The Complexity of Religion and the Definition of "Religion" in International Law

T. Jeremy Gunn*

> When I mention Religion, I mean the Christian Religion; and not only the Christian Religion, but the Protestant Religion; and not only the Protestant Religion, but the Church of *England.*
>
> —Mr. Thwackum (1749)[1]

> [B]elief in a supreme being remains a necessary characteristic of religion for the purposes of English charity law.
>
> —Charity Commissioners for England and Wales (1999)[2]

> [T]he test of belief "in a relation to a Supreme Being" [in a law providing for conscientious objector status from military service] is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . . .
>
> —United States Supreme Court (1965)[3]

INTRODUCTION: THE UNDERSTANDABLE, BUT MISGUIDED, QUEST FOR A LEGAL DEFINITION OF "RELIGION"

Although many international and regional human rights instruments guarantee rights related to freedom of religion or belief,[4] none attempts to define

* Member, OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief; Senior Fellow for Religion and Human Rights, Emory University. I would like to thank the following for their comments and advice at various stages of preparation: Melanie Adrian, Tom Kellogg, Brett Dakin, Karen Musalo, Dot Ivey, Larry Katzman, and Jere Skipper.

An earlier version of this Article was commissioned by the Office of the United Nations High Commissioner for Refugees for the Roundtable on Religion-Based Refugee Claims, October 30–31, 2002, Baltimore, Maryland, sponsored by the Office of the United Nations High Commissioner for Refugees and Church World Service. That paper was prepared in conjunction with Karen Musalo, CLAIMS FOR PROTECTION BASED ON RELIGION OR BELIEF: ANALYSIS AND PROPOSED CONCLUSIONS (2002).

1. HENRY FIELDING, TOM JONES 83 (Sheridan Baker ed., Norton 1995) (1749).

2. Decision of the Charity Commissioners for England and Wales, *Application for Registration as a Charity by the Church of Scientology (England and Wales)* (17 November 1999), 21, *at* http://www.charity-commission.gov.uk/registration/pdfs/cosfulldoc.pdf.

3. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

4. *See, e.g., International Covenant on Civil and Political Rights*, art. 18, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966); *Convention Relating to the Status of*

the term "religion." There was one major international effort to explain the underlying rights protected under the concept of religion or belief,[5] and the UN Human Rights Committee issued an important General Comment on the scope of freedom of religion or belief within the International Covenant on Civil and Political Rights.[6] Nevertheless, the term "religion" remains undefined as a matter of international law. The absence of a definition of "religion" is not peculiar to international human rights conventions; most national constitutions also include clauses on freedom of religion without defining "religion."[7] Thus we are presented, on the one hand, with important provisions guaranteeing fundamental rights pertaining to religion, but on the other hand the term itself is left undefined. Of course, the absence of a definition of a critical term does not differentiate religion from most other rights identified in human rights instruments and constitutions. However, because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater.[8]

It is fairly common for legal analyses of freedom of religion or belief to avoid a serious discussion of the definitional problem, even among the most

---

Refugees (July 28, 1951), arts. 1 & 4, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; *Protocol Relating to the Status of Refugees* (Jan. 31, 1976), 19 U.S.T. 6223, 606 U.N.T.S. 267; *International Covenant on Economic, Social, and Cultural Rights*, art. 2, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Apr. 11, 1950), art. 9, 213 U.N.T.S. 222; *American Convention on Human Rights* (Nov. 22, 1969), art. 12, 1144 U.N.T.S. 123; *African Charter of Human Rights and People's Rights* (June 27, 1981), art. 8, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1986), reprinted in 21 I.L.M. 58 (1982).

5. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981).

6. *General Comments Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 22(48) (art. 18)*, U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 208, 209, U.N. Doc A/48/40 (1993).

7. The United States Constitution is typical in this regard. *See, e.g.*, U.S. CONST. amend. I; GRUNDGESETZ [GG] [Constitution] art. 4 (F.R.G.); INDIA CONST. arts. 25-28; NIHONKOKU KENPŌ [Constitution] art. 20 (Japan); LA CONSTITUCIÓN [Constitution] art. 16 (Spain).

8. Claims of persecution under the 1951 Refugee Convention, *supra* note 4, for example, are likely to be among the most complex, arcane, and incomprehensible that will need to be decided by an asylum adjudicator. While religion may involve group identity (like race and nationality) or voluntary affiliation (like political and social groupings), it also encompasses an enormous range of human beliefs, activities, and manifestations of belief. Adherents of some religions might claim, for example, to suffer persecution if required to cut their hair or shave their beards, while adherents of others might claim to be persecuted if forced to grow their hair. Some religions require ritual slaughter of animals and others forbid eating meat. Some require drinking alcohol in sacred rituals, others forbid its consumption at any time. Some religions forbid military service, others require male adherents to carry knives. Some require worship on Saturday and some on Sunday. Some permit a man to have more than one wife, others consider the practice a sin. Some people believe they are commanded by God to "preach that Jesus is the Christ," others believe that such a profession is a punishable blasphemy. What the adherents of some religions might perceive to be trivial issues, adherents of others may see as absolute commands worthy of martyrdom. Even greater complications are added to this volatile mix when cultural traditions are grafted onto a religion. Is the subservient role of women a command of a prophet or a cultural vestige? While some adherents will dismiss traditions as superstitions, others will see them as an integral part of their religious lives.

important works.[9] Among non-legal scholars in philosophy and religion there is a very lively debate as to whether the word "religion" can or should be defined.[10] It has been observed that the "effort to define religion is as old as the academic study of religion itself."[11] In fact, "dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way. Needless to say, no one definition of religion has garnered a consensus, and the definitional enterprise, as well as the debate over the very need for definitions, continues in full vigor."[12]

While academics have the luxury of debating whether the term "religion" is hopelessly ambiguous, judges and lawyers often do not. Asylum-case adjudicators, for example, may be called upon to decide whether there is a "well-founded fear of being persecuted for reasons of . . . religion" regardless of whether the 1951 Refugee Convention offers a definition.[13] Similarly, judges on the European Court of Human Rights may be required to give meaning to the term "religion" for purposes of interpreting Article 9 of the European Convention. Judicial decisions about what constitutes religion make a very real difference in the lives of persons who may or may not obtain refugee status, or in the economic viability of a group that may or may not be recognized as a tax-exempt religious association.[14]

---

9. *See, e.g.*, NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS 3–5 (2000) (citing dictionary definitions); BAHIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 1–3 (1996) (citing international instruments).

10. For a broad discussion of issues related to defining "religion," see William P. Alston, Definition of "Religion," in ENCYCLOPEDIA OF PHILOSOPHY 140-45 (Paul Edwards ed., 1967). For some examples of attempts to define "religion," see in addition to other works cited below, THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS (Jan G. Platvoet & Arie L. Molendijk eds., 1999).

11. William E. Arnal, *Definition*, *in* GUIDE TO THE STUDY OF RELIGION 22 (Willi Braun & Russell T. McCutcheon eds., 2000).

12. Brian C. Wilson, *From the Lexical to the Polythetic: A Brief History of the Definition of Religion*, *in* WHAT IS RELIGION? 141–42 (Thomas A. Indinopulos & Brian C. Wilson eds., 1998).

13. 1951 Refugee Convention, art. 1.A.2, *supra* note 4.

14. The British Charity Commissioners must decide, for example, whether an entity is "religious" for the purpose of determining whether it is tax-exempt. In the United States, courts must sometimes consider whether governmental financing of certain institutions constitutes an impermissible "establishment of *religion*" under the U.S. Constitution. As an example of the difficulty of this task consider the French Law on the Separation of Church and State of 1905. This law, as amended, exemplifies one of the significant difficulties surrounding legal definitions of "religion." (The 1905 Law uses the French term "*culte*" as the generic term for "religion.") If a religious organization is recognized by appropriate administration officials as a "religion," it becomes eligible to receive certain benefits under French law. But in the very process of deciding whether the entity should be so recognized, the courts are confronted with the express language of the law: "The Republic does not recognize . . . any religion." (1905 Law, art. 2). Thus, on the one hand, the state provides benefits for recognized religions, but on the other hand the state notes that it must not recognize religions. This stark legal schizophrenia in France is only less apparent in other countries.

Whether or not state institutions are competent to determine what is and is not religion, in the actual world of law, judicial and political institutions are sometimes forced to make such determinations. Other situations where state officials (including judges, administrators, and legislators) are called upon to determine whether something is religious include most notably:

—whether an entity is a "religion" or "religious association" for purposes of granting legal personality, obtaining tax benefits, or limiting the personal liability of the organizers;

—whether someone has "religious" beliefs for the purpose of obtaining conscientious objector status;

Asylum law is not the only place where the term "religion" is used in international human rights law, but it is probably the place that gives rise to the greatest number of cases where adjudicators make decisions based upon the meaning of the term.[15] In a study prepared for the UN High Commissioner for Refugees, Karen Musalo presented a detailed examination of religious persecution in refugee cases decided in the United States, Canada, Australia, and New Zealand.[16] Musalo's examination of the adjudicators' decisions revealed, in many cases, serious misunderstandings not only about how "religion" is defined, but what religion is. Indeed, the adjudicators often appear to have made assumptions about the meaning of religion on the basis of their own experiences as members of the educated elite in western, industrial societies. Gvien Musalo's detailed analysis, we can identify the following fairly typical misunderstandings of the nature of religion and religious persecution in refugee cases:

—assessing claimants' credibility on the basis of their knowledge of the doctrines of their religions;
—assessing claimants' credibility on the basis of the consistency of their personal behavior with the doctrines of their religion;
—failing to understand that religions sometimes persecute members of their own religious communities in order to ensure conformity with doctrines and practices;
—failing to understand the sometimes complex interrelationship of religious persecution and gender;
—failing to understand the sometimes complex interrelationship of religious persecution and ethnicity;
—failing to understand that what might initially appear to be only a minor inconvenience might reasonably constitute persecution to a claimant;
—failing to understand that *persecutors'* attitudes toward religion may be more relevant for adjudicating a religious persecution claim than scholarly definitions of "religion"; and
—incorrectly assuming that "neutral laws" or "laws of general applicability" cannot cause religious persecution.

Thus, the most serious conceptual obstacles for adjudicators may derive from well-intentioned but mistaken assumptions about what religion means from

—whether someone should be exempted from a law of general applicability on the grounds of religious belief (e.g., a Sikh motorcyclist being exempted from a requirement to wear a helmet or a Muslim or Jewish slaughterhouse being permitted to kill animals in accordance with ritual laws).

15. While there are scores of reported cases involving religious persecution claims, *see* MUSALO, CLAIMS FOR PROTECTION BASED ON RELIGION OR BELIEF: ANALYSIS AND PROPOSED CONCLUSIONS (2002) (on file with author), there have been relatively few religion cases reported by the European Court of Human Rights. For a recent discussion, see JAVIER MARTÍNEZ-TORRÓN, RELIGIOUS LIBERTY & HUMAN RIGHTS 99 (Mark Hill ed., 2002).

16. MUSALO, *supra* note 15.

their personal perspective or that of scholars rather than from the perspective of how *religious discrimination* and *religious persecution* are actually practiced. These mistaken notions regarding religion, which are found throughout asylum decisions, may well reveal underlying conceptual errors in the other cases involving freedom of religion or belief as well.

Part I of this Article will discuss some of the technical problems surrounding attempts to define "religion." Part II will identify three *facets* of religion that should be more helpful in understanding discrimination and persecution than are definitions of the term "religion." Part III will provide examples of how religious persecution and religious discrimination actually manifest themselves.

I. Difficulties in Defining "Religion"

In the three epigraphs at the beginning of this Article, neither the fictional Mr. Thwackum, the real English Charity Commission, nor the equally real U.S. Supreme Court was attempting to define "religion" for purposes of international human rights law.[17] The definitions nevertheless exemplify a variety of mistakes that have been made by adjudicators in refugee law as well as others attempting to interpret the meaning of "religion" in human rights law.[18]

A. The Underlying Methodological Difficulties in Defining "Religion"

There are two important aspects of definitions of religion. The first involves the underlying metaphysical assumptions about the nature of religion (*what* is being defined). The second involves the type of definition that is to be used (*how* the term is defined).

1. Assumptions about the Underlying Nature of Religion

Definitions of religion necessarily involve assumptions about its underlying nature. "[E]ach and every definition of religion implies at least some theoretical conclusions . . . ."[19] One of the many difficulties encountered in reaching a consensus on a legal definition of the term is that, at root, "no convincing general theory of religion exists."[20] Three of the principal theories about religion are: first, religion in its metaphysical or theological sense

---

17. The key phrase in refugee law is "well-founded fear of being persecuted for reasons of . . . religion . . ." found in the 1951 Refugee Convention, *supra* note 4. *See also Protocol Relating to the Status of Refugees*, *supra* note 4.

18. While the absence of an adequate definition of religion might at first seem troubling, it should be borne in mind that the difficulty of establishing definitions is pervasive in academic fields. Indeed, it is difficult to agree about the meaning of the word "definition" itself. "Definition plays a crucial role in every field of inquiry, yet there are few if any philosophical questions about definition . . . on which logicians and philosophers agree." 2 The Encyclopedia of Philosophy 314 (Paul Edwards ed., 1967).

19. Arnal, *supra* note 11, at 22.

20. Stewart Elliott Guthrie, *Religion: What Is It?* 35 J. for Sci. Stud. Religion 412, 412 (1996).

(e.g., the underlying truth of the existence of God, the *dharma*, etc.); second, religion as it is psychologically experienced by people (e.g., the feelings of the religious believer about divinity or ultimate concerns, the holy, etc.); and third, religion as a cultural or social force (e.g., symbolism that binds a community together or separates it from other communities). Definitions of religion typically begin by assuming one of these three different theoretical approaches. Of course, even within each of these three approaches there will be widely different assumptions. Sigmund Freud and Rudolph Otto, for example, both focus on the psychological dimension of religion, though Freud saw religion as a set of false beliefs while Otto saw it as a powerful feeling of the Other.[21]

2. Types of Definition: Essentialist or Polythetic

Once the underlying theoretical assumptions are identified, there still remains the difficulty of the form that the definition will take.[22] Two of the most important forms of definition may be characterized as the "essentialist" and the "polythetic."

An essentialist definition identifies the elements that are *necessary* for something to be designated as a "religion." In the epigraphs at the beginning of this Article, Mr. Thwackum and the Charity Commissioners both offered essentialist definitions of religion. Thwackum's essentialism reduced the meaning of "religion" to the "Anglican Church." The Charity Commissioners apparently assume that religion must be theistic (and perhaps even monotheistic). Whenever a legal definition is essentialist, it assumes that religion has one or more elements in common with all other religions.

The second type of definition, the polythetic, does not require that all religions have specific elements in common. The most widely known illustration of a polythetic approach to definitions generally is Ludwig Wittgenstein's explanation of the meaning of "game." Wittgenstein described the wide variety of activities for which we use the term "game," but notes that there is no single feature that all games have in common.[23] Yet, he believes, we can see resemblances among the different types of activity that are all called games, even if they do not share any features in common. "I can think of no better expression to characterize these similarities than 'family resemblances'; build, features, colour of eyes, gait, temperament, etc. overlap and

---

21. RUDOLF OTTO, THE IDEA OF THE HOLY (John W. Harvey trans., Oxford University Press 2d ed. 1950) (1923); 21 SIGMUND FREUD, *The Future of an Illusion*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 5 (James Strachey trans., Hogarth Press 1961); 21 SIGMUND FREUD, *Civilization and its Discontents*, *id.* at 64.

22. "[T]he problem does not lie in what is to be defined, but in an inadequate grasp of what a definition is supposed to accomplish." W. Richard Comstock, *Toward Open Definitions of Religion*, 52 J. AM. ACAD. RELIGION 499, 500 (1984).

23. Some logicians would conclude that the term "game" is thus too vague and cannot mean anything.

criss-cross in the same way."[24] The statement of the U.S. Supreme Court in the epigraph above approximates the polythetic approach when it accepts in the religious believer something "parallel" to the orthodox belief in God.[25]

The definitions contained in the epigraphs, as well as other definitions of "religion" (including legal definitions) typically can be analyzed in terms of the components above: the underlying assumptions about religion and the form of definition that is offered. Mr. Thwackum's definition assumes the underlying metaphysical truth of the Church of England (i.e., it is not a psychological or sociological definition) and it is in the essentialist form. The Charity Commissioner's definition, which is essentialist like Thwackum's, nevertheless looks to psychology for the underlying nature of religion. The U.S. Supreme Court's definition, like the Charity Commission's, is psychological, but it is also polythetic.

B. Typical Deficiencies in Legal Interpretations of "Religion"

As discussed above, definitions of "religion" typically begin with assumptions about the nature of religion, and then are presented in either essentialist or polythetic form. Legal definitions of "religion" (whether in statutes or court decisions) follow this same general pattern. However, in addition to the difficulties that surround all attempts to define the term, legal definitions also must take into account other factors that standard definitions may ignore. Legal definitions of "religion" generally appear in the complicating contexts of either: (a) protecting *freedom* of religion, or (b) prohibiting *discrimination* (or persecution) of religion. Legal definitions do not simply describe the phenomenon of religion, they establish rules for regulating social and legal relations among people who themselves may have sharply different attitudes about what religion is and which manifestations of it are entitled to protection. Legal definitions, as a result, may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavored) religions.

1. Incorporating Societal Value Judgments Regarding Familiar or Favored Religions

Statutory and judicial characterizations of religion may wrongly assume that familiar or favored creeds are *real* religions, while different or new creeds are either *not* religions or are only *pseudo*-religions. The most troubling examples of this deficiency are laws that differentiate between tradi-

---

24. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32e (paragraph 67) (G. E. M. Anscombe trans., 3d ed. Blackwell 1958).

25. The most famous polythetic definition in American jurisprudence is Justice Stewart's definition of "pornography": "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). A similar version is provided by Professor Comstock about religion: "if not asked, we know what it is; if asked, we do not know." Comstock, *supra* note 22, at 499.

tional and non-traditional religions (as in Russia), or that differentiate between religions and sects (as in France). One extreme example from a judicial opinion is that of Judge Valticos on the European Court of Human Rights, who differentiates between the (acceptable) Greek Orthodox Church and the (unacceptable) Jehovah's Witness faith. A member of the latter faith, who has been convicted in Greek courts for proselytism, is described by the judge as

> a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy . . . . He swoops on her, trumpets that he has good news for her (the play on words is obvious, but no doubt not to her), manages to get himself let in and, as an experienced commercial traveller and cunning purveyor of a faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness. Who, indeed, would not like peace and happiness?[26]

This language of Judge Valticos, although extreme, illustrates the bias that can enter into legal analysis. The epigraphs above from the Charity Commission and the U.S. Supreme Court are simply less blatant illustrations of the same problem.

Thus legal systems may explicitly or implicitly evaluate (or rank) religions. Depending on the attitudes of the evaluator, religions may be described in ways such as "good religion" versus "bad religion," or, "religion" versus "non-religion." Thus some might think of monotheistic religions in terms such as "traditional," while polytheistic or non-theistic religions may be perceived as "primitive" or "superstitious." Those with broader sensibilities might expand the traditional religions to include not only Christianity, Islam, Judaism, Buddhism, and Hinduism—but nevertheless find that other groups such as the Falun Gong or Scientologists are "not really religions" or are "sects" or "cults" and thus are not deserving of the label of "religion" either for purposes of receiving benefits or being protected against discrimination.

It is very common for legal systems to provide legal benefits to individuals or groups that are designated as "religious" (or some similar term). This, of course, leads many groups to seek the designation in order to obtain such privileges as tax benefits or legal personality. In some cases the designation serves principally to separate religious groups from other groups, such as sports clubs, political parties, or business entities. But, in many cases, the designation leads to a dispute between what is often considered to be "real" religion as opposed to "pseudo" religion. There are many pejorative terms that are used to describe such groups, including "sect," "cult," "splittist,"

---

26. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 431 (1976) (Valticos, J., dissenting).

"heretic," "apostate," and "schismatic." In some particularly extreme cases, adjectives will be piled onto these already pejorative terms and groups will be described, often without any supporting evidence, as "totalitarian sects" or "destructive cults." Whereas scholars of religion, including sociologists and anthropologists, are generally critical of such derogatory labels, which typically derive from emotional hostility rather than from any systematically explained difference with more traditional religions, the attitudes may affect legal judgments as well.[27] The range of legal understandings of religion range from very broad (as in India) to very narrow (as in Saudi Arabia). Thus "religion" may be seen not simply as a neutral description of such things as theological beliefs or ritual practices, but as judgment on whether the particular beliefs or actions are acceptable to the society or the legal system.[28] Thus, a definition of "religion" may not simply be neutral, but may contain an inappropriate societal value judgment regarding particular beliefs or actions with "good" beliefs being characterized as "religions" and "bad" beliefs being characterized as "cults" or "heresies."

2. *Failing to Consider Religion from the Perspective of Its Adversaries*

Conscientious jurists may attempt to overcome the definitional and societal limitations described above by consulting the works of scholars and experts, including anthropologists, sociologists, theologians, and historians of religion. These conscientious jurists might, for example, carefully examine definitions of religion offered by Emile Durkheim, Rudolf Otto, Paul Tillich, Max Weber, Clifford Geertz, or Joseph Campbell. But consulting such scholars will not necessarily explain what religion means in the context of "religious discrimination" because the scholarly definitions do not describe what religion means to those who are discriminating and persecuting. This problem can perhaps be seen more easily by looking to the analogous cases of discrimination on the basis of race or gender.

When asylum adjudicators, for example, are called upon to make determinations about racial persecution, it will probably be of no utility for them to seek a definition of "race" from experts such as biologists, geneticists, and anthropologists. In fact, under the prevailing viewpoint, race is *not* a scientific concept; indeed, it is sometimes argued that attempts to define "race" are themselves motivated by racism rather than by legitimate scientific in-

---

27. In response to the question "what is the difference between a religion and a cult?" scholars of religion sometimes respond with answers such as "about 100 years" or "a religion is a cult with political influence." "[M]ost of the world religions, full of compromise as they have become, began fanatically and usually in identification with a single people before they went international and ecumenical." Martin E. Marty, *Introduction to* RELIGION, ETHNICITY, AND SELF-IDENTITY: NATIONS IN TURMOIL 15 (Martin E. Marty & R. Scott Appleby eds., 1997).

28. Although it will always be necessary for legal systems to differentiate between tolerable religious-type activities and other intolerable activities that may be conducted in the name of religion, such as human sacrifice, it is unfortunately the case that deep social prejudices often profoundly affect and distort legal judgments of what is and is not religious.

terests. Regardless of whether race is a scientific category with biological or genetic markers, there is no doubt that *racism* exists and that people are persecuted because of their *perceived racial characteristics*. Ultimately, adjudicators of racial persecution cases would be remiss in seeking a scientific or expert definition of "race" as a prerequisite to determining whether racial persecution had occurred. What is needed is not an expert definition of "race," but an understanding of whether an asylum applicant has suffered because of the persecutors' belief that the applicant belongs to a disfavored race.[29]

Similarly, in gender discrimination cases, it is also likely to be unproductive to attempt to find a scientific definition of "sex." Although it is easier to identify biologically based differences between males and females than it is to identify biologically based racial characteristics, the actual differences may have little or nothing to do with gender discrimination. In considering a definition of "sex," a biologist would likely focus on the differences between male and female sexual organs. Yet it is perhaps the secondary-sex characteristics that, although only minimally relevant to a scientific definition of "sex," may be more important for understanding gender-discrimination claims. Thus it presumably would be inappropriate for an adjudicator to ask a person claiming gender persecution whether she (or he) has had a hysterectomy (or an orchiectomy) or whether the applicant truly considers herself (or himself) to be a woman (or man).[30] While such questions arguably might be relevant to some notion of what is meant by sex or gender, they really are irrelevant if a woman cannot obtain work because potential employers refuse to hire women to work in public places. The relatively important issue in race and gender persecution, therefore, is not an "objective" or scholarly definition of the terms from the perspective of experts, but the understanding of race and sex from the perspective of the persons who are causing the persecution.

So it is the case with religion as well. We do not necessarily come closer to understanding "religious persecution" by considering whether religion requires either a belief in a divinity, a feeling of the transcendent or "wholly Other," a belief in the supernatural, an "ultimate concern," or community rituals—all of which are the types of issue typically considered when seeking a definition of "religion." While such notions may be of use for understanding religion from the perspective of the religious person or the scholar of

---

29. We can easily understand that it would have been inappropriate, for example, for an asylum adjudicator hearing a case under South African apartheid to focus on issues such as: (a) whether "race" can be defined; (b) whether an applicant truly considers himself to be "Negroid," or (c) whether all four of the applicant's grandparents were black.

30. Of course such inquiries would be appropriate *if* there were reason to believe that male applicants (or members of an unpersecuted race) were attempting to deceive the court about their true status. While such inquiries might be relevant for determining whether the applicants are perpetrating a fraud on the court, they are not relevant to the question whether their *persecutors believe* that they are women or members of a persecuted race.

religion, they do *not* explain what religion means to the person who is instigating the persecution.

Two illustrations may help explain the importance of looking to the persecutor's attitudes when trying to understand religion rather than the persecuted. The Patristic father, Saint John Chrysostom, described Judaism as follows:

> I should say that the synagogue isn't only a brothel and a theatre, but also a cave of robbers and a resting-place for wild beasts. . . . When God abandons (a people), what hope of salvation is left? When God abandons (a place), that place becomes the dwelling of demons.[31]

China offers a more contemporary example. In banning the Falun Gong movement, the Chinese government has stated that:

> Li Hongzhi fabricated the so-called Falun Gong by copying some qi gong practices and adding a lot of superstitious beliefs and ravings. Li propagated the explosion of the earth and the doomsday fallacy to fool the public. These malicious concepts have already resulted in physical and mental injuries and even death of people, undermining social stability. Falun Gong bears strong resemblance to heterodox groups like Branch Davidian in the United States and Japanese Aum Doomsday Cult.
>
> . . . .
>
> Falun Gong organization, advocating malicious fallacies, has put people's life at risk and wreaked havoc on the society.[32]

In such cases, whether it be St. John Chrysostom or the Chinese government, the tenor of the allegations exceeds the weight of the evidence offered, as if the rhetoric itself may be substituted for proof. As conceived by one of the most important psychologists of prejudice, such attitudes are "ordinarily a matter of gross and unwarranted overgeneralizations [that reflect] contempt, rejection, or condescension . . . ."[33] To people subjected to abuse flowing from such attitudes, it should not matter whether they ever attend synagogue or whether they consider Falun Gong to be a "spiritual movement" rather than a "religion." In short, the relevant issues for adjudicators may not be the religious beliefs or religious activities from the perspective of religious communities or academics studying religion, but the attitudes of those who are causing the religious persecution.

---

31. St. John Chrysostom, *Against the Jews Oration 1*, *in* WENDY MAYER & PAULINE ALLEN, JOHN CHRYSOSOTOM (2000), 153–54.

32. EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN CANADA, *Chinese Government Outlaws Falun Gong* (July 29, 1999) *at* http://www.chinaembassycanada.org/chn/7697.html.

33. Gordon W. Allport, *The Religious Context of Prejudice*, 5 J. FOR SCIENTIFIC STUD. RELIGION 448 (1966).

II. Facets of Religion (in Lieu of a Definition of "Religion")

In order to understand religion within the context of persecution and discrimination, there are three different facets that are of particular importance: religion as *belief*, religion as *identity*, and religion as *way of life*. In a religious discrimination case or in a religious persecution claim under refugee law, it could be expected that any of these three facets might be of relevance. It is of course also possible that any combination of the three may occur, or that some other facet of religion not identified here may be present, although these three are those most likely to be involved.

A. *Religion as* Belief

Religion as *belief* pertains to the convictions that people hold regarding such matters as God, truth, or doctrines of faith.[34] *Belief* religion may emphasize, for example, adherence to doctrines such as the Nicene Creed, the transmigration of souls, *karma*, *dharma*, the wisdom of the Lotus Sutra, the five pillars of Islam, or the syncretist message that many religious doctrines reveal an underlying reality. *Belief* religion typically emphasizes the importance of individuals having a proper understanding of doctrines. Although sometimes conflated with so-called "private religion," *belief* religion may in fact emphasize the critical importance of a religious community of like-minded believers, the essential role of a priesthood in the salvation of souls, or even the need to manifest religion in the public square. But whether *belief* religion is exhibited by an individual or in a community of believers, it will emphasize the truth claims of the religion.

From the perspective of the person who is persecuting or discriminating, the religious beliefs of others are likely to be characterized in such terms such as "heresy," "blasphemy," "apostasy," or "superstition." From this perspective, religious leaders will be described as tricksters, false prophets, blasphemers, or cult leaders engaged in mental manipulation or mind control. Some of the clearest examples of persecution for "false" beliefs are encompassed within the accusation of apostasy against those who convert from one religion to another. There also can be cases where groups as a whole may be considered heretics and suffer persecution, even though they are of the same general ethnicity as their persecutors. Some of the clearest cases are Baha'is in Iran and Egypt and Ahmadis in Pakistan and elsewhere. While conversion and related cases may be among the most salient, problems of religious persecution also occur for those with religious beliefs who live in communities that are hostile to those beliefs. Such may be the case for a

34. In his study of religious prejudice, Allport identifies two "polar types of religious affiliation." *Id.* at 452. The first, which corresponds roughly to the facet of "religion as beliefs" as described here, Allport identifies as "associational" and he suggests it is based on the voluntary adoption of beliefs of a somewhat like-minded community. The second, "communal," corresponds roughly to the facet of "religion as identity" in the following Part of this Article.

Muslim or a Catholic in China, an Old Believer in Russia, or for a Christian Pentecostal in Uzbekistan.

There is an important caveat regarding discrimination or persecution on the basis of belief, which is particularly important for adjudicators in asylum cases. Even though such cases described above may be among the clearest examples of persecution on the basis of belief, it is not necessarily relevant or appropriate for the asylum adjudicator to base an asylum decision on the depth of the applicant's knowledge of religious doctrines. A person may convert for many reasons, and a deep knowledge of the doctrines of the religion may be less important than the spiritual feelings that come from communion with fellow believers. While converting to a new religion for reasons of spiritual feelings rather than knowledge of doctrines might not appear to an adjudicator to be the best of reasons, the real issue is whether the person is persecuted because of the conversion rather than why he or she converted. While it presumably is always relevant for an adjudicator to consider the accuracy of the applicant's assertions about the facts of the persecution, the applicant's depth of understanding of religious doctrine is not likely to be relevant in most cases. The asylum adjudicator should focus on the reality of the persecution, not the knowledge of those who are persecuted. The depth or accuracy of the applicant's knowledge of his or her religion may simply be irrelevant.

B. Religion as Identity

While religion as *belief* emphasizes doctrines, religion as *identity* emphasizes affiliation with a group. In this sense, *identity* religion is experienced as something akin to family, ethnicity, race, or nationality. *Identity* religion thus is something into which people believe they are born rather than something to which they convert after a process of study, prayer, or reflection. *Identity* religion, in this basic form, understands co-religionists to be a part of the same group (perhaps even regardless of their personal beliefs). *Identity* religion is less likely to emphasize shared theological beliefs and more likely to emphasize shared histories, cultures, ethnicity, and traditions.

People may consider themselves Muslims on the basis of ethnicity, even though they have not been inside a mosque for twenty years and even though they know little about the *Qur'an*. "Arabs, regardless of whether they observe the outward manifestations of religion or not, insist that they were born and remain Muslims."[35] This affiliation extends even to those who may be self-consciously non-religious. "Arab secularists who are opposed to fundamentalism jump to the defense of Islam when fundamentalists are criticized or attacked by non-Arabs. The return to Islam can be seen as a search for identity in the face of what is perceived as foreign encroachments

35. Ziad Abu-Amr, *Critical Issues in Arab Islamic Fundamentalism*, *in* RELIGION, ETHNICITY, AND SELF-IDENTITY: NATIONS IN TURMOIL 47 (Martin E. Marty & R. Scott Appleby eds., 1997).

or hegemony."[36] Others also may identify them as Muslims simply because of who their relatives are or in which country they were born. It is, for example, common for many people to think that to be a Pole is to be Catholic, to be Russian is to be Orthodox, or to be an Uzbek is to be Muslim. When the Patriarch of the Russian Orthodox Church gave an award to the self-proclaimed atheist President Alyaksandr Lukashenko of Belarus for promoting Slavic unity, we may reasonably believe that the Patriarch was placing a higher value on the link between Orthodoxy and Slavic ethnicity than on Christian theology. "Christian" in Armenia is understood to be part of an ethnic trait.[37] In Burma, some Buddhists engage in propaganda against Muslims because of the fear that "our race is disappearing."[38] In Bosnia-Herzogovina, "[r]eligious intolerance in the country directly reflects ethnic intolerance because the identification of ethnicity with religious background is so close as to be virtually indistinguishable."[39] Thus, "association of ethnicity and religion is so close that the bitterness engendered by the war [in Bosnia] and the 270,000 deaths it caused has contributed to mutual suspicion among members of all three major religious groups."[40] Or, as David Little describes Sri Lanka:

> Ethnicity, language, cultural habits, and race may all serve, singly or in combination, as a relevant badge of identity. The key consideration is this: One group, however defined, believes that it has religious authorization for declaring the superiority and preeminence of its own language and cultural tradition above others . . . .[41]

In the case of Sri Lanka, Sinhalese Buddhists engage in "ethnocentric policies," as do the Hindu Tamils.[42]

Scholars defining religion, and asylum judges who adjudicate cases of religious persecution, may omit this critical dimension of religion that is tied inextricably to ethnicity, family, culture, traditions, and history. But these forces that work to constitute identity are among the most potent social forces that bind communities together or that lead to outbreaks of violence among different communities. "There is one thing we can say with certainty as we scan the group identity conflicts that crowd our contemporary scene: in one degree or another, religion figures in them all. Usually it appears en-

---

36. *Id.* at 47–48.

37. 2001 DEP'T ST. ANN. REP. ON INT'L RELIGIOUS FREEDOM 223 [hereinafter RELIGIOUS FREEDOM REPORT]

38. *Id.* at 120. In Burma there have been forced conversions to Buddhism, almost the last thing that would be expected in a country dominated by Theravadan Buddhism. *Id.* at 119.

39. *Id.* at 245.

40. *Id.* at 248.

41. DAVID LITTLE, SRI LANKA: THE INVENTION OF ENMITY 104–05 (1994).

42. *Id.* at 110.

meshed with other factors of great weight—race, land, nationality, history, power . . . ."[43] The classic study of prejudice pointed to exactly this issue:

> The chief reason why religion becomes the focus of prejudice is that it usually stands for more than faith—it is the pivot of the cultural tradition of a group. However sublime the origins of a religion may be, it rapidly becomes secularized by taking over cultural functions. Islam is more than a religion; it is a well-knit cluster of related cultures carried by ethnic cousins who are sharply demarcated from the non-Moslem world. Christianity is so locked with western civilization that it is hard to keep in mind its original core; and sects of Christianity have become tied into subcultural and national groups so that religious divisions march hand in hand with ethnic and national divisions. Most clear of all is the case of the Jews. While they are primarily a religious group, they are likewise viewed as a race, a nation, a people, a culture. When religious distinctions are made to do double duty, the grounds for prejudice are laid. For prejudice means that inept, overinclusive categories are employed in place of differentiated thinking.[44]

When religion is tied to ethnic identity, the persecutor does not attack because of a disagreement over an interpretation of the Nicene Creed or whether enlightenment is best attained through Pure Land or Theravadan Buddhism; the persecutors typically attack because they see the religion of the other as part of a threat to their own competing identity. These identity issues are not necessarily sophisticated and they do not involve considered understandings of history and culture. For example, "religious identity in Ukraine, particularly among the members of the national churches, does not include a very developed consciousness of tradition and doctrine but tends to be reduced to a rather primitive form of group loyalty."[45] From the perspective of the persecutor, the other's religious identity may well be understood as a form of pollution or corruption. Thus St. John Chrysostom, as quoted above, uses such epithets when he refers to a synagogue as "not only a brothel and a theater; it also is a den of robbers . . . ."[46] Or, as the Nazis saw it, Jews "must not enter Aryan society, because they are a deadly germ that would destroy it. They must not stay in Germany, because their presence pollutes the pure German soil."[47]

While religion as *belief* is perhaps the most readily understandable facet of religion for the typical adjudicator, religion as *identity* is more likely to be

---

43. HAROLD R. ISAACS, IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE 154 (1975).

44. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 446 (Addison-Wesley Pub. Co. 1979) (1954).

45. DAVID LITTLE, UKRAINE: THE LEGACY OF INTOLERANCE 56 (1991).

46. Chrysostom, *supra* note 31 at 41.

47. BERNARD LEWIS, SEMITES & ANTI-SEMITES 116 (1986).

the underlying cause of religious discrimination and persecution as it exists in the world.[48]

C. *Religion as a* Way of Life

A third facet of religion, which is analytically distinct from the previous two but is likely to be tied to one of them *in the mind of the religious person*, is religion as a *way of life*. In this facet, religion is associated with actions, rituals, customs, and traditions that may distinguish the believer from adherents of other religions. For example, religion as a way of life may motivate people to live in monasteries or religious communities, or to observe many rituals, including praying five times a day, eschewing the eating of pork, or circumcising males. Talal Asad has criticized one renowned anthropologist for paying insufficient consideration to religion as a way of life in favor of his emphasis on religion as belief. Asad asserts that Clifford Geertz's "treatment of religious belief, which lies at the core of his conception of religion, is a modern privatized Christian one because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world."[49] Where religion is treated as principally belief and principally private, one thinks of believers as, for example, attending a church or synagogue on a weekly basis and engaging in acts in only a limited way. In this aspect, beliefs are often quietly held and are manifested, if at all, at carefully circumscribed occasions such as baptisms, marriages, high holy days, and funerals. In majority Christian countries, for example, the work week typically provides for Sunday worship and major religious holidays are legally recognized national holidays.

But for other people, religion is the salient aspect of their lives. It may demand prayers five times a day, constant efforts to propagate the religion, refusal to eat meat, the wearing of certain types of clothes, the requirement that beards be grown or that heads be shaved. In this facet, "religion is perhaps the most comprehensive of all human activities."[50] Unlike the once-weekly attendance at religious ceremonies, religion for these other people affects many aspects of their lives that are likely not to be accommodated by the laws of a state. Many countries, for example, require military service, which runs afoul of pacifists' strong religious beliefs. Other countries demand oaths of loyalty, which some religions see as placing humankind's institutions before those of God. Some countries forbid women, in certain situations, from covering their heads, which many women may see not only

---

48. "Let it be noted ironically that one finds this loss of attention to the religious factor in ethnicity and self-identity more apparent precisely among the elites [including] scholars, reporters, commercial leaders, and often politicians." Marty, *supra* note 27.

49. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASON OF POWER IN CHRISTIANITY AND ISLAM 47 (1993).

50. LEONARD J. SWIDLER, RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS vii (1986).

as personal modesty but as devotion to God as well. Some religious persons believe that it is their obligation to proclaim their beliefs to others—a belief that may run afoul of the laws of a state that prohibits proselytism.

With regard to religion in Central Asia, particularly during Soviet times, one author observed that "Islam was, and still is, a way of life that culturally defined every facet of the believer's existence. To destroy Islam, therefore, meant to destroy the centuries-old identity of the Central Asian believer."[51] Another author similarly reports that "Muslim believers stress that Islam is not only a religious doctrine but also a way of life. Islam does not make distinctions between doctrine and life, between thought and action, between word and deed. Islam demands total commitment of the individual for it is a living doctrine."[52] For those who discriminate against and persecute others, these rituals and ways of life may be the trigger for the persecution. The persecutors might accuse those who engage in conscientious ways of life as being "fanatics" or "zealots." Such criticisms are likely to become extremely harsh when the religious movements are unfamiliar or their activities vary from accustomed practices.[53]

States are often not only reluctant to make accommodations for these full religious lives, but they sometimes gratuitously attack adherents for being insufficiently loyal to the state or a danger to society. While states need not make accommodations for all religious practices, they may reveal their deep prejudices and irrational hostilities when they choose to persecute principled, well-meaning people whose practices appear unusually fervent or devout and whose activities do not mesh easily with laws that are designed to accommodate the religion of the majority. The adjudicator should seek to understand the religious facets of such cases not from the perspective of a person who might attend religious services a few times a year, but from the perspective of those who have chosen to devote their lives fully to their religion as they understand it.

III. Religious Discrimination and Persecution

In the preceding Part it was suggested that understanding the "motives" of the person who is persecuting or discriminating can itself be helpful for understanding the meaning of the term "religious persecution" for refugee law or "religious discrimination" for human rights law generally. Here we turn from the definitional and conceptual aspects of "religion," to examine the nature of the actions by those who persecute, particularly in the context of asylum law.

---

51. Mehrdad Haghayeghi, Islam and Politics in Central Asia 39 (1995).

52. Gregory Gleason, The Central Asian States: Discovering Independence 41 (1997).

53. "[W]hen new religions appear or old ones get revitalized, they lack the roots of traditional faiths. This means that the people who profess them are more innovative, frenetic, unstable, and capable of erratic actions than are adherents of half-compromised 'old-time religions.'" Marty, *supra* note 27, at 8.

A. *Two Types of Coercion in Religious Discrimination and Persecution*

It is sometimes mistakenly assumed that religious discrimination and persecution consists only of coercion of religious people by those who are hostile to the victims' religions. In fact, there are at least two different "directions" that the coercion may take: one that *disrupts or interferes* with religious activity, and the other that *enforces compliance* with religious norms.

1. *Coercion That Disrupts or Interferes with Religion*

The most familiar type of coercion is that which disrupts or interferes with religious services, causes harm to religious buildings, shrines, and symbols, or threatens the lives of others. The actions may be taken for the purpose of expressing hatred, destroying a religious community, or forcing it to flee.

2. *Coercion That Enforces or Promotes Religious Conformity*

A second form of religious coercion, which is sometimes overlooked, or misunderstood, comes from efforts to enforce religious conformity in a community. In such situations the state or a religious community forces people to comply with religious (or cultural) rules. For example, the Saudi religious police, the "Commission for the Promotion of Virtue and Prevention of Vice" (*Mutawwa'in*), may walk through the marketplace and strike males who are not at prayers or arrest women who are not completely veiled. Coercion to enforce religious standards may range from the modest parental punishment of a child to an extra-judicial execution of a heretic. While not all coercion to enforce religious norms constitutes religious persecution, the coercion may be sufficiently serious that a person risks severe physical harm or even death merely for holding unacceptable opinions. While this form of persecution may not be the most commonly understood aspect of persecution, it is nevertheless serious and pervasive. As in many other areas related to religious persecution, girls and women are more likely to be the targets of coerced conformity than are males. Another example of the use of enforced conformity against a particular group within a larger religious community occurs in the caste system in India, with the most serious victims being the *Dalits* (untouchables).[54] While women and Dalits suffer disproportionately, enforced conformity can be inflicted on any individual or group within a society.

B. *Agents of Religious Persecution*

From the perspective of asylum law, there can be two types of "agents of persecution": the state and religious (or social) communities.

---

54. *See* HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES" (1999).

1. The State as Persecutor

States may commit religious discrimination or persecution in either of the two "directions" described above. The classic case of state persecution of a religious community is that of Nazi Germany against the Jews. But there are, of course, numerous other situations in which the state may use its power to discriminate against religious groups. Such examples include Saudi Arabia's severe restrictions on all forms of religion except those consistent with Wahhabi teachings. China has attempted to prohibit all religious activity unless it operates under the direct authorization and control of the state. The Burmese government prohibits many religious activities of Christian and Muslim groups, "operates a pervasive internal security apparatus" to control religious activity, and promotes social tension among religions.[55] Many states have conducted political campaigns against disfavored groups to which they attach a wide range of pejorative terms. States also may be involved in seeking to enforce religious conformity. The example of Saudi Arabia has already been used, and Burma promotes an official Theravadan Buddhism. The Pakistani law against blasphemy is designed to promote conformity within Islam and is used disproportionately against Ahmadis, but it is also used against Muslims and Christians.

2. Inter-Religious and Societal Persecution

A second agent of persecution is a religious community that pressures another. Although such persecution may or may not be formally sanctioned by the religious leaders of a religious community, it is frequently the most violent. Particularly when religion is tied with issues of identity and ethnicity, inter-religious conflict can have serious ramifications. "Religion . . . finds itself peculiarly tailored to the nationalistic, class, and ethnic cleavages and outlooks that sustain the prevailing social order."[56] Prejudice, including prejudice against other religions, "provides an explanation in terms of menacing out-groups; religion promises a heavenly, if not terrestrial, reward. Thus for many individuals the functional significance of prejudice and religion is identical. One does not cause the other; rather both satisfy the same psychological needs."[57]

Society, including one or more religious communities within a society, also can be responsible for persecution of religious communities. "The accumulated evidence suggests that the more strongly religious beliefs and affiliations are held, the greater the hostility toward other religious beliefs and those who hold them."[58] While such persecution may take different forms and derive from different motivations, the most typical examples in-

55. RELIGIOUS FREEDOM REPORT, *supra* note 37, at 114–20.
56. Allport, *supra* note 33, at 450.
57. *Id.* at 451.
58. ISAACS, *supra* note 43, at 151.

volve one religious community mobilizing itself to attack another religious community not on grounds of differing beliefs, but because of different notions of identity. Thus the facets of religion noted above as "identity" and "way of life" can provoke particularly violent reactions. No region of the world is immune from such potential conflicts. Among the more salient contemporary examples are the violence principally (though not exclusively) by Hindus against Muslims in the state of Gujarat, India, and the violence principally (though not exclusively) by Muslims against Christians in Indonesia. In Bosnia and Herzegovina all religious groups are in danger of societal persecution and violence.[59]

This type of violence becomes even more serious when the government fails to take effective measures to quell community conflicts or, even more seriously, when governments tacitly encourage violence as has been alleged in Gujarat.[60] The social tensions in Burma between the Buddhist majority and the Christian and Muslim minorities also has led to violence by the former against the latter, with the government apparently stimulating rather than controlling the conflict.[61]

As has already been described above, religious persecution can proceed not only when one religious (or social) group attacks another, but when a religious group persecutes its own people by forcing religious beliefs and practices on those who do not wish to accept them.

C. *Whether It Is* Religious *Persecution*

In many asylum cases it may be difficult to determine whether the alleged persecution is a result of religious, gender, political, or even cultural factors—or perhaps some combination thereof. The issue of the "mixed motives of the persecutor" raises some complex and seemingly contradictory problems.[62] It may, however, ultimately be futile artificially to separate motives that cannot be separated in the mind of the persecutor.

1. Why *There Is Religious Persecution Versus* Whether *There Is Persecution*

It was suggested above that one shortcoming of some legal definitions of religion is their failure to include what religion means to its adversaries. In this regard we understand that those who cause religious persecution may do so because they dislike all religions, because they dislike some religions, or because they seek to impose their own religion onto others. Thus, understanding the motives of the persecutors helps give us a broader understand-

59. RELIGIOUS FREEDOM REPORT, *supra* note 37, at 247–49.

60. *See* HUMAN RIGHTS WATCH, WE HAVE NO ORDERS TO SAVE YOU (2002).

61. RELIGIOUS FREEDOM REPORT, *supra* note 37, at 120.

62. On the one hand, the 1951 Convention does not, on its face, require asylum-seekers to prove the specific motives of their persecutors (which would in fact be virtually impossible in almost all cases). On the other hand, as was discussed above, understanding the motives of the persecutors may be important in determining whether or not the persecution is religious and therefore subject to the 1951 Convention.

ing of what religion actually means and *why* there is religious persecution. In these important, but circumscribed ways, it is helpful to understand the phenomenon of religious persecution. But this raises the significant question of whether *proving the specific motives* of the persecutor should be a prerequisite to proving that there has been *religious* persecution.

For example, what if it is difficult to determine whether alleged persecution was caused by racial animus rather than by religious animus (as in the case of the attacks by the Islamist-Arab government of Sudan on the Animist-Christian population of the Nuba mountains)?[63] Or, what if it is difficult to determine whether forcing women to wear certain attire is due to religious motives or to gender-related motives? Or, what if it is difficult to determine whether the refusal of a state to provide for conscientious objection to military service is due to bias against religious pacifists or if the laws are merely neutral laws of general applicability that are applied equally to all citizens?

2. Mixed Motives: Gender

The problem of the mixed motives of religious discrimination and persecution is perhaps most apparent in the area of gender.[64] According to Professor Susan Akram, "[a]sylum and refugee claims relating to Islam or Islamic law in a particular country have arisen most frequently in claims made by women."[65] It is common for religious societies to establish different roles and rules for men and women. These rules run the gamut from requiring women to sit behind screens in churches and synagogues, to prohibiting women from holding positions of authority, to requiring women to submit to orders from their husbands, to preventing women from owning property, to forcing genital mutilation of girls and women.

> Genital mutilation of women is strongly associated with religion and specifically Islam. No religious text requires believers to undergo mutilation. It is nevertheless practiced among diverse religious populations, including Muslims, Catholics, Protestants, Copts, Jews, Animists, and non-believers . . . . This mutilation is

63. The majority of the population of northern Sudan, including most in the government, considers itself to be "Arab" and Muslim. The majority of the population in Southern Sudan considers itself to be "African" (including the Dinka, Nuer, Beja, Nubians, and other ethnic groups) and either Animist or Christian. While such labels play a significant role in the perceived identities of the Sudanese, the labels themselves may be highly misleading and are sometimes even fictional. Among the best treatments of these issues are FRANCIS M. DENG, WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN (1995) and ANN MOSELY LESCH, THE SUDAN: CONTESTED NATIONAL IDENTITIES (1998).

64. "Gender refers to the social construction of power relations between women and men, and the implications of these relations for women's and men's identity, status, roles and responsibilities. Sex is biologically determined." San Remo Expert Roundtable, 6–8 September 2001, Organized by the UN High Commissioner for Refugees and the International Institute of Humanitarian Law, paragraph 2 *at* http://www.unhcr.bg/global_consult/gender_related_persecution_en.pdf.

65. Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J.REFUGEE L. 7, 16 (2000).

> one example among many others that shows that the argument of cultural or religious identity can be simultaneously dangerous and erroneous. In effect, when it is practiced by Muslims, this mutilation is presented and justified as a religious act.[66]

Religion also has condoned (if not encouraged) practices such as women immolating themselves on their husbands' funeral pyres (*Sati*) and parents "dedicating" their daughters to become temple dancers (*Devadasis*), which allegedly often meant becoming temple prostitutes.[67] Rarely do the disparate rules favor females over males.[68]

Asylum adjudicators, when presented with cases of women seeking asylum from religious persecution on the grounds of (at least in part) the imposition of sex-based rules, understandably ask whether these rules derive from *religion* or whether they derive from *traditional culture*. While the answer to this question should be that a "gender-sensitive interpretation [should be] given to each of the Convention grounds,"[69] it is nevertheless of some practical importance to consider the implications for religion-based claims. A salient example of the difficulty is the requirement in some predominantly Muslim countries that women wear the *abaya* (robe or dress that covers arms and legs) and *hijab* (scarf covering the head). For practical purposes, women in Saudi Arabia are required to wear such coverings when they are in public. If a Saudi woman refuses to wear the *abaya* and *hijab*, and is harassed because of it, should this be considered by an asylum adjudicator to be relevant to the possibility of religious persecution, or is it culture alone?

Following the analysis provided above, religious persecution should not be thought of as solely an issue of an attack on religion from the outside. Religious persecution may involve the attempts to enforce religious beliefs, punish those who are considered deviant, or to rid society of perceived pollutants. As the UN Special Rapporteur has observed, "the common point among extremists and religious fundamentalists (*intégrismes religieux*) in particular, whatever the religion, is the negation, often in violent ways, of the equality of the sexes. The extremism may be imposed by groups or by the state itself."[70] While some women may not feel persecuted by a societal norm that is imposed on them, a woman who rejects such norms may reasonably feel coerced. In the case of Saudi Arabia, political and religious authorities impose standards for ostensibly religious reasons and they apply

---

66. *Report of the Special Rapporteur of the Commission on Human Rights on Freedom of Religion and Belief*, U.N. ESCOR, Hum. Rts. Comm., 58th Sess., Annex, Provisional Agenda Item 11, at 32, U.N. Doc. E/CN.4/2002/73/Add.2 (2002) [hereinafter *Women's Report*] (translated from the French original by the author).

67. There is a sharp debate in India on the question whether Devadasis were simply temple dancers or were actually temple prostitutes for the priests.

68. One of the rare examples where males in a religion may be burdened and where females may not be is circumcision—which of course is not equivalent to female genital mutilation.

69. *See* San Remo Expert Roundtable, *supra* note 64, at paragraph 4.

70. *Women's Report*, *supra* note 66, at 29 (translated from the French original by the author).

coercion to seek compliance with these norms promulgated in the name of religion. Although we might debate academically whether these norms originate in the *Qur'an* or in the customs of the Arabian desert, the fact remains that they are being imposed on women in the name of religion.

One of the extreme examples of such impositions emerged when a fire broke out at a girls' dormitory in Mecca on March 11, 2002. The Saudi *Mutawwa'in* refused to allow girls fleeing the fire to escape unless they were covered with the *abaya* and the *hijab*. Uncovered girls were beaten by the police and forced back into the burning building. At least fourteen girls died in the incident and many more were injured.[71] While on the one hand this case is extreme and the practices of the *Mutawwa'in* were widely criticized even inside Saudi Arabia, it nevertheless reveals the extent to which some religious authorities are prepared to go in order to force their religious beliefs on others and the tragic consequences that may result.[72] If a woman rejects the standards, she may well be subjected to coercion for failing to adopt community religious norms and may well have a legitimate case as a victim of religious persecution. If an observer were to suggest that the dress requirements are a matter of "custom" and not "religion," or that the requirement was "gender-based" rather than "religious-based," or that "most women wear the attire without complaint," or that the requirement could not be considered discriminatory because most women comply, then the observer would simply be failing to understand how religious norms are in fact imposed.

The issue of the *abaya* and *hijab* is illustrative of the larger issue of the relationship between gender and religion. Unfortunately, there are many other examples of how "religious" norms are forced upon girls and women in such a way that they may rise to the level of religious persecution. While the most egregious example is perhaps female genital mutilation, it should be remembered that there are many other ways in which women are subjected to coercion from which men are more typically exempt, including prohibitions on involvement in certain public activities, being subjected to rape, and a host of discriminatory laws—particularly relating to marriage, divorce, and ownership of property.

> Women are subject to discrimination under Shari'a as interpreted in the country. In a Shari'a court, a woman's testimony does not carry the same weight as that of a man: The testimony of one man equals that of two women. Female parties to court proceedings,

---

71. Human Rights Watch, *Saudi Arabia: Religious Police Role in School Fire Criticized* (Mar. 15, 2002), *at* http://www.hrw.org/press/2002/03/saudischool.htm.

72. This case was sufficiently extreme that there was a significant reaction against the *Mutawwa'in* in Saudi Arabia and there was open criticism of them throughout the Saudi press. The government used the occasion to reorganize the educational system and thereby lessen the control of religious authorities over girls' education.

> such as divorce and other family law cases, generally must deputize male relatives to speak on their behalf.[73]

Other forms of discrimination against women are enforced by religious laws. For example, to support ostensible community standards on sexual purity, women typically are subjected to the principal burden. These burdens include being required to travel in the accompaniment of a male family member, being prohibited from driving an automobile, and being required to wear head or body coverings. While some women may not feel burdened by such requirements, others reasonably may feel intense religious pressure to comply.[74] In considering these issues, the adjudicator often will not find the religious requirement in the texts of the religion, but in the mores enforced by religious leaders and the community.

3. Other Mixed Motives: Race, Ethnicity, Identity

As in the case of gender, it may not always be clear whether actions resulting in persecution have been prompted by animus against a religion or against other ethnic markers. As was suggested above, the harsh actions of the Sudanese government against the population in the south might be attributed to the racial bias of the (self-identified) "Arabs" of the north against the "Africans" of the south, or to the "Islamic" government's bias against Christians and animists. The example of Sudan is only one of many. The Special Rapporteur on Freedom of Religion or Belief, after having completed his recent study on the relationship between race and religious discrimination, observed that in India, the "actions of certain extremist groups and ultranationalist (especially Hindu) parties against Muslim communities and their places of worship are based on 'the exploitation of religion to further a programme which is in fact political' in order to 'gain political advantage among the population.'"[75]

Indeed, the UN Special Rapporteurs who have most thoroughly considered the relationship between religious discrimination and other forms of discrimination have concluded that they are fully intertwined. Professor Elizabeth Odio Benito, who served as Special Rapporteur from 1983 to 1986 found that "religion usually encompasses more than faith. Often it is the focal point of the cultural tradition of a group."[76] She thereupon con-

---

73. RELIGIOUS FREEDOM REPORT, *supra* note 37, at 480.

74. In such situations, it may be appropriate for the adjudicator to take into account the specific beliefs of the applicant. As has been suggested throughout, the specific beliefs of the individual may or may not be important in fairly adjudicating a religious persecution claim. This is an example of where the person's beliefs may be relevant.

75. *Report of the Special Rapporteur of the Commission on Human Rights on Religious Intolerance*, U.N. GAOR, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Preparatory Committee, 1st Sess., Annex, Provisional Agenda Item 7, at 23, U.N. Doc A/CONF.189/PC.1/7 (2000) [hereinafter *Racism Report*].

76. Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Sub-Commission on Prevention of Discrimination and Protection of

cluded that "it is usually a political, historical or stereotyped reason that fosters religious persecution."[77] Similarly, Professor Abdel-fattah Amor, who began serving as Special Rapporteur in 1994, concluded that:

> The fact that it is difficult to establish clear distinctions when dealing with double or even triple (racial/religious/sexist) discrimination is merely proof that those guilty of discrimination are not targeting exclusively the racial *or* religious identity of the victim. They target both identities because in their minds they completely reject the other [person], either in a confused way or otherwise, on the grounds of the other's beliefs, religious practices, rites and myths, as much as his racial, ethnic or even cultural origin. [These constitute] a form of aggravated discrimination that cannot be described in terms of a single identity . . . .[78]
>
> There are borderline cases where racial and religious distinctions are far from clear-cut . . . . [M]any instances of discrimination are aggravated by the effects of multiple identities. Moreover, the right to freedom of religion is an essential human right, just like the right to belong to an ethnic group or to a minority. When both of these rights are infringed in the case of a single person or group of persons, the violation is not just a superimposition or ordinary addition of offences. The combination of the two offences creates a new, more serious offence which, while of varying intensity, is by its very nature a separate concept.[79]

The interaction between the racial and religious character of persecution may appear not only in the mind of the instigator, but in that of the victim as well. "In some cases, it is very difficult to distinguish between religious and racial or ethnic discrimination or intolerance. In other cases the two forms of discrimination may even become confused in the mind of both the perpetrator and the victim of the discrimination."[80]

4. Religious Persecution or *the Application of "Neutral Laws"*

In the cases described above involving the interaction of racial, ethnic, and religious persecution, it would typically be assumed that the coercion is directed at a disfavored group or groups. When the state is involved in such activities, it presumably is selecting minorities for disparate treatment. But we also have the possibility that a state may enact "neutral laws" that are applied equally to all religious and ethnic groups, but where some groups

---

Minorities, Commission on Human Rights, Economic and Social Council, 39th Sess., at paragraph 184, U.N. Doc. E/CN.4/Sub.2/1987/26 (1986).

77. *Id.* (paragraph 185).

78. *Racism Report*, *supra* note 75, at 27.

79. *Id.* at 5.

80. *Id.* at 32.

might suffer disproportionately because of their religious beliefs or practices. Typical examples of such "neutral laws" with disproportionate impacts include laws on military conscription (that do not provide for conscientious objection), sanitation laws (that do not provide for ritual slaughter of animals), unemployment compensation laws (that do not allow an exemption for Sabbath worship), laws on oaths (that do not provide for alternative expressions of truthfulness before a court), and laws that forbid door-to-door solicitations (that do not provide an exemption for missionary activities). A state with such laws might be able to provide evidence that it has merely enacted "neutral laws" that are supported by the majority of the community and that the laws are neutrally and consistently enforced with respect to all citizens. It is nevertheless fully possible that these ostensibly neutral laws might nevertheless be evidence of religious discrimination or persecution. An adjudicator should be prepared to examine such laws from two perspectives: first, whether they are in fact neutral, and second, whether their enforcement might nevertheless justify a claim of religious persecution.

First, with the exception of totalitarian states, laws regulating religion typically are responsive to the majority's religious practices. Islamic states and Israel, for example, all have laws permitting ritual slaughter of animals. Countries with a majority Christian population typically provide that Christmas is a recognized national holiday. While there are no states whose population consists of a majority of religious pacifists, a significant number of states provide for conscientious objection to military service. Not all states do so, however, and one of the telling markers of religious freedom in a state is the extent to which it provides for alternative military service. Some states show a marked hostility to conscientious objectors and do not treat them as principled opponents to state policies but as criminals deserving of punishment for anti-state activities.[81] When we consider religion as a way of life, the state's imposition of so-called "neutral laws" can have a devastating impact on an individual's ability to practice his or her religion. Indeed, these laws, if followed, would require the individual either to violate deeply held principles of conscience or to be incarcerated as a common criminal. Whereas an asylum adjudicator presumably would find that a "neutral law" that prohibits people from attending church on Sunday probably qualifies as "religious persecution," so should the adjudicator be prepared to find that a "neutral law" that requires all people to be conscripted or face lengthy jail sentences might similarly qualify as "religious persecution." In such cases the adjudicator should be prepared to look beyond familiar understandings of religion and examine religion as a way of life. The

81. This is the case, for example, in countries such as Algeria, China, Eritrea, Egypt, Kazakhstan, Mali, Singapore, South Korea, and Uganda. *See* War Resisters International *at* http://wri-irg.org/co/rtba/index.html. The UN Special Rapporteur reported that there is evidence of 1505 conscientious objectors in South Korea. *Report of the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief*, U.N. GAOR, 56th Sess., Annex, Provisional Agenda Item 131(b), at 17, U.N. Doc. A/56/253 (2001) [hereinafter *Interim Report*].

fact that the state or society might neutrally enforce certain laws may be irrelevant to the fact that some persons will either be forced to violate their religions or be subjected to severe punishment for adhering to them.

Second, even in cases where the state does not apply laws that would criminalize adherence to religious beliefs and practices, the laws may be part of a larger series of actions that have a cumulative effect of constituting persecution.[82] Thus it is important, at a minimum, to consider whether "neutral laws" that interfere with religious practices and beliefs, in conjunction with other societal factors, might combine to create a case of religious persecution even if such laws in themselves are not sufficient.

Conclusion

The epigraphs with which this Article began exemplify some of the significant misunderstandings of both the concept of *religion* and the definition of "religion." It has been suggested that these conceptual errors, however understandable, can lead to the failure to take sufficient cognizance of the nature of religious discrimination and persecution and can preclude meritorious claimants from receiving deserved relief. Rather than focus on defining "religion," it would be much more valuable for adjudicators of claims involving religious discrimination and persecution to heed the words of Professor Amor, the UN Special Rapporteur on Freedom of Religion and Belief: "The victims of intolerance and discrimination on grounds of religion or belief are quite diverse: they may be believers or non-believers, communities of religion or belief or they may belong to society at large. Particularly affected, however, are vulnerable groups, such as women and minorities."[83]

---

82. *See supra* Part III.B.2.

83. *Interim Report*, *supra* note 81, at 43.