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Reframing the state in eradicating discrimination

Freedom of religion or belief and non-discrimination

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Emergence of international standards

International human rights instruments categorically insist on there being no discrimination on the grounds of religion or belief. This is clear from the language of the UN Charter itself and it is further reiterated in the Universal Declaration of Human Rights. The UN Charter’s Article 1.3 holds one of the purposes of the United Nations to be the promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction inter alia on the basis of religion. Entitlement to all the rights and freedoms of the Universal Declaration of Human Rights is also without distinction of any kind, such as religion, as outlined in its Article 2.2.

This trend continued with the resolution of the UN General Assembly of 1960, which expressed concern regarding instances of religious and racial discrimination not being ‘sufficiently combatted’; calling upon ‘the Governments of all States to take all necessary measures to prevent all manifestations of racial, religious and national hatred’, and condemning all such manifestations and practices. The coming into force of the Twin Covenants saw a further deepening of the concern with discrimination on the grounds of religion or belief. The International Covenant on Economic, Social and Cultural Rights (ICESCR) upholds in Article 2.2 that, ‘the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind’ such

1 Charter of the United Nations, adopted 24 October 1945, 1 UNTS XVI, Art. 1.3.
3 UN General Assembly Resolution 1510(XV), Manifestations of Racial and National Hatred, 12 December 1960, preambular para. 4.
4 UN General Assembly Resolution 1510(XV), para. 2.
as religion. The International Covenant on Civil and Political Rights (ICCPR) uses the term ‘ensure’ rather than ‘guarantee’ and emphasizes ‘no distinction of any kind’ in Article 2.1 that ‘[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind’ such as religion. Article 26, the ICCPR’s standalone non-discrimination provision, elaborates this as follows: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.’

In this respect, ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground’ such as religion. Non-discrimination on the basis of religion or belief is replicated in numerous other instruments too, including Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination.

Further to the 1960 General Assembly resolution, it took the international community 21 years to finally deliver an international instrument addressing religion or belief but when it did so discrimination on the grounds of religion or belief proved its central concern. Even the title of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration) is telling of its focus. ‘Non-discrimination’ on the basis of religion is repeated ten times and ‘without distinction’ once. Preambular paragraph one recognizes that States have, indeed, already ‘pledged themselves to take joint and separate action . . . to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction’ inter alia on the basis of religion. The preamble also recalls the original genesis of the 1981 Declaration, the concern of the 1960 General Assembly resolution about manifestation of discrimination in matters of religion or belief, and the need to eliminate, prevent and combat such intolerance.

The 1981 Declaration also provides us with the only definition in international human rights instruments focused on non-discrimination on the basis of religion or belief. This is captured in Article 2.2: “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis. The impetus for the ‘distinction, exclusion, restriction or preference’ may be grounded in the sense of superiority of the perpetrator, or the religion or belief violation or may be based on broader or intersectional prejudices regarding the victim. Furthermore, the discrimination may be perpetrated by a state or non-state actor. The determination of ‘intolerance and discrimination based on religion or belief’ can be made regardless of motive and by state or non-state perpetrator.


Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 26 November 1981, A/RES/36/55, preambular para. 1.

Id., Art. 2.2.

In E/CN.4/RES/2005/40, Commission on Human Rights, Elimination of all forms of intolerance and of discrimination based on religion or belief, 20 April 2005, para. 7 the Commission on Human Rights, ‘[e]xpresses concern at the persistence of institutionalized social intolerance and discrimination practised in the name of religion or belief against many communities.’
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Article 3 of the 1981 Declaration traces the emergence of the principle of non-discrimination on the basis of religion or belief and outlines its significance. As such, it is important to consider it in full:

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.  

Having considered the emergence and significance of this principle, let’s return to the question of discrimination on the grounds of religion or belief.

‘Grounds of’ religion or belief

Discrimination and freedom of religion or belief is concerned with the use of religion or belief affiliation as the grounds of exclusion from human rights – whether in the economic, social, cultural, civil and/or political fields. One set of concerns that the question of non-discrimination and freedom of religion or belief primarily has in mind is state restrictions, exclusions or limitations of rights on the grounds of the religion or belief of the individual rights holder or rights holders. A second set of concerns relate to determining whether actions by different non-state actors have had the effect of restricting the rights of others on the basis of religion or belief. In both cases, the religion or belief grounds may relate to the beliefs of the perpetrator or victim or a combination of the two. That is, the trigger for the discrimination may be due to the sense of superiority of the perpetrator of the religion or belief violation or on broader or intersectional prejudices regarding the victim. Though this is true of other areas of discrimination too, such as racial discrimination, it is perhaps more pronounced in relation to religion or belief discrimination.

State and non-state actors

Discrimination on the basis of religion or belief may result from state restrictions, exclusions or limitations of rights or the actions of non-state actors. The role of non-state as well as state actors in giving rise to such discrimination finds prominent recognition in Article 2.1 of the 1981 Declaration, ‘No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.’ Article 4.1 builds on this and also recognizes that such discrimination can be in any field: ‘civil, economic, political, social and cultural life’ and states need to pursue ‘effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms’. Recognizing that both state and non-state actions can lead to discrimination, however, this is not the same as inferring an equivalence of power or impact between them.

12 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Art. 3.
13 Id., Art. 2.1.
14 Id., Art. 4.1.
The UN Special Rapporteur on Religious Intolerance was appointed in 1986. The resolution bringing the mandate into being for the first time suggested an explicit highlighting of the role of the state in relation to discrimination. The Commission on Human Rights resolution addressing the Implementation of the Declaration on the Elimination of All Forms of intolerance and of Discrimination Based on Religion or Belief expresses serious concern ‘by frequent, reliable reports from all parts of the world which reveal’ that the 1981 Declaration is not being implemented ‘because of governmental actions’.\(^\text{15}\) This is reinforced in the operative part of the resolution expressing deep concern about ‘reports of incidents and governmental actions in all parts of the world’\(^\text{16}\) which are inconsistent with the 1981 Declaration. When recognizing ‘the value of constructive dialogue on the complex and serious questions of intolerance and of discrimination based on religion or belief’,\(^\text{17}\) the resolution speaks of the Special Rapporteur examining such incidents and recommending ‘remedial measures, including, as appropriate, the promotion of dialogue between communities of religion or belief and their Governments’.\(^\text{18}\) Even in relation to dialogue between communities of religion or belief, therefore, the resolution returned the question squarely to the state actors. This sharp and exclusive focus on state actors has been nuanced in the years since 1986, both in the resolutions renewing the mandate as well as the practice of the mandate holders.

Seven years later, General Comment 22 of the Human Rights Committee of 1993 was again almost totally state-centred in the issues it raised in relation to discrimination. In discussing education, it speaks of public school education being given of ‘the general history of religions and ethics if it is given in a neutral and objective way’\(^\text{19}\) and specifically states that ‘public education that includes instruction in a particular religion or belief is inconsistent with Article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians’.\(^\text{20}\) It balances this with the liberty of parents or legal guardians ‘to ensure that their children receive a religious and moral education in conformity with their own convictions’.\(^\text{21}\) Even in discussing coercion, which arguably often draws on non-state actors in its perpetuation, the discussion largely centres on states. It outlines the prohibition on ‘coercion’ that:

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\text{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 intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by Article 25 and other provisions of the Covenant, are similarly inconsistent with Article 18.2.}\]

\(^{15}\) E/CN.4/RES/1986/20, Adopted at the 50th meeting, on 10 March 1986, by a roll-call vote of 26-5-12, preambular para. 3.

\(^{16}\) Id., para. 1.

\(^{17}\) Id., preambular para. 5.

\(^{18}\) Id., para. 2.

\(^{19}\) Human Rights Committee, General Comment 22 on Art. 18, forty-eighth session, 1993, UN Doc HRJ/GEN/1/Rev. 1 at 35 (1994), para. 6.

\(^{20}\) General Comment 22, para. 6.

\(^{21}\) Id.

\(^{22}\) Id., para. 5.
It is, therefore, addressing state laws, policies and practices that lead to coercion.

The bulk of General Comment 22’s concerns centre around discrimination that may flow from a strong state–religion relationship. This is addressed in paragraphs 2, 9 and 10, with paragraph 9 being the most extensive:

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, including Articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26.23

Paragraph 2 then emphasizes that the Human Rights Committee ‘views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community’.24 Both this article and paragraph 10 put the burden of proof on the state to show that ‘a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice’, this does 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’.25 Even in the case of conscientious objection, the Human Rights Committee insists there be ‘no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service’.26

The Human Rights Committee also gives a lot of attention to the question of discrimination in relation to limitations on manifestation of religion or belief. They remind States Parties that they should ‘proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26’ – that is, non-discrimination on the various grounds as well as the standalone non-discrimination provision. The sharpest focus is then brought to the limitation ground of ‘morality’, where the Human Rights Committee insists that:

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.27

23 Id., para. 9.
24 Id., para. 2.
25 Id., para. 10.
26 Id., para. 11.
27 Id., para. 8.
The Human Rights Committee’s concerns regarding the realization of Article 18 of the ICCPR in 1993 were clearly predominantly focused on the role of the state. The role of state and non-state actors, however, cannot be strictly separated for a number of reasons. Firstly, there is the question of the environment the state has created to facilitate or hinder enjoyment of freedom of religion or belief. This environment sets the tone for interreligious and religious–belief relationships. Secondly, there is the collaboration between state and non-state actors, which often takes place where there is a persistent pattern of discrimination on grounds of religion or belief. This may or may not be intended and may have historical roots. There may be particular concern about this in the context of a strong state–religion or state–ideology relationship. Thirdly, and in less overt instances, overturning an entrenched discrimination, even when continuing as social hostility rather than state exclusion, requires robust and positive state attention.

The 2007 mandate resolution,\(^{28}\) in contrast, draws much attention to the role of non-state actors. It makes specific mention of non-governmental organizations and religious bodies and refers to activities, such as interreligious and intra-religious dialogues and exchanges, that is – activities that do not necessarily involve state actors. It also refers to cultural and traditional practices, an issue that is indelibly linked with the perpetuation of a lot of the religion or belief discrimination that takes place. The preamble includes the following:

\emph{Recognizing} the importance of promoting dialogue in order to enhance mutual understanding and knowledge among different social groups, cultures and civilizations in various areas, including culture, religion, education, information, science and technology, and in order to contribute to the promotion and protection of human rights and fundamental freedoms,

\emph{Underlining} the importance of education in the promotion of tolerance, which involves the acceptance by the public of, and its respect for, diversity, including with regard to religious expressions, and underlining also the fact that education should contribute in a meaningful way to promoting tolerance and the elimination of discrimination based on religion or belief,\ldots

\emph{Convinced} of the need to address the rise in all parts of the world of religious extremism affecting the rights of individuals and groups based on religion or belief, the situations of violence and discrimination that affect many women as well as individuals from other vulnerable groups in the name of religion or belief or due to cultural and traditional practices, and the abuse of religion or belief for ends inconsistent with the Charter of the United Nations and other relevant instruments of the United Nations.\(^{29}\)

The preamble also makes reference to the ‘important role’ of non-governmental organizations and religious bodies, the role of religious organizations and the importance of interreligious and intra-religious dialogue. The objectives are those of combating ‘hatred, intolerance and acts of

\(^{28}\) See also: E/CN.4/RES/2005/40, Commission on Human Rights, Elimination of all forms of intolerance and of discrimination based on religion or belief, 20 April 2005, para. 9, where the Commission on Human Rights ‘[r]ecognizes that the exercise of tolerance and non-discrimination by all actors in society is necessary for the full realization of the aims of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and invites Governments, religious bodies and civil society to continue to undertake dialogue at all levels to promote greater tolerance, respect and understanding.’

\(^{29}\) A/HRC/RES/6/37, Elimination of all forms of intolerance and of discrimination based on religion or belief, 14 December 2007, preambular paras. 5, 6 and 10.
violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as incitement to hostility and violence through all appropriate measures including through exchanges, and with ‘strengthened dialogue among and within religions or beliefs’. The actors in this endeavour are to include ‘non-governmental organizations and bodies and groups based on religion or belief’. Dialogue, in particular, is spelt out to include non-state actors in the following:

Invites all actors to address in the context of that dialogue, inter alia, the following issues within the framework of international human rights:

(a) The rise of religious extremism affecting religions in all parts of the world;
(b) The situations of violence and discrimination that affect many women as well as individuals from other vulnerable groups in the name of religion or belief or due to cultural and traditional practices;
(c) The abuse of religion or belief for ends inconsistent with the Charter of the United Nations and other relevant instruments of the United Nations.

Subsequently, the 2012 report of the Special Rapporteur to the General Assembly addressed the controversial, but central, topic of conversion. If we consider the recommendations made at the end of that report, we see that recommendations are made to various actors: states and non-state actors – and specifically to civil society organizations, public and private media, religious leaders and opinion formers, religious communities, interfaith groups and development aid organizations. It has to be said, though, that the recommendations to state and various levels of state administration are more than four times more extensive than the recommendations to non-state actors, and that a number of those listed as non-state actors exist as state actors in many contexts. For example, religious leaders in some states are civil servants serving on state institutions and need to have their statements approved by the state. Independent civil society and development organizations may also be largely lacking in many parts of the world. Nevertheless, the recommendations specifically made to non-State actors by the Special Rapporteur are significant ones. For example, he recommended that civil society organizations pay particular attention to the vulnerable situations those forced to convert or reconvert may face; and for the media, religious communities and interfaith groups to provide fair and accurate information about converts and those engaging in ‘non-coercive missionary activities’.

Statist discrimination?

Is the strong focus on the state regarding religion or belief discrimination a product of the era in which these standards were drafted, or is it intrinsic to the nature of the violations that are

30 Id., preambular para. 9(l).
31 Id., preambular para. 9(m).
32 Id., preambular para. 12.
33 Id., preambular para. 15.
34 Id., preambular para. 11.
36 Id., para. 72.
37 Id., para. 72a.
38 Id., para. 72b, 72d.
suffered? Certainly the snapshots of resolutions, the treaty interpretation and the report we considered above from 1986 (the resolution bringing the UN religion or belief mandate into being), 1993 (General Comment 22 on Article 18 of the ICCPR), 2007 (resolution renewing the religion or belief mandate) and 2012 reflected an increased attention to the role of non-state actors in relation to discrimination over that timeframe. Though the 2012 report of the Special Rapporteur on freedom of religion or belief to the General Assembly targeted the state with most of its recommendations, it also addressed non-state actors in some detail.

The broader discrimination concerns of international human rights law, for example in addressing women and race, address non-state actors more prominently. What is more is that they consider the role of non-state actors as central to tackling discrimination. Let’s examine this, before returning to the question of why this disparity with discrimination in the field of religion or belief?

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) pre-dates all freedom of religion or belief protections other than those reflected in the UN Charter and UDHR. It offers important insights into discrimination as an early UN standard tackling this scourge. The fate of ICERD and freedom of religion or belief standards were sharply separated subsequent to the UN General Assembly’s joint 1960 concern with both racial and religious discrimination, due to the latter proving too controversial for a steady drafting effort by the international community. Let’s turn, then, to the extent to which ICERD recognizes non-state actors in the effort to eradicate racial discrimination.

First, we can observe that the definition of intolerance and discrimination based on religion or belief in Article 2.2 of the 1981 Declaration largely mimics the definition of racial discrimination in ICERD, namely:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.39

In condemning racial discrimination, however, the range of measures States Parties are to undertake includes the state undertaking ‘not to sponsor, defend or support racial discrimination by any persons or organizations’40 and reviewing and nullifying all laws and policies that have the effect of ‘creating or perpetuating racial discrimination wherever it exists’. This is to include a review of local policies. Two other measures reach deep into the non-state sector.

Article 2 contains the ‘fundamental obligations’ of the Convention, as ICERD itself recognizes.42 It upholds that ‘[e]ach State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division’.43 The rights that are to be enjoyed without discrimination include the right to nationality,44 the

40 Id., Art. 2.1(b).
41 Id., Art. 2.1(c).
42 Id., Art. 5.
43 Id., Art. 2.1(c).
44 Id., Art. 5(d)(iv).
right to marriage and choice of spouse, and the right to inherit. We know that the enjoyment of these rights are very commonly challenged in many parts of the world in relation to religion or belief affiliation, and these violations are not only perpetuated by law but also by practices, interfamilial threats and traditions. These strong measures are supplemented by recognition that States Parties are to adopt ‘immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups’.

Turning to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), we see similarly robust obligations on states. CEDAW lays out its key ‘action plan’ in Article 2, which addresses what states undertake to pursue ‘by all appropriate means and without delay’ in order to eliminate discrimination against women. Although these are state actions to be pursued, they show clear recognition of the important role of non-state actors for discrimination against women to be eliminated. This is laid out very clearly in the following, which calls on the state to undertake to ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’. The following also reflects a deep concern with non-state actions, calling upon states to take ‘all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’. In fact, it puts legislation, laws and regulations on a par with customs and practices. In doing so, it tackles a horizon that those tackling discrimination on the basis of religion or belief have yet been reticent to address.

Women’s rights has long recognized that ‘sex is a central organizing category in society’ (O’Donovan and Szyszczak 1988: 2). In addressing non-discrimination on the basis of sex, therefore, it is recognized that what needs to be addressed is ‘the underlying structures and power relations that contribute to the oppression of women’, to ‘transform these structures’ (Charlesworth and Chinkin 2000: 231) and contribute ‘to a world transformed by the interests of women’ (Charlesworth and Chinkin 2000: 248). This has helped to foster deeper understandings of non-discrimination, such that it goes beyond current state action and additionally takes on board the burden of history and the very structures that ensure the persistence of discrimination. Furthermore, expectations have shifted from the state’s ‘duties of restraint’ since this results in ‘the many forms of structural discrimination which cannot be traced to individual action go unremedied’ (Fredman 2008: 176). The focus has therefore moved human rights discussions from ‘formal’ equality (a claim for equal treatment in relation to another individual or group) to ‘substantive’ equality (a recognition that where the starting point is unequal, then merely levelling the playing field cannot deliver equality). Formal equality, ‘while important, is often radically inadequate to achieve equal enjoyment . . . because of significant historically determined differences’ (Yamin 2009: 6). Substantive equality focuses on facilitating enjoyment on an equal basis with others. It recognizes that positive measures – for example preferential treatment, positive discrimination, or affirmative action – may be required for ‘racial and ethnic minorities, women, persons from scheduled and lower castes, and persons with disabilities – to combat the
constraining effects of socially construed circumstances’ (Yamin 2009: 6). There is ‘not just a duty on the public authority to eliminate discrimination from its activities’ but also to ‘act positively to promote equality of opportunity and good relations between different groups throughout all its policy-making and in carrying out all its activities’ (McCrudden 2003: 21). This duty is an ‘active’ one (McCrudden 2003: 21).

From even a brief overview of these two treaties, it is clear that ICERD and CEDAW give much greater prominence to the role of non-state actors and the need to stamp out prejudices and prejudicial practices and traditions at the societal level. At one level it is clear that this great robustness is, at least in part, due to the fact that ICERD and CEDAW constitute binding legal treaties and are more expansive and detailed than the various freedom of religion or belief standards found across a variety of instruments. However, it may also be due to the great hesitancy in addressing the roots of discriminatory practices relating to religion or belief.

The roots of such discriminatory practices are no less established than the prejudices that burden racial discrimination or discrimination against women, quite to the contrary in fact. UN Sub-Commission expert Arcot Krishnaswami wrote in 1960 that, ‘[u]nderlying most discriminatory practices are prejudices which have crystallized into mores of a society. In the particular case of attitudes towards religions or beliefs, perhaps more than in any other field, mores are slow to change since they stem from deeply held convictions’ (Krishnaswami 1960: 63). In many societies, the ‘normalization’ of such prejudicial mores has only crystallized further in the years since 1960. This was reflected in the expression of concern by the Human Rights Council in its resolution in 2007, with regard to ‘the persistence of institutionalized or social intolerance and discrimination practiced against many in the name of or due to their religion or belief’. Since discrimination related to religion or belief, like racial discrimination and discrimination against women, is propped up with beliefs of superiority, entitlement, exclusion and longstanding prejudices, it is surprising that the role of non-state actors and the need to eradicate engrained societal practices have, so far, gained so little attention in international instruments. This has occurred despite the fact that international instruments addressing discrimination, even those predating the religion or belief instruments, give much sharper and more detailed attention to the need to strike at these roots of discrimination by acknowledging discrimination at all levels of society and the need for non-state actors to be partners with states in its eradication. So why is this so?

The reticence around religion or belief discrimination

It is suggested that the reasons centre around one of the central issues raised in General Comment 22 – the state–religion relationship. It is the burden of the state–religion relationship, allied with the state offering religious autonomy to varying extents to some religious communities, that has likely made the international community reticent to show recognition for the need for far-reaching and serious measures for the eradication of religion or belief discrimination for all. We see there that the Human Rights Committee does not prohibit a state–religion relationship in General Comment 22, but expresses deep concern about the discriminatory consequences that may flow from such a relationship. The Human Rights Committee insists that such a relationship should 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

51 A/HRC/RES/6/37, para. 3.
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non-believers'. The General Comment offers the examples of eligibility for government service, economic privileges, restrictions on practice of other faiths and conscientious objection. The burden of proof is on the state to show that such a relationship does 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’.

The UN Special Rapporteur on freedom of religion or belief made this question the central focus of his 2011 report. In it, he reiterates the Human Rights Committee position that ‘while the notion of State religions is not per se prohibited under international human rights law, States have to ensure that this does not lead to a de jure or de facto discrimination of members of other religions and beliefs’. He then gives attention to discrimination regarding privileging a particular religion or belief in oaths, in fostering national identity, in the historic references of a society, cultural heritage or ‘specific status positions on behalf of religious or belief communities’, all areas that one may consider as being the more innocuous areas of discrimination. He argues, however, that even regarding such matters states ‘should ensure that these provisions are conceptualized and implemented in a non-discriminatory manner’. His rationale is that ‘reference to the predominant historical role of one particular religion can easily become a pretext for a discriminatory treatment of the adherents to other religions or beliefs. There are numerous examples indicating that this is actually the case.’ All in all, he speaks of how ‘it seems difficult, if not impossible, to conceive of an application of this concept [that is, an official State religion] that in practice does not have adverse effects on religious minorities, thus discriminating against their members.’

Conclusion

The prevalence of a variety of state–religion relationships and privileges, it is suggested, has impacted the lack of robustness and clarity of international instruments that address discrimination based on religion or belief, in contrast, for example, with the muscularity of provisions regarding discrimination against women or on the grounds of race. Too much power rests on maintaining systemic discrimination and privileges. Too many governments rest on such systems for their authority and believe that without the ‘religion card’ or ideological ‘card’, their power would be no more. In the meantime, international instruments regarding religion or belief discrimination continue on the fiction that this area of discrimination is less ‘rational’. Even in its more extreme forms, religious discrimination does not appear out of nowhere. As the UN Special Rapporteur stated during the presentation of his report at the UN Human Rights Council, ‘[m]anifestations

52 General Comment 22, para. 9.
53 Id.
54 Id., para. 11.
55 Id., para. 10.
56 A/HRC/19/60f, Report of the Special Rapporteur on freedom of religion or belief, 20 December 2011, para. 64.
57 Id., para. 63.
58 Id., para. 62.
59 Id., para. 61.
60 Id., para. 61.
61 Id., para. 61.
62 Id., para. 72.
of collective hatred [collective religious hatred] do not “erupt” like a volcano, but they are caused by human beings, whose actions or omissions can set in motion a seemingly unstoppable negative dynamic in societies.\(^63\) Such hatred is ‘often caused by a combination of fear and contempt, which can trigger a vicious cycle of mistrust, narrow-mindedness and collective hysteria’ and the role of states is to ‘take an active role in trust-building through public institutions’ and provide for an ‘open, inclusive framework in which religious or belief-related pluralism can unfold freely and without discrimination’.\(^64\)

This chapter has argued that non-discrimination in relation to religion or belief has gradually given increased recognition to the need for robust action by all actors, at all levels and in all fields in order. This evolution has slowly given more recognition to the need for engaging with non-state actors and taking an active role in providing an environment where ‘distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis’\(^65\) is eradicated. A consideration of some parallel provisions in the field of racial discrimination and discrimination against women suggests a much more robust and earlier attention has been given to the measures required for the eradication of discrimination. The chapter therefore concludes that non-discrimination on the grounds of religion or belief needs to evolve to take on board such insights and play ‘catch up’ in relation to these other human rights provisions addressing discrimination.

**Bibliography**


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\(^64\) Id.

\(^65\) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Art. 2.2.