

**ELIZABETH ABI-MERSHED 2023 INTER-AMERICAN HUMAN
RIGHTS MOOT COURT COMPETITION**

BENCH MEMORANDUM

Theme: Equality and Human Rights: Confronting Racial Discrimination

Julia Mendoza et al. v. State of Mekinés

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I. Context of the hypothetical case

A. Overview

This case is set in the hypothetical State of Mekinés, an ethnically and racially diverse country that, despite its economic power, has one of the highest levels of inequality in the world because of intense colonization and a long history of slavery.

As a consequence, the enslaved Black population, as well as Indigenous peoples, faced the erasure of their culture as a form of social control that is part of structural racism. In this context, religious practices other than those of the colonizer were forbidden. Catholicism was entrenched as the mainstream religion, even though the State of Mekinés claims to be secular and democratic and its constitution supports freedom of worship and prohibits racial discrimination and religious intolerance.

The majority of the population identifies as Christian, which is reflected in the widespread acceptance of discriminatory principles considered Christian, especially regarding the rights of women and the LGBTI+ population. Religious intolerance is also prevalent in society, since religions that do not follow Christian precepts are demonized by a segment of society. This situation is aggravated by the rise of political parties affiliated with Christianity and by the significant Christian presence in the public sphere.

This situation of religious intolerance—relevant to the case under study here—is described in the facts of the case.

The hypothetical case takes place against this backdrop, which is marked by discriminatory elements with a strong racial focus, where the government acted in breach of national and international laws, violating several human rights of the people concerned. The country is a member of the Organization of American States and has accepted the jurisdiction of the Inter-American Court of Human Rights. In addition, it is internationally positioned to combat racism, having ratified the Inter-American Convention against Racism and the Convention on the Elimination of All Forms of Racial Discrimination.

B. Structural discrimination

Mekinesian society comprises migrants, formerly enslaved people, and traditional Indigenous peoples. It is a racially and ethnically diverse society, but the effects of colonialism, which imposed a single dominant culture that reduced and erased the others, cannot be mitigated. The society is built on values established by a single social group, making the colonizers' narrative the official one. At the same time, public decisions and policies are shaped by decision-makers who belong to the same socio-ethnic group, thus helping to maintain an exclusionary structure.

When we talk about structural discrimination, we are talking about a form of discrimination that considers the white, heterosexual, Christian, landowning man as the individual rights-holder—that is, as a human being. Those who do not fit into these predetermined templates fall outside the protective ambit of the law and, therefore, are in the zone of non-being. Accordingly, the individuals described in the hypothetical case—lesbian women who practice a religion of African origin—fall within the zone of non-belonging.

Structural discrimination is thus directly related to the social exclusion faced by groups historically on the margins of society, and it involves the curtailment of the individual's freedom to exist and to exercise civil, political, cultural, social, and economic rights.

According to the hypothetical, the State has been structured in a way that disadvantages non-Christians. Notably, the then Ministry of Women, Family, and Human Rights ended public policies aimed at defending the free exercise of religious freedom. At the same time, spaces for popular participation that addressed the rights of LGBTI+ people were also closed or weakened.

Members of the government are also very conservative and hold many prejudices, as reflected in the president's speeches against the rights of women, Afro-descendants, and LGBTI+ people. This is seen even within the judiciary; a justice of the Supreme Constitutional Court of Mekínés has given speeches against the secular State, leaving no doubt about his strong religious ties to Christianity, which could influence the two judicial decisions.

This scenario is thus highly discriminatory, and is perpetuated even by those whose duty it is to protect the citizens of Mekínés, which shows that discrimination in the State is structural.

C. Racial discrimination

The Afro-descendant and Indigenous population in the State of Mekínés has historically been affected by structural discrimination and institutional racism. Racial inequality is a feature of society, which translates into diminished opportunities, such as less access to health care, poorer housing conditions, and more limited access to the labor market. Racism is historically structural not only because it reinforces existing relations and institutions, but above all because it is one of the instruments used to keep racialized populations in a place of subordination, insecurity, and vulnerability.

It is not a disorder, a dysfunction, or an anomaly. Racism is a structuring part of the order itself. It is the normal way in which political, economic, legal, and intersubjective relations are established and, therefore, an expression of political, economic, and legal inequality. Racism is thus part of the structure, meaning that institutions are racist because society is structured by racism in a historical and political process that creates the social conditions for racially identified groups to be systematically discriminated against and subjected to hierarchical social, political, legal, and economic relations. It is the rule, not the exception.

The prohibition of racial discrimination is considered a peremptory norm of international law. The international instruments that address the subject most notably include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹ and the Inter-American Convention against Racism.² The latter instrument defines racial discrimination as follows:

Racial discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the

¹ Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

² Available at: https://www.oas.org/en/sla/dil/inter_american_treaties_a-68_racism.asp. For more information about the convention, see <https://www.cirdi2024.org/>.

equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. Racial discrimination may be based on race, color, lineage, or national or ethnic origin.

Despite the international instruments that, through their coercive power, obligate the State to combat all forms of racial discrimination—and despite the State’s own domestic laws against racial discrimination—discriminatory practices are evident in State actions that favor one social group over another. It is evident in the case at hand when socioeconomic and cultural rights are denied while others are prevented from freely exercising their religious choice. Here, the curtailment of rights in connection with race is seen in the demonization of religions of African origin (Afro-Mekinesian religions) because of structural racism.

If the practitioners of African-based religions cannot practice their religion for fear of being persecuted by the State, as is the case here, it signals the restriction of religious freedom, creating a climate of intolerance that prevents other cultures from fully expressing themselves. It constitutes epistemicide, or the denial of the knowledge and culture produced by counter-hegemonic groups.³

The cycle of racial violence is rooted in pervasive cultural patterns of ethnic and racial subjugation throughout society that have produced historical structural discrimination, prejudice, and inequality which, in turn, have perpetuated a perverse culture of racial domination expressed in a never-ending cycle of violations; in this regard, racial discrimination is present in the case before us.

D. Religious discrimination

1. Religions of African origin

While it declares itself to be secular, the State of Mekinés is strongly influenced by Christianity (Catholicism and Protestantism). The majority of the population professes to be Christian and is prejudiced towards religions of other ethnic and racial origins. Here, the practitioners of religions of African origin experience various forms of violence, both from the population and from government authorities.

Although 81% of the population considers itself Christian, violence against racial minorities is widespread. According to data from the Ministry of Women, Family, and Human Rights, in 2019, attacks motivated by religious intolerance increased by 56%, with 356 reported cases compared to 211 in 2018. Most of the victims were followers of the African-based religions Candomblé and Umbanda.

Discrimination on religious grounds is acknowledged by the State. For example, data from Discrimination Zero, a hotline operated by the Ministry of Justice, shows that 2,712 complaints of religious violence were filed between 2015 and 2019 in Mekinés. Fifty-seven and a half percent of these communications involved attacks on people practicing African-based religions. In other words, in Mekinés, the problem is mostly related to racism, since religious intolerance is practiced on a larger scale against followers of religions of African origin. In 2016, the Ministry of Human Rights published the Report on Religious Intolerance and Violence in Mekinés (2011 – 2015), in which it found that

³ CARNEIRO, Aparecida Sueli. *A construção do outro como não-ser como fundamento*. Thesis (Doctorate in Education with emphasis on Philosophy of Education) – Graduate Program at the University of São Paulo, University of São Paulo, São Paulo, 2005.

religious intolerance is a structural problem that is rendered invisible in society. It also notes that the lack of data at the State level continues to make it a challenge to understand the true extent of this problem.

It is also important to emphasize Articles 5(vii) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁴

The Inter-American Commission on Human Rights (IACHR) has also recognized that religious intolerance is a global problem. In a joint statement with the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (OSRESCER), it expressly calls on States to take effective measures to promote respect for African and African-derived religions and to protect the integrity of their leaders and practitioners.⁵ The Commission notes that reports of persecution and attacks on the lives and physical integrity of leaders and practitioners of African-based religions are increasingly frequent, evidencing clear violations of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, which establishes that States must prevent, prohibit, and punish any restriction or limitation on the language, traditions, customs, and culture of individuals, in public or private activities.

As the OSRESCER has recalled, everyone is entitled to religious freedom. The United Nations Committee on Economic, Social and Cultural Rights has affirmed this right, since the right of everyone to exercise their own cultural practices, which includes the right to religious freedom, must be respected and protected.⁶

The right of all persons to take part in cultural life is also recognized in Article 27(1) of the Universal Declaration of Human Rights: “Everyone has the right freely to participate in the cultural life of the community.” Other international instruments refer to the right to equal participation in cultural activities;⁷ the right to take part in all aspects of cultural life;⁸ the right to participate fully in cultural and artistic life;⁹ the right of access to and participation in cultural life;¹⁰ and the right to take part on an equal basis with others in cultural life.¹¹ Relevant provisions are also found in instruments relating to civil and political rights;¹² to the rights of persons belonging to minorities to enjoy their own culture,

⁴ Art. 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (viii) The right to freedom of opinion and expression;

Art. 6: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

⁵ Available at: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/193.asp.

⁶ Available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F21&Lang=en.

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(vi).

⁸ Convention on the Elimination of All Forms of Discrimination against Women, art. 13(c).

⁹ Convention on the Rights of the Child, art. 31, para. 2.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1)(g).

¹¹ Convention on the Rights of Persons with Disabilities, art. 30, para. 1.

¹² In particular, the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21, 22.

to profess and practice their own religion, and to use their own language, in private and in public¹³ and to participate effectively in cultural life;¹⁴ to the collective rights of Indigenous peoples to their cultural institutions, ancestral lands, natural resources, and traditional knowledge,¹⁵ and to the right to development.¹⁶

2. “Witchcraft” practices

The Special Rapporteur on extrajudicial, summary, and arbitrary executions, Philip Alston, explained that the persecution and killing of individuals accused of practicing so-called “witchcraft” is a significant phenomenon in many parts of the world, although it goes largely unnoticed by human rights observers.¹⁷ After acknowledging the objective difficulties of defining the terms “witch” and “witchcraft” in different cultures, the Special Rapporteur finds that “under the rubric of the amorphous and manipulable designation of witchcraft, individuals (often those who are somehow different, feared or disliked) are singled out for arbitrary private acts of violence or for Government-sponsored or tolerated acts of violence. In too many settings, being classified as a witch is tantamount to receiving a death sentence.”¹⁸

Characterizing a certain rite as “witchcraft” usually involves serious and systematic forms of discrimination against that which is different,¹⁹ including in many cases against non-monotheistic religious minorities. Thus, in his report on the mission to Sierra Leone, Special Rapporteur Heiner Bielefeldt found that “Many Muslims and Christians [...] respect traditional African religion based on the assumption or ascription that it represents just another form of monotheistic spirituality. [...] He also came across more reluctant attitudes towards traditional African religion, which some speakers mainly associated with superstitious practices and a widespread belief in witchcraft. On a number of occasions, people even questioned whether traditional African spirituality, while certainly representing cultural ‘practice,’ could actually be called a genuine ‘religion’ or ‘belief.’”²⁰

Bielefeldt concluded that any measures taken against harmful traditional practices “should always be combined with respect for persons who adhere to traditional African spirituality. Freedom of religion or belief, while allowing for legally defined limitations if needed to protect the rights and freedoms of others (in accordance with the criteria in article 18, paragraph 3, of the International Covenant on Civil and Political Rights) must be broadly understood. It clearly includes traditional African religion and its various manifestations.”²¹

¹³ International Covenant on Civil and Political Rights, art. 27.

¹⁴ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2. See also the Framework Convention for the Protection of National Minorities (Council of Europe, No. 157), art. 15.

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, 10-13 et seq. See also Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, 13-15 et seq.

¹⁶ United Nations Declaration on the Right to Development (General Assembly resolution 41/128), art. 1. In paragraph 9 of its general comment No. 4, the Committee has recognized that these rights cannot be considered in isolation from the other rights contained in the two international covenants and other applicable international instruments.

¹⁷ Special Rapporteur on extrajudicial, summary or arbitrary executions, 27 May 2009, para. 43.

¹⁸ Special Rapporteur on extrajudicial, summary or arbitrary executions, 27 May 2009, para. 43.

¹⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions, 27 May 2009, para. 51.

²⁰ Special Rapporteur on freedom of religion or belief, A/HRC/25/58/Add.1, 23 December 2013, para. 24.

²¹ Special Rapporteur on freedom of religion or belief, A/HRC/25/58/Add.1, 23 December 2013, para. 58(f).

3. The ideal of “family” in a society

The ideal of the family described in the hypothetical case is the standard established by Eurocentric-Christian culture. It is a heterosexual relationship, which ignores gender identities. In this case, we can see that LGBTI-phobia in the State of Mekínés is so pronounced that the sexual orientation of the child’s mother is used as an argument to remove the child from the mother’s custody. The minor’s father complains that same-sex families undermine what ought to be considered a family, and that fundamental values are being affected to the detriment of the child. There is a distinct view that LGBTI+ people are contrary to the Christian notion of the traditional family.

E. Discrimination based on sexual orientation

In addition to the racial discrimination noted above, discrimination based on sexual orientation is constantly under discussion in the case at hand, which shows the need for an intersectional analysis. A Christian approach such as the one advocated by the government is exclusionary and violates several human rights already consolidated in various international instruments, such as the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights treaties.

As the report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal Borloz, states:²²

The Independent Expert also recommends that States ratify relevant universal and regional conventions conducive to giving full consequence to the protection of women, in all their diversity, from violence and discrimination—and in particular from violence and discrimination based on sexual orientation and gender identity; and continue to develop the *corpus juris* to protect women, including lesbian, bisexual and trans women, and LGBT persons from violence and discrimination.

The State has an international obligation to protect LGBTI+ persons, which it failed to meet, as evidenced by the systemic discrimination described in the hypothetical case.

F. The invisibility of religions and beliefs and sexual orientations in the mass media

Freedom of religion and belief are fundamental rights guaranteed by international commitments and national laws in various regions. However, these rights have been systematically violated, with direct attacks on temples, with invasions, fires, and property destruction, as well as the profanation and demonization of images and objects sacred to practitioners. Article 18 of the Universal Declaration of Human Rights (1948) expressly states that everyone has the right to freedom of thought, conscience, and religion, and that it is the duty of States to guarantee and ensure the safe exercise of this right, and this is echoed by other international legal instruments including the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the OSCE Copenhagen Document (Article 9). Still, members of African-based religions and other religious leaders have faced a lack of protection and repeated physical and psychological violence in exercising their freedom of religion, belief, and worship.

²²Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/192/14/PDF/N2119214.pdf?OpenElement>.

No less important, the media do not report on or highlight cases of violence motivated by religious intolerance; nor do they work to raise awareness or explain religious symbols and practices. At times, they reinforce stereotypes in society's imagination, attributing crimes and other adverse events to religious practices and other negative factors not linked to the religion per se.

II. Key issues and standards for deciding the case

A. Application of standards to the case

1. Applying the CIRDI and the ICERD for the interpretation and crosscutting analysis of the case

The human rights violations exposed in the case must be understood and analyzed within the framework of a pattern of structural and institutionalized racist violence under the international law standards enshrined in Articles 1 of the ICERD and 1.4 of the CIRDI. Racist violence is evident in the patterns of human rights violations committed by the State through its inaction and failure to address the violence against the victims in the case—that is, in the persecution of individuals who practice African-based religions and the lack of a State response to protect their rights.

Hence, when interpreting the ACHR, the international *corpus juris* on the protection of people of African descent and the prohibition of racial discrimination must be considered. Article 29 of the ACHR establishes the general rules for the interpretation of the Convention, stating that

No provision of this Convention shall be interpreted as:

- (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

According to the Inter-American Court, this provision refers expressly to general international law norms for its interpretation and application; the ACHR can therefore be construed in light of other relevant treaties and norms.²³

Thus, the rights contained in the ACHR must be interpreted in light of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by Mекinés in 1984; the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (CIRDI), ratified in 2019; and the relevant decisions of the inter-American system.

²³ I/A Court H.R., *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru*. Preliminary Objections, Merits and Reparations. Judgment of February 1, 2022. Series C No. 448, para. 107; *Case of the Massacre of the village of Los Josefinos v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 3, 2021. Series C No. 442, para. 88.

According to the Commission, States that have ratified the ACHR and the ICERD must comply with the obligations derived from these instruments in conjunction with Article 29 of the ACHR.²⁴ Considering that these provisions and standards lend themselves to a crosscutting examination of most of the human rights violations alleged in this case, it is important to underscore the prohibition of racial discrimination in light of the ICERD.

The Commission has said that Afro-descendant communities experience structural discrimination that creates significant obstacles in relation to their human rights, perpetuating their situation of poverty, exclusion, and violence.²⁵ It has also pointed out the interconnection between structural discrimination and obstacles to access to justice for the Afro-descendant population, since these obstacles are a factor in the persistence of racism.²⁶

[T]he lack of judicial guarantees and the lack of sensitivity by the justice [authorities] as regards racial discrimination contribute to the deepening of the resignation of discriminated groups, and to the perpetuation of segregation and exclusion patterns.²⁷

The Commission has therefore interpreted the concept of *discrimination* in the light of the ICERD to mean

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour [...], or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁸

Regarding the concept of *racial discrimination*, the Commission has used Article 1 of the ICERD to interpret the ACHR, understanding racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁹

Finally, Article 5 of the ICERD provides that

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

²⁴ IACHR. [Report No. 66/06. Case 12.001. Merits. Simone André Diniz regarding Brazil](#). October 21, 2006, para. 116.

²⁵ IACHR. [Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities](#). OEA/Ser.L/V/II. Doc. 47/15. December 31, 2015

²⁶ IACHR. [The Situation of People of African Descent in the Americas](#). OEA/Ser.L/V/II. Doc. 62. December 5, 2011.

²⁷ IACHR. [The Situation of People of African Descent in the Americas](#). OEA/Ser.L/V/II. Doc. 62. December 5, 2011, para. 139.

²⁸ IACHR. [Report No. 80/15. Case 12.689. Merits. J.S.C.H and M.G.S. Mexico](#). October 28, 2015, para. 80.

²⁹ IACHR. [Report on the Situation of Human Rights in the Dominican Republic. OEA/Ser.L/V/II. Doc. 45/15. December 31, 2015](#), para. 341.

(...) (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution[.]³⁰

The Commission has thus asserted that the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (CIRDI) is an international instrument that strengthens and complements the ICERD.³¹ In this regard, the ACHR, in conjunction with the ICERD and the CIRDI, comprehensively protects the human rights of Afro-descendants as a historically excluded group.³²

Besides defining the concept of racial discrimination, the CIRDI notes that it can be direct, indirect, multiple, or aggravated. In addition, in Article 1.4, it defines racism as

any theory, doctrine, ideology, or sets of ideas that assert a causal link between the phenotypic or genotypic characteristics of individuals or groups and their intellectual, cultural, and personality traits, including the false concept of racial superiority.

Racism leads to racial inequalities, and to the idea that discriminatory relations between groups are morally and scientifically justified.

All the theories, doctrines, ideologies, and sets of racist ideas described in this article are scientifically false, morally reprehensible, socially unjust, and contrary to the basic principles of international law; they therefore seriously undermine international peace and security and, as such, receive the condemnation of the States Parties.³³

Article 2 of the CIRDI establishes that everyone is equal under the law and entitled to equal protection against racism and racial discrimination. With this in mind, the above standards should be included in the crosscutting analysis and discussion of this case.

2. Intersectionality as an analytical framework for the case

The hypothetical case illustrates several human rights violations involving factors related to the victims' identity, such as race, gender, and sexual orientation. For these reasons, the case must be understood and analyzed from an intersectional perspective.

The IACHR has emphasized in its standards the States' duty to consider the intersection of different forms of discrimination that women may experience due to various factors in combination with their sex, such as their age, race, ethnicity, and economic status, among others. The Commission has noted that "[t]he principle of intersectionality has been established in Article 9 of the Convention of Belém do Pará, since discrimination and violence do not always affect women in the same measure. There are women that are exposed to the violation of their human rights on the basis of more than one risk factor."³⁴ The IACHR has also expressed its concern about the multiple forms of discrimination and

³⁰ [ICERD](#), art. 5(b).

³¹ IACHR. [Economic, Social, Cultural and Environmental Rights of Persons of African Descent. Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination](#). March 16, 2021, para. 9.

³² IACHR. [Economic, Social, Cultural and Environmental Rights of Persons of African Descent. Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination](#). March 16, 2021. para. 145.

³³ [CIRDI](#), art. 1.4.

³⁴ IACHR (2015). [Legal Standards related to Gender Equality and Women's Rights](#). 2015, para. 28.

violence faced by Indigenous and Afro-descendant women based on considerations of race, ethnicity, gender, and poverty, as well as that related to the historical context and structural inequality.³⁵

The Inter-American Court of Human Rights used the concept of intersectionality for the first time in 2015, in the case of *Gonzales Lluy et al. v. Ecuador*, finding a convergence of multiple factors of vulnerability and risk of discrimination associated with gender, poverty, and HIV status.³⁶ In the case of *Ramírez Escobar et al. v. Guatemala*, the Court found with respect to the victim that “different factors of vulnerability or sources of discrimination associated with her situation of single mother, living in poverty, with a lesbian mother, coalesced intersectionally, because the discrimination experienced by Mrs. Ramírez Escobar was the result of the intersecting action of all the reasons for which she was discriminated against.”³⁷

3. Duty to respect and guarantee the right to freedom of religion and belief

The right to freedom of religion or belief does not, and indeed cannot, protect religions or belief systems per se, i.e., their various claims to truth, teachings, rites, or practices; rather, it empowers human beings, as individuals and in community with others, who profess religions or beliefs and wish to define their lives in accordance with their own convictions.³⁸

In general comment No. 22, the Human Rights Committee established that “The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”³⁹

As for the scope of this right, the Human Rights Committee explained that Article 18 recognizes the freedom to “have or to adopt” a religion or belief, including theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief;⁴⁰ it recognizes the right to replace one’s current religion or belief with another and the right to retain one’s own religion or beliefs.⁴¹ Moreover, under Articles 17 and 18, paragraph 2, no one may be compelled to reveal his or her thoughts or adherence to a religion or belief.⁴²

Under Article 4, paragraph 2, of the Covenant, this provision may not be derogated from, even in times of public emergency.⁴³

³⁵ IACHR (2015). [Legal Standards related to Gender Equality and Women’s Rights](#). 2015, para. 56.

³⁶ I/A Court H.R., *Case of Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 290.

³⁷ I/A Court H.R., *Case of Ramírez Escobar et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C No. 351, para. 276.

³⁸ See Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 11.

³⁹ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 1.

⁴⁰ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 2.

⁴¹ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 5.

⁴² UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 3.

⁴³ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 1.

4. Obligations of States

Special Rapporteur Heiner Bielefeld stated that, like any right, the right to freedom of religion or belief gives rise to three main obligations, to wit: to respect, to protect, and to fulfill.

In relation to the obligation to respect, the Rapporteur said that States must recall that human beings, as individuals or in community with others, “do not need any permission by the State to be allowed to have, adopt, profess and practise their religion or belief in private or in public. Like other human rights, freedom of religion or belief follows from the due respect for human dignity, which inheres in all human beings equally and thus commands an unconditional respect, prior to, and ultimately independent of, any acts of legislative or administrative approval.”⁴⁴ As part of the second of these obligations, the State must protect freedom of religion or belief against abuses by third parties.⁴⁵ Lastly, according to the Special Rapporteur, “States should provide appropriate infrastructure that allows all persons living under their jurisdiction to actually make full use of their human rights.”⁴⁶ This obligation includes ensuring the availability of suitable remedies, in particular, an independent and efficient judiciary,⁴⁷ and adopting measures of reasonable accommodation for overcoming the various forms of discrimination in the field of religion or belief, including indirect and structural discrimination.⁴⁸

Special Rapporteur Ahmed Shaheed remarked that “the full realization of equality, including with respect to the exercise of freedom of religion or belief, requires States to move beyond tackling ‘formal discrimination’ to achieving ‘substantive equality.’ While eliminating formal discrimination requires removing barriers to ensure that a State’s constitution, laws and policies do not discriminate on prohibited grounds, achieving substantive equality means, *inter alia*, ‘immediately adopt[ing] the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.’ Furthermore, longer-term measures would be required, that should result in the State undertaking positive steps to ensure that individuals belonging to religious or belief minorities are able to enjoy religious freedoms and rights on a permanent basis and equal to members of the majority religion or belief.”⁴⁹ For example, Special Rapporteur Heiner Bielefeldt has noted that if there is a long history of exclusion of persons belonging to religious minorities from public institutions, special measures may be necessary to encourage members of these minorities to apply for public office, and to promote their opportunities.⁵⁰ Finally, States should address the root causes of societal discrimination, such as stereotypes and prejudices against members of religious minorities, and foster a general climate of openness and tolerance.⁵¹

International human rights treaties, while reticent on the sort of relationship a State should have with religion or belief, impose a duty upon States to be impartial guarantors of the enjoyment of freedom of religion or belief—including the right to freedom from religion.⁵²

⁴⁴ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 21.

⁴⁵ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 22.

⁴⁶ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 23.

⁴⁷ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 23.

⁴⁸ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 20.

⁴⁹ Special Rapporteur on freedom of religion or belief, A/HRC/37/49, 28 February 2018, para. 36.

⁵⁰ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 28.

⁵¹ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 28.

⁵² Special Rapporteur on freedom of religion or belief, A/HRC/37/49, 28 February 2018, para. 28.

5. Restrictions on the right to freedom of religion or belief

Special Rapporteur Heiner Bielefeld recalled that the relationship between a human right to freedom and its limitations must remain a relationship between rule and exception.⁵³ He considered that “No one has to justify the exercise of his or her freedom of religion or belief, which, qua its nature as a universal human right, must be respected as inherent in all human beings. The burden of justification rather falls on those who deem limitations necessary.”⁵⁴

Article 18, paragraph 3, of the ICCPR expressly permits restrictions on the freedom to manifest one’s religion or beliefs to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others, as long as such restrictions are prescribed by law and are strictly necessary.

In interpreting this article, the Human Rights Committee established that “paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”⁵⁵

It should be clarified that, while such restrictions are permissible in relation to manifestations of religion or belief (*forum externum*), the internal dimension of freedom of thought, conscience, religion, or belief (*forum internum*) enjoys unconditional protection under Article 18, paragraph 2, of the Covenant.⁵⁶

Finally, according to the Covenant, the freedom not to be compelled to have or to adopt a religion or belief and the freedom of parents and guardians to ensure religious and moral education may not be restricted.⁵⁷

6. Rights of religious minorities

The Human Rights Committee has stated that “the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.”⁵⁸

⁵³ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 17.

⁵⁴ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 17.

⁵⁵ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 8.

⁵⁶ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 17.

⁵⁷ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 8.

⁵⁸ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 9.

Hence, Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions; rather, the protection extends to religious minorities.⁵⁹ Article 20, paragraph 2, of the Covenant recognizes safeguards for religious minorities and other religious groups to exercise the rights guaranteed by Articles 18 and 27 and against acts of violence or persecution directed toward those groups.⁶⁰ In this regard, we should bear in mind that the identity of a person or group must always be defined in terms of the self-understanding of the human beings concerned.⁶¹

Special Rapporteur Heiner Bielefeldt observed that “all States support, regulate or limit religion and belief to some extent.”⁶² For example, many governments promote certain religions in order to define and demarcate their national or cultural identity, including States that identify as “secular.”⁶³ While this may be true from a historical viewpoint, the Special Rapporteur notes that “Reference to the predominant historical role of one particular religion can easily become a pretext for a discriminatory treatment of the adherents to other religions or beliefs.”⁶⁴

Persons belonging to religious minorities may be subject to discriminatory treatment in family court proceedings, such as divorce and the awarding of child custody.⁶⁵ Besides these instances of direct and overt discrimination that may arise from a preference for a particular religion or belief, members of religious minorities may also face hidden forms of discrimination, such as structural or indirect discrimination.⁶⁶

Moreover, violations of the rights of persons belonging to religious minorities can be perpetrated either by States or by non-State actors, or often by a combination of both.⁶⁷

Among other freedoms afforded to persons belonging to minorities, the Special Rapporteur includes the right to educate one’s children according to one’s faith.⁶⁸

7. Freedom of parents to teach a religion or belief

Article 18, paragraph 4, of the Covenant says that “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.”⁶⁹ The Convention on the Rights of the Child, while recognizing the status of children as rights holders, also reflects their need for a supportive environment to realize their rights. This supportive environment is usually provided by the family.⁷⁰

⁵⁹ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 2.

⁶⁰ UN Human Rights Committee, general comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion). 1993, para. 9.

⁶¹ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 23.

⁶² Special Rapporteur on freedom of religion or belief, A/HRC/37/49, 28 February 2018, para. 10.

⁶³ Special Rapporteur on freedom of religion or belief, A/71/269, 2 August 2016, para. 28.

⁶⁴ Special Rapporteur on freedom of religion or belief, A/HRC/19/60, 22 December 2011, para. 62.

⁶⁵ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 45.

⁶⁶ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 29.

⁶⁷ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 37.

⁶⁸ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 23.

⁶⁹ International Covenant on Civil and Political Rights, art. 18(4).

⁷⁰ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 20.

Special Rapporteur Heiner Bielefeldt notes that while there are many situations of violations in which the rights of the child and those of his or her parents may be affected at the same time, the interests of parents and children are not necessarily the same. For example, in the area of freedom of religion or belief, there may be situations in which it is also necessary to safeguard the rights of the child against his or her parents.⁷¹

Article 14 of the Convention on the Rights of the Child is the only provision of this instrument that reiterates the importance of the evolving capacities of the child. According to the Special Rapporteur, “[this] means that the child should always be respected, including within the family, as having the gradually evolving capacities of forming his or her own thoughts, ideas and religious or belief-related convictions and taking his or her own decisions in that area.”⁷²

In this regard, children should have broad access to information about different religious or philosophical beliefs, even beyond their family’s faith. According to the Special Rapporteur, from a certain age or maturity, children deserve respect when making their own decisions, whether positive or negative, concerning participation in acts of worship, ceremonies, or other religious community activities.⁷³

The parental right to provide “direction” to the child in his or her exercise of freedom of religion or belief includes the religious socialization of the child, although not in a way that is unalterable or inconsistent with the evolving capacities of the child.⁷⁴

The Special Rapporteur has noted that critics of the Convention on the Rights of the Child have questioned whether the instrument places too much emphasis on parental authority, particularly as it relates to freedom of religion or belief.⁷⁵ They contend that, in order for the child to retain the right to freedom of choice in matters of religion or belief, parents should not be able to determine the child’s religious identity by initiating him or her into any particular religion; rather, the child should be allowed to grow up in a more or less religiously neutral environment in order to retain all options for future self-determination.⁷⁶

According to this Special Rapporteur, “attempts made by the State to enforce a religiously ‘neutral’ upbringing of children within their families would amount to a far-reaching violation of parental rights.”⁷⁷ He explains that “welcoming the newborn child into the family and the larger community frequently involves religious initiation rites. As part of religious socialization processes, such initiation rites, provided they take place with the free consent of the parents, fall within the right to manifest one’s religion or belief, as protected under article 18 of the International Covenant on Civil and Political Rights.”⁷⁸ He concludes, “whereas protection against harmful practices can become an argument for prohibiting or limiting the application of certain initiation rites, depending on the specific circumstances of the case, the child’s freedom from religion, or an alleged right of the child to remain

⁷¹ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 14.

⁷² Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 26.

⁷³ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 54.

⁷⁴ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 33.

⁷⁵ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 35.

⁷⁶ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 35.

⁷⁷ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 36.

⁷⁸ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 41.

uninfluenced by religious initiation, cannot be invoked as arguments for limiting such religious ceremonies undertaken with the free consent of the parents of a child who has not yet reached religious maturity.”⁷⁹

8. Neutral application of family law

The Inter-American Court has noted that the American Convention does not establish a limited concept of family, nor does it protect only one particular model of family.⁸⁰ In this regard, it has held that a family can be made up of people with diverse gender identities and sexual orientation.⁸¹

Although Article 17.2 of the American Convention recognizes, in a literal sense, the “right of men and women of marriageable age to marry and to raise a family,” the Court has acknowledged that this formulation does not suggest a restrictive definition of how marriage is to be understood or how a family is to be formed.⁸² In the Court’s view, Article 17.2 merely establishes, expressly, the protection under the Convention of a particular form of marriage.⁸³ It cites as an example that the American Declaration and the Protocol of San Salvador refer to the right of “every person” to form a family. None of these instruments makes any reference to sex, gender, or sexual orientation, or specific mention of a particular type of family.⁸⁴ The Court concluded that “a restrictive interpretation of the concept of ‘family’ that excludes the emotional ties between a same-sex couple from the inter-American protection would defeat the object and purpose of the Convention.”⁸⁵

⁷⁹ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 42.

⁸⁰ I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, paras. 142, 172. Similarly, see United Nations, Committee on the Elimination of Discrimination against Women, general recommendation No. 21 (thirteenth session, 1994). Equality in Marriage and Family Relations, para. 13; Committee on the Rights of the Child, general comment No. 7, 20 September 2006, Implementing Child Rights in Early Childhood, CRC/C/GC/7/Rev.1, paras. 15 and 19; Human Rights Committee, general comment No. 19 (thirty-ninth session, 1990). The Family (art. 23), HRI/GEN/1/Rev.9 (Vol. I), para. 2; Human Rights Committee, general comment No. 16 (thirty-second session, 1988). Right to Privacy (art. 17), HRI/GEN/1/Rev.9 (Vol. I), para. 5.

⁸¹ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 179.

⁸² I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 182.

⁸³ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 182.

⁸⁴ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 185.

⁸⁵ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 189.

Under Article 7.1 of the Convention on the Rights of the Child, a child has the right to be cared for by his or her parents, even after divorce.⁸⁶ The Inter-American Court has held that “the mutual enjoyment of coexistence between parents and children is a fundamental element of family life.”⁸⁷

In relation to the custody of children of couples with diverse gender identities and sexual orientation, the Inter-American Court has established that “there is an increasing list of rights, benefits and responsibilities that same-sex couples could benefit from and enjoy,” among which this issue was expressly included.⁸⁸ Along the same lines, the Human Rights Committee determined that if the marriage is dissolved, States should take measures, based on the best interests of the children, to give them necessary protection and, to the extent possible, to guarantee personal relations with both parents.⁸⁹ The Human Rights Committee also established in general comment No. 19 that “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, [and] child custody [...] must be prohibited.”⁹⁰

Finally, the Inter-American Court has established that, in cases involving the care and custody of minors, the determination of the best interests of the child “must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child’s well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding the parents’ personal characteristics or cultural preferences regarding the family’s traditional concepts are not admissible.”⁹¹

The Court has also recognized that “the evolution of marriage evidences that its current form [reflects] complex interactions of, *inter alia*, cultural, religious, sociological, economic, ideological and linguistic [considerations]” and that, sometimes, opposition to same-sex marriage is based on religious or philosophical convictions.⁹² However, it then clarified that these convictions cannot be used as a parameter of coventionality, since the Court would be prevented from using them as an interpretative guide to determine the rights of human beings.⁹³

⁸⁶ See Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 63.

⁸⁷ I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 242, para. 47.

⁸⁸ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 197.

⁸⁹ UNHRC. General comment No. 17: Rights of the Child (art. 24), 1989, para. 6.

⁹⁰ UNHRC. General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 1990, para. 9.

⁹¹ I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 109.

⁹² I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 223.

⁹³ I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 223.

It has been documented that in many States family law reflects traditional religious or ideological hegemonies, thus causing systematic discrimination based on religion or belief. There, according to the Special Rapporteur, family law reforms aimed at eliminating this discrimination on the basis of religion or belief should be a priority.⁹⁴ He even recommended that judges handling family law matters receive training based on all relevant human rights instruments.⁹⁵

For example, the Special Rapporteur noted that when the two parents profess different religions or beliefs, these differences cannot in themselves serve as an argument for treating the parents differently.⁹⁶ Thus, the Special Rapporteur was informed⁹⁷ of cases in which family courts and religious courts have awarded custody of children with a bias against a parent who belonged to a religious minority.⁹⁸

9. Harmful practices

The issue of harmful practices is a very controversial one. Such practices are sometimes invoked solely to restrict the rights of a religious minority.

The welcoming of a newborn into the family and the community at large is often accompanied by religious initiation rites as part of the religious socialization process. These initiation rites, when considered “harmful practices,” even with the free consent of the parents, may be limited if deemed necessary, provided they meet the criteria listed in Article 18, paragraph 3, of the Covenant and reiterated in Article 14, paragraph 3, of the Convention on the Rights of the Child. These restrictions must be applied with empirical and normative diligence, and those affected by the limitations should have access to effective legal remedies when alleging violations of their human rights.⁹⁹

The Special Rapporteur thus explained that “whatever their reasons may be, harmful practices can never be justified as legitimate manifestations of freedom of religion or belief.”¹⁰⁰ He cited “binding, scarring, branding/tribal marks, corporal punishment, stoning, [and] violent initiation rites” as examples of potentially harmful practices.¹⁰¹

The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have established that “the obligation to protect requires States parties to establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices.”¹⁰²

⁹⁴ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 65.

⁹⁵ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 65.

⁹⁶ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 64.

⁹⁷ In Serbia, Jehovah’s Witnesses reported that some of their members had lost custody of their children in divorce proceedings with a spouse who was not a Jehovah’s Witness (A/HRC/13/40/Add.3, para. 24). The Shiite religious court in the Kingdom of Bahrain denied a woman who allegedly belonged to the Safara community the right to custody of her children following her divorce (A/HRC/16/53/Add.1, paras. 25-32).

⁹⁸ Special Rapporteur on freedom of religion or belief, A/HRC/22/51, 24 December 2012, para. 54.

⁹⁹ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 70.

¹⁰⁰ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 70.

¹⁰¹ Special Rapporteur on freedom of religion or belief, A/70/286, 5 August 2015, para. 67.

¹⁰² Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices (2014).