

# Religion and Human Rights

*An Introduction*

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# 10 Religion and Freedom of Choice

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The key texts in the United Nations instruments which most directly concern religious choice, and which are the primary focus of this chapter, are Article 18 of the 1948 Universal Declaration of Human Rights (UDHR), Article 18 of the 1966 International Covenant on Civil and Political Rights (ICCPR), and Article 1 of the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief (Declaration on Religion). The freedoms which they embody were much in contention in the development of these texts, none more so than on the question of religious choice. This chapter aims to chart both the historical developments within the UN and some contemporary challenges facing the freedom of choice in religious matters. It also aims to demonstrate the numerous facets of religious choice that are not obvious from the face of those texts.

## ■ DISTINCTIVE FEATURES OF THE FREEDOM

To put this discussion in context, at least three distinctive features of the freedom of religion as expressed in Article 18 of the ICCPR deserve comment at the outset since they all bear directly on religious choice and operate to enhance the protection afforded by Article 18 in the scheme of related rights.

First, certain constituent rights within the freedom of religion cannot be restricted under any circumstances. These are the right of every individual to have complete free choice in religion (including the right to choose a particular religion for the first time, to change from one religion to another, to become an agnostic or an atheist) and the right not to be subject to coercion which would impair that choice. Only the right of "manifestation" can be restricted, i.e., the freedom of each person "either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Even then it is also clear that the freedom of outward manifestation of religion may only be restricted in tightly prescribed circumstances and subject to strict preconditions, that is, those that "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>1</sup>

Secondly, Article 18.3 is unique among so-called limitation provisions for its inclusion of the word "fundamental" when identifying the grounds on which

manifestation of religion may be restricted. If the "rights and freedoms of others" are to be the legitimate basis of State restrictions on the manifestation of religion, they must be "fundamental." Among the most conspicuous forms of religious manifestation, and central to religious choice, is the promulgation of belief by various means and by assorted names including proselytism, evangelism, and teaching. These are protected activities under Article 18.3, under the rubric of "worship, observance, practice and teaching" (see discussion in this chapter below under the heading *Manifestation of Religious Choice*) and clearly should not be restricted on the basis of rights that are not characterized as "fundamental."

Thirdly, Article 18 is distinctive in that it is among very few rights that are non-derogable. This is explained by Article 4, which permits contracting states to take measures derogating from their obligations under the Covenant in times of officially proclaimed public emergency which threatens the life of the nation, to the extent strictly required by the exigencies of the situation. What is particularly interesting about the treatment of Article 18 among the non-derogable rights is that the whole of Article 18 is non-derogable, not just those parts that, according to the terms of Article 18, may not be restricted (on grounds of "public safety, order, health, or morals or the fundamental rights and freedoms of others"). This, coupled with the fact that public emergency situations must be so extreme in order to be a basis of derogation from other freedoms under Article 4, at least may suggest that the permissible limitations in Article 18.3 should not be lightly invoked.

These distinctive features are central to the nature of the freedom and are important to keep in mind when considering the elements of religious choice, how they were developed, and the variety of ways they are under challenge in practice.

## ■ THE ELEMENTS OF RELIGIOUS CHOICE: KEY TEXTS, CORE RIGHTS

### The Right to Change Religion

The development of Article 18 of the UDHR, Article 18 of the ICCPR, and much of the Declaration on Religion was not without its struggles, especially on the question of the right to change religion. Article 18 of the UDHR states, in the clearest possible way, that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief." However, this formula could not later be repeated in the drafting of Article 18 of the ICCPR as a result of concerns from certain countries (Saudi Arabia in particular) that the text should also emphasize freedom to maintain a religion. In order to avoid any religious choice becoming final and permanent, which would in effect restrict further choice, the text was ultimately settled to read: "This right shall include freedom to have or to adopt a religion or belief of his choice."

The text of the Declaration on Religion is couched in terms of "freedom to have a religion or whatever belief of his choice" as a result of continuing concerns (by Egypt, Iraq, Kuwait, and Saudi Arabia) that even the ICCPR's phrase "or to adopt" still placed too much emphasis on a right to change religion. Those concerns were met in the final text, even though it clearly imports the right to change from any one religion to another or to adopt a religion for the first time. In the interests of progressing the draft, those who favored the ICCPR's more explicit formula conceded, but only on the basis that the text of the Declaration on Religion was understood to entitle everyone to have or adopt their religion of choice as Article 18 of the ICCPR provided.

The debates in the context of the Declaration on Religion serve to emphasize the already clear interpretation of Article 18 of the ICCPR so as to include a right to change religion. At the same time there was no dilution of standards, given the adoption in the Declaration of Article 8, which states that "[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights." Partsch commented on the UDHR and ICCPR debates that "[i]n the extended discussions, one element stands out as of utmost importance. No one who favored deleting the express mention of the right to change one's religion denied that right."<sup>2</sup> It is also worth observing that no country entered any reservation to Article 18 of the ICCPR even though it would have been possible to do so. The Human Rights Committee's interpretation of Article 18 is clear from paragraph 5 of General Comment No. 22, which states that: "the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, 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."<sup>3</sup> The effect is to remove any ambiguity that may have resulted from the reformulation of the freedom in the ICCPR.

### Freedom from Coercion in Religious Choice

Added to this, of course, is the fact that both the ICCPR and Declaration on Religion each include an express freedom from coercion that would impede religious choice. Article 18.2 of the ICCPR reads: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." It was originally proposed by Egypt to alleviate the concerns of those countries which wanted to dampen the emphasis on an explicit right to change religion and which also considered a simple right to change religion to be too one-sided and to favor missionaries and proselytizers. The amendment was accepted as simply making explicit something that was already implied and provided that it was not restrictive of the freedom of teaching, worship, practice, and observance,

that it did not prevent persuasion or appeals to conscience, or preaching and seeking to influence a person either to maintain or to change his religion, and that it did not restrict argument and discussion (in other words, these activities of themselves were not to constitute coercion).

The Human Rights Committee's interpretation of Article 18.2 is provided in paragraph 5 of General Comment No. 22 and puts clear emphasis on coercive force, in contrast to appeals to conscience and exposure to the teachings of other religions, missionary activity, and so on, in specifying that:

Article 18.2 bars coercions that would impair the right to have or adopt a religion or belief, including the use or threat of 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.

Contemporary examples of such coercion take extreme, as well as more subtle, forms. Recent illustrations of more extreme forms of coercion from the mandate of the Special Rapporteur on Freedom of Religion or Belief (in examining incidents and governmental action incompatible with the Declaration on Religion) include reports of alleged death threats made by local authorities in the Lao People's Democratic Republic against Christians if they did not give up their faith; allegations that members of a banned church in Eritrea were arrested for taking part in Christian worship in a private home, two of whom later died in a nearby army camp as a result of torture to impel them to abandon their faith; allegations that the Indonesian Office of Religious Affairs attempted to force members of the local Baha'i community to recant their faith by threatening to burn their houses and suggesting that their safety could not be guaranteed; allegations that prison guards in the U.S. attempted to force four Muslim detainees in Rikers Island jail in Queens, NY, to become Christians; and allegations that in the Lao People's Democratic Republic a pastor and two church members were held in wooden stocks with handcuffs and leg restraints as a consequence of not signing documents to renounce their faith after three opportunities to do so.<sup>4</sup>

Examples of allegations of coercion in relation to economic, social, and cultural rights include allegations that in the Lao People's Democratic Republic the police prevented Christians from tending their rice fields—they burned those rice fields and took citizenship papers in a climate of persecution that was so intense that it allegedly succeeded in forcing the believers to officially renounce their Christian faith; that the Ministry of Defense in Eritrea put pressure on a prominent Christian singer to sign a statement renouncing her faith and promising to cease her participation in any Christian activities in Eritrea; that in Iran, universities were

instructed to expel any student who was discovered to be a Baha'i, whether at the time of enrollment or in the course of their study; and the marginalization of Muslim children wearing traditional dress in the French public school system as a result of recent French legislation banning religious signs in public schools.<sup>5</sup> The Human Rights Committee, in *Raihon Hudoyberganova v. Uzbekistan*, recently examined a similar complaint that all students wearing the *hijab* at the Tashkent State Institute for Eastern Languages were "invited" to leave their courses and to study at the Tashkent Islamic Institute instead. The Committee considered that "to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2."<sup>6</sup>

This is to be contrasted with the European Court's unusual approach of permitting wide discretion to states (including through the doctrine of "margin of appreciation") so that, for example, in *Şahin v. Turkey* the European Court upheld restrictions on the wearing of the *hijab* at a secular university on the grounds of "public order" and "the rights and freedoms of others" of the same faith who might feel pressure to conform.<sup>7</sup>

In practice, it may be difficult to determine whether a particular violation falls under Article 18.1 or 18.2. As a rule of thumb, however, Article 18.1 typically entails restrictions on the freedom to change (or maintain) religion or adverse consequences for those that do; Article 18.2 violations typically are marked by the element of coercion. Issues of apostasy may fall under either Article and (amid concerns at prohibitions on a change of religion) have been raised by both by the Human Rights Committee when considering state reports in relation to Morocco, Yemen, and Sudan,<sup>8</sup> and by the Special Rapporteur in communications addressed to Malaysia, Afghanistan, Iran, and Jordan.<sup>9</sup>

On occasion, a violation of Article 18.2 might also be a violation of the right to manifest religion under Article 18.3, as illustrated by the *hijab* cases noted above and the European Court case of *Ivanova v. Bulgaria*. In *Ivanova*, the applicant was dismissed from her position as a swimming pool manager in a school because of her religious beliefs and membership of "Word of Life," an organization that had been the subject of an aggressive media campaign calling for the dismissal of particular followers, including the applicant. The applicant claimed that official school inspectors had threatened that if she did not resign of her own accord or did not renounce her faith, she would be dismissed on disciplinary grounds. In finding a violation of Article 9, the European Court emphasized the primary importance of the right to freedom of thought, conscience, and religion and the fact that a state cannot dictate what a person believes or take coercive steps to make him change his beliefs.<sup>10</sup>

### Manifestation of Religious Choice and the Rights and Freedoms of Others

The forms of manifestation commonly and most closely associated with religious choice are those which involve conveying the elements of one's faith with a view to convincing others of the truth or value of that faith. For present purposes, this may be termed "proselytism." Missionary work may involve proselytism but is perhaps more typically characterized by the provision of humanitarian or other services motivated by religious belief and by which the expression of that belief is conspicuous in its practical application.

Two questions that immediately arise are, first, whether both activities are legitimate and protected forms of religious manifestation and, secondly, whether and in what circumstances may these activities conflict with the freedom of religious choice (or indeed different rights) of others?

In response to the first question, it would appear that proselytism has been long recognized as a legitimate form of religious manifestation, evident throughout the Special Rapporteur's mandate but including among recent communications those addressed to Turkmenistan over the arrests of Jehovah's Witnesses for discussing their faith with others, Bhutan where those screening the film "Jesus" were arrested because proselytism of any religion is prohibited in order to maintain and preserve society's harmony, and Uzbekistan, where recently introduced legal amendments restricted the right to promote the Bible outside prayer houses and the "pastor" of the church to which a person who does that belongs can be fined or punished.<sup>11</sup> Furthermore, the Special Rapporteur recently gave supportive acknowledgment to actions aimed at persuading others to believe in a certain religion and noted that "[t]he question of missionary activities and other forms of propagating religion has been at the centre of the mandate on freedom of religion since the beginning."<sup>12</sup>

The Human Rights Committee has also indicated its support for missionary work, for example, in *Joseph et al. v. Sri Lanka*, when a group of Catholic nuns engaged in teaching and other charity and community work claimed that the refusal to allow the incorporation of their Order constituted a breach of Article 18 of the ICCPR. The Committee observed that "for numerous religions, including according to the authors, their own, 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 expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3."<sup>13</sup>

Similarly, the jurisprudence of the European Court under Article 9 of the European Convention is unambiguously supportive of proselytism by any religion that equates with "true evangelism . . . an essential mission and a responsibility of every Christian and every Church."<sup>14</sup>

In response to the second question, however, one limit which must be observed at all times (not just in the case of proselytism) is that defined by the need

to observe the right of others to be free from coercion in religious choice. This is a point taken up by the European Court in *Kokkinakis v. Greece* which distinguished "true evangelism" from so-called "improper proselytism." The latter represented a corruption or deformation of it, which may "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." In short it recognizes the limits of proselytism in the rights and freedoms of others.

This particular statement has been much criticized for its uncertainty, especially since it was invoked in *Kokkinakis* merely to construct a rationale for a finding of violation on the narrowest possible grounds. This was in keeping with a practice, for which the European Court has more generally been reprehended in academic literature, of developing principles which allow wide discretion to states in the use of limitation provisions, both through permitting a wide margin of appreciation, or range of discretion, to states, and in its almost automatic acceptance of claims by states to be pursuing a "legitimate aim." For example, in *Kokkinakis*, the Court accepted that the aim of laws might be designed to punish extreme or "improper" proselytism when that sort of proselytism was never at issue. The distinctively European approach in permitting states broad latitude represents a marked departure from UN jurisprudence, even though it is clear that conventional proselytism is unequivocally treated as a legitimate form of manifestation.

The dissenting judges in *Kokkinakis*, unhappy with the way in which the European Court dealt so narrowly with this issue, grappled in more detail than the majority did with the interaction between the right to proselytize and its appropriate limits. A valuable description of the balance between the right of manifestation through proselytism and the corresponding rights and freedoms of others is that provided by Judge Pettiti in his partly concurring opinion in *Kokkinakis*, when he observes that, "[b]elievers 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. The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques."

Judge Martens (partly dissenting in *Kokkinakis*) was rather more skeptical about the supposed coercive effects of proselytism when commenting that, "[c]oercion in the present context does not refer to conversion by coercion, for people who truly believe do not change their beliefs as a result of coercion; what we are really contemplating is coercion in order to make somebody join a denomination and its counterpart, coercion to prevent somebody from leaving a denomination. Even in such a case of 'coercion for religious purposes' it is in principle for those concerned to help themselves."

From a UN perspective, Natan Lerner usefully observed as follows, when commenting on the newly settled text of the Declaration on Religion after some hard fought debates on the subject of coercion:

Coercion in religious matters is always a grave violation of human rights. The use of coercion to induce others to adopt a religion which is not theirs or to abandon their own beliefs has played a particularly horrible role in the history of mankind. The condemnation of coercion in the field of religious rights is thus beyond controversy. . . . The question of freedom of propagation of one's religion and the legitimacy of attempts to convince others of one's religious truth is different. In modern human rights law, the right to change one's religion, in the absence of coercion and as a result of free will is considered a recognized freedom.<sup>15</sup>

The particular conditions in which certain proselytizing or mission activities occur are important, since these activities may enliven the rights of others in one context but not in another. For example, the European Court in *Larissis and other v. Greece* upheld restrictions on proselytism by members of the armed forces directed at lower-ranking colleagues, on the basis that "what would in the civilian world be seen 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."<sup>16</sup> Yet restrictions on the same form of proselytism directed at civilians constituted a violation. Clearly the military context in this case was decisive for the European Court.

Nevertheless, the special circumstances in which proselytism sensitizes the rights and freedoms of others represent the exception and are relatively confined. The Special Rapporteur was recently prompted to examine the impact of missionary work in her report on a visit to Sri Lanka following a number of complaints after the 2004 Indian Ocean tsunami about "unethical conversions" by those offering material benefits such as food and medicine to the most poor and vulnerable.

43. The description of the behavior complained of is not clear, but has mainly to do with a feeling that the religious groups that are the objects of complaint deceive people because they are not totally transparent about their motivations. It is claimed, in particular, that some groups promise material benefits such as food and medicine, bicycles or even housing. In some cases, assistance was promised with getting a job or an authorization to build a house.

44. It is claimed that those who are the most sensitive to these appeals are the poorest sections of the population. Therefore, it is felt by many that those actions are a form of manipulation and abuse of the most vulnerable.

45. After the tsunami, it was reported that in the east of the country many have converted for health reasons because medical assistance and supplies were brought in by Christian non-governmental organizations and groups. However, a significant number converted back to their original religions later, which sometimes provoked negative reactions from the community.

46. Even members of those Christian communities whose beliefs are relatively close to those being complained of told the Special Rapporteur that it was true that some Evangelical Churches were conducting a rather aggressive form of proselytism with which Sri Lankans were not familiar and which disturbed them. Many, including Christians themselves, emphasized that the Buddhists and Hindus have a far less proactive attitude in propagating their religion.

47. Members of the communities blamed for aggressive proselytism have categorically denied using any coercive methods. Most have also denied using unethical methods, but a few have argued that inducement is central to all beliefs, like the promise of reward for being pious and adhering to the tenets of one's belief. They claimed that there was inducement in all conversions like there was inducement in all political campaigns before elections, but ultimately the choice lies with every individual.<sup>17</sup>

In assessing these complaints, the Special Rapporteur commented that incidents of conversion and proselytizing were usually vaguely described and unclear with regard to the circumstances. She did not meet any person who had changed their religion because of allurement or other form of inducement and was not aware of any substantiated cases that would constitute a violation of the right to freedom of religion or belief, such as forced conversions. At worst, it would seem, that the conduct was very disrespectful and dishonest towards the local population they were addressing, and culturally insensitive and lacking respect for the beliefs of Sri Lankans.<sup>18</sup> Nevertheless, in her view this did not constitute violation of the freedom of religion of others. She described the reaction to this activity as "sharp and alarmist"; by contrast, the resulting acts of violence and threats against the Christian community were characterized as clearly in violation of their freedom of religion or belief.

Nevertheless, the Special Rapporteur did make recommendations that religious groups should separate their religious work from their humanitarian efforts, and where necessary, to avoid disturbing religious harmony, they should respect other religious beliefs in their missionary activities and not use aggressive forms of proselytizing.<sup>19</sup> This does not imply that failure to do so would constitute a violation, since it is clear that the underlying concern (as noted in the Rapporteur's general report on her mandate) is for the broader interests of tolerance, such that, "apart from forcible and other conversions that are improper in the sense of human rights law, there are many cases which, while not constituting a human rights violation, nevertheless raise serious concern because they disturb a culture of religious tolerance or contribute to the deterioration of situations where religious tolerance is already being challenged."<sup>20</sup>

This visit also gave the Special Rapporteur opportunity to examine Sri Lanka's legislative proposals to criminalize certain acts leading to "unethical" conversions. These proposals had been mooted for years and were not an immediate reaction to events following the tsunami. Support for them was drawn from Article 9 of the Constitution which states that "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and

foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e) [freedom of religion in terms similar to the International Covenant]." In the case of one of the proposals the Supreme Court of Sri Lanka ruled as unconstitutional only one or two non-central aspects (such as the requirement that a person who is converting and any person performing or involved in a conversion ceremony must report to the authorities) but otherwise let it pass to the next legislative phase.

The Special Rapporteur concluded that the Supreme Court decisions supporting the proposals were "in the realm of conjecture or speculation that the disadvantaged or vulnerable would be subject to improper conversion." She remained doubtful about claims of violation resulting from inducements (in the absence of any convincing proof). Her emphasis then shifted to concern for a different dimension of the element of choice of the person proselytized, namely their right to convert even in response to an inducement and she pointed out that impairment in that choice would be a violation, since "[w]hile some maintain that freedom of religion, and in particular the right to choose a religion, may be violated in cases where, for example, a person in need has converted after having received presents and inducements that may significantly improve his or her life, the enjoyment of that right by the same person may equally be impaired if he or she does not have the possibility to freely decide to convert to another religion, even after having received a gift."<sup>21</sup>

The Sri Lankan proposals agitate many of the issues raised in *Kokkinakis* but dealt with inadequately by the European Court's judgment. Judge Martens, in his partly dissenting opinion in *Kokkinakis*, questioned the propriety of any legislation directed even against "improper proselytism." "Admittedly, the freedom to proselytise may be abused, but the crucial question is whether that justifies enacting a criminal-law provision generally making punishable what the State considers improper proselytism." He answered this in the negative: "the State, being bound to strict neutrality in religious matters, lacks the necessary touchstone and therefore should not set itself up as the arbiter for assessing whether particular religious behaviour is 'proper' or 'improper.'" The Human Rights Committee has similarly expressed concerns about anti-proselytism laws, for example in relation to Uzbekistan when noting de facto limitations on the right to freedom of religion or belief, including the fact that proselytizing constitutes a criminal offence.<sup>22</sup>

In an overview of violations and other issues associated with a change of religion the Special Rapporteur emphasized one further aspect of the coexistence of, as she put it, "the right to freedom of religion of those who take the decision to convert (freedom of conscience and the right to change one's religion) and the right to freedom of religion of persons who perform acts leading to the conversion of others (missionary activities and the propagation of one's religion)." It is that the right to change religion is absolute and is not subject to any limitation whatsoever, and that any legislation that would prohibit or limit the right to change one's

religion would be contrary to international human rights standards.<sup>23</sup> The Special Rapporteur has also repeatedly contrasted the breadth of the freedom to propagate one's religion with the narrowness with which certain limitations may be imposed in accordance with article 18.3 of the ICCPR, by stressing

that this article allows for restrictions only in very exceptional cases. In particular the fact that it mentions the protection of "fundamental rights and freedoms" (emphasis added) of others as a ground for restriction indicates a stronger protection than for some other rights whose limitation clauses refer simply to the "rights and freedoms of others" (e.g. article 12, 21 and 22). It could indeed be argued that the freedom of religion or belief of others can be regarded as such a fundamental right and freedom and would justify limitations to missionary activities, but the freedom of religion and belief of adults basically is a question of individual choice, so any generalized State limitation (e.g. by law) conceived to protect "others" freedom of religion and belief by limiting the right of individuals to conduct missionary activities should be avoided. . . . The test of legality of a prohibition of any act motivated by belief or religion is therefore extremely strict.<sup>24</sup>

These comments were deliberately confined to questions of individual choice affecting adults. Quite different principles apply in relation to children in so far as it is necessary to respect the rights of parents and guardians in the education of children.

### Parental Choice in the Education of Children

The State's obligations under Article 18.4 of the ICCPR "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," according General Comment No. 22.6, "is related to the guarantees of the freedom to teach a religion or belief stated in Article 18.1." Even though "related" to the freedom to teach a religion or belief, the right is far from equivalent to it since it is clear from paragraph 8 that "the liberty of the parents and guardians to ensure religious and moral education cannot be restricted." Teaching, as a form of manifestation, by contrast, is capable of limitation (in strictly prescribed circumstances).

Violations might take the form of an entrenched state tradition in public education, such as in Norway where the constitution stipulated that individuals professing the Evangelical-Lutheran religion were bound to bring up their children in the same faith.<sup>25</sup> Violations might also include practices or trends in religious education that result in limited access to secular education. Such was the case in Ireland where the Human Rights Committee was concerned that the vast majority of Ireland's primary schools were privately run denominational schools that adopted a religiously integrated curriculum that afforded insufficient access to secular primary education for those who wanted it.<sup>26</sup>

This right is quite unlike other rights within Article 18 and is more commonly linked to issues of discrimination, largely because one of the issues that is closest

to the surface in education, especially in the public sector, is that of curriculum-based religious instruction, which frequently conflicts with parental convictions. General Comment No. 22.6 resolves this by requiring that non-discriminatory exemptions or alternatives be made available in public schools, so that children may avoid receiving the conflicting teaching, since "article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. . . . The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians."

Compulsory instruction of religious subjects should respect the convictions of parents and guardians who do not believe in any religion.<sup>27</sup> Moreover, any scheme of exemption from instruction in a particular religion must be practicable (without unduly burdening the parents) and ensure that exempt pupils are not required to perform religious observance such as the learning by heart of prayers, singing hymns, and attendance at religious services.<sup>28</sup> The same principles do not apply in the private sector, particularly in the context of faith-based schooling.

Article 18.4 also interacts with the requirements of non-discrimination in the terms on which state funding is provided, if it is provided at all. A claim was successfully made before the Human Rights Committee in *Arieh Hollis Waldman v. Canada*<sup>29</sup> under Article 26 (non-discrimination) of the ICCPR because full state funding was available for Roman Catholic schools in Ontario but not for Jewish private schools. Article 18.4 does not impose any obligation on the State to support non-secular schools but if financial support is available for private faith-based schools, for example to recognize the fact that the State is spared the burden and cost of education for those taken out of the public system, support must be available without discrimination.<sup>30</sup>

### Discrimination and Religious Choice

The interaction between principles of non-discrimination and religious choice in Article 18 is extremely important. Non-discrimination, even on grounds of religion, has the potential to vitiate Article 18 rights. For example, an over-simplistic approach to non-discrimination in the employment context would admit no distinctions on grounds of religion. Yet it would be perfectly absurd to imagine that, for example, leadership of churches, mosques, synagogues, and temples must be open to candidates of any religion (or none). Distinctions of a religious kind are obviously necessary based on the requirements of the position. The same may be true of appointments within religious organizations formed in exercise of any of the following forms of religious manifestation in Article 6 of the Declaration on Religion:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

- (b) To establish and maintain appropriate charitable or humanitarian institutions; . . .
- (e) To teach a religion or belief in places suitable for these purposes; . . .
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief.

All of these activities are immediately relevant to religious choice in that, in the absence of the ability of religious groups to function through these means, the collective expression of the religion in question is not available in any form, group participation in the religion is not feasible, nor is meaningful membership of the religious community. Collective forms of manifestation are what create religious communities. The need for places of worship is undeniable but they would be stripped of all value if not supported by the freedom to teach according to the doctrines of the faith in question coupled with the freedom to appoint leaders who are best equipped to discern and expound those doctrines. Similarly with other religious organizations: leaders, teachers, and others in significant roles are often selected on the basis of the values espoused by the community in order to give expression to the community's religious wishes and beliefs. This is fundamental to religious choice on a collective level. Distinctions based on religion are not only inevitable but to one degree or other are integral to the right to manifest religion and to basic choice in religion.

The freedom of manifestation has much in common with the freedom in Article 18.4 in the context of religious schools established to give effect to parental wishes to ensure the religious and moral education of their children in conformity with their own convictions. In the case of faith-based private schools, there may be an expectation that staff with a teaching function or position of influence would be members of the founding religion of the school, if not also be able to demonstrate positive commitment to that religion, as a condition of employment. Much depends on the character of the school or other institution, in particular the extent to which it is established for religious purposes. But there comes a point at which the essential character and purpose of the institution may be entirely lost by an impaired ability to make distinctions based on religion in pupil selection or in employment by virtue, for example, of the need to avoid conflict with the religious susceptibilities of pupils or parents, the inherent requirements of the work or to maintain the mission-oriented focus of the institution.

The principles of non-discrimination in Articles 2.1, 3 and 26 of the ICCPR are reconcilable with the sort of distinctions that are unavoidable in such matters as the appointment of religious leaders, the teaching of religion, and in establishing and maintaining religious institutions. Those principles do not mandate a total ban on differentiation on religious grounds. General Comment No. 18 (on non-discrimination)<sup>31</sup> provides the Human Rights Committee's interpretation of the term "discrimination." It does not require the avoidance of all distinction on any recognized ground (such as race, color, sex, language, or religion) but *only where*

a distinction has the purpose or effect of impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms. The Committee also pointed out that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance, observing that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."<sup>32</sup>

Both General Comment No. 22 and the Human Rights Committee decisions themselves answer the Article 18.4 requirements in the school curriculum by differentiation. Thus, schools provide exemptions or alternatives to those who need to avoid the conflicting teaching, and provide state aid for all faith-based schools, not just selected religious schools. The Committee used a similar principle of differentiation in cases of conscientious objection to military service (which the Committee considers is derived from Article 18), by allowing conscientious objectors alternative forms of non-combat service. The thrust of the Committee's approach is to embrace the need for differentiation, but in such a way that the practical operation of any scheme of differentiation is not discriminatory. In the same way that limitation provisions "must not be applied in a manner that would vitiate the rights guaranteed in Article 18," it would be nonsensical to suggest that principles of non-discrimination may do so.

As Western societies increasingly shift towards secular state models and are shaped by and give expression to secularist viewpoints and culture, greater will be the need for differentiation to ensure that Article 18 freedoms are not stifled. Examples abound of discrimination on the basis of religion that is sufficient to vitiate religious choice. They may take overt or subtle forms, they may be direct or indirect, and they may take the form of discrimination in relation to any number of rights but all are important to apprehend as violations of the fundamental right to free choice in religion. Discrimination is perhaps most pervasive when it takes the form of systematically undermining particular faiths as a deterrent to joining or continued participation in those faiths. Adherents are often held in public contempt or find it virtually impossible to exhibit any evidence of their religious choice without recrimination, with the inevitable result that only the most convinced believers remain in their chosen faith. Illustrations that most explicitly involve such discrimination affecting religious choice include the incessant accounts of repression, torture, and imprisonment of Falun Gong members in China in attempts to force them to renounce their belief; allegations of the detention of Christians in Eritrea solely because of their faith and aimed at forcing them to abandon their beliefs; and reports from refugees from the Democratic People's Republic of Korea that parents were afraid to pass on their faith to their children and that churches lead an entirely underground existence under constant threat of punishment.<sup>33</sup>

Registration requirements for religious communities can similarly have a powerful effect in eradicating particular groups from the religious landscape,



notably the smaller or more recently founded minorities, with corresponding impacts on religious choice. Basic citizenship rights are commonly the basis of discrimination against particular religious groups. In Saudi Arabia and in provisions for a draft Constitution in the Maldives, for example, it is allegedly not possible for non-Muslims to obtain citizenship. In Malaysia, a change of religious identity would be denied because ethnic Malays are defined as Muslims under the Constitution.<sup>34</sup> In some countries, key official documents (identity cards, passports, and birth certificates) cannot be obtained by members of certain religious groups or not easily, with the consequence that, among other things, they experience difficulties in gaining access to higher education, health care, and public sector employment; they cannot open bank accounts, or easily run a business, and in the case of passport requirements are denied freedom of movement.<sup>35</sup> Marriages by those of certain religions are not registered in some countries, nor are inter-religious marriages (so that in Malaysia, for example, a Muslim designation on an identity card would prevent marriage to a Christian), with consequences both for marriage and succession rights. In Costa Rica, only Catholic marriages have civil effect.<sup>36</sup> Religious affiliation is required on official documents in many countries, which is against the right not to manifest one's religion, and the rights under Article 17.1 of the ICCPR to be free from arbitrary or unlawful interference with privacy. In some countries, only limited preselected options of religious affiliation are available, such as in Egypt where only Islam, Christianity, and Judaism are mentioned, with the added consequence that those not falling within those categories are forced to lie about their religious affiliation in order to obtain a card, which is a criminal offence. Changes to official documents to reflect a change of religion may also result in other adverse consequences. In all of these instances, the discriminatory denial of basic rights on the ground of religion is the consequence of the choice to remain affiliated to that religion, and the consequence also for anyone who makes the choice to change to such a religion.

## ■ CONCLUSIONS

Freedom of religious choice, as a fundamental guaranteed right, has many more facets than the text of the key articles of international human rights instruments would suggest. It is not enough to enact in perfect constitutional, statutory, or codified terms a simple right to freedom of choice without also rendering it free of any ambiguity that it includes freedom to change religion in any circumstances and freedom from coercion that would restrict that choice. Religious manifestation is also central to religious choice, particularly in the area of proselytism, both from the perspective of the exponent and the absolute right of others to take the decision to convert in response. Among the most insidious forms of coercion or pressure in religious choice is the pervasive effect of discrimination against a chosen religion. Thus freedom of religious choice, if it is to have any value, must also be underpinned by guarantees against non-discrimination among other

things on the ground of religion. Even that guarantee is insufficient without suitable recognition that certain forms of discrimination should more properly be considered as restrictions on religious choice and altogether impermissible. At the same time, principles of non-discrimination should not be applied in such a way as to vitiate Article 18 rights, particularly those based on religious choice.

## ■ NOTES

1 See Jeremy Gunn's chapter herein for further commentary.

2 K.J. Partsch, "Freedom of Conscience and Expression, and Political Freedoms," in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University Press 1981), 211.

3 United Nations Human Rights Committee, "General Comment No. 22: Article 18," Article 18 (Forty-eighth session, 1993), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), par. 5.

4 Descriptions of these incidents are provided in the reports of the UN Special Rapporteur on Freedom of Religion or Belief at: U.N. Docs: E/CN. 4/2005/61/Add. 1 (2005), par. 162; A/HRC/4/21/Add. 1 (2007), par. 132; A/HRC/7/10/Add. 1 (2008), par. 112; A/HRC/7/10/Add. 1 (2008), par. 280; A/HRC/10/8/Add. 1 (2009), par. 129.

5 Descriptions of these incidents are provided in the reports of the UN Special Rapporteur on Freedom of Religion at: U.N. Docs: E/CN. 4/2005/61/Add. 1 (2005), par. 163; A/HRC/4/21/Add. 1 (2007), par. 129; A/HRC/10/8/Add. 1 (2009), par. 91; E/CN. 4/2005/61 (2004), par. 68.

6 *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. A/60/40 (Vol. II) (2005), par. 6.2.

7 *Şahin v. Turkey*, 44 EHRR 5 (2007) (EctHR, 2005-XI, 175, November 10, 2005) (Grand Chamber Judgment), pars. 108–09. See further the chapter by Carolyn Evans herein.

8 See the following reports of the United Nations Human Rights Committee. U.N. Docs: HRC A/60/40 (Vol. I) (2005) par. 84(21); HRC A/60/40 (Vol. I) (2005) par. 91(18); HRC A/62/40 (Vol. I) (2007) par. 88(26).

9 See following reports of the UN Special Rapporteur on Freedom of Religion or Belief at: U.N. Docs. : E/CN. 4/2006/5/Add. 1 (2006), par. 246; A/HRC/4/21/Add. 1 (2007), pars. 4–6; A/HRC/10/8/Add. 1 (2009), par. 95; E/CN. 4/2006/5/Add. 1 (2006), par. 216 & A/HRC/10/8/Add. 1 (2009), par. 113.

10 *Ivanova v. Bulgaria* (EctHR, April 12, 2007), par. 79.

11 See the following reports of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Docs: E/CN. 4/2005/61/Add. 1 (2005), par. 273; A/HRC/4/21/Add. 1 (2007), par. 69–73; A/HRC/4/21/Add. 1 (2007), par. 335.

12 See the report of the UN Special Rapporteur on Freedom of Religion or Belief at U.N.Doc. A/60/399 (2005).

13 *Immaculate Joseph et al. v. Sri Lanka*, Communication No. 1249/2004, U.N. Doc. A/61/40 (Vol. II) (2006), p. 347, par. 7.2. See also *Kang v. Republic of Korea*, Communication No. 878/1999, U.N.Doc. A/58/40, Vol. II (2003), 152 where the distribution of communist leaflets was recognized by the Human Rights Committee as the manifestation of a belief.

14 *Kokkinakis v. Greece*, 17 EHRR 397 (1994) (EctHR 260-A, May 25, 1993), par. 48.

15 N. Lerner, "The Final Text of the UN Declaration against Intolerance and Discrimination Based on Religion or Belief," *Israel Yearbook on Human Rights* 12 (1982): 185, 188.

16 *Larissis and Others v. Greece* 27 EHRR 329 (1998) (EctHR, 1998-I, no. 65, February 24, 1998), par. 51.

- 17 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. E/CN. 4/2006/5/Add. 3 (2005).
- 18 *Ibid.*, par. 50.
- 19 *Ibid.*, par. 120.
- 20 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. A/60/399 (2005), par. 66.
- 21 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. E/CN. 4/2006/5/Add. 3 (2005), par. 73.
- 22 Report of the UN Human Rights Committee, U.N. Doc. HRC A/60/40 (Vol. I) (2005) par. 89(22).
- 23 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. A/60/399 (2005), paras. 57 and 58.
- 24 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. A/60/399 (2005), paras. 62–63, repeated in numerous later reports eg concerning India and Uzbekistan.
- 25 Report of the UN Human Rights Committee, U.N. Doc. HRC A/61/40 (Vol. I) (2006), par. 81(15).
- 26 Report of the UN Human Rights Committee, U.N. Doc. HRC A/63/40 (Vol. I) (2009), par. 84(22).
- 27 *Folgero and Others v. Norway*, 46 EHRR 47 (2008) (ECtHR, June 29, 2007).
- 28 *Leirvåg et al. v. Norway*, Communication No. 1155/2003, U.N. Doc. A/60/40 (Vol. II) (2005), 203.
- 29 *Arieh Hollis Waldman v. Canada*, Communication No. 694/1996, 7(2) I.H.R.R. (2000), p. 368.
- 30 For an interesting English finding of unlawful discrimination in the oversubscription policy of a voluntarily aided Jewish school, which gave priority to children recognized as Jewish according to matrilineal descent or conversion in accordance with the tenets of Orthodox Judaism (but not the claimant's non-Orthodox conversion), see *R (on the application of the E) v JFS Governing Body* [2009] UK SC 15. See further the chapter by Natan Lerner herein.
- 31 UN Human Rights Committee, "General Comment No. 18: Non-discrimination," (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).
- See also recent comments of the Special Rapporteur when individuals or groups in the same situation are treated differently as well as when individuals or groups are treated in the same way although their situation is different at U.N. Doc. HRC. 10/8 (2009), at par. 31.
- 32 *Ibid.*, paras. 8, 13. For further discussion on the subject of discrimination, see Nazila Ghanea's chapter herein.
- 33 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Docs. : E/CN. 4/2005/61/Add. 1 (2005), par. 64; A/HRC/4/21/Add. 1 (2007), par. 132; E/CN. 4/2005/61/Add. 1 (2005), par. 74.
- 34 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Docs. A/63/161 (2008), par. 29; A/HRC/10/8/Add. 1 (2009), par. 146; A/HRC/10/8/Add. 1 (2009), par. 136.
- 35 Report of the UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. A/63/161 (2008), paras. 31–36.
- 36 Report of the UN Human Rights Committee, U.N. Doc. HRC A/63/40, Vol. I (2009), par. 75(10).

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