

Legal Forms of the Religious Life

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International human rights law regulates religion in two distinct ways: as a prohibited ground for differential treatment, and as part of the freedom of thought, conscience and belief. Based on a review of 50 periodic reports to five UN human rights committees, I argue that local configurations of religiosity have important and overlooked impacts on the implementation of these regulations in domestic law. While religious leaders and institutions perform vital social services in states like Suriname and Senegal, they simultaneously promote the supremacy of religiously derived norms and procedures conflicting with human rights treaty provisions. Human rights committees are divided on how to handle this double role, and create separate discourses on the proper role of religion in society that potentially undermine the supposed universality of the human rights enterprise. This paper is a preliminary test of the analytical framework I intend to use in a larger scale analysis of the entire reporting output to the committees from 1993 to 2010.

1. Introduction

This text has two main parts. The first part briefly introduces the field of law and religion, and locates the present thesis in a larger analytical framework. I outline the analytical strategy underpinning the thesis, and show how this strategy can be employed to map the intertwining of law and religion. The second part introduces the treaty bodies and their work on religion, before presenting main results from the analysis. I lay out the basic framework of how treaty bodies have interpreted their mandate in the field of religion, and show in which ways this has affected the construction of religion by states parties and treaty bodies in reporting cycles. The text is concluded with some final remarks on consequences for the larger thesis.

State reporting to UN treaty bodies does not involve attempts to define religion as an independent object, but construes religion as an attribute impinging upon legal obligations created upon the ratification of international legal materials. Hence, representations of religion in treaty body reporting do not raise questions of ontology, what religion is, can be, or has been, but of epistemology – under which conditions, by who, how and why religion comes into being to fill the definitional requirements inherent in such reporting obligations, and what the consequences of these processes are. Social science methodology commonly presupposes an ontological object before crafting rules and procedures on the correct way to create scientific knowledge about the object.² Removing the presupposition of a stable, identifiable object, as is the case in treaty body reporting cycles, weakens the applicability of such methodological procedures.

De-ontologizing, epistemological approaches, although widely different, are united by their common refusal to acknowledge the pre-existence of objects about which social science can arrive at incontrovertible knowledge. Refusing the existence of any Archimedean vantage point, epistemological approaches theorize not only objects under scientific observation, but also the act of such observation in itself. Consequently, epistemological approaches are inherently oriented towards second-order observations – the investigation of how, who, why, about what and where knowledge (or epistemes) is created.³ Translated to the interrelationship

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² This is commonly labelled a positivist approach, in which methodology for social science is constructed on the basis of methodology in natural science.

³ Widely defined, epistemological approaches have developed across a large number of different fields. While de-ontological approaches have been well-known in philosophy at least since the days of logician Ludwig Wittgenstein (1889-1951), de-ontology in a field like international relations entered the fray only in the latter half of the 1980s, following increasing challenges of constructivist scholars like John Ruggie (1944-) and Friedrich Kratochvil (1944-) to the reigning realist paradigm, emphasizing the contingency and lack of orderliness displayed by the real world, as compared to the compartmentalized world presented by

of law and religion, an epistemological approach asks two questions: First, in which ways has religion been involved in the creation of law? Second, in which ways has law been involved in the creation of religion?

Although both questions presuppose the existence of their respective objects, 'religion', and 'law', they do not require ontological definitions. Rather, their identifications as objects of analysis require the existence of 'religious' and 'legal' systems in which religion and law are meaningful categories, respectively.⁴ This mode of analysis brackets considerations of legality and precedence by examining each appearance of religion as parts of larger discursive formations. Hence, the purpose is not to make a contribution to the already extensive literature on the legal scope of religion in international law, but to map the intersection of legal and non-legal ways of describing and analyzing religion as they appear in reporting to UN human rights treaty bodies.

2. Law in religion in law

Only with the emergence of religion as a separate, generic concept did legal rules on religion emerge.⁵ Following the creation of religion and law as distinct systems in early modern society, religious notions of the real and ideal contents of law and the legal regulation of religion have become increasingly distant. Nowhere is the process of distinction more elaborate than in the domain of international law.⁶ Whereas religiously based legislation has a strong and vocal role in domestic legal systems of a considerable number of contemporary states, the origin of rules in the international domain is presently considered to be entirely removed from religious origins.⁷ Concurrent with the severance from religious foundations, international law has become ever more influential in crafting rules detailing the regulation of religion.⁸

Following the formal split of religion and politics in Western international law at Augsburg in 1555,⁹ religion slowly became subject to an increasing number of treaty provisions in international relations. Consistently construed as a distinguishing trait of minority groups, identification with religion gave rise to more or less special treatment, often due to population displacements in the wake of conflict settlements. Following the

the realist school. In historical studies, writers like Michel Foucault (1926-1984) and Reinhardt Koselleck (1923-2006) helped displace the objects of historical studies by questioning the nature of historical knowledge in itself. Although addressing different disciplines and scientific traditions, these developments are united by their introspective examination of the ambivalence of scientific work.

⁴ Epistemological, or de-ontological approaches, are not devoid of ontology, but emphasize the process at which one arrives at the object of inquiry as well as the object in and of itself. Rather than eliminating the question of ontology, epistemological approaches displace ontology from a primary to an equal position in the sequence of scientific inquiry (cf. Andersen 2003: XIII).

⁵ The emergence of religion and law as separate concepts is a topic of much dispute across a wide field of academic disciplines, relative to whether the emergence is considered real, lexical or stipulative (Baird 1971). The etymological creation of religion as a stand-alone, generic category is commonly ascribed to the Protestant Reformation in the 16th century and the subsequent application of religion as a descriptive category in European expansion (cf. Chidester 1996, Flood 1999, Fitzgerald 2000, Dubuisson 2003). Although legal rules on practices presently considered religious far predates the Reformation, such rules were mute on the category of religion as such.

⁶ Adopting an expansive definition, I refer to international law as the complete body of legal rules created to regulate relations among distinct polities.

⁷ There is consensus among legal historians that international law gradually ceased to be based on religious principles during the rise of legal positivism in the 19th century (Evans 1997). This consensus strictly relates to the development of Western law, ignoring the developmental trajectories of other parts of the world, where other systems of rules among polities formerly existed. However, the secularization of Western law is decisive, as the current system of international rules is a globalized version of Western international legal rules expanded to cover the rest of the world in the late 1800s and early 1900s (cf. Onuma 2000, Gozzi 2007).

⁸ Religion had been subject to domestic legal regulation for millenia prior to Augsburg, foremost in imperial structures where rulers routinely created regulatory regimes in which various religions were allowed to coexist. The paradox of religiously derived legal system regulating religions was resolved by granting other religious traditions clearly differentiated status from the tradition in which the legal system had originated.

⁹ Cf. Koselleck 2004 on a review of how the Augsburg accords separated political and religious authority for the first time in a legal treaty. Although few others trace the development of religion and politics as separate systems to a singular event, there is general consensus that the split between political and religious authority structures is one of the defining characteristics of early modern society, based upon functional differentiation, cf. Luhmann 1995.

expansion of European empires, such protection developed into the doctrine of extraterritoriality, in which minority groups, chiefly identified by their European, religious origin, were forcibly granted special status by non-European states.¹⁰

The creation of the League of Nations in 1919 and the United Nations in 1945 altered the relation between religion and international law. The League and UN charters took upon themselves to create new standards for humanity, effectively positivizing the erstwhile implicit idea of a 'standard of civilization' as an entry requirement to the family of nations.¹¹ Both organizations institutionalized this standard – the League by the creation of the Mandate System, the UN by the creation of the Trusteeship Council, both of which were assigned the objective to clarify the status of contested territories and assist their transition into members of the international system of states.

While the civilizational standard in the Mandate System applied a paternalistic and condescending stance towards the territories it was set to govern,¹² the Trusteeship Council was set to perform its task using the standard of the universalist moral system of human rights.¹³ Launched as one of the principle purposes of the UN in the 1945 Charter, the concept of human rights was enshrined in the unanimously adopted¹⁴ Universal Declaration of Human Rights (1948), self-consciously proclaiming its provisions as '...a common standard of achievement for all peoples and all nations'. Although presented as a universal standard, there is wide consensus that the majority of principles enshrined in the document are derived from Western traditions, in an attempt to re-establish the moral and spiritual dimension to international law that was removed with the rise of legal positivism in the 19th century.

International rules developed in the League and the UN also gradually changed international legal regulation of religion by expanding the object of regulation from group rights to individual rights. Following the end of World War 1, the League negotiated a series of treaties with successor states to the Ottoman Empire in which substantial Christian minorities resided. Intended to safeguard the rights of these minorities, the treaties were a complete failure, as the League repeatedly proved itself to be incapable of intervening in any domestic political issues. Nevertheless, the system of minority treaties were inherited by the UN after World War 2, and due to their existence in a separate system of treaties and to their sensitive nature, minority rights were not included in the UDHR.¹⁵ Instead, a general clause on non-discrimination was introduced in article 2, prohibiting

¹⁰ Extraterritorial jurisdiction was particularly salient in the dismemberment of the Ottoman Empire in the 19th century, when increasing numbers of European states concluded treaties with Ottoman officials, called 'capitulations', assuming the status of protectors of Christian minorities in areas under ever diminishing Ottoman rule. Such treaties were also negotiated with Russia, where they led to the Crimean War, and with China, where they remained in place well into the 20th century.

¹¹ Following the demise of religion as the origin of international legal rules, levels of civilization arose as a new standard to which Non-European polities had to measure themselves to be accepted into the 'family of Nations'. Although initially considered to be identical to Christianity, this standard evolved during the 19th century into a set of 'civilizational' conditions Non-European polities had to fulfill in order to be accepted as 'Nations'. The coherence of this standard is disputed – Gerritt Gong (1984) summarizes five principles that had to be fulfilled, while Martti Koskenniemi (2001) claims the standard was diffuse, and subject to pragmatic, *ad hoc* interpretation to suit economic and political needs.

¹² Article 22 of the Treaty of Versailles (1919) divided successor states into different mandate types, with the level of 'tutelage' for their development was outlined relative to their level of development. The first part of the lengthy article described the rationale for the system: 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.'

¹³ Article 76 (c) of the UN Charter lists the encouragement of universal human rights as one of the basic objectives of the trusteeship system.

¹⁴ Despite unanimity, the UDHR was not passed with universal endorsement, as eight states abstained (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, Union of South Africa, USSR and Yugoslavia). Nor can the document be defended as universal, as close to a third of the world's population were living in non-self-governing territories upon its adoption (Normand and Zaidi 2008).

¹⁵ Several Great Powers, notably the United Kingdom, contested the concept of minority rights, claiming to have no minorities

differential treatment on the grounds of '...race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Additionally, the UDHR created an entirely new concept in international law: the freedom for everyone of thought, conscience and religion, an attendant right to change this religion or belief, and a series of acceptable 'manifestations' of this religion or belief.¹⁶

With these changes, an international legal regime derived from religious principles containing rules governing religiosity, both as a prohibited ground for differential treatment, and as an individual right, was created for the first time. Although there is an enormous amount of scholarship on every dimension of the United Nations, and particularly on the human rights work of the organization, little work has been done to highlight the interconnection of the double existence of religion in the human rights regime.¹⁷ Studies on UN human rights issues are typically ontologically oriented, dedicated to charting features and propositions pertaining to an object or a system of objects that are presupposed from the beginning, taking either religious law or the legal regulation of religion for granted, while theorizing only on the other.¹⁸ An epistemological approach examines the UN as a venue for the import, reinterpretation and export of terms and concepts like law and religion, emphasizing the role of actors and locations involved in these processes.

Nowhere is the confluence of law and religion in the UN human rights regime more frequently addressed than in the work of treaty bodies in their examination of states parties reporting. In every session, treaty bodies are set to apply a religiously derived body of rules that outline the permissible existence of religion in the 193 member states of the United Nations.¹⁹ Treaty bodies are placed in the middle of the multilayered United Nations, straddling divides between the political, rule-making bodies, the bureaucracy of the secretariat and the specialized organs, and the myriad NGOs and other activist organizations attempting to influence decision-making at all levels.²⁰ Although continuously receiving impulses from surrounding levels, treaty bodies are authoritative in deciding upon the interpretation of treaty provisions. Of the nine treaty bodies currently in existence, five have a direct relationship with religion, are near universal in their number of ratifications, and have been in existence long enough to review a considerable number of reports from states parties. Remaining treaty bodies are lacking in one or more of these dimensions.²¹

within its borders (Normand & Zaidi 2008).

¹⁶ The article reads in full: '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'. A less extensive version of this provision was included in the League Charter article 22, but limited to the category 'B' mandates.

¹⁷ Scholarship on the United Nations in general, and human rights especially, tends to highlight only one of these dimensions, at the expense of the other.

¹⁸ Ontologically oriented studies often juxtapose religious law and the legal regulation of religion, but rarely explore their interconnection. An illustrating example is the comprehensive, edited two volume collection entitled *Religion and Human Rights* (Witte et. al., 1996), divided between 'Legal' and 'Religious' perspectives. While several contributions focus on how the legal regulation of religion is conceptualized in distinct religious traditions and vice versa, neither address the mutual constitution of religious law and legal religion. Furthermore, although there is a considerable body of scholarship on human rights issues at the UN, the majority of this frames the UN as one of several actors involved in the creation and interpretation of international legal rules, and does not consider the UN singularly.

¹⁹ Although the UDHR is not formally binding, it is considered *jus cogens* in international law, effectively binding every independent nation state, parties and non-parties of human rights treaties alike. Every consecutive human rights treaty negotiated under the auspices of the United Nations is based on this document, and their authoritative interpretation is the sole responsibility of the treaty bodies.

²⁰ As one of the most complex legal entities in the world, the UN is commonly subdivided in three different layers: (1) the political organs, in which states create rules, make decisions and outline policy, the majority of which are created by the UN Charter. (2) the myriad specialized organizations, programmes and entities created to fulfill the missions of the United Nations, largely staffed by international civil servants. (3) civil society engaged with UN work, mainly NGOs and other organizations lobbying for influence at either of the preceding levels. (cf. Weiss 2008).

²¹ Excluded treaty bodies include: the Committee against Torture (relevance, religion is neither part of the treaty text or regularly mentioned in the reporting cycles), the Committee on Migrant Workers (universality and duration, 45 parties, started work in 2004), the Committee on Enforced Disappearances (universality and duration, 30 parties, started work in 2011), and the Committee on the Rights of Persons with Disabilities (universality, duration and relevance, 105 parties, started work in 2009,

2.1 Treaty Monitoring

The Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC) both started their monitoring work in the 1970s. In the 1980s, they were joined by the Committee on the Elimination of all forms of Discrimination against Women (CEDAW) and the Committee on Economic, Social and Cultural Rights (CESCR). Finally, in 1993, the Committee on the Rights of the Child (CRC) held its first session. To date, these five committees have received, reviewed and commented upon approximately 2600 reports from states parties on their implementation of treaty provisions. Upwards of 1600 of these were reviewed between 1993 and 2010, constituting the main subject matter for the present thesis.²² All treaty bodies require states parties to submit initial reports on their implementation of treaty provisions shortly after ratification of the instrument, followed by periodic follow-up reports, with different intervals.²³ A staggering number of undelivered reports notwithstanding, all treaty bodies have worked up an extensive backlog of reports awaiting review. To handle the steady growth in these backlogs, states parties have been allowed to deliver combined periodic reports, a practice spearheaded by CERD, whose periodicity of reports every other year made for a particularly large backlog, and since adopted by all other treaty bodies.

State party reports are required to contain information on the implementation of treaty measures on an article-by article basis. Additionally, several treaty bodies frequently ask for contextual information relevant to the implementation procedure, leading to the development of so-called 'core reports' with basic information on states parties in the early 1990s. Since the mid-1980s, treaty bodies have called for streamlining of reporting requirements, a cumbersome process that via incremental steps has led to a consolidated reporting manual subject to constant revision, in which only the general, introductory part has been streamlined.²⁴ Any attempt to combine the overlapping rights and common themes that are rife in the conventions have been met by resistance among the treaty bodies for fear of diluting their original mandates, resulting in considerable double work for states that are parties to several treaties.

Following the submission of reports, states parties are invited to confront the committee in a 'constructive dialogue' where individual members can pose questions to state representatives on issues in reports. Consultations are open to the public and published in summary records available online. After an initial reluctance to consider information on implementation apart from state reporting, all treaty bodies now regularly invite shadow reports produced by NGOs and others, often conducting individual sessions with NGOs prior to meetings with states parties. Following the dialogue, treaty bodies issue a set of concluding observations, which is the closest the treaty body machinery comes to a binding decision, although the formal precedent set by such observations is unclear, as they are not created by the treaties themselves, but have been developed over the years by the treaty body machinery (O'Flaherty 2006).

Supervising states parties on the interpretation of individual treaty articles, the handling of recurring themes and the technicalities of the reporting procedure, every treaty body issues general comments.²⁵ Varying in form

religion is neither part of the treaty text, or regularly mentioned in the reporting cycles).

²² The time period is chosen for three distinct reasons, all of which relate to comparability of materials. First, comprehensive access to digitalized UN documents is limited backwards in time to 1993. Secondly, the CRC started its work in 1993. Thirdly, by 1993, all committees had adopted the procedure of issuing 'concluding observations', spearheaded by CESCR.

²³ CERD requires reports every second year (article 9 (b) of the ICERD), HRC and CEDAW require reports every fourth year (article 40 (1) (b) of the ICCPR empowers the committee to request reports 'whenever', the long-standing practice of the committee is to request reports every fourth year, and article 18 (1) (b) of the ICEDAW empowers the committee to review reports 'at least' every fourth year), CESCR and CRC require reports every fifth year (the ICESCR article 17 (1) delegates the decision on periodicity to ECOSOC, which in resolution 1979/43 set the intervals to every fifth year, and article 44 (1) (b) of the ICRC establishes a five year cycle).

²⁴ Last revised in 2004, the consolidated guidelines are collected in document HRI/GEN/2/Rev.2.

²⁵ Although the ICERD, the ICESCR and the ICEDAW mandate the issuance of general 'recommendations', the majority of treaty bodies use 'comments', which has entered the literature as the standard name of such documents.

and scope, these comments offer valuable insight into the ways in which treaty bodies interpret their respective monitoring tasks. In addition to reviewing reporting cycles, three of the treaty bodies are authorized to consider individual communications, in which complaints against states parties can be lodged by individuals that have exhausted domestic legal remedies. Competence to consider individual communications is limited to states that have ratified optional protocols to the ICCPR and the ICEDAW, and states parties to the ICERD who recognize the competence of CERD to review such communications. An optional protocol creating an individual communications mechanism for the ICESCR was adopted in 2008, but has yet to be ratified by the required number of states to enter into force.

How, why, by whom and in which ways religion is employed in reporting cycles will be reviewed on the basis of five distinct types of documents: the five human rights treaties, general comments issued by treaty bodies, initial, periodic and core reports from states parties, summaries of records from constructive dialogues, and concluding observations.²⁶ After a brief summary of how religion is construed in treaties and attendant general comments, I will review the reporting output of six states that are parties to all treaties in question, and that have submitted an average number of reports for the time period 1993-2010.²⁷ In conclusion, I will summarize similarities and differences along two different trajectories: between states, and between treaty bodies.²⁸

2.2 Treaty bodies on religion – normative scripts

Religion appears in three distinctly different ways in treaties and general comments. First and most frequently, religion appears as one of several features of individuals and/or groups. While all lists of features juxtaposed with religion in treaties and comments are derivative of the original such list in the UDHR,²⁹ there is considerable variety in the number and nature of such surrounding features, indicating the scope and weight of the right in question.³⁰ Listings invariably indicate prohibited grounds of discrimination or distinction, either generally, or related to specific rights or sets of rights, and appear in the ICCPR, the ICESCR and the ICRC and their attendant general comments. Additionally, religion appears in this way in general comments issued by CERD and CEDAW, expanding the originally more narrow lists of prohibited grounds for discrimination in their respective instruments.³¹ Religion is one of the most frequent common denominators in lists of features spawned by the original UDHR list, indicating the importance attached by framers to protect against discriminations and distinctions on religious grounds.

²⁶ This excludes individual communications, lists of issues and their replies, decisions and special observations made in the absence of reports, early warning procedures, follow-up procedures and shadow reporting by NGOs. While all of these different types of documents may have given valuable insight into the working of each individual treaty body, neither of them are universally applied by each treaty body, and their inclusion would have weakened the comparative perspective of this thesis.

²⁷ Four states – Suriname, India, Kazakhstan and Panama – represent the exact average, having submitted 2 reports for CEDAW, CERD and CRC, and 1 for ICCPR and ICESCR, while Hungary and Senegal have submitted 2 and 1 more than the average, respectively, and have been included to improve geographic distribution.

²⁸ The larger scale analysis adds time as a third trajectory. Due to the small selection of reports reviewed in this text, the time trajectory has been excluded for lack of representativity.

²⁹ The list enshrined in article 2 of the UDHR reads in full: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty

³⁰ The devolution of grounds is exemplified in the ICCPR, in which article 2 on non-discrimination in the application of the covenant is expansive and comprehensive, while article 20 mentions only national, racial or religious hatred as disallowed forms of hate speech.

³¹ In General Recommendation 21 (1996) CERD expanded the scope of non-discrimination originally enshrined in the convention, at paragraph 5: 'Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of Governments.'. In General Recommendation 28 (2010) CEDAW expanded the meaning of article 2 of the convention at paragraph 5, from 'sex' to 'gender', pointing to the factors interrelated to the social construction of the latter: 'This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community'.

Second, religion appears as an aspect of the freedom of thought, conscience and belief. In the ICCPR, this right is unlimited, while a range of 'manifestations' of religion and belief may be subject to strictly specified limitations. In the ICRC children are granted an equally unlimited right to the freedom of thought, conscience and belief, but no manifestations are listed.³² In the ICERD, everyone is granted the access to a range of civil rights, including the freedom of thought, conscience and religion, without distinction as to race, colour, or national or ethnic origin. The ICESCR and the ICCPR protect the freedom of parents to ensure that the education of their children conform to their religious and moral convictions.³³ In General Comment 22 (1993), the HRC issued the most thorough comment on religion to date, outlining the authoritative interpretation of the ICCPR article 18.³⁴ Three issues are particularly expanded and clarified: the right to change religion is protected despite vagueness in the original formulation, the scope of protected religions or beliefs extends beyond «...traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions», and moral limitations to the manifestation of religion or belief may not be derived from a single social, philosophical or religious tradition.

Third, over a number of general comments, HRC, CEDAW and CRC point to religion as a factor in the implementation of treaty measures. In General Comment 17, HRC points out that minorities in article 27 of the ICCPR is to be construed broadly, and that the existence of minorities eligible for protection by states parties is to be decided on the basis of 'objective criteria', and not the decisions of states parties. Commenting upon article 3 on equal rights for men and women, the committee specifies that states parties were obliged to report, not only on actual discrimination or doctrines defending such practices, but also to:

'...furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or *may jeopardize*, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors. (my italics)

In General Recommendation 14 (1990) on female circumcision, CEDAW highlights the work of religious and community leaders in influencing attitudes towards the eradication of this 'traditional practice'. In 1994, CEDAW issued a recommendation on family and marriage, in which it notes the prevalence in states reporting of common law principles, religious or customary law in the regulation of marriage, rules that 'invariably' restricts women's rights to equal status and responsibility and should be replaced by the provisions enlisted in the ICEDAW. In recommendation 23 (1997) on private and public life, the committee lists religion as one of the most significant factors inhibiting women's ability to participate in public life, and requests the inclusion of such restrictions and their origins in future reporting. On health issues in recommendation 24 (1999), states parties were advised to respect local religious and other variations while implementing treaty measures. In 2010, issuing a general recommendation on the interpretation of article 2, the committee directed the attention of states parties towards the concept of intersectionality,³⁵ pointing to a variety of interlinked factors that affect

³² Article 14 (3) lists acceptable limitations to manifestations of religion or belief, indicating that a right to manifestation may also be inferred from the article.

³³ The right does not extend beyond religion to belief, thought or conscience. In article 13 (3), the ICESCR adds the right to choose schools outside those provided by public authorities: 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.'

³⁴ Article 18 reads in full: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

³⁵ A similar sentiment was launched in recommendation 24 on temporary special measures (2004), but not under the rubric of intersectionality.

women belonging to particular groups in different ways and to different degrees than men, including religion.

CEDAW and CRC have both repeatedly expressed their concern with states parties lodging reservations for religious and other reasons to sections of the ICEDAW and the ICRC, in their general comments. Finally, CRC has noted the important role of religious leaders safeguarding the school environment (1, 2001), engaging in the fight against HIV/AIDS (3, 2003), and assisting with the implementation of the convention (5, 2003). CRC has also specified that prohibitions of corporeal punishment of children for religious reasons is a legitimate curb on the manifestation of religion and belief.

The proper configuration of three guises of religion in treaty body reporting – as prohibited ground for distinction, as part of the freedom of thought, conscience and belief, and as a surrounding feature impinging on implementation – collectively constitute global normative scripts³⁶ on the acceptable role of religion in reporting by states parties. Domestic impacts of such scripts in human rights law are likely to be relative to the level of 'cultural affinity' between the norm-producing center and the norm-implementing periphery.³⁷ In the case of scripts for religion developed by treaty bodies, I suggest that affinities between global norms and domestic implementation measures can be mapped by comparing the extent to which religion is employed under the three aforementioned guises between states, and between treaty bodies.

2.3 States Parties

Scripts developed by treaty bodies create three-dimensional obligations for states parties in their reporting on religion. Obligations directly arising from treaty provisions – i.e. religion as prohibited ground for distinction or part of the freedom of thought, conscience and belief – address the translation and integration of these provisions into domestic legal systems. Reporting requirements on religion as a factor in treaty implementation, on the other hand, create obligations to report on the structure and role of religion in states parties. While reporting on the former indicates the level of affinity in terms of legal regulations of religion, reporting on the latter indicates the level of affinity in terms of the proper role of religion for the implementation of these regulations.

To track how states interpret these differing reporting obligations and how treaty bodies respond, a total of 50 reports submitted by six states to all five treaty bodies over a period of 18 years have been examined. States vary considerably in size, population, religious background, geographical location, language and most other factors, and have been selected based on their reporting output. Four states – Suriname, Kazakhstan, India and Panama – have submitted the exact average number of reports. Senegal and Hungary have submitted close to the average, and have been included to improve variation and representativity.³⁸

Senegal

Senegalese reporting constructs an image of a country in a state of constant religious harmony – exemplified by the long, preexisting history of the nation prior to colonization, in which a spirit of kinship, fraternity and respect for the human being flourished. Furthermore, Senegalese citizens enjoy peaceful relations among the revealed religions, and experiences no interreligious tensions, as there are no minorities in the country, which has a homogenous population.

According to the information furnished in reports, religious tensions in the country were introduced during colonial times, resulting in the need for legal safeguards against religious factionalism – political parties and

³⁶ I use the idea of global scripts suggested by Carruthers and Halliday (2006), but in an expanded sense, to denote the contents not only of formal documents creating global norms, but also on their authoritative interpretation. .

³⁷ Carruthers and Halliday, 2006.

³⁸ See note 29 *supra* for exact numbers.

associations based on a singular religion are prohibited, and the implementation of the ICERD saw an expansion of terminology to cover religion as prohibited ground for discrimination. Tensions are also evident in the handling of polygamy, a problem first and foremost in rural parts of the country. Issues like child begging and female genital mutilation (FGM) enjoy a more ambivalent role: Child begging is sought eradicated by redefining *talibé* (religious pupils) as 'only' beggars, in order to circumvent a legal exemption for religiously motivated begging. On the issue of FGM, Senegalese officials reporting to the CRC in 1995 were adamant that FGM was a tradition that pre-existed Islam, and therefore had no religious aspects. Responding to how the tradition was to be handled, however, representatives pointed to the important role of informing religious leaders of the harm of these practices – because of their social role in small communities.

Religion thus enjoys a dichotomous presence in state reports from Senegal – often positive, often negative, rarely neutral. Frequently invoked as a dimension of a harmonious society, both due to the role of religious organizations in social efforts, and in the historical importance of religions in Senegal, the factional dimensions of religion are repeatedly called upon as a spectre from colonial times threatening national unity and social harmony. Conspicuously absent from Senegalese reporting cycles is the legal regulation of religion. While reports commonly cite a number of measures introduced to curb discrimination and violence because of religion or attendant identity markers, the structure and extent of the legal regulation of individual and collective religiosity seems to be near to non-existent in Senegal. Reporting on the ICCPR in 1997, Senegalese authorities simply stated that, due to the homogenous nature of their society, no legal restrictions on religiosity were necessary.

Suriname

Suriname is frequently described in state reports as a 'fascinating' society, largely due to the uniqueness of its religious makeup. A result of Dutch labor imports in the colonial period, the harmonious diversity of the population of Suriname is characterized as the pride of the nation, and frequently emphasized in state reporting, repeatedly exemplified by the proximity of a mosque and a synagogue in the capital. While religion is commonly construed as a positive force in society, with religious institutions providing health care and education for large portions of the population, religious diversity is also frequently accused of slowing the rate of development in the country, impeding implementation of treaty measures in national legislation.

Problems posed by religious diversity surfaces in reporting in the shape of 'bush negroes' preventing their children from attending school (for the allegedly mistaken fear that they may be subjected to proselytization), the hampering of women's participation in sports, and fragmented legal regulation of marriage, relative to each religious group. While the former two of these problems seem to linger, the latter has been the subject of repeated attempts of reform, a process which has involved religious leaders and stakeholders, and which so far has failed to result in any significant change.

Covering 14 years, the eight reports submitted by Suriname show no particular change in the role of religion in society, a feature underscored by several passages on religion duplicated in reports to different treaty bodies. The religious origins of law runs through the majority of reports, and is particularly emphasized in the 2007 report to CEDAW, where it more or less stands alone as the most important feature of women's rights and religion in Suriname. Legal regulation of religion, on the other hand, is sparse in reports, with the ban on discrimination for religion or other features in article 8 of the Constitution registering the highest number of citations, appearing in most reports.

Kazakhstan

Covering nine years of reporting, Kazakhstani submissions to the treaty bodies show a strong consistency in not mentioning religious dimensions to law, either as parts of the state legal framework, or as factor among the populace. In seven reports, only the dispatch to CEDAW in 2007 made a reference to the existence of religiously regulated marriages, claimed to be illegal, a stance that apparently had changed by 2010, when state officials explained to CESCR that such marriages were not illegal, but not widespread, either.

The overarching theme across all seven reports is the strong revitalization of religion following the demise of communism and the attendant independence in 1991. The rise of religion is evidenced by the increase in houses of worship and the increased registration of religious communities. Kazakhstani authorities have met the challenge of increasing religiosity by adopting a two-pronged approach: firstly, the government has invited religious leaders from all over the world to conferences promoting religious harmony, and has expanded the school subject dedicated to religion, in order to curb any rise in extremist tendencies in evidence in neighboring countries.

Secondly, the authorities have erected a strict legal framework, in which media outlets are constantly monitored in order to clamp down on hate speech and incitement to hatred for religious or other reasons. Additionally, a 2005 law on the compulsory registration of religious communities effectively criminalizes non-registered religious activities. When confronted with this by the Human Rights Committee in 2010, government officials responded that punishments for non-registered religiosity were mild, and that the registration procedure was non-partisan, derived from the general requirement of all associations in Kazakhstan to register, not only religious ones.

The rationale for these divergent policies is often elaborated upon in state reporting, albeit with different emphasis to different treaty bodies. While the 2007 report to CEDAW singled out interreligious tensions as a challenge to national policymaking, the 2010 report to CERD simultaneously claimed that while globalization certainly helped usher in nationalism, which in turn led to religious extremism and the deterioration of psychological well being, tensions in Kazakhstan were first and foremost caused by poverty, and, henceforth, that there was no need for the legal prohibition of racial discrimination, as this was no factor in Kazakhstani society.

India

In 12 years of reporting to treaty bodies, Indian officials have painted a picture of a country in which religion is a constant feature, influencing large and substantial portions of societal activity, both historically and currently, and both beneficially and detrimentally. Indian reporting routinely emphasizes the complex interreligious matrix of society, a feature that has become the bedrock of social organization and a breeding ground for a particular kind of Indian secularism, in which dignity and respect for all religions is the bearing principle. Officials point to how several world religions originate in India, that the laws of Manu constitute the value basis for education, and that religion was a key part of the freedom struggle in the 1940s. Simultaneously, however, Indian officials point to the many and intractable problems posed to implementation of treaty measures by the complexity of India, an observation commonly introduced early on in reporting and meetings with treaty bodies to explain lacks and discrepancies in implementation measures, although rarely elaborated upon.

The importance of religion in India is attested to by the quantity of religious legal citations, which consistently dwarf any mention of the legal regulation of religion, irrespective of which treaty body the report is styled to. Citations on the importance of religious law deal with problems posed by religion to the implementation of various treaty measures – a fragmented marriage system, in which every rule, from age limit and number of wives, to rules of registration, dissolution and inheritance are governed by different religious rules, depending on where you live, and who you are. Other problems posed by religious legal constraints feature the narrow access to adoption (used by parsi and hindu parents as a strategy to recruit male heirs to perform the

necessary religious rites for them when they die), selective abortion of female fetuses (for similar reasons), selling young girls into cultic activities (devadasi), the infamous sati practice (widow immolation), and the hampering of access to education.

Stating to the Human Rights Committee in 1997 that India is 'no melting pot', the government has consistently enforced a policy of non-interference in the internal affairs of minority communities – only upon express wishes for change emanating from such communities will the authorities intervene. The exact nature of when a wish for change is sufficiently stated remains obscure, but the government has quoted reforms of parsi marriage rules after requests from female members of the community as an example of how this policy works.

Although commonly invoked both as a source of good and of mischief, the role of religion is also frequently relocated in Indian state reporting. Reporting to CEDAW in 2007, Indian representatives claimed that the practices of sati and devadasi were 'abuses' of religion. In the same session, the issue of registering marriages, which in the 2000 cycle to the same committee was explained by low levels of literacy, was explained by religious differences. Upon questions from CERD and HRC of the religious dimensions to the conflicts in Jammu and Kashmir and the issue of child labor, Indian officials flatly stated that both of these issues were 'unrelated' to religion – the latter contrasts with the 2008 report to CESCR, in which religious laws are described as parts of exploitation and violence against weaker members of the family.

Hungary

Covering the years 1996-2010, early Hungarian state reporting dedicates substantial space to the political change since the fall of the Communist regime. Changes noted in the 1996 CEDAW report included governmental 'restoration' of religion and the family – while the main policy of the latter was the downsizing of subsidized child care, the former is not linked to any particular political action, although the report mentions that there had been an increase in women's religious groups providing for the elderly and doing charity work. Rise in religious youth organizations were also linked to the political transition in the 1998 CRC report, which also noted the beneficial work being done by religious organizations in fighting drug abuse.

While the need to restrict religion by using legal means was evident in this early phase – children were not allowed any separate freedom of religion, and the collection of data on religion was prohibited – the 2002 report to the HRC represented a departure from the post-transition phase by introducing a new, restrictive law on the registration of religious organizations, while keeping silent on governmental efforts to support religious groups. In a lively exchange with the HRC upon their 2002 report, the Hungarian representative alleged in a response to Mr. Amor on the contents of the new law that it did not entail a definition of religion, although he had listed criteria for definition earlier in the same session.

The stance on children's freedom of religion was slightly loosened in the 2006 report to the CRC, while the prohibition on data on religion was maintained in successive reports to several treaty bodies. The 2002 CERD report saw the Hungarian authorities claiming that religion had no place in the consideration of court cases, a stance that was expanded to child custody decisions in the 2006 CRC report. While the rationale for this hands-off policy has not been offered, the encounter with CERD in 2002 featured a question from the committee on how the non-consideration of religion in court cases worked out practically – a question that remained unanswered.

Panama

Over the course of 13 years, eight periodic reports submitted to the UN human rights treaty bodies from Panama mention religion only infrequently. In six reports, religion features at the margins, in typical summary mentions, as one of several identity traits towards which discrimination, violence or hate speech is not allowed,

or punished more strongly than if directed towards individuals without any such markers.

The relative absence of religion from these submissions draw the remaining two in sharper relief – all the more so as they were lodged more than ten years apart, to different committees. Reporting to the CRC in 1997, Panamanian authorities described legal regulations of religion in the constitution, in education, in the upbringing of children, regarding minorities, and in the penal code. Three passages award religion a considerably more central position in Panamanian society than the marginal citations offered in the majority of reports seem to indicate – the constitutional limit to freedom of religion, which cannot be contrary to Christian morals, the singling out of child abuse by persons hired by religious organizations as object to stronger punishment than other abusers, and the planned reform of Panamanian education, in which sex education was about to be differentiated from religious education.

In 2008, reporting on the CCPR, religion was again back on the agenda, featuring a further elaboration of how the right to freedom of religion was regulated and maintained across several social fields and by which legislative means. Additionally, religion was portrayed as an ambivalent force in Panamanian society – on the one hand, representatives of the government acknowledged the Catholic origins of a restrictive abortion law, and maintained Christian moral limitations on the right to exercise freedom of religion. On the other hand, religion was presented as the main obstacle to integrating underdeveloped regions in the interior, an obstacle, moreover, that the government helped maintain by granting special protection status to areas in the interior used as religious sites.

Summary

Scripts developed by treaty bodies have created three distinct discourses on religion in state reporting. The role of religion as a prohibited ground for distinction and discrimination is the single most repeated guise under which religion appears in state parties reporting, reflecting the dominant position of non-discrimination in reporting scripts developed by treaty bodies. Simultaneously, these appearances are marked by their summary nature, rarely engaging other discourses on religion. Importing treaty provisions on the prohibition of differential treatment across a wide array of different features seemingly offers an attractive and uncomplicated way of showing commitment to the provisions of human rights treaties, although the extent to which such legislation brings about actual non-discrimination is often expressly under-communicated by states parties, who seem content to point to updated legislative frameworks rather than concrete policy measures. Most citations feature more or less direct implementations of treaty measures into domestic law, with only limited exceptions.

Religion as part of the freedom of thought, conscience and belief enjoys widely divergent roles in state reporting, ranging from a major feature inspiring comprehensive legal frameworks with separate bureaucratic institutions dedicated to enforcement and monitoring, to near absence, only mentioned in passing inbetween other reporting requirements. Most states incorporate phrases from the first part of article 18 of the ICCPR on the freedom of thought, conscience and religion more or less verbatim, but neither state seem satisfied with the contents of acceptable limitations listed in the third part of the article. Limitations in state reporting range from complete absence to a stronger version of the ICCPR, following no distinct pattern.

As a factor in the implementation of treaty measures, religion is dominant. Among the issues listed as beneficial or detrimental to treaty implementation, few, if any, compete with the role of religion. As benefactor, religion influences treaty implementation first and foremost as a strong and important actor among civil society groups, picking up the slack in areas where states are unable or unwilling to fulfill their treaty obligations, such as health care, education and care for the poor. As culprit, religion is most commonly mentioned in reporting as systems of rules competing with treaty norms, prescribing or prohibiting issues that create conflicts with treaty measures. States take very different views of what the ideal role of religion in their societies should be – while

some seem content to keep legislation explicitly based on particular religious creeds in place, others express their ambition to purge their legal systems of any religious origins.

2.4 Treaty Bodies

Scripts developed by treaty bodies present states with relatively unambiguous obligations in their reporting on religion – they provide guidance as to the approximate location, extent and role of religion allowed in state reports. In practical reporting, the coherence of such scripts rapidly dissolve, faced by delinquent state reporting and disagreements among committee members. Consequently, the drafting process of concluding observations often proves to be difficult, resulting in reporting procedures that at times seem far removed from the order and clarity developed in treaty provisions, general comments and reporting guidelines. Treaty bodies respond differently when their authoritative scripts are interpreted by states – while some members editorialize on issues far removed from their mandate, others interpret treaty provisions stricter than general comments seem to indicate. Yet others accept criticism of legal ambiguities raised by states parties, while some treaty members opine on the sufficiency of arguments raised by committee colleagues. These differences lead to divergent practices among the treaty bodies in their interpretation of the proper configuration of the three dimensions of religion in state reporting.

The Committee on the Elimination of Racial Discrimination

Although related to the oldest and shortest of all UN human rights instruments, reviews of the provisions of the ICERD are the most volatile of the system. Largely unchallenged by any notable presence of religion as a feature of implementation, the committee has struggled with the relationship between discrimination based on race and religion throughout the period, echoing the drafting controversies relating to both features in the 1960s. In a few mentions, the committee has also touched upon the legal regulation of religion, in comments that seem to reinterpret their original mandate.

Notwithstanding general recommendation 21 (1996), in which the reach of non-discrimination was construed as covering religion, the committee seems undecided on whether discrimination on this basis is relevant to the convention or not. Commenting upon reports by Senegal (1994) and Hungary (1996), members suggested an expansive interpretation, as they aired their views on a Senegalese prohibition against political parties running for office based on the precepts of a singular religion, and criticized a Hungarian law not mentioning religiosity as a distinct minority trait. Reviewing the Indian submission of 1996, one committee member acknowledged the ambiguity of race as a legal term as a response to the state party claim that Indian society was composed of religious, not racial minorities. Two other members, however, countered that an unwillingness to recognize the role of racial relations was unacceptable.

Commenting on the Hungarian submission in 2002, one committee member asked how the state party assertion that the ban on religious data prohibited the use of such data in court cases worked in practice, alluding to the relevance of the treaty to this legislation. In 2002, one member of the committee praised the Senegalese delegation for expansive legislation on non-discrimination, while another member asked the delegation why the implementation of non-discrimination provisions from the convention was expanded to cover religion. In 2007, commenting upon the report of India, the chairman of the committee refused to accept statements on the situation in Jammu and Kashmir, due to the religious nature of the conflict.

Commenting upon religion as part of the right to freedom of thought, conscience and belief, the committee seems to take an expansive view of the script developed in treaty provisions and general recommendations, in which this freedom is thematized only as a subset of pre-existing civil rights, the access to which should not be prevented by racial discrimination. In 2002 the concluding observations to the Hungarian report featured praise of the enactment of a new law on the right to the free exercise of religion in penal facilities, while a committee

member asked the Senegalese delegation about the scope of the law of religious associations. In 2004 and 2009, Suriname was repeatedly asked about the religious rules governing marriage, without any racial connotations.

The Human Rights Committee

Mirroring the comprehensive legal framework on religion in the ICCPR, HRC statements on religion in reporting cycles are largely related to the specifics of legal measures regulating religion. More than any other treaty body, HRC confronts states with the ways in which they have incorporated treaty articles on religion into substantial legislation, and the ways in which they create policy measures from this legislation. While religion as a ground for distinction or discrimination appears only in passing, the existence of normative rules derived from religion in states parties reporting is met with unequivocal opposition. Commenting on India in 1997, committee members castigated state representatives over the role of religious norms in Indian society, repeatedly pointing out that religious diversity and underdevelopment was no legitimate excuse for failing to comply with treaty requirements. One committee member claimed that abortions targeting girls were understandable given the weak position of females due to religious constraints in Indian society, pointing to education as the only way to reform and change society to bring about compliance with treaty provisions.

Scrutinizing legal regulations on religion, committee members have pointed to the incompatibility of limitations to the manifestation of religion or belief based on singular morality (Panama, 2008), and criticized state bureaucracies involved in the creation of acceptable state versions of religious traditions (Kazakhstan, 2010). Upon the review of a new registration law mentioned in the Hungarian submission of 2002, a committee member claimed that as religion was an inner matter, it would be better protected without legal definitions. In their individual submissions to state representatives, then, committee members espouse a strong and consistent separation between law and religion – norms derived from religious traditions should not have any bearing on the implementation of treaty provisions, whether on religion or on other issues. Simultaneously, legal regulations should not encroach upon religion, which should be left without state interference, to the extent where the entire matter should be left undefined. Consequently, law and religion are construed as separate and unconnected spheres, between which relations in any direction receives criticism. The committee is mute on the obvious gray areas arising from this position.³⁹

In concluding observations, the issue is less clear cut. Despite clear and unambiguous statements from several committee members on the irrelevance of religious diversity to the obligations arising from the covenant, the concluding observation after the review of the 1997 submission from India acknowledged that religious tensions complicated the task of implementation. Additionally, with the exception of critique targeting the Panamanian limitations to manifestations of religion and belief, criticism directed at states parties on the role of religion never found its way into concluding observations.⁴⁰

The Committee on Economic, Social and Cultural Rights

While the normative script developed by CESCR on reporting obligations on the ICESCR has elaborated on the scope of religion as ground for discrimination or distinction and the role of religion in education, reviews of state party reports only rarely address religion in any way. Scattered remarks center on the nature of religious instruction in schools and the access of churches to start their own schools, rules governing marriage, and the extent to which religious communities manage to live in harmony in diverse societies like Suriname (1995).

In an exchange on the review of a Senegalese report in 2001, committee members evinced different views of the origins of female circumcision – while one member asked the state party representative whether initiatives

³⁹ Requiring a legal separation between two societal spheres necessary entails working definitions of the borders of either sphere.

⁴⁰ The concluding observations to the 2010 report from Kazakhstan are still pending.

to combat this practice was met with resistance in religious communities, another member pointed out that the practice was not a religious, but a traditional one, echoing sentiments from general recommendation 14 by CEDAW (1990). Religion is only thematized in one set of concluding observations, upon the review of India in 2008. Calling for the development of disaggregated statistics on homelessness and minority groups, the observations first point to the need to enact not only laws, but also to develop policies battling discrimination and violence religious and other grounds, only later to recommend the expansion of the legal framework on the topic.

The Committee on the Elimination of all Forms of Discrimination against Women

Entirely absent from the legal framework of the ICEDAW, religion appears frequently as a feature of treaty implementation in CEDAW reviews of state reports. Provoking a substantial number of reservations for religious reasons,⁴¹ the implementation of articles 2 and 16 of the convention is repeatedly commented by committee members. Echoing general recommendation 21 (1994) on family and marriage, committee members have pointed to the incompatibility of religiously derived legislation on the rules of marriage with treaty provisions (Kazakhstan, Suriname and India). While both the general comment and several comments by committee members allude to a general incompatibility of religiously derived laws with the convention, other comments point to the ways in which religions should not be perceived as sources of discrimination.

Overall, committee members seem to disagree on the extent to which states may influence – and be influenced by – religious norms. Commenting on the 1997 report of India, one member called for the reinterpretation of religious precepts to bring them in line with treaty provisions. Another member criticized the non-intervention policy favored by Indian authorities in their relations with religious communities, calling upon the state to compel religious communities to change their views. In reviewing the report from Kazakhstan in 2001, one committee member pointed out that discrimination against women, although non-existent in Kazakhstan, was often perpetrated under the guise of religion, particularly Islam. Another member insisted on the care that should be taken not to misinterpret religion as being a source of discrimination.

In concluding observations, the picture is no less complicated. While all states in which religious norms influence marriage legislation are called upon to bring about changes, these calls are differently addressed. In 2000 (India) and 2002 (Suriname), states are compelled to work with religious communities in order to bring about changes in their legislation. In 2007 (India and Kazakhstan), states parties are requested to bring about these changes themselves by reforming their marriage codes.

The Committee on the Rights of the Child

In state reporting on the provisions of the ICRC, religion as a factor of implementation plays a considerably larger role than provided for in the reporting obligations developed by CRC in the normative script. Religious leaders are frequently mentioned, both as a hindrance and as a potential ally in the furtherance of children's rights. Reviewing the Senegalese submission in 1995, committee members pointed to the multiple roles of religious leaders, both as important conduits for the dissemination of the convention and helpers in health schemes, and as targets towards which prohibition of female genital mutilation should be directed, due to their important social role. During the same session, several treaty members recommended Senegal to follow the lead of Tunisia, in re-assembling and re-interpreting the Koran to bring it in line with treaty provisions.

A similar wish to engineering religious precepts was espoused by committee members in the review of the Indian report in 1997, in which religious traditions were accused of promoting sexual abuse of children and creating acceptance of highly discriminatory adoption practice. Suggesting ways to confront these problems,

⁴¹ The ICEDAW has received the highest number of reservations of any human rights treaty to date, the majority of which has been made for religious reasons (ref.).

Indian officials were asked both by individual treaty members and in the concluding observations to alter religious legislation in dialogue with religious leaders, in order to bring an end to these practices. In reviewing India in 2001, the tone had hardened, and the concluding observations not only encouraged dialogue with religious leaders, but the eradication of religious practices not harmonizing with treaty measures.

While review of state reporting is largely mute on the issue of religion as ground for discrimination, there is repeated mentions of two novel legal issues created by the convention: the best interest of the child, and the religious freedom of the child. While the compatibility of the former and religious law was questioned in the review of India in 1997, the content of the latter was questioned in reviews of Panama (1997) and Hungary (1998), neither of which had provided the committee with the age at which children attained their full rights to freedom of religion.

Summary

The amount of attention dedicated to the legal regulation of religion by treaty bodies largely corresponds to their respective normative scripts, with committee members airing their views on regulatory issues considered particularly pertinent in their differing treaty provisions. State interference with religions is consequently also viewed rather differently – where CEDAW, devoid of regulatory measures on religion, suggests states actively partake in the reinterpretation of religious norms, HRC, bound by a comprehensive regulatory framework, vigorously opposes state-approved versions of religious norms. Differences between treaty bodies are particularly pronounced in their views on religion as a factor in implementation. While most committees seem hostile to the concept of religiously derived norms having any influence on fields covered by treaty provisions, their view of the roles played by religious leaders and institutions in providing services and assistance in different societal sectors are largely sympathetic, although generally cautious. Suggestions offered to states parties on how to handle instances where religion collides with treaty measures diverge considerably, ranging from calls to eradicate religiously condoned, harmful practices, to offer more education or negotiate with religious leaders.

3. Conclusion

Reporting cycles pit states in the position of hermeneutes, interpreting a canonical tradition developed by treaty bodies, their canonicity being constantly reinvented by the raft of available hermeneutes, willing and bound to offer their interpretations.⁴² Like any hermeneute, states offer idiosyncratic ways of reassembling canonical elements offered by treaty bodies, creating national narratives in which religion plays a range of different parts, acting as benefactor, threat or parenthesis in unequal measures. Unlike conventional canons, however, treaty bodies are able to talk back, to offer their corrective suggestions to the interpretations offered by states. In doing so, treaty bodies constantly reinvent, adjust and contradict their canonical scripts, further destabilizing the already unsettled position of religion in state reporting.

Treaty bodies consistently hold regulatory measures on religion, developed as parts of a new standard of civilization, apart from the impact of norms and rules derived from religion. When states fail to respect this division, treaty bodies craft their responses from different rationales, recommending states to do very different things to harmonize the role of religion in their societies with treaty provisions. Whenever legal regulations of religion are considered to be inadequate, treaty bodies have a comprehensive script from which to draw suggestions and recommendations – not only their respective treaty provisions, but also those of other committees, supplementing the explicitly holistic ideal of the monitoring machinery. When religion appears on the margins of law, however – when states invoke religion as problem, benefit or influencing factor for implementation – treaty bodies are largely left unscripted, crafting *ad hoc* recommendations that do not follow any set pattern. Although several treaty bodies deal with extra-legal religion in their comments and reporting

⁴² Smith 1982, see also Murphy 2003.

guidelines, neither have fashioned a systematic body of principles or recommendations for its handling.

Evaluating from the small selection of reports reviewed in this text, the creation of such principles or recommendations would be complicated, if not impossible. The variation in how states relate to religion in their reporting is too great to allow for any systematic set of handling principles. This raises two interrelated questions of the proper connections between legal and extra-legal forms of religion: Firstly, what is the epistemic relation between legal and extra-legal religion – are they related at all, or are they simply different categories? Reporting cycles suggest that states parties and treaty bodies view this differently. To several state parties, the existence and importance of religion to the regulation of their societies is not sufficiently captured by normative scripts, resulting in widely different practices of invoking extra-legal and legal religion in state reporting. To treaty bodies, religion is not different from any other extra-legal factor impinging upon implementation of treaty provisions, prompting calls for reinterpretation, eradication, mediation and support of religion in unequal measures. While treaty bodies have been forced to fashion rules in general comments and reporting guidelines after being confronted with the role of extra-legal religion in state reporting, reservations and declarations by state parties, these rules exclusively deal with contents of state reports, not with how states should handle these issues.

The second question is how these differing views of the role of extra-legal religion affect reporting cycles, and, ultimately, the legal formations of the religious life. On the state level, differing views matter only to the extent that states actually implement changes suggested by treaty bodies. While there is an extensive literature dedicated to the examination of whether ratifying human rights treaties actually bring about changes in state behaviour, results from this literature are inconclusive, at best.⁴³ Evaluating from the small selection of reporting cycles reviewed, states generally ignore recommendations from treaty bodies on how to handle the role of extra-legal religion in their societies, while displaying a modest willingness to alter the nature of legal regulations. On the level of treaty bodies, views of extra-legal religion are constrained by the confines of legal religion – anything labelled religious outside these confines creates an uncertainty that is handled differently. Attempts to treat extra-legal religion as any other factor, like tradition, culture or social norms consistently fail, because concepts like these have a much more limited existence in the legal regulations monitored by treaty bodies.⁴⁴

Ultimately, religion appears to states parties as concrete, real and important, both in its legal and extra-legal inceptions, doubling as a depository of legal, social and cultural norms, and as a discreet, limited phenomenon subject to certain legal rules. With the reintroduction and positivization of a standard of civilization in international law in 1948, although heavily and explicitly involved in the creation of the standard, religion was cut off from any future normative role, firmly placed on the list of issues subject to legal regulation within the standard. Arguably, this location prohibits treaty bodies from allowing religiosity any role in the normativity of human rights, creating interpretative problems whenever states emphasize the ways in which religions actually do influence their normative systems, for better or for worse.

Returning to the idea of normative scripts, evaluated reporting cycles seem to confirm that cultural affinities between the norm-producing center and the norm-implementing periphery does play a role in thoughts and ideas on religion. The single-mindedness of treaty bodies in matters religious tend to favour states with strongly 'western' legal systems, due to their cultural affinity with the standard of civilization that spawned the UN human rights regime.

⁴³ Additionally, inquiries into the effect of human rights treaties invariably accept normative scripts developed by treaty bodies at face value, and measure state compliance in terms of their adherence to these scripts, thus ignoring extra-legal formations of religion in state reporting.

⁴⁴ While tradition, social and culture feature prominently in several treaties, notably the ICEDAW and the ICESCR, neither of these are legally protected as a negative (i.e. non-interference) right that individuals can evoke against states.

3. 1 Consequences for the larger scale analysis

Work on the present text has changed the premises of the larger scale analysis in a variety of ways. First, and most prominently, the combination of a theoretical backdrop with empirical analysis has provided some much needed concretization of erstwhile intangible theoretical and meta-theoretical work. While the text stops short of fleshing out a concrete set of parameters and the various ways in which they are applied, it nevertheless helped clarify the applicability of second-order observations and notions of normative scripts, both of which will be elaborated considerably for the larger scale analysis. Second, work on the text gave a much needed opportunity to compare between treaty bodies and states on their approaches to religion and law, testing the coherence and interrelationships of legal and extra-legal discursive constructions of religion. These concrete comparisons furthermore forced some reflections on whether the religious origins of the human rights regime via the standard of civilization concept play a relevant role for the ways in which religion is legally regulated in this regime. Third, the text necessitated a pointed summary of normative scripts developed by treaty bodies, providing a framework in which such a summary could be applied and tested.

While these points helped focus issues that will be developed further, the analysis in the text addresses single issues and states in a way that the larger scale analysis cannot. Rather, summaries and comparisons constructed on single states and minor issues may serve as building blocks to identify cross-cutting themes that can be isolated from the 1550 remaining reports. A major challenge in this work will be to develop and employ abstract, yet meaningful points of comparison between states and treaty bodies. Some topics from the present text seem particularly useful in this respect. Firstly, the extent to which states thematize the nexus between legal and extra-legal configurations of religions seems to vary considerably. A quantitative approach may have helped examine the extent to which these differing configurations correlate between states and groups of states – for instance, if states that downplay legal regulations tend to emphasize extra-legal considerations, and vice versa.

However, I believe that the ways in which this nexus is created, the terms and conditions that are used by states, make for a more interesting, less mechanistic approach to the issue. For instance, if one state emphasizes the legal regulation of religion on the basis of the detrimental impact of religious sects and cults on the populace, this is different from a state in which the legal regulation of religion is emphasized due to the implementation of a regional human rights instrument like the European Convention on Human Rights. States may downplay or ignore religious laws in their reporting simply because these are indistinguishable from human rights norms due to shared origins, or because the state prefers to re-categorize norms that in other countries would receive the label 'religious' as customary or traditional, because this corresponds more closely to domestic legal categories. Motivations of these sorts would not be picked up by quantitative measures, which would risk grouping states based on distinctions that are in place for very different reasons.⁴⁵ Employing a second-order perspective, I propose examining differing discursive strategies rather than their outcomes, as exemplified in the case of states downplaying extra-legal religion – whenever a state divides a report between legal and extra-legal religion, the rationale offered for this division seems a far more interesting issue than its measurement.

Secondly, treaty bodies offer widely dispersed advice on the handling of extra-legal religion, indicating not only different interpretations on their respective treaty provisions, but different views on the nature and extent to which religion can be socially engineered. An analysis starting from either a presupposition of religious law or legal religion would bring important perspectives to bear on these views. The former would be helpful in identifying ways in which committees tap into existing bodies of religiously sanctioned laws to frame their understanding of extra-legal religion in state reporting, and the latter would supplement the extensive literature on the acceptable configurations of the legal regulation of religion. Both of these perspectives would, however,

⁴⁵ This is not to say that quantitative measures capturing the process of forming different discourses could not have been created. Rather, I contend that the interrelationship of such measures would risk being obscured if quantified and correlated.

take the existence of religious law or legal religion as identifiable concepts for granted, examining the one from the perspective of the other. I propose, rather, to examine the ways in which states and committees take part in the ongoing formation and reinterpretation of these categories: How do states and committees describe and interpret differing formations of religion, and what handling strategies do they propose? Do strategies vary among treaty bodies, over time and towards different states, or are there consistent patterns across these trajectories? While some preliminary suggestions have been offered in the present text, the larger scale analysis will hopefully create a more substantial and nuanced answers to these questions.

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