

Introduction

Overview

An appraisal of the development and content of the freedom of thought, conscience and religion has never been more challenging. Events since the collapse of the former Soviet Union and the aftermath of the attacks of 11 September 2001 have confronted the traditional concept of freedom of religion with an entirely new range of demands. These could not have been anticipated by the drafters of the core freedom of religion Articles in the foundational instruments. In the United Nations context these are Article 18 of the Universal Declaration on Human Rights (the ‘Universal Declaration’)¹ and Article 18 of the International Covenant on Civil and Political Rights (‘the ICCPR’).² Within the

¹ The full text of the Universal Declaration is at Annex 1. Article 18 of the Universal Declaration reads as follows:

‘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.’

(Universal Declaration on Human Rights, adopted and proclaimed by GA Res. 217A(III) of 10 December 1948, UN Doc. A/3/810 (1949)).

² The key Articles of the ICCPR are set out in Annex 2. Article 18 of the ICCPR reads as follows:

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.

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Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention'), adopted under the auspices of the Council of Europe, the key provision is Article 9.³ Even the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief ('the 1981 Declaration'),⁴ which was concluded much later and was the first international instrument dedicated solely to freedom of religion, did not contemplate recent patterns of violation which are emerging globally.

Those texts constitute the basic building blocks of the freedom of religion and were inevitably shaped by the issues which faced the original drafters. Prominent areas of contention in the early debates were resistance to an explicit right to change religion (from various Islamic countries), doubts about proselytism as an adjunct to the right to practise a religion and, more generally, the ideological opposition from numerous Communist countries to the assertion of rights of the individual over the interests of the State. The extent to which neutrality should be preserved in State education was also a fundamental, though more recent, concern (in the ICCPR and the 1981 Declaration).

However, since those instruments were concluded a number of trends have tested whether the text of the core provisions is sufficient to address the immediate and foreseeable challenges of the future. Among such

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.'

(International Covenant on Civil and Political Rights (1966), New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171)

³ The key Articles of the European Convention are set out in Annex 4. Article 9 of the European Convention reads as follows.

1. '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 worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

(European Convention on Human Rights and Fundamental Freedoms (1950), Rome, 4 November 1950 in force 3 September 1953, 213 UNTS 221)

⁴ The full text of the 1981 Declaration is at Annex 3 (Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), proclaimed by GA Res. 36/55 of 25 November 1981, UN Doc. A/36/51 (1982)).

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trends is the political momentum in many countries of the former Soviet Bloc to protect traditional State religion in response to the influx of new religious movements. New religious movements filled the vacuum left by the abrupt exodus of Communism and are seen as a threat to the process of rebuilding the national identity of those countries. Obstacles imposed to prevent the emergence of new religious movements include prohibitive registration formalities required for their establishment, as well as widespread prohibitions on religious practice, particularly proselytism. The protection of traditional State religion as a means of reigniting national identity is a relatively new issue. Until recently, the protection of State religion has more commonly been a feature of many Islamic countries where national law is inseparable from religious law and preservation of the orthodoxy of State religion is paramount.

Another recent trend has been the pronounced incidence of religious hatred against Muslims. The xenophobia, intolerance and discrimination towards Muslims which followed the events of September 11 caused the Commission on Human Rights to react with calls for appropriate control of the mass media to prevent incitement to violence and intolerance towards Islam.⁵ This gave strength to moves which were already afoot in certain countries (for example, Australia) to enact legislation to prohibit vilification on grounds of religion and has since given rise to initiatives in other countries (notably the United Kingdom) to create religious offences such as incitement to religious hatred. However, there have been concerns that such a low threshold could, in practice, be applied to this type of legislation so as to interfere directly with fundamental aspects of freedom of religion, particularly religious practice through teaching and proselytism. The risks are inherent in the teaching of any religion which amounts to the denial of other religions but are greater in the case of comparative teaching or teaching by one religious group of the beliefs of another.

At same time, there has been misplaced concern that the overt practice of Islam is a proxy for 'extremism'. This has influenced certain European States (notably France and Switzerland) to react against traditional Muslim observance, such as the wearing of religious head-dress in State schools, relying on the obligation of neutrality of States in education and (in the case of Switzerland) prohibiting religious head-wear as a form of proselytism. The same issue has a different dimension in Turkey where principles of secularity are enforced more generally.

⁵ CHR Res. 2002/9 (2002) of 15 April 2002.

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Fears of extremism, coupled with a lack of understanding of the requirements of Islam has resulted in a widespread failure on the part of many European States to appreciate the importance to Muslims of straightforward religious practice and observance. The 1981 Declaration has done much to correct this by providing a detailed explanation of different forms of manifestation of religion or belief.

One other phenomenon of note has been the emergence of political parties adopting an overtly religious agenda, with the most radical parties advocating the introduction of a system of government based on religious law. The aspirations of some religious political parties have given rise to concerns over the imposition of religious law on non-adherents. Outside the political sphere positive endorsement has undoubtedly been given recently to the collective, rather than individual, aspects of religious manifestation through religious association and church membership (and this goes some way towards dismantling the impediments to religious association posed by registration requirements).

Recent years have also witnessed a steady growth in recognition of the conscientious implications of compulsory military service. This has served to demonstrate just how undeveloped are the general principles concerning various forms of coercion, particularly coercion to act contrary to one's religion or belief and compulsion to disclose one's beliefs. Of the core freedom of religion Articles, Article 18(2) of the ICCPR and Article 1(2) of the 1981 Declaration offer explicit protection against coercion but only against coercion in religious choice. It remains to be seen what future direction these developments will take.

Another dimension of recent change has been the escalation of religious intolerance by non-State entities and the corresponding role of the State in combating intolerance. Greater emphasis has been placed on the positive obligations on States to protect rights and freedoms by appropriate means and it is expected that this principle will see greater practical recognition in future years.

All these issues will be discussed in detail in later chapters, which will address the origins of the text of each of the core freedom of religion Articles and the development of standards applicable to each constituent freedom.

One other observation worth making at the outset concerns the obvious differences between the United Nations and European frameworks. The textual similarities between Article 9 of the European Convention and Article 18 of the Universal Declaration from which it

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stemmed are self-evident. However, the relative homogeneity of legal and democratic systems across European countries contrasts with the vast range of ideological, religious and cultural foundations of the systems of government of the nations represented within the Universal system. In some countries these foundations even go the root of their basic conception of the freedom of thought, conscience and religion. Following more than half a century of experience of both the European and United Nations systems, and in the face of new patterns of religious intolerance in recent years, it is timely to examine critically the paths taken by each system in developing the standards applicable to religious freedom since the Universal Declaration was adopted in 1948, and since the European Convention entered into force in 1953.

This work therefore aims to provide an appraisal of the development of the right to freedom of thought, conscience and religion at both United Nations and European levels. Standards within the United Nations system are reflected principally in the work of the Human Rights Committee and the Special Rapporteur ('the Special Rapporteur')⁶ appointed by the Commission on Human Rights to examine incidents and governmental action inconsistent with the 1981 Declaration. In addition, wider sources such as the *travaux préparatoires* of most instruments touching upon freedom of religion play an essential part. Within European jurisprudence, the practice of the European Court on Human Rights ('the European Court') and the former European Commission on Human Rights ('the European Commission') provide the basis for evaluating developing European standards under the European Convention. Although this work is primarily aimed at the conclusions to be drawn from a critique of the practice of the United Nations and European institutions, occasional reference will be made to other regional initiatives found in the Council of Europe Framework Convention for the Protection of National Minorities and the Organization for Security and Co-operation in Europe ('OSCE', formerly the Conference for Security and Co-operation in Europe), as well as certain systems of national law where they have particular relevance.

The United Nations and the European systems were selected for examination because of the historical interrelation between the two

⁶ The title of the 'Special Rapporteur on religious intolerance' was changed to 'Special Rapporteur on freedom of religion or belief' by CHR Res. 2000/33 of 20 April 2000.

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(given that Article 9 of the European Convention was taken from the text of Article 18 of the Universal Declaration). However, it is important to appreciate fully the significance of any apparent departures between United Nations and European standards and to distinguish genuine from supposed paths of divergence. Some differences may be explained merely by the different role and function played by each of the various organs from which applicable standards of religious freedom may be derived or through which they are expressed. Limitations of legal competence and technical expertise are also relevant. Some differences are explicable only in terms of policy (for which historical trends are particularly important) while others are attributable to the different contexts in which Universal and European standards apply.

A thematic approach will be followed as closely as possible throughout this work in order to discern the advances and reversals on particular issues of recurring importance. An in-depth evaluation of apparent discrepancies within particular themes will help to expose the significance of points of divergence. A thematic approach also lends itself to an assessment of the future development of standards of religious freedom in such a way that might achieve better consistency between the United Nations and European institutions, and may point to the most effective means of utilising the existing organs.

Of the major recent works on freedom of religion, that by Tahzib⁷ represents the most comprehensive survey of United Nations instruments, and those by Malcolm Evans⁸ and Carolyn Evans⁹ both provide penetrating insight into the decision-making of the European Court and European Commission. However, none attempts any detailed thematic evaluation of both European and Universal standards beyond coverage of the separate historical developments of the major United Nations and European instruments and the occasional comparison between the two.¹⁰ Given the importance of such an evaluation this work attempts to develop a framework for the discussion of both United Nations and

⁷ B. G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, The Hague/London: Martinus Nijhoff Publishers (1996).

⁸ M. D. Evans, *Religious Liberty and International Law in Europe*, Cambridge: Cambridge University Press (1997).

⁹ C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford: Oxford University Press (2001).

¹⁰ A useful overview of the role of UN and regional systems in protecting freedom of religion is found in N. Lerner, *Religion, Beliefs and International Human Rights*, Maryknoll, New York: Orbis (2000).

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European jurisprudence. Extensive use will be made of the Special Rapporteur's reports in order to demonstrate the value of the role of the Special Rapporteur in offering more in-depth understanding of religious conflict and violation than the barest outline available in the Human Rights Committee's review of State reports or the specific instances considered in individual communications. The Special Rapporteur's reports offer, in the Universal context, a better appreciation of the dynamics of the freedom of religion which, it will be argued, are all too often overlooked in the decisions of the European institutions. It is important to be aware of emerging trends in religious intolerance and to heed the warnings that can only be discerned from an examination of situations worldwide in which the widest variety of cultures, religions and values interact. It is suggested that the European Court might take into account, far more than hitherto, the different sources and guises of intolerance evidenced globally and anticipate more fully the implications and potential reach of its decisions.

Interrelation between the UN and European systems

The historic connection between the Universal Declaration and the European Convention from which it stemmed deserves special comment at this stage. It is also important to note some of the practical obstacles faced by the development of freedom of religion in the Universal context, which arguably have less relevance to Europe in isolation.

Article 9 of the European Convention drew its inspiration and its text from Article 18 of the Universal Declaration in pursuance of the express aim of the European Convention in taking 'the first steps for collective enforcement of certain rights stated in the Universal Declaration'.¹¹ Article 9 was to be based as far as possible on Article 18 of the Universal Declaration to reduce the risk of devising definitions that were at odds with those in United Nations instruments. The *travaux préparatoires* of Article 18 of the Universal Declaration,¹² and those of subsequent United

¹¹ Preamble to the European Convention. For the drafting of the European Convention, see Council of Europe, *Collected Edition of The 'Travaux Préparatoires' of the European Convention on Human Rights*, 8 vols., The Hague: Martinus Nijhoff (1975–85). For commentary, see A. H. Robertson and J. G. Merrills, *Human Rights in the World*, Manchester: Manchester University Press (1996).

¹² For commentary on the drafting of Article 18 of the Universal Declaration, see: N. Robinson, *Universal Declaration of Human Rights: Its Origins, Significance, Application*

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Nations instruments in the field of freedom of religion, demonstrate that some of the influences that fashioned the text of Article 18 may be said to have little relevance to Article 9 of the Convention. Some of the most significant issues debated in the formulation of Article 18 of the Universal Declaration, such as the right to change religion, accentuate the differences between instruments intended for Universal and European application, were raised with greater force (and were to have lasting impact) in the debates that led up to Article 18 of the ICCPR¹³ and the 1981 Declaration.¹⁴ Divergence in the basic conception of the freedom of religion at Universal level was particularly marked when impetus was given to a United Nations initiative on religious intolerance following various anti-Semitic incidents in the early 1960s. The General Assembly passed a resolution calling for the preparation of a draft declaration and a draft convention on the elimination of religious intolerance. Simultaneously, a draft declaration¹⁵ and a draft convention¹⁶ were advanced on the elimination

and Interpretation, New York: Institute of Jewish Affairs (1958); R. Cassin, *La Déclaration Universelle et la Mise en Oeuvre des Droits de l'Homme*, 79 RCADI (1951) 241; B. Kaufmann, *Das Problem der Glaubens- und Überzeugungsfreiheit im Völkerrecht*, Zürich: Schulthess Polygraphischer Verlag (1989), pp. 124–46; M. Scheinin, 'Article 18', in A. Eide (ed.), *The Universal Declaration of Human Rights: A Commentary*, Oslo: Scandinavian University Press (1992); A. Verdoodt, *Naissance et Significance de la Déclaration Universelle des Droits de l'Homme* (1964), Lourain: Paris Société d'études morales, sociales et juridiques, Editions Nauwelaerts (1964).

¹³ M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht/Lancaster: Martinus Nijhoff (1987). For commentary on the drafting of Article 18 of the ICCPR, see: T. van Boven, *De Volkenrechtelijke Bescherming van de godsdienstvrijheid*, Assen, Netherlands: Van Gorcum (1967); K. J. Partsch, 'Freedom of Conscience and Expression, and Political Freedoms', in L. Henkin (ed.), *The International Bill of Rights The Covenant on Civil and Political Rights*, New York/Guildford: Columbia University Press (1981).

¹⁴ For commentary on the drafting of the 1981 Declaration, see S. Liskofsky, 'The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives', in J. E. Wood (ed.), *Religion and the State: Essays in Honour of Leo Pfeffer*, Waco, Texas: Baylor University Press (1985).

¹⁵ United Nations Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by GA Res. 1904 (XVIII) of 20 November 1963 (1963), UN GAOR, 18th Sess., Supp. No. 15, 1261 Plen. Mtg at 35, UN Doc. A/5515 (1963).

¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination (1965) (New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195, reprinted in 5 ILM 352 (1966); UN GAOR, 20th Sess., Supp. No. 14, 1406 Plen. Mtg at 47, UN Doc. A/6014 (1964). See: E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination 1965', 15 Int'l & Comp Law Q (1966) 996; N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Alphen aan den Rijn: Sijhoff & Noordhoff (1980); M. Banton, *International Action Against Racial Discrimination*, Oxford: Clarendon Press (1996).

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of racial discrimination in the knowledge that issues of racial discrimination could be progressed swiftly with the removal of content relating to religious intolerance, given opposition expected from Communist countries on ideological grounds.¹⁷ Also by then the requirements of certain Middle East countries were better appreciated than during the drafting of the Universal Declaration. The result was that the Declaration on Racial Discrimination was adopted in 1963, followed rapidly by the adoption of the Convention on Racial Discrimination in 1965. By contrast, it was not until nineteen years after the General Assembly called for preparation of a convention on religious intolerance that, at best, a declaration could be adopted, while a convention still remains an aspiration.¹⁸

In short, it may be speculated whether developments in Universal standards since the Universal Declaration was adopted, and developments in European standards since the Convention entered into force mean that the two systems have, in certain respects, followed different trajectories. It is important to understand any resulting differences between Universal and European standards. In doing so, it is also necessary to appreciate the differences between various sources of interpretation (both within the United Nations and European systems) that reflect emerging standards of religious freedom.

The institutions and their contribution to standard-setting

From United Nations sources, specific guidance on the Human Rights Committee's understanding of Article 18 of the ICCPR is found in

¹⁷ For further insight into these parallel developments, see: N. Lerner, 'Toward a Draft Declaration Against Religious Intolerance and Discrimination' 11 Isr YB Hum Rts (1981) 82; N. Lerner, 'The Final Text of the UN Declaration against Intolerance and Discrimination Based on Religion or Belief' 12 Isr YB Hum Rts (1982) 185; A. Cassese, 'The General Assembly: Historical Perspective 1945–1989', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford: Clarendon Press (1992); W. McKean, *Equality and Discrimination under International Law*, Oxford: Clarendon Press (1983).

¹⁸ For further detail concerning the background to the draft declaration and draft convention, see: J. Claydon, 'The Treaty Protection of Religious Rights: UN Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' 12 Santa Clara L Rev (1972) 403; T. van Boven, 'Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs' 13 HRQ (1991) 437.

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General Comment No. 22¹⁹ and, in the case of those countries which accepted the right of individual petition under the first Optional Protocol, the Human Rights Committee's consideration of individual communications.²⁰ More general sources of interpretation of Universal standards under the ICCPR include the *travaux préparatoires* (which are recorded in some detail) and the results of examination of State reports submitted under Article 40 of the ICCPR. Unfortunately, State reports have limited interpretative value in relation to specific Articles and there has been a relative shortage of communications from countries with a non-European conception of freedom of religion. The work of the Special Rapporteur, by contrast, provides a wealth of information on a variety of violations but its emphasis is more factual than interpretative.

As far as European sources of interpretation are concerned, the *travaux préparatoires* of the European Convention are incomplete although, given that the origins of Article 9 are so clearly found in Article 18 of the Universal Declaration, this is not a significant handicap. Furthermore, the decisions of the European Commission and the European Court are so clearly documented with supporting reasoning that they themselves represent a thorough reflection of developing standards, even if the reasoning is open to criticism for its lack of rigour.

The role and function of each organ determine not only the authoritative status of its findings but also the context and limitations of its own operations. Each of the United Nations and European institutions will now be considered briefly in turn, so that standards expressed by them may be seen in the context of their function. This will help to explain some of the apparent differences in emphasis, and substantive divergences, between the United Nations and European systems.

The Human Rights Committee

As the body charged with monitoring the implementation of the ICCPR, the Human Rights Committee is extremely influential. Its eighteen members are elected from candidates nominated by each State party (they must be nationals of that State) though relatively few countries in reality make

¹⁹ General Comment No. 22 (48), UN Doc. CCPR/C/21/Rev.1/Add.4 (1993). The text of General Comment No. 22 is at Annex 5.

²⁰ For the most thorough account of Optional Protocol procedures, see P. R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication, Law and Practice*, Aldershot: Ashgate (1998).