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Back to Basics in Evaluating Belief

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BACK TO BASICS IN EVALUATING BELIEF

Nazila Ghanea*

ABSTRACT

The growing academic literature around freedom of thought, conscience, and religion has stretched the topic to many arenas and offered a detailed analysis of its relevance to numerous related concerns. It has, rightly, gone beyond a theoretical consideration as an individual right to also examining it within the community and society at large. This Article, however, assesses whether we need to return to ensuring that freedom of thought, conscience, and religion rest on a sufficiently close nexus with the conviction of particular claimant(s), and why this matters.

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TABLE OF CONTENTS

INTRODUCTION	662
I. PROFESSOR AN-NA‘IM’S SCHOLARSHIP	663
II. FORB: THOUGHT, CONSCIENCE, AND RELIGION	665
III. PERSONAL CONVICTION AND COMMITMENT—THE HEART OF THE MATTER	666
IV. EARLY UNDERSTANDINGS OF THIS CENTRALITY	666
V. CONTINUED EVIDENCE FOR THE CENTRALITY OF CONVICTION AND COMMITMENT	668
VI. MANIFESTATION	670
VII. CASE LAW	671
A. <i>Deducing Belonging by Means Other Than Reference to Claimant(s)</i>	672
B. <i>Religion or Belief Practice According to Personal Conscience</i>	673
1. <i>SAS</i>	673
2. <i>Shabina Begum</i>	674
VIII. CAUTIONS	676
IX. RETURNING TO PROFESSOR AN-NA‘IM	677
CONCLUSION	678

INTRODUCTION

International human rights law enshrined freedom of thought, conscience, and religion (FORB)¹ to protect beliefs—whether static, changing, being reconsidered, or in a deep freeze. The essential point was to protect the having, exploring, or adopting of thought, conscience, and religion claimed by a particular human person or persons.² The objective of FORB—or more generally of human rights—was not that of upholding: the status quo; historic norms; traditions in the name of others; assumptions as to the belief of others or the manner of the expression of their belief; or a legal expectation or compulsion on them to express particular religious or personal status laws regardless of their

¹ The author will be using FORB as an abbreviation of freedom of thought, conscience, and religion. She does not intend to de-emphasize thought and conscience or highlight religion and belief in adopting this abbreviation.

² The Article will not discuss the forum internum/externum distinction. Those interested in this concept can access the scholarship of Caroline Kayliegh Roberts for explanation. *See generally* Caroline Kayliegh Roberts, *Reconceptualizing the Place of the Forum Internum and Forum Externum in Article 9 of the European Convention on Human Rights* (2020 Ph.D. dissertation, University of Bristol) (on file with the British Library), <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.801646>.

commitment to those laws. Yet these latter objectives persist and continue to impact much of humanity. Professor An-Na'im's scholarship has grappled with this continuing challenge and raised various ways in which this may be addressed from within the communities concerned, holding this to be the only sustainable way of effectively addressing it.

This Article highlights the importance of scrutinizing FORB claims for a sufficiently close nexus with the conviction of particular claimant(s) and shows this to be the *raison d'être* of these human rights.

I. PROFESSOR AN-NA'IM'S SCHOLARSHIP

Professor An-Na'im's scholarship was one of the earliest courageous voices addressing the rights rationale of not forgetting the individual within the political, legal, and societal phenomena that arise in religious practice. He did so by focusing on these issues within Muslim societies, offering analysis for others to relate to different contexts. Over decades, his work has generated a field of scholarship that formed a sub-discipline in its own right. It inspired articles, research projects, civil society organizations and advocacy groups, doctorates, and monographs.

Professor An-Na'im drew attention to the violation of the human and civil rights of religious minorities, of women and dissidents. He did so years before the U.N. human rights mechanisms began to squarely address the rights of religious minorities. In insisting on the universal rights of religious minorities, he analyzed the norms available at the time,³ though many have emerged since.⁴

As early as 1987, Professor An-Na'im denounced apologists who sought to "minimize the seriousness of discrimination" against religious minorities.⁵ He recognized that this was an issue that had to be addressed squarely, not least due

³ Abdullahi A. An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUMAN RIGHTS Q., 1, 6–9 (1987) (those discussed included: Articles 55 [especially 55(c)] and 56 of the UN Charter; Articles 2, 29, and 30 of the Universal Declaration of Human Rights (UDHR); Article 2 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR); Article 18 of both the UDHR and the ICCPR; the 1982 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; and Articles 2 and 8 of the African Charter on Human and Peoples' Rights).

⁴ See generally Rita Izsák-Ndiaye (Special Rapporteur on Minority Issues), *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, U.N. Doc. A/68/268 (Aug. 5, 2013); Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), *Rep. of the Special Rapporteur on Freedom of Religion or Belief*, U.N. Doc. A/HRC/22/51 (Dec. 24, 2012).

⁵ An-Na'im, *supra* note 3, at 1.

to the “dynamic and evolutionary nature of human rights.”⁶ In later scholarship he also recognized dynamism in religion and secularism too.⁷ He was determined and uncompromising in his clarity on this matter in his scholarship. His appeal stretched far beyond, into activism and the wider community, instigating a prescient momentum to address this issue. In fact, it took decades for such clarity to crystallize and for this matter to get the attention he knew it deserved.

Focusing on Muslims and the Islamic State, Professor An-Na‘im highlights the individuality at the core of FORB and its practice. He warns of governmental abuse against individuals in the name of religion, calling on human rights to protect from this and secularism to secure it.⁸ He elaborates a key point addressing the concerns above with the detachment of FORB from particular individuals, leading to the two-level concerns that were discussed. He notes:

a constitution that reflects particular religious beliefs will be static (a grounding in divine authority can sanction little change) and therefore doomed in a changing world. States that adopt religious law as national law and allot political positions according to religious affiliation discover eventually that religious adherents do not necessarily act politically in terms of their religious beliefs and that religions suffer by their association with the exigencies of politics. Religion and politics are not well mixed—and Muslim history offers ample evidence of that generalization.⁹

He puts forward a different engagement with, and understanding of, religion.¹⁰ This would be an understanding of religion transformed¹¹ such that it’s “open to free interpretation and thus renewal,”¹² evolution, and relevance.¹³ Here he crafts out the essential role of human agency:

Human agency is always integral to the interpretation and implementation of every doctrine. Yet the guardians of orthodoxy everywhere claim eternal validity for their own interpretation and practice. . . . the process [interpretation] requires a level of security and

⁶ *Id.* at 4.

⁷ See generally Abdullahi Ahmed An-Na‘im, *The Interdependence of Religion, Secularism, and Human Rights: Prospects of Islamic Societies*, 11 HUM. RTS. Q. 56, 71 (2005).

⁸ *Id.* at 74–75.

⁹ *Id.* at 79.

¹⁰ *Id.* at 75.

¹¹ *Id.* at 71.

¹² *Id.* at 65.

¹³ *Id.*

stability for dissidents to make their case and for the body of believers to hear and make up their own minds without fear of retaliation.¹⁴

History is replete with conflicts and wars caused by disagreements over the interpretation and implementation of religious doctrine, in turn resulting in schisms. Yet he notes that with education and communication, believers will increasingly assess religious sources and history for themselves, increasing the chances of both consensus and disagreement.¹⁵ He perceptively holds that “[d]isagreement is logically integral to religious experience because human beings do not truly believe where disbelief is not an option.”¹⁶

II. FORB: THOUGHT, CONSCIENCE, AND RELIGION

The breadth of FORB has not been a matter of serious contention by the academy. Article 18.1 of the International Covenant on Civil and Political Rights (ICCPR) upholds the right of “everyone” to

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.¹⁷

It is clear from the interpretation of this article in General Comment 22 of the U.N. Human Rights Committee that this right is to be broadly construed and understood to stretch from theistic to non-theistic and atheistic beliefs, “as well as the right not to profess any religion or belief,”¹⁸ irrespective of whether they relate to traditional and institutional religions or beliefs or otherwise.

¹⁴ *Id.*

¹⁵ *Id.* at 72.

¹⁶ *Id.*

¹⁷ International Covenant on Civil and Political Rights art. 18, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁸ Hum. Rts. Comm., General Comment No. 22 on the International Covenant on Civil and Political Rights art. 18, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4, July 30, 1993 [hereinafter General Comment No. 22]; see also *18 Commitments on “Faith for Rights”*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/Documents/Press/21451/18CommitmentsonFaithforRights.pdf> (Feb. 27, 2022) (“As religions are necessarily subject to human interpretations, we commit to promote constructive engagement on the understanding of religious texts. Consequently, critical thinking and debate on religious matters should not only be tolerated but rather encouraged as a requirement for enlightened religious interpretations in a globalized world composed of increasingly multi-cultural and multi-religious societies that are constantly facing evolving challenges.”); Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Rep. of the Special Rapporteur on Freedom of Religion or Belief*, U.N. Doc. A/HRC/40/58, at annex II, commitment III (Mar. 5, 2019).

III. PERSONAL CONVICTION AND COMMITMENT—THE HEART OF THE MATTER

The *travaux préparatoires* of Article 18 of the ICCPR are replete with evidence for the centrality of the thought, conscience and religion of a particular person/persons to the very crafting of FORB as a right. “Everyone” holds the right, but each “one” is the subject of the drafting in the *travaux*.

The centrality of conviction and commitment by particular individual(s) becomes even more pronounced when one considers the *travaux préparatoires* of Article 18 of the ICCPR. The *travaux* show that there was initially the adoption of language in 18.1, after reference to manifestation, to include “and he shall not be required to do any act which is contrary to such worship and observance.”¹⁹ Discussions between delegations “stressed that the paramount issue was the protection of the individual’s freedom of choice in matters of thought, conscience and religion,” including change of “one’s own religion or belief.”²⁰ Religious conversion was referred to as being “spiritual in character.”²¹ Debates on Article 18 also drew frequent characterization by delegations of this right being “‘absolute’, ‘sacred’ and ‘inviolable’ . . . ‘without qualifications’ No restrictions of a legal character, it was generally agreed, could be imposed upon man’s inner thought or moral consciousness, or his attitude towards the universe or its creator.”²²

IV. EARLY UNDERSTANDINGS OF THIS CENTRALITY

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Special Rapporteur Arcot Krishnaswami to carry out a study of discrimination in the matter of religious rights and practices. His report supports the centrality of commitment and conviction to FORB, especially highlighting this when emphasizing freedom to change one’s religion or belief.

Freedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual.

¹⁹ The Working Group in 1947 drafted this and it was adopted by four votes with one abstention. U.N. Comm’n H.R., 2nd Sess., 5th mtg. at 11, U.N. Doc. E/CN.4/AC.3/SR.5 (Dec. 8, 1947), *discussed in* MARC J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS § 352 (1987). This was not adopted at the Commission on Human Rights “[a]lthough there was no objection in principle to the proposal, it was thought that it might not always be possible to apply such a provision, especially in countries where many different religions were practiced.” U.N. Comm’n H.R., 5th Sess. at 10, U.N. Doc. E/CN.4/SR.116 (June 17, 1949), *discussed in* BOSSUYT, *supra*, § 364.

²⁰ Debates at the fifth session of the U.N. Commission on Human Rights, *discussed in* Bossuyt, *supra* note 19, at 358.

²¹ G.A., 10th Sess. at 138, U.N. Doc. A/2929 (July 1, 1955), *discussed in* Bossuyt, *supra* note 19, § 361.

²² G.A., 10th Sess. at 106, U.N. Doc. A/2929 (July 1, 1955).

Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible. . . . If it is to be considered that freedom to maintain or to change religion or belief does not admit of any restraint—and it seems to be so rightly considered by the consensus of world opinion—any instance of compelling an individual to join or of preventing him from leaving the organization 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.²³

His report also draws attention to: (1) compulsory conversion, or pressure to leave one religion or belief for another; (2) improper inducements to stay with or change religion or belief; (3) the asymmetry in the treatment of followers of official or state religions and others; and (4) where public authorities consider individuals “as members of a faith which they had not voluntarily accepted.”²⁴ Krishnaswami is drawing attention to what I’ll call the **first level concerns**: that of belonging, that “everyone should be free to adhere, or not to adhere, to a religion or belief in accordance with the dictates of his conscience.”²⁵ I want to distinguish these from what I’ll call **second level concerns**: that of the imposition of laws or practices on a person who does not hold onto them as part of their commitment or conviction. Krishnaswami also notes these in his report, where “although the State does not deny the right of individuals to change their religion or belief, it enforces that part of the religious law of the various recognized communities which pertains to personal status.”²⁶ The point to be observed here is that the dictates of conscience stretch beyond belonging—they are ongoing, and should be understood to extend to “worship, observance, practice and teaching.”²⁷

The more expansive understanding of the “dictates of conscience” was supported by Special Rapporteur Krishnaswami. He observed that, as a general rule: “everyone should be free to worship in accordance with the prescriptions of his religion or belief”²⁸ and “the members of a religion or belief should not be prevented from acquiring or producing articles necessary for the performance of the rituals prescribed by their faith.”²⁹ He also noted that no one should “be

²³ Arcot Krishnaswami (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, at 16 (1960).

²⁴ *Id.* at 24.

²⁵ *Id.* at 27–28.

²⁶ *Id.* at 25.

²⁷ ICCPR, *supra* note 17, art. 18.1.

²⁸ Krishnaswami, *supra* note 23, at 31.

²⁹ *Id.* at 34.

compelled to undergo a religious marriage ceremony not in conformity with his convictions”³⁰ and, “the right to seek and to obtain a divorce should not be denied to anyone whose convictions admit divorce, solely on the ground that he professes a particular religion or belief.”³¹ The point to be observed is that when conviction and commitment are considered to be at the heart of FORB, then belonging or not belonging and profession are dynamic rather than static and revert back to the person(s) concerned.

Our tools for assessing this to date have often been too blunt. Even Krishnaswami’s nuanced understanding switched to addressing this under the heading of “dissenters” when elaborating on personal status law. He notes that it is when an individual is not permitted to “break away” from their faith and become a “dissenter” that they are “not permitted to contract a marriage except in the form prescribed by the faith to which he is nominally attached,”³² being denied the civil marriage alternative.³³ The discussion below, however, examines the extent to which belonging and practice are assessed in relation to the individual(s) concerned in FORB irrespective of labels such as the “faithful” or “dissenters.”

V. CONTINUED EVIDENCE FOR THE CENTRALITY OF CONVICTION AND COMMITMENT

This centrality is also reflected in the interpretation of ICCPR Article 18 by the U.N. Human Rights Committee, issued in 1993, in emphasizing the centrality of “personal conviction” to this right. They state “(t)he 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 thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”³⁴ The ICCPR then goes further to emphasize the significance of this core aspect of the right. Article 18.2 states “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”³⁵

³⁰ *Id.* at 38.

³¹ *Id.* at 39.

³² *Id.* at 37.

³³ More than 60 years on, this observation still holds true in many countries with personal status laws in place.

³⁴ General Comment No. 22, *supra* note 18, para. 1.

³⁵ ICCPR, *supra* note 17, art.18.2.

The emphasis is articulated even more clearly in the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration). It states “considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed.”³⁶ The term “for anyone who professes” is crystal clear in this being the condition of the right, a continuing and active condition with the person(s) concerned at its center.

The application of this in the case of the FORB rights of women becomes evident from the interpretation of ICCPR Article 3 on equality of the rights between men and women by the U.N. Human Rights Committee in General Comment 28. They state, regarding regulations on clothing to be worn by women in public, that these may violate a whole host of ICCPR rights. This includes those of Articles 18 and 19 “when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression,” and of Article 27 “when the clothing requirements conflict with the culture to which the woman can lay a claim.”³⁷ The purposefulness of a close nexus with the woman concerned is highly evident.

Deductions from this have long been that of the unlimited nature of the right to have, hold, and change religion or belief. For example, the U.N. Special Rapporteur on Freedom of Religion or Belief has observed that “freedom of thought, along with one’s conscience and belief, is regarded as part of one’s *forum internum*—a person’s inner sanctum (mind) where mental faculties are developed, exercised and defined.”³⁸ What is not, however, often extrapolated from the above is the integral relationship between the conviction and the manifestation. The original source of the right to manifest, whether alone or with others, is the conviction and commitment of the individual. That conviction or commitment is also the thread that connects “thought, conscience and religion.” Indeed, why else would FORB be “a precious asset for atheists, agnostics, sceptics and the unconcerned”³⁹ as well as the religious?

³⁶ G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) [hereinafter G.A. Res. 36/55].

³⁷ Hum. Rts. Comm., General Comment No. 28 on the International Covenant on Civil and Political Rights art. 3, ¶ 13, U.N. Doc. HRI/GEN/1/Rev.9, Mar. 29, 2000.

³⁸ Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Freedom of Thought*, ¶ 2, U.N. Doc. A/76/380 (Oct. 5, 2021).

³⁹ *Kokkinakis v. Greece*, No. 14307/88, ¶ 31, Eur. Ct. H.R. (1993) (defending FORB as upheld in article 9).

Despite this being seemingly self-evident, there has been a tendency to separate these from one another and examine FORB without sufficient consideration of the conviction and commitment of the individual(s) concerned. Conviction and commitment as to the internal thoughts of the individual should never be subject to interference, investigation or coercion according to the U.N. Human Rights Committee, which notes that according to Articles 18.2 and 17 of the ICCPR, “no one can be compelled to reveal his thoughts or adherence to a religion or belief.”⁴⁰ In relation to religion or belief practice or manifestation, however, let us explore issues that arise when sufficient consideration is not taken of the conviction and commitment of individual(s).

VI. MANIFESTATION

Manifestation, in the ICCPR, is signaled in the phrase “worship, observance, practice and teaching,”⁴¹ with the same words in a different order in Article 18 of the Universal Declaration of Human Rights.⁴² The scope of manifestation is far broader than these headings, with the U.N. Human Rights Committee interpreting worship to include “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”; observance and practice of religion or belief to 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”; and practice and teaching as including “acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”⁴³ This interpretation, dating back to 1993, largely subsumes the breadth given to manifestation in the 1981 Declaration, except for several provisions. This includes the establishment and maintenance of “appropriate charitable or humanitarian institutions[;]”⁴⁴ soliciting and receiving of “voluntary financial and other contributions from individuals and

⁴⁰ General Comment No. 22, *supra* note 18, ¶ 3.

⁴¹ ICCPR, *supra* note 17, art. 18.1.

⁴² G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18 (Dec. 10, 1948).

⁴³ General Comment No. 22, *supra* note 18, ¶ 4.

⁴⁴ G.A. Res. 36/55, *supra* note 36, art. 6(b).

institutions[;]”⁴⁵ clarifying choice of leaders: “[t]o train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief[;]”⁴⁶ and specifying: “To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.”⁴⁷

Article 18.3 of the ICCPR holds that, “freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁴⁸

Freedom of religion or belief upholds the freedom to manifest belief “either individually or in community with others and in public or private.”⁴⁹ Central to upholding manifestation is that it stems from matters of conviction and commitment of the human person. Whilst matters of convictions and commitments are very diverse, the possibility of practice along with others is core to many, if not most, of them. It is along with others that practices of conviction and commitment are nurtured, children reared, charitable activities planned and worship experienced.

VII. CASE LAW

FORB jurisprudence is clear on two points: that courts should not adjudicate on theological matters and that not everything that is motivated by religion or belief can be protected as a manifestation of FORB. Regarding the former, the European Court of Human Rights (ECtHR) observes that, “in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.”⁵⁰ Regarding the latter, the ECtHR observes that its FORB article, article 9, “does not protect every act motivated or inspired by a religion or belief,” and “does not always guarantee the right to behave in a manner governed by a religious belief.”⁵¹ Indeed, the ECtHR has also insisted on “a

⁴⁵ *Id.* art. 6(f).

⁴⁶ *Id.* art. 6(g).

⁴⁷ *Id.* art. 6(i).

⁴⁸ ICCPR, *supra* note 17, art. 18.3.

⁴⁹ *Id.* art. 18.1.

⁵⁰ Metropolitan Church of Bessarabia v. Moldova, No. 45701/99 Eur. Ct. H.R., at ¶ 117 (2001).

⁵¹ Leyla Şahin v. Turkey, No. 44774/98 Eur. Ct. H.R., at ¶ 66(2004) (citing in the same paragraph many other cases reiterating this same point: “see, among many other authorities, *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 27; *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission decision of 12 October 1978, *Decisions and Reports* (DR) 19, p. 5; and *C. v. the United*

certain level of cogency, seriousness, cohesion and importance”⁵² to matters that fall within the ambit of FORB, enjoying the protection of article 9. Importance circles round to conviction and commitment, as it is the importance to the holder that is pertinent.

Manifestations, though, can be presumed, imposed or related to person(s) without sufficient scrutiny as to a sufficiently close nexus with the conscience of **traceable claimant(s)**. As a consequence of this lack of scrutiny, FORB claims can be severely restricted before FORB rights can be claimed. In some cases, the State speaks in the name of religion or its traditions, in another the judiciary restricts rights on the basis of religious laws. States regularly make reservations to human rights treaties in the name of religion. This presupposes that the State can be considered to have FORB or be able to be an authorized channel for the articulation of the FORB rights of those in its jurisdiction, or able to severely restrict the scope of FORB rights for claimants. ...

In the case of courts which issue judgments restricting rights on the basis of religious laws (e.g., blasphemy laws, restrictions on minorities or of women), again the question arises as to whether the legislative role in enshrining laws stemming from religion severely infringe on FORB claims and detaches them from the claimant(s).

A. Deducing Belonging by Means Other Than Reference to Claimant(s)

It is problematic from a human rights perspective that some national cases deduce religion or belief belonging according to codes of membership stemming from the religion or belief, or the state concerned. What is pertinent in these cases is that the membership is not determined through reference to the person(s) concerned. A prominent example of this was evident in the case of *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* at the Malaysian Federal Court. Born of a Muslim father and Christian mother, Lina Joy was considered Muslim according to the law in Malaysia but was estranged from her father and brought up by her Christian mother and later baptized into the faith. In adulthood, she wished her Christian faith recognized, at least allowing her to marry a Christian man. On appeal to the Malaysian Federal Court, however, the court refused her definition of her belief. As a result, the legal system which applies to her in terms of a whole host of personal status laws including who she can marry and how she can marry.

Kingdom, no. 10358/83, Commission decision of 15 December 1983, DR 37”).

⁵² *Campbell & Cosans v. UK*, No. 7511/76; 7743/76 Eur. Ct. H.R. (1982).

The Egyptian Initiative for Personal Rights published a report with Human Rights Watch in 2007 documenting a host of similar cases where religious affiliation was presumed, which led to a variety of challenges in terms of civil rights and personal status, from custody, to education and travel.⁵³

B. Religion or Belief Practice According to Personal Conscience

Beyond the overall belonging claimed by the person(s) the question arises as to how they seek to, have succeeded in, or choose to practice the codes and laws of that religion or belief. A number of cases that raise this issue with respect to dress codes for women or girls.

I. SAS

*SAS v France*⁵⁴ was a Grand Chamber judgement of the ECtHR. It concerned the full-face cover veil ban in France. The Court unanimously declared the case admissible as raising FORB (article 9) concerns—articles 8, 9, and 10 taken separately and along with article 14—but held by a vote of 15 to 2 that there was no violation of article 9 of the Convention in light of “living together” as pursuing the legitimate aim and limitation ground of the “protection of the rights and freedoms of others.”⁵⁵

Though a violation was not found, there was recognition of the applicant’s right to have a say on the religious requirements applicable to her according to her commitment or conviction. It was recognized by the Court that “she is a devout Muslim” and that the wearing of the burqa and niqab was “in accordance with her religious faith, culture and personal convictions.”⁵⁶ The Court also noted her emphasis of the absence of any family pressure to wear it.⁵⁷ The Court did not disparage, or allege inconsistency, that the applicant noting the fact that she wore the niqab in public and private “but not systematically” noting that she would sometimes not wear it when visiting the doctor, meeting and socializing with friends, . “She was thus content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it

⁵³ HUM. RTS. WATCH, PROHIBITED IDENTITIES: STATE INTERFERENCE WITH RELIGIOUS FREEDOM (2007).

⁵⁴ S.A.S. v France, App. No. 43835/11, ¶ 1 (July 1, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=uexpxlonsk>.

⁵⁵ *Id.* ¶ 156.

⁵⁶ *Id.* ¶ 11.

⁵⁷ *Id.*

in public to express her religious, personal, and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.”⁵⁸ Elsewhere in the judgement it was clear to the Court that, for the women concerned, this was the “chosen manner of manifesting their religion or beliefs”,⁵⁹ that they “have chosen to wear the full-face veil for reasons related to their beliefs”,⁶⁰ and that wearing the full-face veil in public allows them to express “their personality and their beliefs”.⁶¹ The Court also referred to the *Eweida and Others v the UK*⁶² case noting that “a healthy democratic society needed to tolerate and sustain pluralism and diversity and that it was important for an individual who had made religion a central tenet of her life to be able to communicate her beliefs to others.”⁶³

In *Yaker v France*, the U.N. Human Rights Committee found a violation of FORB for the claimant who is a niqab-wearing woman, recognizing it as negatively impacting her “right to manifest her religion through wearing the veil and potentially other rights.”⁶⁴ The Court further noted the criminal ban on the niqab as “a form of intersectional discrimination based on gender and religion.”⁶⁵

2. *Shabina Begum*

Another of these cases was a domestic case, that of *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)*.⁶⁶ A nearly 14 years old girl, Shabina Begum who found the school uniform offerings inadequate, claimed a violation of her Article 9 rights under the European Convention on Human Rights. Her school offered three uniform options and Muslim girls at her school availed themselves of the options given but she stated that a jilbab, a long coat,

⁵⁸ *Id.* ¶ 12.

⁵⁹ *Id.* ¶ 139.

⁶⁰ *Id.* ¶ 146.

⁶¹ *Id.* ¶ 153.

⁶² *Eweida and Others v. the United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10 (January 15, 2013), <https://hudoc.echr.coe.int/fre?i=002-7391>.

⁶³ *S.A.S. v France*, App. No. 43835/11, ¶ 121 (July 1, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=uexpxlonsk>.

⁶⁴ *Yaker v. France*, U.N. Hum. Rts. Comm., No. 2747/2016, at ¶ 8.16, U.N. Doc CCPR/C/123/D/2747/2016 (2010).

⁶⁵ *Id.* ¶ 8.17.

⁶⁶ *R v. Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 (appeal taken from Eng.).

was “the only garment which met her religious requirements”⁶⁷ which she considered as “an absolute obligation”⁶⁸ to wear.

There was insistence by Lord Bingham that the case was not a ruling on “whether Islamic dress, or any feature of Islamic dress, should or should not be permitted”⁶⁹ in schools, let alone the requirements of Islamic dress on Muslim girls. He insisted that, “this case concerns a particular pupil and a particular school in a particular place at a particular time.”⁷⁰

There was consultation with others regarding the requirements of Islamic dress, but this was not to question the sincerity of her religious belief or the applicability of FORB, but to assess the appropriateness of the school’s efforts to consider its student population. It was noted that the school had consulted parents, students, school staff and the Imams of three local mosques, and that none of these consultations suggested that the school provision “failed to satisfy Islamic requirements.”⁷¹ This was followed by independent advice sought by the school after Shabina Begum had raised her concerns. Though Begum’s solicitors obtained three other religious sources to support jilbab as “the appropriate dress for mature Muslim women,”⁷² while two mosques held contrary.⁷³

The case was adamant on the point that “any sincere religious belief must command respect”⁷⁴ hence there was no question that article 9.1 was engaged and applicable to her. The only question was therefore whether interference or limitation to her FORB rights was justified under article 9.2.⁷⁵ On that point the approach of the school was upheld as being “fully justified,” having taken “immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way.”⁷⁶

It is interesting that in the case of women’s and girls’ headdresses, there is careful consideration of not only the conviction and commitment of the holder but also how they wish to express that conviction. In these cases, we see consideration of the holder’s own interpretation of what their religion or belief calls on from them in terms of “worship, observance, teaching and practice.”

⁶⁷ *Id.* ¶ 10.

⁶⁸ *Id.* ¶ 12.

⁶⁹ *Id.* ¶ 2.

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 7.

⁷² *Id.* ¶ 15.

⁷³ *Id.* ¶ 13.

⁷⁴ *Id.* ¶ 21.

⁷⁵ *Id.*

⁷⁶ *Id.* ¶ 34.

The U.N. Special Rapporteur on Freedom of Religion or Belief has given strong support to this approach, emphasizing that “it is not the Government’s role to look for the ‘true voices of Islam’ or of any other religion or belief.” In recognizing that “religions or communities of belief are not homogenous entities” he advises that “the diversity of voices” needs to be taken into account. In short, he reiterates that “the contents of a religion or belief should be defined by the worshippers themselves while manifestations may be limited according to Article 18, paragraph 3.”⁷⁷ This Article would emphasize that the voice of the worshipper/follower should also be heard in relation to the manifestation, though, as the Special Rapporteur notes, manifestation may be subject to limitation. Inferring belonging and assuming certain modes of being in relation to religion or belief weakens the necessary bond between FORB and individual conviction and commitment to which this right owes its rationale.

VIII. CAUTIONS

Ensuring the conviction and commitment of individual(s) remains at the heart of FORB adjudication does not imply diminishing recognition of the collective aspects of FORB. Krishnaswami’s report in 1960 recognized the collective aspects of manifesting FORB as including “freedom of assembly only, or freedom of association and the right to organize in addition.”⁷⁸

In fact, the rights of religious minorities under Article 27 of the ICCPR is a necessary adjunct consideration. It provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁷⁹ FORB protects the right of everyone to manifest their religion or belief along with others and in public as well as alone and in private. Minority rights extend State duties to ensure the minority rights of persons belonging to religious minorities in detailed and specific ways, which have been discussed elsewhere.⁸⁰ Yet even in the case of the rights of religious minorities, the nexus of belonging and practice with the individual(s) concerned must not be

⁷⁷ Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/10/Add.3, at 21 (Feb. 7, 2008).

⁷⁸ Krishnaswami, *supra* note 23, at 21.

⁷⁹ ICCPR, *supra* note 17, art. 27.

⁸⁰ Nazila Ghanaea, *Are Religious Minorities Really Minorities?*, 1.1 OXFORD J. L. & RELIG. OXFORD UNIV. PRESS. 57 (2012).

presumed.⁸¹ Manifestation of FORB rests on conviction and commitment and should not be expected or demanded when the former is absent or undergoing review by the person(s) concerned. It is not the role of the State authorities or legal process to presume either belonging or manifestation. As one Special Rapporteur on Freedom of Religion or Belief put it pointedly, “it is not the business of the State or any other group or community to act as the guardian of people’s consciences and encourage, impose or censure any religious belief or conviction”.⁸² Religious authorities have their autonomy and can offer religious counsel if sought, and if a relationship with the applicant(s) is intact. When religious and State authorities are one and the same, the role of such religious counsel becomes a lot more clouded to assess in human rights terms. At the very least, there should be no adverse civil and political consequences from the person not accepting to avail themselves of such religious counsel or submitting to the guidance of the religious counsel.

One arena in which the assessment of belonging and practice bleeds into one another in the legal arena is that of refugee law, where checking the credibility of a refugee’s story in the determination process proves rigid and reliant on mainstream practice. As Jeremy Gunn has said, in this arena, freedom of religion or belief is captured in a tripartite belief, identity, or way of life.⁸³ Whilst this article has called for the voice of the claimant(s) to be prioritized in belonging and practice so that it draws on the conviction and commitment of the person(s) concerned and not the presumption or determination of others, it does not have an answer to how this leeway can be facilitated in the refugee determination process.⁸⁴

IX. RETURNING TO PROFESSOR AN-NA‘IM

As detailed above, Professor An-Na‘im’s scholarship draws attention to situations where the bond between the individual(s) and FORB has been broken

⁸¹ See Juan-Pablo Pérez-León-Acevedo & Thiago Alves Pinto, *Disentangling Law and Religion in the Rohingya Case at the International Criminal Court*, 39 NORDIC J. OF HUM. RTS. 458 <https://doi.org/10.1080/18918131.2021.1997502> (forthcoming).

⁸² Abdelfattah Amor (Special Rapporteur), *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. Doc. E/CN.4/1997/91, at 19 (Dec. 30, 1996).

⁸³ T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 200 (2003).

⁸⁴ It is worth noting that the Special Rapporteur on Freedom of Religion or Belief has noted that “immigration authorities should evaluate the genuineness of the conversion on a case-by-case basis taking into account the applicant’s past and present circumstances.” Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), art. 79, U.N. Doc. A/HRC/7/10/Add.3 (Apr. 10, 2012).

or over-stretched. The *travaux*, early understandings, and the jurisprudence that has upheld that careful deliberation and nuance, has stayed true to that necessary proximity between person(s) and their beliefs. What has skewed it is when the FORB rights of the holders become inferred by the State, particular leaders, or are obfuscated altogether by the imposition of rigid personal status laws. These implicate the concepts such as: change of religion or belief, discrimination, and State religion.

CONCLUSION

This paper observed how FORB is most challenged when it loses sight of the conviction and commitment of the individual(s) being at its core. This leads to not only the first level concerns of having, adopting, and changing religion or belief but also insisting on that connection being evident in manifestations of religion or belief. When that conviction or commitment is inferred, or voiced by another—the State, majorities, the leader, or community—and distanced from traceable claimants, manifestation turns into imposition of one set of religion or belief laws and codes on others who do not adopt, understand or practice them in the same way. Professor An-Na'im's work speaks to the discrimination, hierarchies and divisions that can result from such clumsy dealings with FORB rights.

An-Na'im has decried the “sovereignty”⁸⁵ asserted over the affairs of religious minorities and treating them in accordance with the cultural norms of the majority.⁸⁶ He has appealed for approaches that can remove all discrimination and “legally guarantee complete freedom of conscience and belief” and “uphold and protect the full human rights of religious minorities.”⁸⁷ Leapfrogging a couple of decades of his scholarship, he recognizes a role for “regulating the role of religion in public life”⁸⁸ in order to uphold “individual freedom and social justice.”⁸⁹ He puts individual agency at the core, both recognizing the need for “religious believers to express the moral implication of their faith in the public domain” and insisting that societal change rests on the shoulders of “individual members of those societies.”⁹⁰

⁸⁵ An-Na'im, *supra* note 3, at 2.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.* at 18.

⁸⁸ An-Na'im, *supra* note 7, at 57.

⁸⁹ *Id.* at 56.

⁹⁰ *Id.* at 64.