

# *Are Religious Minorities Really Minorities?*

NAZILA GHANEA\*

This article will argue that although, historically, religious minorities were the primary trigger for the institutionalization of the international framework of minority rights, they have long since been sidelined from its protections. This sidelining is evident in a variety of international human rights norms and mechanisms, the focus below being on the jurisprudence of the UN Human Rights Committee. The article offers a number of explanations for this diversion of religious minorities away from the international minority rights regime. It also argues for a cautious reintegration of religious minorities within the minority rights regime after having sought understanding with regard to some issues of concern.

## *1. Introduction*

It was religious minorities who spearheaded minority rights concerns onto the regional and, later, international level. It was the effort to protect religious minorities that led to the aborted attempt for recognition of minority rights at the League of Nations and that later slowly percolated through to United Nations (UN) human rights norms and mechanisms. Nevertheless, though minority rights eventually—after some decades of uncertainty—gained currency in the UN, persons belonging to religious minorities never came to be re-integrated into the concept of minorities. Religious minorities are formally covered in human rights protections offered by minority rights—these being in addition to human rights standards that apply to all, regardless of these categories. However, we will see from the below that they are largely excluded from its mechanisms and procedures.

## *2. Historical Antecedents*

Migration has had religious overtones throughout history, with the very emergence and spread of religion—and the subsequent linkages related to that religious civilization—leading to minority demands and concerns in many lands. One such example is the history of the spread of Islam across the Middle

\* Lecturer in International Human Rights Law, University of Oxford. E-mail: nazila.ghanea@conted.ox.ac.uk

East, Asia, North and East Africa and across Europe. Some of these patterns led to relatively progressive norms coming into being. However, others were tinged with colonialist ambition and led to devastating human rights violations, for example, against indigenous populations. These patterns of religious migration were later built upon to establish trade between the horn of Africa and East Africa, Oman and India; and subsequently led to an increase in the presence of religious minorities on these soils. Though they were ethnic minorities too, they were primarily conceived of and catered to in terms of religious minorities. Religious minorities have also been a serious Islamic concern from the outset of its revelation, since there was explicit textual recognition given in the Quran to 'People of the Book'.<sup>1</sup> Hence, provision for particular religious minorities is well-established in Islam, for example, as indicated by the later Millet system. Religious minorities, meanwhile, had long established themselves as a matter of enduring European concern, not least due to the religious underpinnings of the devastating Thirty Years War. Eide describes the problem as having been 'wars which pitted subordination to a universalizing religion (the Catholic church) against national independence, which also appeared to require religious independence'.<sup>2</sup>

From this European experience, the protection for religious minorities could hardly be of a higher pedigree. It has a record dating back to the mid to late 1500s,<sup>3</sup> when successive treaties sought to provide protection for religious minorities. The post-First World War period and the Treaty of Versailles re-focused concern on the question of religious minorities and a new generation of religious minority protection clauses were enshrined as non-negotiable elements of emerging peace treaties. In sum, it would be no exaggeration to suggest that the roots of minority rights are to be found in the protection of religious minorities, not only in Europe where related protections were enshrined explicitly in bilateral and multilateral treaties over three centuries,<sup>4</sup> but with traces over other continents and eras too. Such concern with religious minorities pre-dated not only the emergence of modern human rights but also preceded international concern with racial minorities by centuries. This precedence is all the more remarkable, considering the fact that the proposed League of Nations Article 21<sup>5</sup> had failed on grounds that protection for racial minorities was deemed unpalatable by the great powers of

<sup>1</sup> For a discussion of both the limitations and opportunities offered by the 'People of the Book' status see N Ghanaea, 'Phantom Minorities and Religions Denied' (2009) 2 *Shi'a Affairs Journal* <<http://shiaaffairs.org/index.php/journal/article/viewArticle/4>> accessed 15 December 2011.

<sup>2</sup> A Eide, 'Minority Situations: In Search of Peaceful and Constructive Solutions' (1990–91) 66 *Notre Dame Law Review* 1316.

<sup>3</sup> For a discussion, see M Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 42–82.

<sup>4</sup> As Eide observes, the issue of religious minorities 'first emerged between Catholics and Protestants in the seventeenth century, and later between Christians and the Islamic world of the Ottoman Empire in the eighteenth and early nineteenth century'. This was followed later in the peace settlement after the First World War with five special treaties, five peace treaties, five declarations and two conventions. See: Eide (n 2) 1316–17.

<sup>5</sup> Art 21, the proposed 'racial equality clause', stated in its first draft of 28 February 1919 that 'The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord as soon

the time. Protection for religious minorities was not an issue. Now, some 90 years on, however, racial minorities enjoy protections<sup>6</sup> that religious minorities have almost totally been sidelined from.

The scope of these historical legal protections for minorities, however, should not be overstated or romanticized. The underlying concern was that of security, and the scope of protection was tightly drawn, in terms both of geography and of beneficiaries. The protections were discrete, rather than generally applicable, and the objective was the maintenance of the status quo rather than motivated by broader humanitarian concerns. In essence, the aim was the containment of religious minorities and tit-for-tat guarantees of protection between empires and, later, states. It was not underpinned with a concern with freedom of religion or belief, as enshrined in international human rights standards since 1948, nor indeed with our principled rationales for minority rights today.

### *3. The Separation of Religious Minorities from Minorities*

Religious minorities are formally covered in human rights protections offered under both freedom of religion or belief and minority rights—these being, in addition to human rights, standards that apply to all, regardless of these categories. Minority rights are to be enjoyed in addition to existing rights. The UN has recognized them as ‘special rights’ that accrue to persons belonging to minorities on the understanding that equality alone would not provide sufficient protection against discrimination. One could, in fact, consider minority rights as a means of ensuring substantive equality for a specific category of rights holders. Henrard declares non-discrimination as the ‘*condition sine qua non* for adequate minority protection’.<sup>7</sup> She also distils the essential element of minority rights to that of the right to identity, which requires ‘effective protection of their general human rights in combination with the right not to be discriminated against’; and one which is informed by, and limited to, a quest for the goal of real, substantive equality.<sup>8</sup>

International legal provisions regularly preface any reference to minorities with the designations ‘ethnic’, ‘religious’ or ‘linguistic’. Religious minorities have always been assumed to be part and parcel of the minorities’ regime

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as possible to all alien nationals of states, members of the League, equal and just treatment in every respect making no distinction, either in law or in fact, on account of their race or nationality.’

<sup>6</sup> For example, as upheld in the UN Convention on the Elimination of all Forms of Racial Discrimination. For a discussion see N Ghana, ‘Religious or Minority?’ (2008) 36(3) *Religion, State and Society* 303–25; and D Keane, ‘Addressing the Aggravated Meeting Points of Race and Religion’ (2007) 6 *Maryland Law Journal of Race, Religion, Gender and Class* 353–91.

<sup>7</sup> K Henrard, ‘Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments’ (2003–04) 3(15) *The European Yearbook of Minority Issues* 29.

<sup>8</sup> *ibid* 16.

normatively, but have, in fact, rarely been protected through it. Though there has long been concern about the narrowness of these designations, and the need to include other categories of minorities explicitly, this important consideration will not be addressed in this article. This article seeks to establish that though religious minorities have been one of the three most explicitly recognized categories of minorities in the minority rights regime, they have largely been excluded from consideration under the umbrella of minority rights.

The UN era started out with 30 years of downplaying, if not outright rejection, of minority rights for historic reasons. There was no appetite in the UN for provisions for minorities due to the inter-war experience regarding the failed minorities system. In fact, the ideology of the time held that universal rights would be the panacea for all ills; equality served as the answer to all, and removed the premise for any kind of singling out of categories of rights holders.<sup>9</sup>

It took a number of decades for the realization to dawn that equal treatment could result in discrimination for those who started lower down the pecking order. If, for example, the Brahmins and the Dalits are treated 'equally' in India, the discrimination against the Dalits will only become further entrenched. Equal treatment could too easily continue, or fail to cure, discrimination against those that had previously been unequal; it merely concealed that inequality with the gloss of equal treatment. In 1976, the International Covenant on Civil and Political Rights (ICCPR) came into force with its Article 27 holding that '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 practise their own religion, or to use their own language'.<sup>10</sup>

The UN Human Rights Committee, however, took some years to feel comfortable with this provision and to utilize it, but it eventually started reflecting on it in its jurisprudence and eventually interpreting it in its 1994 General Comment 23 on Article 27 of the ICCPR regarding the rights of minorities. Capotorti's 1977 UN Sub-Commission<sup>11</sup> study also contributed to a gradual return to a reinvigorated notion of minorities, this time under the UN's umbrella. Capotorti, who was a UN Sub-Commission expert, held that a minority is 'a group, numerically inferior to the rest of the population of a

<sup>9</sup> For a broader and rich discussion, see P Thornberry, *International Law and the Rights of Minorities* (OUP 1991).

<sup>10</sup> International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, art 27.

<sup>11</sup> Though the name of the UN Sub Commission on Prevention of Discrimination and Protection of Minorities (1947-98) suggested a focus on minorities, in fact the scope of its work was much broader. In 1999, it changed its name to Sub-Commission on the Promotion and Protection of Human Rights and it held its final session in 2006.

State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'.<sup>12</sup> Capotorti's emphasis is on the shared solidarity towards the preservation of different characteristics. However, others have widened their reading of the beneficiaries and the rationale for the enjoyment of minority rights. Van Dyke has stated:

The groups that enjoy [minority] rights seem to fall into two broad categories that sometimes overlap. One category includes groups characterized by weakness that calls for protection or disadvantage that calls for compensatory action. Special measures for such groups seem to be approved if their purpose and effect is to promote equality and not to establish or preserve inequality. The characteristic that distinguishes groups in the second category is a shared sense of a community of interest that is relatively fundamental, important, and enduring...<sup>13</sup>

Then in 1978, the UN started a drafting effort that resulted in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Later still, from 1995 to 2006, the UN sponsored the annual week-long meeting of the UN Sub-Commission Working Group on Minorities. In the aftermath of change from the UN Commission on Human Rights to the UN Human Rights Council,<sup>14</sup> this has been meeting for just two days per annum since 2008 as the Forum on Minority Issues.

Some 30 years had passed since the formation of the UN, therefore, before its concern for minorities came into full effect. This 30-year question mark over minority rights meant that 'minority protection ceased to be the primary vehicle through which religious freedoms were addressed on the international plane'.<sup>15</sup> When religious minorities face discrimination and persecution as a group, then, their case is addressed under the 'freedom of religion or belief' umbrella in international human rights and not under minority rights.

This observation can be deduced primarily from the examination of the jurisprudence of UN treaty bodies such as the Human Rights Committee, though it is also evident in how such violations have been handled by UN Charter-based bodies, for example under the 1235 and 1503 procedures and the lack of serious consideration to date of the matter of religious minorities by the Independent Expert on Minority Issues. The assessment below will focus on the jurisprudence regarding Article 27 of the ICCPR, since this is the most

<sup>12</sup> F Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub2/384/Rev1, published by the UN in 1991, Sales No E.78.XIV.1.

<sup>13</sup> V Van Dyke, 'Human Rights and the Rights of Groups' (1974) 18(4) American Journal of Political Science 741.

<sup>14</sup> For a discussion of the implications of this change see N Ghana, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?' (2006) 55 International and Comparative Law Quarterly 695–705.

<sup>15</sup> Evans (n 3) 183.

significant binding norm addressing minorities at the UN level. Before doing so, it is worth observing six key elements in minority rights which could serve to complement and enhance the protection of religious minorities beyond the protections offered within freedom of religion or belief.<sup>16</sup>

### *A. Religious Culture*

Firstly, religious minorities stand to gain enhanced protection through minority rights for their language and culture.<sup>17</sup> Whilst professing and practising their own religion would appear to be the most appropriate of the enjoyments accruing to religious minorities, some religious communities may worship in a language differing from the majority community. Furthermore, the term ‘culture’ may be the most apt description for their literature, symbols, cumulative manifestation and practice of relevant rites, customs, observances—for example, holidays, dietary codes, fasting, pilgrimage, worship and a separate calendar—again, especially when these differ from those of the wider society.<sup>18</sup> In the broader minorities landscape, preservation of minority culture has, at times, led to particular political arrangements and policies for such purpose. Van Dyke has outlined such possibilities as including special assurances and constitutional arrangements, a share in government and measures of autonomy;<sup>19</sup> but argues for avoidance of ‘the poison’<sup>20</sup> of attitudes of inferiority and superiority when arranging for such recognition.

### *B. Group Rights*

Secondly, religious minorities would—self-evidently—gain a broader scope of protection of their group rights through the minority rights regime, especially when their religious autonomy does not already enjoy protection through other measures. The language of Article 27 of the ICCPR: ‘in community with other members of their group’ in their culture and the profession and practice of their religion; contrasts with the ICCPR’s Article 18 language of protection of manifestation ‘either individually or in community with others, and in public or private...in worship, observance, practice and teaching’—though the UN Human Rights Committee (‘Human Rights Committee’, ‘the Committee’ or ‘HRC’) has emphasized that the implications of the latter are to be broadly construed and not restricted to official or traditional religions.<sup>21</sup>

<sup>16</sup> In terms of this argument, of how minority rights supplements and enriches enjoyment of freedom of religion or belief rights, this article builds on my observations in a previous article: Ghanaia (n 6) 303–25.

<sup>17</sup> International Covenant on Civil and Political Rights (n 10) art 27.

<sup>18</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA res 36/55, 36 UN GAOR Supp (No 51), 171, UN Doc A/36/684 (1981).

<sup>19</sup> V Van Dyke, ‘The Cultural Rights of Peoples’ (1980) 2.2 Universal Human Rights 5–7.

<sup>20</sup> *ibid* 8.

<sup>21</sup> See: Human Rights Committee, General Comment 22, art 18 (Forty-eighth session 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev1, 35 (1994), paras 9 and 10. It is to include ‘not only ceremonial acts but also such customs as the

### C. *Objective Determination*

Thirdly, the objective determination of the existence of religious minorities is supported more sharply by the minority rights regime rather than under freedom of religion or belief provisions. The Human Rights Committee has emphasized that ‘The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria’.<sup>22</sup> Freedom of religion or belief norms do not determine this so clearly but do emphasize the religion or belief should be broadly construed and not limited to traditional religions.<sup>23</sup> The criterion of objectivity has not specifically been raised in relation to freedom of religion or belief in communities in international standards, and the clarity, if offered, would be advantageous.

### D. *Positive Measures*

A fourth reason is that positive measures of protection should enable a minority group to ‘maintain its culture, language or religion’.<sup>24</sup> The Human Rights Committee has stated that this means ‘positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group...’.<sup>25</sup> It is worth considering this General Comment at more length.

Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group... as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.<sup>26</sup>

Whilst cautious that positive measures should be reasonable and objectively based, the possible need for positive measures thus becomes applicable to

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observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the 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’. Human Rights Committee, General Comment 22, *ibid* para 4.

<sup>22</sup> Human Rights Committee, General Comment 23, art 27 (Fiftieth session 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev1, 38 (1994) para 5.2.

<sup>23</sup> Human Rights Committee, General Comment 22 (n 21) para 2.

<sup>24</sup> Human Rights Committee (n 22) para 6.2.

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid*.



(religious) minorities too. The relevance of positive measures with regards to religion is starting to be outlined in the case law but is not found in any of the freedom of religion or belief instruments. Nor are its objectives laid out so clearly to protect identity, the right of developing culture and practising religion, in community with others. In this regard, therefore, minority rights extend the protection of religious minorities.

#### *E. Effective Participation in Decision Making*

Fifthly, the minority rights regime emphasizes the effective participation of religious minorities in decisions which affect them and their full participation in the progress and development of their country. The Human Rights Committee states that the enjoyment of cultural rights ‘may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them’.<sup>27</sup> Here again, minority rights extend the protection of religious minorities, as no instruments concerned with freedom of religion or belief delineate the need for the effective participation of members in decisions affecting them. Logically this would at least include the areas outlined regarding manifestation—worship, observance, practice and teaching. The Minorities Declaration further calls for their full participation in ‘the economic progress and development of their country’, ‘due regard for the legitimate interests of persons belonging to minorities’ and state cooperation with them on questions relating to them in order to ‘promote mutual understanding and confidence’, as well as advancing respect for their rights.<sup>28</sup> There is no parallel requirement reflected in the Religious Discrimination Declaration.

#### *F. Survival and Continued Development*

The sixth reason is that whereas minority rights norms uphold the ‘survival and continued development’ of the ‘cultural, religious and social identity’<sup>29</sup> of minorities; freedom of religion or belief standards themselves make no mention of being directed towards the survival and continued development of religious minorities, let alone observing that this would enrich the fabric of society at large. This positive purposive approach would lead to the enhancement of such rights. This positive purposive approach is, unfortunately, never cast as an objective of freedom of religion or belief in international standards. By way of example, such an objective is not outlined in the preamble to the Religious Discrimination Declaration. Instead, the purpose behind the Declaration is

<sup>27</sup> *ibid* para 7.

<sup>28</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, GA res 47/135, annex, 47 UN GAOR Supp (No 49), 210, UN Doc A/47/49 (1993) arts 4.5, 5, 6 and 7.

<sup>29</sup> Human Rights Committee (n 22) para 9.



cast in negative terms in recognition of the wars, great suffering, foreign interference and hatred caused by disregard of this freedom.<sup>30</sup> The preamble of the Minorities Declaration, however, considers the promotion and protection of the rights of persons belonging to inter alia religious minorities as ‘an integral part of the development of society as a whole’ and as a contribution ‘to the strengthening of friendship and cooperation among peoples and States’.<sup>31</sup> Ensuring the survival and continued development<sup>32</sup> of religious identity is not explicitly stressed anywhere in freedom of religion or belief instruments. The bar for ‘continued development’ is higher than mere survival, and indeed, than any spelt out in freedom of religion or belief standards. ‘Continued development’ should not just be assessed for the group’s internal and separate ‘development’, but also requires the possibility of a healthy interaction with society at large.

#### 4. *The Void*

The objective of this section is not to get into a broader consideration of the limitations of the jurisprudence of the UN Human Rights Committee. However, a few preliminary points need to be considered. The first is that we should note the criticism that has also been expressed with regard to its jurisprudence regarding freedom of religion or belief: ‘So far, the HRC has not concluded in many individual Communications to a violation of the prohibition of discrimination on the basis of religion.’<sup>33</sup> The second is that the very language of Article 27 makes reference to ‘persons belonging to’ minorities rather than minorities as such and, furthermore, the individual communication procedure of the ICCPR does not allow for *actio popularis*.<sup>34</sup> A third point is

<sup>30</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA res 36/55, 36 UN GAOR Supp (No 51), 171, UN Doc A/36/684 (1981), preambular para 3.

<sup>31</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (n 28) preambular para 6.

<sup>32</sup> Human Rights Committee (n 22) para 9.

<sup>33</sup> K Henrard, ‘The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties’ (2007) 14 International Journal of Minority and Group Rights 168.

<sup>34</sup> This has been reiterated in a 2009 case, *Anderson v Denmark*, where the Committee observes:

the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant. Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. In the Committee’s decision regarding *Toonen v. Australia*, the Committee had considered that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminated facts on administrative practices and public opinion had affected him and continued to affect him personally. In the present case, the Committee considers that the author has failed to establish that the statement made by Ms. Kjærsgaard had specific consequence for her or that the specific consequences of the statements were imminent and would personally affect the author. The Committee therefore considers that the author has failed to demonstrate that she was a victim for purposes of the Covenant. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

See *Fatima Andersen v Denmark*, (1868/2009), CCPR/C/99/D/1868/2009 (7 September 2010) para 6.4.

that the Human Rights Committee has, time and again, reiterated that it understands ‘minorities’ to refer to minority status within the whole nation and not within a particular province or geographic area. This was determined in the *Ballantyne et al v Canada*<sup>35</sup> case and has been reiterated again since.<sup>36</sup> In *Ballantyne v Canada*, the Committee observed that:

As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the ‘State’ or to ‘States’ in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.<sup>37</sup>

This means that religious minorities fulfill the numerical aspect of their relevance to Article 27 by being numerically inferior in the State and not in a particular province or geographic area of that State.

These observations alert us to the narrowness of the scope of Article 27 jurisprudence for minorities in significant ways. Nevertheless, Article 27 still remains highly important for (religious) minorities. As Jabareen asserts:

if Article 27 is to have any noticeable effect on the position of minorities in a given society, and if the ICCPR is to achieve its goal of securing true equality, then Article 27 must be invested with more than a passive interpretation. If no such positive, forceful content is given to it, Article 27 adds nothing to the Covenant. This discussion is all the more important given that the ICCPR legally binds the largest number of states parties of any treaty containing minority rights and arguably has gained the status of customary international law.<sup>38</sup>

The purpose of addressing Article 27 jurisprudence in this article is to observe the dearth of consideration of religious minorities as minorities. So, we now turn to a review of the jurisprudence of the UN Human Rights Committee and, regrettably, observe the overall exclusion of religious minorities from consideration under Article 27.

### *A. Faith or Ideological/Anti-Religion Schools*

From a quick overview of the Article 27 jurisprudence, we find a number of communications addressing faith schools. These consider freedom of religion

<sup>35</sup> *Ballantyne, Davidson, McIntyre v Canada* (359/1989 and 385/1989/Rev 1), CCPR/C/47/D/359/1989 and 385/1989/Rev1 (5 May 1993).

<sup>36</sup> For example in *Peter Michael Queenan v Canada* (1379/2005), CCPR/C/84/D/1379/2005 (26 July 2005).

<sup>37</sup> *Ballantyne* (n 35) para 11.2.

<sup>38</sup> YT Jabareen, ‘Toward Participatory Equality: Protecting Minority Rights Under International Law’ (2008) 41 *Israel Law Review* 647.

or belief standards (ie Article 18) but not minority rights standards (ie Article 27). If the education offered by faith schools were to be considered under the latter, then it would have to factor in consideration of Sections 3A, 3D, 3E and 3F above—that is, the possible role of faith schools in allowing enjoyment of religious culture, whether positive measures of protection are required for religious minorities, the effective participation of religious minorities in decisions that affect them and whether the survival and continued development of the cultural, religious and social identity of the religious minorities are at stake.

In *Waldman v Canada*,<sup>39</sup> the Committee noted that the case was concerned with ‘whether public funding for Roman Catholic schools, but not for schools of the author’s religion, which results in him having to meet the full cost of education in a religious school [Jewish: Bialik Hebrew Day School], constitutes a violation of the author’s rights under the Covenant’.<sup>40</sup> Canada argued that ‘no discrimination has occurred, since the distinction is based on objective and reasonable criteria’<sup>41</sup> and due to the privileged treatment of Roman Catholic schools being enshrined in the Constitution. However, the applicant,<sup>42</sup> and later the Committee, rejected this position.

The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to the members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party’s argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.<sup>43</sup>

The Committee furthermore considered that ‘the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author’s religion, which are private by necessity, cannot be considered reasonable and objective’.<sup>44</sup> Finally, the Committee observed that:

the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.

<sup>39</sup> *Waldman v Canada* (694/1996), CCPR/C/67/1996(5 November 1999).

<sup>40</sup> *ibid* para 10.2.

<sup>41</sup> *ibid* para 10.3.

<sup>42</sup> ‘The author maintains that the provision of full funding exclusively to Roman Catholic schools cannot be considered reasonable. The historical rationale for the Ontario government’s discriminatory funding practice, that of protection of Roman Catholic minority rights from the Protestant majority, has now disappeared, and if anything has been transferred to other minority religious communities in Ontario.’ *ibid* para 3.1.

<sup>43</sup> *ibid* para 10.4.

<sup>44</sup> *ibid* para 10.5.

This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria.<sup>45</sup>

The Committee, therefore, found a violation of Article 26 but considered that no additional issue arose for consideration under articles 18, 27 and 2(1). In this case, the assessment of the Committee seems to have largely taken on consideration of Article 27 in all but name. It is not suggested that overt consideration of Article 27 would have changed the finding. However, it is disappointing that the Committee did not make its observations with clear reference to Article 27's language, with Section 3A's clear recognition of the role of educational establishments regarding minority religious culture, Section 3D's acknowledgement of positive measures and Section 3E's effective participation of minorities in decisions that affect them. Indeed, the concurring individual opinion by Martin Scheinin raises a number of these concerns, along with pertinent observations about the combined state duties regarding articles 18, 26 and 27 of the Covenant with regard to public schools. He states 'I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18'.<sup>46</sup> He follows this on with a detailed consideration of a variety of provisions that a State party may wish to consider in providing for religious instruction—including in minority religions—as part of its public policy. He reminds us that State parties should 'bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions', must ensure that 'possible distinctions between different minority languages are based on objective and reasonable grounds', but also that having considered these factors, the exact arrangement arrived at 'is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant'.<sup>47</sup> Analysed solely from a minority rights perspective, indeed the claim by the Committee raises concern when it considers that 'the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination'.<sup>48</sup> It seems to be articulated in too strident a manner. From an Article 27 perspective, clearly there may be scenarios that justify a duty—and even a positive one at that—for the State to make a financial provision for some kind of religious minority educational provision.

<sup>45</sup> *ibid* para 10.6.

<sup>46</sup> *ibid* Individual opinion by member Martin Scheinin (concurring), para 4.

<sup>47</sup> *ibid* paras 4 and 5.

<sup>48</sup> *ibid* para 10.6.

It may not be a duty to fund a whole school which is ‘established on a religious basis’, but it may indeed require some other funding arrangements towards a religious minority. Questions of solidarity, homogeneity, shared culture and group boundaries will however be highly pertinent to determining the group identity of the religious minority concerned. As such, some religious communities may constitute a minority, others may contain several minorities whose identities intersect with other characteristics, and yet others may contain persons belonging to minorities but not constitute a minority in itself.

### B. *Headscarf or Other Headdress*

We can also observe cases where the prohibition of the headscarf is considered again without any possible consideration of the headscarf as being part of a minority—whether ethnic and/or religious—culture. If Article 27’s implications received scrutiny, one would expect consideration of Sections 3A, 3D, 3E and 3F above—that is whether the headscarf can be deemed part of culture, whether positive measures may be necessary for minority members to enjoy this cultural and/or religious practice, participation of the religious minority in decisions concerning it and whether the ban on the headscarf may jeopardize the survival and continuity of cultural, religious and social identity.

In *Hudoyberganova v Uzbekistan*,<sup>49</sup> however, there is no consideration of Article 27 at all. Though the claimant herself had not claimed violation of Article 27, the Committee could have chosen to bring this article within its purview and invoked its consideration. The Committee’s consideration focuses on Article 18 and the limitations possible to manifestation of religion or belief and coercion in this regard. Since a violation of Article 18.2 is found, it is not being suggested that consideration of Article 27 would have changed the finding. However, in relation to the State’s claim that Ms Hudoyberganova’s hijab constituted a ‘cult dress’,<sup>50</sup> and assertion that ‘Islam does not prescribe a specific cult dress’,<sup>51</sup> consideration of the possible relevance of expression of minority religion as culture could have added this interesting consideration to Article 27 jurisprudence.

An older related case is that of *Bhinder v. Canada*,<sup>52</sup> where a Sikh worker claimed violation of Article 18 due to the refusal of the Canadian Railway Company to exempt him from wearing a hard hat; in effect, disallowing him from wearing his turban. The State party, at that time, made a claim that should have served as a red rag to the Committee and compelled consideration of Article 27. Canada stated ‘The State party further considers that article 18 does not impose a duty of “reasonable accommodation”, that the concept of

<sup>49</sup> *Hudoyberganova v Uzbekistan* (931/2000), ICCPR, A/60/40 vol II (5 November 2004).

<sup>50</sup> *ibid* para 2.7.

<sup>51</sup> (n 49) para 2.8.

<sup>52</sup> *Karnel Singh Binder v Canada*, (208/186), CCPR/C/37/D/208/1986, 9 November 1989.

freedom of religion only comprises freedom from State interference but no positive obligation for States parties to provide special assistance to grant waivers to members of religious groups which would enable them to practice their religion'.<sup>53</sup> Bringing in consideration of Article 27 clearly would have made the positive duty towards a religious and ethnic minority pertinent to the Committee's considerations. However, the Committee did not flag up Article 27 but did consider Article 26, deciding that:

If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.<sup>54</sup>

The Committee decided that 'the facts which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights'.<sup>55</sup>

However, another case has suggested a faint connection between the Committee's views on the scope of cultural rights and their relevance for religious minorities. This arises in the case of a Latvian national, who is a member of the Jewish, and Russian-speaking minorities, in his quest to have his name corrected to its Russian Jewish form on his passport. In *Raihman v Latvia*, the Committee found a violation of Article 17. Specifically, 'with respect to the unilateral change of the author's name by the State party, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 26, article 27, or article 2, paragraph 1, read in conjunction with article 17'.<sup>56</sup> Although the Committee does not consider Article 27, Mr Rafael Rivas Posada and Mr Krister Thelin do so in their dissent from this opinion—a dissent within which no violation is found. They state that the reasoning and conclusions on the merits should in their view instead have: (i) noted the claimant to be a member of the Jewish and Russian-speaking minorities in Latvia; (ii) recalled that 'States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right',<sup>57</sup> (iii) considered that 'the imposition of a declinable

<sup>53</sup> *ibid* para 4.5.

<sup>54</sup> *ibid* para 6.2.

<sup>55</sup> *ibid* para 7.

<sup>56</sup> *Leonid Raihman v Latvia* (1621/2007), CCPR/C/100/C/100/D/1621/2007, 30 November 2010, para 8.4.

<sup>57</sup> *ibid* dissenting opinion of Mr Rafael Rivas Posada and Mr Krister Thelin, para 8.6. In making this point, they reference *George Howard v Canada* (879/1999) 26 July 2005, para 12.7; *Kitok v Sweden* (197/1985) 27 July 1988 and, *Länsmann v Finland* (511/1992 and 671/1995) 30 October 1996 and particularly its para 9.4.

termination on his name and surname did not adversely affect his right, in community with the other members of the Jewish and Russian speaking minorities of Latvia, to enjoy his own culture, to profess and practice the Jewish religion, or to use the Russian language', hence there was no violation of Article 27.<sup>58</sup> Mr Rafael Rivas Posada and Mr Krister Thelin's reference back to the jurisprudence of the Human Rights Committee regarding the culture of indigenous peoples in relation to religious minority culture is very promising, as it suggests that religious minorities are equal beneficiaries of the right to (religious) culture. One of the cases they reference in this connection is *Länsmann v Finland*. Mr Rafael Rivas Posada and Mr Krister Thelin make reference to the following paragraph in particular:

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.<sup>59</sup>

In relation to persons belonging to religious minorities—albeit both ethnic and religious in this present case—Mr Rafael Rivas Posada and Mr Krister Thelin are, therefore, suggesting a similar judgment call regarding 'certain limited impact on the way of life' of the religious culture.

### C. *Registration of Religious Communities*

In the context of cases addressing the registration of religious communities, we find scant reference to Article 27, though it clearly holds implications captured in all six subsections under Section 3—particularly holding importance for Section 3A's protection of culture, Section 3B's enjoyment of rights in community with other members of their group, Section 3C's objective determination of the existence of the minority and Section 3F's 'survival and continued development' objective. The case *Malakhovsky et al v Belarus*,<sup>60</sup> for example, concerned the registration of a religious community but gave no consideration to Article 27 at all. Again, as in the *Hudoyberganova v Uzbekistan*<sup>61</sup> case, the claimant does not claim violation of Article 27. Indeed, part of the assertion of this article is that both claimants and international mechanisms are serving to sideline religious minorities from the

<sup>58</sup> *Leonid Raihman* (n 56) dissenting opinion of Mr Rafael Rivas Posada and Mr Krister Thelin, para 8.6.

<sup>59</sup> *Länsmann v Finland* (n 57) para 9.4.

<sup>60</sup> *Sergei Malakhovsky and Alexander Pikul v Belarus* (1207/2003) ICCPR, A/60/40 vol II (26 July 2005).

<sup>61</sup> *Hudoyberganova v Uzbekistan* (931/2000), ICCPR, A/60/40 vol II (5 November 2004).



minority rights regime. Since persons belonging to religious minorities are largely focusing their claims solely on Article 18 and not, for example, Article 18 in conjunction with Article 27, we have to turn to the Human Rights Committee itself to invoke the relevance of Article 27 in order to be able to consider its relevance in pertinent cases before it.

The Committee observes that the *Malakhovsky et al v Belarus* case regards the following:

In the present case, the Committee notes that the State party's law distinguishes between religious communities and religious associations, and that the possibility of conducting certain activities is restricted to the latter. Not having been granted the status of a religious association, the authors and their fellow believers cannot invite foreign clerics to visit the country, or establish monasteries or educational institutions. Consistent with its General Comment, the Committee considers that these activities form part of the authors' right to manifest their beliefs.<sup>62</sup>

They proceed to find a violation of Article 18.1. Article 27's pertinence for this case is, nonetheless, numerous—for example, in relation to Section 3A and religious culture, Section 3B's group rights and especially Section 3E's the effective participation of minorities in decisions which affect them.

In the case of *Sister Immaculate Joseph et al v Sri Lanka*,<sup>63</sup> the sisters did claim violation of inter alia Article 27 regarding the Sri Lankan Supreme Court's decision to deny incorporation of their Order, which was established in 1900 and was engaged in teaching, charity and community work.<sup>64</sup> They argued that 'to reject the Order's incorporation while many non-Christian religious bodies with similar object clauses have been incorporated violates article 26. In support, the author provides a (non-exhaustive) list of 28 religious bodies that have been incorporated and their statutory objects, of which most have Buddhist orientation, certain Islamic, and none Christian'.<sup>65</sup> The Human Rights Committee found violation of Article 18.1 and Article 26 and considered that Article 27 would not add anything and did not need separate consideration.<sup>66</sup>

#### D. Exclusion of Minorities from Particular Spheres

In addressing the exclusion of members of a particular belief from a political party in *Arenz et al v Germany*,<sup>67</sup> there was no consideration of Article 27 at all

<sup>62</sup> *Sergei Malakhovskyand* (n 60) para 7.2.

<sup>63</sup> *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka v Sri Lanka* (1249/2004), CCPR/C/85/D/1249/2004 (21 October 2005).

<sup>64</sup> *ibid* paras 2.1, 2.2, 2.4 and 3.1.

<sup>65</sup> *ibid* para 3.1.

<sup>66</sup> *ibid* para 7.6. As a contrast, see discussion of the variety of forms the legal status of religion in the state can take: A Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (Routledge 2011) 67–125.

<sup>67</sup> *Paul Arenz, Thomas Röder and Dagmar v Germany* (1138/2002) ICCPR, A/59/40 vol II (24 March 2004).

despite the claimants alleging its violation and despite the possible implications of Section 3E's effective participation. The Committee focused on the right of political participation under Article 25.<sup>68</sup> The case concerned the expulsion of the claimants from the Christian Democratic Union (CDU) National Party Convention because of their membership in the Scientology Church. The State had argued that 'it cannot be responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association',<sup>69</sup> was rejected, with the Committee recalling that, under Article 2.1, the State party 'is under an obligation not only to respect but to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where, as in the present case, the domestic law regulates political parties, such law must be applied without consideration'.<sup>70</sup> The Committee proceeded to emphasize the obligation of States to 'protect the practices of all religions or beliefs from infringement',<sup>71</sup> but did not refer to Article 27 or its General Comment 23 to consider the relevance—or otherwise—of protection of religious or belief culture. Indeed, the consideration of Article 27 could have clarified the Human Rights Committee's views on the scope of Article 27 and its relevance to belief minority communities as well as religious minority communities, along with the criteria for such an identification. This would clearly have arisen since the Committee refers to Scientology as an 'organization of ideological nature'.<sup>72</sup> The communication was declared inadmissible without consideration of any of the other Articles that violation had been alleged of, on the grounds that the Committee did not consider itself competent to re-evaluate the finding of fact or application of domestic legislation 'unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice'.<sup>73</sup> In this case, they considered that neither of these grounds had been substantiated by the authors.

Alfredsson has argued that '[i]f group rights are not forthcoming, discriminatory patterns are likely to persist and the achievement of equal rights by minorities becomes less likely'.<sup>74</sup> In this sense, therefore, we can say that by not considering religious minorities as minorities, we are at risk of perpetuating discriminatory patterns against them and denying them equal rights. We are

<sup>68</sup> *ibid* para 8.5.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid* para 8.6.

<sup>72</sup> *ibid*.

<sup>73</sup> *ibid*.

<sup>74</sup> G Alfredsson, 'A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *International Journal of Minority and Group Rights* 295.

also impoverishing the jurisprudence of minority rights through the refusal to consider religious minorities within its ambit.

## 5. *Obstacles*

Having argued that religious minorities triggered the very concern for minorities as a whole in international law, and that religious minorities were intended for inclusion in the minority rights regime and should not be sidelined from its provisions and mechanisms, we now move to the issue of what a full return of religious minorities to the minority rights regime would entail. Whereas the benefits of such an inclusion for religious minorities themselves were discussed in Section 3 above, what are the challenges that could result from such an inclusion? Four areas that are ripe for further study and require careful consideration will be outlined below. These four are far from exhaustive but they are suggestive of the challenges that may ensue. These points are not being raised in order to chill the argument for the inclusion of religious minorities, but in order for their re-integration to be realistic and informed.

### *A. State–Religion or State–Ideology Relationships*

The first is the question of the state–religion or ideology relationship and how this impacts on the issue of minority rights. To start with, we need to recognize who is minority and who is majority. If we take Capotorti’s definition as our point of departure, we are drawn to the characteristic of a non-dominant position and solidarity towards preserving their religious characteristics. Regarding the latter, it should be noted that this ‘religious characteristic’ may itself overlap with or subsume ‘culture’, ‘traditions’ and ‘language’. The particularities in relation to recognition of the characteristics of religious minorities may, therefore, be multiple.

In recognizing religious minorities, we also need to make a clear distinction between numerical minorities and minorities as recognized in international human rights law, the former in itself being insufficient for the recognition of the latter. Where the political leadership itself constitutes a numerical minority in terms of religion or belief, then, in fact, both religious or belief majorities and minorities would become non-dominant, creating quite a complex religion–belief ‘minority’ landscape. An example of this, taking into consideration not only the religion of Islam as a whole, but one branch in question, may be seen in Assad’s Syria or the Al Khalifa’s Bahrain. Taking the example of Syria<sup>75</sup> and considering only Sunnis, Alavis and Christians; we can observe that both Sunnis and Christians in Syria are non-dominant, the Alavis are numerically inferior but dominant in the sense of being in power. In this

<sup>75</sup> The point of this example is not to draw attention to the scale of human rights violations in Syria, but to consider its population demographics along with the political power dynamics.

context, and of these three communities in Syria, only the Christians ‘fit’ Capotorti’s definition of constituting a religious minority in the understanding of international human rights law. Considering this situation from the ground, however, one would not always observe that the non-dominant numerical majority enjoys any advantage in terms of religious manifestation over the non-dominant and also numerical minority (eg Shias in Bahrain versus Christians in Bahrain), in fact the reverse may hold. In such scenarios, the definitions of religious minority prove somewhat wanting. The complexity of religious and belief landscapes, of course, is not limited to this. The state may situate itself anywhere along a spectrum of anti-religious or fundamentalist, secular or theocratic, exclusive or inclusive with regards to religion and belief—each having a variant impact on a variety of non-dominant religion or belief groups in legal, political, societal or other forms.<sup>76</sup> In each, a meaningful recognition of ‘religious minority’ may prove problematic and vigilance is necessary for a ‘minority rights’ approach not be exploited to reinforce dominant ideologies and elites and further repress religious or belief minorities or ‘others’. As Van Dyke rightfully observes, in some countries—he gives the examples of Saudi Arabia and Spain—‘the relationship between church and state is so close that it may or may not be appropriate to say that the dominant religious group has special status or rights; it simply acts through the government to work its will’.<sup>77</sup> In sum, the state religion or the state ideology is a key factor in determining the power dynamics. In turn, this colours the ‘dominance’ criteria in the definition of minorities. These power dynamics will often be more significant than the numerical criteria in the process of determining who the religious minorities are, in particular contexts.

Having given more acute relationship to who should be considered ‘minority’, we then move to the question of state support. Arguably, the state–religion or ideology relationship raises more complex issues regarding state support structures than the parallels one may draw with the other explicitly-recognized minorities—that is the state–ethnic relationship or the state–linguistic relationship. The state–religion or ideological relationship may give rise to concerns in relation to state funding for religious schools or religious organizations, muscular state promotion of the religion or ideology, enforcement of religious law as state law (a point discussed in more detail in Section 5D below), state penalties for ‘non-believers’ and so on. The complexities stemming from this largely distinguish themselves, or are often of a higher level of magnitude, compared to the state ethnic or linguistic relationship. As Eide observes ‘If the state provides resources to facilitate the flow of cultural or religious information, then a proportional share should be given to the corresponding activities of minorities in order to avoid the

<sup>76</sup> For a discussion see J Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Martinus Nijhoff 2010).

<sup>77</sup> Van Dyke (n 13) 736.

challenge of discrimination. Can the same argument be made in regard to resources provided for education?<sup>78</sup> Whilst recognizing the possible overlap between preservation of culture and preservation of religion, Van Dyke recalls that this right is not absolute and limitations need to be identified, particularly in order to deal with possible conflicts ‘between the right of a group to preserve an aspect of its culture and the right of [other] individuals to non-discriminatory treatment’.<sup>79</sup> Since so-called nation building and the preservation of national unity can become highly dependent on reliance on an intolerant state–religion or state–ideology relationship, vigilance is required to ensure that states do not discriminate between religion–belief minorities in order to entrench their own political support base. The state and minority leaders should also not presume the membership of persons belonging to particular (religious or other) minorities, but allow for both change of religion or belief and voluntary ascription by individuals as to such belonging.

### *B. Who Fits the category of ‘Religious Minority’ and Who Doesn’t?*

A related question, is how we are to recognize religious minorities. The onus here is not on their ‘minority’ aspect but their ‘religious’ aspect. There are several dimensions to this. The first is whether ‘religious’ minorities include ‘belief’ minorities. As has been discussed elsewhere,<sup>80</sup> within freedom of religion or belief protections and mechanisms, belief enjoys equal protection as religion. It is not clear within minority rights instruments that the same holds, though the same rationale is relevant. Historically, the reason for the inclusion of belief with religion in the freedom of religion or belief instruments was the Cold War and the insistence of the Soviet block that atheism and non-religion be included. However, over time a further explicit advantage of this broad scope has become evident, that being its relevance for states who tightly demarcate controls and rights for ‘recognized’ religions versus ‘others’. As the UN Human Rights Committee has so often reiterated, whether in its concluding observations on State Party reports or in its jurisprudence and interpretation of Article 18, it is thus irrelevant whether a state refuses ‘religious’ recognition for persons within its jurisdiction. Irrespective of this, the state would be obliged to ensure enjoyment of Article 18 rights for them as a ‘belief’. Hence the same rationale stretches to minorities. A state, for theocratic or ideological reasons, may not recognize a religious minority as ‘religious’; but would it nevertheless need to ensure that minority equal enjoyment as a ‘belief’ minority? This would appear to be the progressive approach to take. However, noting the framework of minority rights as special and additional rights, it is not intended to broaden its scope to such an extent that its *raison d’être* is

<sup>78</sup> Eide (n 2) 1335.

<sup>79</sup> Van Dyke (n 19) 12.

<sup>80</sup> Ghana (n 6) 303–25.

trivialized. If we consider extreme cases and concerns, and without wanting to play into the ‘securitization’ of minorities discourse, we should be vigilant towards groups that would want to claim ‘religious minority’ rights in order to advance political, and even terrorist, objectives. Hence, there would need to be some interrogation of ‘religion’ and ‘belief’ in order to ensure it is more than a façade. The language of Capotorti’s definition itself is indicative here, in that minorities as a whole are recognized as having a sense of solidarity towards ‘preserving their culture, traditions, religion or language’. Political and militaristic objectives do not find a fit here. However, realities make this demarcation more difficult to draw and more debate and indicators may be helpful. Furthermore, there is the very question of fluidity here, as discussed in Section 4A—namely that religious communities may constitute a minority, may contain several minority groups whose identities also intersect with other characteristics or may contain a variety of persons belonging to minorities.

### *C. Religious Leadership*

Another question that requires close attention is that of religious leadership. Whereas racial and linguistic minorities—too—may have leadership structures or representatives, the frequency with which they do so and the constancy of their leadership structures is usually less rigid than that of religious leadership and the manner through which such leaders assume power is usually more familiar to wider society. That is, they often use political, economic and electoral means to gain a following, in much the same way as others seeking leadership positions in their societies. Freedom of religion or belief human rights standards have soft norms acknowledging the freedom to choose their religious leaders, priests and teachers to maintain one’s religious leadership structures;<sup>81</sup> however, this has not been effectively theorized within the minority rights regime. The ‘gap’ is that the minority rights regime goes further than freedom of religion or belief standards in requiring states to maintain the development and continuity of minority communities. In the few instances where there may be concerns regarding ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’<sup>82</sup> in relation to what particular religious leaders/leadership structures uphold, on what grounds can the state withdraw its support and commitment? Would it withdraw from its commitments in relation to the religious leader or the community as a whole? And to what extent would this prove a legitimate infringement? Another arena within which leadership structures have been acknowledged in international human rights is that of indigenous peoples. Here, we find that the Declaration on the Rights of Indigenous Peoples recognizes that ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their

<sup>81</sup> Human Rights Committee, General Comment 22 (n 21) para 4.

<sup>82</sup> International Covenant on Civil and Political Rights (n 10) art 18.3.

rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'.<sup>83</sup> It is further recognized that 'Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures'.<sup>84</sup> Nevertheless, the point of view of leaders is not considered the final word and is subject to human rights assessment but is one factor which is taken into consideration. The position taken is neither anti nor subservient. A similar balancing can serve as the foundation for developing the framework for addressing religious leaders or leadership structures.

#### *D. The Implication of Religion or Belief Laws*

A fourth complex area is that of religious or belief laws and how they fit within the human rights landscape. Compared with racial and linguistic minorities, we can generally observe that legal structures are one area where religious or belief minorities differentiate themselves from these other minorities and, therefore, the impact of this needs to be unravelled. The question of the position of human rights norms and mechanisms on religious laws relates not only to their voluntary application to individuals who wish to apply them in their daily lives, but also to those within the community who may be compelled to apply them or may be sanctioned for not doing so. It also overlaps with the first point raised above regarding the state–religion or ideology relationship. Furthermore, the question arises of the effort to enforce such religious laws on others outside the community, either through the new guise of civil law or through its enforced application—in the most extreme and concerning of contexts—for example, by insurgency movements such as Al-Shabaab or the Taliban. Here, Eide's reminders that 'minorities cannot use their religious freedom, or practice their culture, in ways which impede the equal exercise of others (this precept also applies to majorities)',<sup>85</sup> and that 'measures adopted to protect minorities [should] also respect the human rights of majorities',<sup>86</sup> offer useful touchstones.

The above discussion is merely traced in outline in an effort to acknowledge that there are specific questions that are raised in a more pronounced way in relation to religious minorities, and not ethnic and linguistic minorities, and that these are ripe for further discussion. Without such discussion, it is unlikely that religious minorities will be brought in from their de facto sidelining from the minority rights regime.

<sup>83</sup> Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/47/1 (2007) art 18.

<sup>84</sup> (n 83) art 33.2.

<sup>85</sup> Eide (n 2) 1335.

<sup>86</sup> *ibid* 1345.



## 6. *Conclusion*

This article has provided reasons to show that religious minorities have largely come to be sidelined from the minority rights regime. It has critiqued this, and outlined the reasons why this could prove detrimental to religious minorities. Having done so, it also acknowledges why religious minorities are not an easy 'fit' within the minority rights regime and outlines four reasons to pause and for caution. Nevertheless, the aim of doing so has been to propose more open debate towards overcoming such obstacles in order to re-integrate religious minorities to their rightful place and consider them, once again, within the minority rights regime.

The direction of the argument has been to consider where minority issues and freedom of religion or belief concerns coincide and trace, through a consideration of the jurisprudence of the UN Human Rights Committee, where minority rights can supplement freedom of religion or belief protections. This has not allowed the opportunity for an analysis of the ongoing challenge of where these two sets of rights should rightly be differentiated, the question of how to determine how a religious community relates to the minority framework, and where a religion or belief protection may be more extensive than a minority protection—for example, in the case of the scope of religious autonomy granted in some jurisdictions and in certain cases.