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# *The Boundaries of Religious Persecution: Refugee Law and the Limits of Permissible Restrictions on Religion*

***Samuel Cheung****
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## Abstract

The right to freedom of religion or belief has been well-established in human rights instruments since the inception of the modern era of international law. However, while inner freedom of belief has been uncontested, the ability to manifest those beliefs publicly has been made subject to limitations for certain purposes which include public safety and order, health, morality and the fundamental rights and freedoms of others. The degree to which such restrictions on religious practice may be permissible under the rubric of international human rights law has been and continues to be under debate. International refugee law has played an important role in safeguarding religious freedom, as persecution for reasons of religion is one of the five grounds enumerated in the 1951 Convention relating to the Status of Refugees. To what degree are restrictions on religious practice permissible and at what point do such restrictions rise to the level of persecution meriting international protection? An examination of the refugee jurisprudence of States adjudicating religion-based claims will help illustrate the nebulous boundaries of the definition of persecution in the context of religious practice and identify some of the factors and trends which influence refugee decision-making.

Part I will provide an overview of international refugee law as it relates to religion and describe the Westphalian context under which it was constructed. The modern era of international law was strongly influenced by wars of religion and the principle of cuius regio, eius religio – whose the rule, his the religion – which emphasized respect for national sovereignty and non-interference in religious affairs of the state as essential to international stability. International refugee law, developed largely in response to World War II and the Holocaust, attempts to balance respect for national sovereignty with humanitarian protection concerns by only applying to persons outside their country of origin. Part II will discuss refugee jurisprudence interpreting the point at which religious restrictions

* Senior Protection Cluster Coordinator at UNHCR.
Email: samdcheung@hotmail.com

constitute a well-founded fear of persecution and highlight issues which form the boundaries of persecution. How does refugee law distinguish discrimination, which does not merit international protection, from persecution? Should refugees be able to avoid the prisoners' dilemma of either renouncing their identity or beliefs or face persecution and should the imposition of a moral view constitute serious or grave harm? What deference should be given to religious States who advocate a certain religion as an affair of the State, whether through Shari'a or other religious laws? Can persecution be caused by non-State actors or religious extremists and is non-State sectarian violence a matter for refugee law? Part III will reflect on the inextricable links between religion and politics, economics and culture in light of the fact that religion demands practice by adherents and dictates standards of social conduct. It will discuss the relationship between States and religion and consider whether and how international refugee law promotes religious toleration and pluralism.

**Keywords:** Refugees; Religious Persecution; Restrictions; Pluralism.

## INTRODUCTION

The right to freedom of religion or belief has long been acknowledged as one of the most basic and core of human rights since the inception of the modern era of international law. At the same time, it cannot be denied that freedom of religion or belief is also one of the most controversial, stoking up inherent tensions between fanatical belief and notions of relativism, theocratic regimes and atheist States and issues of public morality, sovereignty and the separation between State and religion. The underlying difficulty in dealing with the freedom of religion or belief has resulted in a conditional right wherein the inner freedom of belief has been uncontested, but the ability to manifest those beliefs publicly has been made subject to limitations for certain purposes which include public safety and order, health, morality and the fundamental rights and freedoms of others.[1] The degree to which such restrictions on religious practice may be permissible under the rubric of international human rights law has been and continues to be under debate.

In this uncertain milieu, it is undoubted that refugee law has historically played an important role in safeguarding religious freedom through the principle of *non-refoulement* (non-return) and ensuring the rights of refugees in relation to religious persecution. Indeed, persecution for reasons of religion was one of the five foundational grounds enumerated in the 1951 Convention relating to the Status of Refugees[2] and has always been accorded a special place in refugee protection. However, there are still significant unanswered questions as to the degree to which restrictions on religious practice are permissible and the point at which such restrictions rise to the level of persecution, meriting international protection. An examination of the historical context in which refugee law was formed, current international instruments and the jurisprudence of States adjudicating religion-based claims will help illustrate the nebulous boundaries of the definition of persecution in the context of religious practice and identify some of the issues which are raised by refugee decision-making.

Part I will examine the historical context in which international refugee law was formed and, in particular, how wars of religion and early concepts of asylum from religious persecution influenced the development of the refugee protection regime. In its earliest stages, both modern international law and, ultimately, modern refugee law,

1. See: Article 18(3), International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. [hereinafter 'ICCPR']
2. See: The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter '1951 Convention']

were deeply influenced by wars of religion and the aspiration of religious tolerance as a means toward a stable international order. The principle of *cuius regio, eius religio*, which emphasized non-interference in religious affairs of the state as essential for international stability, enshrined in international law a respect for national sovereignty that would later delimit refugee protection along State borders. In time, the State practice of asylum developed in parallel to the growth of sovereign nation States and began to be framed as a right of the asylum-granting State based on a priority of territorial jurisdiction over the claims of a sovereign upon its subjects. As such, the justification for asylum became more and more dependent on the severing of the relationship between citizen and State of origin and the basis for protection more reliant on its status as a neutral humanitarian, as opposed to political, act.

Part II will discuss the inherent relativity embodied in the language with which current international human rights and refugee instruments deal with freedom of religion or belief. First, Article 18 of the Universal Declaration of Human Rights[1] and Article 18 of the International Covenant on Civil and Political Rights[2] both specifically permit derogations from the right to manifest one's religion or belief. Second, the absence of a consistent or universally accepted definition of persecution under the 1951 Convention has resulted in the adjudication of religion-based claims being even more tenuous when addressing permissible limitations on religious practice. With both human rights law and refugee law permitting significant subjectivity in their treatment of restrictions on religious freedom, refugee law has tiptoed around inevitable tensions between principles of non-interference in religious affairs and humanitarian protection concerns in a manner which reflects asylum's historical roots and constraints. This has been achieved by means of refugee law's often bewildering distinction between persecution, which merits international protection, and discrimination, which does not. In view of the human rights norm absolutely prohibiting discrimination on the basis of religion or belief, there are fundamental questions around the degree to which refugee law is intended to reinforce the religious rights contained in international human rights law.

Part III will discuss the apparent inconsistencies in refugee jurisprudence relating to restrictions on the right to religion or belief and the threshold at which international protection is merited. For

1. Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71(1948) [hereinafter 'UDHR'].
2. ICCPR, Article 18(3), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

example, cases involving apostasy, total and partial bans on religions or religious activities all raise issues concerning the continuum between preferential treatment toward a particular religion or envisaged public morality and when such measures become tantamount to forced compliance. In such cases, how does refugee law invoke ICCPR Article 18 in addressing whether the imposition of a moral view constitutes serious or grave harm and whether refugees should be able to avoid the prisoners' dilemma of either renouncing their identity or beliefs or face persecution? Other cases involve multiple dimensions where religious claims overlap with issues relating to gender roles, social mores, inter-religious relationships and the acts of non-state agents. With these claims, refugee law has concocted a myriad of ways to apportion responsibility using other Convention grounds or State complicity in a method which belies its unease in dealing with religious matters.

## 1. REFUGEE LAW IN ITS RELIGIOUS CONTEXT

The refugee scholar Guy S. Goodwin-Gill observed that religious intolerance and persecution have been prevalent in human history for many ages, from the revocation of the Edict of Nantes and the oppression and massacre of the Huguenots in the seventeenth century, the pogroms of Jews in Russia and Armenians in Ottoman Turkey in the late nineteenth century, and large-scale persecution of the Jews under the hegemony of Nazi and Axis powers up to 1945, to more recent examples of Jehovah's Witnesses, Moslems, Baha'is, Ahmadis and believers of all persuasions in both totalitarian and self-proclaimed atheist States.[1] Indeed, it is not difficult to identify other examples of religious intolerance and persecution common throughout history, with members of various faiths playing the role of victim or perpetrator at some point in their histories. The issue of religious intolerance has multiple dimensions and involves more than merely whether a religion holds its own beliefs to be correct and other incompatible beliefs to be incorrect. From a political dimension, authorities in power have also often understood religious uniformity to be the foundation of a stable society and enforced it on that basis.[2] As an intended or unintended consequence and for various ideological, cultural and political reasons, religion or belief has "long been the basis upon which governments and peoples have singled others out for persecution." (Goodwin-Gill, 1996: 44)

It is thus important to recognize that the modern state system of international law and, ultimately, modern refugee law, were both formed in this historical context of religious intolerance, inquisitions,

1. See: Goodwin-Gill, 1996: 44.
2. See: Davis, 2002: 217, 220.

religious wars and persecution. Closer analysis reveals that both international law in general, and refugee law in particular, were deeply affected by the then prevailing understandings of how to achieve religious tolerance as a means toward international stability. Hence, the modern refugee protection regime finds many of its roots, as well as its structural advantages and limitations, in the paradigm of religious tolerance which was set out during those historical periods of religious wars.

### 1.1. Wars of Religion and Non-Interference in Religious Affairs

The early stages just prior to the formation of the modern state system of international law were marked particularly by periods of religious wars which were often the result of authorities who pursued religious uniformity as a means toward enforcing State hegemony. In the process, large-scale persecution frequently occurred which precipitated the flight of large groups of religious minorities. Following the Protestant Reformation in the 1500s, Lutherans and Catholics waged continuous struggles over which faiths would be practiced under the Holy Roman Empire. These were partially resolved by the Peace of Augsburg Treaty, signed in 1555, which first established a policy of *cuius region, eius religio*, meaning 'whose the ruler, his also the religion.' This policy, implying that the religion of the king or other ruler was also the religion of the people, was a revolutionary advance against previously prevailing theories of enforcing religious uniformity and established for the first time official tolerance within the domain of the Holy Roman Empire by permitting territorial princes the right to prescribe local worship.

However, the Peace of Augsburg Treaty only temporarily ended hostilities and tensions erupted again in the 1600s with what would be called the Thirty Years' War. After thirty more years of bitter wars involving Calvinists, Lutherans and Catholics, the religious conflicts were negotiated and settled in 1648 and culminated in a document which is widely considered the starting point for modern principles of international law, the Peace of Westphalia. Although not a religious document per se, the Peace of Westphalia exemplified a growing movement toward religious tolerance at the time and explicitly included the principle of *cuius region, eius religio* as one of its main tenets, offering for the first time limited protection to religious minorities. Hugo Grotius, widely considered a founding father of international law as well as a major influence on the Peace of Westphalia, began to set forth in his seminal work, *De Jure Belli ac Pacis,* rules which were to govern international society and standards on the use of force. Influenced by his witnessing of many years of conflict between princes, all of whom claimed theirs was the

authorized dominion of God, Grotius was persuaded that non-interference in the religious affairs of the State was essential to ensure international stability. According to Grotius, in the same sense that religious tolerance depends upon respect for international law, a stable international order depends upon religious toleration.[1]

The Peace of Westphalia will be remembered primarily for establishing the principles of sovereignty of States and political self-determination in the modern system of international law. However, it should not be forgotten that, in the aftermath of a century of religious wars, these modern principles were established in large part as a result of the pursuit of religious tolerance as a means toward a stable international order. However, what is particularly peculiar about this achievement is that the proposed solution toward religious tolerance was embodied in *cuius region, eius religio* – permitting local rulers to prescribe the religion of the people without interference from the outside – meaning, religious tolerance as it was conceived at the time of the Peace of Westphalia was expressed as non-interference in the religious affairs of the State. In establishing a framework toward achieving religious tolerance, the Peace of Westphalia simultaneously dictated that non-interference in the religious affairs of the State would be part and parcel with respect for national sovereignty as preconditions for a stable international order. Hence, it can be argued that while the Peace of Westphalia furthered religious tolerance by establishing that external actors may not violate political boundaries to interfere in the religious affairs of other States, it also resulted in a structural limitation such that States are free to suppress the religious practices of their own people. Religious liberty thus became caught at the border between States at the expense of religious minorities within those very borders.[2]

### 1.2. Early Concepts of Asylum and the Exercise of Sovereignty

Not long after the Peace of Westphalia, what may be considered the first refugee migration recognized as such in the modern state system occurred when King Louis XIV revoked the Edict of Nantes in 1685. The revocation of a proclamation which had granted French Calvinists, called Huguenots, substantial rights and toleration as religious minorities under Catholic rule, prompted the flight of thousands of Huguenots from France despite harsh punishments for those who attempted to emigrate. Other European countries such as England, Germany, the Dutch Republic, Switzerland and Denmark welcomed the arriving Huguenots at that time in an ad hoc fashion primarily because of religious kinship or

1. See: McDougal et al., 1980: 63, in: Adams, 2000.
2. See: Adams, 2000: 33.

because they recognized that those wealthy enough to travel would strengthen society.[1] In this budding refugee protection environment, there was still no coherent doctrinal notion of asylum nor any uniformly recognized status by the name of 'asylum' other than certain hospitalities and protections accorded by princes.[2]

It is well acknowledged that early concepts of asylum date back to antiquity and references range from the historical Greek and Roman periods to religious documents such as the Mahabharatha and the Qur'an. For example, the *Shari'a* calls upon every Muslim, through the institution of *aman* (safeguard), to grant asylum and protection to any non-Muslim stranger fleeing persecution in time of war, who takes refuge in the territory of Islam *(dar al-islam)*. (Arnaout, 1987: 7) After the inception of the modern international legal system with the Treaty of Westphalia in 1648, this early concept of asylum began to develop into its modern form and would undergo a radical change that paralleled growing concepts of sovereign nation States and territorial jurisdiction and supremacy. For example, as the concept of sovereignty began to take shape, it became more and more necessary to reconcile the principles of complete authority of a sovereign over its nationals with the ability of nations to grant asylum.[3] No longer an uncontroversial discretionary act of hospitality or merely a place of refuge for exiles, asylum began to be framed as the right of a State to provide protection to foreign nationals against the exercise of jurisdiction by another State. The International Court of Justice described the practice of asylum as:

> a derogation from the sovereignty of [the local] State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. By adapting to a system of bounded sovereign authorities, asylum also began to take on a more limited quality, with protection derived from sovereign boundaries. (Kennedy, 1986)

As such, it became all the more important that asylum reconcile its political or humanitarian character. In order to escape characterization as a purely political act, the granting of asylum found its theoretical basis increasingly in two justifications: the severing of the relationship between the State of origin and the citizen and the priority of territorial jurisdiction over other claims of

1. See: Barnett, 2002:238.
2. See: Kennedy, 1986.
3. See: Goodwin-Gill, 1996: 173.

a sovereign upon its would-be subjects.[1]

Modern refugee law as it developed in the twentieth century subsequently calcified the concept of asylum as the right of States to provide refuge to exiles based on the law of State responsibility. After several iterations at refugee protection which initially defined temporal and specified groups of protection, it required the aftermath of two World Wars, a mass exodus of refugees fleeing the Bolshevik regime and the persecution of Jews in Nazi Germany for international consensus to finally recognize that refugees would be a continuing issue. In 1950, the United Nations High Commissioner for Refugees was established and the 1951 Convention finally set about agreeing on a universal definition of refugee. During the drafting sessions for the 1951 Convention, the Jews in Nazi Germany were used a model for the idea of a persecuted refugee[2] and the issue of religion was acknowledged as an issue of great importance, perhaps more so than any of the other enumerated grounds, as religion "is the only article in the convention where treatment is "at least as favorable' as that accorded to nationals of the contracting states is provided for." (The Refugees Convention, 1951: 42-43)

Nevertheless, the concept of sovereign nation States and territorial jurisdiction and supremacy had grown significantly and now formed the basis for nearly all international affairs. The Charter of the United Nations, which was drafted in 1945 shortly before the 1951 Convention, establishes in Article 2, paragraph 7, that "nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the Charter."[3] The 1951 Convention was no exception. As such, the 1951 Convention articulated a definition of refugee which balanced respect for national sovereignty with humanitarian protection concerns by only applying to persons outside their country of origin. As a result, asylum was fixed in its more limited quality with the international modern legal system entrenching the concept of refugees and refugee protection within the territorial notion of boundaries.[4]

If asylum were characterized as a political or morally arbitrary act contrary to principles of sovereignty and non-interference, the entire refugee regime would be open to debate. As an unavoidable intervention against the exercise of jurisdiction of the State of origin,

1. See: Kennedy, 1986.
2. See: Samahon, 2000.
3. See: Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
4. See: Lee, 1996: 27, 30.

modern refugee law already began to feel the strain of its position and laid its basis in the law of State responsibility. Indeed the entire refugee regime was premised on the law of State responsibility and aimed at the provision of protection to those whom state protection had been withdrawn or the withholding of diplomatic facilities such as travel documents and consular representation. (Turk and Nicholson, 2005: 40) Intervention would be justified by the severing of the relationship between the State of origin and the citizen and the priority of territorial jurisdiction over other claims of a sovereign upon its would-be subjects. However, insofar as the grant of asylum reflects a judgment that the asylum-seeker has suffered harms as a result of the action or inaction of the State, then asylum can be considered a political act. Those who espouse a political view of asylum emphasize the fact that its historical function was to protect unfortunates from specifically political harms, and granting asylum to them communicated condemnation of their state of origin's political wrongdoings.[1] As such, it became essential that the grant of asylum be construed as a neutral, purely humanitarian act universally justified by the lack of protection afforded by the State of origin. By 1967, it was necessary for the UN General Assembly to state by resolution that: "[t]he grant of asylum by a State is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any state."[2] The commentator Atle Grahl-Madsen writes: "[A] finding by the authorities of one State to the effect that persecution is taking place in the territory of another State, cannot be construed as a censure on the government of the latter State, and that such a finding does not constitute any interference or intervention in the domestic affairs of that State." (Grahl-Madsen, 1972: 27) Various regional instruments concur in supporting the peaceful nature of asylum.[3]

Modern refugee law cannot escape the tenuous position it has created for itself: it must maintain its character as a neutral humanitarian act filling a vacuum created by the withdrawal of protection by the State of origin without crossing the line into interference or condemnation of a State's domestic affairs. Certain measures, such as forcible expulsion of an ethnic minority or an individual, will clearly evidence a severance of the normal relationship between citizen and State and justify the grant of asylum on the basis that the persecuted clearly lacks the protection of their country of origin.(Goodwin-Gil, 1996: 69) However, other cases may

1. See: Price, 2004: 281.
2. Declaration on Territorial Asylum, G. A. Res. 2312 (II), 22 U.N. GAOR, Supp. No. 16, 81, U.N. Doc. A/6716 (1967),
3. See e.g. 1969 Organization of African Unity Convention, 1000 U.N.T.S. 46, Art. II.; 1977 Council of Europe Committee of Ministers Declaration on Territorial Asylum; 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc. 10, rev. 1, at 190-93.

be less clear and the relationship between persecution and lack of protection will be less evident. Despite attestations to the contrary, where it is not as clear that the relationship between citizen and State has been severed by the lack of protection or where it is ambiguous that exercising jurisdiction over the national of another state is a purely humanitarian act, there will be the propensity to consider implicit in the recognition of certain individuals as refugees a condemnation on the religious practices of a State or a critique of the human rights situation of a particular country. In the context of the interpretation of permissible restrictions on religious practice and particularly in light of the historical context which conceived of religious tolerance in terms of non-interference, despite the fact that refugee law clearly makes no intervention unless persons are beyond the borders of their country of origin, modern refugee law still must continually strike a fine balance between neutral humanitarian protection and political human rights criticism and/or intervention.

## 2. THE ROLES OF HUMAN RIGHTS LAW AND REFUGEE LAW VIS-À-VIS RELIGIOUS PERSECUTION

There is an inherent relativity contained in current international instruments dealing with freedom of religion or belief that make it difficult for refugee law to maintain a consistent approach toward religious persecution, and in particular, permissible limitations on religious practice. First, the underlying difficulty in dealing with the freedom of religion or belief has resulted in a conditional right wherein the inner freedom of belief has been uncontested, but the ability to manifest those beliefs publicly has been made subject to limitations for certain purposes which include public safety and order, health, morality and the fundamental rights and freedoms of others.[1] Second, the absence of a consistent or universally accepted definition of persecution under the 1951 Convention has resulted in the adjudication of religion-based claims being even more tenuous when addressing permissible limitations on religious practice.

With both human rights law and refugee law permitting significant subjectivity in their treatment of restrictions on religious freedom, it is no wonder that academics and States have been inconsistent in their treatment of religious-based refugee claims. With these issues in mind, the fundamental question is what role refugee law plays in safeguarding religious freedom and to what degree refugee law is intended to reinforce the religious rights contained in international human rights law?

1. See: ICCPR, Art. 18.

### 2.1. The Derogable Right to Religious Practice

Article 18 of the UDHR addresses the right to freedom of religion, belief and conscience in stating, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[1] This right was incorporated as Article 18 in the ICCPR, which states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. (ICCPR, Art. 18)[2]

As is evident under the ICCPR, inner freedom of thought, conscience and religion is uncontested and not subject to any limitation which would subject a person to forced compliance or coercion. It should be noted that the difference in language between the UDHR's "freedom to change his religion or belief" and the ICCPR's "freedom to have or to adopt a religion or belief" in Article 18(1) was a result of a compromise by ICCPR delegates particularly to Islamic States who feared that the language in the UDHR may be used to encourage missionary or atheistic activities.[3] Nevertheless, as a baseline, Article 18 of the ICCPR explicitly affirms inner freedom of thought, conscience and religion. The Human Rights Committee in its

1. See: UDHR, Art. 18
2. See: Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, UNGA res. 36/55, 25 Nov. 1981, Art. 1 [hereinafter 'Religion Declaration'].
3. See: Nowak, 1993: 312.

General Comment No. 22 notes that the freedom 'to have or adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views.[1] Methods of coercion which are prohibited include use of 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.[2]

Whereas inner freedom of belief is uncontested, Article 18(3) acknowledges permissible limitations on the freedom to manifest one's religion or belief, as long as such limitations "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Reflecting the limitations language in other provisions of the ICCPR with the exception that it does not permit as many types of interference, such as national security, Article 18(3) is to be strictly interpreted and the list of purposes is exhaustive.[3] Limitations are subject to a level of scrutiny as to their proportionality and must be directly relevant to their purpose.[4] In 1984, thirty-one international law experts from seventeen countries clarified in the Siracusa Principles on the Limitations and Derogation in the ICCPR that any limitation imposed on one's freedom to manifest one's religion, or on other derogable rights in the Covenant, must be justifiably necessary and must constitute a response to a pressing public or social need, pursue a legitimate governmental purpose, and be appropriate to that purpose.[5]

The Human Rights Committee lists some possible restrictions which may be permissible, which include "measures to prevent criminal activities (for example, ritual killings), or harmful traditional practices and/or limitations on religious practices injurious to the best interests of the child, as judged by international law standards. Another justifiable, even necessary, restriction could involve the

1. See: Human Rights Committee, General Comment No. 22, adopted 1993, UN Doc. HRI/GEN/1/Rev.1 (1994), paragraph 5. [hereinafter 'HRC General Comment No. 22']
2. See: Human Rights Committee, General Comment No. 22, adopted 1993, UN Doc. HRI/GEN/1/Rev.1 (1994), paragraph 5.
3. See: Human Rights Committee, General Comment No. 22, adopted 1993, UN Doc. HRI/GEN/1/Rev.1 (1994), paragraph 8.
4. "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner." Human Rights Committee, General Comment No. 22, adopted 1993, UN Doc. HRI/GEN/1/Rev.1 (1994), paragraph 8.
5. United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

criminalization of hate speech, including when committed in the name of religion.[1] However, beyond these bare minimums, any analysis of the limitations on religious practice will necessarily entail a subjective assessment of the legitimacy of the restriction based on its purposes and the means of its imposition. For example, the Siracusa Principles define "public safety" as protection "against danger to the safety of persons . . . or their physical integrity, or serious damage to their property" and define "public order" as the "sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded." Limitations on "public morals" must be "essential to the maintenance of respect for the fundamental values of the community." Despite these further articulations, it is obvious that the derogations to ICCPR Article 18 are subject to a wide range of subjective interpretation. It is fair game as to what constitutes 'fundamental values of the community,' or 'fundamental principles on which society is founded' and most all purposes except for the most insidious could be construed as legitimate by some tribunal.

### 2.2. The Malleable Definition of Persecution

In addition to the derogable right to religious practice under human rights law, adjudication of religion-based claims is made even more tenuous by the somewhat malleable definition of persecution contained in modern refugee law. The 1951 Convention defines a refugee as:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country." (1951 Convention, Art. 1(A).)

Neither the 1951 Convention nor any other international instruments contain a definition of 'persecution.'[2] The *travaux preparatoires* around the drafting of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process.[3] However,

1. HRC General Comment No. 22, para. 8.
2. Although persecution is defined in the 1998 Statute of the International Criminal Court, its definition there is for purposes of defining a crime of a particularly serious nature which warrants international criminal jurisdiction and does not have any relevance to defining persecution in refugee law. See Turk and Nicholson, 2005: note 21, p. 38.
3. See: UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06* (28 April 2004), at para. 4.

while the *travaux preparatoires* reveal lengthy debates over the definition of a refugee, there is little discussion of the kind and degree of persecution necessary to qualify for refugee status. The UNHCR Handbook acknowledges that "[t]here is no universally accepted definition of persecution and attempts to formulate such a definition have met with little success." (UNHCR, 1992: para 51)[1]

Some academics have attempted to formulate more specific guidelines for what constitutes persecution. For example, James Hathaway outlines an accountability-based view that persecution is "the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community." (Hathaway, 1991: 112) Grahl-Madsen articulates persecution as: "acts or circumstances for which the government is responsible, that is, … acts committed by the government or organs at its disposal, or behavior tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State."(Grahl-Madsen, 1972: 189) The majority of academics, however, place less emphasis on the complicity or accountability of the State in a persecution analysis and instead on an overall protection standpoint.[2] Volker Turk and Frances Nicholson note that "the lack of definition [of persecution is] indicative of the deeper rationale behind the very interpretation of persecution… attempts to define it… could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind."(Turk and Nicholson, 2005: 39) As Goodwin-Gill notes: "[t]here being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution."(Goodwin Gil, 1996: 69) Instead, the lack of a legal definition of persecution "is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution be encompassed by the term."[3] Evidence of this non-exclusionary intent of the drafters of the 1951 Convention is also supported by the inclusion of the social group category in Article 1(A), which was proposed by the Swedish delegation during the Conference of Plenipotentiaries in order to stop a possible gap in the coverage of the Convention. It may be that broader humanitarian purposes guided the drafters of the 1951 Convention to cast a wide

1. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees:* UN doc. HCR/IP/4/Eng/REV.1, Re-edited, Geneva, Jan. 1992 (1979) [hereinafter 'UNHCR Handbook'] para. 51.
2. See: Moore, 2001.
3. See: UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* (April 2001), para. 16.

net for those suffering persecution in any and all forms.

However, what is also clear is that modern refugee law did not intend to provide international protection for every minor inconvenience that an individual may suffer. There is a degree of harm required before international protection is merited, although the specific degree may not be abundantly clear. Persecution is connected with unacceptable, unjustified, abhorrent infliction of harm.[1] It is the result where measures harm the inherent dignity and integrity of a human being to the degree considered unacceptable under prevailing international standards. What particular level of harm that means also requires subjective judgments and a 'wide margin of appreciation' is left to States interpreting this fundamental term, and practice reveals no coherent or consistent jurisprudence.[2] In the context of religious persecution, this is made all the more difficult due to the fact that crimes against the conscience are naturally harder to prove than physical harms such as torture. The core meaning of persecution clearly includes the threat of deprivation of life or physical freedom. (Grahl-Madsen, 1972: 193) The UNHCR Handbook states that a "threat to life or freedom… is always persecution" and "[o]ther serious violations of human rights" would also constitute persecution.[3] Beyond that, however, assessments of persecution must be made from case to case considering the totality of the circumstances, including the individual's history and the restrictive measures. Persecution remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship or freedom of movement.[4]

### 2.3. Discrimination and Persecution

With the inherent subjectivity permitted in the uncertain scope of the derogable right to freedom of religion or belief in human rights law as well as the malleable definition of persecution in refugee law, modern refugee law has delicately tiptoed around the inevitable clashes between non-interference in religious affairs and humanitarian protection concerns by means of an often times bewildering distinction between discrimination and persecution.

Religion-based refugee claims are fraught with issues of

1. See: Aleinikoff, 1991.
2. See: Goodwin Gil, 1996: 67-68.
3. See: UNHCR Handbook, para.51.
4. See: Goodwin Gil, 1996: 67-68.

discrimination against religious minorities through various restrictions, limitations or penal measures against disfavored groups. Such discrimination on the basis of religion is prohibited under international human rights law. Article 2 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides that "no one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs."(Religion Declaration, Art. 2) The Declaration also distinguishes "intolerance based on religion or belief" from "discrimination based on religion or belief," apparently addressing systemic cruelty from members of another religion, from members of a particular sect or division of the same religion, and from a state or state religion.

However, the threshold for what is desirable as a human rights norm differs from the threshold required to merit international protection under refugee law. Refugee law dictates that international protection is merited only for cases of a well-founded fear of persecution and not for discrimination, despite the absolute prohibition of discrimination in human rights law. The UNHCR Guidelines put it succinctly: "Religion-based claims often involve discrimination. Even though discrimination for reasons of religion is prohibited under international human rights law, all discrimination does not necessarily rise to the level required for recognition of refugee status."(UNHCR Guidelines on Religion, para. 16) The UNHCR Handbook expounds on the differences between discrimination and persecution:

> Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned. (UNHCR, 1992: paras. 54–55)

As part of the malleable definition of persecution, an evaluation of whether discrimination amounts to persecution is inherently a subjective determination, based on whether the discrimination is of a grave enough nature in the light of all the circumstances. The existence of discriminatory legislation alone would not normally constitute persecution, although such legislation can be indicative depending on its implementation and the effect on the particular individual. Economic measures which are, for example, imposed in order to "destroy the

economic existence" of a particular religious group may constitute persecution.[1] Other examples would include serious restrictions on the right to earn a livelihood, practice religion or access normally available educational facilities or health services. Where a person has been the victim of a number of discriminatory measures of this type, a claim will be stronger as there is a cumulative element to discrimination amounting to persecution.

How does one explain the discrepancy between the norms set out in human rights law, such as the absolute prohibition on discrimination based on religion, and the relatively higher, although somewhat subjective, threshold of persecution in refugee law? This question begs another: to what degree is refugee law intended to reinforce the religious rights contained in international human rights law? On the one hand, it is clear that human rights law is supposed to set standards which help establish what might constitute persecution under refugee law. UNHCR notes that "the on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR Handbook, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element."[2] Thus, a determination of whether restrictions or limitations on religious freedom rise to the level of persecution should naturally take into account relevant international human rights standards, including permissible limitations on the exercise of religious freedom as set out in ICCPR Article 18. On the other hand, refugee law is a body of law which, while overlapping with, is in many ways quite distinct from the body of human rights law. While human rights law developed as a means toward international normative behavior-setting, modern refugee law developed as a somewhat pragmatic, operational solution to providing protection to individuals forced to migrate beyond their borders where protection is lacking in the country of origin. Deborah Anker notes: "The function of the international human rights regime is to judge whether states are fulfilling their duties under internationally agreed upon human rights norms and, through monitoring and publicizing, to deter future abuse: in short, to change the behavior of states… Refugee law provides surrogate national protection to individuals when their states have failed to fulfill fundamental obligations, and when that failure has a specified discriminatory impact… refugee law is not aimed at holding states

1. See: UNHCR, 1992: paras. 54–55.
2. See: UNHCR, Interpreting Article 1 of the 1951 Convention relating to the Status of *Refugees* (April 2001), para. 17.

responsible; its function is remedial."[1] In short, he two bodies of law have very different operating models.

As refugee law becomes increasingly intertwined in international norm-setting objectives of international human rights law, it risks losing its character as a non-political humanitarian act or becoming enmeshed in condemnation of a State's domestic activities. There has been some argument that the 1951 Convention, in limiting international protection to a relatively higher threshold of 'persecution,' has used a morally arbitrary term and already deviated from the humanitarian principles of the early phase of refugee law. As a result, it has distorted asylum into a political instrument to be wielded against another State, rather than a form of humanitarian assistance focused exclusively on addressing the urgent needs of refugees. (Price, 2004*:* 281)

It is indisputable that internationally accepted norms on freedom of religion or belief should inform the determination on whether restrictions constitute persecution. Karen Musalo argues that, if restrictions would not be permissible under ICCPR Article 18(3), there should be a presumption that the limitation or persecution constitutes persecution.[2] Additional factors in the analysis would focus on issues such as the importance or centrality of the particular act in the religion and the subjective importance of the act to the individual given his or her history and background. For example, UNHCR Guidelines note that "[w]here the restricted practice is not important to the individual, but important to the religion, then it is unlikely to rise to the level of persecution without additional factors. By contrast, the restricted religious practice may not be so significant to the religion, but may be particularly important to the individual, and could therefore still constitute persecution on the basis of his or her conscience or belief." (UNHCR, Guidelines on Religion, 2004: 16) In looking particularly at the subjective effects of such restrictions on the particular individual, refugee law is able to balance slightly the political critique which confounds refugee protection with human rights norm-setting. Refugee law is a remedial measure focusing on the individual's experience of persecution. Nevertheless, the more refugee law imports from human rights law, the more it is prone to being interpreted as a condemnation on State practices. The fact remains that the question of encouraging normative behavior on the part of States of origin is intrinsically linked to the degree to which refugee law reinforces human rights norms. To the degree that refugee law can remain true to its neutral humanitarian character, it will play an important role in safeguarding religious

1. See: Deborah Anker, 2002.
2. See: Musalo, 2002.

freedom. However, as it continually struggles to maintain its non-political character, refugee law will tiptoe around tough questions over the permissibility of restrictions on religious freedom and the inevitable clashes between non-interference in religious affairs and humanitarian protection concerns.

## 3. REFUGEE JURISPRUDENCE AND RELIGIOUS PERSECUTION

Religious intolerance and persecution assume a variety of forms, such as official bans on specific religions or restrictions on certain activities, whether through general application or specifically targeted on a certain faith or community. Acts of religious intolerance and persecution can also committed by non-State agents, such as religious extremists or community members in a particular sect. Unfortunately, the refugee jurisprudence relating to such cases implicating the right to freedom of religion or belief has been fraught with apparent inconsistencies which betray the unease with which decision-makers approach sensitive matters such as religious affairs. Although a thorough review of refugee jurisprudence is beyond the scope of this paper, a selection of typical cases highlights just how nebulous are the boundaries of the definition of religious persecution and the threshold at which international protection is merited. The inconsistencies also illustrate the constraints which refugee law faces in balancing its character as a neutral humanitarian, as opposed to political, act that does not cross the line into interference in the religious affairs of a State.

### 3.1. The Continuum from Public Morality to Forced Compliance

Cases in several jurisdictions have involved punitive laws, total bans or restrictions on the activities of a particular religion in the name of public morality, or as is often the case, in furtherance of an official State religion. The decisions on these cases raise issues concerning the continuum between official religious advocacy or preferential treatment toward an envisaged public morality and when the imposition of a moral view through such measures constitutes serious or grave harm sufficient for a finding of persecution.

At their most extreme, apostasy and anti-blasphemy laws which may be enforced with punishments as severe as the death penalty have been widely recognized by courts to constitute a well-founded fear of persecution. In the United States, the case of Bastanipour v. INS involved an Iranian who claimed that, while in the United States serving a sentence for drug trafficking, he had converted to Christianity from Islam and risked death upon return to Iran due to

the fact that apostasy was a capital offense. Dismissing questions of the sincerity of the applicant's beliefs as well as uncertainty surrounding the implementation of the punishment in Iran, the court held liberally that, based on the possibility his professed adherence to a faith could jeopardize his safety, the applicant had a well-founded fear of persecution.[1] In New Zealand, Refugee Appeal No. 1039/93 involved a Malaysian domestic law relating to apostasy and the marriage of a Muslim male to a non-Muslim female. The applicant was a Muslim by birth and was governed by Shariah Law which forbids renunciation of Islam. The applicant now considered himself a Christian, although without any attachment to a specific church. The RSAA went into an in-depth analysis of ICCPR Article 18 and, acknowledging that there was no evidence that renunciation of Islam is punishable by death in Malaysia, found that the applicants were refugees in light of the "insuperable difficulties placed in the way of those in Malaysia who wish to renounce Islam." (Refugee Appeal No. 1039/93 (1995))

Somewhat less severe than apostasy laws are restrictive bans on a particular religion. In the United States, courts have held that "it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it." (Bucur v. INS, 109 F.3d 399, at 405 (7th Cir. 1997)) However, even where there are total bans on particular religions, tribunals have struggled on whether persecution requires that, in effect, the individual applicant is unable to practice his or her religion even in private or secret. A Canadian case, Irripugge, Mendis & Qiu v. Canada [2] is indicative of the analysis. Irripugge involved an applicant from China who was rejected on first instance because, although the practice of any religion in China was highly restricted, he was able to practice in secret and in a manner which never came to the notice of the authorities. The Federal Court quashed the decision, in part acknowledging that the right to freedom of religion includes not only the freedom of inner belief articulated in ICCPR Article 18(1), but also the freedom to demonstrate one's belief in public or private. Nevertheless, other courts have looked very closely at intrusion into private homes or the arrests of members as evidence that a total ban was being implemented and hence, would be tantamount to forced compliance. The Canadian case of Okyere-Akosah v. Minister of Empoyment and Immigration[3] involved an applicant from Ghana who was a member of Council of Elders in the Nyame Sompa Church, which was banned along with three other

1. See: Bastanipour v. I.N.S., 980 F.2d 1129 (7th Cir. 1992).
2. Irripugge, Mendis & Qiu v. Canada (Minister of Citizenship and Immigration) [2000] Docket: IMM2784-98; IMM-2969-98; IMM-2089-98.
3. Okyere-Akosah v. M.E.I. [1992] 33 A.C.W.S. (3d) 1119.

churches, including the Church of Jesus Christ of Latter Day Saints (the Mormons) and the Jehovah's Witnesses at the same time as a new law requiring registration of all religious groups. Members of the church had been arrested and government agents had come to the applicant's house twice to arrest him. The Federal Court allowed an appeal, dismissing the argument that the government was merely controlling the proliferation of various cults and sects, and held that the Board had not considered 'the totality of evidence' when it found the facts insufficient to support a claim of religious persecution. In New Zealand, Refugee Appeal No. 300/92 involved an Iranian who had converted to the Hare Krishna movement. The applicant had been involved in underground meetings, when various leaders and gurus had been arrested and imprisoned. In similarly finding a well-founded fear of persecution, the RSAA held: "[i]t is the ... total inability to practice his religion which distinguishes this case from those where the practice of a religion is possible, but subject to the qualification that proselytizing is forbidden." [1]

Where restrictions on religion fall short of a total ban on practice, or which allow adherence to a religion subject to certain restrictions on activities, courts have been more reluctant to find persecution. A United Kingdom case, Ahmad v. Secretary of State,[2] involved a group of applicants from Pakistan, all members of the Ahmadi community, who claimed that they had suffered physical violence from mullahs and could no longer look to the police for protection. In Pakistan, Ordinance XX of 1984 broadly prohibited Ahmadis from "indirectly or directly posing as a Muslim." The Court of Appeal ruled that generally individuals could not qualify for protection if they intentionally violated laws regarding restrictions on their religious practice: "a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws." In another Ahmadi case from New Zealand, Refugee Appeal No. 72350/2000, an applicant was limited in education and employment possibilities and had suffered beatings and threats by fellow students without protection from the police. In reference to the permissible derogations language of ICCPR Article 18(3), the RSAA affirmed the public order purpose of Ordinance XX, stating "it appears clear from all the country information that is available that any attempts to propagate or manifest the Ahmadi religion in Pakistan in the face of the overwhelming Sunni Moslem majority is likely to provoke breaches of the peace and is likely in the minds of that

1. Refugee Appeal No. 300/92 (1994).
2. Ahmad and Others v. Secretary of State for the Home Department [1990] Imm AR 61 (CA).

majority to be detrimental to their fundamental rights in relation to their religion" The RSAA further stated: "[w]e are unable to find that the restriction upon the manifestation of Ahmadi religion in Pakistan amounts to persecution given the social conditions prevailing there and given the qualification imposed by Article 18(3) of the International Covenant on Civil and Political Rights on the right to freedom of religion… Ahmadis were subjected to restrictions in the way that they were permitted to manifest their religion ... they were not prevented from practicing their religion'.[1]

Where restrictions on religious practice have involved the right to proselytize, courts have been inconsistent, at times determining that such activities were so subjectively important to the applicant as to constitute persecution. For example, New Zealand Refugee Appeal No. 10/92 involved an applicant from Bangladesh who converted from Islam to Christianity. In Bangladesh, conversion from Islam was possible, but proselytisation of Muslims was forbidden. Despite the applicant's claim to have a duty to 'spread Christianity', the RSAA considered the qualification in Article 18(3) once more, stating: "We do not consider that it would be unreasonable for him to accept a restraint against proselytising activities as Article 18(3) of the [ICCPR] itself qualifies the "right" to freedom of religion ..." (Refugee Appeal No. 10/92 (1992)) In another similar case but with a different result, Refugee Appeal No. 70692/97, the RSAA found persecution where an ethnic Korean from China who converted to Christianity and established an underground house church in China. The RSAA found determinative that he was "the kind of individual who is likely to become involved in proselytising his religion ..., it being his deeply held belief that it was the 'will of God' to promote such teachings." (Refugee Appeal No. 70692/97 (1998))

The cases above illustrate a few of the various means of preferential treatment or restrictions in favor of an envisaged public morality or religion which form a continuum ranging from apostasy laws to total bans to restrictions on certain activities. At their most extreme, apostasy laws have been widely regarded as persecution, despite questions as to their enforcement, and have clearly invoked a violation of the core right against forced compliance articulated in ICCPR Article 18(1). With respect to total bans, the refugee analysis has increasingly been that a total ban is typically tantamount to forced compliance and, hence, persecution, regardless of whether the applicant can practice in private or secret. Nevertheless, in many cases, refugee decision-makers have still felt the need to justify their

1. Refugee Appeal No. 72350/2000 (2001).

decisions by reference to the actual implementation of the ban or the subjective effect on the applicant's practical ability to manifest his or her religion, including arrests or intrusions into the home. Where restrictions fall short of a total ban or which only restrict particular activities of a religion, courts have rarely contested the derogation language of ICCPR Article 18(3) to make a finding of persecution in conflict with official restrictions. Only where the effect of the restrictions implicates a core subjective interest of the applicant given his or her individual history, have tribunals found persecution.

The UNHCR Guidelines note that forced compliance can take many forms, such as mandated religious education that is incompatible with the religious convictions, identity or way of life of the child or the child's parents, an obligation to attend religious ceremonies or swear an oath of allegiance to a particular religious symbol. Such forced compliance could rise to the level of persecution if it becomes an intolerable interference with the individual's own religious belief, identity or way of life and/or if non-compliance would result in disproportionate punishment.[1] The Human Rights Committee has also commented that the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant . . . nor in any discrimination against adherents to other religions or non-believers." (HRC General Comment No. 22, para. 4) With these, there has been much rhetoric in favor of a widely respected freedom of religion or belief. However, in practice refugee decision-makers have limited findings of persecution to the core protected interest of inner freedom of belief against coercion or forced compliance. Such forcible compliance apparently reaches the level of unacceptable, unjustified or abhorrent harm as to justify intervention based on the severing of the relationship between the State of origin and the citizen. However, beyond such forced compliance, refugee law has avoided making a determination that other kinds of restrictions in favor of a particular moral view constitute serious or grave harm sufficient to warrant a finding of persecution presumably so as not to jeopardize refugee law's status as a neutral humanitarian and non-political device. As a result, refugees are left alone in the prisoners' dilemma of either renouncing their identity or beliefs or face persecution, in contravention of the consistently held principle that one cannot be expected to suppress one's political opinion or religious beliefs in order to avoid persecution.[2] Such is the limitation of refugee's status

1. UNHCR Guidelines on Religion, para. 21.
2. UNHCR, *Internal Flight or Relocation Alternative" within the Context of Article*

and legacy in non-interference in religious affairs.

### 3.2. Social Mores, Religious Extremists and Inter-Religious Relationships

Besides facially obvious official restrictions on religious activities, religious restrictions and intolerance can also assume other forms. These refugee claims often overlap with other related issues, including race, ethnicity, nationality or gender and involve the transgressions of, or against, women and families, non-state actors such as religious extremists or culturally determined norms of society.

Cases relating to the transgression of social norms have more often not been analyzed not as religious claims but as either social group or political opinion. A number of cases have involved the Iranian law requiring the wearing of the chador. In the Canadian case of Namitabar v. Canada,[1] the Federal Court of Canada rejected the argument that the punishment under Iranian law was a generally applicable punishment constituting prosecution and not persecution because it only applied to women and the penalty was disproportionately inflicted without procedural guarantees. In making a finding of persecution, the court found determinative the fact that Iran was a theocracy and that the failure to observe the clothing code "could be regarded as a political act giving rise to a valid fear of persecution." In the New Zealand case of Refugee Appeal Number 2039/93,[2] the RSAA also ruled in favor of an Iranian woman who was "passionately opposed to the patriarchal society comprising her extended Arab family and to the male domination of women in Iranian society at large." The RSAA, dismissing cultural relativist arguments and after brief mention of ICCPR Articl 18, based its decision on the fact that Iran was a theocracy and made largely on political opinion as well as religion grounds. However, in the United States case of Fisher v. INS, the court vacated an earlier holding that forced compliance with generally applicable dress codes could be persecution on account of religion and instead ruled that any action taken by the government would not be on account of religion or political opinion because no intent had been proven to persecute for those reasons.[3] Another United States case, Fatin v. INS[4] involved an

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*1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 (23 July 2003), para.4. [hereinafter, 'UNHCR Guidelines on IFA']

1. Namitabar v. Canada (Minister of Employment and Immigration) [1993] 2 F.C. 42.
2. Refugee Appeal No. 2039/93 (1996).
3. Fisher I: Fisher v. I.N.S. 37 F.3d 1371 (9th Cir. 1994); Fisher II: Fisher v. I.N.S. 79 F.3d 955 (9th Cir. 1996).
4. 12 F.3d 1233 (3rd Cir. 1993).

applicant from Iran who opposed the Iranian requirement to wear the chador as she claimed she was a liberal-minded and irreligious feminist. The court rejected her claim, acknowledging that governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs would constitute persecution. However, requiring a non-believer to engage in the same conduct that is merely inconvenient, irritating or mildly objectionable would not be persecution.

Cases involving acts by non-state agents has been at times been inconsistent in finding religious persecution, depending on the complicity of the State involved. New Zealand Refugee Appeal No. 75391/05 involved a fifty-eight year old Chaldean Christian woman from Iraq who was repeatedly threatened by hooded men, harassed by her Baghdad neighbors and attacked in her home, during which time the attackers accused all Chistians of being devils. In this rather clear cut case, the RSAA noted country of origin information showing continual, unabated attacks on Christians in Baghdad and made a finding of persecution. However, a United Kingdom decision, R v. Secretary of State for Home Department, ex parte Ehsan Hamid,[1] involved an applicant who had converted from Sunni Muslim to Ahmadi and suffered threats of violence and hostility, including being arrested and assaulted and beaten while in prison. The Special Adjudicator found 'no police or official harassment' and held that the beatings while in prison were "the actions of individual police officers." A Canadian case, Haimov v. Minister of Citizenship and Immigration[2] involved the refusal by Israeli police to protect a Russian Christian Orthodox woman who was the victim of domestic violence by her Jewish husband. The court, noting that when the wife "went to the police, the officer started to write a report but tore it up when he learned the conflict took place because the applicant and her husband were of different religions" found that the state inability to protect were sufficient for a finding of persecution.

Cases dealing with inter-religious relationships have raised the issue of whether such disputes are private matters or not and whether the level of harm constitutes discrimination or persecution. The case of Chabira v. Canada[3] involved an atheist Berber from Algeria and a Muslim woman who became pregnant.

1. R v. Secretary of State for Home Department, ex parte Ehsan Hamid [1997] EWCA Civ 2612.
2. Haimov v. Minister of Citizenship and Immigration 2001 FCT 665 (2001) .
3. Chabira v. Canada (Minister of Employment and Immigration) [1994] 27 Imm. L.R. (2d) 75.

The woman's family, upon learning of the pregnancy, attacked the applicant and his family and posted his photo on the walls of mosques, 'inviting vengeance' and saying he deserved the death penalty. In overturning the Refugee Division's finding that it was merely a private conflict, the Federal Court noted that what had been a purely private conflict between families escalated into a religious incident. "The applicant … did not, it seems, respect the religious and moral customs of his girlfriend's family, and accordingly was subjected to the wrath of the entire community to which that family belonged." Where inter-religious relationships have been dictated by State restrictions, however, courts have been clear in finding persecution. In the United States, Bandari v. INS[1] involved an Armenian Christian from Iran who had been secretly dating a Muslim woman. He was arrested after being seen embracing her, in violation of a law against public displays of affection and was severely beaten. The judge informed him that he had violated the prohibition on 'interfaith relationships' and was told he could convert to Islam or face a punishment of 75 lashes. The court dismissed arguments that Bandari had violated a generally applicable law and found for the applicant. In Refugee Appeal Number 1039/93[2] involving a mixed couple from Malaysia as discussed above, the RSAA ruled that rights of family and privacy were implicated by requirements of the wife's conversion to Islam, which she opposed, co-habitation without marriage, exposing them to jail or a fine, depriving the female applicant of marital rights and rendering any children born illegitimate. Finally, a United Kingdom case, Moezzi v. Secretary of State, involved an Iranian who married an Indian national of the Hindu faith. Unless the applicant's wife converted to Islam, the marriage would not be recognised and their child would be illegitimate. On these facts, the Court of Appeal dismissed the appeal on grounds that the there was a risk of discrimination but not persecution.

The cases above illustrate a myriad of approaches toward religion-based refugee claims which intersect with other areas of the law and which reveal a certain uneasiness on the part of refugee law in addressing religious issues of the State directly. For example, in cases relating to the repression of social mores, such claims have more often than not been determined along social group or political opinion lines. Indeed, the social group analysis was proposed by Ex-Com Conclusion No. 39.[3] Nevertheless, despite the statement by the UNHCR Guidelines

1. Bandari v. I.N.S., 227 F.3d 1160 (9th Cir. 2000).
2. Refugee Appeal No. 1039/93 (1995).
3. UNHCR Executive Committee Conclusion No. XXXIX, Refugee Women and International Protection (1985), para. (k).

which emphasize that, where the norms derive from religion, such claims may also be analyzed as religion based claims, many of the cases regarding transgression of social mores have more often then not been determined on the basis of social group or political opinion, on the theory that where the religion is an official or State religion, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows.[1] In certain cases relating to religion directly, protection has been precluded on the basis of the nexus requirement.

Furthermore, the refugee definition under the 1951 Convention contains no requirement that the persecution feared be due to a State agent or necessitate the existence of effective institutions of government as a precondition for a successful claim to refugee status.[2] The UNHCR Handbook provides guidance that "offensive acts ... committed by the local populace ... can be considered as persecution ... if the authorities refuse, or prove unable, to offer effective protection." (UNHCR Handbook, para. 65) While a minority of jurisdictions, including France and Germany, subscribe to a more restrictive concept of complicity or accountability, with refugee status limited to individuals who fear persecution at the hands of entities for whom the State is responsible, the majority of jurisdictions, including Australia, Belgium, Canada, the United Kingdom and the United States subscribe to a more protection-oriented theory which includes victims of unofficial and official persecution by certain non-State actors.[3] Religious intolerance or persecution is often perpetrated by non-state actors, such as religious extremists or the result of sectarian violence, and whether the jurisdiction adopts an accountability or protection-oriented approach can have significant consequences on refugee decision-making. Yet even in jurisdictions subscribing to a more protection-oriented approach, decision-makers have been inconsistent in finding religious persecution and have looked hard to find complicity on the part of the State involved in order to demonstrate the level of State inaction which evidences a lack of protection such that the relationship between citizen and State has been severed.

Finally, where persecution is directed at individuals to punish them for entering into or maintaining a relationship, some adjudicators have often analyzed the ill-treatment as apersonal or private matter unrelated

1. UNHCR, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (7 May 2002), para. 25. [hereinafter, 'UNHCR Guidelines on Gender']
2. See: Goodwin Gil, 1996: 74
3. See: Moore, 2001.

to a Convention reason. Here courts have struggled to find the appropriate level of involvement where acts are the result of non-state actors such as families or religious communities. Courts have looked increasingly at the involvement of the State and its complicity through its endorsement on restrictions or the actual implementation of punishments for their breach. The variety of ways in which refugee law apportions responsibility in these cases is reflective of the uneasiness with which refugee law deals with sensitive religion cases.

## 4. CONCLUSION

It is only natural that dealing with spiritual issues and matters of the conscience invites such complexity and ambiguity. There are inextricable links between religion and politics, economics and culture which have existed since antiquity. Religion is rarely just about religion. Nor is religion merely about matters of the conscience, as nearly every religion demands practice by adherents and dictates standards of social conduct. As such, it is likely that the right to freedom of religion or belief will continue to be one of the most controversial of the core body of human rights. In many ways, refugee law was born out of the religious wars and intolerance that stretched emerging nation States to find a solution to the problems afflicting refugees. In future, refugee law will continue to play a major role in safeguarding religious freedom through the principle of *non-refoulement* (non-return) and ensuring the rights of refugees in relation to religious persecution.

Yet as is the nature of the beast, significant subjectivity as to the degree to which restrictions on religious practice are permissible and the point at which such restrictions rise to the level of persecution, meriting international protection will continue to pose a significant challenge to refugee adjudicators. Deeply influenced by wars of religion and the aspiration of religious tolerance as a means toward a stable international order, modern refugee law cannot escape the tensions that are caused by its precarious position in international law, maintaining its character as a neutral humanitarian act filling the vacuum created by the withdrawal of protection by the State of origin.

Encouraging normative behavior on the part of States of origin is will always be intrinsically linked to the degree to which refugee law reinforces human rights norms. At the same time, human rights law will continue to monitor and judge whether states are upholding their obligations under internationally-accepted human rights norms and influence state behavior accordingly. To the degree that refugee law can remain true to its neutral humanitarian character, it will play

an important role in safeguarding religious freedom, even as universal notions of that freedom evolve over time. However, in an effort to maintain its non-political character, refugee law will continually tiptoe around tough questions over the permissibility of restrictions on religion and the inevitable clashes between non-interference in religious affairs and humanitarian protection concerns in the hopes that it will avoid crossing the line into political condemnation of a State's domestic affairs. Perhaps by doing so it will hold true to Grotius's aspiration that religious tolerance may lead to a stable international order.

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