Religion, State & Society, Vol. 36, No. 3, September 2008

Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East

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Abstract

The Middle East region has had a long, and periodically impressive, record of religious diversity, yet there is much concern regarding the contemporary standing of its religious minorities. Rather than assessing the chequered historical record of religious minorities in the Middle East, the purpose of this article is to provide an assessment of how international human rights standards may best be utilised to advance their rights. The contention of this article is that the human rights of religious minorities in the Middle East have primarily been considered under the lens of freedom of religion or belief. Relevant though this framework is to their concerns, it will be suggested that promoting the rights of the Middle East's religious minorities through the framework of minority rights may provide a more promising avenue for their protection. The purpose of the article is therefore to provide a reassessment of how best to negotiate the rights of religious minorities in the Middle East. The focus will be on formal legal and political obstacles to the enjoyment of their rights entitlements. Though a broader contextual analysis also assessing economic, cultural and sociological factors would be highly informative, it lies beyond the scope of this article. Despite the fact that minority rights provisions apply to members of minorities alongside all other human rights – among them freedom of religion or belief – the two lenses of minority rights and freedom of religion or belief highlight somewhat different provisions and protections. The two are certainly not mutually exclusive or in contradiction with one another, but a state that prioritises one set of legal and policy options over the other will arrive in different places.

Historical Overview: Minorities of the Religious Kind in International Law

Protection for religious minorities in international law could hardly be of a higher pedigree. It has a record dating back to the mid- to late 1600s (see Thornberry, 1993; Evans, 1997), when successive treaties sought to provide protection for religious minorities. The scope of these legal agreements, however, should not be overstated or romanticised. The underlying concern was that of security, and the scope of protection was tightly drawn in terms both of geography and of beneficiaries. The protections were discrete rather than generally applicable and the objective was the maintenance of the status quo rather than motivated by broader humanitarian concerns. Nevertheless, the fact remains that international legal awareness of the need for particular protection for religious minorities pre-dated the emergence of the modern human rights movement by some 300 years.

ISSN 0963-7494 print; ISSN 1465-3974 online/08/030303-23 © 2008 Taylor & Francis
DOI: 10.1080/09637490802260385

The post-First World War period and the Treaty of Versailles accelerated this concern and a new generation of religious minority protection clauses were enshrined as non-negotiable elements of emerging peace treaties (Thio, 2005). In sum, it would be no exaggeration to suggest that the roots of minority rights are to be found in the protection of religious minorities in Europe, protections that were enshrined explicitly in bilateral and multilateral treaties over three centuries. This was all the more remarkable considering the fact that the proposed League of Nations Article 21 had failed on the grounds that protection for racial minorities was deemed unpalatable by the great powers of the time. Some 90 years on, however, racial minorities enjoy formal protections that religious minorities can only be dazzled by in envy (see Ghanea, 2003b).

What is clear, however, is that religious minorities are formally covered in human rights protections offered under both freedom of religion or belief and minority rights – these being in addition to human rights standards that apply to all regardless of these categories. The question to be tackled in this article is that of which framework offers more, in what circumstances, to religious minorities, and particularly how access to these frameworks applies in the Middle East context. Though a distinction can rightly be made between the enjoyment of these rights as they apply to individual members or to communities of religion or belief in the Middle East, its examination cannot be entered into in this article.

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Freedom of Religion or Belief in International Human Rights Law

The modern human rights era, or post-United Nations age, is when 'religious liberty' came to be enshrined as a subject worthy of independent protection in international human rights. The form of its encapsulation consistently as 'religion or belief' has important implications in terms of both its scope and its challenge. Four main sources inform us of its key elements: Article 18 of the Universal Declaration of Human Rights (UDHR, 1948); Article 18 of the International Covenant on Civil and Political Rights (ICCPR, 1966); General Comment 22 of the UN Human Rights Committee considering Article 18 of the ICCPR (HRC, GC 22, 1993) and the 1981 UN Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief (UN, 1981). From these sources, and particularly the latter, one may identify the following elements.

(A) No Derogation

The Human Rights Committee draws attention to the 'fundamental character' of this freedom being reflected in the fact that it cannot be derogated from even in time of public emergency (HRC, GC 22, para. 1). Minority rights provisions are subject to derogation in times of public emergency, which suggests both a less fundamental nature compared to freedom of religion or belief as well as the wider scope of the protections minority rights offers.

(B) Scope

Freedom of religion and belief[1] is 'far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others' (HRC, GC 22, para. 1). It includes 'theistic, non-theistic and atheistic beliefs, as well as the right not

to profess any religion or belief' (HRC, GC 22, para. 2). It should not be restricted to traditional religions alone (HRC, GC 22, para. 2) nor to official ones alone (HRC, GC 22, paras 9 and 10). A major limitation of minority rights compared to freedom of religion or belief protections is that minority rights explicitly protect only religious minorities. It is not at all clear whether its protection is to cover 'belief' communities as well or not. Considering the lack of agreed definition of 'religion' in international law and the clear decision to extend freedom of religion to thought, conscience and therefore belief, it may be assumed that minority rights protection should also stretch to belief where indeed there are communal aspects that call upon it. The principal reason for this is that states often attempt to restrict religion or belief rights entitlements only to specific 'recognised' religions. This reduces religion or belief rights to privileges extendable only by state decree. Regardless of that challenge, however, it is clear for example that Scientologists in Germany or the Ahmadiyyah in Pakistan are a minority community that cannot be subsumed under linguistic or ethnic characteristics. In other instances non-theistic belief communities may not wish to be referred to as 'religions', yet they would still wish to avail themselves of minority protections. Hence I contend that minority rights protection should extend to belief communities, where they consist of analogous communities with a sense of solidarity towards preserving their belief-based characteristics.

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(C) Forum Internum/Externum?

While 'having' or 'adopting' a religion or belief should not be subject to coercion, manifesting religion or belief may be subject 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' (ICCPR, Article 18, para. 3). These two aspects are referred to as the *forum internum*, enjoyment of the rights of which are absolute, and the *forum externum*, enjoyment of which may be subject to limitation. Such duality of protection between identity status and expression of minority characteristics (be they religious, linguistic or ethnic) is not distinguished with respect to minority rights. Its assertion in freedom of religion or belief, however, is itself more legal myth than of practical consequence. Although having or changing religion or belief is not subject to limitation, clearly extensive limitations on manifestation can put such pressure on individuals and communities of religion or belief that 'having' itself is actually limited. On the other hand, if there is an environment conducive to manifestation of religions and beliefs, there is more likelihood of individuals being informed about minority communities and their beliefs and therefore of possibly choosing to change religion or belief to join them.

(D) Non-Coercion

'Coercion' has been defined by the UN Human Rights Committee as that which

> would impair the right to have or adopt a religion or belief, including the 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. Policies or practices having the same effect, such as, for example, those restricting access to education, medical care, employment or ... other provisions of the Covenant are similarly inconsistent with article 18.3 [regarding non-coercion]. (HRC, GC 22, para. 5)

This 'freedom from coercion to have or to adopt a religion or belief ... cannot be restricted' (HRC, GC 22, para. 8). 'Coercion' is not a concept that finds its way into minority rights, though of course discrimination and external pressures are oftentimes borne by minorities with respect to their minority status and characteristics.

(E) No One to be Compelled to Reveal His or Her Religion or Belief

Linked to the above is the observation that the UN Human Rights Committee has emphasised that 'no one can be compelled to reveal his thoughts or adherence to a religion or belief' (HRC, GC 22, para. 3). This requirement of not being compelled to reveal this component of identity, which may in turn trigger certain rights to accrue to the beneficiary, is not so clearly recognised with respect to minorities. The independent treaty body the Committee on the Elimination of Racial Discrimination has taken the approach of highlighting 'self-identification by the individual concerned' (CERD, GC 8, 1990, para. 2) as the means of identifying the rights holders in its sphere of concern – racial or ethnic groups. The Committee goes further to express concern that if states use their own discretion or differing criteria in order to assess which groups constitute ethnic or indigenous groups, this may lead to different treatment. Instead, the Committee believes 'there is an international standard concerning the specific rights of people belonging to such groups, together with generally recognized norms concerning equal rights for all and non-discrimination' (CERD, GC 24, 1999, para. 3). The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities, 1992) notes that 'No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration' (Minorities, 1992, Article 3.2).

While freedom of religion or belief emphasises non-compulsion in revealing one's religion or belief, minority rights offers 'special rights' on the basis of minority belonging. This therefore compels individuals belonging to religious minorities to identify their religion or belief in order to avail themselves of minority rights entitlements. A tension arises between the need to identify minorities if they are to be protected and the religious freedom right of not being forced to reveal one's religion or belief. While the desirability of the standard of voluntary 'self-identification' remains, certain costs will still be incurred by those who do not want to reveal their religion or belief. States, however, need to be sensitive to the reluctance of minorities who have suffered discrimination or even persecution to self-identity as minorities. The added complexity with regard to religious minorities stems from the possible incoherence between the *forum internum* and the *forum externum* for some: those individuals who maintain cultural identification with a particular religion or belief whilst no longer retaining, or while being somewhat ambivalent about, its beliefs and/or laws. Such individuals may wish to manifest aspects of the religion or belief in community with others while not in fact being fully convinced about internally holding that religion or belief. The voluntary aspect of self-identification, therefore, becomes all the more pertinent.

(F) More Vigilance with Respect to Non-Dominant Status

Further to the clarification regarding the wide scope of religion or belief, the UN Human Rights Committee expresses concern for those who find themselves against the stream of the dominant or official religion or belief. The Committee 'views with

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concern any tendency to discriminate against any religion or belief for any reason' (HRC, GC 22, para. 2).

Additionally,

> 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, GC 22, para. 9)

Further,

> If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it. (HRC, GC 22, para. 10)

The Committee also recognises the interrelatedness of freedom of religion or belief and minority rights:

> ... the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. (HRC, GC 22, para. 9)

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Collective Rights Regarding Freedom of Religion or Belief?

A 20-year drafting effort complementing these standards resulted in the 1981 UN Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief (UN, 1981). Whilst in part it echoes the above standards, the Declaration's added value is mainly in terms of its Article 6, which offers a non-exhaustive list of the scope of freedom of thought, conscience, religion or belief. All the provisions of this article relate to the collective aspects of this freedom: assembling for worship and maintaining places of worship (6a); establishing and maintaining charitable institutions (6b); acquiring and using articles required for customs and rites (6c); publishing and distributing publications (6d); teaching religion or belief (6e); receiving financial and other contributions (6f); training leaders and calling into being the leadership of the religion or belief (6g); celebrating holidays and ceremonies (6h); communicating regarding the religion or belief with individuals and institutions, at national or international levels (6i). While the 1981 Declaration does not refer explicitly to the collective right to freedom of religion or belief, or indeed to religious minorities (see Ghanea, 2003b), it is significant that virtually all the concrete examples of the protected freedom in Article 6 involve the collective right. The only reference is the standard one that this right includes the freedom of 'everyone' to manifest religion or belief in community with others (UN, 1981, Article 1). In 1986 the former

UN Commission on Human Rights appointed a mandate holder with specific responsibility *inter alia* to promote the standards of the Declaration. The mandate (known before 2000 as the special rapporteur on religious intolerance, but since then as the special rapporteur on freedom of religion or belief) was most recently renewed by the UN Human Rights Council on 14 December 2007 (Resolution, 2007). In her reports the current special rapporteur on freedom of religion or belief has drawn attention to the 'particularly vulnerable situation' of a number of groups, including minorities, with regard to their freedom of religion or belief (Jahangir, 2007, para. 11). She has also recommended that 'States should devise proactive strategies in order to prevent' violations for reasons of religion or belief (Jahangir, 2007, para. 31).

Freedom of religion or belief standards alone appear to go no further than passively tracing the possibility of collective manifestation of this freedom. Their explicit protection of collective rights needs strengthening.

Minority Rights in International Human Rights Law

Minority rights are explicitly concerned with the protection of collective aspects of individual rights. The extent to which they additionally protect group rights *per se*, rather than the existence of a group so that individual rights holders may benefit from group protection, remains a matter of much contention. Nevertheless their collective aspect is beyond dispute. A detailed discussion of this point is unfortunately beyond the scope of this article.

Furthermore, it is understood that minority rights are to be enjoyed in addition to existing rights. The UN has recognised them as 'special rights' that accrue to persons belonging to minorities on the understanding that equality alone would not provide sufficient protection against discrimination. Minority rights as special rights allow members of minority communities to start off on a platform of equality with majorities. As the UN independent expert on minority issues has observed,

> Minority rights go beyond anti-discrimination to address the issues of those who may seek to promote and preserve their distinct identity. The opportunity to participate fully and effectively in all aspects of society, while preserving group identity, is essential to true equality and may require positive steps on the part of government. Minority rights ... are about recognizing that, owing to their minority status and distinct identity, some groups are disadvantaged and are at times targeted, and that these communities need special protection and empowerment. All States should seek to realize the goal of equality in diversity, in law and in fact. (McDougall, 2006, para. 84).

Whilst there is no definition of 'minority' agreed in international legal provisions, reference to minorities is routinely prefaced by the designations 'ethnic', 'religious' or 'linguistic'. Religious minorities, as we shall see, have always been assumed to be part and parcel of the minorities' regime, but have in fact rarely been protected through it.

The UN era started out with 30 years of downplaying, if not outright rejection, of minority rights. The UN had been built on the ashes of the Second World War, and Hitler achieved interim victories at least in part through his exploitation of the minorities clauses of the Treaty of Versailles; it was also formed just three years before the coming to power of South Africa's apartheid government. There was no appetite

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in the UN for provisions for minorities. In fact, the ideology of the time held that universal rights would be the panacea for all ills; equality served as the answer to all, and removed the premise for any kind of singling out of categories of rights holders.

It took a number of decades for the realisation to dawn that equal treatment often resulted in discrimination for those who started lower down the pecking order. If, for example, the Brahmins and the Dalits are treated 'equally' in India, the discrimination against the Dalits will only become further entrenched. Equal treatment could too easily continue, or fail to cure, discrimination against those who had previously been unequal; it merely concealed that inequality with the gloss of equal treatment. In 1976 the International Covenant on Civil and Political Rights (ICCPR) came into force. Its Article 27 holds that

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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The UN Human Rights Committee, however, took some years to feel comfortable with this provision and to utilise it, but it eventually started reflecting on it in its jurisprudence and referred to it in drafting its 1994 General Comment 23 on Article 27 of the ICCPR regarding the rights of minorities. It was Capotorti's 1977 UN Sub-Commission study that triggered a gradual return to a reinvigorated notion of minorities, this time under the UN's umbrella. Capatorti, who was a UN Sub-Commission expert, held that a minority is

> a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language. (Capotorti, 1977)

Then in 1978 the UN started a drafting effort that resulted in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities, 1992). Later still, from 1995 to 2006, the UN sponsored the annual meeting of the UN Sub-Commission Working Group on Minorities. In the aftermath of change from the UN Commission on Human Rights to the UN Human Rights Council (see Ghanea, 2006a), this will henceforth be meeting for just two days per annum as the new Forum on Minority Issues (Resolution, 2007b).

Some 30 years had passed from the formation of the UN, therefore, before its concern for minorities came into full effect. This 30-year question mark over minority rights meant that 'minority protection ceased to be the primary vehicle through which religious freedoms were addressed on the international plane' (Evans, 1997, p. 183). When religious minorities face discrimination and persecution as a group, then, their case is addressed under the 'freedom of religion or belief' umbrella in international human rights and not under minority rights. This observation can be deduced from the examination of the jurisprudence of UN treaty bodies such as the Human Rights Committee, but also from how such violations have been handled by UN Charter-based bodies – for example under the 1235 and (now revised) 1503 procedures, in an

analysis of the reports of mandate holders such as the special rapporteur on freedom of religion or belief, and the lack of consideration to date by the independent expert on minority issues. For example, on being appointed to this mandate the latter did not list the 1981 UN Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief (UN, 1981) as part of the UN instruments she believed to be most relevant to minority issues, whereas she even listed the 1989 Convention on the Rights of the Child as being so (McDougall, 2006, para. 11).[2]

Collective Rights for Religious Minorities?

Having observed that religious minorities are rarely considered under the minority rights framework, we need to ask the question as to what they would hope to gain from such a consideration. What added benefits could accrue regarding their protection, which are not already duplicated, if not enhanced, within the freedom of religion or belief framework? In view of the fact that the latter is the *lex specialis*, what is there to be gained from minority rights?

As in the section 'Freedom of Religion or Belief in International Human Rights Law' above, I shall identify three main sources as informing the key elements of minority rights: Article 27 of the ICCPR; General Comment 23 of the Human Rights Committee on Article 27 (HRC, GC 23, 1994); and the 1992 Minorities Declaration (Minorities, 1992). Some key elements in minority rights which could serve to complement and enhance the protection of religious minorities beyond the protections offered within freedom of religion or belief follow.

(A) Culture and Religion

Article 27 holds that persons belonging to religious minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. While professing and practising their own religion would appear to be the most appropriate of the enjoyments accruing to religious minorities, some religious communities may worship in a language differing from the majority community. Furthermore the term 'culture' may be the most apt description for their literature, symbols, cumulative manifestation and practice of relevant rites, customs, observances – for example holidays, dietary codes, fasting, pilgrimage, worship and a separate calendar – again especially when these differ from those of wider society.

(B) In Community with Others

The language of Article 27 echoes that of Article 18 of the ICCPR. However, the former protects the right of 'persons belonging to' religious minorities to have their rights protected 'in community with the other members of their group' regarding their culture and the profession and practice of their religion; whereas the latter protects only manifestation 'either individually or in community with others, and in public or private ... in worship, observance, practice and teaching' – though the implications of this are to be broadly construed and not restricted to official or traditional religions (HRC, GC 22, paras. 9 and 10). It is to include:

> not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings,

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> participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications. (HRC, GC 22, para. 4)

The scope of the collective element in minority rights is, nevertheless, more widely drawn than that outlined more specifically in freedom of religion or belief.

(C) A Group Sharing Particular Characteristics

Minority rights are to be enjoyed by persons who 'belong to a group and who share in common a culture, a religion and/or a language' (HRC, GC 23, para. 5.1). There are no other conditions on the enjoyment of these rights, not even citizenship or permanent residence. The Human Rights Committee has clarified that these rights are to be enjoyed equally by migrant workers or even visitors.

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(D) Existence to be Established Objectively

The Human Rights Committee has emphasised that 'The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria' (HRC, GC 23, para. 5.2). No freedom of religion or belief standard makes such a clear declaration of objective establishment regarding religious minorities – and, by deduction, the existence of a religion in a particular country. In General Comment 22, however, it is made clear that religion or belief should be broadly construed and not limited to traditional religions (HRC, GC 22, para. 2). Since self-identification has been highlighted by human rights bodies such as CERD as the preferred means of establishing a particular individual's identification as a member of a minority, this raises an interesting tension between objective identification of the existence of the minority group as a whole alongside self-identification by individuals in relation to that group.

The emphasis on objective criteria is important in preventing states denying the relevance of minority rights by just declaring that they have no minorities. Objective criteria should privilege self-identification as well as considering independent legal and policy analyses of the existence of groups in the light of definitions such as that of Capotorti. 'Existence' of minorities should not just rely on the question of political convenience for the states concerned. The criterion of objectivity has not specifically been raised in relation to freedom of religion or belief communities in international standards, but the clarity if offers would be advantageous.

(E) Positive Measures of Protection Required

Minority rights are contingent on the 'ability of the minority group to maintain its culture, language or religion' (HRC, GC 23, para. 6.2). The Human Rights Committee draws from this that

> Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop

> their culture and language and to practise their religion, in community with other members of the group ... as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria. (HRC, GC 23, para. 6.2)

While cautious that such positive measures should be reasonable and objectively based, the Human Rights Committee is applying the possible need for positive measures to religious minorities *qua* a minority and not *qua* a group. The relevance of positive measures with regard to religion is not found in any of the freedom of religion or belief instruments. In this regard, therefore, minority rights extend the protection of religious minorities both individually and collectively.

(F) Effective Participation

The Human Rights Committee also comments that the enjoyment of cultural rights 'may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them' (HRC, GC 23, para. 7). The relevance of cultural rights to freedom of religion or belief was outlined above. Here again, minority rights extends the protection of religious minorities, as no instruments concerned with freedom of religion or belief delineate the need for the effective participation of members in decisions affecting them. Logically this would at least include the areas outlined regarding manifestation – worship, observance, practice and teaching.

The Minorities Declaration further calls for their full participation in 'the economic progress and development of their country', 'due regard for the legitimate interests of persons belonging to minorities' and state cooperation with them on questions relating to them in order to 'promote mutual understanding and confidence', as well as advancing respect for their rights (Minorities, 1992, Article 4.5, Article 5, Article 6 and Article 7). There is no parallel requirement reflected in the Religious Discrimination Declaration.

(G) Survival and Continued Development of Identity

The objective of minority rights is 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole .... States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected' (HRC, GC 23, para. 9). Freedom of religion or belief standards themselves make no mention of being directed towards the survival and continued development of religious minorities, let alone observing that this would enrich the fabric of society at large.

This positive purposive approach is unfortunately not cast as the objective of freedom of religion or belief in international standards. By way of example, such an objective is not outlined in the preamble to the Religious Discrimination Declaration. Instead, the purpose behind the Declaration is cast in negative terms in recognition of the wars, great suffering, foreign interference and hatred caused by disregard of this freedom (UN, 1981, preambular paragraph 3). The preamble of the Minorities Declaration, however, considers the promotion and protection of the rights of persons

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belonging to *inter alia* religious minorities as 'an integral part of the development of society as a whole' and as a contribution 'to the strengthening of friendship and cooperation among peoples and States' (Minorities, 1992, preambular para. 6). Ensuring the survival and continued development of religious identity is not explicitly stressed anywhere in freedom of religion or belief instruments. Perhaps the different facets Gunn draws out regarding 'religion' will be helpful here. He offers three understandings of religion: religion as belief, religion as identity and religion as a way of life (Gunn, 2003, pp. 200–5). In questioning why freedom of religion or belief standards do not explicitly uphold the 'survival and continued development' of religious communities whereas minority standards do, one may conclude that human rights standards appear to prioritise collective religion insofar as it expresses 'identity' rather than 'belief' or – perhaps more threatening still – 'way of life'. If so, this imposes a notable limitation to the protection of the full scope and diversity of freedom of religion or belief.

Amalgamating the Frameworks, Tracing the Options

From the above, we can see that there are notable distinctions between the formal protections flowing from minority rights and from freedom of religion or belief – the protections offered, the duties specified and the tests set up for their assessment.

Minority rights – for example in accordance with the ICCPR – are subject to derogation 'at times of emergency which threaten the nation' whereas freedom of religion or belief is not. Nevertheless, no derogation should 'involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (ICCPR, Article 4.1). The scope of freedom of religion or belief explicitly includes belief – whether theistic, non-theistic or atheistic – whereas the extension beyond 'religion' to belief communities as well is questionable in minority rights. In freedom of religion or belief the freedom to have, adopt and change religion or belief is absolute; only manifestation of religion or belief can be limited and only then in accordance with the exact limitation grounds given, strictly interpreted. In minority rights, the law does not recognise such a sharp distinction between the belief aspect – and its engagement of the principle of non-coercion – and its manifestation. The collective aspect of minority rights at a minimum relates to the right of individuals to enjoy cultures, religions and languages. Freedom of religion or belief, in turn, spells out manifestation as including 'worship, observance, practice and teaching'.

Non-compulsion in identifying oneself according to a particular religion or belief has been emphasised explicitly in international norms regarding freedom of religion or belief. In the case of racial identity, the UN Committee on the Elimination of Racial Discrimination has put forward the standard of self-identification – which also includes the right not to identify according to a particular race – as the criterion for identifying membership of racial groups. In both freedom of religion or belief and minority rights one can observe the need for vigilance in relation to individual members and groups that are in a non-dominant position. But whereas minority rights recognises the need for the survival of the group's characteristics *per se*, freedom of religion or belief standards have not explicitly emphasised the importance of the survival of (diverse, religious) group characteristics – though the principle of religious pluralism has been highlighted as a factor in more recent European jurisprudence (Evans, 2003). On the contrary, many countries are adept at purposefully compromising the long-term development and survival of religious communities while affording them some controlled cultural freedoms in the short term, at times

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under the forced agreement that they do not gain members from amongst the majority population. Some states, therefore, ostensibly 'protect' the religious characteristics of the majority whilst infringing both minority rights and freedom of religion or belief standards. Human rights should not allow such political opportunism, or outright chauvinism, to become confused with the legitimate balancing of rights standards that sometimes arises. 'Special rights' and protectionism for majorities at the expense of minorities has no place in human rights. Positive measures of protection required of states to nurture a religious group's characteristics relate to minorities, not majorities, otherwise it is both minority rights and freedom of religion or belief that are compromised, and this may even jeopardise the very survival of minority religious groups. The criteria of 'survival' and 'continued development' of identity in minority rights have a bearing here too. The bar for 'continued development' is higher than that for mere survival, and indeed than any spelled out in freedom of religion or belief standards. 'Continued development' should not just be assessed for the group's internal and separate 'development', but also requires a healthy interaction with society at large. Minority rights recognise that minorities should be able to 'participate effectively' in society at large and in all matters concerning them. It is only through these provisions that religious communities can achieve 'continued' and healthy development. Lest these provisions be denied to minorities assessed unfavourably at the whim – or indeed calculation – of the state, minority rights reiterates that the 'existence' of a minority should be decided objectively.

Freedom of religion or belief standards, alone, only implicitly outline the collective aspects of manifestation. We need to turn to minority rights' more exacting provisions to complement these standards with a richer and more explicit recognition of collective rights.

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Applying the Minorities Framework to Religious Minorities in the Middle East

Costs and Benefits of a Minorities Approach

If we now turn to the Muslim Middle East, we discover further arguments in favour of approaching freedom of religion or belief rights primarily through the prism of minority rights. I am considering only the Middle East region because of this article's focus on the formal legal and political positions of these states. What these states have in common is that, with the exception of Lebanon, all declare Islam as the state religion within their constitutions, whereas a notable number of Muslim states in Africa, East Asia and Eurasia do not do so (see Stahnke and Blitt, 2005, pp. 53–67).

The Islamic tradition, which later largely shaped the Ottoman *millet* system, arguably caters for the diversity of religions through a minority framework rather than through freedom of religion or belief provisions. While the 'no compulsion in religion' provision in the Quran is central to this debate and is arguably more individualistic in orientation, there is no protection regime as such that flows from this other than the *ahli-l kitab* or *dhimma* provisions for a certain level of self-autonomy and space to continue in existence for recognised religious minorities in exchange for a contract of loyalty, taxes and self-restraint (Arzt, 1996; Ye'or and Maisel, 1985). Arzt distinguishes the two terms by explaining that *ahli-l kitab* or People of the Book were 'those whose faith was based, like Muslims, on revealed scripture ..., the Jews and Christians whom Muhammed had decreed to be treated with tolerance' (Arzt, 1996, p. 413). The *dhimma*, however, 'were conquered peoples who had agreed to submit to Muslim rule. Offered a compact or covenant of protection, ... [they] were permitted

certain privileges, including the autonomy to practice their faith, in exchange for payment of the *jizya* tax . . . , certain restrictions on their freedom, and a commitment to live peacefully' (Arzt, 1996, p. 413). While this regime – whether as historically practised in different contexts or as it is now more loosely applied in a number of Arab and other Muslim countries – falls short of minority rights provisions in numerous ways, it is nevertheless more hospitable to the protection of minority rights than to the protection of freedom of religion or belief as such. This is because conservative decision-making as to who freedom of religion or belief rights should apply to makes them inaccessible to many religious communities in the Middle East. From this one may deduce that there will be a greater receptiveness to – or at least, fewer grounds for objecting to – approaching the question of enhanced protection for religious minorities in the Middle East through a minority rights regime rather than through freedom of religion or belief. As An-Na'im has argued, the status of non-Muslim religious minorities – whether under sharia, constitutional provisions of Muslim states or Muslim cultural norms – is 'not consistent with current universal standards of human rights'. However, it is 'imperative' that this anomaly be 'authoritatively discussed and settled with the Islamic tradition', from within 'the fundamental sources of Islam'. This is in order to render such reform 'both Islamic and fully consistent with universal human rights standards' (An-Na'im, 1987, p. 17).

It is interesting to note that the *ahli-l kitab* scheme historically caters exclusively for religious minorities and not for racial and linguistic minorities, except insofar as race or language may be incidentally protected as aspects of the identities of religious minorities – this being the case for religious minorities that use a particular language in religious services and maintain it as part of their community life or religious minorities that share a particular racial identity. The applicability of this scheme to religious minorities is therefore clear. However, the limitations of the *ahli-l kitab* scheme as a means of realising human rights law standards applicable to the Middle East's religious minorities – whether through minority rights or freedom of religion or belief – need also to be duly noted. The *ahli-l kitab* model was based on direct instruction by the Prophet Muhammad to tolerate – and prevent fear and grief (Quran 5:69) coming upon – such people. *Dhimma* protection was arrived at pragmatically by contract as a guarantee of peace with a subjugated non-dominant religious community, and entailed 'burdens', 'second-class status' and 'coerced submission' (Arzt, 1996, p. 414). Both models required that the religious communities concerned be forbidden to manifest their religion too publicly, and certainly forbidden to spread it amongst the majority Muslim community and gain converts. Their limitations are thus very significant as far as minority rights (particularly 'continued development' and 'full participation') and freedom of religion or belief (particularly in manifestation in community with others, in teaching and practice and in change of religion or belief) are concerned. Indeed the fact that their standards fall short of current norms is to be expected considering the some 1200 years separating these schemes of protection. Furman has in fact described the *dhimma* status as being '*a priori* an inferior situation', noting that '[w]hilst the Islamists required that "protected-people" do not offend Muslims' sensitivities, they do not offer a reciprocal undertaking' (Furman, 2000, p. 4) and referred to the 'protected-people' regime as one that 'allows for cultural and religious pluralism but not fully equal rights' (Furman, 2000, p. 17). Hussain has also noted that the 'Islamic policy relating to minorities is oriented towards cultural pluralism rather than homogeneity' (Hussain, 1997, p. 93). Despite these very serious shortcomings, however, one may yet decide that building on the *ahli-l kitab* and *dhimma* models as the basis for enhanced understandings may well

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prove more successful than importing models that have had no prior cultural frameworks to sustain them and risk outright rejection. Though neither model was based on the idea of rights or lives up to any notion of equality, they at least provide some legal and political protection for non-Muslims living in Muslim countries. This is a standard which is denied even today to some communities living in Muslim countries – for example Baha'is in Iran, Mandeans and Yizidis in Iraq and Ahmadiyyah in Pakistan.

The most serious of the challenges faced by these schemes, though, is the very question of who they can apply to. Classic jurists may argue for limiting both schemes to Christians and Jews alone. However, the model has in fact long been extended to many other religious communities in the Muslim world: to Zoroastrians in Iran, to Hindus, Sikhs and Buddhists in India, and to Mandeans in present-day Iraq – a number of these extensions having been called upon as a result of Islamic conquests. Clearly the models – and particularly the *dhimma* model – have not purely been restricted to relations with monotheistic or pre-Islamic religions for centuries. It would therefore be logical to assume that there are no insurmountable historico-religious barriers to extending them further still, or to replicating the models in Muslim countries that have not yet extended their 'benefits' beyond Christian and Jewish communities. Indeed if one sees their essential relevance as being to those who worship according to their own scriptures and try to be righteous, then the models prove promising in terms of both depth and breadth – that is, in terms of building upon them to advance greater rights and in terms of extending their application to all religion or belief communities. What this would potentially offer is the possibility of distinguishing obstacles that Middle Eastern Muslim states allege in the name of religion from enduring domestic resistance to respect for human rights values (though this is not to say that states can wash their hands of their obligations in the case of the latter; such enduring resistance in fact underscores their obligations further). While many states claim a variety of highly questionable obstacles to the extension of equal enjoyment of human rights to all within their jurisdiction, those claimed in the name of religion appear particularly obstinate and difficult to overcome. Since a number of Muslim Middle Eastern states have constitutional and other laws that implicate not only a religion–state relationship but also a hierarchy of citizenship – indeed of enjoyment of fundamental human rights – on the basis of religious affiliation, the 'religious' objection to rights takes enduring legal shape and becomes yet more obstinate. In a study of the constitutions of Muslim states, for example, Stahnke and Blitt (2005) observe numerous constitutional barriers to the full enjoyment of freedom of religion or belief rights in the name of upholding Islam. As Arzt notes, however, it is important to 'detect when Islam is being exploited or distorted as a convenient rationale for repression' (Arzt, 1996, p. 400).

There is also another consideration that needs to be borne in mind. Whilst historical experience makes the adoption of a minorities approach appear quite favourable in the Middle East, because of its historico-religious precursors, one needs to be cognisant of the reality of the widespread rejection of the term 'minorities' (Ghanea, 2006b) by political regimes across the Middle East. The term tends to be rejected more strongly in the case of ethnic and national minorities than in the case of religious minorities (see the examples of the Kurds in Syria and the Bidoun in Kuwait and the UAE (Ghanea, 2006b)). One reason for this is perhaps because the vast majority of the Middle East's minorities are in fact ethnic rather than religious. There is also the fact that Islam formally both accepts religious minorities and rejects racial discrimination. This makes Muslim regimes reluctant to admit the existence of racial

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discrimination in their countries. The result, then, is that while many Muslim countries are religiously aware in terms of questions of diversity they are also unfortunately ethnically blind (Ghanea, 2003a, p. 9). As Furman has noted, 'Minorities, in the Islamist concept, are "non-Muslims" who continue to live under Islamic rule on the basis of an agreement' (Furman, 2000, p. 2), they are not ethnic minorities.

Hardening Stance against Freedom of Religion or Belief

It would be possible to give many examples showing a greater affinity with the concept of upholding some rights for religious minority communities rather than upholding standards of freedom of religion or belief *per se*. For example, whilst the Organisation of the Islamic Conference (OIC) is becoming increasingly active at the UN, and aims towards block voting on matters of mutual concern at international human rights fora (OIC, 2008, p. 22), its freedom of religion concerns have exclusively focused on Muslims and Islamophobia (OIC, 2008, pp. 35–37 and OIC, 2007, pp. 7–8). I want now, however, to focus on one particularly alarming recent case from Egypt which indicates a hardening stance against freedom of religion or belief. I do not claim that the experience of the whole of the Middle East with its wide range of religious communities can possibly be summed up in this one case, but the case does provide a notably stark illustration of a more general challenge to freedom of religion or belief in the region. (For an examination of this challenge as reflected in 44 'Muslim' constitutions, see Stahnke and Blitt (2005), and for further discussion, see Mayer (2006), Arzt (1996) and Arjomand (1996).)

The case in question arose out of the computerisation of applications for compulsory identity cards in Egypt, which altered the previous options of Muslim, Christian, Jewish or Other in the statement of religious affiliation. The computerised system retained the first three categories only and did not allow the applicant the option of ticking none of them. While these requirements affected all those who were either not affiliated to any of these three religions or were unwilling to be legally forced to indicate religious affiliation, it was the Egyptian Baha'is who challenged this administrative practice in the courts. The case of Husam Izzat Musa and Ranya Enayat Rushdy was decided in the Administrative Court on 4 April 2006 (Egypt Case, 2006a). The decision upheld the Baha'i case. However, the government filed an appeal and, after a number of delays, on 16 December the Supreme Administrative Court upheld the government's denial of the right of Baha'is to have their religious affiliation recorded on the identity card application form (Egypt Case, 2006b: extracts reproduced as an Appendix to this article).

What is particularly alarming from the legal point of view in this judgment is its claim that denying freedom of religion or belief to the Baha'is of Egypt does not violate the Universal Declaration of Human Rights, on the grounds that the right described in Article 18 'should be understood within the limits of what is recognized, i.e. what is meant by religion is one of the three religions: Islam, Christianity and Judaism'. The judgment goes on to claim that recognised religions are 'namely the three heavenly religions: Islam, Christianity and Judaism, on the grounds that they are the religions for whose rites the successive Egyptian constitutions guaranteed freedom'. Others are said not to be among the heavenly religions – they are said to 'dissent from Islam as well as the religions of the book (Christianity and Judaism)' – and the conclusion is that the recording of such data in the compulsory identity card system of Egypt would be contrary to public order since the 'foundation and origin' of Egypt is based on sharia.

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In a separate development, on 29 January 2008 the Administrative Court issued its decision on two cases, that of Imad and Nancy Ra'uf Hindi and Hosni Hussein Abd Al-Massih (Court, 2008; Prohibited, 2008) and this time upheld the rights of Baha'i applicants to not have to indicate any religious affiliation when applying for identity cards. The Egyptian Initiative for Personal Rights has urged the Egyptian government to 'implement the decision without delay, and not to appeal this clear verdict of the court' (Court, 2008).

If the political and legal dynamics in Middle Eastern states such as Egypt are such that the extent of freedom of religion or belief rights – even the obligatory disclosure and recording of one's religion or belief affiliation in official documentation – is assessed through a theological schema of religious hierarchies, then again perhaps bypassing it through replicating a historical Islamic model of toleration through the *dhimma* scheme would offer a more promising way forward. So, for example, the government of Egypt could politically justify the toleration of the Baha'is of Egypt not on grounds of any theological affinity, but on the basis of the extension of the *dhimma* scheme to them in the same terms as it was offered to another post-Islamic community, that of Sikhs in India. As noted above, if this judgment and other arguments of its ilk claim that denying freedom of religion or belief to all those who do not or cannot profess to be Muslims, Christians or Jews is justifiable according to the sharia, then at least recasting their minority status would require the provision of additional justifications as to why they cannot even be considered minorities. If one assumes the good faith of governments of the Muslim Middle East – such as Egypt – regarding their human rights obligations, then one may be sensitive to the challenge of the definition of 'religion' that arises in states with both a strong state–religion relationship and strong political dominance of the majority religion. Assuming that this is the challenge being faced in countries such as Egypt, then perhaps that dilemma can be somewhat bypassed by not waving the red flag of 'religion' in such contexts and instead, at least initially, normalising the idea of equal rights to all regardless of religious or belief affiliation by approaching the issue via the arguably less contentious minority rights framework. This shifts the focus from the *ahli-l kitab* model (explicitly mentioned by the Prophet Muhammad) to the *dhimma* model (pragmatic coexistence), following the latter's historico-religious precedent in Islamic history that all communities – whether monotheistic, pre-Islamic or otherwise – deserve political and legal protection and should enjoy peaceful existence. If this alternative of minority rather than religious status failed, then at least some evidence as to the question of the good faith of the governments concerned would have been obtained.

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Conclusion

I began this article by assessing the complementary benefits to religious minorities of the minority rights framework, compared with the protections offered within the freedom of religion or belief framework. Turning to the Middle East, I do not argue that a choice must be made between freedom of religion or belief and minority rights, nor between minority rights and *ahli-l kitab* or *dhimma* status. International standards regarding both freedom of religion or belief and minority rights apply to the Middle East's religious minorities, and those standards cannot be diluted by reference to traditional or historical precedents that existed in particular regions; but where freedom of religion or belief is denied to these minorities, I argue that the *dhimma* status, while it falls well short of a number of international human rights standards, nevertheless has potential as an initial means of breaking the deadlock (and that it has

more potential than the *ahli-l kitab* status to offer flexibility because it stems from pragmatic decision-making rather than Prophetic instruction). As a historico-religious sanctioned model it can potentially build a foundation of tolerance for new or excluded religious minority communities, hence offering a non-antagonistic option and a politically and legally acceptable stepping-stone on which to advance rights in a sphere where violations are often rampant, and lead both to a deepening of entitlements and to a broadening of beneficiaries. The examination of a notably high-profile case where sharia objections were stated as the grounds for rejecting freedom of religion or belief rights illustrates the motivation to sidestep highly dubious and heated freedom of religion or belief rejections. As Furman has argued, 'in terms of practical thinking ... one finds awareness of the need to escape the frozen doctrinaire framework and try to refresh it without contradicting it, whether by expanding it and adding elements ... or by finding temporary alternatives' (Furman, 2000, p. 19). Since the 'alternative' of human rights standards has found an insufficient reception in the Middle East with regard to its religious minorities, and few other alternatives are enhancing enjoyment of rights for the region's religious minorities, refreshing the framework would seem an option well worth pursuing. The primary objective in such a context is to break the deadlock of alleged or actual theological challenges formally put forward by states in order to advance respect for the human rights to which religious minorities are legally entitled.

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Notes

1 Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights refer to freedom of 'thought, conscience and religion'. In its General Comment 22, the Human Rights Committee explains that this freedom includes the freedom to 'hold beliefs' – hence its abbreviation to 'religion or belief'.

2 She did, however, highlight the demographics of religious minority communities in Hungary (see McDougall, 2007a, para. 8) and recommended that disaggregated data by, *inter alia*, religion be collected in order to assess the realisation of Millennium Development Goals (MDGs) in relation to minorities and ensure lack of discrimination against them, the working thesis being that such minorities suffered disproportionate disadvantage and poverty (see McDougall, 2007b, para. 108; McDougall, 2007c, para. 12).

References

An-Na'im, A. A. (1987) 'Religious minorities under Islamic law and the limits of cultural relativism', *Human Rights Quarterly*, 9, 1, pp. 1–18.

Arjomand, S. A. (1996) 'Religious human rights and the principle of legal pluralism in the Middle East', in J. van der Vyver and J. Witte Jr (eds), *Religious Human Rights in Global Perspectives: Legal Perspectives* (The Hague, Martinus Nijhoff).

Arzt, D. (1996) 'The treatment of religious dissidents under classical and contemporary Islamic law', in J. Witte and J. van der Vyver (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (The Hague, Martinus Nijhoff).

CERD, GC 8 (1990) Committee on the Elimination of Racial Discrimination, General Comment 8 on Article 1 para. 1 and 4 of the Convention, Identification with a particular racial or ethnic group, www.unhchr.ch/tbs/doc.nsf/(Symbol)/3ae0a87b5bd69d28c12563ee0049800f?Opendocument (last accessed June 2008).

CERD, GC 24 (1999) Committee on the Elimination of Racial Discrimination, General Comment 24 on Article 6 of the Convention, www.unhchr.ch/tbs/doc.nsf/(Symbol)/9ce4cbfde77a452a8025684a0055a2d0?Opendocument (last accessed June 2008).

Capotorti, F. (1977) *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (UN Doc E/CN.4/Sub.2/384/Add. 1–7) (United Nations, 1991, Sales No. E.78.XIV.1).

Court (2008) Egyptian Initiative on Personal Rights, *Court Prohibits Withholding Documents from Baha'is* (press release), http://www.eipr.org/en/press/08/3001.htm (last accessed January 2008).

Egypt Case (2006a) Egyptian Administrative Court, Decision of 4 April 2006, summary translation, http://www.bahai.org/persecution/egypt/2006april_en (last accessed May 2008).

Egypt Case (2006b) Supreme Administrative Court, Egypt, Decision of 16 December 2006, translation, http://info.bahai.org/pdf/EGYPTSAC_16DEC06_ENGLISH.pdf (last accessed May 2008).

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

Evans, M. D. (2003) 'Believing in communities – European style', in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden, Martinus Nijhoff).

Furman, U. (2000) 'Minorities in contemporary Islamist discourse', *Middle Eastern Studies*, 36, 4, pp. 1–20.

Ghanea, N. (2003a) *Ethnic and Religious Groups in the Islamic Republic of Iran* (UN Doc E/CN.4/Sub.2/AC.5/2003/WP.8) (UN Commission on Human Rights, Working Group on Minorities, 5 May); also available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.AC.5.2003.WP.8.En?Opendocument (last accessed May 2008).

Ghanea, N. (2003b) 'The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: some observations', in N. Ghanea (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Leiden, Martinus Nijhoff).

Ghanea, N. (2006a) 'From UN Commission on Human Rights to UN Human Rights Council', *International and Comparative Law Quarterly*, 55, 3, pp. 695–705.

Ghanea, N. (2006b) 'Middle East', in R. Green (ed.), *State of the World's Minorities 2006, Events of 2004–5* (London, Minority Rights Group International).

Gunn, T. J. (2003) 'The complexity of religion and the definition of "religion" in international law', *Harvard Human Rights Journal* 16; also available at http://www.law.harvard.edu/students/orgs/hrj/iss16/gunn.shtml (last accessed May 2008).

HRC, GC 22 (1993) Human Rights Committee, General Comment 22 on Article 18 of the Convention, The right to freedom of thought, conscience and religion, www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument (last accessed June 2008).

HRC, GC 23 (1994) Human Rights Committee, General Comment 23 on Article 27 of the Convention, The rights of minorities, www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument (last accessed June 2008).

Hussain, S. S. (1997) *Minorities, Islam and the Nation State* (Kuala Lumpur, Islamic Book Trust).

ICCPR (1966) International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/law/ccpr-one.htm (last accessed May 2008).

Jahangir, A. (2007) *Elimination of All Forms of Religious Intolerance: Interim Report of the Special Rapporteur on Freedom of Religion or Belief* (UN Doc A/62/280, 20 August); also available at http://daccess-ods.un.org/TMP/1483698.html (last accessed May 2008).

Mayer, A. E. (2006) *Islam and Human Rights: Tradition and Politics*, 4th edn (Boulder, CO, Westview Press).

McDougall, G. (2006) *Specific Groups and Individuals: Minorities: Report of the Independent Expert on Minority Issues* (UN Doc. E/CN.4/2006/74, 6 January); also available at http://daccessdds.un.org/doc/UNDOC/GEN/G06/101/26/PDF/G0610126.pdf?OpenElement (last accessed May 2008).

McDougall, G. (2007a) *Mission to Hungary: Report of the Independent Expert on Minority Issues* (UN Doc. A/BHR/4/9/Add.2, 4 January); also available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/100/83/PDF/G0710083.pdf?OpenElement (last accessed May 2008).

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McDougall, G. (2007b) *Implementation of General Assembly Resolution 60/251: Achieving the Millennium Development Goals (MDGS) for Minorities: a Review of MDG Country Reports and Poverty Reduction Strategies, Report of the Independent Expert on Minority Issues* (UN Doc. A/HRC/4/9, 2 February); also available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/105/93/PDF/G0710593.pdf?OpenElement (last accessed May 2008).

McDougall, G. (2007c) *Achieving the Millennium Development Goals (MDGS) for Minorities: a Review of MDG Country Reports and Poverty Reduction Strategies: Report of the Independent Expert on Minority Issues* (UN Doc. A/HRC/4/9/Add.1, 2 March); also available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/113/05/PDF/G0711305.pdf?OpenElement (last accessed May 2008).

Minorities (1992) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, http://www2.ohchr.org/english/law/minorities.htm (last accessed May 2008).

Organisation of Islamic Conference (2007) *Final Communique of the Thirty-fourth Session of the Islamic Conference of Foreign Ministers* (OIC/34/ICFM/2007/FC/Final) (Islamabad, Pakistan, 15–17 May); also available at http://www.oic-oci.org/oicnew/34icfm/english/resolution/FC-34ICFM-ENG.pdf (last accessed May 2008).

Organisation of Islamic Conference (2008) *Final Communique of the Eleventh Session of the Islamic Summit Conference* (OIC Summit-11/2008/FC/Rev. 6) (Dakar, Senegal, 13–14 March); also available at http://www.oic-oci.org/oicnew/is11/english/res/FC-11-%20SUMMIT.pdf (last accessed May 2008).

Prohibited (2007) Human Rights Watch and Egyptian Initiative for Personal Rights, *Prohibited Identities, State Interference with Religious Freedom* (vol. 19.7(E), November) (New York, Human Rights Watch), also available at http://hrw.org/reports/2007/egypt1107 (last accessed January 2008).

Resolution (2007) UN Human Rights Council, *Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* (Resolution A/HRC/6/37, adopted 14 December); also available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_37.pdf (last accessed May 2008).

Resolution (2007b) UN Human Rights Council, Forum on Minority Issues, Resolution A/HRC/RES/6/15, adopted 28 September; also available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_15.pdf (last accessed May 2008).

Stahnke, T. and Blitt, R. C. (2005) *The Religion–State Relationship and the Right to Freedom of Religion or Belief: a Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries* (Washington, US Commission on International Religious Freedom), also available at http://www.uscirf.gov/images/stories/pdf/Comparative_Constitutions/Study0305.pdf (last accessed January 2008).

Thio, L. (2005) *Managing Babel: the International Legal Protection of Minorities in the Twentieth Century* (Leiden, Martinus Nijhoff).

Thornberry, P. (1993) *International Law and the Rights of Minorities* (Oxford, Oxford University Press).

UDHR (1948) Universal Declaration of Human Rights, http://www.unhchr.ch/udhr/lang/eng.htm (last accessed May 2008).

UN (1981) UN Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief, http://www2.ohchr.org/english/law/religion.htm (last accessed May 2008).

Ye'or, B. and Maisel, D. (1985) *The Dhimmi: Jews and Christians under Islam*, rev. edn (Cranbury, NJ, Fairleigh Dickinson University Press).

Appendix

The case of Husam Izzat Musa and Ranya Enayat Rushdy was decided in the Administrative Court on 4 April 2006 and upheld the complaint of a Baha'i couple

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against the Egyptian government regarding the denial of (compulsory) identity cards to them. Such a denial makes daily existence in Egypt near impossible, as ID cards need to be carried at all times and are necessary to a whole array of essential procedures from school registration to receiving hospital treatment or applying for bank accounts. However, the government filed an appeal and on 16 December the Egyptian Supreme Administrative Court upheld the government's denial of the right of Baha'is to have their correct religious affiliation recorded on the identity card application form.

The following excerpts from the text of the decision of the Supreme Administrative Court explain the Court's reasoning. The full text of the translation is provided by the Baha'i International Community, and its original source is The Baha'i World News Service Web Site at http://info.bahai.org/pdf/EGYPTSAC_16DEC06_ENGLISH.pdf *(last accessed May 2008). The text reproduced here has not been altered from that version, but has been slightly edited for layout.*

The circumstances of this litigation as is reflected in the documents are that Husam 'Izzat Musa and Rania 'Inayat 'Abdu'Rahman Rushdi had submitted their application no. 24044 of 58 J. to the Administrative Court of Cairo on 10/6/2004 requesting the stay of execution and annulment of the negative decision under examination.

The applicants explained their grievances saying that they are Egyptian citizens and their religion is Baha'i. They submitted an application for the purpose of adding the names of their daughters Bakinam, Farah and Hana Husam'Izzat to their passports, but surprisingly the administration refused to give them back their passports and withdrew their ID cards with no legal reason. The applicants alleged that this action violates the Constitution and the Universal Declaration of Human Rights. However, the applicants changed their request later on and asked the court to stay the execution of the negative decision concerning the refusal to issue them ID cards on which it is mentioned that their religion is Baha'i as well as the refusal to issue birth certificates for their daughters Bakinam, Farah and Hana in which the same religion is mentioned. During the hearings Adv. 'Abdu'l-Majid Al'Anani interfered as a party in support of the administration and requested that the case be dismissed.

On 4/4/2006 the court delivered its ruling, which is now under consideration, stating that, concerning the absence of a negative administrative decision and the issue of not following the appropriate course, these [points] are rejected on the grounds that 'the Civil Status Committee is not competent to examine the issues raised in the present case according to Article 47/2 of Law no. 143 of 1994. In addition, a negative administrative decision exists in the present case.' The court based its decision concerning the inadmissibility of the request for intervention in support of the administration 'on the absence of the required interest for such intervention'. The court also rescinded the negative decision on the grounds that

> existing authoritative reference books on Islamic jurisprudence indicate that Muslim lands have housed non-Muslims with their different beliefs; that they have lived in them like the others, without any of them being forced to change what they believe in; but that the open practice of religious rites was confined to only those recognized under Islamic rule. In the customs of the Muslims of Egypt this is limited to the peoples of the Book, that is Jews and Christians only. The provisions of the shari'a [Islamic jurisprudence] require a disclosure that would allow to distinguish between the Muslim and non-Muslim in the exercise of social life, so as to establish the range of the rights and obligations reserved to Muslims that others cannot avail [themselves]

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> of, for these [rights and obligations] are inconsistent with their beliefs. Thus, the obligation prescribed by the Law of Civil Status no. 143 of 1994 concerning the issuance of an identity card to every Egyptian on which appears his name and religion and the same on birth certificates is a requirement of the Islamic shari'a. It is not inconsistent with Islamic tenets to mention the religion on a person's card even though it may be a religion whose rites are not recognized for open practice, such as Baha'ism and the like. On the contrary, these [religions] must be indicated so that the status of its bearer is known and so he cannot enjoy a legal status to which his belief does not entitle him in a Muslim society. It is not for the Civil Registry to refrain from issuing identity cards or birth certificates to the followers of Baha'ism, nor it is up to such Registry to leave out the mention of this religion on their identity cards.

The court concluded that the refusal of the administration to give the plaintiffs ID cards on which mention is made of this religion (Baha'ism) and its refusal to issue birth certificates to their daughters which mentions the Baha'i religion ... (sic) constitute an invalid negative decision that should be annulled with all the consequences of such annulment, in particular, to issue the plaintiffs ID cards and birth certificates for their daughters on all of which the Baha'i religion is inscribed.

[...]

As to the merits of the appeal, it is clear from the provisions regarding freedom of belief in successive Egyptian constitutions that they originated in Articles 12 and 13 of the Constitution of 1923. The former stipulated that the freedom of belief is absolute, but the latter stated that the State protects the freedom of practicing the rites of religions and beliefs in accordance with the observed customs of Egypt, on condition that they do not violate the public order or morals. The travaux préparatoirs indicate that these two articles were originally one in the draft prepared by the committee in charge of the general principles who was guided by a model proposed by Lord Curzon, the Minister of Foreign Affairs of Britain, the country that occupied Egypt at the time. The draft ran as follows: 'freedom of religious belief is absolute. All inhabitants of Egypt may practice with complete freedom in public or private the rites of any confession, religion or belief provided these rites do not violate the public order or the public morals.' This text gave rise to strong opposition from the members of the constitutional committee, because it was so general that it covered all religious rites. Meanwhile, the religious rites that needed to be protected were those of the recognized religions, namely the three heavenly religions: Islam, Christianity and Judaism. It was then decided to confine the provision to the protection of these religions so that there will be no possibility to create another religion. These provisions were divided into the two aforementioned Articles: 12 and 13. The former provided for the freedom of belief and the latter provided for the freedom of practicing religious and belief rites etc. ... These two articles remained in force until the Constitution was replaced by that of 1956, which combined the two provisions in one, which became Article 43: 'The freedom of belief is absolute and the state protects the freedom of the practicing of religious and belief rites in accordance with the customs observed on condition that they do not violate the public order and morals.' The same provisions appeared later under Article 43 of the Constitution of 1958. The same provision was prescribed again under Article 34 of the Constitution of 1964. Finally it has become Article 46 of the

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present constitution which reads as follows: 'the state guarantees the freedom of belief and the freedom of practice of religious rites'.

It is clear from the above that all Egyptian constitutions guaranteed the freedom of belief and the freedom of religious rites, as they constitute fundamental principles of all civilized countries. Every human being has the right to believe in the religion or belief that satisfies his conscience and pleases his soul. No authority has power over what he believes deep in his soul and conscience.

As to the freedom of practicing religious rites, this has the limitations that were explicitly mentioned in previous constitutions and were omitted in the present constitution, i.e. the condition of respecting the public order and morals. This omission does not mean the purposeful forfeiting of this stipulation and the permitting of the practice of religious rites even if they violate the public order and morals. The legislature considered that this stipulation is self-evident and a fundamental constitutional provision that must be observed without express mention. But, the religions whose rites are protected by this provision, as deduced from the travaux préparatoirs of Articles 12 and 13 of the Constitution of 1923, the origin of all the provisions that appeared in the successive Egyptian constitutions, including Article 46 of the present constitution, are the three heavenly religions: Islam Christianity and Judaism.

Considering that the Baha'i belief – as unanimously concluded by the Muslim 'imams' as well as the rulings of the Supreme Constitutional Court and the Supreme Administrative Court – is not among the recognized religions, whoever follows it from among the Muslims is considered apostate 'Murtad'. Investigation of the history of this belief reveals that it began in 1844 when its founder Mirza Muhammad 'Ali (sic) entitled the Báb declared in Iran that he intends to reform Islam and redress the affairs of the Muslims. People were divided about this belief especially in its attitude towards the Muslim shari'ah. In order to put an end to this division, its founder called for a conference in 1848 that was held in 'Badasht' in Iran wherein he revealed the concealed [purpose] of this belief and its complete separation from Islam and its shari'ah. The books of their belief, the most important of which are the Bayán, which was written by the founder of the movement, and the book that they call 'The Aqdas', which was written by his successor Mirza Hasan 'Ali (sic) entitled Bahá'u'lláh, which he styled after the Koran, are overflowing with principles and tenets that confirm this declaration by their variance with the principles of the Islamic religion as well as their contradiction to all the heavenly religions. They absolutely and totally forbid the Jihad that is provided for in the Islamic shari'ah, because they want people and nations to submit to their executioners without any resistance, in return for poetic and sweetened words calling for the establishment of a world government, which is the main purpose of the Baha'i movement. This is one of the secrets of their ties with the colonialists, old and new, who embrace and protect them. Furthermore, they made up a 'shari'ah' for themselves in accordance with their beliefs which forfeits the provisions of fasting, praying, family law in Islam and makes new and different provisions. The founders of this belief were not satisfied to come to an end with their claim of prophethood and divine message (for they proclaimed that they were Messengers from God who receive revelation from the Most High Almighty in denial of Muhammad, God's blessing and peace be upon him. [He] is the seal of the Prophets and Messengers of God as is stated in the Koran: 'Muhammad is not the father of any man among you, but he is the Apostle of God, and the seal of the prophets'), but went on to claim godhood for themselves. For this reason, the legislator promulgated Law no. 263 of 1960 concerning the dissolution of all existing Baha'i Assemblies and

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centres in the country and forbade at the same time individuals, establishments or bodies to perform any of the activities that these Assemblies and centres used to perform. This is the law that was brought before the Supreme Court under no. 7 of 2 J. C. on allegations of being unconstitutional, which case it was decided on 1st of March 1975 was unfounded and to be dismissed. This ruling is binding upon all the authorities of the state. In addition, that court also ruled that the said law does not violate the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10/12/1948 and which Egypt signed, because this declaration, despite its guarantee in Article 18 to give everyone the right to freedom of thought, expression and religion, [provides that] 'this latter right should be understood within the limits of what is recognized, i.e. what is meant by religion is one of the three religions: Islam, Christianity and Judaism'.

Considering that the study of the provisions of Law no. 143 of 1994 and its regulations made by the Minister of the Interior, Decision no. 1121 of 1995, shows that religion is an item of basic data that the legislation requires to be recorded on birth and death certificates, ID cards, family record, marriage and divorce records as well as other documents issued by the Civil Status Department issued in implementation of the aforementioned Law no. 143 of 1994 and its regulations: In light of this it is imperative to determine that what is meant by religions are those that are recognized, namely the three heavenly religions: Islam, Christianity and Judaism, on the grounds that they are the religions for whose rites the successive Egyptian constitutions guaranteed freedom. Other than these (such as Baha'ism or others), which the scholars 'fuqaha' of the nation and the successive rulings of both the constitutional and administrative courts unanimously agreed are not among the heavenly religions, and which thus dissent from Islam as well as the religions of the book (Christianity and Judaism), their recording in either the documents of the Civil Status Department – [documents] which are mentioned in the civil status law, including the documents under consideration – or in any other official documents issued by the government administration that requires the mention of religion – is not allowed. This is established on the grounds that the legal provisions that regulate all these issues are considered part of the public order. Therefore no data that conflict or disagree with it should be recorded in a country whose foundation and origin are based on Islamic *shari'ah*. Consequently, the demands of the plaintiffs for the annulment of the negative decision of the administration regarding not writing the word Baha'i in the space assigned for religion in their ID cards and for their three daughters Bakinam, Farah and Hana are unfounded and must therefore be dismissed.

Considering that the court ruling under examination is inconsistent with these views, such judgment is contrary to law and thus must reversed.

Considering that the party who loses his case must bear the costs according to Article 184 of the procedures.

For these reasons the court decides to admit the two appeals as to the form and as to the merits of the case to annul the appealed ruling, dismiss the case and enjoin on the first and second respondents in the appeal nos. 16834 and 18971 of 52 J.S. to pay the costs.

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