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Freedom of Religion in International Human Rights Law

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

1. Introduction

1. On 12 March 2010, a Commission was appointed to inquire into and report on the working of Article 11 of the Constitution of the Independent State of Samoa in relation to the right to freedom of religion.
2. The appointing document recognises that:

freedom of religion is a fundamental human right protected by a number of international treaties and declarations, including Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) to which Samoa has acceded
3. This submission:
 - (a) examines the rights to freedom of religion and non-discrimination as codified in the *International Covenant on Civil and Political Rights (ICCPR)*;¹ and
 - (b) considers the permissibility of limitations on human rights under international law.
4. This submission is intended to provide detail on the content of the relevant human rights and international law principles. It does not address implementation issues particular to the Samoan social and political context.

2. Freedom of Religion

5. The right to the freedom of religion is protected by art 18 of the ICCPR. This right includes:
 - (a) the freedom to have or adopt a religion of one's choice (art 18(1));
 - (b) the freedom to manifest religious beliefs in private or public, either individually or in community with others (art 18(1)); and
 - (c) the prohibition of coercion that would impair the right to hold a religious belief (art 18(2)).
6. Freedom of religion has been described by the UN Human Rights Committee (**HRC**) as being "far-reaching and profound" and of a "fundamental character".² Consistent with this fundamental nature, a state party to the ICCPR cannot derogate from (i.e., suspend) its obligations under art 18, even in times of public emergency (art 4(2)).
7. The HRC has also observed that:
 - (a) governments may not permit any limitations on the freedom of thought and conscience, or on the freedom to have or adopt a religion or belief of one's choice;³

¹ Samoa acceded to the ICCPR in February, 2008.

² HRC, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (1993) [1], available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

³ *Ibid* [5].

- (b) it may be permissible to restrict freedom to manifest religion or belief only if such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others (see section 4, below);⁴
- (c) the terms 'belief' and 'religion' are to be construed broadly, and are not limited to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions;⁵
- (d) the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the display of symbols, the observance of holidays and days of rest, the observance of dietary regulations, and the wearing of distinctive clothing or headcoverings;⁶
- (e) the establishment or existence of an official or State religion is compatible with art 18 as long as those who are not members of the religion are not discriminated against; and;⁷
- (f) the right protects against coercion to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. The same protection is enjoyed by holders of all beliefs of a non-religious nature.⁸

⁴ Ibid, [8]. See also *Church of Scientology Moscow v Russia* [2007] ECHR 18147/02, in which the European Court of Human Rights held that the state has an obligation of 'neutrality and impartiality vis-à-vis religious communities' but may restrict religious association or manifestation of belief where such associations or manifestations endanger democracy.

⁵ HRC, *General Comment No 22*, above n 2, [2].

⁶ Ibid [4]. *Cf R (Begum) v Governors of Denbigh High School* [2005] 2 WLR 3372 and *R (on the application of X (by her father and litigation friend)) v Headteachers* [2006] EWHC 298 (Admin) in which UK courts held that a school's decision to refuse to allow Muslim students from wearing a jilbab (a long coat-like garment) and a niqab (a veil covering the entire face and head except the eyes) were justifiable and permissible limitations 'in the interests of public safety or for the protection of the rights and freedoms of others'. The courts held that freedom of religion 'does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'. See also *Singh Binder v Canada*, HRC, Communication No 208/1986, UN Doc CCPR/C/37/D/208/1986 (1989) in which the UN Human Rights Committee ruled that a restriction on the wearing of a turban due to a requirement to wear safety headgear was permissible.

⁷ Human Rights Committee, *General Comment 22*, above n 2 [9]; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed), [17.21].

⁸ HRC, *General Comment No 22*, above n 2, [5].

3. Freedom from Discrimination

8. The implementation of the right to freedom of religion may also give rise to issues around the right to equality and non-discrimination as laws and practices concerning religion may favour or place restrictions on particular religious groups.
9. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,⁹ human rights instruments,¹⁰ and jurisprudence.¹¹
10. Art 2(1) of the ICCPR obliges state parties to ensure all individuals in its territory are accorded the rights in the ICCPR regardless of, amongst other things, the religion of the individual. An even wider protection against discrimination is also afforded by article 26, which states that individuals are equal before the law and that the law shall guarantee effective protection against discrimination.¹² A law that in itself is discriminatory towards specific religious groups will constitute a breach of the ICCPR, even if it were otherwise validly passed.¹³
11. The HRC has confirmed that the prohibitions against discrimination in the ICCPR extend to both “direct” and “indirect” discrimination.¹⁴ Direct discrimination takes place when a person or group is given less favourable treatment compared to others in similar circumstances because of a prohibited distinction.¹⁵ Indirect discrimination takes place when a practice or condition appears to be neutral, but in fact disproportionately impacts on specific groups.¹⁶

⁹ See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171, arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006), art. 5.

¹⁰ See, eg, HRC, *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004).

¹¹ See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zraggen v Switzerland*, Ser. A No. 263 (1993).

¹² Joseph et al, above n 7, [23.09] and [23.12].

¹³ HRC, Communication Number 172/1984.

¹⁴ HRC, *General Comment 18*, above n 10, [6]; Joseph et al, above n 7, [23.32].

¹⁵ Joseph et al, above n 7, [23.31].

¹⁶ *Ibid.*

4. Limitations on Rights

12. At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited.
13. Art 18(3) permits limitations on the right to freedom of religion if the limitation is prescribed by law and is necessary to protect public safety, order, health or morals, or the fundamental rights of others.
14. The HRC has stated that art 18(3) of the ICCPR is to be strictly interpreted.¹⁷ Regarding the protection of “public morals”, the HRC has observed that any such measures should not be based on a concept of morals derived exclusively from a single tradition.¹⁸ This means that public morals should reflect a “pluralistic view of society”.¹⁹
15. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)*.
16. Among other things, the Siracusa Principles provide that:
 - (a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;
 - (b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;
 - (c) any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
 - (d) limitations must not be arbitrary or unreasonable;
 - (e) limitations must be subject to challenge and review;
 - (f) limitations must not discriminate on a prohibited ground;
 - (g) where a limitation is required to be ‘necessary’, it must:
 - (i) be based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - (ii) respond to a pressing need;
 - (iii) pursue a legitimate aim; and,

¹⁷ Human Rights Committee, *General Comment 22*, above n 2, [8].

¹⁸ *Ibid.*

¹⁹ Joseph et al, above n 7, [17.19].

(iv) be proportionate to that aim.²⁰

17. In its General Comment No. 31, the HRC stated that, where limitations or restrictions are made, “States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right”.²¹

²⁰ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

²¹ HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [6].