The International Human Right to Freedom of Conscience: an approach to its application and development

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Abstract

This thesis considers the scope and application of the human right to freedom of conscience. It traces the development of the right to conscience in international law, analyses the principal human rights treaties which codify the right, and considers various interpretations of the right to conscience in select national courts. The thesis argues that in judicial and scholarly interpretation, the human right to freedom of conscience has been linked too closely to religious belief, thus obscuring the non-religious dimensions of the right. The thesis aims to develop a jurisprudential framework to facilitate a broader practical application of the right to conscience.

Developing an analysis of the scope of the right to conscience, the thesis considers two distinct aspects: first, the forum internum, relating to the right to harbour a conscientious belief internally, and second, the forum externum, relating to the right to externally manifest a conscientious belief. Building upon this scheme, the argument turns to three practical applications of the right to conscience: conscientious objection to military service, objection to certain types of state taxation on conscientious grounds, and objection to the performance of a termination of pregnancy. For each example, the international and national aspects are considered.

The thesis concludes that a more generous scope be accorded to the right to conscience and more rigorous analysis be utilised when considering the application of the right.

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List of Abbreviations

AfrCHR	-	African Charter on Human and People's Rights
AmCHR	-	American Convention on Human Rights
CHR	-	Commission on Human Rights
CRC	-	Convention on the Rights of the Child
Declaration	-	Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief
ECHR	-	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	-	Economic and Social Council
GA	-	General Assembly
HRC	-	Human Rights Committee
ICCPR	-	International Covenant on Civil and Political Rights
ICJ	-	International Court of Justice
OAU	-	Organisation of African Unity
UDHR	-	Universal Declaration on Human Rights

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Chapter One

Introduction

I. Conscience as a Human Right

The freedom of conscience is enshrined as a fundamental human right in a broad range of international and regional human rights documents.[1] The fundamental status of the right is further acknowledged in a wide variety of domestic legal systems and it has been the subject of several international conferences. Various cultures also seem to acknowledge the existence of an ideal that is similar to conscience, such as the liang-chih of the Chinese,[2] dharama of the Hindu tradition,[3] or the Judeo-Christian link between religion and morals.[4] These elaborations suggest a universal recognition of the importance of the right to freedom of conscience.

Despite the foundational role ascribed to the conscience in assisting to uphold an individual's internal beliefs, entrenchment of the norm in international human rights law has been largely inadequate. For example, a key document indicating an emergence of the right as a norm of customary international law,[5] the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (hereafter, 'Declaration'), took over two decades to draft and was still subject to opposition by some states. A more binding Convention that was to follow the Declaration has not ensued.

Part of the problem for the right to conscience is the difficulty in defining the right in a decisive manner. The international human rights system has not offered a specific definition of the right to conscience that would provide some direction for its application. Even the Human Rights Committee's General Comment to Article 18 of the International Covenant on Civil and Political Rights (hereafter, 'ICCPR'),[6] the Article that codifies the right to conscience, does not provide any substantive definition of

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[1] See discussion infra at Chapter Three
[2] Cheng (1974)
[3] See e.g. Underwood (1974)
[4] See discussion infra at Chapter Two
[5] See e.g. Meron (1991)
[6] See Appendix III

the term and fails to indicate how the right is to be applied.[7] Kevin Boyle provides an accurate summary of the right's status in noting that:

> as compared with other rights and freedoms, freedom of conscience remains relatively ill defined as to substance and of uncertain normative force in international law.[8]

The current international status of the human right to conscience then is somewhat puzzling. Conscience is a fundamental internal human function that is acknowledged by the international human rights system, yet it lacks a proper legal definition and has not been elucidated through a large body of jurisprudence. This indeterminate treatment of the right to conscience is also reflected in the secondary literature.

II. Survey of the Literature

The principal approach to analysing the right to conscience in the secondary literature has been to associate the right to conscience with the right to freedom of religion. For example, in one of the first United Nations reports to focus on this right, the 1960 Krishnaswami Report entitled The Study of Discrimination in the Matter of Religious Rights and Practices, the author incorporated conscience as a protected belief while emphasising the evolution of the right to conscience from the right to freedom of religion.[9] Historical,[10] philosophical,[11] and legal[12] commentators have similarly noted how the right to conscience developed from religious principles[13] and the emerging protections granted to minority beliefs.[14]

The literature associating the right to conscience with religion is necessary. Human rights treaties generally embody the right to conscience in tandem with the right to freedom of religion[15] and the two forms of belief are similar in character.[16]

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[7] Save for the right to military conscientious objection.
[8] Boyle (1993;38)
[9] Krishnaswami (1960)
[10] Kamen (1967); Bates (1945)
[11] Manelli (1984)
[12] See e.g. McDougal, Laswell and Chen (1980); Dickson (1995); Clarke (1977)
[13] Typified by the writing of St. Thomas Aquinas. D'Arcy (1969)
[14] McDougal Laswell and Chen (1980)
[15] See discussion infra at Chapter Three
[16] See discussion infra at Chapter Five

Ironically, the emphasis on religion poses one of the key obstacles to developing the right to conscience. Studies tend to focus on the role of the right to conscience within the framework of the freedom of religion, at the expense of any formal understanding of the right to conscience in a broader context.[17] This preoccupation with freedom of religion in turn has influenced and altered the practical application of the right to conscience.

For example, the analytical focus of the right to conscience in the European Convention on Human Rights[18] (hereafter, 'ECHR') or the ICCPR[19] is either within the context of freedom of religion or other human rights. Due to the focus on religion in supporting materials to the treaties, such as state reports submitted to the ICCPR's Human Rights Committee (hereafter: 'HRC'), both Partsch[20] and Lillich[21] turn their attention almost exclusively to the freedom of religion. Humphrey,[22] on the other hand, accords some status to the right to conscience but deems it an internal right that is not subject to any formal means of externally manifesting the belief. Scheinen[23] and Vermeulen[24] also offer a similar account of the Universal Declaration on Human Rights (hereafter, 'UDHR') and ECHR, respectively.

One problem with these analyses of the right to conscience is that the commentators tend to overlook the intentions of the treaty drafters. The travaux preparatoires to the treaties reflect an understanding of the right to conscience as meriting specific protection on a comparable scale to the freedom of religion.[25] While all commentators acknowledge that the treaties protect religious, atheist, and non-theist beliefs, the right to conscience is normally interpreted as an internal right that protects non-believers against an oppressive imposition of religious beliefs.[26] This approach to the right to conscience does not seem to consider the importance of a conscientious belief for an individual asserting the right to conscience.[27]

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[17] See e.g. Dickson (1995); Benito (1989); Clark (1978); Neff (1977); Lerner (1982)
[18] See e.g. Beddard (1993); vanDijk and vanHoof (1992)
[19] See e.g. Harris (1995) (analysis of UK law's conformance to ICCPR standards)
[20] Partsch (1981)
[21] Lillich (1985)
[22] Humphrey (1985)
[23] Scheinen (1992)
[24] Vermeulen (1992)
[25] See discussion infra at Chapters Three and Five
[26] Dickson (1995); Benito (1989); Walkate (1989); Frowein (1986); McDougal Laswell and Chen (1980); Clark (1978); Neff (1977)
[27] See discussion infra at Chapters Four and Five

More recent studies, however, have propounded a limited expansion of the right to conscience. Nowak,[28] for example, offers quite a comprehensive analysis of the right in the ICCPR that specifically considers the possibility for manifesting a conscientious belief. In reviewing current interpretations of the right to conscience in international tribunals, such as the HRC and the ECHR Commission, he acknowledges that it is possible to manifest a conscientious belief in the same manner as a religious belief. The problem is that he too focuses principally on the right to freedom of religion,[29] possibly because of his reliance on the Declaration as a means of clarifying the scope for exercising the right.[30]

An additional recent source that begins to clarify the right to freedom of conscience is derived from a 1992 Council of Europe Seminar, that was followed by a book entitled Freedom of Conscience. The publication provides a collection of essays by academics and legal practitioners. The studies however offer either a macroanalysis of the right in international law or a microanalysis of the right within a particular context or domestic situation. As a result there is a lack of any focused analysis on the international status and scope of the right to conscience.

For example, following a discussion of the potential limits on the right to conscience in international law,[31] the rapporteurs discuss conscientious objection to trade unions or to military service within a particular country. They generally do not consider the international legal status of the right. As a result, the essays reflect the unique approach of each author towards the right, such as the Quakers' approach to conscientious objection to taxes. While such considerations certainly lead towards a better understanding of the right to conscience, and illustrate the breadth of the issues raised by the right, the essays do not evaluate the overall manner in which the right to conscience is being applied. The Seminar participants' questions following each section are however enlightening as they provide a broader context for consideration of the submitted communications.

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[28] Nowak (1993)

[29] The study by Cumper (1995) also adopts a similar approach.

[30] This was the same oversight committed by the HRC when drafting the General Comment to Article 18. The manifestation of a conscientious belief is acknowledged as a right under the ICCPR yet the amplification of the potential scope for manifesting a conscientious belief reflects the religious manifestations listed in Article 6 of the Declaration. See discussion infra at Chapter Five

[31] Vermeulen (1992)

A 1990 report of an EC conference held in Italy, entitled Conscientious Objection in the EC Countries, provides a more focused analysis of the right to conscience in a variety of EC states. The authors' comments regarding the status of the right to freedom of conscience in EC member states certainly has comparative merit and demonstrates the variegated manner in which the right is applied. Because the purpose of the conference was to focus on particular applications of the right to conscience in specific states, the articles vary between broad ranging analyses of the right[32] to one-dimensional considerations regarding the right to conscientious objection to military service.[33] No clear understanding of the right in international law emerges.

Analysis of the right to conscience in the domestic context has also tended to focus on the religious aspect of the right.[34] Hence even in the US, where the separation of Church and State is a fundamental principle, the right to a secular conscience derives from the freedom of religion.[35]

Upon considering domestic applications of the right to conscience, commentators generally focus on specific applications of the right, such as conscientious objection to military service or objection to trade unions.[36] Military conscientious objection has received the majority of attention,[37] and a 1993 publication, The New Conscientious Objection,[38] sums up the status of the right in a wide variety of states.[39] The significant conclusion by the editors of the study is the noticeable shift in providing for the right to secular based military conscientious objection along with religious based objections.[40]

Another significant body of secondary literature on conscience consists in interpretation of the internal derivation of the individual's conscience. Philosophical, theological, and sociological articles attempt to provide a phenomenological understanding of conscience.[41] Some philosophical accounts of

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[32] Larricia (1992;111) (article on Italian law); Lyall (1992;165) (article on UK law)

[33] Siesby (1992;159) (analysing military conscientious objection in Danish law)

[34] See discussion infra at Chapter Five

[35] See e.g. Eisgruber and Sager (1994); Smith (1993); Laycock and Thomas (1995); Marshall (1995); Flowers (1993)

[36] Olivier & Potgeiete (1994) (objecting to trade unions in South Africa); Leader (1992;147-161); Vranken (1994)(trade union objection in Australia); Bradney (1987)(trade union objection in the UK)

[37] Davis (1991); Major (1992); Lippman (1990); Brown, Kohn and Kohn (1986); Landskroen (1991); Sweeny (1980); Noone (1989).

[38] Moskos and Chambers, ed. (1993)

[39] See also Amnesty International (1991)

[40] See also discussion infra at Chapter Six

[41] See e.g. May (1983); Childress (1979); Neibhur (1945); Broad (1969); Wallace (1978)

conscience consider the role of conscience as a basis of human rights and human dignity.[42] A recent article by Rotenstreich[43] provides an excellent analysis of the function of conscience. Additionally, a 1984 Salzburg Colloquium resulted in a range of multi-disciplinary views on conscience, with a principal focus on understanding the significance of conscience for the individual and society.[44] The Colloquium also served to explain the current Christian approach to conscience[45] that has experienced a recognisable shift towards acknowledging the secular conscience.

The various phenomenological and ontological approaches towards conscience have not been considered within the context of international human rights law. They do however raise important issues that merit consideration for this thesis, such as understanding the underlying moral and ethical principles that are raised by the conscience and the relevance of such principles for an individual relying upon a conscientious belief. Elaborating on the underlying meaning of conscience furthers one's understanding of the implications of a conscientious belief and enhances the importance of the right to freedom of conscience.

III. Emerging Questions

Recognising that the majority of legal analyses of the human right to freedom of conscience have focused on the freedom of religion, there remain important questions regarding the scope of the right to conscience within a non-religious context. Does it only involve moral or ethical choices comparable to a religious standard or does conscience relate to broader notions of individual beliefs? Furthermore, unlike a religious belief, a conscientious belief need not be linked to a 'universal' set of beliefs. The subjective nature of a conscientious belief makes it difficult to assess adequately the substance of an individual's conscientious belief. What does conscience mean when considered outside of a religious context?

One must also consider the possibility for manifesting a conscientious belief, as indicated by the treaties that codify the right. Does the manifestation of a belief extend to all practices that might result from

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[42] Beach (1992); Buga (1992); Kordig (1979); Lorenzen (1990)
[43] Rotenstreich (1993)
[44] Zecha and Weingartner (1987)
[45] See also Fuchs (1990).

a belief or is it limited to the actual practice of a conscientious belief? What are the permissible limitations that may be imposed by a state on the manifestation of a conscientious belief?

Additional considerations involve the social implications of the right to freedom of conscience. It is almost inevitable that a conflict will arise between an individual's conscientious beliefs and society's principles, particularly when the socio-religious principles upon which a state is based derive from political, rather then religious, influences.[46] Individuals might begin to assert whimsical notions under the guise of the right to conscience that are contrary to fundamental social principles. Must a state automatically defer to an individual's conscientious belief? Providing for the manifestation of a variety of conscientious beliefs may act to undermine social morality, possibly even creating an incoherent social-moral framework.[47] Even in a secular state, one must determine the boundaries for alleging a conscientious belief that differs from the principles upheld by the state. What is the capacity of a conscientious belief that is operating outside a particular religious or social context?

Referring to the human rights treaties that codify the right to conscience can provide some initial resolutions to the problems posed by a right as internally diverse as the right to freedom of conscience. In drafting the human rights treaties that codify the right, the drafters considered a host of perspectives that reflect the various cultural and philosophical approaches to the term 'conscience'. As the international human rights system evolved, and the status of treaties as normative standards developed, the application of the right to conscience has been considered in a variety of legal systems. Hence, one can begin to address the questions regarding the right to conscience by examining the manner in which the right is interpreted and applied in the international law sources of treaty law and state practice.

IV. Sources

The principal human rights treaties, namely the ICCPR, ECHR, African Charter on Human and People's Rights (hereafter, 'AfrCHR'), and the American Convention on Human Rights (hereafter, 'AmCHR'), along with other human rights documents and international instruments that refer to the right to freedom of conscience, such as the Declaration, will serve as the main sources for explicating the right to

[46] Reisman (1993)
[47] See e.g. MacIntyre (1982)

conscience. Reference shall be made to the travaux preparatoires, state reports to supervisory committees, and judicial or tribunal decisions, whenever relevant, to explore the underlying meaning of the treaty or document. These sources demonstrate the manner in which the right to conscience is interpreted and applied, and provide a framework for facilitating the practical application of the right to conscience. Because the travaux preparatoires for the AfrCHR are difficult to obtain, and it is a relatively new document, a clear definition of its legal parameters has not emerged. Nonetheless, it is an important document that merits attention due to the unique cultural approach of the AfrCHR.

Due to a dearth of international sources that deal specifically with the right to freedom of conscience, the analysis will also rely on domestic sources of law. International and domestic standards exist in a complementary relationship resulting from the jurisprudential inter-development of these legal systems. Each system assists in refining the other and shaping the direction for developing human rights. The different approaches adopted by domestic legal systems also provide a useful cross-fertilisation between the international and domestic systems, thereby amplifying the manner in which the right to conscience can operate.

Both international and domestic approaches to the right to conscience are viable sources of interpretation, as reflected in Article 38 of the Statute of the International Court of Justice. Article 38(1) does not appear to distinguish between international sources of law, such as conventions, and general principles of law as recognised by civilised nations.[48] While judicial decisions are a subsidiary means for determining international law,[49] there is no indication that they should be accorded secondary status,[50] particularly as the individual's ability to raise an international human rights cause of action before a judicial tribunal develops.

The principal domestic systems to be examined will be the US and India, with reference to other states, such as the UK, Germany, and Australia, where appropriate.[51] English is the common language in

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[48] Compare Article 38(a) of the ICJ Statute with Article 38(b) and (c).

[49] Article 38(d) of the ICJ Statute

[50] See e.g. Brownlie (1990) noting that while sources from international convention and custom are important, they do not discount the other sources in any hierarchical sense.

[51] Additional legal systems, such as Israel or South Africa shall be considered for demonstrating the possible emergence of a customary norm, such as military conscientious objection. See discussion infra at Chapter Six.

these systems (the German sources are all translated) and these legal systems provide a rich source of case law. India and the US contain large populations, encompassing diverse views external to the European context. Consequently, these states offer a dynamic range of legal systems by which to consider, compare, and analyse the right.

More specifically, the US, which is an obvious legal influence in a host of developed and developing countries, maintains the dichotomous system of prohibiting state establishment of, or association with, religion[52] yet also providing for the right to free exercise of religion and conscience.[53] The freedom of religion in the US embodies an underlying tension of dissociation yet preservation that may present unique difficulties not associated with other rights, such as freedom of speech. Therefore, upholding the right to conscience may be prone to referring to rights other than the freedom of religion.[54]

By contrast, the divisive politics of religion confronts India. It therefore provides for a more specific equal entitlement to freedom of conscience and the rights to freely profess, practice, and propagate religion.[55] Other countries are also confronted with social divisions due to a religious populace.[56] The sheer size of India and the willingness to tackle its problems within legislative and judicial fora,[57] however, makes it a useful case study for exploring the application of the right to conscience. Furthermore, it will serve as an interesting contrast to the US since India also desires to maintain a secular state that is free from religious influences.

Although consideration of the ECHR partially covers the Council of Europe members' laws, clarifying the accepted scope of the right to conscience can be highlighted by systems such as Germany and the UK. This is particularly so since not all the members' domestic law incorporates the ECHR.[58] Furthermore, Germany and the UK provide an interesting contrast. Germany provides for a broad right to

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[52] US. Constitution, First Amendment (commonly referred to as the 'Establishment Clause').

[53] US Constitution, First Amendment (commonly referred to as the 'Free Exercise Clause').

[54] See discussion infra at Chapter Five

[55] Article 25 of the Indian Constitution. The right is subject to public order, morality, and health, echoing the limitations of the international human rights instruments. See discussion infra at Chapter Three

[56] See e.g. Israel, Turkey Kuwait, Egypt, and Indonesia.

[57] Such as social reform for all Hindu classes pursuant to Article 26 of the Constitution. See also Galanter (1992) referring to the legal requirement to apply a more equitable version of the caste system.

[58] See e.g. Lyall (1992) (regarding the UK.)

the freedom of conscience.[59] The UK however adopts a conservative approach given the religious overtones of its society[60] and its reluctance to subject its rule of law to an individual's morality.[61] Despite Australia owing its legal origin to the UK, it has expanded the right to freedom of conscience in certain areas. Development of the right to conscience in Australia will, at times, serve as a stark contrast to the direction taken in the UK.

V. Scope of the Thesis

The initial focus of this study will highlight the historical development of the right to conscience and initial attempts to codify the right. Chapter Two will offer a brief history of conscience, focusing on the development of conscience as a concept separate from religion. The chapter will consider the development of the right to conscience within European states as the freedom of religion began to emerge. Analogous developments in various Islamic states will be considered as well.

Due to the focus of the thesis on the relatively recent evolution of international human rights law, the chapter does not consider the broader framework of freedom of religion in other cultures. Nonetheless, it demonstrates the international trend of the development of the right to conscience within international law. Although initially linked to a religious standard, conscience began to acquire a distinct role in various minority treaties over the past two centuries. Minority belief protection assisted in isolating a moral conception external to the dominant religious ideology, thereby providing for development of individual moral beliefs as meriting some form of protection.[62]

The third chapter will concentrate on the post-World War Two development of human rights, specifically the documents and treaties that have contributed towards the codification of the right to conscience. The objective is to outline the treaty drafters' understanding of conscience when composing the principal international human rights documents and treaties. The chapter is limited to attaining a legal understanding of the treaties in providing for a right to conscience based on an analysis of the relevant

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[59] See Article 4(1) of the Grundgesetz (the "Basic Laws" or Constitution). The German Constitutional Court also has interpreted the right in quite a broad manner. Loschelder (1992).

[60] See e.g. Cumper (1995)

[61] Lyall (1992)

[62] The link between minority rights and the right to conscience is reflected in current international human rights law as well. See discussion infra at Chapter Four

travaux preparatoires. International commentators have never really conducted such an examination and it provides for the development of the right in subsequent chapters of the thesis.

Chapters Four and Five will focus on the 'content' of the right to conscience. Chapter Four will analyse the internal aspect of the right to freedom of conscience. Generally referred to as the forum internum, it is universally accorded absolute protection. Nevertheless, the forum internum has not been subject to precise definition or legal discussion, particularly since protecting an internal idea is difficult to conceptualise in any practical sense. The chapter will demonstrate that a practical application of the internal aspect of the right to conscience can occur given the right circumstances. This chapter will further elaborate on the meaning of conscience, as distinguished from other aspects of an individual's forum internum, such as conscious thought. It will also demonstrate how the right to conscience can operate within a group context, with a particular focus on New Religious Movements.

Chapter Four will also begin to offer a brief account of the possible meaning and implications of a conscientious belief. While the analysis is not exhaustive, it serves to distinguish conscience from other forms of conscious thought. Such an analysis of the internal conscientious process could have entailed a host of other issues, such as the problems associated with an immoral conscience or the uniqueness of conscience when contrasted with other forms of internal beliefs. The chapter however is limited to issues that serve to explicate the consequences of a conscientious belief for the individual. Such an understanding will lend further credence to the international human rights approach to the right to conscience and sharpen the means for practically applying the forum internum right to conscience.

Chapter Five will discuss the more common understanding of conscience as relating to the external manifestation of the right, the forum externum. This chapter will entail a detailed analysis of the international and domestic treatment of the right to conscience, with a principal focus on the case law of the relevant states. The key goal of the chapter is to outline the singular nature of the right to conscience when compared with other human rights such as freedom of religion, expression, and assembly. Distinguishing the right to conscience from these human rights allows for an investigation of a broader approach to the right.

The underlying purpose of the chapter is to demonstrate that a broad application of the right to conscience is possible. The right to conscience can be applied in a manner comparable to a religious belief, particularly when the manifestation of the conscientious belief is a specific practice mandated by the belief. A broader approach to the right to conscience also provides for the right to manifest a conscientious belief in situations where, similar to a religious belief, an individual cannot conduct a particular action due to an underlying conscientious belief. Unlike the predetermined directives that give substantive shape to the manifestation of a religious belief, manifestation of an individual's conscientious belief derives from a subjective process. Because the broader approach to the manifestation of a belief incorporates a variety of individual beliefs that mandate different practices, it is difficult to identify the belief and determine the scope of the right to manifest a conscientious belief.

One may address these problems associated with the broader right to manifest a conscientious belief by examining a variety of practical applications of the right. The final three chapters of the thesis will consider three different situations that raise the issue of the right to manifest conscientious beliefs. Chapter Six considers the status of the right to military conscientious objection in international law. The right to military conscientious objection is emerging as a customary norm in international law and it is generally treated as the quintessential example for manifesting a conscientious belief in a host of articles and reports. This chapter will attempt to offer a broader overview of the international status of the right to military conscientious objection by examining a variety of international reports, documents, and cases that have considered the right to military conscientious objection.

The chapter will not specifically address the social and political ramifications of the right to military conscientious objection nor the philosophical justifications for upholding the right. Other commentators have adequately addressed such issues.[63] Rather, the chapter will account for the role the international human right to freedom of conscience has to play in developing the right to military conscientious objection and how the analysis of conscience developed thus far assists in expanding and entrenching this right. The

[63] See e.g. Greenawalt (1987); Raz (1983); Symposium - The Duty to Obey the Law (1984)); Green (1992)

chapter will then compare the international system's approach with the right to military conscientious objection in various domestic systems.

Chapters Seven and Eight consider two additional manifestations of the right to conscience, with the particular forum of action being divided between the public and private sphere. The public sphere for asserting the right to conscience will focus on the right to conscientiously object to particular tax payments. The general problem giving rise to this form of conscientious objection is that the tax revenues support actions that are contrary to one's conscientious belief.

Chapter Seven could have considered a host of public forms of conscientious objections, such as objection to taking an oath or serving on a jury. However, these latter forms of objections do not present such a contentious assertion of the right to conscience as the non-payment of taxes. It is difficult to assert that paying taxes to a general governmental fund violates the right to conscience because tax revenues support activity that is contrary to one's conscientious belief. Yet, the objector seems to be asserting a valid form of objection that is based on the directives of a conscientious belief. Jury and oath objection on other hand are quite similar to military conscientious objection and do not entail the intense degree of conflict that the military conscientious objector or the tax objector present as a result of a conscientious belief.

The private aspect of a conscientious objection, to be considered in Chapter Eight, focuses on the right to object to an abortion. This chapter will address conflicts between the objector and other individuals, such as the objector's employer, and consider particular objections for individuals, such as health care professionals who maintain a conscientious objection to abortion.

Due to the broad spectrum of rights raised by the conscientious objection to an abortion, such as the right to life, gender rights, or the right to privacy, the objection presents an interesting facet of the right to freedom of conscience. The chapter will only briefly touch upon ancillary considerations regarding the potential social conflicts raised by an abortion objection, such as when a state imposes an abortion on an individual. Rather, the chapter will attempt to trace an emerging form of objection to an abortion that can assist in demonstrating a broader approach to the right to freedom of conscience.

The thesis will amplify the manner in which the right to conscience can be applied. Upon considering the historical development of the right coupled with an understanding of the implications of a conscientious belief, it is conceivable that a broader application of the right to freedom of conscience can emerge.

Chapter Two
A Brief History of the International Development of the Right to Conscience

Throughout the recorded history of man, religion has at times served as a destructive force. Religion has provided a basis for intolerance of others and grounds for oppressing non-believers.[64] The right to freedom of conscience developed in response to such intolerance to uphold minority beliefs of particular religious systems.[65] Some international commentators attribute the basis for contemporary international human rights to bilateral treaties protecting minority religions drafted in the wake of the seventeenth century's European wars.[66] More specifically, some commentators ascribe the emergence of the right to freedom of conscience as an important forerunner to civil liberty.[67] While the intention of this chapter is not to provide a history of human rights or religious intolerance,[68] it will argue that as the protection for minority religions developed, the idea of freedom of conscience began to be associated with the preservation of individual beliefs, independent of any theological standard.[69]

In Christian Europe, already in the fourth century, religious intolerance towards other beliefs was severe, as indicated by the punishment for heresy.[70] Benevolent compulsion, which forcibly converted individuals to Christianity as a mean of 'preserving' their salvation, was the method used for upholding the official faith[71] and preserving the community's unity and cohesion.[72] Christian beliefs and values served as

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[64] See e.g. McDougal, Laswell and Chen (1980;654 and fn. 5)

[65] Krishnaswami (1960;4-11); McDougal Laswell and Chen (1980;663-664); Dickson (1995;331-332); Clark (1978); Walkate (1989)

[66] See e.g. Verzijl (1958;7); Russo (1971;15)

[67] Bates (1945); 297-302; Richards (1986) (referring to chapter four of Rawls (1972)); Lorenzen (1993); Kordig (1979) (human rights and conscience desire to uphold the individual's basic dignity through a personal moral standard); Toth (1968) (dignity, as a fundamental concept of human rights, is composed of reason and conscience)

[68] Bates (1945) quotes from the fourth edition of Jules Simon's La Liberte de Conscience, a nineteenth century scholar and statesman and the author of a number of influential tracts on religious liberty, who stated: "I shall try not to write the history of intolerance; that would be to write the history of the world." Bates nonetheless provides an excellent overview of the development of religion starting from the common era to post World War One. See also Kamen (1967) for a shorter, yet detailed, overview from the Reformation to the American Revolution, accounting for political as well as theological factors of religion's development.

For the history of religious freedom in international law, see generally McDougal Laswell and Chen (1980;chapter); Lauterpacht (1945;chapter two) (freedom of religion as providing political theory for universal rights of man); Macartney (1934) (development of modern nation state as influenced by minority religious protection).

[69] See e.g. Manelli (1984;89-90) referring to Spinoza who believed in developing the individual's capability for independent reasoning.

[70] McDougal Laswell and Chen (1980;663); Krishnaswami (1960;1).

[71] Manelli (1984;73)

[72] Bates (1945;133-135)

the context for approaching a notion of liberty. Even St. Thomas Aquinas, who preached liberty and tolerance, would not consider dissenting individual belief since that would have been outside the framework of the Church.[73] Christian states forcibly imposed theological Christian beliefs as the acceptable basis for morality.

Similar developments arose in non-Christian societies outside Europe, albeit to a different degree.[74] Intolerance of other religions in the Muslim lands was not as extreme as in Europe. Minority religions were tolerated, principally Christianity and Judaism, in the Muslim communities of the Near and Middle East.[75] But between the eleventh and fifteenth centuries, the Middle East, North Africa, and the Persian Gulf all experienced levels of Islamic intolerance that were comparable to the Christian West.[76] The dominant religious forces imposed limitations on minority religions, exemplified by the imposition of various taxes, separation of societies such as prohibiting a Muslim from marrying outside the faith, and limiting other religions to specific social roles.[77]

The Islam religion transformed from a ruling class religion to become the dominant faith of the masses who were faced with severe economic hardships. In response, the rulers used the minorities as a scapegoat for social and economic difficulties.[78] As a result, social and cultural intercourse between the different faiths diminished,[79] and persecution resulted.[80]

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[73] See e.g. D'Arcy (1961) who defines the notion of conscience pursuant to the ideas of St. Thomas Aquinas. See also Bates (1945;140); Kirk (1948;31) for the historical context of Aquinas.

[74] Krishnaswami (1960;9-10); Bates (1945;260-280); Hourani (1991;117-119)

[75] Krishnaswami (1960;9) This possibly resulted from the notion that one religion did not possess absolute and exclusive access to the truth as well as additional social reasons, such as the economic benefits afforded by such a society.

[76] Hourani (1991;118)

[77] Hourani (1991;117-118)

[78] See e.g. Hourani (1991;186-188) noting intolerance in twelfth century with emergence of Almohads.

Hourani points out that the persecutions that took place were not sanctioned by the religious spokesman. This highlights the difference with the intolerance in Europe where the basis for the intolerance derived from the rulers to entrench their power. This difference resulted in conscience emerging in a different manner in Europe, especially as it began to develop separately from religion.

[79] Hourani (1991;119)

[80] Hourani (1991;118) referring to the Fatimil Caliph al-Hakim who ruled in Egypt between 996-1021, the Almohads in the Middle East and Northern Africa, and various persecutions carried out by Mongol leaders in Iran and Iraq following their conversion to Islam.

In India, during the Muslim domination in the medieval period, persecutions of the minority were rare.[81] Persecution occurred during the thirteenth and fourteenth century,[82] until the period of Akbar[83] who tolerated all forms of religious beliefs. Intolerance of Hindus began after the end of Akbar's rule.

The common development in Europe and elsewhere was that the central authority of the state served as a means through which the dominant religion could either assert itself[84] or prevent the practice of other religious beliefs.[85] As various lands were subject to foreign influences, religious intolerance became further enmeshed with political power. Hence the Chinese referred to ethnic Confucianism as one of the grounds for intolerance of Buddhist beliefs in the second century, and of Christian missionaries a century later, thereby preserving the homogeneous character of their people by relying on a particular belief system.[86] Japan, which only adopted Buddhism in the sixth century as the 'state' religion, did not tolerate other religious identities; it imposed its political will by enforcement of religious beliefs such as requiring every household to maintain a place of worship.[87] Similarly, Muslims who were a religious minority in foreign lands such as Turkey or India asserted their belief by maintaining political control.[88]

Throughout the period of religious dominance of the political system in Europe, up to the post-Reformation,[89] certain individuals attempted to question the authority of the religious power that was imposing its will to the exclusion of all other beliefs. While the state viewed these religious innovators as the social rebels of the time, their assertions nevertheless remained within the context of theology to advance their opinions.[90]

Until the rise of humanism, it was almost impossible to view conscience outside a theological framework. All individuals viewed 'moral action' as arising from the objective law of God. The result was that while the minority's approach towards religious belief might have differed from the majority, thereby

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[81] Krishnaswami (1960;8) noting the exception of the Sasanka persecution during the fifth century.
[82] Khawaya (1992;96, fn.15) noting various occurrences of persecution.
[83] Akbar ruled from (1556-1605)
[84] Krishnaswami (1960;9) referring to the Ottoman Empire; Bates (1945;262) referring to Europe and various Muslim lands.
[85] Bates (1945;272-279) referring to the intolerance of Christian missionary activities in the Far East.
[86] Bates (1945;272-275)
[87] Bates (1945;279)
[88] Bates (1945;262-270)
[89] Capotorti (1991;1); McDougal Laswell and Chen (1980;665)
[90] Kamen (1967;20)

raising an issue of conscience, a similar oppressive outcome resulted when, or if, the minority assumed power. Each faction disallowed any deviation from the theological standard that was deemed equivalent to a religious directive.[91] For example, while Protestants might have recognised the existence of the individual conscience, it was still subject to, and in the framework of, the word of God that took precedence over all, including the state.[92]

It was difficult to conceive a conscientious belief outside a religious framework. Religious principles embodying an ultimate moral standard was the sole source of one's personal moral framework.[93] As a result, even movements such as the Reformation, which adhered to the belief in a central concept of truth common to all mankind, operated within the framework of the Scriptures without allowing for personal deviations. While the Reformation might have challenged the autonomy of the Church, the movement could not conceive the disengagement of a conscientious belief from the religious framework. Even upon acknowledging a person's conscience as a moral authority, theological beliefs may have served to limit one's intellectual capacity to comprehend the conscience.[94]

Yet, moral views were developing during the Renaissance which, although operating within the doctrinal theistic order of the time, initiated the notion of individual moral reasoning.[95] Because it is impossible to determine conclusively the 'truth', religious innovators began to preach the idea of a more personal understanding of the Scriptures. Individuals such as Erasmus focused on the humanistic side of religion, thereby allowing future thinkers to conceive of a conscientious individual as one acting outside of any formal religious framework.[96]

Despite the inherent limitations on an individual's moral outlook, a key development that emerged from the religious upheaval of sixteenth century Europe was some recognition of religious liberty.[97] Certain

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[91] Kamen (1967;190-200)

[92] Manelli (1984;80-83). Kamen (1967;50) asserts that this was also the result of political developments, since the Protestant movement realised that the sole mean of solidifying their power was to act with the state rather then against it.

[93] Kirk (1948;31)

[94] O'Brien (1991); Kamen (1967;160)

[95] Richards (1986;89)

[96] Manelli (1984;85-86)

[97] McDougal Laswell and Chen (1980;665); Krishnaswami (1960;11); Dickson (1995;330); Russo (1971;16); Robinson (1948;117)

members of the ruling classes now began to question the previously inviolable religious doctrines.[98] Minority religious beliefs achieved further acceptance with the evolution of toleration by the state[99] and due to economic needs.[100] Both the English and Dutch tolerated the Jews during this period because they realised that it was essential for prosperity. Rulers felt that providing a balanced economic infrastructure among all individuals would promote trade and improve the economy. The granting of broader autonomy to particular groups also meant concessions to minority interests and requests.

Various treaties also reflected this developing tolerance as states began to stipulate particular protections for minority religions.[101] For example, freedom of religion was upheld in a 1538 treaty of the principality of Transylvania in 1538 and the Holy Roman Empire did the same in 1555.[102] In 1536, France developed the notion of capitulation, whereby a state would grant religious freedom to foreign travellers.[103] While these early examples emanated from a desire of the European powers to apply state law to their nationals who were travelling abroad, thereby protecting missionaries and merchants in the Ottoman Empire as the European powers extended eastward,[104] it reflected an evolving trend towards religious toleration.[105]

In the seventeenth and eighteenth centuries, with the beginning of the end of Church domination of the State, the necessity of bridging the gap between religions, principally to end warfare,[106] allowed for further development of the notion of toleration[107] and assertions of more individual beliefs.[108] The prime example is the 1648 Treaty of Westphalia which ended the Thirty Years War. It contained a stipulation

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[98] Kamen (1967;119-120) noting that the politically dominant Noble classes were afforded the luxury of questioning the Church's authority over the state while the poor and lower classes who adopted "heretical" views felt the brunt of the Churches wrath as they received the punishments.

[99] Capotorti (1991;2) noting the build-up to the American and French Revolutions.

[100] Kamen (1967;225)

[101] Krishnaswami (1960;11); Dickson (1995;330); Robinson (1948;118-120)

[102] McDougal Laswell and Chen (1980;665-666)

[103] Krishnaswami (1960;11) noting the 1536 Treaty between France and the Ottoman Empire, which became a model for later treaties.

[104] Phillimore (1917;73-75)

[105] The doctrine of humanitarian intervention also developed out of these treaties since a state asserted its right to invade another state that did not allow for free practice of religion to the invader's nationals. See Oppenheim (1955;347) noting that the doctrine did not develop into customary law since it was subject to aberrations and inconsistent practice.

[106] Kamen (1967;129)

[107] Krishnaswami (1960;11); McDougal Laswell and Chen (1980;665); Russo (1971;15)

[108] McDougal Laswell and Chen (1980;666); Ganji (1962;153)

protecting Protestants in Catholic states and Catholics in Reformed states.[109] The key limitation of this Treaty was that it required all minority religions to leave the state within two years or convert, thereby inhibiting development of a genuine religious toleration.[110] Other treaties subsequent to Westphalia began to provide for religious freedom within their territories. But this was generally subject to the limiting proviso that the protection be accorded 'as far as the laws' of a country would provide for such freedom. This limitation, in effect, granted states the ability to nullify the intended protection of the treaty.[111]

The emergence of diverse religious thought during the Reformation and the disengagement of state and religious institutions following the 1648 Treaty of Westphalia weakened the influential grip of the religious authorities over the state.[112] The questioning of the Church's power, principally regarding its role within the state structure and the unyielding imposition of its principles,[113] led to the acceptance of a notion of personal liberty and the development of an individual conscience. The toleration of views based on reason and piety of the individual, albeit still within a theological context, became accepted forms of beliefs. Freedom of conscience was therefore inseparable from liberty since one could now adhere to a particular belief.[114]

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[109] Krishnaswami (1960;11); McDougal Laswell and Chen (1980;668); Dickson (1995;330)

[110] Russo (1971); Phillimore (1917;19) referring to article 49 of the Treaty; McDougal Laswell and Chen (1980;669)

[111] The typical example of such a provision is the 1763 Treaty of Paris, Article 4 that grants liberty to the "new Roman Catholic subjects of Great Britain" (in the Canadian territories ceded by France to Great Britain) to follow their own form of worship for "as far as the laws of Great Britain allow". For similar treaty stipulations, see also 1713 Treaty of Utrecht between France and Great Britain at Article 14; 1660 Treaty of Oliva between Prussia and Sweden (only protecting co-religionists in each state); 1678 Treaty of Nijmegan between France and the Netherlands at Article 9 (which essentially relies on the capitulation regarding freedom of religion for the Roman Catholic minority living in the territory ceded by France to Holland); 1686 Treaty of Moscow between Poland and Russia at Article 9 (Poland pledged not to molest either Orthodox Church members nor try to convert same); 1697 Treaty of Ryswich between France and Netherlands (same provision as in 1678 Treaty of Nijmegan); 1699 Treaty of Carlowitz between Turkey and both Austria and Poland (protection of Roman Catholics and allowances for their visits to holy sites); 1736 Treaty Hubertsburg and 1742 Treaty of Breslau, both between Prussia and Austria; 1732 Treaty of Warsaw between Austria and Poland; 1739 Treaty of Belgrade between Russia and Turkey (same provisions as in 1699 Treaty of Carlowitz).

The aforementioned treaties can be found in Israel (1969). See also Russo (1971;16); Phillimore (1917;19); Capotorti (1991;1-2); Walsh (1990;26)

[112] Ganji (1962;153). Kamen (1967) and Abram (1968;44) both note that the strive for tolerance derived out of political necessity, especially as church power weakened, rather then as an altruistic drive for individual diversity.

[113] As noted by Richards (1993;66):

> In effect, the conception of religious truth, though perhaps having once been importantly shaped by more ultimate considerations of reason, ceases to be held or understood and elaborated on the basis of reason.

[114] Manelli (1984;89-90) referring to Spinoza who asserted that an individual's reasoning served as a central basis for moral, rational, action.

The works of two influential thinkers, Bayle and Locke, reflect this historical development of conscience as an independent notion upholding individual approaches to ethics and morals.[115] Both recognised that the formation of reasonable moral beliefs was a matter of personal life experiences, such as parental or cultural training, which would create quite a diverse cross-section of religious and moral views. Since religious questions were really a matter for God, man could only guess at the proper answer; a political resolution of a religious question could be just as wrong as the views that were being suppressed.[116] Locke further developed the argument that since the ultimate truth was never attainable due to the inherent limitations of man and the omniscient nature of a deity,[117] imposing one's own ethical approach over another was futile.[118] Even worse, attempts to repress the views of others stifled the reasoning of all individuals with a free conscience. Hence these thinkers created a division between beliefs in the truth, such as God-given law, and rational individual beliefs.[119] Bayle, in particular, held that conscience served as an internal focal point for ethical knowledge and an external means by which such knowledge shaped one's life and actions.[120]

As the general tolerance of individual reasoning developed, so did the approach to conscience. The epistemological foundation of religion and morals dictated by the Church was now shifting to provide for rational inquiry by the individual, though still within a religious context. Reliance on individual reasoning developed as a response to exclusive theistic beliefs, which had served as the basis for barbarous acts to

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[115] Richards (1986;90) noting epistemological and circumstantial similarities between the two thinkers, with the key difference being Locke's political, republican, focus as opposed to Bayle's more philosophical approach to toleration. Bracken (1991) distinguishes Bayle's reliance on conscience as clarifying a person's moral position, versus Locke's separation of Church and State that served to regulate the individual's morality.

[116] Kilkullen (1985) noting that while both agreed that God left the search for the truth to man, Locke would allow the ruler to suppress a dangerous view while Bayle believes in corrective punishment.

[117] Kelly (1991) noting how Locke respected liberty of conscience due to the inability of distinguishing the correct from incorrect interpretation of divine law.

[118] Bracken (1991;1) The author distinguishes between Bayle's reliance on the individual conscience as the central basis for reason, as opposed to Locke's reliance on the state, when separated from the Church, as a principal source for upholding the individual's beliefs. Richards (1986;89-98) notes that the toleration espoused by Locke and Bayle did not necessarily incorporate atheistic beliefs, although such individuals were still perceived as maintaining a moral standard.

Philosophers in the nineteenth century however rooted conscience in the individual's beliefs rather than in religion by relying on similar arguments made by Locke. See e.g. J. Bentham and J.S. Mill.

[119] Bayle held that it is a moral good to abide by the conscience, even if objectively it was incorrect, as long as the agent is intending to carry out a moral good. Kilkullen (1985)

[120] Richards (1986;94) contrasting Bayle with Locke's theo-centric mode of thought based on a just God and adherence to the Gospel's minimum ethical standards, i.e., the natural law.

other individuals. Individual reasoning would allow for the development of a purer form of religious and social ethics.[121]

The developing notion of liberty was based on the realisation that a person's central goal was to lead a proper and moral life rather then blindly follow theological ordinances.[122] The ability to develop one's personal orientation towards morals and ethics replaced the dominant religion's control of what to believe and think.[123] Political power could not enforce moral truths since it led to intolerance of other forms of conscientious belief.[124] Furthermore, the emergence of the principle of liberty led to the realisation that the state must tolerate all forms of religious beliefs and ideals since man is indivisible and retains an inherent worth that merits protection.[125]

Such ideals developed into political practice, particularly after the French and American revolutions established a more effective protection for freedom of the individual and his beliefs.[126] The tolerant ideals of the US were reflected in the international sphere by a variety of bilateral commerce and navigation treaties that, during the latter half of the eighteenth century, sought to ensure religious freedom for Americans abroad.[127] For example, Article 11 of the Treaty of Commerce and Amity between the United States and Prussia of 1785 declared:

> The most perfect freedom of conscience and of worship is granted to the subjects of either party within the jurisdiction of the other without being

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[121] Note that the theological origins still played a role for both Bayle and Locke as they did not give credence to the atheist thinker not because such individuals were immoral, especially since atheists can act morally, but because they were non-believers in God which precluded the ability for an ethical motivation.

[122] Kamen (1967;125) noting the perspective of the Sectarians who preached a non-dogmatic ideology that centred on a separation of Church and State and linked civil with religious liberty.

[123] McDougal Laswell and Chen (1980;664); Krishnaswami (1960;3)

[124] Richards (1993;72) notes that as a result of the religious authority and individual moral autonomy distinction, the Lockean approach provides a proper basis upon which to establish authority. The individuals composing the body politic will, pursuant to reason, limit or extend the state's power as they reasonably see fit since there is no over-arching standard imposed by an ultimate authority.

[125] Manelli (1984;100-101) referring to the eighteenth century Encyclopeadist movement spearheaded by Diderot who strove for peaceful co-existence, even without approval, with a focus on separating Church and State to remove opposition to minority beliefs.

[126] McDougal Laswell and Chen (1980;666); Ganji (1962); Krishnaswami (1960).

[127] McDougal Laswell and Chen (1980;670-71) referring to Commerce and Amity Treaties with Netherlands (1782), Sweden (1783) and Prussia (1785).

> liable to molestation in that respect other than an insult on the religion of others.[128]

This reference to conscience is notable. Protecting conscience provided for a broader application and scope to the treaty as it was not limited to religious beliefs. Indeed, protection of internal thoughts, 'freedom of conscience', as opposed to the external manifestation of a belief, 'worship' that cannot 'insult' the 'religion of others', is reminiscent of the present day treaties' distinction between the internal and external aspect of the right to conscience.[129] It is possible however that the use of the term 'conscience' instead of 'religion' probably derived from the separation of Church and State in the United States. The Establishment Clause of the US Constitution prevents the Government from protecting any religion. Hence reference to the more neutral term of 'conscience' allowed the Government to protect general, and not solely religious, beliefs.[130]

On a multilateral level, international developments upheld the developing rights of religious and non-religious minorities.[131] The term 'conscience' however had yet to be used as the standard treaty language.[132] The multilateral treaties of the time do reflect the emerging attitude of tolerance towards religious and other minorities. The 1814 Congress of Vienna[133] and the 1815 Treaty of Vienna both show this developing attitude.[134] They provided for blanket protection of minorities, regardless of religion or nationality. For example, Article 2 of the 1814 Congress of Vienna states:

> There shall be no change in the articles of the Fundamental Law which assure to all religious cults equal protection and privileges, and guarantee

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[128] Bevans (1974;78). The Treaty was renewed in 1799 and again in 1828.

Similar language was used in the 1783 Treaty of Amity and Commerce between the U.S. and Sweden, Bevans (1974;Vol.11;710) referring to Article 5 of the Treaty which provides:

> There shall be granted a full perfect and entire liberty of conscience to the inhabitants and subjects of each party and no person shall be molested on account of his worship provided he submits so far as regards the public demonstration of it to the laws of the country.

This Treaty was renewed in 1816 and again in 1827 until it terminated in 1919.

[129] See discussion infra at Chapters Four and Five

[130] Bates (1945;487-88) notes that the treaties' protection of external activity related to missionary activity and erecting houses of worship.

[131] Capotorti (1991;2) notes that the protection began to focus on civil and political rights as well.

[132] The term "conscience" began to crop up in various treaties of the League of Nations, post World War One.

[133] Which created the Kingdom of the Netherlands.

[134] Between the Netherlands, Great Britain, Russia, Austria, Prussia, Portugal, France, and Sweden. See also Russo (1971;17) who notes that individual religions, such as Jews and Catholics, sent representatives to the treaty negotiations, playing a similar role to the Non Governmental Organisations of today.

> the admissibility of all citizens, whatever be their religious creed, to public office and dignities.[135]

Article 4 further provides for equal claim by all to fair commercial opportunities without hindrance or obstruction. Additionally, Article 8 of the 1815 Treaty requires protection for all 'religions and creeds' along with equal access to employment. The 1830 Kingdom of Greece Treaty had similar provisions concerning free worship for Muslims;[136] the 1856 Conference of Constantinople, which established an independent Moldavia and Wallachia, provided for equal liberty and protection for all religions and equal civil rights for all individuals;[137] and the 1856 Congress of Paris,[138] granted protection to Turkish Christians in Article 9.[139]

The 1878 Treaty of Berlin proved a seminal document for consolidating the right to freedom of religion because it applied to many states, including the Ottoman Empire, and required signatories to assure religious freedom for all.[140] The Treaty linked recognition of the newly created states with adherence to the principle of non-discrimination on religious grounds.[141] The Articles provided for no discrimination on grounds of 'religion or creed', in employment or civil and political rights, as well as ensuring freedom of worship.[142] The key problem of these treaties however was ineffectiveness and lack of any enforcement mechanism.[143] For example, Rumania continued to discriminate against its minorities by amending its Constitution to provide that one can only become a national, and thereby acquire protection of the Treaty,

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[135] Mair (1928;30). See also Russo (1971;17) who refers to Article 77 of the Congress of Vienna which provided protection not only for freedom of religion but also against national and racial discrimination, as well as allowing for individual petitions to their states for protection; Phillimore (1917) refers to Article 73 which provides for protection of religious worship and overall allowance for equality.

[136] Capotorti (1991;2); Mair (1928;31) noting a similar declaration in 1863 concerning the Ionian Islands.

[137] Mair (1928;31) referring to Articles 13 and 18.

[138] Concluded between Austria, France, Great Britain, Prussia, Sardinia, and Turkey.

[139] The Treaty specifically excluded any allowances for intervention, an oversight that was to be rectified at the 1878 Congress of Berlin.

[140] Krishnaswami (1960;11); McDougal Laswell and Chen (1980;669)

[141] Mair (1928;32); Capotorti (1991;3); Phillimore (1917;94)

[142] The Treaty essentially used the same language throughout each application to the relevant states. See Article 5 regarding Bulgaria, Article 44 regarding Rumania, Article 27 concerning Montenegro, Article 35 regarding Serbia, and Article 62 regarding the Ottoman Empire, which was subject to additional requirements concerning protection of missionaries. Hourani (1991;297) notes that with the urbanisation of the Ottoman Empire and growth of its economy, foreign religious elements increased and they were provided with protection by their foreign country.

[143] Oppenheim (1917;366); Russo (1971).

through a specific legislative act. That was a virtual impossibility for a minority lacking political power and influence.[144]

As both religious and other minorities were receiving international protection, the assertion of freedom of conscience developed outside a religious context. The concept of freedom and liberty that provided impetus for the American and French Revolutions[145] propelled philosophers to consider ethical motivation as a process distinct from religion.[146] Individuals were viewed as free and rational beings who enjoyed moral autonomy and created their own morality, independently of any authority.[147] Upholding a conscientious belief was central to this notion of liberty since one cannot be denied the ability to exercise a moral belief once liberty is a desired outcome.[148]

The Abolitionists' reliance on conscience to buttress their attack on the slavery movement in the late eighteenth and early-nineteenth centuries demonstrates the emergence of conscience as a moral standard separate from religion.[149] Confronted with a heavy burden of justification in a society that treated slavery as an accepted norm, the Abolitionists made an analogy between the oppression of the black slaves to the intolerance practised by the Catholic Church during the Middle Ages.[150] Similar to the loss of reasonable foundations for justifying religious intolerance that eventually contributed to the downfall of the Church, the Abolitionists questioned the reasonableness of slavery from the standpoint of a conscientious objector.[151]

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[144] Phillimore (1917;95).

[145] Verzijl (1958;7)

[146] Richards (1986;97); Manelli (1984;133-143)

[147] Manelli (1984;144) refers to J.S. Mill, noting the constant struggle between toleration and freedom and how the latter needs to always be re-established.

[148] Bates (1945;295-297)

[149] See e.g. Bolt & Drescher (1980); Brown (1994). The Abolitionists' arguments in the United States essentially derived from the European sources' reasoning for abolishing slavery. The argument in the US is interesting because it refers to conscience as a unique reasoning process with an epistemological basis external to a religious context. Richards (1993).

[150] Richards (1993;63-73)

[151] Brown (1994;237) noting strong reliance by British Abolitionists on a basic moral argument due to the Quaker influence and a desire to incorporate a large cross-section of the population. He asserts that the sentiments in Britain derived from a reaction to the American revolution where each side referred to moral principles, such that an anti-slavery stance became an issue of national virtue for Britain.

The underlying contention of the Abolitionists was that slavery violated the dignity of the individual.[152] The majority's view that slaves were not worthy of any basic rights suppressed the slaves' moral, or conscientious, position. Similar to the intolerant beliefs of a dominant religion that refuses to acknowledge the beliefs of others, the narrow views of the majority deprived the slaves of any notion of conscience.[153]

The Abolitionists' argument demonstrates that a conscientious belief need not be linked to religious principles since upholding a 'belief' does not necessarily imply the existence of a religious system; rather a belief can refer to an individual's understanding of a particular practice, like slavery, as determined by moral and social influences. The famous argument put forward by Thoreau at this time with regard to civil disobedience, to do what one personally thinks is 'right', hinges on this very concept of conscience as an individual power over and above that of the state. He insisted that:

> The only obligation which I have the right to assume, is to do at any time what I think right ... There will never be a free and enlightened State, until the State comes to recognise the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly.[154]

Minority religious beliefs continued to receive protection in various bilateral treaties throughout the nineteenth and early twentieth centuries.[155] The 1898 Treaty of Paris between France and Spain granted the inhabitants in the territories ceded by Spain the 'free exercise of their religion '.[156] The 1881 International Convention of Constantinople concluded between Germany, Austria, Hungary, France, Great Britain, Italy, Russia, and Turkey, gave freedom of worship to the Mohammedans, as well as the continued existence of their religious courts and local infrastructure.[157]

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[152] Daget (1980) referring to the French Abolitionists, who relied on a general moral argument, as Church influence over moral thought weakened; Anstey (1980) makes a similar point concerning British Abolitionists. Note however that both authors conclude that the eventual legal change developed due to other ancillary factors, such as economic changes, and the humanist argument was only a part of the impetus for change.

[153] Richards (1993;60-62)

[154] Thoreau (1849;4 and 41)

[155] Bates (1945;486-489)

[156] Phillimore (1917) referring to Article 10 of the Treaty

[157] Capotorti (1991;3) referring to Article VIII of the Treaty

Various broad protections for minority beliefs resulted from the creation of the League of Nations.[158] Here the motivation was the commitment to strengthen peace after the World War, and the conviction that for this to be achieved, protection must be granted to minority communities scattered throughout the world.[159] The dangers of monopolistic state religions were recognised. They were causes of friction within the state and unrest among the minority population whose interests might not be addressed. So, tolerance and moral pluralism were becoming recognised as fundamental to peaceful coexistence between states. Such an approach is exemplified in a letter sent by the French delegate M. Clemenceau to the President of Poland noting that the re-establishment of Poland's sovereignty depended on:

> the secure possession of these territories. There rests therefore upon these powers an obligation, which they cannot evade, to secure in the most permanent and solemn form guarantees for certain essential rights which will afford to the inhabitants the necessary protection, whatever changes may take place in the internal constitution of the Polish state.[160]

Additionally, the drafters of the League's Covenant proposed an article that prevented interference with the free exercise of religion and prohibited discrimination against any 'creed religion or belief' as a condition precedent for membership.[161] The basis for the proposal, as noted by Lord Cecil of Britain, was the recognition that religious persecution and intolerance were fertile sources of war and political unrest.[162] But, in the end, the League's Covenant failed to include any such article as the delegates decided that it would address such issues in the future.[163]

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[158] Krishnaswami (1960;11-12) pointing out that the protections were not universal but focused on the racial, religious or linguistic minorities found within the state.

For a more detailed explanation regarding the operation of the League's system protecting the right of minorities, see Stone (1932); Stone (1933) (a more focused analysis of the post-World War One conventions); Macartney (1934;chapter four); Capotorti (1991;chapter II).

[159] Russo (1971;25); Capotorti (1991;17); Mair (1928;35) quoting President Wilson's 1919 speech addressing Rumania's protest to the minority provisions where he stated that "If we agree to these additions of territory we have the right to insist upon certain guarantees of peace."

[160] Mair (1928;36)

[161] Capotorti (1991;16-17)

[162] Wilson (1948;104-105). Miller (1924;Appendix 5) refers to the Smut's plan, one of the original drafts of the Covenant for the League of Nations, which provided for an automatic right to military conscientious objection, and the suspension of any forced national service as a means of meeting this underlying policy of preserving the peace.

[163] Wilson (1948;106) referring to remarks by the Greek delegate, M. Veniselos.

Nonetheless, Article 22(5) of the League's Mandate System required a Mandatory (the power that was to oversee the dissolution of colonies) to ensure for 'conditions which will guarantee freedom of conscience and religion.'[164] Hence, various Mandates that establish the state's responsibilities for its protectorate area under Article 22[165] provide further examples of the development of conscience as an individual belief. Article 1 of the French Mandate for Togoland required France to:

> ensure in the territory complete freedom of conscience and the free exercise of all forms of worship, which are consonant with public order and morality.[166]

A similar provision is found in the South African Mandate for Southwest Africa, at Article 5.[167]

In the League's subsequent treaties and mandates with various states regarding minority protection, the League used language reminiscent of the present-day international human rights treaties.[168] For example, the 1919 Treaty with Poland[169] provided at Article 2, following the prohibition of religious discrimination, that:

> All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion, or belief whose practices are not inconsistent with public order or public morals.[170]

But the implementation and enforcement mechanisms of the League, which included a right to individual petitions to the Council, proved ineffectual[171] due to the absence of the more powerful states,

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[164] Note that the terms of subsection (5) are unique to Article 22, possibly because it was drafted by the Supreme Council and not the League Committee which generally used the language of protecting "religion and worship". Article 22 is viewed as a policy-oriented Article which established the underlying framework for a Mandate. Walters (1952;57).

[165] See generally Capotorti (1991;chapter II)

[166] McDougal Laswell and Chen (1980;671)

[167] McDougal Laswell and Chen (1980;671-672)

[168] Capotorti (1991;17-18)

[169] Capotorti (1991;18).

McDougal Laswell and Chen (1980;672) refer to similar arrangements with Czechoslovakia, the Serb-Croat-Slovene State, Rumania, Greece, Austria, Bulgaria, Hungary, and Turkey and, via unilateral League resolutions, Albania, Estonia, Latvia, Lithuania, and Iraq. The resolutions were signed by the States upon joining the League and had the same force as a treaty.

[170] McDougal Laswell and Chen (1980;672-673) noting as well Articles 7 and 8, which provide for protection of civil and political rights without distinction of race, religion, creed, or language. Similar provisions are also found at Section IV, Articles 49-57, in the 1919 Treaty of Neuilly between the Allies and Bulgaria, and at Articles 54-60 in the 1920 Treaty of Triamen with Hungary.

[171] Bates (1945;490 and 500-501)

such as Germany and Italy.[172] Furthermore, only collective entities were entitled to the rights in the aforementioned treaties,[173] as indicated by the narrow right to manifest a belief solely through worship.

Despite the seemingly limited protection for individual conscientious beliefs, the notion of conscience as a belief system distinct from any religious standard was nevertheless acquiring recognition, as demonstrated in the Permanent Court of International Justice case concerning Upper Silesia.[174] The International Court was confronted with a provision of the 1922 German-Polish Convention of Upper Silesia that gave power to a parent to declare, according to one's conscience, whether he did or did not belong to a particular linguistic, racial, or religious minority. This declaration would then serve to determine the proper language course for one's child. The key issue in the case centred on whether the state's appointment of an outside expert to verify the parent's declaration violated the Convention. Recognising the development of conscience as an axiomatic assertion of a belief, the Court held that the state may not appoint an objective expert but a declarant must ensure that he is stating his 'true' position regarding his status.

The right to conscience was therefore emerging as an individual right independent of religious belief. This development was to be unequivocally codified after World War Two with the founding of the international human rights system.[175]

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[172] Robinson (1948;123)

[173] Krishnaswami (1960;12); Dickson (1995;331). Contra Capotorti (1991;19) noting that states desired to protect themselves against the risk of dismemberment by a particular minority group.

[174] PCIJ Judgment No. 12, Advisory Opinion of 1928 Rights of Minorities in Upper Silesia (Minority Schools)

[175] McDougal Laswell and Chen (1980;653 and 661); Krishnaswami (1960;15-17)

Chapter Three
Codification of the International Human Right to Freedom of Conscience – An Examination of the Principal Human Rights Treaties

I. Introduction

This chapter will focus on the codification of the right to freedom of conscience in the post-World War Two era.[176] Exploring the manner in which the right has been codified in international law will facilitate the promotion of a practical application of the international human right to freedom of conscience. Analysing the development of the right in international human rights law will assist in understanding the drafters' intentions, amplify the meaning of the various treaties that codify the right to freedom of conscience, and further clarify the object and purpose of the right.[177] The travaux preparatoires will play a central role in this regard, particularly since the terms used to codify the right to freedom of conscience are ambiguous.[178] Considering the somewhat obscure nature of the right to freedom of conscience in the principal human rights treaties, namely the UDHR, ICCPR, ECHR, AmCHR, and AfrCHR, analysis of the legal development of the right would seem an important exercise. As stated by Sinclair in his discussion of the Vienna Convention on the Law of Treaties:

> In any event, it is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted.[179]

Targeting the differences and highlighting the similarities of the relevant provisions in the principal human rights treaties shall further clarify the status of the right to freedom of conscience in international human rights law.

While the drafters for the various human rights documents were confronted with a host of issues, especially when determining which rights to include within the treaties, this chapter will focus on the discussions regarding the right to freedom of conscience. As the chapter unfolds, it will become apparent that the drafters for the various human rights treaties were concerned with rather similar issues concerning

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[176] See Appendix V
[177] Sinclair (1984;114) referring to Article 31 of the Vienna Convention on the Law of Treaties.
[178] See Article 32 of the Vienna Convention on the Law of Treaties
[179] Sinclair (1984;116)

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the right to freedom of conscience. The cognate terms and phrases used to codify the right to freedom of conscience corroborate this underlying commonalty in approaching the right and indicate that, in certain instances, the treaties maintain like freedoms for the right to conscience.

Various studies were conducted towards the end of World War Two which focused on rights to be included in a universal human rights document.[180] Between 1942 and 1944, the American Law Institute issued a document, entitled Declaration of Essential Human Rights, that included a general provision upholding the right to freedom of religion.[181] The 1945 UN Charter however only incorporated general notions of human rights within various articles of the Charter,[182] with a view towards codifying human rights in a particular document.

At the United Nations' first General Assembly meeting in October 1945, Panama presented for discussion a draft human rights document which was being considered by the Latin American states.[183] After submitting the draft to the International Law Commission, the General Assembly (hereafter, 'GA'), on the recommendation of the First and Third Committees passed the document to the Economic and Social Council (hereafter, 'ECOSOC').[184] ECOSOC's Nuclear Commission on Human Rights[185] reviewed the document and passed it on to the newly created Commission on Human Rights (hereafter, 'CHR').[186]

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[180] See e.g. Winston (1948) (world philosophers and scientists responded to UNESCO questionnaire and provided comments regarding general approach towards human rights); Lauterpacht (1945) (natural law basis for human rights, with heavy emphasis on importance of freedom of religion. Lauterpacht even links the overall rights of man to a coherent political theory based on free religion).

[181] The ALI solicited jurists' opinions regarding the content of human rights from countries as varied as America, Britain, Arab states, Canada, China, France, Italy, India, Latin America, Poland, pre-Nazi Germany, Russia, and Spain.

[182] See the Preamble and Articles 1 (UN to promote and encourage human rights), 13 (GA to assist in realising human rights), 55 and 56 (signatory countries responsible to promote respect for human rights and fundamental freedoms), 62, 64, 68 and 71 (ECOSOC's responsibility vis-ℵ-vis human rights), and 71 and 73 (dealing with the Trusteeship System). There was no particular testimonial to human rights due to pressing time limitations and the desire to focus on general world security concerns. Samnoy (1993;17-18)

[183] The working title was Declaration on the Rights and Duties of States and a Draft Declaration on Fundamental Human Rights and Freedoms. Moller (1992;fn.1) See also E/CN.4/21 (Secretariat collated the various draft documents submitted for consideration which included the Panamanian submission).

[184] Moller (1992;fn.1)

[185] ECOSOC, 1st Session, Resolution 1/5, 1946. See also Samnoy (1993;20 and 28-33) (discussing internal conflict regarding extent of governmental participation and the desired scope of the Commission's work).

[186] The CHR's members were the five powers at the time, US, USSR, UK, France, and China, along with Byelorussia, Iran, Lebanon, Panama, Uruguay, Ukraine, Belgium, Chile, Egypt, Australia, Philippines, and Yugoslavia. Note the absence of the defeated states from World War Two and the weak representation of the African states. The only other UN members, aside for Egypt, being Liberia and Ethiopia.

II. International Treaties

At its first session, the CHR decided to focus on codifying an 'International Bill of Rights' and a Drafting Sub-Committee was created.[187] The CHR further decided that an initial declaration of human rights, whose legal character was subject to dispute,[188] would be drafted, followed by a more specific and more binding international covenant.[189] Hence the CHR initially focused on the UDHR.

A. UDHR, Article 18[190]

The final version of UDHR Article 18 states:

> Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[191]

An important issue confronting the drafters dealt with the focus of the article. Was it to solely protect the right to freedom of religion or also incorporate other forms of belief such as a conscientious belief? Consequently, the initial draft of ECOSOC's Secretariat provided an overview of the status of the right to free religion in various domestic systems. The focus of the participatory states' systems was to provide for free religion, such as in the US, or free worship and belief, such as in India or Panama. Those systems which did provide for a 'liberty of conscience', such as in Lebanon and Czechoslovakia, centred the right on protecting religious beliefs, although Brazil and Turkey provided protection for 'general beliefs' as well.

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[187] The Sub-Committee was originally three states, US, China and Lebanon, but was expanded to include Australia, Chile, France, USSR, and UK

[188] See E/CN.4/82 where the US. stated that the UDHR was to maintain "considerable weight" despite the absence of any legal obligation. Cf. France, Chile and Lebanon who viewed the UDHR as clarifying the human rights obligations of the UN Charter. E/CN.4/SR.48

[189] E/CN.4/57 (1947). The CHR decided to use the UK draft as a forerunner to the covenant and an in-session Working Group used the Drafting Committee's submission as a basis for the proposed draft declaration. See Malik (1950); Mollard (1992;2); UNESCO (1950). Note that an implementation procedure was also to be drafted (and a separate committee was established for that purpose) see E/CN.4/SR.25, but it was eventually incorporated by the covenants.

[190] GA Res. 217A (III), GAOR Third Session, Part I

[191] The text, as submitted by the CHR, was adopted in the Third Committee by 38 votes in favour, 3 against, and three abstentions, while in the GA, it was passed by 45 votes in favour, four abstentions, and no negative votes

Despite the domestic focus on religion, the ensuing draft provided a clear provision for the individual's right to freedom of conscience. The proposal reflects the second freedom of Roosevelt's famous 'Four Freedoms' speech, 'freedom to worship God in his own way everywhere in the world'[192] but with a provision for the right to conscience. The Secretariat's draft proposal provided protection for the:

> freedom of conscience and belief and of private and public religious worship.[193]

Subsequent drafts of the article expanded on this broad approach to the right to freedom of religion by specifically incorporating the right to freedom of conscience as well. [194] As indicated in the Annex to the Secretariat's draft, the proposed amendments not only centred on protection for 'conscience, belief, and opinion'[195] but also included protection for 'religion or any other belief as dictated by his conscience'[196] or 'freedom of religion, conscience, and belief.'[197] This is quite significant since it demonstrates a specific intent by the drafters to protect other beliefs, including conscientious beliefs.

During the drafting process, some states were hesitant to adopt such a broad approach to the right to freedom of religion. These states argued for a more specific right focusing exclusively on protection for formal religious beliefs.[198] The argument was discredited by other states that desired a more unified right incorporating 'religion, conscience, and thought' that was interpreted as providing protection for atheists

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[192] The speech is quoted in Samnoy (1993;11). See also de Zayas & Bassiouni (1994) noting the enduring influence of the speech.

[193] E/CN.4/AC.1/3/Add.1 (1947). Note the absence of any particular reference to freedom of religion since it was probably incorporated into "conscience and belief".

[194] The CHR draft of the article included protection for beliefs other than religious beliefs. See E/CN.4/56. The draft provided for:

1. Individual freedom of thought and conscience, to hold and change beliefs, is an absolute and sacred right
2. Every person has the right, either alone or in community with other persons of like mind and in public or private, to manifest his beliefs in worship, observance, teaching, and practice. ECOSOC, Sixth Session, Supp. 1, E/600 (1948)

[195] E/CN.4/21 Annex D (1947)

[196] E/CN.4/21 Annex F (1947) a UK proposal which had initially provided for "free thought and conscience" with the manifestation centring on worship and "the manifestation of differing convictions".

[197] E/CN.4/37 (1947) US proposal which eventually formed the basis for future discussion.

[198] E/CN.4/SR.60 (1948) where UK and Peru argued for exclusive protection of freedom of religion; E/CN.4/99 (1948) (similar argument by UK and India). This argument was echoed in the General Assembly as well. See A/C.3/218 (Lebanon's proposal for a separate provision for religion). See also Malik (1950)

and non-religious individuals. Some state representatives even contended that the protection for 'beliefs' should include cultural, scientific, and political beliefs and not solely religious or philosophical tenets.[199]

More tellingly, the final provision, for freedom of 'thought, conscience, and religion', derived from proposals to incorporate general notions broader then religion.[200] Acting pursuant to an earlier New Zealand proposal in the GA, the protection of religion was combined with that of conscience and thought to create a more unified right.[201] The proposals to limit Article 18 to freedom of religion only, to the exclusion of other beliefs, were rejected because they would have denied protection for non-religious believers.

Additionally, the term "belief" was positioned alongside 'religion' to incorporate the manifestation of conceptions other than religion.[202] Reflecting this development, the French delegate altered the French translation of "belief" from "croyance', which has religious overtones, to 'conviction", which reflects a more secular approach towards belief. As noted by Belgium:

> it would be unnecessary to proclaim that freedom [of conscience] if it were never to be given an outward expression; if it were intended, so to speak, only for the use of the inner man. It was necessary however to stress the external manifestation of creeds by which expression was given to beliefs.[203]

Hence, when considering the right to freedom of conscience under the UDHR, it is apparent that the drafters intended to provide for the manifestation of a conscientious belief as well. This was to prove to be an important step since the phrase 'religion or belief' has become a summary form for describing manifestation of both a conscientious and religious belief in subsequent human rights documents.

Aside for the distinction between religious and conscientious beliefs, the drafters also focused on differentiating conscience and thought. The CHR's Drafting Committee incorporated freedom of thought

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[199] E/CN.4/SR.60 (1948)

[200] E/CN.4/85 (1948). Note as well Mexico's proposal in the GA to allow for manifestation of beliefs as well as religion. E/CN.4/SR.60 (1948)

[201] See E/CN.4/85 (1948); E/CN.4/82/Add.8 and 12 (1948)

[202] E/CN.4/85 (1948) based on the suggestion of Mexico, discussed supra.

[203] GA, Third Committee, Third Session, meeting 127 (1948) at 395. See also China id. at 398 noting that "freedom of belief was an integral part of freedom of thought and conscience."

into the right of freedom of religion and conscience specifically to codify thought and conscience as a unit.[204] The proposed draft stated:

> Individual freedom of thought and conscience, to hold or change beliefs, is an absolute and sacred right. [205]

While this language is not found in the final version of the UDHR, the drafters combined thought and conscience since thought was perceived as a precursor to conscience by serving as a basis for developing a conscientious belief.[206] Nonetheless, unlike a religious or conscientious belief, the protection for thought in this article was limited to the individual's "inner freedom"[207] because this article did not provide for manifestation of all forms of thought. As stated by France:

> The opposite of inner freedom of thought was the outward obligation to profess a belief, which was not held. Freedom of thought thus required to be formally protected in view of the fact that it was possible to attack it indirectly.[208]

The term "thought" therefore was replaced with "opinion" in the right to freedom of expression provision to avoid an overlap of protection.[209] The indication is that "thought" in the article upholding the right to freedom of conscience is an internal notion, whereas the thought or opinion in the article regarding the right to freedom of expression is an external action.

These approaches to thought and conscience and the manifestation of a conscientious belief are important for the development of the right to freedom of conscience. What is apparent from the travaux preparatoires of the UDHR is that a conscientious belief attained the status of a protected international human right on par with a religious belief. This approach to the codification of the right to freedom of conscience is also reflected in other human rights documents, most notably the ICCPR and ECHR.

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[204] The limitation section is provided for in Article 29 of the UDHR.
[205] E/CN.4/21 Annex F (1947)
[206] E/CN.4/85 (1948)
[207] E/CN.4/SR.60 (1948) Representatives of USSR and France noting the distinction from free expression, which is a manifested, external, opinion and therefore subject to public order limitations.
[208] E/CN.4/SR.60 (1948) at 10
[209] E/CN.4/113 (1948) now Article 19, then Article 18.

Before analysing subsequent documents to the UDHR, the limitations to the right to freedom of conscience must also be considered. Limitations are essential for the right to freedom of conscience since they provide specific boundaries for the exercise of a conscientious belief.

Egypt had proposed that the right to freedom of conscience be subject to "public order" as early as the Third Session of the CHR. Lebanon however refuted the suggestion, noting that the aim in drafting the article was to provide for a right above the law.[210] Recognising the necessity for some form of general limitation to the exercise of human rights, the UDHR drafters imposed a general limitation clause in Article 29. The Article provides that:

> 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 29 of the UDHR is understood as imposing a blanket limitation on the rights mentioned therein.[211] Because the limitation terms stated in Article 29(2)[212] are echoed in later human rights documents,[213] they merit more specific examination.

While initial UDHR drafts at the First Session of the CHR's Drafting Committee centred on the individual's duty to the state, society, the community, and the UN,[214] the actual limitations stated therein

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[210] E/CN.4/SR.60 (1948). See also Scheinen (1995;266) noting that Article 29 was viewed as imposing a general form of limitation on the right; Humphrey (1985) making the same point.

[211] Opsahl (1992;449)

[212] Article 29(1) refers to the notion of duties of the individual, which is treated as a theoretical counterbalance to rights. Daes (1980). Article 29(3) is a somewhat self-serving provision (to use Opsahl's (1992) terms) which disallows the rights to be used in a manner contrary to the "purposes and principles of UN". Since these paragraphs do not relate to limitations per se', they will not be the centre of analysis.

[213] Kiss (1981;290) (noting the development of the ICCPR's limitation clauses from the UDHR).

[214] See generally Daes (1980;17-18) referring to the initial drafts of the Article.

related mainly to abusing the rights of other individuals.[215] At the Third Session of the CHR, adherence to the requirements of morality, public order and the general welfare of a democratic society were adopted.[216]

One of the chief problems in drafting Article 29 related to the phrase "public order". The French text required the general phrase "public order" since a literal translation of the phrase is "ordre' public", which generally implies notions of morality and public order.[217] The English version incorporated these latter ideas through the phrase "general welfare", with the English meaning of "public order" implying a wider latitude of action with broad political overtones.[218] While the terms "morality" and "public order" presented adequate limitations, to solely base the limitation on the "general welfare" of a democratic society was deemed too narrow as it depended on one's approach towards the implications of a democratic society. Retaining all the terms however upheld interpretations according to both the French and the English versions.[219] Furthermore, with the addition of the phrase "prescribed by law solely for the purpose of securing...", it was believed that limitations were thereby not subject to arbitrary measures since, by definition, a democratic society is not subject to summary administrative actions.[220]

The UDHR contains an additional limitation requiring an individual to consider the 'general welfare in a democratic society'. Originally, it was drafted as the welfare of the 'democratic state' which implied a more functional characteristic to the term,[221] but the language was altered to allow for a broader understanding of democracy.[222] 'General welfare' can also serve to defuse instances of conflicts of rights,

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[215] See various proposals in E/CN.4/21 (1947) that resulted from the Drafting Committee's 1st Session.

[216] E/CN.4/82 (1948). See also Daes (1980;72)

[217] Spain had a similar problem with "orden publico". The term implied public policy and the general existence of the state. Verdoodt (1963;145).

[218] Daes (1980;72) referring to E/CN.4/SR.74 (1948)

[219] GA Third Committee, Third Session, meetings 153-155 (1948). See also Opsahl (1992;451-452) noting that other proposed limitations, centring on national sovereignty, solidarity, security, loyalty or good faith, were rejected since the delegates felt that they were covered by the present terms of the Article.

[220] GA Third Committee, Third Session, meeting 154 (1948). Opsahl (1992;460) notes that although the limitation is pursuant to the law of the state which is broader than a limitation granted by an international document, it is narrowed as a result of the democratic society requirement.

[221] See E/CN.4/SR.51 (1947) (USSR interpreting the phrase as the right of all to participate in the governmental process and gain accessibility to elected officials).

[222] E/CN.4/SR.50 (1947). See also Daes (1980;72) (noting that the term centres on the administrative officials of the state as being subject to the power of its peoples who elected them); Verdoodt (1963;146) (drafters had in mind democratic virtues which are greater then the characteristics of a particular state, such that governmental power is restrained).

as between the individual and society or minority and majority groups.[223] This can prove to be an imperative limitation for a conscientious belief, particularly as a minority group belief can conflict with the beliefs of other individuals.

Note that while the final draft of the UDHR was not subject to any negative votes in the GA, the right to change one's religion posed a particular problem for some states, notably the Soviet bloc states and certain Islamic states,[224] leading to the abstaining of some states from the final vote.[225] This issue was to prove to be an obstacle in later documents relating to the right to freedom of religion and conscience.

B. ICCPR, Article 18[226]

Following completion of the UDHR in 1948, the CHR turned its attention to drafting a more binding international covenant. The right to freedom of conscience is codified in ICCPR Article 18 and states:

> 1. Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety order health or morals or the fundamental rights and freedoms of others.
> 4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[227]

Many of the issues regarding the right to freedom of conscience discussed by the UDHR drafters were also raised during the drafting of the ICCPR. Along with the influence of the UDHR on the drafting process, the ICCPR drafters also relied upon a report from the Sub-Committee on Prevention of Discrimination and Protection of Minorities[228] drafted by A. Krishnaswami. The report was completed in

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[223] Verdoodt (1963;146)
[224] GA Third Committee, L.876
[225] The ability to change one's religion was to prove to be the key subject of discussion during the drafting of the ICCPR.
[226] 999 UNTS 171
[227] The article, as a whole, was adopted in both the Third Committee and the GA by a unanimous vote.
[228] Following a 1954 preliminary report on the matter by a US rapporteur. E/CN.4/Sub.2/711 (1954)

1960,[229] at around the same time that the GA Third Committee began to focus on Article 18 of the ICCPR.[230]

More generally, the focus of discussion for the ICCPR centred on understanding what is meant by thought, conscience, religion, and belief, the implications of providing for a change to one's religion,[231] and the nature of the limitations.[232] While similar in approach and general scope to UDHR Article 18, the ICCPR incorporated some obvious differences. Most notably, ICCPR Article 18 omits any specific reference to the right to change one's religion and amplifies notions relating to thought and conscience.

Similar to the UDHR, the ICCPR drafters intended to distinguish conscience from religion by equating conscience with generally accepted beliefs.[233] The drafters were hesitant to define the terms for fear of creating a limited, subjective, notion of the right, which might unduly confine the concepts being protected without allowing for development of the right in the future.[234] Nonetheless, the drafters approached a conscientious belief as meriting specific protection apart from a religious belief.

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229 Study of Discrimination in the Matter of Religious Rights and Practices E/CN.4/Sub.2/200/Rev.1 (1960)

230 Indeed, the Third Committee's Secretariat specifically referred to the Krishnaswami study as a drafting tool. GA Third Committee, Fifteenth Session, meeting1027 (1960). See also Partsch (1981;211) (delegates relied on the study as a means of defining belief in the broad sense, and as including beliefs held by atheists, agnostics, free thinkers, and rationalists).

Note that while the study assisted the ICCPR Third Committee drafters, it was passed to the CHR with the view towards drafting a particular covenant against religious discrimination based on the 16 principles that Krishnaswami had proposed in his report. Furthermore, the Krishnaswami study also provided impetus for UNESCO's drafting of the 1960 Convention against Discrimination in Education (which protects the rights of religious groups in Article 5(1)(a)) and the ILO's 1960 Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation (Article 1 of which prohibits religious and political opinion discrimination). Dickson (1995;334 and 337-338). See also 1959 Convention on the Reduction of Statelessness and Discrimination that disallows deprivation of a person's nationality based on religion or political opinion. These documents do not provide for protection of belief or conscience in a manner similar to UDHR or ICCPR but centre solely on freedom of religion.

231 See e.g. E/CN.4/SR.116 (1949) where the Commission of Churches (an NGO) identified this right, along with religious education, as being central to the freedom.

232 See e.g. E/CN.4/SR.117 (1949) where France notes that the limitations are to apply solely to the manifestation of a religion or belief but not to inner convictions.

233 E/CN.4/SR.116 (1949) at 3-4

234 Hence, when Nigeria desired to define religion in a manner that protected the general populace against sects and unduly harsh proselytising, Uruguay responded that the concepts are too difficult to actually label in any structured manner. See also GA Third Committee, Fifteenth Session, meeting 1024 (1960), Liberia (defining the right's concepts is subjective and dangerous); GA Third Committee, Fifteenth Session, meeting 1026 (1960) (France referring to Krishnaswami (1960;fn.8) who did not define religion or belief in any specific manner so as to avoid the possibility of future limitations and allow for further development of the right pursuant to changes in the future). See also GA Third Committee, Fifteenth Session, meetings 1021-1027 (1960) at 17.

Similar to the assertions made while drafting the UDHR, however, some delegates desired to construe the right solely within a religious context, to the exclusion of any other form of belief. The UK delegate, for example, interpreted manifestation as not including conscience because a conscientious belief is a subjective internal notion that is too intimate to even consider.[235] The delegate from El Salvador similarly reasoned that conscience only addresses man's spiritual loneliness.[236] The Saudi Arabian delegate defined conscience as the moral and intuitive ability to discern right form wrong and good from evil.[237] These definitions of conscience served to diminish the capacity for the manifestation of a conscientious belief. The delegate from Spain went even further by limiting the ability to manifest only to theistic beliefs, excluding atheists or those with indifferent opinions.[238] The Venezuelan delegate acknowledged that although the right might imply the ability to not maintain any religious belief, it does not therefore mean that the right automatically provides for manifestation of atheistic beliefs or other general forms of beliefs.[239]

By contrast, other state delegates latched on to the importance of safeguarding the views of non-religious believers by comprehending a conscientious belief as an essential counterbalance to religion. This counterbalance was deemed imperative upon considering the rights of non-religious believers such that granting the ability to manifest a general conscientious belief was essential to the freedom being granted.[240] The delegate from Liberia amplified this point by noting that the role of a conscientious belief is greater than merely counterbalancing religious oppression since the belief also merits manifestation, as indicated by the wide variety of manifestations intimated in the phrase "religion and belief". The delegate from Ceylon referred to the broad nature of the article, especially for secular and non-religious societies, and reasoned that upholding the internal protection of conscience will, by default, uphold the external manifestation as well.[241]

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[235] GA Third Committee, Fifteenth Session, meeting 1021 (1960)
[236] GA Third Committee, Fifteenth Session, meeting 1024 (1960)
[237] id. at meeting 1021.
[238] id. at meeting 1026.
[239] id. at meeting 1021
[240] id. at meeting 1024.
[241] id. at meeting 1022.

Despite the different approaches aired by the states throughout the drafting process, the inclusion of the term "belief" illustrates a right to manifest non-religious or secular beliefs such as atheism and rationalism.[242] The USSR delegate noted that because atheism centres on natural and historical facts and not a supernatural being, it was clear that the term "belief" was not referring to religious oriented beliefs.[243] "Beliefs" address a different range and form of ideals than religion, as demonstrated by Pakistan's distinction between "religion" which centres on a belief in a superhuman power and "belief" which refers to general forms of belief, such as atheism.[244]

The approach to belief as incorporating notions outside a religious context was further endorsed by the delegate from Argentina[245] whose state delegate broadly defined beliefs as including creeds, philosophical conceptions of man and the meaning of life, and those beliefs which influence all aspects of an individual's existence.[246] The Argentinean delegate contrasted this approach to belief in religion, which relates to beliefs that are more fundamental.[247] The delegate from Cyprus also defined belief in the widest sense as incorporating every kind of faith and belief,[248] while the delegate from Ceylon viewed belief as incorporating general philosophical beliefs as well.[249] In the final report of the Third Committee to the GA, it was noted that although it is advisable not to define the terms, 'belief' includes non-religious and secular beliefs.[250]

Upon recognising that non-religious believers were worthy of protection in the same manner as religious believers were, the drafters further had to provide for the manifestation of such beliefs.[251] The delegate from Brazil recognised that it is impossible to really safeguard the freedom of conscience without providing for an external manifestation of the right.[252] The delegate from the Philippines also stated that

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242 GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960)
243 GA Third Committee, Fifteenth Session, meeting 1025 (1960)
244 id. at meeting 1024
245 id. at meeting 1025
246 Argentina noted that the right does not protect negative beliefs, defined as those that harm another.
247 id. at meeting 1025
248 id. at meeting 1025.
249 id. at meeting 1026
250 GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960)
251 GA Third Committee, Fifteenth Session, meeting 1021 (1960) Philippine responding to remarks of UK who proposed to limit right to religious protection only.
252 id. at meeting 1023

once you acknowledge the right not to maintain a religion, the right to manifestation must incorporate a conscientious belief in order to protect non-believers as well.[253] Consequently, similar to the interpretation accorded to the UDHR, the ICCPR provides for the manifestation of both a religious and a conscientious belief. While there was some initial doubt expressed regarding the scope of the article, it is apparent by the term 'belief' that the drafters intended to include a provision for the manifestation of a conscientious belief.

Another issue similar to that raised during the drafting of the UDHR related to the relationship between protecting thought and a conscientious belief. Expanding on the protection accorded in the UDHR, the drafters included a second paragraph in the article prohibiting coercion. 'Coercion' was defined as relating to an individual's internal mind whereby undue pressure and improper inducement, including non-physical coercion,[254] are used to adopt a different religion or belief.[255] For example, at the GA's Tenth Session in 1955, the Secretary General noted that although the CHR had trouble distinguishing between thought and belief in the right to freedom of conscience, and thought and opinion in the right to freedom of expression, opinion and thought either complement one another, with free expression serving as a means of manifesting one's thought, or freedom of expression is a superfluous right. As for the internal aspect of the right to freedom of conscience which also includes thought, the Secretary General referred to it as an individual's inner thought and moral consciousness which could not be subject to restrictions.[256]

Hence, Article 18 is providing specific protection for the internal aspect of thought and conscience.[257] The right to manifest a belief however is limited to religious or conscientious beliefs, particularly since thought will manifest as an expression. Furthermore, 'coercion' involved not only physical pressure, such as forced conversion,[258] but also pressure which focused on one's internal thoughts, such as refusal to grant a state benefit on the basis of one's identification with a religion or belief.[259]

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[253] id. at meeting 1021

[254] id. at meetings 1021 and 1022. See also GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960) at 18; Nowak (1993;318) (noting that this is the reason why the term "impair" rather "deprive" was used).

[255] GA Third Committee, Fifteenth Session, meeting 1023 and 1024 (1960)

[256] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955) at 136.

[257] E/CN.4/SR.116 (1949)

[258] Cumper (1995;370)

[259] Contra Cumper (1995;370-371) who limits the term to physical coercion as inferred from the HRC's General Comment to Article 18 that did not specifically refer to psychological pressure and due to the greater need to eliminate physical pressure.

The addition of Article 18(2) derived also from the desire of various states to emphasise the right to change one's belief, while balancing such a right against undue coercion by external forces, such as zealous missionaries.[260] The term 'coercion' recognised that a third party may use moral or intellectual persuasion to appeal to an individual's internal spiritual authority.[261] Indeed, an initial proposal centred on specific protection for proselytising religious groups. While the proposal was not added to the final draft, the first paragraph of Article 18 does provide for the freedom "either individually or in a community with others", which implies a protection for such groups.[262]

Nonetheless, the ICCPR drafters removed the specific right to change one's religion or belief. [263] Various state delegates noted the conflicts with their internal laws if the right provided for a change by further highlighting the problem of missionaries and the possibility of fraudulent changes of religion.[264] Both the delegates from Egypt and Saudi Arabia objected to the right to change a belief, reasoning that it supported improper missionary work and caused greater long-term damage to society.[265] There was no need for a specific provision regarding change, argued the Saudi Arabian delegate, by virtue of the provision for freedom of religion that implies a right to change one's religion as well.[266] If freedom really was the issue, then changing conscientious belief or a conscious thought should also be included in the provision.[267]

The response, summarised by the delegate from the Netherlands, recognised that it is difficult for any religion to recognise apostasy, however that is the very nature of the freedom being upheld.[268] Another

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[260] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955) referring to the CHR's 5th Session

[261] E/CN.4/SR.319 (1955)

[262] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955) The Secretary General pointed out the lack of any specific protection for minority religious groups due to the potential conflict which could result with other religions.

[263] GA, Third Committee, Fifteenth Session, meetings 1021-1028 (1960). The following notes shall refer solely to the meeting number.

[264] E/CN.4/SR.161 (1950). A memo drafted by the Secretary General prior to the CHR's next session highlighted this problem as troubling many states which disallow one to change religions. E/CN.4/528 (1951) (the Secretary General also distinguished between religion and belief as two distinct concepts).

[265] GA Third Committee, Fifth Session, meetings 288 (1950). Saudi Arabia echoed this argument at the next GA Third Committee meeting (GA, Third Committee, Sixth Session, meeting. 367 (1951)).

[266] E/CN.4/SR.319 (1952). See also E/CN.4/528 (1951) Memo by Secretary General who outlined Saudi Arabia's and Egypt's position on this matter.

[267] GA Third Committee, Fifteenth Session, meeting 1021 (1960)

[268] GA Third Committee, Fifth Session, meetings 306 (1950). See also GA Third Committee, Fifteenth Session, meeting 1021 (1960)

argument was that the ability to change related to the individual's capabilities and it was not a right granted to groups, such as missionaries.[269] In support of this contention was the use of the term 'coercion' at the beginning of the paragraph which implied not only a deprivation of an individual's freedom, but also applied to impairing one's freedom via improper inducements and indirect pressure.[270]

The CHR attempted to address this problem of changing one's religion by adding in the words 'to maintain or' prior to 'change' one's religion. This proposal however did not alleviate the problem for states disallowing apostasy. The issue of providing for change of belief persisted until the end of the GA's Fifteenth Session when initially the words 'to have a religion or belief of one's choice' was proposed and rejected as being too static, followed by the present language which upholds one 'to adopt' a religion or belief. As a result, it would seem that although the right to change one's belief is not as clearly provided for in the ICCPR, an individual may still assert the right to change a belief since it is an exercise of the freedom provided by the right.[271]

The ICCPR drafters had also proposed more specific recommendations regarding the right to freedom of conscience, some of which were rejected.[272] The drafters desired to avoid any specific protections within the right, especially when oriented towards a religious belief.[273] Consequently, the drafters rejected a paragraph regarding the right to conscientious objection to the military.[274]

Despite this underlying policy regarding specific provisions within the right, Greece successfully inserted a provision protecting the education of children in conformity with a parents' convictions.[275]

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[269] GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960)

[270] id. at 18.

[271] Id. See also GA Third Committee, Fifteenth Session, meeting 1027 (1960) where this compromise was initially proposed by the UK

Note that the HRC's 1992 General Comment to Article 18 interprets the phrase in paragraph 5 as "the right to replace one's current religion or belief" and commentators have upheld the allowance to change one's religion or belief under the terms of the ICCPR. Clarke (1978); Partsch (1981;211); Humphrey (1985;179); Nowak (1993;316); Edge (1996); Walkate (1983)

[272] See also earlier drafts of the UDHR that allowed for conscientious objection to acts against ones beliefs as dictated by one's conscience. E/CN.4/82/add.12(1948); E/CN.4/NGO/1 (submission by NGO to Secretary General requesting right to military conscientious objection in article).

[273] E/CN.4/SR.161.

[274] See also discussion infra at Chapter Six

[275] E/CN.4/SR.94 and 103-104 (1949). A similar provision is found in Article 26(3) of the UDHR, which was proposed at the 3rd Session of the GA's Third Committee. See Arjarvi (1995;410) See also the 1960 UNESCO Convention Against Discrimination in Education at Article 5(1)(b) that protects education of one's children "in conformity with their convictions". This provision has been defined in a negative manner and not as a right to deny education to a child. Arjarvi (1995;415)

Although the proposal was previously rejected by the CHR, [276] Greece noted that Article 18(4) is based on Article 13(3) of the International Covenant on Economic, Social, and Cultural Rights[277] which did not intend to grant individuals the right to control state education or require a state to provide a particular form of education.[278] Such an approach was deemed to violate the separation of church and state.[279] Rather, the goal in drafting the provision, as originally noted in the CHR,[280] was to ensure that one's faith and customs are preserved for future generations.[281]

The term 'convictions' was used in Article 18(4) to protect individuals other than religious believers.[282] As pointed out by Canada, for purposes of paragraph 4, moral education is equivalent to religious education.[283] This further indicates the broad scope of the article as including beliefs other than formal religious beliefs.

Concerning the limitations provided for in Article 18(3), a uniform limitation was initially proposed for ICCPR Articles 18-21 but no further action was taken towards that end.[284] Nonetheless, the

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[276] Lebanon had noted a desire for a paragraph on the right to educate one's child in accordance with one's belief. See also E/CN.4/SR.160 (1950) where an NGO, the Agudas Israel World Organisation, desired a similar paragraph as a means of protecting Jewish World War II orphans who might not receive a religious education when sheltered by international charity organisations.

[277] GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960); GA Third Committee, Fifteenth Session, meeting 1022 (1960). Although viewed as being somewhat repetitive between the ICCPR and ICESC, the paragraph was included in case a state ratified only one of the two conventions. Id. at meetings 1023 and 1027.

[278] E/CN.4/SR.285-291 (regarding the drafting of ICESC Article 13(3)). Similarly, the ECHR, which codified the education right in the First Optional Protocol, Article 2 (as a means of avoiding any particular focus on a specific right in Article 9), also does not impose a duty on the State despite the more binding terms "to ensure" education. Travaux Preparatoires, VIII (1975) at 24.

[279] E/CN.4/SR.161 (1950). The original proposal was opposed by the US, UK, and Chile because the proposal on education violated the desired separation of Church and State and was felt to be too specific for a general human rights document. See also E/CN.4/528 (1951).

[280] E/CN.4/SR.161(1950)

[281] GA Third Committee, Fifteenth Session, A/4625, Agenda Item 34 (1960) at 19

[282] Similarly, the ECHR right is extended to "religious and philosophical convictions". Collected Edition of Travaux Preparatoires Vol. VIII (1978;156) (right includes all forms of beliefs) and at 172 (religious convictions incorporates all aspects of beliefs).

[283] GA Third Committee, Fifteenth Session, meeting 1024 (1960). Similar to Canada's interpretation, Article 13(3) of the ICESC desired to protect individuals who adhered to their general moral and spiritual values by ensuring that those values are passed onto their children. See E/CN.4/SR.285-291.

[284] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955) . See also E/CN.4/528 (1951) Memo of the Secretary General calling for uniform limitations throughout the Treaty.

interpretation given to the limitation phrases of the Article are quite similar to the other principal treaties that codify the right to freedom of conscience and consequently they maintain a similar meaning. [285]

The limitations provided in the ICCPR play an important part in understanding the scope of the right to freedom of conscience and assist to clarify what the right desires to uphold. As noted by the Russian delegate, if no limitations are imposed, a manifested belief could lead to disastrous consequences, such as committing murder on religious grounds.[286] The travaux preparatoires however clearly state that the limitations apply to external manifestations of a religion or belief and not to the internal protections of the right.[287]

The limitations of ICCPR Article 18(3) are narrower than the limitations found in the other articles of the ICCPR, possibly due to the high value accorded to the right.[288] The key differences between the limitations of Article 18 and other limitations in the ICCPR are the disallowance of a derogation on the grounds of a public emergency,[289] the absence of a limitation on national security grounds because the term was deemed too imprecise to apply to the right to conscience,[290] and no limitation on the basis of the 'general welfare in a democratic society'.

The phrase 'prescribed by law' replaced the original version's term 'pursuant to law' since the latter was viewed as imposing a narrower, weaker, duty on a legislature imposing a limitation.[291] A legislature

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[285] Documents and treaties drafted after the ICCPR have generally adopted the language and structure of the ICCPR's limitations. See e.g. Convention on the Rights of the Child, Article 14(3); Declaration of Human Rights for Individuals not Nationals of the Country in which they Live, Article 5(e) (despite initial, broader, allowance for limitations, the drafters altered the language to conform to the narrow limits as established by the ICCPR).

[286] E/CN.4/SR.116 (1949)

[287] E/CN.4/SR.117 (1949) (as noted by the CHR); GA Third Committee, Fifteenth Session, meeting 1022 (1960). See also Nowak (1993;324); Kiss (1981); Cumper (1995;373) (reasoning that forum internum will generally not encroach upon the rights of others); Partsch (1981;212).

[288] See Partsch (1981;212). Nowak (1993;326) however notes that broader limitations found in other articles can apply to Article 18 if the manifestation of a religion or belief infringes such rights.

[289] ICCPR Article 4(2) disallows a derogation from Article 18 in case of a public emergency. The public emergency derogation to the right to conscience is allowed in the ECHR.

[290] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955). Cf. ICCPR Articles 19-22 where the limitation is found.

Kiss (1981;296) notes that while "national security", "public safety", and "public order" are at times used interchangeably, it is safe to conclude that the limitation on grounds of "national security" was intentionally left out of ICCPR Article 18 (and ECHR Article 9). The HRC supports this conclusion by noting in the General Comment to Article 18, at paragraph 8, that the limitations are to be "strictly construed" and restrictions are only to be applied for the grounds specified and not on other grounds, such as national security.

[291] E/CN.4/SR.119 (1949)

must now draft a formal and adequately constructed law[292] that provides sufficient precision in the regulation. The second requirement of 'necessity' refers to the need for proportionality between the limitation and the danger being addressed,[293] such that the limitation must be essential and inevitable.[294]

Similar to the UDHR, the phrase 'public order' posed a particular problem due to translation difficulties and overlapping meaning, particularly with public safety.[295] As discussed at the CHR's Eighth Session, the French term, 'ordre public', is closer to a meaning of public policy,[296] whereas the English term 'public order' refers to the absence of public disorder.[297] This latter term had been criticised for its general and ambiguous nature.[298] While the UDHR and ECHR retain the term for both the English and French versions,[299] some commentators have concluded that because ICCPR Article 18(3) does not actually place the term 'public' before 'order',[300] and because in other Articles of the ICCPR, when the limitation 'public order' is imposed the French term 'ordre' public' is placed in parenthesis,[301] that the English approach towards the term as preventing disorder is the operative interpretation.[302]

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[292] Cumper (1995;373).

[293] HRC General Comment at paragraph 8, noting that the limitation "must be applied for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." See also Nowak (1993;325); Daes (1980;135); 17851/91 Vogt v. Germany 21 EHRR 205 (1996)

[294] Kiss (1981;308)

[295] See e.g. Kiss (1981;299) noting that because of the broad nature of the term, some drafters of the ICCPR assumed it incorporated public safety as well.

[296] Concerning the Spanish version, Spain defined the term as "considerations of public order to safeguard the state's integrity and sovereignty". Argentina noted that it is a body of political, economic or moral principles considered essential for the maintenance of a given social structure. See GA, Third Committee, Fourteenth Session, meeting 956 (1959)

[297] E/CN.4/SR.319 (1952). See also E/CN.4/528 (1951) Memo of the Secretary General where a similar point is noted and the broad nature of the English term is criticised; GA, Third Committee, Fourteenth Session, SR.956 (1959)

[298] E/CN.4/32 (1947); E/CN.4/85 (1948) Various NGO's criticised the term on the same grounds, noting that it was the critical limitation of the Article. See E/CN.4/SR.116 (1949); E/CN.4/SR.160 (1950)

[299] But see Kiss (1981;fn.34) who notes that while the English phrase "public order" is used in the ECHR Article 9(2) and the French version only refers to "l'ordre", judicial bodies have interpreted the term as "ordre public". He refers to Engel v. 22 ECHR Ser.A 41 (1977).

[300] Article 18(3) provides for "public safety, order, health...". The AmCHR also avoids the reference to "public order" by structuring the limitation in a similar manner to the ICCPR.

[301] See e.g. Articles 19, 21, and 22.

[302] Cumper (1995;374); Nowak (1993;327) ("order" to be interpreted in a narrow sense); Partsch (1981;213); Kiss (1981;300-302) outlines the scope of the term "ordre' public" under French law, pointing out that it is a tool which can also be used to defend an individual's rights, such that the term should be considered within the context in which it is being asserted and be limited to allowing the "adequate functioning of the public institutions necessary to the collective..."

Note that while Nowak's approach (of separating the term "public" from "order") might clarify the limitation, it also can unintentionally broaden the allowance since the term "public" is disassociated from the rest of the limitations. Kiss on the other hand allows for consideration of the term within a more "public" context. See also Verdoodt (1963;145) (when including French version in text, it becomes the operative term).

The phrase 'public safety' is also ambiguous and difficult to interpret.[303] In an attempt to clarify the phrase by stating what it is not, 'public safety' differs from a 'national security' limitation since the focus of public safety is the act being conducted by the individual and the need to prevent disorder.[304] National security on the other hand relates to an external threat to the state.[305] Nonetheless, the problem of overlap remains, particularly when a group endangers public safety on political grounds or because of an external threat.[306]

The limitations based on public health and public morals were not discussed in detail in the travaux preparatoires. It should be noted that the limitation of public morals for a right such as conscience poses an interesting conundrum, especially since the relative nature of morals prevents a state from singularly relying on this limitation.[307] It is difficult to separate individual from social morals, or even find a universal conception of morals, especially when a conscientious belief derives from an individual moral evaluation which will presumably involve, or be influenced by, considerations of underlying social morals. Both private/individual and public morals are each bound up with the unique social and cultural perspectives of the various individuals within the state.[308] In practice, it has been recognised that the actual scope of the 'public morals' limitation is difficult to define and it is largely left to the states themselves to apply the common (domestic) meaning of the term.[309]

The limitation of 'fundamental rights and freedom of others',[310] refers to a state's basic fundamental constitutional rights as well as international human rights.[311] It is generally interpreted as disallowing a person from abusing one's right to harm the human rights of another person.[312]

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[303] GA Third Committee, Tenth Session, A/2929, Agenda Item 28 (1955) (noting the ambiguity and lack of clarity surrounding the term). For a similar contention, see also Cumper (1995; fn. 155, referring to CCPR/C/SR.1225); Kiss (1981;298)

[304] Kiss (1981;298); Nowak (1993;326). Cf. Daes (1980;121) noting the imprecise and broad nature of both terms.

[305] Nowak (1993;327).

[306] Cumper (1995;374). Typical examples being the problems facing immigration officials who are wont to admit individuals associated with terrorist or rebel groups.

[307] Verdoodt (1963;139) notes that if a state relies solely on "public morals", it is increasing the rule of law at the expense of morality and not, as possibly intended, upholding the morality.

[308] See e.g. Cumper (1995;375)

[309] Kiss (1981;304), referring to the ECHR and Handyside 24 ECHR, Ser.A (1976) (UK authorities can decide what is considered obscene materials, pursuant to limitation in Article 10 of ECHR).

[310] The ECHR and AmCHR do not contain the term "fundamental". Commentators have concluded that no legal distinction results from the omission. Cumper (1995;376-377).

Concerning the derogation clause of ICCPR Article 4, the drafters recognised that, at certain times, it was necessary to provide for more general human rights derogations in the interest of preserving the state.[313] The purpose of limiting the Article 4 derogation however was specifically to prevent abuses which might arise from such a general derogation clause.[314] Hence while ICCPR Article 4 is limited in scope to particular public emergencies which threaten the existence of the nation and which must be officially proclaimed,[315] the derogation cannot apply to the right to freedom of conscience.[316]

The travaux preparatoires of the ICCPR demonstrate the similarities to the UDHR in codifying the right to freedom of conscience, as indicated by the similar phrases used in each document. While the ICCPR drafters employed a rather broad understanding of the ability to manifest a conscientious belief, the ICCPR uniquely provides a clearer understanding of the protection for the internal aspect of the right to freedom of conscience.[317] Furthermore, the limitations offer somewhat less of an opportunity for restricting the right to freedom of conscience when compared to other rights in the document.

III. Regional Treaties

While the UDHR and ICCPR were being drafted, a variety of regional organisations also were working on human rights treaties specific to their regions. The first significant document to emerge was the ECHR. Because the ECHR was completed prior to the ICCPR, the UDHR served as the principal influence on the drafters.

A. ECHR, Article 9

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311 Nowak (1993;329); Daes (1980;119-120) noting the relation of human rights to other rights and of individuals to one another, such that an individual requires protection of one's rights not only from the state, but also from one's fellow man. This latter protection/limitation of one's rights is to emanate from the state.

312 Daes (1980;128-129) refers to UDHR Article 29(3) and Article 30, which, the author notes, requires a narrow interpretation. The ECHR does not narrow the infringement of other's rights to "fundamental", while the AmCHR does not use the "fundamental rights" language.

313 Daes (1980;183-184) referring to times of war or other instances of extraordinary peril and noting that the majority of state's provided for such derogation's in their constitutions; UN (1995;45) noting the required seriousness of a threat which threatens the life of a nation.

314 Daes (1980;184) referring to E/CN.4/170

315 See generally Daes (1980;191-197)

316 Because judicial fora do not acknowledge Article 18 as providing the basis for a right to military conscientious objection, the public emergency derogation might still apply to a military conscientious objection claim during a period of war. See e.g. Daes (1980;200-201). Cf. Nowak (1993;323). See also discussion infra at Chapter Six.

317 See also discussion infra at Chapter Four

The influence of the UDHR on the ECHR drafters is reflected in ECHR Article 9, the article codifying the right to freedom of conscience, which states:

> 1. Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as a re prescribed by law and are necessary in a democratic society in the interests of public safety for, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Although the UDHR served as the chief source for the ECHR, the impetus for drafting the ECHR derived from a desire to create a document that better reflected the political and ideological framework of the European countries.[318] The typical example which demonstrates this point is the interpretation given to the UDHR's Article 29 limitation to a human right on the basis of necessity 'in a democratic society'. The scope of the phrase will vary depending on the underlying value concepts of the state that can radically differ from one region to another.[319] Furthermore, the European states desired a uniform approach towards human rights. While the UDHR could exemplify the minimum level of international human rights protection,[320] an important goal of the ECHR was to achieve unity, as opposed to the UN's purpose of reflecting a host of different views in a world forum.[321] The fact that the ECHR also provides for judicial enforcement of rights indicates a possible intent to allow for different interpretations of the rights within the ECHR.

When considering the right to freedom of conscience, the ECHR drafters adhered to the general approach of the UDHR. The seminal Teitegen Report of 1949, which provided a drafting basis for the ECHR, quotes the UDHR in full[322] and relies on the UDHR's interpretations as a means of understanding

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[318] Schwelb (1975;510)
[319] Opsahl (1979;30 and 34); Schwelb (1975;109)
[320] Eurigenis (1979;75) noting that the ECHR has actually developed a stricter standard of rights.
[321] Schwelb (1975;510) (noting that the UDHR can still assist to interpret the ECHR).
[322] Collected Edition, Vol. I (1975;168 and 196).

the freedom of conscience.[323] That the UDHR served as a blueprint for the right to conscience in the ECHR is evident by the first paragraph of Article 9 that duplicated, word for word, UDHR Article 18.

Although the ECHR does not have a sub-section similar to Article 18(2) of the ICCPR, the 1949 Teitegen Report notes that the internal protection of Article 9 is not solely against forced confessions but to prevent 'abominable methods of police inquiry or judicial process which robs the suspected or accused person of control of his intellectual facilities and of his conscience'.

The essential difference from the UDHR is that the ECHR provides for limitations within each article. The limitations to the right to conscience are codified in Article 9(2). The ECHR retains the proviso 'necessary in a democratic society',[324] with 'democracy' being interpreted pursuant to the desired framework of the state's institutions.[325]

Concerning 'public order', the ECHR has interpreted the phrase in a similar manner to the ICCPR by upholding a dual understanding of the term.[326] Both methods of interpretation are referred to in the HRC[327] and ECHR judiciary bodies,[328] when appropriate.

Unlike the ICCPR and the AmCHR, the ECHR provides for derogation[329] to the right to conscience in times of public emergency.[330] The derogation has however been applied in the ECHR in quite a narrow manner and with specific restrictions.[331] The public emergency exception has been defined as affecting the

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[323] The Teitegen Report is quoted in Vol. I of the Collected Edition (1975).

[324] Kiss (1981;fn.67) is ambiguous as to the significance of the omission in Article 18. He notes that it is either a mere oversight because of haphazard drafting, or reflects the drafter's treatment of the rights within the articles as "sacrosanct".

[325] Volume V of the Travaux Preparatoires of ECHR (1975;292). See also Kiss (1981;307). Hence the ECHR judiciary bodies have upheld various administrative decisions which have imposed limitations to the right based on protecting rights within a "democratic society". See e.g. 6886/75 X v. UK 5 D&R 100 (1976); 25522/94 Negotiate Now v. UK 19 EHRR CD93 (1995); 20490/92 Ikson v. UK 18 EHRR CD41 (1994) (pressing social needs, pursuant to interpretation of state, where state decision is proportionate to legitimate aims and are relevant and sufficient)

[326] Humphrey (1985;181). ECHR case law generally considers the interpretation within the context of prison rights cases, where the decisions of the prison's to override a particular individual's beliefs are upheld on the basis of public order. Cumper (1995;375). Cf. HRC General Comment at paragraph 8 noting, in quite general terms, that prisoners should "continue to enjoy the right to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint".

[327] 453/1991 Aurik v. Netherlands CCPR/C/52/453/1991 (regulation of surnames considered a matter of public order, implying a public policy approach).

[328] See e.g. 25522/94 Negotiate Now v. UK 19 EHRR CD93 (1995); Manousakis v Greece 26/9/96 VII(11) H.R. case Digest 844 (1996) where public order was defined as the prevention of disorder.

[329] Humphrey (1986;64-66) (despite a limitation, the duty on the state to uphold the right remains, whereas the more powerful device of derogation temporarily removes the right in deference to a domestic law); Kiss (1981;290)

[330] ECHR, Article 5

[331] Oraa (1992;43-45). But see Hartman (1981;23) noting inconsistent standard applied by judicial bodies of the ECHR.

composition of the entire nation as a whole and not just a particular group therein. While a certain margin of judgement is left to the state when applying the derogation, the ECHR judiciary bodies retain the power to evaluate and review the determination following the state's declaration of emergency.[332] Hence, the derogation differs[333] from a 'public order' limitation, whose purpose is to prevent public disorder or uphold public policy.

B. AmCHR, Article 12[334]

Another significant regional human rights document in which the right to conscience was codified is the AmCHR. The drafters of the AmCHR seemed to maintain a different understanding of the right to conscience, as their principal focus was on codifying the right to freedom of religion. The right to conscience is codified in Article 12 and states:

> 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
> 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or belief.
> 3. Freedom to manifest one's religion or beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights and freedoms of others.
> 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

One of the reasons for drafting a more focused document such as the AmCHR was, similar to the ECHR, based on a desire to incorporate particular regional interests in the rights enunciated.[335] Although the UDHR provided some form of direction,[336] it was viewed as 'soft' law and lacking any substantive

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[332] See e.g. Lawless EHRR 1961

[333] Aside for the broader functional parameters of a derogation. See e.g. Higgins (1976-77)

[334] 1144 UNTS 123

[335] de Abranches (1968;184)

[336] Note that Chile Cuba and Panama had submitted their own drafts for a human rights document to the ECOSOC Secretariat that reflected the results of the Inter-American drive towards creating a human rights document. ECOSOC Official Records, Second Year, Fourth Session, Supp. No. 3. The UDHR and AmCHR served to influence the other, Samnoy (1993;48-49), although the AmDHR maintains a clearer focus on individual duties.

means for human rights enforcement.[337] While some state delegates, such as Brazil, desired to rely on UN human rights documents to uphold regional human rights,[338] the majority of states preferred a regional human rights documents which could work in tandem with the ICCPR.[339]

The predecessor to the AmCHR, the AmDHR, concentrated exclusively on the freedom of religion.[340] In 1959, however the Inter-American Council of Jurists put together a draft human rights document[341] that was modelled on the CHR's draft for the ICCPR. The right to conscience was essentially the same as that found in the ICCPR, with the important difference being a change in the first paragraph of the word 'manifestation' to 'profess' a 'religion or belief'. The delegates from Chile and Uruguay had also submitted their versions of the document[342] by specifically providing for a manifested right to conscience via the terms 'manifest and profess'. The Chilean delegate also included the terms 'celebrating rituals' along with 'worship'.[343]

The OAS Commission rapporteur, Dr. C.A. Dunshee de Abranches, recommended changes to the document in accordance with the Chile and Uruguay proposals, as demonstrated by the minor changes to the right to 'profess and disseminate' rather then merely 'profess'. The Commission also removed the term 'fundamental' before 'religion or belief' in the first paragraph.

These changes do suggest a more religious overtone to the document. 'Profess' and 'disseminate' imply specific rights for proselytising religions, a license that was not provided for in the ICCPR. Similarly, removing the term 'fundamental' indicates a specific provision for manifesting beliefs that differ from conventional religious beliefs. The implication is that a belief need not be fundamental but can entail a more general conscientious belief harboured by an individual.

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337 de Abranches (1968;185-187).
338 Sandifer (1968;175)
339 Inter-American Yearbook of Human Rights (1968)
340 Article 3 of the AmDHR baldly provided for the right to "freely profess religious faith".
341 The Inter-American Council of Jurists drafted the first draft in 1959 at the request of the OAS members' Ministers of Foreign Affairs.
342 1968 Inter-American Yearbook of Human Rights (1973) Appendix 3 and 4 (in Spanish).
343 See de Abranches (1968;282)

The drafters also distinguished between conscience and thought in a more obvious manner than the ICCPR drafters had. In the AmCHR, freedom of thought is protected in the free expression article[344] whereas freedom of conscience is protected alongside religion. The different approach derived from the AmCHR drafters' view of freedom of expression as a basic and essential right.[345] While the drafters recognised that conscience and thought maintain some form of internal relationship, as reflected in the ICCPR, thought was discerned as being closer to expression since the external manifestation of a general thought was via expression.

This approach to thought and expression was noted by G. Escudero in his 1967 report to the OAS. He stated that:

> Freedom of conscience presupposes the natural drive of the human spirit to act within the self on the subjective level or outside the self on the objective level of the life of the community.[346]

Escudero continued to note that when acting internally, conscience relates to the freedom of the mind, however when acting externally, conscience manifests as an expression.[347]

Indicative of the importance attached to free expression is Article 12(4) of the AmCHR which protects against limitations of indirect expression, a provision not found in the ICCPR.[348] Furthermore, Article 12(2) of the AmCHR does not centre on coercion, as in the ICCPR, but on impairing one's ability. It also retains the "maintain or change" language of the 1955 CHR proposal for the ICCPR.

These differences indicate that the AmCHR drafters adopted a somewhat different view of the right to freedom of conscience. Rather than treat a conscientious belief as a counterbalance to a religious belief, the AmCHR seems to equate a conscientious belief with a more general thought. While Article 12 codifies the rights to freedom of religion and conscience, the focus centres on upholding religious beliefs, including minority religious beliefs. Hence the right to profess and disseminate a belief. Placing the right to freedom

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[344] The term "opinion" is not found in the AmCHR but it is utilised in the ICCPR right to free expression, indicating the close relation between opinion and thought as pertaining to the internal consciousness of the person. See e.g. A/2929 where this same point was noted regarding thought and opinion (in Article 19) of the ICCPR.

[345] Sandifer (1967) (expression is cornerstone of liberty).

[346] Escudero (1967;119)

[347] Escudero (1967;119)

[348] de Abranches (1967;196-197).

of thought within the context of free expression however indicates that the drafters might have intended for the manifestation of a conscientious belief within the context of the freedom of expression.[349]

As for limitations on the right to freedom of conscience, the limitations are essentially the same as the ICCPR.

C. AfrCHR, Article 8[350]

The African states also codified the right to conscience. Article 8 of the AfrCHR offers a unique understanding of the right to conscience, as demonstrated by the different terms of the Article and the approach of the drafters. Article 8 states:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The AfrCHR, which emanated from a 1979 UN seminar[351] and was approved in 1981,[352] utilised unique language different from the other principal treaties when codifying the right to freedom of conscience. The AfrCHR aims to accord equal status towards both rights and duties, and thereby between the individual and the state, by protecting groups such as the community or the tribe.[353] The Organisation of African Unity (hereafter: 'OAU') endeavoured to create a distinctive human rights document which would focus on issues unique to African society, such as banning colonialism,[354] while retaining an overall African flavour regarding one's duty to others and the state.[355]

This approach of the drafters' assists in explaining the structure of Article 8. The terms of the Article refer to the freedom of conscience along with the free profession and practice of religion. The drafters thereafter did not elaborate on the rights stated therein, unlike prior codification's of the right to

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349 See discussion infra at Chapter Five for the distinction between freedom of conscience and expression.
350 21 ILM 59
351 Umozurike (1983;903)
352 Following a 1979 meeting of governmental experts in Dakar (who were appointed by the OAU), the Council of Ministers reviewed the draft in 1980 and 1981 in Banjul (hence the Banjul Conference) and submitted it for final approval to the OAU's 37th Ordinary Session of Council of Ministers 1981. Gittleman (1982;670).
353 See Nuituri (1995;376).
354 Gittleman (1982;676)
355 Gittleman (1982;677)

freedom of conscience that specifically fashioned a singular right to freedom of conscience. It is possible that the drafters' desired to avoid an elaboration of the individual's rights associated with the right to conscience by providing for group-oriented aspects of the right, such as professing and practising a religion.

Yet, while Article 8 does not seem to specifically accord the right to freedom of conscience any practical external significance, it is possible to interpret the intention of the AfrCHR drafters in a broad manner. One commentator has noted that 'the right to manifest one's conscience is inherent in the freedom of conscience. What good is conscience which is not manifested?'.[356] Conscience is further considered as a right granting the ability to retain any form of belief 'be it religious, political or any other conviction'.[357] Nonetheless, because the AfrCHR does not employ the usual phrase 'religion or belief' that provided for manifestation of a conscientious belief in other treaties, such as the ICCPR, the intended scope of the freedom accorded to conscience, as opposed to religion, is not clarified.[358]

Concerning the right to education, the AfrCHR does not have any corresponding provision in Article 8. It does however provide for the right to education in Article 17(1), and Article 17(3) states that the 'promotion and protection of morals and traditional values recognised by the community' is the duty of the State. Again, the overtones of the right centre on the relationship between the individual and state, yet the result seems to be a similar right to ICCPR Article 18(4).

With regard to limitations on the right to freedom of conscience, the AfrCHR has a unique limitation in Article 8 that subjects the exercise of the right to conscience to 'law and order'. This phrase has been criticised as granting the state an almost unfettered ability to limit the right since it subjects the exercise of the right to the interests of a state's domestic policies. In essence, asserting the right would be moot once

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[356] Ankumah (1996;133-134). The author bases this conclusion on the general spirit of the AfrCHR and uses similar logic to imply a right to change one's religion (as deriving from the inherent freedom). Such a broad interpretation also results from the somewhat vague nature of the rights that allow for greater flexibility. See e.g. Rembe (1991;4).

[357] Ankumah (1996;133) (distinguishing religion which is centred on theistic notions relating to a general philosophical outlook on life).

[358] See e.g. Amnesty International (1991;28) defining AfrCHR Article 8 within a religious context, but noting that reference must also be made to other international treaties and standards (as required by AfrCHR Article 60) and that military conscientious objection should be considered a right under the AfrCHR.

the notion of law and order are imposed, unlike the ICCPR, ECHR, and AmCHR, where limitations are subject to specific requirements which do not undermine the ability to retain the right.[359]

The AfrCHR also contains a general limitation clause similar to Article 29 of the UDHR. AfrCHR Article 27 provides:

> 1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
> 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 27 of the AfrCHR focuses on the individual's 'duties' and operates in a similar manner to a limitation clause. The duties on the individual are imposed specifically to exercise one's rights 'with due regard for the rights of others, collective security, morality and common interest'. This Article has been interpreted as providing quite a broad discretion to the state to legally restrict the rights provided for in the first part of the Charter,[360] with some commentators equating its provision with a general clawback clause.[361] This is especially due to the general language of the Article that is applicable to all the rights therein and the lack of any external control over the imposition of a limitation.[362]

Despite the broad language of the Article, the 1995 Guidelines for Submission of State Reports under the AfrCHR, as drafted by the African Commission, appear to treat the provision for limitations as derogations rather than strict clawback clauses.[363] This approach is supported by the Commission's practice to first determine whether a right has been violated before examining the derogation being asserted,

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[359] Gittleman (1982;693). The limitation in the AfrCHR could be broadened to incorporate the forum internum too since the right does not seem to distinguish between the internal and external nature of the right to conscience.

[360] See e.g. Rembe (1991) referring to Tanzania's disbanding the Jehovah Witnesses sect because the group gives the impression of being anti-establishment. See also Franck (1969;Vol.3;325) referring to a similar problem in Zambia.

[361] Gittleman (1982;690-692). Clawback clauses are broader then derogation since the circumstances for deviating from the right are not enumerated in any specific sense. A derogation is generally allowed for a particular reason (e.g., a public emergency) and is only temporary. A clawback is more discretionary, centres on domestic policies, and is created pursuant to a domestic legal directive.

[362] Gittleman (1982;691-692). The author does note, at 702-703, that reference can be made to other human rights documents as a means of defining the limitations.

[363] Ankumah (1996;177)

and because the limitation itself is subject to specific requirements.[364] Hence, concerning the limitations within the AfrCHR, the AfrCHR can be interpreted as conforming to ICCPR standards.[365]

IV. Other Documents

For purposes of further demonstrating the underlying meaning of the right to freedom of conscience in international law, it is worth turning to other human rights documents that codify the right. The most significant of such documents is the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (hereafter: 'Declaration'). Although the Declaration is not a legally binding document, one can infer a certain level of consensus regarding the right to conscience among the state delegates who participated in the drafting of the document. Furthermore, one of the purposes in drafting the Declaration was to further clarify the rights in ICCPR Article 18.[366]

A. Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief[367]

The relevant provisions pertaining to the right to conscience in the Declaration are:

> Article 1
> 1. Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect

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364 Ankumah (1996;176-177) referring, in fn. 591, to Communication No. 129/94, where the Commission, without explanation, overruled the state's imposed limitation.

Ankumah also refers, in fn. 587, to a Tanzanian case, Rumbun v. Attorney General Civil Suit No. 32 (1992) (cited in 52 Nairobi Legal Monthly 2/95) where the Court defined a limitation, subject to the proviso "prescribed by law", as requiring adequate safeguards against arbitrary provisions in order to uphold the right being abrogated from, imposing a proportional and reasonable standard in attaining the objective of the limitation, and not offending the natural justice principles. Similar phrasing is found in Articles 11-14 of the AfrCHR.

365 See also AfrCHR, Article 60 which requires the Commission to "draw inspiration" from other human rights instruments and Article 61 which directs the Commission to "take into consideration, as subsidiary measures to determine the principles of law", other international conventions which conform to African customs and practices.

366 See discussion infra

367 GA Res36/55, 25/11/81. The GA unanimously approved the Declaration in 1981.

> public safety, order, health or morals or the fundamental rights and freedoms of others.
> Article 6
> In accordance with Article 1 of the present declaration, and subject to the provisions of Article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:...

What is interesting about the travaux preparatoires of the Declaration is the drafters' focus on the same issues as the UDHR and ICCPR. The fact that the drafters came to similar conclusions regarding the breadth of the right to freedom of conscience and the right to manifest a conscientious belief further assists to entrench the underlying meaning of the right as developed thus far.

The significant aspect of the Declaration for the right to freedom of conscience is that the drafters specifically intended to incorporate protection for a conscientious belief in the same manner as a religious belief. This is exemplified by the discussion regarding the title of the document. The French delegate preferred the singular reference to intolerance in the title since, from a legal standpoint, the term incorporated freedom of conscience as well.[368] The majority of states, led by the Eastern European bloc, favoured the phrases used in the UDHR and ICCPR 'religion or belief'. These states noted that the title should not refer solely to intolerance, as intolerance could be limited to a religious context, but also to beliefs which imply more general notions of protection.[369] The Russian delegate amplified this point by noting the inclusion of atheists, non-believers, and rationalists in the ICCPR's use of the term 'belief' .[370] Indicative of this broad approach towards beliefs is the remark made by the delegate from Italy that:

> Belief, whether moral, religious, or philosophical, was a fundamental element in his conception of life. For an atheist, the important thing was of course not the negative side of believing in God [i.e., the right to deny God's existence] but the positive fact of having a moral or philosophical conviction that was undoubtedly a fundamental element in his conception of life [and therefore comparable to religion].[371]

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[368] GA Third Committee, twenty-second Session, meeting 1498 (1967) at 180

[369] GA Third Committee, twenty-second Session, meetings 1497-1499 (1967) (references to this document will hereafter be to the meeting number only).

[370] GA Third Committee, twenty-eighth Session, SR.2009-2014 (1973)

[371] GA Third Committee, twenty-second Session, meeting 1498 (1967) at 184.

Therefore, the title was altered to include 'intolerance' as well as 'religion or belief'.[372] This development demonstrates the broad notion accorded to the term 'belief' as incorporating a conscientious belief.

On a substantive level, as the drafters of the Declaration began to focus on specific articles within the document, it is apparent that they specifically intended to uphold manifestations of a conscientious belief as well. This is quite significant since the Declaration is a key source for interpreting ICCPR Article 18 especially since the drafters were acting with the specific intention of amplifying the meaning of that article, [373] as indicated by Article 1 of the Declaration.

Focusing on Article 1 of the Declaration, the Romanian delegate stated that the draft was specifically based on ICCPR Article 18[374] such that it related to upholding an individual's right to any belief or non-belief.[375] The delegate from Spain pointed out that the Declaration was to address issues of a broader nature than religious freedom,[376] and, as noted by the German Democratic Republic delegate, was to include general moral notions greater then transcendental ideals.[377] Similar to the arguments posited when drafting the ICCPR regarding the distinction between religion and conscience, the German Democratic Republic delegate noted that to focus solely on religion at the exclusion of other, more general beliefs, would be discriminatory to those beliefs.[378]

In another action reflective of the drafting process of the UDHR and ICCPR, the drafters avoided any specific definition of the terms. The underlying fear was that a specific definition could weaken the universality of the document and lead to definitions that veered from protecting non-religious beliefs as well.[379] This apprehension explains why the definition of belief as 'atheist, non-theistic and theistic' was

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372 GA Third Committee, twenty-second Session, meeting 1505 (1967)

373 Declaration's general purpose as amplifying ICCPR Article 18 and its term "belief", to provide for protection to atheists and non-believers as well. E/CN.4/1154 (1974) noting desire to enhance Article 18 but not necessarily affect the substance of the right.

374 GA Third Committee, twenty-eighth Session, meeting 2011 (1973). See also E/CN.4/1987/35 CHR's Rapporteur on Declaration, First Report, noting that purpose of Declaration was to clarify Article 18

375 GA Third Committee, twenty-eighth Session, meeting 2011 (1973) (similar remarks also being made by Costa Rica).

376 Id. at meeting 2010

377 Id. at meeting 2012 The GDR noted however that it is not allowing for the manifestation of any general feelings.

378 Id. at meetings 2010 and 2012

379 See generally A/9134; E/CN.4/1475 (1981)

deleted in favour of the phrase 'whatever belief', thereby upholding an even broader notion of the term than found in ICCPR Article 18.[380]

The phrase 'whatever belief' reflects the broad scope of protection in the Declaration[381] and removes the term from a religious oriented context.[382] This was necessary, according to the Bulgarian delegate, in order to counterbalance the religious flavour of the Declaration, as indicated by Articles 6 and 7 that focus solely on religious manifestations.[383]

The Declaration seems to further entrench the understanding of the manifestation of a belief as including a conscientious belief. The drafters desired to amplify ICCPR Article 18 in a broad manner that includes manifestation of conscientious beliefs. Furthermore, the drafters utilised the same basic phrases found in the UDHR, ICCPR, and ECHR when describing the scope of the right to freedom of conscience. Indeed, the phrases 'religion or belief' have become a watchword of sorts for implying the right to manifest a conscientious belief as well. This is demonstrated in additional documents that provide for the right to freedom of conscience.

B. Other Documents

The additional documents to be examined generally utilise similar phraseology to the UDHR, ICCPR, and ECHR when providing for a right to freedom of conscience. When internal protection of a conscientious belief[384] is safeguarded, the general phrase "freedom of conscience" is employed. When the broader, external, protection[385] is also codified, the phrase "manifestation of religion or belief" is used. Indicating the influence of the UDHR and ICCPR's terminology is the fact that the documents drafted after the ICCPR was approved utilise the same phrases as a means of codifying the right to freedom of conscience. By contrast, documents drafted before the 1966 approval of the ICCPR invoke different language, such that the protection generally centres on the right to freedom of religion.

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380 E/CN.4/1408 (1980) and E/CN.4/1475 (1981)

381 GA Third Committee, thirty-sixth Session, Summary Record 32-36 (1981)

382 GA Third Committee, thirty-sixth Session, Summary Record 35 (1981). See also GA Third Committee, thirty-sixth Session, meeting 73 (1981)

383 GA Third Committee, thirty-sixth Session, Summary Record 35 (1981)

384 Referred to as the forum internum, as discussed infra at Chapter Four

385 Referred to as the forum externum, as discussed infra at Chapter Five.

For example, the 1949 Fourth Geneva Convention regarding the Status and Treatment of Protected Persons provides in Article 27, inter alia, to respect 'their religious conviction and practices'. This document was drafted before the UDHR and contains a different form of language that need not necessarily incorporate the right to conscience. Nonetheless, the Commentary to the Geneva Convention has interpreted this phrase as:

> being part of freedom of conscience and freedom of thought in general. It implies freedom to believe or not to believe and freedom to change from one religion or conviction to another. This safeguard relates to any system of philosophical or religious belief.[386]

As a means of reflection, the 1979 Additional Protocols to the Geneva Conventions of 1949 (Protocol I), Article 75, uses the more familiar terms 'religion or belief' in the list of fundamental guarantees for individuals affected by a conflict. The key difference is that the Protocols were drafted after the ICCPR had been approved. Hence Article 75 has been interpreted in a somewhat broader fashion than the Fourth Geneva Convention as requiring the conflicting parties to respect the person's 'honour, convictions, and religious practices', with the latter being understood in the broad sense to cover 'all philosophical and ethical convictions'.[387]

Further examples are treaties that had been drafted before the approval of the ICCPR. While the UDHR might have had some influence on these documents, it had not yet attained its current influential status, arguably as customary international law, such that the language in pre-ICCPR documents centre exclusively on religious freedom. Hence the 1950 Convention Relating to the Status of Refugees at Article 4 protects the 'practice of religion' and 'freedom as regards the religious education of their children'. The same language is used for the 1954 Convention Relating to the Status of Stateless Persons (also at Article 4).[388]

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[386] Picket (1958;203) noting, at 248, that the sole limitation allowed for this right is on the basis of preserving public order and morals.

[387] Sandoz (1987;871).

[388] See also Standard Minimum Rules for the Treatment of Prisoners that emanated from a 1955 UN conference. Article 6 refers to the necessity "to respect the religious beliefs and moral precepts of the group to which a prisoner belongs".

The tendency to reflect the ICCPR's terms is demonstrated by the 1965 International Convention on the Elimination of all Forms of Racial Discrimination.[389] Article 5(d)(vii) of the Convention prohibits discrimination and requires for equality in the enjoyment of the 'right to freedom of thought, conscience, and religion', language reminiscent of the ICCPR's draft then pending before the GA. While protection of the listed rights in Article 5[390] were limited to issues of discrimination and equality,[391] the Committee to Eliminate Racial Discrimination has focused on substantive aspects of the right when an inequality occurs.[392] Such consideration has also included secular aspects of the right to freedom of conscience,[393] (in accordance with the ICCPR's drafters intended scope of these phrases).

The 1985 Declaration on Human Rights of Individuals who are not Nationals of the Country in which they Live[394] provides, in Article 5(e), for the same protection as stated in the UDHR. The travaux preparatoires to this document explicitly note the singular nature of the right to freedom of conscience,

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389 GA Res. 2106A(XX) 21/12/65; 60 UNTS 195

390 Which are not meant to be interpreted in any exclusive fashion.

391 E/CN.4/SR.796-800 (1964) Remarks by Austria and UK. The Netherlands representative specifically notes that "the purpose of the Article [5] was not to proclaim that the rights which were enumerated must be fully respected, but merely to prohibit racial discrimination with regard to their enjoyment." The problem derives from Article 4, which prohibits "hate speech", and the extent of overlap with the protection mentioned in Article 5 (which takes precedence over Article 4). The problem is resolved by viewing Article 5 as only applying to states which provide for such rights, that such rights must be equally upheld. Burgenthaul (1977;210-211).

392 See e.g. CERD's response to recent state reports in Report to the forty-ninth Session of the GA, Supp. 18 (1994) where CERD focuses not only on the violation of Article 5 (regarding discrimination) but also on implementation of the rights therein in an equal manner (exemplified by requiring Australia to discuss the treatment of hiring aborigines within governmental bodies, such as the police force). See also Burgenthaul (1977;211) noting possibility that CERD can provide for substantive protection if as a result of a violation, an inequality occurs; Meron (1985;288-289) (noting how focus of CERD activity has been on upholding overall equality rather then racial discrimination per se'). Cf. Partsch (1979;225-226 and 248) (calling for restrictive approach to CERD's manner of reviewing rights and to adopt narrower view of no discrimination, along with equality, as basis for review with regard to enjoyment of rights, but not providing for such rights ab initio, relying on E/CN.4/Sub.2/L.344 (1964) and E/CN.4/SR.396 (1964)); Lerner (1980;150-152) (adopting non-discrimination approach since broader restrictions are placed on individuals as a means of lessening incidents of incitement - even at expense of violating an individual's expression of thoughts); Schwelb (1966) (similar conclusion to Lerner).

393 The State Reports to CERD and CERD's response to the States evidence this approach. See e.g. Report to the forty-eighth GA, Supplement 18 (1993) Zambia report required to provide information regarding ethnic groups; Report to the forty-sixth GA Supplement 18 (1991) Burundi's report focusing on both secular and religious allowances; A/43/18 (1988) (CERD referred Ukraine to Declaration and required Kuwait to provide interpretation of freedom of conscience outside of a religious context. The latter State responded in a non-committal fashion that all rights were equally upheld); Report to the forty-second GA, Supplement 18 (1987) (CERD focused on Tunisia's report with regard to foreign workers and individuals and the allowances for their right to freedom of thought and conscience).

394 GA, Fortieth Session, Res.144 (1985)

which must conform to the right as provided in the UDHR and ICCPR, by using the same terms of these documents.[395]

The 1989 Convention on the Rights of the Child ("CRC"), which provides for freedom of thought, conscience, and religion in Article 14,[396] also codifies a conception of conscience as a singular right separate from religion. This is apparent from the unique perspective adopted by the Convention concerning the establishment of a 'sliding scale' approach to the child's rights. The previous standard had been an all-encompassing 'best interest' of the child.[397] Hence, a court would refer to external factors and need not consider the developing beliefs or wishes of a young person. The current standard implemented by the CRC however entails a broader scope whereby a parent must consider the 'evolving capacities' of the child, especially as the child nears the majority age. Recognising that a child can develop and manifest particular individual beliefs and ideals[398] would seem to indicate that a court should 'respect' the developing beliefs of an older child that can also include conscientious assertions, in a progressive manner relative to age.

This approach had been hinted at in the travaux preparatoires to CRC Article 14. In the 1982 and 1983 Working Group, the US proposed to incorporate ICCPR Article 18[399] but was met with resistance. Some states also felt the provision for religious education was previously codified, while others asserted that the practice of religion is not necessarily the child's right.[400] At the Working Group's next (1984) session, Canada proposed to make the freedom subject to the authority of the parents, who will provide the necessary direction to the child, pursuant to the child's evolving capacities.[401] The Holy See objected to

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[395] GA Third Committee, Fortieth Session, (1985) at 12, Italy noting the importance of drafting the Article pursuant to current international standards and the Working Group, at 24-25, providing for the same language as in the ICCPR. See also GA Third Committee, thirty-sixth Session (1981) at 11 where the Working Group's draft was revised, at suggestion of Italy, to conform to ICCPR.

[396] Note as well the 1991 African Charter on the Rights of the Child, Article 9, which uses similar language but has not yet entered into force, as it is pending the required ratification of 15 states.

[397] See Declaration on the Rights of the Child (1959)

[398] See e.g. GA Third Committee, SR.1027 noting the broad approach towards "religion and belief" because of a hesitation to define the terms.

The Committee on the Rights of the Child, which was instituted by the CRC's provisions, generally focuses on serious violations regarding children, such as child pornography and prostitution, and on basic survival needs of children. See e.g. Report to GA, Forty-ninth Session, Supplement 41 (1994)

[399] E/CN.4/1983/62; E/CN.4/1984/71.

[400] E/CN.4/1983/62 (specifically with regard to allowing for changes to a child's religious belief, a contention reminiscent of the UDHR and ICCPR drafting).

[401] E/CN.4/1984/71 Sweden also supported this approach

this because it did not provide enough credence to parents to ensure for the religious education of their children.

The drafters were presented with a deadlock between granting greater status to the child, particularly to prevent any form of coercion on non-believers, versus recognising the importance of parental discretion.[402] The dispute was settled in the form of a compromise by deleting paragraphs that were not universally accepted by all legal systems.[403] References to other international instruments, such as the UDHR, were removed from CRC Article 14 and the general notion of 'respecting', as opposed to 'ensuring' or 'recognising' which presented problems for various secular systems, a child's 'freedom of thought, conscience, and religion' was adopted. Hence Article 14(1) requires State Parties to 'respect the right of the child to freedom of thought, conscience and religion'.

The second paragraph of Article 14 requires a state to respect a parent's desires about directing one's child,[404] with a view towards incorporating the rights of ICCPR Article 18.[405] The third paragraph makes an implicit reference to the manifestation terms of the ICCPR 'religion or belief',[406] but, in light of the compromise among the drafters, refers only to the limitations that may be imposed on the child's right.

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families at Article 12 essentially super-imposed ICCPR Article 18, with an adjustment of terms to reflect the focus on the migrant worker and their families.

Although not of any binding nature, the documents resulting from the Helsinki Accords and the Conference on Security and Co-operation in Europe were clearly based on Article 18 of the ICCPR.[407] The 1989 Concluding Document of Vienna provides, at paragraph 11, for respect of human rights including 'freedom of thought conscience religion or belief' and, at paragraph 16, to ensure for the freedom to 'profess

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[402] E/CN.4/1986/39

[403] E/CN.4/1989/48

[404] E/CN.4/1989/48. This paragraph was understood to apply to all forms of belief, not solely religious issues.

[405] See E/CN.4/1989/WG.1/WP.1/Rev.2 (Sweden notes that the Article is to be read as encompassing ICCPR Article 18).

[406] E/CN.4/1989/WG.1/WP.1/Rev.2 (Holy See equated manifestation with the right to educate following one's convictions).

[407] Luchterhandt (1991;162) noting the Helsinki Accords basis on Article 18 in Principle VII at Section 3 which protects manifestations of "religion and belief acting in accordance with the dictates of his own conscience".

and practice religion or belief'.[408] The Document has been subject to a broad reading to include non-religious convictions[409] and, more importantly, has played an influential role in the development of the right to freedom of conscience outside of a religious context within newly emerging Eastern European states.[410]

V. Conclusion [411]

In analysing the travaux preparatoires for the right to freedom of conscience, this chapter has focused on a number of principal issues considered by the drafters. The treaties almost universally provide protection for the right to freedom of conscience on a comparable level to that of the freedom of religion. This approach serves as a marked contrast to the secondary literature because the treaties provide for a broader, extra-religious, right to conscience. It would seem that there is room for developing a jurisprudence that fulfils the spirit of the treaties.

Furthermore, the regional treaties seem to adopt different approaches to the right to conscience. In the AmCHR, free expression serves as an important right in upholding the right to conscience. The AfrCHR adheres to the group-oriented focus of the document, although the right also seems to provide protection for an individual conscientious belief. The indication is that a doctrinal diversity exists for the right to conscience, a development that can assist to entrench the right in domestic systems.

Despite the different approaches used by the treaties to uphold the right to conscience, similarities exist. The treaties provide for a distinction between conscience and thought, an important determinant for developing one's understanding of conscience, and similar language throughout the treaties is used for the limitations on the manifestation of a conscientious belief, despite the derogations provided for in the ECHR and AfrCHR. Furthermore, as the treaties achieve greater stature in the domestic sphere, principally though

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[408] The Concluding Document is quoted in 10 HRLJ 274-277 (1989) and, concerning the freedom of religion and belief, essentially adheres to the Declaration. The limitation to the right, stated at paragraph 17 of the Document of Vienna, although liable to a possible broad reading, is "subject to international obligations" and has been equated with the limitations provided for in ICCPR Article 18(3). See Tretter (1989;258); Luchterhandt (1991;168-169).

[409] Luchterhandt (1991;165) noting that inclusion of protection for non-believers broadens freedom of religion to include free convictions.

[410] Luchterhandt (1991;174-180) discussing the broad parameters of the right to freedom of religion and conscience in Hungary and Poland whose newly drafted laws, in 1990 and 1989, respectively, appear to offer broader protection for a free conscience and non-religious believers than ICCPR Article 18, and USSR where the protection for a "non-religious" conviction, while stated in the 1990 law, focuses mainly on religious protection. See Tahzib (1991;188-194).

[411] Certain human rights documents, such as the Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180 (1979), do not provide for the right to freedom of religion or conscience.

ratification, other documents that expand on the right to conscience, such as the Declaration, will also develop and acquire greater recognition and application.

The next two chapters will rely on the travaux preparatoires as a basis for interpreting various aspects of the right to freedom of conscience that has been provided in the treaties. The intention is to amplify the nature and implications of a conscientious belief, with a view towards expanding the application of the right to freedom of conscience in a manner that better reflects the underlying intentions of the treaty drafters.

Chapter Four

Forum Internum

I. Introduction

The international human rights system aims to uphold the right to freedom of conscience. The travaux preparatoires of the various treaties codifying the right to conscience demonstrate a clear intention to codify a specific and singular right to freedom of conscience.[412] Furthermore, the historic development of the right along with the right to freedom of religion entrenches the right to conscience as a basic, fundamental, human right.[413] The key questions are, what type of activity is protected by the right to freedom of conscience and what are the normative elements of the right to conscience and how will it effectively operate in a practicable sense? These issues will dominate the remainder of the thesis where the key underlying purpose is to provide a modus operandi for the right to freedom of conscience.

This chapter will focus on the forum internum, the internal aspect of the right to freedom of conscience. Examining the normative functions of a human right can provide an understanding of the right to conscience in general and begin to provide for a distinction between the forum internum and externum.[414] While the treaties and judicial decisions endorse this distinction, there is not a great deal of material that defines or expands on the meaning of the forum internum. J.S. Mill's analysis of liberty refers to ideas that are quite similar to the forum internum of a conscientious belief. Mill will be referred to as a starting point for the analysis of the forum internum. Further elaboration is required however since Mill sanctions some limitations on the forum internum while the right is accorded absolute status under international human rights law.

The forum externum will also refine the parameters of the forum internum. Coupled with a functional understanding of conscience, at least from a consequential standpoint, the parameters of the forum internum can begin to take shape. It will be demonstrated that the key focus of protection for the forum internum is the prevention of coercion and upholding the right to develop a conscientious belief.

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412 See discussion supra at Chapter Three
413 See discussion supra at Chapter Two
414 See Appendix II

This chapter will also discuss the forum internum right to conscience of a group. This discussion can assist in defining the parameters between the rights of minorities and the right to freedom of religion and conscience, especially when a minority group is bound together by a specific belief. Analysing a group belief relates not only to the forum internum of the group, but to other individuals who might have their forum internum infringed as a result of a group's actions or because limiting a group's belief can be at the expense of the forum internum of other individuals who might have benefited from the group's belief. The discussion therefore begins to address the potential conflicts that arise from the absolute nature of the forum internum.

II. The Notion of a 'Right' and its Implications

Referring to the normative functions of an international human right can begin to answer some of the questions referred to above regarding the right to conscience. It is important to understand and consider the possible implications of a human right as a prelude towards understanding the right to conscience, particularly since the right to freedom of conscience is not fully clarified in international law.

Hohefeld's categorisation of rights offers a platform from which to consider the underlying implications of a right. These include treating a right as an immunity, liberty, claim or entitlement that defines a right relative to the duty that it creates.

Conceiving human rights merely as 'immunities' appears limited in scope. Construing a human right solely as the absence of a prohibition provides an insufficient basis for exercising a human right because the immunity does not necessarily mean that all action emanating from a right is permissible.[415] In the context of the right to conscience for example, the manifestation of a conscientious belief might entail rather broad action.[416] The absence of a prohibition to believe in a conscientious ideal will not provide an adequate foundation for exercising the belief.[417]

Similarly, treating the right to conscience as an unfettered liberty or privilege implies that the right derives from an external authority. If the external authority is the state, it is possible to restrict the liberty in

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[415] Nino (1991)

[416] See discussion infra at Chapter Five

[417] See also discussion infra regarding the approach to the forum internum as a freedom from state interference.

a broader manner than that provided for in treaty limitations. This is the problem for example with military conscientious objection where the liberty to exercise the right emanates from a specific legislative provision and not the right to conscience.[418] As a result, various restrictions are imposed on the right to military objection that reduces the individual's privilege to the right to conscience.[419]

Another possibility is to interpret the right to conscience by reference to the correlative duties. Initially this approach would appear quite suitable given that particular applications of the right to conscience raise social duty considerations,[420] such as military conscientious objection.[421] Indeed, one of the central arguments of some commentators against the right to military conscientious objection is that the correlative duty on the state to honour the right is non-existent when accounting for the individual's more general social duties.[422]

Such an approach to the right to conscience however tends to weaken the correlatively between rights and duties. A conscientious belief derives from independent permissive norms[423] that serve as a basis for creating a particular conscientious belief.[424] As a result of such independent norms, the manifestation of a conscientious belief can affect a variety of constantly shifting correlative duties that will also incorporate the consideration of one's social duty. Furthermore, there are instances where one's social duty is not a correlative of the right to freedom of conscience since the duty derives from other social and political forces independent of the right.[425]

The additional Hohefeldian interpretation is to treat the right as a claim. The key factor in such an approach is the exercise of the right.[426] The claimant assumes the existence of the right, as it would be

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[418] See discussion infra at Chapter Six

[419] For example, limiting the allowance for military objection to religious objectors and not conscientious objectors. See discussion infra at Chapter Six

[420] See discussion infra at Chapters Six - Eight

[421] See discussion infra at Chapter Six

[422] See e.g. Larsen & Hess (1992) (reaching this conclusion because the right to military conscientious objection in the US derives from specific legislation and not the Constitution).

[423] See discussion infra

[424] See e.g. Gewirth (1982) whose entitlement based approach to human rights, which derives from necessary action to pursue one's basic needs, discounts the right to conscience for this very reason.

[425] Raz (1989)

[426] Martins and Nickel (1980)

difficult to make a claim for a right that did not exist. As a result, a claim right seems to focus on the function of a right, but it does not necessarily define the essence or derivation of a right.

The problem with focusing on the function of a right is that a host of interpretations that may serve as the basis for a claim might be at odds with other pre-defined rights, especially where state interests transcend individual interests.[427] For example, deriving the antecedent claim from a person's right to the necessary condition of human existence might lead to results that conflict with other pre-determined, basic, human rights. Additionally, the basis for these basic human rights might focus on rights that are necessary in an economic sense. Pursuant to such a standard, the right to conscience would not be considered.

An approach to rights that appears adequately to incorporate the right to conscience as intended by the international human rights framework is one that integrates the various Hohefeldian characteristics of rights. For example, a liberty can exist even if the right is not being enforced,[428] a common occurrence in international human rights law. In such an instance, the liberty granted by the right lays the groundwork for the rights holder to make a claim to that entitlement in a specific context. The privilege to a human right leads to a claim for some form of protection or particular action.

With regard to the right to freedom of conscience, the liberty centres on the underlying object or purpose of the right. The entitlement for the right to conscience is not a pre-determined form of action; rather it provides for a range of individual actions that have as their source a particular conscientious belief. The entitlement defines what the right is, while the claim defines its application.

Two principal characteristics of a right then can at times clarify one's understanding of a right - the underlying entitlement or purpose in maintaining the right, and the actual conduct or claim towards exercising the right. Each aspect of the right maintains a particular significance, principally for assisting the other in providing for the exercise of the right. This means that the normative validity of a right provides the foundation for the entitlement, while the normative autonomy or function of a right provides for its operation.[429]

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[427] Shestack (1983)

[428] Donnelly (1985;16) comparing a right with a stolen car. Even if the stolen car's owner does not actually use the car, he still retains the right to enjoy it.

[429] Bickenbach (1989)

The importance of such an approach towards a human right like the right to freedom of conscience is that it recognises some form of relativity within different legal systems. The right itself can remain fixed as a constant, while its application will vary depending for example on social, economic or political conditions or even personal circumstances.[430] While the human 'right' unconditionally exists, its application can differ depending on the social and cultural background of the individual or the state.[431]

The structure of the international human right to freedom of conscience reflects this distinction between the existence, or entitlement, of a right and the application, or claim, of a right. The right to conscience comprises two principal provinces -- the internal source of the right and the external manifestation of the right. For the internal aspect of conscience, the forum internum, the importance lies in recognising one's entitlement to a right to conscience. The focus is on upholding a person's internal, mental, framework that shape and forms the conscience.[432] For the external aspect, the forum externum, the important role is the exercise of the right to conscience.[433]

This distinction between internal as entitlement and external as a claim does not specifically define the terms forum internum and forum externum. Rather the distinction assists in understanding the focus of protection being granted to the right to conscience. The central focus distinguishing the forum internum from the forum externum is the manner in which enforcement of the right to conscience operates, depending on the particular aspect of the right that merits protection. Because the forum internum relates to the entitlement aspect of the right, it will focus on the formation of a conscientious belief to discern exactly what the entitlement of the right to conscience implies. The forum externum centres on the claim aspect of the right because it entails manifesting or applying the derived entitlement.

Prior to elaborating on the entitlements developed in the forum internum, the chapter will offer a comparative look at the relationship between the forum internum and externum. The interplay between these two aspects of the right to conscience will assist in delineating the desired protection accorded to the forum internum.

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[430] Panichas (1985)

[431] A communal society for example will inherently account for local traditions and social considerations. Alexy (1991)

[432] See discussion infra

[433] See discussion infra at Chapter Five

III. The Internal and External Right to Conscience[434]

Historically, the right to freedom of religion and conscience has maintained this internal/external distinction. For example, Locke recognised the individual's unbridled right to freedom of conscience but relied on the underlying social contract to restrain external manifestations that would cause social damage. Writing in 1758, Vattel outlined the limit of religious freedom by noting the difference between religion that is 'rooted in the heart' where it is an 'affair of conscience in which every one ought to be directed by his own understanding: but so far as it is external, and publicly established, it is an affair of state.'[435] Vattel explains that a person may internally believe what he desires, but it does not entitle one to act externally and disregard social consequences.[436]

The distinction proposed by Vattel indicates the division between the normative validity as opposed to the normative function of the right. Internally, the right to conscience is a broad entitlement. Externally, where the claim is being asserted by way of a manifested conscientious belief, the right is subject to limitations.

The current codification of the right to freedom of conscience has also used the internal/external distinction.[437] Using the ICCPR as a typical example, the treaties provide for 'the right to freedom of thought, conscience, and religion' as well as the manifestation of 'religion or belief'. Thus the protection relates to two particular facets of an individual's conscientious belief; the forum internum, the individual's internal thoughts and beliefs, and the forum externum, the manifestation of such beliefs. One's internal thoughts and beliefs serve to create some form of underpinning or foundation as a prelude to exercising the right. The entitlement derives from this forum internum, before its manifestation in the forum externum. The forum externum, where the right to conscience functions in a more practical 'claim' sense, entails external action. Hence, as noted supra,[438] limitations to the right to conscience only apply to external manifestations that affect public and social concerns.

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[434] See Appendix II

[435] Vattel (1758;56).

[436] Vattel (1758;57-59). Responsibility is on the sovereign to ensure for a pluralist state, even if the majority adhere to a single religion, by allowing for minority practice or granting the right to leave the state.

[437] UDHR, Article 18; ICCPR, Article 18; ECHR, Article 9; AmCHR, Article 12

[438] See discussion supra at Chapter Three

A similar framework is applied in the ECHR. When considering the right to freedom of conscience, the ECHR Commission acknowledges the importance of the forum internum, but analyses the application of the right within the forum externum context due to the social ramifications caused by the exercise of a right.[439] The Commission therefore has maintained the distinction between the absolute protection for the forum internum while applying limitations to the external practices deriving therefrom.[440]

The travaux preparatoires to the treaties also support this division of the right. The drafters created a practical dichotomy between the internal and external aspect of the right,[441] as indicated by the terms 'public or private' manifestation. Manifestation implies a public, external, aspect of 'religion or belief' that is broader than private, internal, thoughts.[442] The unlimited nature accorded to the forum internum[443] and the limitations imposed on the forum externum demonstrate this distinction. The forum internum is limitless because it creates the entitlement for the right, whereas the forum externum is subject to limitations since that is where the claim aspect of the right occurs.

The HRC's General Comment to ICCPR Article 18 has maintained this internal/external dichotomy.[444] Paragraphs' three and four of the General Comment state that the freedom to maintain a thought or conscientious belief, the forum internum, require unconditional protection, in a manner similar to Article 19(1) freedom of opinion;[445] however the external manifestation of the right, the forum externum, is subject to the stated limitations.[446]

State reports to the HRC also allude to this internal/external distinction. For example, in its 1990 report to the HRC, Mexico distinguished between the different nature of religious freedom based on the

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[439] See e.g. 22838/93 Van den Dungen v. Netherlands 80 D&R 147 (1995)

[440] For further elaboration of the ECHR Commission's approach to the right, see discussion infra at Chapter Five

[441] For UDHR, see e.g. E/CN.4/SR.1 17 at 6. For ICCPR, see e.g. GA, 15th Session, Third Committee, mtg. 1021-1023, particularly, mtg. 1022, where Greece explicitly refers to the distinction; E/.CN.4/SR.319, CHR, Eighth Session (1952) (Lebanon referring to the division of the internal and external sphere). For ECHR, see Travaux Preparatoires of ECHR, Vol.1 at 222.

[442] Nowak (1993;313-315,319). Nowak notes (1993;fn.56) that to "manifest" is defined as "to make public", which creates a contradiction of terms in manifesting a private action. He prefers the AmCHR which uses the terms "to profess or disseminate". See also AfrCHR which upholds the "profession" of religion.

[443] See e.g. A/2929 Draft International Covenant on Human Rights, report prepared by Secretary General (1955).

[444] See Appendix 1

[445] See also Vermeulen (1992) (same unconditional protection in the ECHR, as noted in travaux preparatoires).

[446] See also Summary Record of HRC, CCPR/C/SR. 1166, where the Committee members amplify this distinction, particularly with regard to protecting the individual's forum internum.

internal and external aspects of the right.[447] Paraguay also made this distinction while noting that protection of beliefs exclusive of religion fall under other provisions of its constitution.[448] Nigeria follows the ICCPR by providing an absolute internal freedom of conscience and a relative external aspect.[449] Hence the Nigerian authorities impose limits on the external manifestation, such as limiting forceful public preaching or preventing public disturbances. Similarly, in India, the courts distinguish between harbouring a belief internally, as opposed to practising the belief in public.[450]

Commentators have further distinguished between the internal and external aspect of the right, focusing on the fact that the treaties do not provide for any limitations on or derogation from the forum internum. As stated by Boyle:

> The international norms distinguish thought from action. The inner freedom of thought and conscience is absolute in that the state has no place there, but the standards acknowledge the legitimacy of constraint on the manifestation or exercise of conscience.[451]

The absolute nature of the forum internum has led commentators to accord it quite a broad scope. Partsch has noted that the protected rights:

> include all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance.. 'conscience' includes all morality...and no limitation whatsoever is admitted as far as the realm of personal conscience is concerned.[452]

Partsch describes the forum externum however in a more limited manner as such manifestations 'have to respect the fundamental rights and freedoms of others'.[453]

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[447] A/44/40 (1990) Report of Mexico

[448] CCPR/C/84/Add.3 1995 Report of Paraguay

[449] CCPR/C/92/add. 1

[450] See e.g. Ghandi v. Stat of Bombay 1954 SCJ 480; Alam v. Commissioner of Police AIR 1956 Cal. 9

[451] Boyle (1993;42) See also Beddard (1993;14); Dickson (1995) (noting the difference, in a religious context, between religious thought and religious action with the former being impossible to actually determine); Vermeulen (1992;82); Humphrey (1985); Partsch (1981).

[452] Partsch (1981;213-214).

[453] Partsch (1981;214)

While the forum internum creates the entitlement for the right to conscience and certainly warrants protection, the question is in what form? Recognising that a person's internal conscientious conceptions are impossible to accurately identify, can securing the forum internum serve any practical role in international human rights?

The principal importance of the forum internum is its function in creating a foundation for the forum externum. J.S. Mill alluded to this function in his seminal work, On Liberty, where he desired to fashion a security for elements that bear a close resemblance to the forum internum of the right to conscience.

A. Mill and the Forum Internum

In On Liberty, Mill addressed the issue of state regulation of an individual's inner domain. He defines this inner domain as solely affecting the individual only and the 'inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense.'[454] When considering the necessity for regulating this inner-sphere of liberty, Mill centred on the difference between opinions and actions that might emanate from the inner-sphere.[455] While a host of actions can derive from the inner sphere, Mill focuses on the need to regulate acts that affect another person's interests. Opinion relates to the beliefs and internal moral values of a person.[456] Opinion however can change in the 'marketplace of ideas' by way of discussion and integration of the opinion into the social system.[457]

While an opinion can entail social consequences for another,[458] Mill focuses on protecting others from a person's action. He defines the 'interest' of another as a pre-existing, socially created, obligation or duty. Social control limiting one's actions operates when a person has a valid claim for protection. This protection is similar to a claim right that creates an obligation on the state to protect that person.[459] If an action resulting from a belief will affect the interest of another, with interest defined as another person's de facto claim to a right, social protection is merited and limitations on liberty may be imposed.[460]

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[454]Mill at 11.
[455] Rees (1985)
[456]See generally Rees (1985;Chapter Two)
[457] Rees (1985;121-122). See generally Ten (1980;chapter three).
[458] See e.g. Ten (19808080); Gray (1983); Rees (1985;138).
[459] Rees (1985;146-148).
[460] Rees (1985)

The distinction presented by Mill between opinions and actions seems to equate opinion with the forum internum. Both Mill's opinion and the forum internum are contingent ideals that centre on internal beliefs and, while prone to external influences, do not singularly violate the rights of another. Further, due to their internal nature, they do not involve an infringement of another individual's interests or rights. This lack of social harm is the very basis for deeming the forum internum an inviolable sphere.[461]

Mill further notes the difference between violating personal dignity as opposed to violating a personal right.[462] One can be apathetic towards one's dignity since the only person whom it will affect in any substantive sense is yourself. One can therefore dress in a slovenly manner or practice boorish manners. An individual cannot be apathetic towards a right since it could result in a violation of an entitlement either to another or oneself. Hence one cannot contract to become a slave since this will entail a violation of a right.

Even regarding dignity, however, Mill imposes limitations pursuant to his harm principle. If one's dignity or opinion creates such a pernicious effect as to harm the rights of another, infringement of the individual's liberty may occur. The example he raises is a drunken Father who neglects to care for his household. While a person is entitled to become a drunk, that person cannot thereby neglect the rights of his family by not providing food, shelter, and education, as required by social convention. In that instance, society may infringe the individual's liberty, presumably by forcing the drunk to mend his ways. Mill considers the greater 'public order and morality',[463] using terms similar to the limitations enunciated in the human rights treaties,[464] because one cannot ignore the general duty owed to society.

Even when factoring in his utilitarian tendencies, Mill's protected 'inner-sphere' of liberty can be analogous to the forum internum.[465] Gray for example categorises Mill as indirect utilitarianism which entails an intermingling of utilitarian principles, as a justifying basis for action, with individual moral

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[461]See e.g. Vermeulen (1992); Boyle (1993)
[462]Mill (1859;77)
[463]Mill (1859)
[464] See discussion supra at Chapter Three
[465]Note that some commentators dismiss the utilitarian issue by considering Mill in an historical light. See e.g. Rees (1985) (Rees distinguishes his view from Himmelfarb who divided Mill into distinct historical periods).

notions that serve as secondary considerations.[466] He concludes that utilitarianism only applies to actions and not opinions. More revisionary approaches towards the sphere of liberty, exemplified by Ten, place utilitarian considerations to the side when conflicting with individual moral considerations of the inner domain.[467]

Similarly, when a person internally harbours a moral value or belief, society cannot attempt to alter such knowledge. The human rights system therefore disallows a state to tamper with an individual's internal beliefs, as indicated by the absolute nature of the forum internum. If an internal belief engenders a general dislike for a minority belief, the internal belief should not be violated as long as no infringement occurs to the rights of the minority. One can therefore harbour racist views internally without being subject to regulation. Manifesting the belief might result in their curtailment, especially if social convention deems such views immoral or contrary to public policy.

While Mill's protection of opinion provided a means of initially identifying the forum internum,[468] he was not solely referring to conscience but to a host of conscious opinions and thoughts. The forum internum of conscience however might differ from other forms of conscious thought. Therefore, to further explicate our understanding of the forum internum and its practical application in the international human rights system, it is necessary to identify the internal conscientious ideal developed in the forum internum and isolate it from other general forms of thought.

IV. Dimensions of the Forum Internum

A. Identification Problems

Article 18(2) of the ICCPR indicates an approach towards identifying the forum internum. Prior to providing for the manifestation of the right to conscience, Article 18(2) requires that:

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[466] Gray (1983)

[467] Ten (1980)

[468] Note that pursuant to the "harm principle", it is possible that Mill's might allow for some form of limitation on the forum internum.

> No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.[469]

It is apparent from the travaux preparatoires that part of the focus of this subsection is on the forum internum. It is noted in the travaux that the intention of the phrase 'to have or adopt' is to sanction the ability of the individual to change a religion or belief, a freedom which various states severely objected.[470] The ability to change a belief is linked to the forum internum because the change focuses on the internal, cognitive, abilities of the individual. Hence the travaux preparatoires also refer to the issue of proselytising and the protection of missionaries from coercing individuals into changing their belief.

While one's external actions might also change as a result of adopting a new form of belief, the change itself occurred within the internal sphere due to a conscious decision to adopt a new form of belief. Alternatively, one can be coerced into changing one's external actions without altering one's internal beliefs. Indeed, one's internal resolve might even be strengthened by coercive state tactics. Such coercion of external actions however results in a violation to the forum externum of the right to freedom of conscience.[471]

Furthermore, coercion focuses on preventing a hindrance to the internal development of ideas and beliefs. The HRC's General Comment to Article 18 defines coercion as incorporating

> the use of threat of [sic] physical force or penal sanctions to compel believers or non-believers ... to recant their religion or belief or to convert. Policies or practices having the same intention or effect ... are similarly inconsistent with Article 18(2).[472]

The General Comment refers not only to preventing the external practice of a belief, the forum externum, but also to coercing one to recant a belief, the domain of the forum internum. Even if the forum internum belief is maintained, the coercive actions of the state can be interpreted as violating the forum internum

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[469] See also ST/HR/SER.A/16 at paragraph 26 which disallows the use of both physical and psychological coercion due to one's religion or belief. The other principal treaties which codify the right to conscience, the UDHR, ECHR, AmCHR, and AfrCHR, do not contain such a provision.

[470] See discussion supra at Chapter Three

[471] See discussion infra at Chapter Five

[472] General Comment to ICCPR Article 18, paragraph 5.

right to freedom of conscience, particularly where the state is coercing an individual to alter the internal belief.[473]

Commentators have also interpreted Article 18(2) as centring on the forum internum. Coercion appertains to the individual's private, spiritual, or moral existence that cannot be subject to undue persuasion. The prohibited form of coercion differs from influences found in external forces, such as daily exposure to the media and advertising.[474] While 'appeals' to change a belief can include material inducements, the key factor is to avoid coercing the individual's freewill.[475]

Both the Indian Supreme Court[476] and the ECHR[477] also have distinguished between propagating a religion through missionary work, such as engaging a person in a general discussion, versus forcibly converting a person to another religion. Although not explicitly stated by the ECHR Commission in Larissis v. Greece, the prevention of coercion can also be a reason for upholding an Air Force member's proselytising to civilians while disallowing proselytising to fellow Air Force officers.[478] The Commission recognised the concern of the state that the inherent trust between Air Force personnel could be compromised in order to appease the desires of a superior officer,[479] thereby avoiding the potential for coercion.

Commentators have further noted the illegality of state brainwashing or other inhumane inquisitorial methods that rob the intellectual facilities and conscience of a person.[480] Coercion in this sense is comparable to losing one's autonomous ability to be a person.[481] Additional examples centre on denying the

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[473] See discussion infra

[474] Nowak (1993;314); Sullivan (1988;494)

[475] Cumper (1995;370) citing to Sullivan (1988;494). Of course, advertising can be coercive as well. See, e.g., 7805/77 Church of Scientology v. Sweden 16 D&R 68 (1979) (restrictions on wording of advert for an "E-meter", arguably a religious item, was upheld due to commercial nature of transaction)

[476] Stainslaus v. M.P. AIR 1977 SC 908

[477] 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1993)(Greek law limiting proselytising exceeded permitted limitations on the right to conscience)

[478] 23372/94 Larissis v. Greece VII(1) H.R. Case Digest 60 (1997)

[479] Note as well that the limiting the practices or beliefs of a particular group also affects the forum internum of other individuals who might have developed their beliefs by being exposed to the suppressed group. This broader aspect of the right shall be considered infra regarding the forum internum of groups.

[480] Vermeulen (1993) relying on the ECHR Travaux Preparatoires at 222.

[481] Shapiro (1983)

existence of personal moral or religious norms, such as coercing one to follow a particular religious belief system.[482]

Krishnaswami's approach to the forum internum also focused on upholding the freedom of one's internal beliefs to prevent compulsion or coercion to belong or not to belong to a certain group.[483] As described by Krishnaswami when studying the right to freedom of religion, a method for violating the forum internum is:

> any instance of compelling an individual to join or of preventing him from leaving the organisation of a religion or a belief in which he has no faith must be considered to be an infringement of the right to freedom of thought conscience and religion.[484]

Pursuant to these comments, the protection accorded to the right to conscience in the forum internum involves preventing outside forces from violating an individual's internal thoughts and conscientious or religious views. The focus is on prohibition the compulsion of an individual's internal thought or belief system, with the purpose of altering such a view. For example, brainwashing an individual is not so much concerned with a particular external practice or activity of the individual, but with a desire to change a belief or unit of knowledge harboured internally. The act of brainwashing, which can also entail a physical, external, action that invokes other human rights violations, consists of a desire to impose one's own beliefs or thoughts on the internal structure of the individual.

As a means of further understanding the forum internum and the protection accorded to an individual's forum internum in international human rights law, the prohibition against mental or psychological torture merits scrutiny. Article I of the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (hereafter: 'Convention') defines torture as including physical and mental torture with an intention to coerce or intimidate an individual. The intention of adding the term 'mental' to the Convention was to incorporate actions that force an internal change in the tortured

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[482]McDougal, Laswell and Chen (1980;655-660) discussing mistreatment of individuals identified with a particular religious belief.

[483] Krishnaswami (1960;24-27)

[484] Krishnaswami (1960; 16)

individual's psyche.[485] Instances of such torture include implied threats or creating fear in the victim, thereby altering the victim's perception and forcing a change in ones will or conscience.[486]

Although the ICCPR Article 7 does not specifically prohibit mental torture, the drafters discussed incorporation of the terms 'moral and mental' torture and indicated the prohibition against methods that paralyse the individual's will via non-physical, psychological, methods.[487] While the HRC has not always seized the opportunity to incorporate a prohibition against psychological torture when defining the term,[488] it has acknowledged that psychological torture is an important consideration.[489]

Mental torture focuses on instances where authorities desire to alter or change the internal belief of a person to extract information or convince the person of their guilt.[490] This understanding of mental torture is similar to the HRC's General Comment to Article 18 regarding the definition of coercion. Both torture and coercion centre on altering the internal conscientious framework of the individual to either extract information or force a change to a person's belief.

Analogous to the prohibition of brainwashing and the disallowance of mental torture may be a host of measures which oppress internal beliefs. Upholding the forum internum includes protection from dubious state practices against particular beliefs, especially a belief that need not be asserted in the forum externum. Because a person might internally adhere to a particular belief or ideology, as exemplified by external action such as associating with a group or engaging in various protests, the state authority determines that the person must not only be made aware of the state's opposition to the belief, but the belief must also be altered.

State harassment, such as constantly being followed by a state security agent due to one's association with a contrary belief or religion, is an example of a violation. For example, the African Commission held that AfrCHR Article 8 right to freedom of conscience was violated when the Zaire Government continually

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485 Macdonald (1989)

486 See also Report in the Greek Case 12 Ybk of the ECHR 1969 where the European Commission defined torture as driving an individual to act against his will or conscience.

487 See e.g. E/CN.4/SR. 141(1950) that indicates a broad reading for Article 7

488 McGoldrick (1991;368)

489 McGoldrick (1991;376) referring to Quinteros v. Uruguay A/38/40 who suffered psychological torture following the disappearance of her daughter.

490 Burgers & Danelius (1988)

harassed the Jehovah Witnesses.[491] The African Commission found that the State targeted the Jehovah Witnesses for harassment because they were associated with a different form of belief

By contrast, the ECHR Commission did not find a forum internum violation when teachers subjected a pupil to psychological pressure to convince her to attend religious classes, which she eventually did contrary to the wishes of her parents.[492] The teachers would for example suggest that it would be better for the student to attend the classes and leave blank spaces on her school reports pertaining to religious education. The Commission did not find a forum internum violation since there was no indication of indoctrination or force. The Commission held that the fact that there was an exemption from the classes sufficed to protect the forum internum of the student.[493]

The significance then in broadening the understanding of the right to conscience in the forum internum is that it provides an expanded protection for beliefs that might not be upheld in the context of other rights. Even in instances where the making of a statement or the manifestation of a belief might not merit protection, the absolute protection accorded to the forum internum of a conscientious belief can provide some protection where the state desires to alter the belief as well.

B. The Broad Scope of the Forum Internum

This approach towards the forum internum demonstrates that the protection accorded to the forum internum is not exclusively limited to prohibitions against intrusive 'internal' action by an outside party, such as psychological as opposed to physical torture.[494] The protection can also extend to prohibiting external actions that lead to a violation of the forum internum. Similarly, the external actions of an individual need not be an actual manifestation of a belief; a forum internum violation can result from merely targeting an individual for identifying with a particular group. The violation of the forum internum develops as the authority or external source acts to alter the internal belief. The key factor is the focus on altering the individual's adherence to a particular thought or belief.

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[491] 56/91 Les Temoins de Jehovah v. Zaire reported in 4(1) IHRR 89 (1997) The Commission also accounted for the State's denial of access to education

[492] 23380/94 C.J. v. Poland 84 D&R 46 (1996)

[493] The Commission also dismissed the claim of emotional distress on the basis of ECHR Article 3 and not Article 9

[494] Contra Dickson (1995)

The description however demonstrates the fine line inherent in identifying a violation of the forum internum. Many instances of a violation will spill over into the domain of the forum externum or other rights, especially where external state action might mask the underlying intentions of a state. As noted in the HRC's General Comment to Article 18, for example, ICCPR Article 17 (right to privacy) and Article 19(1) (right to hold opinions without interference) serve to buttress the unlimited protection accorded to the forum internum.[495]

ECHR cases also tend to link ECHR Article 8 (right to privacy) with instances of conscientious assertions centring on altering a belief. For example, the case of Kjeldsen, Busk, & Pederson v. Denmark entailed a challenge before the ECHR Court regarding the teaching of sex education in public schools. The applicants contended that such education violated a belief in educating one's children on the matter of sex in private. The ECHR distinguished between religious education, as involving private matters, and a sex education course, as relating to social public morals. The ECHR Court considered the right to privacy issue that the case raised in tandem with the asserted challenge to the applicant's belief regarding sexual education. Although the outcome of the case hinged on privacy grounds, the Court noted the inherent relationship between these rights.[496]

Another typical example would be discrimination against an individual for identifying with a group that professes a particular belief. While the state might be interfering with the individual's forum internum if the state desires that an individual alter a belief, the violating state action generally entails a claim of discrimination against the state.[497] Thus even if initially a state might focus on an individual in a manner that seems to violate the forum internum, i.e. with a specific intention to alter the internal belief system of the individual, the eventual violation will centre on more explicit human rights breaches, such as torture or the right to security.[498]

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[495] HRC General Comment to Article 18, paragraph 3. See also Nowak (1993) making a similar point with regard to privacy and concluding that the private sphere is not subject to any limitations.

[496] 5095/71 Kjeldsen, Buck. & Pederson v. Denmark 1 EHRR 711(1980). See also 8811/79 X Y & Z v. Sweden 5 EHRR 147 (1984) (right to privacy not violated after state imposed restrictions on religious sect that believed in beating their children); 12875/87 Hoffman v. Austria 17 EHRR 293 (1994) (Commission held that Articles 8 and 14 -- right against discrimination -- were violated for Jehovah Witness' right to custody. The Court decided the case solely on the basis of Article 14)

[497] See e.g. ICCPR Article 26.

[498] See e.g. 195/1985 Delgado v. Columbia (1990)

The odd result seems to be that while the protection accorded to the individual's forum internum is quite broad, the actual illegitimate activity is limited. This is a result of the difficulty in identifying violations of an internal belief when dealing with more extreme state action, such as discrimination or right to security, and the ease in focusing on identifiable beliefs of the forum externum.

Additionally, it is difficult to define the scope of the forum internum because it relates to all forms of thought and mental processes.[499] This is especially the case when considering the broad manner in which external authorities can influence or violate an individual's thoughts. An authority might cause an alteration of the forum internum by forcing an individual to divulge certain information. Alternatively, an authoritative influence can result unintentionally by limiting an individual's education that will hinder one's mental processes or by encouraging an excessively competitive society that can create frustrated individuals who cannot cope with social demands.[500] One's internal thoughts will also be a reflection of one's own intellectual limitations that can hinder a person's overall mental perceptions. Such a drawback can result exclusive of any external authority. For example, it can derive as a result of one's upbringing or unduly traumatic childhood.

Obviously it was not the intention that an international human right would hold the state accountable for all forms of forum internum alterations, even if they might be due to state oversight or error, such as not adopting a structured education policy.[501] The examples of brainwashing and coercion however suggests a more active role by the authority, one that seems to adopt a teleological approach towards the authority's actions. The manner in which the forum externum upholds the right to conscience can assist to configure the desired protection in the forum internum.

1. Analogy to Forum Externum

As noted supra, the forum internum is unconditionally protected. Nonetheless, there remains a host of questions to consider regarding the forum internum right. What if the mere existence of the belief harms another, for example believing in homosexuality or abortion might create feelings of disgust in another

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[499] See discussion infra regarding the distinction between thought and conscience
[500] Scharr (1967)
[501] See also ICCPR Article 18(4)

person? The question is especially relevant if the disgusted person is of a particular religious persuasion. Further, how is one to then achieve a balance between the individual's liberty and social interests? Can one limit pornography merely because one believes that it is indecent? Will that person's internal beliefs then be 'harmed' upon observing a pornographic book for sale in a local shop? What if the internal belief centred on a religious principle, such as the one cited by Mill regarding a Muslim not eating pork? Could pork then be sold at the local butcher even if it might infringe the Muslim's interest?

While the forum internum differs from the forum externum principally as a result of the physical realm of the right, one can analogise between the two to clarify the forum internum's scope. The freedom of conscience in the forum externum has been grouped into two fundamental sections. The right applies to freedom to a belief, meaning to practice according to the beliefs directives, as well freedom from a belief, meaning to prevent applications of a belief's requirements on non-believers. While this division does not alter the practical application of the right, international commentators use the approach to clarify the dimensions of the right.[502]

The forum internum can also be divided along these lines despite operating within a different context than the forum externum. Indications for this approach to the forum internum are found in ICCPR Article 18(2), where the terms 'have or adopt' have been interpreted as protecting the individual's right to change a religion, freedom to, as well as limiting the actions of excessively zealous missionaries, freedom from.[503] The HRC has also noted that 'coercion' applies to not only impairing one's right to a belief (freedom to) but also to protecting non-believers from compulsion to believe (freedom from).[504] The next two sections will amplify these distinctions by considering freedom from and to within the context of the forum internum.

a. Freedom To

The principal considerations of the freedom to for the forum internum relate to situations where it is not necessarily the physical practice of the belief that merits protection but the ability to mentally adhere to a belief or thought. In such a case, the state might be imposing its will through various avenues that need

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[502] See e.g. Krishnaswami (1960).
[503] Scheinen (1993;267).
[504] HRC General Comment to Article 18, paragraph 5

not necessarily entail a physical violation but affect the person's psyche or mental process. The key factor here is the consequential desire of the state to alter the internal beliefs or thoughts of a person, even when associating the state violation with another form of human rights violation.

For example, a state's suppression of a person's freedom of expression can also violate one's forum internum if the state desires that the person alter the expressed belief rather than solely suppress the expression. It is one thing for a state to close the offices of a particular journal or limit the political abilities of a group that the state deems a public danger. It is quite a graver violation however for a state to also attempt to alter the internal beliefs of the journalists or the dissident group making the expression by way of mental or physical coercion.[505]

That a particular external action occurred need not disqualify the violation of the forum internum vis-ℵ-vis freedom to. As noted above, the scope of the forum internum right is quite broad such that the analysis of the violation will generally focus on more explicit or violent violations that emanate from the underlying goal of altering the internal belief.

A 1990 case before the HRC demonstrates the manner in which to apply the freedom to right. In Delgado v. Columbia, the state demoted the plaintiff, a teacher, from his position in a state school as a result of his insistence on teaching liberation theology along with the required curriculum mandated by the State's Church authorities. The School system forced the plaintiff to teach in areas not relating to his expertise, threatened him with criminal prosecution on false charges, and he was subjected to harassment and duress, for example, receiving threatening, anonymous, telephone calls.[506]

The HRC held that ICCPR Article 9 (right to security) was the applicable provision as it is a State's duty to safeguard individuals who are subject to such threats. The HRC limited its examination of ICCPR

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[505] Coercive state tactics to alter a belief sometimes serve to strengthen the belief rather than diminish it. This result does not change the fact that the state is committing a forum internum violation.

[506] See also 314/1988 Bwala v. Zambia (1993) where the HRC found a violation of the right to security for a political party member who was prevented from campaigning, was continually harassed, and was denied employment.

A similar case was also raised before the AmCHR Commission after the Nicaraguan Government published false information regarding the leader of the opposition political party. The applicant claimed that the Government violated AmCHR Article 12 because their actions effectively stifled his beliefs. See Res. No. 29/86 OAS Doc. OEA/Ser.L/V/II.68, Doc. 8 Rev. 1 (1986). The AmCHR Commission however decided the case on defamation grounds, AmCHR Article 5.

Article 18 to the manifestation of the belief, the forum externum, and held that there was no violation since the government can control state education of religion.

Considering the case from the forum internum standpoint however the state exerted pressure on the individual as a result of his identification with a set of beliefs. Granted that the manifestation of the beliefs might have been properly curtailed by not allowing the plaintiff to preach his minority beliefs in a state classroom.[507] However the subsequent treatment of the plaintiff as a result of his beliefs, including the alteration of his position from religious educator to teaching shop mechanics and ongoing harassment through bogus telephone calls, created a different violation than a breach of the right to security. [508] The violations of the plaintiff's rights resulted in the State oppressing the plaintiff due to his internal beliefs that conflicted with the authorities. This is especially the case for the State Church that had withdrawn initial support for the plaintiff as a religious teacher despite being aware of his liberation-theology beliefs. The State's actions indicated a desire to alter the plaintiff's belief before allowing him to continue teaching the religious course.

b. Freedom From

Freedom from in the forum internum involves the imposition of an outside belief with the purpose of impelling the individual to adopt a particular belief. The underlying objective of the imposing force is to replace one belief for another; however a person need not identify with a particular ideology to have this aspect of the forum internum violated. Freedom from primarily relates to developing a proper and fair social divide that provides for the existence of beliefs while preventing imposition of these beliefs on another. Individual beliefs should be granted the ability to develop independently of undue influences from ancillary sources, such as an authority's ideologically derived desire to entrench a particular thought in the psyche of its populace.

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[507] Cf. 23991/94 Ergul v. Turkey 84 D&R 69 (1996) (Commission upheld denial of judicial service due to claimant's membership in a political party. state policy deemed a necessary condition established by law)

[508] Some commentators limit the right to security to circumstances surrounding detention, such as an individual facing an unfounded threat of detention. See e.g. Dinstein (1981); Scheinen (1993;147). The HRC decisions seem to refute their conclusions.

The freedom from aspect of the forum internum is generally easier to identify than freedom to because a state is targeting a specific belief or mode of thought with a view towards changing it. Since the state is acting as an overseer of thought, the compulsion on the individual's forum internum is more recognisable. The state is acting in a pro-active manner by creating a policy of desired change and forcing modification of one's internal thoughts and beliefs. Even if the targeted individual does not adhere to a belief, a violation occurs when a state acts to alter or instil a particular belief. For example, a state violates the right to free expression by requiring its teachers to accede to a 'duty of loyalty' oath to the state, even if a teacher is a member of a dissident political faction.[509] In such a case, a violation to the forum internum also occurs. The state desires to alter the views of political dissent groups by imposing state ideology at the expense of an internal belief. [510]

Of course, the distinction between freedom from and to in the forum internum is not a strict division. The lines eventually merge as a result of social and individual forces. While the thoughts or beliefs of an individual serve to structure the overall social and cultural construct, such thoughts and beliefs originated from objectively accepted knowledge that the individual had acquired from external sources. Culture is a multi-directional process; a person objectifies one's inner thoughts into an external reality and the thoughts are subsequently internalised back into the subjective consciousness. Each aspect of culture is equally important since the definition of reality transpires by how other members of society view one's thoughts, especially since one's reality is defined by a comparison with the external objective world.[511]

The result is that without referring to the expressive symbols of the external reality, one's internal thought patterns become meaningless. As noted by Geertz, culture defines the individual because the individual is dependent on culture to adequately define his or her behaviour.[512] Hence external influences on a person (freedom from) also shape and form a person's beliefs (freedom to),[513] particularly when

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[509] 17851/91 Vogt v. Germany 21 EHRR 205 (1996)

[510] Note that if a state utilises the loyalty oath on the basis of an allowed limitation, such as state necessity in times of political unrest, a forum internum violation can still occur.

[511] Berger (1969)

[512] Geertz (1973) contends that one should grasp the unique nature of each culture rather then attempt to construct universal, and somewhat shallow, generalisations about overall culture.

[513] Hence the right to educate ones child pursuant to one's beliefs. See ICCPR Article 18(4).

considering a person's development in a closely knit social, religious, or group context. As a result, whatever a person believes (freedom to) will, to a certain extent, indicate the social and communal arrangement of that society (freedom from) that influenced, to varying levels of degrees, the individual's beliefs.

While the classification of the forum internum into freedom to and from assists to understand descriptively the right, and begins to categorise it, the actual scope of the forum internum is still quite broad. Internal thoughts and beliefs refer to essentially anything, particularly when considering the subjective quality of thoughts as well as the difficulty in creating an objective, justifiable, basis for beliefs. Taken to its extreme, the forum internum can be confronted with the same problem facing the manifestation of conscience; because there is no defined limit to the right, any practical application is discounted.

Certain essential considerations can however assist in clarifying the scope of protection granted to the forum internum. One is that the discussion is focused on a particular aspect of the right's forum internum, namely conscience. Conscience, as defined infra, refers to more precise beliefs that create a motivation for particular external action. A general conscious thought does not necessarily require a particular manifestation because it can 'exist' within one's psyche without ever being manifest. Upholding the forum internum of a conscientious belief will lead to a manifestation of such a belief as a result of the nature and content of conscience and its implications for the individual's belief system.[514] A more general thought can also have external implications but it is not a necessary result of all conscious thought.

Because a conscientious belief might require specific external action, the forum internum for such particular beliefs can be considered alongside the manifestation of the belief or the exercise of another right. For example a state violates the right to free expression by requiring its teachers to accede to a 'duty of loyalty' oath to the state, even if a teacher is a member of a dissident political faction.[515] In such a case, a

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[514] See also discussion infra at Chapter Five

[515] 17851/91 Vogt v. Germany 21 EHRR 205 (1996) (case decided within the context of the "necessity" limitation of ECHR Article 9, which was deemed inapplicable to a teacher of languages).

violation of the forum internum also occurs since the state desires to alter the views of political dissident groups.[516]

To fully comprehend the protection being granted to the forum internum of conscience, it is essential to analyse conscience and the implications of a conscientious belief for the individual as well as distinguish a conscientious belief from a general thought.

C. Forum Internum and Conscience

1. Dual Notion of Forum Internum Beliefs

As noted, the treaties that codify the right to conscience describe the forum internum as protecting 'religion conscience and thought' but use the terms 'religion and belief' to codify the manifestation of the right in the forum externum. While the next chapter will address the meaning of the term 'belief' vis-א-vis the forum externum,[517] apparently a broader form of belief is being protected in the forum internum.

'Thought' implies an infinite realm of ideas that a person might internally harbour. These can range from a general opinion, such as the merits of the colour blue in a bedroom, to a more developed form of knowledge, such as one's understanding of the laws of nuclear physics.

The protected forum internum beliefs are closely aligned to a psychological conception of the term. A 'belief' in that sense refers to an internal unit of knowledge deriving from specific mental processes. The unit of knowledge acquires its importance because individuals' attribute to such knowledge some level of truth[518] even for a non-scientifically justified belief.[519] The forum internum then encompasses all forms of thought and knowledge since it is internally unlimited, is subject to constant change and development as one considers new inputs of knowledge that reinstitute the thought process, and is unique to each individual since each person's social experiences and particular environment will result in different thoughts and knowledge.[520]

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[516] Note that if a state utilises the loyalty oath on the basis of an allowed limitation, such as state necessity in times of political unrest, a forum internum violation can still occur.

[517] See discussion infra at Chapter Five

[518] See e.g. Bar-Tal (1990)

[519] Any form of criticism will result from inter-subjective thought thereby preventing any true form of objective criticism. See e.g. Popper (1945;213).

[520] Bar-Tal (1990)

Furthermore, forum internum thoughts need not manifest themselves as forum externum beliefs since more general forms of expression could suffice.[521] For example, one's thought as to the merits of painting a prison wall bright red as opposed to brown based on the psychological benefits to the inmates can manifest itself via a number of general avenues. The typical mode might be by expressing one's opinion in governmental reports or professional prison journals. While the underlying 'belief' originates from an internal thought developed in the forum internum, the manifested action does not derive from a mandate to 'adhere' to the belief but as a result of a decision to express an opinion stemming from a thought. The thought itself does not demand any particular action from the person, even if it influences a person towards taking some form of external action, such as testifying to the benefits of the colour red before a governmental prison committee.

When compared with the manifestations of a religion or belief, the forum externum refers to a more structured set of beliefs. The treaty terms 'to manifest his religion or belief in worship, observance, practice, and teaching' indicate such an approach.[522] The manifestation of a belief, at least in the sense indicated by the treaties, refers to cognitive beliefs that the individual relates to an underlying truth vis-א-vis one's existence.[523] Unlike a general thought, the manifestation of a 'belief' mandates specific modes of action pursuant to particular principles from which it is difficult to deviate. For example, a doctor's Christian beliefs is grounds for not performing an abortion based on the specific mandates of the belief. The narrower forum externum sphere of beliefs then derive from structured internal obligations that differ from the general units of knowledge protected in the forum internum.

Recognising that a manifested forum externum originates from particular internal processes, the forum internum of such beliefs also take on a different character than the more general notions incorporated by thought. Granted that all internal beliefs derive from a host of influences and justifications; the internal conscientious process takes a belief a step further by shaping and developing a belief into a more structured set of conative directives or imperatives that require particular action. The internal mental process that

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[521] The typical example is freedom of thought manifesting via the freedom of expression. vanDijk and vanHoof (19 ;398).

[522] See e.g. ICCPR Article 18(1). For a more particular discussion of the meaning of the term "belief", see discussion infra at Chapter Five

[523] Partsch (1981); Lillich (1981); McDougal, Laswell, and Chen (1980); Benito (1989)

shapes and forms the belief is directed towards specific external action. A Christian doctor for example is relying on specific internal directives as developed by basic tenets of her religious or conscientious belief when refusing to perform an abortion. This is not to say that all religious or conscientious beliefs are fully coherent, however a conscientious belief differs from a general thought by virtue of the importance of the eventual manifestation of the belief to uphold a belief's underlying tenets or directives.

An opinion regarding the colour of a prison wall on the other hand relates to more general considerations regarding possible positive psychological effects on prisoners. The individual lobbying for the colour red might 'believe' in its importance to the prison system, but it does not necessarily hinge on the person's underlying existence that mandates specific external action. Rather the individual will assert the need for the colour red to benefit prisoners or improve the prison system.

The importance of this distinction between a conscientious belief and a general thought can allow for a broader freedom for the right to conscience. Recognising that a conscientious belief relates to a specific form of action that differs from a general thought provides a focus not only on the protection accorded to the manifestation of the belief, but also augments the possibility for forum internum protection. If the development of a conscientious belief is recognised as a distinct process by virtue of the fact that the belief develops into specific external practices, the protection accorded to the internal aspect of the belief is similarly entitled to specific protection.

Nonetheless, prior to expanding on the practical possibilities for an expanded protection for the forum internum of the right to conscience, the distinction between thought and conscience merits further explanation for it does not explain how a conscientious or religious belief differs from a 'belief' that derives from a general unit of knowledge or from a more particular thought that encompasses a person's external actions. One might believe in the necessity for prison reform and the need for painting prisons the colour red as an example of manifesting a belief at the expense of one's employment or personal relationships. Why does a conscientious belief merit specific protection and how is conscience different, if at all, from a thought? The next section will address these issues by focusing on the forum internum of conscience and the foundational role it can play in upholding the manifestation of the belief in the forum externum.

2. Development and Meaning of Conscience

a. Understanding Conscience

The term 'conscience' can imply a host of internal or external reactions depending on one's approach towards the meaning of the term.[524] Some commentators treat conscience as an emotive based response to a dilemma,[525] or adopt a psychological approach.[526] Conscience then preserves the individual's inner harmony based on apprehensive thoughts -- internal disharmony --should the conscience be violated. Conscience need not be an emotive reaction but a reflexive action motivated by an egoistic desire to prevent apprehension arising from a loss of harmony. This approach also removes conscience from any moral context.[527]

Other approaches to conscience view a conscientious belief as creating some form of categorical imperative.[528] This approach is somewhat analogous to the historical link between conscience and religion whereby conscience created an objective notion of morals based on theological principles. In each instance, conscience is associated with pre-determined cognitive beliefs that involve particular manifested action.[529]

The various approaches accorded to conscience demonstrate that, from a phenomenological standpoint, it is virtually impossible to adequately define the meaning or implications of conscience. When considering one's subjective nature of comprehension, which is accompanied by an inherent personal agenda,[530] attempting to identify the underlying conscientious reasoning of a person seems an impossibility.

For example, equating conscience with an emotion[531] at first glance seems valid when considering the subjective nature of conscience as being governed by one's emotional whims. A similar approach relies on a psychological definition of internal reasoning, such as Freud's linking of conscience with the superego.

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[524] See e.g. Bahm (1964) grouping conscience into eight categories, centring on the innate - such as biological, acquired - such as apprehension, and a combination of the two - such as a personal, spiritual, experience.

[525] See e.g. Arendt (1971)

[526] Freud, who links conscience with the superego

[527] May (1983) notes that the "inner harmony" approach favours harm to oneself rather than another as a means of reducing apprehension if confronted with the choice. This results in the individual deferring to the interests of another pursuant to a pre-conceived conscientious standard, the very action which the approach was attempting to avoid.

[528] Kant

[529] Roberts (1992)

[530] Taylor (1985) (consideration of the self in the moral space is quite vast due to a person's particular identifications)

[531] See e.g. Arendt (1971)

Each equates conscience with other human phenomenon, such as a desire for inner harmony, and attempts to incorporate a wide range of internal mental processes.

On a functional level, however, these views do not cover the range of beliefs associated with conscience. Despite conscience being a process that derives from internal reasoning,[532] conscience also must consider the broader social and moral considerations prior to undergoing any external action. One couples the 'inner morality' of conscience with an evaluation of the person's overall condition of existence as influenced by society and distinct personal experience.[533] A conscientious determination is to relate to one's destiny both individually and socially.[534] As noted by Fuchs:

> The subject, in the realisation of the object world,... must on account of his goodness attempt with personal responsibility to act according to the proper meaning of the human object world.[535]

Hence the 'moral' approval involved in the conscientious process, even if not universal, incorporates some form of social value for the individual within the social group.[536]

Additionally, equating conscience with a categorical imperative or moral duty, such as noted by Kant or a latter-day theologian, creates a problem when confronted with a moral uncertainty. Reference to pre-determined moral principles for an individual confronted with a moral dilemma will not necessarily resolve the conflict. Focusing on the maxims of conscience and not the motivations for action cause conscience to become a blind duty that ignores the broader effects of one's actions[537] and seems to overlook the possibility for relative human action. Indeed such an overbearing belief is what the international human rights system desired to avoid. Furthermore, rationality is only a necessary, but not a sufficient, condition for conscience since referring to logic does not identify what is to be adhered to.[538]

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532 See e.g. Richards (1986)
533 Virt (1987)
534 Kordig (1979)
535 Fuchs (1987:36) (note that since the author is a theologian who relies on St. Thomas Aquinas, he assumes that goodness exists prior to conscience); Harvey (1970)
536 Garnett (1965)
537 Teale (1952) (noting that Kant adhered to a strict duty of conscience as a means of avoiding the erratic or incorrect conscience).
538 MacIntyre (1981)

Note however that one should not discount the descriptions accorded to conscience by these views as they represent internal mental processes meriting forum internum protection, particularly when acknowledging that conscience is a peculiar combination of both feelings, a psychological fact, and claims.[539] The underlying problem with these descriptive approaches is that no one can unequivocally prove or demonstrate what this internal conscientious process entails. The conscientious process appears to entail broader considerations, such that examining the moral ontology of a conscientious belief in the same manner as a rule of natural science appears misplaced.

b. Conscience and Moral Action

Further attempts to describe conscience will regress to relative linguistic metaphors as a means of offering a discernible definition, which are in turn subject to countless contingencies due to our own subjective perceptions.[540] The use of available language tools to focus on the desired result of a conscientious assertion, and not the more formal, descriptive, definition of the concepts invoked by a conscientious assertion,[541] can however begin to allow for a clearer understanding of what conscience entails. For example, a supposedly tolerant society will be, by definition, intolerant towards a non-tolerant society, such that society requires a constant re-formulation of the social function of tolerance.[542] Conscience also can be considered from the desired result that is to ensue from a conscientious determination, as evidenced by the manifested result, with the understanding that its basic tenets must be constantly re-formulated.

Furthermore, while conscience obviously does not provide a universal justification for action, it can at least provide a window from which to view a person's moral approach towards a particular matter.[543] As contended by Neibuhr,[544] a person attempts to objectively consider personal feelings when forming an opinion about one's actions or other individuals. Since 'we know ourselves only in the presence of

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[539] McGuire (1963)
[540] Rorty (1989)
[541] See e.g. Searle (1969:15)
[542] Fish (1995)
[543] Childress (1979) for example defines conscience as a reflection of the individual's approval or disapproval of a particular action on the basis of personal moral convictions.
[544] Neibuhr (1945)

another',[545] the self is both the subject and object because it is influenced by many 'others', such as social background, culture, family, profession, et. al. As a result, a person will attempt to make a personal, judgement about oneself in a mature and fair fashion. Conscience then retains its importance for the individual by focusing on the individual's striving for moral action and to better understand their social and individual practices.[546]

Due to the broad nature of the conscientious process, particularly regarding its subjective and objective impact, conscience can entail both instinctual reactions as well as reflective claims about one's moral ontology or relative importance as a moral being. What emerges then from a conscientious decision is that conscience forms an essential component of one's self identity. Conscience is part of an important element of one's internal framework from which one shapes and forms qualitative discriminations regarding the good. Such qualitative discriminations are a necessary and constitutive condition for human agency since 'who I am' is determined by what I deem to be fundamentally important.[547] In the words of Taylor:

> My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good...[548]

The conscientious process is part of this internal framework as the qualitative discriminations that a person creates both instinctually and intuitively assist in making sense of one's life and in shaping one's self identity. A person will strive to achieve this self-imposed standard of good since it composes an essential element of one's identity on an instinctive plane and as a morally conscious human agent.[549]

Conscience then is part of a process that allows the individual to make sense of one's life and define what is important and what is not. It entails a component of self reflection and moral understanding[550] that develops into a cognitive responsive action.[551] One's identification of the good, which will also consider the

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[545] Neibuhr (1945)
[546] Rorty (1989:58)
[547] Taylor (1989)
[548] Taylor (1989;27)
[549] In the words of Taylor (1989;34) "What I am as a self, my identity, is essentially defined by the way things have significance for me."
[550] Garnett (1965)
[551] Clarke (1987:135).

role of the individual within the social group,[552] serves as the initial motivating force for conscience to ascertain the proper action for a particular circumstance.

The international human rights system appears to adopt an understanding of conscience that is quite similar to the aforementioned description. Conscience is not merely awareness of a moral dilemma. If morals created a conscientious obligation, the ensuing conscientious directive would seem superfluous because the obligation would exist by virtue of the moral standard.[553] Conscience moves beyond the moral standards by conceiving a broader social context that entails external action.

The treaties indicate this distinction between morals and conscience by the 'public morals' limitation to the right to conscience.[554] The implication is that conscience differs from a process that compiles public moral choices or identifies subjective moral imperatives that are influenced by social or environmental factors. Rather, one develops judgements whose binding directives then provide the basis for external actions.[555] Conscience creates a motivation for individual action by reference to fundamentally important qualitative discriminations.

While conscience might entrench moral norms, it does not create moral norms.[556] The applied moral standards which serve as a conduct-regulating facility for conscience, arise antecedent to the conscience.[557] One can adopt a host of views regarding the derivation of morals depending on one's identification with natural law, positivism, rationalism or any other view. The conscience however assesses and applies these moral standards to a particular situation.[558]

The importance of the application of conscience for international law is that it entails a manifestation of self reflection. The forum internum joins awareness, which is consciousness, or 'thought', with a subjective understanding of moral sanction. As stated by Rotenstreich:[559]

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552 Sibley (1970) (with the relative differences arising out of the various applications of the objective moral order).
553 Wallace (1978)
554 See discussion supra at Chapter Three
555 Bourke (1966) (distinguishing cognitive determination from a practical judgement where one's practical reasoning determines how one should act in a particular situation, once "conscience" has determined the moral action). See also Clarke; Wand.
556 Kordig (1979:376)
557 Childress (1979:319).
558 Rotenstreich (1993): Fuss (1974)
559 Rotenstreich (1993;3)

> Even if we interpret the position of conscience as a subjective phenomenon,. .. we cannot be oblivious to the phenomenological component that we find two levels in conscience - one of awareness and one of evaluation.

An individual will form an opinion regarding the morality of one's acts that influences one's decision and evokes a certain external response.[560] The eventual action that derives from one's conscience implies that an individual has no internal justification for acting against the conscience, cannot forget the act in question if compelled to perform the act, and has no excuse to avoid responsibility for the act.[561]

The important role of conscience is that the ensuing conscientious decision to act personifies that person's approach towards moral action for both that particular action and similar future situations. The ongoing revision involved in the conscientious process is encouraged to improve upon one's moral standards, especially since such action will serve as a basis for individual moral norms in future decisions.[562]

The incorporation of subjective and objective factors shapes the individual's moral practice and influences the individual's conception of morality. Conscience in essence becomes an element of the individual's character and moral beliefs. As part of our self identity, the conscience will assist in identifying our constitutive moral self. This ideal moral self will always be a sought after goal since it serves as a basic means for classifying our self identity.

Conscience then can be understood as operating on two different levels. One is the internal development of the conscience, which will include an assessment of moral standards, to create the foundation for a conscientious belief. The other level relates to the manifestation the conscientious belief following the internal assessment and development of the belief. The conscientious decision and conscientious action highlight the forum internum and forum externum distinction.[563] The internal conscientious decision does not decisively direct the individual towards action since it might appear too

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[560] Broad (1952)

[561] Childress (1982)

[562] Wand (1961): Ryle (1954). Rotenstreich (1995:33) notes that "we learn from our experience,...and turn it [conscience] into a motive which goes beyond the particular occurrence to become an element of our constant attitudes and thereby of our character" .

[563] Wallace (1978): Nowell-Smith (1957)

narrow or conflict with other social or moral criteria. Although the eventual manifestation could deviate from the original conscientious decision,[564] the manifestation of a conscientious belief will reflect the standard developed in the forum internum. The internal standards are readily definable as a result of the externally manifested action.

c. Conscience and Thought

Although a host of factors influence the open-ended mental process that forms the conscience, it differs from thought both in the forum internum and the manner in which each concept arises in the forum externum. Rotenstreich distinguishes conscience from thought as follows:

> Conscience is characterised by the foci; it differs from consciousness because it does not just point to a content but points to two interrelated directions of human behaviour -approval or disapproval...Judging is not just awareness but an application of criteria to specific situations or deeds.[565]

The key difference between conscience and thought is that conscience is similar to a religious belief. Conscience directs the individual towards taking a particular action through the application of internal conscientious norms.[566] These norms' focus on an individual's orientation towards the good which in turn play a central role in defining and constituting one's basic self identity, as exemplified by external action. While a general cognitive thought might account for similar considerations and lead to external action, the external action is not necessarily a result of the thought itself.

This distinction between thought and conscience is clarified in the travaux preparatoires for the ICCPR. The drafters equated religious beliefs with conscientiously held moral directives and beliefs as a contra-distinction to more general thoughts. The manifestation of a conscientious belief was deemed an essential facet in providing for the freedoms delineated in the right.[567] As noted by the delegate from Brazil, it is impossible to maintain a 'conscientious directive' without recognising the ability to manifest that ideal.[568]

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[564] Clarke (1987) (one retains the option of rejecting the conscientious decision where it is morally commendable to do so).
[565] Rotenstreich (1993;30-3 1)
[566] See Robert (1993:24)
[567] See e.g. GA 15th Session Third Committee, mtg. 1024-1025, in particular, the statement by the El Salvador representative
[568] id. at mtg.1023

Furthermore, the GA's Third Committee delegates noted that although conscience and religion are associated, conscience includes philosophical and scientific concepts that relate to belief, as opposed to religion that is an act of faith.[569] Conscience was viewed as a morally based process that focuses on the individual's intuitive ability to discern right from wrong and good from evil, and whose manifestation was equated with a religious belief.[570]

Thought on the other hand was limited solely to the protection of an individual's internal conscious process. Thought encompassed a broad range of internal, individual, thoughts,[571] with its manifestation being placed within the confines of free expression.[572] The AmCHR indicates such an approach by separating thought from conscience and religion and upholding its protection, along with opinion, in the right to free expression.[573] Thought and free expression are associated[574] since free expression can protect a broad range of manifested thoughts, and not solely an expression that reflects the conviction of a person asserting the expression.[575]

While the aforementioned distinction focuses on the forum externum aspect of conscience, it does allow for a better understanding of conscience as a concept that implies something more compelling than thought. The protection of conscience centres on upholding one's moral integrity and autonomy to adhere to a belief, such that the protection will generally arise in the context of the forum externum. When a conscientious belief develops into external action, its basis for action is clarified and delineated in such a manner as to also provide for protection of the forum internum of the belief.

This differs from a more general thought, even one implying particular external action such as the merits of painting a prison red. While the colour red might serve an important social purpose, the thought itself does not constitute the underlying principle of the good nor can it serve as a basis for shaping one's

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569 See e.g. A/C.3/218

570 See e.g. GA, 15th Session, Third Committee, mtg. 1021, remarks by Saudi Arabia

571 GA, 15th Session, Third Committee, mtg. 1021

572 See e.g. A/2929 regarding UDHR Article 4(2) (which disallowed any derogation to Article 18) where the drafters note the similarities between thought, as protected in Article 18, and opinion, as protected in Article 19 (freedom of expression).

573 AmCHR Articles 12 and 13.

574 See e.g. vanDijk and vanHoof (1990;413) equating the freedom to hold opinions (Article 10 of the ECHR) with freedom of thought (Article 9 of the ECHR).

575 See also discussion infra at Chapter Five.

self identity. Granted that the desire to alter the colour of prison walls might emanate from a fundamental and underlying good, say to adequately care for all institutionalised human beings. The 'belief' forming the basis for the external action then derives from a more general altruistic principle.[576] The 'thought' regarding the colour of prison walls however does not involve application of pre-determined criteria as a condition precedent to externally manifesting the thought. This is demonstrated by the broad and varied means in which one can convince society of the need to paint all prison walls in the colour red.

Of course, a conscientious belief need not always manifest; however the belief will be of such a nature that it affects an individual's external actions pursuant to the internally developed directives. Hence the prohibition of mental torture as an example of violating the forum internum. A torturer can attack the internal conscientious belief of a victim to alter the victim's external reality. As a result of the change to the individual's forum internum, subsequent actions of the individual will differ.

The basic distinction between thought and conscience is that conscience entails particular external actions that are formed in the forum internum. The forum internum serves a constitutive role in shaping and developing a person's self identity. It is an element of the individual's character that is constantly undergoing evaluation while at the same time influencing external actions in such a way that disallowing the particular action will also affect the internal belief.

V. Forum Internum of the Group

A. Introduction

Recognising the importance of the forum internum for directing and shaping a conscientious belief, it is essential to acknowledge that elements forming the forum internum raise broader social concerns as well. Particularly with regard to the conscience, where manifestation of the belief is a pivotal element, the importance of adequately articulating the belief will affect the manner in which the conscience develops in the forum internum. While fundamental intuitive and rational reactions serve to underline a conscientious belief, social and cultural influences also assist in defining the boundaries of a conscientious belief, thereby requiring consideration of external sources as well.[577] The relevant social considerations however can

[576] Cf. Raz's similar distinction between a core right and a right. Raz (1984)
[577] Taylor (1989)

influence the forum internum in a variety of ways. This section will begin to consider the role of external social influences in the forum internum both for the individual conscience and for the possibility of acknowledging some form of group conscience.

In the previous section that began to analyse the importance of a conscientious belief, it was noted that the forum internum process will consider the broader, social, interest in forming a conscientious belief. The implication is that because a conscientious belief considers the underlying social impact of the belief, social influences will serve to clarify and solidify a particular belief. Undoubtedly, a person will encounter other individuals harbouring the same or similar belief. What is the significance of such contact, both for the individual who is shaping an internal conscientious belief and for a group of individuals who develop similar forms of beliefs? Can a group collectively assert a conscientious belief or is consideration of the forum internum to be taken only from an individual standpoint?

From an alternative angle, can a state serve as protector of its own society's forum internum beliefs by limiting the influx of external influences? Will a state's policy goals in turn lead to undue impositions on the forum internum of minority groups? Although limitations may be imposed on the forum externum, no such limitations may be placed upon the forum internum, such that the question of a minority group forum internum raises practical considerations.

Referring to an example noted by Mill, society might uphold Sunday Closing Laws for non-religious reasons. Typically the reason centres on the need for a general day of rest or time spent with family or friends. Nonetheless, such laws can infringe the forum internum beliefs of other minority groups whose religious day of rest is on another day of the week, such as Friday or Saturday. The minority might not only suffer economic hardship by virtue of keeping two days of rest, but they are also being forced to adhere to the practices of the majority. Among other violations, adherence to such laws impinges upon the internal belief process of minority groups who do not desire to celebrate Sunday as a day of rest.

Similarly, a group might be reacting to the ideals of the society around it, and desire to reflect a change in its internal development and external customs. For example in considering the methods for addressing female circumcision in various African societies, some proposals focus on local custom and

practices that will accord the woman a more developed social status, such as influence in making family decisions, and a broader role in modern society, such as engaging in commerce or a profession. External influences such as human rights can control the practice of circumcision[578] by focusing on a local, rather then a national, forum within which to educate and inform individuals,[579] thereby creating a forum internum change. Such an approach can allow for the natural development of change within society, rather than force a group to adopt a particular belief system or stay rooted in a cultural context. Indeed, the African approach towards human rights is an attempt to combine the interests of the collective with those of the individual[580] to provide the interpretative context for human rights in the society.[581]

How does the right to freedom of conscience conform to an approach that incorporates individual and communal interests? Conscience need not be viewed in a vacuum as an individually based assertion of internal beliefs or solely as a conflict between the individual and society.[582] Rather, as conscience develops and manifests a belief, it can also serve to uphold society and its communal values by developing internal beliefs. Conscience identifies with the community and its underlying values by influencing, and being influenced by, society.

General social factors would therefore seem to provide for the consideration of a group forum internum right due to the inherent consideration and recognition of the important role of external, social, influences. The importance of a group approach to the forum internum applies to both society as a whole and a minority group therein. The purpose of this section is to sketch a boundary for the group forum internum by indicating possible applications for this form of the right.

B. Reference to the Treaties

In one sense, the terms of the treaties' such as the UDHR, ICCPR, ECHR, and AmCHR provide for at least an initial approach towards understanding a group notion of the right to conscience. Manifestation is generally described as 'in community with others and in public or private'. The particular forms of

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[578] See e.g. Mikell (1992)
[579] See e.g. Adjety (1995); Note (1993)
[580] Ojo & Sesay(1986) (without desire to impose any superior status to one concept)
[581] See e.g. Van Boven (1986)
[582] Contra Boyle (1992;39).

manifestation, such as worship, practice, and teaching, also demonstrate some form of an approach involving a group.[583] For example, teaching a belief implies some form of group context, even if it only involves one individual teaching another.

Furthermore, the ICCPR, ECHR, and AmCHR provide for the ability to educate one's children pursuant to one's belief, a fundamental and sensitive area of the forum internum with strong communal or group overtones. Education centres on developing the beliefs of individuals, generally within a group context, and can greatly influence a child's internal belief systems. While the motivation of education has recently focused on its economic function, a key goal of education is also to allow for personal growth and development of values.[584] Education is one of the key method for entrenching a group's or society's values.

This view of education is no more apparent then for minorities who desire to instil in their children the values and beliefs that they hold central to their existence. The importance to certain groups for developing their children's' education demonstrates a more communal focus for the right to conscience. Similar considerations are apparent in the Convention on the Rights of the Child (hereafter: 'CRC') as well.[585]

An additional indication of a group-oriented approach for the right to conscience is a number of ECHR cases. The Commission has recognised that a group may raise an action on behalf of its members. The Church of Scientology for example was able to raise an Article 9 issue before the Commission on behalf of the entire sect[586] because the Commission considered its members linked by their collective beliefs. The ECHR Court has also upheld the right of a community or group to challenge a state that was threatening certain social aspects of its spiritual life.[587] The state must consider a group's interests, even if conflicting with overall social ideals, so long as the group's interests do not violate the basic dignity of the person or preach views fundamentally contrary to the state.[588]

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583 Frowein (1986;256)
584 Batelaan (1993;168-169) noting in particular the role of education in promoting democratic values.
585 See e.g. Convention on the Rights of the Child at Article 30
586 7805/77 Church of Scientology v. Sweden 16 D&R 68 (1979)
587 11921/86 Verein v. Austria 57 D&R 81(1988)
588 7511/76 Campbell and Cosans v. UK 4 EHRR 293 (1982) (in context of public and private schools).

The freedoms granted to a group-oriented cause of action tend to focus on the forum externum. Although forum externum applications are apparent for a group identifying with a particular belief such as a group of pacifists collectively objecting to the testing of nuclear arms,[589] can the protection for the forum internum, which is a more subtle right, be extended to groups as well? What is the implication, if any at all, of a 'community' freedom for an internal conscientious belief? The possible avenues for addressing this query shall be considered following a more focused understanding of the meaning and implications of a 'group' belief and its attendant rights.

C. Group Beliefs Defined

Lerner defines a group as a spontaneous, yet permanent, joining of individuals for a specific purpose or due to particular qualities, depending on the individuals within the group and the greater community's view of the group as such.[590] Such a definition can readily apply to a group linked by a conscientious belief, especially when the belief serves as the antecedent foundation for the group's overall conception of itself as a group. For example, pacifists engaging in public activism can be identified as a group as a result of their common views of the military or nuclear weapons. The basic premise then supporting a group-oriented approach towards the forum internum right is that conscientious beliefs, in a manner similar to religious beliefs,[591] create a common identity among individuals within a group.

Nonetheless, the focus of analysis here is the protection to be accorded to the forum internum of a group belief, such that a closer examination of the characteristics of an internal group belief is merited. In delineating the basic understanding of a group belief, the key factors for identifying a group belief are that the belief serves as an important element for the group's existence, the members of the group are consciously aware of the shared belief and the belief regulates the actions of the members regarding the group.[592]

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589 Frowein (1986;256) noting that while the right centres on freedom of association, it also "must be seen as protected by Article 9 freedom of conscience] already".

590 Lerner (1991)

591 See e.g. Berger (1967) (religion as a social function which creates an identification with the external human world by legitimating one's empirical reality of existence with an ultimate reality).

592 Bar-Tal (1990;41 and chapter 4). See also Galanter (1989;5) for a narrower definition with regard to the beliefs of cult members which will include consideration of behavioural norms and the charismatic power of the group.

Where one of these factors constituting a group belief is missing, the forum internum right can possibly still be invoked on an individual scale should the assertion involve a conscientious belief. However the importance in focusing on a group belief is that it broadens the application of the forum internum right to freedom of conscience by considering social factors that might be part of the conscientious process, while beginning to address the possible conflicts that can arise between individuals and group conscientious beliefs. Examining the group belief from a forum internum standpoint can also assist in sharpening the rights of groups as they attain a greater level of protection in international law.[593]

The 'formation' of a group with an identified conscientious belief need not be a formal occurrence. Rather, an individual might be aware of other individuals with similar beliefs because such beliefs regulate their external actions,[594] thereby creating a similar pattern of action for the group members. A pacifist group is a typical example since a belief in pacifism binds its members and regulates their actions in a common way, such as refusing military service.

The actions of the group members can however differ as individuals resort to varied degrees of manifested action. Pacifists might retain a common belief against the use of nuclear weapons that constitutes them as a group, but their actions can range from massive protest demonstrations to underhanded tactics against nuclear armament plants. The group members might not agree with all of these manifested actions and yet still retain a sense of group structure resulting from the common foundational belief that formed the group. The underlying pacifist belief still serves a constitutive purpose for the group. As the belief becomes externalised, it will develop into a holistic notion within the group because the belief, and not the actions, will serve to define the essence of the group.

By contrast, a more general 'belief' (or conscious thought) shared by a number of individuals in society is not considered to be a group belief if the belief is not a constituting factor for the group. For example, a common belief that it is raining when rain falls outside will not necessarily serve to define the group in any structured manner. While all the individuals who believe it is raining might form some type of

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593 See e.g. Kingsbury (1992)

594 As well as instil a measure of social cohesion. Galanter (1989)

group, their belief is not equivalent to a conscientious belief of the forum internum in the same manner that a general thought is not equivalent to a conscientious belief.

An example of a group being linked by a specific set of beliefs that merits attention is minorities. The beliefs of a minority group are accorded specific safeguards in international human rights law. Protection of minorities and the right to conscience are linked since a minority can retain a specific belief or ideology that serves as a binding force for the group. Such an antecedent belief creates a group conception that differs from the majority[595] and merits specific protection. Referring to the international human rights of minorities can therefore further clarify the importance of maintaining the internal group belief that is a principal constitutive factor for the group.

1. Minority Rights and Conscience

The protection accorded to a minority group also will include an obligation to protect a belief that binds the group.[596] The Permanent Court of International Justice recognised this protection in Interpretation of the Greco-Bulgarian Agreement of December 9, 1927[597] and Access to German Minority Schools in Upper Silesia[598] The Court held that states must preserve ethnic, religious, and linguistic traditions of minorities and provide for a minority's peaceful coexistence among the population. Hence minorities merit protection for their religion, language, and ethnicity.[599] Indeed, the current protection accorded to minorities, as codified in ICCPR Article 27 and various GA declarations,[600] creates a positive obligation on the state to prevent not only discrimination but also provide equal treatment to all that would presumably include protection for the group's beliefs.

Owing to the link between minority rights and the right to freedom of religion and conscience, some commentators have attempted to distinguish these rights[601] by narrowing minority rights to specific group

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595 See e.g. HRC General Comment to article 27, paragraph 5.1-5.2

596 ICCPR Article 27

597 PCIJ Judgement No. 57, Advisory Opinion of 1932

598 PCIJ Judgement No. 52, Advisory Opinion of 1931

599 See e.g. Shaw (1992); Sohn (1981); Ermacora (1983); Capotorti (1991). All have defined protection for minorities based on notions of ethnicity, religion and language, and the inherent desire to uphold and preserve their unique community.

600 See e.g. Alfredsson & deZayas (1993). A state's obligation towards minorities had previously been limited to non-interference, without any obligation to ensure for equality. See e.g. Sohn (1981)

601 See e.g. Dinstein (1992); Thornberry (1991)

assertions regarding their existence as a unit. The focus is on a communal conception of the minority's existence,[602] such as physical enjoyment of the group's resources or manifestation of its cultural and ideological practices in society. For example, in Lubicon Band v. Canada,[603] the HRC centred its decision on the fact that Canada's restrictions imposed on the use of land was threatening the Band's way of life and culture.

Furthermore, the HRC's General Comment to ICCPR Article 27 focuses on a minority's enjoyment of a particular way of life 'which is closely associated with territory and use of its resources.' The HRC defines the exercise of cultural rights under article 27 as manifesting in many forms, 'including a particular way of life associated with the use of land resources'.[604] The right's protection has therefore centred on external, communal, factors such as the need to establish minority institutions like schools, places of worship, or communal temples.

Note that despite attempts to define Article 27 within a group context, the HRC's General Comment to the Article need not be read as interpreting it as such.[605] The HRC states that Article 27 is an individual right.[606] Recognising however that minority rights are not subject to any formal limitations or derogation,[607] the HRC limited the scope of Article 27 to operating in tandem with other rights to create practical limitations to the right.[608] As noted by the HRC in the General Comment to Article 27:

> The Committee observes that none of the rights protected under article 27 of the Covenant [ICCPR] may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.[609]

One of the aims in protecting minority groups however is not to 'preserve' the minority and its culture, a method that can be excessively paternalistic and even dominating, but to provide for continued

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602 Thornberry (1991); Dinstein(1992): Shaw (1992): Ermacora (1983)

603 167/84 Lubicon Band v. Canada (1990)

604 CCPR/C/21/Rev.1/Add.5, General Comment to ICCPR Article 27, paragraph 3.2, referring to HRC case of 197/1985 Kitok v. Sweden (1988)

605 HRC General Comment to Article 27, CCPR/C/21/Rev.1/Add.5. See also Capotorti (1991)

606 A possible, albeit weak, reason for the HRC's focus on the individual could centre on the fact that the HRC desired to distinguish minority rights from the right of self determination, which is quite obviously a group/peoples right. This might however be reading too much into the comments.

607 Cf. ICCPR Article 27 with Article 18(3).

608 Sohn (1994)

609 General Comment to Article 27 at paragraph 8

development of the minority culture within society.[610] The fine line between state domination and group development can be straddled by granting a minority group the ability to play an active part in the majority's social dialogue.

Upholding the imperative underlying belief that constitutes the group accomplishes this recognition. While a minority right can manifest in a number of ways, the underlying belief developed in the forum internum is a constant factor that merits particular protection. The right to conscience can clarify a minority right,[611] by expanding its role to include consideration of the minority group's forum internum as well. The minority view will not only exist, but also influence the development of culture and its necessary condition -- society[612] -- in structuring the behaviour of man[613] and creating social changes. In this sense, the community is constitutive of the individual as well because it creates, and protects, an individual's rights.[614]

Furthermore, because minority rights focus on external requirements, or manifestations, of a minority group's belief, protection of the internal dimension of the right can be accomplished through the forum internum of Article 18. This is particularly the case since a belief that formulates a minority group develops from an individual's antecedent belief. Hence the relationship between minority rights and conscience can be the role that the right to conscience plays in preserving the group's forum internum, with the minority right protecting the group's external manifestations.

Recognising the importance of upholding a group's forum internum belief, as exemplified by the role it can play in founding a group and buttressing minority rights, the more particular question regarding the scope of the protection accorded to a group's forum internum merits further examination.

D. The Scope of Protection

The parameters of the forum internum protection for a group belief can be delineated in an analogous manner to the form of protection accorded to the individual's forum internum. Similar to the restrictions

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610 Addis (1991)
611 Thornberry (1991) (noting overlap with article 18).
612 Berger(1967)
613 Geertz (1973)
614 Taylor (1985)

imposed on an individual forum internum, a state cannot impose restrictions on the internal beliefs of a group, with a view to altering the group's constitutive beliefs. A violation occurs when an external force is used to impose undue influence or coercion on a particular group by targeting their underlying belief. The coercion not only limits an external action of the group but also attempts to alter or eradicate the underlying group belief. The key consideration is not the external action taken by the state to limit the group, but the state's intentions towards the group's internal belief.[615] The protection granted can be divided between the positive freedom to adhere to a belief (freedom to) or the negative resistance to external influences to either adopt or change a belief (freedom from).

The typical example of freedom to is where the state engages in a discriminatory policy that not only limits the practices of a belief but is so intolerant as to be viewed as a policy that intends to alter or undermine the belief itself. The ECHR Commission hinted at such a possibility when confronted with a challenge to the Swedish authorities criticisms of the Church of Scientology.[616] The Commission intimated that a state's policy against a particular group belief could reach an intolerance level that would endanger the freedom of religion. A similar problem was noted by the AfrCHR Commission in Les Temoins de Jehovah v. Zaire[617] where the State's harassment of Jehovah Witnesses amounted to a violation of AfrCHR Article 8. In each of these cases, the state policy focused on groups united by a particular belief, with an intention to alter or eradicate the belief.

A broader example is the strategy undertaken by Serb forces during the disintegration of the Yugoslav Republic in the early 1990s. In raping Muslim women, the Serb's desired to weaken the Muslim's group cohesiveness by undermining their religious beliefs. The raped women were ostracised from their religious and social group, where chastity and modesty are key, a high number of bastard children were born into the group, and a feeling of helplessness was engendered among the men.[618] While the action of rape clearly violated humanitarian norms, the broader objective was also to create more enduring damage to the group's internal belief structure as a whole.

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615 Frowein (1986;257-259)
616 8282/78 Church of Scientology v. Sweden 21 D&R 111 (1981)
617 Communication No. 56/91 reported in 4(1) IHRR 89 (1997)
618 Wing & Merchan (1993)

An example that does not necessarily focus on a religious belief is a World Trade Organisation (hereafter, 'WTO')[619] action raised by Thailand against the US tobacco industry. Although the WTO tribunal did not uphold the import limitations imposed by Thailand on foreign cigarette companies, it did recognise Thailand's claim to limit advertising to protect the uneducated Thai consumer who was unaware of the dangers associated with smoking.[620] Despite the inherent limitations imposed on the tobacco companies' rights to free expression and commerce, the WTO tribunal acknowledged the importance of protecting the unaware consumer from damaging advertising that could alter the cultural status associated with cigarettes.[621]

Granted that the prevention of misleading adverts is not necessarily focusing on a strict constitutive group belief. Nonetheless, the WTO case can be viewed as an instance of freedom from. to prevent tobacco companies from trumpeting the habit's social benefits by focusing on the internal belief system of a country's social group. Be it the Thai consumer or a more specific consumer group, such as teenagers,[622] a particular group merits protection from misleading information targeted at one's internal belief structure.

Additional applications will similarly centre on occurrences involving a change to the internal constitutive belief of a group. Similar to discrimination against the individual, if the intention of a state's discriminatory policy is not only to suppress a group but also create a change in the group's internal belief system (freedom from) or alter one's view of the group's practices (freedom to), the forum internum can also be violated.[623]

E. Group and Individual Forum Internum Conflicts

Recognising the entitlement of a group to some form of forum internum protection however creates an inherent conflict within the right between the individual and group forum internum. A group's belief can violate the individual's forum internum by coercing an individual to alter a previously held belief, as

[619] At the time of the action, the trade organisation was known by the acronym GATT (General Agreement on Tariffs and Trade).

[620] For a general discussion of the issues raised by the case, see Thaveechaiyagarn (1990).

[621] See e.g. 1997 WHO report regarding huge rise in cigarette smokers in Far-Eastern markets as a result of Western tobacco companies' campaigns.

[622] See e.g. US legislation prohibiting cigarette adverts near schools. See also Nowak (1993)

[623] Of course, there remains the broader problem relating to demonstrating the intent of the state. The actions of the state towards the group however will assist in that endeavour.

exemplified by the actions of some missionaries. The individual's freedom to a forum internum can be violated by an overly zealous missionary using underhanded tactics. On the other hand, a state based on fundamental principles of a particular religion might contend that a minority group's lack of belief, or different form of belief, is damaging to society and should be changed or suppressed. The freedom from aspect of the forum internum of a group or of an individual can be subject to attack and change as a result of coercive state actions.

This problem is particularly the case when conscientious beliefs of a group require specific external action, such as proselytising, since the required manifestation of the belief can heighten the conflict between the individual and the group. Either a state will act to protect individuals while suppressing the beliefs of the group, or the state will allow the group to practice its beliefs at the possible risk to its citizen's forum internum. While the forum externum can be subject to limitations, a state seems caught between Scylla and Charybdis when attempting to uphold the forum internum for both the group and the individual -- favouring one side will expose the other to possible undue change.

The UDHR and ICCPR drafters referred to this problem in the discussions relating to the scope of desired protection for missionaries. Protection for missionaries was a particularly sensitive issue since missionary work inevitably raised the problem of upholding the right to change one's religion or beliefs.[624] Countries opposed to the language 'to have or adopt' in Article 18[625] also opposed any protection to missionaries and the like. Yet some religious movements view proselytising as an integral practice of their belief, with a goal no doubt of altering the forum internum belief structure of targeted individuals.

Various state reports to the HRC also refer to this conflict between individual and group forum internum rights. For example, Nigeria noted in its 1996 report that it will not tolerate any form of forceful public preaching, such as Islamic fanaticism.[626] The Ukraine also noted similar limitations of preaching sects on the grounds of upholding the public order.[627] Granted that these reports focused on the forum externum aspect of preaching. While the external manifestation is subject to limitations, one must also

[624] See A/2929 (1955) and E/800
[625] See discussion supra at Chapter Three
[626] CCPR/C/92/Add. 1
[627] CCPR/C/95/Add.2

consider the relevant forum internum rights that will be affected by state policy towards minority sects or beliefs.

Treatment towards proselytising belief movements can provide a good example for elaborating on this inherent conflict between the forum internum of the individual and the group and a possible avenue for resolving the dilemma. The discussion can also assist to further refine our understanding of the forum internum and its form of protection.

1. Forum Internum and New Religious Movements

New Religious Movements do not universally derive from religious or theological origins. Rather, the goal of current-day New Religious Movements is to address the internal, personal, needs of its members and not to transform society, create a universal moral standard, or achieve the status of a formal religion.[628] New Religious Movements are therefore analogous to a group conscientious belief since an antecedent belief unifies the group and directs its members towards particular external action.

New Religious Movements also represent emerging belief systems of a minority group[629] that could become entrenched in the social consciousness. They maintain a similar position to religions that developed during the Reformation, such as Protestantism,[630] or the Salvation Army that was accused of using brainwashing tactics when initiating its operations in the late nineteenth century.

The Salvation Army provides an interesting contrast since the brainwashing charge, the typical example of a forum internum violation, is generally levelled against present day New Religious Movements.[631] The basis for this charge derives from the New Religious Movements' tenets which require their members to target new potential members as a basic practice of the belief.[632] The typical examples are the Jehovah Witnesses[633] and the 'Moonies' whose members spend close to seventy percent of their time on active recruitment duty.[634] The literature on New Religious Movements, both empirical and

[628] Wilson (1990) referring to the Scientology movement; Robbins (1988;2-5) noting 1960s and 1970s development of counterculture movements as a form of cult development that did not have strict religious overtones.
[629] See Wilson (1990;47) defining a sect as a religious minority which espouses a faith different from other religious bodies.
[630] Kamen (1967)
[631] Mayer (1993:58); Richardson (1991)
[632] Robbins (1988;63).
[633] See e.g. 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1993)
[634] Beckford (1985).

sociological, also provides a better understanding of the methodology of brainwashing and what it entails, thereby assisting in defining the scope and protection for the forum internum.

The basic attributes that sociologists have referred to in distinguishing acceptable New Religious Movements from coercive ones are whether the latter are rooted in ideological totalism characterised by the use of fear as a tactic, alteration of the social psychological abilities of the individual, and using a great deal of resources and time within which to coerce the individual. The key attributes of the forum internum that become the focus for coercion are the physiological and psychoanalytical abilities of the person. Sleep deprivation, ego destruction, over-stimulation of the nervous system, and weakening critical facilities by forced confessions alters these mental capacities.[635] In essence the identified improper tactics by New Religious Movements are analogous to the prohibition against mental torture; each action involves a desired change to the individual's forum internum by removing the individual's ability to exercise independent choice.

Thus brainwashing entails, among other things, a focus on the individual's belief, an intention to alter that belief, and the use of coercive methods that effectively deprive the individual of the capacity to make a choice whether to adopt or forsake a belief. Such actions focus on one's internal thought processes and disallow any rational or reasonable method of assessment. The result is deprivation of individual autonomy and incapacity to form an independent volition.[636]

While brainwashing techniques would therefore violate an individual's forum internum such as to limit the coercive practices of a group, it does not mean that all proselytising groups engage in coercive behaviour. In analysing methodologies of New Religious Movements, sociologists have noted that the New Religious Movements' techniques, particularly deprivation of choice, have not been a typical method of indoctrination. Rather, recruitment, defined as a sudden action to join a group, has been the general means of acquiring new members following invitations to attend a meeting or learn a skill such as meditation. Actual conversion of those attending these meetings, defined as a more gradual and evolutionary process,

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[635] Robbins (1988;72) referring to a 1984 study by Snow and Machalek

[636] Brown (1991). The author defines independent volition as a mental ability to desire to do something, and then transforming that desire to action.

rarely occurs.[637] One sociologist noted a .005 percent success rate in indoctrination through public meetings and the like, with many of these individuals not committing themselves to the movement.[638] Of those who do remain with a New Religious Movement, many voluntarily depart within a short time.[639]

Thus New Religious Movements do not focus on the individual's cognitive beliefs to indoctrinate because they tend to rely on the affective and social responses of the person. The individuals who join New Religious Movements are seeking an internal change[640] as they willingly adopt the sect's practices and beliefs.[641] Studies of the 'Moonie' movement have further found that the majority of individuals generally leave the sect voluntarily within one to two years and, somewhat meekly, return to their former lives without any significant lasting after-effects or mental scars.[642]

Sociological studies of individuals within New Religious Movements further indicate that the brainwashing charge essentially derives from the family's sense of loss because a family member has committed himself to the sect.[643] Indeed, attempts to deprogram such individuals are generally a graver violation of the sect member's forum internum than any action taken by the sect.[644] The use of brainwashing by a New Religious Movement also derives from the public's view of a sect in a negative light, such as a sect whose leader has engaged in illegal practices.[645]

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637 Robbins (1988;chapter three)

638 Barker (1982)

639 See e.g. Wilson (1990): Barker (1982); Beckford (1985). But Cf. Robbins (1988) who contends that the reliance on voluntary departure is the result of a biased, ex post, reflection of apostates on their reasons for joining as well as an over reliance on the social dimension of the New Religious Movements, for example, as filling a gap for a socially dysfunctional youth, rather then giving any credence to the atomistic belief of the individual which might have actually been subject to a desired change.

640 See also Wilson (1990) noting the benefits of non-violent New Religious Movements as providing emotional and social haven for lost youth who might otherwise deviate towards some of the more dangerous ills of society (such as drugs). This depends of course on whether conversion is an atomistic concept or a social condition which serves to address social problems?

641 See Barker (1982): Wilson (1990)

642 Beckford (1985). But see Robbins (1988;65-66) noting that such studies should be tempered with the understanding that they are generally an ex-post reflection of the individual's reasons for joining the NRM after one has left it which results in an altered perception.

643 Wilson (1990): Robbins (1988)

644 Wilson (1990). Note that forced de-programming is on the wane due to legal deterrence (indicating that it can entail coercive action), the falling recruitment rates of NRMs in general, and the developing professionalism of anti-cult movements. Robbins (1988;96-97).

645 Wilson (1990) distinguishing between internal factors, such as the New Religious Movement's organisation, and external factors, such as its depiction in the public or media, both of which can affect its status.

The dimensions then of the individual and group forum internum emerge along similar lines outlined in the human rights treaties. Social pressure or affective arousal of emotions for example need not be coercive as they are similar to a convincing marketing campaign or political advertisements. What raises forum internum concerns is where the coercive action uses measures that disallow choice or remove the freewill, with an ultimate view of altering an internal belief.

At times, such coercive action can be inherent in a state's action to limit the practices of a particular group as a prelude to altering the internal belief. It is even possible that a particular advertising campaign focusing on a naive or uneducated consumer vulnerable to suggestiveness might violate the forum internum. Certainly a shrewd marketing campaign targeting potential consumer groups is not engaging in coercive tactics against the forum internum of the conscience. That should not preclude a state from attempting to protect its citizens from an unduly suggestive form of advertising geared to altering the cultural approach towards a dangerous practice, particularly where it endangers the health of its citizens. In such an instance, the group notion of a conscientious belief might have greater credence.

The possible limitations on advertising can be compared to certain limitations imposed on proselytising. For example, India protects sects that spread the tenets of their religion, as opposed to sects that focus on a specific goal of converting others.[646] Similarly, there is an inherent difference in an advertising campaign extolling the virtues of its product as opposed to attempting to sway an uneducated consumer that the product has extraordinary qualities. The key factor is that coercion, with a view towards altering the belief being targeted, is avoided.

VI. Conclusion

While the treaty drafters granted the forum internum absolute protection, analysis of the meaning of the forum internum right has been largely overlooked, possibly due to the broad concepts that are raised by the forum internum. As a result, this chapter focused on understanding the internal nature of a conscientious belief and the importance of maintaining the internal, cognitive, abilities of the individual to allow for the development of an internal belief.

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[646] See e.g. Stainislaus v. MP AIR 1977 SC 908

It was contended that one of the significant aspects of the forum internum is the seminal role it plays in developing the grounds for manifesting a conscientious belief. The forum internum differs from other conscious thought because it evaluates and develops particular conscientious beliefs, with a view towards upholding the beliefs in particular situations. Unlike a general thought, one can comprehend the forum internum by examining the manner in which an individual manifests the conscientious belief in the forum externum.

The forum internum of the individual or the group is generally violated by coercive action. Coercive action involves not only the suppression of a belief, but also the intention to alter a belief. This aspect of intent can assist to define the parameters of the forum internum since not all actions are considered coercive. A state might have to limit the beliefs of an individual or a group without any intention of creating a change to the forum internum belief. Furthermore, the distinction between coercive practice, such as depriving an individual of her freewill, and mere persuasiveness was elaborated upon in the discussion concerning New Religious Movements.

Chapter Five

Forum Externum

I. Introduction

As demonstrated in the previous chapter,[647] the forum internum represents the internal source for a belief and plays an important a priori role for the manifestation of a conscientious belief. For example, an Indian's belief that he should don a turban, an external action, emanates from an internal belief, such as a requirement to act in a modest manner or show respect for a higher authority. The forum externum however will provide the context for deliberation, demonstrated by the person's external action to refuse to don a motorcycle helmet in place of the turban[648] or wear safety head-gear at a building site.[649]

Upon acknowledging the formation of an internal belief, the central question to be addressed in this chapter is, what are the possible means for an individual to manifest such a belief? Recognising the absolute protection accorded to the forum internum, should all manifestations of the belief also be granted absolute status?

This chapter will address these questions initially by focusing on the distinction between the category of protection granted to the forum internum and the forum externum. The problem is that it is difficult to define the limits to be imposed on the manifestation of a conscientious belief, particularly when the limitations might affect the forum internum as well. For example, if, as implied by the term forum externum, external action is the key factor for manifestation, is hanging a banner against abortion in one's living room considered manifestation of a belief or merely an exercise of the forum internum? Would it matter if the believer placed the pro-life banner on her front lawn for all to see?[650] Does manifestation of a belief then occur if all know that the person is against abortion, even if that person did not intend to

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[647] See discussion supra at Chapter Four

[648] 7992/77 X v. UK 14 D&R 234 (1978). Cf. UK law that exempts Sikhs from the statutory requirement to wear a motorcycle helmet. Motorcycle Crash Helmets (Religious Exemption) Act 1976.

[649] 208/1986 Singh Binder v. Canada (HRC upheld Canadian requirement to wear a hard hat as condition of employment on grounds of protecting public health); Singh v. British Rail [1986] ICR 22 (similar case involving removal of a safety helmet); Van Schaik v. Neuhaus (S.Ct. of Canberra, 1/5/96) (asserted belief against wearing a bicycle helmet denied as being unreasonable in light of contrary legislation). Cf. Goldman v Weinberger 475 US 503 (1986) (disallowing Military Rabbi to wear religious "Kippah" to uphold military directive to remove all headgear while inside a building).

[650] See also discussion infra regarding other rights raised by manifesting a belief, such as freedom of expression.

manifest the belief, for example a neighbour learns through a third party of the person's moral abhorrence of abortion? Or is an intentional action to abide by the underlying belief the key for determining the forum externum realm? Alternatively, maybe the external action is an expression rather then a manifestation of a belief. Would it then matter if one placed the banner on the front lawn pursuant to a conscientious or religious belief's specific directive or mandated practice?

The chapter will also focus on the meaning of the treaty term 'belief'. The issues to be considered centre on the nature of a manifested conscientious belief. Is manifestation only an action taken pursuant to a particular directive of the belief or does it incorporate all action derived therefrom? Does the international human rights system intend to provide for the manifestation of any belief, or only beliefs analogous to a religious tenet?

The example of a moral or religious opposition to abortion demonstrates the range of the problem. Is manifestation of the belief solely the non-performance or non-receipt of an abortion or does manifestation of the belief extend to bombing abortion clinics or physically blocking their entrances?[651] What of less extreme actions such as handing out pamphlets extolling the moral or religious prohibition of abortion or refusing to pay a tax established specifically to support abortions?[652] Would it matter where the individual protest occurs or on what basis the individual was acting when asserting a religious right to protest an abortion?[653] Some individuals manifest their anti-abortion beliefs by even refusing to type a doctor's referral letter recommending an abortion.[654] Are these actions' manifestations of a conscientious belief or do they fall under the guise of other human rights?

II. Forum Internum and Forum Externum Compared

A. Limitations

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[651] Included in the equation will be the actual limitations provided for in the right, such as protection of public safety, order, health, or morals or the fundamental rights and freedoms of others. See discussion supra at Chapter Three.

[652] 20747/92 Bouessel v. France 16 EHRR CD49 (1993) (refusal to pay social security tax because it supported publicly funded abortions. The Commission summarily rejected the contention). See discussion infra at Chapter Seven

[653] 2238/93 Van den Dungen v. Netherlands 80 D&R 147 (1995) (Commission upheld injunction on claimant from handing out anti-abortion materials near abortion clinic).

[654] Grubb (1988) referring to R v. Salford [1988] 2 W.L.R. 442. See also discussion infra at Chapter Eight

A key difference between the forum internum and externum is that manifestations of a belief are subject to specific limitations.[655] The right acknowledges various social ramifications or other considerations of public protection raised by the manifestation of a belief as being subject to restrictions. Hence courts have disallowed polygamous marriages[656] or required an Indian who works in a food processing plant to remove all facial hair.[657] The limitations apply even concerning specific practices of worship, such as prohibiting the use of dangerous knives for public ritual dances[658] or curtailing public 'calls for prayer' on loudspeakers in the interest of non-adherents living in residential areas.[659]

Similarly, judicial bodies have curtailed conscientious beliefs for comparable reasons. Abatement of a belief system that prohibits the purchasing of automobile insurance[660] or registering one's cattle with the Health Service[661] transpire on grounds of public health protection or to prevent harm to third parties. Additional examples include the limitations imposed on manifesting racist 'beliefs'. Individuals are entitled to harbour such illicit views in the forum internum, but are limited in the manifestation of the same due to the harm that the views present to third parties.[662]

While limitations are important in distinguishing between the operative application of the forum internum and externum, courts impose limitations after the belief has manifested. The initial determination for a reviewing body confronted with a conscientious belief however is whether the forum internum belief can even manifest ab initio. Hence the distinction between the forum internum and externum merits further examination.

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655 See discussion supra at Chapter Three

656 See e.g. Reynolds v. US 98 US 145 (1879) non-monogamous marriages among Mormons disallowed.

657 See e.g. Panesar v. Nestle Co. Ltd. [1980] ICR 144 The UK Court of Appeals referred to ECHR case law for support. There exists a similar problem for children of Jehovah Witnesses who undergo forced treatment despite protest from the parents. Craig v. Maryland 155 A.2d 684 (1959); In Re R (A Minor) [1992] 1 FLR 190

658 See, e.g., Jagdishwaranand v. Police Commissioner AIR 1984 SC 51 (knife was also deemed non-essential to the celebration ceremony)

659 Cumper (1995;378) (referring to UK law); PA Jacol v. Superintendent of Police AIR 1993 Ker. 1

660 2988/66 X v. Netherlands 10 Ybk.ECHR 476 (1967)

661 1068/61 X v. Netherlands 5 Ybk.ECHR 278 (1962); Jacobson v. Massachusetts 197 US 11 (1905) (compulsory vaccination of animals)

662 See International Convention on the Elimination of all forms of Racial Discrimination Article 4. Although the Article disallows racial hatred and discrimination, it is to be applied "with due regard" for the "rights expressly set forth in Article 5 of this Convention". Article 5(d)(vii) provides for the right to freedom of thought, conscience, and religion. Cf. US. case law which generally upholds racial speech on Free Speech grounds. See, e.g., Collin v. Smith 578 F.2d 1197 (7th Cir. 1978) (local ordinance deemed unconstitutional for prohibiting dissemination of literature which promoted racist views).

B. External Versus Internal

When comparing the freedom for the forum externum to the forum internum, the external manifestation of a belief appears to be an easier right to explain. From a purely functional standpoint, the external nature of the forum externum presents a more readily assessable occurrence. Krishnaswami for example defined manifestation of a religious belief as incorporating a host of actions that a religion demands of its followers, such as worship, pilgrimages, burials according to the religion, celebrating holidays, marriage and divorce, and dietary practices.[663]

The forum internum, which can include a general thought or opinion, differs in that no specific form of mandated action need arise therefrom. Personal desires can serve as a driving force and not the underlying directives of a belief. US Courts therefore have not accorded external manifestation to new forms of 'religious' beliefs based on informal creeds that do not present any formal binding directives for practice nor an underlying ideology.[664]

Thus an attorney objecting to wearing a wig in court because it is uncomfortable may internally harbour the thought. However, the attorney cannot manifest the thought through the right to conscience because manifesting a thought generally occurs by way of an expression.[665] If however the internal basis for the objection to the wig is that the particular wigs are made from fur of endangered species, the manifestation of such a 'belief', as opposed to being based on the opinion that it might be uncomfortable, would arguably fall under the guise of a conscientious belief. The action of not wearing the wig is linked to a particular standard of belief, a need to protect endangered species, that mandates action. Forcing an attorney to buy and wear the wig then can raise a forum externum problem,[666] while certainly entailing a violation of the forum internum.

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663 Krishnaswami (1960;31-36). See also discussion infra regarding the narrow approach to belief

664 See, e.g., Jacques v. Hilton 569 F.Supp. 729 (N.J.Dist.Ct. 1983) prisoners' creation of a new religion was not entitled to "Free Exercise" protection. The Court compared the new religion to a general code of an organisation, like the Boy Scouts, as opposed to a belief which provides direction and an "ordering of one's life" relating to ultimate rewards which focus on fundamental issues of life.

665 Loschelder (1990;30) refers to this case with regard to a German attorney. See also discussion supra at Chapter Four regarding the distinction between conscience and thought.

666 Whether forcing the attorney to wear the wig is an actual violation of the belief will be discussed infra where the "actual practice" of a belief is distinguished from motivations derived therefrom.

A believer is compelled to abide by the belief in the forum externum. Non-adherence to the internal conscientious decision would result in undermining the belief itself, in a manner similar to preventing the performance of a religious practice.[667] Manifestation of a conscientious belief is analogous to a religious person's need for worship at specific times of the day; upholding the conscientious belief demands the guarantee of specific practices that serve to maintain the belief.[668]

Of course, preventing the practice of a belief does not necessarily undermine the basis for the belief itself. The forum internum need not be violated by a state's prevention of an external practice, save for where the intention of the state in preventing the practice is to alter or change the belief itself.[669] The forum externum will however be violated if practice of a belief is prevented for no reason. An individual is required to abide by specific practices with regard to conduct as well as result.

By contrast, it will be difficult to violate the forum externum of a general internal thought that does not require particular action as necessary for the maintenance of the thought. Hence the uncomfortable attorney refusing to wear a wig is not necessarily asserting a conscientious belief, per se. Here the attorney can maintain her desire through other avenues, such as allowing for more frequent court recesses in which to remove the wig or raising the thermostat controls on the air conditioner, without undermining the ultimate objective of remaining comfortable.[670] The obligation does not relate to the conduct of the individual but rather the result, i.e. to be comfortable.[671]

This distinction between thought and conscientious belief can explain the decision of the ECHR Commission regarding an organisation's challenge to removing its ability to visit prisoners.[672] The founders of the organisation desired to offer free advice to prisoners and the prison service granted unlimited access to prisons. The state denied access following an internal mishap between the organisation and the prison,

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667 See, e.g., Texas v. Bullock 489 US 1 (1991) (comparing conscience to religion); US v. Seeger 380 US 163 (1965) (belief as occupying a parallel position to religion); Loschelder (1990;30) (regarding German law).

668 Robert (1993;24-25) concluding that the right to conscience is not simply a matter of internal faith.

669 See discussion supra at Chapter Four

670 Other avenues of "manifesting" a thought or opinion exist, principally freedom of expression, which do not necessarily centre on upholding a belief per se. See, e.g., AmCHR Article 13 and discussion infra

671 In one sense, this distinguishes a political movement to change a law via civil disobedience, where the result is key, versus a conscientious objection to abide by a belief, where the specific conduct is just as important as the result.

672 11308/84 Utrecht v. Netherlands 46 D&R 200 (1986)

and the organisation challenged the denial. The organisation claimed that disallowing access was a violation of a belief under Article 9. The Commission however deemed the organisation's manifesto as an ideal rather then a belief because there was no particular exercise of a mandated action; the organisation focused on a particular result, to improve the conditions of prisoners. The ideals of the organisation can still be maintained by other means, with a view towards reaching some form of political compromise with the state.

In a somewhat awkward contrast to the ideals of the prison group, other forms of secular beliefs, such as veganism[673] or pacifism,[674] are accorded protection as a manifestation of conscience. The supposed distinction is that these beliefs mandate specific forms of action, ex ante, that relate to a believers' specific conduct. This is opposed to assertions based on singular opinions or thoughts that do not affect the individual in any over-arching or universal manner. Particular 'beliefs', such as not wearing an uncomfortable wig[675] or desiring that one's ashes be scattered over one's grave,[676] have generally not benefited from the right to freedom of conscience protection.[677] Judicial bodies consider these assertions to be individual desires for which the legal system cannot cater in the context of the right to conscience.

Two key criteria for identifying the forum externum are emerging that at this point are necessary, but not sufficient, to demarcate its boundaries. First, the conscientious decision emanating from the forum internum leads to definitive action or inaction in the forum externum. The internal belief provides specific direction for external action according to the belief's underlying directives. Second, the action that composes the forum externum is of a serious nature for the individual's belief system. Prevention of the desired action or inaction will therefore not only impede its performance, but also generate an unyielding predicament that can serve to thwart the belief itself.[678] This internal dilemma is in essence comparable to a violation of a religious belief.

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673 18187/91 H v. UK 16 EHRR CD44 (1993)
674 7050/78 Arrowsmith v. UK 19 D&R 5 (1980)
675 Loschelder (1990)
676 8741/79 X v. Germany 24 D&R 137 (1981).
677 Cf. US case law which upholds "sincere" individual beliefs, discussed infra.
678 Edge (1996); Loschelder (1992;30); Marshall (1995) (relying on this same point as a means of equating the "Free Exercise" of conscience with religion); Childress (1979)

Nonetheless, the noted division between forum internum and externum also raises two essential issues regarding the required boundaries for manifestation in the forum externum. If, as noted by the attorney who objected to wearing the wig, a belief protecting endangered animals is a basis for an assertion, why cannot a 'belief' in being comfortable also be protected? Surely such a belief can derive from a person's forum internum as a belief, and not merely a thought or desire, which can structure one's life in a particular direction, i.e., to always be comfortable?

This contention is similar to the problems raised by various belief systems that use illegal narcotics to practise their belief. Although public policy serves as a limitation to the practice,[679] some decisions focus on the underlying 'belief'. For example, the HRC held that a belief that consists primarily in the distribution of narcotic drugs is not a 'belief' for purposes of ICCPR Article 18.[680] The HRC did not refer to the limitations of Article 18 in reaching its conclusion, thereby indicating some form of narrow definition for the meaning of a belief. Hence even if only a particular form of belief merits preservation, protecting a belief merely because it entails a particular practice is not a sufficient standard. Otherwise, courts would uphold any form of practice deriving from the directives of a 'belief', such as keeping comfortable or ingesting drugs.

Furthermore, can the manifestation of a belief derive from a seemingly non-existent forum internum that requires manifestation? For example, what of an individual who might not identify with atheism yet also not believe in the religion supported by the state? May the local parish force her to pay Church taxes as is the accepted practice in some states[681] or should she be entitled to forego payment because she does not identify with any 'belief'?

On the positive side of exercising a right, are IRA prisoners' assertions to wear special prison clothes unique to a POW[682] entitled to manifest their protest as a conscientious belief? What of an individual's

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679 See e.g. Employment Division v. Smith 494 US 872 (1990)

680 570/1993 M.A.B. v. Canada

681 Capotorti (1979;73) noting practice in Norway and exemption for non-believers. Cf. 1979 HRC Report, A/34/40 Report of Finland stating that church tax served a secular purpose in funding the local census as well as assisting with the upkeep of the church buildings.

682 8317/78 McFeely v. UK 3 EHRR 161 Commission held that it was not equivalent to a 'belief'

desire to forego a burial due to a belief mandating the scattering of his cremated remains over his grave?[683] Are such random 'beliefs', seemingly deriving from political or personal desires that nevertheless entail specific action, suitable for manifestation or should they be classified as random thoughts deriving from an innate idea developed in the forum internum?

The above discussion regarding the forum internum and externum is based on a descriptive distinction between decision and action. Merely acknowledging a right for action in the forum externum however does not solve the initial query regarding the prescriptive breadth for the manifestation of a conscientious belief. If acting according to the belief is the determinant, how do we deal with all other action that might derive from a conscientious decision or create a motivation for action? Must the manifestation centre solely on action taken pursuant to a belief that establishes specific and identifiable directives? What if one's belief system did not establish specific directives for action, such as belief in protecting endangered animals that can lead to a variety of manifestations or an anthroposophic's refusal to join a mandatory welfare scheme?[684]

Alternatively, what if a belief system, such as pacifism, includes actions motivated by the belief, as illustrated by blocking shipments to armament plants or refusing to participate in alternative army service that need not entail discharging military weapons?[685] The problem can also arise in a religious context, such as relying on Church doctrine to claim that one's belief entitles a refusal to undergo a breathalyser test on the Sabbath[686] or that a book should not published because it blasphemes one's religion.[687] Is such a contention an actual 'manifested' action of the conscientious or religious belief or is it too removed from the underlying belief to be excluded from the protection created by the right to conscience?

The rest of this chapter will focus on the nature and implications of a belief. Discerning what a belief mandates or implies for an individual will assist to clarify the scope of the right to conscience in the forum externum. Upon considering this issue in the framework of the international human rights system, the

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683 8741/79 X v. Germany 24 D&R 137 (1981) the contention was not deemed a belief.

684 See, e.g., 10678/83 V. v. Netherlands 39 D&R 267 (1984) (refusal to join state pension scheme on basis of anthroposophic beliefs was not considered an "actual practice" of the belief)

685 See discussion infra at Chapter Six

686 Chaousie v. Police Commissioner 1995 Aust. SASC Lexis 4

687 17439/90 Choudhury v. UK (1991)

question becomes one of interpretation. What type of 'belief' merits forum externum protection under the treaties providing for the right to conscience and what is the scope of manifestations subject to protection?

III. Defining 'Belief'

A. Introduction

The international human rights treaties that codify the right to conscience provide for the manifestation of 'religion and beliefs'.[688] There is no reference to manifestation of conscience, unlike the forum internum where conscience merits specific protection.[689] For example, ICCPR Article 18 codifies the ability 'to manifest his religion or belief' in contrast to the initial forum internum protection of 'freedom of thought, conscience and religion'.[690]

The shift in terminology raises the question whether the term 'belief' includes a claim of conscience as well. The question centres on whether conscience is a norm entitled to a broad manifestation that includes a host of 'beliefs', or does the manifestation of a conscientious belief refer to a narrower, internal, aspect of the right, such as being limited to a 'freedom from' context?

The answer will initially entail a demonstration that the treaties' provision for the external manifestation of 'beliefs' refer to a particular, conative, application of beliefs. The asserted belief is linked to an axiomatic belief system developed in the forum internum that is comparable in status and importance to religious beliefs. Indeed the underlying utility of the term 'belief' in the treaties is to afford protection for conceptions that differ from religion.[691] Commentators have taken a common sense approach towards interpreting belief by defining the term in a broad manner that includes beliefs other than merely formal religious beliefs.[692] International documents have similarly distinguished between religion and belief.[693]

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688 See discussion supra at Chapter Three

689 See discussion supra at Chapter Four

690 Cf. AmCHR, Article 12 and Declaration, Article 2, which uses the terms "religion or whatever beliefs" [emphasis supplied] as a means of underscoring beliefs to include notions external to religion, such as atheism, agnosticism, and rationalism. See discussion supra at Chapter Three

691 See, e.g., E/CN.4/SR.116 at 3-4 (right to conscience need not be equated with religion but beliefs in the general sense).

692 Partsch (1980;214); Boyle (1993;41); Edge (1996); Cumper (1995); Nowak (1993); Krishnaswami (1960;1); Sullivan (1988). Cf. Vermeulen (1992) and (1993); Humphrey (1985).

693 See e.g. ST/HR/SER.A/16 Seminar Encouraging Understanding Tolerance and Respect in Matters Relating to Freedom of Religion and Belief (1984; paragraph 22) "beliefs" defined as "beliefs other then religious beliefs according to the individual's conscience".

When codifying the right to freedom of conscience in the ICCPR, the CHR delegates relied on the 1960 Krishnaswami study that advocated a broad definition for belief.[694] The definition incorporated beliefs held by atheists, agnostics, free thinkers, and rationalists, in contrast to the delegates who desired to focus solely on the manifestation of the religious aspect of right.

The Secretary General's 1960 memorandum further supports this approach. The memorandum states that even though the first part of the paragraph of ICCPR Article 18(1) that provides protection for freedom of 'thought, conscience, and religion' did not include belief, the terms 'religion and belief' of ICCPR Article 18(3) refer to two distinct ideas. The policy reason for adopting a broader approach to 'religion and belief' in Article 18(3) was the risk that defining belief or religion in any structured sense would unduly confine the right without providing for different approaches towards the right in the future.[695]

The HRC's General Comment to Article 18 further supports the approach to 'belief' as a term with different connotations than its counterpart term 'religion'.[696] The HRC specifically supports a broad construction of the term 'belief',[697] by not limiting the application of Article 18 to:

> traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[698]

While this statement is more a description than a definition of the term, it indicates that the HRC is applying an interpretation of the term 'belief' that can incorporate belief systems that differ from religion.

Whether the interpretation will also incorporate a manifestation of conscience depends upon the implications of the term 'belief' as interpreted in judicial fora. One can categorise the approach towards the manifestation of conscience as either being of a narrow or broad nature. The narrow approach limits

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694 See A/4625, 8/12/60, item no. 34, where the CHR delegates noted specific reliance on the Krishnaswami study.

695 Krishnaswami (1960;1). See also UN./GA./15th Session, Third Committee, mtg. 1024, remarks by Liberia advising not to translate the term "religion" since the result would be too subjective; Edge (1996) (noting similar considerations regarding ECHR article 9); E/CN.4/1475, at 140 (travaux preparatoires to Declaration making same point regarding definition of "religion and belief").

696 McGoldrick (1991;100) noting that General Comment of HRC is generally of a sharper nature since they do not focus on a particular state; Shelton (1986) (presumption that General Comment are final word for interpreting ICCPR).

697 Similar to the drafters of the treaties, the HRC did not define the term, so as to include all forms of religion and belief. See CCPR/C/SR.1162 (travaux preparatoires to HRC's General Comment to Article 18).

698 General Comment to Article 18, paragraph 1

manifestation to the 'actual practice' of a particular doctrine by pre-determined beliefs.[699] For example, limiting pacifism, a protected conscientious belief,[700] to manifestations that only entail an 'actual practice' of pacifism. Manifestation of the belief therefore includes conscientious objection to military service. General actions deriving from the belief are not construed as 'actual practice', such as refusing to pay taxes supporting the armed services or engaging in alternative military service that does not involve the use of weapons.

The broader approach recognises the right to manifest beliefs that derive from an individual's conscience, without necessarily being an 'actual practice' of the belief. An individual in the US, for example, can rely on pacifist ideals to refuse employment in an armaments' factory and still be entitled to unemployment benefits.[701] Pursuant to the broader approach, manifestation of conscience can emanate from a general motivation that derives from a belief.[702]

As will be discussed in the next few sections, a narrow reading of the right that limits manifestation to 'actual expressions' of a belief is the favoured approach in international judicial fora. The remainder of the chapter will compare and contrast the narrow and broad approach towards the meaning of belief, with a view towards understanding the implications of each approach.

B. Narrow Approach Towards Conscientious Belief

The key factor for the narrow approach is that the belief in question must be of a universal nature whose principles are practised within a particular pre-defined framework. The belief's directives must also serve a uniform function for all individuals who identify with the belief.

Despite its narrow application, the right to conscience can still manifest in limited instances. The 'freedom to' manifest the right to conscience[703] provides for actions according to a beliefs directives that

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[699] Beddard (1993;114); Edge (1996); Vermeulen (1993;84) noting that it is not the personal motivation, but the "objective characteristics of the relevant act" which determine whether the act falls within the scope of the law.

[700] See e.g. 7050/75 Arrowsmith v. UK 3 EHRR 218 (1978)

[701] Thomas v. Review Board 450 US 707 (1980)

[702] Rimanque (1993;157) (distinction between manifestation and motivation is unfair and superfluous in light of derogations inherent in article which protect against arbitrary reliance on the right); 7050/78 Arrowsmith v UK 3 EHRR 218 (1978) (Opsahl for dissent) (requirement for conscience need not be "clearly manifesting a belief" if action is based on a genuine belief which provides motivation for the action).

[703] Krishnaswami (1960;29-46) proposed the distinction between freedom from and freedom to the exercise of the right to freedom of religion

adhere to particular practices of the belief.[704] Hence a pacifist has the right to assert the freedom to believe in pacifist ideals, such as not using deadly weapons and foregoing military service.[705] Freedom to would not include the right to object to other actions that support the military, such as refusing to engage in alternative military service[706] or objecting to payment of military tax. Freedom to is a positive assertion of a right to conscience that affords the individual the ability to manifest only particular beliefs.

Upholding the right to freedom of conscience can also derive from the freedom from approach towards a belief. The freedom from a belief centres on limiting applications of religious beliefs supported by the state, such as forced participation in religious ceremonies or taking an oath.[707] If a state supports a particular ideology, it must not impose the ideology on those who do not identify with the belief, such as an apostate in a fundamentalist Muslim states.[708] The freedom from then applies to prevent coercive state practises when a state 'requires individuals to support the practices of a faith with which they do not agree'[709] such as mandating all public school students to participate in prayers[710] or salute the flag.[711] The HRC's General Comment to Article 18 alludes to such protection when defining morals as deriving from a host of sociological and philosophical traditions, such that a limitation for moral reasons must 'be based on principles not deriving exclusively from a single tradition'.[712]

Some commentators favour defining the right to conscience solely within the context of the freedom from approach[713] because the manifestation of a conscientious belief can be quite broad and, at times,

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704 Krishnaswami (1960;32)

705 Cf. Krishnaswami (1960;43) who deems military conscientious objection as a freedom from. Since his report, pacifism has been accepted as a conscientious belief which is entitled to manifestation. 7050/78 Arrowsmith v. UK 3 EHRR 218 (1978); 1567/85 Fritz v. France 11 EHRR 67 (1988). See generally discussion infra at Chapter Six.

706 See e.g. 20972/92 Raninen v. Finland 84 D&R 17 (1996)

707 Krishnaswami (1960;42)

708 See e.g. E/CN.4/1994/79, CHR, 50th Session, where the rapporteur to the Declaration noted that the disallowance of apostasy in Muslim states posed a central problem for non-believers and the overall right to freedom of religion.

709 Marsh v. Chambers 463 US 783 (1983) dissent to opinion which upheld practice of opening each state legislative session with a prayer from a publicly funded chaplain.

710 Lee v. Weisman 112 SCt 2469 (1992) non-sectarian prayer at public school graduation; D.A.U. College, Jullunder v. State of Punjab AIR 1971 SC 1737 (religious college did not possess right to mandate teaching of religious principles to all students).

711 West Virginia v. Barnette 319 US 624 (1943) Jehovah Witness foregoing pledge of allegiance; Bijoe Emmanuel v. Kerala AIR 1987 SC 748 (similar decision by Indian Court).

712 HRC General Comment at paragraph 8. Cf. CCPR/C/SR.1209 where the HRC members debate the merits of allowing for a pluralist society, especially if a society is rooted in a single religious doctrine.

713 Vermeulen (1993; 82-83); Scheinen (1980)

indeterminable. The freedom from aspect of the right can protect non-believers without having to delve into their internal beliefs.[714] Indeed, ECHR case law indicates such an approach as it generally favours upholding the forum internum[715] while hesitating to practically sustain the forum externum.[716] Conscience is therefore considered solely as a forum internum principle and not entitled to any form of specific manifestation.

For the freedom from approach, the determination is whether the state or religious authority is imposing its beliefs on individuals outside the accepted religious framework. Whether the individual is exercising a particular form or aspect of a belief is not at issue. The resultant protection for the right to conscience is limited to the forum internum, as a non-believer is responding to an overbearing religious assertion.[717] The assertion of the right to conscience then would generally arise in a state that maintains an over-arching ideology or particular religious beliefs.[718]

The narrow approach then upholds the manifestation of a conscientious belief by way of two principal avenues: either pursuant to a specific pre-determined principle, or 'actual practice', of a belief system, or through another human right that incorporates more general manifestations of the belief, such as the right to freedom of expression or assembly.

Religion is a prototype form of belief for the narrow approach, at least in the manner in which the international system interprets religion, because it is an over-arching belief system that provides a lucid, assessable, doctrine for the 'actual practice' of the belief. For example, pursuant to the principles of a religious belief prohibiting abortions, a physician or nurse may refuse to participate in an abortion procedure, even when mandated by the state. It is doubtful however whether religious grounds provide for

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[714] Humphrey (1985) (conscience as an internal right, with external manifestation relating solely to religion or other, similarly identifiable, beliefs); Vermeulen (1990) relies on ECHR case law to establish 'beliefs' as being the equivalent to religious beliefs.

[715] 23380/94 C.J. v. Poland 84 D&R 46 (1996) (focus of Article 9 protection is upholding the forum internum aspect of a belief)

[716] See, e.g., 22838/93 Van den Dungen v. Netherlands 80 D&R 147 (1995) (belief against abortion and right to disseminate literature); 10295/82 C v. K 37 D&R 142 (1983) (pacifist's objection to paying military taxes)

[717] Rather then existing as a right of the individual to assert/manifest a conscientious belief, outside of a religious context.

[718] See e.g. 1979 HRC Report A/34/40 regarding Bulgarian practice to teach ideology of communism, at exclusion of all other forms of religion; 1982 HRC Report, A/37/40 regarding Moroccan limitations imposed on non-Islamic beliefs; 1983 HRC Report A/38/40 regarding Catholic majority in Peru, where Peru noted it was 'willing' to cooperate with other forms of beliefs.

further forms of objection under the narrow approach. Hence, a religious adherent cannot object to a tax payment made to support local abortion clinics[719] since the action is not an actual practice of a belief's directive.

While the narrow approach recognises the existence of a host of forum internum beliefs, manifestation of a conscientious belief is generally linked to other human rights that provide a clearer, and more focused, method of assessing the action.[720] Assessment of the manifestation of a belief then occurs within the context of freedom of expression, such as a Jehovah Witness' refusal to pledge allegiance to the flag in the US,[721] or freedom of assembly, such as protesting due to an infringed belief.[722] Conscientious beliefs will similarly fall under free expression protection, such as a pacifist's dissemination of peace pamphlets,[723] or the right to assembly, such as publicly protesting against fascist views,[724] due to the broad scope of actions that these rights can encompass.

Upon re-considering the initial questions regarding the scope of the right to conscience and the type of belief being protected, the narrow approach furnishes an initial answer. The belief in question must be linked to an over-arching doctrine that provides a universal direction for the individual pursuant to clearly defined principles. In the ECHR, a belief must mandate an actual practice that is an expression of a 'coherent view on fundamental problems' in order for an action to amount to a protected manifestation.[725]

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719 See, e.g., 20747/92 Boussel v. France 16 EHRR CD49 (1993)

720 Beddard (1993;115); Humphrey (1985) (noting parallel between right to religion and assembly); ST/HR/SER.A/16 (protection of secular beliefs generally derives from right to free expression, such that context for considering freedom of conscience is "actual practice" standard); Church of Lukumi v. City of Hialeah 508 US 520 (1993) in a concurring opinion, Justice Scalia notes that examining the link between expression, assembly, and religion poses an issue of vast proportions.

721 West Virginia v. Barnette 319 US 624 (1943). Cf. Bijoe Emmanuel v. Kerala AIR 1987 SC 748 (Indian Supreme Court deciding same case on free religion grounds).

722 Platform Artze v. Austria 44 D&R 65 (1985)

723 vanDijk and vanHoof (1990) noting how right to conscience is supported by free expression. Note however that the ECHR cases deferring to free expression in lieu of the right to conscience have denied the free expression assertion as well. See, e.g., 11567/85 Fritz v. France 11 EHRR 67 (1988) (Commission held that distribution of pamphlets should be banned since they incited incorrect military conduct); 22838/93 Van den Dungen v. Netherlands 80 D&R 147 (1995) (free expression against abortion limited due to legitimate and necessary aim of government)

724 See e.g. 8440/78 Christians Against Racism v. UK 21 D&R 138 (1981) (although assembly was central right for manifestation of group's anti-racist and anti-fascist views, the state had a legitimate security consideration in limiting the protest); 25522/94 Negotiate Now v. UK 19 EHRR CD93 (1995) (assembly to support peaceful negotiations with Ireland was banned due to public order limitation); 19601/92 Ciraklion v. Turkey 80 D&R 46 (1995) (free thought and expression deemed subsidiary to right to assembly).

725 8741/79 X v. Germany 24 D&R 137 (1981); 7050/75 Arrowsmith v. UK 3 EHRR 218 (1978); 8317/78 McFeely v. UK 3 EHRR 161 (1981)

Similarly, in Australia, the courts interpret belief as involving accepted canons of conduct that are practised to substantiate that belief[726] and the Indian courts refer to acts done in pursuance of religion that are integral parts and practices of the religion.[727] While the US has a somewhat subjective standard due to a focus on the individual's sincerity, it too defines belief as a conviction equivalent to religion that centres on an ultimate goal, distinguishes between right and wrong on moral, ethical or religious grounds, and is sincerely held as determined by one's expressions and actions.[728]

An asserted belief deriving from a 'personal' desire will not necessarily meet these criteria. The asserted belief will not provide an over-arching doctrine or mandate specific actions for the practice of the belief. Hence a personal belief, such as removing an uncomfortable wig, or a more general belief, such as protecting endangered species, will not manifest as a belief because they lack pre-determined means for upholding the belief. These assertions do not entail prayer or particular observances of actual practice as mandated by pre-determined directives of the belief system. Rather, the narrow approach will consider the manifestation of such beliefs within the context of free expression and assembly. These rights provide a more practical context for assessing the allowable scope for the manifestation of an asserted belief.

The key characteristic of a narrow approach to the right to conscience then is the comparative role to religion that the conscientious belief must play. As a result, many beliefs, whether emanating from a thought or from a conscientious belief, will be manifested through reliance upon another human right. Because conscience and religion present the strongest link both historically[729] and in practice,[730] it will be the initial focus of discussion, principally to determine the adequacy of the narrow approach to uphold the forum externum right to conscience.

1. Conscience and Religion

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[726] Jones (1994;830) referring to Church of New Faith v. Commissioner of Pay-roll Tax (1983) 154 CLR 120 and noting that the definition excludes non-mainstream religions, such as Aborigines.

[727] HRE v. LT AIR 1954 SC 282; Swami v. TN AIR 1972 SC 1586

[728] See, e.g., US v. Ward 989 F.2d 1015 (9th Cir 1992); International Society for Krishna v. Barber 650 F.2d 430 (2nd Cir 1981) (using similar criteria with regard to Krishna faith).

[729] See discussion supra at Chapter Two

[730] See discussion infra

The manifestation of conscience through religious beliefs is associated with the narrow approach because it limits the range of conscientious manifestations to actions that derive from a particular doctrinal directive of the belief. This generally results in a limited form of manifestation pursuant to a particular practice, as specifically dictated by the belief system.

In the context of the ECHR, manifestation of a belief, be it religious or otherwise, has been linked to the 'actual practice' of a belief. While the standard utilised in the ECHR framework is somewhat illusory due to the difficulty in creating distinctions between beliefs that can manifest and beliefs that cannot, the basic requirement imposed by ECHR judicial fora is to uphold a generally recognisable, and particular, practice that has been pre-determined as a central element of the belief. For example, the Commission indicated that a 'belief' that one's ashes be scattered over the grave is not a formal belief since it does not present a 'coherent view on fundamental problems' but a personal view regarding the manner of burial.[731] Even in situations where the Commission has recognised a formal belief that maintains particular direction, such as anthroposophy, the belief can only manifest as an 'actual practice'. Hence the Commission has interpreted a refusal to join a state pension scheme as being motivated by one's anthroposophic beliefs and not representing an 'actual performance' of the belief.[732]

Manifestation of a conscientious belief in the ECHR occurs within a limited context where the principles underlying the belief serve a purpose analogous to religious principle. Hence a pacifist belief can manifest in circumstances entailing a practice of the belief, such as military conscientious objection, but not in other instances where the action is not a 'generally recognisable form' of practice, such as refusing to pay a percentage of income tax that supports the military.[733] Similarly, when confronted with a more general 'belief', such as an architect objecting to joining a professional organisation where the organisation's political views are at odds with his conscientious beliefs,[734] the manifestation is not considered an 'actual

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731 8741/79 X v. Germany 24 D&R 137 (1980)
732 1067/83 V v. Netherlands 39 D&R 267 (1984)
733 10358/83 C v. UK 37 D&R 142 (1983) (tax being deemed a neutral activity).
734 14331/88 Revert Legallais v. France 62 D&R 309 (1989)

expression' linked to the objector's personal beliefs.[735] Rather the protest is interpreted as a general refusal that is not linked to any pre-determined practice of a belief.

The result is that in the framework of the ECHR, the majority of decisions regarding this right have focused on religious, rather then conscientious, principles.[736] Because the freedom to manifest a conscientious belief is limited to narrow instances of 'actual practice', it is difficult to interpret a conscientious belief as creating any traditional form of pre-determined practice.

In the US, the US Supreme Court will not analyse the merits of an individual's pre-determined religious beliefs.[737] The determination is linked to the strength of the belief that the individual harbours, with the focus on how a belief creates an uncompromising moral issue for the person.[738] Hence a tax exemption for a religious publication violated the Establishment Clause since the exemption did not extend to other groups that focus on accommodating reflection and discussion about 'ultimate values or the contours of a meaningful life'.[739] Similar reasoning was used to uphold the religious sacrifice of animals, despite state law indicating that the ritual was contrary to the wishes of the local public.[740]

A key difference between the approach of the US and the ECHR judicial bodies is that US laws protect individual practice deriving from particular beliefs, whereas the ECHR might not. For example, US courts upheld a Christian's refusal to work on Sunday based on a personal interpretation of Scriptures although other Christians would work on Sunday.[741] Similarly, US courts have upheld an Amish's claim to remove a red triangle from his horse-drawn cart despite the practice of other Amish who used the

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[735] Cf. the ECHR's treatment of individuals who object to paying dues to trade unions. See, e.g., 16130/90 Sigurjonsoon v. Iceland 16 EHRR 462 (1993).

[736] Compare 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1994) (proselytising upheld as part of religious belief) with 11308/84 Utrecht v. Netherlands 46 D&R 200 (1986) (organisation's mandate to assist prisoner's not considered a belief that can manifest in any practical sense).

[737] Thomas v. Review Board 450 US 707 (1981)

[738] Seeger v. US 380 US 163 (1965) (key aspect is the manner in which the asserted belief plays a central role in one's life); Torasco v. Watkins 367 US 488 (1960) (Court defines belief system in broad manner).

[739] Texas v. Bullock 489 US 1 (1991) at 16

[740] Church of Lukumi v. City of Hialeah 508 US 520 (1993). A key basis for overturning the law was due to its specific focus on this form of practice, excluding other forms of ritual practice on animals such as ritual slaughter for Kosher meat. Note that the Lukumi majority attempted to distinguish Reynolds v. US 98 US 145 (1879), which involved a challenge to the Congressional banning of polygamous Mormon marriages, because the legal focus in Reynolds was of a more general public nature. Nonetheless, the Mormons in Reynolds treated polygamy as an "actual practice" of their beliefs. See also Moens (1989)

[741] Frazee v. Illinois 489 US 829 (1989)

triangle,[742] a Native American's refusal to cut his hair despite a prison regulation to the contrary and the lack of any scriptural evidence,[743] and a Muslim prisoner's individual interpretation of religious belief requiring him to grow a beard despite conflicting evidence regarding the religious basis of the practice.[744]

A key factor in the US that might imply a broader understanding of belief is the focus on the 'sincerity' of an individual, as determined by prior adherence to the asserted belief and the individual's current assertion of faith. This was the test applied to a Church of God member who relied on prayer instead of surgery to heal a cancerous tumour, even though her religious sect did not advocate such an approach. The Circuit Court nevertheless granted the woman state assisted benefits.[745] Similarly, the manifestation of a conscientious belief would seem to be protected when linked to an over-arching standard of a sincerely held belief deriving from an individual's moral approach[746] as exemplified by the right for non-religious military conscientious objectors.[747]

One reason for this individual approach is that the US derives protection for freedom of religion from the 'norm of liberal neutrality'.[748] Such an approach, which perceives religion as an individual and secular process, protects a religious belief that is consistent with secular constitutional norms,[749] such as free expression.[750] A court will therefore be hard-pressed to uphold general assertions of a conscientious belief that might be unfair to other individuals. This develops not because of a pre-determined limitation, but as a result of the underlying secular nature of the system. For example, the Supreme Court denied First Amendment 'Free Exercise' protection to an Indian who refused to register his daughter for a social security number. The Indian claimed that the registration would 'rob her spirit'. The Court decided however that

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742 State v. Miller 538 NW2d 573 (Wis. App. 1995)
743 Gallahan v. Holyfield 516 F.Supp. 1004 (E.D.Va. 1981)
744 Lewis v. Scott 910 F.Supp. 282 (E.D.Tex. 1995)
745 Lewis v. Califano 616 F.2d 73 (3rd Cir. 1980)
746 Marshall (1995); Smith (1993) (criteria centre on both subjective views towards belief and broader, more abstract, conceptions); Killilea (1973) (belief creates an uncompromising moral issue in a manner equivalent to a religious belief).
747 But see discussion infra at Chapter Six as the US court provided for the right on grounds of statutory, and not constitutional, interpretation. Welsh v. US. 398 US 333 (1970)
748 Gedicks (1995) referring to a verity of critical legal studies proponents such as Kelman and Unger.
749 See, e.g., Tushnet (1988) (noting as well cases where it was socially inexpensive to grant an exemption, such as allowing Amish to teach their own children); Marshall (1983) (protection for free exercise of religion granted in situations analogous to free expression)
750 See e.g. Heffron v. Krishna Consciousness 452 US 640 (1981) (regulation of distribution of pamphlets, including religious pamphlets, upheld on basis that free expression be applied equally to all).

upholding the belief would create a unique right for a religious belief in violation of the principles of establishment and neutrality.[751]

The seemingly broad exemption for secular conscientious beliefs in the US seems to be the exception rather then the norm. The manifestation of a belief is upheld in the US when the action will either not entail severe social costs by granting undue deference to a particular belief,[752] or other constitutional rights are raised.[753] Indeed, the current problem that some US commentators have with the First Amendment's freedom of religion is the focus on preventing the imposition of a religious standard on the state, rather then an attempt to provide for the manifestation of a belief or 'exercise' of the right.[754]

In India, where the underlying governmental policy of secularism operates in what is a largely religious populace, cases have focused on the degree to which the state will involve itself with religious policy. Hence the state may require a sect to allow for entrance and prayer by all individuals, including lower caste untouchables,[755] or disallow discrimination towards untouchables.[756] When confronted with a conflict between a religious belief and state law, an Indian court will not hesitate to examine the underlying religious principles which formed the basis for the belief[757] and attempt to find available alternatives.[758] India therefore poses an interesting contrast to the US and ECHR because the courts confront issues of religious conflict that have invaded the state's domain and superimpose the social goal of equality and secularism.[759]

The state will actively regulate society in a manner that will conflict with, and even create a change to, a particular religious practice, such as providing divorced women with larger maintenance sums

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751 Bowen v. Ray 476 US 693 (1986)

752 See e.g. Frazee v. Illinois 489 US 829 (1989)

753 Gedicks (1995;112-113) noting the general lack of success for individual free exercise challenges before the Supreme Court.

754 See e.g. Eisgruber & Sager (1994)

755 Yagnapurushdasji v. Muldas AIR 1966 SC 1119

756 The [Central] Untouchability (Offences) Act 1955 (No. 22 of 1955) (law disallowing discrimination of untouchable).

757 Rajasthan v. Sajjanlal AIR 1975 SC 706 (court analyses Jain scriptures to determine whether state regulations regarding management of a Jain temple's trust funds violated the religious requirements).

758 Faruk v. State AIR 1970 SC 93

759 Bijoe Emmanuel v. State of Kerala AIR 1987 SC 748 (Court upheld right of child of Jehovah Witnesses to refuse to sing the National Anthem in school since it infringed a genuine religious belief). The social policy goals provide a more focused determination of genuine action (or sincerity) since the courts more readily refer to the doctrine and practice of the belief.

contrary to a religion's practice.[760] A key goal of the state is to address various inequalities in society to remedy the situation of the under-class.[761] Hence while a religion might require hereditary priesthood as a central tradition of its belief, the state will act in the guise of a social reformer to alter the practice, especially if a priest is serving a secular role while acting as a servant to the Temple.[762]

A case involving a Hindu believer who objected to the use of a photo on a voter registration card highlights the different approach to freedom of religion in India. The determination regarding the practice centred on whether, historically, there existed a religious basis for the asserted belief.[763] The focus of attention for the Indian judiciary was the religion itself and the particular demands which emanate therefrom.[764]

Galanter[765] further clarifies India's approach by distinguishing between the US, as a limitation system, and India, as an intervention system. The US participates in 'shaping' religion, however it is conducted, by:

> promulgating public standards and by defining the field in which these public standards shall prevail, overruling conflicting assertions of religious authority.[766]

Hence the decisions disallowing polygamy[767] or requiring the use of social security numbers[768] as violating the public standards that centre on the strive for a secular, independent, state. Regarding the positive exercise of the right, the US courts will also incorporate socio-religious influences, as exemplified by the decision upholding a Christmas tree and Menorah display in a public square, while disallowing the display

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760 Kahin v. Shah Bono AIR 1985 SC 945 Court upheld law regulating maintenance payments in amounts greater then the pre-determined amount in Muslim law. See also Dhavan (1978)
761 Bharatiya (1987); Chatterjee (1994); Dhavan (1987)
762 Swami v. T.N. AIR 1972 SC 1586.
763 Kuman v. CEC AIR 1961 Cal. 289 (Court held no historical basis for the assertion). But cf. Saheb v. Special Officer AIR 1988 Andh. Pra. 377 where the court held that taking photographs violates the religious principle of haram.
764 See also Narayanan v. State of Madras AIR 1954 Mad. 386
765 Galanter (1992;250-252)
766 Galanter (1992;250)
767 Reynolds v. US 98 US 145 (1878)
768 Bowen v. Ray 476 US 693 (1986)

of a crüche depicting the birth of Jesus[769] or upholding Sunday Closing laws as representative of a secular holiday that enhances family life.

India, on the other hand, is interventionist according to Galanter since the issue is

> more explicit and more complex. The Constitution attempts a delicate combination of religious freedom in the present with a mandate for active governmental promotion of a transformation of India's religions...[it is] an attempt to grasp the levers of religious authority and to reformulate the religious tradition from within, as it were.[770]

Hence an Indian court upheld a Jain festival not only because it was a secular holiday celebrated by all, but also because the state wished to propagate minority beliefs and tolerate, as well as identify with, all forms of faiths.[771] While both legal systems will unavoidably engage in decisions involving a balancing of religious practices against the secularist foundation of the state, India desires to intentionally create a pluralist society[772] composed of diverse views and thoughts.[773] The state therefore plays a more active role in balancing its maintenance of a plural society with equality for all individuals.[774]

On a more practical level however the Indian Courts seem to enforce the right to freedom of religion and conscience in a comparable manner to the ECHR. Pursuant to the interventionist nature of the State's secular policy, the Indian Supreme Court has interpreted Article 25 of the Indian Constitution to incorporate an internal and external dimension. Religion is not only a code of ethics or set of beliefs that an individual may harbour internally, but also includes rituals and ceremonies that are carried out in

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769 Allegheny v. ACLU 492 US 573 (1989). As noted by Galanter, "The American legal setting, [for example,] has made and presumably will continue to make a profound contribution toward shaping religion in the United States." See also Greenawalt (1988) (while government should not promote religion, religion will still play an unavoidable role in society and in political decisions).

770 Galanter (1992;250).

771 Chandra v. Irdui AIR 1975 Delhi 168 Cf. Thornton v. Caldor US (19) (Court upheld Sunday Closing Laws, despite religious overtones, since Sunday had become a universal day of rest).

772 Bharatiya (1987; chapter 1). See also Chatterjee (1994) noting importance of accounting for overall minority representation (in policy-level/national sphere) as a means of ensuring for a secular state which reflects all forms of the population.

773 Bharucha (1994) (Indian secularism is respecting all religions within a framework of equality). The author notes that the strive for equality should be based on a cultural framework which lies between religion and politics, so as to address the instability and differences inherent in relying on any one force to determine the equal position; Bhargava (1994) (noting necessity for a number of ideals in a neutral state)

774 Galanter (1992;249-250) noting the profound contribution made by the state towards shaping religion.

furtherance of the religion.[775] Courts have also upheld acts done in pursuance of the 'essential matters' of religious beliefs[776] that are viewed as 'genuine assertions' of an essential religious belief or practice.

The broad scope accorded to the right to freedom of religion in India seems to include conscientious beliefs as well. Courts have interpreted the right to freedom of religion and conscience as including non-theistic principles which centre on a conscious duty to obey certain rules of conduct. In Mittal v. India for example, the Supreme Court interpreted 'religious activity' as a conscious duty to obey rules restricting one's conduct which need not be theistic. In deciding whether the State could appoint an administrator for a town, the Court held that while the establishment of the town was a secular multi-cultural experiment, the asserted belief, derived from a Yogic ideal, was equivalent to a religion since it maintained a collective system of beliefs, as exemplified by the town's tax provisions, that included adherence to moral practices resulting from the belief.[777] The minority opinion, which agreed that operating a town was a secular activity, noted that 'religion' encompassed thought, belief or faith 'as involving the conscience' and included profession or practices in a particular manner even if the belief was not originally intended as such.[778]

Commentators have also equated the right to conscience with minority beliefs,[779] noting that the manifestation be an essential and integral part of the belief.[780] Religion then is a doctrine that also concerns the conscience and underlying spirit of the person as long as it is capable of being overtly expressed and relates to an essential practice.[781]

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[775] HRE v. LT AIR 1954 SC 282 (referred to as the Shirur Mutt case, where the state's appointment of a manager to oversee funds of a bankrupt religious institution was limited to secular actions of the institution, such as economic or political decisions, and not to funds which were to be used for religious purposes); Swami v. State off T.N. AIR 1972 SC 1586 (right extends to not only doctrines or beliefs but to actions that are integral part of the belief).

[776] Bharatiya (1987; chapter four) noting key requirement for Article 25 (constitutional basis for freedom of conscience) is that the asserted belief be an "essential matter" for the religion.

[777] For purposes of Article 26, ("religious denomination") the Court found a common organisation and distinctive name.

[778] See also Swami v. State of TN AIR 1972 C 1586 (right extends to not only doctrines or beliefs but to actions that are integral part of the belief).

[779] Bharatiya (1987) (although subject to state interest, Article 25 relates to manifesting a general belief as well).

[780] Jain (1987;635); Khawaya (1992;95) (concept of tolerance applies to a host of different beliefs and ideals). Cf. Basu (1988) noting that manifestation of conscience only occurs within the context of free expression, with Article 25 protection relating solely to forum internum.

[781] Bharatiya (1987) (religion as being based on the adherence to moral and ethical rules which, conceptually, incorporate the right to conscience as well).

Nonetheless, courts generally limit the individual's manifestation of a belief to a particular mandated practice. Hence in disallowing polygamy for both Muslims[782] and Hindus,[783] the decisions focused on the distinction between a religion allowing for polygamy, as opposed to requiring a religious adherent to be polygamous. Because polygamy was not a specific practice mandated by the respective religions, there was no violation by the state in restricting the practice. Similarly, in deciding the merits of a state's decision to restrict a religious dance in public, the court focused on the historical importance of the dance for the religion, as the dance forms an essential and integral part of the religion's practice.[784]

What emerges is that in the legal systems examined thus far, a conscientious belief can manifest when the belief requires a particular form of practice. Even if motivation is a factor for the action, it must be linked to a particular practice demanded from the belief system. Furthermore, each system appears to lean towards the narrow approach for the right to freedom of conscience. Even the US, which upholds some manifestations of non-traditional conscientious beliefs, interpretation of the constitutional freedom is linked to other constitutional rights and entangled in the underlying debate between establishment versus exercise of religion.

From the standpoint of international human rights however, the status of the right to freedom of conscience, particularly regarding its link with the freedom of religion under the narrow approach, merits further examination. The problem is twofold. Conscience operates in a different manner than religion, such that deferring to the ECHR's 'actual practice' standard or solely referring to traditional practices might not provide for the proper manifestation of a conscientious belief. Furthermore, the narrow approach cannot avoid the pitfalls raised by a broader approach, even when applying the narrow 'actual practice' test, since both religious and conscientious principles can be practised in a variety of ways.

a. Distinctions Between Religion and Conscience

The consequences for the right to conscience, when considering an approach which centres on religion as a basis for the right, are manifold. The association with religion tends to dilute the right to

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[782] Badhuddin v. Aisha Begum 1957 All.L.J. 300
[783] Bombay v. Narasu Appo AIR 1952 Bom. 84
[784] AIR 1990 Cal. 336 (D.B.)

manifest non-theistic and atheistic beliefs and can exclude the beliefs of formative or socially unacceptable religious minorities.[785] Because an accepted 'universal' belief such as pacifism is not formally subject to specific tenets of action in a manner comparable to a religious belief, the manifestation is subject to stricter limitations and more restricted protection.[786]

The result is that the significance of conscience tends to be either overlooked or accorded secondary status. Merely upholding the forum internum aspect of conscience and focusing solely on manifestation of religious beliefs disregards the importance of the individual's desire to abide by a belief, especially when the manifestation derives from a protected forum internum belief.[787]

Furthermore, disregarding the motivation behind the act can lead to a misunderstanding of the liberty for the manifestation of a belief. For example, there is a distinction between a Christian who kneels and cites the Lords prayer as opposed to an atheist doing the same action on a film set.[788] A reviewing body can generically interpret each 'act' as being religious in nature, with the difference arising from the motivation for the actions. Motivation certainly seems to play a role when an individual is genuinely motivated by a particular belief as demonstrated by the external action. Opsahl noted in his Arrowsmith v. UK dissent that the key criteria for manifestation should be a genuine motivation deriving from the belief, even if not clearly manifested, when the action entails expression of the belief. The second dissenting opinion of Klecker clarified this point regarding the role of motivation by noting the necessity for harmony between the motivation and the act under scrutiny.[789]

Approaching conscience as both a cognitive and conative process,[790] manifestation of the conscientious decision is an essential aspect thereof. The underlying utility of conscience is not solely to

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[785] See, e.g., Perotti (1993;179) (discussing problems relating to education of Muslim minority in France).

[786] Compare 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1993) (ECHR upheld right to propagate religion as a form of practice thereof); Stainislaus v. MP AIR 1977 SC 908 (propagation, as opposed to conversion, was upheld as a form of religious practice) with 11567/85 Fritz v. France 11 EHRR 67 (1988) (pacifist limited in ability to distribute peace pamphlets as a form of manifesting the belief).

[787] Lorenzen (1992) (conscience marks the individual dignity and integrity of the human person); Kordig (1979) (denial of conscientious belief can be equated with denying the individual's fundamental existence and underlying human dignity).

[788] See e.g. Edge (1996)

[789] The next section that discusses the broader approach shall amplify the relationship between motivation and belief

[790] See discussion supra at Chapter Four

protect free thought,[791] but also to root the individual's moral norms in a particular situation.[792] Limiting the manifestation of the conscientious decision therefore tends to undermine the right to conscience ab initio by preventing an exercise of a conscientious belief. This can in turn violate the forum internum as well.

The problem with determining 'practice' further highlights a fundamental distinction between religion and conscience in consequential and utilitarian terms. Religion need not be based on logical reasoning or a deep-rooted moral conviction; it is a matter of faith in objective principles that require particular action by the individual based on a specific duty. Religion is an assertive process that dictates the required action ex ante. One's religious faith results in particular actions that reflect that faith as required by the religion.

The focus then for examining a religious assertion can be the extent, or sincerity, of belief rather then the actual basis of the belief. The proof will relate to the degree of faith or duty one feels towards a religion as demonstrated by one's actions. When coupled with the general judicial policy of avoiding any assessment of a religious belief's underlying validity, as is common in the ECHR,[793] the US,[794] and India,[795] the key factor becomes the sincere assertion of an objective standard of religious doctrine.[796]

The focus for a conscientious determination is different, especially since demonstrating one's sincerity to personal moral beliefs is quite difficult. The practical problem is that due to the subjective nature of a conscientious belief, sincerity can only be demonstrated by an individual's willingness to bear the negative consequences of an action to avoid a breach of a conscientious belief. Such a test then creates a tautology since it undermines the very freedom that one is striving to protect by forcing an individual to demonstrate their sincerity.[797]

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[791] The distinction between freedom of thought and conscience is apparent in the treaties which separately codify the two freedoms. See also discussion supra at Chapter Four

[792] See e.g. Boyle (1990) noting that "Freedom of thought is the internal freedom of the mind. From that freedom of the mind flows the freedom of conscience which is the moral resource of the individual."

[793] See 17086/90 Autio v. Finland 72 D&R 245 (1991)

[794] Hobbie v. Unemployment Appeals 480 US 136 (1987) the US. Supreme Court declared that it would not determine the truth of an underlying belief which is being asserted

[795] Bijoe Emmanuel v. Kerala AIR 1987 SC 748 (key goal is not to assess the belief but to ensure that the belief is held in a genuine manner. The Court also referred to Jamshedi v. Soonabai 23 Bombay ILR 122).

[796] Note that relying on sincerity can be interpreted as creating a new form of limitation as well.

[797] Vermeulen (1993;79-80)

As noted by the discussion regarding the forum internum,[798] conscience derives from a host of internal thoughts and personal beliefs that can be manifested in a variety of ways. The different process associated with conscience indicates that focusing on sincerity towards a conscientious principle will not suffice by merely demonstrating faith in a belief. A link to an over-arching belief is not necessary for conscience since it can derive from subjective evaluations or be based on personal moral principles which need not dictate a particular course of action. The GA's Third Committee alluded to this aspect of the right in noting that conscience is associated, but not equated with, religion since conscience includes philosophical and scientific concepts that relate to a more general understanding of belief, as opposed to religion that is an act of faith.[799]

As a result of the subjective nature of the conscientious process, demonstrating 'sincerity' in the same manner as a religious assertion would be meaningless. Assessment of a 'sincere' conscience can only be understood within the cognitive moral framework of the individual making the assertion. Proving sincerity towards a conscientious belief then will entail clarifying the underlying principles of the conscientious assertion since such principles, similar to the idea of faith in religion, provide the impetus for the individual to act or refrain from acting. For example, Australian case law regarding objection to trade union membership requires an individual not merely to demonstrate belief in particular views, but also:

> it must be shown that there is a deep-seated conviction that those views are right and that the conviction represents something more than persuasion and in a general sense operates to influence the actions of the applicant.[800]

Demonstrating one's sincerity for a conscientious claim will focus on the underlying basis for the belief. For example, proving a 'sincere' objection to military service in the US entails a demonstration of one's prior non-violent or non-militarist behaviour.[801] Similarly, to conscientiously object to jury service in Australia one must prove the genuineness of one's claim based on past behaviour, affidavits from friends

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[798] See discussion supra at Chapter Four

[799] See, e.g., A/C.3/218

[800] Wright v. Minister for Labour and National Service 14 F.L.R. 91 (1969). See also discussion infra at Chapter Six regarding the right to military conscientious objection.

[801] As codified in 32 C.F.R. Ch. XVI part 1636.

and family, as well as provide 'an explanation of their conscientious beliefs.'[802] Such evidence relates just as much to the basis for one's conscientious conviction as it does to the sincerity of one's beliefs. Unlike religion, where prior behaviour involves adherence to a particular tenet of the religion, thereby allowing for the possibility of an objective evaluation of an individual's sincerity,[803] a prelude to the proof of a sincere conscientious belief requires one to first state what that belief entails, especially since a conscientious standard derives from subjective evaluations of particular principles.

The freedom from aspect of the right to conscience demonstrates that a conscientious assertion will entail a focus on the underlying asserted belief. As noted supra, some commentators interpret the narrow approach as limiting conscientious manifestations to situations of freedom from a belief. However this limited application of the right to conscience overlooks the underlying basis for making the conscientious assertion. If a state imposes a religious belief on its population, the conflict with the individual's 'freedom from' aspect of the right to conscience will arise because the individual adheres to another form of belief.[804] This is the common ground for preventing minority sects from the ritual slaughtering of animals for non-consumption purposes.[805] The state imposes its majority's principles as a result of an individual assertion to abide by a belief.

In the typical freedom from example, a religious state disallowing apostasy[806] not only violates the freedom from, to be free from the imposition of an external belief system, but also infringes the individual's freedom to believe or not believe in another religion or belief. The individual might desire to become an apostate not only to remove oneself from a religious framework, but also to practice another religious or conscientious belief or to not practice any belief at all. In each of these instances, asserting the freedom from aspect of the right entails an identification with another form of belief. This identification with a

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802 New South Wales Jury Report (1984) page 40 paragraph 4.7.

803 Usually involving a demonstration that an individual is a member of a particular religious order. See, e.g., New South Wales Anti-Discrimination Board, Discrimination and Religious Conviction (1984) at paragraph 4.37, where proving a sincere objection to jury service for a member of the Christadelphian sect entails a demonstration that the claimant is an avowed member of the religious order.

804 See e.g. Nowak (1993;317)

805 Church of Lukumi v. City of Hialeah 113 S.Ct. 217 (1993); Faruk v. Pradesh AIR 1970 SC 93

806 Which is allowed in the UDHR, ECHR, and ICCPR. See discussion supra at Chapter Three

different belief is a desire to assert the right to believe as well, which is in essence a freedom to harbour a belief.

Krishnaswami hinted at this relationship between freedom from and freedom to when discussing the freedom from protections.[807] He refers to not taking an oath or engaging in military service[808] because the objection against such actions derives from the person's internal belief system. If the basis for freedom from is that a state infringes an individual's belief because of a particular law, the protection deriving from the right to conscience is an assertion of the right to freedom to. Each instance of freedom from manifestation then will entail an understanding of the individual's belief upon which she is relying in order to assert the freedom from claim.

A US case involving a Native American forced to register his daughter's social security number as a pre-condition for receipt of welfare alluded to this symmetrical relationship between freedom from and freedom to. The plaintiff contended that the social security number would 'rob the spirit' of his child.[809] The concurring opinion of Justice O'Connor noted that the Court's attempt to distinguish between an individual not receiving a benefit due to a belief, such as unemployment benefits for leaving employment that violates one's beliefs,[810] as opposed to forcing the government to practice pursuant to the complainant's belief,[811] such as not registering a social security number, is meaningless. Whether the individual is practising a belief, as a 'freedom to' the right, and thereby losing a benefit, or desires to avoid required governmental action, as a 'freedom from' another belief, by demanding particular governmental practice, does not avoid the violation to that individual's system of beliefs. The result is that limiting the right to freedom of conscience solely to a freedom from notion implicitly acknowledges the right to a freedom to manifest a conscientious belief.

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807 Krishnaswami (1960;42-45)

808 Krishnaswami also refers to not participating in religious ceremonies (the basis for which can be adherence to atheist beliefs) and compulsory treatment of a disease (the basis of which is a particular belief against external, or non-natural, medical treatment).

809 Bowen v. Ray 476 US 693 (1986)

810 Referring to Sherbert v. Verner 374 US 398 (1967) and its progeny, such as Hobbie v. Unemployment Commission of Florida 480 US 136 (1987) which uphold receipt of unemployment benefits following a voluntary dismissal for not working on the Sabbath.

811 As the majority contended in Bowen v. Ray 476 US 693 (1986).

Additionally, as a result of the open-ended nature of conscience, manifestation of conscience can apply to a host of varied situations and depend on a number of factors, such as the scope of the principle being asserted or the surrounding events that caused the conscientious conflict. For example, an individual can conscientiously oppose abortion in a number of ways ranging from a refusal to physically perform the act to more general protests such as not paying welfare taxes which support abortions[812] or refusing to type medical forms recommending an abortion.[813] By contrast, because of the link between a religious belief and a particular directive to which a believer will faithfully adhere, a religious objection to participating in an abortion is a clear manifestation of a religious belief. A religion will specifically forbid the taking of life or broadly define when life begins such as to create a bar to performing or participating in an abortion.

While highlighting the distinctions between conscience and religion serves to buttress the position of conscience as a right deserving of protection exclusive of religion, there are also similarities between conscience and religion that will affect the status of the right to conscience. Religion will not always provide a pre-defined basis from which to assess the right to manifest a belief. If the particular action under consideration is not a pre-conceived manifestation of a dictated religious belief, the assertion of the 'belief' seems closer to a conscientious assertion.

Instances can arise involving motivated actions from religious principles, despite the link to a pre-conceived set of universal beliefs. For example, refusing to fiscally support publicly funded abortions might derive from a religious belief prohibiting one's participation in an abortion; however because the manifested action is not an 'actual practice' of a religious belief, it is closer to an assertion of a conscientious belief. Religious standards motivate the individual and, similar to a conscientious assertion, provide an underlying reason for acting.[814]

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[812] See, e.g., 20747/92 Bouessel v. France 16 EHRR CD49 (1993) (conscientious belief in the right to life will not allow withholding of social security tax payments which support state-sponsored abortions).

[813] Grubb (1988;162) (discussing R v. Salford [1988] 2 WLR 442 which involved a secretary who refused to type a doctor's referral letter recommending an abortion).

[814] Note that this very issue formed a central debate in the US. Congress when drafting the Religious Freedom Restoration Act, discussed infra. The drafters were hesitant to explicitly state whether the Act included motivations deriving from religious beliefs due to a pending decision on the legality of abortion from the US. Supreme Court. See Lupu (1995)

In India, decisions interpreting the constitutional right for regulating non-religious or wholly economic aspects of a religion exemplify this point. Scriptures might be ambiguous[815] or reference to other forms of beliefs might be necessary without a clear understanding of the religion under review.[816] Hence while the criterion for manifestation of a belief is 'actual practice', ambiguities inevitably arise since the actual 'practice' will depend on personal insights of the religion's requirements in a manner comparable to a subjective conscientious assertion.

The affinity of epistemological sources between conscience and religion indicates the possibility for comparable treatment when considering both involve the manifestation of particular beliefs. Conscience and religion incorporate transcendent and immanent factors.[817] The transcendent factors relate to the abstract principles that form the basis for the underlying obligation. This can derive from a host of ideas, such as belief in a god, in pacifism, or in what type of food to consume. The individual places the abstract principles within the context of an action based on one's immanent, subjective, perceptions.[818]

While a transcendental view might base religion on over-arching or universal principles, the manifestation and degree of adherence will, as with conscience, depend on the individual's approach to the doctrine. Hence the broad provision in US law for the free exercise of individual views of a religious directive, such as a prisoner growing a beard due to a personal interpretation of his religious doctrine.[819] The US courts recognise the individual derivation and interpretation of religious directives that can in turn lead to a variety of manifestations. Similar to a conscientious belief, religious principles can influence a person in a variety of ways ranging from a strict, positivist, account of religious directives to using religion as a source of inspiration for further reflection.[820] Acknowledging the broad, subjective, range in which

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[815] See, e.g., Rajasthian v. Sajjanlal AIR 1975 SC 706 (state management of temple did not violate religious requirements to manage the temple as a result of ambiguity of the scriptures)

[816] See, e.g., Yagnapurushdasji v. Muldas AIR 1966 SC 1119 (court compared beliefs of petitioners to that of Hindus to demonstrate similarities of religion, despite assertions to the contrary, on the basis of particular philosophies and scriptures).

[817] Smith (1993)

[818] See, e.g., Greenawalt (1988) noting how religious sources incorporate our perspectives on human nature and society which in turn influence our ethical judgements.

[819] Lewis v. Scott 910 F.Supp. 282 (E.D.Tex. 1995) (Muslim prisoner allowed to wear a beard, despite conflicting evidence as to the actual religious requirement)

[820] Greenawalt (1988)

religion acts as a belief system indicates that its manifestation does not radically differ from a conscientious directive.

Reference to religion as a mainstay of unwavering doctrine should still provide for the assertion of more general conscientious principles. Religion does not really assist to distinguish, in any substantive manner, a religious assertion from a conscientious one; the considerations for a court are essentially the same such that the 'actual practice' doctrine does not create a definitive framework.

2. Conscience and Freedom of Expression and Assembly

The narrow approach to the right to freedom of religion and conscience can unduly limit the exercise of the right at the expense of the underlying belief being asserted. There are other avenues for upholding a conscientious belief however that merit examination before discussing a broader approach to the right to conscience.

When attempting to broaden the manifestation of the right to freedom of conscience apart from the religious context, courts and commentators tend to incorporate conscience within other rights, particularly freedom of expression and assembly.[821] Commentators have equated the right to hold opinions of ECHR Article 10 with the Article 9 right to freedom of thought.[822] Some commentators on India and US laws only consider the manifestation of the right through free expression while treating the right to conscience solely as an internal right.[823] The analytical focus shifts to viewing conscience as manifesting through these rights because these rights tend to more readily entail external conduct.[824]

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[821] Note as well other rights, such as the right to the family. These more particular rights however tend to incorporate the right to conscience in rather specific circumstances.

[822] Beddard (1990); Scheinen (1994); van Dijk & van Hoof (1990;413). See also Eide (1995;266) (both freedom of expression (article 19) and freedom of assembly and association (article 20) strengthen the right to manifest one's religion or belief); Benito (1989) (right to freedom of religion and conscience is closely linked with other human rights, particularly freedom of expression and assembly); van Dijk & van Hoof (1990;398) noting the close relation between article 9, 10 and 11 and that the manifestation of conscience is "shored up" by freedom of expression and assembly since the manifestation of these latter rights is not limited to actual expression of a belief.

[823] Basu (1988); Richards (1993)

[824] See, e.g., Cohen-Almogovar (1994) (expression as incorporating action, thereby serving as a means from which to measure tolerance of others); 10126/82 Platform Artze v. Austria 44 D&R 65 (1985) (outward appearance of action, being the assembly, is favoured over the intrinsic significance of the action for the individuals).

Recognising that all forms of speech involve the performative use of symbols to convey ideas as well as information,[825] assertion of externally manifested conduct based on conscientious principles can occur through free expression.[826] In the context of India, for example, the Maneka Ghandi[827] case involved an assertion of the right to travel under the guise of free expression. The Court held that free expression is a fundamental right with narrow limitations that can uphold other rights where the latter are an integral part of free speech or represent an instance of same due to the basic nature and character of the action.

Freedom of expression is also a right which can protect a broad range of expressions.[828] For example, while an individual might object to joining an organisation whose creed conflicts with her conscience, the assertion manifests as a negative speech claim to the right to silence because the requested 'speech', joining the organisation, would appear to an outsider as an expression of identification with the organisation's beliefs.[829]

Similarly, concerning the right to assembly, the concentration for a court centres on the invocation of the right to assembly rather than the asserted belief,[830] such that the right to freedom of conscience is an element of the right to assembly.[831]

Concentrating on the freedom of expression and assembly is also more practical since it avoids an assessment of the merits of a conscientious belief. The focus is on the invocation of the particular right and

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[825] Searle (1967) who defines speech based on acts which are thereby produced or carried out as a result of the speech (due to the impossibility of actually defining a word via any linguistic avenue). See also Searle (1987)

[826] See, e.g., Richards (1993) (speech is key avenue for conscience since ensures for an equal communicative integrity in formation and exercise of the conscience, such that any restrictions on speech would hinder the individual's conscience). But See Barendt (1992;42) disagreeing because not all acts are entitled to free expression (the example he refers to is a terrorist attack whose purpose is to communicate an idea

[827] Maneka Ghandi v. India AIR 1978 SC 597. The authorities had confiscated plaintiff's passport and denied her a right to appeal. The basis of her claim was that denying the right to travel without an appeal was equivalent to a denial of the fundamental right to free speech.

[828] van Dijk and van Hoof (1990) (can express a belief as well as an opinion); Dimitrijevic (1993) (free expression as an absolute right under ICCPR).

[829] Barendt (1992;63-64). Cf. 14331/88 Revert Legallais v. France 62 D&R 309 (1989) (applicant's ideological conflict with professional organisation did not preclude him from paying dues on basis of the right to conscience); R v. Secretary of State Queens Bench Division, 12/1/96 (dismissal of police officer upheld due to possibility that public will identify him with Orange Brigade following his disclosure of membership in the group).

[830] 8440/78 Christians Against Racism and Fascism v. UK 21 D&R 138 (1981) (right to assembly deemed central right for anti-abortion protest march, rather then underlying belief).

[831] See, e.g., Platform Artze v. Austria 44 D&R 65 (1985) (Commission considers right to conscience and expression as elements of right to assembly); 16130/90 Sigurjonsoon v. Iceland 16 EHRR 462 (1993) (analysis of right to expression and conscience precluded by examination of right to assembly); 2522/94 Negotiate now v. UK 19 EHRR CD93 (1995)

not whether an asserted 'belief' lies within the framework of the right. Individuals who refuse to salute a flag because it violates a particular belief, religious or otherwise, demonstrate this advantage. If the analysis is within the framework of the right to free speech, as in the US, the focus is on whether the right to free speech incorporates the act of saluting the flag.[832] If however one comprehends the refusal to salute the flag as a right of freedom of religion, as in India, the analysis will shift from determining whether the right to free expression incorporates such an action, to an assessment of the belief and whether the action derives from a genuine 'actual practice'. Hence the court in India had to delve into the question of whether Jehovah Witnesses harbour a belief not to pledge allegiance to the flag.[833]

Free speech is therefore referred to as an alternative method for manifesting a conscientious belief since it allows for a more direct application of a belief in a manner that avoids any reference or assessment of the asserted conscientious belief. Courts would also be inclined to consider more radical beliefs, such as burning the flag,[834] or decide issues involving conflicts between beliefs.[835] Political speech or negative speech provide a better context for considering the issue rather then focusing on the underlying belief which drove the individual towards such action.

Linking free expression with the right to conscience is particularly suitable for the US where speech is a mechanism for refining and developing the communicative integrity of the individual. Free communication upholds the democratic ideal of evaluating ideas. Hence the broad grant of free speech in the US, since the right incorporates forms of action that relate to the 'communicative integrity' for the critical conscience. This basis justifies 'hate speech' because individuals, and not the state, are to use their inherent conscientious powers of rational conduct and reasonableness to assess the credibility of various expressions, even if the expression tends to offend the audience.[836] Additionally, acts such as burning the

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[832] West Virginia v. Barnette 319 US 624 (1943).
[833] Bijoe Emmanuel v. State of Kerala AIR 1987 SC 748
[834] See, e.g., Street v. New York 394 US 576 (1969).
[835] See, e.g., PA Jacol v. Superintendent of Police AIR 1993 Ker. 1 where Indian court upheld ban on loudspeaker based on applicant's right to negative speech (i.e., not to listen to call for prayer).
[836] Richards (1986;180)

US flag or wearing black armbands to protest the Vietnam War are protected expressions because they relate to a symbolic communication that affects the conscientious perceptions of the greater community.[837]

Nonetheless, while free expression and assembly might be better suited for analysing a particular conflict or upholding the manifestation of a belief, these rights do not universally encompass the full range of manifestation as intended in the international human rights system.[838] Fundamental distinctions between the rights exist[839] so that the reasons for originally turning to the right to expression and assembly to expand the manifestations of a conscientious belief in the forum externum are not necessarily effective.

a. Distinctions Between Expression, Assembly and Conscience

Considering the underlying justifications for free speech and the manner in which conscience can or cannot conform to such theories will demonstrate the problem of incorporating conscience as an aspect of free expression or assembly. The identified grounds for free speech, particularly the search for truth,[840] the right to democratic participation,[841] and the need to allow for self fulfilment,[842] only provide for a limited manifestation of conscience. These cardinal grounds for free expression overlook the underlying assertions and personal ideals involved in a conscientious decision and do not retain the capacity to incorporate all forms of conscientious manifestation.

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[837] Richards (1986;194)

[838] Note as well that free expression under the ICCPR is a derogable right and subject to clawback clauses, while under the ECHR the right is subject to broader limitations.

[839] See, e.g., Dimitrijevic (1993;64) noting the difference between merely harbouring an opinion or thought (which is linked with freedom of expression) as opposed to manifesting a conscientious belief. See also discussion supra at Chapter Four (difference between thought, which incorporates a host of ideas, as opposed to belief/conscience, which is focusing on specific individual standards of action).

[840] This basis can be viewed either as an argument that all assertions are fallible and therefore require an allowance for a free speech challenge or that allowing for free expression ensures for the development of truth in the free marketplace of ideas, whereby all beliefs are ensured of vitality and guarded against undue suppression. See Cohen-Almogovar (1994).

[841] The notion that a rational public should decide which ideas to accept or identify with and that free expression is a necessary component of democracy.

[842] Cohen-Almogovar (1994) perceiving this basis as a means of preserving autonomy, whereby one can advocate ideas and beliefs, protect one's moral sovereignty and general spirit, and challenge accepted social standards. See also Barendt (1992;8-23).

A central ground for upholding free speech is the role it plays in the search for social truth.[843] Encouraging free expression assists society in achieving a broader understanding of what individuals view as the truth, thereby allowing for a more reasoned and measured approach to the truth. The link between this justification and the assertion of a belief derives from the focus on preserving the vitality of an individual's belief by tolerating its outward expression.[844]

The problem with this approach is that the right to conscience is not a consequential notion but a rights-based freedom that morally autonomous individuals may heed their personal, moral, beliefs. The search for truth basis of free speech does not recognise the importance of a conscientious assertion nor that such an assertion derives from a need to adhere to personal conscientious belief. Rather the basis involves a social oriented goal of allowing for an open society that encourages expression of a broad range of ideas, with a view to enabling society to make their own reasoned determination of the truth.

Furthermore, not all conscientious assertions' involve a desire to have others agree or identify with the asserted belief. A vegan's belief in not using printing dye tested on animals typifies such a conscientious manifestation.[845] The reason for only using synthetic printing dye results from the adherence to a belief and not to engage in social discussion or convince society of the merits of a belief.

The truth aspect of expression highlights the distinction between the manifestation of a thought and the manifestation of a conscientious belief.[846] Adherence to a conscientious belief invariably derives from internal directives formed in the forum internum. Communicating a thought can entail an attempt to convince others of the merits of a belief, but it need not raise an action that manifests the belief.[847]

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[843] Barendt (1992;8-13) referring to Mill. Barendt notes however that this approach will not incorporate all aspects of free speech, such as emotive speech or pornography, and is not supported by the various interpretations of the right in domestic courts, especially because the restraints on free speech due to other, public policy or social, reasons. See also Richards (1994;35) (noting how this basis does not conform to US law).

[844] Cohen-Almogovar (1994) who perceives the truth basis as central to free expression. He relies on Mill to form a balancing of striving for the truth versus allowing for respect for others, thereby imposing limitations on free expression where its sole purpose is to incite and cause harm, rather then communicate an idea.

[845] 18187/91 H v. UK 16 EHRR CD44 (1993)

[846] See discussion supra at Chapter Four

[847] This does not discount the problem of proselytising, discussed supra at Chapter . The difference is that a proselytiser is acting pursuant to a belief's directives to convince others of the religion's merits. See 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1993)

The eventual outcome in interpreting conscience within the context of the search for social truth could result in a dismissal of conscientious assertions that do not relate to a social search for the truth. This is particularly the case when equating speech with conscientious conduct since the criteria for deeming 'action' as speech concentrates on the intentions of the actor and whether the public views the actor as communicating the particular idea.[848] Such factors will limit the manifestation of a conscientious belief to specific actions involving communication, while overlooking the underlying reasons for acting.

A related rationale to the social truth basis for free expression is the importance of free speech as allowing for full participation by all individuals in the democratic process.[849] In such a case, expressing one's conscientious beliefs is a form of exercising one's democratic entitlement by familiarising the greater society with one's individual moral conceptions.

Such an argument however is difficult to uphold when considered within the context of an assertion of a conscientious belief. Preserving a democratic society could diminish the very values of the individuals that the society is attempting to support as a result of utilitarian calculations[850] by not focusing on the individual's conscientious calculation and the basis of the assertion.

For example, courts in India limit the reliance on free expression to buttress other rights to actions that retain the 'character and nature' of the right to expression. Hence in the Maneka Ghandi case, the Court compared interference with the right to travel to a more specific preclusion to prevent one from speaking at a conference.[851] However linking the right to travel with free expression might cause a problem when a person is not travelling to lecture at a conference but desires to undergo a pilgrimage to a holy site.[852]

One must still consider the individual making the assertion and not solely the desired effect that the communication is to have on other individuals within society.[853] For example, the military might deny a

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[848] Barendt (1992;47).

[849] Barendt (1992;20).

[850] Barendt (1992); Machan (1989)

[851] Maneka Ghandi v. India AIR 1978 SC 597

[852] See Mason (1993) discussing the right to make a religious pilgrimage

[853] Even an "absolutist" such as Richards (1986;184) recognises this distinction when discussing the allowance for subversive advocacy in a democratic society. He notes the difference between expressing subversion (which is subject to First Amendment free speech protection) versus actually carrying out the action (which is not protected).

See also No OC-5/85 Request by Costa Rica Regarding Compulsory Membership in an Association for all Journalists Inter-American Court of Human Rights, November 13, 1985. The Court held that because journalists engage in the

claim for military conscientious objection due to the potential effect the objector's actions can have on other individuals within the military unit. If the conscientious assertion is an expression that is to have an effect on others, the military might have grounds to quash the assertion without considering the importance of the belief to the conscientious objector. Furthermore, a state might grant a military conscientious objector the ability to express his views but deny the ability to manifest the belief by not granting an exemption from the military.

There is also a problem due to the negative right to free expression. A person might not want to identify with a belief by uttering an expression,[854] such as refusing to take a loyalty oath as a pre-condition for employment.[855] The problem is that it is not clear whether the negative free expression right also applies to not engaging in particular conduct. The latter instance, which can raise the more important issues regarding manifestation of conscience, is not necessarily a protected form of expression under the right not to speak. If covering a motto on a license plate is a form of free speech, where is the doctrinal limitation to free expression?[856] Would a negative speech right also apply to not paying taxes? Referring to the right to conscience for such actions moves the determination into a venue where understanding, but not assessing, the underlying belief is essential, rather then examining the issue solely from the view of free speech.

A similar argument is also relevant to the incorporation of the right to conscience with free assembly.[857] The freedom for an employee to conscientiously object to union membership is narrower when considered within the context of the right to assembly. Courts have dismissed the claim where other unions are willing to take the employee.[858] However, such a systematic approach to the objection being made tends

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communication of ideas, they merit greater protection (as compared with other professionals) when objecting to joining a (compulsory) organisation. The proposed distinction, which centres on the connection of the right to expression with association, could limit the conscientious assertions of professionals who do not engage in the communication of ideas.

[854] Barendt (1992;63-66) (noting distinction between withholding ideas and opinions, as opposed to imparting beneficial information to the public).

[855] 17851/91 Vogt v. Germany 21 EHRR 205 (1996) (loyalty oath to state for language teacher who was member of dissident political party was violation of right to expression despite claims by Germany of internal political unrest). See also Wooley v. Maynard 430 US 705 (1977) (Court upheld Jehovah Witnesses' covering motto "Live Free or Die" on New Hampshire license plate since state, by requiring motto, unconstitutionally abridged right not to speak). The dissent (Rhenquist) did not deem such action as "speech".

[856] Barendt (1992;67)

[857] See, e.g., Leader (1992;175).

[858] See e.g. 14327/88 Sibson v. UK 17 EHRR 193 (1994) (plaintiff's basis for objection was loss of honour stemming from being accused of robbery by co-workers. Plaintiff was dismissed following refusal to join dominant union or switch to another,

to overlook the underlying reason for making the objection, such as asserting a conscientious belief against any form of participation in a union. [859]

The rights to free expression and assembly are subject to broader limitations than the right to conscience.[860] Linking the right to conscience with expression or assembly can thereby create broader grounds for limiting a belief when considered within a different rights context.[861] Furthermore, freedom of expression and assembly are derogable rights in both the ICCPR and ECHR; the right to conscience by contrast is non-derogable in the ICCPR.

An alternative approach to free speech, one which seems closely affiliated with conscience, is viewing speech as a means to self-fulfilment, such that restrictions on speech will inhibit the personal growth and moral sovereignty of the individual.[862] Free expression can serve to uphold the individual's right to freedom of conscience by engaging in arguments against the state based on the exercise of independent reasoning.[863] This ensures a free conscience as well since expression incorporates 'sincere convictions about matters of fact and value in which a free people reasonably has a higher-order interest'.[864]

The question, then, is why limit the right to conscience to the confines of free expression when other avenues exist to preserve the individual's personality, specifically by granting the right to adhere to the conscientious belief? The question seems particularly relevant upon noting that applications of the right to free expression do not support the preservation of one's self fulfilment. For example, other ancillary grounds might limit speech, such as restricting advertising to protect the public, which seems to relate to

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lower status, position); Application of Aper 35 FLR 388 (1978) (Australian Court rejected selective conscientious objection of independent contractor to particular employee organisation).

[859] The dissent in 14327/88 Sibson v. UK 17 EHRR 193 (1994) held that the plaintiff was denied a right to conscience by being forced to either join a union to which he objected or trade his self esteem for a lower paying job.

[860] Compare ICCPR, Article 19(2) with Article 18(3). See, e.g., Hertzberg and Others v. Finland Doc A/37/40 where the HRC gave wide discretion to the state to determine the extent of "public morals" with regard to the right to assembly.

[861] Indeed, the broader allowance for limitations of free expression in the ICCPR was one of the reasons why the US reserved its adherence to Article 19. See Stewart (1993)

[862] Barendt (1992;19); Cohen-Almogovar (1994) referring to this view as the autonomy basis; Richards (1994) referring to this view as the toleration model.

[863] Richards (1994;42).

[864] Richards (1994;38).

paternalistic grounds rather than the individual's self-fulfilment.[865] The very purpose of upholding the right to conscience is to preserve the individual's personality and moral dignity, such that turning to free speech seems superfluous and awkward.[866]

Hence, when confronted with manifestation of a belief rather then expression of a belief, the ECHR Court has held that the right to conscience is the proper context for consideration.[867] The ECHR Court has further limited free expression as a method for upholding the beliefs of others outside a free expression context. For example, in Otto Preminger Institute v. Austria,[868] the Court upheld a ban to screen a film that insulted Christian beliefs by invoking the right to conscience and religion and not because the film was a form of 'hate speech'.

The basic problem with the narrow approach as outlined herein is that it does not prevent the unfettered conscientious manifestation that the freedoms of religion, expression and assembly were meant to avoid. This does not mean that one should never consider conscience within the context of these rights.[869] However, the narrow approach inadequately upholds a conscientious belief because the right is

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[865] See, e.g., 7805/77 Church of Scientology v. Sweden 16 D&R 68 (1979) (restrictions in advert for E-meter on grounds of protecting public. The Commission denied the conscientious claim since the case centred on a commercial issue involving the sale of an item).

Note as well the issue of racial speech which is essentially limited for political reasons. Barendt (1992). Compare Cohen-Almogovar (1994) who bases the limitations of racial speech on the inherent paradox that to allow for toleration of ideas or beliefs, one must be prepared to impose limitations on one's own freedom. His reasoning, which centres on the communication of ideas, is linked to the Kantian notion of respect for others and mutuality among society members such that intolerant members need not be tolerated.

[866] Barendt (1992;64) noting that the existence of a right to conscience essentially moots the notion of referring to free expression when considering the distinction between conduct (or external action) and speech, since any attempt to distinguish the concepts leads to equivocal results.

[867] 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1994) (right of Jehovah Witness to proselytise considered a manifestation of a belief and not a free expression case). See also Eisgruber and Sager (1994) (arguing that the US Free Exercise clause should be treated, like free speech cases, as a vulnerable right which merits protection, rather then a privilege to be weighed against state interests).

[868] 13470/87 Otto Preminger Institute v. Austria 19 EHRR 34 (1995) See also 8710/79 Gay News v. UK 5 EHRR 123 (1980) (similar decision with regard to a publication).

[869] The ECHR Court and US Supreme court for example have noted, in a number of instances, the unavoidable relationship between these rights. See e.g. 7511/76 Campbell and Cosans v. UK 4 EHRR 293 (1982) (must account for freedom of religion and expression when considering merits of human social behaviour); 5095/71 Kjeldsen Buck and Pederson v. Denmark 1 EHRR 711 (1980) (same consideration in context of evaluation of all subjects, not just sex or religious education, in school syllabus); Church of the Lukumi v. City of Hialeah 508 US 520 (1993) (concurrence, Scalia, noting how free expression and assembly should be linked with religious cases, despite vastness of task); Allegheny v. ACLU 492 US 573 (1989) (Court links Establishment Clause determination with underlying message which plaintiff desires to communicate, comparing religious context of crüche display with neutral, secular, display of Christmas tree and Menorah).

almost wholly confined to the forum internum with only a limited right to manifest a conscientious belief. A conscientious belief seems to merit broader protection particularly since the international human rights system has codified the right to conscience and accorded it fundamental status on par with the freedom of religion. The remainder of this chapter, and to a certain extent, of this thesis, will consider the broader approach to the right to conscience and the practical considerations presented by a broad understanding of the right to conscience.

C. Broader Approach

A broader approach to the right to freedom of conscience entails a reliance on conscientious beliefs as a motivating factor for the forum externum. While the movement away from a positive framework of norms is difficult to comprehend for a formal legal system, manifestation of the right to conscience can occur in a manner that does not eviscerate the underlying legal fabric of a society structured by the rule of law.

A positive indication of the movement towards a broader understanding of the term 'belief', specifically as incorporating the manifestation of conscientious beliefs, is the HRC's General Comment to Article 18.[870] The HRC's summary record noted that the underlying purpose in drafting the Comment was to expand the right to freedom of conscience and thought to place these rights on par with the right to religion.[871] The impetus for drafting the comment was that the HRC felt that the state reports were focusing attention exclusively on the right to religion.[872]

As noted by Dimitrijevic, the Yugoslav HRC member and principal drafter of the comment:

> With regard to the freedom to manifest one's religion or belief, freedom of religion implied the right to have or to adopt a religion or belief of one's choice and such freedom applied to thought conscience and religion alike. As for the right to manifestation, it applied solely to religion or belief. It was for that reason that the term 'belief' was interpreted very broadly in the draft general comment in order to encompass all forms of thought and - to use terms which had obviously been avoided in drafting the covenant - beliefs which are not expressed as being the affirmation of a truth. That,

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[870] See Appendix III

[871] CCPR/C/SR.1162 where the drafters to the General Comment note the lack of attention to the right to conscience and a desire to expand on the manifestation of the right

[872] CCPR/C/SR.1162

> indeed, was how religion was defined, since it was based on a belief and not on a scientific premise.[873]

The HRC further distinguished between the forum internum and forum externum. Focusing on the forum internum, the main point of the first paragraph of the General Comment to Article 18 is to equate the right to freedom of thought and conscience with that of religion. However the summary record notes that the internal protection of thought and conscience is not merely to support toleration, but to also provide for the manifestation of the belief.[874] The General Comment expands on this idea by adopting what appears to be a considerable definition of conscience that is to be 'broadly construed' and include non-theistic and atheistic beliefs, in accordance with the travaux preparatoires of the ICCPR. The intention was to encompass all religions and beliefs in all their diversity, even if not regarded as a religion by the state.[875]

The General Comment does recede somewhat from the original broad interpretation of 'belief'. The HRC referred to the Declaration[876] to explicate the terms used to delineate manifestation in Article 18 - 'worship, observance, practice and teaching' - by simply quoting the various forms of religious manifestation stated in Article 6 of the Declaration.[877] In particular, the HRC did not provide a singular interpretation of the term 'practice', especially since it was linked to observance and not distinguished, in any meaningful manner, from manifestation of a religious practice.[878]

While the Declaration might be a valid starting point from which to interpret the scope for manifesting religious beliefs, the travaux preparatoires to the Declaration note that its Article 6 is not an exhaustive interpretation of ICCPR Article 18 rights. The intention of the Declaration was to provide only

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[873] CCPR/C/SR.1162 at paragraph 10. See also Dimitrijevic (1993;64) noting, at a Council of Europe sponsored conference on the right to conscience, that "One of the efforts the (ICCPR) Human Rights Committee is making is to show that in addition to the religious dimension of the freedom of conscience and thought, there is a non-religious secular dimension, ideological dimension, from which many problems stem."

[874] CCPR/C/SR.1162.

[875] CCPR/C/SR.1162 at paragraph 67.

[876] See Declaration Article 6. Note however that the Declaration had accorded a broad definition to the term "belief". See E/CN.4/SR.1522 (broad perception of belief, as including theistic, atheistic, and non-theistic beliefs); E/CN.4/SR.1636 (drafters discussed broad perception of term); Benito (1989) (belief being explanation of meaning of life and "how to live accordingly"); Boyle (1992) (interpreting Article 1 of Declaration as incorporating a broad range of beliefs and not solely religious standards); Walkate (1989) (belief being interpreted in first Sub-Commission report, E/CN.4/Sub.2/711, as entertaining "a belief which may be regarded as a system of philosophy.").

[877] See Paragraph 4 of the General Comment to Article 18.

[878] Cumper (1995)

a partial listing of what the right can include, with a prime focus on protecting religious beliefs.[879] State reports submitted to the rapporteur created under the Declaration support this understanding.[880] It would therefore seem odd that the HRC would rely on a document whose focus is religious protection, when the very reason for drafting the General Comment to Article 18 was to rectify the tendency to refer exclusively to religion rather then other beliefs.[881]

Nevertheless there has been some evidence of a shift towards recognising a broad role for the right to conscience following the 1993 drafting of the General Comment.[882] The HRC has referred states to the General Comment to clarify their reports regarding protections for secular beliefs[883] and State reports have, at times, begun to incorporate considerations of additional aspects of the right, such as the protection of secular, individual, beliefs.[884]

Other systems have also hinted at a broader understanding of the right to conscience. In the ECHR system, the Commission has upheld the manifestation of 'acts intimately linked to the [conscientious] attitude'.[885] While the assertion of a belief must still be within the context of some over-arching or universal system, the acts which stem from the belief can be of a broader nature. Hence a belief system linked to specific acts, such as a vegan's belief towards eating requirements, can manifest in a general manner, such

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[879] See, e.g., E/CN.4/1154 CHR 30th Session (1974)

[880] See, e.g., Report of Rapporteur from 1990 - E/CN.4/1990/46; 1991 - E/CN.4/1991/56; 1992 - E/CN.4/1992/52 as typical examples regarding the sole focus on religious manifestations.

[881] When Committee Member Dimitrijevic was asked why the General Comment did not provide for manifestation of conscience, especially when attempting to develop the right to conscience would seem to imply that manifestation must be allowed for in order to recognise the right, he responded that the HRC desired to adhere to the language and composition of the article.

[882] See, e.g., CCPR/C/81/Add.4 - 1995 Report of US referring to general manifestation of conscience as well as religion.

[883] GAOR 49th Session, Supp.40 A/49/40 1994 Report of Jordan which focused on requirement to register "non-recognised" religions or beliefs; 1994 Report of Slovenia (which had problems with religious education); CCPR/C/28/Add.7 1995 Report of Libya.

[884] CCPR/C/94/Add.2 1995 Report of Ireland, noting change in domestic law to allow for freedom of more general, secular, convictions; CCPR/C/84/Add.3 1995 report of Paraguay, noting that general beliefs are protected by other articles in Constitution; CCPR/C/84/Add.1 1995 Report of Tunisia noting free conscience is defined as allowing for any belief or religion; CCPR/C/81/Add.6 1995 Report of Brazil noting toleration and allowance of general, secular, beliefs; CCPR/C/81/Add.5 - Report of Estonia (general discussion regarding right to belief and opinions); CCPR/C/81/Add.2 - 1995 Report of Azerbaijan noting allowance for any beliefs or "own convictions" even if not in common with other individuals.

[885] 18187/91 H v. UK 16 EHRR CD44 (1993)

as not working with printing dye tested on animals.[886] Other cases involved motivated actions based on a belief, such as objecting to a forced participation in a pension scheme.[887] The manifestation of the belief is upheld even if the acts are only 'intimately linked' to the asserted belief and not an 'actual practice' of a particular directive.

The ECHR Court has also hinted at a broader notion of manifestation without actually addressing the issue by upholding the right of Jehovah Witness to proselytise.[888] While the Court focused on the limitations of the right,[889] the Court seemed to allude to a broader conception of protected forms of manifestation.[890] A subsequent Commission case amplified Kokkinakis for example in allowing Pentecostal Church members to proselytise.[891]

It is interesting that the stance adopted by the Kokkinakis Court regarding a Jehovah Witness' manifestation of a belief is quite similar to, albeit not as broad as, the dissent's position in Arrowsmith, where the Commission upheld a ban preventing a pacifist from distributing literature.[892] The dissent in Arrowsmith maintained that so long as the individual is genuinely asserting a belief, such as expressing a pacifist belief by distributing pamphlets, the action should be considered a manifestation thereof and should be protected. The key factor for the dissent was a genuine motivation deriving from the belief, rather then an 'actual practice' of the belief. In Kokkinakis, while the Court did not directly discuss the right to manifest a belief, the decision did centre on the applicant's desire to express his belief by distributing pamphlets and engaging in discourse.[893]

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[886] 18187/91 H v. UK 16 EHRR CD44 (1993). Note that the case recognised the basis for the belief but denied the claim on security grounds, as the applicant was in prison, a forum which has generally resulted in denial of such claims due to the security interests involved. See e.g. X v. UK 5 EHRR 162 (1983).

[887] See 1067/83 V v. Netherlands 39 D&R 267 (1984) (anthroposophic beliefs asserted as a basis for objecting to pension scheme. Commission held that even if the action might have been motivated by the belief, it was not an actual practice pursuant to a particular directive of the belief).

[888] 14307/88 Kokkinakis v. Greece 17 EHRR 397 (1994)

[889] The Court seemed to apply a standard that is not provided for in the ECHR by balancing state latitude to regulate the right to religion with oversight by the ECHR.

[890] The concurrence noted that the Court should have upheld the applicant's action as a proper manifestation of his belief and the Greek law should have been overturned.

[891] 23372/94 Larissis v. Greece VIII(1) H.R. Case Digest 60 (1997)

[892] 7050/75 Arrowsmith v. UK 3 EHRR 218 (1980)

[893] See also 23372/94 Larissis v. France VIII(1) H.R. Case Digest 60 (1997) (Pentecostal Church members allowed to proselytise while serving in Air force, save for attempting to convince their fellow officers).

Note further a 1988 case with similar facts to Arrowsmith[894] where the Commission disallowed the distribution of anti-military pamphlets at an army base because they incited a lack of military discipline. Using rather odd reasoning, the decision regarding the right to conscience hinged on the contents stated within the pamphlets rather then the action taken by the pacifist. The Commission held that the pamphlets contained material targeting servicemen to ignore orders, which posed a danger to military discipline at the base. The implication is that if the pamphlets merely stated the pacifist's position, the Commission might have treated the action as a manifestation of the belief, in a manner similar to a proselytising Jehovah Witness, despite the absence of any formal directive or mandated actual practice.

Nonetheless, the ECHR has hesitated to apply this broader approach to instances involving more general beliefs. For example, the Commission upheld an injunction against a claimant from standing in front of an abortion clinic distributing pro-life pamphlets. The Commission held that dissuading others from undergoing an abortion did not entail manifestation of a belief.[895] The Commission noted that practising a belief does not incorporate all forms of action influenced by a belief.

Some states also adopt a broad approach to the manifestation of the right to conscience. The German courts define conscience as incorporating any moral decision which the individual treats as binding.[896] In practice, this has included absolute moral decisions which, as a result of their seriousness and weight, create a non-derogable obligation.[897] The key advantage of the German approach is the credence granted to the conscientious belief as a singular right, rather then considering the right within another rights framework, such as religion or speech.

Despite the seemingly broad freedom for the right to conscience in Germany, the various forms of manifestation are, in practice, quite similar to the ECHR.[898] The key reason for limiting the right to

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[894] 11567/85 Fritz v. France 11 EHRR 67 (1988) (pacifist handed out leaflets on military base stating objection to French military presence in Federal Republic of Germany).

[895] 22838/93 Van den Dungen v. Netherlands 80 D&R 147 (1995)

[896] Loschelder (1990;30)

[897] Loschelder (1990;31-32) The author states that conformance with a general system of values (such as a religion or philosophical ideology) as well as membership in a particular sect provide support for the assertion but do not serve as the conditio sine qua non for demonstrating adherence to the belief.

[898] Loschelder (1990;33) referring to the disallowance of Selective military conscientious objection. Cf. 10410/83 N v. Sweden 40 D&R 203 (1984)

conscience in Germany is the underlying necessity to uphold constitutional values, fundamental moral concepts of a pluralist society such as tolerance of others, and general order within the state.[899] As a result, the necessity of upholding the proper function of the state outweighs objections that conflict with various state functions, such as refusing to pay military taxes.[900] Nonetheless, the broad notion of manifestation does seem to apply in Germany.

In the US, where one must demonstrate sincerity towards a belief that is being 'substantially burdened' by a contrary state directive,[901] a broader view of conscience is also feasible. Although the Supreme Court has interpreted belief as being 'parallel to religion' by relating to a fundamental problem of human existence whereby one's faith centres on a higher power,[902] it has also incorporated a more general account by including those who accommodate reflection and discussion regarding the 'ultimate values or the contours of a meaningful life.'[903]

Probably because of the ease with which one can demonstrate sincerity to a religion, as based on the individual's prior behaviour in practising the religion, the Supreme Court has generally focused on protecting formal religious beliefs.[904] Interpretation of the term 'substantially burdened' to provide for individually derived beliefs, such as the right of the Amish to teach their children at home, demonstrates the inclination towards a broader approach.[905] Case law has upheld claims which, although loosely based on formal doctrine, manifest as individually interpreted assertions,[906] such as the desire to wear a beard[907] or to forego a haircut[908] because of general belief principles.

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899 Loschelder (1990;38). Cf. 7511/76 Campbell and Cosans v. UK 4 EHRR 293 (1982) (Court notes necessity of referring to general human outlook and social behaviour when considering corporeal punishment in schools).

900 Loschelder (1990;39-40).

901 The burden of proof then switches to the state to demonstrate that the action was taken due to a compelling state interest and via the least restrictive means.

902 US v. Seeger 380 US 163 (1965)

903 Texas v. Bullock 489 US 1 (1991) at 16; Smith (1993) (asserting that Court has veered towards accepting more general forms of beliefs)

904 Sherbert v. Verner 374 US 398 (1967) (Sabbath observer's entitlement to unemployment compensation); Thomas v. Review Board 450 US 707 (1981) (Jehovah Witness entitled to unemployment); Hobbie v. Unemployment Appeals Commission 480 US 136 (1987) (Seventh Day Adventist).

905 See, e.g., Wisconsin v. Yoder 406 US 205 (1972) Note that the claim did not derive from an "actual practice" but a desire to impress personal values on their children.

906 See, e.g., Frazee v. Illinois 489 US 829 (1989) (Christian's refusal to work on Sunday upheld, despite fellow believers working on that day); Lewis v. Califano 616 F.2d 73 (3rd Cir. 1980) (Court held that member of "Church of God" sincerely

The 1992 Religious Freedom Restoration Act (hereafter, 'RFRA') also has been interpreted to include motivations deriving from a belief system, where the motive is a substantial or important reason for acting, as a basis from which to determine the burden.[909] Courts have thus upheld practices which are only motivated by a formal belief system, such as an American Indian's use of a sweat box in prison[910] or wearing a cross.[911] The broad liberty for asserting religious beliefs under RFRA seems to provide for the inclusion of conscientious beliefs as well. To interpret RFRA solely as upholding religious freedom without considering other secular beliefs would violate the Establishment Clause.[912]

Nonetheless, in June, 1997, the Supreme Court issued a rather narrow interpretation of RFRA.[913] It remains to be seen whether the case definitively defines RFRA or can be interpreted as applying to the specific facts of the case.

Furthermore, even with a broad interpretation of RFRA, courts grant greater credence to legislative policy than to individual beliefs. The Supreme Court has rejected cases such as objection to tax payments,[914] refusal to register a social security number,[915] or a belief in polygamy[916] as being to contrary

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believed that prayer would cure her tumour in lieu of operation, and hence was entitled to Medicaid benefits, even though other adherents to her religion would not agree with plaintiff's actions).

907 Lewis v. Scott 910 F.Supp. 282 (E.D.Tex. 1995) (individual's perception of demands of Muslim religion, despite evidence to the contrary).

908 Gallahan v. Holyfield 516 F.Supp. 1004 (E.D.Va. 1981) (Cherokee's assertion that hair is a sense organ pursuant to beliefs of American Indian provided grounds for foregoing prison haircut); Magele v. Faxonthy 1996 US App. Lexis 16525 (9th Cir. 1996) (Court referred case back to district court with direction that growing a beard could be an assertion of a belief).

909 Laycock & Thomas (1995) defining RFRA's language of "a person's exercise of religion" as including religiously motivated acts. See also Lupu (1995) noting that one cannot claim that an action is merely consistent with a religious belief since the motivation does not solely derive from the belief.

910 Werner v. McCotter 49 F.3rd 1476 (10th Cir. 1995) (American Indian prisoner's demand for sweatbox was deemed being equivalent to a central tenet of his belief). Cf. Bryant v. Gomez 46 F.3rd 948 (9th Cir. 1995) (Pentecostal prisoner desired full individual service. Court found no burden since could practice in inter-faith service).

911 Sasnett v. Sullivan 908 F.Supp. 1429 (W.D.Wis. 1995), affm'd. 1996 US App. Lexis 19203 (7th Cir. 1996) (although not mandated to wear cross, prisoner's assertion was upheld since based on sincere religious motivation).

912 Texas v. Bullock 489 US 1 (1991) (Establishment Clause violated where tax break provided for religious publications and not for other, non-profit/non-religious, publications). See also Marshall (1995) (concluding that all indications point to RFRA allowing for non-religious assertions).

913 The US Supreme Court issued the case at the end of June, 1997 and the means for reading the case were not available to this author.

914 US v. Lee 455 US 252 (1982) (Amish objection to paying social security tax for employees overruled in light of legislative interest in maintaining and running tax system).

915 Bowen v. Ray 476 US 693 (1986) (Court rejected claim that social security number for daughter of American Indian would "rob her spirit" due to entrenched practice of government).

916 Reynolds v. US 98 US 145 (1879) (congressional desire to uphold public safety and order merited rejection of Mormon claim that polygamy was a practice of religious belief).

legislative policy.[917] State courts have similarly decided that deliberately refusing to rent accommodation to unmarried couples, even when properly motivated by a belief, is nevertheless discriminatory.[918]

It seems that both international and state judicial fora are equivocal in interpreting the right to manifest a conscientious belief in a broader manner. While certain motivations deriving from a conscientious belief are granted the right to manifest, there is no systematic recognition of this broader approach.

IV. Conclusion

As noted at the outset when referring to the forum internum as a reference point from which one's beliefs emanate, conscientious beliefs will lead to external manifestations as well. The international human rights system recognises such a necessity and accords protection to the forum externum right to conscience in the form of a negative right, freedom from, and positive right, freedom to. While the magnitude of such protection can be either narrow or broad, the scope of the manifestation will depend on the clarity of the asserted belief. Domestic legal systems also seem to require a structured set of principles prior to upholding the right to manifest a belief.

While this chapter addressed some of the issues raised at the outset, particularly concerning the interpretations to be given to the treaties, more needs to be said regarding the overall scope of the right to conscience. Broadening the scope of the forum externum right to conscience by incorporating motivations derived from a belief is conceivable yet merits further examination. The treaties codifying the right to conscience[919] and various international resolutions and declarations interpreting the right[920] have hinted at a broader approach to conscience. A more particular analysis that considers the mechanics of the right to conscience in various contexts is therefore necessary as a prelude to further explicating the right. The next three chapters will focus on three different kinds of conscientious manifestation that can assist to

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[917] The Court seems to allow for a bending of the rule in two instances; military conscientious objection, US v. Welsh and in cases involving the denial of unemployment benefits. Sherbert v. Verner 374 US 398 (1963).

[918] Smith v. Fair Employment 913 P.2d 909 (S. Ct. Cal. 1996) (the Court noted that manifesting the belief in this instance also harmed the interests of third parties); Swanner v. Anchorage E.R.C. 874 P.2d 274 (S. Ct. Alaska 1994) (Alaska anti-discrimination law clearly desired to incorporate unmarried couples).

[919] See discussion supra at Chapter Three

[920] See e.g. Chapter Six regarding military conscientious objection

demonstrate the mechanics of a broader approach to the right to conscience: objection to the military, objecting to the payment of taxes, and objection to participation in an abortion.

Chapter Six

Military Conscientious Objection

I. Introduction

Following the explication of the internal and external dimensions of the freedom of conscience, the next step is to examine the various applications of the right. Military conscientious objection seems to be a proper starting point as it embodies a typical example of exercising the forum externum right to freedom of conscience. A military conscientious objector is asserting a conscientious belief, generally against the bearing of arms, whereby the requested action by the state, participating in the military, entails a direct conflict with the belief.

The right to military conscientious objection also possibly has attained the status of a norm of customary international law. International institutions such as the General Assembly, Commission on Human Rights, and the Human Rights Committee have elaborated the right in one form or another.[921] A majority of states also provide for the right to military conscientious objection in a variety of forms. Commentators have approached the right to military conscientious objection as a customary norm, following the acceptance of the right in state practice and recognition in international bodies.[922] Further examination is merited, however, before bestowing military conscientious objection the status of a customary international law.

Upon considering military conscientious objection in the international human rights framework however there are two central issues to be addressed. The initial problem is the accepted scope of the right to military conscientious objection. While states might universally recognise military conscientious objection as a valid basis for foregoing military duty, the domestic applications of the right vary. State practice will differ in ways that can affect the very essence of the right, such as discrimination towards military conscientious objectors, disallowing alternative service in place of military service, or distinguishing between religious and secular objectors. The scope of the right also raises the problem of military conscientious objection for the selective conscientious objector, one who objects to a particular

[921] See discussion infra

[922] See e.g., Major (1992); Lippman (1990); Weisbrodt (1988); Wolff (1982); Schwelb (1975)

military action because the action violates principles of international law regarding the initiation of warfare or the humanitarian norms relating to the manner of warfare.

Secondly, while international and domestic law might provide for military conscientious objection, the basis for the right is not clear. International and domestic fora do not universally consider military conscientious objection an exercise of the right to conscience. The reasons range from the unique freedom for military conscientious objection as a form of legislative grace,[923] to the assertions made by a military conscientious objector that do not necessarily involve conscientious considerations but concern the protections offered by other rights.

The problem in looking to other rights as a basis for military conscientious objection is that it can result in a limited scope of the right to military conscientious objection. The grounds referred to are either based on specific prohibitions, such as genocide or apartheid, or combine the freedom of conscience with another human right. For example, one of the key grounds commonly asserted for military conscientious objection is the right to life.[924] Relying on the right to life as a basis for military conscientious objection narrows the focus of the right to the prevention of arbitrary killing. While prevention of random killing includes that of state security forces such as the military, the focus for the right to life is to place a burden on the state to control the actions of its forces.[925] Granted that because a state might inadequately address the arbitrary deprivation of life by its military, at times a military conscientious objection issue can arise for one refusing to carry out such illegal actions.[926] However that claim does not fully encompass the broad form of military conscientious objection upheld by the international human rights system.

Referring to the HRC's First General Comment to ICCPR Article 6 as a means of clarification, one sees that the Comment mentions a state's obligation to engage in the legal use of force. The focus for the discussion is the inherent tension between a state protecting the right to life while also maintaining the ability to take life in given circumstances. There is no reference to the responsibility of the individual actors in the military. Furthermore, the state reports to the HRC rarely mention the connection between warfare

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923 See discussion infra

924 Major (1992); Wolff (1982)

925 See e.g. General Comment I to ICCPR Article 6

926 See discussion infra

and Article 6.[927] Hence, it would seem unrealistic to interpret the right as prohibiting warfare or providing a unitary basis for military conscientious objection because they involve the prevention of taking a life.[928] In a sense, similar to considering freedom of expression and assembly in tandem with the manifestation of conscience, the right to life is a right that works in tandem with the right to conscience to form the groundwork for the right to military conscientious objection.[929]

This chapter will outline the international and domestic development of the right to military conscientious objection, with a specific focus on the manner in which the right to military conscientious objection derives out of the right to freedom of conscience. By highlighting the emergence of common principles in international and domestic systems, a composite standard for the right can develop that will assist in clarifying the content of the right.

II. Military Conscientious Objection in Treaty Articles

A. A Prima Facie Look

The ICCPR and ECHR[930] would seem to provide the perfect underpinning for upholding military conscientious objection as an exercise of the right to freedom of conscience. Codification of the right to conscience[931] and interpretation of its form of manifestation of a belief[932] indicate the possibility for permitting some type of right to military conscientious objection as well.

The problem in relying on these rights as a source for the right to military conscientious objection is the inherent implication in other Articles of these treaties that military conscientious objection is not a protected right under the treaties. In ICCPR Article 8, which abolishes slavery, Article 8(3)(c)(ii) defines 'forced or compulsory labour' as not including:

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927 McGoldrick (1991;334)

928 Dinstein (1980;120). See also Fawcett (1987) noting that the ECHR upholds the right to life and not life itself.

929 Particularly regarding selective conscientious objection and nuclear weapons. The General Comment II to ICCPR Article 6 regards nuclear weapons as a threat to peace. Cf. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, in 35 ILM 809 (1996)

930 The ICCPR and ECHR are discussed herein, at the exclusion of the AmCHR and AfrCHR, because the issue has been raised under the aegis of their respective judicial bodies.

931 ICCPR, Article 18; ECHR Article 9

932 See discussion supra at Chapter Five

> any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors.

Similarly, Article 4(3)(b) of the ECHR provides for:

> any service of a military character, or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service.

The implication from these provisos, as defined by the HRC and ECHR judicial bodies,[933] is that legislatures tolerate military conscientious objection but the right does not derive from the legal framework of the treaties.

Additionally, the drafters of ICCPR Article 18 proposed to incorporate the right to military conscientious objection into the Article. During the drafting of the Article, the delegate from the Philippines proposed the following sub-section:

> Persons who conscientiously object to war as being contrary to their religion shall be exempt from military service.[934]

The drafters however did not accept the amendment, thereby serving as a further indication that the treaties do not provide for the right to military conscientious objection.

Upon a closer examination of the travaux preparatoires however the implications that the right to freedom of conscience does not incorporate a right to military conscientious objection are somewhat dubious. Concerning the definition of 'forced and compulsory labour', the drafters inserted the phrase 'in countries where conscientious objection is recognised' in deference to those countries who did not recognise the right to military conscientious objection.[935] Furthermore, the insertion was based on the International Labour Organisation's approach to military service as unforced labour[936] rather than an indication against

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933 See discussion infra

934 E/CN.4/353/Add.3 and E/CN.4/SR.119. See also E/CN.4/NGO/1 (submission to Secretary General regarding status of military conscientious objection in various countries)

935 A/2929

936 See ILO Forced Labour Convention, 190, No. 29, Article 2, section 2(a), that excludes "any work or service exacted in virtue o compulsory military service laws for work of a purely military character" from being considered forced or compulsory labour.

the right to military conscientious objection. France also pointed out that some states would refuse to ratify the treaty if such a phrase defining forced labour was not inserted.[937]

Similarly, ICCPR Article 8 concerned some drafters as being too broad to exclude the option for military conscientious objection. A debate within the CHR ensued as to whether the Drafting Committee intended to uphold the right to military conscientious objection.[938] The Lebanese Representative desired to focus on the treatment accorded to military conscientious objectors. He proposed that they receive equal service and remuneration and be treated in a proper and humane manner[939] or at least in a non-retributive manner of employ.[940] Furthermore, deference to those countries that did not provide for the right to military conscientious objection was unnecessary because military conscientious objection was a developing trend.[941] Hence the CHR noted at its Seventh Session that the wording of the article could conceivably deprive protection for military conscientious objectors.[942] Israel even suggested that the wording be altered to include compulsory 'alternative' military service, thereby upholding the possibility for military conscientious objection under the ICCPR.

The problem was that some state representatives were apprehensive of a burgeoning of claims from insincere military conscientious objectors should the ICCPR provide an explicit provision for alternative military service. Other representatives felt the provision regarding fair employment went too far and was unnecessarily specific for a general article.[943] While the proposals were rejected due to the inappropriateness of discussing rights not related to the prevention of slavery, the indication is that the clause in ICCPR Article 8 was not meant to remove the possibility that other treaty articles could serve as a source of military conscientious objection.

Regarding the Philippines' proposal for military conscientious objection in ICCPR Article 18, the delegate from Uruguay noted that because Article 8 already recognised the right to military conscientious

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[937] E/CN.4/SR/104
[938] E/CN.4/SR.94 CHR Fifth Session
[939] E/CN.4/SR.94
[940] E/CN.4/SR.103
[941] E/CN.4/SR.104
[942] E/CN.4/528
[943] E/CN.4/SR.104

objection, there was no need to provide for it in Article 18.[944] The delegate from India protested the proposal's focus on the religious aspect of military conscientious objection without accounting for a secular based military conscientious objection right.

Nonetheless, the majority of drafters, including the UK and US, objected to the inclusion of a specific privilege in such a general right.[945] The drafters rejected the proposal because they desired to maintain a certain level of generality in Article 18 rather then refer to specific rights emanating from the right. Note as well the Krishnaswami study, which served as a background for the drafters of Article 18,[946] had referred to the right of military conscientious objection under the proposed article.

The indication is that it is incorrect to imply the disallowance of the right to military conscientious objection from the definition of 'forced or compulsory labour' and the absence of a specific provision in the right to conscience. The drafters clearly desired to uphold the right to military conscientious objection without specifically providing for the right. Rather the Articles were drafted in a manner that would realistically allow for adoption of the treaty by all states.

B. Decisions of International Tribunals

A second important source for determining the basis for military conscientious objection is decisions from the HRC and ECHR. Similar to the reasoning regarding the structure of the treaties, decisions and recommendations of international bodies have generally held that the treaties do not unequivocally provide for the right to military conscientious objection.

In the ECHR, the Commission and Court have not provided for the right due to the ECHR's definition of 'forced or compulsory labour' in Article 4. The ECHR Court has qualified Article 9 by the terms of Article 4.[947] The first military conscientious objection case that arose before the European Court related to a Jehovah Witness' objection to alternative service on conscientious grounds.[948] The Court held

[944] E/CN.4/SR.161. The comment was rather odd considering that the present discussion took place a year after that regarding Article 8. It is possible that the amendments to Article 8 were pending final approval.
[945] E/CN.4/SR.161
[946] See discussion supra
[947] See e.g. 18206/91 Faclini v. Switzerland 16 EHRR CD13 (1992); 5591/72 X v. Austria 43 Commission's Decision and Reports 161 (1973); 7565/76 Conscientious Objectors v. Denmark 9 D&R 117 (1977); 7705/76 X v. Germany 9 D&R 196 (1977); 10600/83 Johansen v. Norway 9 EHRR 103 (1987); 10410/83 N. v. Sweden 40 D&R 203 (1984).
[948] 2299/64 Grandrath v. FRG 10 Ybk. of the ECHR 626 (1967)

that ECHR Article 9 is to be interpreted by reference to Article 4(3)(b) of the Convention, such that alternative service of a non-military character is not a right. A number of subsequent cases before the European Commission have upheld this reasoning.[949]

Additionally, the different treatment accorded to military conscientious objectors is not considered discriminatory since it is not a protected right under the treaty.[950] When the Commission considered the issue of discrimination, the Commission deferred to the state's legal framework, even if the domestic law is discriminatory towards certain military conscientious objectors. For example, in N. v. Sweden,[951] the objector claimed that granting Jehovah Witnesses an exemption from alternative service violated ECHR Article 14 since all other conscientious objectors were subject to alternative service. The Commission held however that the state had an objective basis for discriminatory treatment since Jehovah Witnesses adhere to specific guidelines through strict principles and religious convictions, thereby providing a basis for complete exclusion. The secular military conscientious objector cannot refer to any objective standard specifically to demonstrate sincerity, thereby allowing for different treatment.[952] By comparison, the Commission upheld the reliance on Article 14 where the domestic law discriminated against a particular religion whose tenets disallowed military service.[953] The result is that while it is possible to rely on provisions such as ECHR Article 14 to prevent discrimination against a military conscientious objector, the liberty being recognised by the ECHR Commission stems from the freedom provided by the domestic law and not because military conscientious objection is a protected right under the ECHR.

The HRC has adopted similar reasoning in finding that Article 18 of the ICCPR does not provide for military conscientious objection by inferring from ICCPR Article 8 that military conscientious objection is

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949 See e.g. 10600/83 Johansen v. Norway, 9 EHRR 103 (1987) applicant's refusal of civilian service on ground that it contributed to military activities was denied under Article 9.

950 11850/85 G v. Netherlands 51 D&R 180 (1987); 10640/83 A v. Switzerland 38 D&R 219 (1984); 7565/76 Conscientious Objectors v. Denmark 9 D&R 117 (1977); 5591/72 X v. Austria 43 Collection of Decisions of ECHR 161 (1973); 7705/76 X v. FRG 9 D&R 196 (1977)

951 10410/83 N v. Sweden 40 D&R 203 (1984)

952 See also 11595/85 Suter v. Switzerland, 51 D&R 160 (1986) (military could distinguish between penalties imposed on conscientious objectors who act based on secular or religious reasons, as long as law is applied fairly).

953 Tsirlis and Kouloumpas v. Greece 21 EHRR CD 30 (1996). Cf. dissent who noted that Article 9, in tandem with Article 4, can be interpreted as allowing for the right to military conscientious objection as well by merely applying a wider margin of appreciation.

a voluntary right. In a decision involving the admissibility of a claim, the HRC noted that there is no inherent right under Article 18 requiring a state to grant the right of military conscientious objection.[954] The HRC arrived at this conclusion by referring to Article 8(3)(c)(ii) that prevented construing Article 18 as implying a right to military conscientious objection. Subsequent HRC cases involving military conscientious objection have focused on the equality of treatment accorded to objectors pursuant to ICCPR Article 26. The HRC has upheld distinctions concerning the application of a right to military conscientious objection, such as a state denying a military conscientious objector the right to appeal.[955] The HRC based its reasoning on the premise that the limitation is equally applied to all individuals within the military and that a state may impose military service even if it results in the limitation of an individual's rights.[956]

The HRC has begun to recognise the right to military conscientious objection as deriving from Article 18. The key impetus in this respect derives from the HRC's General Comment that provided a basis for viewing Article 18 as protecting the right to military conscientious objection.[957] Recent cases have alluded to military conscientious objection as being a right provided for in the ICCPR. For example, in a case involving a conscientious objection to military taxes,[958] the HRC noted that Article 18 provides for manifestation of one's conscience, which includes military conscientious objection. While made in passing, the statement reflects the change in the HRC's approach to Article 18, particularly as the HRC was drafting the General Comment to Article 18 at around the same time.

While the HRC and, possibly, the ECHR[959] are slowly moving towards upholding the right to military conscientious objection, the hesitancy in deriving the right from the relevant treaties remains. The right to military conscientious objection has however been the topic of discussion in international bodies. International fora have attempted to clarify the right to military conscientious objection, in particular using the right to freedom of conscience as an underpinning. Hence resolutions and recommendations from the

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954 LTK v. Finland 185/1984 (1986)

955 MJG v. Netherlands 267/1987 (1989); RTZ v. Netherlands 245/1987 (1989)

956 See also discussion infra regarding the right to alternative service.

957 See discussion infra

958 JP v. Canada 446/1991 (1992)

959 See e.g. dissent in Tsirlis v. Greece supra noting that Article 9 should be read as allowing for military conscientious objection.

Commission on Human Rights, Human Rights Committee, Council of Europe, General Assembly, and European Community reflect the range of protection accorded to the right to military conscientious objection.

C. Clarification of the Right

A number of important international bodies have clarified the right to military conscientious objection via particular resolutions or declarations.[960] Elaboration of the right tends to focus on common issues involving the right to military conscientious objection. These issues shall be addressed following a survey of the action taken in each body when considering the right to military conscientious objection and the domestic protection of the right.

1. Commission on Human Rights

Of all the international bodies dealing with military conscientious objection, the CHR has addressed the issue in the most extensive manner. The CHR initially broached the issue under the agenda item Study of the Question of Young People all over the World for the Development of its Personality and Strengthening of its Respect for the Rights of Man and Fundamental Freedoms beginning with its 27th Session in 1971.[961] The CHR discussed military conscientious objection throughout the 1970's, requesting the Secretary General to issue semi-annual reports regarding the status of the right in various states.[962] In 1981, the CHR passed a Resolution noting the need to study military conscientious objection. It requested the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to prepare a report on the issue of military conscientious objection.[963]

The final version of the report, presented in 1983,[964] summarised the status of military conscientious objection in various countries. It recommended that, at a minimum, states provide for a general right to military conscientious objection to any form of warfare. Upholding the common good of society should not

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960 See Appendix IV

961 See e.g. E/CN.4/1068 (1971)

962 See e.g. E/CN.4/1118/Add.1-3 (1973); E/CN.4/1118/Con.1 (1974); E/CN.4/12-13 (1976); E/CN.4/1408 (1980)

963 Resolution 40 of 37th Session of CHR (1981).

964 Asbjorn Eide and Chama Mubanga-Chipoya prepared the report, entitled Conscientious Objection to Military Service E/CN.4/Sub.2/1983/30/Rev.1 (1983) ("Report"). See also E/CN.4/Sub.2/1982/24 (preliminary report).

be a basis for a summary rejection of the right. The report noted that conscientious objection is broader than pacifism as it incorporates genuine ethical convictions reflected in international and domestic law.[965]

The report requested that military conscientious objection be extended to individuals who conscientiously object to the military when used to enforce apartheid, genocide, illegal occupations, gross violations of human rights, illegal weapons, or weapons of mass destruction.[966] As a preliminary framework for the right to military conscientious objection, the report referred to Articles 18 of the UDHR and ICCPR, Article 9 of the ECHR, Article 12 of the AmCHR, and Article 8 of the AfrCHR. The rapporteurs also referred to the right to life as a basis[967] and the Nuremberg Principles that hold individuals responsible for breaches of international law.[968] Furthermore, the report noted that ICCPR Article 8 is a specific provision that disallows objection to military or alternative service on grounds of forced labour and the article should not be interpreted as discounting a general right to military conscientious objection.[969]

In analysing the countries' responses to the rapporteurs' requests for information, the rapporteurs formed three tiers for the right to military conscientious objection: countries with limited rights for military conscientious objectors, countries with alternative service as provided in law or on an ad-hoc basis, and countries that disallow both military conscientious objection and alternative service.[970] The rapporteurs noted that they would also examine countries with a voluntary service. A draft could be re-instituted at any time and conscientious objection issues arise even in an all-voluntary military service.

The rapporteurs noted that the right to military conscientious objection can be based on both religious and ethical grounds, albeit they require a high standard of proof to demonstrate the veracity of ethical convictions.[971] Claimants who have been denied the right to military conscientious objection are repeatedly imprisoned, particularly in countries that disallow alternative service or deny the right to military conscientious objection.[972] The rapporteurs noted that this is a violation of double jeopardy under

[965] E/CN.4/Sub.2/1983/30 at 4-6.
[966] E/CN.4/Sub.2/1983/30 at 7.
[967] Report at 8, referring to the UDHR article 3, ICCPR article 6, ECHR article 2, and the AmCHR art.4.
[968] Report at 9.
[969] Report at 7-8.
[970] Report at 28.
[971] Report at 18-19.
[972] Report at 22.

ICCPR Article 14(7). The objector is repeatedly being jailed for the same violation - sometimes for periods even longer than the actual military service.[973]

Concerning the rapporteurs' actions and additional information received by the Secretary General in the mid-1980's,[974] the CHR proposed a resolution in 1985. The proposal was withdrawn.[975] The CHR decided to re-consider the proposal in 1987, at which time it adopted Resolution 1987/46.[976] Because the CHR desired to reach a consensus on the issue, it toned down the language of the 1987 Resolution.[977] Hence, unlike the 1985 proposal that had used strong language such as 'determines' and 'decides' that military conscientious objection is a 'recognised' right,[978] the 1987 resolution 'appealed' to states to recognise military conscientious objection as a legitimate exercise of UDHR and ICCPR Article 18.[979]

The CHR acknowledged however that military conscientious objection derives from reasons of conscience and profound convictions based on religious, ethical, moral, or similar motives.[980] It also recommended that states adopt an alternative service system and provide impartial review tribunals.[981] The resolution finally placed the matter officially on the agenda of the CHR under the title The role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service.

Twenty-six members of the CHR adopted the Resolution. Fourteen states abstained[982] due to their approach to military service as an honour and duty to be undertaken by all citizens[983] or because they provided for military service in their constitution.[984] Iraq and Mozambique voted against the Resolution

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973 Report at 23.

974 E/CN.4/1985/25. The Secretary General's report reviewed the status of the right in some states and considered submissions by various NGOs.

975 E/CN.4/1985/L.33/Rev.1

976 See E/CN.4/1987/60

977 E/CN.4/1987/SR.54/Add.1 CHR 43rd Session

978 The 1985 proposal also allowed for in-service objection, an option not contained in later resolutions.

979 CHR Resolution 1987/46 at paragraph 1

980 Resolution 1987/46, Preamble

981 Resolution 1987/46 at paragraphs 3-4

982 Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, China, Congo, Cyprus, Ethiopia, German Democratic Republic, India, Mexico, Nicaragua, Union of Soviet Socialist Republics, Venezuela, and Yugoslavia

983 See e.g. remarks by Yugoslavia in E/CN.4/1987/SR.54/Add.1

984 See e.g. remarks by the Congo, Algeria and Venezuela E/CN.4/1987/SR.54/Add.1

claiming that continuing conflicts with Iran and South Africa, respectively, prevented them from supporting the Resolution.[985]

Following additional submissions to the Secretary General by various countries and Non-Governmental Organisations,[986] the CHR passed another resolution in 1989 without a vote.[987] The Resolution explicitly recognised the right to conscientious objection based on Articles 18 of the UDHR and the ICCPR.[988] The grounds for military conscientious objection however were reasons of conscience arising from 'religious or similar motives'. The 1989 Resolution did not mention ethical or moral grounds. Additionally, the Resolution considered the Secretary General's reports by noting that while some states might not provide for a legislative right to military conscientious objection, state practice recognises the right.

The Resolution also expanded the notion of alternative service, noting that such service should be of a non-combatant or civilian character and not a punitive measure.[989] Nonetheless, similar to the 1987 Resolution, the CHR only recommended alternative service and an impartial tribunal to review conscientious objector's claims.[990]

In 1991, the CHR considered the Secretary General's report but deferred consideration of military conscientious objection to its 49th Session in 1993. A cursory review of the Secretary General's report however demonstrates the scope of the problem facing the CHR when attempting to draft a resolution favourable to all participant states. Some states do not recognise any form of military conscientious objection[991] although the majority of states provided for military conscientious objection and alternative service when based on a refusal to bear arms.[992] The particular provisions ranged from only a pre-

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985 E/CN.4/1987/SR.54/Add.1. Cf. Nicaragua who used the same reasoning to abstain from the voting.
986 E/CN.4/1989/30
987 1989/59
988 Resolution 1989/59 at paragraph 1
989 Resolution 1989/56 at paragraph 4
990 Resolution 1989/56 at paragraphs 3 and 5.
991 Madagascar Venezuela, Philippines, Singapore and, despite having a voluntary military, Panama
992 For example, Argentina and Sweden

induction right to military conscientious objection,[993] to disallowing any right of appeal to the military's decision regarding a prospective military conscientious objector's status.[994]

In 1993, the CHR adopted another resolution without a vote.[995] A significant addition to the preamble of the 1993 Resolution was a reference to the developments of military conscientious objection on the regional level and a direct reference to the possibility that individuals may develop an in-service objection to military duty. Furthermore, the preamble included ethical as well as religious motives as grounds for military conscientious objection, although moral motives again were not mentioned.[996] Although possibly only a result of minor semantic distinctions, Paragraph 1 was also changed from 'Appealing for' the right to military conscientious objection to 'Draws attention to' the right of military conscientious objection as emanating from Article 18 of the UDHR and ICCPR.

Paragraph 2 was a wholly new addition and affirmed that those performing 'compulsory' military service who developed an objection, referred to herein as in-service objectors, 'should not' be denied the right of military conscientious objection. The original draft of this paragraph however did not contain the term 'compulsory' and used the term 'cannot' rather then should not.[997] The CHR altered the final draft to allow for an overall consensus.

Paragraph 3 recognised the 'various domestic legislation' regarding military conscientious objection, reflecting its emergence as an accepted customary norm. Paragraph 8 was also a new addition, affirming the importance of providing conscripts with information about the right to military conscientious objection. Of further note is Paragraph 4 that appealed to states to enact legislation for military conscientious objectors who conscientiously objected to 'armed service'. While some Non-Governmental Organisations requested reference to the right to selective military conscientious objection,[998] the Resolution did not make any reference to this aspect of the right.

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[993] See e.g. Chad
[994] Argentina
[995] Resolution 1993/84
[996] Resolution 1993/84 at preamble.
[997] E/CN.4/1993/SR.67
[998] E/CN.4/1993/SR.62

The CHR again requested another report from the Secretary General and decided to review the issue at its 51st Session in 1995. The significance of the Secretary General's 1994 report was that a majority of Eastern-European states formerly part of the Communist Bloc submitted reports noting their recognition of the right to military conscientious objection and alternative service.[999] The CHR then adopted another resolution in 1995.

The key development in the 1995 CHR Resolution[1000] is the Preamble's reference to the HRC's General Comment that recognised Article 18 as a basis for military conscientious objection.[1001] Other changes were the inclusion of ethical and humanitarian, along with religious, motives as grounds for military conscientious objection,[1002] and reference to UDHR Article 14 regarding the right to asylum that is to serve as a basis for a military conscientious objector facing persecution.[1003]

Paragraph 2 of the Resolution improved on the 1993 version by removing the term 'compulsory', thereby extending the right to an in-service objection for voluntary military services. Paragraph 4 was a new addition urging states not to differentiate in their treatment of military conscientious objectors who maintain different forms of beliefs. The CHR also altered Paragraph 7 to incorporate an emerging practice among some states whereby the military conscientious objector's claim is accepted as 'valid without inquiry'. In the final paragraph, the CHR notes that it will refer to the issue again at its 53rd Session in 1997 under the new title, The question of conscientious objection to military service. This demonstrates a more concentrated focus on military conscientious objection as an important right external to the issue of human rights among the youth.[1004] The CHR adopted the 1995 Resolution without a vote.

2. Human Rights Committee

The key indication that ICCPR Article 18 upholds the right to military conscientious objection is the HRC's General Comment to Article 18. Indeed the HRC's reason for focusing on military conscientious objection and not other forms of conscientious manifestation in the General Comment was due to the prior

[999] E/CN.4/1995/99
[1000] Resolution 1995/83
[1001] E/CN.4/1995/SR.59
[1002] E/CN.4/1995/SR.62
[1003] See discussion infra
[1004] See E/CN.4/1995/SR.62

rejection of the right to military conscientious objection. The HRC decided that the time had come to provide for the right under the Covenant.[1005] Hence the HRC considered proposals to include other forms of conscientious objection, such as a doctor's conscientious refusal to perform an abortion, as being already accounted for by the General Comment's amplification of the manifestation of conscience.[1006] Military conscientious objection however merited specific mention as a means of ensuring for the right under the Covenant.

Paragraph 11 of the General Comment to ICCPR Article 18 states that while the:

> covenant does not explicitly refer to a right of conscientious objection, the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience...

The term 'lethal force' referred to any act of aggression that will lead to homicide, such that military conscientious objection is not limited to individuals who do not desire to use firearms. The HRC felt that although using this broader term also upholds a military conscientious objector opposed who is to killing, the phrase should not be interpreted as equating military service with murder.[1007] Rather, one must object to lethal force, language that relates to more general notions regarding an aversion to taking the life of another person. The General Comment also requested states to report on the right to alternative service and noted the desire for ensuring equality of such service with one's military counterparts.

3. Council of Europe

In 1966, the Parliament of the Council of Europe proposed a motion for a recommendation on military conscientious objection.[1008] The following year, the Consultative Assembly passed Resolution 337. The Resolution specifically referred to Article 9 of the ECHR as a basis for military conscientious objection on grounds of 'religious ethical moral humanitarian philosophical or similar motives'. It required that notification be given of the right to military conscientious objection for all conscripts,[1009] that the

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[1005] CCPR/C/SR.1237
[1006] General Comment at Paragraph 8.
[1007] CCPR/C/SR.1237
[1008] Doc. 2076 (1966)
[1009] Resolution 337 at paragraph B.1.

decision making tribunal be separate from the military,[1010] and that an alternative social service be provided on equal terms with their military counterparts.[1011]

The Committee of Ministers received the Resolution by way of Recommendation 478. The Recommendation requested the Committee to give effect to the principles of Resolution 337 through a Recommendation or Convention, and further requested all member states to adopt similar legislation.

Subsequent action in the Council of Europe generally centred on suggestions and opinions to consider the right to military conscientious objection.[1012] The Committee of Ministers however informed the Consultative Assembly that while states addressed the right internally, those not providing for the right might not respond favourably to the proposed changes.

In 1977, the issue was again raised before the Consultative Assembly who adopted Recommendation 816. This document urged the Committee of Ministers to introduce the right of military conscientious objection into the ECHR and consider Resolution 337. The Committee of Ministers again replied that several members had settled the question of military conscientious objection within their own laws, while other states could not provide for such a right.

The Steering Committee for Human Rights then took control of the matter. The Steering Committee appointed Mr. Zanghi who prepared a written report on the status of military conscientious objection in member states of the Council of Europe. The Steering Committee also referred to reports from other international organisations. The key problem noted by the Steering Committee was that although many member states had adopted provisions for military conscientious objectors, the solutions were extremely diverse. The central focus of the Steering Committee's activity in drafting a draft Recommendation therefore was harmonisation of domestic laws and practices.

In 1986, the Steering Committee concluded that the Committee of Ministers was best suited to this end and transmitted a draft Recommendation to the Committee of Ministers. The Council of Ministers

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[1010] Resolution 337 at paragraph B.2.and 3.

[1011] Resolution 337 at paragraph c.1. - 3.

[1012] See Appendix to Resolution 683 (1972) - suggestion by Amnesty International at the 1971 Parliamentary Conference on Human Rights to consider resolution 337; 1974 Opinion of Committee of Experts on Human Rights to consider issue of military conscientious objection.

consulted with the Assembly in 1987[1013] and, at its 906th meeting, adopted Recommendation No. R(87)8.[1014] The document recommended the following: that conscientious objection be recognised as a right albeit without any reference to ECHR Article 9, individuals be informed of the right to conscientiously object prior to enlistment, the military provide for conscientious objection during military service and provide an impartial tribunal or right to appeal to such a tribunal, allow for alternative service and ensure that military conscientious objectors receive benefits on an equal scale to those granted to other military personnel.

In approaching military conscientious objection, the Ministers categorically stated as a Basic Principle in paragraph 1 that all compulsory conscripts are entitled to release from service if 'for compelling reasons of conscience' they 'refuse to be involved in the use of arms'. They can be liable for alternative service. The reference to 'use of arms', as opposed to the HRC's language of 'lethal force', implies a narrower basis for military conscientious objection. The HRC's phrase can refer to a host of beliefs, such as opposition to nuclear weapons, while Recommendation (87)8 focuses on individuals opposed to personally 'using' arms. Hence the term 'compelling', which was meant to discount selective military conscientious objectors who object to the use of particular arms.[1015]

The Ministers, unlike the drafters of the 1967 Assembly draft, specifically did not mention or refer to ECHR Article 9. This was due to the existing case law that does not recognise military conscientious objection as a right under the ECHR.[1016] Nonetheless, the terms 'reasons of conscience' were used to imply that 'all compelling reasons dictated by conscience against being involved in any use of arms are to be considered as a basis for granting conscientious objection status',[1017] thereby encouraging states to avoid a precise definition of the right.[1018] Furthermore, the Ministers noted that while the Recommendation refers to compulsory service, the terms could also be applied to voluntary service as well.[1019]

[1013] Opinion No. 132 (1987)
[1014] Reported at 9 EHRR 529 (1987).
[1015] Explanatory Report to Recommendation No. R(87)8, at paragraph 16. See also discussion infra
[1016] Explanatory Report to Recommendation No. R(87)8, at paragraph 13.
[1017] Explanatory Report to Recommendation No. R(87)8, at paragraph 15.
[1018] Explanatory Report to Recommendation No. R(87)8, at paragraph 16.
[1019] Explanatory Report to Recommendation No. R(87)8, at paragraph 11.

While not using obligatory language,[1020] the passing of these resolutions certainly directs the interpretative bodies of the ECHR to reconsider their position on military conscientious objection and alternative service as a recognised right under the ECHR. Furthermore, another key consideration is proper review for individuals claiming conscientious objector status.

Following the Resolution, the Parliamentary Assembly requested a formal report on the right to military conscientious objection. The reporter, Rodota, issued his final report in 1993.[1021] The report focused on recognition of military conscientious objection as a right under the ECHR, called for a reasonable duration of non-military alternative service, and the right to appeal to a non-military tribunal. As to an in-service right to military conscientious objection, the report upheld such a right due to the possible introduction of new forms of warfare or development of one's beliefs after joining the military. The report furthermore recognised the right to selective military conscientious objection as being based on religious, philosophical, ideological, or political grounds.

The report also referred to other instances of conscientious objection, such as to abortion or military taxes. The rapporteurs noted however that a right to conscientious objection still requires a state to uphold rights equally. Hence the key is to ensure for the manifestation of beliefs along with equality of treatment.

Upon reviewing the domestic state systems,[1022] the report referred to the problem that various state constitutions enshrine the obligation of military service.[1023] The report noted that states have dealt with the problem by interpreting alternative service as falling under a constitutional mandate of military service as well.[1024] Consequently, the report noted key qualitative and quantitative changes to the right to military conscientious objection. Qualitatively, the right has been expanded in scope, particularly concerning alternative service. Quantitatively more countries have begun to provide for the right to military conscientious objection. The key requirements are clear legislative directives, civilian alternative service, and non-military review of rejected applications for military conscientious objectors.

[1020] The resolution either "calls for..." or "urges..."

[1021] Doc. 6752 29/1/93 Report on the Right to conscientious objection to military service

[1022] A review that had previously been conducted in AS/JUR (36)4 and corrigenda; AS/JUR (38)3; AS/JUR (41)17

[1023] Referring to Greece and Italy

[1024] See e.g. Lariccia (1992)

4. European Community

The European Parliament has been active in promoting the right to military conscientious objection .Following a commissioned report in 1982 outlining the status of the right,[1025] the Parliament passed a Resolution in 1983 stating that the right to military conscientious objection is a form of the right to freedom of conscience[1026] and should be accepted as such within the ECHR.[1027] The Resolution affirmed the importance of alternative service, which should not exceed the duration of military service,[1028] and that a written statement regarding one's objection should suffice as proof for a military conscientious objection claim.[1029] The Resolution further stressed the need for harmonisation and fair administration of complaints.

In 1989, the European Community's European Parliament reacted to the lack of activity by the Member States' governments and the Commission over the prior six years. As a result, they passed another Resolution on military conscientious objection.[1030] Various Parliament members also had requested that the issue be addressed.[1031]

The Parliament acted on the grounds of harmonising laws, creating a common social policy and the desire to establish a volunteer youth service for Third World development projects. Furthermore, the Parliament also referred to the Council of Europe's 1987 Resolution and the 1987 CHR Recommendation.[1032]

The Resolution stated that because it is impossible to properly examine one's conscience, a potential conscript 'must' be entitled to conscientious objection, whether armed or unarmed,[1033] on the basis of a declaration setting out the individual's motives.[1034] The Resolution used broad language to provide for in-service military conscientious objection 'at any time',[1035] and 'calls on' states to provide information

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[1025]1 Doc. 1-546/82, referred to as the Macciocchi Report, after its author.
[1026] OJ No C68 14/3/83 ("Resolution")
[1027] Resolution at paragraph 9.
[1028] Resolution at paragraphs 4-5
[1029] Resolution at paragraph 3
[1030] Doc A3-15/89; OJ No C 291/123
[1031] Resolution No c291/123 at Preamble
[1032] Resolution c291/123 at Preamble
[1033] Resolution c291/123 at paragraphs A.-B.
[1034] Resolution c291/123 at paragraph 4
[1035] Resolution c291/123 at paragraph 1

regarding the right to military conscientious objection to all potential conscripts,[1036] along with a proper national appeals procedure.[1037] It further required that the granting of alternative service be on equal terms with military service,[1038] should not exceed more than fifty per cent of the period for military service to compensate for reserve periods,[1039] and should be recognised as a right in the ECHR.[1040]

D. A Provisional Conclusion

The more recent elaboration's of the right to military conscientious objection, in particular the HRC's General Comment to Article 18, give credence to the contention that military conscientious objection emanates from the right to freedom of conscience. More importantly, it serves to further entrench the right to military conscientious objection as an emerging norm of customary international law. While the exact contours of the right are not universally agreed upon, for example the extent of a military conscientious objector's burden of proof, the indications are that the right to military conscientious objection is gaining acceptance.

The opinio juris that can be derived from the various resolutions is particularly important for developing a customary human right norm. As acknowledged by the International Court of Justice,[1041] such statements tend to influence the practice of states and assist to interpret the scope of the law. Additionally, the states, as participants in creating such resolutions, certainly indicate an intention to be bound by the resolutions. They participate in the drafting process or are members of the treaty system that founded the international bodies such that one can infer a notion of responsibility on the state to uphold the norm. Certainly in the international legal framework, where human rights pose a somewhat unique form of international law,[1042] acceptance of the right to military conscientious objection indicates the emergence of a norm of customary international law.

[1036] Resolution c291/123 at paragraph 2
[1037] Resolution c291/123 at paragraph 8
[1038] Resolution c291/123 at paragraphs 3, 6, and 10
[1039] Resolution c291/123 at paragraph 5.
[1040] Resolution c291/123 at paragraph 11
[1041] See e.g. Case Concerning Military and Paramilitary Activities in and against Nicaragua 1984 ICJ Rep. 169 where the ICJ relied on UN resolutions and statements in the GA as indicative of opinio juris, while tending to de-emphasise state practice.
[1042] Meron (1989)

Of course state practice, a key element of customary international law, should not be dismissed. While state practice might be inferable from the fact that international and regional human rights systems are essentially 'codifying' the right, differences in application might occur in domestic jurisdictions. Just because a state consented to a particular resolution in the international sphere does not mean that it perceives itself as being bound by the principle to the extent that it will change its domestic law. Acceptance of the right to military conscientious objection is easier to discern following an overview of the manner in which various state systems provide for the exercise of military conscientious objection. Included in the consideration of the domestic provision for the right to military conscientious objection will be an assessment of more specific features of military conscientious objection, such as alternative service, in-service objection, and the right to a non-military appeal. These particular considerations relating to the scope of military conscientious objection will assist to further define the contours of the right.

III. Domestic Law

Domestic jurisdictions generally acknowledge the right to military conscientious objection for individuals who object to all forms of military service. The differences arise in the application of the right to specific situations. Hence this section will focus on a variety of states, some with a voluntary and some with a compulsory military system. The voluntary systems to be examined are the US, a current military power, two European nations, the UK and Germany, and Australia, which will provide an interesting contrast to the approaches of the European nations. The states to be examined that mandate a compulsory military service are India, Israel, and South Africa. Because these states maintain a democratic system of government and they are confronted with a variety of internal and external security problems, they represent a fair cross-section of the status of the right in a democratic state with compulsory military service.

A. United States

A legislative enactment serves as the basis for military conscientious objection in the US rather than a Constitutional right.[1043] While commentators generally agree that one can infer the right to military

[1043] For the history of the right within the US, see Brown, Kohn and Kohn (1985-86); Kohn (1986); Russell (1951);

conscientious objection from the 'Free Exercise' clause,[1044] the legislative provision of the right has made the issue irrelevant for a court deciding a military conscientious objection case.[1045] Furthermore, while the US maintains an all-volunteer military, the Selective Service Act requires military registration of all 18 year old males.[1046]

Although the Supreme Court has addressed the issue of military conscientious objection in a number of cases,[1047] it has never directly ruled whether military conscientious objection is a constitutional right. Arguably, the Supreme Court has noted in dicta that military conscientious objection is not a constitutional right,[1048] however the context for the decision focused on the statutory requirements for the Naturalisation Act and not the right to military conscientious objection.[1049] While the Supreme Court has issued a decision upholding Congress' ability to compel military service by a draft,[1050] the sole decision dealing with the Free Exercise clause and military conscientious objection was Gillette v. US.[1051] The Supreme Court explicitly noted in Gillette that it was not deciding the constitutionality of a military conscientious objection right per se', but whether the Constitution allows for a distinction of the right between military conscientious objectors and selective conscientious objectors.[1052]

The law[1053] provides for the right to military conscientious objection for all forms of religious training and belief, save for political, sociological, philosophical, or personal moral views.[1054] The

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1044 See e.g. Brown, Kohn and Kohn (1985-1986) (analysing framer's approach to military conscientious objection and concluding that it is a constitutional right); Davis (1991) (Military CO is a constitutional right since dealing with a fundamental interest); Landskroen (1991); Fogarty (1983)

1045 50 USC app. sections 451-471(a)

1046 Military Selective Service Act 50 USC app. section 462 (1982)

1047 See e.g. Selective Draft Law Cases 245 US 366 (1918) (Congress' ability to enact a draft service law); US v. Macintosh 283 US 605 (1931); US v. Schwimmer 279 US 644 (1929); US v. Bland 283 US 636 (1931) (three cases dealing with Naturalisation Act and military conscientious objection) overruled in Girouard v., US 328 US 61 (1946); US v. Seeger 380 US 163 (1965) (CO on basis of non-religious beliefs upheld); Welsh v. US 398 US 333 (1970); Gillette v. US 401 US 437 (1971) (SCO status denied); Johnson v. Robinson 415 US 361 (1974) (veteran benefits denied to alternative service)

1048 US v. Macintosh 283 US 605 (1931)

1049 Davis (1991;194-195)

1050 See e.g. Selective Draft Law Cases 245 US 366 (1918)

1051 401 US 437 (1971)

1052 See discussion infra regarding selective conscientious objectors.

1053 50 USC sections 451-471(a) (1988); 32 CFR Ch., pt.75 (1996). For history of the military conscientious objection in the US, see Russell (1951-52); Brown, Kohn and Kohn (1985-86); Kohn (1986); Chambers (1993;23)

1054 50 USC section 456(j) (1988)

protection of beliefs similar to religion derived from the US v. Seeger[1055] case where the Supreme Court held that objection to war in any form can derive from pacifist or other non-religious belief systems.[1056] Welsh v. US further clarified the decision by recognising the right to military conscientious objection for any moral or ethical belief that acts in a manner similar to a religious belief. The key criteria are the sincerity of the objector, as for example demonstrated by his prior actions, and an objection to all war that is rooted in religious training or beliefs.[1057] The determination of military conscientious objection is a discretionary action of the investigating officer based on an interview with the objector and the submitted proof, such as letters from his minister attesting to the objector's beliefs.[1058]

As a result of the requirement to register without being inducted, one of the key issues currently involving military conscientious objectors in the US is the ability to object to the initial registration.[1059] As the law does not provide for such a right, prosecution has resulted for potential military conscientious objectors who refuse to register under the Act.[1060] The infringement on the Free Exercise clause is deemed minimal. The objector is complying with an administrative necessity that involves a minor, incidental, burden on the objector's beliefs, particularly when weighed against the administrative burdens involved.[1061]

Commentators however have noted that this reasoning is questionable[1062] since accommodating the objector's beliefs should be through the least restrictive method available. The state could provide another column in the registration form for individuals to denote that they would object to the military.[1063] Such a registration form could further the military's preparedness for a possible re-instituting of the military draft,

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1055 US v. Seeger 380 US 163 (1965)

1056 Note that the Second Circuit had originally decided the case on Establishment Clause grounds. The Supreme Court however limited its analysis to the law itself.

1057 See 32 CFR Ch. section 75.5(1)(1)-(3). See also Taylor v. Clayton 601 F.2d 1102 (9th Cir. 1979)

1058 See e.g. 32 CFR Ch. section 75.6. Cf. Sullivan (1992) criticising the manner of review that entails the investigating officer engaging in a review of the credibility of the individual's beliefs

1059 See e.g. Landskroen (1991) (contending that the right to object to registration is a constitutional right under the Free Exercise clause); Reilly (1988)

1060 See e.g. US v. Schmucker 815 F.2d 413 (6th Cir 1987)

1061 Rostker v. Goldberg 453 US 57 (1981); US v. Schmucker 721 F.2d 1046 (6th Cir 1983)

1062 Fogarty (1983); Kellet (1984); Landskroen (1991); Reilly (1988)

1063 Congress raised this proposal, see HR Rep. No. 223 98th Cong. 1st Sess. at 43 (1983), but was rejected by the Selective Service System. See 98th Cong. 2nd Sess. 837 (1984)

a key reason for implementing the registration process, since the military would have already identified those individuals wishing to claim military conscientious objection status.[1064]

With regard to alternative service, the option exists in case a compulsory military draft is re-instituted. Furthermore, alternative service provides an option for individuals who develop an in-service conscientious objection to the military after voluntarily consenting to join. The law provides for non-combatant alternative service, such as in the military's medical corps, for those opposed to combatant training. For those objecting to any connection with the military, alternative service that contributes to the health, safety, or interest of the nation can be arranged.[1065]

B. United Kingdom

The ability to exercise the right to military conscientious objection in the UK's volunteer service derives from specific legislation.[1066] The principal law is the National Service Act 1948[1067] that upholds the right to military conscientious objection against performing military service, combatant duties, or being registered in the military register. A written application by the objector serves as the basis for the military conscientious objection claim. A specially constituted local tribunal considers the military conscientious objector's application to determine the sincerity of the objection and whether an entitlement exists for a complete exemption or one involving civilian duties.[1068] An appeal on legal grounds can be made to a court of law.[1069] No reported cases have dealt with the selective military conscientious objection or the distinction between religious and secular objectors. A secular based objection can however be construed from the law.[1070]

C. Australia

Australia, which also maintains a voluntary military service, provides for a legislative military conscientious objection option for all individuals who demonstrate a conscientious objection to engaging in

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[1064] Fogarty (1983); Kellet (1984)

[1065] See Eberly (1993;60) referring to Reagan's institution, while the Governor of California, of a California Ecology Corps in 1971 for alternative servicemen

[1066] For a brief history, see Harries-Jenkins (1993)

[1067] Section 173(2)

[1068] Harries-Jenkins (1993;69)

[1069] Lyall (1990;171)

[1070] Lyall (1990;171)

military service.[1071] The asserted belief need not be grounded solely in a religion but also can be a durable and compelling moral conviction.[1072] The key is a deep rooted conviction that serves to influence the external actions of the military conscientious objector. The Legislature expanded the law in 1992 to incorporate selective conscientious objection as well[1073] and it provides for a right of appeal to a 'Conscientious Objector Tribunal'. While the military conscientious objection has the burden of proof, an independent Administrative Appeals Tribunal can hear an appeal following a negative decision.[1074]

D. Germany

Before the drafting of the 1949 Basic Law, military conscientious objection was virtually non-existent in Germany.[1075] By contrast, Article 4(3) of the Basic Law provides that:

> No one shall be forced to perform armed military service against the dictates of his conscience.[1076]

This is quite a unique constitutional right, given that there is a mandatory draft in Germany. In essence, the Constitution is providing for a right not to serve in the military, subject to the administrative laws that interpret and apply Article 4(3).

The phrase 'armed military service' implies a specific form of military conscientious objection where the claim involves an opposition to killing another human being against his conscience through the use of weapons. The objection incorporates all forms of service involving the use of weapons, including for example ammunition supplies or even transmitting orders regarding deployment of weapons.[1077] Hence the German courts have ruled out objections to particular forms of weapons or particular forms of warfare because the individual is not against all performances of armed service.[1078] Furthermore, religious or secular grounds can serve as the basis for the objection, such as pacifist or ideological reasons, or because

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[1071] Defence Act (1992) section 61CA-CV, formerly the National Service Act 1951 section 29(19)(b). For a history military conscientious objection in Australia (and England), see the remarks of Wendeyer, J. in ex parte White 116 CLR 644 (1966).
[1072] ex parte Thompson (1968) 118 CLR 488
[1073] See discussion infra
[1074] Defence Act section 61 CA(1) and CV(1)
[1075] Kuhlman and Lippert (1993;98)
[1076] Kuhlman and Lippert (1993;98)
[1077] Loschelder (1990;34-35)
[1078] Loschelder (1990;33) referring to BCerfGE 12, 45; BVerwGE 60, 336.

performing an act would entail a severe conflict of conscience.[1079] Intellectual or political objections are not, alone, sufficient but can serve as a basis for making an objection.[1080]

The law recognises an in-service objection.[1081] The military conscientious objector is subject to a review by an administrative proceeding with the option of appeal. Following the changes to the system in 1984 however, the Federal Office of Civilian Service peruses the written statements to ensure that they conform to the legal requirements, with an oral hearing being conducted for in-service objectors.[1082]

Performance of alternative service is universally required. Such service is of a civilian nature, such as service in hospitals or environmental protection. Alternative service cannot exceed the length of regular military duty however a longer duration, up to one-third longer than military service, is the general norm.[1083] This difference has been upheld to counterbalance the additional duties imposed on military conscripts, such as quartering in barracks or future reserve duty.[1084]

The law upholds an objection to alternative service by having the objector take up private employment in the social service sphere generally employing other alternative servicemen and of a duration equivalent to military conscripts.[1085] Otherwise, the alternative service objector would be subject to the criminal code.

The Military cannot impose multiple punishments for repeated refusals to conscript or perform alternative service.[1086] Nonetheless, if an individual refuses to serve following an initial administrative decision and while an appeal is pending, the individual can be subject to prosecution even upon the granting of the military conscientious objection claim on appeal.[1087]

E. India

[1079] Amnesty International POL 31/1/91 at 9 referring to a Federal Constitutional Court decision.
[1080] Kuhlman and Lippert (1993;99)
[1081] Kuhlmann and Lippert (1993;98); Loschelder (1990;33) referring to section 2 of the Act on Conscientious Objection.
[1082] Kuhlmann and Lippert (1993;100) noting that nearly 99 per cent of requests for military conscientious objection are granted; Loschelder (1990;34)
[1083] Fifteen months as opposed to twelve months for military conscripts.
[1084] Kuhlman and Lippert (1993;101) contending that alternative service provides for indispensable social work at a cheap rate; Loschelder (1990;35-36) referring to BVerfGE 69, 1 at 28.
[1085] Loschelder (1990;37)
[1086] Loschelder (1990;36)
[1087] Amnesty International POL 31/1/91 at 9-10.

India's Constitution contains a specific provision upholding the freedom of conscience.[1088] The government has noted however that military conscientious objection is not an issue due to an all-volunteer military.[1089] As a result, cases dealing with military conscientious objection are virtually non-existent. The Court's have indicated in other contexts that, in accordance with Article 23(1) of the Constitution, the state may impose a compulsory service for a public purpose.[1090] The case, which centred on a challenge to compulsory service in the civic police force, did not involve a conscientious challenge but focused on the basis for interfering with his business, free movement, and forced labour.[1091]

Furthermore, service in the military in India is a coveted position offering many social benefits.[1092] In light of this desire, the military has experienced recruitment from a diverse range of social levels during the 1980's and provided for vertical social mobility and acceptability of all castes within the military.[1093]

F. Israel

In Israel, where military service is mandatory, Section 36 of the Defence Services Law states that the Minister of Defence may, by order, alter the size of the regular forces or reserve forces for education, security, national economy matters and family reasons or 'for other reasons' and:

> (1) Exempt a person of military age from the duty of regular army service or reduce period of the regular service of a person of military age;
> (2) Exempt, for a specific period or absolutely, a person of military age liable to reserve service from the duty of reserve service for a set period of time or permanently.

Interpretation of the phrase 'for other reasons' has included those individuals who conscientiously oppose military service, with the government reserving the power to grant the right. The Military either accepts the claim or has its decision challenged before the Israel Supreme Court.[1094]

[1088] Article 25

[1089] See CCPR/C/37/Add.13 (1991)

[1090] Samanta v. Magistrate AIR 1958 Calcutta 365

[1091] The court held the duty was outside business hours, the state can impose a reasonable restriction on free movement, and forced labour generally centres on traffic in human beings.

[1092] See e.g. Karim (1994)

[1093] Sinha and Chandra (1992)

[1094] See, Courts Law, 1957 section 7 that enables one to appear, in the first instance, before the Supreme Court sitting as a High Court of Justice should the individual desire that an elected official or public body act, or refrain from acting, in a given situation.

The Military grants an automatic exemption to women[1095] and Non-Druze Arab men and women. Furthermore, governmental policy grants an automatic exemption to Jewish males studying at religious schools.[1096] The right to military conscientious objection in Israel therefore appears to be ad-hoc without any real right being incorporated into the law.

The central element in the Israel Supreme Court decisions dealing with conscientious objection has been that of military necessity. In the two principal decisions involving military conscientious objection decided by the Court, the key elements were consideration of military needs, with the Court generally deferring to the military's determination. For example, in Elgazi v. Minister of Defence,[1097] the Military determined that the effect of a protest or action would cause damage to the Army, such that the personal motivation of the individual must succumb to the public necessity.[1098]

Another case[1099] involved a conscientious objection to service in Lebanon during the Lebanon War of 1980-81. The objector deemed the war illegal as it violated the underlying justifications for military behaviour. The concerns of the Army were a lowering of morale and an overall outbreak of objections to service in Lebanon. Furthermore, the objector was undermining the Military's operations. The Military desired to ease the tasks of all its soldiers and provide more leave time for the soldiers already stationed in Lebanon.[1100]

The Israel Supreme Court referred to specific regulations that granted the Military the right to enforce service as it sees fit.[1101] Although section 23 of the Defence Service Law states that reserve duty will not include a reservist's period spent in jail,[1102] the Military's internal regulations regard prison time as

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[1095] Defence Service Law, Section 30.

[1096] See, e.g., H.C. 40/70 Baker v. Minister of Defence, Resolution c291/123 24 (1) 238 (petitioner denied standing to challenge exemption of religious students); H.C. Resler v. Minister of Defence Piskei Din 42(2) 441 (1980)

[1097] H.C. (High Court) 470/80, Elgazi v. Minister of Defence, (unreported)

[1098] Elgazi, at 5.

[1099] H.C. 734/83 Shein and others v. Minister of Defence, P.D. 48(3) 393 (1984)

[1100] Shein at 397.

[1101] Shein at 397. The Court also noted other sections in the Defence Services Law that demonstrate the latitude given to the military. Section 19 allows the commander to order reserve duty at a place and time that the commander sees fit, sections 20 and 21 allow monthly and yearly variations in reserve duty and section 26 grants the Minister of Defence the right to prolong reserve duty service.

[1102] Unless a military or civilian court declares otherwise.

part of a reservist's period of duty.[1103] The Military's regulations also require a reasonable interval both before and between military service to make it easier for soldiers.[1104]

In this instance, the Military had recently altered the regulations with the premise of avoiding a massive protest. Calculation of reserve duty would not include a conscientious objector's jail time and reserve orders were effective immediately.[1105] The Court upheld the new regulation since its purpose was to ensure that all army personnel satisfy the security needs of the Army.[1106] Recognising the right to object affects the Military's strength as well as the morale of fellow army personnel since one missing soldier increases the burden of service for the remainder of the unit members who are serving.[1107]

The right to military conscientious objection in Israel is largely in the hands of the Military. The Military has historically handled instances of military conscientious objection on a case by case,[1108] with no real policy emerging for individuals desiring to exercise the right.

G. South Africa

South Africa provides an interesting contrast to Israel since South Africa also maintains a compulsory draft. The difference is that the law specifically provides for the right to military conscientious objection .Before the end of the apartheid regime in the early-1990s, the key problem for military conscientious objectors in South Africa was the narrow application of the military conscientious objection law.[1109] The right to military conscientious objection only applied to religious pacifists who objected to all wars.[1110] Changes began to appear in the late-1980's when military conscientious objection was for the first time granted to a Buddhist believer.[1111] In 1990, the court mentioned in dicta regarding a case involving the

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[1103] Shein at 398. The Court referred to Chapter 5 section 22(3) of the Army Regulations
[1104] Shein at 397-398.
[1105] Shein at 398.
[1106] Shein at 399.
[1107] Shein at 399.
[1108] See e.g. This is not my War, Ha'aretz Supplement, 10/1/97 at 26 discussing three cases of military conscientious objection during the 1956 Sinai campaign against Egypt.
[1109] Defence Act 44 of 1957; Mthombeni (1991/92)
[1110] See e.g. S v. Farber 1985 1 SA 340 (O); S v. Lewis 1985 4 SA 623 (T); Berat (1989) for a comprehensive history of military conscientious objection in South Africa up to 1988.
[1111] Hartman v. Chairman 1987 1 SA 922 (O)

sentencing of an in-service military conscientious objection that the right includes non-religious objectors as well.[1112]

The law was amended in 1992 to provide for military conscientious objection on grounds of morals, ethics, or religion, and an alternative service system was established.[1113] Furthermore, the Bill of Rights, at section 14, provides for the right to freedom of conscience that can also incorporate the right to military conscientious objection.[1114] Additionally the Constitution recognises the right of a soldier to refuse an order if the action would constitute a legal offence or would breach the international law of armed conflict then binding on the Republic of South Africa.[1115]

The key determination for military conscientious objection status is sincerity of the objector and the deep rooted nature of the conviction, as well as the individual's prior conduct and the prevention of anarchy. The review board will provide for a narrow objection to combatant training as well as a more general form of objection to any connection with the military.[1116]

H. Provisional Conclusion

The domestic laws of the states that have been examined[1117] appear to recognise a right to military conscientious objection. This reflects the protection provided for by international organs. The key difference between the domestic protection and the international protection is that the right to military conscientious objection in the domestic context usually derives from legislative action rather then constitutional rights upholding the right to conscience. Where the right derives from a constitutional right, the parameters of the objection are limited, as in Germany or India.

The remainder of this chapter will discuss the more particular attributes of the right to military conscientious objection. Selective military conscientious objection is not provided for however international and domestic law recognise the right to alternative service, in-service objection, and the right to appeal to a neutral reviewing body.

[1112] S v. Toms and S v. Bruce 1990 2 SA 802 (A)
[1113] Defence Act 44 of 1957 section 72 A & B
[1114] Smith (1996) interpreting the provision as including the right to military conscientious objection
[1115] Constitution of South Africa, Act 200 of 1993, section 226(7)
[1116] Joubert, Harms and Wessels (1995)
[1117] As well as the majority of states examined by the CHR's rapporteurs.

IV. Specific Issues

A. Alternative Service

The initial issue confronting the right to alternative service is whether it is an automatic requirement once the right to military conscientious objection is recognised. From a practical standpoint, most states that grant the right to military conscientious objection establish an alternative service system. As a purely practical matter, alternative service establishes a positive contribution by military conscientious objectors and serves as some form of a deterrent for insincere objectors. Hence while domestic law does not universally recognise alternative service, it is in a similar position to military conscientious objection as an emerging customary international principle.

Similar to military conscientious objection, the key focus in the right to alternative service is determining the limits of the right. For example, can alternative service consist of non-military duties, such as working in the kitchen of an army base, or should a state offer alternative service of a wholly 'civilian' nature, such as assisting the social services or service in a non-military hospital?[1118] Because some military conscientious objectors object to any link with the military, should states then also incorporate a right to object to alternative service? Furthermore, can a state differentiate between the treatment accorded to military personnel and those engaging in alternative service? If yes, must the distinction relate to time limits or also recognise differences in payment or other conditions, such as less post-military benefits or a reduced pension?

In the ECHR framework, the right to alternative service has been dismissed because the Court and Commission have consistently held that military conscientious objection is not a right provided for by the Treaty.[1119] A military conscientious objector has no right under the ECHR to demand that a state provide for alternative service or, when provided, that the alternative service be of a civilian nature.

[1118] See e.g. Amnesty International, POI 31/1/91 at 2 whereby it notes that it will not designate an individual as a prisoner of conscience if he or she is "offered and refused comparable alternative service which is of purely civilian character and under civilian control."

[1119] See e.g. 10640/83 A. v. Switzerland, 38 D&R 219 (1984) (article 4 only allows for alternative service "in countries where it is recognised" thereby implying that alternative service is a discretionary right of the state); 7565/76 Conscientious Objector v. Denmark 9 D&R 117 (1977) (lower wage for conscientious objector's alternative service is valid since status is not a protected right)

The decisions in the ECHR have centred on the requirement that states providing alternative service do so in a fair and equal manner. G v. Netherlands[1120] reflects the rationale for upholding different degrees of alternative service. The Commission held that alternative service could be subject to a longer service period than one's counterparts in the military due to the less arduous nature of the tasks imposed and the reasonably proportionate service instituted by the state.

No violation of the ECHR occurs where there exists an objective reason for distinguishing between forms of alternative service and the policy is proportionately applied to achieve the goals of the legislature. For example, in Suter v. Switzerland[1121] the Commission held that the state could distinguish between moral-based military conscientious objectors and religious-based military conscientious objectors in granting the latter, Jehovah Witnesses, a complete exemption from alternative service.[1122] The Commission held that religious-based objectors refer to specific principles and practices, thereby recognising an objective evaluation of their assertion. The means employed by the state bear a reasonable relationship of proportionality to the state's aims,[1123] to deter insincere non-religious objectors, by imposing a longer alternative service.[1124] The Commission nevertheless noted that the proportionality requirement did not merit an unduly long alternative service, in this instance a fair duration being three-quarters longer than military service.

The Council of Europe's 1987 Resolution reflects the ECHR's approach to alternative service. The Resolution presents alternative service as an option. The Recommendation states that it should be of a 'civilian nature' while further urging states to provide for unarmed alternative service 'assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms'.[1125]

Note however that Paragraph 9 of Resolution (87)8 is a rather odd provision. The Ministers had originally defined military conscientious objectors as individuals opposed to the use of arms,[1126] implying

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[1120] 11850/85 G v. Netherlands 51 D&R 180 (1987).
[1121] 11595/85 Suter v. Switzerland 51 D&R 160 (1986)
[1122] See also 10410/83 N v. Sweden 40 D&R 203 (1984)
[1123] See also 11850/85 G v. Netherlands 51 D&R 180 (1987)
[1124] 17086/90 Autio v. Finland 72 D&R 245 (1991)
[1125] Recommendation No. R(87)8 at paragraph 9.
[1126] See discussion supra and Recommendation No. R(87)8 at paragraph 1.

the non-recognition of other forms of military conscientious objection. Because the civilian nature of alternative service merits specific protection in paragraph 9, the implication is that the Recommendation recognises other forms of military conscientious objection. The Explanatory Note to the paragraph supports this interpretation in stating:

> Alternative service shall in principle be civilian in character. However that does not prevent States that so wish from providing also for unarmed military service, to be reserved for persons whose objections are restricted to the personal use of arms.[1127]

It could be that because the majority of Member States accepted the option of alternative service, the Ministers desired to adopt a harmonising approach among the different States.

The Council of Europe further reflects ECHR case law in Resolution(87)8 by disallowing punitive alternative service or service of an unreasonable duration.[1128] There is no specification regarding the difference in time limit between military and alternative service. Furthermore, the Recommendation upholds financial benefits to military conscientious objectors, with equal remuneration to their military counterparts being granted along with employment career and pension benefits.[1129]

Similarly, in the CHR, the rapporteurs found that states provide for alternative service either pursuant to regulations or on an ad-hoc basis. The 1983 CHR Report noted that imposition of alternative service creates an equal burden between military servicemen and military conscientious objectors. The military conscientious objector can contribute to society,[1130] with non-military service for those who do not desire to participate in the military.[1131] The CHR's Resolutions reflect this approach by calling for alternative service of a non-combatant or civilian character and disallowing any punitive alternative service.[1132]

In the HRC, decisions initially reflected the reasoning used in the ECHR. Because there was no right per se to military conscientious objection in the ICCPR, the HRC tended to focus on discriminatory

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[1127] Explanatory Report at paragraph 28 (emphasis supplied).
[1128] Recommendation No. R(87)8 at paragraph 10.
[1129] Recommendation No. R(87)8 at paragraph 11.
[1130] Report at 21.
[1131] Report at 22.
[1132] See e.g. Resolution 1995/83 at paragraph 5-6; Resolution 1989/59 at paragraph 3-4

treatment of military conscientious objectors under ICCPR Article 26. The HRC has upheld the imposition of an additional four months of alternative service for military conscientious objectors because a military desires to facilitate its administrative needs and streamline the objection process.[1133] The HRC noted however that alternative service should not be of a punitive nature.

The key factor for the HRC is that there is equal treatment among military personnel and military conscientious objectors. Hence if military conscientious objectors performing alternative service receive equal pay to their military counterparts for rendering services for which a civilian receives greater pay, no inequality exists. As long as military conscientious objectors are accorded equal treatment among themselves and their fellow conscripts, they have no basis for a complaint.[1134]

The General Comment to Article 18 also prevents discrimination against military conscientious objectors.[1135] The HRC further implies in the General Comment that alternative service is a recognised right by concluding that:

> The Committee invites State parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under Article 18 and on the nature and length of alternative national service.[1136]

Considering the General Comment to Article 18, a recent decision of the HRC has hinted at a broader standard regarding different treatment between religious and non-religious military conscientious objectors. In Brinkhof v. Netherlands[1137] the Netherlands upheld alternative service objections for religious persons, such as Jehovah Witnesses, but not for non-religious objectors. The HRC held that there was no ICCPR Article 26 violation regarding the right to equal treatment. The applicant did not demonstrate a harm to his interests resulting from the favourable treatment towards the Jehovah Witnesses nor that his beliefs merited an alternative service objection. The HRC did however note that it:

1133 295/1988 Jarvinen v. Finland A/45/40 (1990)

1134 297/1988 HAE v. Netherlands A/45/40 (1990) (decision centred on payment of social security benefits)

1135 General Comment to Article 18 at paragraph 11. The Krishnaswami report also noted that a state should take all measures to prevent any adverse distinctions between military conscientious objectors and other conscripts. Krishnaswami (1960;43)

1136 General Comment to Article 18 at paragraph 11.

1137 402/1990 Brinkhof v. Netherlands (1993)

> considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable.

The HRC referred to the General Comment that disallows differentiation between individuals on the basis of their beliefs and concluded that:

> The State party should give equal treatment to all persons holding equally strong objections to military and substitute service, and it recommends that the State party review its relevant regulations and practice with a view to removing any discrimination in this respect.

This statement hinted at the HRC's future approach towards preventing discriminatory treatment between religious and non-religious, or secular, based military conscientious objectors.

Domestically, problems remain for military conscientious objectors choosing the alternative service option. Even when engaging in alternative service in place of military service, an objector could be denied veteran benefits accorded to other servicemen. For example, in the US, the government forfeits the right of alternative servicemen to Group Life Insurance and to other post-service benefits generally granted to military veterans.[1138] The law does not consider alternative service an excused leave of absence for purposes of time towards pension, while it does include military service for such purposes.[1139] Such distinctions are upheld because of the military's desire to make military service more attractive and the government's underlying interest in maintaining a military.[1140] Furthermore, the military's desire to protect veterans who might experience a difficult time adjusting to civilian life outweighs the incidental burden imposed on the military conscientious objector.[1141]

Alternative service is largely viewed as a legislative option of the state. In contrast to the domestic law, the protection for alternative service in the international sphere centres on preventing discrimination between alternative service members and military conscripts. This is particularly the case concerning equality of benefits both during and after military or alternative service.[1142] It is also possible that states

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[1138] See e.g. 38 USC section 1973 (1988); 38 USC 5303 (1988)

[1139] See e.g. Diffray v. ATT 1988 US Dist. Lexis 4681 (E.D. Ill. 1988)

[1140] Johnson v. Robinson 415 US 361 (1974)

[1141] Cf. dissent in Johnson noting the distinction between military servicemen who worked at desk jobs or in a civilian capacity

[1142] See e.g. CHR Resolution 1995/83 paragraph 5-6; EC Resolution No C 291/123 (1989) at paragraph 3, 5-6

providing for an objection to military alternative service for some military conscientious objectors and not others are acting incorrectly.[1143]

B. In-Service Objection

Another important option for military conscientious objectors that merits attention is the in-service objection, where a military conscript develops a conscientious objection during military training or service. Many countries do not recognise this option, as exemplified by the lack of any reference in the Council of Europe's Resolution.[1144] The 1987 Council of Europe Resolution does note that state law 'may' provide for in-service objection.[1145] Nonetheless, the Explanatory Report acknowledges that this is a common occurrence among Member States that can lead to conscientious conflicts. Hence prescribing a time-limit for a military conscientious objection claim is contrary to the very notion of drafting a recommendation upholding the right.[1146]

The EC Resolution, by contrast, specifically provides for this form of objection in paragraph 1, upholding the right to military conscientious objection 'at any time'. Similarly, the CHR's Resolutions of 1993 and 1995 provide that 'persons performing military service should not be excluded from the right to have conscientious objection to military service.'[1147]

It would appear that this right to in-service objection is becoming an accepted practice. Changing the wording of the CHR's Resolution from 'cannot' to 'should not' resulted in a weakening of the overall character of the paragraph. However the broad wording of the Resolution, such as the first paragraph's statement that everyone has the right to military conscientious objection as a legitimate exercise of conscience, demonstrates that an in-service objection can develop. Individuals may identify with new beliefs or ideals while in the military, particularly when confronted with new situations or experiences.

Furthermore, the right to an in-service objection appears to be accepted in state practice. This is an essential right to military conscientious objection, especially as states maintain an all-volunteer military.

[1143] See 402/1990 Brinkhof v. Netherlands (1993)

[1144] Recommendation No. R(87)8

[1145] Recommendation No. R(87)8 at paragraph 8

[1146] Explanatory Report to recommendation No. R(87)8, at paragraph 26.

[1147] Resolution 1995/83 at paragraph 2. Resolution 1993/84 at paragraph 2. The 1993 Resolution only applied to "compulsory" service, but this proviso was removed in 1995.

For example, an in-service military conscientious objector in the UK either undergoes similar procedures to the pre-service military conscientious objection or applies for an exemption to the Secretary of State for Defence's Advisory Committee.[1148] Similarly, South Africa provides for an in-service objection but the objector must continue with military service pending an outcome of the claim.

As a result of the voluntary nature of the military, the issue of military conscientious objection in the US generally arises for individuals who develop an in-service objection. The US grants the ability for in-service military conscientious objection for those objecting to war in any form or the bearing of arms.[1149] The key problems associated with the in-service objector relate to the determination of sincerity and the requirement that the grounds for forming the belief could not have crystallised before joining the military.[1150]

In the US, a military authority conducts the determination for in-service objectors. This procedure however raises significant problems for the Establishment Clause because a governmental officer is judging the viability of various beliefs. The officer is not necessarily qualified to make the determination. Furthermore, the officer might uphold more established or recognised religious beliefs at the expense of marginal or individually oriented beliefs.[1151]

The Persian Gulf War of 1990-91 brought the problem with in-service objection to the fore. The number of in-service military conscientious objectors rose considerably during this period. Although some units re-assigned objectors,[1152] others, such as the Marines, were particularly harsh to its objectors, with many being incarcerated. Furthermore, the military suspended the right to file in-service military conscientious objection claims by only considering the objector's claim after sending the objectors to Saudi Arabia.[1153] This strategy made it easier for the military to reject conscientious objection claims. The objectors were cut-off from their attorneys or support organisations and either had to participate in the

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[1148] Lyall (1990;170)

[1149] Eberly (1991;63) referring to the Department of Defence definitions.

[1150] 32 CFR section 75.3(b). See also Reiser v. Stone 791 F. Supp. 1072 (E.D. Penn. 1992).

[1151] Sullivan (1992) concluding that the allowances granted to the in-service objector entails a constitutional violation and should be discontinued in an all-volunteer military.

[1152] Chambers (1993;4) referring to the US Army

[1153] Kuby and Kunstler (1992)

conflict or wait until the end of the conflict for a return flight home.[1154] Additionally the in-service objection is highly administrative and time-consuming,[1155] especially since demonstrating one's sincerity proves quite difficult once an individual voluntary has agreed to join the military.

As a response to the potential and unique problems associated with the in-service objector, the US House of Representatives proposed a measure to reform the procedures for military conscientious objectors.[1156] The key contribution of the proposed law was fairer procedures for reviewing a military conscientious objector's claim. For example, a military conscientious objector would not participate in any military action before a determination of the claim, and mainly civilians would compose the reviewing tribunal rather then military personnel.[1157] Congress however did not adopt these proposals.

The result seems to be that in-service objection is possible, with the problems centring on its application. Similar to alternative service right, there are instances whereby upholding the right creates more problems for the military conscientious objector.[1158] Hence even in the states that provide for an in-service objection, key problems remain in its application.

C. Military and Civil Review

A more serious violation of rights occurs when a military conscientious objector's status is subject to review by partial tribunals deciding the veracity of the objector's conviction. These tribunals consist of military personnel deciding the issue in a summary fashion without recognising a right to appeal to a neutral administrative body.[1159] The CHR has 'appealed' to states in its Resolutions to establish independent and impartial decision-making bodies to determine the status of military conscientious objectors,[1160] while the EC Resolution calls for a national appeals procedure.[1161]

[1154] Kuby and Kunstler (1992)

[1155] Fox (1982)

[1156] Chambers (1991;fn.96) referring to 138 Congressional Record, 102nd Cong., 2d Sess., no.60 h2942, e1246-48 (5/5/92). For a discussion of the selective conscientious objection allowance, see discussion infra

[1157] Kuby and Kunstler (1992;684-686)

[1158] See e.g. Kuby and Kunstler (1992;680) noting the problem of military conscientious objections in the Marines during the Gulf War whose reserve service duty was prolonged unless they agreed to renounce their beliefs.

[1159] See e.g. 1983 Report at 29.

[1160] See e.g. Resolution 1995/83 at paragraph 7

[1161] Resolution 1995/83 at paragraph 8

By contrast, the ECHR case law has not been tolerant of challenges to Military Review Boards reviewing the claims of military conscientious objectors. One basis for challenging a wholly military review has been ECHR Article 5 that requires a prompt and fair trial.[1162] The military conscientious objector claimed that a military tribunal was not independent. The Commission decided however that a military tribunal can be fair since the military 'swears' it will properly decide such issues and military regulations generally ensure a stable and adequate reviewing committee.[1163] Similarly, the Commission rejected any claims that relied on ECHR Article 6, which guarantees civil rights.[1164] The Commission reasoned that Article 6 only applied to rights of a private person and not to a citizen who is subject to the public law.

The 1987 Recommendation in paragraphs 5,6, and 7, requires states to ensure necessary guarantees for a fair procedure, specifically a right to appeal to an authority external to the military. The first instance authority however need not be separate from the military authorities, as reflected in the practice of European countries.[1165]

The right to appear before a neutral tribunal either in the first instance or at the very least as an appeal option, however seems to be emerging. Domestic law reflects this where the individual objector can appeal to a non-military tribunal as a matter of right. Hence in the US, a denied military conscientious objection applicant maintains the right of appeal, but military duty still commences pending the outcome of the appeal.[1166] Although under the present system in the US the military maintains a great deal of discretion,[1167] a reviewing court will assess the factual basis for the review board's decision.[1168]

D. Information on the Right to Military Conscientious Objection to Conscripts

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[1162] 11013/84 D. v. Netherlands 42 D&R 241 (1985).

[1163] Cf. 9312/81 Van Der Skuijs v. Netherlands 13 EHRR 461 (1984) where the European Court found a violation of Article 5 for military conscientious objections placed in detention pending a hearing by a military review board. The court did not consider the review boards to be judicial panels per se since they can be reviewed and overturned at any time.

[1164] 11734/85 Nicolussi v. Austria 52 D&R 266 (1987).

[1165] Explanatory Report to recommendation No. R(87)8, at paragraph 25

[1166] 32 CFR ch1 section 75.7

[1167] Fox (1982)

[1168] Reiser v. Stone 791 F Supp 1072 (E.D. Pa. 1992)

Another key consideration is the ability to receive pre-induction information regarding the right to object to the military. In some states, this is an essential requirement as the ability for in-service objection is either non-existent or demands a higher standard of proof.

In international bodies, the consensus has been that states should provide pre-induction information regarding the possibility for military conscientious objection to a prospective conscript. The Council of Europe Recommendation[1169] requires states to inform conscripts of the possibility for military conscientious objection before conscription, with a view towards considering any application prior to an individual's actual conscription. The 1983 Report from the CHR's rapporteurs also concluded that while the standards should require that prospective draftees be provided up-front with military conscientious objection information,[1170] a majority of countries did not provide such information. Nonetheless, the CHR Resolution specifically provides for such a right,[1171] as does the EC Resolution.[1172]

By contrast, most states, even those that provide for the right to military conscientious objection, do not require the military to provide pre-induction information regarding the right. Indeed, one of the reasons why the US Selective Service Agency objects to a pre-registration of military conscientious objectors is the publicity it will provide for individuals who have not heard of, or considered, the possibility of military conscientious objection.[1173] However the practice does not seem difficult to uphold. It is an administrative formality that is becoming an accepted norm, particularly as the CHR and other international organs recognise the right.

E. Selective Conscientious Objection

1. Introduction

Selective conscientious objection entails an objection to a specific military conflict or form of warfare. The selective conscientious objector need not object to participating in the military. Rather, the

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[1169] Recommendation No. R(87)8 at paragraph 3-4
[1170] Report at 20-21.
[1171] See e.g. Resolution 1995/83 at paragraph 8
[1172] Resolution 1995/83 at paragraph 2
[1173] Landskroen (1991)

objection relates to a particular action that the individual deems will violate a conscientious belief as a result of carrying out a particular military directive.

In passing various resolutions on the right to military conscientious objection, international organs have never specifically provided for the right to selective conscientious objection, with some bodies clearly disregarding the right to selective conscientious objection. The Council of Europe in the Explanatory Notes to Recommendation 87(8) did not encompass selective conscientious objection.[1174] The Council of Europe however did apply the right to military conscientious objection to 'all compelling reasons of conscience against being involved in any use of arms'.[1175] While this might discount a right for a selective conscientious objection claim to particular forms of military action, it does seem to provide for objections entailing a conscientious objection to any use of a form of weapon, such as a nuclear device or other standards of jus in bello. The Explanatory Notes to the Recommendation however do not allude to this interpretative distinction.

By contrast, the 1983 CHR Report referred to the possibility of a selective conscientious objection right. The Report noted that a selective conscientious objector determines that a form or method of military action breaches an internal moral that is equated with international law. Nonetheless, following analysis of the state reports on military conscientious objection, the Report concluded that selective conscientious objection is not an acknowledged right.

In the CHR Resolutions that followed the Report, the basis for military conscientious objection was a 'genuinely held conscientious objection to armed service.'[1176] The term can arguably provide for selective conscientious objection to certain methods of armed service, particularly when contrasted with the Council of Europe's language of 'use of arms'. Such an interpretation would be difficult to construe. There is no indication that the CHR intended such a broad understanding of 'armed service' as referring to particular forms of such service. Furthermore, state practice, which the CHR was attempting to reflect, generally does not provide for the right to selective conscientious objection .

[1174] Recommendation 87(8) at paragraph 16

[1175] Explanatory note to Recommendation 87(8) at paragraph 15

[1176] See e.g. Resolution 1995/83 at paragraph 3

The right to selective conscientious objection can, arguably, be derived from the HRC's provision for military conscientious objection in the General Comment to Article 18. The notion of objecting to 'lethal force', rather then using language regarding the bearing of arms, focuses on the manner of warfare being conducted. A broad interpretation of the term 'lethal' can include objections to particular lethal weapons such as nuclear or chemical weapons. Nonetheless, the same person might not object to handling a gun or bearing arms.

On the domestic front, some states provide for selective conscientious objection. Examples of such states are Australia,[1177] Denmark,[1178] and the Netherlands.[1179] However the majority of states do not recognise selective conscientious objection as an option even when providing for the right to military conscientious objection. This is principally due to the limited approach to military conscientious objection. The right is deemed a legislative grace rather then an individual right and is subject to the factoring in of more practical considerations regarding administrative necessity. The US Supreme Court for example has held that the legislative right to object to 'war in any form'[1180] does not provide for particular objections to war but only overall objections.[1181] Furthermore, the Court did not find a violation of the Establishment Clause as a result of the distinction between general military conscientious objectors and selective conscientious objectors. The Court found a neutral, secular, purpose for distinguishing them; namely to ensure for a proper administration of the military and uphold a fair method of discerning sincere from insincere objectors.[1182]

Even in Germany, where military conscientious objection is a constitutional right,[1183] no right exists to claim a selective conscientious objection .[1184] The reasoning is based on the phrase 'active military service' in Article 4(1) of the Grundgesetz. The Federal Administrative Court has defined the phrase as

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[1177] Defence Legislation Amendment Act 1992, Division 2-5

[1178] Siesby (1992) noting that some selective political objectors, such as refusing to serve under a capitalistic social order, would have a stricter burden of proof.

[1179] Vermeulen (1992) noting objections to NATO, politically based such as to capitalist systems, or nuclear weapons.

[1180] Cite to law then same as now - 32 CFR section 75.3(a) (1991)

[1181] Gillette v. US 401 US 437 (1971), decided with Negre v. Larsen

[1182] Gillette v. US 401 US 437 (1971); See also Greenawalt (1971)

[1183] See discussion supra

[1184] Kuhlmann and Lippert (1990;98)

exempting an objector opposed to killing another human being. Hence, the right is only for individuals wholly opposed to killing another and does not provide protection for individuals opposed to a particular war.[1185] The only right to a limited selective conscientious objection derives from a particular legislative enactment recognising military conscientious objection based on an objection to nuclear war.

In states where conscription exists, military conscientious objection is a difficult right to uphold, especially upon considering the reasons why a state maintains a draft. Conscription might exist as a response to a perceived security threat from a neighbouring state or due to an ongoing external or internal conflict that would make selective conscientious objection quite a difficult right to uphold. Providing for selective conscientious objection raises the level of administrative concerns within the military and could wreak havoc on the overall preparedness of a military.

Despite the general indifference towards selective conscientious objection, it is possible to uphold such an assertion. Following a discussion of the key underlying problems associated with selective conscientious objection and an attempt to address these concerns, this chapter will focus on various international and domestic laws that provide for the right to selective conscientious objection.

2. Underlying Problems

Similar to the in-service objector, selective conscientious objection poses problems of administrative difficulty. Presumably, the selective conscientious objection can object at any time, especially when a particular action confronts the objector in the military theatre, thereby creating a burden to the operation of the military.[1186] The possible loss of control or decrease in military morale is a problem as a result of having disagreement within ranks and possible conflicts among the soldiers.[1187]

Additionally, sincerity is a major factor for determining the validity of the objector's claim. Hence the problem of in-service objectors where the burden of proof will weigh against the objector who has already consented to participating in the military but has developed his beliefs during service. An even

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[1185] Loschelder (1990;33) referring to BVerfGE 12, 45 and BVerwGE 60, 336. See also Germany's 1996 Report to the HRC, CCP/C/84/Add.5 noting that its constitutional provision for military conscientious objection is to be narrowly interpreted.

[1186] Fogarty (1983;655)

[1187] Langan (1989;101-104). See also Kuby and Kunstler (1992;681-684) describing discriminatory treatment towards objectors to the Persian Gulf conflict.

greater burden confronts the selective conscientious objection. The selective conscientious objection not only has initially consented to participate in certain military actions, but also will continue to do so, pending the objection to certain military actions or use of particular weapons. From a practical standpoint then it is difficult to distinguish the sincere from insincere selective conscientious objector, especially when based on a secular belief. The asserted beliefs are not associated with any particular practice or doctrine and can arguably shift depending on the practice of the military.[1188]

Another problem involves the nature of the claim. The selective conscientious objection is generally objecting to the method of a state's warfare. As noted in the 1983 Report of the CHR's rapporteurs, states are not willing to acknowledge that their actions are morally incorrect or contrary to international law.[1189] Furthermore, due to the focus on a particular form of action as the basis for the selective conscientious objector's objection, a reviewing body will treat the claim as a political assertion rather then a matter of conscience.[1190] For example, the government might interpret an objection to a particular military action that violates international norms as a political reaction to the state's decision to enter a conflict.

3. Addressing the Problems

As noted from the general discussion regarding the right to military conscientious objection,[1191] the human rights treaties that codify the right to freedom of conscience are beginning to emerge as the basis for the right to military conscientious objection in international law. The significance of such a development for the right to selective conscientious objection is that it highlights the selective conscientious objector's assertion of a conscientious belief. In making a claim, the selective conscientious objector is manifesting a belief, be it against a particular war or due to a particular method of warfare, such as using illegal weapons.

Moving away from the context of military conscientious objection and considering selective conscientious objection as any other conscientious assertion provides for an analogy to other forum externum beliefs of the right to conscience. Manifesting a 'belief' has been defined as particular actions

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1188 See e.g. Gillette v. US 401 US 437 (1971); Greenawalt (1971;56 and 64)

1189 Report at 29. See also Langer (1989) (outlining the specific problems of selective conscientious objection).

1190 Langer (1989;100)

1191 See discussion supra

emanating from the belief's directives, including the motivations derived therefrom.[1192] Depending on the manner of belief being asserted, the right to freedom of conscience can also incorporate the claim of a selective conscientious objector. Where the selective conscientious objector's claim does not relate to a formal belief as provided for in the treaties, it is easier to dismiss the assertion or consider it within other contexts, such as a free expression claim.

For example, similar to the case involving the German lawyer asserting the right to remove the required wig,[1193] a mere whim or desire might also be the basis for the selective conscientious objector's claim. In such an instance the selective conscientious objector is not asserting any particular belief. Rather the selective conscientious objection can be interpreted as a free expression claim, for example as making a political statement regarding a particular war. Hence the problem with many objectors to the Vietnam War whose assertions centred on their political opinions regarding the US action overseas.

Alternatively, a selective conscientious objector can be asserting a belief, such as one desiring to adhere to the just war doctrine. For example, a selective conscientious objection to the US-Vietnam conflict might base an objection on the illegal use of arms, such as Agent Orange as chemical warfare, or the possible 'use of force' violations committed by the US. Although rejected by the Supreme Court, the claim of unjust war and general humanist and ethical grounds served as the basis for the selective conscientious objection in Gillette v. US.[1194] An assertion based on internal beliefs was also the basis for Israeli soldiers objecting to the Lebanon War of the early 1980's.[1195] An ex post psychological study of the objectors to the Lebanese War found that their objections were based on personal moral beliefs, such as objection to the improper bombing of civilian centres.[1196] Such instances relate to assertions of beliefs that merit protection on a scale equivalent to any other asserted conscientious or religious belief.[1197]

[1192] See discussion supra at Chapter Five

[1193] See discussion supra at Chapter Five

[1194] Gillette v. US 401 US 437 (1971)

[1195] See e.g. H.C. 734/83 Shein and others v. Minister of Defence, P.D. 48(3) 393 (1984)

[1196] Linn (1989;129) (author conducted psychological study of SCOs, finding that their reasoning generally centred on moral reasoning and a common moral consistency regarding their objection to the method of Israeli warfare in Lebanon).

[1197] Greenawalt (1971;54-55)

Furthermore, selective conscientious objection is not merely a political objection, even if the objection might revolve around political debate.[1198] Recognising the right to freedom of conscience as protecting a person's eating habits[1199] or manner of employ[1200] also should provide for protection of a person's beliefs concerning the required method or form of warfare ordered to carry out. The selective conscientious objector desires to manifest a conscientious belief; disallowing the selective conscientious objection claim can result in a violation of the belief in a manner equivalent to a military conscientious objection [1201] or to any other conscientious assertion.

The notion of coercing an individual to violate a belief, which is one of the key basis' for upholding the right to military conscientious objection, similarly operates for the selective conscientious objection being forced to perform an act in violation of the conscience.[1202] Almost every form of military conscientious objection raises the possibility of political argument. For example, a government can equate a military conscientious objector's objection against all forms of warfare with a political statement against the inefficient or overabundant allocation of resources towards the military.[1203] Attempting to distinguish military conscientious objection from selective conscientious objection appears futile when considering personal variances and particular circumstances that would alter the individual's stance, such as a pacifist's willingness to defend one's family if there is an armed invasion. As noted by Greenawalt when discussing the ramifications of the US Supreme Court's decision that disallowed the right to selective conscientious objection :

> The difficulty of drawing an acceptable line between general and selective objection when convictions are clear and fixed and the further difficulty imposed by the uncertainties of an estimate of one's moral response to hypothetical situations are reasons for treating objection to participation in particular wars on the same level as objection to participation in all wars.[1204]

[1198] Capizzi (1996;339); Langan (1989)
[1199] 18187/91 H v. UK 16 EHRR CD44 (1993)
[1200] Thomas v. Review Board 450 US 707 (1980)
[1201] Capizzi (1993); Fogarty (1983)
[1202] Capizzi (1996)
[1203] In particular, see discussion infra at Chapter Seven
[1204] Greenawalt (1971;67)

From a more practical approach, providing for the right to selective conscientious objection can improve the administrative efficiency of a military. The military would run smoother by avoiding a loss of morale within the troops serving with a selective conscientious objector. The selective conscientious objector forces a military to confront the selective conscientious objector's reasoning and possibly to alter the improper practice, while upholding its effectiveness by winnowing out individuals who cannot conscientiously act according to military directives.[1205] In a military framework, the preference would seem to be for obedient individuals. The selective conscientious objector can serve the military in another capacity rather then be forced to violate a belief system.[1206] This right is easier to uphold than the in-service objector since the selective conscientious objector desires to continue in military service despite the disagreement with the military's actions or practices. Such willingness indicates that the selective conscientious objector is not making a political statement regarding the military but is acting to adhere to a particular belief system.[1207]

In one sense the reason for overlooking the selective conscientious objector's claims as a means of asserting the right to freedom of conscience generally is due to the narrow approach taken to such assertions. Not only have courts associated selective conscientious objection claims with political assertions,[1208] but they have narrowly interpreted military conscientious objection laws as disallowing the possibility of selective conscientious objection claims. For example, the German court's approach to 'active military service' as being limited solely to one who objects to the entire form of service or US law being only for complete prohibition overlooks the assertion being made and is a rather narrow view of the military conscientious objection right. The Council of Europe and ECHR Resolutions have also adopted a similar approach. Once a state provides for the right to military conscientious objection, however, there does not seem to be any qualitative difference between a general and selective assertion of a secular objection. Both forms of objection raise the same type of administrative and practical difficulties. The military is confronted with issues of sincerity in both instances that entail similar forms of evaluation.

[1205] Fogarty (1983); Capizzi (1996)
[1206] Langan (1989)
[1207] Langan (1989)
[1208] See e.g. Capizzi (1996)

The notion of upholding the right to selective conscientious objection might still seem difficult to apply in any practical sense, particularly due to the deleterious affect the right can have on the effective operation of the military. Yet, as demonstrated in the next section, selective conscientious objection is already recognised within certain contexts, both international and domestic, such that providing for a selective conscientious objection claim is not as impossible as first imagined. This would especially seem to be the case for states providing for a general right to military conscientious objection, as the legal apparatus exists to expand the right to selective conscientious objection as well.

4. Current Examples of Selective Conscientious Objection

The most widely cited example of selective conscientious objection is the general grant of military conscientious objection to particular religions. Some religions do not necessarily preach a wholly pacifist doctrine yet the legislature upholds their claims to military conscientious objection. Islam recognises the eventuality of a 'holy war' yet Muslim's maintain the ability to assert a military conscientious objection claim. The religious doctrine of the Jehovah Witnesses, the consummate example of a pacifist-oriented religion, requires them to raise up arms in a theocratic war or use carnal weapons in the battle of Armageddon.[1209] The underlying assertion for the Jehovah Witness is not necessarily religious objection to all forms of warfare but an objection to participating in state apparatus. Hence their objection is to the military and to alternative service.[1210]

Similarly, the US military granted Islamic believers the status of military conscientious objectors during the Persian Gulf War because Islam prohibits the killing of a fellow Muslim.[1211] US case law has further upheld military conscientious objection claims for individuals who would raise up arms to defend their family or friends if there is an invasion by a foreign military.[1212] Other pacifists approach their

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[1209] See e.g. Sicurella v. US 348 US 385 (1955); Kretchet v. US 284 F.2d 561 (9th Cir 1960)

[1210] 402/1990 Brinkhof v. Netherlands (1993)

[1211] Larsen and Hess (1992;695). But see Petition for Naturalisation of Kassas 788 F.Supp. 993 (M.D.Tenn. 1992) (Naturalisation denied to Muslim refusing to take oath regarding bearing arms in case he would be confronted with the problem of killing a fellow Islamic believer. The Court compares the issue to military conscientious objection, noting that selective conscientious objection ids not allowed).

[1212] US v. Purvis 403 F.2d 555 (1st Cir. 1968) (objector would agree to defend US against armed attack and use force to restrain an individual from committing a wrong act but objected to participating in military service); Goldstein v. Middendorf 535 F.2d 1339 (1st Cir. 1976) (use of force to restrain wrongdoing, but not to use in military); Goodrich v Marsh 659 F. Supp. 855 (W.D. Ky. 1987) (support of use of force in civilian law enforcement work). Cf. Rosenfeld v. Rumble 515 F.2d 498 (1st

objection as a means of improving society by offering a pacifist viewpoint as a counterbalance to the military.[1213] In Welsh v. US for example, the petitioner based his objection on his approach to international politics and the wastefulness of military expenditures. The Supreme Court upheld such an objection as a valid belief upon which to base a military conscientious objection claim.

A more pertinent example relates to the recognition of military conscientious objection against a state condoning apartheid. The General Assembly, relying on UDHR Article 18, passed a Resolution upholding the right of individuals to object to a military that condones apartheid.[1214]

These instances provide some basis for developing a right to selective conscientious objection. The main contention is that restricting military conscientious objection to a total objection to all warfare or all use of arms is over-broad. Such a narrow treatment of the right does not adequately consider the variety of conscientious beliefs that the international system currently upholds.

a. Right to Asylum for Military Conscientious Objectors

Granted that the right to asylum for selective conscientious objectors is somewhat different than upholding a right to selective conscientious objection within a state's military. Nonetheless, the policy issue regarding a state's acknowledgement of an illegal action is in a sense even harder to consider in asylum cases since the determination of the objector's claim involves a judgement regarding the actions of a foreign state.[1215] Furthermore, it demonstrates that the selective conscientious objector's assertion can function in an administrative sense by granting external bodies the right to review the merits of a selective conscientious objector's assertion. The development of the right within the asylum context provides a framework within which a reviewing body can operate.

The preamble to the CHR's 1995 Resolution refers to UDHR Article 14 and mentions the right to asylum for military conscientious objectors who have fled their native land.[1216] The CHR deemed it a

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Cir 1975) (CO status denied after applicant admitted he would take up arms to defend himself against an invading force intent on killing members of his religion).

[1213] Greenawalt (1971;53)

[1214] A/33/165 (1978)

[1215] See e.g. MA v. INS 899 F.2d 304 (4th Cir 1990) (court hinted that asylum issues involving SCOs could be approached as a non-justiciable foreign policy issue)

[1216] See e.g. Resolution 1995/83

relevant issue based on the General Assembly's resolution calling for the right to asylum for military conscientious objectors against a military supporting the policy of apartheid.[1217] As early as 1978, the GA passed a declaration entitled Status of persons refusing service in military or police forces used to enforce apartheid[1218] which recognised the right to object to participation in a military used to enforce apartheid, and called upon all UN member states to grant such individuals' asylum.[1219] The 1983 CHR Report had also discussed the right to asylum for military conscientious objectors.[1220] The Report noted that although granting asylum is a matter of domestic law,[1221] UDHR Article 14[1222] requires the granting of asylum to military conscientious objectors forced to desert the military.[1223]

Another important source demonstrating the association between refugee law and selective conscientious objection is the 1979 United Nations High Commissioner on Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (hereafter, 'Handbook'). The Handbook codifies the entitlement to asylum for military conscientious objectors and includes selective conscientious objectors.

Following the establishment of the High Commissioner by the General Assembly in 1950,[1224] one of the key duties of the High Commissioner was to interpret the Protocol Relating to the Status of Refugees.[1225] The project emanated from the requests of UN member states desiring guidance for determining refugee status.[1226] The Handbook is therefore served as a seminal means of clarifying the extents of the rights of refugees,[1227] as recognised in domestic jurisdictions.[1228]

1217 Wolff (1982;79)

1218 A/33/165 (1978)

1219 A year later the GA resolution A/34/93 (1979) calling on individuals to refrain from enlisting in the South African armed forces.

1220 CHR Reporters. at 19.

1221 CHR Reporters. at 25.

1222 "Everyone has the right to seek and to enjoy in other countries asylum from persecution...". The report also referred to Article 1 of the Declaration on Territorial Asylum requiring states to grant asylum. CHR Reporters. at 26.

1223 CHR Reporters. at 26.

1224 Doc/A/1252, GA Resolution 319A

1225 606 UNTS 267 (1967) see in particular article II(1)

1226 See preamble to the Handbook at paragraph iv

1227 Cf. Godwin-Gill (1995;fn.91) noting inherent ambiguities in the Handbook

1228 See e.g. INS v. Cardoza-Fonseca 480 US 421 (1987) noting, at Fn.22 the significance of the Handbook in interpreting the limits of the Protocol; MA v. INS 899 F.2d (4th Cir 1990) (department of Justice acknowledged that Handbook is key source and that Congress was aware of criteria stated therein when drafting the 1980 Refugee Act); Canas-Segovia v. INS 902 F.2d

Concerning the right to asylum for military conscientious objectors, the Handbook notes that a 'well-founded fear of persecution', the key determinant for receiving asylum protection, does not arise for an individual who has evaded conscription or deserted the military.[1229] Rather, what is essential is that one evading the military would suffer disproportionate punishment because of one's race, religion, nationality, membership in a group, or political opinion.[1230] Such a disproportionate punishment would arise for the military conscientious objector who refuses military service based on a specific belief. The Handbook bases such beliefs on religious grounds[1231] and the developing right for secular-based military conscientious objectors.[1232]

It is possible that the secular-based military conscientious objector has a higher burden of proof as it is more difficult to prove one's secular beliefs in a foreign court. The religious military conscientious objector can more readily acquire proof from a local minister or fellow congregant. Yet domestic legal systems recognise a secular-based military conscientious objection, which possibly acquired greater acceptance since the time the drafting of the Handbook in 1979. This is particularly the case when considering the various Resolutions and Recommendations discussed supra that were passed in the 1980's and 1990's.[1233]

What is significant about the Handbook is the provision regarding selective conscientious objection. The Handbook grants asylum status to an individual required to participate in military actions contrary to his political, religious, or moral beliefs, or for 'valid reasons of conscience'.[1234] Courts have interpreted this provision as protecting military conscientious objectors who conscientiously object to particular actions of the military. Hence a country should grant asylum to a soldier facing a court martial due to a refusal to

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717 (9th Cir 1990) (Handbook as an authoritative source). Cf. Budgaycay v. Sect. of State (1987) 1AllER 940 (refugee denied asylum following illegal entry to country, despite contrary statement in Handbook).

[1229] Handbook at paragraphs 167-168

[1230] Handbook at paragraph 169.

[1231] Paragraph 172

[1232] Paragraph 173

[1233] The allowance for military conscientious objection based on political opinion, which can raise evidentiary problems not commonly raised in assertions of a conscientious or religious based objection to the military, might be limited to actions condemned by the international community. Handbook at paragraph 171; Musalo (1989)

[1234] Handbook at paragraph 170.

participate in the random killing of civilians.[1235] The objection need not be to the military in its entirety, but to specific actions committed therein.

The Handbook further grants refugee status to a soldier who has a reasonable probability of being involved in military actions condemned by the international community.[1236] This proviso provides a means of narrowing the right of selective conscientious objectors seeking asylum, specifically when the objection focuses on a difference of political opinion.[1237] It is different if a military is violating humanitarian norms or human rights principles. Then a selective conscientious objector would surely have the right to seek asylum.[1238] Condemnation by the international community however invokes different forms of considerations. The prime example of this sort of objection would be soldiers refusing to participate in the South African military due to their potential involvement in upholding the apartheid state.[1239] The key indication of condemnation by the international community in this regard is the 1978 General Assembly Resolution 33/165. As noted supra, the Resolution recognised the right to asylum for refusing to participate in military or police forces enforcing apartheid.[1240]

Some states adopt the approach indicated in the Handbook. Courts in the US for example have granted asylum protection to individuals who experience persecution due to their beliefs,[1241] such as refusing to commit illegal acts like shooting army deserters.[1242] Australia also adheres to the standards of the Handbook in granting asylum for pacifists or religious believers.[1243]

In the UK, persecution of the individual must result from a military conscientious objection based on belief rather then opinion.[1244] Sweden maintains a vestigial law from the Vietnam War that grants resident permits to selective conscientious objectors. The permit holders are not granted asylum per se, but they are granted the right to reside in the country.

1235 See e.g. Barraza Rivera v. INS 913 F.2d 1443 (9th Cir 1990)
1236 Handbook at paragraph 171
1237 Musalo (1989)
1238 Kuzas (1991)
1239 Kuzas (1991;469)
1240 Doc A/33/45 (1978)
1241 Abedini v. INS 971 F.2d 188 (9th Cir. 1992)
1242 Ramos-Vasquez v. INS 57 F.3rd 857 (9th Cir. 1995)
1243 Refugee Review Tribunal V94/01589, 6/3/95 [Lexis]
1244 See e.g. Borrisov v. Secretary of State for the Home Department Ct. of Appeals (Civ. Div.) 20/3/96

i. Direction for the Selective Conscientious Objector

The relevance of the selective conscientious objection claim within an asylum context is the basis it provides for making a selective conscientious objection claim within the domestic context. An important development for the selective conscientious objection claim on asylum grounds is that it encompassed issues associated with the policy of the military as well as the conduct of the military.[1245] In determining the relevance of an asylum-seeker's selective conscientious objection claim, the key focus has been the reproach of the international community towards the military action, evidenced by development of international norms in both human rights and humanitarian laws,[1246] specific condemnations by regional and international bodies,[1247] and the willingness of the state in question to address the problematic issues. The domestic selective conscientious objection claim can similarly focus on these basis' to provide a proper foundation for the claim of selective conscientious objection.

The asylum right for the selective conscientious objection further demonstrates that such issues are justiciable without making a judgement regarding a state's particular actions. Rather, the focus for an asylum selective conscientious objection claim is on an individual's perception of the state's action and whether persecution will result due to a person's beliefs.[1248] Similarly, a determination regarding a domestic selective conscientious objection need not entail a judgement as to the merits of a state's policy or conduct. Rather, the determination should focus on whether a violation of the individual's belief system occurs as a result of specific action. Accounting for the external standards can be considered within the context of the selective conscientious objector's assertion and not as a determination of the conduct of the military. In a sense this determination could assist to separate the politically oriented selective conscientious objector, where the burden of proof is higher concerning the international condemnation, from the conscientious based selective conscientious objector, where the proof will centre on the international norms and standards that are being asserted.

[1245] Kuzas (1991;fn.84) referring to a letter from Gilbert Jaeger, one of the authors of the Handbook stating that "type" of military action included the underlying policy motivating the military, as well as the actual conduct of the military.

[1246] Musalo (1989;fn.26)

[1247] Kuzas (1991)

[1248] See Abedinni v. INS 971 F.2d 188 (9th Cir. 1992) where the court notes that it is the subjective perception that counts

Adopting an individual-oriented analysis of the selective conscientious objector's claim does not only remove the focus on judging the actions of a state, but also removes the possibility for prosecution from the selective conscientious objection. Pursuant to the Nuremberg Principles, an individual can be responsible for committing a crime against peace, humanity or a war crime even if not acting in a formal government position. Some commentators tend to reject the crimes against peace and humanity as dormant principles that have no practical effect in international law.[1249] Other commentators tend to stress the overall importance of the Nuremberg Principles to uphold the actions of civil disobedients.[1250] Pursuant to either view however, individual liability can result for military servicemen breaching international standards. This is apparent from the prosecution of former East-German border guards for shooting at defectors attempting to cross the Berlin Wall. Stronger evidence is the current trials undertaken against individuals for crimes committed in the Former Yugoslavia and Rwanda.[1251] Such actions provide grounds for asserting the selective conscientious objection claim when considering the possibility of individual prosecution for violations.

b. Objection to Nuclear Weapons

A further example demonstrating the possibility for the right to selective conscientious objection is the objection to a military's reliance on nuclear weapons. This has attained some level of acceptance as a form of objection. In Germany, objection to the use of nuclear weapons is grounds for upholding a military conscientious objection claim. Similarly, Norway provides for a military conscientious objection claim to those objecting to the use of weapons of 'mass destruction'.[1252] In the US, such objectors are generally transferred from units dealing with nuclear weapons,[1253] thereby avoiding any official acknowledgement of the claim. Such an ad-hoc approach can also be inferred from the Netherlands treatment of military conscientious objectors objecting to any form of association with nuclear weapons. In the HRC opinion

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[1249] See e.g. Snee (1982)

[1250] Lawrence (1989); Lippman (1990); Lippman (1987). See also Bauer and Eckerstrom (1987) and Levitin (1987) noting the use of the necessity defence to uphold the civil disobedient's claim.

[1251] See e.g. Security Council Resolution 827 (1993) S/RES/827/1993, in particular, the Annex, at Articles 5 and 7, outlining the Crimes against humanity violations and the criminal responsibility of all individuals involved in the commission of a crime.

[1252] See Norway's 1992 Report to HRC CCPR/C/70/Add.2

[1253] McGrath (1985)

Brinkhof v. Netherlands,[1254] the applicant based his military conscientious objection claim on his participation in preparing for the use of nuclear weapons. The Netherlands implicitly recognised such a form of objection, as the case focused on whether Brinkhof had the right to object to the imposition of alternative service.

The underlying problem with the nuclear weapons objection is that the objection focuses on the illegality of nuclear weapons in the international framework[1255] yet there is no final resolution regarding the legality of nuclear weapons. The HRC's Second General Comment to ICCPR Article 6 refers to the dangers of nuclear weapons, as do various General Assembly Resolutions. Yet nuclear states, such as the US, recognise the possibility that nuclear weapons might be used in war in a limited, defensive, manner.[1256] Even states claiming the illegality of nuclear weapons note the possibility that some form of limited use for such weapons might develop.[1257] The International Court of Justice also acknowledged the possibility that nuclear weapons can be used where the survival of the state is at risk.

The significance of the 1996 ICJ Advisory Opinion to the General Assembly regarding the use of Nuclear Weapons is that the Court did not find any operative law prohibiting nuclear weapons as such. The Court tended to treat human rights law[1258] as a secondary source for developing an international law violation to the use of nuclear weapons. Furthermore, a human rights basis, while relevant, tended to focus on humanitarian law principles of jus in bello.[1259] The Court's decision however centred on humanitarian law principles of jus ad bellum that might provide for the possibility of using nuclear weapons in certain instances, such as when the survival of the state is at risk.

[1254] 402/1990 Brinkhof v. Netherlands (1993)

[1255] In 402/1990 Brinkhof v. Netherlands (1993) for example, he asserted that nuclear weapons are a crime against the peace and a form of genocide. Cf. 509/1992 ARU v. Netherlands CCPR/C/49/D/609/1992 where the Dutch court had directed the selective conscientious objection to nuclear weapons to apply for CO status. The HRC subsequently dismissed the claim for failing to substantiate an Article 18 violation considering complainant's ability to undergo alternative service.

[1256] McGrath (1985) The policy is called counterforce, where the weapons would be used in non-civilian areas using low levels of radiation.

[1257] The memorials to the ICJ regarding the General Assembly's Advisory Opinion Request referred to the possible use of nuclear micro weapons.

[1258] As well as environmental law

[1259] Hence there was some significance to the ICJ's reference to human rights as upholding their principles in warfare.

The significance of the ICJ's decision for the selective conscientious objector is the possibility for asserting the right to object to a military that, on a policy level, relies on such weapons as a means of carrying out its military directives. The ICJ's decision was quite focused in finding a limited right for the use of nuclear weapons and even that part of the decision was subject to strong dissent, principally as a result of the majority's awkward reasoning. Coupled with the acceptance of an objection to nuclear weapons as a basis for a military conscientious objection claim in a variety of states, it is possible that a form of selective conscientious objection can develop for individuals objecting to the use of nuclear weapons.

V. Conclusion

In light of the importance of maintaining a viable international legal system, one must be wary of indiscriminately labelling a norm as attaining the status of customary law. This proviso certainly applies to the human rights context. The instinctive reaction is to attempt to develop as many rights as possible within the customary law umbrella. Restraint is necessary, however, to avoid weakening the legal framework of the international system.[1260]

As noted at the outset, many commentators have labelled the right to military conscientious objection as a customary international norm. In principle, they might be correct. The right is generally observed in state practice. Opinio juris is implied in the resolutions of international and regional bodies, while the treaties upholding the right to freedom of conscience are beginning to serve as a basis for a military conscientious objection right.

On a practical level, certain aspects of the right appear to be universally accepted. These would include the recognition of a conscientious along with religious basis for the objection, a right to alternative service, due process in examining the military conscientious objection claim and upholding the right to an appeal, and possibly in-service objections. Of course, other forms of the right, such as selective conscientious objection, clearly are not universally accepted. While application of the right will differ

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[1260] See e.g. Weil (1983)

depending on the domestic system or the particular circumstances, it probably is fair to say that the right to military conscientious objection is an emerging norm of customary international law.

On a broader level, the emergence of military conscientious objection as a customary right provides further impetus to clarifying the right to freedom of conscience. According military conscientious objection the status of a right raises the prospect that other analogous forms of conscientious objection can be derived from the principal treaties that codify manifestation of a conscientious belief. Resolutions of international bodies indicate this derivation as do the travaux preparatoires of the General Comment to Article 18. Although the General Comment focused on military conscientious objection to entrench the right within Article 18, the HRC noted that manifestation is to include a host of beliefs.[1261] The right to military conscientious objection is an example of the manner in which such beliefs can manifest.

While the international human rights system has begun to codify the right to military conscientious objection, additional forms of manifestation of one's conscientious beliefs have not been developed. The implication is that the international human rights system is upholding the right to manifest a variety of conscientious beliefs comparable to military conscientious objection. Two additional rights to be considered therefore will be the right to conscientiously object to various tax payments, and the right to object to abortion procedures. These objections maintain similar characteristics to military conscientious objection and the remainder of the thesis will attempt to demonstrate how these conscientious assertions can function as well.

[1261] See CCPR/C/SR.1237 for the reason why the HRC focused specifically on the right to military conscientious objection in paragraph 11 of the General Comment.

Chapter Seven

Conscientious Objection to Taxes

I. Introduction

Upon considering the practical application of a right to manifest conscientious beliefs, especially beliefs analogous to a military conscientious objector's, one is confronted with the prospect that deference to personal conscientious belief will eclipse state directives and the rule of law. Such a right of course raises the questions mentioned when discussing the forum externum aspect of the right to freedom of conscience,[1262] namely what is the scope to the manifestation of a conscientious belief and how can it be provided for in a legal system? Does an individual maintain the right to assert any conscientious belief as grounds for disregarding a particular state law, subject to the limitations provided for in the law?[1263]

The remainder of this thesis will address these issues by examining two additional examples of conflict between manifested conscientious beliefs and state directives -- conscientious objection to taxes and to abortion procedures. Similar to military conscientious objection, the common factor among these objections is that the state is requiring action from the objector that would entail violation of a particular conscientious belief. Furthermore, these objections have been addressed by states and somewhat marginally by the international human rights system. While the actual level or scope of objection shall vary depending on the action being objected to, states generally uphold the objection when confronted with a conscientious conflict. Although the breadth of objection will be considerably narrower than the more developed right to military conscientious objection, referring to other forms of conscientious objection can begin to provide a framework for addressing questions of scope for the manifestation of a conscientious belief.

II. Tax Objection

Equating the payment of a tax with the manifestation of a conscientious belief might initially seem to stretch the understanding of 'manifestation'. This is particularly so upon considering judicial decisions that limit the manifestation of a belief to the 'actual practice' demanded from a conscientious belief. Making a tax payment does not appear to violate any 'actual practice', save for a belief that precludes a person from

[1262] See discussion supra at Chapter Five

[1263] Such was the position adopted by the HRC when drafting the General Comment to Article 18.

actually making a tax payment.[1264] The objection does not seem to be based on any particular conflict entailing the manifestation of a conscientious belief.

Comparing a tax objection to a military conscientious objection claim can clarify how the objection derives from a manifested conscientious belief. Individuals assert the right to conscientiously object to a variety of tax payments because the tax is supporting state activity contrary to one's beliefs. The contention focuses on the inherent problem that the tax payment supports activities that violate one's religious or conscientious beliefs. The fiscal support provided to the state for activity that violates one's conscientious beliefs is, for the conscientious objector, comparable to physically conducting the action.

Such a contention has some merit with regard to the payment of taxes. Certain taxes were instituted to provide governmental services where the individual could not perform them due to the public nature of the task, the scale of work involved, or the difficulty in creating satisfactory boundaries between individuals. Hence paying tax is akin to engaging in an agency agreement with the government to carry out the task in one's stead. In certain instances, an 'actual practice' mandated by the belief can possibly prevent a variety of tax payments that are made in support of actions conflicting with the belief.

For example, the military tax objector is conscientiously opposed to supporting the military both in a physical sense, by participating in military operations, or by being required to fiscally support the military. In the words of one military tax objector, 'If I were to say to you, 'I will not kill my neighbour but I will pay for someone else to do it' would you not question my integrity?'[1265] For the tax objector, the action of physical participation or fiscal support results in the individual acting contrary to a conscientious belief. The participation for the tax objector is broadened to include any form of support that would lead to a violation of a belief.

Despite the possibility that manifestation of a belief can include payments made to support contrary activity, in practice it is quite a limited objection. International judicial bodies and domestic courts have

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[1264] Such forms of objections are routinely rejected as the court refers the objector to the legislature. Crowe v. CIR 396 F.2d 766 (8th Cir. 1968) (objection to paying federal, as opposed to state, taxes as well as objection to welfare taxes); Lyall (1992;Fn.27) referring to fundamental opposition to poll tax payments in Scotland.

[1265] DiSalvo (1982;507 fn. 60) quoting a pacifist's characterisation of tax objection from Durland, W., ed., (1980) in People Pay for Peace.

relied on similar reasoning when confronted with the tax objector.[1266] The analysis of the tax objection is generally divided into an examination of the internal beliefs mandating a tax objection, the endogenous factors, and an understanding of the external ramifications and importance of taxes, the exogenous factors.

From an endogenous standpoint, the problem generally is that there is no nexus between the tax objector's beliefs and the tax being paid. An objector has a difficult time demonstrating a violation of a belief by conducting a neutral activity such as paying taxes into a general fund. This is especially the case when it is indeterminable whether the objector's taxes are used to support an activity that violates the objector's belief. According to this reasoning, there is no assertion of any right to conscience since there is no infringement occurring to one's conscientious belief.

On the exogenic level, the key problems noted by judicial fora is that taxes are an administrative necessity determined by the legislature to be important. Objecting to taxes creates an undue administrative and fiscal burden on the functioning of the system that cannot be justified because it might infringe an individual belief. The 'slippery slope' problem also is raised since upholding one form of objection opens the door to additional objections against funding programs contrary to one's belief. This apprehension compounds the administrative problems that the tax objector raises.

Note however that the exogenous reasons for limiting the tax objector's claim, while acknowledging the existence of a right to conscience, do not appear to fall within the limitation standards established by the treaties codifying the right to freedom of conscience. The right to conscience is subject to very specific and focused limitations that do not necessarily incorporate administrative burdens. It is one thing for the state to supersede a belief against paying a tax supporting a no-fault car insurance policy.[1267] The policy could relate to a 'public safety' interest in protecting third parties injured in an accident with the tax objector. However to limit an assertion because of administrative reasons that are not based on any specific treaty limitation, such as an undue fiscal burden on the system, appears to extend the limitation beyond the scope of the treaty.

[1266] The particular instances are discussed infra

[1267] 2988/66 X v. Netherlands 10 Ybk. Eur. H.R. 472 (1967)

In general, the domestic decisions involving tax objection direct the objector to the legislature as the proper forum within which to raise the issue of objection. A possible reason for this is that legislatures condone certain forms of tax objection via specific legislative action. The state however will exempt the tax objector from paying a particular tax where the objection develops from a belief. These forms of objection shall initially be considered as a means of focusing on the methods for upholding a conscientious objection to tax payments. The manner in which legislatures uphold an objection can clarify methods for addressing other forms of tax objections while avoiding the administrative and fiscal burdens imposed on the state.

A. Church Tax

The Church Tax is a method of taxation that requires all individuals to pay a certain amount to support the state church. Non-believers or individuals objecting to the payment of the tax on conscientious grounds are exempted from paying that portion of the tax used to support the religious activities of the church. Where however some portion of the tax subsidises a church's non-religious activities that benefit the public, such as keeping birth records or taking a population census, the objector must pay that particular percentage of taxes, as determined by the state.

In Switzerland for example, the state subsidises official state churches and they retain the ability to raise taxes. Non-believers and individuals of other faiths are exempt from paying the taxes used to fund the worship activities of the official local church pursuant to Article 49(6) of the Constitution. Oddly enough however the deduction does not apply to the share of general tax allocated to a canton's principal church, even if the funds are being used to support worship within such a church.[1268]

In Iceland, the national church[1269] receives direct support from the state. Individuals who are not members of a particular religious organisation are exempt from paying the tax.[1270] A percentage of an objector's taxes are given to the University of Iceland rather then the state church.[1271] The imposition of the

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[1268] 1995 Switzerland report to the HRC, CCPR/C/81/Add.8

[1269] Evangelical Lutheran

[1270] 1993 Iceland report to the HRC, CCPR/C/46/Add.5

[1271] Why Iceland requires funds to the University rather then a complete exemption was not clarified following a request by the HRC. See A/38/40 (1983)

tax might have changed however following Iceland's move away from a theo-centric constitutional model to one providing for individual personal convictions as well.[1272]

By contrast, in Finland, an individual generally cannot object to the imposed church tax. The state's reasoning is that the tax does not support any worship or church religious practices. Rather, the tax is imposed to subsidise the churches task of updating the personal register.[1273] Note however that the tax also is used to maintain church buildings.[1274]

Additionally, a Finnish 1994 Supreme Administrative Court decision upheld the imposition of the church tax on corporations whose members objected to the tax on conscientious grounds. The decision applied even if the partners composing the corporation were not members of the state church.[1275] This decision was challenged before the ECHR Commission where the complaint was deemed inadmissible. The Commission held that the applicant company, which was a limited liability corporation established for commercial purposes, was responsible for the tax payment and not the individual members raising the challenge.[1276]

Similar reasoning is used by the Indian Courts. The Courts do not deem funds as a religious 'tax' where the funds are used for educational purposes[1277] or to ensure for improved secular administration or governance of religious trusts.[1278] For example, the state had created a Distress Relief Fund to re-build Hindu and Muslim temples that had been destroyed following local disturbances. The challenge to the use of funds in this manner was rejected since the purpose was not to support a religion, but to provide for restoration and repairs to the temples.[1279]

1272 1996 State Report of Iceland to HRC, CCPR/C/94/Add.2

1273 1979 Finland state report to HRC A/34/40

1274 This point was not addressed by Finland in its state report to the HRC.

1275 1994 State Report of Finland to HRC, CCPR/C/95/Add.6. Cf. 17522/90 Ortega v. Spain 72 D&R 256 (1992) where the Commission rejected an application by the Protestant Church to be accorded equal treatment to the Catholic Church, specifically with regard to its granted tax exemptions.

1276 20471/92 Sundstrom v. Finland VII (7) H.R. Case Digest 636 (1996)

1277 See e.g. Khatun v. State AIR 1981 Cal. 302; Ahmed v. State AIR 1976 Cal. 142

1278 Jagamath v. State AIR 1954 SC 400

1279 Raghunath v. State (1974) A.Ker. 48. Note that the Court also distinguished between fees and taxes, as the latter cannot support a religious institution pursuant to Article 27 of the Constitution.

The legislative provisions of some states that uphold the refusal to pay a particular tax are significant. They demonstrate that the dismissal of a tax objector's claims because of administrative necessity need not be universally applicable. It is possible to institute adequate and efficient schemes that address the beliefs of the tax objector without hampering the collection process. Such an approach was hinted at in the one case where the ECHR upheld a tax objection. In Darby v. Sweden,[1280] the applicant objected to paying a church tax since he was not a member of the church nor was he even a resident in the state. The Court held that because the state granted an exemption for resident non-believers of a certain percentage of the church tax, it was discriminatory to deny same to a non-resident. While the case was decided on ECHR Article 14 grounds regarding discrimination between residents and non-residents, the Court did not refer to the administrative or fiscal burdens that such an objection can raise.

B. Public Support Schemes

Many minority religions or beliefs object to the notion of any form of public support. Although some objections are recognised, the majority of challenges are denied due to the administrative and fiscal reasons discussed supra. For example, a challenge to a pension program tax in the framework of the ECHR[1281] was dismissed. The Commission held that tax revenues are placed in a central fund and are then transferred to the relevant receiving agency. The tax objector's money does not necessarily go to the public support schemes.

An additional ECHR case centred on a compulsory auto insurance scheme that provided for an alternative tax to those religiously and conscientiously opposed to the requirement.[1282] The Commission rejected the challenge to the alternative tax due to the limitations stated in ECHR Article 9(2). The legislature did not impose an alternative tax to provide public insurance for the tax objector but to protect third parties who might be involved in an accident with such believers. The need to protect the 'public safety' therefore served as the basis for the tax scheme. While the reliance on public safety for a no-fault

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[1280] 11581/85 Darby v. Sweden 13 EHRR 774 (1991)
[1281] 1497/62 Reformed Church of X v. Netherlands 5 Ybk 286 (1962)
[1282] 2988/66 X v. Netherlands 10 Ybk 472 (1967)

insurance scheme is somewhat tenuous, the decisions reflect the deference accorded to states in instituting specific tax regimes for collecting revenue.

Turning to the right to claim a tax exemption from public support schemes, individual challenges are generally denied when based on a personal or political reasons, such as a personal distaste for welfare recipients.[1283] Nevertheless, some states provide for certain forms of tax objection. For example, in the US, public insurance scheme taxes are not paid on any funds received for services performed on behalf of a religious order objecting to public insurance.[1284] Furthermore, a self-employed individual whose religious order is conscientiously opposed to insurance schemes may also obtain an exemption. The criteria are that the objection emanates from established tenets or teachings of the sect and the sect makes alternative provisions for its dependent members.[1285]

The problem with these exemptions is that they tend to be unduly limiting and subjective. In particular the law granting an exemption for self employment tax protects only certain forms of religious beliefs. A narrow interpretation of the law has excluded sects opposed to insurance schemes who do not have any formally instituted program of support for their dependent members,[1286] or individuals who conscientiously cannot contribute to public programs such as social security.[1287] The courts reason that the US Congress provided for certain, limited, objections to tax only in instances where forms of support were available to replace public assistance, like unemployment or social security. Note however that the US law only provides an exemption for the self employed. Hence a Church doctrinally opposed to public insurance must pay the tax for hired employees,[1288] even when the employees are also members of the Church.[1289]

The more general reasoning for disallowing public support scheme tax objectors is best summed up in a 1982 US Supreme Court case, US v. Lee.[1290] In Lee, Amish employers objected to paying Social

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[1283] Crowe v. CIR 396 F.2d 766 (8th Cir. 1968)
[1284] 26 USC section 1402(e)(1)
[1285] 26 USC section 1402(g)(1)(A)-(E)
[1286] See e.g. Henson v. CIR 66 TC 835 (1976) (Sari Baba Society, who believe that God will provide all their needs)
[1287] Droz v. CIR 48 F.3rd 1120 (9th Cir. 1995); Jaggard v. CIR 582 F.2d 1189 (1978); Palmer v. CIR 52 TC 310 (1969) (Seventh Day Adventist objected to social security tax, even though it was not part of formal church doctrine).
[1288] South Ridge Baptist Church v. Industrial Commission 911 F.2d 1203 (6th Cir 1990)
[1289] Bethel Baptist Church v. US 822 F.2d 1334 (3rd Cir. 1987)
[1290] US v. Lee 455 US 252 (1982)

Security tax for their Amish employees. The Court referred to the usual policy reasons for disallowing such an objection. The law did not provide for an objection, it was a minor interference with a religious belief outweighed by the administrative and fiscal necessity of upholding the tax system,[1291] and objection would encourage other forms of tax objection. Significantly, the Court distinguished prior accommodation cases involving unemployment compensation for those refusing employment on their Sabbath[1292] since they entailed receipt of a necessary benefit.[1293] The Court held that receipt of a benefit differed from making a payment to a general fund, especially since the objectors can refuse receipt of social security when they reach the eligible age limit. Unemployment insurance however is a necessity that should not be denied to an individual compelled to adhere to the specific practices of a belief.

The fiscal and administrative viability of the tax system, and the prevention of additional tax objection claims, has served as the central reasoning in cases involving tax objectors not only in the US,[1294] but in other domestic jurisdictions[1295] including Australia,[1296] the UK,[1297] Canada,[1298] and India.[1299] The key limiting factor is that if the legislature has not provided a specific exemption for the objector, the assertion of the belief will be denied.

Relying on legislative action for the right to tax objection demonstrates a rather narrow approach to the understanding of a conscientious belief. As noted by Dignan:

> Forcing a man to act in contradiction to his conscience does constitute a denial of equal concern and respect which is not assuaged by allowing him to protest about it freely.[1300]

[1291] This is the same reasoning used to find no violation of the Establishment Clause. See e.g. Bethel Baptist Church v. US 822 F.2d 1334 (3rd Cir. 1987)

[1292] See e.g. Sherbert v. Verner 374 US 398 (1963)

[1293] Stevens, concurrence, at fn.3, referring to Thomas v. Review Board 450 US 707 (1981)

[1294] See e.g. Ballinger v. CIR 728 F.2d 1287 (10th Cir. 1984)

[1295] See also discussion infra

[1296] Burrowers v. Deputy Commissioner of Taxation 91 ATC 5021 (1991) involving a military tax objection, discussed infra

[1297] Oxley v. Raunham 54 Tax Cas. 779 (1983) (objection to paying income tax because conscientiously opposed to governmental policies)

[1298] Prior v. Queen (1988) 2 C.F. 371 (involving a military tax objection, discussed infra).

[1299] Ananthakaishman v. Madra AIR 1952 Madras 395 (power to tax is absolute right such that administration fee for attorney, even if not beneficial to public, can supersede right to freedom of profession)

[1300] Dignan (1983;25)

Furthermore, because the right to object is a legislative grant, there is no established right to rely on one's conscientious belief.[1301] The problem is similar to that confronted by military conscientious objection when it is deemed a legislative grace rather then a right deriving from the assertion of a belief.[1302] Limitations can be applied,[1303] with the less-established or formalised beliefs being ignored by the legislature. Deriving a tax objection from the right to freedom of conscience however will encompass all forms of religious and conscientious objectors.

Furthermore, tax administration is not an insurmountable predicament. Indeed, the argument of administrative efficiency was a key basis for the military's protest against the right to military conscientious objection at the turn of the century. However as demonstrated by the church tax objection, a legislature can provide for some measure of tax objections in an administratively efficient manner. A number of countries have even proposed the establishment of an alternative Peace Tax in lieu of military taxes. Conscientious objectors to military tax can have their share of military taxes paid to a neutral fund that will be used for non-militaristic activity.[1304]

The possible development of a plethora of other forms of tax objection is still a problem. One can refer to a conscientious 'belief' to refuse to pay a specific tax and wreak havoc on the tax system. Such a contention was also raised by states when considering the right to military conscientious objection and the possible affect it would have on recruitment. The concern focused on a similar issue -- how to provide for a proper manifestation of conscientious beliefs? The next section will address this 'slippery slope' problem when considering the right to a military tax objection.

C. Objection to Military Tax

The assertions of the military tax objector have been raised in a number of international and domestic judicial tribunals, generally meeting the same results - the objection is denied. The HRC dealt

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[1301] See e.g. Muste v. CIR 35 TC 913 (1961) where the US tax court denied plaintiff's analogy between military tax objection and military conscientious objection, discussed infra. The Court held that military conscientious objection derives from a legislative grace and is not a matter of right.

[1302] See discussion supra at Chapter Six

[1303] For example, upholding distinctions between recruited soldiers and those doing alternative service.

[1304] See US - 140 Cong. Rec. S4464, 103rd Cong, 2nd Sess., 11/4/94; 104 HR 1402, 104 Cong., 1st Sess., 5/4/95; Italy - Larricia (1992;140) referring to a 1989 Bill; The Netherlands - Vermeulen (1992;268) regarding a 1988-89 Bill.

with two cases of military tax objection in 1991. In JP v. Canada,[1305] a Quaker desired to place his percentage of military tax into a peace fund account. The HRC held that 'while the Covenant certainly protects the right to hold express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscience' is outside the scope of the article. Similarly, in JVK v. Netherlands,[1306] the HRC denied the right of a nuclear weapons protester to place his military taxes into a peace fund since conscientious objection to taxes is outside the scope of ICCPR Article 18.

The approach adopted by the HRC is arguable considering their 1993 General Comment to Article 18. In discussing the inclusion of a specific paragraph on the right to military conscientious objection,[1307] the HRC noted in the paragraph addressing limitations to the right that other forms of manifesting a belief should not be overlooked.[1308] As limitations in the interest of the public safety, order, health or morals do not seem to universally limit the right to military tax objection, it is possible that the right can derive from the ICCPR. Furthermore, the administrative necessity of the tax system does not appear to be a recognised limitation under any treaty, particularly where the objector desires to pay the money into a neutral peace fund.[1309]

Interpretation of the ECHR has met with somewhat more defined analysis that reflects the usual reasoning adopted by judicial bodies when confronted with a form of tax objection. In 1983, the Commission denied the claims of a pacifist who refused to pay taxes that were used to support the military.[1310] The Commission held that one does not possess the right to manifest all aspects of a belief's practices, nor to manifest all underlying attitudes intimately linked to the belief.

In 1983, a Quaker relied on his pacifist beliefs as grounds for a military tax objection.[1311] The applicant noted that he was willing to pay the tax and that his objection did not raise any of the stated

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[1305] 446/1991 JP v. Canada

[1306] 483/1991 JVK v. Netherlands

[1307] Paragraph 11 of the General Comment

[1308] Paragraph 8 of the General Comment

[1309] But see 568/1993 KV and CV v. Germany CCPR/C/50/D/568/1993 where the HRC dismissed a complaint similar to the JVK v. Netherlands case, one of the reasons being that it had already decided the issue.

[1310] 10295/82 X v. UK 6 EHRR 558 (1984)

[1311] 10358/83 C v. UK 37 D&R 142 (1983)

limitations provided in Article 9(2). The Committee however decided that a manifested 'practice' of a belief does not include every aspect of a belief's practice. This is especially the case for tax objection since paying one's taxes into a general fund does not violate any form of conscientious belief or practice per se. Additionally, taxation of income is an accepted form for collecting funds and it is administratively impossible to identify the final destination of the funds. Furthermore, the ECHR preserves the state's power to tax in Article 1, First Protocol.

Domestic courts invoke similar reasoning when confronted with a military tax objector. In Australia, the Courts held that the right to conscience does not provide an adequate ground for tax objection because the payment is a neutral act that does not violate the asserted conscientious beliefs. The tax objector was referred to the legislature to institute a change in the law since raising revenue for the state was their domain.[1312]

In Canada, the Court distinguished tax objection from military conscientious objection. In the latter instance, one is physically participating in the action, whereas tax payment is a neutral activity involving money being paid into a public fund that supports a variety of state activity.[1313] Additionally, the Court referred to the 'slippery slope' problem raised by other potential tax objectors and the necessity for turning to one's legislature. The English courts also referred a military tax objector to the Parliament if a change was desired in the manner in which taxes are to be paid.[1314]

Similar reasoning has resulted in the denial of military tax objector's claims in the US. Even when asserted within the context of a belief and not as a political objection to a particular war,[1315] the US Courts have dismissed the right to military tax objection.[1316] Hence courts have dismissed military tax objector

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[1312] Burrowers v. Deputy Commissioner of Taxation 91 ATC 5021 (1991). Plaintiff's reliance on international law was dismissed for similar reasons.

[1313] Prior v. Queen (1988) 2 C.F. 371

[1314] Boughton v. Inland Revenue Ct. of Appeal, Civ. Div., 31/3/93; Cheney v. Conn. (1968) 1 All ER 779 (challenge to military tax used to support nuclear weapons based on the Geneva Convention. Court held that the Convention had not been incorporated into law, such that must adhere to legislative policy)

[1315] Notably, the Vietnam War that was generally challenged as violating the Nuremberg Code. See Russell v. CIR 60 TC 942 (1973); Egnal v. CIR 65 TC 255 (1975); Anthony v. Commissioner 66 USTCR 367 (1976); Autenrieth v. Cullen 418 F.2d 586 (9th Cir. 1969); Kalish v. US 411 F.2d 606 (9th Cir. 1969)

[1316] See Kennedy v. Rubin 1995 US Dist. LEXIS 19834; 77 AFTR2d (P-H) 558; Jenny v. US 755 F.2d 1384 (9th Cir. 1985); Lull v. CIR 602 F.2d 1166 (4th Cir. 1979); Mckee v. US 781 F.2d 1043 (4th Cir. 1986); First v. CIR 547 F.2d 45 (7th Cir. 1976)

claims due to fiscal and administrative reasons better suited for the legislature, and the possibility of future claims by other forms of tax objectors. Furthermore, courts reject the Free Exercise claim since taxation is a neutral activity designed to ensure for the support of the government; taxation does not limit one's ability to abide by conscientious beliefs.

Some commentators have attempted to distinguish military tax objection from other forms of tax objection to avoid the 'slippery slope' argument. They contend that military tax objection involves a particular, fundamental, belief that desires to avoid any participation with the taking of life[1317] and that has historically been protected by the legislature in other situations.[1318] This differs from a politically based objection, such as welfare tax objection. The latter is a qualitative determination that tends to affect the fiscal rights of others.[1319] The military tax objection relates solely to the fiscal relationship between the government and the objector, particularly when the objector is willing to make a payment into an alternative fund that will assist the government in some other manner.[1320]

While the aforementioned distinctions might apply to differences between military tax objection and certain tax objections such as welfare tax objection, other possible forms of tax objection analogous to the military tax objection remain. In particular, it is difficult to distinguish military tax objection from an objection to paying taxes supporting abortion or the death penalty. Individuals objecting to abortion and death penalty taxes desire to avoid any form of support for practices that, like the military, involve the state in the taking of human life. Thus fiscal support to the state can be a direct contravention of the asserted belief. Additionally, states in which abortion is legal generally provide for conscience clauses[1321] that grant a right to a nurse or doctor to forgo participating in the procedure.

Some commentators have attempted to address this problem by referring to the historical basis for objecting to military participation.[1322] Furthermore, because governments maintain huge defence budgets, the military tax objector has stronger grounds to have the legislature create an alternative peace fund.[1323]

1317 See Cook (1980); Gray (1979); DiSalvo (1982)
1318 Gray (1979); DiSalvo (1982)
1319 Dignan (1983)
1320 DiSalvo (1982)
1321 See discussion infra at Chapter Eight
1322 Cook (1980); DiSalvo (1982)

These quantitative reasons however do not provide a proper distinction. The assertion being made by the tax objector involves a particular belief. Distinguishing a belief because of its fiscal quantity or historical basis disregards the underlying assertion being made by both the military tax objector and other tax objectors.

Rather, a possible distinction between military tax objection and other forms of tax objections based on a viable belief can relate to what the state is requesting the objector to support. In the case of the military, the objector does not believe in supporting an action that the government is compelling its citizens to undergo.[1324] In reasoning similar to the development of the military conscientious objection right, the underlying premise for upholding this form of tax objection is to provide for an individual to abide by her beliefs. The connection with military conscientious objection is particularly apt as technological-oriented methods of warfare continue to develop, thereby requiring greater financial support, with lesser reliance on the foot-soldier.[1325]

In the case of abortion and the death penalty, or similar forms of tax objection, the objection relates to activity conducted by the state as a result of another person's unilateral action. While the state might offer assistance to conduct an abortion, it is the individual making the decision to undergo the procedure. Similarly, receiving the death penalty resulted from an individual's conscious decision to commit a particular crime.[1326] While the burden on the individual's belief will remain, the derivation of the burden is from external factors that are suitable for legislative redress, such as campaigning for a change in the abortion law.

Other forms of tax objection that derive from particular beliefs can occur. For example, one might refuse to pay education taxes that support the teaching of sex education or creationism in the schools. In such an instance the state is compelling particular behaviour contrary to one's beliefs that one is being forced to support.

[1323] DiSalvo (1982)

[1324] Cook (1980;fn.125)

[1325] Dignan (1983); DiSalvo (1982)

[1326] Hence the reason for international law's disallowance for the death penalty to minors.

Some objections are based on the problem of wrongful convictions or racist juries. These contentions however entail difficulties with the criminal justice system and not necessarily a conflict with a belief.

While the assertion is similar to the military tax objector, these forms of objection centre on specific state policy. It is possible that public policy limitations apply to the manifestation of a belief against sex education or the like since a state must educate its youth on general moral matters by non-indoctrinating, general, information.[1327]

Furthermore, other forms of tax objection can, and should, be recognised. For example, with regard to tax objection for particular state education programs, a state is required to provide an alternative form of education or conduct the education in a neutral manner that does not violate the objector's principles. It is conceivable that an individual may request to have tax education funds placed towards the teaching of individual's who object to the teaching of specific courses that violate their beliefs. For example, upholding alternative sex education courses within a religious context or teaching a host of evolutionary theories along with creationism.

III. Conclusion

When compared to the right to military conscientious objection, the right to tax objection is somewhat narrower. International and domestic judicial bodies generally do not recognise tax objection as a manifestation of a conscientious belief. From an administrative standpoint, the objection appears to entail a great deal of complications.

Yet, upon considering the reasons for rejecting a right to a tax objection, the analogy with military conscientious objection should not be overlooked. The reasons of public policy, deference to the legislature, administrative difficulties, and the slippery slope were all reasons originally offered for denying the right to military conscientious objection. Furthermore, disallowing the manifestation of a conscientious belief on the aforementioned grounds can lead to a violation of the right since these limitations are broader than those provided in the treaties. While it is tempting to defer to other human rights as a means of objecting to a tax payment,[1328] occasions do arise where paying the tax will entail a violation of one's conscientious

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[1327] Cf. e.g. 5095/71 Kjeldsen, Buck and Pederson v. Denmark 1 EHRR 711 (1980)

[1328] Free speech, for example, can serve as a context for various challenges to tax payments. See e.g. Superintendent v. Lahia 1960(2) SCR 821 (political objection to irrigation rates in Upper Pradesh).

belief.[1329] As discussed throughout this chapter, it is possible to provide for a limited form of tax objection when considering the belief being asserted and the particular demands emanating therefrom.

[1329] See discussion supra at Chapter Five.

Chapter Eight

Abortion Objection and Conscience Clauses

I. Introduction

The forms of conscientious objection discussed thus far centred on objections to actions demanded from the state. Conscientious objections to military service or to payment of taxes derive from a particular conscientious belief that conflicts with a state's directives. What of a different form of conscientious objection, where the conflict with a conscientious belief derives from the actions or demands of other individuals? Alternatively, what if the objection focuses on the policy of the state rather than the actions being demanded by the state? Can one claim to be manifesting a belief based on a conflict with private actors who harbour different views or due to a disagreement with state policies?

This chapter will begin to focus on a broader form of conscientious objection by considering the rights of abortion objectors. The intense level of protest that legalised abortion elicits from pro-life campaigners intimates that at issue is an undercurrent of a core belief regarding human life. Religious and conscientious individuals might feel compelled to engage in radical acts such as bombing abortion clinics as a result of their fierce commitment.[1330] Because some individuals equate abortion with an act of murder, pro-life campaigners might resort to radical action to attain a meaningful level of protection for all life, including the unborn.

The issues raised by the anti-abortion camp however do not solely involve a compulsion to manifest a conscientious belief. The protests are also a form of civil disobedience to persuade the state or individuals performing or receiving an abortion to change their ways or policies. While the pro-life campaigners' opposition to abortion might emanate from a religious or conscientious belief, the underlying goal is usually an attempt to alter the state's policy towards abortion, particularly as the protests derive from actions being carried out on individuals other than the protesters. Therefore the pro-life protests tend to raise issues involving other rights such as free speech[1331] or the boundaries of the right to privacy.

[1330] Smolin (1995)

[1331] See e.g. Madsen v. Women's Health Centre 114 S.Ct. 2516 (1994) where the US Supreme Court upheld an injunction on pro-life protesters' access to an abortion clinic's entrance; 22838/93 Van den Dungen v. Netherlands 80 D&R 147 (1995) (free expression could be limited on basis of legitimate and necessary aims of state)

Similarly, individuals who believe in the necessity of abortion might also resort to extreme assertions of their views. An individual might conscientiously believe that abortion is vital in an underdeveloped state where people are starving, even if abortion is illegal. A woman might feel compelled to undergo a life-threatening, yet illegal, abortion procedure because she believes in asserting her personal autonomy over her body. A state might impose its pro-abortion views to address its social ills, such as overpopulation or dire poverty.

Nonetheless, the pro-abortion stance also is fraught with considerations that go beyond manifestation of a conscientious belief. These broader factors include social issues, such as the desire to address overpopulation and poverty, resolving conflicts between rights - especially where abortion is outlawed on religious grounds, and the status of fundamental human rights, such as the importance of the individual in relation to the state or the prevalence of a universal as opposed to relative human rights system. Additionally, there is the underlying issue of culture and economics that places the pro-abortion debate within the context of a larger picture.[1332]

Acknowledging that the pro and anti abortion protesters raise broader issues demonstrates that abortion protests need not solely be based upon the assertion of an individual conscientious belief. Both points of view rely on expansive reasoning and are subject to a host of cultural influences that lay the groundwork for taking external action.

A further indication that an abortion protest involves broader grounds than a conscientious belief is that the protest focuses on abortions being performed, or not being performed, on other consenting adults and not necessarily the protesters. Abortion protests are comparable to an abortion tax objection.[1333] In both instances, the objection is to an action being conducted to another person either because of a conscious decision to undergo the procedure or because the state is mandating that the individual receive an abortion.

Of course, a general protest action against abortion differs from a conscientious refusal to submit to a state-imposed method of population control, such as China's coercive abortion or sterilisation policy

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[1332] See e.g. Abrams (1996) (noting the need to address cultural approaches to women as a prelude to effectively upholding the right to reproductive self determination)

[1333] See discussion supra at Chapter Seven.

for all couples with one child. It should be possible to rely on a religious or conscientious belief to prevent an abortion occurring to yourself.[1334] In such instances the abortion objection is against a coercive state policy being imposed on an individual with a contrary belief system, a typical application of the freedom from right to conscience.[1335] This instance differs however from the actions of an abortion protester who blockades abortion clinics in an attempt to deter other individuals from seeking an abortion or engaging in a march in support of a woman's right to choose. These campaigners generally maintain a broader agenda to alter the law or dissuade individuals from undergoing the procedure.

The intention of this chapter is to consider abortion objections that focus principally on the right to freedom of conscience. The stark choice confronting the abortion objector in this chapter is whether to actually perform or assist in the performance of an abortion that is contrary to a religious or conscientious belief. Similar to the military tax objection, the question is - may an individual assert a conscientious or religious belief as a basis for ignoring an employer's or a state's demands to carry out an abortion procedure on another individual? How far does the right to abortion objection extend? Does it apply to the surgeon conducting the abortion procedure or also to the anaesthetist or nurse assisting with the abortion? What of personnel removed from the abortion procedure, such as individuals washing surgical instruments used for abortions or those who work in the administrative department of a health facility? These questions shall be addressed throughout this chapter, with a view towards providing for a broader form of an abortion objection in accordance with the right to freedom of conscience.

The chapter initially will consider the rather equivocal status of the right to abortion under international law. Indeed, the obscure nature of the international law on abortion in a sense precludes consideration of the pro-abortion conscientious objector alongside the anti-abortion objector. A pro-abortion objector will have a difficult time asserting a 'right' to receive or perform an abortion. Even when basing the abortion objection on a conscientious belief, such as a belief in control over one's body, the assertion assumes an a-priori right to an abortion when in actuality there is no definitive right to an

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[1334] See discussion infra regarding asylum and abortion

[1335] As well as raising other human rights issues such as the right to life, privacy, raise a family, and possibly security, where the procedure is dangerous.

abortion under international law.[1336] Hence the rights of other 'entities', such as the right to life of the foetus, enter the evaluation. By contrast, there are stronger grounds under international law for recognising a conscientious belief as a basis for not receiving or performing the abortion procedure. In this instance, the conscientious assertion hinges on a set of principles that need not necessarily be linked to the right to abortion but can be supported by other human rights.

The chapter will also focus on a variety of state laws that either disallow abortion or legalise the procedure. In instances where abortion is legal, it is possible to discern a certain degree of developing state practice that provides for an abortion objection for individuals conscientiously opposed to the procedure. The key issue then relates to the scope of the objection. That matter will be addressed in the remainder of the chapter by deliberating the broader applications of the abortion objection and considering the status of the objection in the asylum context.

II. International Law and Abortion Objection

International law is indeterminate when considering the right to abortion, with the decision being left to the individual state.[1337] While commentators have attempted to demonstrate a developing state practice upholding abortion,[1338] the practice is still unlawful in many states.[1339]

Although human rights treaties provide for the right to life as a seminal and basic right, it is unclear whether such a right also includes protection for the unborn foetus. The ICCPR drafters rejected a proposal to include protection of prenatal life.[1340] Yet the HRC in reviewing state reports has noted both the rights of women to an abortion as well as an obligation to provide adequate protection and care to prevent infant mortality.[1341]

[1336] The importance of the pro-abortion objection is that it highlights the debate regarding a woman's right to reproductive autonomy. Furthermore, it raises the issue of conflicts between rights, especially when abortion is outlawed on religious grounds.

[1337] See e.g. Shelton (1987); Thompson (1994) criticises the doctrine of "margin of appreciation" which defers public moral issues to states since an abortion decision is a private matter for the woman and the state is the very actor that was discriminating against the woman in the first place.

[1338] Boland (1994); George (1985)

[1339] Ireland - Article 40, @3(3) of the Constitution; Germany - see Frank (1994-95) discussing the law and various Constitutional Court decisions; Australia - R v. Wald (1971) 3 NSWDCR 25. Note as well the possible development in Poland against abortion. Leslie (1994)

[1340] Shelton (1987;10)

[1341] Shelton (1987;10-12)

The Convention to Eliminate Discrimination against Women grants the right to the woman to have an equal say as the man in determining the size and spacing of a family.[1342] The Convention also prevents any discrimination when considering issues of health, especially the mortality of a woman.[1343] While this does not categorically provide for a right to abortion, the notion of reproductive self determination that was recently espoused at the 1994 Cairo Population Conference[1344] indicates that at the very least a woman has the right to make an informed choice about her reproductive activities, which presumably could include the option of abortion.

Regional human rights bodies have also tended towards treating the abortion decision as a choice for the pregnant woman. For example, the Inter-American Commission has not accorded the right to life protection to the foetus in holding that the determination of when life begins is really a matter for each state.[1345] The Commission made this decision despite the clear language of the AmCHR stating that life begins from the moment of conception.[1346] The Commission held that the language actually reflects a compromise between pro and anti abortion forces.[1347] Harsh dissenting opinions to the contrary, the result is that consideration of the right to life of a foetus is to be considered within the context of accounting for the pregnant women's right to life and privacy.

The ECHR has not explicitly recognised the absolute right to life of the foetus nor has it summarily dismissed the right. In Paton v. UK,[1348] the Commission adopted a narrow, textual, approach in holding that the entitlement of 'everyone' to a right to life only applies to the postnatal stage and does not extend to the foetus. Note however that the right to privacy and family life under ECHR Article 8 can possibly protect the unborn foetus as well as the pregnant woman depending on the status a state accords to the foetus. Considering a foetus to be a viable entity thereby entitles it to specific rights. Pregnancy then is not

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[1342] Cook (1992) also invokes the right against discrimination, the right to life, to security, to privacy, and to the family as a basis for making this determination a shared one. See also Hernandez (1991)

[1343] Article 2 and Article 12 of the Convention.

[1344] A/CONF.171/13 (1994)

[1345] Case 2141 OAS/SER.1/V/I.52 doc.48, 6/3/81

[1346] Note however that the state party to the case, the US, had not ratified the AmCHR, only the AmDHR which does not contain that clause. The Court however treated the phrase as an amplification of the right within the AmDHR.

[1347] See also Shelton (1987)

[1348] 8416/78 Paton v. UK 19 D&R 224 (1980)

an issue solely within the private life of the mother because it affects another interest, thereby granting the ability to states to impose some form of restrictions on an abortion procedure.[1349]

From the standpoint of international law, the right to life does not necessarily prevent or mandate an abortion. The decision to allow or disallow an abortion seems to be a matter left to the states. Hence to consider the rights of an abortion objector, it is necessary to examine state laws that provide for the abortion objection.

III. State Law

A. Abortion as an Illegal Act

The right to abortion is not universally accepted or granted by all states. The majority of Australian states for example still treat abortion as an illegal act that technically can provide grounds for a criminal prosecution against a physician or medical staff.[1350] The common law has however recognised certain judicially created exceptions.[1351] Furthermore, on a practical level, the state has imposed such a high standard of proof for a criminal prosecution[1352] that application of the law is only in instances where the doctor is acting unethically.

In Germany, due to the constitutional protections accorded to the foetus, abortion is unlawful. The state does provide for an abortion in limited circumstances, such as to avert a grave danger to the pregnant woman.[1353] Similar to Australia however the state rarely prosecutes a physician for conducting an abortion.[1354]

In Ireland, the Constitution accords protection to the "unborn" foetus.[1355] Recent decisions by the Irish Supreme Court, which have taken note of a number of critical EC and ECHR decisions, have begun

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[1349] 6959/75 Brugermann & Scheuten v. FRG 5 D&R 103

[1350] Petersen (1996) noting that South Australia and Northern Territory have statutes similar to the UK law that allows for abortions.

[1351] See e.g. R v. Davidson (1969) VR 687 (abortion allowed if the pregnancy endangers the mental or physical health of the woman). Note the debate surrounding the meaning of "mental", as opposed to physical, danger which is a more subjective determination regarding the mental health of the pregnant woman.

[1352] A "beyond a reasonable doubt" standard.

[1353] Gossel (1987;144)

[1354] Kommers (1994); Frank (1994-95)

[1355] Irish Constitution Article 40 @3(3). Quinlan (1984) notes that the key purpose of the amendment was to ensure against legalised abortions in Ireland, in response to the developing trend in other Western states.

to recognise the right of an abortion outside the state.[1356] The Court has upheld the right of the woman to receive information regarding abortions in other countries as well as the right to travel to other states to receive an abortion. The Court distinguished between disallowing abortions in Ireland to protect the unborn versus recognising the rights of the pregnant woman to travel and receive information about abortions elsewhere.[1357]

In these aforementioned countries, there is no right to an abortion objection. Because abortion is illegal, a physician who does not object to abortions will generally conduct the procedure when it is legal.[1358] Furthermore, most states provide for some form of an abortion procedure, such as providing for abortions to preserve the mental or physical health of the woman or imposing a high burden of proof for a criminal action. Due to the informal nature of the right however, no structured abortion objection seems to have emerged. Granted that certain emergencies might arise that would entail the immediately available physician or other medical staff member to participate or conduct an abortion. In such instances, most abortion objectors agree that they would overlook their beliefs in deference to the life of the woman.[1359]

Therefore to determine the right of abortion objections, it is necessary to examine states that provide for the right to abortion. Recognising the strong nature of the belief that serves as the core for abortion objection, many states providing for an abortion also recognise the medical personnel's prerogative to refrain from any involvement with the abortion procedure. Generally referred to as 'conscience clauses', a variety of domestic legislation provide exemptions for medical personnel performing or assisting with an abortion procedure.

B. Abortion as a Legal Act

1. US

In the US an employer cannot force a physician to perform an abortion that is contrary to her beliefs.[1360] Federal law disallows any public authority from requiring an individual to 'perform or assist in

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[1356] In Re Article 26, No. 87 Ir. S. Ct., 12/5/95

[1357] Carder (1996) claiming that the decision can be interpreted as equating the rights of the woman with that of the foetus.

[1358] Indeed, in Germany the woman must appear before various governmental officers who attempt to dissuade a pregnant woman from having an abortion. Kommers (1994)

[1359] Durham Wood and Condie (19) relying on a survey of US nurses

[1360] Daar (1993); Stern (1975)

the performance of any sterilisation procedure or abortion' if it would be contrary to 'religious beliefs or moral convictions'.[1361] Note however the applicability of the law only to facilities that receive federal funding. The law does not necessarily bind state or private institutions.[1362]

The majority of states have also passed statutes preventing discrimination against individuals who refuse to perform or assist in the performance of an abortion as a result of their beliefs.[1363] Performance or refusal to perform an abortion cannot be grounds for dismissal of a physician or deny the physician any privilege accorded to other medical staff.[1364]

The scope of protection accorded to abortion objectors is similar to the federal legislation. The state laws generally exempt medical personnel who 'assist' or 'participate' in an abortion procedure. Some states indicate an intention to narrow the scope of objection to physicians or nurses physically performing the procedure by adding in phrases such as 'directly participate' in the abortion procedure.[1365] Other states indicate a desire to broaden the objection by including those individuals who participate 'directly or indirectly' in the abortion.[1366] Furthermore, some states extend objection to individuals objecting to other medical procedures as well, such as euthanasia or sterilisation.[1367]

Note as well the minimal evidentiary threshold for making the objection, unlike a military conscientious objection claim.[1368] Generally all a physician need do is state an objection to the abortion procedure, even if the objection developed over time or during the course of employment.[1369] This is quite different to the stricter burden of proof for the in-service military conscientious objector. An in-service

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[1361] 42 USC section 300a-79(b)(1). The law goes on to protect medical facilities that harbour such an objection, such as a Catholic hospital, section 300a-79(b)(2), and to prevent discrimination against both supporters and objectors to abortion, depending on the health care facility's position on the issue. section 300a-79(c)(1).

[1362] State institutions are still subject to more general anti-discrimination measures, such as Title VII. The protection accorded to religious believers by the Civil Rights Law is beyond the scope of this chapter. Note however that such law is not as broad as the more specific conscience clauses upholding the right to abortion objection. See e.g. Durham, Wood and Condie (1982)

[1363] See Daar (1993;fn.149); Durham Wood and Condi (1982;fn.179)

[1364] See e.g. US federal law, USC section 300a-7(c)(2)(A)-(B)

[1365] As used in California. Cal. Health and Safety Code section 25955(a) (please note, section of law is altered following 1995 changes)

[1366] Tex. Rev. Civ. Stat. Ann. article 4512.7(1). See also Missouri Louisiana and Illinois law that provide broad forms of protection. Durham Wood and Condie (1982;321)

[1367] Durham Wood and Condie (1982;fn.181)

[1368] Daar (1993;1276)

[1369] Swanson v. St Johns 597 P.2d 702 (S.Ct.Mont. 1979)

military conscientious objector is confronted with an uphill battle and subject to a stricter burden of proof.[1370]

It is possible that there is a lower burden of proof for the abortion objector simply because there are enough doctors willing to perform an abortion. Since the abortion objection relates solely to one task, it is easier to accommodate the belief. Alternatively, because the abortion objection focuses on a private action not related to one's social duty, the state might be inclined towards providing for a broader form of objection.

2. UK

The UK has a similar law to the US concerning medical personnel opposed to abortions. Section 4 of the 1967 Abortion Act provides that a person with a conscientious objection to an abortion is under no duty to 'participate' in the procedure. The law discourages employers from winnowing out abortion objectors as a condition precedent to employment.[1371]

The UK courts however interpret participation in a very physical sense, i.e., as actual participation in the abortion. Hence nurses participating in an abortion[1372] or junior medical staff undergoing training[1373] can claim the law's protection. It is unclear however whether other medical personnel not physically associated with the procedure can claim protection. The typical examples are a doctor refusing to certify an abortion procedure or an anaesthetist refusing to assist in an abortion.[1374] Furthermore, the UK law imposes a direct burden of proof on the abortion objector regarding the asserted belief.

Note that the 1990 Social Services Committee report, entitled Abortion Act 1967 - 'Conscience Clause', recommended that section 4 should extend to ancillary medical staff.[1375] The Social Service

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[1370] See discussion supra at Chapter Six

[1371] These issues were raised before the 1989-90 Social Services Committee that examined Section 4 of the Abortion Act (1967). See Tenth Report of the Social Services Committee, House of Commons Session 1989-90, HC 123, Abortion Act 1967 "Conscience Clause"

[1372] Royal College of Nursing v. Department of Health (1981) 1 AllER 545

[1373] Morgan and Lee (1991)

[1374] Morgan and Lee (1991); Grubb (1988;164). See also discussion infra regarding the breadth of abortion objection laws.

[1375] The two prior bodies authorised to analyse the Abortion Act, the 1974 Lane Commission, Cm 5579 of 1974, and the 1976 Select Committee, First Report from Select Committee Session 1975-76, HC 573-I and HC 737, had also reached similar conclusions with regard to Section 4 of the Act.

Committee also concluded that an elaboration of the meaning of a conscientious belief was necessary.[1376] The Committee based its conclusions on testimony from medical practitioners and Department of Health officials who referred to the necessity of adequately accommodating the beliefs of their medical personnel. The consensus of the testimonials before the Social Service Committee was that senior staff attempt to accommodate abortion objections on an ad-hoc basis. For example, large health facilities uphold nurses harbouring an abortion objection to forego pre and post operation treatment of abortion patients.

3. Italy

The conscience clause under Italian law provides for a similar right to the UK. The exemption applies only to medical and paramedical personnel performing procedures that are required for the abortion procedure.[1377] The law therefore excludes individuals who have a causal relation to an abortion procedure, such as individuals managing the hospital.[1378]

4. India

Legalisation of abortion in India occurred in 1971 under the Medical Termination of Pregnancy Act. Modelled on the 1967 UK law,[1379] the goal of the law was to address the population problem in India.[1380] While not providing for an unfettered right to abortion, the law provides for a right to an abortion if the birth of a child would cause mental anguish to the parents. The Legislature has broadly defined mental anguish, including for example the anguish caused by the failure of a birth control device.[1381] The law therefore can be interpreted as providing for abortions by adopting a broad interpretation of the potential mental anguish confronting the pregnant woman.[1382]

Unlike the 1967 UK law however, the Indian law does not provide for the right to an abortion objection. In drafting the 1971 law, only the state of Utter Pradesh proposed the inclusion of a conscience

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[1376] A suggestion also made by the 1976 Select Committee.
[1377] Lariccia (1990;141) referring to law N.194, Article 9, 22/5/78
[1378] Lariccia (1990;142)
[1379] Minattur (1974)
[1380] Chandrasekhar (1974); Minattur (1974)
[1381] Minattur (1974;fn.3-4) referring to explanation II, section 3 of the Act.
[1382] Minattur (1974)

clause for doctors refusing to perform an abortion.[1383] The final draft of the law did not include this proposal.

It is possible that a doctor with an abortion objection can narrowly apply the law's provision for an abortion. For example, a doctor can refuse to conduct an abortion where the pregnant woman's life or health is not in any physical danger.[1384] By narrowly applying the right to an abortion, a physician can assert an abortion objection in an indirect manner.

In states where abortion is legal, there is also a right to assert an abortion objection. These states however tend to narrowly interpret the objection. To effectively function as a device upholding the conscientious beliefs of abortion objectors, this chapter will now examine the adequacy of these narrow applications of the abortion objection laws.

IV. Broadening the Scope of Abortion Objection

While providing for an abortion objection is not universal, the right to abortion objection can extend to other individuals associated with the abortion procedure. The US and UK abortion objection for those "performing" or "participating in" the procedure clearly applies to physicians and other medical personnel actually performing or physically participating in the abortion procedure. The state recognises the direct conflict between the asserted belief and the action being demanded of the individual. Similar to the right to military conscientious objection, the law upholds an objection to the requested action because it would entail a direct contravention of a belief.

The question is, what if an individual defines more marginal actions as violating a belief? Physical participation might be one avenue for defining the extent of a belief conflict. What of other physical tasks required of medical workers that could be viewed as 'participating' in the abortion? Does an abortion objection extend to washing the utensils used for the abortion procedure or filling out forms on behalf of the hospital that certify performance of an abortion?

A. Analogy to Military Conscientious Objection

[1383] Chandrasekhar (1974;97)

[1384] Minattur (1974) noting that the explanation of the law with regard to broadly defining mental anguish is not necessarily controlling or conclusive.

The issues developing out of opposition to abortion are similar to those associated with military conscientious objection. As noted supra, there is a clear similarity between the freedom of an objector to develop a belief while conducting military service or performing an abortion procedure. The belief might develop only when the stark reality and consequences of an action confront the individual. A person might then begin to examine their conscientious understanding of an issue or refer to religious principles for direction.

Furthermore, military conscientious objection issues focused not only on individuals refusing to physically carry out their military duty, but also extended to individuals who believed in severing any form of link with the military. Hence some states recognised the ability of the military conscientious objector to also object to performing alternative service.[1385] The abortion objector raises similar issues. Instances of not necessarily performing the procedure but being associated with an abortion can raise an objection. Assisting with an action that is contrary to a conscientious or religious belief can create grounds for an objection, as recognised in the military conscientious objection context.

Note however a key difference by the abortion objection. The state is not demanding that the individual conduct an action, unlike the situation of tax objection or military conscientious objector. Rather the abortion objector is acting at her own instigation to prevent the occurrence of abortions. By military conscientious objection or tax objection, the state was forcing the objector to conduct an action contrary to a belief.

While this might prove to be a valid distinction between tax objection to military taxes or to abortion taxes,[1386] the distinction will not apply to the individual objector associated with the abortion procedure. In such an instance, the dilemma of violating a particular belief confronts the individual. The violation can arise from actual performance of the procedure or by assisting with the procedure, whether or not compelled to do so by the state. Both military conscientious objection and abortion objection involve a person refusing to perform an action contrary to their beliefs. The abortion objection demonstrates that within the medical field, states are willing to tolerate an individual's assertion of a belief.

[1385] See discussion supra at Chapter Six

[1386] See discussion supra at Chapter Seven

B. Additional Applications of the Abortion Objection

In the US, some states broaden or narrow the range of protection accorded to the abortion objector. For example, the phrases 'perform or participate in' an abortion emphasises the performance dimension of the act rather then the preparatory procedures surrounding an operation or other administrative duties.[1387] Some US states broaden the scope of the abortion objection by protecting those who 'perform or participate, directly or indirectly' in the abortion procedure, thereby including individuals marginally involved with the procedure.[1388]

Furthermore, US law requires an employer to accommodate, to the best of his abilities, the religious beliefs of his employees in accordance with the 'Free Exercise' clause of the US Constitution. Hence a Court exempted an IRS employee from auditing any organisation that was contrary to his Roman Catholic faith, including abortion clinics. The Court held that another auditor in the IRS could handle the work.[1389] The objector's beliefs merited accommodation as long as no undue hardship develops to other auditors and to the IRS. It is possible to extend this form of accommodation to a medical employee only marginally associated with an abortion procedure.

Nonetheless, the protection accorded to a belief that is relying on a constitutional right is prone to narrow interpretations.[1390] Courts do not extend the various conscience clauses to uphold broader claims of the abortion objector outside the operating theatre. For example, a workroom instrument aide charged with cleaning surgical instruments requested another work detail after he discovered that abortions were performed with the instruments.[1391] The Court upheld the objector's request for a transfer upon accounting for the hospital's inability to properly accommodate the plaintiff's beliefs. The Court did note however that the state conscience clause relied on by the objector only extended to individuals assisting with abortion. Because cleaning instruments and transporting blood samples was not 'assisting' the abortion, the Court held that the conscience clause was not at issue.

[1387] Durham Wood and Condie (1982;320) referring to legislation in Arkansas and Delaware.
[1388] Durham Wood and Condie (1982;320) referring to Texas.
[1389] Haring v. Blumenthaul 471 FSupp 1172 (DC 1979)
[1390] Durham, Wood and Condie (19)
[1391] Tramm v. Porter Memorial Hospital 128 FRD 666 (N.D.Ind. 1989)

The UK Courts adopt a similar approach when considering the meaning of participation in an abortion procedure. For example, a medical secretary refused to type a letter recommending an abortion for a particular patient.[1392] She asserted the right to refuse participation because if abortion was illegal, the state would have charged her with participating in the crime merely by typing the letter of referral. The Court rejected this reasoning because she lacked the sufficient level of men's rea[1393] and because typing a letter was not equivalent to physically 'performing' the act. The Court distinguished between persons who were participants in the abortion operation team as opposed to medical staff on the periphery of the action.

This narrow approach towards the abortion objection has influenced other forms of medical objections in the UK. For example, a psychiatric nurse conscientiously objected to the use of electric shock treatment.[1394] Upon transfer to the night shift where the treatment was generally given, the nurse refused to participate in the treatment. The hospital then dismissed the nurse from his post. The Court upheld the plaintiff's dismissal following his refusal to carry out any instructions demanded by his employer without examining whether the possibility for accommodating plaintiff's beliefs existed. Furthermore, the Court dismissed the plaintiff's attempts to analogise his situation to an abortion objection since there was no specific right to objection other than to an abortion procedure.

By contrast, hospitals routinely exempt medical residents from conducting rounds in abortion clinics should they harbour an objection to the procedure. This exemption applies even when the abortion procedure did not involve the participation of the objecting medical residents.[1395]

The UK abortion law also requires doctors to certify their approval of a particular abortion. May a doctor claim an exemption from such certification even when not physically performing the abortion? The 1990 study of the UK abortion law noted that such issues have not, yet, arisen. This could possibly be due to the ease in which a certifying physician can pass the form to a colleague. Such reasoning does not however remove the conflict of belief problem for other marginally involved individuals such as the secretary or workroom technician.

[1392] Janaway v. Salford (1988) 3 AllER 1079

[1393] A dubious conclusion in light of current UK criminal law. Grubb (1988;162-163)

[1394] Owen v. Coventry Health Ct. of Appeal (Civ. Div.) 19/12/86

[1395] Morgan and Lee (1991); Hastings Centre Review (1989?)

Furthermore, the term 'participate' can be broadly construed upon noting the development of the Abortion Act from a gradual alteration to the criminal statutes.[1396] Before the drafting of the 1967 Act, criminal liability extended to an individual assisting in a clerical fashion with an abortion on grounds equivalent to a conspirator. Because the current statute is to remove criminal liability, an equally broad scope should also apply to the exemption.

An interesting contrast to the UK law is the New Zealand law that also developed from an alteration to the criminal statute. Pursuant to current New Zealand law, definition of performance and assistance includes preparations leading up to the abortion procedure from the moment the patient enters the hospital.[1397] The reason for applying such a broad scope to the abortion objection right is due to the broad manner in which the prior criminal statutes outlawing abortion incorporated any form of external assistance.

Despite the abortion objection's narrow application in the UK, it has served as a groundwork for other forms of objection. The UK's 1990 enactment of the Human Fertilisation and Embryology Bill exemplifies this development in providing for an even broader form of conscience clause than the Abortion Act.[1398]

V. Asylum and Abortion

Recognising the similarities between an abortion objection and military conscientious objection, it is worth mentioning the abortion objector's right to asylum.[1399] As discussed supra by military conscientious objection, states grant asylum to a military objector confronted with persecution because of his beliefs. Abortion and sterilisation objectors have raised a similar claim, most notably to China's coercive one-child population policy. Similar to military conscientious objection, referring to requests for asylum extends the breadth of an abortion objection outside a formal legislative context. Abortion objection

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[1396] As opposed to the US, where federal case law created a radical change in the abortion laws. Petersen (1996)

[1397] O'Neil (1984) referring to section 46 of the Contraception Sterilisation and Abortion Act 1977 that is quite similar to the UK's statutory language.

[1398] See section 38 of the Bill.

[1399] See Tobin-Sniers (1990) making the analogy and calling for broader rights to abortion objectors seeking asylum.

can develop as a claim to manifest a conscientious belief rather then limit the objection to the confines of a narrow legislative provision.

Some states are willing to grant asylum status to medical practitioners or individuals who harbour an objection to abortion and therefore flee China to avoid the one-child policy. In Australia for example, the administrative court upheld the granting of asylum to a physician forced to perform abortions in China.[1400] Seeking grounds for granting such status under the 1950 Refugee Convention, the Tribunal analogised the situation to a military conscientious objection claim. International law grant's asylum to a military conscientious objector persecuted for asserting a religious or conscientious belief, as indicated in the High Commissioner for Refugee's Handbook that interprets the Refugee Convention While the refusal to perform an abortion might emanate from a religious belief and not necessarily an opinion, the Tribunal held that the term 'religion' includes the ability to abide by a belief as well. Similar to the situation of military conscientious objection, a physician refusing to perform the ordered procedure would find it impossible to seek employ and possibly face severe sanctions. Further, upon considering the human right to a family and the right to freedom of religion and conscience, the coercive population policy could be interpreted as violating human rights norms.

In Canada, the Appeals Court adopted an even broader approach in holding that the forced-sterilisation policy of China's one-child policy could constitute grounds for a well-founded fear of persecution.[1401] Note that plaintiff in this case did not assert any conscientious or religious grounds for refusing sterilisation. The Court however held that she was a member of a particular 'group' of women requiring sterilisation who genuinely fear forced sterilisation. The Court, in a somewhat sweeping fashion, held that such a practice violates the right to life and could constitute cruel inhuman or degrading treatment in violation of human rights norms.

While the Canadian Court adopted a different approach in its treatment of sterilisation, courts could also deem abortion objectors seeking refugee status as a persecuted social group.[1402] Common

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[1400] Refugee Review Tribunal: V93/00153, 15/4/94

[1401] Cheung v. Canada (M.E.I.) 102 D.L.R.(4th) 214 (1993)

[1402] Lai v. Canada 48 ACWS3rd 815 (1994)

principles separate abortion objectors from other social groups and the correct circumstances can lead to a subjective persecution by the state.[1403]

Despite the emergence of some recognition being accorded to the abortion objector seeking asylum, the US has generally denied asylum status to such individuals.[1404] The INS has strictly adhered to its Regulations despite contrary indications from the Executive and Legislative branch that the INS grant asylum status to abortion objectors. For example, despite a 1995 Executive Order requiring the Attorney General to consider granting asylum to those fleeing forced sterilisation or abortions, courts have deferred to the Immigration and Naturalisation Service's denial of asylum.[1405] The courts have held that the Order is not equivalent to a formal change in the rules but merely an indication of a desired policy.[1406] Furthermore, there is no persecution of the applicants due to their political opinions since their objection emanates from an overall objection to the policy. Should they return to China, punishment might follow for not adhering to the law but that is not persecution as a result of their particular views. They receive a punishment as would any law violator, even if the authorities subsequently force an abortion or sterilisation upon them. The applicant must demonstrate that any government action taken against him or her was for a reason other than the mere enforcement of the government's population control policies.[1407]

Note however that in 1995, the INS published new guidelines regarding gender persecution that reflect the development in Canada. Asylum officers are to consider gender specific claims such as persecution resulting from refusal to undergo genital mutilation or submit to an abortion.[1408] These guidelines do not create a change in the law but merely require an officer to consider the possibility of gender persecution as grounds for asylum. The courts still apply the subjective standard that persecution be directed against that particular individual as a result of her beliefs.[1409]

[1403] Note that the Canadian courts are hesitant to apply the same standards to men facing sterilisation since they are not necessarily a particularly defined social group who, as a policy, always undergo sterilisation. See e.g. Chan v. Canada 3 CF 675 (1993)

[1404] See e.g. Chai v. Carroll 48 F.3rd 1331 (4th Cir. 1995); Zhang v. Slattery 55 F.3rd 732 (2nd Cir. 1995); Guo Chun Di v. Moscato 1995 US App. LEXIS 25964 (4th Cir. 1995); DeYou Chen v. INS 95 F.3rd 801 (9th Cir. 1996)

[1405] Wines (1995) discussing background to INS laws and to the Legislative and Executive decisions.

[1406] Chen v. INS 95 F.3rd 801 (9th Cir. 1996).

[1407] Guo Chun Di v. Moscato 1995 US App. LEXIS 25964 (4th Cir. 1995)

[1408] Gomez (1996)

[1409] Gomez (1996) noting that the guidelines could lead to the development of a standard similar to Canada.

Similar to Canada, although not to the same extent, the consideration of gender persecution as grounds for asylum should also extend to abortion objectors. Particularly where such individuals will be subject to harsher penalties than individuals fleeing the abortion, for example conscientious or religious objectors who deliberately left China as a result of their beliefs. In such instances, the assertion of an abortion objection should serve as grounds for asylum where the applicant would be subject to persecution for his or her beliefs, in the same manner of protection accorded to the military conscientious objection seeking asylum.

VI. Conclusion

Despite the disparate state treatment accorded to abortion objectors seeking asylum, grounds still exist for discerning a right to an abortion objection. International law does not directly address the issue, largely because the right to abortion is a matter of domestic policy. States that have legalised abortion however generally provide for some sort of abortion objection. The resulting status of the abortion objection is similar to military conscientious objection. An abortion objection must derive from a particular legislative grant before asserting the right to adhere to a conscientious or religious belief. States confine the abortion objector to an assertion against any physical participation to an abortion, unless indicated otherwise. Unlike military conscientious objection however the abortion objection has not been the focus of discussion in international bodies. Coupled with the ambiguous approach of international law in providing for the right to abortion, it is doubtful whether there exists any opinio juris on the matter of an abortion objection. This should not however discount the derivation of an abortion objection from the right to freedom of conscience.

Amplifying the right for an abortion objection further raises the issue of including other medical procedures that might conflict with a conscientious or religious belief. What of a medical practitioner objecting to conducting medical procedures that are contrary to her conscience, such as sterilisation[1410] or euthanasia?[1411] What of a biological researcher's conscientious opposition to using foetal tissue or animals

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[1410] The majority of conscience clause statutes include an objection to sterilisation procedures as well.

[1411] In the US, for example, a 1997 Oregon law allows euthanasia.

for experimental purposes?[1412] Does the entitlement to conscientiously object to abortions also extend to other state-supported medical procedures that violate one's conscience? This chapter did not address the broader issues raised by the plethora of scientific advances during this century that have created new and unique medical and ethical dilemmas.[1413] Nonetheless, the manner in which states provide for abortion objections can assist to determine the allowable scope of objection for other similar assertions centring on a belief conflict. It remains to be seen however whether the abortion objection will extend to additional medical procedures.

[1412] But see Lafferty and Furer (1993) noting the social advantages to foetal tissue research, especially when the tissue comes from women who have consented to the abortion.

[1413] For example, the debate over using scientific data from experiments conducted by the Nazis, or the problems of cloning or using genetically enhanced fruit.

Chapter Nine

Conclusion

The goal of this thesis has been to develop a jurisprudence to facilitate the application of the international human right to freedom of conscience. In particular, the thesis has attempted to analyse the underlying meaning and implication of a conscientious belief. Recognising the rather limited substantive development of the right to freedom of conscience in international law, the thesis offers an approach that would provide for its broader application.

The study is composed of three principal sections. The first section, comprising the first three chapters of the thesis, focused on the historical development and codification of the right to freedom of conscience. The notion of a conscientious belief that can manifest developed concomitantly with the historical evolution of the right to freedom of religion, although the right to freedom of conscience emerged as a singular right, separate from a religious framework, at a later period along the historical continuum. While initial treaty protection upheld the rights of minority religions, the League of Nations and certain Permanent Court of International Justice decisions began to uphold the development of a separate right to conscience.

Certainly during the Post-World War Two period, which experienced the beginning efforts to codify international human rights, the right to freedom of conscience achieved the status as a right meriting distinctive protection. The travaux preparatoires of the principal human rights treaties quite clearly provide for the manifestation of a conscientious belief. The treaties are generally structured in a manner that distinguishes conscience and religion from other forms of conscious thought that might manifest via other human rights, such as freedom of expression. Additionally, the drafters' approach to the right to freedom of conscience indicates a broad understanding of conscience that in one sense belies the current interpretation of the term in international and domestic judicial fora. In essence, the drafters recognised the requirement for a broad application of a conscientious belief as a necessary consequence once the freedom of conscience is acknowledged as a human right.

It was necessary to lay this groundwork in the first section as a prelude to developing an approach that would broaden the possible applications of the right to conscience. Commentators and judicial bodies all too often link the right to freedom of conscience with that of religion, at the expense of the individual asserting a more general conscientious belief. These chapters demonstrate that the purpose of codifying the right to freedom of conscience within the international human rights system was to provide for its application, and not merely to serve as a corollary to the right to freedom of religion.

Nonetheless, focusing solely on the travaux preparatoires of the treaties presents an overly textual approach. The analysis does not offer any specific practical critique of the manner in which the right is applied. Furthermore, there were some contentious issues not fully resolved by the treaty drafters, as exemplified by the problem surrounding the right to change one's belief. Pursuant to a narrow interpretation of the treaty terms, the possibility exists for some states to refer to religious principles at the expense of individual conscientious beliefs.

Chapters Four and Five form the next principal section of the thesis. These chapters, respectively dealing with the forum internum and forum externum, began to focus on the interpretation of the right to conscience. Attempting to outline the protection accorded to the forum internum proves quite a difficult task. The individual's internal understanding of a conscientious belief might not be so readily apparent in light of the varied assertions that derive from a conscientious belief. On the other hand, broadly defining the forum externum can lead to conflicts between state directives and the belief or to clashes with other individuals harbouring a contrary belief. Furthermore, as intimated in the travaux preparatoires, defining a term such as 'conscience' might cause unduly narrow interpretations that do not account for evolving beliefs or overly broad definitions that undermine any practical meaning for the right.

In examining the forum internum and forum externum, the thesis has referred to each forum as a reflection of the other. The approach has been to define the internal and external aspect of the right in a somewhat circular fashion. Referring to an external manifestation assists in identifying the internal belief, while considering the internal belief that is driving the individual to act provides a precise definition of the forum externum thereby upholding manifestations of a conscientious belief.

More specifically, to promote an understanding of the internal protection accorded to a conscientious belief, one must discern the importance of a conscientious belief for an individual. How does a conscientious belief differ from a conscious thought or other forms of conscious reasoning? The chapter demonstrated that the distinguishing characteristic of a conscientious belief from other forms of conscious thought is that a conscientious belief must be applied or adhered to in a specific manner, as dictated by the principles of the conscientious belief. As indicated in the travaux preparatoires, removing the ability to manifest a conscientious belief tends to undermine the basis for the belief as well. Hence referring to the external application of a conscientious belief, the forum externum, can assist in understanding the internal belief that served as an antecedent basis for the external action.

While the first section of the thesis addressed the difference between religion and conscience in the historical development of the right, the section on the forum internum distinguished conscience from thought. The difference centred on conscience as entailing specific external action in accordance with the conscientious belief. Thought, however, focuses on psychological and general conscious ideas that an individual might possess without the necessity for external manifestation. While both conscience and thought are entitled to similar protection under the treaties, the purpose of the section was to describe conscience in a manner that would demonstrate the application of the forum internum right despite the difficulty in identifying this internal, personal, sphere. The forum internum merits protection when the state is focusing on a particular belief with the intention of not only suppressing the belief, but also altering or eradicating the belief.

The thesis initially referred to mental torture or other actions involving state coercion to identify violations of the forum internum. At times, consideration of human rights other than the forum internum of a conscientious belief is merited due to the severe violations involved, such as breaching the right to life or security. Nonetheless, there are instances where the forum internum of the right to freedom of conscience can augment the protection provided by other human rights. Furthermore, because the general response to an individual asserting a conscientious belief is to refer to the protection of the forum externum, it was

necessary to demonstrate that the possible violation to the forum internum also merits consideration, especially since the forum internum is not subject to limitations.

In attempting to develop the possibilities for upholding the right to the forum internum, it was necessary to consider the broader implications of an internal conscientious belief. A group, as well as an individual, might harbour specific internal beliefs that serve as a coalescing factor in creating the group. Chapter Four therefore also focused on a group approach for the right to freedom of conscience, a somewhat unique approach for a right generally considered within an atomistic context. Understanding the forum internum of a group's belief is also important due to the role the group plays for the right to freedom of conscience in both shaping a conscientious belief and, in certain instances, upholding its application. A conscientious belief is part of the social process and accounts for broader social considerations as well, as indicated by the functional analysis of the forum internum. The importance of the group is further intimated in the treaties that uphold both individual or community practices.

Despite the possibility for expanding the forum internum protection for individuals and groups, problems can arise due to the absolute protection granted to the forum internum of a conscientious belief. Individuals or groups, particularly those engaging in proselytising, might exercise their forum internum or externum right in a manner that violates other individual's forum internum. The thesis explored the possible boundaries for protecting the forum internum by examining the methods of proselytising groups and distinguishing their behaviour from the coercive activity disallowed by the treaties.

Because commentators have not substantively broached the forum internum right to freedom of conscience, the chapter attempted to outline a possible method for applying the forum internum right to the freedom of conscience. Further research could be conducted to elaborate the delicate balance between upholding individual and group forum internum beliefs as well as discussing the implications of the conflict for the manifestation of a conscientious belief. Recognising that an inherent conflict exists within the right, it is possible that Mill's 'harm principle' can assist to identify the parameters of the forum internum right for the individual and the group.

Additional research can also focus on the difficulty in upholding an internal conscientious belief. A belief is subject to on-going change, thereby making it difficult for a reviewing body to determine what to uphold. The analysis would be assisted by a sharper distinction between conscience and morals, particularly since a key contention in the thesis is that morals are antecedent to conscience, a point that might not be wholly obvious or consented to by other schools of thought, such as an individual adopting a natural rights approach.

The next chapter addressed the forum externum. The essential goal of Chapter Five was to consider the scope of the forum externum. Reference to the forum internum was important as a means of discerning what exactly the individual desired to externally manifest. The discussion also centred on the meaning of the term 'belief'. As noted in Chapter Three, the treaties use this term to provide for the manifestation of a conscientious belief. It was therefore imperative to analyse the implications of a narrow versus broad right for the manifestation of a conscientious "belief".

The domestic legal systems that were examined seems to adopt a rather narrow understanding of the scope of a protected conscientious belief. This is the case despite indications to the contrary in the travaux preparatoires and other interpretations by human rights bodies, such as the Human Rights Committee. The problem with the narrow approach is that it creates an overly narrow focus on the right to religion, with conscience serving a secondary role. The underlying premise for this approach is that a religious manifestation derives from particular, pre-determined, principles, whereas conscience does not.

The narrow approach towards the right to conscience overlooks the possibility of a conscientious belief beyond the religious sphere. The main contention barring a broader approach to the right to conscience is that the asserted conscientious belief is practically indeterminable. This contention however equally applies to religious directives as well, as illustrated in the domestic case law where there is a general lack of any significant underlying definition of the freedom of religion, and inconsistencies in application of the right routinely occur.

Additionally, conscience is protected through other rights, principally the right to freedom of expression or assembly. This chapter demonstrated how these secondary rights furnish an inadequate

protection for a conscientious belief. Free expression and assembly can assist to uphold a conscientious belief but the protection is inadequate. For example, upholding the right to military conscientious objection as a form of free expression will not uphold the manifestation of a conscientious belief, even if one has the opportunity to express one's negative views of the military. The basis for the objection is to receive an exemption from military service, not influence the actions of others or improve the democratic nature of the state.

A broader approach to the right to manifest a conscientious belief was also considered. The purpose was to lay a foundation for the remainder of the thesis from which to examine practical applications. The basic premise of the broader approach to conscientious manifestation is that one can, at times, manifest various motivations deriving from a conscientious belief. While this is not entirely apparent from the international system, there is support for adopting this broad approach. For example, the travaux preparatoires seem to adopt a broader understanding of the right to manifest a conscientious belief, as does the HRC in its General Comment to ICCPR Article 18.

As a means of facilitating one's understanding of the forum externum, further research could be conducted on the different state approaches towards the right to freedom of conscience. While the various state systems examined in the thesis assisted to define the parameters of the forum externum, from a comparative law perspective, further research could attempt to integrate the various approaches of states to create a broader comparison.

On a practical level, the obvious problem with the broader approach to conscience is that of scope. A genuine concern is that any form of conscientious belief can manifest and will have to be recognised by the state. The question then is how does the right operate. The thesis attempted to address this question in the final section of the work. The last three chapters examined three different instances of manifestation of a conscientious belief.

The three areas examined are military conscientious objection, objection to tax payments, and objection to performing abortions. The three represent a sliding scale vis-א-vis the action being required. The military conscientious objection claim derives from a state ordering an individual to carry out an action

contrary to the individual's conscientious belief. The conflict with the conscientious belief is apparent, although the range of state interference with the asserted conscientious belief depends on the requested state action. For example, there is a difference between conducting physical military service, as opposed to refusing to assist the military in an alternative capacity that does not advance the interests of the military. The objection to making tax payments is a different than military conscientious objection due to the manner in which the objection occurs. While the objection is to what the government does with its tax revenue and not to the actual making of the tax payment, the objection still centres on a state request for funds that in turn support actions contrary to one's belief. Abortion objection differs from the other forms of objection in that the objection is not necessarily to conducting a mandated state requirement. This private form of objection is generally targeted at the individuals requesting the procedure or at an employer ordering the action. The chapter however does address instances of state-imposed abortions and the possible right of asylum for individuals' objecting to performing or receiving abortions.

Chapter Six focused on the right to military conscientious objection. The chapter demonstrated how the right could derive from the right to freedom of conscience, as demonstrated by the resolutions of various international bodies. This is quite a significant development since military conscientious objection can serve as an analogy for additional forms of conscientious manifestation. Furthermore, deriving military conscientious objection from the treaty right to conscience, as demonstrated by the HRC's General Comment and a variety of international and regional bodies, serves to enhance the status of the right to military conscientious objection as a general principle of international law. This status is enhanced by the domestic laws of a variety of states, either with mandatory or voluntary military services, which provide for some form of a right to military conscientious objection.

Nonetheless, while the opinio juris seems to point towards military conscientious objection as a norm of customary international law, it is difficult to state categorically that military conscientious objection is accorded such status. Upon examining the state practice, one sees a wide variety of applications. Some states provide for broader applications of the right, such as selective objection to particular military actions, while others grant the right solely on an ad-hoc basis. Furthermore, broader

consideration is required of other states, such as the Eastern European states who still maintain compulsory military service or Far-Eastern states who might maintain a different approach to the right to military conscientious objection. The problem also is that while the international system derives military conscientious objection from the right to conscience, the domestic systems approach military conscientious objection as a particular legislative right granted by the state. To conclude that military conscientious objection is a customary norm might be premature, however it certainly is an emerging norm, possibly attaining the status of a general principle of international law in light of the codification of the right in various international fora.

As to tax objection, the essential obstacle to this form of conscientious objection is that the manifested belief serving as the basis for the objection is not connected to the act being demanded from the state. The payment of the tax to which the individual is objecting seems to be a neutral activity. This chapter demonstrated however that states do provide for non-believers to claim this form of conscientious objection to the payment of church taxes. Alternatives can be employed whereby church tax funds support another, more objective, institution. The contention is that these alternative programs can be implemented in other instances where the individual's belief will be infringed by making the tax payment. For example, an objection to paying military tax can be recognised where the funds are used to support non-military state programs.

The problem is that a tax objection can lead to complete disarray of the tax system due to a possible plethora of other forms of tax objection claims, such as an individual asserting a belief against the welfare system. Surely a state can accommodate such a belief by creating an alternative fund for the payment of welfare taxes.

The essential distinction among the variety of tax objection claims noted in Chapter Seven however is the level of connection between the asserted belief and the tax payment to be made. Military or church taxes directly infringe the individual's belief as a result of making the payment. The funds directly support an action that is fundamentally contrary to one's beliefs. By other forms of objection, such as objecting to abortion or welfare taxes, the actions which serve as the basis for the objection derive from a third person's

unilateral and voluntary action. While paying the tax might support the action in some manner, the action occurs because another individual desires to conduct the activity. For example, an abortion occurs not because the state orders the action, but because the individual desires it. Similarly, one turns to welfare due to one's dire financial circumstances. This differs from paying a church tax or military tax. In such instances, the tax itself is supporting activity mandated by the state.

It is possible that additional forms of tax objection can emerge, such as an objection to paying school taxes where used to support religious classes or the teaching of evolutionary theory. However, that possibility should be considered after the tax objection has acquired greater status as a form of manifesting a conscientious belief. States generally do not recognise a tax objection, despite it being analogous to the military conscientious objection right and somewhat operable given the correct legislative exemptions.

The final chapter focused on what can be termed a more private-oriented form of objection, that is objection to the performance of an abortion. The difference with the abortion objection is that the action relates to an objection to a private action that does not raise a social duty equivalent to military conscientious objection or tax objection. The objection to performing or participating in an abortion is therefore generally upheld. Indeed, a host of states recognise the abortion objector as a result of particular legislative action.

The abortion objection has not been the focus of resolutions or reports in international bodies, unlike military conscientious objection. Furthermore, it is not clear how the abortion objection should operate for an individual only marginally connected to an abortion procedure. The chapter contended that the objection should be granted a broader scope as the objection involved a manifestation of conscience.

Overall, the last section of the thesis entailed a more descriptive account of the status of various forms of conscientious objection. Further research could focus on the external, social, issues that these forms of objection bring to the fore. For example, the abortion objection raises issues regarding privacy and the right to life that must be considered, especially when being asserted by another individual. The tax objection similarly raises issues of social duty that might very well override the conscientious belief being

asserted. Additionally, the limitations provided for in the treaties should also be more explicitly accounted for and factored into the overall balance when considering these forms of objection.

An essential goal of this thesis has been to focus on a right that has not merited a great deal of attention and yet is codified in every principal international human rights treaty. While it is possible to understand the hesitation in providing for an expanded right to conscience, the last section of the thesis demonstrated that the right could be applied. Recognising the growing acceptance of the right to military conscientious objection, it would seem a short step to providing for other forms of analogous objection. The tax and abortion objections exemplify the manner for applying the right such as to provide for the manifestation of conscientious beliefs without endangering the state.

Furthermore, the role of the forum internum should not be dismissed. Too often, a judicial body will glide over consideration of the right to conscience by solely focusing on the forum externum. This is an inadequate consideration since the forum externum is subject to the limitations provided in the treaties and has generally been interpreted in a narrow sense. Where appropriate, the forum internum should also be considered, especially where denial of the action demanded from the belief will serve to undermine the internal conscientious belief.

Considering the thesis from a broader perspective, there remain a number of principal issues to be addressed. While a group-oriented notion of conscience was discussed in Chapter Four, the ramifications of a group belief should also be considered in the forum externum. It is important to delineate a group-oriented approach towards a right such as the freedom of conscience as states begin to acknowledge the social vacuum created by the reliance on the atomistic individual. States might attempt to create some form of general framework of principles to develop a model of social duties and values such that the individual conscientious belief might be diminished in importance or overlooked.

Additionally, further research concerning the relationship between the right to freedom of conscience and other human rights would assist. In order to provide for the complete exercise of the right, freedom of conscience has to be adequately distinguished from other human rights. Certainly in this age of codified

human rights, where the focus has turned to attempts to enforce human rights standards, it is imperative that an adequate parameter is established between the rights.

On a more philosophical level, an understanding of the right to conscience would be enhanced by additional research into the meaning and implication of a conscientious belief. For example, some commentators on conscience adhere to the distinction between a legislative and judicial conscience, depending on the purpose served by the conscientious belief. The legislative conscience has been the focus of analysis here as that seems to be the understanding adopted in the travaux preparatoires. Nevertheless, the judicial conscience, which was alluded to at the beginning of the thesis, also serves a role especially when compared to a religious belief. There remains a host of other considerations regarding a person's conscience and the role served by a conscientious belief.

Further to the understanding of the implications of a conscientious belief, another important consideration is the relative understanding of the conscience. Many implications arise from the freedom of conscience and the thesis has not altogether analysed in any systematic sense the variety of interpretations accorded to the term. Cultural relativity rears its head not only for a society rooted in religious values, but also for a system that adopts a wholly different approach towards the meaning or importance of an individual's conscientious belief. It is possible that beginning to comprehend the meaning and importance of an individual conscientious belief can assist to address contentious issues in the international human rights arena while improving our understanding of, and appreciation for, human rights.

Appendix I

UDHR, Article 18:

> Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ICCPR, Article 18:

> 1. Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety order health or morals or the fundamental rights and freedoms of others.
> 4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[1414]

ECHR, Article 9:

> 1. Everyone has the right to freedom of thought conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as a re prescribed by law and are necessary in a democratic society in the interests of public safety for, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[1414] The article, as a whole, was adopted in both the Third Committee and the GA by a unanimous vote.

AmCHR, Article 12:

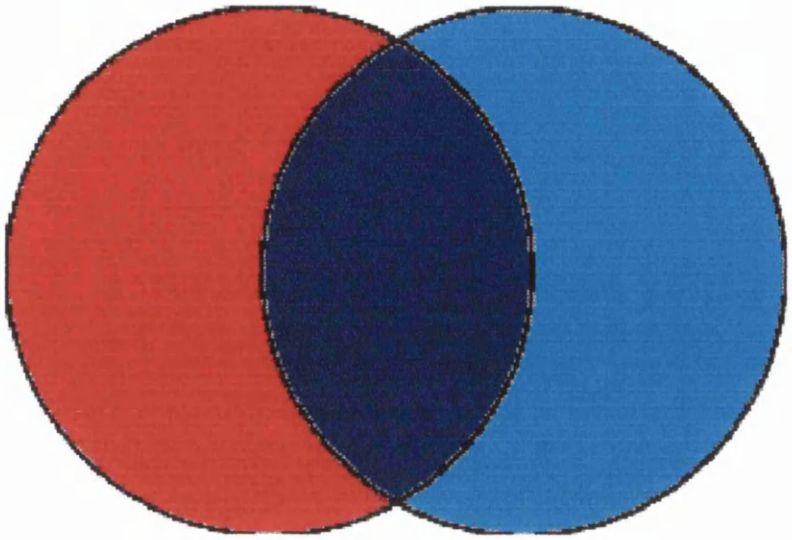
> 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
> 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or belief.
> 3. Freedom to manifest one's religion or beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights and freedoms of others.
> 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

AfrCHR, Article 8:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

APPENDIX 11

Forum Internum and Forum Externum



Forum Internum = The individual's consciousness where one develops conscientious beliefs, general opinions, or engages in other forms of thought. Developing a belief or opinion internally does not automatically entitle one to manifest the belief or thought.

nifested belief = The manifestation of a conscientious belief as provided by the treaties, such as not performing an abortion or, arguably, a pacifist's refusal to pay taxes supporting nuclear weapons.

orum ternum = The external manifestation of beliefs, some of which are not necessarily protected by the right to conscience. Certain external actions might derive from a belief but the actions are not classified as manifestations of a belief. For example firebombing an abortion clinic to prevent abortions.

Appendix III

Human Rights Committee's General Comment to ICCPR Article 18

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2) of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19(1). In accordance with articles 18(2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, 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, *inter alia,* 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.

5. The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia,* the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18 (2) bars coercion that 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). The same protection is enjoyed by holders of all beliefs of a non-religious nature.

6. The Committee is of the view that article 18 (4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18 (4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18 (1). The Committee notes 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.

7. According to article 20, no manifestation of religions or beliefs may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its General Comment 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. Article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of the parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties 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. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. 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. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18 (3), both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognised 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 of 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. The measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringements of 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 toward 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. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

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

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall 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. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

APPENDIX IV

STATUS OF THE RIGHT TO MILITARY CONSCIENTIOUS OBJECTION

BLANK SPACES INDICATE LACK OF INFORMATION AND SHOULD NOT BE READ AS A NEGATIVE RESPONSE
'CO' IS AN ABBREVIATION FOR CONSCIENTIOUS OBJECTION

	ALTERNATIVE SERVICE	DUE PROCESS	IN SERVICE CO	CONSC-IENCE AS A BASIS FOR CO	CO INFORMA-TION TO CONSCRIPT	SELE-CTIVE CO	TREATY BASIS FOR RIGHT
CHR 1987/46	YES	YES		YES			YES
CHR 1989/59	YES	YES		YES			YES
CHR 1993/84	YES	YES	YES	YES	YES		YES
CHR 1995/83	YES	YES	YES	YES	YES		YES
HRC	YES			YES			YES
COE, PARL. RES. 337	YES	YES			YES		
COE, MINISTERS RES. 87(8)	YES	YES	YES	YES	YES		YES
GA							
EC, PARL. RES. C68	YES			YES			YES
EC, RES. C291/123	YES	YES	YES	YES	YES		YES
US	YES	YES	YES	YES			
UK		YES	YES	YES			

	ALTERNATIVE SERVICE	DUE PROCESS	IN SERVICE CO	CONSC. BASIS FOR CO	INF. TO CONSC-RIPT	SCO	TREATY BASIS FOR RIGHT
AUSTRALIA		YES	YES	YES		YES	
GERMANY	YES		YES	YES			YES
SOUTH AFRICA	YES			YES			

IN INDIA MILITARY CO IS GENERALLY NOT AN ISSUE.

IN ISRAEL, MILITARY CO ALLOWANCES ARE GRANTED ON AN AD-HOC BASIS. THE POLICY IS THEREFORE INDETERMINATE.

APPENDIX V

The right to freedom of conscience as codified by the principal human rights treaties

	RIGHT TO CONSCIENCE	CAN CHANGE BELIEF	LIMITATIONS	NON DERO-GABLE STATUS	COERCION PROHIBITED	ARTICLE FOR EDUCATION
UDHR	YES, ART. 18	YES	YES, ART. 29			
ECHR	YES, ART. 9	YES	YES			
ICCPR	YES, ART. 18	YES	YES	YES	YES	YES
AmCHR	YES, ART. 12	YES	YES	YES	YES	YES
AfrCHR	YES, ART. 8		YES, ART. 27	YES		
Declaration	YES					YES

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