religion and belief was a 1956 report of the World Council of Churches.⁵⁵ The authority that this secular human rights court placed in the World Council of Churches in informing its reasoning raises questions of how the actions of a non-Christian proselytiser could ever be considered ‘bearing Christian witness’. The difference drawn between ‘improper’ proselytism and ‘Christian witness’ reveals an obvious bias: the latter applies only to Christians. The implication, whether the European Court meant it or not, is that proselytism of a religion or belief other than Christianity, at least in Greece, might always be considered incompatible with the article 9 of the ECHR, while ‘bearing Christian witness’ will always be compatible.

The spectrum of viewpoints that emerged in the court’s reasoning also hints at the existence of a bias towards minority religions.⁵⁶ Viewpoints ranged from the tolerance of the author’s actions (in the case of the majority), to bias against him on the basis of his religious activities (in the case of Judge Valticos) to disregard for the state’s own bias in this respect (in the case of partly dissenting Judge Martens). The sum of reasoning in this case reveals a bias against non-traditional or unpopular religions in favour of more acceptable religions. Of particular note is the ostensible bias of the majority in unquestioningly agreeing with the state and the World

⁵⁵ Ibid [48].

⁵⁶ Also see Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 166-171.

Council of Churches that 'Christian witness' constitutes permissible proselytism, while everything else may amount to a 'corruption or deformation' of it.⁵⁷

5.3(a)(ii) *Larissis v Greece*

Issues of proselytism in Greece appeared before the European Court of Human Rights again in 1998 in *Larissis v Greece*.⁵⁸ The applicants of the case were Mr. Dimitrios Larissis, Mr. Savvas Mandalarides and Mr. Ioannis Sarandis, followers of the Pentecostal Protestant Church which adheres to the principle that its members have a duty to evangelise. The applicants, all officers in the same unit of the Greek air force, proselytised to subordinate airmen in their unit and to civilians outside the army. The Permanent Air Force Court in the first instance found all three applicants guilty of proselytism for abusing their positions by trying to convert their subordinates into the 'sect' of the Pentecostal Church.⁵⁹ The Courts-Martial Appeal Court upheld most of the convictions but reduced the sentences of the applicants and further ordered that the sentences not be enforced providing that they did not commit further offences in the next three years.⁶⁰ The applicants appealed to the Court of Cassation, which dismissed their appeals.⁶¹

The European Court of Human Rights held that there had been no violation of the applicants' rights with regard to measures taken against them for proselytising to airmen, but did find that there had been a violation of article 9 with regard to the measures taken against them for proselytising to the civilians. The court found it significant that the civilians were not subjected to the same pressures and constraints as the airmen were.⁶² The court held that the prosecution, conviction and punishment of the applicants for proselytism amounted to an interference with their right to manifest their beliefs, but that such an interference was 'prescribed by law' for the legitimate aim of protecting the rights and freedoms of others. On both of these points, the court referred to the earlier decision in *Kokkinakis*, which it found no

⁵⁷ *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A) [48].

⁵⁸ *Larissis and others v Greece* (1998-V) No 65 Eur Court HR (ser A).

⁵⁹ *Ibid* [14-20].

⁶⁰ *Ibid* [21-24].

⁶¹ *Ibid* [25].

⁶² *Ibid* [59].

reason to depart from.⁶³ On considering whether the interference was necessary in a democratic society, the court underlined that article 9 of the ECHR did not protect every act motivated or inspired by belief, and did not for instance protect improper proselytism “such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church.”⁶⁴

In reaching its decision as to whether the interference with the applicants’ rights was justified, the court weighed the requirements of protecting the rights of others against the conduct of the applicants, and in doing so, considered the particularities of the situation regarding proselytism of airmen. In this regard the court found that there had been no breach of article 9, and that the applicants had abused their position of authority. The court asserted that hierarchical structures in the armed forces could colour relations between personnel, such that “what would be seen in the civilian world as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.”⁶⁵

Justice Repik, in his partial dissent in relation to article 7 (the principle of legality), disagreed that the interference with the applicants’ rights was ‘prescribed by law’. Judge Repik asserted that the law was applied inconsistently, was not sufficiently precise and could not guarantee legal certainty nor equality of treatment, and could not protect against arbitrary measures by the authorities responsible for applying the law.⁶⁶ Judge Repik referred to the inconsistency of Greek case law which meant that a believer who tried to spread his religious belief could never be certain whether his conduct was illegal or not.⁶⁷

The majority found abuse of power in respect of all of the airmen who were allegedly targeted by the applicants. Notwithstanding the fact that airman Kafkas testified before the Courts-Martial Appeal that he himself initiated the religious

⁶³ Ibid [39 - 44].

⁶⁴ Ibid [45].

⁶⁵ Ibid [51].

⁶⁶ Ibid, partly dissenting opinion of Judge Repik.

⁶⁷ For the same reasons, under article 9 Judge Repik failed to see how the applicants could have foreseen that their conduct towards the airmen would be illegal, while their conduct to others would not, and was therefore of the opinion that the interference with the applicant’s article 9 rights was not ‘prescribed by law’.

discussions that took place and that the applicants had applied no pressure on him, the court held that he must have felt constrained and obliged to convert to the Pentecostal faith.⁶⁸ It is interesting to speculate on whether religious conversations that an interested Pentecostal airman initiated about religion with his Orthodox Christian superior would also have been construed as improper proselytism by the latter. Article 13(2) of the Greek Constitution states that there shall be '[f]reedom to practice any known religion' and that '[p]roselytism is prohibited'. It is not clear how a 'known religion' is to be construed, though article 3(1) of the Greek Constitution states that "[t]he prevailing religion in Greece is that of the Eastern Orthodox Church of Christ."⁶⁹ It could be inferred that the inherent bias of Greek law towards the traditional Orthodox religion would mean that proselytism would not likely be deemed improper where it entailed discussions about the dominant religion. However, the European Court was not moved by the applicants' assertion that the law was applied discriminatorily in contravention of article 14. On this point, the court held that the applicants did not produce any evidence to suggest that an officer in the armed forces who attempted to convert his subordinates to the Orthodox Church would be treated any differently and accordingly found that no separate issue arose under ECHR article 14 prohibition on discrimination.⁷⁰

Like *Kokkinakis* before it, the scant reasoning offered by the majority evinced its hesitancy to distinguish between improper and acceptable proselytism, and to censure states' attempts to do so when such attempts violated human rights. As with *Kokkinakis*, the ease with which the state's bias was subsumed into its own reasoning is arguably evident in *Larissis*, in which the court did not question the state's understandings of Christian witness, nor its stigmatising use of the term 'sect' for the non-Orthodox religion.⁷¹

⁶⁸ *Larissis* (1998-V) No 65 Eur Court HR (ser A) [53].

⁶⁹ The Constitution of Greece, in the name of the Holy and Consubstantial and Indivisible Trinity, The Fifth Revisionary Parliament of the Hellenes Resolves, <http://www.hri.org/docs/syntagma/artcl25.html>.

⁷⁰ *Larissis* (1998-V) No 65 Eur Court HR (ser A) [68]. This vulnerability of the domestic law to the biases of the majority faith is also hinted at in the reasoning of Judge Repik.

⁷¹ The term 'sect' is discussed in Chapter 4. Also see Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001) 198, in which she notes the repeated use of term 'sect' in *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A).

5.3(a)(iii) Summation of *Kokkinakis v Greece* and *Larissis v Greece*

A summation of these two key cases can be offered as follows. In *Kokkinakis* the majority found that there was a violation of article 9 rights on the basis that the state failed to show how the applicant's proselytism was improper and therefore failed to establish how its interference with the applicant's rights was necessary and proportionate. In *Larissis*, interference with the applicants' rights was found to be necessary in respect of proselytism of subordinate airmen, but not necessary in respect of proselytising to civilians; article 9 was therefore violated in the latter respect only. It is asserted that the reasoning applied in both cases fails to make a clear distinction between proper and improper proselytism or to censure domestic attempts to do so which resulted in a bias in favour of the rights of those adhering to the dominant religion over others. Both *Kokkinakis* and *Larissis* concerned domestic Greek legislation and its application by Greek courts. It is noteworthy that the bias inherent in distinguishing between proselytism that is permissible and that which is illegal along Christian and non-Christian lines remained unchecked by the European Court of Human Rights in both cases. Indeed, the majority in *Kokkinakis* applied this distinction in its own reasoning, taking its guidance from the World Council of Churches.⁷² The taking of guidance from the World Council of Churches would seem to entrench religious bias into the European Court's own reasoning, rather than assist it in making clear rights-based decisions based on the facts before it.⁷³

It is interesting to speculate on whether, if called upon to consider a case in a similar context again, the European Court would itself identify this fallacy to arrive at a more even-handed distinction between protected proselytism and improper proselytism which could stand up to protect the rights of non-Christian proselytisers. Subsequent discourse suggests that the error has been identified, and would not be replicated at the International level. The former Special Rapporteur on

⁷² *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A) [48].

⁷³ The website of the World Council of Churches states that "The World Council of Churches is a fellowship of churches which confess the Lord Jesus Christ as God and Saviour according to the scriptures, and therefore seek to fulfil together their common calling to the glory of the one God, Father, Son and Holy Spirit. It is a community of churches on the way to visible unity in one faith and one Eucharistic fellowship, expressed in worship and in common life in Christ. It seeks to advance towards this unity, as Jesus prayed for his followers, 'so that the world may believe'. (John 17:21)". See <http://www.oikoumene.org/en/who-are-we.html>, accessed on 4 November 2011.

religion and belief conducted a country visit to Greece in 1996. In her report, she noted that proselytism “is itself inherent in religion, which explains its legal status in international instruments and the 1981 Declaration.”⁷⁴ Despite this, she noted that Greece made proselytism punishable under two Acts, and raised concern about their impact on religious freedom in Greece. The Special Rapporteur strongly recommended the removal of these legal prohibitions, which were “inconsistent with the 1981 Declaration” and stressed the need “for greater respect for internationally recognised human rights norms, including freedom to convert and freedom to manifest one’s religion or belief, either individually or in community with others, and in public or private, except where necessary restrictions are provided by law.”⁷⁵ Failing the removal of such prohibitions, the Special Rapporteur suggested that proselytism should be defined in domestic law in such a way that did not trespass upon the exercise of religious freedom.⁷⁶

5.3(b) Proselytism through threats or violence

General Comment 22 clarifies that article 18(2) of the ICCPR “bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force.”⁷⁷ In her 2005 Report to the General Assembly, the Special Rapporteur on freedom of religion and belief notes that some proselytising acts cannot be considered manifestations of religion or belief as would be protected under article 18(1). Asma Jahangir expressed the opinion that a distinction should be made between proselytising acts that invite human rights concerns in respect of article 18(2) and those acts which are criminalised in the domestic criminal law of a state and should be prosecuted as such.⁷⁸ However in respect of criminalisation of particular acts, the Special Rapporteur offers the caution that

...it would not be advisable to criminalise non-violent acts performed in the context of manifestation of one’s religion, in particular the propagation of religion, including because that might criminalise acts that would, in another

⁷⁴ UN Doc A/51/542/Add.1, [12].

⁷⁵ Ibid [134].

⁷⁶ Ibid.

⁷⁷ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [5].

⁷⁸ UN Doc A/60/399 (30 September 2005) [65].

context, not raise a concern of the criminal law and may pave the way for persecution of religious minorities. Moreover, since the right to change or maintain a religion is in essence a subjective right, any concern raised with regard to certain conversions or how they might be accomplished should primarily be raised by the alleged victim.⁷⁹

The Special Rapporteur's suggestion raises the question of whether violent acts performed by way of propagating a religion would also entail mere threats of violence, and by extension, whether such threats of violence should be limited to violence in the immediate earthly realm or can also entail violence that is threatened in the hereafter.

At first glance this consideration could be dismissed as too speculative or supernatural to be an acceptable subject of legal reasoning. However, to so quickly dismiss this level of 'threat' is to dismiss a person's beliefs and the impact that such beliefs can have on him or her. After all, threats to a person's soul can be just as effective, if not more so, as threats to a persons' body.

In his partial dissent in *Kokkinakis*, Judge Martens raises the notion of 'spiritual coercion', noting that "it is evidently difficult to establish where spiritual means of conversion cross the borderline between insistent and intensive teaching, which should be allowed, and spiritual coercion akin to brainwashing."⁸⁰ He adds that

...there probably are methods of spiritual coercion akin to brainwashing which arguably fall within the ambit of article 3 [of the ECHR, prohibiting torture] and should therefore be prohibited by making their use an offence under ordinary criminal law [...but...] there is no justification for making a special provision in the law for cases where such methods are used for the purpose of proselytising.⁸¹

It is argued in this chapter that spiritual threats or coercion should be considered with equal scrutiny as other forms of coercion, balanced against considerations such

⁷⁹ Ibid.

⁸⁰ *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A), partly dissenting opinion of Judge Martens [18].

⁸¹ Ibid, partly dissenting opinion of Judge Martens [18].

as the power dynamics at play between the source and the target. Characteristics that may make the target particularly vulnerable and other relevant factors are discussed below.

5.3(b)(i) Case study: Catholicism

To extrapolate this point further, it is instructive to examine the position of Catholicism, one of the world's most influential religions, on the concept of 'coercion' in proselytism.⁸² In 1965, the Vatican released its encyclical Declaration on Religious Freedom, titled 'Dignitatis Humanae' on the right of the person and of communities to social and civil freedom in matters religious, promulgated by his Holiness John Paul VI, on December 7, 1965. On the point of coercion, the Vatican Council declared:

...the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.⁸³

Prima facie this statement seems compatible with article 18 of the ICCPR, particularly given that the encyclical contains a clear pronouncement against coercion by stating that "[i]t is one of the major tenets of Catholic doctrine that man's response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his own will."⁸⁴

Despite its assertions of Catholicism as "the true religion" and "the one Church of Christ"⁸⁵ the right to change religion is well-recognised by the encyclical:

...a wrong is done when government imposes upon its people, by force or fear or other means, the profession or repudiation of any religion, or when it

⁸² The strong reliance in this section on Catholic views of proselytism is not intended to infer that the Catholic tradition is any more proselytising and / or coercive than other major religions. It has been selected for consideration here because the Vatican Council's encyclical 'Dignitatis Humanae' offers greater authoritative clarity of its standpoint on coercion than can be gleaned with respect to other major religious traditions.

⁸³ Second Vatican Ecumenical Council, *Dignitatis Humanae: Declaration on Religious Freedom*, (1965) [2].

⁸⁴ Ibid [10].

⁸⁵ Ibid [1].

hinders men from joining or leaving a religious community. All the more is it a violation of the will of God and of the sacred rights of the person and the family of nations when force is brought to bear in any way in order to destroy or repress religion, either in the whole of mankind or in a particular country or in a definite community.⁸⁶

Despite its apparent support of human rights of religious freedoms, the Vatican's understanding of the concept of 'coercion' must be more closely examined. First, the encyclical contains a clear defence of proselytism in its statement that:

We believe that this one true religion subsists in the Catholic and Apostolic Church, to which the Lord Jesus committed the duty of spreading it abroad among all men. Thus He spoke to the Apostles: "Go, therefore, and make disciples of all nations, baptising them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all things whatsoever I have enjoined upon you" (Matt. 28: 19-20). On their part, all men are bound to seek the truth, especially in what concerns God and His Church, and to embrace the truth they come to know, and to hold fast to it.⁸⁷

Cautiously ensuring that such proselytism does not amount to 'coercion', the encyclical states that:

...in spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy, especially when dealing with poor or uneducated people. Such a manner of action would have to be considered an abuse of one's right and a violation of the right of others.⁸⁸

Therefore, when considering the practical manifestations of Catholic proselytism, one must ask: what constitutes a 'hint of coercion'? Can fiery religious rhetoric amount to coercion in some circumstances?

⁸⁶ Ibid [6].

⁸⁷ Ibid [1].

⁸⁸ Ibid [4].

To arrive at a deeper understanding of the Vatican's standpoint on religious freedom, it is instructive to examine the encyclical more closely. On some points, scripture is referred to but not provided in full.⁸⁹ For instance, in discussing Jesus Christ, paragraph 11 of the encyclical states that "He did indeed denounce the unbelief of some who listened to Him, but He left vengeance to God in expectation of the day of judgment."⁹⁰ The encyclical here then references Mark 16:16 which states simply that "He who believes and is baptised will be saved. He who does not believe will be condemned."⁹¹ The blow of this news to non-believers is softened marginally by noting that Jesus himself instructed that both believers and non-believers should be allowed to exist next to each other, but the relief is short-lived in light of the fact that this is only true until the day of judgment, where the 'parable of weeds' contained in Matthew 13: 24-29 explains the fate of those who do not submit to Christ. Jesus states that "[t]he kingdom of heaven is like a man who sowed good seed in his field, but while everyone was sleeping his enemy came and sowed weeds among the wheat, and went away...". When the servants ask their master whether he wants the weeds pulled up, the master instructs them not to, "because while you are pulling the weeds, you may root up the wheat with them. Let both grow together until the harvest. At that time I will tell the harvesters: First collect the weeds and tie them in bundles to be burned; then gather the wheat and bring it to my barn."⁹² This parable is explained by Jesus thus;

The one who sowed the good seed is the Son of Man. The field is the world, and the good seed stands for the sons of the kingdom. The weeds are the sons of the evil one, and the enemy who sows them is the devil. The harvest is the end of the age, and the harvesters are angels. As the weeds are pulled up and burned in the fire, so it will be at the end of the age. The Son of Man will send out his angels, and they will weed out of his kingdom everything that causes sin and all who do evil. They will throw them into the fiery furnace, where

⁸⁹ Here it must be noted that not providing references in full should be no defence to the message conveyed. Indeed, the US military required the removal of bible references from equipment provided by weapons manufacturer Trijicon to protect church-state separation, though Trijicon did not provide bible verses in full on the equipment it sold.

⁹⁰ Second Vatican Ecumenical Council, above n 83, [11].

⁹¹ *Bible*, Mark 16:16.

⁹² *Bible*, Matthew 13:24 – 29.

there will be weeping and gnashing of teeth. Then the righteous will shine like the sun in the kingdom of their Father.⁹³

The fact that the 'evil' ones in this parable are considered to be those who do not accept Jesus Christ is clarified by the reference made in the encyclical to the less convoluted explanation contained in Thessalonians 1:8: "[h]e will punish those who do not know God and do not obey the gospel of our Lord Jesus."⁹⁴

In light of the Vatican's view of the fate of unbelievers, one must wonder whether sharing the news contained in Matthew with regard to the fiery furnace, the weeping and the gnashing of teeth, and the punishment contained in Thessalonians, would constitute a 'hint of coercion' especially, as the Vatican notes, 'when dealing with poor or uneducated people.'⁹⁵

5.3(b)(ii) Case study: Islam

Despite the fact that Islam by its very name requires complete 'submission' to the will of God, the principle of 'free choice' is contained in the Koran in that "there is no compulsion in religion."⁹⁶ Yet at the same time, the conversion of a Muslim to another religion or to no religion, is considered apostasy, for which the Hadith instructs that the converter be killed. It is not surprising then that in some Islamic religious traditions, proselytising by non-Muslims to a Muslim is forbidden, while proselytism *by* Muslims may be regarded as a religious duty.⁹⁷ Spiritual threats in Islam akin to those discussed above in Catholicism can be found in the Koran in which it is explained that: "On the Day when those who disbelieve are brought to the Fire (they will be asked): "Is this not true?" They will say: "Yes, most certainly, by our Lord!" He (God) will say: "Taste the punishment in which you used to believe!"⁹⁸ Indeed, it is clear in Islam that Allah will forgive all sins but the sin of disbelief.⁹⁹

⁹³ *Bible*, Matthew 13:37-43.

⁹⁴ *Bible*, Thessalonians 1:8.

⁹⁵ Second Vatican Ecumenical Council, above n 83, [4].

⁹⁶ *Koran*, Surah 2:256

⁹⁷ Abdullahi A. An-Na'im, 'Islamic Foundations of Religious Human Rights', in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (Martinus Nijhoff Publishers, 1996) 352.

⁹⁸ *Koran*, Surah 34, Wind-Shaped Dunes, verse 34.

⁹⁹ *Koran*, 4:48, 4:116.

There is however some disagreement about this point; Kamran Hashemi distinguishes Islam from the Christian 'essential mission' to proselytise, by explaining that "[t]hough inviting non-believers to Islam is generally encouraged... proselytism for Muslims is not considered as one of the religious obligations or practices."¹⁰⁰ Perhaps the distinction between the different viewpoints of the extent to which Muslims are requested or required to 'invite' non-Muslims to Islam depends on the nature of the invitation offered. Abdullahi Ahmed An-Na'im explains the traditional Islamic approach to proselytism, that while in theory unbelievers should be offered the choice of adopting Islam, if they reject it they may be killed, enslaved, or ransomed.¹⁰¹ The result, as Tad Stahnke puts it, is that "proselytism targeted at Muslims is prohibited, whereas aggressive proselytism by Muslims directed at non-believers is demanded."¹⁰² Indeed,

"In the Hadith of the Prophet Mohammad he is reported to have declared: 'I am ordered to fight polytheists until they say: "There is no god but Allah."' All the jurists, perhaps without exception, assert polytheism and Islam cannot exist together; the polytheists, who enjoin other gods with Allah, must choose between war or Islam."¹⁰³

Whatever may be the requirements on Muslims to disseminate their religion, it is an undisputed point among Islamic scholars that proselytism by non-Muslims targeting Muslims is not tolerated.

However, as with Christianity, the choice for many is between Islam and the fiery pits of hell. Ayaan Hirsi Ali, a former Muslim and now a political activist living in exile after receiving death threats from fanatical Islamists, describes her Islamic childhood:

I tried to pray five times a day and to obey the countless strictures of the Koran and the Hadith. I did so mostly because I was afraid of Hell. The Koran lists Hell's torments in vivid detail: sores, boiling water, peeling skin, burning

¹⁰⁰ Kamran Hashemi, 'Religious Legal Traditions, International Human Rights Law and Muslim States', (Martinus Nijhoff Publishers, 2008) 31.

¹⁰¹ An-Na'im, above n 97, 352.

¹⁰² Stahnke, above n 1, 258.

¹⁰³ Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins, 1955) 75.

flesh, dissolving bowels. An everlasting fire burns you forever for as your flesh chars and your juices boil, you form a new skin. Every preacher I encountered hammered more mesmerising details onto his nightmarish tableau. It was genuinely terrifying.¹⁰⁴

It is asserted that the preachers' descriptions of hell to the child Ali would be appropriately defined as coercive proselytism through the threat of violence.

5.3(c) Proselytism through exploitation of circumstance

In addition to attempts to convert a person to a religion or belief by citing the violence that will be delivered upon him if he fails to do so, another improper method of proselytism is that which offers a benefit in exchange for a person's conversion. In addition to the threat of physical force to compel believers or non-believers to adhere to, recant or convert to a particular religious belief, General Comment 22 notes that "policies or practices having the same intention or effect, such as for example, those restricting access to education, medical care, employment or the rights... of the Covenant, are similarly inconsistent with article 18(2)."¹⁰⁵ Logically, the circumstances in which goods and services are offered or denied to most effectively proselytise are those in which the target of proselytism is in particular need of assistance. Examples may include targets who are impoverished or lacking access to basic needs or are otherwise vulnerable to incentives.

5.3(c)(i) Missionary and humanitarian activity

Former Special Rapporteur Jahangir's position on where the line between permissible proselytism and prohibited coercion is drawn is summarised thus:

"Missionary activity is accepted as a legitimate expression of religion or belief and therefore enjoys the protection afforded by article 18 of the ICCPR and other relevant international instruments. Missionary activity cannot be considered a violation of the freedom of religion and belief of others if all involved parties are adults able to reason on their own and if there is no

¹⁰⁴ Ayaan Hirsi Ali, 'How (and Why) I Became an Infidel' in Christopher Hitchens (ed), *The Portable Atheist*, (Da Capo Press, 2007) 478.

¹⁰⁵ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [5].

relation of dependency or hierarchy between the missionaries and the objects of the missionary activities.”¹⁰⁶

Several questions are begged as to how this caution can be heeded in practice. For instance, where the missionary activity is oriented towards delivery of humanitarian aid, can there ever *not* be a relationship of dependency between those delivering aid and those in need of receiving it? On matters of faith, how is a person’s capacity to reason to be objectively determined? Against this statement, and in consideration for the valuable work of missionaries in the delivery of humanitarian aid, how does one avoid issues of coercion arising in respect of children, without denying them access to humanitarian aid?

The following is a simplistic hypothetical example of the Special Rapporteur’s approach to ‘unethical’ conversion (the “promise of material benefit or taking advantage of vulnerable situation of the person whose conversion is sought”).¹⁰⁷ A missionary group enters a community during a famine and offers food on the condition that recipients of that food convert to a particular religion or belief. This situation would seem a clear example of ‘unethical’ conversion, if exploitation of circumstance is considered ‘unethical’. In her 2005 report to the General Assembly, Special Rapporteur Jahangir noted that she had received numerous reports of cases where missionary groups, religious groups and humanitarian groups “allegedly behaved in a very disrespectful manner vis-à-vis the populations of the places where they were operating.”¹⁰⁸ The Special Rapporteur stressed that such behaviour was deplorable and constituted and promoted religious intolerance. In this context, she noted that “...religious groups, missionaries and humanitarian NGOs should carry out their activities in full respect of ethics, including the Code of Conduct for International Federation of Red Cross and Red Crescent Societies in Disaster Relief... as well as guidelines adopted by religious organisations.”¹⁰⁹ Paragraph 3 of this Code of Conduct for International Federation of Red Cross and Red Crescent

¹⁰⁶ UN Doc A/60/399 [67].

¹⁰⁷ Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/6/5 (20 July 2007) 7 [8].

¹⁰⁸ UN Doc A/60/399, [66].

¹⁰⁹ Ibid. The IFRC Code mentioned by the Special Rapporteur in this paragraph is available at <http://www.ifrc.org/publicat/conduct/code.asp>.

Societies in Disaster Relief states that “[a]id will not be used to further a particular political or religious standpoint” and explains that

Notwithstanding the right of [non-governmental humanitarian agencies] to espouse particular or religious opinions, we affirm that assistance will not be dependent on the adherence of the recipients to those opinions. We will not tie the promise, delivery or distribution of assistance to the embracing or acceptance of a particular political or religious creed.¹¹⁰

But as raised above, how can aid ever be ‘untied’ from the beneficiary’s acceptance of a particular belief system conveyed, when the delivery of the aid is motivated by that belief system? Indeed, even when services are not delivered in exchange for conversion of the recipient of those services, can a service deliverer who is motivated by his or her beliefs ever genuinely avoid promoting those beliefs?

Though it is clear that not all missionaries tie their religious agenda to their humanitarian activities, there are compelling examples of some doing so. For instance, Mother Theresa who was beatified by the Catholic Church and widely known for her work with the poor in Calcutta, was accused by Christopher Hitchens as having made “no real effort at medical or social relief, and that her mission is religious and propagandistic and includes surreptitious baptism of unbelievers”¹¹¹ and that “her stated motive for the work is that of proselytisation for religious fundamentalism for the most extreme interpretation of Catholic doctrine.”¹¹² The thrust of Hitchens’ opposition to the life work of Mother Theresa is that despite having a constant stream of monetary resources at her disposal, she failed to deliver meaningful health care or medical treatment to poor people. Hitchens asserts that she glorified suffering and maintained the illusion of poverty while channelling

¹¹⁰ International Federation of Red Cross and Red Crescent Societies, *Principles of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes*, <http://www.ifrc.org/publicat/conduct/code.asp>, accessed on 6 October 2010.

¹¹¹ Christopher Hitchens, ‘Letter to the Editor’, *New York Review of Books* (online), 9 January 1997, <http://www.nybooks.com/articles/archives/1996/dec/19/mother-teresa/>

¹¹² Matt Cherry, ‘An interview with Christopher Hitchens on Mother Teresa’, *Free Inquiry Magazine* (online), Volume 16, Number 4. http://www.secularhumanism.org/index.php?section=library&page=hitchens_16_4, accessed 12 November 2010.

funds intended to help the poor, towards building Catholic fundamentalist convents in her name.¹¹³

Despite the fact that the former Special Rapporteur deplores acts of ‘unethical conversion’, she advises that the criminalisation of such acts be avoided, recommending instead that they be addressed on a case-by-case basis under domestic legislation.¹¹⁴ This position has been affirmed by the current Special Rapporteur who appreciates the significance of such ethical guidelines but emphasises that they should be respected as voluntary and cannot be enforced by states, nor become a pretext for them to circumvent the criteria set out in Article 18(3) of the ICCPR.¹¹⁵ As an example of this case-by-case basis, it is important to note that the provision of humanitarian or other assistance in the course of propagation of a religion or belief is not automatically considered to be a form of proselytism that should be limited. In the HRC case of *Sister Immaculate v Sri Lanka*, an Order of Catholic nuns filed an application for incorporation in Sri Lankan law, which was rejected on the grounds of unconstitutionality.¹¹⁶ The Supreme Court of Sri Lanka held that the Order’s use of charitable activities to ‘propagate a religion’ to ‘defenceless and vulnerable people’ would “result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in article 10 of the Constitution.”¹¹⁷ On this reasoning, the Sri Lankan Court considered that the Constitution did not recognise a right to propagate a religion. Furthermore, on the basis of Article 9 of the Constitution which gives ‘foremost place’ to Buddhism, the court decided that the propagation of Christianity would impair the existence of Buddhism, contrary to article 9 of the Constitution.¹¹⁸ The HRC held that the Order’s right to disseminate its faith was a legitimate exercise of its right to freedom of religion and expression under article 18(1) of the ICCPR, but one that could be limited in accordance with

¹¹³ See for instance, Christopher Hitchens, *The Missionary Position: Mother Teresa in theory and practice* (Verso, 1995) and BBC television, *Hell’s Angel: Mother Teresa*, 1994, Christopher Hitchens.

¹¹⁴ Jahangir, above n 107, 7 [8].

¹¹⁵ UN Doc A/67/303 [29].

¹¹⁶ *Sister Immaculate v Sri Lanka*, UN Doc CCPR/C/85/D/1249/2004.

¹¹⁷ Ibid [2.2].

¹¹⁸ Ibid [2.3].

article 18(3) of the ICCPR.¹¹⁹ The HRC noted that the Supreme Court considered that the Order's activities would coercively or otherwise improperly propagate religion through the provision of material or other benefits to vulnerable people, but failed to provide any foundation for this conclusion, nor for the threat that such propagation would have on Buddhism.¹²⁰ As a result, the limitations imposed on religious freedom were not well-founded under article 18(3), meaning that a breach of article 18(1) had occurred.

In accordance with the case-by-case basis that must be taken in considering missionary or humanitarian activity, two competing considerations must be balanced. Firstly, it is clear that missionary activity is a legitimate and often valuable manifestation of religion that should be protected as such. But secondly, such activities may need to be limited where relationships of dependency or circumstances of need are exploited in pursuit of proselytising objectives.

5.3(c)(ii) Imposing conditions on benefits

Another dimension of improper proselytism are those situations that demand that behaviour be modified in accordance with a particular religion or belief, to the detriment of freedom of religion and belief. For instance, colonisers gained several Christians in parts of Africa by making Christianity a precondition for receiving health and education services.¹²¹ A more recent example of this situation can be seen in the policy of the former United States government, whereby aid was withheld from organisations that promoted particular forms of family planning or worked with sex workers; a particularly detrimental policy in the fight against HIV/AIDs.¹²² In criticising the religiously-biased policies of the time, Christopher Hitchens noted that

We are not dealing, as early missionaries might have liked to believe, with witch doctors and savages who resist the books that the missionaries bring.

¹¹⁹ Ibid [7.2].

¹²⁰ Ibid [7.3].

¹²¹ See for instance Makau Mutua, 'Human Rights, Religion and Proselytism' in Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 622-3.

¹²² Human Rights Watch, 'Africa: Bush's Trip highlights flaws in US HIV/AIDS policy', 14 February 2008, <http://www.hrw.org/en/news/2008/02/14/africa-bush-s-trip-highlights-flaws-us-hiv-aids-policy>, 11 November 2010.

We are instead dealing with the Bush administration, which, in a supposedly secular republic in the twenty-first century, refuses to share its foreign aid budget with charities and clinics that offer advice on family planning.¹²³

In 2003, US President George W Bush declared that \$15 billion would be spent on AIDS relief, but access to such relief came with ‘moral strings attached’, namely, that recipient countries would have to emphasise abstinence over condoms.¹²⁴ The policy was criticised for pushing a religious agenda by attaching Christian morality to the AIDS issue. Indeed, the final report of George Bush’s ‘Faith-based and Community Initiatives’ noted that “Faith-based organisations form a large portion of [the groups necessary to achieve AIDS relief], providing between 30 and 70 percent of the health care in the countries of sub-Saharan Africa.”¹²⁵

The Christian agenda of the Bush administration in its delivery of services, both domestically and internationally, was not disguised. In his introduction to the final report of the Faith-based and Community initiative (dedicated in typically Bushian parlance, to ‘the armies of compassion’), outgoing President Bush offered

...sincere gratitude to every individual and organisation that has joined us in this work. As you have loved your neighbor as yourself, you have made a real, measureable impact in lives across America and around the globe. You are part of a great work that is changing the world – one heart, one soul at a time.¹²⁶

Several other incidents point to a proselytising agenda during the tenure of George W Bush; the \$60 billion that his government made available for religious charitable groups was not earmarked for secular spending but could only be used to promote religion. Some of this funding went to the ‘InnerChange Freedom initiative’, which provided voluntarily participating prison inmates access to benefits such as televisions, private bathrooms and computers, in exchange for receiving Christian

¹²³ Christopher Hitchens, *God is not great* (Allen & Unwin, 2007), 49.

¹²⁴ ‘Bush accused of Aids damage to Africa’, *The Guardian* (online), 30 August 2005, <http://www.guardian.co.uk/world/2005/aug/30/usa.aids>, accessed 9 November 2010.

¹²⁵ ‘Innovations in Compassion, The Faith-Based and Community Initiative: A Final Report to the Armies of Compassion’ (The White House, US) December 2008, 6.

¹²⁶ *Ibid*, introduction.

counselling.¹²⁷ Additional benefits offered to InnerChange participants and denied to non-participants included increased access to family visits, credit towards parole, and even the keys to their cells, but such privileges could be withdrawn if participants failed, for instance, in Bible-verse memorisation tests or committed some other violation of the program's rules.¹²⁸

In response to this prison-based initiative, 'Americans United for Separation of Church and State' filed a successful lawsuit on behalf of inmates who were denied benefits under the programme on the basis that the programme was unconstitutional in being discriminatory and proselytising.¹²⁹ The lead counsel in the lawsuit, Alex J Luchenitser, described InnerChange as "an intensive, day-and-night religious program that indoctrinated inmates into one particular version of Christianity"¹³⁰ and pointed out several incidents in which its staff had attacked the beliefs of those who did not participate, discriminated on the basis of religion against those who refused to convert to the particular strand of Christianity it was promoting, and coerced those who agreed to participate by offering material benefits and then threatening their removal. This programme (which Luchenitser describes as not an isolated experiment¹³¹) is a clear example of coercive proselytism where the modus operandi was to exploit the circumstance of a persons' captivity.

¹²⁷ 'Bush says God chose him to lead his nation', *The Guardian* (online), 2 November 2003, <http://www.guardian.co.uk/world/2003/nov/02/usa.religion>, accessed 9 November 2010. Also see Alex J. Luchenitser, 'Innerchange': Conversion as the price of freedom and comfort – a cautionary tale about the pitfalls of faith-based prison units', 6 *Ave Maria Law Review* 445, 458-459.

¹²⁸ See Alex J. Luchenitser, 'Innerchange': Conversion as the price of freedom and comfort – a cautionary tale about the pitfalls of faith-based prison units', 6 *Ave Maria Law Review* 445, 451.

¹²⁹ Alan Cooperman, 'Suits Contest Iowa Prison Ministry Program', *Washington Post* (online), 13 February 2003, <http://www.washingtonpost.com/ac2/wp-dyn/A64760-2003Feb12?language=printer>, accessed on 9 November 2010. On June 2, 2006, the district court of Iowa held that the program violated the Establishment Clause separating church and state, expelling the program and directing the InnerChange Freedom Initiative to repay the Department of Corrections the \$1.5 million that it had been paid by the state. The decision was upheld on appeal. In March 2008, Iowa terminated the IFI program. Shortly thereafter, Defendants asked the district court to dissolve its injunction against future state support of IFI, on the ground that they had complied with the injunction. In May 2008, the district court rejected the request of the Defendants to dissolve the injunction against future state support of the InnerChange initiative, but stated that it would be later willing to consider renewed requests.

¹³⁰ Luchenitser, above n 128, 445.

¹³¹ *Ibid* 446.

5.3(d) Proselytism through exposure to religious symbols

Questions have arisen at the European Court of Human Rights about the extent to which mere exposure to religious symbols or messages can have a proselytising effect. In *Dahlab v Switzerland*, the wearing of an Islamic headscarf by a teacher in a state school was deemed coercive enough to justify her removal for failing to take it off. However, in the later case of *Lautsi and Others v Italy*, the proselytising effect of displaying Christian crosses in classrooms was not deemed coercive enough to require their removal.

5.3(d)(i) *Dahlab v Switzerland*

In *Dahlab v Switzerland*, the applicant was a primary school teacher in a secular public school system who began wearing the headscarf in accordance with her religious beliefs after converting from Catholicism to Islam.¹³² No complaints were made about her wearing of the headscarf by anyone in the school community. She had worn the headscarf for some four years before the Director General of Public Education requested that she remove it. She eventually lost her job for refusing to do so. Dahlab was not given relief by Swiss courts. The European Court determined that Switzerland had not exceeded its margin of appreciation, and found the case inadmissible.

In reaching its decision, the European Court in *Dahlab* considered the manifestation of Ms Dahlab's religion by wearing the veil to have a proselytising effect on her young students. It was conceded that Dahlab did not promote Islam in any way, nor discuss why she was wearing a headscarf with her students.¹³³ The sole proselytising effect was considered to be the mere wearing of the headscarf.

Hege Skjeie considers that this proselytising effect warranted Dahlab's removal from her employment. Skjeie is of the view that the mere wearing of the headscarf as a religious symbol will affect non-religious persons and argues that "teachers,

¹³² *Dahlab v Switzerland*, (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001). Contrast this case to that of *Leyla Şahin v Turkey*, (European Court of Human Rights, Application No. 44774/98, Judgment, 10 November 2005) in which a student was prevented from attending classes for wearing a headscarf in accordance with Islam.

¹³³ *Dahlab* (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001), 16.

students and their parents at public institutions have the right not to be confronted with religious symbols.”¹³⁴ In this respect it must be acknowledged that children are more vulnerable than adults; they may admire a person and want to emulate him or her for whatever reason. But it cannot be assumed that merely seeing an authority figure manifesting a religion (assuming they make the connection between their teacher’s headscarf and her religion) is enough to deny them choices to adopt other religious beliefs they see evidence of in their lives, at home or in the community more generally.

In this case the court pointed to the age of the pupils, who were between four and eight years old, “an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.”¹³⁵ Its decision that Switzerland had not exceeded its margin of appreciation was reached, above all, on the basis of “the tender age of the children for whom the applicant was responsible as a representative of the State.”¹³⁶

5.3(d)(ii) Lautsi and others v Italy

Lautsi and others v Italy involved the displaying of crucifixes in classrooms of state schools.¹³⁷ The applicants asserted that the state’s prescription for crucifixes to be displayed in classrooms of state schools violated the right to education and freedom of religion and belief by imposing a religion on students.¹³⁸ In its judgment of 2009, the European Court found that states were obliged to refrain from imposing beliefs, even indirectly, where people are dependent on it, including through schooling. It also emphasised that the ‘negative’ element of freedom of religion and belief extended beyond the absence of religion to include beliefs such as atheism. The Lower Chamber of the European Court unanimously found that the presence of

¹³⁴ Hege Skjeie, ‘Headscarves in Schools: European Comparisons’, in M.L.P. Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 165.

¹³⁵ *Dahlab* (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001).

¹³⁶ *Ibid.*

¹³⁷ *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009).

¹³⁸ *Ibid.*

crucifixes was contrary to the principles of state neutrality and pluralism, finding a violation of article 2 of Protocol No 1, taken together with article 9.¹³⁹

However, the Grand Chamber of the European Court overturned that decision. It concluded that “the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State”, though it noted that a state’s traditions did not relieve it of obligations to respect rights and freedoms.¹⁴⁰ The court asserted that Christianity had been significant in Italy’s history, so its prevalence over other religions could not itself be seen as indoctrinating. Though the crucifix was considered to be a religious symbol,¹⁴¹ its presence in classrooms was found to be essentially ‘passive’. The court also noted that there was no evidence which suggested that the state was intolerant of pupils who believed in other religions or were non-religious, or that the rights of parents to instruct children in accordance with their own beliefs was violated. Furthermore, the presence of the cross in classrooms was found not to detract from the rights of parents to bring their children up in accordance with their own religion or belief.¹⁴²

In short, no proselytising effect was found.¹⁴³ No violation of Article 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (concerning the right to an education) was found, and no separate issue was considered to have arisen under Article 9.

5.3(d)(iii) Summation of *Lautsi and Others v Italy* and *Dahlab v Switzerland*

The Court in *Lautsi and Others* differentiated the issues before it from the facts in *Dahlab*. It noted that *Dahlab* involved the prohibition of the applicant from wearing the Islamic headscarf while teaching to protect the religious beliefs of her pupils and their parents. This prohibition, it noted, upheld the principle of denominational

¹³⁹ Ibid 15 [31].

¹⁴⁰ Ibid 29 [68].

¹⁴¹ Italy unsuccessfully attempted to argue that the crucifix was not so much a religious symbol but could be considered a historical and cultural symbol that had come to represent secular values. See *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009), 5 [15].

¹⁴² *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009), 19 [39-40].

¹⁴³ Ibid [74].

neutrality in schools.¹⁴⁴ In *Lautsi*, the Court found that there was no evidence that the display of a religious symbol on classroom walls could influence pupils, so it could not be reasonably asserted that it did or did not have a proselytising effect on young persons whose convictions were still being formed.¹⁴⁵ What remains unsaid in the court's analysis is that no proselytising effect was proven in *Dahlab* either. There was no evidence to suggest that any of these factors explored in *Lautsi* were not equally true on the facts of *Dahlab*. Nevertheless, in *Lautsi*, rather than veering towards protecting children from potential coercion, the court left the matter within the state's margin of appreciation.

The submissions of the International Commission of Jurists and Human Rights Watch in *Lautsi*, and the joint dissenting opinion of Judge Malinverni and Judge Kalaydjieva, pointed to the lack of state neutrality inherent in this decision,¹⁴⁶ The compulsory display of religious symbols is incompatible with state neutrality in matters of religion and belief, a necessary principle in upholding pluralism in state education.¹⁴⁷ While *Dahlab* told students who asked about her headscarf that she wore it to keep her ears warm,¹⁴⁸ the court in *Lautsi* did not discuss what teachers were instructed to tell students who inquired about the crucifix in their classroom.

Pictures and posters are ostensibly displayed in classrooms so that children will imbibe whatever message is depicted in them. However, the court held that the crucifix is essentially a passive symbol that cannot be deemed to have a proselytising influence on pupils.¹⁴⁹ Yet it is difficult to see how children would avoid the implicit message inherent in those crosses.

Where the target of proselytism is particularly vulnerable to messages, as children are, courts are wise to be particularly vigilant in protecting them from coercion. Both *Lautsi* and *Dahlab* involved children as potential targets of proselytism, and both occurred in the context of a classroom where children were captive audiences. This

¹⁴⁴ Ibid [73].

¹⁴⁵ Ibid [66].

¹⁴⁶ Ibid, 48-9 [2], dissenting opinion of Judge Malinverni joined by Judge Kalaydjieva.

¹⁴⁷ Ibid, 23 [54], 47-51.

¹⁴⁸ Carolyn Evans, 'The 'Islamic Scarf' in the ECHR' (2006) *Melbourne Journal of International Law* 52, 59, referring to *Dahlab* (2001) V Eur Court HR 449, 456.

¹⁴⁹ *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009), 23 [72].

being the case, the decision reached in *Lautsi* seems difficult to understand in light of the decision arrived at in *Dahlab*. It must be conceded here that a margin of appreciation was afforded to the state in both cases, which might explain why the status quo was maintained in both cases.

Alternatively, the contrast between these cases may hint at the hierarchy between religion and belief. The decision in *Lautsi* supports adherents of majority religion whereas the decision made in *Dahlab* fails to support adherents of a minority religion. Indeed, the Court in *Lautsi* was explicitly influenced by the majority status of Christianity in Italy. Further, while the wearing of religious dress is justified by the wearer's personal freedom of religion and belief, the state has no recourse to such a right in defending its decision to require the display of religious symbols be displayed in state schools.¹⁵⁰ Rather the state has a responsibility to ensure neutrality in ensuring that religious symbolism is not coercive, regardless of which religion is being symbolised.

5.3(e) Conclusions on 'improper' proselytism

Judge Valticos in his partial dissent in *Larissis and others v Greece* reiterated his hard line that *all* acts of proselytism were contrary to the human rights of its targets:

...acts of proselytism may take forms that are straightforward or devious, that may or may not be an abuse of the proselytiser's authority and may be peaceful or – and history has given us many bloodstained examples of this – violent. Attempts at 'brainwashing' may be made by flooding or drop by drop, but they are nevertheless, whatever one calls them, attempts to violate individual consciences and must be regarded as incompatible with freedom of opinion, which is a fundamental human right.¹⁵¹

In this sense, Judge Valticos expresses the view that there is no useful distinction to be drawn between proselytism and improper proselytism, given that any proselytising act is contrary to freedom of religion in the ECHR. This view is to be rejected for its blanket violation of the religious freedoms of proselytisers. The fact

¹⁵⁰ This fact was pointed out by dissenting Judges Malinverni and Kalaydjieva.

¹⁵¹ *Larissis* (1998-V) No 65 Eur Court HR (ser A), Judge Valticos (partly dissenting) joined by Judge Morenilla.

that proselytism is an accepted and protected manifestation of religion has, since the fervent dissents of Judge Valticos, been clearly established at international law as discussed above. If Judge Valticos was to consider the scenario that his strict approach would lead to for proselytising by adherents of Greek Orthodox to members of their own congregation, he would see that all religions would be rendered unpracticable. The practical effect would be that preaching to the already converted members of one's own congregation would constitute proselytism.

In determining whether a given proselytising activity constitutes a permissible manifestation of religion, or whether it constitutes an interference with religious freedom of others that should be prevented, it is submitted that the existence of 'coercion' can be determined by considering whether freedom of choice is interfered with. Put simply; one is coerced if one cannot meaningfully choose. Proselytism, assessed from the perspective of the target can reduce a person's choices or present them with them more choices; the extent to which proselytism can be considered coercive should therefore be measured by the extent to which a target's capacity to choose has been interfered with.

Such a test would ensnare situations where food or health services are dangled before a hungry person, or where a person's prospects for happiness are threatened if he or she does not 'choose' whatever brand of belief is on offer. In other words, "...the ability to maintain a choice is eroded under circumstances where the target is forced to choose between something of necessity (such as the exercise of their rights, education, employment, or health care) and abandonment (however brief) of their religion or belief."¹⁵²

It is further concluded that religious rhetoric per se should be considered coercive in some contexts. Considering the impact of the threat on the target of proselytism avoids the need to grapple with subjective religious concepts. It would mean that manifestations of religious freedom would be limited where they interfere with another person's enjoyment of his or her freedom of religion or belief, whatever that religion or belief may be.

¹⁵² Stahnke, above n 1, 340.

Regardless of whether being presented with the prospect of burning eternally in a fiery furnace constitutes the ‘hint of coercion’ prohibited by the Vatican’s own instruction, it should, in some contexts, be considered a ‘threat of physical force’ prohibited by article 18 of the ICCPR. Where a person is threatened either physically or spiritually, the test should consider the impact of the threat on the threatened person rather than the likelihood of the threat transpiring; the fact that a gun is not loaded is irrelevant to the target who believes it to be. Such threats of violence may be considered aggravated where there are power imbalances, for instance, when such rhetoric is espoused by high religious authorities such as the Vatican Council or by Fatwa. As will be discussed below, the relationship between the source and the target of proselytism must also be considered in determining whether coercive proselytism trespasses on the rights of the target, as was the case in *Larissis v Greece*. Where the proselytiser is a priest or imam describing to a child the degrees of pain that lie waiting in the fires of hell, the suggestion that this child is not threatened but is simply freely practicing her religion or that of her parents, is the moral equivalent of abandoning a vulnerable person to the coercive proselytism of others, simply because she is vulnerable. While an educated grown adult may not be dismayed (or swayed) at threats of eternal damnation, a child may be as much distressed by this prospect as he or she would be by a more immediate physical threat. Threats to freedom of religion and belief and other rights of children will be specifically discussed in Chapter 7, but what is necessary to conclude for present purposes is that proselytising religious rhetoric can constitute coercion. The key role that particular religious beliefs play in some religious traditions must be borne in mind if human rights policies can truly claim to respect freedom of religion and belief. Regardless of whether or not burning eternally is a real prospect, for many people the threat is real.

5.4. Determining where coercion undermines choice

Thus far, no clear measure exists to determine which behaviour precisely constitutes improper proselytism of the type that should be limited. The European Court of Human Rights provided only limited guidance in the cases of *Kokkinakis* and *Larissis*. Special Rapporteur Jahangir suggested that limitations be meted out on a case-by-

case basis which necessitates the balancing of various considerations, but she did not precisely explain what these considerations are.¹⁵³ Perhaps the conclusion to be drawn is that such specificity is not possible, leaving the decision as to what constitutes improper proselytism to be determined against certain parameters of consideration rather than through clear criteria.

Tad Stahnke offers a framework as a starting point to determine what may constitute 'improper proselytism' that should be limited, albeit an incomplete one by his own admission. This framework considers four interrelated variables; 1) the attributes of the source, 2) the attributes of the target, 3) where the action alleged to be improper proselytism takes place, and 4) the nature of the action.¹⁵⁴ The touchstone of this proposed framework, according to Stahnke, is the notion of coercion, namely that the more that proselytism interferes with a person's ability to freely choose in matters of religious belief or affiliation, the more he or she is likely to have been coerced. Under the framework, the particular coercive authority that a source exerts would be relevant, alongside the susceptibility of the targets to the actions of sources. The location of the alleged coercion may be relevant for instance, where the target is unable to freely move in or out, and the nature of the exchange between the source and target may reflect more or less coercion.¹⁵⁵

5.4(a) Attributes of the source of proselytism

The attributes and authority of the source relative to the target can be a factor in determining whether proselytism is improper. Where, for instance, the relationship between the source and target is such that there is a power imbalance with the source having more power, alarm should be raised that the target may be coerced. Such power imbalance would be present in instances where the source of proselytism is the state or an agent of it, or is the employer or professional superior of the target, or is economically advantaged vis-à-vis the target. In these situations the target may have a strong incentive to maintain a good relationship with the

¹⁵³ Jahangir, above n 107, 7 [8].

¹⁵⁴ Stahnke, above n 1, 326.

¹⁵⁵ Ibid, 327.

source, such that his decision to reject or adopt whatever religious belief or affiliation is being proselytised is influenced by this consideration.¹⁵⁶

The case of *Larissis v Greece* discussed above offers a good illustration of power dynamics. In that case the convictions were not found justified to protect the civilians' rights because the relevant civilians "were not subject to pressures as constraints of the same kind as the airmen" and were not obliged to listen to the proselytising.¹⁵⁷ However, situations where a military hierarchy was at play were considered to make the target less able to rebuff conversations initiated by a senior ranking individual and less inclined to reject what was being offered.¹⁵⁸ In *Larissis*, partly dissenting Judge Valticos, who established himself in *Kokkinakis* as an anti-proselytism hardliner, expressed the view that even the applicants' attempts to proselytise civilians would have justified penalties, given "the prestige of the officers' uniform may have had an effect even on civilians."¹⁵⁹

However another view offered in a partial dissent in the *Larissis* decision must also be considered. The majority held that even airman Kafkas, who himself testified that he was not pressed to convert and had himself initiated all discussions in respect of religion, *must* have been somehow pressured to convert. This conclusion was questioned in the partial dissent of Judge Van Dijk who, since the court did not present evidence as to how Kafkas was coerced, could not join the majority in concluding that there was a pressing social need to prosecute and punish those whose guidance he sought, even though they were his military superiors.¹⁶⁰ On this basis, Judge Van Dijk asserted his opinion that "it should be possible to rebut the assumption of undue influence exercised by a higher ranking over a lower ranking person in the army."¹⁶¹ Conversely, as discussed above, the susceptibility of a target of proselytism to a particular message should also be capable of confirming such an assumption, allowing for instance, for a child's fear of hell or an uneducated adult's fear of juju to be relevant in proving coercion.

¹⁵⁶ Ibid, 328-329.

¹⁵⁷ *Larissis* (1998-V) No 65 Eur Court HR (ser A) [59].

¹⁵⁸ Ibid [51].

¹⁵⁹ Ibid, partly dissenting opinion of Judge Valticos, joined by Judge Morenilla.

¹⁶⁰ Ibid, partly dissenting opinion of Judge Van Dijk.

¹⁶¹ Ibid.

The source of the proselytism may be considered subjectively in determining whether there is a proselytising effect. Displaying crucifixes in the classroom at the behest of the state was not considered to amount to coercive proselytism in *Lautsi and Others v Italy*, while the wearing of a religious symbol by Ms Dahlab was considered to be in *Dahlab v Switzerland*. Where Ms. Dahlab was an individual who acted in a way to minimise any potential proselytising effect her religious manifestation may have had on her pupils, a crucifix hung in a classroom is essentially a religious symbol offered by the state and of the state, in an environment in which children are to receive the messages delivered to them. In other words a state is a more pernicious source of proselytism than an individual is, but the court failed to recognise this fact in the decisions it reached in *Lautsi* and *Dahlab*.

These considerations underline the need to balance considerations about the source of the proselytism and his or her relationship with the target of proselytism, alongside inquiry into the latter's capacity to rebut proselytism or incapacity to deflect it.

5.4(b) Attributes of the target of proselytism

The above considerations underline that the source of proselytism cannot be considered in isolation from the target of it in determining situations of potential coercion. Stahnke explains in this respect that the greater the perceived vulnerability of the target, the more likely that the proselytism directed at her will be coercive.¹⁶² To this consideration must be added an inquiry into the knowledge that the source has of the target's vulnerability, which may lessen the culpability of the source where he has no particular knowledge or conversely may reveal a *modus operandi* that deliberately exploits that vulnerability. The *mens rea* of the source shows again the interconnectivity of the factors to be considered in determining whether proselytism has been improper.

Separate from the nature of the vulnerable relationship that the target may have with the source, the attributes at particular issue here relate to the nature of the target him or herself. Stahnke notes that "[c]ertain people may be susceptible to a change in

¹⁶² Stahnke, above n 1, 332.

religious beliefs, as they might be susceptible to persuasion in any matter” and includes children¹⁶³ as well as people who are vaguely described as “uneducated, naïve or generally weak or unsure of themselves.”¹⁶⁴

Determining a target’s vulnerability raises some particularly subjective concerns. For instance, the posthumous threats discussed above may come into play. Stahnke mentions an Orissa High Court case involving a law which included the ‘threat of divine displeasure’ within the definition of prohibited conversion by force.¹⁶⁵ In that case, the Indian court supported the provision on the basis that it was needed to protect those with ‘undeveloped minds’. The result of this could be to imply that only a person with an ‘undeveloped mind’ could be susceptible to such threats, which in turn implies that a person with a ‘developed mind’ would not believe such threats. Such reasoning could lead to the further implication that there is something baseless in the threat, which is an implication that goes beyond what a court of law can speculate about. Indeed, the implication that a person holds a particular belief because her mind is undeveloped would cause offense to many believers.

The same concerns are true in respect of Stahnke’s suggested criteria of ‘uneducated’ as amounting to vulnerability, which proselytisers could argue amounts to an assertion that education is somehow antithetical to whatever religion or belief they are offering. Determining who is and who is not a vulnerable target becomes confused again when we consider specific individuals; clearly someone who is suffering from learning disabilities or is insane would be deemed more vulnerable than those who are not. However, a person who has for whatever reason suffered particular hardship and found himself without friends or other support may be more susceptible to proselytism than he would at another time of his life. What appears from one perspective to be a particularly vulnerable person, to another may simply be a person who is ready to receive and accept a particular message. In short, these issues are obscured by the ethereal nature of religion and belief, such that it is

¹⁶³ Such power imbalances are also arguably present where the source of proselytism is an adult and the target is a child. The right of children to freedom of religion and belief is the subject of Chapter 7.

¹⁶⁴ Stahnke, above n 1, 332

¹⁶⁵ *Mrs. Yulitha Hyde And Ors. vs State Of Orissa And Ors.*, 1973 A.I.R. 116 (Ori) 121 (24 October 1972).

difficult to separate vulnerability to coercion from the susceptibility of a person to religion or belief.

In *Kokkinakis v Greece*, the consideration of vulnerability or susceptibility of the target of proselytism was particularly interesting. In the first instance, the Lasithi Criminal Court heard evidence that the defendants had attempted

...to proselytise and, directly or indirectly, to intrude on the religious beliefs of Orthodox Christians, with the intention of undermining those beliefs, by taking advantage of their inexperience, their low intellect and their naivety. In particular, they went to the home of [Mrs. Kyriakaki]... and told her that they brought good news; by insisting in a pressing manner, they gained admittance to the house and began to read from a book on the Scriptures which they interpreted with reference to a king of heaven, to events which had not yet occurred but would occur, etc., encouraging her by means of their judicious, skilful explanations... to change her Orthodox Christian beliefs.¹⁶⁶

In the reasoning offered by the Crete Court of Appeal for upholding the conviction of Mr. Kokkinakis, it was noted that he read passages from Holy Scripture "...which he skilfully analysed in a manner that the Christian woman, for want of grounding in doctrine, could not challenge."¹⁶⁷ This reasoning implies that a 'grounding in doctrine' is an antidote to proselytising discussions of the type at issue here (and indeed that 'skilful explanations' are a tool of improper proselytism). Though the extent of such "grounding" was not specified by the Court, the bar is set high given that even the wife of an Orthodox Christian Cantor was not considered to possess an adequate enough grounding in doctrine that she could use to defend herself against new ideas. Indeed, only one judge of the Court of Appeal raised this point in dissent arguing that Mr. Kokkinakis should have been acquitted because "none of the evidence shows that Georgia Kyriakaki... was particularly inexperienced in Orthodox Christian doctrine, being married to a cantor, or of particularly low intellect or particularly naïve...".¹⁶⁸ This issue of Mrs. Kyriakaki's alleged

¹⁶⁶ *Kokkinakis* (1993) No. 260-A Eur Court HR (ser A) [9].

¹⁶⁷ *Ibid* [10].

¹⁶⁸ *Ibid*.

inexperience, low intellect and naivety was also challenged at the European Court of Human Rights by Judge Martens in his partly dissenting opinion, on the basis that it was evidenced solely by her own testimony that she did not fully understand everything that Mr. Kokkinakis read and told her. Indeed, drawing a conclusion of low capacity from so scant a testimony would mean that any person who does not immediately grasp a system of supernatural belief that is new to them would be deemed of low intellect or naïve. The consequence then, of Kokkinakis' conviction by Greek Courts, noted Judge Martens, "was based on the view that the mere proclaiming of one's faith to a heterodox person whose experience in religious matters or whose mental capacities are less than those of the proclaimer makes the latter guilty."¹⁶⁹ Further, an odd implication that results from this reasoning is that those who are most likely to agree with the proselytised message are those who should not be proselytised to.

On this point, Judge Pettiti in his partly concurring opinion offers a pertinent caution when he says that:

The government themselves recognised that the applicant had been prosecuted because he had tried to influence the person he was talking to by taking advantage of her inexperience in matters of doctrine and by exploiting her low intellect. It was therefore not a question of protecting others against physical or psychological coercion but of giving the state the possibility of arrogating to itself the right to assess a person's weakness in order to punish a proselytiser, an interference that could become dangerous if resorted to by an authoritarian state.¹⁷⁰

Indeed, the consequence of this reasoning would be not only to reduce the number of converts to a disliked brand of belief but also to render their right to proselytise practically redundant. As Judge Pettiti says, this reasoning would arm authoritarian states with a multitude of grounds to attack a proselytiser to the point that a successful conversion of a target could itself be laxly tendered as evidence of his or her weakness. Were such a state to have a dominant religion, it is likely that this

¹⁶⁹ Ibid [11].

¹⁷⁰ Ibid, partly concurring opinion of Judge Pettiti.

approach would frequently find converts *from* the dominant religion to be ‘weak’ and of ‘low intellect’ and those converts *to* the dominant religion as too intelligent to have been coerced.

Situations where an economic imbalance between source and target would come into play would include a wealthy and potentially foreign source who visits a less developed country to deliver humanitarian aid and to proselytise. In such a situation, the target’s need for the aid could comprise an incentive to also accept the religion or belief being proselytised or at least pretend to. This consideration also overlaps with others already discussed, notably, that the susceptibility of the target to the message being given would be further increased where she lacks understanding of wider contexts, meaning that she may be unable to separate the message (for instance, Jesus loves you) from the goods she receives (so that, Jesus feeds you).

Attributes of those exposed to religious symbols have also been considered as crucial in determining whether there may be any proselytising affect on them. In both *Dahlab v Switzerland* and *Lautsi and others v Italy*, the European Court emphasised the susceptibility of young children whose ideologies are still being formed. In *Dahlab*, the vulnerability of children between four and eight was a reason to consider that the religious symbols in question might have a proselytising affect on them.¹⁷¹ This same reasoning did not transfer to *Lautsi*, which was not adequately explained by the court in that case.¹⁷²

5.4(c) Attributes of the location of the proselytism

The location where the proselytism takes place is also asserted by Stahnke as potentially reflecting on how welcome the proselytism by the target is; where proselytism is welcome or invited it is less likely to be coercive. For instance, proselytism in the place of worship of the source where the target is there willingly would not raise as much cause for concern as proselytism that takes place in the

¹⁷¹ *Dahlab* (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001).

¹⁷² *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009).

place of worship or classroom of the target.¹⁷³ Another bearing that location has on determining the type of proselytism that is occurring concerns the listener, who in a place of worship is likely to be a willing audience, whereas the audience in a park or other public place can include those who have not chosen to listen.¹⁷⁴ Where the proselytism takes place in the home of the target, such a location could either show that the target's privacy had been trespassed upon, or conversely prove that the target is a willing listener who invited the source to share his views. Deciding this case would require balancing other considerations, such as the vulnerability of the target.

The key role that location can play in increasing the likelihood of coercion, paired with increased vulnerability of the target, concerns situations where the audience is captive, as is the case for instance in public schools.¹⁷⁵ Such a situation is also acutely evident in prison contexts as discussed above with respect to the InnerChange program. Among the benefits given to those inmates who chose to participate in the InnerChange program was the possibility to be transferred to another prison, a relatively safe and more centrally located facility where family visits were easier. This other prison also offered more attractive living arrangements including toilets with private stalls rather than toilets in cells in plain view of other cellmates.¹⁷⁶ These benefits, among the host of others offered under the InnerChange initiative, amount to taking advantage of a person's circumstance. Offering the opportunity to improve conditions of the location in exchange for submitting to a program to indoctrinate participants in a particular belief clearly undermines the targets' capacity to make a meaningful choice not to participate.

In the case of school environments, where students may be exposed to religious symbols, the environment is one in which students are required to submit to the authority of their teachers, imbibe information they receive in that environment, and respect the institution in which they are taught. Particular vigilance is certainly required to maintain the neutrality of such environments, where the audience of

¹⁷³ Stahnke, above n 1, 334.

¹⁷⁴ Ibid 334.

¹⁷⁵ See *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009) and *Dahlab* (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001) above.

¹⁷⁶ Luchenitser, above n 128, 459.

messages is not comprised of captive adults (as in the InnerChange programme), but of 'captive' and impressionable children. The obligations of states to ensure that public schools are neutral and pluralistic with respect to religion and belief were emphasised in *Dahlab v Switzerland* and *Lautsi and others v Italy*. In both cases, the court deferred to the state's margin of appreciation on matters concerning the 'perpetuation of traditions' by displaying religious symbols in its schools.¹⁷⁷

5.4(d) Nature of the proselytism

Stahnke's final consideration concerns the nature of the proselytism, which he says can range from simple communication of one's beliefs, through to threats or use of violence.¹⁷⁸ Between these extremes are the more grey approaches, for instance, of offering benefits in exchange for a change of religion or belief, or conversely, denying rights or privileges in the tangible world or in the afterlife. The result of exploring this grey area requires that consideration as to the nature of proselytism not only take into account proselytising acts, but also consider what is being offered to the target in exchange for his or her change of religion or belief. Stahnke asserts that there must be a division here between tangible and intangible benefits. The latter, which may include for instance eternal life in paradise, would be intangible spiritual benefits in Stahnke's view, which "are, of course, one of the primary reasons for holding religious beliefs, and it is difficult to imagine making a principled division between proper and improper in this area."¹⁷⁹

This dismissal of the "intangible" is not convincing. As discussed above in relation to spiritual coercion, while religion and belief are essentially intangible, the experience of it may be more significant and add more value to many peoples' lives than many tangible elements do. Out of respect for the spiritual benefits that can result from intangible beliefs, consideration must also then be given to spiritual coercion that can result from intangible threats. The very real impact on targets of 'intangible' threats or benefits can be evidenced in the example (albeit an extreme one) of child sexual abuse within the Catholic priesthood. One mechanism for

¹⁷⁷ *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009) and *Dahlab* (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001).

¹⁷⁸ Stahnke, above n 1, 335.

¹⁷⁹ Stahnke, above n 1, 337.

securing a child's silence is to threaten him with spiritual punishment if he informs his family or state authorities of the abuse, and in some instances spiritual rewards or absolution are given to him in exchange for sexual services.¹⁸⁰ Another extreme example which demonstrates the real impact that a possibly unreal incentive can have on a believer can be found in the motivations of a suicide bomber who is prepared to end his life (and the lives of others) in exchange for the rewards which he is told await him in paradise.¹⁸¹ To disqualify such 'intangible' threats or incentives from scrutiny is to undermine the very tangible impact that they can have on their targets.

At the outset of his framework, Stahnke noted that the four key considerations are interrelated and must, as the case requires, be considered in the context of each other. In considering then, the intangible benefits presented or threats made in the course of proselytising, due consideration must be given to the vulnerability of the target, his or her relationship to the source and the location where the proselytism takes place. If the statement 'You will go to hell if you do not believe in God' was considered to be improper, the net would arguably be cast too wide. However, where this statement is directed at a particularly vulnerable target, such as a child or a mentally impaired person, and comes from a particularly empowered source relative to that person, such as a priest, imam, teacher or military superior, it could arguably constitute improper proselytism.

5.4(e) Context of the proselytism

Danchin adds another element to those offered by Stahnke. Danchin suggests that the task of balancing competing rights claims is not so simple as determining where the point that the proselytiser's right to religious expression amounts to prohibited coercion of the target. This, Danchin says, would be a daunting task in that it would require us to "advance some moral conception of harm or coercion in order to mark

¹⁸⁰ See for instance, Geoffrey Robertson QC, *The Case of the Pope: Vatican Accountability for Human Rights Abuse*, (Penguin 2010) 21.

¹⁸¹ See for instance, Nasra Hasan, 'An Arsenal of Believers' *The New Yorker* (online) 19 November 2001, http://www.newyorker.com/archive/2001/11/19/011119fa_FACT1, accessed on 12 November 2010, in which a failed suicide bomber describes the attraction of martyrdom. The author notes that he was told "in order to be accepted for a suicide mission the volunteers had to be convinced of the religious legitimacy of the acts they were contemplating, as sanctioned by the divinely revealed religion of Islam."

the precise boundary between proper and improper conduct... between the two equal individual freedoms.”¹⁸² Alas, the situation is more challenging, for as in the case of *Kokkinakis*, Danchin asserts that we are not only called upon to balance the competing freedoms of specific individuals, but also to consider the ‘collective dimension’. The ‘ethical meaning’ of the relationship between respective religious traditions is therefore relevant, taking into account “the broader historical and inter-group context in which these forces and actors are operating.”¹⁸³

Stahnke concurs that the context in which the proselytism takes place is a valid consideration, for;

...restrictions on expression must be viewed in light of the circumstances in which they arise, including the extent to which information of all kinds flows freely within a society. For instance, if people are continually confronted with information designed to influence their political opinions, their moral values, and even their consumer choices, it might be inconsistent to otherwise overly restrict information designed to influence their religious choices... On the other hand, in societies where information is generally restricted and people must seek it out rather than be confronted by it, it may be more problematic to allow information on religion to flow freely. Although generally restrictive policies on free expression cannot, in themselves, support further restrictions, it should be left open to states to articulate the specific harm that could result from the confrontation occasioned by unsolicited expression.”¹⁸⁴

Paul Taylor agrees with this approach when he says that “[f]or some countries, distaste of proselytism is rooted in issues of culture or national identity quite separate from matters of doctrine.”¹⁸⁵ The examples that Taylor offers in this context include Armenia, Bulgaria and Greece where the dominant religion is commensurate

¹⁸² Danchin, above n 3, 284.

¹⁸³ Ibid 285-6.

¹⁸⁴ Stahnke, above n 1, 286.

¹⁸⁵ Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 65.

with national identity and is seen as being potentially threatened by proselytising from competing religions.¹⁸⁶

A caution must be issued in this respect. It is surely in those countries where religion is bound to national identity that the religious freedoms of individuals and of minority religious groups are most threatened. The preservation of national identity is not a protected human right. The rights and freedoms of others comprise a justifiable grounds for limiting a persons' protected right to manifest his religion through proselytism, but such a ground should be relied on cautiously without allowing notions of cultural or contextual relativity to remove protection from individuals in contexts where they may be particularly vulnerable. Indeed, in many states where proselytism is feared as something that may be perpetrated by minorities to threaten the dominant religion, the bigger threat to religious freedom is from the bias shown to that dominant religion. Such bias could be construed as coercive proselytism not only to individual rights-holders who do not subscribe to the dominant religion, but also to those who already belong to it; their beliefs may be coercively reinforced and they may be denied meaningful choice to leave the religion or question their beliefs. The Supreme Court of Sri Lanka in the HRC case of *Sister Immaculate v Sri Lanka*¹⁸⁷ attributed its decision to concern about the impact that an Order of Catholic nuns would have on Buddhism in Sri Lanka, which is given 'foremost place' in the Constitution.¹⁸⁸ Happily, the HRC did not endorse Sri Lanka's decision in this respect. Were it to do so, it would have endorsed the notion that there is a hierarchy among rights holders determined by their choice of religion or belief.

5.4(f) Application to 'belief'

The term 'proselytism' *per se* is generally not used in reference to promotion of anti-religious or non-religious ideology, but it is nonetheless important to specifically consider 'belief' alongside religion in determining when coercion undermines choice. The writings of prominent atheists could be argued as seeking to persuade

¹⁸⁶ Ibid.

¹⁸⁷ *Sister Immaculate v Sri Lanka*, UN Doc CCPR/C/85/D/1249/2004 (2005)

¹⁸⁸ Ibid [2.3].

religious people away from their religions, though it is questionable whether attempted persuasion through criticism of religion is meant to 'convert'. Atheists have less incentive to convert religious people to atheism than religious people have to convert atheists; there is no spiritual incentive to do so, and propagation of non-belief is not a tenet of non-belief in the way that propagation of belief is a tenet of some religions. Perhaps it is for this reason that door-to-door proselytism more often involves religious parties trying to persuade others of their religion, rather than non-believers or atheists trying to persuade religious people not to be. The latter tend to express their views in mediums which can be read, or not, by religious persons. Notwithstanding brands of 'militant' atheism (discussed below at 6.3(d)), it can also be argued that the messages of non-religion or even atheism are less hostile than religious rhetoric can be; as was discussed above, a child may be more threatened by being told by her parents that fiery pits of hell await her if she rejects or questions their religion, than she is by being told by atheist parents that there are no such fiery pits.

Yet it is nonetheless possible that the actions of non-believers can undermine a religious person's choices. Notably, a person's ability to maintain or change his or her religion may be compromised by the work of non-religious humanitarian agencies based on non-religious ideologies in belief. It also may be just as challenging for non-religious service providers who are motivated by a particular ideology or belief to avoid promoting that ideology or belief in the course of their work.

In the context of proselytism through exploitation of circumstance, generally more concern is raised about the proselytising actions of religious groups, than is mounted against secular or atheist groups. Following the 2004 tsunami in Southeast Asia, concern was raised that different religious groups exploited the situation by offering ideological messages to destitute and vulnerable people, alongside delivering aid.¹⁸⁹ No such concerns were raised about atheist organisations attempting to encourage religious people to renounce their faith. The fact that there are fewer examples of

¹⁸⁹ See for instance, Mariane Kearney, 'Religious groups are exploiting Aceh chaos', The Telegraph, 14 January 2005, accessed on 10 April 2013, <http://www.telegraph.co.uk/news/worldnews/1481197/Religious-groups-are-exploiting-Aceh-chaos.html>.

atheist organisations exploiting such situations to extol atheism than there are examples of religious humanitarian organisations promoting religion, may be a result of there being fewer atheistic or non-religious humanitarian organisations. The suggestion could be made that non-religious people are less charitable,¹⁹⁰ or rather that the contributions they make are less visible in that they are not directly attributed to their atheism.¹⁹¹ It also may be a result of the fact that promotion of an alternative religion by religious organisations manifests more overtly than does promotion of non-religious beliefs in the actions of secular organisations. The fact that there are no atheist 'missionary' organisations, is almost certainly owing to the fact that proselytism is not a part of atheism in the way it is of some religions.

Yet while there are no overtly atheist humanitarian organisations, there are several 'secular' organisations that are driven by beliefs that are not religious. It can be considered whether such organisations risk promoting secular agendas. Perhaps a distinction can be drawn between the relative risks of proselytising from religious organisations and non-religious organisations, on the basis that while religious organisations define themselves by religion, secular or non-religious organisations do not define themselves by non-religion. Secular organisations are rather 'unreligious' and the extent that the beliefs on which they are based challenge religious practices – or indeed support them – is essentially incidental.

By way of illustration, many international organisations and non-governmental organisations actively campaign to prevent certain religious practices; not because they are religious but because they are antithetical to the beliefs espoused by the organisation concerned. For instance, where an organisation's agenda is determined by human rights-based beliefs, they may challenge religious practices that undermine those beliefs. The International NGO Council on Violence against

¹⁹⁰ This assertion is however refuted in a recent University of California, Berkeley study that found that atheists and agnostics are more driven by emotions like compassion than their religious counterparts. See Laura Saslow, Rob Willer et. al, 'My brother's keeper? Compassion predicts generosity more among less religious individuals', *Social Psychology and Personality Science*, published online 26 April 2012, <http://static.squarespace.com/static/5014cf5ce4b006ef411a1485/t/504404a8c4aa0a1a22152f78/1346634920390/>, accessed on 10 April 2013.

¹⁹¹ For instance, the Richard Dawkins Centre For Reason and Science provides aid to non-religious relief organisations through its charitable arm titled 'Non-believers giving aid' (NBGA). See <http://givingaid.richarddawkins.net/about>, accessed 11 April 2013.

Women for instance, provides examples of human rights abuses resulting from culture, tradition, religion and superstition including birth superstitions, corporal punishment, cosmetic mutilations, juju curses, female and male circumcision, initiation rites, refusal of life saving medical treatment, organ removal, ritual killings, sharia law punishments, ritual sexual slavery and witchcraft, among several other examples.¹⁹² To the extent that such practices are based on religion and belief, and to the extent that international organisations and non-governmental organisations seek to prevent them, they can be said to be working to undermine religious practices. Yet challenging a religious practice is not the same thing as challenging a religion itself.

What becomes relevant again then, is a balancing act encompassing the above considerations. Individuals in a religious organisation may be inspired by its religion or not, and individuals in a secular organisation be inspired by beliefs that may or may not be religious. Whether agents of such organisations act in a way that is coercive can only be considered on a case-by-case basis, considering the attributes of the source, the target and the location of proselytism, as well as the nature and context in which it occurs. These factors are relevant in determining whether a given situation constitutes coercive proselytism of the type that should be curtailed, regardless of the religion or belief being proselytised.

5.5. Conclusion: Freedom from coercion

"Those who can make you believe absurdities can make you commit atrocities"

Voltaire

To recap on the key points discussed in this chapter, *prima facie*, proselytism should be protected as a manifestation of religion or belief, irrespective of the content of the views asserted by the source and the manner in which those views are asserted.

However, freedom to engage in proselytism is not unlimited. Where proselytism involves improper coercion such that the target's choice to maintain or change his or

¹⁹² International NGO Council on Violence against Women, *Violating Children's Rights: Harmful practices based on tradition, culture, religion or superstition* (CRIN, 2012), pp.19-39.

her religion or belief is impaired, it should be limited. Whether an act of proselytism is determined to be improperly coercive will depend upon the characteristics of the source, the characteristics of the target and their relationship to each other, as well as the place where the act takes place, the nature of the act and to a lesser extent, its context. These considerations are interrelated, and determinations as to whether proselytism has been improperly coercive require a complex balancing act to be performed on a case-by-case basis.

Limitations imposed on proselytism must be in accordance with international law, and so be prescribed by law, necessary to achieve listed purposes, and proportionate to the realisation of those purposes. The objective of imposing such limitations in accordance with international law must be in furtherance of secular interests rather than purely religious or ideological goals. The listed purposes for imposing such limitations which will most often be called upon in the context of proselytising activities are firstly, the rights and freedoms of others and secondly, public order. This is in line with Tad Stahnke's view that "...the validity of limitations on proselytism turns on the existence of overriding interests, articulated on behalf of the state, either in the protection of society in general or in the protection of the rights of others. Equally important, the limitations must sufficiently further those interests."¹⁹³ Added to these considerations is the right to be free from coercion that rights holders enjoy under article 18(2) of the ICCPR.

In respect of the rights and freedoms of others, generally it is a person's freedom to have or maintain a religion or belief of his choice that may be trespassed upon through the coercive tactics of the proselytiser. In relation to the public interest consideration, it is necessary to bear in mind that any limitation must be proportionate and time bound and cannot be imposed in a way that discriminates against those of one particular religion or belief over another. Indeed the fact that there is a dominant religion in a particular state should not afford it special rights or privileges that would be discriminatory to the non-dominant religions in the state. In other words, the nature of the religion or belief should not be a determinant of whether the proselytism is coercive. As has been noted about alleged 'brainwashing'

¹⁹³ Stahnke, above n 1, 279.

of members of new religious movements, any criteria that could be used to determine whether a person has been forced to believe something against his or her will could threaten old and established religions as much as they threaten new ones.¹⁹⁴

In his *Study of Discrimination in the Matter of Religious Rights and Practices*, Krishnaswami acknowledges that the line between what are justifiable and what are not justifiable constraints on proselytism is unclear, but offers three objectives to guide policies in this respect. First, though proselytism should be safeguarded, such safeguards should be applied in the framework of ensuring freedom to maintain religion or belief. Secondly, limitations should maintain peace and tranquillity inside and outside the country or territory. Thirdly, limitations that are temporarily imposed must be removed as quickly as possible.¹⁹⁵ The key outcome of Krishnaswami's report is the 16 rules he offers towards achieving the religious freedom goals set out in the UDHR. The tenth of these rules provides guidance on determining the point at which proselytism crosses from being a protected religious manifestation to being a limitable imposition on another's enjoyment of his or her freedom: "[e]veryone should be free to disseminate a religion or belief, in so far as his actions do not impair the right of any other individual to maintain his religion or belief."¹⁹⁶ In other words, limitations to the right to proselytise should not jeopardise freedom of religion and belief or indeed other human rights. Therefore in considering whether proselytism is coercive, one should be considered coerced if one cannot choose to maintain or change his or her religion or belief. In keeping with the broad goal of this thesis, this same consideration should be borne in mind with respect to non-believers and atheists: if a person is not free to choose to adopt, reject or maintain non-belief he has been coerced.

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¹⁹⁴ Eileen Barker, 'Why the Cults? New religious movements and freedom of religion or belief', in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 584.

¹⁹⁵ Krishnaswami, above n 5, 41.

¹⁹⁶ Ibid.

CHAPTER 6: CASE STUDY – FREEDOM FROM HATE

6.1. Introduction

*"You can safely assume that you've created God in your own image
when it turns out that God hates all the same people you do."*

Anne Lamott

The freedom of expression entailed in article 19 of the ICCPR, and the limitations introduced to it by article 19(3) were discussed in Chapter 1. Beyond this, article 20 of the ICCPR provides for the compulsory restriction of 'hate speech' – a particular type of expression. This chapter discusses the application of the mandatory limits introduced by article 20 of the ICCPR to religious hate speech.

In relation to article 20, Dennis De Jong says that "...hurt feelings as such do not matter... [h]owever, speeches aimed at mobilising parts of the population against adherents of a particular religion or belief do come under the realm of article 20 and are therefore prohibited."¹ The question which will be explored here is whether hate speech is less likely to be curtailed when it comes from a religious point of view, and more likely to be curtailed when it expresses a non-religious belief, and whether international human rights law privileges manifestations that are religious over manifestations which are not. As the Council of Europe notes,

...in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.²

¹ Dennis De Jong, 'Freedom of Religion in Light of Recent Challenges', in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 182, 193.

² Parliamentary Assembly of the Council of Europe, *Resolution 1805 on Blasphemy, religious insults and hate*

Though the religious and the non or anti-religious are equally entitled to express their views, what emerges from considerations of the workings of article 20 is that expressions from a non-religious perspective are more likely to be limited as hate speech than are equivalent expressions originating from a religious perspective. The implication is that article 20 is biased towards situations where offence is caused *to* religions or the religious rather than *by* religions or the religious. Beyond this, it is argued that article 20 of the ICCPR is limited by its inability to address all forms of hate, including religious expressions which are directed against non-believers, members of new and emerging religions, or gays and lesbians.

The conclusion ultimately reached in this chapter is that human rights law would be strengthened by recasting article 20 of the ICCPR to overcome its current bias, so that theistic and atheistic convictions are weighed equally in limiting "hate speech." The strength of article 20 should be measured by its ability to protect all targets of hatred from hatred that incites discrimination, hostility or violence regardless of the particular hated traits.

6.2. Article 20 and hate speech

"The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race, posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

John Stuart Mill

Article 20 of the ICCPR reads:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

speech against persons on grounds of their religion, 27th sitting (29 June 2007) [5].

Article 20 is an express requirement on states parties to interfere with freedom of expression to prohibit propaganda for war or advocacy for national, racial or religious hatred. There is no equivalent requirement in the ECHR, the African Charter on Human and Peoples' Rights, or the Arab Charter on Human Rights. The American Convention on Human Rights contains an equivalent section in article 13(5).³

Article 20 is unusual in that it does not provide for a human right as other provisions of the ICCPR do, but rather establishes limitations on other rights.⁴ Yet article 20 differs from limitations clauses contained in articles 18(3), 19(3), 21 and 22(2) because it is a mandatory limitation to freedom of expression, *requiring* states parties to provide corresponding restrictions, rather than merely permitting them to do so.⁵

Provisions under article 20 are to be interpreted in conformity with the legitimate limitations contained in article 19(3). Though article 20 is a separate article it merely sets forth additional, specific purposes for interference, which could have been included under those in article 19(3). The prohibition of propaganda for war may be necessary for the protection of national security, and the prohibition of advocacy of hatred is necessary for the respect of the rights of others and for the protection of public order or *ordre public*.⁶

The fact that free expression is so valued in many countries has meant that article 20 has attracted several reservations. A number of western democratic states have entered reservations to article 20(1); Australia, Belgium, Denmark, Finland, Iceland, Malta, New Zealand, the United Kingdom and the United States reserve the right

³ "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language or national origin shall be considered as offences punishable by law." Article 13(5), Organisation of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969

⁴ *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance*, UN Doc A/HRC/2/3 (20 September 2006) [46].

⁵ Human Rights Committee, *General Comment 34: Freedom of Opinion and Expression (Art 19)*, UN Doc CCPR/C/GC/34 (29 June 1983) [50-52].

⁶ Manfred Nowak, *CCPR Commentary* (NP Engel Kehl, 2nd ed, 2005) 476.

not to enact any prohibitions going beyond existing legislation.⁷ Belgium made a declaration with respect to article 20, "that it does not consider itself obligated to enact legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole shall be applied taking into account the rights to freedom of thought and religion, freedom of opinion and freedom of assembly and association proclaimed in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant."⁸

The freedom from hate that article 20 offers is limited only to some forms of hate. Some of the hatred that emanates from religion is not contrary to article 20, notably, hatred directed at gays and lesbians. This limited scope of article 20 is a significant obstacle to freedom from religious hatred.

6.2(a) Advocacy of hatred: the jurisprudence so far

Paragraph 2 of article 20 prohibits the advocacy of hatred. This paragraph does not require the prohibition of hatred in private that falls short of advocating violent acts of racial or religious discrimination.⁹ Incitement is only to be prohibited when it takes place by way of "advocacy" of national, racial or religious hatred. Not all hatred is prohibited by article 20. Rather, article 20 only takes issue with the type of hatred that has the effect of inciting discrimination, violence and hostility. The insertion of the word 'discrimination' is inexplicable to Nowak who correctly notes that it "is most difficult to conceive of any advocacy of national, racial or religious hatred that does not simultaneously incite discrimination."¹⁰

In the 1981 case before the HRC of *J.R.T and the W.G. Party v Canada*, the state took action to repress the speech of the Western Guard which had used public telephone services to warn "of the dangers of international finance and international Jewry

⁷ UN Treaty Series (Online) *Declarations and Reservations to the International Covenant on Civil and Political Rights*, 1197 UNTS 411, available at

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-4&chapter=4&lang=en#EndDec

⁸ Ibid. Here it should also be noted that in its General Comment 24, the HRC has suggested that a state may not reserve the right to engage in advocacy of hatred. See Human Rights Committee, *General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.6 (11 April 1994), [8].

⁹ Nowak, above n 6, 475.

¹⁰ Ibid.

leading the world into wars, unemployment and inflation and the collapse of world values and principles."¹¹ The authors alleged violations of their article 19(2) rights, an allegation deemed inadmissible by the HRC which held that the Party's warnings "clearly constituted the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit."¹²

In the HRC case of *Faurisson v France* in 1993 the author, a former Professor at the Sorbonne University, argued that his freedom of expression had been violated.¹³ Faurisson was charged under the Gayssot Act which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-1946. In an interview with a magazine, Faurisson stated, among other things, that "...No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible." Faurisson's complaint to the HRC related to his belief that his freedom to doubt and conduct academic research and freely express himself were curtailed by the Gayssot Act, which he believed to be targeting him personally. The HRC found that there was no breach of Faurisson's article 19 rights, given that the state's actions were justified by virtue of article 19(3).¹⁴ On the facts of the case, some members argued the implicit application of article 20. Rajsoomer Lallah for instance argued that article 20 of the ICCPR should have been evoked in the HRC's reasoning to exonerate the state.¹⁵

The European Court of Human Rights applied similar reasoning with respect to Holocaust denial in *Garaudy v France*.¹⁶ It found that the expression in question was not entitled to protection under ECHR article 10 concerning free expression because the denial of crimes against humanity was

¹¹ Human Rights Committee, *Communication No. 104/1981*, UN Doc CCPR/C/OP/2 at 25 (1984), (*J.R.T. and the W.G. Party v Canada*) [2.1].

¹² Ibid [8(b)].

¹³ Human Rights Committee, *Communication No. 550/1993*, UN Doc CCPR/C/58/D/550/1993 (1996) (*Faurisson v France*).

¹⁴ The court found that the limitations of Faurisson's rights were justified under article 19(3) grounds of protecting the rights and reputations of others. This case is also mentioned in Chapter 1.

¹⁵ See the opinion of Rajsoomer Lallah, *Faurisson*, UN Doc CCPR/C/58/D/550/1993 [11].

¹⁶ *Garaudy v France* (Application no 65831/01) 2003-IX Eur Ct H.R. 369 (7 July 2003).

...one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.¹⁷

The European Court of Human Rights invoked the article 17 savings clause of the ECHR to come to its conclusion. Article 17 has been invoked in several other cases to reach a decision of inadmissibility,¹⁸ potentially offering a convenient means of supporting states in taking actions against hate speech, in the absence of a prohibition against hate speech in the ECHR. Interestingly where article 17 has been invoked to reach inadmissibility decisions, the expressions at issue have been directed at religious groups. In the case of *Pavel Ivanov v Russia*, the target of Ivanov's writings were Jews; in *Norwood v United Kingdom*, Norwood displayed a poster that read "Islam out of Britain – protect the British people", and in the case of *Hizb Ut-Tahrir v Germany*, the applicant association called for active Jihad to deny the state of Israel and the killing of Jews.¹⁹ It is interesting to note though that in the latter case, although Hizb Ut-Tahrir described itself as a "global Islamic political party and/or religious society", the German Federal Ministry of Interior did not consider it to be a political party as it had no intention of standing for elections, yet decided that it pursued political rather than religious objectives and was therefore not religious in nature.²⁰ This decision was made in spite of the association calling upon Islamic duties of Jihad and publishing statements including: "Allah, the Exalted, commands: 'And slay them wherever ye catch them, and turn them out from where they turned you out' (Al Baquarah 2, Aya 191)."²¹ The applicants'

¹⁷ Ibid, 296.

¹⁸ See *Pavel Ivanov v Russia* (App no 35222/04), *Hizb Ut-Tahrir v Germany* (App no 31098/08) and *Norwood v United Kingdom* (App no 23131/03) in which the court relied on article 17 to assert that the applicants' anti-Semitic (in *Pavel Ivanov* and *Hizb Ut-Tahrir*) and anti-Islamic expressions (in *Norwood*) were found not to be protected article 10 (and article 11 in the case of *Hizb Ut-Tahrir*), and found the cases to be inadmissible.

¹⁹ See *Pavel Ivanov v Russia* (App no 35222/04), *Norwood v United Kingdom* (App no 23131/03) and *Hizb Ut-Tahrir v Germany* (App no 31098/08).

²⁰ *Hizb Ut-Tahrir v Germany* (European Court of Human Rights, Application no 31098/08, 12 June 2012) [7].

²¹ Ibid [15].

claims under article 9 and article 10 were considered incompatible with article 35 (concerning admissibility) and rejected accordingly.²²

Furthermore, concerning racial hatred the European Court clearly established in *Jersild v Denmark* that “there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by article 10 of the Convention.”²³ This same principle was reaffirmed in the later case of *Gündüz v Turkey*, but on the facts of this case the substance of the religious expression in question was not found to constitute hate speech.²⁴ In this case, the applicant expressed views during a live television interview in his capacity as the leader of a self-proclaimed Islamic sect called Aczmendis. The public prosecutor brought proceedings against the applicant for expressing opinions that a child born to a couple married by a council official (rather than Islamic cleric) would be a ‘*piç*’ [bastard],²⁵ that secularism and democracy are impious and that the aim of he and his followers was to destroy both and establish a system based on sharia. The applicant was convicted for inciting hatred based on religious intolerance. The European Court of Human Rights determined that there were insufficient reasons for purposes of article 10 to justify the interference with the applicant’s rights.²⁶ The court in *Gündüz v Turkey* upheld the finding of the earlier case of *Refah Partisi (The Welfare Party) and Others v Turkey*,²⁷ that while it was difficult to support democracy and human rights while at the same time supporting sharia, the mere fact of defending sharia, without calling for violence to establish it, did not amount to hate speech.²⁸ This conclusion is a logical one. What is more surprising however is the court’s failure to attach importance to the insult mounted at children born of a civil rather than Islamic marriage. The court contextualised the comment as one made on live TV without the possibility for rephrasing it, despite the applicant’s own

²² Ibid [78].

²³ *Jersild v Denmark* (2994) No 298 Eur Crt Hr 25 (ser A) (23 September 1994) [35].

²⁴ *Gündüz v Turkey* (European Court of Human Rights, Application No 35071/97, 4 December 2003).

²⁵ “In Turkish, ‘*piç*’ is a pejorative term referring to children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence.” *Gündüz* (European Court of Human Rights, Application No 35071/97, 4 December 2003), [49].

²⁶ *Gündüz* (European Court of Human Rights, Application No 35071/97, 4 December 2003), [52].

²⁷ *Refah Partisi (The Welfare Party) and Others v Turkey*, (European Court of Human Rights, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003).

²⁸ *Gündüz* (European Court of Human Rights, Application No 35071/97, 4 December 2003) [51].

submission that the comment was an accurate reflection from his Islamic standpoint. Dissenting Judge Türmen stressed that the applicant was given the opportunity to rephrase his remarks but instead chose to reinforce them in religious terms. According to Judge Türmen the applicant's remarks must be contextualised from his vantage point as a religious authority; as such the applicant claimed that he was reflecting God's views and wishes and that those who did not share them were by implication, ungodly. This, Judge Türmen opined, was a good example of hate speech and as such did not warrant protection of the law.²⁹ In failing to identify this speech as hate speech, Judge Türmen hints at the court's religious bias:

I am concerned that the present judgment may be interpreted by the outside world to mean that the court does not grant the same degree of protection to secular values as it does to religious values. Such a distinction, intentional or unintentional, is contrary to the letter and spirit of the Convention.³⁰

Indeed, it is interesting to speculate on the court's findings if children born of Jewish parents were the targets of the offence, or the speaker was an atheist calling Islamic children bastards.

In the 1997 ICCPR case of *Malcolm Ross v Canada*,³¹ the applicant had asserted that his distribution of material asserting that the Jewish faith was a threat to Christianity was religious expression, and that his consequent removal from his teaching position for such activities outside the work place was a breach of his rights under article 18 and 19 of the ICCPR. The state party responded that Ross's activities were designed to incite hatred against Jews and that in acting in the way it did, it was simply upholding article 20 of the ICCPR. The HRC found that the permissibility of such restrictions was an issue for consideration on the merits.³² In so doing, the HRC found that the author's comments called upon Christians not only to question Jewish beliefs and teachings but to hold Jews in contempt as undermining freedom, democracy and Christian beliefs and values. The HRC concluded that the restrictions

²⁹ Ibid, Judge Türman dissenting.

³⁰ Ibid

³¹ Human Rights Committee, *Communication No. 736/1997*, UN Doc CCPR/C/70/D/736/1997 (18 October 2000) (*Ross v Canada*)

³² Ibid [10.6].

imposed on Ross were therefore warranted to protect the ‘rights or reputations’ of persons of Jewish faith or ancestry, including the right to have an education in the public school system free from bias, prejudice and intolerance. The restrictions imposed on Ross were also noted by the HRC to derive from the principles reflected in article 20(2) of the ICCPR, reinforcing the relationship of this article with the limitations provided for in article 19(3).³³

Thus far, the HRC has not been called upon to consider religious hatred complaints made under article 20 itself. For instance, the case of *Andersen v Denmark* involving a statement likening the Islamic headscarf to the Nazi swastika was found inadmissible, given that the author (a Muslim who wears a headscarf for religious reasons) failed to demonstrate how the statement affected her personally.³⁴ Salient cases, discussed above, have been more relevant to racial hatred than religious hatred (though this depends on whether Jews are hated for their race or their religion or a combination of both). Some cases have been brought under article 4 of the International Convention on the Elimination of Racial Discrimination, which relates only to racial rather than religious hatred.³⁵

Some of the HRC’s Concluding Observations shed light on its approach to article 20. In Concluding Observations on Poland, the HRC emphasised that the state party should intensify its efforts to combat and punish incidents of desecration of Catholic and Jewish cemeteries and acts of anti-Semitism, which violate articles 18, 20 and 27.³⁶ The HRC also implied that the local advertising campaign in Switzerland against minarets may have breached article 20, in calling on the state to respect freedom of religion and combat incitement to discrimination, hostility and violence.³⁷

³³ Ibid [11.5].

³⁴ Human Rights Committee, *Communication No. 1868/09*, UN Doc CCPR/C/99/D/1868/2009 (7 September 2010) (*Andersen v Denmark*).

³⁵ See for instance *Ahmad v Denmark* (CERD 16/99), *Jama v Denmark* (CERD 41/2008), and the *Jewish Community of Oslo et al v Norway* (CERD 30/2003).

³⁶ UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, UN Doc CCPR/CO/82/POL, 82nd Sess (2 December 2004) [19].

³⁷ UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, UN Doc CCPR/C/CHE/CO/3, 97th Sess (3 November 2009) [8].

Relevant to the ends of equal protection of religious and non-religious belief, it is interesting to consider the point at which the HRC would determine that a *religious* expression advocating hatred on the grounds of religion or belief (or lack of either) would become advocacy of violence. It must also be considered whether, if called upon to consider such a case, the HRC would find article 20 adequate to address all forms of hate speech which commonly arise in religion, such as vilification of all non-believers. For instance, where a Christian expresses hatred for 'non-believers' would article 20 intervene to protect all non-believers of Christianity (including Sikhs, atheists, Hindus, Buddhists, Muslims, Jews, agnostics and others)? Or would article 20 be construed as addressing only hate speech that targets a *particular* religion or belief?

Finally, it must be noted that for a long time the UN Human Rights Council, and its predecessor the Human Rights Commission, passed several resolutions condemning "defamation of religions."³⁸ These resolutions were very controversial, as they posed a significant threat to freedom of expression.³⁹ The language of these resolutions seems to reach far beyond religious vilification to protection of the religions themselves, not only from hate but also from lesser forms of denigration and offence. Indeed, Special Rapporteurs on both race and religion stated that "international human rights law protects primarily individuals in the exercise of their freedom of religion and not religions per se", noting that "the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule".⁴⁰ Indeed, there is no right to not be 'offended.'⁴¹ The issue of defamation was finally set aside

³⁸ See for instance, Commission on Human Rights resolutions 1999/82 of 30 April 1999, 2000/84 of 26 April 2000, 2001/4 of 18 April 2001, 2002/9 of 15 April 2002, 2003/4 of 14 April 2003, 2004/6 of 13 April 2004, and 2005/3 of 12 April 2005. Also see Human Rights Council resolutions 4/9 of 30 March 2007, 7/19 of 27 March 2008 and 10/22 of 26 March 2009.

³⁹ See for instance, the joint 2006 report of the Human Rights Council of the Special Rapporteur on Racism and the Special Rapporteur on Freedom of Religion or Belief to the second session of the Human Rights Council (UN Doc A/HRC/2/3 [8 and 17]), in which they note that the close links between defamation of religion and freedom of expression are illustrated by the fact that "The political and ideological approach to human rights has been confirmed by the fact that, in the logic of a clash of civilizations, Governments, political leaders, intellectual personalities and the media have flagged and radically set against each other freedom of expression and freedom of religion." (UN Doc A/HRC/2/3 [8]).

⁴⁰ UN Doc A/HRC/2/3 [27 and 36].

⁴¹ See, however, *Wingrove v the United Kingdom*, 1996-V Eur. Ct. H.R. at 1947-49, 1960. In that case the European Court of Human Rights invoked the notion of protecting 'religious feelings' to support a total ban on a

in the Council in 2011 when it became clear that majority support no longer existed for the notion.⁴² Nevertheless, these resolutions manifested a clear interest amongst many states in protecting adherents of religions from defamation of their religion, being ‘all religions’ generally and Islam in particular.⁴³

6.3. Religious hatred

“Freedom of religion does not protect hate-preach”

Geoffrey Robertson QC

In 2005, the (now replaced) Commission on Human Rights,

...[r]ecognises with deep concern the overall rise in instances of intolerance and violence directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia.⁴⁴

But what of the intolerance and violence motivated by phobia of people who are not Muslims, Jews or Christians? Indeed, does article 20 stop the hate speech issued by those who belong to those religions in defence of those who do not?

Hatred in itself is not prohibited. Interventions with expressions of hatred are required when such hatred amounts to incitement to discrimination, hostility or violence. Hatred may be sometimes justified. While hatred on the basis of race is

video containing content depicting sexual conduct between individuals revered in Christianity, which was deemed blasphemous under British law. In offering reasoning, the Court argued that the video would “outrage the feelings of Christians.”

⁴² Given that the impetus to combat defamation of religion has risen at times when some consider their religion to be particularly defamed, it is possible that the issue could again return to the UN. For instance, there was a push to reintroduce the notion of defamation of religion to the Human Rights Council following the release of ‘The Innocence of Muslims’ on YouTube in late 2013, which insulted Mohammed and sparked violence throughout the world resulting in many deaths. See for instance, Brett G Scharffs, ‘International Law and the Defamation of Religion Conundrum’ (2013) 11 *The Review of Faith and International Affairs* 66, 66-7.

⁴³ See for instance, General Assembly Resolution 65/244, UN. Doc A/RES/65/244 (11 April 2011). The emphasis on Islam stands to reason in light of the role of the Organization of Islamic Conference in promoting resolutions on defamation of religion and its professed aim to “Protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilizations and religions.” See <http://www.oicun.org/2/23/>, accessed on 2 October 2013.

⁴⁴ UN Commission on Human Rights, *Resolution 2005/40 on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/RES/2005/40 (19 April 2005) [6].

always illogical in light of the arbitrariness of birth and the irrelevance of the small components of DNA which comprise skin colour, hatred on the basis of religion may be based on more substantial considerations pertaining to a person's actions, character and treatment of others. Peter Cumper concurs that "...a blanket repudiation of 'hatred' is open to question."⁴⁵ While racial hatred, he says is inevitably irrational and should never be condoned, "there may be occasions where toleration of *religious* hatred is permissible."⁴⁶ He raises the example of beliefs of sects that permit young children to be severely beaten to have evil spirits exorcised from their bodies, to which hatred, he argues is an appropriate reaction. He also raises the examples of 'religious' groups that engage in child sacrifice or teach that murder is a sacred duty.⁴⁷ It could be argued that not only is hatred an 'appropriate response' to such beliefs and practices but also that it is perhaps necessary; tolerance is *prima facie* a virtue, but it is unacceptable to tolerate intolerable practices.

On this point, Abrahamic religions and human rights agree. But while rights advocates may hate those people that violate rights, religious advocates may hate people on far broader grounds. "Many faiths exhort their followers to hate 'sin' and those who perpetrate evil. In the Bible, for example, David wrote 'O Lord, How I hate those who hate you!... I hate them with a total hatred' (Psalm 139:21)."⁴⁸ Dennis de Jong notes that

...hardly any religion or belief is pacifist. Especially when threatened or in order to spread their message throughout the world, most religions or beliefs can be interpreted in a way permitting the acceptance of violence if necessary. Compare the Crusades and colonialism of Christianity, the (external) *jihad* of Islam, and the Hindutva or radical Buddhism. Such religiously inspired violence is in direct conflict with international human rights and humanitarian law.⁴⁹

⁴⁵ Peter Cumper, 'Inciting Religious Hatred: Balancing Free Speech and Religious Sensibilities in a Multi-Faith Society', in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 249.

⁴⁶ Ibid 249.

⁴⁷ Ibid.

⁴⁸ Ibid 248.

⁴⁹ De Jong, above n 1, 190.

Such issues arguably even evoke considerations in respect of propaganda for war which is prohibited under article 20(1).⁵⁰

Aside from the fact that hatred is in some circumstances warranted, it cannot of itself be practically prohibited. It is incitement which is the external manifestation of hatred that must be limited. The challenge is that the circumstances in which hatred is warranted differ in religious perspectives and rights perspectives, as does the tipping point at which such hatred can be considered incitement. Some religions may promote hatred of certain people (homosexuals for instance, perhaps Jews, or maybe non-white races). Here the conflict between the manifestation of religion and other human rights becomes immediately apparent; while such hatred could be prohibited on the basis that it incites discrimination or violence against the object of hatred, from the religious point of view, such hatred may constitute a fundamental part of the belief in question and therefore be protected as a religious manifestation. Consider for instance, the rights of a woman leaving an abortion clinic who is subject to hateful taunts from Christian fundamentalist pro-life advocates who accuse her of a being a murderer destined for hell. Is human rights law, particularly article 20 of the ICCPR, adequately equipped and applied by human rights bodies to address this conflict?

Jurisprudence and academic literature addressing religious hatred is primarily concerned with hatred *of* religions rather than hatred *by* the religious. In 2006, Asma Jahangir, the then Special Rapporteur for Freedom of Religion and Belief expressed the concern that "[i]ntolerance of any form or expression of religion is becoming a very negative outcome of certain forms of radical secularism."⁵¹

This said, the Special Rapporteurs of both freedom of expression and freedom of religion and belief jointly issued a report in 2006 which touched upon this issue of hate speech that originates in religious expression. In the joint report,⁵² the Special Rapporteurs, in discussing forms of expression directed against religious and belief communities, noted that authors of such expressions "are not necessarily secularists,

⁵⁰ Article 20(1) on propaganda for war is beyond the scope of this thesis.

⁵¹ UN Doc A/HRC/2/3, 6.

⁵² Ibid.

but also members of religious communities. Religious groups and communities are therefore not only the target of critical forms of expression but also in many cases the origin".⁵³ This acknowledgement that religious individuals or communities may be the source of hateful expressions is a welcome development. However, the statement would be more appropriate had it been issued without the suggestive comment that the authors of such expressions are 'not necessarily secularists' for the same reason that it would be entirely inappropriate and borderline discriminatory to say 'terrorists are not necessarily Islamists.'

Three years later, in her last general report to the Human Rights Council, Asma Jahangir took her final opportunity as Special Rapporteur to express her strong concerns about hate speech. In doing so she noted that the preaching of hatred by religious leaders was an indicator of incitement to discrimination, hostility or violence, and went on to express her increasing concern about discrimination and violence incited and perpetrated on the grounds or in the name of religion, often against those who are dispassionate about religion.⁵⁴ But increasing concern has not been met with increasing action at the jurisprudential level. The lack of cases brought by those who have been unacknowledged victims of hate speech *from* a religious basis may perhaps represent a failing of the international human rights framework to present and promote itself as accessible not only to people whose religious beliefs have been attacked but also to those who have been attacked by religious beliefs. Similarly, there is a lack of Concluding Observations on religious hatred by religious groups of non- or unreligious groups for their lack or denial of religion, though concern is expressed over anti-Semitic, anti-Islamic acts and hatred of other religious groups.⁵⁵

6.3(a) Hatred in the name of religion

That religious beliefs are sometimes the source of hate speech is borne out in the fact that there is sometimes a positive link between religiosity and prejudice, beginning

⁵³ Ibid 8 [25].

⁵⁴ *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, UN Doc A/HRC/13/40 (29 December 2009) [28].

⁵⁵ See for instance, Egypt, ICCPR, A/58/40 vol. I (2002) 31 at para. 77(18); Israel, ICCPR, A/58/40 vol. I (2003) 64 at para. 85(20).

at the point that one religion is subscribed to in preference over others which are rejected as untrue or inferior.⁵⁶ Social scientists define fundamentalists as those who believe “that one religion uniquely represents the fundamental truth, that this truth is opposed by evil, and that only followers of this religion have the desired relationship with God.”⁵⁷ Defined thus, it can be said that “[a]ll religions are to a greater or lesser extent ‘fundamentalist’ in character in that they recognise that theirs is the just rule, the correct avenue to truth.”⁵⁸ Beyond this unavoidable element of fundamentalism in all religious and belief worldviews, researchers have confirmed a correlation between religiosity and prejudice based on religion or belief, race, ethnicity, sexual orientation, gender and several other characteristics.⁵⁹ Research has also revealed a negative relationship between religiosity and 'universalism', defined as "[u]nderstanding, appreciation, tolerance and protection for the welfare of all people and for nature."⁶⁰ It logically follows that the more 'fundamental' a person is in his or her beliefs, the less likely he is to be tolerant and to subscribe to universal values of pluralism.

It is submitted here that certain passages of the Bible and the Koran could be said to constitute incitement to hatred. Indeed, Peter Cumper agrees that there are several passages of both texts which, where taken literally are "capable of inciting hatred on the grounds of religion."⁶¹ Examples of such passages include the following:

- “Those who (knowingly) conceal and reject Our Revelations, We Will land them in a Fire to roast there. Every time their skins are burnt off, We will replace them with other skins, that they may taste the punishment. Surely God is All Glorious with irresistible might, All Wise.”⁶²

⁵⁶ Deborah Jones Merritt & Daniel C Merritt, ‘The Future of Religious Pluralism: Justice O’Connor and the Establishment Clause’ (2007) 39 *Arizona State Law Journal* 895, 926.

⁵⁷ Lynne M Jackson & Bruce Hunsberger, ‘An Intergroup Perspective on Religion and Prejudice’ (1999) 38 *Journal for Scientific Study Religion* 509, 512.

⁵⁸ Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), 324.

⁵⁹ See for instance, Bruce Hunsberger and Lynne M. Jackson 'Religion, Meaning and Prejudice' (2005) 61 *Journal of Social Issues* 807, 811.

⁶⁰ Shalom H. Schwartz and Sipke Huismans, 'Value Priorities and Religiosity in Four Western Religions' (1995) 58 *Social Psychology Quarterly* 88, 90. In this report, the authors found a negative relationship across four religious faiths (Protestantism, Judaism, Roman Catholicism and Greek Orthodoxy).

⁶¹ Cumper, above n 45, 247.

⁶² *Koran*, Surah 4, Women, Verse 56.

- “If your very own brother, or your son or daughter, or the wife you love, or your closest friend secretly entices you, saying, ‘Let us go and worship other gods’... do not yield to him or listen to him. Show him no pity. Do not spare him or shield him. You must certainly put him to death. Your hand must be the first in putting him to death, and then the hands of all people. Stone him to death, because he tried to turn you away from the Lord your God...”⁶³

In 2012 a UK preacher, Mr Michael Overd, was acquitted of charges of homophobic hate crime after he approached a gay couple in the street and told them they were sinners who would burn in hell. He asserted that he was only quoting passages from the Bible in accordance with his free expression.⁶⁴

In this respect, the practical implications of finding a substantive basis for hate speech in religious texts must be taken into consideration. It hardly seems possible (nor indeed desirable) to criminalise quoting the Bible or the Koran. Doing so would not only breach the religious freedoms of countless individuals and deprive humanity of the goods of its cultural heritage, but would do a grave disservice to freedom of religion and freedom of expression throughout the world. Rather, consideration must be given not only to the content of the scripture in question, but to the inciting effect of expressing it in a particular context.

The fact that religious expressions can amount to hate speech was acknowledged at the domestic level in 2002 when a UK court found a man guilty of inciting racial hatred for having distributed leaflets containing quotations from the 'Hadith' calling upon Muslims to fight and kill Jews.⁶⁵ The defendant's submission that he had merely been quoting from a religious text, was rejected by Justice McCullen on the basis that "words created 1400 years ago are equally capable of containing race hate

⁶³ *Bible*, Deuteronomy 13:6-10.

⁶⁴ See ‘Gay men told they would burn in hell by preacher’, BBC News (online) 9 February 2012, <http://www.bbc.co.uk/news/uk-england-somerset-16967037> and ‘Michael Overd cleared of verbally abusing gay men in Taunton’, BBC News (online) 10 February 2012, <http://www.bbc.co.uk/news/uk-england-somerset-16984133> both accessed on 2 September 2013.

⁶⁵ It must be noted that while domestic courts do not make international law decisions, there is a nexus between international and domestic law and the interpretation of it, with domestic decisions having significant bearing on the implementation and enforcement of international standards including international human rights standards.

as words created today."⁶⁶ Indeed, the very suggestion that the power of the words in the Koran has diluted over time would itself be an affront to the religious beliefs of many people.

Ultimately, what matters is whether a statement in context is capable of inciting hatred; the fact that a source of a statement is religious should not change the characterisation of a statement that incites hatred. A telling example is found in the 2006 Australian case of *Catch the Fire Ministries Inc and Ors v. Islamic Council of Victoria Inc and Attorney-General for the State of Victoria* at the Victorian Supreme Court of Appeal (hereafter the Catch the Fire Case).⁶⁷ The appeal case followed on from proceedings at the lower Victorian Civil & Administrative Tribunal, instituted by the Islamic Council of Victoria. The Islamic Council alleged that the Catch the Fire Ministries had contravened section 8(1) of the *Racial and Religious Tolerance Act 2001*, which states that:

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

The Islamic Council argued that statements of a Catch the Fire pastor at a gospel assembly, a newsletter written by another, and an article on its website incited hatred against, serious contempt for, or revulsion or severe ridicule of the Islamic faith. The tribunal agreed. Catch the Fire Ministries appealed to the Supreme Court on a number of grounds, including that the tribunal erred in its construction of section 8 of the Act and that a number of the tribunal's findings were not substantiated by evidence. The Supreme Court found that the lower court erred in pointing to evidence that offence had been caused as proof that hatred had been incited. Similarly, the tribunal's characterisation of the Catch the Fire Ministries' comments as being false and unbalanced were beside the point. In this context Justice Nettle noted that:

⁶⁶ 'Muslim guilty of inciting racial hatred', *BBC News* (online), 3 May 2002, http://news.bbc.co.uk/2/hi/uk_news/england/1966839.stm, accessed 10 March 2009.

⁶⁷ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006).

Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. At the same time, statements about the religious beliefs of a group of persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. In any event, who is to say what is accurate or balanced about religious beliefs? ...In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.⁶⁸

The Supreme Court also noted that the tribunal failed to distinguish between hate speech directed at religious beliefs, and that directed at holders of those religious beliefs.⁶⁹ To establish incitement of hatred contrary to section 8, the former was wholly irrelevant. The expressions at issue had to attack Muslims themselves to incite hatred of them. Rather, the expressions were found to have attacked Islamic beliefs with the aim of encouraging Christians to share the Christian faith with them.⁷⁰ The Supreme Court ordered that another tribunal member hear the case again without further evidence.

The Supreme Court's reasoning is commendable for acknowledging that while the viewpoints emanating from a religious position may not be balanced or fair, they do not necessarily amount to hate speech. In lay terms, the decision upholds the valuable notion that the entitlement to criticise another person's religious belief is an essential ingredient in freedom of expression and freedom of religion and belief. Justice Nettle explained that section 8:

...does not prohibit statements about religious beliefs *per se* or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of

⁶⁸ Ibid [36].

⁶⁹ Ibid [76].

⁷⁰ Ibid [90].

persons. The proscription is limited to that which *incites* hatred or other relevant emotion and s.8 must be applied so as to give it that effect.⁷¹

In keeping with the focus of this thesis on the extent to which atheists and non-believers enjoy freedom of religion and belief relative to their religious counterparts, Justice Nettle's statement confirms that their expressions criticising religion must not be repressed. However, section 8 of the *Racial and Religious Tolerance Act 2001* prohibits vilification of a person or class of persons on the ground of 'religious belief.' Irrespective of the fact that the Islamic Council was ultimately unsuccessful in its claim, it had standing to bring the issue before VCAT. If Catch the Fire Ministries had targeted atheists on the basis of their beliefs, they would have had no such recourse to the *Racial and Religious Tolerance Act*. At the international level, article 20 of the ICCPR suffers from the same failing.

6.3(b) Homophobia: prohibited discrimination or a religious right?

The failings of article 20 to address all forms of hate are particularly evident when considered in the light of hatred of gays and lesbians, or homophobia.⁷² Given that homosexuals are a group defined by their sexual orientation rather than their nationality, race or religion, hatred directed at them on the basis of their sexuality is not captured by article 20. Hatred on the basis of sexual orientation is a type of expression which often emanates from a religious point of view.

The practical manifestation of Bible interpretations resulting in a clash between religious precepts and human rights principles is evident with respect to religious views about gays and lesbians or perhaps more specifically, about gay and lesbian sexual activities. Several passages of the Bible state clearly or imply that homosexuality is sinful. Indeed, a lay-reader of certain passages could construe Bible morality as teaching that gang-rape of a woman is far less sinful than men having sex with one another. When Lot was hosting male visitors (actually incognito angels sent by God), men from all over the city of Sodom surrounded the house, and called out to Lot "Where are the men who came to you tonight? Bring them out to us so

⁷¹ Ibid [15].

⁷² Homophobia is defined in the Merriam-Webster Dictionary as "irrational fear of, aversion to, or discrimination against homosexuality or homosexuals."

that we can have sex with them."⁷³ Lot bravely confronted the men, and said "No, my friends. Don't do this wicked thing. Look, I have two daughters who have never slept with a man. Let me bring them out to you, and you do can what you like with them. But don't do anything to these men, for they have come under the protection of my roof." In the end, the daughters were spared from being gang-raped; the angels told Lot to flee with his family and God destroyed every living thing (including the vegetation) in the city.⁷⁴

The girls in the book of Judges did not fare so well. In a similar story told therein, men of the city also demanded that male visitors be presented for sex. The host of the visiting men went outside and said "No, my friends, don't be so vile. Since this man is my guest, don't do this disgraceful thing. Look, here is my virgin daughter and his [the guest's] concubine. I will bring them out to you now, and you can use them and do whatever you wish. But to this man, don't do such a disgraceful thing."⁷⁵ The man who was under threat sent his concubine outside in place of himself; "...and they raped her and abused her throughout the night and at dawn they let her go."⁷⁶ The woman's 'master' who had given her over to be gang-raped found her in the morning collapsed at the door. He said to her "Get up; let's go."⁷⁷ Discovering that the woman was dead, he loaded her on his donkey and took her home. When he arrived home, he cut her body into twelve parts which he sent into different areas of Israel.⁷⁸

The 'correct' interpretation of such passages is difficult to ascertain. Is the message that rape of a man is far worse than the rape of a woman? That a male visitor is to be afforded more protection than one's own daughter? That the dead body of a rape victim should be dismembered and disseminated? Regardless of whatever 'meaning' is to be inferred from these passages, it is generally undisputed that homosexuality

⁷³ *Bible*, Genesis 19:5.

⁷⁴ *Bible*, Genesis 19:23-26. Lot's family was spared, other than his wife who defied instructions not to look back when she was fleeing and was turned into a pillar of salt for doing so. Curiously, Lot ended up hiding in a cave with his daughters who got him drunk and took it in turns to have sex with him so the family line could continue (*Bible*, Genesis 19:30-38).

⁷⁵ *Bible*, Judges 19:23-24.

⁷⁶ *Bible*, Judges 19:25.

⁷⁷ *Bible*, Judges 19:28.

⁷⁸ *Bible*, Judges 19:28-29.

is not sanctioned by the Bible. Perhaps this principle is more expressly established in passages such as the following:

- If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads.⁷⁹
- ...Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God.⁸⁰

Similarly, the Koran does not look favourably upon homosexuals.

- What! will you continue to come with lust to men in place of women? You are indeed an ignorant people with no sense (of decency and right and wrong).⁸¹

In relation to gay sex, the Hadith also instructs:

- Kill the one that is doing it and also kill the one that it is being done to.

Though domestic courts do not make international decisions, there is a nexus between what happens at the international level and its implementation and enforcement at the domestic level. For this reason, domestic law sheds light on how international human rights law is unpacked in practice. In 2005 in Sweden, evangelical Christian pastor, Åke Green, was issued with a month-long prison sentence for his offensive comments about homosexuals. The conviction was quashed on appeal with the Appellate court finding that Green's sermon on homosexuality could not be considered incitement against homosexuals, but simply as a sermon faithful to the Bible.⁸² In his sermon, Green referred to homosexual acts (and other 'sexual abnormalities') as a 'cancerous tumor' on society and implied that homosexuals were more likely than heterosexuals to rape children and animals. The fact that this comment was made in reference to the acts rather than the people performing them was argued by Green as absolving him from having expressed hate

⁷⁹ *Bible*, Leviticus 20:13.

⁸⁰ *Bible*, 1 Corinthians 6:9-10

⁸¹ *Koran*, Surah 27:55.

⁸² Cumper, above n 45, 248. Also see <http://www.akegreen.org/>.

speech.⁸³ The Supreme Court confirmed that the statements made by Green and the context in which he expressed them showed ‘contempt’ for homosexuals, but fell short of hate speech.⁸⁴ Indeed, the Supreme Court noted that “The way he expressed himself perhaps cannot be deemed that much more derogatory than the wording of the Bible verses in question.”⁸⁵ In its reasoning, the Court considered what the European Court of Human Rights would decide if it was asked to do so, and came to the conclusion that it would consider the limitations imposed on Green to be disproportionate. Green’s sermon, the Supreme Court reasoned, was based on a theme contained in the Bible, and the legitimacy of that belief was not a question for the court.⁸⁶

It is a shame that neither the European Court of Human Rights nor the HRC was given the opportunity to consider this case. While the Supreme Court of Sweden may be correct in its predictions as to what the European Court would hypothetically decide, it is submitted here that if Green had said in his speech that Jewish practices were a “cancerous growth” on the body of society, or that Muslims will “force themselves upon animals” or “corrupt young boys”, then the group targeted by Green’s assertions would have achieved protection under the Swedish justice system, the ECHR and the ICCPR.

But there are insights to be gained into what the ECHR did decide in a later ECHR case that arose in relation to expressions against homosexuals in Sweden from a non-religious point of view. In *Vejdeland and others v Sweden* the applicants were convicted of distributing leaflets throughout a secondary school which spoke about the ‘deviant sexual proclivity’ of homosexuality, its ‘moral destruction of society’ and attributed blame to homosexuality for the rise and HIV and AIDS.⁸⁷ The European Court unanimously found that there had been no violation of article 10, given that the interference with the applicants’ rights had been appropriately limited

⁸³ The sermon delivered by Pastor Ake Green can be read at <http://www.akegreen.org/en-2-left/en-2-9.htm>.

⁸⁴ *Prosecutor General v Green* (Supreme Court, Sweden) Appeal Judgment, Case No B, 1050-05, ILDC 200 (SE 2005) (29 November 2005) 8.

⁸⁵ *Ibid* 15-16.

⁸⁶ *Ibid*.

⁸⁷ *Vejdeland and Others v Sweden* (European Court of Human Rights, Application No 1813/07) ECHR 050 2012 (9 September 2012)

by the Swedish authorities in consideration for the reputation and rights of others.⁸⁸ Interestingly, the applicants in this case argued that their situation should be compared to that of Green, and similarly be acquitted.⁸⁹ However, in reaching its decision the Swedish court distinguished this case from that of Green, who had made his statements to his congregation and used biblical quotes, while the applicants' stated objective was to instigate a public interest debate concerning the objectivity of Swedish school education.⁹⁰ In other words, the court distinguished between Green's religiously-anchored messages, which it was unacceptable to interfere with, and the non-religious messages of the applicants, which were acceptably interfered with.

Judge Yudkivska joined by Judge Villiger concurred but regretted that the court did not take the opportunity to clarify its approach to hate speech, particularly vis-à-vis homophobia.⁹¹ The European Court's acceptance of the Supreme Court's conviction in this case can be contrasted to the decision reached in Green. The Supreme Court's decision to acquit Green, whose controversial expressions were biblically based and therefore 'religious' expressions, supports the key submission of this chapter; hatred that is not inspired by religion is met with more interference than hatred that is.⁹²

Dennis de Jong has commented on the privileged position of religious manifestations in a number of cases in the Netherlands concerning Islamic and Christian teachings or publications condemning homosexuality. Such manifestations, he notes, were generally held to be consistent with international and national law providing that they only concerned religious precepts for the followers of that particular religion.⁹³ "If, however, sermons or literature contain language exhorting followers to persecute homosexuals who do not belong to the same religion or belief, such manifestations are not protected by the freedom of religion and belief and are to be prohibited in accordance with article 20 of the ICCPR."⁹⁴ The

⁸⁸ Ibid.

⁸⁹ Ibid [30].

⁹⁰ Ibid [15].

⁹¹ Ibid, concurring opinion of Judge Yudkivska joined by Judge Villiger.

⁹² Also see for instance, the above-mentioned acquittal of Michael Overd as one such example.

⁹³ De Jong, above n 1, 194.

⁹⁴ Ibid.

implication is that human rights law should not intervene where a gay Christian or gay Muslim is being persecuted by fellow Christians or Muslims.

A more recent decision of the Derby Crown Court in the United Kingdom resulted in the prosecution of three men for hate speech against gays, which they expressed from the perspective of their religious beliefs. In response to the upcoming 2010 gay pride parade in Derby, a group of five Muslim men distributed flyers to passers-by in the vicinity of their mosque and posted them through doors and letterboxes. The flyer contained passages from the Koran, a picture of a wooden mannequin hanging from a noose, and read 'Death Penalty?'⁹⁵ On 20 January 2012, three of the five men were found guilty of inciting hatred and sentenced to prison.⁹⁶ The case was the first in the UK to apply an amendment to the *Public Order Act* of 1986, which by virtue of the *Criminal Justice and Immigration Act* of 2008, criminalised acts intended to 'stir up hatred on the grounds of sexual orientation.'⁹⁷ By prosecuting the defendants in this case, the court confirmed that religious expressions could incite hatred against gays on the basis of their sexual orientation. In this situation, domestic law was available to the court to enable them to make a decision accordingly.

At the international level, hatred directed at gays from religious standpoints is not captured by article 20 because homosexuals are a group defined by their sexual orientation rather than by their nationality, race or religion. Article 20 should not be limited to hatred that is incited only on the grounds of nationality, race or religion, but should be broadened so that it focusses on incitement to discrimination, hostility or violence, rather than on the trait that is hated. Article 20 as it currently stands privileges certain groups by protecting them from hatred, over others, who are not protected. Setting the limits of article 20 in terms of hated traits rather than the nature and extent of the hatred itself has the effect of condoning hate speech directed at some people for some reasons.

⁹⁵ 'Convictions show society won't tolerate homophobia', *Derby Telegraph* (online), 21 January 2012, accessed on 30 January 2012, <http://www.thisisderbyshire.co.uk/Convictions-society-won-t-tolerate-homophobia/story-14994895-detail/story.html>.

⁹⁶ 'Derby men guilty over gay hate leaflets', *BBC News* (online), 20 January 2012, accessed on 30 January 2012, <http://www.bbc.co.uk/news/uk-england-derbyshire-16656679>.

⁹⁷ *Criminal Justice and Immigration Act 2008* (UK), s.74.

However, there is some sign that lesbian, gay, bisexual and transgender (LGBT) people are being increasingly considered by the international human rights community as targets of hate speech. In 2006, the HRC expressed concern over violent crimes against sexual minorities in the US and requested that such crimes be included in federal hate crime legislation, though it cited articles 2 and 26 in doing so, rather than article 20.⁹⁸ In Concluding Observations on Sweden in 2009, the HRC spoke of homophobic and racial hate crimes, citing articles 20 and 26 in relation to the latter.⁹⁹ A year later in 2010, the HRC noted the rise in hate speech directed at LGBT people in Poland and recommended that the state amend its penal code to include hate speech based on sexual orientation.¹⁰⁰ In the year before, the HRC named ‘religious leaders’ among those manifesting hate speech against LGBT people in the Russian Federation, alongside public officials and the media, although it made this comment in relation to article 26 protection from discrimination, not article 20 protection from hate speech.¹⁰¹

6.3(c) Hatred of atheists and non-believers

It is necessary to consider whether or not vilification of non-believers or atheists can constitute religious hatred. If this form of hatred were to fall between the cracks of article 20, a severe failing of the ICCPR would be shown in its inability to equally protect people of all religions and beliefs. In practice, such a failing would mean that people who subscribe to certain beliefs are more entitled to protection than those who subscribe to other beliefs or no beliefs.

Vilification of all non-believers is a difficult form of hatred to address within article 20, largely because such vilification is not necessarily targeted at particular non-believers, but rather at those who subscribe to all religions and beliefs that are

⁹⁸ UN Human Rights Committee, *Consideration of reports submitted by States Parties under article 40 of the Covenant*, UN Doc CCPR/C/USA/CO/3, 87th Sess (10-28 July 2006) [25].

⁹⁹ UN Human Rights Committee, *Consideration of reports submitted by States Parties under article 40 of the Covenant*, UN Doc CCPR/C/SWE/CO/6, 95th Sess (7 May 2009) [19].

¹⁰⁰ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 4 of the Covenant, Concluding Observations of the Human Rights Committee*, UN Doc CCPR/C/POL/CO/6, 100th Sess, (15 November 2010) [8].

¹⁰¹ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, UN Doc CCRP/C/RUS/C/6, 97th Sess (24 November 2009) [27].

different to that of the person or people espousing hatred. That is, the hatred may not be targeted at a distinct group but an amorphous, non-cohesive group.

Neither General Comment 11 on article 20 nor the HRC's jurisprudence provides any guidance on whether or not the prohibition of religious hatred extends to those with non-theistic and atheistic beliefs, as well as those who profess no religion or belief at all. Indeed it would seem that the broad understanding of religious freedom as protecting all religions and beliefs has been forgotten at this crossroads of freedom from hate and freedom of religion.

For example, the Christian Bible instructs:

Do not be yoked together with unbelievers. For what do righteousness and wickedness have in common? or what fellowship can light have with darkness?... What does a believer have in common with an unbeliever? Therefore come out from them and be separate, says the Lord. Touch no unclean thing, and I will receive you, and you will be my sons and daughters, says the Lord Almighty.¹⁰²

Similarly, the Islamic Koran predicts a fiery finish for non-believers;

- Those who disbelieve, neither their wealth nor their offspring will avail them at all against God; they are fuel for the fire.¹⁰³
- And kill them wherever you find them, and drive them out from whence they drove you out, and persecution is severer than slaughter, and do not fight with them at the Sacred Mosque until they fight with you in it, but if they do fight you, then slay them; such is the recompense of the unbelievers.¹⁰⁴
- Let not the believers take the unbelievers for friends rather than believers; and whoever does this, he shall have nothing of (the guardianship of) Allah, but you should guard yourselves against them, guarding carefully; and Allah

¹⁰² *Bible*, 2 Corinthians 6:14-18.

¹⁰³ *Koran*, Sura 3:10.

¹⁰⁴ *Koran*, Surah 2.191.

makes you cautious of (retribution from) Himself; and to Allah is the eventual coming.¹⁰⁵

While domestic legislation may generally be too narrow to explicitly protect non-believers against hatred, a wide interpretation has been made in some countries. One example is the Racial and Religious Hatred Act 2006 of the Parliament of the United Kingdom, which defines 'religious hatred' by virtue of Section 29A as "hatred against a group of persons defined by reference to religious belief or lack of religious belief."¹⁰⁶ Interestingly, one of the concerns raised against this Act by religious groups was that it might imply that certain passages of the Koran or Bible would become illegal.¹⁰⁷

As yet there have been no complaints brought to the HRC by atheists alleging that they are victims of hate speech. The lack of complaints brought is not proof that atheists are not victims of hate speech and discriminatory practices in many countries of the world, but rather is indicative of the issue being largely invisible in international human rights law. It is submitted that there is an inherent bias in the human rights system in favour of individuals who adhere to organised and established religions.

As another example, note that during a storm of controversy about paedophilia within the Catholic Church, Catholic Bishop Anthony Fisher, in his Easter address in Parramatta, Sydney in 2010 said:

¹⁰⁵ *Koran*, Surah 3.28.

¹⁰⁶ *Racial and Religious Hatred Act 2006* (UK) c.1, s 29A.

¹⁰⁷ See for instance, Matthew Tempest, 'Religious hatred bill 'will not harm free speech'', *The Guardian* (online), 31 January 2006, <http://www.guardian.co.uk/politics/2006/jan/31/immigrationpolicy.religion1?INTCMP=ILCNETTXT3487> accessed on 18 October 2001, and Polly Toynbee, 'What's at stake is the right to insult and cause offence', *The Guardian* (online) 31 January 2006, <http://www.guardian.co.uk/politics/2006/jan/31/religion.politicalcolumnists?INTCMP=ILCNETTXT3487> accessed on 18 October 2001. See also *The Christian Institute*, <http://www.christian.org.uk/briefingpapers/incitement.htm>.

Last century we tried godlessness on a grand scale and the effects were devastating: Nazism, Stalinism, Pol Pot-ery, mass murder, abortion and broken relationships - all promoted by state-imposed atheism.¹⁰⁸

Other than receiving widespread media coverage and criticism from the atheist and rationalist societies,¹⁰⁹ there was no particular response from NGOs or the state, or the international human rights community, nor was an apology forthcoming. It is hard to imagine that in 2010, this Catholic Bishop would credit any belief other than atheism with a century's mass murder without being met with accusations of vilification or, at the least, discrimination. The question for international human rights law is whether atheists are truly respected equally alongside other non-believers who may subscribe to other religious beliefs. The apparent lack of concern shown by former Special Rapporteur Abdelfattah Amor during his visit to the Vatican (mentioned above at 4.2(a)), suggests that atheists are often overlooked.

6.3(d) Hatred by atheists and non-believers

Other considerations arise from the fact that atheists are not mere passive victims of vilification. The last decade in particular has seen a spate of discourse from prominent atheists including but not limited to Sam Harris (author of *The End of Faith: Religion, Terror and the Future of Reason*) Richard Dawkins (author of *The God Delusion*), the late Christopher Hitchens (author of *God is Not Great: How Religion Poisons Everything*), and Michel Onfray (author of *The Atheist Manifesto: The Case against Christianity, Judaism and Islam*). Works by such authors have achieved significant sales, promoted discourse about religion and belief, and have also become notorious not for merely promoting atheism but for active and sometimes vitriolic criticism of religions. Father Frank Brennan (a Jesuit priest and prominent Professor of law in Australia) had this to say in reviewing a selection of atheist books released in 2007:

¹⁰⁸ Miles Godfrey, 'Atheists are believers who hate god, says Anglican Archbishop Peter Jensen', *News* (online) 2 April 2010, http://www.news.com.au/national/atheists-are-believers-who-hate-god-says-anglican-archbishop-peter-jensen/story-e6frfkvr-1225848927144?from=igoogle+gadget+compact+news_rss, accessed on 3 April 2010.

¹⁰⁹ See for example, 'Atheists hit back at clergy for criticism of non-belief', *Sydney Morning Herald* (online) 2 April 2010, <http://www.smh.com.au/national/atheists-hit-back-at-clergy-criticism-of-nonbelief-20100402-rjmr.html>, accessed on 30 March 2011.

The successful marketing of *The God Delusion* has now unleashed a steady flow of anti-religious rantings from intelligent authors who have thrown respect for the other and careful argument to the wind, staking bold claims for the destruction of religion. Instead of proposing strategies for weeding out religious fundamentalists who pose a threat to the freedom, dignity and rights of others, these authors are proposing a scorched earth policy of killing off all religion.¹¹⁰

The effusiveness of some atheists has lead to growing concern that they pose a threat to religious freedom or to religion itself. Critical interpretation of the atheistic agenda as being to annihilate religion has lead to some atheists being labelled 'militant' atheists, that is, 'new atheists' who portray "religious believers as the main cause of the major problems we face today" and imply that "Christianity and traditional religions need to be silenced or removed for mankind to move forward."¹¹¹ These 'radicals' have been accused of viewing religion as inherently 'fundamentalist', and 'liberal' religion if not as an oxymoron than as a manifestation of bad faith; an interpretation noted as "the 'fundamentalist' position turned on its head."¹¹²

The term 'militant atheism' is one that has uncertain connotations. While a 'militant Christian' could be conceived of as a person who bombs an abortion clinic, and a 'militant Muslim' could justifiably be attached to an Islamic terrorist, it is difficult to see how writers, scientists and philosophers who generate public debate and discourse warrant being labelled 'militant'. Atheism as an individual belief (or even a movement, if one were to emerge) poses no physical threat. Expressing opposition to religious beliefs, scientifically challenging or even vindictively offending them does not exceed the limits of freedom of expression. Nor do attempts to convince others to adopt atheism exceed freedom of expression any more than non-coercive proselytism of any religion or belief. Though the label 'militant' would seem more

¹¹⁰ Frank Brennan, 'Frank Brennan answers atheist manifestos', *Eureka Street* (online), 5 June 2007, accessed on 27 January 2012, <http://www.eurekastreet.com.au/article.aspx?aeid=2955>.

¹¹¹ See for instance, Phil Fernandes, 'The Atheist Delusion: A Christian Response to Christopher Hitchens and Richard Dawkins' (Xulon Press, 2009), 1.

¹¹² Peter Beyer, "'Fundamentalism' and the Pluralization of Value-Orientations", in Lisbet Christoffersen et al, *Religion in the 21st Century* (Ashgate, 2010) 47.

fairly reserved for fundamentalists who use violence in pursuit of their ideological agenda, it is sometimes imposed on atheists by theists who are concerned that atheists are no longer mute targets of heated religious speech, but are now vocally responding with criticisms of their own. Philosopher A. C. Grayling notes that while historically atheists were burnt at the stake by theists, the atheists of today are only exercising their right to speak frankly, much to the chagrin of religious opponents of non-belief. Grayling notes the logic failure of the term when he rhetorically asks "...how can you be a militant atheist? How can you be a militant non-stamp collector?... You just don't collect stamps. So how can you be a fundamentalist non-stamp collector? It's like sleeping furiously."¹¹³

In short, while atheists are particularly vulnerable to hate speech by religious actors on the basis of their antipathy towards, rejection of, or opposition to religious beliefs, the human rights community has been relatively silent in its defence of them.

6.4. Conclusion

The arguments in this chapter are not meant to support the necessity of hate speech laws in protecting against religious hatred; it could be argued that human rights protection would be equalised to the enjoyment of all regardless of their religion or belief, where hate speech was allowed for all. Indeed, while article 20 introduces the onerous requirement that states prohibit hate speech by law, any limitations to expression must nonetheless be justified on the basis of article 19(3).¹¹⁴ But the question of whether or not hate speech laws are necessary is beyond the scope of this thesis, and the fact that there *are* such laws means that article 20 must be considered against the danger of it being implemented in ways that are inherently biased. The challenge for the international human rights community is to prohibit hate speech while simultaneously upholding freedom of religion and belief. In accordance with the pluralist approach advocated in this thesis, the role of human rights law is to determine when the manifestation of a religion or belief must be limited as inciting violence, hostility or discrimination.

¹¹³ Decca Aitkenhead, 'AC Grayling: 'How can you be a militant atheist? It's like sleeping furiously.' *The Guardian* (online), 3 April 2011, accessed on 27 January 2012, <http://www.guardian.co.uk/books/2011/apr/03/grayling-good-book-atheism-philosophy>.

¹¹⁴ *General Comment 34*, UN Doc CCPR/C/GC/34 [50-52].

6.4(a) Religious bias of article 20

Despite there being several examples of hate speech in the name of religion, often targeted at those who do not share the same belief, there is a reluctance to deem expressions which come from a religious point of view as 'hate speech' of the type which should be prohibited. But even more telling than the criticisms mounted against atheists for their non-belief is the silence of the human rights community in defence of them and the lack of consideration and deliberation as to whether such attacks amount to limitable hate speech. It is submitted here that the expressions most likely to be interfered with are those that criticise established religions.¹¹⁵ Those least likely to be interfered with are expressions that come from a religious point of view and target groups who are not defined by virtue of their religion or who are defined by virtue of their lack of religion. Logically in the middle of this spectrum are expressions that are religious but directed at adherents of another religion such that the competing rights both involve religion; the right to be free from religious hatred and the right to manifest religious belief.

The key contention proffered in this chapter is that the prohibition on hate speech should be applied to protect everybody from hatred and to prohibit all incitement to hatred, regardless of the particular prejudices of the source or the hated traits of its target. References to nationalities, race and religious hatred are not adequate to address all of the types of hatred that are advocated, including those emanating from religious points of view. Human rights protection should not depend on the particular traits, beliefs or characteristics of the individual or group needing protection, but should non-discriminatorily be afforded regardless of nationality, race, religion, belief, gender, class, sexual orientation or other trait or characteristic that can conceivably be the subject of hatred. Indeed, a dwarf who becomes the target of hatred by a dwarf-hating new religion should not be left unprotected because the trait for which he is hated is not listed in article 20. From the perspective of the hated person this is clear, and from the perspective of those espousing hatred, limitations to human rights are designed to protect individuals rather than belief

¹¹⁵ Expressions directed against a particular race or races are also likely to be interfered with, but this is not relevant to the issue being addressed in this chapter.

systems so that every person will have all of his or her human rights protected.¹¹⁶ Surely then, the catalyst for intervention in respect of incitement to hatred, should be the fact that violence, hostility or discrimination is incited, regardless of who is inciting it or why.

6.4(b) The need to strengthen article 20

The application of article 20 should pass the test not only of protecting religious individuals from hate speech directed at them, but also of protecting non-religious individuals from calls to aggression thinly disguised as permissible religious expressions. Article 20 should guard against all forms of incitement regardless of the hated traits. Hatred should *prima facie* be allowed (because hatred is sometimes a reasonable response and even where it is not, it can not be practically disallowed), but only up to the point that it does not incite violence, hostility or discrimination. At present it seems that people who are hated for their religion receive more protection than those who are hated by a religion (often for reason of their different religion or belief or their sexual orientation). Indeed, it was argued above that some religious teachings, depending on the context in which they are delivered, can constitute incitement to hate, but that such expressions are rarely repressed by article 20.

Gays and lesbians do not receive the explicit protection of article 20. Instead, hate speech against homosexuals is sometimes permitted (or simply not opposed) on the grounds that they are permissible religious expressions. Similarly, religious expressions that incite hatred against non-believers should also be captured by article 20; currently 'religious hatred' is anticipated, but 'religious or belief hatred' is not. A challenge is posed in extending article 20 to protect non-believers from hate speech; the victims in question do not belong to a homogenous group who subscribe to a particular religion different from the source of the hatred, but represent all religions, beliefs or lack of beliefs that are different. Article 20 should be broadly construed, and the point of interference with expression should be determined by the point that hatred becomes incitement rather than by the religion of its source or the traits of its target. Hatred of any person for any reason should be allowed (and

¹¹⁶ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo*, UN Doc A/HRC/7/14 (28 February 2008) [65].

cannot in practical terms be disallowed), but where such hatred manifests as incitement to discrimination, hostility or violence it should be prohibited.

In her last general report to the Human Rights Council, Special Rapporteur Asma Jahangir noted with regret that at the country level, “denunciation of human rights abuses is often selective; the religion of the victim and of the perpetrator, rather than the act itself, seems to be a determining factor as to who feels obliged to publicly condemn the incident.”¹¹⁷ The same should not be true at the level of international human rights law.

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¹¹⁷ Jahangir, above n 54, [38].

CHAPTER 7: CASE STUDY – CHILDREN VS PARENTS

7.1. Introduction

*“Let the little children come to me, and
do not hinder them, for the kingdom of God
belongs to such as these.”*

Jesus, Mark 10:14

The potential conflict between one person’s freedom of religion and belief and that of another is acutely illustrated in considering the relationship between children and their parents. Indeed, ideological worldviews and rights worldviews can collide no more forcefully than through objective consideration of the situation of children around the world. It is in considering the often violated rights of children and the violations of those rights in the name of article 18 rights of their parents, that the human rights community can be said to have failed the most in its mission to protect individuals above religions and beliefs. The late Christopher Hitchens vehemently underscored the particular vulnerability of children at the hands of their religious parents when he said:

By all means let an observant Jewish adult male have his raw-cut penis placed in the mouth of a rabbi... By all means let grown women who distrust their clitoris or labia have them sawn away by some other wretched adult female. By all means let Abraham offer to commit suicide to prove his devotion to the Lord or his belief in the voices he was hearing in his head. By all means let devout parents deny themselves the succor of medicine when in acute pain and distress. By all means – for all I care – let a priest sworn to celibacy be a promiscuous homosexual. By all means let a congregation that believes in whipping out the devil choose a new grown-up sinner each week and lash him until he or she bleeds. By all means let anyone who believes in creationism instruct his fellows during lunch breaks. But the conscription of

the unprotected child for these purposes is something that even the most dedicated secularist can safely describe as a sin.¹

Despite the particular vulnerability of children vis-à-vis their parents, their independent right to freedom of religion and belief has not received significant attention.² There is no question that article 18 of the ICCPR applies equally to protect the right of children to freedom of religion and belief; indeed the right belongs to 'everyone' and it is a universally recognised principle that children do not have 'smaller' rights than their adult counterparts.³ However, there remains little guidance as to how article 18 rights of parents and the competing rights of their children are to be balanced in the event of collision. This is true not only of the child's article 18 rights, but also of the child's other human rights including (but not limited to) his or her rights to education and health.

Sylvie Langlaude expresses the right of the child to religious freedom as "the right of every child to be unhindered in their growth as an autonomous independent actor in the matrix of parents, religious community and society."⁴ It will be asserted in this chapter that the international human rights framework affords children no such right. Rather in the event of a conflict, the rights of parents to impose a religion or belief trump the rights of their children to choose their own. In determining how to balance parents' religious freedoms with the competing rights of their children, examples of religious education of children and the circumcision of infant males will be considered. With respect to education, the interplay between parents' rights to determine their child's religious and moral education as contained in article 18(4) will be considered in relation to the child's right to receive an education and his right to be free from coercion under article 18(2) of the ICCPR. With respect to male circumcision, the key limitation that will be considered will be the limitation of parents' religious rights in relation to the health and religious rights of 'others', where those 'others' are their infant children.

¹ Christopher Hitchens, *God is not great* (Allen & Unwin, 2007), 51-52.

² Cornelis D. de Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946-1992)*, (Intersentia, 2000), School of Human Rights Research Series, Vol 5, 606.

³ See for instance, UNICEF, *Convention on the Rights of the Child* online, http://www.unicef.org/crc/index_using.html, accessed 16 December 2011.

⁴ Sylvie Langlaude, *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers, 2007) 116.

Ultimately, this chapter will demonstrate that the international human rights framework betrays a misunderstanding of the nature of religion and belief, and of the nature of the relationship parents have with their children. The fact that parental perceptions of what is in their child's best interests are not always compatible with human rights, means that the state may have an obligation to interfere with parents' upbringing of their child. The challenge is to determine the point of and grounds for such interference.

7.2. The primacy of parents' rights

"Anyone who curses his father or mother must be put to death."

Exodus 21:17

A succinct recap of the religion and belief rights and freedoms that a child enjoys should simply require reference to chapter 1 in which the right to freedom of religion and belief was discussed. Indeed, *everyone* enjoys freedom to have a religion or belief of their choice, free from coercion, and their entitlement to do so is not limited by their age.⁵ However, the vulnerability and developing capacity of a child mean that he or she is not always able to exercise rights in the same way that an adult is able to. The international human rights law response has been to bolster the role of their parents (or guardians) until such a time the child is able to make certain decisions for him or herself. The clear challenge presented by such a response is in determining when such a time comes, which requires an objective determination to be made as to when a child is capable of and therefore entitled to exercise her own right to freedom of religion and belief. Avoiding human rights violation in this sense is no easy task; where the point is called too late, the child's freedom of religion and belief may be repressed, but where it is called too early, the rights of parents to bring their children up according to their own convictions may be inappropriately interfered with. A simpler way of understanding the challenge in the framework of this thesis is to consider the point at which a child can change or reject her religion against the wishes of her parents.

⁵ See for instance Human Rights Committee, *General Comment 17: Article 24 (Rights of the Child)* CCPR 35th Session (7 April 1989) [2]. Children have the right to freedom of religion and belief according to article 18(1) of the ICCPR and article 14(1) of the CRC.

7.2(a) Relevant human rights provisions

Consideration of relevant human rights instruments reveals how closely children's religion and belief rights are interwoven with the rights of parents. The ICCPR and the 1981 Declaration do not offer clear guidance on what to do in the event of a clash, but leave states to determine the threshold for a child's religious autonomy.⁶

The key international legal provisions which empower parents in respect of their children's religion and belief rights are article 18 of the ICCPR, article 13 of the ICESCR, article 5 of the 1981 Declaration and article 14(2) of the CRC.

7.2(a)(i) ICCPR and ICESCR

Article 18(1) of the 1966 ICCPR contains the basic freedom of religion and belief enjoyed by parents and their children. That article reads:

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

Article 18(2) of the ICCPR prohibits coercion of the enjoyment of article 18(1), in that:

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

Article 18(4) of the ICCPR reads:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

⁶ Asma Jahangir (Speech delivered at the 25th Anniversary Commemoration of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief, Prague, 25 November 2006) <http://www.tolerance95.cz/1981declaration/download.php> accessed on 23 February 2011.

It is unclear the extent to which article 18(1) affords parents rights in relation to their children. In respect of article 18(2) the extent to which parents are allowed to influence their children in religion and belief is unclear, particularly before the child has the capacity to make autonomous decisions. Article 18(4) of the ICCPR has no equivalent in the UDHR. The danger of this subsection is that in protecting the broad religious freedoms of parents, it can possibly be construed as limiting the rights of children to freedom of religion and belief.⁷

A comparable article is included in article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

This article goes further in protecting the child than its equivalent article in the ICCPR by adding that the relevant education must meet ‘minimum standards’. However, this safeguard is reduced by the fact that the minimum standards are determined by the state. It is unclear whether the state has complete discretion in this regard or whether there are autonomous objective ‘minimum standards’ that the state must demand.

7.2(a)(ii) 1981 Declaration

Article 5 of the 1981 Declaration reads:

1. The parents or, as the case may be, the legal guardians of the child have the right to organise the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

⁷ It should be noted that throughout this chapter where the term ‘parents’ is used, it intends to denote both ‘parents’ and ‘legal guardians’.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. Practices of religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3 of the present Declaration.⁸

Soon after the 1981 Declaration was adopted, the Commission on Human Rights was requested by the General Assembly to consider how to implement it. This process brought to light many criticisms of the 1981 Declaration, including the lack of clarity in article 5 concerning the age at which a child should be allowed to decide his religion or belief for himself, the absence of which can result in conflict between parental rights and children's rights to freedom of religion and belief. As a result of considerations by the Commission's special working group on the rights of the child, the UN Convention on the Rights of the Child adopted article 14 of the CRC.⁹

⁸ Article 1(3) reads "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

⁹ Brice Dickson, 'The United Nations and Freedom of Religion' (1995) 44 *International and Comparative Law Quarterly* 327, 347. Also see Donna Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 487, 512-4, in which Sullivan notes that the conflicts that may arise between religious and

7.2(a)(iii) CRC

Article 14 of the 1989 CRC reads:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

These CRC provisions positively act to reduce the control that parents have in the upbringing of their child by explicitly referring to the child's own religion and belief in article 14(1). Both the ICCPR and the 1981 Declaration must be construed with the CRC in mind.¹⁰

Comparing article 18(4) of the ICCPR with article 14(2) of the CRC, which came 23 years later, shows a shift in the emphasis placed on parental duties. While the ICCPR afforded parents the right to "ensure the religious and moral education of their children in conformity with their own convictions", the CRC protects the rights of parents to "provide direction to the child... in a manner consistent with the evolving capacities of the child." This alteration illustrates a shifting scale from the primacy of parents' rights in the 1966 Covenant towards greater freedom granted to children in the exercise of their own in the 1989 CRC.

However, the extent to which this shift has resulted in any recognition of increased freedom for children is questionable, particularly given the reality of the principles

belief freedoms of parents and children could have been partially resolved had the Declaration specified an age at which the child may decide on matters of religion or belief.

¹⁰ Brice Dickson, 'The United Nations and Freedom of Religion' (1995) 44 *International and Comparative Law Quarterly* 327, 347.

enshrined in religions that are often imposed by religious parents. Indeed, among the provisions discussed here, only articles 14(1) and (2) of the CRC explicitly mention the rights of the child; the other provisions concern the rights of parents in respect of the child's religion and belief.

It is submitted that the CRC offers children weaker religious freedoms than those they enjoy under the ICCPR. The right set out in paragraph 1 of article 14 of the CRC refers only to the child's freedom of thought, conscience and religion, omitting two elements which provide explicit protection for rights-holders in the ICCPR, namely, the freedom to *have or to adopt* a religion or belief of his choice and the freedom to *manifest* his religion or belief. One possible interpretation could be that article 14 intends only to protect the internal elements of the right, rather than the external elements (in effect, allowing a child to believe anything he or she wants, but not to do so out loud).¹¹ Manifestation is mentioned in article 14(3), but only in the context of limiting it. The internal right afforded to children by article 14 is further weakened by the fact that the state is required only to 'respect' the right of children, which falls short of a more positive obligation to 'protect' or ensure it.¹² The same respect is accorded to third parties in the second paragraph of article 14, which gives parents 'rights and duties' to direct their children in their enjoyment of this internal right. Finally, these rights and duties of parents are not explicitly limited by article 14; the limitations provided for by article 14(3) work to limit the rights of children to manifest their religion or belief (a right not explicitly set out elsewhere in the CRC), but not to limit the role played by parents in 'providing direction' to their children.

7.2(b) The role of religion

The primacy of parents in directing, determining or sometimes dictating the religion and beliefs of their children is reflected in some religious viewpoints. The religious basis for parental authority in spiritual matters needs to be discussed, given that it will later be suggested that in affording rights and duties to parents to interfere with

¹¹ Ursula Kilkelly, 'The Child's Right to Religious Freedom in International Law: The Search for Meaning,' in Martha Albersson Fineman and Karen Worthington (eds.), *What is Right for Children? The Competing Paradigms in Religion and Human Rights* (Ashgate, 2009) 247-248.

¹² Eva Brems, 'Article 14: The Right to Freedom of Thought, Conscience and Religion', in A. Allen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghams and M. Verheyde (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006), 3 and 10.

their child's religion and belief, international human rights law bolsters religions over the rights of children to willingly adopt or reject them. In so doing, when it comes to children, the rights framework can be argued to be reflecting tenets of major religions rather than principles of human rights.

Some major religions are concerned with the family entity as being the path through which a given belief is arrived at; a Christian view would assert that the state should not interfere with the family and that parents have a "God-given mandate and responsibility (for which they will be accountable)" to raise their children as they are commanded to do.¹³ Some major religions instruct obedience to parents. One of the ten commandments of the Hebrew bible underscores obedience to parents:

Honour your father and your mother, as the Lord your God commanded you, so that your days may be long and that it may go well with you in the land that the Lord your God is giving you.¹⁴

Some biblical passages have also been interpreted to encourage parents to corporally punish their children, suggesting a relationship of dominance. Indeed Proverbs 23:13-14 reads "Do not withhold discipline from a child; if you punish him with the rod, he will not die. Punish him with the rod and save his soul from death."¹⁵ A challenge to strict obedience to the religious teachings of parents may arise where those teachings are anti-religious or differ from the dominant religion in question. For instance, a person attempting to obey parents who commanded Hinduism or atheism would be faced with a choice of failing in respect of the commandment to honour one's parents, or in respect of the first commandment to have no other god but the God of the Old Testament.¹⁶

This notion of obeying parents only if parents command a particular ideology is also reflected in Islam, in which the notion of 'obeying parents' as a means of justifying a

¹³ Rex J. Ahdar, 'Children's Religious Freedom, Devout Parents and the State' in Peter W. Edge and Graham Harvey (eds.) *Law and Religion in Contemporary Society* (Ashgate, 2000) 102.

¹⁴ *Bible*, Deuteronomy, 5:16.

¹⁵ *Bible*, Proverbs, 23:13-14.

¹⁶ *Bible*, Exodus, Deuteronomy.

non-believer's non-belief, has been rejected by the Koran.¹⁷ Contrasted with this is another rule of Islam that every Muslim from the age of maturity (a boy at fifteen years and a girl between nine and thirteen years) should stand for the principles of his or her religion.¹⁸ Yet it seems clear that that child is not free to stand for his principle to reject Islam given the prohibition of apostasy and another key principle that a Muslim child is not allowed to choose a religion other than his father's, namely Islam.¹⁹

The situation that a child who questions the beliefs of his parents is faced with is challenging from a religious point of view, and also poses challenges for the well-meaning state which aspires to protect the child's human rights while simultaneously respecting religious tenets and traditions. The child is faced with a predicament of disobedience to his parents and their religion, or disobedience to his own convictions, while the state is faced with the prospect of offending against fundamental religious tenets (that children should follow the religion of their parents) in upholding fundamental rights (that children should be free to choose their own religion and belief).

To avoid this result, several states have entered declarations and reservations to article 14 of the CRC, which shows that where rights ideology and religious ideology clash, the latter often triumphs. Reservations were made to article 14 by Afghanistan, Algeria, Bangladesh, Belgium, Brunei Darussalam, the Holy See, the Islamic Republic of Iran, Iraq, Jordan, Kiribati, Kuwait, Malaysia, Maldives, Mauritania, Morocco, the Netherlands, Oman, Poland, Qatar, Saudi Arabia, Singapore, Syria and the United Arab Emirates.²⁰ In relation to the potential conflict between the religious

¹⁷ Kamran Hashemi, 'Religious Legal Traditions, International Human Rights Law and Muslim States', (Martinus Nijhoff Publishers, 2008), 28, referring to *Koran* 2:170, 5:104, 7:28, 10:78, 21:54-54, 26:74-76, 31; 21; 43:22-23.

¹⁸ Ibid 28-29.

¹⁹ Ibid 242.

²⁰ It is interesting to note that other than Belgium, the Holy See, Kiribati, the Netherlands, Poland and Singapore, all of the states which entered reservations to article 14 were Islamic states who often entered general reservations on all provisions deemed incompatible with Islamic Shariah, and sometimes made specific clarifications as to the point of incompatibility. Several European states objected to reservations made by other states with regard to article 14 on the basis that they were vague or inappropriately evoked internal law to avoid treaty obligations, and that such reservations, as Sweden put it, "may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to the undermining the basis of international treaty law". See UN Treaty Series (online), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en#EndDec,

rights of children and their parents, Algeria entered an interpretative declaration in respect of article 14, underscoring that according to article 2 of its Constitution, Islam is the state religion and that Law No. 84-11 of 9 June 1984, which comprises the Family Code, stipulates that a child's education is to take place in accordance with the religion of its father. The Holy See emphasised that it interprets the articles in a way that safeguard the "primary and inalienable rights of parents", particularly concerning education, religion, association with others and privacy. Kiribati, Poland and Singapore all stressed respect for "parental authority" in interpreting article 14. Although article 14 does not clearly express the rights of children to choose their own religion or belief, and/or reject that of their parents, these reservations show that some states are concerned enough to take precautions against such an interpretation.

Conversely, other states show a tendency to increase the freedom of children; Belgium and Netherlands for instance declared that they understand article 14 to include the right of a child to choose his or her religion or belief.²¹ Collectively, these state responses illustrate the difficulty of reconciling international law with religious precepts and the challenge involved in separating a child's rights from those of his parents.

7.2(c) Resolving conflict between parents and children

The horizontal obligations of states require that they protect rights-holders from rights abuses perpetrated by non-state actors.²² That the manifestation of a person's religion or belief should not harm another person's human rights is an uncontroversial statement of law. From this principle it is clear that a parent's manifestation of his religion or belief can and indeed must be limited where it would harm the human rights of his child. The rights of the child which could be trespassed upon are numerous given the range of possible manifestations of religion or belief;

accessed on 22 February 2011. See UN Treaty Series (online) http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec, accessed on 22 February 2011.

²¹ See Status of Ratifications of the Convention of the Rights of the child at United Nations Treaty Collection (online), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec, accessed on 22 February 2011.

²² See section 3.4(a) above.

her right to life, her right to education, and even her right to be free from torture could be violated by another person, including for instance, her father, in the exercise of his religion or belief. The point at which a parent's article 18 rights should be interfered with to protect a competing human right of his child is often clearly determined. For instance, parents killing their children for reasons of religious beliefs about possession or witchcraft would unequivocally fall outside of any right a parent has over his or her child and would abuse the child's right to life.²³ However, when the right at risk is the child's freedom of religion and belief, determining the point of interference is significantly more complicated, particularly in light of article 18(4) which specifically provides parents with the right to bring up their children in accordance with their own religion or belief.

Article 18 of the ICCPR, article 14 of the CRC and article 5 of the 1981 Declaration should be read together. This being the case, it is possible to unpack some of the protections in place to mark the moment when a parent's wishes should be set aside out of respect for the child's religion and belief rights. A simple reading of relevant provisions determines that a parent's wishes can be disregarded when a child wishes otherwise and his or her capacity has evolved to make him or her capable of fully exercising his or her rights.²⁴ Other considerations include the best interests of the child,²⁵ and her right to express views about decisions that affect her.²⁶ Finally, the 1981 Declaration cautions that "practices of religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development."²⁷

²³ See Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, (Oxford University Press, 2013) 205, and 'National Action Plan to tackle child abuse linked to religion or belief' (The UK National Working Group on Child Abuse linked to Religion or Belief, 2012), which notes that parents have been key perpetrators of such abuse.

²⁴ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5 (entered into force 2 September 1990), Art 5 and Art 14(2).

²⁵ *Ibid* Art 3.

²⁶ *Ibid* Art 12.

²⁷ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN GAOR, UN Doc A/Res/36/55 (25 November 1981), article 5(5).

7.2(c)(i) Evolving capacities

The CRC introduced an important new factor to determine the point at which a child's religion and belief rights are her own to exercise, being the notion of 'evolving capacities'.²⁸ The principle recognises that parents have a right to guide their child in the exercise of her rights, but as the child's capacity increases, she has more influence on her own religion and belief, and her parents have less.²⁹ Though article 14(2) of the CRC offers such a framework, it offers little guidance as to how or when this transfer takes place.³⁰ This notion of a child being entitled to make her own choice of religion or belief according to her ability to do so is referred to as a 'sliding scale' that tilts according to the child's evolving capacity.³¹

It is clear that such a scale must slide rather than be marked with clear indicators of requisite capacity; the different rates at which humans evolve and the sometimes supernatural nature of religion and belief make absolute criteria impossible. Therefore, as Cornelis D de Jong asserts, a sliding scale "does not provide absolute guarantees, but taking into account the sensitivity of the issue it seems to be the best possible solution."³² But while the sliding scale may indeed be the best possible solution, it is still not a particularly good one. De Jong argues that the international human rights framework applies the consideration in a way that is heavily biased in favour of the rights of the parents.³³ Measuring the evolving capacities of a person on objective criteria is a complicated issue, but measuring the evolving capacities of a person in relation to spiritual matters is objectively impossible. For example, a child at a certain point develops the capacity to question the existence of Santa Claus or the tooth fairy. His eventual disbelief in these imaginary beings is expected to occur to such an extent that his continued belief in either into adulthood would raise concerns about his capacity. However, where a child continues to believe in a religiously sanctioned supernatural being, it would be wholly inappropriate to draw

²⁸ CRC, Art 14(2) and Art 5.

²⁹ Kilkelly, above n 11, 246. Also see Geraldine Van Bueren, 'The Right to be the Same, The Right to be Different: Children and Religion' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004), 563.

³⁰ Langlaude, above n 4, 102.

³¹ de Jong, above 2, 54 and 69.

³² Ibid 54.

³³ Ibid 587.

a connection between his continued belief in these entities and his capacity. Indeed for many families, a child who questions the existence of such beings causes far greater concern than his continued belief does.³⁴

Another criticism of the evolving capacities approach is that it is an oversimplification of how a child relates to religion and belief and has the effect of devaluing the way in which a child is religious or believing. Sylvie Langlaude has criticised how international law approaches children's freedom of religion or belief, suggesting that it caters to an adult's understanding and does not reflect how children engage with religion and belief.³⁵ She suggests that holders of a particular religious belief are generally required by human rights law to have an appropriate understanding of the doctrines of that religion or belief.³⁶ This requirement was questioned in Chapter 5 on proselytism, where it was suggested that a threshold of understanding of religious doctrines should not be a prerequisite for espousing a particular religion.³⁷ The same notion applies with children. Indeed, Langlaude makes the telling point that "...children's religious beliefs may be less coherent than those of adults..." but "[f]rom a religious perspective, of course, children may be better able to 'connect' with spiritual matters than adults."³⁸ The reason that children are potentially able to connect better with spiritual matters may in fact be *because* of their lower capacity; they may for instance not yet have been exposed to viewpoints which challenge the 'truths' of the religion in which they are brought up and not yet have the analytical capacity to question religious doctrines. However, it should not follow from a religious or indeed a legal perspective that the lower capacity of a child relative to that of an adult should mean his freedom of religion or belief is entitled to lower protection. Such a finding would not only result in the abandonment of rights-holders who require special protection, but would also be to entirely misunderstand the spiritual nature of religion.

³⁴ It must be stressed that this point is not made to suggest that the existence of God, Allah, Xenu, Ganesha or any other religious figure is as implausible as Santa or the tooth fairy, but merely to highlight the difficulty of measuring a persons' capacity against the intangible beliefs he or she holds.

³⁵ Langlaude, above n 4, 201.

³⁶ Ibid 201-202.

³⁷ See Chapter 5, Proselytism, Section 5.4(b) on attributes of the target of proselytism.

³⁸ Langlaude, above n 4, 202.

Furthermore, to consider the evolving capacities of the child as a stand-alone phenomenon is to step over the issue of the impact that parents have on the development of their children's capacities. Parents can act to promote the development of their child's capacity or to hinder it. Failure to consider the role that parents play in the development of their child is to neglect a factor that may offer the most insight into the extent to which a child enjoys freedom of religion and belief. It must be of relevance, for instance, where the parent acts in such a way as to prohibit the evolution of the child's capacity by stifling rational inquisition with religious rebuke (or indeed stifles religious inquisition with rational rebuke).

Conflict may arise between parents and their child when the child expresses the wish to practice a religion or hold a belief different to that his parents have chosen for him. It is suggested here that where such a conflict can arise between a parent and a child, the child has sufficient capacity to independently enjoy his freedom of religion or belief. Indeed, it is the fact of the conflict that proves that the child has developed the capacity to both question the religion and belief of his parents and to assert his own alternative conviction or opinion. However, the nature of the relationship between parents and children means that a child obtaining the capacity to exercise her rights autonomously is not tantamount to her parents granting her the freedom to do so.

The situation of Amish children is enlightening in considering the challenges young people face in making decisions that diverge from the religion in which their parents raised them. The Amish are a strict group of Christian Mennonites based largely in the eastern parts of the United States.³⁹ Though religious practices permeate every aspect of the Amish lifestyle, some subgroups allow their young members 'rumspringa', a period of grace from the high standards of behaviour demanded by their faith. During this period, when the youth are between sixteen and eighteen years old, some even choose to live for a period of time within non-Amish communities. After this period, the teenager must choose to be baptised into the faith and live according to its doctrines for the rest of his or her life, or must leave

³⁹ John Bowker (ed), *Oxford Concise Dictionary of World Religions*, (Oxford, 2005) 35. Also see Donald B Kraybill (ed), *The Amish and the State* (Johns Hopkins University Press, 2nd edition, 2003) 5-8.

the faith and their community.⁴⁰ The fact that most return to the faith can be considered to be the exercise of a free choice which reflects well on the popularity of the religion, but the alternative of leaving one's family and community, and being shunned by them, arguably does not present a meaningful choice to a teenager. Additionally, the activities engaged in during the period of rumspringa (including experimentation with or exposure to previously forbidden modern clothes, alcohol, cigarettes, drugs, pre-marital sex, motor vehicles and technological gadgets) cannot be considered to provide meaningful insight into alternative belief systems; such activities are engaged in because they are prohibited by the Amish, not because they are permitted by other religions or beliefs.⁴¹ Though the choice between complete submission to a religion or complete separation from family and friends may not be a 'free' one, it is still a choice that many children of religious parents are never presented with. Indeed, in some parts of the world the idea that an Islamic teenager would be given 'time off' to decide whether she wants to commit to being a Muslim for the remainder of her life is unthinkable, particularly in parts of the world where significant duties may already imposed upon her while she is still a child (such as marriage and motherhood).⁴²

Ursula Kilkelly also criticises the "evolving capacity" approach for neglecting to contemplate the particularly heavy influence parents have in the exercise of their children's rights. She notes that "[w]hile some parents will facilitate and support their children's independent exercise of their rights at the earliest possible stage, others will seek to retain control long beyond the time when the child's capacity determines their ability to exercise them for themselves."⁴³ Indeed, arguably every teenager or young adult who succumbs to the authority of his or her parents, despite having reached the age of majority, proves the truth of this statement. Kilkelly goes on to note that while the "evolving capacities" approach may be a pragmatic

⁴⁰ *The Devil's Playground* (Directed by Lucy Walker, Stick Figure Productions, 2002). Also see <http://www.thebudgetnewspaper.com/home.html> and <http://amish.net/lifestyle.asp> accessed on 25 February 2011.

⁴¹ Ibid.

⁴² See for instance UNICEF, *Early Marriage, A Harmful Traditional Practice* (2005) 26, and UNODC, *Combating trafficking in persons in accordance with the principles of Islamic law* (2010) 11. Also see Anthony Bradney 'The Legal Status of Islam within the United Kingdom' in Silvio Ferrari and Anthony Bradney, *Islam and European Legal Systems* (Ashgate, 2000) 185, in which the author notes that in some branches of Islamic law females (of any age) are regarded as having no capacity to contract marriages.

⁴³ Kilkelly, above n 11, 246.

suggestion to resolve potential conflicts between parents' and children's rights, ultimately "...there is no remedy to the totalitarian exercise of parental authority."⁴⁴ In other words, while a child may have capacity to exercise her rights independently from her parents, this does not mean that her parents will step aside and let her.

It is contended that the evolving capacity approach cannot stand alone to determine the point at which a child's religious or belief wishes trump those of her parents. Rather this approach must be considered in the context of the role that parents play in the religion or belief of their child. Chapter 5 on proselytism explored the notion of prohibited coercion to conclude that 'one is coerced if one cannot meaningfully choose'. The same consideration should be applied in considering the extent to which parents trespass on or enhance their child's capacity to choose his religion or belief, in accordance with his evolving capacities to do so.

Determining the extent to which parents improperly coerce their children and thereby undermine their freedom of religion or belief must be done in context. Such a determination requires that the nature of the message imparted by a parent be analysed alongside how that message is delivered. Depending on how such messages are delivered, article 19 of the CRC (concerning the state's obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of anyone including their parents) allows the state to intervene to remind parents that in trying to impose their ideas onto their child, they cannot resort to mental or physical violence.⁴⁵ The nature of the message has significant impact on whether it can be considered coercive to the child's freedom of religion or belief. For instance, baptising a baby into a particular religion should not trigger the same concern as would interference with that baby's bodily integrity for religious reasons.⁴⁶

⁴⁴ Ibid.

⁴⁵ Article 19 of the CRC reads: 1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child 2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child treatment described heretofore, and, as appropriate for judicial involvement.

⁴⁶ See for instance, Manfred Nowak, *CCPR Commentary* (NP Engel Kehl, 2nd ed, 2005), 417.

Similarly, deciding that a child should take part in her kindergarten nativity play would seem to have no implications on the long term religious or belief choices of the child, whereas presenting her on a daily basis with the 'truth' and horror of hell may hinder her capacity to consider alternative ideologies, or potentially be so injurious as to require intervention.⁴⁷ Similarly, atheist parents who explain their views about evolution to an inquisitive child do not preclude her from believing in creationism, whereas callously reprimanding her for her stupidity may blunt her capacity for spiritual inquisitiveness.

Consideration of the nature of such parental decisions vis-à-vis their child's upbringing will be further explored below in the context of religious education and circumcision of infant males for religious reasons. As an added safeguard, it is also suggested that there should be a presumption in favour of the child, or rather that the sliding scale should be tilted in his favour. Where the two parties concerned about the religiosity of a child are the parents on one hand and the child on the other, the child should be given the greater say in the matter, for it is she whose long term enjoyment of freedom of religion and belief is affected.

7.2(c)(ii) Participation Rights

The child's freedom of thought, conscience and religion in the CRC is considered a 'participation' right.⁴⁸ Eva Brems asserts that the way parents exercise their right and duty to give direction in matters of conscience and religion in accordance with the CRC must be consistent with the CRC as a whole.⁴⁹ All provisions of the CRC are guided by the child's article 12 right to be heard and have his or her views taken into account in all relevant matters in accordance with the child's age and maturity.⁵⁰ There is however little guidance as to how that principle is to be observed. It is not clear for instance the extent to which the right to be heard includes a duty to empower the child to communicate his or her views. Nor is it clear what is to be

⁴⁷ The extent to which threats of a religious nature, for instance, to a person's soul, can be considered to constitute mental violence was considered in Chapter 5 on proselytism.

⁴⁸ Kil Kelly, above n 11, 244.

⁴⁹ Brems, above n 12, 31.

⁵⁰ CRC, Art 12.

done with regard to the child's views once they have been heard.⁵¹ It is difficult to conceive of parents simply acquiescing to this vague right of children to be heard without feeling that article 12 unduly interferes with their approach to parenting; parents who raise their child on the basis that 'children should be seen and not heard' or send them to their rooms for talking back should arguably not be branded human rights violators.

In analysing the CRC, Ursula Kilkelly argues that the fundamental right to freedom of religion and belief is that of the child (article 14(1)) and that the parents' duty is merely to provide direction (article 14(2)). Such direction, she notes, must be consistent with article 19 of the CRC and not involve any physical or mental violence, and in light of article 12, must take into account the child's views in accordance with the child's age and maturity.⁵² Kilkelly goes on to say that while there is no clear solution in resolving conflicts between a child and the child's parents in relation to religious matters, "a more positive interpretation of article 14(2) may reflect the reality that in most cases such conflict would not exist, given that most children will share their parents' religious beliefs."⁵³

That 'most children will share the religious beliefs of their parents' is not a coincidence. Rather it is indicative of the significant influence parents have on their children. Indeed, Richard Dawkins makes a telling point in relation to the legitimacy of a child's religious 'choice' when he argues that it is just as erroneous to label a child a Muslim child or a Christian child as it would be to label him or her a Keynesian child, Marxist child or a secular humanist child.⁵⁴

In other words, the fact that 'most' children share the religion of their parents says little about the extent to which they have enjoyed religious freedom. More convincing would be a situation in which 'most' children were practicing a different religion to that of their parents, for such a situation would show that those children had played an active role in individually choosing a religion or belief, and that their

⁵¹ Kilkelly, above n 11, 248.

⁵² Ibid 250.

⁵³ Ibid.

⁵⁴ Richard Dawkins, *The God Delusion* (Bantam Press, 2006), 337-338.

parents had actively given them a meaningful choice and the freedom to act upon it. Referring to the situation of Amish children, Dawkins comments;

Even if the children had been asked and had expressed a preference for the Amish religion, can we suppose that they would have done so if they had been educated and informed about the available alternatives? For this to be plausible, shouldn't there be examples of young people from the outside world voting with their feet and volunteering to join the Amish?⁵⁵

Dawkins' point highlights the need not only to balance consideration for the wishes of the child with his evolving capacities, but also to consider the extent to which a child has been empowered to form and express his wishes.

Article 14(2) would seem to serve no purpose at all as far as the child is concerned if it serves only, as Kilkelly suggests, to reflect the duty of the state to "respect the integrity of the family and its collective beliefs and convictions."⁵⁶ Were it so, this would be a clear example of international human rights law serving to empower parents potentially against children, and quieting the already hushed voices of children, in contravention of their article 12 right to be heard. But at the same time, assuming that a child shares the religion or belief of his or her parents simply because he or she does not actively speak out to say otherwise fails to consider the relationship of the child with his parents and whether coercion has taken place.

7.2(c)(iii) Best interests of the child

Article 3 of the CRC emphatically clarifies that the best interests of the child shall be the primary consideration in all actions concerning children, and yet offers no definition or explanation of what those best interests are.⁵⁷ This guiding principle, should theoretically override all others, yet it is uncertain how this principle operates in respect of a child's freedom of religion or belief.⁵⁸ For instance, the best interests of the child as pursued by the ICCPR and CRC "do not necessarily correspond with that which might be shown empirically to be the best for the child's

⁵⁵ Ibid 330.

⁵⁶ Kilkelly, above n 11, 250.

⁵⁷ CRC, Art 3(1).

⁵⁸ Langlaude, above n 4, 112.

physical development, psychological disposition, social well-being, education advancement, economic prosperity, or religious salvation.”⁵⁹ This is so, Van der Vyver explains, because legal decisions as to what is in a child’s best interests must be cognisant of non-legal factors such as social realities and the religious convictions of local populations.⁶⁰

As with the sliding scale of capacity, assessing the best interests of the child in matters of religion and belief is fraught with complexity. The grounds for deciding what is and what is not good for a child are invariably contestable, all the more so when issues of religion and belief come into play.⁶¹ For instance, while international organisations generally agree that child marriages negatively impact on the physical and mental development of the child,⁶² other perspectives would argue that marriage may be in the child’s best interest.⁶³

The subjectivity of ‘best interests’ is highlighted when rights perspectives are compared with religious perspectives. While the international framework of human rights is concerned with the interests of the child in the tangible world during the course of the child’s life, a religious viewpoint may also be concerned with the child’s posthumous spiritual wellbeing. There is no objective way of ascertaining which of these considerations should prevail in the event that they conflict. Courts of law are not qualified to decide upon religious doctrine, but where the best interests of the child are at stake, legal reasoning may be required to wander into considerations of the implications a given religion or belief has for the child who is being brought up in it.

The complexities involved in determining the best interests of the child in religious matters are evident in the European Court of Human Rights case of *Hoffmann v Austria*.⁶⁴ When Hoffmann (the applicant) and Mr. S married, they were both Roman Catholics, but Hoffmann later became a Jehovah’s Witness. When the couple

⁵⁹ Johan D. van der Vyver, ‘Limitations on Freedom of Religion or Belief: International Law Perspectives’ (2005) 19 *Emory International Law Review* 499, 517.

⁶⁰ *Ibid.*

⁶¹ See generally, Van Bueren, above n 29.

⁶² See generally UNICEF, *Early Marriage, A Harmful Traditional Practice* (2005).

⁶³ UNODC, *Combating trafficking in persons in accordance with the principles of Islamic law* (2010) 61.

⁶⁴ *Hoffmann v Austria* (European Court of Human Rights, Application No 12875/87) 17 EHRR 1993, (3 June 1993)

divorced, Hoffmann took the couple's children (Martin and Sandra) with her. In the court of first instance, Mr. S argued that his ex-wife's religion would be detrimental to her upbringing of the children because she would not celebrate Christmas and Easter with them, they would have trouble integrating at school by virtue of the religious faith in which they would be raised, and they would be denied blood transfusions if the need arose.⁶⁵ The Austrian court at first instance found that no such danger could be inferred and that custody could not be denied from a parent by reason of his or her religious conviction.⁶⁶ Custody was granted to Hoffmann who was found to have a closer psychological relationship with the children, and a higher capacity to take care of them than Mr. S. The Court of Appeal upheld the decision, stating again that the mother's membership in a religious community could not in itself constitute a danger to the children's welfare.⁶⁷ Mr. S appealed to the Supreme Court, which overturned the previous decision and granted custody to him. The Supreme Court's grounds for doing so were that the lower courts had failed to apply article 2(2) of a 1921 Act concerning the religious education of children, which stated that neither parent could decide that a child was to be brought up in a different faith from the one shared by both parents when they were married, without the consent of the other parent. The Supreme Court inferred that the children therefore did not belong to the Jehovah's Witness faith (which it termed a 'sect', not recognised as a religious community in Austria) but remained Catholics.⁶⁸ The court also found that the mother's potential refusal of a blood transfusion constituted a danger to the children, and that by being brought up and educated according to the teachings of the Jehovah's Witnesses, the children would become 'social outcasts'.⁶⁹

The European Court of Human Rights found that the difference in treatment afforded to Hoffmann by the Supreme Court on account of her religion, while in pursuit of the legitimate aim of protecting the health and rights of the children, was

⁶⁵ Ibid [11].

⁶⁶ Ibid.

⁶⁷ Ibid [13].

⁶⁸ Ibid [15].

⁶⁹ Ibid (generally).

not pursued by reasonably proportionate means.⁷⁰ As a result, the court held by five votes to four that there had been a violation of Hoffman's article 8 right to family life in conjunction with her article 14 right to be free from discrimination on the grounds of religion. No separate issue was found to have arisen under article 9 religious rights.

Dissenting Judge Matscher did not consider that there was a violation of article 8 taken together with article 14. He felt that the return of the children to their father following the Supreme Court's decision was not itself an interference with the mother's article 8 rights. He further reasoned that even if there had been an interference with those rights, the Supreme Court's decision was not in itself discriminatory against Hoffman's religion per se, but simply took into consideration the impact on the children's welfare that would flow from her membership in that religion.⁷¹ Partially dissenting Judge Walsh was similarly of the view that there was no interference with article 8 or article 14, though he agreed with the majority in relation to article 8 taken alone, article 8 and article 2 of Protocol No.1. Judge Walsh was particularly concerned with the issue of the blood transfusion, which he felt the Supreme Court had considered as posing a 'health hazard' to the children, the religious cause of the hazard being secondary to the primary consideration of its effect. Judge Walsh felt that Hoffman was imposing her religious beliefs on her children, disregarding the wishes of their father or the children themselves (who in his reading of Austrian law, remained Roman Catholics).⁷² Dissenting Judge Valticos similarly did not share the opinion of the majority that there had been a violation of article 8 taken with article 14. He agreed with Judge Walsh that the hazard posed to the children's health by virtue of the refusal of a blood transfusion (if it became necessary) would be cause for concern even if it were not traceable to a religious belief.⁷³ Dissenting Judge Mifsud Bonnici also thought that considerations about the ramifications of the applicant's religious belief were beside the point. In his view, the only relevant question was whether the applicant was able to alter the agreement on

⁷⁰ Ibid [34-36].

⁷¹ Ibid [2].

⁷² Ibid [1 – 3].

⁷³ Ibid [1 – 3], dissenting opinion of Judge Walsh, and dissenting Opinion of Judge Valticos. Judge Valticos also expressed concern about the applicant's 'proselytising zeal' which he assumed the children would eventually be subjected to, as the applicant would naturally seek their salvation.

religious instruction initially reached with her husband; a question that Judge Bonnici considered to be addressed by Austrian law in a way that did not violate the European Convention. On this reasoning, Judge Bonnici found no violation of the Convention.⁷⁴ The decision has been considered an example of the court evading difficult choices that arise in balancing parental religious rights with the best interests of their child.⁷⁵

The case of *Palau-Martinez v France*⁷⁶ was factually similar to *Hoffman v Austria*. In *Palau-Martinez*, divorce was granted to the applicant and her husband (R) on the basis of his moving in with his mistress. The court of first instance granted custody to the applicant, with unrestricted visitation rights granted to R during school holidays provided that he picked up and returned the children to their mother. The applicant later contested these conditions when R failed to return the children to her. Before the domestic Court of Appeal, R claimed that the children were being harmed by their strict upbringing as Jehovah's Witnesses. The Court of Appeal found that "[i]t is in the children's interests to be free from the constraints and prohibitions imposed by a religion whose structure resembles that of a sect" and granted custody to R.⁷⁷ The applicant asserted to the European Court that the French Court of Appeal decision was based upon abstract value judgments about the way she practiced her religion. The European Court found that the domestic court's consideration of the religion of only one of the parents constituted a violation of the applicant's article 8 right to family life, in conjunction with her article 14 right to be free from discrimination. While the aim pursued was legitimate (namely the protection of the interests of the child), the European Court could not find that proportionate means had been used to achieve it. The European Court found that no separate issue arose under article 9 religious rights given that the factual circumstances relied on by the applicant were the same as those used to make a claim with respect to article 8.

⁷⁴ Ibid dissenting opinion of Judge Misfud Bonnici.

⁷⁵ See for instance, Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 164.

⁷⁶ *Palau-Martinez v France*, (European Court of Human Rights, Application No 64927/01) (16 December 2003).

⁷⁷ Ibid [13].

The court in *Palau-Martinez* criticised the domestic court for treating the two parents differently on the basis of their religion, and duly found a breach of the right of non-discrimination in article 14. Yet the court fell into this same trap in its own reasoning. The European Court went on to consider whether there was in fact evidence of adverse effects upon the children caused by their mother's religion.⁷⁸ While it concluded that such evidence was lacking, one might wonder why it considered the matter at all given the absence of any consideration or submission on the possible adverse effects of the father's religion, and given that it had already found the focus on only the mother's religion to be discriminatory.

Dissenting Judge Thomassen in *Palau-Martinez* agreed that the applicant's article 8 rights had been violated (though for reasons that differed from those relied on by the majority) but held that there was no violation of article 14.⁷⁹ In the opinion of Judge Thomassen the distinction drawn by the domestic court between the mother and father on the basis of their religions was justified because a link was established between the mother's religious convictions and adverse affects on the children.⁸⁰ Judge Thomassen's dissent was based on the fact that the majority had endorsed R's illegal actions in disregarding the court's initial order, thereby depriving the applicant of her right to a family life with her children.

The cases of *Hoffmann v Austria*, *Palau-Martinez v France* and the opinions expressed therein are interesting for numerous reasons, one of which is that the judges involved at the both domestic and European level were drawn into consideration of the merits and demerits of the Jehovah's Witness faith. The justification for entering into such consideration was that it was not the religion itself that was being considered but the impact that being brought up in the religion would have on children. However, even the domestic and European Court judges who took this view with the legitimate aim of securing the best interests of the children neglected to consider the merits or demerits of the father's faith. Much deliberation at the domestic level and at the European Court in *Hoffman v Austria* centred on the fact that the mother would refuse her children a blood transfusion if the need for such a

⁷⁸ Ibid [39, 42].

⁷⁹ Ibid [14-15].

⁸⁰ Ibid [14].

transfusion arose. If the remote possibility of Sandra or Martin requiring a blood transfusion at some point can be considered in determining their best interests, it is conceivable that the less remote possibility that the children would be at risk of contracting HIV from neglecting to use condoms in accordance with Catholic teachings should also perhaps be considered in determining their best interests. Such reasoning is admittedly convoluted, and yet would arguably be warranted if courts were to consider the impact that parents' religion can have on the interests of children, and consider all religions equally. Discriminatory legal reasoning by institutions that uphold the idea of non-discrimination on the basis of religion demonstrates the existence of a 'hierarchy' of religions, as argued elsewhere in this thesis.⁸¹

However the more recent case of *Vojnity v Hungary* shows that at the European level at least, this same hierarchy is being levelled. The applicant, a member of the 'Congregation of the Faith', had his access rights entirely revoked after the Szeged District Court decided that his religious convictions were detrimental to his son's upbringing. The decision was upheld by the Csongrád Court of Appeal, which considered that the applicant's 'irrational worldview made him incapable of bringing up his child' and that he sought to exercise his access rights to impose his religious convictions on the child.⁸² The European Court held that the Hungarian courts had failed to prove that it was in the child's best interest to sever all ties with his father. The decision therefore amounted to discrimination against the applicant (article 14) on the basis of his religious beliefs, in conjunction with a violation of his right to privacy and family life (article 8). The court cited *Hoffmann* and *Palau-Martinez* in emphasising that differences in treatment based on religion alone are not acceptable in the absence of reasonable and objective justification.⁸³ The court noted that the right of parents to bring up children in accordance with their beliefs would be uncontested where two parents remained married and promoted the same worldview to their child "even in an insistent or overbearing manner, unless this exposes the latter to dangerous practices or to physical or psychological harm." It

⁸¹ See Chapter 4 on the hierarchy of religion and belief.

⁸² *Vojnity v Hungary* (European Court of Human Rights, *Application No 29617/07*) (12 February 2013) [14].

⁸³ *Ibid* [31-32].

saw no reason why this right should be altered where parents separated or divorced, and found no evidence that the applicant's convictions resulted in physical or psychological harm.⁸⁴ The lack of proportionality in entirely prohibiting access resulted in the court's finding that the applicant suffered discrimination on the basis of his religion in the exercise of his right to respect for family life. The applicant's claims under article 9 and article 6 were not considered independently given the factual circumstances were the same as those examined in finding violation of article 14 together with article 8.⁸⁵ The extreme nature of interference with the applicant's rights in *Vojnity* makes it perhaps unsurprising that the court was able to decide in favour of the applicant in this case; this decision may have been harder to reach had there been a more minor interference with his rights.

More concerning than the difficulty in determining the best interests of the child is the fact that the child's interests are often not considered at all. When the impact of the parents' religion on the upbringing of their children is taken into consideration, it is often done in an abstract fashion without consideration of the specific interests of specific children. In *Palau-Martinez v France*, dissenting Judge Thomassen noted that a link between the mother's religious convictions and adverse impact on the children was established through a psychiatrist's report and the clearly expressed view of one of the children;⁸⁶ the fact that these points were disregarded by the majority court evidences the tendency for courts to be distracted from objective best interest considerations in respect of children when religious issues concerning their parents are at play.

In other words, what is in the best interests of the child will depend on who is deciding; the reasoning of a court of law and a child's parents or religious community may be irreconcilable and yet they may be equally valid. As Johan D. Van der Vyver notes, "[t]he law operates alongside a conglomerate of other non-juridical structures, each with its own vital function in human society and a typical set of values that contribute, each in its own way, to the best interests of the child."⁸⁷

⁸⁴ Ibid [37-38].

⁸⁵ Ibid [43-47].

⁸⁶ *Palau-Martinez* (European Court of Human Rights, Application No 64927/01) (16 December 2003) [14].

⁸⁷ van der Vyver, above n 59, 517.

Whatever the best interests of a child are determined to be in a given scenario, consideration must be given to the participation rights of the child, in accordance with her evolving capacities to determine what is in her own best interests.

7.2(d) Conclusion: freedom from coercion

The relationship that a child has to the religion or belief of his parents is fraught with potential human rights issues concerning the nature of coercion in the exercise of the right of parents to bring their children up in accordance with their own religion or belief. Despite these issues, neither the ICCPR nor other instruments offer particularly relevant guidance to resolve potential conflicts.⁸⁸ It is unreasonable to expect parents who take their child with them to church on Sunday to explain to him before each service that Christianity is but one of many options which he happens to have been baptised into, but is free to withdraw from as soon as he has the capacity to decide what else he might like to be, if anything. But at the same time it is also unreasonable to allow a child to be so coerced into one way of thinking that his capacity to discover and decide his own beliefs is blunted. Indeed, “the child, by reason of his physical and mental immaturity, needs special safeguards in care.”⁸⁹ Where the parent fails in his duty to provide such care, the state must intervene. Indeed, the state has a duty to protect children in their enjoyment of their religious rights, including the duty to protect them from unwanted interference of that right by others, including parents or religious communities.⁹⁰

It must therefore be determined when the state should interfere to protect the child from his or her parents. The practical reality of the parent-child relationship would almost seem to make it impossible for the state to fulfil its obligation to children in this respect. In Chapter 5 it was established that withholding food for religious reasons undermines meaningful choice and is improperly coercive. However a parent sending a child to bed without supper for failing to say his prayers would generally be considered a private parental matter rather than religious coercion. Similarly, a parent who threatens his grown daughter with disinheritance for

⁸⁸ Brems, above n 12, 2.

⁸⁹ Such safeguard are indicated in the *Declaration on the Rights of the Child* and restated in the preamble to the *United Nations Convention on the Rights of the Child* (1989).

⁹⁰ Langlaude, above n 4, 62.

marrying outside the faith would be unlikely to attract state intervention, if only for the sheer number of interventions that would subsequently need to be made.

A recent England and Wales High Court case offers interesting guidance on the type of coercion that states may protect children from. In the case of *Johns & Anor, R (on the application of) v Derby City Council & Anor*,⁹¹ local authorities rejected Mr. and Mrs. Johns' application to become short-term foster carers, on the basis of their disapproval of homosexuality. The applicants alleged that they had been discriminated against on the basis of their religion and belief given that their anti-homosexual beliefs were entrenched in their faith as members of the Pentecostal Church. The applicants asserted that such a decision was tantamount to imposing a blanket ban on all prospective Christian parents, or to requiring certain religious persons to compromise their religious beliefs in order to care for a child. The court responded by clarifying that article 9 of the ECHR protects freedom of religion and belief, but not the substance of the beliefs themselves merely because they are religious.⁹² The court found that there was no discrimination against the couple on the basis of their religion or belief; the treatment of them was, rather, based on their attitudes towards same-sex relationships. The court considered that attitudes of potential foster carers to sexuality were relevant in considering an application to become foster parents, and concluded that permission should not be granted to the claimants to apply for judicial review of the decision. No undue interference with the couple's rights was found (and indeed, it was noted that there is no 'right' to foster). The decision raises interesting questions: the state has the luxury of screening potential foster or adoptive parents before a child is placed in their care, but has no such capacity to screen biological parents. For those children the state's ability to remove them from the care of their parents can only serve to protect them from further harm not prevent it from occurring in the first place. It seems unlikely that the state would intervene in situations where, for instance, the biological parents of a

⁹¹ *Johns & Anor, R (on the application of) v Derby City Council & Anor* [2011] EWHC 375 (Admin) (28 February 2011)

⁹² *Ibid* [45-47].

gay child regularly take their child to church or send him to church-run camps in the hope that anti-gay Christian teachings will 'turn' the child from his sexuality.⁹³

As a general principle, the state cannot be held liable for everything that happens in the complex relationship between parents and their children, but it should be held responsible where it fails to act to protect a child from an interference which makes her autonomous enjoyment of human rights, including that of religious freedom, meaningless.⁹⁴

Article 18(2) of the ICCPR is clear that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." Consideration of this prohibition as it relates to children highlights the extreme difficulty of bringing children up in accordance with a religion or belief in a way that is not somehow coercive. The particular susceptibility of children to persuasion, and the circumstances in which their religion or belief is initially determined (for instance, by being born into a family with a particular religion or belief) may indicate coercion or may simply be the product of parents exercising their liberty under article 18(4) of the ICCPR.⁹⁵ The fact that making a determination either way is difficult does not detract from the fact that such a determination must be made.

Assessments of whether a child has been improperly coerced can be aided by interconnected considerations of the evolving capacity of the child to enjoy religious freedom, the extent to which she has participated in her own religion and belief and the best interests of the child. Consideration of these factors is only useful when it is contextualised in a wider matrix of factors, including the role that parents play in encouraging the development of the child's capacity and participation in his own religion or belief, and their view of what is in the child's best interests. The nature of religion and belief is such that even a person who has evolved to the full extent of his capacity is not capable of having an objectively measureable understanding of, or commitment to, religion or belief. Consideration must therefore be given to the way

⁹³ For an example of a religious programme available to parents, see for instance 'Love in Action' <http://www.loveinaction.org/>, accessed on 5 May 2011. Love in Action is "a Christian discipleship ministry that exists to restore those trapped in sexual and relationship sin through the power of Jesus Christ" which also offers courses for parents and children 'struggling with same-sex attraction'.

⁹⁴ Langlaude, above n 4, 93.

⁹⁵ See for instance, Ibid 208.

in which a child is brought up in a particular religion or belief, and the extent to which his upbringing supports his evolving capacity to exercise free thought and consequently choose his own religion or belief. The hesitancy to date in applying this reasoning on a practical level is perhaps due to the inconvenient fact of just how many children around the world would be found to be improperly coerced by their parents.

7.3. Religious education

“There is in every village a torch – the teacher: and an extinguisher – the clergyman.”

Victor Hugo.

Article 18(4) has been asserted before the HRC by parents against school authorities to stop proselytism through education. Little consideration has been given to the functioning of this provision in situations where children resist the proselytism of their parents.⁹⁶ It is well-established that students should be able to opt out of religious instruction classes and have access to alternative courses in public schools.⁹⁷ However, what is less established is who decides whether or not the student participates in religious education. Eva Brems asserts that the choice cannot be left in the hands of parents until the child reaches the age of majority and argues that a child should be given the responsibility for this decision earlier than he should be entitled to decide his membership of a religion, given her view that the choice of religious education is ‘less radical’ than membership of a religion.⁹⁸ The precise point at which children should be granted the right to make such a decision, must be determined through weighing the considerations discussed above according to the specificities of the child and the context in which the decision is being made.

The Special Rapporteur on freedom of religion and belief, Heiner Bielefeldt, says that:

⁹⁶ See for instance, *Report of Special Rapporteur on Freedom of Religion and Belief, Heiner Bielefeldt*, UN Doc A/HRC/16/53 (15 December 2010) [25].

⁹⁷ *Ibid* [50].

⁹⁸ Brems, above n 12, 30.

...respect for difference based on freedom of religion or belief requires an attitude of giving students (or their parents or guardians) the possibility to decide for themselves whether, to which degree and on which occasions they wish to manifest, or not manifest, their religion or belief.⁹⁹

The state, he says, must find a framework to support this goal, with the best interests of the child being the overarching principle. However, Bielefeldt leaves the decision with students *or* their parents, presenting the two actors in the alternative without offering any guidance as to whose decision trumps in the event of conflict. This potential conflict between the religious education sought by a child and that sought for them by their parents is the topic of this section.

7.3(a) Human rights perspective of education

The human right to education is provided for in the ICESCR and the CRC. Article 13(1) of the ICESCR reads:

The State Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Article 29 of the CRC sets out the aims of education, which are linked to the realisation of the child's human dignity and rights, taking into account the child's developmental needs and various evolving capacities. Such aims are:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

⁹⁹ Bielefeldt, above n 96, [40].

- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origins;
- (e) The development of respect for the natural environment.

The HRC's General Comment 17 on the Rights of the Child stresses that "...every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognised in the Covenant, particularly the right to freedom of opinion and expression."¹⁰⁰ However, this ambitious notion as to the type of education seems qualified by the wishes of parents. Indeed, the CRC's General Comment 1 on the aims of education stresses the importance of respect for parents in the application of children's rights, and "the need to view rights within a broader ethical, moral, spiritual, cultural or social framework and... the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities."¹⁰¹

The current Special Rapporteur on freedom of religion and belief, Heiner Beilefeldt, like Asma Jahangir before him, stresses the role that education can play in upholding religious freedom, promoting religious pluralism and tolerance, and eliminating negative stereotypes of persons with other religions or beliefs.¹⁰² Achievement of

¹⁰⁰ Human Rights Committee, *General Comment 17: Article 24 (Rights of the Child)* CCPR 35th Session (7 April 1989)

¹⁰¹ Committee on the Rights of the Child, *General Comment 1: The Aims of Education (Article 29(1))* CRC 26th Sess, UN Doc CRC/GC/2001/1 (17 April 2001) [7].

¹⁰² Asma Jahangir, *Elimination of all forms of religion intolerance: interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/62/280 (20 August 2007, [84] and Beilefeldt, above n 96, [26 – 29].

such rights-affirming outcomes depends on the content of the religious education and how religion is taught. Here Heiner Bielefeldt draws a distinction between religious instruction that familiarises students with their own religions, and information about religions which broadens students' understanding of different religions and beliefs, the latter of which is not theological but more akin to history or social sciences.¹⁰³ Article 17 of the CRC concerning the child's right to access of information may also be relevant here, given its application to information about religious matters.¹⁰⁴

The Council of Europe (COE) made a recommendation in 2005 to strengthen education about religion on the basis that "[e]ducation is essential for combating ignorance, stereotypes and misunderstanding of religions."¹⁰⁵ In the criteria set out for provision of such education, the COE stated that

...the aim of this education should be to make pupils discover the religions practised in their own and neighbouring countries, to make them perceive that everyone has the same right to believe that their religion is the "true faith" and that other people are not different human beings through having a different religion or not having a religion at all.¹⁰⁶

Such recommendations must be contextualised for the region for which they were offered; Europe can be generalised as being more open-minded than parts of the Middle East for instance, where teaching respect for non-Islamic religions as being the 'true faith' for its members could be considered an act of apostasy against Islam.

A simple suggestion is offered in preference to the recommendations above that assume the authority to determine the compatibility and respectability of religions. Instead, it is the freedom of an individual to choose what he or she thinks and believes that should guide the rights approach to religious education. Richard Dawkins urges parents to "[l]et children learn about different faiths, let them notice their incompatibility, and let them draw their own conclusions and consequences

¹⁰³ Bielefeldt, above n 96, [31].

¹⁰⁴ Brems, above n 12, 8.

¹⁰⁵ Parliamentary Assembly of the Council of Europe, *Resolution 1720 on Education and Religion*, 27th sitting (4 October 2005) [6].

¹⁰⁶ Ibid [14.1]

about that incompatibility. As for whether any are 'valid', let them make up their own minds when they are old enough to do so."¹⁰⁷ Indeed, while the incompatibility of different faiths is arguably something that is taught from many religious perspectives, it is allowing children to make their own conclusions about this incompatibility that is the difference between educating and proselytising. From a human rights perspective which is built on religious pluralism it is desirable that children "... be taught that their own religion is one out of many and that it is a personal choice for everyone to adhere to the religion or belief by which he or she feels most inspired, or to adhere to no religion or belief at all."¹⁰⁸ However the question that must be reasonably posed from a religious perspective is why a parent concerned about the spiritual wellbeing of his child would offer options to the child that could lead away from the 'one true faith' that offers salvation.¹⁰⁹ And from a human rights perspective, it must not be forgotten that parents have a right to bring their children up in accordance with their own religious and moral convictions.

7.3(b) Parents' rights in respect of children's education

That parents are at liberty to ensure that their children are educated in accordance with their own religious convictions is well established by international human rights law, notably by article 18(4) of the ICCPR and article 13(3) of the ICESCR. Such provisions are not phrased in terms of the right to education enjoyed by the child, but rather are framed in terms of the 'liberty' that parents have vis-à-vis their children. Article 13(3) has two elements; one is that states parties undertake to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions; the second is the liberty of parents to choose schools for their children provided they meet minimum educational standards set by the state.¹¹⁰ The actors involved in implementing these

¹⁰⁷ Dawkins, above n 54, 340.

¹⁰⁸ Mr Piet de Klerk, Ambassador at Large of the Netherlands on Human Rights, (Speech delivered at the 25th Anniversary Commemoration of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief, Prague, 25 November 2006), <http://www.tolerance95.cz/1981declaration/download.php> accessed on 23 February 2011.

¹⁰⁹ See for instance: Ahdar and Leigh, above n 23, 249-250, on the Christian perspective of the purpose of education.

¹¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment 13: Article 13 on the Right to Education*, 21st Sess, UN Doc E/C.12/1999/10 (8 December 1999) at [28 – 29].

elements are the state and the parent: the child is noticeably absent as an actor in respect of article 13(3). Indeed, the child does not enjoy any rights as an individual rights-holder under this provision nor under the equivalent article 18(4) of the ICCPR.

Other relevant human rights provisions that emphasise the rights of parents include article 26 of the UDHR stating that ‘parents have a prior right to choose the kind of education that shall be given to their children’. Principle 7 of the Declaration on the Rights of the Child specifies that ‘the best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents’. Article 5(1)(b) of the Convention against Discrimination in Education underlines respect for the liberty of parents “to ensure in a manner consistent with procedures followed in the state for the application of its legislation, the religious and moral education of the children in conformity with their own conviction”.

In taking steps to afford people their right to education, states parties to the Covenant undertake to respect the liberty of parents (and guardians) to ensure the religious and moral education of their children in accordance with their own convictions.¹¹¹ Clearly a conflict may arise when the type of education that a parent wishes for his or her child clashes with the type of education a child is entitled to receive by virtue of article 13(1) of the ICESCR.

7.3(b)(i) Potential conflict with children’s education rights

There have been a number of cases before human rights bodies regarding the relationship between education and religion, but there have been no cases in which a child applicant has sought state assistance to exercise his right to be educated according to his own religion or belief against the wishes of his parent. Thus far, article 18(4) of the ICCPR and article 13(3) of the ICESCR have been used by parents

¹¹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976), article 13(3), *International Covenant for Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 18(4).

to protect their children against school authorities; they have not been asserted by a parent in response to a spiritually-digressing child.¹¹²

A religious education that promotes the subjugation of women to men or incites hatred or otherwise undermines human rights would fail to “strengthen the respect for human rights and fundamental freedoms” as provided in article 13(1) of the ICESCR. Vice versa, an education that promotes respect for all religions may conflict with parents’ wishes to bring their child up with the belief in the superiority of one religion over all others. Indeed, a 2006 report of then Special Rapporteur on freedom of religion and belief, Asma Jahangir, noted that she “regularly receives allegations about schoolbooks which display, and even encourage, a lack of respect for members of non-traditional religious minorities or for religions that differ from the predominant religion in the country.”¹¹³ The same conflict may arise in respect of the CRC; article 29 of the CRC directs education to the development of the child to his or her full potential. Such potential may not be reached where a parent exercises his or her right to ‘provide direction’ to a child in the exercise of his freedom of religion by directing her against such education.

The Special Rapporteur on religious freedom is clear that forcibly exposing children to religious instruction against their will is a violation of article 18(2) of the ICCPR, and that such practices may also violate the rights of parents under article 18(4).¹¹⁴ In making this point however, the prohibited coercion is that applied by school authorities rather than by the parents. Similarly, article 5(1)(b) of the Convention against Discrimination in Education stipulates that “no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions.” Again, the compulsion here is that coming from the state rather than from parents. The HRC clearly adopts a strict approach to ICCPR article 18(4) and is

¹¹² It must be noted in this respect that there is no forum to bring cases yet under article 13(3) of the ICESCR. As at 26 January 2012, the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (opened for signature on 24 September 2009, GA Resolution A/RES/63/117) had not yet entered into force.

¹¹³ Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council*, UN Doc. A/HRC/4/21 (26 December 2006) [49-50].

¹¹⁴ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53/Add.1 (14 February 2011), [53].

protective of parental rights in the education of their children.¹¹⁵ It is not clear which approach human rights bodies would take where parental rights clash with their child's educational rights.

In permitting parents to direct the religious upbringing of their children by virtue of article 18(4), a line must be drawn where such instruction denies the child an education which reaches the standards required by the ICESCR and CRC. General Comment 22 on article 18 of the ICCPR, General Comment 13 on article 13 of the ICESCR and General Comment 1 on article 29 of the CRC all underline the importance of respect for parents in the education of their children, but are all silent on any tension that may exist between children and their parents.¹¹⁶ However, some guidance may be found in the HRC's General Comment 17 on article 24 concerning the rights of the child. The HRC stresses that "every possible measure should be taken to foster the development of [children's] personality and to provide them with a level of education that will enable them to enjoy the rights recognised in the Covenant, particularly the right freedom of opinion and expression."¹¹⁷ The General Comment stresses that responsibility for protection of children lies with the child's state, his society and primarily his family, and that "in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the state should intervene to restrict parental authority."¹¹⁸ Unfortunately clarity is not offered on what constitutes a serious failure of duties, ill-treatment or neglect that would warrant state intervention. At the least, the General Comment can be read to mean that a state should intervene where the parents' religious or moral education of the child fails to fulfil the child's right to an education of the standard set in the ICESCR.

There are three types of education that relate to religion and belief; education in matters of religion or belief, general education, and education within the family.¹¹⁹ In respect of religious education, parents are granted a seemingly unqualified right to

¹¹⁵ See for instance, Langlaude, above n 4, 91.

¹¹⁶ See Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993) [6], *General Comment 13*, UN Doc E/C.12/1999/10 [9], and *General Comment 1*, UN Doc CRC/GC/2001/1, [7].

¹¹⁷ Human Rights Committee, *General Comment 17: Article 24 (Rights of the Child)* CCPR 35th Session (7 April 1989).

¹¹⁸ Ibid [6].

¹¹⁹ de Jong, above n 2, 565.

determine the nature of the religious education their child receives, which often manifests as the right for the child *not* to participate in religious education at her school where such participation would be contrary to the parent's wishes.¹²⁰ In the HRC case of *Hartikainen et al v Finland*, the author claimed that the Finnish law stipulating obligatory attendance of children of atheists in classes on the history of religion and ethics, was in violation of article 18(4). The HRC found no violation, and did not consider such a requirement objectionable if the course was taught in a neutral and objective way in respect for the convictions of parents and guardians who did not believe in any religion.¹²¹ This decision was consistent with the decision in the European case of *Angelini v Sweden*, in which an atheist mother and daughter alleged the latter's rights were violated by the state's refusal to exempt the latter from teaching of religious knowledge. The court found that teaching about religion was not the same as the teaching of religion, so it found no violation of the applicant's rights.¹²²

In the HRC case of *Leirvåg et al v Norway*, humanist parents objected to the compulsory education of their children in a subject called "Christian Knowledge and Religion and Ethical Education", which they argued emphasised Christian tenets. The HRC agreed with the authors that the course was not neutral and objective, and went on to conclude that the exemption arrangements did not protect the liberty of parents to ensure the religious and moral education of their children in conformity with the own convictions thereby violating article 18(4).¹²³

The operation of article 18(4), where it conflicts with a child's religious freedom, has not yet been tested. For instance, no case has yet arisen involving a child seeking to

¹²⁰ This principle of providing for a non-discriminatory exemption from participation in religious education is protected by article 13(3) of the ICESCR and article 18(4) of the ICCPR. See for instance, *General Comment* 22, UN Doc CCPR/C/21/Rev.1/Add.4 [6] and Human Rights Committee, *Communication No. 40/1978*, UN Doc CCPR/C/12/D/40/1978 (1981) (*Hartikainen et al v Finland*).

¹²¹ *Hartikainen et al v Finland*, UN Doc CCPR/C/12/D/40/1978 [10.4].

¹²² *Angelini v Sweden* (European Court of Human Rights, Application No. 10491/83, 1986).

¹²³ See Human Rights Committee, *Communication No. 931/00*, UN Doc CCPR/C/82/D/1155/2003 (2004) (*Leirvåg et al v Norway*), [14.2-14.7]. Also see the similar European Court of Human Rights case of *Folgerø and Others v Norway* (European Court of Human Rights, Grand Chamber Judgment, Application No 15472/02, 29 June 2007) in which the Court found a violation of Article 2 of Protocol No. 1 on the right to education, on similar facts. See also *Hasan and Eylem Zengin v Turkey* (Application No 1448/04), *Grzelak v Poland* (Application No 7710/02) and *Appel-Irrgang v Germany* (Application No 45206/07).

override his parents' wish to exempt him from or include him in religious education classes. It is notable that as the law is stated, whether a child participates in religious education or not is determined by the expressed wishes of the parent, not the child.

In relation to general education, there is a minimum standard set for the education of children, which the state is obliged to actively provide for. In the exercise of a parent's right to ensure that her child is educated in accordance with her own convictions, it is clear that parents do not have the right to decide against the participation of their child in general (non-religious) courses on the grounds that those courses do not accord with their own religious convictions.¹²⁴ Indeed, if parents could object to the teaching of history that touches on other religions and beliefs or science that teaches evolution, basic education would be hampered. General interest considerations would prevail in this situation; the parents' rights are not unduly limited given that they have the option of enrolling their child in a private institution.¹²⁵ One example of such a scenario arose in the European Court of Human Rights case of *Kjeldsen, Busk Madsen and Pedersen v Denmark*, in which the applicants argued that compulsory sex education of their children was contrary to their convictions as Christian parents.¹²⁶ The parents in this case argued that exemption should be provided from sex education classes as it was for religious education classes. The court found a public interest distinction between these two types of classes in that religious education imparts tenets where sex education imparts facts, and found that there had been no breach.¹²⁷ In *Dojan and others v Germany*, five couples similarly sought to exempt their children from sex education classes that they considered contrary to their Christian beliefs. The European Court found that there was no violation given that the classes transferred knowledge in a neutral way and did not undermine the ability of parents to provide sexual education to their children in conformity with their religious convictions. It found

¹²⁴ de Jong, above n 2, 567.

¹²⁵ Ibid.

¹²⁶ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, ECHR App no 5095/71; 5920/72; 5926/72 (A/23), Judgment (7 December 1976).

¹²⁷ Ibid [56].

the applicable inadmissible, referring to *Kjeldsen, Busk Madsen and Pedersen v Denmark* in doing so.¹²⁸

The third type of education mentioned above relates to the religious and moral upbringing of a child by his parents. *Prima facie*, the state must be able to interfere with family life where doing so is in the best interests of the child. Were this not possible, the child's rights would be reduced in the private domain. However, it is difficult to determine the tipping point at which religious and moral parental guidance undermines the child's right to an education. Best interest determinations are further complicated by spiritual perspectives of what those interests are. For instance, where parents place the posthumous interests of the child above his or her immediate educational interests, the parents and the state may disagree as to what serves that child's best interests. An example of such conflict could arise, for instance, where religious parents opt for prayer and theological study aimed at the child's salvation, over secular education that can empower her to participate in the community and secure a livelihood for herself.¹²⁹

7.3(b)(ii) Potential conflict with children's religious rights

The rights of parents to ensure that their children are educated in accordance with their beliefs are clearly established in international human rights law. However, the potential conflict that may arise between the rights of a parent under article 18(4) and a child's own religious rights under article 18(2) has received virtually no attention from human rights bodies.

De Jong makes the point that if a Convention on religious freedom was to be drafted, it should contain a distinct section on education in matters relating to religion and belief and in so doing, clarify that education should be in accordance with minimum standards, and that the 'best interests of the child' is the leading principle for education within and outside the family. He stresses that the application of the

¹²⁸ *Dojan and others v Germany* (ECHR App Nos 319/08, 2455/08, 7908/10, 8152/10 and 8155/10), Declared inadmissible (13 September 2011).

¹²⁹ Such a scenario was at issue in the European Court case of *Çiftçi v. Turkey* (European Court of Human Rights, Application 71860/01, 17 June 2004), in which national authorities refused permission for a father to enrol his son in a course exclusively dedicated to study of the Koran. Though the case was found inadmissible by the European Court of Human Rights, the court suggested that a purely Koranic religious education might be indoctrinating, and therefore not in the best interests of the child.

principle of the best interests of the child requires further clarity particularly in cases where the views of parents diverge from those of their child.¹³⁰

The key assertion of this thesis is that the child has a right to freedom of religion and belief by virtue of article 18 of the ICCPR, and within it, the right to be free from coercion. In the event of conflict between a parent's rights to educate his child in accordance with article 18(4) and a child's article 18 rights, the child's right to enjoy her own religion or belief should trump the parent's right to dictate the child's religion or belief to her. A primary caution in limiting the rights of parents with respect to the religious upbringing of children is that the grounds for justifying such interference should be to uphold the human rights of children, not to justify state actions to attack and undermine the continuance of religious belief itself.

The susceptibility of children to ideological teachings and their particular vulnerability must be borne in mind in determining whether their freedom of religion and belief has been undermined by coercion. That the nature of religious (or moral) education should be mitigated according to the evolving capacities of a child is clear; where a child is not protected from the parent or teacher who takes advantage of her limited capacity in the delivery of a religious message, the result can be significant to the child concerned.

7.3(b)(iii) Education and 'belief'

It is clear that the children of atheist parents may similarly be coerced by the non-religious or anti-religious beliefs of their parents. Indeed it could be argued that a non-religious parent who removes her child from religious education classes is denying him the choice to abandon non-belief and instead adopt a religion.

Distinctions can be made however between the challenges faced by the child of religious parents and those faced by children with non-religious or atheists parents, in enjoying freedom of religion or belief. Firstly, in the vast majority of states it is generally religion rather than atheism that is taught in schools.¹³¹ Even if a child does

¹³⁰ de Jong, above n 2, 587.

¹³¹ See for instance Bielefeldt, above n 96, [52-53], in which the Special Rapporteur expresses concern for the forcible subjection of children to religious instruction on the basis of the state's dominant religion; the same concerns are not expressed with regard to non-religious or belief education. Similarly, the displaying of religious

not participate in religious classes, he is aware that they take place and has ready access to those who teach and attend them. Secondly, parents who choose to bring their children up as atheists have less incentive to deny them information about religions than religious parents do. An atheist parent will not be concerned about her child's faith weakening as a result of exposure to different ideas in the same way a religious parent may be. As far as an atheist parent is concerned, her son's adoption of Catholicism amounts to disparate ideologies between them but does not amount to a fall from grace or compromise his posthumous physical or spiritual wellbeing. In contrast, for Catholic, Jewish or Islamic parents, the adoption of atheism by their son or daughter could have negative spiritual, cultural and even social consequences. Moreover, atheist or agnostic parents may have a positive incentive to expose their children to a range of religious worldviews. Atheism rejects theistic beliefs; it is impossible for a person to reject religious beliefs if he does not know what they are. Agnostics parents similarly may be happy to expose their child to a spectrum of spiritual choices, and are unlikely to coerce him in his decision given their admission to not knowing (nor necessarily caring about) answers to religious questions themselves.

The particular vulnerability of children to the influence of their parents should ensure that the state is particularly vigilant in protecting them against third parties. However, for some parents the notion that they would not be able to teach their child about, for example, hell, would be tantamount to not teaching their child about religion and would therefore contravene article 18(4) of the ICCPR. Despite the challenge posed by having to navigate through family, privacy, and religious rights landmines in efforts to protect children from the religion of their parents, the state cannot simply abandon the child to whatever religious hand he was dealt. It is asserted that religious education mandated by parents should be limited where it reaches a level of coercion that undermines the child's enjoyment of his own human rights. Or, at the very least, the attempt to do so should be made.

symbols in schools is discussed, rather than non-religious or belief symbols [41-46]. No concern was raised by the special rapporteur.

7.4. Male Circumcision

"Whether born in your household or bought with your money, they must be circumcised. My covenant in your flesh is to be an everlasting covenant. Any uncircumcised male, who has not been circumcised in the flesh, will be cut off from his people; he has broken my covenant."

Genesis, 17:13-14.

Article 5(5) of the 1981 Declaration states that "[p]ractices of religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development."¹³² Sylvie Langlaude explains that the right of the child includes protection against harmful religious practices concerning the body, life and health of the child and acknowledges that criminal law may be involved where such harm is caused.¹³³ She also explains however that the child has a right that the state not intervene in his nurture, including in religious practices such as circumcision. The implication of her suggestion is that being circumcised is a 'right' for an infant to enjoy. Alternatively, if the child's nurture is considered from the point of view of the parent, the ludicrous suggestion is that he or she has a 'right' to cut off another person's foreskin.

Circumcision involves removing the loose fold of skin (or prepuce) that covers the head of the penis.¹³⁴ When performed for religious reasons the practice generally takes place before the infant has the mental capacity to refuse or the physical capacity to resist, but is generally not considered to be breach of the child's rights.¹³⁵ In opposition to this widely accepted stance, it is asserted in this chapter that the circumcision of infant males for religious purposes can amount to a breach of the child's right to health and may undermine his freedom from religion given that the result is an irreversible mark of another person's religion being inflicted on his penis.

¹³² Article 1(3) reads "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

¹³³ Langlaude, above n 4, 59.

¹³⁴ Thoi D. Ngo and George Obhai, Marie Stopes International, *At the Cutting Edge: Delivering Male Circumcision through Marie Stopes' Reproductive Health Mobile Outreach Programmes in Kenya* (2009) 4.

¹³⁵ It must be acknowledged that in many instances of ritual or customary circumcision which may have religious or spiritual elements, the child being circumcised may not be an infant.

Simply put, it is asserted here that the owner of the foreskin should determine whether to remove it for religious reasons, when he has the capacity to do so.

7.4(a) Cultural, religious or health practice

In academic discourse, female circumcision often falls into a different category of consideration to male circumcision and is abhorred with little controversy. Female circumcision, widely known as female genital mutilation (or FGM) is practiced for both cultural and religious reasons,¹³⁶ though in rights discourse tends to be classified as a 'cultural' rather than a 'religious' practice.¹³⁷ Though some supporters of female circumcision consider that the practice has some health benefits,¹³⁸ medical professionals generally agree that the practice offers no benefits for the circumcised person.¹³⁹ Female genital mutilation is recognised as breaching several human rights of the girl who is mutilated, including her right to health and her right not to be subjected to torture or cruel and degrading treatment.¹⁴⁰

Male circumcision is similarly practiced for cultural, religious and health reasons. Yet the practice is not considered to be a violation of the rights of the child in the same way that female circumcision is, nor is it equivalently labelled as 'male genital mutilation'.

Among the religions which prescribe male circumcision, Judaism and Islam are the largest. In Judaism circumcision is a sign of the covenant between God and mankind known as B'rit Milah, which takes place on the eighth day after the baby is born.¹⁴¹

¹³⁶ See for instance, 'Egypt girl's death puts spotlight on genital mutilation', BBC News, 19 June 2013, <http://www.bbc.co.uk/news/world-middle-east-22975400>, accessed on 24 June 2013.

¹³⁷ For instance, see OHCHR, *Fact Sheet 23, Harmful traditional practices affecting the health of women and children*, <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>, accessed on 25 February 2011, and Human Rights and Equal Opportunity Commission, *Article 18 Freedom of Religion and Belief*, (Commonwealth of Australia, 1998) 59.

¹³⁸ Some supporters of female genital mutilation are of the view that reduced sexual arousal is a health benefit. See for instance, Dr Trisha Macnair, 'Female Genital Mutilation', BBC (online) January 2011, http://www.bbc.co.uk/health/physical_health/conditions/female_genital_mutilation.shtml, accessed on 4 May 2011.

¹³⁹ See for instance, the World Health Organisation, *Fact Sheet No 241: Female Genital Mutilation* (2010), <http://www.who.int/mediacentre/factsheets/fs241/en/>, accessed on 4 May 2011.

¹⁴⁰ For instance, see OHCHR, *Fact Sheet 23: Harmful traditional practices affecting the health of women and children*, <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>, accessed on 25 February 2011, and Human Rights and Equal Opportunity Commission, *Article 18 Freedom of Religion and Belief*, (Commonwealth of Australia, 1998) 59.

¹⁴¹ Philip Wilkinson, *Religions* (Dorling Kindersley, 2008) 78.

The religious prescription for this practice is found in Genesis 17 of the Torah, which prescribes that every male be circumcised.¹⁴² Of the 30% of the world's males who are believed to be circumcised, around two thirds are believed to be Muslims.¹⁴³ Though there is no specific mention of the practice in the Koran, the practice in Islam as with Judaism is considered to confirm the relationship between man and God. There is no prescribed age at which a person should undergo the ritual in Islam, which generally takes place between the child's seventh day of life and puberty.¹⁴⁴

While international organisations are clear on the urgent need to abolish the practice of FGM due to the danger it poses to health,¹⁴⁵ male circumcision is often promoted for its contribution to reducing HIV prevalence.¹⁴⁶ Indeed, research has found that male circumcision can (in combination with other measures) reduce contraction of HIV among sexually active males by up to 60%.¹⁴⁷ However, the medical pros and cons of the procedure are beyond the scope of this thesis, and are very much beside the point. No matter how beneficial the alleged benefits of circumcision are, they do not absolve the religious motivations of parents in relation to another person's penis. The decision to be circumcised to guard against HIV contraction should be left to adult males, or children with the requisite capacity to decide.

Male circumcision is a custom that is widely accepted in many societies often for social reasons.¹⁴⁸ Studies have found that a key determinant in parental decisions to circumcise sons was the desire of parents for their child not to look 'different' and to

¹⁴² *Bible*, Genesis 17:10.

¹⁴³ World Health Organisation and Joint United Nations Programme on HIV/AIDS, *Male Circumcision: Global trends and determinants of prevalence, safety and acceptability* (2007) 7.

¹⁴⁴ *Ibid* 3-4.

¹⁴⁵ See for instance World Health Organisation, *Fact Sheet No 241: Female Genital Mutilation* (2010), <http://www.who.int/mediacentre/factsheets/fs241/en/>, accessed on 25 February 2011.

¹⁴⁶ See for instance, World Health Organisation, *Male circumcision for HIV prevention*, <http://www.who.int/hiv/topics/malecircumcision/en/>, accessed 25 February 2011 and Ngo and Obhai, above n 134.

¹⁴⁷ See for instance, World Health Organisation, *Male circumcision for HIV prevention*, <http://www.who.int/hiv/topics/malecircumcision/en/>, accessed 25 February 2011 and Ngo and Obhai, above n 134, 3. There remain some medical opinions that remind us that HIV transmission is more concerned with sexual behaviour than it is with genital anatomy or the best interests of the child, and that decisions to undergo the procedure should be made by the person when he is old enough to make an informed decision. See for instance, Geoff Hinchley, 'Head to Head: Is infant male circumcision an abuse of the rights of the child?' (2007) 335 *British Medical Journal* 1180.

¹⁴⁸ See for instance, World Health Organisation and Joint United Nations Programme on HIV/AIDS, *Male Circumcision: Global trends and determinants of prevalence, safety and acceptability* (2007).

ensure that their son conforms to what is 'normal'.¹⁴⁹ In some societies the practice is indeed so widely spread that it is accepted as being normal; in the United States of America 75% of males are circumcised for non-religious reasons.¹⁵⁰ A desire in fathers that their son's penis resembles their own has also been noted; a study in the United States of America showed that 90% of circumcised men chose to circumcise their sons compared to 23% of non-circumcised fathers.¹⁵¹ In several parts of the world, circumcision is a rite of passage to manhood that is associated with factors such as courage and masculinity.¹⁵²

Setting aside health and cultural reasons for circumcision which are beyond the scope of this thesis (though the spiritual elements of some customary rites raise religious issues), it is asserted that the religious motivations of parents do not lessen the implications of that act for the child, and do not amount to a universally acceptable practice that human rights law should protect. From a criminal point of view, the *actus reus* (cutting off a part of an infant's genitalia) could not be excused by the *mens rea* (entering that infant into a covenant with God) any more than other assaults (for instance, whipping the child) could be excused by religious reasons (to excise the devil from the infant's body).¹⁵³

In the matter of cutting off the foreskin of an infant's penis, the protection of the practice under international human rights law is based on a parent's religious rights vis-à-vis his child. But from the point of view of the child there must be countervailing human rights that intervene to protect his bodily integrity, his health and his freedom not to permanently bear the mark of his parents' religion if he chooses to join another.

¹⁴⁹ Ibid 5.

¹⁵⁰ Ibid 11. Here it should be noted that in some societies the practice of FGM is also so widespread that it could be considered 'normal'.

¹⁵¹ Ibid 5.

¹⁵² Ibid 4. For instance, as a member of the Themba people of the Xhosa nation, Nelson Mandela recalls his circumcision ceremony, during which he had to shout 'I am a man!' at the moment his foreskin was severed. See Nelson Mandela, *Long Walk to Freedom* (Abacus, 1994), 30-34.

¹⁵³ Here it should be noted that in the instance of whipping a child, depending on the severity of the assault, the child is capable of physically recovering.

7.4(b) Relevant parents' rights

As mentioned above, Sylvie Langlaude suggests that the state cannot interfere with a child's nurture, including religious practices such as circumcision, implying that an infant has a right to be circumcised.¹⁵⁴ Generally though, circumcision of infant males is not considered to be a manifestation of the infant's religion but a protected manifestation of his parents' religion.

The most relevant human right at issue is the right of parents to manifest their religion contained in article 18(1) of the ICCPR.¹⁵⁵ The wide acceptance of male circumcision for religious purposes throughout the world implies that a rationally and objectively approached rights perspective plays little role. Indeed, no question has been raised by human rights bodies about whether parents have a right over their son's penis for this purpose.¹⁵⁶ Yet, circumcision of an infant represents the manifestation of the religion of one person upon another person's penis. At issue here are the child's own article 18 rights; where circumcision represents a covenant with God, it is the circumcised child who is entered into such a covenant rather than his parents.

Applying the evolving capacities consideration to the circumcision scenario reveals the flaws in human rights law as it operates in this respect. The point at which the child evolves to have adequate capacity to decide on the fate of his penis operates not to enable that child to choose to have a part of it removed, but rather becomes the point at which the child is capable of refusing consent. In other words, the parents are given the advantage of decision in this respect, simply because the child is entirely helpless against them. The fact that the child is incapable of giving or refusing consent is the reason that parents are able to remove foreskins uncontested, yet a necessary principle of international human rights law is that all people should enjoy human rights, regardless of their capacity to do so. The consequences were this

¹⁵⁴ Langlaude, above n 4, 59.

¹⁵⁵ Article 23 of the ICCPR concerning family rights may also come into play, but is beyond the scope of this thesis.

¹⁵⁶ A search for 'male circumcision' of the 'Universal Human Rights Index of United Nations Documents' (<http://www.universalhumanrightsindex.org/en/index.html>) on 5 May 2011 yielded 6 results which raised issues about the health implications of male circumcision carried out in unsafe conditions, but none questioning whether the practice should be allowed.

not to be the case would result in respect for human rights being tempered by degrees in relation to the capacity of rights-holders such that torture for instance, would be considered less reprehensible where it is meted out on a person with low mental or physical capacity to understand or experience it.

The best interests of the child are supposed to be the overriding consideration in all decisions with respect to him. It is suggested here that an irreversible procedure carried out purely for ritual rather than medical reasons, which has both short and long term implications for the individual concerned, cannot be considered to be in the child's best interests. Indeed, the fact of the potential risks, not only in the course of the procedure itself (particularly where that procedure is performed by someone who is not medically trained or medically regulated), along with the long-term impact that the procedure may have on the individual's sexual life, are strong arguments to suggest that the procedure is *not* in the best interests of the child.

Against these considerations, it seems possible that the article 18(1) rights of parents could be limited. The fact that the parents are manifesting their own religion on the body of another person raises issues of the countervailing rights that the infant may have to be protected from the manifestations of another person's religion. The most relevant ground for limiting the parents' right to circumcise their child is the 'rights of others'; namely the rights of their infant child. Indeed, if religion could be manifested by slapping another person in the face, the law would probably intervene to prohibit the slapper from interfering with the bodily integrity of the slapped, irrespective of the mildness of the harm done from incurring a slap from another person. Similarly, challenges would likely be mounted against a new religion that encouraged scarring or branding of infants as a mark of their membership. The same is not true when a religion is manifested by cutting off another person's foreskin.

It must be acknowledged that the practice may be accepted owing to its fundamental importance to those who practice it. Indeed, religion and the practices that follow are of such significance to many people that they transcend practical considerations of their acceptability by secular standards. The importance of religion and its value to human life and dignity is such that the human rights protections thereof entail an

express right of parents to bring children up in accordance with their beliefs. In the case of circumcision, considered by some as a command from God necessary to enter a given faith,¹⁵⁷ a human command not to circumcise is understandably less significant. For some Jews, circumcision is considered essential to Jewish identity and one of the most key commandments of Judaism.¹⁵⁸ Therefore, for some, the negative consequences of not being circumcised from a religious point of view may be so grave as to outweigh any negative considerations from a rights point of view. But from the rights-based, non-religious viewpoint, it seems that circumcision is largely acceptable at the international level, not because it does not injure the people it is inflicted upon, but because it has been practiced for so long.

Continued acceptance of the violation of children's rights in deference to their parents' commitment to ancient traditional religious practices, is evident even in modern secular societies. In May of 2011 in the city of San Francisco, child rights advocates managed to put the issue of banning circumcision on the voter's ballot. Legal challenges to the referendum alleged that the proposed ban was anti-Islamic and anti-Semitic, and an assault on ancient religious practices. In July 2011 Judge Loretta Giorgi struck the issue from the ballot on the grounds that the ban would violate religious freedom, and because the city of San Francisco had no authority to regulate what she termed medical procedures.¹⁵⁹ Her decision was based on consideration of the impact the proposed ban would have had on the rights of parents, rather than on the children being circumcised by them.

¹⁵⁷ See for instance, Jack Ewing, 'Some Religious Leaders See a Threat as Europe Grows More Secular', *New York Times*, 19 September 2012, accessed on 16 May 2012, http://www.nytimes.com/2012/09/20/world/europe/circumcision-debate-in-europe-reflects-deeper-tensions.html?pagewanted=all&_r=0.

¹⁵⁸ See for instance, 'Why do Jews circumcise their children? Dossier of the Central Council of Jews in Germany on the issue of circumcision', Zentralrat der Juden in Deutschland, <http://www.zentralratjuden.de/en/article/3734.html>, accessed on 21 June 2013.

¹⁵⁹ See for instance Carolina Madrid, 'Jews, Muslims sue to block referendum on circumcision' *Reuters* (online), 22 June 2011, accessed on 26 January 2011, <http://www.reuters.com/article/2011/06/23/us-circumcision-sanfrancisco-idUSTRE75M05120110623>, and Anna Holligan, 'Dutch Jews and Muslims fight for circumcision right', *BBC News* (online), 3 November 2011, accessed on 26 January 2012, <http://www.bbc.co.uk/news/world-europe-15486834>. Also see 'San Francisco circumcision ban struck from ballot', *BBC News* (online), 28 July 2011, accessed on 26 January 2012, <http://www.bbc.co.uk/news/world-us-canada-14335715>.

However, a 2012 decision of the Cologne regional court in Germany came to a different conclusion, deciding that the child's right to not be subjected to bodily harm trumps the religious rights of parents. That case involved medical complications resulting from the circumcision of a four-year old child. Though the surgeon who performed the procedure at the request of the child's parents was acquitted on charges of criminal battery, the court nonetheless found that circumcision of a boy unable to consent, if not medically necessary, could constitute criminal battery even if performed with the consent of both parents. The court noted that such circumcision was not in the best interests of the child given that irreparable and permanent change results from the procedure, which is counter to the child's interest to decide about his religion later. Further, it did not consider the rights of the parents unduly interfered with as the child could later decide to be circumcised when capable of doing so. The child's right to bodily integrity and self-determination were thus found to trump the rights of parents.¹⁶⁰

The reactions to the decision of the Cologne regional court offer insight into the significance of the practice for many people. While the case concerned the child of Muslim parents, an enraged response came also from the Jewish community; the decision was hailed by the head of the Orthodox Conference of European Rabbis in Berlin as the "worst attack on Jewish life since the Holocaust."¹⁶¹ The decision also attracted the chagrin of scholars, who pointed out the failings of the decision-makers to adequately consider established literature emphasising the importance of the practice in religion, and for failing to give adequate consideration to the rights of parents.¹⁶² The negative response to the decision was so vehement (and it must be said, so politically charged) that the German government amended its Civil Code in

¹⁶⁰ Landgericht Köln, Beschneidung, Judgment of Monday, 7 May 2012, No. 151, Ns 169/11, Neue Juristische Wochenschrift (NJW), available at http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html in German. An unofficial translation is available at <http://www.scribd.com/doc/98810698/Cologne-Circumcision-Decision-Translated-6-12>.

¹⁶¹ Quoted in 'The World from Berlin: Circumcision Ruling is a 'Shameful farce for Germany', *Spiegel Online*, 13 July 2012, accessed 16 May 2012, <http://www.spiegel.de/international/germany/german-press-review-on-outlash-against-court-s-circumcision-ruling-a-844271.html>.

¹⁶² See for instance, Angelika Günzel, 'Nationalisation of Religious Parental Education? The German Circumcision Case' (2013) 2 *Oxford Journal of Law and Religion*, 206, 208 and Bijan Fateh-Moghadam, 'Criminalizing male circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11', (2012) 13 *German Law Journal* 1131, 1136.

December of 2012, to clarify that circumcision for religious reasons remained legal in Germany.¹⁶³

These cases highlight the complexity of ritual circumcision from a human rights perspective. For the secular observer, the practice may constitute criminal battery amounting to bodily harm inflicted against an unconsenting minor. But for the religious parents concerned, prohibiting that practice may amount to something much worse, being to prevent them from establishing the child's place in their community and religion.

7.4(c) Child's countervailing rights

It is clear that certain decisions made by an adult in accordance with his religious beliefs are limitable where those decisions impact on his child. For instance Ursula Kilkelly argues that situations where a parent seeks to deny a life-saving blood transfusion from their child for religious reasons, or where a parent seeks to rely on religious grounds to inflict corporal punishment on his or her child, would be captured by limitations in the relevant human rights instruments.¹⁶⁴ She does not comment on whether such a limitation should act to stop parents from removing their child's foreskin.

The rights of the infant which would most logically trump those of the parent wishing to circumcise him are firstly the right to health and secondly his freedom of religion and belief.

7.4(c)(i) Right to Health

Limitations against the rights of parents to circumcise their infants on the grounds of health are not to be confused with apparent long-term benefits, namely, the reduced risk of HIV transmission among males who have been circumcised.¹⁶⁵ The health consideration at issue rather concerns the risks posed to infants through the *procedure* of circumcision. Article 12 of the ICESCR recognises the right of everyone

¹⁶³ See §1631d of the German Civil Code and reasoning offered for the amendment, including the significance of the practice to several religions, notably Judaism and Islam (available in German at <http://dipbt.bundestag.de/dip21/btd/17/112/1711295.pdf>). Also see Günzel, above n 162, 209.

¹⁶⁴ Kilkelly, above n 11, 249.

¹⁶⁵ Ngo and Obhai, above n 134, 3.

to the 'highest attainable standard of physical and mental health'.¹⁶⁶ Steps taken by states parties to fully realise such a standard include those necessary for the reduction of infant mortality and for the healthy development of the child.¹⁶⁷ Article 24(3) of the CRC requires states parties to "take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Additionally, article 5(5) of the 1981 Declaration provides that practices of a religion or belief in which the child is brought up must not be injurious to his physical or mental health or to his full development.

Relative to FGM, it is generally conceded that male circumcision does not result in the same level of trauma, physical injury and long-term health and sexual problems, but this distinction is of little comfort to the boy concerned. Nor does it mean that the same reasoning should not apply in considering the impact that the practice has on those who it is performed on. It is submitted that where FGM is performed in a way that carries no short or long term risk to the girl concerned (for instance, by symbolically cutting her labia in a way that does not interfere with the sexual functioning of her genitalia and may even completely heal), the procedure would still raise human rights concerns on principle. Indeed, many scholars argue that the distinction drawn between male and female genital mutilation amounts to discrimination on the basis of sex which detracts from a clear and objective approach to the issue of mutilating genitalia of infant males.¹⁶⁸ Though we are urged to consider the practice of male circumcision as being quite separate from FGM,¹⁶⁹ there is some concern about the infant's health where his foreskin is removed. Though male circumcision is often performed for medical reasons (as conceded above), there

¹⁶⁶ ICESCR article 12(1).

¹⁶⁷ ICESCR article 12(2)(a).

¹⁶⁸ See for instance, Ranipul Narulla, 'Circumscribing circumcision: Traversing the moral and legal ground around a hidden human rights violation' (2007) Vol 12, *Australian Journal of Human Rights*, 89-118, also see Robert Darby and J. Seven Svoboda, 'A Rose by any other Name: Rethinking the Similarities and Differences between Male and Female Genital Cutting' (2007), Vol 21, *Medical Anthropology Quarterly*, 301-323, and Christine Mason, 'Exorcising excision: Medico-legal issues arising from male and female genital surgery in Australia', (2001), Vol 9, *Journal of Law and Medicine*, 58-67.

¹⁶⁹ For instance, see Kirsten Patrick, 'Head to Head: Is infant male circumcision an abuse of the rights of the child?' (2007), Vol 335, *British Medical Journal*, 1181, "It cannot be compared with female circumcision, which has been shown to be no more than genital mutilation without medical benefit and with an unacceptably high likelihood of pain, immediate and long term medical complications, and psychosexual scarring."

are risks posed to the infant that should be weighed in decisions to allow parents to circumcise their child for religious reasons.

Where circumcision of boys is performed as a religious practice, their physical health may be put at risk for no discernable benefit that justifies that risk. Risks to infants in circumcision include anaesthetic risks (where anaesthetic is used, which is not always the case),¹⁷⁰ as well as short-term risks of bleeding and infection. Potential long-term risks include pain on erection, penile disfigurement, and research has also found that there may be some psychological harm resulting from the operation.¹⁷¹ Though the World Health Organisation encourages the use of circumcision to reduce HIV transmission, it acknowledges that risks can include pain, bleeding, infection, injury to the penis, urethra, glands and scrotum, disfigurement and scarring, and reactions to anaesthetic agents.¹⁷² Indeed there have been instances of babies bleeding to death as a result of circumcision.¹⁷³ Though the risk of complications is low when performed by well-trained, adequately equipped and experienced healthcare practitioners, the absence of these factors is acknowledged to increase the risk of complications by up to 20%.¹⁷⁴ It is also necessary to underline that the complication rate for infant circumcision is essentially unknown because most operators are unregistered.¹⁷⁵ Lack of information and a failure to register persons who are commissioned to bring a knife to an infant's penis should act as a caution against allowing the practice to continue without being subjected to greater objective scrutiny.

In addition to the medical risks of circumcision, there is also the risk of reduced sexual health in circumcised males. There is evidence to suggest that the non-circumcised adult penis is more sensitive than its circumcised counterpart, given

¹⁷⁰ Hinchley, above n 147, 1180.

¹⁷¹ See for instance D Bollinger and R Van Howe, 'Alexithymia and Circumcision Trauma: A Preliminary Investigation' (2011), *International Journal of Men's Health*, 184-195 and R Goldman, 'The psychological impact of circumcision', (1999) *British Journal of Urology International*, Volume 83, Supplement 1, 93 – 102, <http://www.cirp.org/library/psych/goldman1/>, accessed on 21 October 2011.

¹⁷² World Health Organisation, *Manual for early infant circumcision under local anaesthesia* (2010) 7.

¹⁷³ For instance, in Canada one-month old Ryleigh McWillis bled to death despite being circumcised at a Hospital. See 'Baby bleeds to death after circumcision' *The Miami Herald*, 26 June 1993.

¹⁷⁴ World Health Organisation, *Manual for early infant circumcision under local anaesthesia*, (2010) 7.

¹⁷⁵ Patrick, above n 169, 1181. It should be noted here that Patrick was arguing in the negative (that male circumcision is not an abuse of the rights of the child) and was presenting the lack of data to support her contention that there is no significant harm caused to the child.

that the five most sensitive areas of the penis are removed during circumcision, implying reduced sexual sensitivity for the circumcised male.¹⁷⁶ Here it should be noted that one of the key oppositions to FGM is the reduced sexual pleasure the victim will experience upon becoming sexually active. While the degree to which this is the case is admittedly significantly higher than for her male counterpart (often resulting in pain as opposed to reduced pleasure), the fact of this relativity should not exempt male circumcision from objective scrutiny.

As mentioned, medical conclusions on the process of male circumcision of infants are beyond the scope of this thesis. The material legal point to emerge is that there are various views, and that the person who should decide whether to circumcise a given penis is the person who will bear the risks and experience the consequences of the procedure in the long and short term. Consider for instance the position of a doctor rendered objective by having being isolated from exposure to the widespread acceptance of the practice that has tended to 'normalise' it. Were this doctor asked to decide upon the ethics of circumcising an infant for the religious convictions of his parents, she would consider both questions of consent and the Hippocratic Oath which compels her to 'do no harm', and arguably decide that "the irreversible, invasive and painful removal of any neurologically complex external organ of a powerless patient at the request of a third party is an ethical travesty."¹⁷⁷

Christopher Hitchens (an atheist who was himself circumcised as an infant and said in an interview the year before he died, that he sometimes 'broods about the missing bit'¹⁷⁸) was firm in his belief that the health risks posed to the baby concerned should outweigh the religious preferences of his parents:

...who can bear to read the medical textbooks and histories which calmly record the number of boy babies who died from infection after the eighth day, or who suffered gross and unbearable dysfunction and disfigurement? The

¹⁷⁶ See for instance, Hinchley, above n 147. However, the World Health Organisation disagrees with this finding, arguing that reduction of sexual satisfaction is unlikely to result from male circumcision. See, World Health Organisation, *Manual for early infant circumcision under local anaesthesia* (2010) 8.

¹⁷⁷ Paul Mason, Commissioner for Children, Hobart, Tasmania, Australia, Letter to the Editor, *Sydney Morning Herald* (online), 6 June 2009, <http://www.smh.com.au/national/letters/stopping-circumcision-a-matter-of-human-rights-20090605-byf4.html?page=6>, accessed on 28 February 2011.

¹⁷⁸ Paul Holdengraber, interview with Christopher Hitchens (in conversation at the New York Public Library, 4 June 2010).

record of syphilitic and other infection, from rotting rabbinical teeth or other rabbinical indiscretions, or of clumsy slitting of the urethra and sometimes a vein, is simply dreadful... If religion and its arrogance were not involved, no healthy society would permit this primitive amputation, or allow any surgery to be practiced on the genitalia without the full and informed consent of the person concerned.¹⁷⁹

Objectively scrutinised with reference to medical findings over religious reasons, the continued circumcision of infant males could raise issues under article 7 of the ICCPR which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁸⁰ The right of children to be protected against such treatment is reinforced by article 37(a) of the CRC.¹⁸¹ It is asserted here that the removal of the foreskin (often without anaesthetic)¹⁸² from an infant who does not have the capacity to consent to its removal not only risks violating his right to health but could even amount to degrading and inhuman treatment, contrary to article 7 ICCPR.

7.4(c)(ii) Right to Freedom of Religion and Belief

The decision as to whether a parent’s right to remove her child’s foreskin in accordance with her religion is trumped by a child’s right to keep it also turns on whether or not the decision would impair the child’s article 18 right to enjoy (and later change) his or her religion or belief. While the absence of a foreskin may not prevent the circumcised male from joining a religion that does not practice circumcision or leaving one that does, it is submitted here that the permanent nature of circumcision could still constitute improper coercion by his parents.

As discussed above, the evolving capacity consideration operates to allow a child to assume his own religious identity when he has the capacity to do so. When religious circumcision is performed on an infant child, he is unaware of what is happening and the reasons why, and unable to articulate his viewpoint or describe the nature

¹⁷⁹ Hitchens, above n 1, 226.

¹⁸⁰ *ICCPR*, Article 7.

¹⁸¹ *CRC*, Article 37(a).

¹⁸² See for instance, Hinchley, above n 147.

and gravity of his pain. The choice then to circumcise infants takes advantage of the fact that their capacity has not yet evolved to let them exercise their own religious choices. Subjecting this particular religious practice to the test of evolving capacities may indicate the coercive intention of the parents.

The fact that a practice is a religious practice should not make it immune from scrutiny, particularly where it is committed by an adult on a powerless infant. Prohibiting male circumcision of infants for religious reasons would not result in lost medical benefits or lost religious significance; an individual is free to choose to undergo such a ritual when he has the capacity to consent to the procedure, its associated risks, and the religious connotations of it. A parent's decision to circumcise her son before he has capacity to participate in the decision amounts to improper coercion, which robs the child of the choice to be circumcised or not in accordance with his religion or belief.

7.5. Conclusion: Children's rights to be free from parental coercion

The international human rights framework views the religion of children through the lens of their parents. Among the guidance issued on freedom of religion and belief of children, there is an obvious dearth of guidance as to how conflicts between parents' rights and those of their children are to be resolved. In guidance on the rights of the child and of his or her parents, the Special Rapporteur addresses conflicts between parents of different religious or belief-related orientations in the content of divorce settlements, but does not refer to conflicts between parents and children of different persuasions.¹⁸³ Rex Ahdar acknowledges that a child's religious and belief wishes may conflict with the wishes his parents have for him, but ultimately argues against recognising an autonomous right of children because its practical operation would undermine family integrity and call upon secular decision makers to adjudicate on sensitive matters they are ill-qualified for and may be biased in relation to.¹⁸⁴ He notes that in bringing up their children, parents are wise to respect the eventual freedom that a child will have in relation to his or her religion

¹⁸³ See UN General Assembly, *Elimination of all forms of religious intolerance*, UN Doc A/67/303 (13 August 2012) [48-50].

¹⁸⁴ See Ahdar above n 13, 93-114, and Ahdar and Leigh, above n 23, 241.

and belief, but in the meantime considers that “[t]he danger of occasional abuses of their authority by some parents seems to be outweighed by the harm that the introduction of right of religious autonomy for children generally would bring” and that “[u]nless the parent is commanding something patently objectionable or immoral – in other words is abusing his or her office as parent he or she ought to be given the benefit of the doubt.”¹⁸⁵ But, regardless of the rights that parents have in relation to their children, the fact remains that children also have rights, including that to freedom of religion and belief by virtue of article 18, which cannot be simply ignored.

Nowak and Vospernik express a view that differs from that of Ahdar. They point out that a baby or small child being forced to become a member of a political party or trade union, would likely be considered an unjustified interference with his privacy or freedom of association. Such interferences however, are generally accepted when they become members of religious organisations, or even protected when it emanates from the baby’s parents. But they go on to note that even parental rights to bring up their child in accordance with their own religion or belief have limits, referring to intervention that they believe should take place to protect the life and health of children.¹⁸⁶ The example they offer relates to blood transfusions. The same is asserted here as applying to male circumcision. The fact that children currently do not enjoy meaningful freedom from the religion of their parents, raises the question of what their article 18 rights practically mean if they have no autonomous recourse to protection from bodily interferences.

The pro-parental bias inherent in international law is acutely borne out in considering male circumcision, where the interests and preferences of the parent trump any claim the child may have to a contrary outcome. Indeed, the primacy accorded to the wishes of parents over the individual rights and interests of their children in respect of circumcision and religious and moral education could be construed as promoting an agenda to preserve religions and related practices by ensuring that the number of followers is perpetuated. Alternatively, if the intention

¹⁸⁵ Ahdar, above n 13, 108.

¹⁸⁶ Nowak and Vospernik, above n 75, 170.

is not to perpetuate religion through the generations, primacy may be afforded to parents so as not to cause religious offence to the more powerful party. But religions do not have human rights, and no one (including the religious) has a right not to be offended.

Article 5(5) of the 1981 Declaration states that “[p]ractices of religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development.” Determining physical or mental injury in matters of religion and belief is a complicated issue, but must be done in a way that upholds the right of individuals including their right to education, health and to be free from torture and inhuman or degrading treatment, as well as their right to choose their own religion when they are capable of doing so.

International human rights instruments uphold parental rights in respect of the religious rights of their children.¹⁸⁷ This protection of a person’s rights over those of another must be guided by the principle that at some point, the child acquires the right and capacity to enjoy his non-derogable article 18(1) right to freedom of religion and belief. Human rights bodies are reticent to define the outer limits of parents’ article 18(4) rights for the good reason that interfering with all instances in which parents improperly coerce their children would result in an unmanageable number of potential human rights violations and require an unmanageable number of state interferences with privacy and family rights contained in articles 17 and 23 of the ICCPR. Indeed, from a practical point of view, it could be suggested simply that children do not enjoy religious freedom from their parents. This is so not necessarily because of the coercive intentions of their parents, but because of the nature of religion and belief; it may not be possible even for well-meaning parents to bring their child up in accordance with their own convictions without coercing him towards the same religion or belief.

The challenges of practical implementation notwithstanding, a general principle must be asserted. Bearing in mind the underlying need to offer special protections to children for reason of their particular vulnerability, it is asserted that states are

¹⁸⁷ ICCPR article 18(4); ICESCR article 13(3), 1981 Declaration article 5; CRC article 14(2).

empowered to protect children from the religious coercion of their parents. What parents do in manifesting their own religion and in bringing their children up in accordance with their own convictions should not undermine the child's enjoyment of competing human rights, including his right to have or adopt a religion or belief different to that of his parents. Indeed, to abandon children to the harmful religious practices of their parents is the moral equivalent of denying human rights to people who are particularly vulnerable, simply because they are vulnerable.

* * * * *

CHAPTER 8: IS THE HEIRARCHY OF RELIGION AND BELIEF JUSTIFIED?

8.1. Introduction

"...one of the most important aspects of the historical development of the 'human rights' tradition in the European context has been the struggle for the right not to believe."¹

In the case study chapters it is asserted that a hierarchy of religion and belief exists in the practice of international human rights law. Despite the fact that the position formally taken in international human rights law is that all religions and beliefs must be treated equally, special treatment is afforded in practice to followers of major religions relative to those devoted to less-established religions or no religion. It is clear that distinctions can be made between manifestations to the extent that they impact on human rights; for instance human rights law would not defend a religious practice that involves human sacrifice. Yet some manifestations appear to be treated with more consideration than others, depending on the religion or belief being manifested.

8.2. Recaps of findings

Appropriately, religion and belief remain undefined in international human rights law for the purpose of allowing all manner of religions and beliefs to fall within jurisprudential understanding of the terms. The understanding of 'religion and belief' extends beyond those that are well known and have stood the test of time, so as to accommodate new religions or beliefs that may emerge. Here, it seems that international law has been drafted in a way intended to ensure that no hierarchy of religions and beliefs is created among the rights-holders who can exercise freedom of religion and belief. The broad understanding of religion and belief achieved by not defining either is tempered by the fact that the manifestation of religion and belief can be limited. Yet the chapters above reveal that there is nonetheless bias

¹ Paul Weller, 'Human Rights', 'Religion' and the 'Secular': Variant Configurations of Religion(s), State(s) and Society(ies)', in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007) 150.

towards followers of some religions and holders of some beliefs over others on the basis of those religions or beliefs. This hierarchy is evident not only in terms of the disadvantaged position of atheists but also in the privileged position of some theists, with major monotheistic religions accorded the most respect by international human rights institutions.

8.2(a) Biased approach in deciding what is coercive proselytism

Chapter 5 emphasised that proselytism is a protected manifestation of religion and belief, but suggested that the extent to which proselytism is permissibly limited has sometimes depended on the religion or belief being proselytised. Two seminal cases were discussed, the European Court of Human Rights cases of *Kokkinakis v Greece* and *Larissis v Greece*.² In both cases, the court failed to make a clear distinction between proper and improper proselytism. It also failed to confront the state's failure to do so, effectively endorsing Greece's bias in favour of its dominant religion. The result of the scant guidance on the considerations to be weighed in deciding whether proselytism is improper is that decisions are susceptible to the biases of decision makers and tend to cautiously err in favour of the dominant or 'traditional' religion in a given state. Special rights or privileges are therefore afforded to members of those religions vis-à-vis members of less established or less popular ones, thereby exacerbating the vulnerability of the latter and entrenching their lower position relative to followers of more 'mainstream' religions.

A hierarchy of religions under international human rights law was also evident in the use of religious rhetoric as a means of proselytising. It was asserted that ignoring the potentially coercive effect of such rhetoric is to overlook and undermine its potency. Yet, thus far, there is little acknowledgement at the international level that religious rhetoric can constitute the type of coercive threat envisaged by General Comment 22 on article 18(2) of the ICCPR.³ Similarly, a hierarchy of religion and belief can be found in cases concerning the proselytising effect of religious symbols on children in school settings. While one teacher wearing an Islamic headscarf was

² *Kokkinakis v Greece* (1993) No. 260-A Eur Court HR (ser A), and *Larissis and others v Greece* (1998-V) No 65 Eur Court HR (ser A).

³ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4, (27 September 1993), [5].

found to be justifiably prohibited in Switzerland, the displaying of Christian crucifixes in classrooms in Italy was not.⁴ While these cases concern two of the “high ranking” monotheistic religions, it may be noted that the state’s majority religion was favoured in the latter, while a minority religion was disfavoured in the former.

Ultimately, the test put forward in Chapter 5 in determining whether proselytism is coercive in a given situation was the extent to which it interferes with a person’s freedom to meaningfully choose his or her religion or belief. Such a test overrides the need to engage with complex and subjective religious concepts and ideas, and requires only that the impact of the proselytism on targets of it be considered, whatever the religion or belief of the target or the proselytiser. Currently, failure to consider the impact of proselytism independent of the religion or belief being proselytised reinforces the place of dominant religions at the top of the hierarchy of religion and belief in the practice of international human rights law.

8.2(b) Hierarchy of hate speech

In Chapter 6, hate speech was discussed. While hatred alone does not damage human rights, incitement to violence, discrimination or hostility is a human rights issue. It was argued that article 20 of the ICCPR is inadequately equipped to respond to hatred that occurs in the name of religion rather than against religious people. The international community is concerned about Islamophobia, as evident for instance in the specific attention the UN gives to the rising tide of anti-Islamic feeling in the wake of increased Islamist terrorist attacks.⁵ Without wanting to detract from the seriousness of vilification of Muslims that the international community is correct to be concerned about, the comparative controversy of condemning hatred that emanates *from* an Islamic perspective must be mentioned. In human rights discourse it is less controversial to say that ‘...an increasing number of Muslims are victims of

⁴ See *Dahlab v Switzerland*, (European Court of Human Rights, Application No. 42393/98, Judgment, 15 February 2001) and *Lautsi and others v Italy* (European Court of Human Rights, Application No. 30814 /06), 3 November 2009.

⁵ See for instance UN Commission on Human Rights, *Resolution 2005/40 on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, E/CN.4/RES/2005/40 (19 April 2005) [6].

hatred' than it is to say that '...an increasing number of Muslims are perpetrators of hatred'.⁶

In this context, the hierarchy at play is argued to show more reluctance to repress hate speech that comes *from* a religious perspective than it is to repress hate speech that is directed *at* people on the basis of their religion. Article 20 was shown to be inadequate against all forms of hate speech for two reasons. Firstly, it does not address all possible reasons that a person might be the target of hatred. Secondly, those who are left unprotected (such as gays, lesbians and atheists) may be particularly vulnerable to hatred prompted by the hater's religious beliefs. For instance, gays and lesbians are not specifically protected by article 20, while vilification of them from a mainstream religious perspective is protected by article 18 (though it can be limited under article 18(3)).⁷ Similarly, it is not clear whether atheists or non-believers of the religion that hates their non-belief are protected by article 20. At the European level, the Swedish case of pastor Åke Green⁸ and the European Court case of *Vejdeland and others v Sweden*⁹ can be referred to by way of example; in the former case hatred against gays and lesbians from a religious point of view was allowed while the hatred that emanated from a non-religious point of view in the latter was not.¹⁰

It was contended in Chapter 6 that the expressions most likely to be targeted under article 20 are those that "hate" people based on their adherence to an established

⁶ Note here that the HRC's General Comment 34 (albeit on article 19 freedom of expression rather than article 20 hate speech) cautions states parties to ensure that counter-terrorism measures do not lead to unnecessary or disproportionate interferences with freedom of expression. See Human Rights Committee, *General Comment 34: Freedom of Opinion and Expression (Art 19)*, UN Doc CCPR/C/GC/34 (29 June 1983) [46]. Indeed, measures that condemn 'encouraging', 'praising', 'glorifying' or 'justifying' terrorism have been criticised for inordinately targeting Muslims. See for example, Ellen Parker 'Implementation of the UK Terrorism Act 2006 – The Relationship between counterterrorism law, free speech, and the Muslim Community in the United Kingdom versus the United States' (2007) 21 *Emory International Law Review* 711, 722 on the United Kingdom Terrorism Act of 2006.

⁷ A hierarchical approach can be argued when the relationship of article 18 limitations relative to those prescribed by article 19 of the ICCPR is considered. While *prima facie* it could be argued that expression of a non-religious ideas can be more readily limited than can the expression of a religious idea, it is true that the limitations accorded in article 18(3) allow the suppression of 'hate preach'.

⁸ *Prosecutor General v Green* (Supreme Court, Sweden) Appeal Judgment, Case No B, 1050-05, ILDC 200 (SE 2005) (29 November 2005).

⁹ *Vejdeland and Others v Sweden* (European Court of Human Rights, Application No 1813/07) ECHR 050 2012 (9 September 2012).

¹⁰ See 6.3(b) Homophobia: prohibited discrimination or a religious right?

religion (or their race), while hatred that comes from the point of view of a major religion is less likely to be limited. At the bottom of the hierarchy are the targets of religious hate speech who are not defined by their religion but by their lack of it. Such individuals are not only particularly vulnerable to being hated, but also have no recourse to the protection of article 20. In short, article 20 bolsters the hierarchy at international human rights law with established religions at the top and atheism at the bottom.

8.2(c) Religious rights of parents trump the rights of others

The final case study chapter discussed the clash between the rights parents to choose their children's religion, and the rights of children to enjoy freedom of religion and belief. The primacy of parents' rights over the competing rights of their children is clear through the explicit rights accorded to them in respect of bringing up their children, thereby entrenching the hierarchy of religion and belief. The result is that a child's right to freedom of religion and freedom from religious coercion is arguably sacrificed on the altar of her parents' rights to determine her religious and moral education.

The right to education was raised to illustrate the potential clash between the rights of parents to bring up their children in accordance with their own religion and belief, and the child's right to an education that supports her to achieve her potential. Jurisprudence offers numerous examples of parents asserting their right to educate their child in accordance with their beliefs. But as yet there are no instances of a child asserting her right to receive a religious or belief education that her parents seek to deny from her, or of refusing one they wish to impose. It is clear that a child's enjoyment of freedom of religion and belief in education may be compromised by the exercise of her parents' right to educate her in accordance with theirs. Yet rather than being met with proportionately vigilant protection of her right to education, the acute vulnerability of children vis-à-vis their parents is more commonly overlooked in the practice of international human rights law.

The issue of ritual male circumcision was explored, to demonstrate that international human rights law protects the right of parents to manifest their religion on the body

of their child. From a religious point of view it can be argued that repression of the practice would be tantamount to outright denial of the parents' right to enjoy religion, for a boy cannot be entered into the religion of his parents unless he is circumcised. However, where the mere facts of what transpires are considered (being the unconsenting ritual removal of an infant's or child's foreskin), it becomes clear that the bodily integrity of one individual is compromised in favour of the religious rights of another to interfere with it. This act is not an expression of the child's freedom of religion and belief, but a manifestation of his parents' religion. Protecting the practice allows the parents' religious rights to trump the child's right to health and his freedom to religion and belief, presupposing that he will not exercise the freedom of a religion or belief different to that of his parents and indeed discouraging him from doing so.

Setting aside the implications of these facts for the human rights of the individual concerned, the result is to elevate the religious manifestations of a religious parent over a potentially irreligious child. At a fundamental level, the primacy accorded to the wishes of parents over another person's rights and sometimes over his or her best interests, implies an agenda to preserve religions and religious practices, especially those that are well established.

Circumcision is undeniably fundamental to many people whose religious society practices it. Yet it is doubtful that all practices that irreparably mutilate babies or children for religious reasons would be similarly be protected as permissible manifestations of religion. Even practices that are less permanent and painful may be unlikely to achieve the same protection; a new religious sect that sought to initiate a child by interfering with his or her sexual organs, even in a way that did not involve branding, scarring or removal (for instance, ritual laceration of a girl's hymen) would likely attract the chagrin of human rights law rather than its protection. Similarly, less mainstream religious practices that harm children, including those motivated by witchcraft or spirit possession, are likely to be less tolerated than

circumcision.¹¹ The implication is that established religions are hierarchically higher in the international human rights system than newer or less-widely practices religions.

8.3. Is the hierarchy of religion and belief justified?

Having established that a hierarchy of religion and belief exists, it becomes necessary to ask whether such a hierarchy is justified. In Chapter 4 it was asserted that the hierarchy exists despite the fact that the human right to freedom of religion and belief aspires to neutrality. Yet perhaps it is appropriate to accord more respect to followers of established, time-tested religions over members of new and/or ‘unusual’ religions and atheists. Simply put, perhaps the hierarchy of belief is justified because some religions and beliefs are more deserving of respect than others.

8.3(a) Inherent value of some religions or beliefs over others

An argument could be made that the hierarchy of religion and belief at international law is justified by considering the inherent value of some religions and beliefs relative to others. This proposition obviously raises questions as to who is to judge what the inherent value is, and what the implications of doing so are. After all, the task of a legal body is to exclusively determine what is and is not permissible according to the laws that it is mandated to interpret and apply; it is not able to judge whether a religion or belief is inherently ‘good’ or ‘bad’. Setting this point aside for the moment though, it should be considered whether some religions or beliefs are more inherently valuable than others, if only for the purpose of underscoring the impossibility of objectively answering this question.

8.3(a)(i) Longevity of religion or belief

It is perhaps tempting to accept the favouritism that established religions enjoy on the basis that it has always been thus. History shows that followers of almost any religion have had to survive significant persecution before their beliefs and practices

¹¹ See for instance ‘National Action Plan to tackle child abuse linked to religion or belief’ (The UK National Working Group on Child Abuse linked to Religion or Belief, 2012), which discusses witchcraft but does not include circumcision (female or male) among those practices it addresses.

achieved respect. One can then speculate that their longevity alone gives them credence; their survival through turbulent tides of history means that modern-day believers no longer have to prove the sincerity of their beliefs. And the fact that they have stood the test of time indicates that they will most likely continue to do so. The longevity of a religion or belief therefore could be considered to bestow it with its inherent value, such that the endurance of a religion or belief throughout generations is proof of its worth. A consequence of this approach would be that Judaism would gain more esteem than relatively newer religions like Christianity and Islam.

This approach may be acceptable from a religious or cultural point of view, but from a rights point of view, the extent to which a religion or belief has endured in a given tradition or culture does not justify discriminatory treatment of other religions or beliefs that have not so endured.¹² Indeed, some religions and beliefs have *not* endured due to rights violation and eradication of their adherents. Followers of now extinct indigenous religions who died refusing their colonisers' attempts to convert them cannot be said to have been less entitled to freedom of religion and belief.

Further, if longevity is considered to be a factor justifying a particular place on the hierarchy, how long is a religion or belief expected to endure and in what form? Endurance, no matter how bravely achieved, remains a sketchy criterion and is essentially irrelevant to the individual who sincerely adheres to a religion.

8.3(a)(ii) Popularity of religion or belief

Another approach to asserting the inherent value of one religion or belief over another may be to assert a utilitarian proposition, such that the greater number of adherents a religion or belief has, the greater the respect it is entitled to. Strength of numbers would therefore give a major religion or belief higher standing than a religion with a handful of adherents.

¹² Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 165.

In 2010, the Pew Research Centre's Forum on Religion and Public life estimated that there are 5.8 billion religiously affiliated adults and children around the globe, representing 85% of the world population of 6.9 billion. Of these, 2.2 billion (32%) are Christian and 1.6 billion (23%) are Muslim, making up more than half the global population.¹³ These numbers could justify the higher place of Christians and Muslims, relative to the significantly less practiced Cao Dai, for instance.¹⁴ The implication of such numbers is that their adherents have a collective voice that is comparatively louder than that of members of minority religions or beliefs living among them.

Almost three quarters of people in the world (73%) live in countries in which their religion is the majority religion,¹⁵ begging the question of how the other 27% fares. This question points to the obvious weakness of this approach; the vulnerability of minority groups would be solidified merely because they lack strength of numbers. The result would be that heavily persecuted Baha'i would be sidelined to their persecutors. Rankings would also be ever changing, as the popularity of one religion or belief rose and another fell out of favour, potentially providing an incentive for believers to recruit additional adherents more aggressively in a bid to increase the respect they are afforded. It would also mean that Jews, who account for only 0.2% of the global population (approximately 14 million people), would be ranked very low in the hierarchy.¹⁶ Yet it is the particular history of Jewish persecution resulting in tragically depleted numbers of adherents that stands as a compelling argument against measuring the worth of a religion on the basis of its popularity. It may be for the reason of their small numbers that some adherents of religion or belief are in particular need of human rights protection.

While utilitarianism may be a relevant consideration in balancing competing rights, it is not the basis of human rights. Human rights are individual entitlements. In

¹³ The Pew Forum on Religion and Public Life, 'The Global Religious Landscape; A report on the size and distribution of the world's major religious groups as of 2010', December 2012, 9.

¹⁴ There are an estimated 8 million followers of Cao Dai. See Philip Wilkinson, *Religions* (Dorling Kindersley, 2008), 279.

¹⁵ The Pew Forum on Religion and Public Life, above n 13, 11. This figure does not include sub-groups of major religions, for instance Shia Muslims living in Sunni-majority countries or Catholics living in Protestant majority countries.

¹⁶ Ibid 9.

seeking to afford freedom of religion and belief to those who are denied enjoyment of that right, utilitarian considerations must be set aside in the face of minorities who often have a greater need of greater protection than majorities. While the religious freedoms of members of the majority religion may be well protected, the rights of members of minority religions may face a higher threat for not belonging to that religion. On the other hand, members of the majority religion may not be free but may remain members for want of a meaningful choice to do otherwise. In the final analysis then, numbers may speak to the extent to which a given religion is being adhered to around the world, but say nothing of the methods used to bring about that phenomenon or the rights enjoyed by individuals who belong to that religion or not. The implication of a reliance on popularity to determine worth could be that Islam and Christianity could be ranked against each other on the basis of which has more adherents, or different denominations within a religion could be pitted against each other. More support may be provided to the most popular religion rather than to the individuals who need the support most. In short the popularity of a religion, whether high or low, says nothing about the extent to which members are enjoying freedom of religion and belief and should be irrelevant in determining the rights entitlements of individuals.

8.3(a)(iii) Content or plausibility of religion or belief

Another approach that could justify the existence of a hierarchy could be found in considering the content of the beliefs in question against each other. However, it is difficult to determine who has authority and capacity to measure the value of a given belief set or element of it.

Attempts to establish which beliefs are more correct or plausible than others are fraught, and may misunderstand (and potentially disrespect) the nature of religion. Similarly, any attempt to identify elements within belief sets that are 'good', 'bad', 'better' or 'worse' than others, begs similar questions of "who" decides and "how" that decision is made. As discussed at 4.3(b), the ingredients of relatively new religions, such as Scientology, are met with less respect than those of more established religions. But the Dianetics of Scientology may be as ridiculous to a Protestant as baptism is to a Scientologist. Reincarnation may be as implausible to a

Catholic as resurrection is to a Hindu. The ideas contained in different branches of Islam may be vital to some Muslims and offensive to others. If an international tribunal was to rank Sunni or Shiite branches of Islam against each other, doing so would invariably discriminate against those who adhered to whichever branch was decided to have less inherent value or verisimilitude than the other. As Jeremy Gunn explains:

Whether the E-Meter is a mechanical gimmick or is a sophisticated piece of equipment that provides spiritual information is not the question. For a court or a government to presume that it knows the answer to that question, and to impose restrictions accordingly, is to ignore rights of conscience.¹⁷

The respect that different religions and beliefs are afforded must be acknowledged as being time and culture bound; what is respectable now was not always so. Emerging religions have always had a long journey to achieve respect. Indeed, Jesus Christ of Christianity and Joseph Smith of Mormonism are examples of past prophets who were persecuted for their controversial and far-fetched claims, which are now accepted as 'respectable' religious beliefs. Flesh and blood prophets of the present are met with more scepticism than prophets of the past who do not have (and may never have had) flesh and blood presence to vouch for their credibility. This is the case despite the fact that the claims of 'new' prophets are not necessarily any more supernatural, intangible or lacking in proof than the claims made by prophets of 2000 years ago.¹⁸ While followers of major established religions are often protected from criticism, adherents of new religions and belief systems are often abandoned to their antagonists. This abandonment occurs despite the assertion made in this thesis that human rights law cannot and should not define what religion or belief is, or engage in questions of the verisimilitude of its precepts.

¹⁷ Jeremy Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights', in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Publishers, 1996) 327.

¹⁸ Consider for instance the people of the island of Tanna in Vanuatu whose belief that Prince Philip, the Duke of Edinburgh is a deity were only strengthened by an in-person meeting with him in the mid-1970s and gifts and photographs the Prince subsequently sent to them. See, Amos Roberts, 'Waiting for Philip' *Dateline Report* (SBS Australia), 8 August 2010, <http://www.sbs.com.au/dateline/story/about/id/600662/n/Waiting-for-Philip>.

This point is explained by the Tandem Project, a non-governmental organisation with special consultative status to the Economic and Social Council of the UN established in 1986 to eliminate all forms of intolerance and discrimination based on religion or belief. According to the Tandem Project, the United Nations

...takes no position on the existence of God or the ultimate meaning of life. Freedom of conscience, to believe or not to believe, as one so chooses, is an embracing inclusive right and guiding principle. The United Nations is committed to the inherent dignity, equal and inalienable rights of all members of the human family, which includes tolerance and respect for diversity, and protection for the rights of all religious and non-religious beliefs.¹⁹

8.3(a)(iv) Purpose of religion or belief

A related consideration to justify the position of a given religion on the hierarchy may be to consider its purpose. There is perhaps an argument to be made that some religions pursue genuine religious or spiritual purposes, while others have questionable religious aspirations. The loaded terminology used to distinguish between 'cults' or 'sects' and more prevalent and widely accepted 'religions' was discussed briefly at 4.3. The terminology is emotive and can generate intolerance of some beliefs and practices, for instance, where the state takes measures to counteract the influence of 'sects' but does not do so in relation to 'religions'.²⁰ Irrespective of terminology though, the true challenge in determining whether spiritual or religious motives are genuine or not, starts at the point of determining what a 'genuine' religious aspiration is. Genuineness measured by verisimilitude is a problematic endeavour in religion and belief; for some it is the absence of proof that makes their believing all the more sacred and sincere. A cult that tragically ends in a mass suicide may, from a spiritual point of view, have achieved its religious purpose and transported its adherents to an afterlife of sorts, in the same way that some monotheists believe they are bound for eternal life after death. The point is we may never know.

¹⁹ http://www.tandemproject.com/part2/part_2_undec.htm

²⁰ Natan Lerner, *Religion, Beliefs, and International Human Rights* (Orbis Books, 2000) 7-8.

At the same time, genuineness measured as sincerity of belief cannot be measured by the intentions of religious (or belief) leaders. A 'cult leader' may rally followers for the purpose of his own sexual gratification or financial gain, or may simply be insane, but his motivation may not make the devotion of his followers any less sincere. Respected leaders of major religions may also promote practices that are criminal in nature or intended to subvert justice. What happens at the higher levels of a religious or belief organisation, or what the motivations of its leaders are, should not necessarily detract from the religious rights of the people who adhere to that religion or belief. Regardless of the fact that leaders of a given church may have questionable and non-religious motives, the sincerity of the beliefs of their followers may remain unscathed. For instance, the Unification Church (referred to derogatorily as the 'Moonies' after its self-proclaimed messiah, the late Sun Myung Moon, and known for its mass wedding ceremonies) continues today, and is generally recognised as a religion despite several scandals and significant financial interests of the 'true family' who leads it.²¹ The fact that the Church of Scientology may be driven largely by the financial thirst of its upper echelons does not detract from the rights of Scientologist to practice Scientology. In the same way that some Catholics have stepped out of the Catholic Church in protest against its handling of paedophilia but remain believing Catholics, so too are many Scientologists leaving the establishment disillusioned by its exploitation and mistreatment of members, but continuing to practice Scientology outside the 'official' Church.²² In short, it is impossible to judge the content of religions and beliefs from a non-religious rights-based point of view, and doing so remains beside the point as far as believers are concerned. A religion or belief is good and important and true to its adherents in a way that is unchanged by the absence of proof.

²¹ Ibid 43. For more on the Unification Church, see John Bowker (ed), *Concise Dictionary of World Religion*, (Oxford University Press, 2005) 384 and 'Rev. Sun Myung Moon, Self-proclaimed messiah who built religious movement, dies at 92', *New York Times*, 2 September 2012, http://www.nytimes.com/2012/09/03/world/asia/rev-sun-myung-moon-founder-of-unification-church-dies-at-92.html?pagewanted=all&_r=0, accessed on 27 May 2013.

²² See for instance, Lawrence Wright 'The Apostate: Paul Haggis v the Church of Scientology' *The New Yorker* (online), 14 February 2011, http://www.newyorker.com/reporting/2011/02/14/110214fa_fact_wright, accessed on 27 May 2013.

8.3(b) Relevance of role of religion or belief in social life

Another argument to justify a hierarchy of religion and belief could be found by looking to the impact that religions and beliefs have on society, beyond their intrinsic value to the individual. It is often religion that determines how an individual spends his or her time, who he or she associates with or marries, or even how he or she earns and spends money. Put another way, some adherents of some religions would assert that it is religion that determines how we are to live in society. Parameters for measuring the relevance of religion and belief explored below include the extent of its influence, the extent to which it benefits society, and the extent to which religion and belief unite rights-holders into a discernible group or 'minority'.

8.3(b)(i) Extent to which religion or belief influences community

Article 18 speaks explicitly of the enjoyment of freedom of religion and belief 'either individually or in community with others'. Certainly some religions have had more influence on community than others. As Anthony Bradney comments, "[t]he most vibrant examples of belonging to a religion occur where the religion is both a religious resource and also a significant social resource for its members."²³ Therefore, perhaps an argument in favour of elevating more established or traditional religions on the hierarchy is that they integrate people into a religious community and regulate and organise social relationships between them.

According to this rationale, major religions can be seen to have had particularly significant impacts on social life and to have contributed social practices that bring communities together, notably for key occasions such as births, deaths and marriages. In many societies, Diwali, Ramadan, and Christmas are social, cultural and familial highlights of the year for many members of society, irrespective of their religion or belief. Some key religious events are observed even in secular states that have no official religion, or in states that officially adopt another religion.²⁴ In

²³ Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish, 2009) 22.

²⁴ For instance, Christmas is widely celebrated in secular Australia, and streets are festively decorated to mark that event in the streets of Buddhist Thailand.

contrast, newer religions have not yet proven that they can underpin viable and enduring societies.

Similarly, major religions have made significant contributions to the way societies are governed, even adding ingredients and principles to law. The application of Sharia law in some states today is evidence of the far reaching and long-standing influence of Islam. Islam has shown that it can govern societies through Sharia, punishing transgressions and mediating disputes that may arise in human relationships. Similarly, the continuance of canon law in some church communities speaks to the organisational capacity of Catholicism. Indeed the higher place that Islam and Christianity occupy on the hierarchy could be justified by the fact that precepts from each continue to inform legal systems in several countries around the world in ways that cannot necessarily be said for other religions.²⁵ Similarly, the fact that some communities choose to adhere to Jewish law (or the *halakhah*) underscores the enduring role of major religions in social life in Israel. Hinduism and Buddhism also influence legal systems in some countries (including India and Bhutan respectively).²⁶

Also at the global political level, and as touched on in Chapter 1, the history of several major religions is inextricably linked to the history of several societies. A history of Europe, for instance, cannot be separated from the history of Christianity.²⁷ The history of Islam cannot be separated from the history of the Arab world. States have also organised themselves around some religious beliefs. The Organisation of Islamic Cooperation (OIC) is the second largest inter-governmental organisation after the United Nations with 57 member states and claims to be the 'collective voice of the Muslim world'.²⁸

Yet the weight that these considerations are given at the international level must be justified by clear criteria. A religion may play a significant role in one country and

²⁵ See however, Micheline R. Ishay, *The Human Rights Reader* (2nd ed, Routledge, 2007) 23-38, in which the influence of several other religions on the development of human rights law is discussed.

²⁶ However, as mentioned in 4.2, there are few other religions that determine the legal system in a state.

²⁷ See Peter Cumper and Tom Lewis, *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar Publishing, 2012) 5.

²⁸ See Organisation of Islamic Cooperation website, http://www.oic-oci.org/page_detail.asp?p_id=52 accessed on 23 May 2013.

only a minor role elsewhere. Dangers of relativity arise in determining the point at which a religion or belief can be considered to have had adequate social influence to claim a high place in the hierarchy. It also must be asked whether a prescribed number of societies, or individuals within them, is necessary to affirm that a religion has earned a higher position. Such questions are extremely difficult to answer and will likely elicit relativist and inconsistent responses depending on who is required to address them.

Furthermore, the above examples speak largely to the breadth of influence through time and across the globe, not necessarily to the depth of that influence. The continued celebration of Christmas by non-Christians in secular countries may point to the continued influence of Christianity or be conversely offered as evidence of its demise. Some new religious movements may have achieved a higher level of influence in particular communities, albeit on a smaller scale. Some polygamist sects in the United States for instance, or the Sea Org faction of the Church of Scientology, or communes of 'The Family', could on face value be considered to have successfully permeated all aspects of the social life of that community and be deemed worthy of commensurate respect for having done so. Confronting implications therefore arise for establishing criteria on the basis of influence in community. If animist or Wiccan beliefs were to infiltrate all elements of society in a given state, would this religion be entitled to an equal place on the hierarchy as Judaism, which influences the legal system of one state?

The paradoxical result of ranking one religion above another on the basis of the influence it wields may be to value a religion that is detrimental to human rights over one that is rights-supportive. Religions that now bind people together are often the result of divisive religious wars marked by extreme violence and untold casualties. It would seem inappropriate for human rights law to privilege the victorious religion for having 'triumphed' over a community and forcing individuals within it to surrender their beliefs through violence, terror or other aggression. It may therefore not be appropriate to equate the influence a religion wields with its entitlement to greater respect at international human rights law. This consideration

flags another possible criteria, being the extent to which a religion or belief *benefits* society.

8.3(b)(ii) Extent to which religion or belief benefits society or its members

In asserting that the societal benefits of a religion are relevant to determining its place on the hierarchy of religion and belief, it must be asked how such benefit is to be determined. Should the measure of such benefits be taken within the religious community or within society at large? Is it even fair to rate a religion for its service to society where its aims are spiritual? Again issues of relatively and subjectivity arise; what is considered by some to advance societies, to others would be to degenerate it and what is considered to be a social 'good' may for others represent a social 'ill'. Judging which is which from a human rights perspective could perhaps be achieved by considering which religions and beliefs advance human rights enjoyment in society. However, even where the definition of a 'benefit' is set very low, as being the absence of detriment to human rights, the criteria remains a problematic one.

If taken on face value, Scientology may ascend up the hierarchy in light of the fact that its founder explicitly included human rights support in the Code of Scientologists.²⁹ Meanwhile, some major religions may fall down, for instance, where some religious states fail to ratify international human rights instruments or adhere to the obligations prescribed in them. The Holy See's prohibition of females in leadership positions could justify demoting the standing of Catholicism. Some interpretations of Sharia law have also been widely criticised for the individual rights violations that are perpetrated in its implementation.

Similarly, the high degree of influence wielded by some less mainstream religions may reduce the enjoyment of rights by adherents. For example, the pervasive influence of some newer religious movements on members of their community may have the effect of isolating them from wider society. The controversial death in 1995 of Lisa McPherson in Clearwater, Florida in the custody of a branch of the Church of Scientology stands as one prominent example.³⁰ This incident has often been pointed

²⁹ See for instance, <http://www.scientology.org/how-we-help/human-rights.html>, accessed on 21 June 2013.

³⁰ See for instance, Wright, above n 22.

to as a symptom of a wider concern about the Church of Scientology, that it discourages its followers from seeking mainstream treatment for mental health problems.

Affording religions and beliefs greater or lesser respect on the basis of their beneficial or detrimental influence on society and the individuals within it cannot be supportable from a human rights perspective. Such an approach risks implying that a person who adheres to an 'intolerant' religion or interpretation of religion (where the measure of "intolerance" may be somewhat arbitrary or at least contestable) has a lesser claim to freedom of religion and belief than a person who adheres to a more pro-rights religion.³¹

Certainly, manifestation of a 'pro-rights' religion would seem more likely to be protected than manifestations of an 'anti rights' or 'intolerant' religion. However, such decisions cannot be made *a priori* according to the religion involved but must only be made on a case-by-case basis.

8.3(b)(iii) Extent to which religion or belief unite people into a 'group' of 'minorities'

The hierarchy of religion and belief may be justified by the extent to which religions and beliefs unite people into groups of people who accordingly have access to group rights. Article 27 of the ICCPR reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

General Comment 23 on article 27 defines a minority as "those who belong to a group and share in common a culture, a religion and/or a language."³² The UN Declaration on Rights of Persons Belonging to National or Ethnic, Religious and

³¹ See for instance Malcolm Evans, *Religious Liberty and International Law in Europe*, (Cambridge, 1997) 260.

³² Human Rights Committee, *General Comment 23: The rights of minorities* (Article 27), UN Doc CCPR/C/21/Rev.1/Add.5, (4 August 1994) [5.1].

Linguistic Minorities³³ grants persons belonging to religious minorities the right to profess and practice their own religion and effectively participate in religious life, as well as to establish and maintain associations and contact with other members of the group. However, the Declaration does not explain what religious minorities are.³⁴

Natan Lerner has noted that “[r]eligion is based on faith, and faith is, of course, an individual phenomenon. But religious rights are also collective rights and encompass the rights of an entire group or community.”³⁵ Perhaps a justification for some religions and beliefs being “higher” than others is therefore found in their relative ability to maintain a group or community unified by a religion or belief. The text of article 27 does not change the fact that rights attach to individuals, yet individuals depend on the ability of the group to maintain its culture, language or religion.³⁶

Against this criterion, the hierarchy is somewhat justifiable. Dominant religious groups have clearly succeeded in creating cohesive group identities for the purposes of article 27. Newer religious groups have been less obviously successful in doing so. Finally, the assertion that atheists could constitute a minority group is unlikely; article 27 and the declaration essentialise religion, omitting consideration of ‘belief’ groups alongside national, ethnic, religious and linguistic groups.

It is perhaps for this reason that the low position of atheists on the hierarchy can be explained. Though there are humanist and rationalist associations, there are very few traditions or practices that unite atheists into a discernible ‘group’. Nor do atheists congregate with any enduring regularity (with notable exceptions including the recently established Sunday Assembly of London).³⁷ Atheists are labelled for

³³ *United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted and proclaimed by United Nations General Assembly Resolution 47/135 on December 18, 1992.

³⁴ Lerner, above n 20, 35. Also see Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 45-6.

³⁵ Lerner, above n 20, 120. Also see, Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 15.

³⁶ *General Comment 23*, UN Doc CCPR/C/21/Rev.1/Add.5 [6.2].

³⁷ See for instance, The Sunday Assembly, <http://sundayassembly.com> and Brian Wheeler, ‘What happens at an atheist Church’ BBC Online, 4 February 2013, <http://www.bbc.co.uk/news/magazine-21319945>, accessed on 21 June 2013.

what they do not believe rather than for what they do. Unlike members of religions, atheists may stand alone in their beliefs which they do not share with a cohesive 'group' of others. As former Special Rapporteur Jahangir noted, this circumstance could largely be due to the fact that atheistic or non-theistic beliefs often imply personal approaches that cannot unite individuals into a community in the same way that religious beliefs can.³⁸

By way of example, an ongoing struggle of Scientologists is for recognition of their beliefs and their status as being 'religious', which has been achieved in several countries of the world. Such a status will never be accorded to, nor requested by atheists. As a result, it is unlikely that atheists will be eligible for tax exemptions in the same way that Scientologists are in some countries given their status as an organised religion. In other words, while a Scientologist may be considered by himself (and increasingly by others) as 'religious', an atheist is by his own and by others' definition, 'irreligious'. The logical conclusion is that although access to and enjoyment of human rights should not be conditional on the religion or belief of rights holders, individuals who eschew religion have less recourse to religious rights than do their religious counterparts who are empowered by them. In this sense, atheists are lower on the hierarchy than Scientologists who can claim to constitute a religious group in a way that atheists can not.

However, the fact that atheists are excluded from article 27 protection does not justify their relative low position on the hierarchy as far as article 18 is concerned. Indeed, if any conclusion is to be reached on the basis of their lack of access to group rights, it should be the necessity of guaranteeing their enjoyment of the individual rights afforded to them by article 18 of the ICCPR.

8.4. Conclusion: Hierarchy is not justified

The conclusions reached in this chapter point to the fact that the hierarchy of religion and belief is not justifiable from a human rights perspective. The neutrality of article

³⁸ It also must be borne in mind that the lack of organisation among atheists is not necessarily due to their weakness in numbers. As Tom Flynn points out "If atheists are lonely and downtrodden, we have only ourselves to blame. Numerically, we are strong. Let's start punching our weight." ('Secularism's breakthrough moment', *Free Inquiry* 26: 3, 2006, 16-17).

18 in its approach to religion and belief is borne out on two clear grounds. Firstly, human rights attach to humans, not social or religious groups. Secondly, looking to those on the lowest rung of the hierarchy, atheists and non-theists clearly fall within the ambit of article 18, which protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.³⁹ This being the case, the hierarchy that is evident in the practice of international human rights law is not one that is justified on the basis of it.

8.4(a) Conclusions on inherent value of religion and belief

With regard to the inherent value of religions or beliefs, a religious perspective may be that a given religion is intrinsically good and represents the one correct way for humans to live and organise themselves. The same cannot be true from a human rights point of view for which diversity of religion and belief is intrinsically 'good', because it represents individuals exercising and enjoying freedom of religion and belief. Religions and beliefs are important to individuals who hold them in a way that other religions and beliefs are not, regardless of what those religions and beliefs are.

Religion and belief do not matter to human rights law because of the social or spiritual contribution they make, but because of their contribution to individual personality and as an expression of individual freedom. Human rights law cannot judge the merits of individual beliefs, but can uphold the value of pluralism by ensuring that all individuals equally enjoy freedom of religion and belief. From a human rights perspective, any hierarchy of religion and belief could only be justified by framing it according to the vulnerability of particular individuals, not according to the content, viability, popularity, durability, or influence of their religion or beliefs. The particular vulnerability of atheists would be an argument for elevating their position in such a hierarchy above less vulnerable rights-holders, but this too is an undesirable outcome in a bid for neutrality, and should not be necessary to achieving it.

³⁹ *General Comment 22*, UN Doc CCPR/C/21/Rev.1/Add.4 [2].

Freedom of religion and belief is a human right to be enjoyed universally and equally among all rights holders on the basis of their human dignity, not on the basis of their religion and belief. An individual's freedom of religion and belief should not be qualified on the basis his religion or belief, any more than his family rights should be qualified on the basis of his family, or his right to hold opinions on the basis of the opinions he holds, or his right to education on the basis of what he wants to study or his capacity to learn. Anything less would be discriminatory, and a non-discriminatory approach must be taken to uphold the universality of human rights attaching to all humans on the basis of their humanity.

8.4(b) Conclusions on the role of religion and belief in society

Emphasising the social elements of religion and belief in defending a hierarchy of respect at international law is equivalent to subverting the rights of individuals to the rights of groups, exacerbating the vulnerability of persons who do not belong to them. Another point to consider is that religious or belief communities may not treat all members of their group equally, instead privileging some over others (for example men over women, or full members over other members).⁴⁰ In other words, there is a risk that the 'group' can be used to disguise the plight of individuals within it.

Rather than trying to justify why different religions and beliefs are respected relative to others at international law, there is more value to be gained in understanding the nature of the respect that should be accorded to religion and belief. The Special Rapporteur on Freedom of Religion and Belief offers salient advice in this regard, when he notes that;

...respect is a keyword for any understanding of human rights in general and freedom of religion or belief in particular. It does not primarily refer to this or that concrete religion or belief which still we may consider wrong or

⁴⁰ Nazila Ghanea, 'Religion, Equality, and Non-Discrimination', in John Witte Jr. and Christian M. Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012), 213. Also see Peter Edge, *Religion and Law: An Introduction* (Ashgate, 2006) 8.

unreasonable. Rather, respect is due for the *underlying ability of human beings to have and develop deep convictions in the first place*.⁴¹ [sic].

The conclusions reached in this chapter point to the value of the pluralism asserted at the outset of this thesis. Only by respecting all religions and beliefs equally can all rights holders be considered to meaningfully enjoy freedom of religion and belief. Anything less would tend towards diluting a rights-based approach with religious considerations. International human rights law decision-makers cannot determine the merits of an individual's religion or belief but can assert her right to enjoy that religion and belief subject to the legal limitations set out in article 18(3) of the ICCPR. This approach can only be effective where it is made in full respect for pluralism that demands equal respect for all rights holders, across all religious and belief denominations and also within them.

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⁴¹ Heiner Bielefeldt, 'Freedom of Religion or Belief – a Human Right under pressure' (2012) 1 *Oxford Journal of Law and Religion* 1, 3.

CHAPTER 9: FREEDOM FROM RELIGION

9.1. Introduction

“...to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others.”

Nelson Mandela

“Our freedom can be measured by the number of things we can walk away from”

Vernon Howard

In this chapter, freedom *from* religion is put forward as an effective measure of the extent to which freedom of religion and belief is meaningfully enjoyed in society. Where freedom of religion and belief is implemented in a way that elevates the rights of some rights holders over others on the basis of their belief or their non-belief, it becomes evident that the right is being unequally applied. Therefore freedom of religion should be balanced against the extent to which freedom *from* religion is also protected. Indeed, freedom from religion and belief has even been suggested as an indicator of the health of all human rights; the International Humanist and Ethical Union comments that “[t]he countries with the worst records on freedom of thought are the countries with the worst records on all human rights. This is no coincidence: when thought is a crime, no other freedom can long survive.”¹

Freedom of religion and belief must be applied in a way that respects pluralism, and does not depend on the religion and belief of the person concerned. Yet in practice it is hard for decision makers to be blind to the beliefs of the people in front of them. Rather, non-belief and belief are differentiated on the basis that the religious and belief freedoms of non-believers or atheists are often overlooked. This fact makes a compelling case for suggesting that freedom *from* religion should be distinctly asserted in upholding freedom of religion and belief.

¹ International Humanists and Ethical Union (IHEU), *Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Non-Religious*, (IHEU, 2012), 12.

Freedom from religion is not a new right; it is a protected component of freedom of religion and belief but, thus far, an overlooked one. Natan Lerner notes that;

One of the neglected ingredients of freedom of religion or belief is the right to be a secular person, not to be coerced to believe, to practice a religion, to behave according to some religious precepts, to identify with a particular faith, to belong to a religious community, organization or association, or to be registered in official documents, *volens non volens*, as a member of a religion, faith, church or any form of institution related to religion.²

Special Rapporteur Heiner Bielefeldt reminds us that in honouring the diversity of religion and belief we must have equal concern for ‘positive’ freedom and ‘negative freedom’, as two sides of the same coin.

No one can be free to do something unless he or she is also free not to do it, and vice versa. That is why freedom of religion or belief also covers the ‘negative’ dimensions, for example, the freedom *not* to profess a religion or belief, *not* to attend worship or just *not* to care about religious or philosophical issues, etc. There is no hierarchy between positive and negative freedom. Indeed, any attempt to establish such a hierarchy would finally obscure the liberating essence of freedom of religion and belief in general.³

Freedom from religion, then, can be understood as the set of rights and freedoms that a person has *not* to be coerced by the state or other actors to submit to a religion. Meaningful enjoyment of this right does not require only that the state refrain from imposing certain religious precepts or beliefs but that it fulfils its horizontal obligations, as discussed in Chapter 3, by actively protecting individual rights holders from such imposition by non-state religious actors, including a right holder’s own family.

² Natan Lerner, *Religion, Secularism and Human Rights* (2nd ed., Martinus Nijhoff Publishers, 2012) 57.

³ Heiner Bielefeldt, ‘Freedom of Religion or Belief – a Human Right under pressure’ (2012) 1 *Oxford Journal of Law and Religion* 1, 8.

9.2. Equal and pluralistic application of horizontality

In Chapter 8 it was asserted that the hierarchy of religion and belief is not justifiable from a human rights perspective. The key question then becomes: how can the playing field be levelled to ensure that interactions between non-state actors, both religious and non-religious, are addressed in a way that does not discriminate between or depend on the religion or belief of the stakeholders concerned? In Chapter 3 human rights responsibilities were argued to fall upon non-state actors, including religious non-state actors. In any case, states clearly have a duty to ensure that non-state actors, including religious ones, are held to account when they abuse human rights.

9.2(a) Where religious manifestations are excessively limited

Where human rights law too readily allows the state to restrict manifestations of religion and belief in a bid to protect others, horizontal application of human rights may be considered too invasively applied. An example of such interference was seen in the case study on proselytism in chapter 5.

In *Kokkinakis v Greece*, the state sought to protect the religious rights of Kyriakaki (an adherent of the minority religion) from interference by Kokkinakis (an adherent of a minority religion). The European Court found in favour of Kokkinakis, determining that his conviction for proselytism was a violation of his freedom of religion and belief. However, the state's determination to protect followers of majority religions from interferences by followers of minority religions was essentially upheld by the European Court. The court's failure to criticise Greece's discriminatory laws had the effect of endorsing its repeated interference with the religious freedoms of minority believers. As such, *Kokkinakis* stands as an example of excessively strong protection for members of the majority religion from other religious manifestations being endorsed to the detriment of freedom of religion and belief.

9.2(b) Where religious manifestations are not adequately limited

Where human rights law fails to intervene to protect individuals from improper interference with their freedom of religion and belief and other rights, horizontality is underutilized, ostensibly endorsing state decisions to permit some manifestations of religion and belief at the cost of the rights of others. On this end of the horizontality spectrum are examples of international human rights law allowing certain manifestations of religion that interfere with the rights of others in circumstances where those manifestations should be limited, as well as cases where the rights of members of a minority religion are left unprotected from the harmful actions of others. *L.M.R. v Argentina*⁴ is a possible example of the former while *Arenz v Germany* is a possible example of the latter.⁵ Both cases were discussed above at 3.4(c) and raise pertinent questions in this regard which arguably should have been explored beyond the admissibility stage.

9.2(c) Conclusion: horizontality must be applied equally and pluralistically

The test in knowing when to limit manifestations or not should be driven by consideration of how freedom of religion and belief can be most enhanced for all, not how religion or belief itself can be enhanced. Decision makers can ensure that they do not inadvertently impose a hierarchy of religion and belief by testing their decisions against the extent to which those decisions support pluralism. And perhaps most tellingly, tendencies to support the dominant faith over other religions and beliefs can be kept in check by testing whether decisions would also serve to protect the rights of non-believers, including atheists, to be free from that dominant faith. In short, the human right to freedom of religion and belief can only be defended against the harms of unequally applied horizontality through properly realising and meaningfully protecting freedom *from* religion equally alongside freedom of religion.

⁴ Human Rights Committee, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) (*L.M.R v Argentina*)

⁵ Human Rights Committee, *Communication No 1138/2002*, UN Doc CCPR/C/80/D/1138/2002 (2004), (*Arenz v Germany*).

9.3. Levelling the hierarchy with freedom from religion

Dr Bielefeldt, the Special Rapporteur, made the following comment in his introduction to the International Humanist and Ethical Union's 2012 report on discrimination against humanists, atheists and non-believers:

As a universal human right, freedom of religion or belief has a broad application. However, there seems to be little awareness that this right also provides a normative frame of reference for atheists, humanists and freethinkers and their convictions, practices and organizations.⁶

Natan Lerner is of the view that freedom from religion is implicitly incorporated in freedom of religion, though its implementation is neglected given that the focus of article 18 has been primarily on the rights of believers rather than non-believers.⁷ He therefore asserts that a detailed catalogue of the specific rights and freedoms involved is necessary to ensure the principle of equality in matters of religion and belief.⁸ In outlining the content of the right to freedom of and *from* religion, Natan Lerner sets out the following rights:

- a) To have or not to have a religion or a belief and not to be coerced to belong to a religious community, church, or faith;
- b) To opt out from any religious community, church, or faith which one does not want to identify with or be a member of;
- c) To be excluded from any official register identifying persons by religion or belief;
- d) Not to be coerced to perform any ceremony or act of a religious nature;
- e) Not to be obliged to take an oath related to religion;
- f) Not to be exposed to religious indoctrination or mandatory religious instruction against one's will or the will of the parents or legal guardians of a minor;

⁶ Professor Heiner Bielefeldt, United Nations Special Rapporteur for Freedom of Religion or Belief, quoted in International Humanists and Ethical Union (IHEU), above n 1, 6.

⁷ Lerner, above n 2, 60.

⁸ Ibid 61.

- g) Not to be buried in a religious ceremony;
- h) Not to be coerced to reveal one's religion or belief in official documents;
- i) Not to be exposed to religious propaganda, indoctrination or proselytism when forming part of a captive audience.⁹

Lerner notes that this list is non-exhaustive, and that everyone is free to be exempted from any practice imposed by a religion. It is also to be noted that the ingredients he sets out are phrased in the negative; they are freedoms not to do something, rather than to do something. It is therefore submitted that the list should go a step further to not only exempt atheists from the religion around them, but to give them positive rights to profess their own beliefs, namely:

- j) Freedom to manifest atheism subject only to proportionate limitations prescribed by law.

9.3(a) Pluralism

David Robertson, speaking in the domestic UK context, makes a point that could equally be applied at the international level when he says

...if those who are believers wish to have their struggle against religious inequity taken seriously as part of an agenda to create a pluralist society rather than as part of a nostalgic campaign to re-establish a society ruled by religious conformity, then all people, whether majority Christians, minority Muslims, Hindus, Sikhs and others, as well as atheists, agnostics and humanists, will need to see a shared interest in tackling religious inequity. They will need to dare to imagine, and begin to engage in a process of construction, at all levels of society, of parallel, more equitable and inclusive ways to engage the participation of all.¹⁰

This is the true meaning of equality in pluralism; it means challenging any entrenched advantage of one religion or belief over the other, and defending the place of all of them in society. It means emphasising the common value of human

⁹ Ibid 60-1.

¹⁰ David Robertson, 'Neutrality between Religions or Neutrality between Religion and Non-Religion?' in Peter W. Edge and Graham Harvey (eds.) *Law and Religion in Contemporary Society* (Ashgate, 2000) 67.

rights for both religious and non-religious communities.¹¹ In short, pluralism must be valued over fundamentalism of all types, so that it is as much in the interests of atheists to support the religious and belief rights of Muslims or Catholics in society, as it is in the interests of Muslims or Catholics to support the religious and belief rights of atheists. At the very least, it requires that any actions by actors from either side that undermine the freedoms of the other are limited where human rights are violated.

9.3(b) Equality

Some differentiation between religion and belief may be inevitable owing to historical, socio-demographic and religious realities of decision makers,¹² but there is ultimately no need to limit or rank religion or belief at international human rights law. In fact there are compelling reasons not to. Rather, religion and belief should be construed broadly and respected equally with limits imposed on their manifestation only in accordance with clear legal criteria as established in article 18(3), including where such manifestations interfere with the rights of non-believers to be free from religion.

Equal treatment means non-discriminatory treatment. If states take sides in intervening between different actors on the basis of their religion or belief, they are revealing discrimination that could amount to human rights violations.¹³ When holders of different religions or beliefs conflict with each other on the basis of those religions and beliefs, the principle of pluralism determines that the correct response is not to repress one or the other in a bid to remove the cause of conflict, but rather to assert their equal entitlements in a bid to increase tolerance between them.¹⁴

¹¹ Peter Cumper, 'The Accommodation of 'Uncontroversial' Religious Practices' in M.L.P. Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 209.

¹² See for instance Sophie Van Bijsterveld, 'Equal Treatment of Religions? An international and comparative perspective', in M.L.P. Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 117.

¹³ Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in T. Lindholm, W. Cole Durham and B. G. Tahzib-Lie, *Facilitating of Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff, 2004) 170.

¹⁴ See for instance, *Ibid* 155.

For example, a Jehovah's Witness who refuses a blood transfusion would be allowed to die, but he would not be entitled to refuse that same life-saving treatment on behalf of his child who has a right to be free from the religious manifestations of his parents.¹⁵ Boys would be free to grow into men who can be circumcised or not in accordance with their own religion or belief rather than the beliefs of their parents. And where a person is not free to leave a religious group, whether it is a remote religious movement following a new prophet or the established religion of his family, interventions are justified on the basis of upholding his freedom to be free from that religion or belief, as a necessary corollary of his freedom to have entered it in the first place.

9.4. Relevant cases involving freedom *from* religion

As the analysis above has shown, it is not easy to determine the point at which the state should intervene in manifestations of religion or belief. As Nowak and Vospernik have noted, it is surprising that many pressing issues on freedom of religion and belief have not generated more litigation at the level of international human rights law, given the abuses that often occur.¹⁶ The cases below explore situations in which questions of freedom *from* religion arises.

9.4(a) Protecting rights holders from the religion of the state

There have been cases at both the international level of the HRC and at the European level that protect people from the religion of the state. In the case of *Leirvåg et al v Norway*, the HRC protected the rights of humanist parents to be free from the religion of the state in the education of their child in accordance with their own convictions.¹⁷ In the European case of *Eweida and others v The United Kingdom*, the

¹⁵ Ibid 163-4.

¹⁶ Ibid 147-8.

¹⁷ See Human Rights Committee, *Communication No. 931/00*, UN Doc CCPR/C/82/D/1155/2003 (2004) (*Leirvåg et al v Norway*), [14.2-14.7]. Also see the similar case of *Folgerø and Others v Norway* (European Court of Human Rights, Grand Chamber Judgment, Application No 15472/02, 29 June 2007) in which the Court found a violation of Article 2 of Protocol No. 1 on the right to education, on similar facts. The case of *Hasan and Eylem Zengin v Turkey* (Application No 1448/04) concerned parents of the Alevist branch of Islam, which also resulted in the finding of a violation of Article 2 of Protocol No. 1. The case of *Grzelak v Poland*

rights of those seeking to enter into same-sex civil partnerships were upheld by allowing the dismissal of Ms Ladele for her refusal to perform these civil partnerships in accordance with her religion.¹⁸

Lautsi and others v Italy is another key case on freedom from the religion of the state.¹⁹ The court's decision in that case to allow the state to display the cross in classrooms raises questions about the extent to which children enjoy freedom from the religion of their state. In finding that the proselytising effect of crosses in classrooms was not enough to justify their removal, the European Court may have failed to protect the right of children from improper proselytism (a point raised in Chapter 5). It may also have failed to protect their right to be free from the religion of the state.²⁰

9.4(b) Protecting rights holders from the religion of others

There have also been cases that have protected the rights of people to be free from the religion of others. The decision made concerning Mr McFarlane in the case of *Eweida and Others v The United Kingdom* stands as an example of horizontal protection; in that case McFarlane's freedom of religion was not upheld, due to the competing rights of others to be free from his religion.²¹

In *Dahlab v Switzerland* (discussed in Chapter 5), a teacher was prohibited from wearing a headscarf in a public school to protect her pupils from the proselytising affect her headscarf would have.²² The case aptly illustrates the challenge of balancing on person's freedom of religion and belief against the rights of others. The court in *Dahlab* explained that it "must weigh the requirements of the protection of

(Application No 7710/02) involved agnostic parents; the Court found a violation of Article 14 taken together with Article 9 given the stigmatising absence of a mark in school reports for the religion / ethics subject.

¹⁸ *Eweida and Others v The United Kingdom*, (European Court of Human Rights, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

¹⁹ *Lautsi and others v Italy* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009).

²⁰ *Lautsi* (European Court of Human Rights, Application No. 30814 /06, 3 November 2009). See also Lerner, above n 2, 60-1.

²¹ *Eweida* (European Court of Human Rights, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013). This case is discussed in Chapter 3.

²² *Dahlab v Switzerland* (European Court of Human Rights, Judgment, Application No. 42393/98, 15 February 2001).

the rights and liberties of others against the conduct of which the applicant stood accused.”²³

Another case involving wearing the Islamic headscarf was that of *Leyla Şahin v Turkey*. This case did not involve a teacher but a student who alleged that a University ban on her wearing the headscarf in accordance with her religious beliefs violated her freedom of religion and belief. The applicant was a fifth year medical student who had worn the headscarf for the duration of her studies. Following an instruction issued by the University’s Vice Chancellor to lecturers, she began to be excluded for refusing to remove her headscarf.²⁴ She eventually relocated to Austria to finish her studies after continually being barred from attending classes for refusing to remove her headscarf. The European Court found the interference with her rights to be justified on the basis of the rights and freedoms of others.²⁵

Key considerations in this case pivoted on the rights and freedoms of others who chose not to wear the headscarf, but who may have felt pressured to conform by those who did, but also on the maintenance of public order in universities.²⁶ Turkey’s strong secularism, and its goals of maintaining and promoting equality between women and men and protecting pluralism, were considered to support a ban on wearing the headscarf at universities. Here, the court considered that such a ban could be considered as “meeting a pressing social need... especially since... this religious symbol has taken on political significance in Turkey in recent years.”²⁷ The court was also clear that “there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”²⁸ The imposition on the applicant was therefore found to be a justifiable measure to maintain public order in a secular university.

In reaching its decision, the court described freedom of religion and belief as

²³ Ibid 12.

²⁴ *Leyla Şahin v Turkey*, (European Court of Human Rights, Judgment, Application No. 44774/98, 10 November 2005) [16, 46].

²⁵ Ibid.

²⁶ Ibid [111].

²⁷ Ibid [115].

²⁸ Ibid.

...one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion.²⁹

In both *Leyla Sahin v Turkey* and *Dahlab v Switzerland*, the European court emphasised that its reasoning was based on protecting the rights and freedoms of others; ostensibly (though not explicitly) the right to be free *from* the religion of the applicants concerned. However, this is not the type of freedom from religion asserted in this thesis. Indeed, it is asserted that the wrong conclusions were reached in both cases.

In both cases the court reasoned that the Islamic headscarf was contrary to gender equality. In *Dahlab v Switzerland* the court stated that the headscarf “appears to be imposed on women” and is therefore “hard to square with gender equality” and “appears difficult to reconcile with respect for others and, above all, equality and non-discrimination.”³⁰ Similarly, in *Leyla Şahin*, the court referred to that earlier reasoning in *Dahlab* and emphasised “respect for the rights of others and, in particular, equality before the law of men and women...” in finding that the state was correct to consider the headscarf an affront to the secular principle of gender equality.³¹ Whether or not the Islamic headscarf has implications for gender equality is a question beyond the scope of this thesis.³² The point is that the court did not

²⁹ Ibid [104].

³⁰ *Dahlab* (European Court of Human Rights, Judgment, Application No. 42393/98, 15 February 2001) 12.

³¹ *Leyla Şahin* (European Court of Human Rights, Judgment, Application No. 44774/98, 10 November 2005) [115-6].

³² Briefly put, among the several diverse reasons that Islamic women have been suggested to wear the veil, are reasons of self-identifying as Islamic; as a public statement against Western civilization; to denote modesty, religiosity and purity; as a measure taken for the collective interest to ensure that contact between men and women is avoided; or even conversely as a manifestation of sexuality or social empowerment. See for instance Hans Werdmölder, ‘Headscarves at Public Schools: The issue of open neutrality reconsidered’ in M.L.P Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 156-9. Also see Jenny E. Goldschmidt and Titia Loenen, ‘Religious Pluralism and Human Rights in Europe: Reflections for Future Research’, ‘Headscarves in Schools: European Comparisons’, in M.L.P Loenen & J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 324. Many scholars assert that there is no authority in the Koran to oblige Islamic women to

bother to determine the reasons why the women wore them in the particular cases of *Dahlab* and *Leyla Şahin*. Indeed, in the latter case, Judge Tulkens noted in his dissent that the majority did not explain how banning the headscarf could be understood to promote equality between men and women.³³ The court's assumption in both cases that the headscarf had been imposed on the women concerned overlooks the fact that both women had campaigned for their human rights; one so determined that her she lost her job for her convictions (*Dahlab*), and the other so determined to finish her medical degree that she moved abroad in order to be able to do so without compromising hers (*Leyla Şahin*). These facts do not portray either woman as an example of disempowerment or oppression.³⁴ Rather it is the court's decisions that tend towards subjugating them, by silencing their voices to tell them they are subjugated, an approach criticised by Judge Tulkens as 'paternalistic' in both cases.³⁵

Regarding *Dahlab*, Carolyn Evans makes the following observation;

...the right-holder ceases to be Ms Dahlab and she instead becomes someone 'accused' of behaviour. Instead of weighing the rights of Ms Dahlab against the rights of others, the court sets up a scenario in which these mysterious and ill-defined others must be protected against a presumptive wrongdoer.³⁶

The conclusion drawn in *Dahlab* was that manifesting religion is tantamount to proselytising it to others. This cannot be the case. Indeed, in a pluralistic society one must expect to be 'confronted' with all manner of religions and beliefs. Meaningful pluralism is brought about by learning to respect plurality of belief in the knowledge that you are likewise free to manifest your own. In practical terms, Dahlab lost her job despite not having violated any laws or failing by any professional standard; the

wear the veil. See for instance Salah Eddine Ben Abid, 'The *Shari'a* Between Particularisms and Universality' in Silvio Ferrari and Anthony Bradney (eds.) *Islam and European Legal Systems* (Ashgate 2000) 17.

³³ *Leyla Şahin* (European Court of Human Rights, Judgment, Application No. 44774/98, 10 November 2005) dissenting opinion of Judge Tulkens, 48 [11].

³⁴ Also see Carolyn Evans, 'The 'Islamic Scarf' in the European Court of Human Rights' (2006) 7 *Melbourne University Journal of International Law* 52, 66-9.

³⁵ *Leyla Şahin* (European Court of Human Rights, Judgment, Application No. 44774/98, 10 November 2005) dissenting opinion of Judge Tulkens, 48-9 [12]. Judge Tulkens also notes that if the wearing of Islamic headscarfs truly was contrary to equality between men and women, the state would have a positive obligation to prohibit it in all places, whether public or private.

³⁶ Evans, above n 34, 61.

only conduct of which she was 'accused' was manifesting her religion. Her losing her job did not result in any greater freedom of or from religion or belief, for the students whose interests were being considered. Rather the lesson they learnt was that religion and belief should not be manifested.

The decision reached in *Leyla Şahin* was that pluralism required an absence of religious dress in shared spaces. The conclusion reached here is precisely the opposite; secular citizens may enjoy evidence of the religious diversity of their society. A religion or belief that is shaken merely by seeing evidence that there are other religions and beliefs is arguably not worth defending. More essentially, a person cannot be considered to be improperly coerced merely by seeing evidence of other religions and beliefs in their society. Just as women's rights are not enhanced by reducing men's rights, nor are the rights of atheists enhanced by reducing religious freedom. Rather, the right of an atheist to wear a t-shirt to university proclaiming that 'There's probably no god' should be vehemently defended by the girl who wears hijab.

Ultimately, the decisions reached in both *Dahlab* and *Leyla Şahin* do as much of a disservice to freedom *from* religion as they do to freedom of religion. They imply that secularism is upheld by repressing ideologies and that freedom *from* religion is threatened by freedom of religion, meaning that the reverse can also be true. But freedom *from* religion does not require that there is no religious freedom any more than freedom *from* religion threatens freedom of religion; they are mutually supportive. Atheists, whose rights are offered as a means by which freedom of religion and belief in society can be measured, do not necessarily want to live in a world without religion any more than all religious people want everyone else to adopt their worldview. Requiring a Muslim to remove her headscarf in the interests of others is equivalent to demanding that an atheist wear one for the same reason. Both approaches offend against freedom of religion and belief.

9.4(c) Freedom from religion and the domestic level

There is of course a nexus between international and domestic laws, with the latter reflecting how international standards are being implemented and enforced. In the

present context, some state-level measures towards (or against) freedom of religion can be flagged.

The case of *Johns & Anor, R (on the application of) v Derby City Council & Anor*³⁷ was discussed above at 7.2(d). That result of that case (in which prospective foster parents were rejected from becoming so on the basis of their views about homosexuality) can be considered an example of freedom from religion. Though there was no actual person in that case whose freedom from religion was at issue, the decision had the effect of protecting children potentially fostered by Mr and Mrs Johns from their religion and belief, in this case being their Pentecostal views vis-à-vis homosexuality. The decision in this case was based on the substance of their views, not the religious origins of those views.

Contrasted with this is legislation in Australia that effectively exempts religious actors from prohibitions on discrimination. Australia's Sexual Discrimination legislation was amended in 2013 to expand protection against discrimination to include grounds of sexual orientation, gender identity and intersex status. However, exemptions are provided for certain religious actors who raised doctrinal concerns about sexual orientation and gender identity, and therefore remain free to discriminate on those grounds by prohibiting employment of anyone who is deemed to offend against the religious sensibilities of adherents of that religion.³⁸ Article 37(d) of the *Sexual Discrimination Act* explicitly states that the non-discrimination requirements do not affect any "act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion."³⁹ Article 38 goes on to explain that it is not unlawful for educational institutes established for religious purposes to discriminate on the grounds of a person's sex, marital status or pregnancy so long as that discrimination

³⁷ *Johns & Anor, R (on the application of) v Derby City Council & Anor* [2011] EWHC 375 (Admin) (28 February 2011).

³⁸ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Explanatory Memorandum* (The Parliament of the Commonwealth of Australia, House of Representatives, 2013) 8.

³⁹ *Sex Discrimination Act 1984*, Australia, article 37(d).

is “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”⁴⁰

The message of such legislation is that discrimination can be in ‘good faith’ where it emanates from a religious position and that such discrimination by religious actors should not be prohibited, but rather should be allowed as a manifestation of religion.⁴¹ No such exemptions are made for manifestation of ‘belief’; the privilege is held by religious organisations only.

The preferable UK approach revealed in *Johns & Anor* is to weigh facts on their merits and allow for discrimination, where inspired by a religion or belief, to be prohibited (or perhaps allowed) irrespective of the set of beliefs that inspires it. The result then would also be that prospective atheist foster parents, if their beliefs manifested in hostility towards the religion of a potential foster child, might be prohibited from fostering him in the same way that Mr and Mrs Johns were. As the court explained in that case, article 9 (of the European Convention on Human Rights) “only provides a “qualified” right to manifest religious belief and that interferences... are readily found to be justified, even where the members of a particular religious group will find it difficult in practice to comply.”⁴² In Australian legislation, unfortunately, discrimination that is inspired by religion is not only allowed but is legislatively protected.

Freedom from religion is not an absolute right any more than freedom of religion. Rather, they are equal rights that must be weighed equally when they happen to clash. In some cases, discrimination will be allowed on religious grounds, but it must only be allowed following a case by case consideration that weighs competing rights equally, not on the basis of legislation such as that in Australia, which has the effect of elevating religion above such equal scrutiny.

⁴⁰ Ibid article 38(1) – (3).

⁴¹ Also see David Marr, ‘Gillard’s bizarre act of faith leaves vulnerable unprotected’ The Age online, 14 January 2013, <http://www.theage.com.au/opinion/politics/gillards-bizarre-act-of-faith-leaves-vulnerable-unprotected-20130113-2cnf0.html> accessed on 17 June 2013.

⁴² *Johns* [2011] EWHC 375 (Admin) (28 February 2011) [102].

Regardless of the fact that freedom from religion is protected in international law, some states may remain unwilling to overtly protect the right to be free from that religion. Freedom *from* religion will continue to be an unwelcome right particularly in those states that are governed in strict accordance with religious precepts. However, this consideration speaks to the challenge of enforcing international human rights law in practice; it does not mean that such a right does not exist. The fact that a notion of freedom *from* religion will offend some states or other actors is not a reason to abandon its pursuit. Rather it underscores the need to proactively promote its enjoyment for the benefit of rights-holders who currently do not enjoy the freedoms to which they are entitled.

9.5. Conclusion: Freedom from religion as a measure of freedom of religion and belief

This thesis illustrates that there is a hierarchy of religion and belief, with monotheists at the top, new religions that have not yet become entrenched in history below them, and atheists at the bottom. The lower down in the hierarchy a religion or belief sits, the less protection the international human rights community practically affords the freedom of religion and belief of its followers.

Offences to religious freedoms occur despite the fact that the human right to freedom of religion and belief provides for the equal protection of those who believe in one god, those who believe in many gods and those who believe in no god. For reason of the particular vulnerability of those who have atheistic beliefs, the key assertion of this thesis is that freedom of religion should be construed to ensure that the ambit of its protection reaches to holders of all religions and beliefs, protecting even freedom *from* religion. In this way, meaningful religious freedom can be measured against the extent to which a person enjoys the right to profess no religion or even to profess atheism. Any interference with such rights must be considered a grave offence to true freedom of religion and belief.

The challenge for the international human rights community is to uphold freedom of religion and belief, regardless of the nature of the religion or belief concerned. To achieve this goal, legal equality grounded in pluralism must prevail to avoid

speculation as to which versions of the 'truth' may be truer than others. To fulfil obligations under article 18, domestic legislation must ensure that those who hold religious beliefs (or even *particular* religious beliefs) are not treated preferentially to those who do not. The standards enshrined in international instruments must be interpreted and applied in line with this pluralist equality.

The test of the extent to which this is achieved is the extent to which the most disadvantaged person on the spectrum of religion and beliefs can be said to enjoy his article 18 rights. Only when international human rights law meaningfully protects the right of a person to reject the religion or belief of those around him (whether the state, or non-state actors such as the community or family) to adopt another or none at all, can meaningful freedom of religion and belief be said to exist. In other words, the extent to which a person can be said to be free *from* religion is a key measure of his or her freedom of religion and belief.

In concluding his *Study on Discrimination*, Krishnaswami noted with approval the trend of greater acceptance across and between faiths, and the benign attitude of the public towards 'dissenters'. However, he also cautioned, perhaps prophetically, that a reversal of these trends could not be ruled out in the future. Almost 50 years after this report was delivered, we are wise to take note of Krishnaswami's concluding words:

It is the duty of the United Nations to see to it not only that all types of discrimination – whether they are remnants of the past or something new – are eradicated, but also that in the future no one should be subjected to treatment likely to impair his right to freedom of thought, conscience and religion. In short, its duty is to ensure that the trend towards equality should become both universal and permanent.⁴³

In order to afford such equality, and to level the existing 'hierarchy' that skews it, the individuals charged with fulfilling the United Nations' duties in respect of religious freedom should consider the extent to which freedom *from* religion is protected

⁴³ Arcot Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices*, UN. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No 60.XIV.2, 60.

alongside freedom of religion. This thesis stands on the belief that religious freedom entails choice. That choice is only valuable where it can extend to any religion or belief including the choice to have no religion or to practice atheism. Only when people are also free to enjoy freedom *from* religion do they meaningfully enjoy freedom of religion and belief.

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