

# The Diversity of Womanhood and All of God's Creatures: Addressing Challenges in the Protection of Women's Religious Freedoms Using a Novel Classification

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The protection of women's right to freedom of religion or belief presents many challenges to liberal states. Yet, this fundamental right of women has not been recognized as such in global treaties. Women's entitlement to this right is a neglected matter in international law. When reference is made to the liberty to manifest religion, states are often given the vague guidance that discriminatory practices should be eliminated. However, what happens when it is women who choose to believe those supposedly oppressive practices to be the absolute truth from God or when women seek protection for promoting and practicing new traditions? We tend to focus on the struggle between women's freedoms and religion, but forget that women are not a homogenous group, especially when it comes to their religious and faith aspirations. Some women wish to bring equality to their religious communities, some wish to remain secular, and others express deep attachment to their religious traditions despite conflicts with feminist ideas. The most complex dilemmas that states confront are those that present clashes between those diverse women's groups. This Article reveals that the variety of women's religious and non-religious practices are not adequately reflected in the guidance human rights treaty bodies give states. To date, only harmful practices committed against women and girls have been fully addressed and defined within numerous international

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sources. It is often obvious that international standards were formed and consolidated at a time when women were not considered bearers of the right to freedom of religion or belief, but rather victims of religion. States are therefore left to develop their own understandings of complexities in the protection of women's religious liberties. This Article proposes a novel classification and suggests distinguishing between harmful, traditional, and reformatory practices of women. It lays out guidelines for the protection of such practices in the hope that they assist human rights' advocates and policymakers in achieving the delicate balance needed in such situations to affirm women's belief liberties.

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## Introduction

"[I] could not in good conscience agree to mixed-gender prayer at the Wall [surrounding the ancient Jewish temple site in Jerusalem-CEL]. In the past months I have been torn . . . . My conscience would not let me rest. I could not approve the Western Wall plan in a manner that would upset the status quo. The Reform Movement's demand to turn the Wall into a place where men and women pray together is unacceptable to me or to Jewish tradition. . . . We did not return to our most sacred site in order to disgrace it . . . ." [Sue, can you format this part like the quotes below? It shouldn't really be a block quote, just an introductory quotation like the ones below].

Israel's Minister of Culture, Ms. Miri Regev Chairwoman of the Parliament Committee on the Protection of Holy Places<sup>1</sup> (July 2018)

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1. Raoul Wootliff, *Ministers Pass Western Wall Prayer Hot Potato to Netanyahu*, TIMES ISR. (July 1, 2018, 2:49 PM), <https://www.timesofisrael.com/ministers-pass-western-wall-prayer-hot-potato-to-netanyahu/> [<https://perma.cc/4774-9H5J>]; see also Chaim Levinson, *Israeli Minister: My Conscience Won't Let Me Approve Mixed-Gender Prayer at Western Wall*, HAARETZ (June 28, 2018, 12:09 AM), <https://www.haaretz.com/israel-news/premium-israel-s-culture-minister-blocks-mixed-gender-prayer-at-western-wall-1.6219844> [<https://perma.cc/4CWS-FD8N>] ("Miri Regev, who heads the committee in charge of approving [the] plan to construct a site for egalitarian prayer, announced she's resigning from the council.").

“This is a matter of conscience. . . I also cannot see women wearing Tallit [a religious garment traditionally worn by men-C.E.L.] at the Western Wall.”

Israel’s Minister of Culture, Ms. Miri Regev Chairwoman of the Parliament Committee on the Protection of Holy Places<sup>2</sup> (July 2018)

“We refuse to back down. We refuse to be told how to pray or where to pray. We refuse to be told—under religious pretenses—that women cannot have access to pray with Torah at the Kotel. It is simply not true; it is a (literally) man-made regulation put in place to keep women in second-class status at Judaism’s holiest site.”

Yochi Rappeport, Executive Director of Women of the Wall<sup>3</sup>

Human rights scholars and practitioners, by training, are primed to remedy conflicts between women’s rights and the laws, entities, or institutions that violate them. At domestic and global levels, advocates for women’s rights have largely been engaged in countering the forces that limit or block women’s advancement, constituting an ongoing battle against entrenched discriminatory attitudes and patriarchal establishments that disadvantage women. One particularly long and complex struggle has been preventing the use of religion, religious norms, and religious liberties to justify the violation of women’s rights.<sup>4</sup> Over the past few decades of feminist writing, the intersection of gender issues and religion in the context of human rights law has been characterized by many clashes. A main concern has been that the claims for religious autonomy and for the liberty to practice religion frequently conflict with provisions imposing gender equality in global and domestic debates.<sup>5</sup> Therefore, the many dis-

2. Chaim Levinson, *Israeli Minister: My Conscience Won’t Let Me Approve Mixed-Gender Prayer at Western Wall*, HAARETZ (June 28, 2018), <https://www.haaretz.com/israel-news/.premium-israel-s-culture-minister-blocks-mixed-gender-prayer-at-western-wall-1.6219844> [<https://perma.cc/A7FZ-Z52X>].

3. E-mail from Yochi Rappeport, Exec. Dir., Women of the Wall, to general members of Women of the Wall (Jan. 17, 2020, 9:38 AM) (on file with author).

4. For an extensive overview of the situation of women in light of religious discrimination, see Abdelfattah Amor (Special Rapporteur on Freedom of Religion or Belief), *Rep. of the Special Rapporteur on Freedom of Religion: Study on Freedom of Religion or Belief and the Status of Women in the Light of Religion and Traditions*, ¶1, U.N. Doc. E/CN.4/2002/73/Add.2 (Apr. 24, 2009) (noting that “[a]t the dawn of this third millennium, many women across the world suffer discrimination in their private and family lives and in relation to their status in society. Such discrimination, which is deeply rooted in the dominant culture of some countries, is largely based on or imputed to religion. It is often trivialized and tolerated by the State or society and sometimes sanctioned by law. In some cases, it assumes very cruel forms and denies women their most fundamental rights, such as the right to life, integrity or dignity.”) [hereinafter U.N. Study on Freedom of Religion or Belief].

5. See, e.g., Frances Raday, *Culture, Religion, and Gender*, 1 INT’L J. CONST. L. 663, 665 (2003) (arguing that “[t]he clash between culture or religion and gender equality rights has become a major issue in the global arena. It is probably the most intractable aspect of the confrontation between cultural and religious claims and human rights doctrine. Both cultural practices and religious norms have been frequently invoked, in international and constitutional law contexts, as a form of defense in order to oppose gender equality claims. . . . [R]eligious claims, in opposition to human rights standards, are commonly made under the umbrella of freedom of religion.”); Donna J. Sullivan, *Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution*, 24

cussions around religious freedoms and women's rights were predominantly framed as a battle between these two opposite concepts.<sup>6</sup>

However, this framing often obscures underlying internal tensions among what are actually different, conflicting women's rights. Ending religious discrimination against women, for example, often seems to suggest that women's rights are on one side while religion is on the other, posing solely as a negative force. This reflection is far from the truth that a matrix of different factors influences the rights of women. It conceals that women themselves present clashing positions about the role of religion in their lives. More worryingly, the paradigmatic focus on the conflict between religious freedoms and women's rights prevents discussions about women's own religious liberties and beliefs. National policymakers and human rights advocates today, in many liberal countries around the world, face a complex regulatory, if not also philosophical, task: discerning the meaning of equality to women of diverse backgrounds, and maintaining a delicate balance among the competing interests and religious liberties of heterogeneous women's groups.

A present debate in Israel about women's prayer at the holy site of the Western Wall demonstrates this concept well.<sup>7</sup> The controversial quotes above encapsulate an immense clash between two competing views: on the one hand, the plea of traditional women demanding to preserve public recognition of their ancient religious customs (represented by Israel's Minister of Culture herself); and on the other hand, the demand of reformist women claiming space for the exercise of their new practices calling for state acknowledgment.<sup>8</sup> While much has been written of this matter,<sup>9</sup> the fact that this controversy revolves around the assertions of two different

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N.Y.U. J. INT'L L. & POL. 795, 795-804 (1992) (offering a framework for resolving conflicts between women's human rights and freedom of religion); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 155 (2003) (arguing that religion and cultural norms serve as "justifications for discrimination on the basis of sex," specifically against women). See generally Anat Scolnicov, *Women and Religious Freedom: A Legal Solution to a Human Rights Conflict*, NETH. Q. HUM. RTS. 569 (2007).

6. See Madhavi Sunder, *Keeping Faith: Reconciling Women's Human Rights and Religion*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 281-82 (John Witte, Jr. & M. Christian Green eds., 2012) (claiming that "[f]or some time, scholars and human rights practitioners have posited the conflict between women's equality and religious liberty as inherent . . . argu[ing] that women must set themselves free of the shackles of religion and culture if they truly want to be free. Contemporary legal theory takes a similar approach."); Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief) *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, ¶ 32, U.N. Doc. A/68/290 (Aug. 7, 2013) [hereinafter *Interim Report of Special Rapporteur on Freedom of Religion or Belief*]; see also HIENER BIELEFELDT ET AL., FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 365 (2016) ("The relationship between freedom of religion or belief and women's right to equality and non-discrimination has been described as a political and legal battlefield.")

7. See *Western Wall: Jewish Women Clash over Prayer Rights*, BRIT. BROAD. CO. NEWS (Mar. 8, 2018), <https://www.bbc.com/news/world-middle-east-47496456> [<https://perma.cc/ZN72-JTA9>].

8. See *id.*

9. See, e.g., *id.*

women's groups who seek recognition of their religious liberties is repeatedly overlooked. Women's diverse religious claims are often unobserved or pushed aside by more popular arguments about the notorious effect of religion on women or disrespect to religious groups as a whole. The monumental issue of balancing the aspirations of two very different women's groups is frequently left overlooked.

This Article reveals that, in international human rights law, there is a similar tendency to protect women from religion while their own belief liberties are compromised and more substantive discussions on the variety of women's religious practices are overlooked.<sup>10</sup> It demonstrates that global efforts have been mainly directed at combating and defining harmful practices, while reformative and traditional practices have not been properly recognized or defined.<sup>11</sup> The complexities that liberal states experience in the protection of traditional and reformist women receive little response. Dilemmas that frequently arise around states' obligations to protect women's right to freedom of religion or belief, challenge the international human rights system, which has thus far failed to recognize this right among the recognized rights of women.<sup>12</sup> This Article therefore delineates

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10. I use the term "women's belief liberties" to reflect a broader approach to the protection of this right focused on "belief" rather than "religion" or "religious freedom."

11. Harmful practices receive a comprehensive response as international norms are very clear in this regard, strictly prohibiting them. Harmful practices have been recently defined. See Comm. on the Elimination of Discrimination Against Women & Comm. on the Rights of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18, ¶ 1, 2, 6, 7 (Nov. 14, 2014) [hereinafter Joint General Recommendation]. As the Committees explain, harmful practices are deeply rooted in cultural or religious norms "according to which women and girls are regarded as inferior to men and boys based on stereotyped roles." *Id.* ¶ 6. These practices "highlight the gender dimension of violence and" they defy the most basic of women's rights. *Id.* In addition, "[t]o date, the [Committee on the Elimination of Discrimination Against Women] has referred to harmful practices in nine of its [thirty-one] general recommendations: No. 3 on the implementation of article 5 of the Convention[;] No. 14, No. 19, No. 21 on equality in marriage and family relations[;] No. 24 on women and health[;] No. 25 on temporary special measures[;] No. 28 on the core obligations of States parties under article 2 of the Convention[;] No. 29 on the economic consequences of marriage, family relations and their dissolution[;] and No. 30 on women in conflict prevention, conflict and post-conflict situations." *Id.* ¶ 10 n. 5. No. 31 on harmful practices makes ten. The need to respond to harmful practices has been further extensively developed by other United Nation's (U.N.) bodies and mechanisms. For example, the General Assembly resolution *Traditional or Customary Practices Affecting the Health of Women and Girls* released on December 12, 1997, and the *Declaration and Platform for Action* adopted at the 1995 Beijing World Conference on Women, call upon States to take legislative or other measures against harmful cultural practices. The 1995 Beijing World Conference on Women represented further progress when the definition of violence against women was expanded to incorporate harmful practices such as dowry-related violence, female genital mutilation, female infanticide, and prenatal sex selection. See Rep. of the Fourth World Conf. on Women (1995), ¶ 113, 115, U.N. Doc. A/CONF.177/20/Rev.1 (1996).

12. See Cochav Elkayam Levy, *Where Is God When We Need Her? Women's Right to Freedom of Religion or Belief as Key to Promoting Gender Equality*, 95 TUL. L. REV. (forthcoming 2021) (discussing the implications of the absence of this right from CEDAW); see also Bahia G. Tahzib-Lie, *Women's Equal Right to Freedom of Religion or Belief: An*

the boundaries between these clashing aspirations, which reappear in many parts of the world, and explains the importance of defining the distinct treatment of these boundaries. By distinguishing between harmful, traditional, and reformatory practices of women, this Article urges a more profound discussion of the nature of women's interests when women themselves hold a diverse range of views on the merits of religious practices. It further shows that there is a need to enhance the protection of women's belief liberties. This discussion exposes, *inter alia*, the insubstantiality of current guidelines about the situation of reformist women around the world and the urgent need to encourage states to devise special measures to protect them. It also reveals the thin obligations of states regarding the protection of traditional women and shows that while states ought to protect their religious liberties, they should also remain diligent about their obligation to promote gender equality within their religious communities. Regrettably, international standards are not expressive of the diversity of ideas about equality that exist among women. States, on the other hand, are not fully aware of this multiplicity either and tend to miss the nuances and delicate ways in which women in traditional, even orthodox, communities challenge conservative ideas about their position. The result is simply a compromise on the protection of these women and their right to equality. This Article also addresses the formidable question of permissible limitations, explaining the rationale behind the wide spectrum of circumstances in which women's religious practices deserve the protection of the right to freedom of religion or belief and the rare instances in which these practices must be subject to limitations out of concern for gender equality or the fundamental rights of others.

This Article ultimately aspires to provide guidance to states in the protection of women's belief liberties and discusses the variety of women's religious practices. Part I explains the need for a new classification to address current challenges in the protection of women's right to freedom of religion or belief. Part II examines the global response to harmful practices. Part III and IV define and explore traditional and reformatory practices, respectively. These three sets of practices (*i.e.*, harmful, traditional, and reformatory practices) indeed create completely different challenges for liberal states; they call for a different analysis of the unique and complex intersection between the rights of different women to freedom of religion or belief, and to gender equality. This work demonstrates that the right to freedom of religion or belief is instrumental for the protection of women and could guide the resolution of many controversies in this area. Women's belief liberties are meant to empower women to live according to their faith and to freely express their diverse opinions, moral convictions, and experiences without social or other constraints. The right to freedom of religion or belief protects women's personal autonomy to pursue their chosen faith (be it theistic, non-theistic, or atheistic). The perception of

women as passively affected by religious conflicts must change to include the variety of women's interests in these monumental debates. Above all, we must remember that women are entitled to freedom of belief.

## I. New Classification in Response to New Challenges

### A. A View from the Trenches

The situation in Israel illustrates some of the problems in current global regulation of religious freedoms and reveals the need for change. In May 2013, Israel's prime minister Benjamin Netanyahu appointed an advisory team to address the issue of women's prayers at the Western Wall, a national Jewish holy site in Jerusalem.<sup>13</sup> The team was assigned to resolve the conflicts that arise over the request of a group of Jewish women<sup>14</sup> to hold men-like prayers in the women's section of this site. This request instigated one of the most controversial disputes in Israel. The orthodox Jewish community—and among them orthodox women—objects vehemently to these non-traditional prayers.<sup>15</sup> The demands of reformist women also lack public support more generally.<sup>16</sup> Among the many reasons for this opposition is that the prayers are considered an affront to Jewish tradition and a violation of a sacred place.<sup>17</sup> Women that are traditional or more conservative observers claim that allowing the new customs would preclude them from attending the place.<sup>18</sup> For over twenty years,

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13. Israel's Ministry of Foreign Affairs provides some background and explains the importance of this site:

The Western Wall, all that remains of the Second Temple retaining wall, currently serves as the central place of worship for the Jewish people. For years, the Western Wall has been a magnet for many as a site of unique historic, national and religious importance. According to data gathered over the past several years, more than [ten] million people visit the Western Wall site each year. Most of the worshippers at the existing Western Wall Plaza pray in what is referred to as the Orthodox custom. However, there are people who wish to pray in a different manner, in accordance with their own identity, path and custom.

*Prayer Arrangements at the Western Wall*, ISR. MINISTRY FOREIGN AFFS. (2016), <http://mfa.gov.il/MFA/IsraelExperience/Religion/Pages/Prayer-arrangements-at-the-Western-Wall-2-Feb-2016.aspx> [<https://perma.cc/Z3CN-KLRN>]. The "people who wish to pray in a different manner," to whom this formal statement refers to, are women, mostly belonging to the Women of the Wall feminist group or to other reform Judaism movements. *See id.*

14. *See Who We Are*, WOMEN OF THE WALL, <https://www.womenofthewall.org.il/who-we-are/> [<https://perma.cc/5P3J-NY58>] (last visited Mar. 3, 2021).

15. *See* Wootliff, *supra* note 1; Levinson, *supra* note 1.

16. *See generally Religious Services Minister: Reform Jews Aren't Jewish, Have Lost Their Way*, TIMES ISR. (July 7, 2015, 3:33 PM), <https://www.timesofisrael.com/religious-services-minister-reform-jews-have-lost-their-way/> [<https://perma.cc/JTV4-FGV7>]; *Prayer Arrangements at the Western Wall*, *supra* note 13; Wootliff, *supra* note 1.

17. *See* WOMEN OF THE WALL, THE ADVISORY TEAM FOR THE ISSUE OF PRAYER ARRANGEMENTS AT THE WESTERN WALL: RECOMMENDATIONS 11-18 (2016), <https://www.womenofthewall.org.il/wp-content/uploads/2016/02/FINAL-VERSION-The-Advisory-Team-for-the-Issue-of-Prayer-Arrangements-at-Falsepdf> [<https://perma.cc/ZW3U-NYHR>] [hereinafter THE ADVISORY TEAM: RECOMMENDATIONS].

18. *See* Wootliff, *supra* note 1; Levinson, *supra* note 1.

state regulation has thus prevented the reformist prayers.<sup>19</sup> This governmental position was debated in various legal proceedings and was the subject of several national committees, giving this issue continuous public attention that emphasizes the profound disagreement.<sup>20</sup> The advisory team's task, therefore, was to examine the existing prayer arrangements at the site, define the changes needed, and propose ways for applying these changes.<sup>21</sup>

In January 2016, about three years after its appointment, the team presented its proposal, "at the heart of which is an expansion of the possibilities for worship at the Western Wall site so that each person wishing to worship at the Western Wall can do so in accordance with their custom and faith."<sup>22</sup> The team ordered that a new section be built for the reformist group; so, it seemed that the long struggle of these women to achieve equality and freedom of religion had come to an end. However, shortly afterwards, despite the government's initial decision to approve the proposed framework, the plan was revoked to protect the status quo at the site.<sup>23</sup> Today, this issue continues to make headlines as Israeli ministers and government officials oppose the establishment of the new pluralistic pavilion at the site and inhibit efforts to allow reformist women to pray at the Western Wall in accordance with their faith.<sup>24</sup>

There is a lot to be said about the situation of these women and many angles by which their struggle, and thus far the failure to protect them, could be explored. What seems most interesting for the purpose of the discussion here about the role of human rights law is that surprisingly, unlike many other public debates in Israel, international law seems to have had almost no relevance in this case. For example, the advisory team's report did not make a single reference to international law, and the Israeli Supreme Court did not mention Israel's international obligations or saw

19. See THE ADVISORY TEAM: RECOMMENDATIONS, *supra* note 17, at 11-18.

20. See *id.*

21. *Id.* at 33.

22. *Id.* at 3. As noted, the recommendations advocated for the following:

[A]n attempt to balance the rights of all relevant parties—to respect, to equality and to freedom of religion and worship—and to do so in a manner that preserves the special historic, national and religious place that the Western Wall holds for the Jewish people, the entire Jewish people. . . . The framework is intended, on the one hand, to provide proper expression for religious pluralism in Judaism in a manner that will allow the various denominations of Judaism to pray and worship, while on the other hand preserving the existing Orthodox method of worship in the northern section, all as part of freedom of religion, and in a manner that is in line with the principles of equality.

*Id.*

23. This was mainly a result of political pressure from ultra-Orthodox parties. See Jeremy Sharon & Herb Keinon, *Israel Shelves Plan for Mixed-Sex Prayer Space at Western Wall*, JERUSALEM POST (June 25, 2017), <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Israel-shelves-plan-for-egalitarian-prayer-space-at-Western-Wall-497859> [<https://perma.cc/5EVF-VEZ8>].

24. Associated Press & Israel Hayom Staff, *Gantz Promises Area for Mixed-Gender Prayer at Western Wall*, ISRAELHAYOM (Oct. 29, 2019, 5:29 PM), <https://www.israelhayom.com/2019/10/29/gantz-promises-area-for-mixed-gender-prayer-at-western-wall/> [<https://perma.cc/Y3ZD-VEE4>].

reasons to include international sources in its case law.<sup>25</sup> It is safe to say that international law has played no significant role in the efforts made to advance the religious rights and the equal position of these women.<sup>26</sup>

What seems to be unique about this case is that it involves protecting women's religious rights, women on both sides of the conflict, as well as highly controversial but non-harmful religious practices.<sup>27</sup> This combination is quite different from the common practices that concern international bodies. It is often harmful religious practices (like polygamy or forced marriages) that receive the most attention. Recently, for instance, two of the UN human rights committees (CEDAW and CRC) have joined together to publish a special general recommendation specifically dedicated to eliminating harmful practices.<sup>28</sup> As the Committees clarifies, harmful practices are deeply rooted in cultural or religious norms "according to which women and girls are regarded as inferior to men and boys based on stereotyped roles," and "highlight the gender dimension of violence."<sup>29</sup> They take cruel forms<sup>30</sup> and defy the most basic of women's rights.<sup>31</sup> The recommendation clearly defines these practices and clarifies states' obligations to prohibit them.<sup>32</sup> It attests the global commitment to end these practices and the negative influence that they have on women and girls.<sup>33</sup>

However, in these extreme circumstances, in which religious beliefs serve as defenses to abuse women, women's religious liberties appear simply irrelevant. In fact, many international documents establish norms that chiefly concentrate on showing why religious freedoms cannot be relied upon to justify the violation of women's rights.<sup>34</sup> The fact that harmful

25. See generally THE ADVISORY TEAM: RECOMMENDATIONS, *supra* note 17.

26. This is so even though Israel is party to all major human rights treaties.

27. See Joint General Recommendation, *supra* note 11.

28. See generally *id.*

29. *Id.* ¶ 6.

30. See U.N. Study on Freedom of Religion or Belief, *supra* note 4, ¶ 1. The study covers numerous examples of harmful practices that deny women "their most fundamental rights, such as the right to life, integrity or dignity." *Id.* It then concludes that these harmful practices express collective manifestations of freedom of religion that are "exercised in many countries in a manner injurious to the status of women." *Id.* ¶ 191.

31. See Joint General Recommendation, *supra* note 11, ¶¶ 1, 6-7.

32. See *id.* ¶¶ 17-30.

33. Part II of this paper further elaborates on the global response to harmful practices and the obligations of states.

34. See generally Elkayam-Levy, *supra* note 12; Treaty bodies' general comments and recommendations concerning harmful practices generally do not mention women's religious rights. If religious freedom is mentioned, it is often to assert that it cannot be relied upon to justify discrimination against women. See, e.g., U.N. High Commissioner for Human Rights, CCPR General Comment No. 28: Article 3 (*The Equality of Rights Between Men and Women*), ¶ 5, U.N. Doc. CCPR/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter *General Comment No. 28*]. For example, the Human Rights Committee notes that "Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion." *Id.* ¶ 21; see also *id.* ¶ 5 ("Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses. States parties should ensure that traditional, historical,

practices defy women's own fundamental right to believe is vastly unrepresented. For example, the recent Joint Recommendation does not mention women's religious rights nor considers their relevancy.<sup>35</sup> Certainly, the new practices that the Women of the Wall demand that Israel protect are certainly very different. Not only are they non-harmful, but they are also based on a belief in women's equality and women's dignity. Thus, they present serious challenges when they clash with the more traditional practices of women.

Such conflicts between the religious liberties of different women arise in many different contexts. They repeatedly stand at the heart of the most heated controversies around the world and yield overwhelmingly different views.<sup>36</sup> To use the example of the European debate over Muslim attire, reactions have been widely divergent: from viewing concealing headscarves as a potential threat to more secular women<sup>37</sup> and as an oppressive, isolat-

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religious, or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with [A]rticle 3, and indicate what measures they have taken or intend to take to overcome such factors."). The Committee further asserts that even the rights of persons belonging to minorities to enjoy their own culture and practice their religion (under Article 27) do not authorize violation of the equal rights of women under the convention and should be restricted if proven to do so. *Id.* ¶ 32.

Similarly, the CEDAW Committee does not make specific reference to the right to freedom of religion or belief, yet it also extensively targets religious practices and religious laws and notes that they notoriously affect women's equality and should thus be prohibited and eliminated. The CEDAW Committee also requires that states grant the principle of women's equality an "overriding and enforceable status" through constitutional or other legislative means, especially when it conflicts with discriminatory religious practices. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 28 of the CEDAW Committee on the Core Obligations of States Parties Under Article 2 of the Convention*, ¶ 31, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter *General Recommendation No. 28*].

35. See generally Joint General Recommendation, *supra* note 11.

36. See generally Lisa Fishbayn Joffe, *Introduction: Theorizing Conflicts Between Women's Rights and Religious Laws*, in GENDER, RELIGION AND FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN'S RIGHTS AND CULTURAL TRADITIONS xiii-xiv (Lisa Fishbayn Joffe & Sylvia Neil eds., 2013) (exploring examples of conflicts from around the world); see also Raday, *supra* note 5, at 664-65 (arguing that as religious and cultural norms were formulated or interpreted in a patriarchal context, "[t]he clash between culture or religion and gender equality rights bec[a]me a major issue in the global arena" that needs to be addressed).

37. See generally, e.g., Şahin v. Turkey, 2005-XI Eur. Ct. H.R. There, it was clear throughout the decision that the Turkish authorities have had a genuine concern over women's right not to wear a hijab and sought to preserve the values of gender equality and state secularism. The Turkish government referred to the headscarf as "a sign that was regularly appropriated by religious fundamentalist movements for political ends and constituted a threat to the rights of women." *Id.* at 21. In previous work on this case, I show that the European Court of Human Rights accepted the Chamber's concern of the possible threat "such symbol" as the Islamic headscarf may have on those women who choose not to wear it. According to the Chamber, it may be of a compulsory nature, imposing religious duties on other, less observant women. Thus, the court gave greater weight to the freedom of belief of those secular women. See Cochav Elkayam-Levy, *Women's Rights and Religion—The Missing Element in the Jurisprudence of the European Court of Human Rights*, 35 U. PA. J. INT'L L. 1175, 1192 (2014).

ing cloth that calls for states' intervention;<sup>38</sup> to presenting them as a form of dress that emancipates women from conforming with Western dress codes, allowing them to freely express their religious beliefs.<sup>39</sup> Those various practices do not amount to being harmful in the same way that is defined by the human rights' treaty bodies; they are protected by the right to freedom of religion or belief.

The problem is that, in these difficult cases, in which women seek protection of traditional or reformative practices, global norms are scarce.<sup>40</sup> Unfortunately, numerous global sources—within and outside the United Nations (U.N.)—stress the importance of eliminating practices that

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38. See, e.g., Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 370–71 (2007) (exploring European case law, the author argues that the European Court of Human Rights ruled correctly in its recent decisions); Frances Raday, *Professor Frances Raday Comments on SAS v France*, OXFORD HUM. RTS. HUB (July 19, 2014), <http://ohrh.law.ox.ac.uk/professor-frances-raday-comments-on-sas-v-france/> [<https://perma.cc/ZV83-YYGH>] (arguing in favor of bans against the full-face veils and claiming that “[f]ull-face covering depersonalizes women in social interaction and is harmful for their freedom of expression and freedom of movement and, often, for their access to healthcare. In a democratic society it is necessary to protect the rights and freedoms of women, including by providing effective regulatory frameworks to protect them against harmful practices.”).

39. See, e.g., Christine Chinkin, *Women's Human Rights and Religion: How Do They Co-exist?*, in RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES 53 (Javaid Rehman & Susan C. Breau eds., 2007). Criticizing the decision of the European Court of Human Rights, Chinkin notes:

In the midst this struggle are Muslim women who are denied by many participants to the debate agency and control over their own lives. The veil is seen by women who freely choose to wear it, not as a symbol of oppression “hard to square with gender equality[,]” but rather as a tool of identity, freedom, empowerment and emancipation.

*Id.* Chinkin claims that the voluntary wear of headscarves could be considered emancipating and discusses the stereotypes associated with said headscarves. *Id.*; see also Gila Stopler, *Rights in Immigration: The Veil as a Test Case*, 43 ISR. L. REV. 183, 193, 215 (2017) (explaining the positive effects of the Islamic veil); ERICA HOWARD, LAW AND THE WEARING OF RELIGIOUS SYMBOLS: EUROPEAN BANS ON THE WEARING OF RELIGIOUS SYMBOLS IN EDUCATION 30 (2012) (exploring the arguments for and against the bans of religious symbols in the literature as well as in the case law of both the European Court of Human Rights and national courts across Europe); Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 2 CONST. L. REV. 164, 164 (2010) (criticizing the lack of comprehensive analysis in the European Court of Human Rights jurisprudence on the clash between gender equality and religious freedom). An interesting approach to the diversity of cases involving attire and appearance has been offered by Yofi Tirosh who suggests “that appearance adjudication should shift its focus from inquiring about the extent to which the appearance is connected to its bearer’s identity to inquiring about the significance of appearance to his or her personhood.” Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 YALE J.L. & FEMINISM 49, 49 (2007) (emphasis in original).

40. See Elkayam-Levy, *supra* note 12 (pointing to the implications of the absence of women’s right to freedom of religion or belief from CEDAW); see also Chinkin, *supra* note 39, at 71 (discussing the contested issue of women’s right to manifest their religion and noting notes that “[t]here are no consistent answers. States’ approaches reflect a complex interaction of diverse factors”). See generally Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) (pointing at the inability of international human rights law to handle religion and claims of religious individuals).

discriminate against women but fail to distinguish between them.<sup>41</sup> States are repeatedly called upon to eliminate practices that discriminate against women, making it not only a legitimate aim for employing restrictions on religious practices, but also a significant obligation of states.<sup>42</sup> Yet, aside from extremely harmful practices, treaty bodies and other international sources do not specify which practices justify intervention: All? Some? Only those of a certain type? What happens when this clashes with women's own expectations of religious freedom? The complexities that states experience in protecting women's rights to freedom of religion or belief appear to have been neglected or, at the very least, inadequately attended. For example, states confront serious practical challenges when addressing traditional practices because traditions of a less harmful nature raise a real dilemma about whether and when states should intervene to limit those practices, especially when such practices are carried out by women who express their consent and willingness to follow tradition.

One major gap that gives rise to this situation is that the right to freedom of religion or belief is not mentioned in the Convention to Eliminate Discrimination Against Women (CEDAW).<sup>43</sup> The CEDAW Committee currently has no mandate to address this right or to supervise its implementation. More pressingly, no state is being systematically monitored for protecting the fundamental right of women to freedom of religion or belief.<sup>44</sup>

## B. Conceptual Challenges (or What About Gender Equality?)

The obligation of states to protect the right of women's freedom of religion or belief is excruciatingly complex because this right presents conceptual difficulties regarding the protection of women in light of discriminatory religious norms. The interplay of religious liberties and states' commitment to gender equality is one that triggers thorny dilemmas about the extent to which states should be allowed to accommodate inegalitarian values or intervene to eliminate them. While we are used to considering how religious freedoms affect women, the more challenging discussion arises when this right is asserted *by* women. The right to freedom of religion or belief essentially protects "beliefs" and "practices."<sup>45</sup> It recognizes, on the one hand, the fundamental right of a woman to have or not to have beliefs, and on the other hand, her right to manifest those beliefs. While there should be an absolute protection for a woman's freedom to hold a belief, it may be legitimate to restrict her freedom to practice this belief.

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) reflects these core international commitments to the protection of

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41. See generally Chinkin, *supra* note 39.

42. *Id.*

43. See generally G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Sept. 13, 1981).

44. See Elkayam-Levy, *supra* note 12.

45. *Id.*

the right to freedom of religion or belief.<sup>46</sup> It states as follows:

1. *Everyone* shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>47</sup>

As with other provisions upholding this right,<sup>48</sup> Article 18 embraces these two distinct concepts and distinguishes between the freedom to believe and the limited freedom to act (or to exercise a religion or belief).<sup>49</sup> In its first two paragraphs, Article 18 unconditionally protects the freedom to have or to adopt a religion or belief of one's choice, and states that no one can be compelled to reveal, change, or practice a certain religion or belief. Article 18(3) then identifies circumstances in which a state may legitimately restrict the freedom to *manifest* a religion or belief, allowing only "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>50</sup> It thus permits the state to limit manifestations of religion or belief that are thought to be harmful to society or to the fundamental rights of other individuals.

The right to freedom of religion or belief covers all beliefs (religious and non-religious) and a wide range of practices, as well as the right not to profess any religion or belief.<sup>51</sup> Whereas individuals or groups may seek to promote a broad understanding of their freedom to (or from) religion or belief, states and public authorities may actually tend to emphasize "an expansive reading of limitations clauses and their responsibility to limit manifestations of religion that they believe are not in the interest of the State or the public."<sup>52</sup>

In most instances, therefore, the question is not whether a belief or a practice is protected by the right to freedom of religion or belief, but rather

46. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, T.I.A.S. No. 14668, 999 U.N.T.S. 171, 178 [hereinafter ICCPR].

47. *Id.* at art.18(1)-(3) (emphasis added).

48. *See, e.g.*, Convention on Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

49. *See* ICCPR, *supra* note 46, at art. 18.

50. *Id.* at art. 18(3).

51. U.N. High Commissioner for Human Rights, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, ¶ 2, U.N. Doc. CCPR/21/Rev.1/Add.4 (July 30, 1993) [hereinafter *General Comment No. 22*].

52. T. Jeremy Gunn, *Permissible Limitations on the Freedom of Religion or Belief*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION, *supra* note 6, at 254, 257.

whether or not a proposed state limitation is *justified*. If a state aims to restrict beliefs, the limitation is necessarily illegitimate. However, if the restriction targets manifestations only, it may prove to be justified if the debated measure satisfies each of the requirements set forth in Article 18.<sup>53</sup> It is in this context that a state may rightly justify imposing limitations on religious manifestations on grounds of concern for gender equality. Because many religious norms “presuppose [or] reinforce unequal gender roles, often with far-reaching discriminatory repercussions on women,” and provide the basis of religious practices, the right to freedom of religion or belief may indeed often negatively impact women and require states’ interference.<sup>54</sup>

Nevertheless, this does not mean that women only seek protection or state intervention to impose limitations on religious freedoms. Many women “feel attached to their religion and wish this personal attachment to be recognized as part of their (‘positive’) freedom of religion or belief.”<sup>55</sup> Moreover, there are also women who rely on their rights to freedom of religion or belief and to gender equality in order to demand the recognition of new, more equal modes of practice as well as to advance gender-sensitive interpretations of religious traditions.<sup>56</sup>

The ways in which women resort to their right to freedom of religion or belief and equality may be widely different.<sup>57</sup> Women may wish to abide by ancient *traditional beliefs* or choose to follow *new reformative interpretations*; both paths could be seen as promoting the rights of women to equality as long as these practices are not in any way harmful. As was recently noted in a commentary on the right to freedom of religion or belief:

Freedom of religion or belief is a norm to which liberals and conservatives, feminists, and traditionalists, etc. can—and do—refer in order to promote their various and often conflicting religious or belief-related concerns, including conflicting views in the field of religious traditions and gender issues.

. . . [Therefore,] the question of how freedom of religion or belief relates to women’s right to equality and other gender issues does not find one general answer but shows a broad range of positions and possibilities. The general

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53. *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 31 (“[R]estrictions on freedom of religion or belief cannot be legitimate unless they meet all the criteria prescribed for limitations in [A]rticle 18, paragraph [three], of the International Covenant on Civil and Political Rights. The reasonable assumption that promoting equality between men and women always constitutes a legitimate purpose does not in itself suffice to justify restrictions; such restrictions must also have a legal basis, they must actually be conducive to pursuing the said purpose[,] and one has to demonstrate that less restrictive means are not available.”).

54. BIELEFELDT ET AL., *supra* note 6, at 365. Such interference may limit religious practices for the sake of protecting women’s right to hold and to practice a religion or belief of their choice. *See id.*

55. *Id.* These various assertions about the right to freedom of religion or belief creates many challenges and conflicts. *See id.*

56. *See id.*

57. *See id.*

picture of activities in this area is complex, nuanced, and often confusing.<sup>58</sup>

Women's right to gender equality adds further difficulty because it not only prohibits discrimination against women on the basis of sex, but also on the basis of any other status including religion or belief. While a woman's right not to be discriminated against on the basis of sex may often conflict with the right to practice religion and justify limitations, *a woman's right not to be discriminated against on the basis of religion or belief is a central aspect of her religious liberty*. Claims about religious discrimination often arise as a defense of women's religious practices in order to oppose limitations. For example, bans on the religious practice that mandates women to wear burqas usually aim to eliminate gender discrimination but, at the same time, these bans have been claimed to discriminate against women on the basis of religion and to prevent them from enjoying the right to exercise their religion. Hence, a woman's right not to be discriminated against on the basis of religion or belief is intricately tied to her right to freedom of religion or belief.<sup>59</sup> This means that gender equality claims are inseparably linked with religious liberties claims, despite the fact that they might clash with each other as well.<sup>60</sup>

This multifaceted relationship presents conceptual challenges that are largely not reflected by international human rights bodies. Over the years, states have been repeatedly called upon to eliminate practices that discriminate against women, not only legitimizing restrictions on religious practices, but also assigning the responsibility of these endeavors to the states. For example, the U.N. Human Rights Committee insists that Article 18 cannot be relied upon to justify discrimination against women.<sup>61</sup> It asks that states protect women's rights against any discrimination.<sup>62</sup> The Committee even asserts that the rights of minorities to enjoy their culture and practice their religion (under Article 27) do not authorize violating the equal rights of women under the CEDAW; and if they do so, then they should be restricted.<sup>63</sup> In a similar vein, the Committee's *General Comment No. 22*

58. *Id.* at 372; see also *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 27.

59. See Elkayam-Levy, *supra* note 12. Although the prohibition of discrimination against women on the basis of religion or belief is protected under the right of women to equality, it is also one core aspect of women's right to freedom of religion or belief. The right of women not to be discriminated against on the basis of religion or belief includes both (1) the right not to be discriminated on the basis of their own religion or belief, and (2) the right not to be discriminated in the name of religion or belief (i.e., discrimination against women that is motivated by religion or belief/discrimination against women for not following a certain faith). See *id.*

60. For example, while some women may argue that a practice should be prohibited based on sex discrimination, others may claim that it should be protected because prohibiting the practice constitutes discrimination against women on the basis of religion.

61. See *General Comment No. 28*, *supra* note 34, ¶ 21.

62. *Id.*

63. The U.N. Human Rights Committee grants precedence to the individual rights of women over minority rights to practice religion. See *id.* ¶ 32 ("The rights which persons belonging to minorities enjoy under [A]rticle 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the

(on freedom of religion or belief) explains that “in interpreting the scope of permissible limitation” of religious freedoms, states should prioritize the need to protect women’s right to equality.<sup>64</sup> The right to practice religion is seen as a privilege; thus, when religious practices disadvantage women’s equal status, they should be limited.<sup>65</sup> Yet, it is much less clear what should happen when women are those demanding protection of their religious practices.

As previously stated, a major guiding influence is the CEDAW, but this convention does not contain provisions on women’s religious *freedom*. Instead, the CEDAW Committee targets religious practices and religious laws, noting that they notoriously affect women’s equal position in society and should thus be prohibited and eliminated.<sup>66</sup> The CEDAW Committee is in fact occupied with struggles regarding various states’ reservations made on the basis of religion or religious laws; therefore, in many of its concluding observations, it calls on states to eliminate religious practices that discriminate against women. The Committee further requires that states grant the principle of women’s equality an “overriding and enforceable status” through constitutional or other legislative means, especially when it is in conflict with discriminatory religious practices.<sup>67</sup> It explicitly

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right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. States should report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant . . . and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women. In their reports, States parties should pay attention to the contribution made by women to the cultural life of their communities”); *see also* Anat Scolnicov, *THE RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW: BETWEEN GROUP RIGHTS AND INDIVIDUAL RIGHTS 2* (2011) (claiming that “the supremacy of individual rights to group rights *ought* to be the interpretation of international law, and that largely it is so.”) (emphasis in original).

64. *General Comment No. 22, supra* note 51, ¶ 8 (placing the right to equality under Article 3, and the principle of non-discrimination under Articles 2 and 26 as important preliminary factors when assessing the limitations of religious liberties); *see also* Bennoune, *supra* note 38, at 404 (explaining that the U.N. Human Rights Committee singled out equality rights, proving that women’s equality can be a legitimate reason to restrict religious expression).

65. *See General Comment No. 22, supra* note 51, ¶ 8.

66. THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 411, 150 (Marsha A. Freeman et al. eds., 2012); *see, e.g.*, Marsha A. Freeman, *Article 16, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY, supra* note 66, at 411, 150 (“Article 16, in conjunction with Articles 2 and 5, requires States parties to prohibit discrimination, to eliminate discrimination in personal status laws[,] and to address the gender[-]stereotyping customary and religious law and practice that support persistent inequality within the family.”).

67. *See General Recommendation No. 28, supra* note 34, ¶ 31 (“States parties must ensure that, through constitutional amendments or by other appropriate legislative means, the principle of equality between women and men and of non-discrimination is enshrined in domestic law with an overriding and enforceable status.”). The CEDAW Committee further stresses that “domestic laws may never be used as justification for failures by States parties to carry out their international obligations.” *Id.* ¶ 33. Further-

calls on states parties, inter alia, to modify “existing laws, regulations, customs and practices which constitute discrimination against women,”<sup>68</sup> and to take all measures to eliminate social and cultural patterns of conduct and all other practices that “are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>69</sup> In short, like other treaty bodies and international sources, the CEDAW Committee frequently finds it satisfactory to express concern with discriminatory practices and to require that states eliminate them in the name of equality but does not specify how to do this when women are those defending these practices or, in other words, how this requirement to eliminate discriminatory practices corresponds with the obligation to protect women’s religious liberties.<sup>70</sup>

Considering this complexity, the task of responding to conflicts in this area seems onerous. To solve the tensions around women’s religious liberties, there is a need to disentangle the many contrasting appeals that may be presented and expose the multiple interests of women that are at stake. With the right of women to freedom of religion or belief not specified distinctly in any global instrument,<sup>71</sup> the starting point for governments and human rights advocates (or bodies) is not ideal: having to deal with the limited powers of treaty bodies, partial guidance on the implementation of women’s belief rights, and often great political resistance on the basis of religious and traditional beliefs by some states and by powerful religious entities. The gap in CEDAW coupled with religious resistance certainly dictates a very minimal protection of women’s belief liberties and little attention to the difficulties that liberal states have in balancing religious freedoms and equality claims.

Examining this situation, it is apparent that there are three different challenges that liberal states face: (1) responding to *harmful practices* that seriously threaten the most basic women’s human rights; (2) defining the limits to *traditional practices of women* that may appear to be conflicting with the right to gender equality or with other fundamental rights and freedoms, but that do not amount to harmful practices (namely those practices that seem to rely on discriminatory grounds but there is uncertainty on whether restrictions are justified); and (3) protecting *reformative practices* of women that are based on the belief that women and men are equal. Reformative practices rely on gender-sensitive understandings of religion in ways that fundamentally challenge traditional views and thus attract fierce, and even violent, religious opposition that requires devising special measures to protect women and communities that adhere to such

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more, courts should “draw . . . the attention of the appropriate authorities” to “any inconsistenc[ies] between national law, including national religious and customary laws, and the States part’s obligations under the Convention.” *Id.* ¶ 33.

68. G.A. Res. 34/180, *supra* note 43, at art. 2(f).

69. *Id.* at art. 5(a).

70. See Bennoune, *supra* note 38, at 404.

71. See Elkayam-Levy, *supra* note 12.

practices.<sup>72</sup>

These three types of practices raise distinct dilemmas about the dual and often entwined commitments of states to protect women's religious rights and women's equality rights. The next parts of this Article thus lay out the global norms that states should apply to address those challenges.

## II. Responding to Harmful Practices

Harmful practices are practices that are based on religion or other set of beliefs, and are often violent in nature or defy the most basic of women's rights.<sup>73</sup> These practices include, for example, female genital mutilation, forced marriages, and honorary killing, all of which are inflicted on women and girls in almost every region of the world.<sup>74</sup> Harmful practices are often associated with "serious forms of violence or are themselves a form of violence against women."<sup>75</sup> Therefore, many declarations, general comments, general recommendations, reports, and other international documents cover such violations in detail to aid states in devising measures for their eradication.<sup>76</sup> To date, harmful practices are the only practices that are clearly defined and thoroughly addressed by human rights bodies.

Harmful practices began receiving increased global attention during the early 1990s. It was then that the CEDAW Committee published its General Recommendation No. 14 on female genital mutilation—one of the most prevalent and well-documented harmful practices,—which causes long-term health problems to women and girls, including severe pain, shock, complications during childbirth, psychological trauma, and even death.<sup>77</sup> Shortly after, in 1993, the World Conference on Human Rights held in Vienna in the presence of 171 state representatives, urged states "to counter intolerance and related violence *based on religion or belief*, including practices of discrimination against women."<sup>78</sup> The same year, the Gen-

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72. See RUTH HALPERIN-KADDARI & YAACOV YADGAR, U.N. RSCH. INST. SOC. DEV., RELIGION, POLITICS AND GENDER EQUALITY AMONG JEWS IN ISRAEL 42, 43 (2010).

73. Joint General Recommendation, *supra* note 11, ¶ 7.

74. See *id.* ¶¶ 8, 15 ("Harmful practices are endemic to a wide variety of communities in most countries. Some are also found in regions or countries in which they had not been previously documented, primarily owing to migration, whereas in other countries where such practices had disappeared they are now re-emerging as a result of such factors as conflict situations.")

75. *Id.* ¶ 7. See generally Tahzib-Lie, *supra* note 12.

76. See Joint General Recommendation, *supra* note 11, ¶¶ 17-30; Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, ¶¶ 11, 18, 22, 23, U.N. Doc. A/47/38 (1992); *General Recommendation No. 28*, *supra* note 34, ¶¶ 8, 11, 22; U.N. Study on Freedom of Religion or Belief, *supra* note 4, ¶¶ 88-101. See generally Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female Circumcision*, U.N. Doc. A/45/38 (1990).

77. Joint General Recommendation, *supra* note 11, ¶ 19 (reporting that "[t]he World Health Organization and the United Nations Children's Fund estimate that between 100 million and 140 million girls and women worldwide have been subjected to a type of female genital mutilation."); see also *General Comment No. 28*, *supra* note 34, ¶ 11.

78. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 22, U.N. Doc. A/CONF.157/23 (June 25, 1993) (emphasis added).

eral Assembly adopted the Declaration on the Elimination of Violence Against Women, which clarifies that states must not invoke “any custom, tradition or religious consideration” to evade their obligations to eliminate violence against women.<sup>79</sup> The former U.N. Commission on Human Rights later joined these efforts and called upon states, “[i]n conformity with international standards of human rights, to take all necessary action to combat hatred, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, including practices which violate the human rights of women and discriminate against women.”<sup>80</sup> Since 1996, the U.N. Commission on Human Rights has explicitly stressed the need for its Special Rapporteur on Freedom of Religion or Belief to apply a gender perspective through “the identification of *gender-specific abuses*, in the reporting process, including in information collection and in recommendations.”<sup>81</sup> A large number of other global human rights’ documents have similarly targeted harmful practices conducted in the name of religious, traditional, or cultural attitudes.<sup>82</sup> The issue has also been extensively developed by treaty bodies in their general recommendations and general comments. For example, to date, the CEDAW Committee has referred to harmful practices in ten of its thirty-one general recommendations.<sup>83</sup>

In 2014, the CEDAW Committee and the Committee on the Rights of the Child (CRC) issued a joint general recommendation exclusively dedicated to harmful practices.<sup>84</sup> This joint general recommendation addresses the identification, prevention, and elimination of harmful practices. It defines harmful practices as “persistent practices and forms of behavior[r] that are grounded in discrimination” against women and children and that often involve “violence and cause physical [or] psychological harm[,] or suffering.”<sup>85</sup> Among the most widespread recorded practices that the Committees mention are “female genital mutilation, . . . forced marriage, polygamy, and crimes committed in the name of so-called hono[r] and dowry-related violence.”<sup>86</sup>

It is widely agreed that harmful practices disproportionately affect women and girls. The committees explain that harmful practices are

79. G.A. Res. 48/104, at art. 4 (Dec. 20, 1993).

80. Comm’n on Hum. Rts., Rep. on the Fifty-Fourth Session, U.N. Doc. E/CN.4/1998/177, at 78 (1998).

81. Human Rights Council Res. 6/37, U.N. Doc. A/HRC/RES/6/37, ¶ 18 (Dec. 14, 2007) (emphasis added).

82. See e.g., G.A. Res. 52/99, Traditional or Customary Practices Affecting the Health of Women and Girls, at 5 (Feb. 9, 1998); Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 124, U.N. A/CONF.177/20 (Sept. 15, 1995) (calling upon States to take legislative or other measures against harmful cultural practices). See *id.* ¶ 113 (marking further progress when violence against women was given a definition that allowed the incorporation of harmful practices such as dowry-related violence, female genital mutilation, female infanticide, and prenatal sex selection).

83. See Joint General Recommendation, *supra* note 11, ¶ 10 n.5.

84. See generally *id.*

85. *Id.* ¶ 15.

86. *Id.* ¶ 7.

“deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles,”<sup>87</sup> and patriarchal notions.<sup>88</sup> Harmful practices in fact emphasize “the gender dimension of violence,”<sup>89</sup> and constitute a grave violation of the most fundamental of women’s human rights. The harm that such practices cause to victims “surpasses the immediate physical and mental consequences” and has “a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education[,] and economic and social status.”<sup>90</sup>

The 2014 joint recommendation outlines the specific criteria of harmful practices so states can identify them more easily. It is noted that to be regarded as harmful, states should ascertain that the practices: (1) form “a denial of the dignity [or] integrity”; (2) amount to discrimination that has “negative consequences for [women] as individuals or groups, including physical, psychological, economic and social harm”; (3) are set out by social norms that “perpetuate male dominance and [gender] inequality”; and, lastly, (4) are “imposed on women regardless of whether the victim provides, or is able to provide, full, free and informed consent.”<sup>91</sup> Once proven as such, the committees urge states to set clear prohibitions, and provide means for victims’ recovery and protection.<sup>92</sup> Harmful practices thus constitute crimes and should be treated as such.

Although harmful practices are often “justified by invoking sociocultural and religious” norms,<sup>93</sup> it is clear from the above discussion that there is no real dilemma regarding whether or not harmful practices should be restricted and prohibited. The gravity of these violations, the infringement of not one but several basic women’s human rights, and the long-term adverse effect on women make irrelevant the question of whether or not Article 18 of the ICCPR permits limitations of these religious manifestations of harmful practices. It is obvious that freedom of religion or belief cannot protect such cruel practices.<sup>94</sup> The question of permissible limita-

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87. *Id.* ¶ 6.

88. *Id.* ¶ 9.

89. *Id.* ¶ 6.

90. *Id.* ¶ 15.

91. *Id.* ¶ 16.

92. *Id.* ¶ 13.

93. *Id.* ¶ 7.

94. *Interim Report of Special Rapporteur on Freedom of Religion or Belief, supra* note 6, ¶ 46.

Measures to eradicate violations of women’s human rights necessarily include State-enforced prohibitions of harmful practices. An extreme example is female genital mutilation, which leads to lifelong and far-reaching health problems, as well as grave forms of traumatization. . . . Be that as it may, freedom of religion or belief clearly does not protect such cruel practices. If individuals or groups were to invoke their right to freedom of religion or belief in order to get permission to perform such harmful practices, this must become a case for restricting these manifestations of religion or belief, in conformity with the criteria laid down in [Article 18(3)], of the International Covenant on Civil and Political Rights.

*Id.* ¶ 46; see also Raday, *supra* note 5, at 709–10; BIELEFELDT ET AL., *supra* note 6, at 366.

tions appears utterly mundane in the context of harmful practices.

However, because individuals and groups frequently invoke their religious rights in order to perform such practices, it is important to note that harmful practices require not only explicit limitations by states but comprehensive prohibitions and sanctions.<sup>95</sup> Article 18(3) is therefore important in that it provides the criteria for restricting belief manifestations.<sup>96</sup> While the joint recommendation calls to criminalize harmful practices “in accordance with the gravity of the offence and harm caused,”<sup>97</sup> Article 18(3) specifically provides the appropriate test for such prohibitions.<sup>98</sup> It requires that limitations be “necessary,” which is taken by international tribunals to suggest that the restriction be “proportional” to the harm that the state seeks to avoid.<sup>99</sup> This requirement is met by verifying that there is no “less restrictive alternative action that the state could have employed that similarly would have eliminated the real harm,” and that would have “imposed less of an infringement on the human right[s] in question.”<sup>100</sup> If there is an alternative that could satisfy the state’s legitimate interests to ban the harmful practice, then “the less burdensome alternative should be employed.”<sup>101</sup> For example, it could be true that long-term incarceration penalties would prevent the practice of polygamy, but it might be the case that shorter term detention periods coupled with high financial penalties, educational programs, and strong enforcement mechanisms would be far more effective in preventing this practice.

Although the joint recommendation does not address the right to freedom of religion or belief, it should be read together with General Comment No. 28 of the U.N. Human Rights Committee (concerning Article 3 of the ICCPR, which calls for equality between men and women). There, the U.N. Human Rights Committee specifically states that harmful practices violate many women’s rights and underscores that freedom of religion or belief “may not be relied upon to justify discrimination against women.”<sup>102</sup> It reminds states of their obligations under Article 5 of the ICCPR, which insists that nothing in the covenant may be interpreted “as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights provided for in Article 3, or at limitations not covered by the Covenant.”<sup>103</sup> Furthermore, according to

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95. See *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 46.

96. See G.A. Res. 2200A (XXI), at art. 18 (Mar. 23, 1976).

97. Joint General Recommendation, *supra* note 11, ¶ 13.

98. Article 18(3) recognizes that the “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR, *supra* note 46, at art. 18.

99. Gunn, *supra* note 52, at 265.

100. *Id.*

101. *Id.*

102. *General Comment No. 28*, *supra* note 34, ¶ 21.

103. *Id.* ¶ 9 (adding that “there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does

the U.N. Human Rights Committee, states should take into consideration that “[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.”<sup>104</sup> It calls upon state parties to ensure that “traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”<sup>105</sup> In fact, the committee requires that states provide “appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with [A]rticle 3, and indicate what measures they have taken or intend to take to overcome such factors.”<sup>106</sup>

Moreover, the U.N. Human Rights Committee identifies other harmful practices beyond those mentioned by the CEDAW and CRC. These include: “prenatal sex selection and abortion of female fetuses”;<sup>107</sup> “practices that violate [women’s] right to life, such as female infanticide, [and] the burning of widows”;<sup>108</sup> “practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house”;<sup>109</sup> practices which restricts women’s right to freedom of movement, for example the exercise of marital powers over the wife or parental powers over adult daughters, and requirements which prevent women from travelling;<sup>110</sup> “practices that prevent women from being treated or from functioning as full legal persons,” and limit “the capacity of women to own property, to enter into a contract or to exercise other civil rights . . . on the basis of marital status or any other discriminatory ground”;<sup>111</sup> “practices that may interfere with women’s right to enjoy privacy” and require, for example, “the husband’s authorization to make a decision in regard to sterilization”;<sup>112</sup> forced marriage;<sup>113</sup> practices and laws that fail to ensure women’s equality in regards to divorce and dissolution of marriage “as well as decisions with regard to property distribution, alimony and the custody of children”;<sup>114</sup> “practices which jeopardize the freedom and well-being of

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not recognize such rights or that it recognizes them to a lesser extent.”); *see also* NAZILA GHANEA, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, WOMEN AND RELIGIOUS FREEDOM: SYNERGIES AND OPPORTUNITIES 8 (2017), <http://www.uscirf.gov/sites/default/files/WomenandReligiousFreedom.pdf> [<https://perma.cc/B83S-TPST>] (detailing the ICCPR rights that may be violated by harmful practices).

104. *General Comment No. 28*, *supra* note 34, ¶ 5.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* ¶ 10.

109. *Id.* ¶ 14.

110. *Id.* ¶ 16 (using as an example “the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. States parties should also report on measures taken to eliminate such laws and practices and to protect women against them, including reference to available domestic remedies”).

111. *Id.* ¶ 19.

112. *Id.* ¶ 20.

113. *Id.* ¶¶ 21, 23, 24.

114. *Id.* ¶ 26.

female children;<sup>115</sup> and lastly, severe penalties on women for adultery or other offences.<sup>116</sup> The many examples that the Human Rights Committee provides for states are important since they specify states' obligations and may therefore increase the potential for implementation.

Several other U.N. mechanisms offer concrete guidance on the elimination of harmful practices. Perhaps the most significant of those have been the U.N. Special Rapporteurs on Freedom of Religion or Belief, which were given a specific mandate to investigate gender issues relating to the freedom of religion or belief.<sup>117</sup> In the past two decades, the rapporteurs on freedom of religion or belief have played a central role in raising awareness to harmful practices. They drew attention to several such practices where women were the principal victims of grave human rights violations that were asserted in the name of religion.<sup>118</sup> The Special Rapporteurs on Freedom of Religion or Belief have in fact included women as among their priority issues.<sup>119</sup> Relatively recently, the rapporteurs submitted two extensive reports dedicated to freedom of religion or belief and the equal status of women.<sup>120</sup> One of them, issued in 2009 by Abdelfattah Amor, presented a thorough "study on Freedom of Religion or Belief and the Status of Women in the light of Religion and Traditions" where the rapporteur analyzed harmful practices.<sup>121</sup> Amor explains that these practices are frequently justified in the name of religion or culture and notes that, even to this day, discrimination against women is still "deeply rooted in the dominant culture of some countries" and "is largely based on or imputed to religion."<sup>122</sup> The study covers numerous examples of harmful practices that assume "very cruel forms and den[y] women their most fundamental rights, such as the right to life, integrity or dignity,"<sup>123</sup> and in the end concludes that "collective manifestations of freedom of religion" are "exercised in many countries in a manner injurious to the status of women."<sup>124</sup> Among the many measures the study sets out to protect women from such religious manifestations, it recommends formal constitutional and legisla-

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115. *Id.* ¶ 28.

116. *See id.* ¶ 31.

117. Human Rights Council Res. 6/37, U.N. Doc. A/HRC/RES/6/37, ¶ 18 (Dec. 14, 2007).

118. *See, e.g.*, U.N. Study on Freedom of Religion or Belief, *supra* note 4, ¶ 97; Human Rights Council Res. 60/251, U.N. Doc. A/HRC/4/21, ¶¶ 37, 39 (Dec. 26, 2006); *see also* BIELEFELDT ET AL., *supra* note 6, at 376.

119. *See, e.g.*, Comm'n on Hum. Rts., Rep. on the Fifty-Fourth Session, U.N. Doc. E/CN.4/1998/177, at 110 (1998); G.A., Fifty-Second Session, Agenda Item 112(b), U.N. Doc. A/52/477, ¶ 89 (Oct. 16, 1997) (announcing that special attention will be given to the status of women in light of religion and traditions).

120. *See generally* U.N. Study on Freedom of Religion or Belief, *supra* note 4; *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6. For a detailed examination of the work of the Special Rapporteurs in this area, *see* BIELEFELDT ET AL., *supra* note 6, at 363 (exploring international standards relating to women's rights and freedom of religion or belief).

121. U.N. Study on Freedom of Religion or Belief, *supra* note 4, at 1.

122. *Id.* ¶ 1.

123. *Id.*

124. *Id.* ¶ 191.

tive recognition of gender equality by states, educational programs, training, law enforcement, and public awareness activities.<sup>125</sup>

To summarize the above, harmful practices often violate a number of women's fundamental rights, result in far-reaching negative consequences for women, deny women's dignity and integrity and are either associated with serious forms of violence against women or constitute violence themselves. As such, they have been widely condemned and addressed by various human rights bodies and state declaration, which asserted that harmful practices cannot be protected as religious manifestations even if they rely on religious customs, values, or beliefs, and should be strictly prohibited. By contrast, the right to freedom of religion or belief of women and girls that are subject to harmful practices should actually be *one of the conceptual bases to prohibit such harmful religious manifestations*, as they impede the very right of women and girls to believe (i.e., the *forum internum* of the right to freedom of religion or belief).<sup>126</sup>

Other arguably more-moderate religious practices require entirely different treatment and measures and deserve separate consideration since they present distinct challenges for states. The discussion in the next two sections distinguishes between those practices of women that are based on traditional beliefs and customs (i.e., traditional practices) and those that are based on new interpretations that strive to change religion so it would reflect women's equal status in society (i.e., reformative practices). Each of these two sets of practices raises different legal questions regarding the protection of women's rights to freedom of religion or belief and to equality.

### III. Defining the Limits of Traditional Practices

Harmful practices are the only clearly defined practices in international human rights law. As previously mentioned, CEDAW and CRC issued a joint recommendation in 2014 for that purpose.<sup>127</sup> Other practices have no such clear definitions. Traditional practices, which fall short of being classified as harmful practices, may seriously disadvantage women's rights but may not amount to the severity of harmful practices. Thus, this Part argues that they are among the group of practices that merit a definition and clear criteria for applying limitations. Traditional practices may include discriminatory ideas but, because they are less harmful, they are generally protected by the right to manifest a religion or belief. This Part, therefore, also attends to the formidable question of permissible limitations, clarifying under what circumstances traditional practices deserve the protection of the right to freedom of religion or belief and when they must be subject to limitations on grounds of concern to gender equality or other fundamental women's rights. This Part first defines traditional

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125. *Id.* ¶¶ 191-217.

126. See *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 60.

127. See Joint General Recommendation, *supra* note 11, ¶ 2.

practices, ultimately revealing that women's right to manifest traditional practices was not taken into consideration by treaty bodies. Human rights bodies continue to advocate for the elimination of discriminatory practices without taking into consideration the fact that women may be the ones who choose to follow them.<sup>128</sup> When it is women who choose to follow traditional practices (even if these practices are discriminatory), the call to eliminate them is problematic. It fails to engage with the complex challenge of protecting women's religious liberties and the rights of religious women.

#### A. Defining Elements of Traditional Practices

First, traditional practices can be defined as practices that rely on religious or cultural norms that often presuppose unequal positions and roles of men and women. Like harmful practices, they are "deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles."<sup>129</sup> They are based on traditions that often create or justify structures that differentiate women from men (or that simply rely on religion "as is"). Therefore, traditional practices may frequently appear to be compromising on women's equality at best, and highly discriminatory and degrading at worst. Traditional practices include, for instance, women's covering of their hair, face, or entire body on the basis of norms dictating women's dress; modesty rules that require separation of women from men in public spaces, buses, pools, etc., or that create other forms of segregation in religious communities; limitations on women's ability to assume public, religious, and political leadership roles; or limitations on women's access to places of worship.

Although traditional practices may well hinder women's full and equal enjoyment of fundamental human rights, they do not fall under the current definition of "harmful practices."<sup>130</sup> As said, harmful practices often involve various grave forms of psychological and physical violence that cannot be similarly established for traditional practices. Frances Raday refers to such practices as "lesser infringements" of the right to gender equality that should generally be distinguished from harmful practices which deny women "the most basic of their human rights and that undermine[] their very personhood and their capability for dissent."<sup>131</sup> Beyond the differences in the gravity of the harm, traditional practices differ from harmful practices in that "no consent can be considered genuine" for harmful practices.<sup>132</sup> The question of consent is actually central in assessing the legitimacy of traditional practices and the fundamental assumption is that if there is informed consent, then the traditional practice should be protected

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128. See U.N. Study on Freedom of Religion or Belief, *supra* note 4, ¶ 34.

129. Joint General Recommendation, *supra* note 11, ¶ 6.

130. See generally Joffe, *supra* note 36 (discussing the accommodation of religious and cultural traditions and its impact on women's rights).

131. Raday, *supra* note 5, at 710; see also GHANEA, *supra* note 103, at 9.

132. Raday, *supra* note 5, at 701.

to respect the basic freedom of individuals to practice their chosen faith. As Raday puts it:

It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the acceptor. This liberty to choose is an essential part of the freedom of religion and the right to equal autonomy of the individual[s].<sup>133</sup>

Third, in that connection, traditional practices of women are perhaps protected by the right to manifest religion but present a distinct challenge of how to validate the consent of the believer. In practice, determining whether women were able to provide full, free, and informed consent is often a very complex task. It is particularly difficult to validate the consent of women who live in closed or particularly orthodox religious communities. Under these circumstances, it is almost impossible to verify whether women can genuinely express free choice regarding their beliefs and practices and whether they have enough *power* to convey their independent opinion. Women who are members of religious minority groups, for example, may be subject to internal pressures and often do not have a path to truly challenge their own communities. Alternatively, these women may be too afraid to be perceived as “betraying their own background [and tradition,] and as being disruptive to their community.”<sup>134</sup>

In addition, the issue of consent by young girls ought to be given special consideration. The free choice of girls—regarding whether or not to wear, for example, concealing religious garments—is questionable if not unreliable. In Israel, for instance, several Jewish and Muslim religious groups cover young girls with hijabs (a headscarf revealing only the face) or burqas (a garment concealing the face and the body).<sup>135</sup> Such practices raise real concerns over coercion since, as Karima Bennoune argues, girls may be especially vulnerable “to pressure, including peer pressure . . . and need extra protection from religious extremists and coercive family members.”<sup>136</sup> Therefore, the issue of consent is a major challenge when assessing traditional practices that does not exist for harmful practices. It is hard to ascertain whether women and girls have been coerced into following traditional practices. Hence, justifying necessary limitations to protect women is fundamentally more complicated for traditional practices than it is for harmful practices.

Fourth, whereas the pervasive negative consequences of many harmful practices are well recognized, documented and condemned, the adverse impact of traditional practices is often more controversial, especially when

133. *Id.*

134. Chinkin, *supra* note 39, at 62; *see also*, Suzan Moller Okin, *Is Multiculturalism Bad for Women*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 24 (Joshua Cohen et al. eds, 1999) (arguing that “older women [are] often co-opted into reinforcing gender inequality”).

135. *See* Sumanto Al Qurtuby, *Does the Hijab Belong to Islam Only?*, WAHID FOUND. (Oct. 2016), <http://wahidfoundation.org/eng/index.php/news/detail/Does-The-Hijab-Belong-to-Islam-Only> [<https://perma.cc/69JZ-YGYR>].

136. Bennoune, *supra* note 38, at 406.

women are those defending tradition.<sup>137</sup> In fact, it seems that traditional practices are now receiving more support from religious women's groups than ever before. The human rights discourse over religious freedoms and gender equality is in many ways changing towards greater acknowledgement of women's empowerment through religion.<sup>138</sup> While in the past, traditional practices were automatically categorized and understood as harmful to women and as jeopardizing women's equal status in society,<sup>139</sup> this is not the case today. Human rights agendas seem to be preoccupied now more than ever with various assertions about women's empowerment through religious rights. Surely, this shift is important because it signifies a developing interest in women's modes of practice and gender-sensitive understandings of their enjoyment of religious liberties. States are also encouraged by global human rights bodies to search for synergies between the right to freedom of religion or belief and equality.<sup>140</sup> Yet, as part of this change, women are increasingly those offering feminist explanations to justify traditional practices. This was obvious, for example, in the case of *SAS v. France*, where the applicant insisted that the wearing of a full-face and body covering "denoted women's emancipation, self-assertion and participation in society," and gained the support of several prominent human rights' organizations that joined the proceedings for this purpose.<sup>141</sup> Therefore, unlike harmful practices, traditional ones generate polemic opinions and their acceptance may at times risk the advancement of the right to gender equality.

To summarize the above elements, traditional practices are practices that rely on religious or cultural norms that often differentiate between men and women. They constitute discrimination against women when they place a greater social, economic, or other burden on women and are similar to harmful practices in that they may similarly perpetuate "gender-based attitudes and stereotypes, power imbalances," and gender inequalities.<sup>142</sup> Traditional practices are subsequently suspected of violating women's equality and other women's human rights. Nevertheless, traditional practices prove to be very different from harmful ones. Although traditional practices may negatively influence women's rights, they do not do so to the extent that harmful practices do. Thus, traditional practices are protected by the right to freedom of religion or belief and thus involve challenges in the protection of gender equality that are very different from those raised by harmful practices. Particularly, traditional practices prompt a dilemma between the protection to manifest them, and the requirement to employ restrictions when women's consent is questionable.

Because they are less harmful to women,<sup>143</sup> restricting traditional

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137. See *id.* at 385.

138. See generally Elkayam-Levy, *supra* note 12.

139. *Id.*; see, e.g., Raday, *supra* note 5, at 701–09.

140. See GHANEA, *supra* note 103, at 1.

141. *S.A.S. v. France*, 2014 Eur. Ct. H.R. 695, 730.

142. Joint General Recommendation, *supra* note 11, ¶ 6.

143. And because it may prove difficult to determine that they are *imposed* on women (e.g., by their religious community) rather than *chosen* by women.

practices raises serious difficulties for states (and for other relevant stakeholders that need to assess such practices) to find sufficiently compelling justifications for setting limitations and may require a delicate balance between various interests that states may have (including, for example, respect for religious minorities). Those difficulties in justifying limitations become even more challenging when traditional practices are performed and defended by women themselves. In these cases, reliance of states on gender equality arguments to limit women's practices can seem not only paternalistic and condescending but patriarchal in itself. States may struggle to overcome this somewhat circular obstacle where attempts to promote women's equality rights are met with resistance because of concern for women—particularly, the concern for women's religious rights and their right not to be discriminated against on the basis of religion or belief.

The question that follows from this discussion is: How can states nevertheless define limits to traditional practices in circumstances that involve possible infringements of gender equality and other women's rights? There are several principal rules that should guide the response to this dilemma.

#### B. Coercion Is Prohibited

ICCPR provisions protect the right of women to equality<sup>144</sup> and to freedom of religion or belief,<sup>145</sup> and include several provisions prohibiting discrimination, whether on the basis of sex or religion.<sup>146</sup> As noted before, Article 18 unconditionally protects the right to believe and bars any coercion that would impair this right.<sup>147</sup> Article 18(3) nevertheless permits certain limitations on the right to practice a religion or belief.<sup>148</sup> Such limitations must be prescribed by law and must be clearly necessary to pursue a legitimate aim, such as the protection of “public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>149</sup> Hence, states must ensure that the right to freedom of religion or belief—including the freedom to adopt, change and to manifest one's religion or belief—will be protected in law and in practice for both men and women, “on the same terms and without discrimination.”<sup>150</sup>

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144. ICCPR, *supra* note 46, at art. 3.

145. *Id.* at art. 18.

146. *Id.* at arts. 2, 26 (guaranteeing to all individuals the rights under the Convention “without distinction of any kind” including on the basis of sex and religion and ensuring “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

147. *Id.* at art. 18.

148. *Id.* at art. 18(3).

149. *Id.*

150. See *General Comment No. 28, supra* note 34, ¶ 21 (“States parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice—including the freedom to change religion or belief and to express one's religion or belief—will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination.”).

Having said that, Article 18 does not permit coercion. Article 18(2) specifically notes that no one shall be subject to coercion, which would impair the freedom to have or to adopt a religion or belief of one's choice.<sup>151</sup> According to the U.N. Human Rights Committee, this provision bars all forms of such coercion "including the use of 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."<sup>152</sup> Article 18, in fact, "does not permit any limitations whatsoever" on the freedom to have or adopt a religion or belief and no one can be compelled to follow a certain belief or to perform a religious practice.<sup>153</sup> Women's religious freedoms in particular should not be constrained by "rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others."<sup>154</sup> If state laws, for example, require that women adopt or act by a certain traditional practice or mandate religious practices, they are necessarily illegitimate and violate the *forum internum* dimension of the freedom of religion or belief; that is, the very right of women to believe and to adopt a religion or belief of their choice.<sup>155</sup> Hence, coercion of any kind by any entity on women to keep a traditional practice violates women's right to hold a religion or belief of their choice as well as other fundamental rights including the right to personal autonomy. Based on these provisions, traditional practices necessarily justify state intervention when they are coercive. Traditional practices that are imposed on women are a clear violation of women's human rights regardless of the severity of the infringement; in other words, regardless of whether or not they qualify as "harmful practices."

Where it seems that there is no coercion to follow a traditional practice, then as noted before, traditional practices are generally protected by the right to manifest religion or belief. Yet, in instances where women's consent is questionable or where it is difficult to prove the existence of coercion, states should be more diligent about their obligation to protect not only the right to gender equality but these women's fundamental belief liberties. Heiner Bielefeldt, former U.N. Special Rapporteur on Freedom of Religion or Belief, suggests in that regard that states should look for empirical evidence that proves the absence of consent when attempting to protect women from pressure and may not rely on speculative assumptions that women do not follow a traditional practice of their own free will.<sup>156</sup>

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151. See ICCPR, *supra* note 46, at art. 18(2).

152. *General Comment No. 22*, *supra* note 51, ¶ 5.

153. *Id.* ¶ 3.

154. *General Comment No. 28*, *supra* note 34, ¶ 21.

155. *Id.*

156. See *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 47 ("Before resorting to restrictions on the freedom to manifest one's religion or belief, legislators or representatives of the judiciary should always analyze the respective cases with empirical and normative precision. However, States sometimes impose restrictive measures in a rather loose way, beyond the confines of [Article 18(3)] of the [ICCPR].").

However difficult this decision may prove to be in practice, women who choose to adhere to traditional practices should generally be allowed to do so as part of their right to practice their religion or belief. Raday emphasizes that even when individuals choose to follow “inegalitarian cultural or religious norms,” their religious liberty to do so must be respected.<sup>157</sup> Where traditional practices are not violating human rights, then the freedom of women should be preserved and should be taken to reflect a personal preference that generally “precludes intervention by the state.”<sup>158</sup>

That said, the reality is often more complex and the consent of a woman or the approval of a group of women to follow a traditional practice is not enough to release states from their obligation to ensure equality and non-discrimination against women. For example, Ayelet Shachar explains, in the context of the Canadian debate over the establishment of a private Muslim arbitration tribunal, that despite the support voiced by women’s groups, there remain many measures for states to take in order to address the serious concern regarding women’s rights created by the existence of this tribunal.<sup>159</sup> She notes that in light of the religious obedience expected from the parties in religious tribunals, “the language of ‘choice’ or ‘free will’ in discussions on whether individuals will submit their disputes to the tribunal’s authority is entirely without substance.”<sup>160</sup> Shachar notes that the duties of loyalty to the group under Muslim family law “leaves little if any room for individual choice by women who care about their group affiliation.”<sup>161</sup> The male identity of arbitrators,<sup>162</sup> and the uncompromising authoritative religious statements that were voiced, also raise serious concerns.

For this reason, states must remain vigilant, take active measures to ensure women’s consent and add as many legal safeguards as possible to ensure that women members of traditional religious groups will be adequately protected if and when they choose to adhere or not to adhere to a traditional practice.<sup>163</sup> In another context, Shachar has offered parallel civil review processes and several amendments to the Canadian Arbitration Act to make it more compatible with the concerns involved regarding the participation of religious women in these private religious arbitration proceedings.<sup>164</sup> Her innovative engagement with the requirements of religious groups, particularly those made up of religious women, is a perfect example of the kind of involvement that states should employ in devising strategies to tackle traditional practices that seem to risk women—even if women

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157. Raday, *supra* note 5, at 701 (noting that “[t]he autonomy of the individual is the ultimate source of legitimacy”).

158. *Id.* at 708.

159. See Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 74-76 (2005).

160. *Id.* at 74.

161. *Id.*

162. See *id.*

163. See *id.* at 75-77.

164. See *id.* at 75.

themselves defend and accept these practices.<sup>165</sup> States have an obligation not to abandon efforts to promote gender equality and to remain very active and creative, and perhaps even more so in circumstances where women express consent to continue to follow traditional practices. States must attempt to find a delicate balance between the twin goals of gender equality and ensuring women's religious freedom.

In a similar vein, Raday adds an even greater responsibility on states to guarantee and facilitate an environment that would promise women's consent.<sup>166</sup> She notes that women's consent should be actively validated, especially in patriarchal communities.<sup>167</sup> She argues that states must examine "the quality of women's consent" and that "it is incumbent upon [states] to establish the conditions for genuine, free, and informed consent."<sup>168</sup> For that purpose, she claims that states ought to create "a spectrum of measures to create an educational and economic infrastructure that will augment women's autonomy, indeed, that will offer autonomy as an alternative."<sup>169</sup>

Thus, as a general rule, states must put limits on traditional practices that involve coercion and follow their obligation to ensure that traditional practices are performed by a woman's free will. Traditional practices that are indeed performed from validated free will are covered by the right to practice a religion or belief and may not be limited, even if they appear discriminatory to women or create a certain sense of unease to non-observers. While states should not intervene to restrict such traditional practices, they remain obligated to protect the right to gender equality and must make sure adequate legal safeguards protect women's interests. This is certainly true in circumstances in which coercion seems to be involved but cannot be proved or is difficult to prove, but also in situations in which women are the ones defending these practices. In other words, women's approval of a certain traditional practice does not free states from their international obligation to eliminate discrimination against women and take active steps to guarantee a powerful position for women.

### C. Infringement of the Rights of Others and Practices that Are Harmful to Society

Although traditional practices are generally protected if there is no coercion, there are instances in which these practices may very well hinder the rights of others or prove to be harmful to society. As mentioned, Article 18(3) permits limitations on the right to practice a religion if they are prescribed by law and are clearly necessary to pursue a legitimate aim.<sup>170</sup> Hence, if there is an infringement of the rights of others, or if states view the limitation to be necessary to prevent harm to society, states may legiti-

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165. *See id.* at 76.

166. *See Raday, supra* note 5, at 696.

167. *See id.* at 710.

168. *Id.*

169. *Id.*

170. ICCPR, *supra* note 46, at art. 18(3).

mately pass laws to restrict traditional practices.<sup>171</sup>

Traditional practices cannot be protected where they violate fundamental rights or freedoms of others. Indeed, an unease with traditional practices of men and women becomes a serious concern where the debated practice involves a violation of another's human rights, or when it limits women's basic capacities.<sup>172</sup> For example, in a case brought before the European Court of Human Rights regarding the use of hijabs, the court accepted that the wearing of hijab at a Turkish University bears the risk of becoming compulsory and may result in imposing religious duties on other female students considering the political and social context in Turkey.<sup>173</sup> Although many critiqued the courts' decision,<sup>174</sup> there seems to be agreement on that when such assumptions are based on empirical evidence, then limiting such religious practices could prove necessary and legitimate for the protection of gender equality and the rights of others.<sup>175</sup> The same is true of burqas.<sup>176</sup> Though it has become popular to argue for the right of women to wear burqas, there is empirical evidence that this full face and body garment can negatively affect women's enjoyment of the right to work, the right to health, the ability to acquire education, and the ability to function as free individuals.<sup>177</sup>

Article 18(3) of the ICCPR indeed permits restrictions on religious manifestations, but only if the limitations are (1) prescribed by law, (2) aimed at protecting a specified right or a legitimate aim, and (3) necessary for the protection of said specified right or goal.<sup>178</sup> General Comment No. 22 on freedom of religion or belief further explains that Article 18(3) "should be strictly interpreted,"<sup>179</sup> suggesting that restrictions of traditional practices should not be easily applied and should only rely on the grounds specified in the provision.<sup>180</sup>

For restrictions to be legitimate, according to the U.N. Human Rights Committee, all of the three conditions of Article 18(3) must be satisfied.<sup>181</sup>

171. In this respect, women's religious freedoms may not be subject to any restriction other than those covered in Article 18(3). See *General Comment No. 28, supra* note 34, ¶ 21.

172. See Raday, *supra* note 38; see also Raday, *supra* note 5, at 708.

173. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 24-25; see also Bennoune, *supra* note 38, at 381 (concluding that because "Turkey is ninety-nine percent Muslim, removing the concern of certain types of discrimination, these measures taken to combat fundamentalist coercion of students were seen as justified" in the context of the Turkish society).

174. See Benjamin Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 129, 149 (2005).

175. See *id.* at 167.

176. See Raday, *supra* note 38.

177. See *id.*

178. ICCPR, *supra* note 46, at art. 18(3).

179. *General Comment No. 22, supra* note 51, ¶ 8 (explaining that "restrictions are not allowed on grounds not specified" in Article 18 of the ICCPR).

180. See *id.*

181. See *id.*

The first condition obliges states to enact laws.<sup>182</sup> Hence, the limitation of traditional practices must be based on specific legislation and not simply on a policy or a standard resolution of state authorities.<sup>183</sup> The second condition identifies five legitimate aims upon which a state may restrict manifestation of traditional practices and, more specifically, lists the need to protect “the fundamental rights and freedoms of others.”<sup>184</sup> The third condition, requiring that the limitation be “necessary,” means that limitations imposed on traditional practices “must be directly related and proportionate” to the specific need to protect the fundamental rights of women, including the right to equality.<sup>185</sup> This proportionality examination indicates that a state needs to prove that there is a harm; that said harm can be associated with the manifestation of the particular traditional practice it wishes to restrict; and “that the procedures it employs are effective in reducing or eliminating this harm.”<sup>186</sup> As part of this examination, states “must resort to the least restrictive alternative way” of achieving their objective.<sup>187</sup> Therefore, if there is a less restrictive alternative available, then it should be employed.<sup>188</sup>

In this regard, Bielefeldt emphasizes the importance of providing empirical and normative evidence that proves that the restrictions are necessary.<sup>189</sup> To the extent that state restrictions of traditional practices meet these requirements, the restrictions are presumably justifiable.

#### D. Gender Equality Claims: Addressing the Gap Regarding Traditional Practices

Traditional practices are unique and very different from harmful practices in that despite the risk they may present to women, they are less harmful and generally permissible if a woman expresses free, genuine consent to obey them. Justifying limitations is fundamentally more complicated for traditional practices than it is for harmful practices. Traditional practices also present a distinct challenge to validate the consent of the believer.

The need to distinctly address traditional practices of women has yet to be met at the international level. The protection of traditional practices proves most difficult when gender-equality claims are made against traditional practices. It appears that most international guidelines do not even take into consideration this difficulty or women’s manifestation of tradi-

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182. See ICCPR, *supra* note 46, at art. 18.

183. See Gunn, *supra* note 52, at 259.

184. ICCPR, *supra* note 46, at art. 18.

185. *General Comment No. 22, supra* note 51, ¶ 8.

186. Gunn, *supra* note 52, at 265.

187. See Tahzib-Lie, *supra* note 12, at 122; *General Comment No. 22, supra* note 51, ¶ 8; see also *Interim Report of Special Rapporteur on Freedom of Religion or Belief, supra* note 6, ¶ 48 (“restrictions must remain within the realm of proportionality which, *inter alia*, means they must be limited to a minimum of interference.”).

188. See Gunn, *supra* note 52, at 265.

189. *Interim Report of Special Rapporteur on Freedom of Religion or Belief, supra* note 6, ¶ 74(e).

tional practices given the lacuna in this area of law. To illustrate the problem, it is useful to simply add the word “women” in the two major international guidelines of the Human Rights Committee in General Comment 28<sup>190</sup> and CEDAW Committee in its General Recommendations discussed in the previous section. In that way, the relevant texts would read: “freedom of religion or belief of women may not be relied upon to justify discrimination against [women]” and “states should eliminate religious practices of women that discriminate against [women].”<sup>191</sup> Adding the word “women” to these guidelines raises a wide range of questions, proving that these guidelines were not written with women’s complex rights in mind. Some of the questions that arise include: What should we do when women themselves choose to follow discriminatory practices or do not in any way feel discriminated by them? What happens when women adopt new feminist interpretations to practices once thought of as discriminatory and now followed by these women based on entirely different justifications?

Despite this gap, it is obvious that protection of the right to gender equality is not only a legitimate aim that may justify limitations on traditional practices, but also a genuine requirement even if international law appears insufficiently inclusive of women’s various claims. As previously mentioned, when traditional practices involve coercion or violate others’ human rights, they should be restricted regardless of whether women or men are those to defend them. In addition, women’s validated consent to follow traditional practices does not release states from their obligations to continue to protect women’s interests and advance their equality rights. States ought to place different legal safeguards to protect women’s rights, promote gender equality and eliminate coercion.

This delicate balance between women’s religious rights and women’s gender equality rights is one that can be achieved by constant engagement with the requirements and interests of the different women in these discussions (religious and non-religious), rather than just conceding to the general aspirations of religious groups. In this regard, respect for religious rights of minorities or cultures alone, does not justify an unlimited right to religion if women’s right to gender equality is jeopardized and their consent cannot be validated. Nevertheless, states’ restrictions must be necessary,<sup>192</sup> proportionate, and supported by empirical evidence.<sup>193</sup> States should essentially show that without such limitations of traditional prac-

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190. *General Comment No. 28*, *supra* note 34, ¶ 21.

191. Many international sources call on states to eliminate discriminatory practices. *See, e.g., id.* ¶¶ 3-5 (listing many discriminatory practices that infringe women’s rights under the ICCPR, making implicit and explicit references to religious, social, and cultural practices). The CEDAW Committee repeatedly notes the importance of taking steps to address discriminatory attitudes embodied in personal status laws, religious laws or customs, and gender stereotypes more generally. *See generally* Joint General Recommendation, *supra* note 11.

192. *See Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 31.

193. *Id.* ¶¶ 47-48.

tices, the harm that would be inflicted on women's equal status in society is significant and that there is no alternative action that infringes women's traditional practices less. States should also be cautious to intervene only where there is a genuine concern for women's rights, giving proper weight to the fact that limitations of traditional practices affect women's enjoyment of their religious liberties (and do not express an irrational consent to inequality or to living discriminatory lives). These practices are often part of women's most fundamental sense of personhood.<sup>194</sup>

In this regard, there is no way to avoid the fact that the end result of applying limitations on women's traditional practices is that the elimination of discrimination against women on the basis of their sex is given greater weight than the need to avoid discrimination on the basis of religion. Limitations of religious rights obviously disproportionately affect religious women and may therefore appear discriminatory. It should be noted, however, that eliminating religious discrimination against women is really an expression of the broader goal of promoting women's equal status which brings with it the improvement of women's economic, social, and political position in society. Therefore, the appropriate test for such differential treatment on the basis of religion or belief will center upon what is "reasonable and objective" and would demonstrate a pursuit of a "purpose which is legitimate under the Covenant"; that is, the right of women to have equal "economic, social and political power in both the public and private" spheres of their lives.<sup>195</sup> Finally, states should show that there is a reasonable relationship of proportionality between the means employed for the purpose of achieving gender equality and the aims sought to be realized.<sup>196</sup>

#### IV. The Protection of Reformative Practices

The previous Part identified the traditional practices which fall short of being classified as harmful but may still discriminate against women. This Part focuses on yet another set of practices that requires special attention: reformative practices. Madhavi Sunder examines such practices of "women reformers" that strive to "modernize and harmonize religion with global and local norms of gender equality."<sup>197</sup> This third

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194. See *id.* ¶ 42; Raday, *supra* note 5, at 701; Tirosh, *supra* note 39, at 108-13 (discussing how outward manifestations of religious beliefs—even if they go against common practices or clash with other fundamental rights—can become so enmeshed with one's "personhood" that many courts hesitate to place restrictions on these manifestations).

195. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 215, 229 (2000).

196. See *id.* at 215 (noting that this test is "a tacit adoption of criteria developed by the [European Court of Human Rights] to measure ostensibly discriminatory national laws" and to "show[] that . . . there is a reasonable relationship of proportionality between the means employed and the aims sought to be realized," in accordance with "the so-called 'margin of appreciation doctrine.'"); see also HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS* 600-39 (3d ed. 2008) (exploring case law and scholarship in this area).

197. Sunder, *supra* note 6, at 282.

type of practices need to be distinguished from both harmful practices and traditional practices. Reformatory practices do not, in any way, risk women or their rights. On the contrary, they are based on the belief that women and men, and people of all genders, deserve equal dignity and that religious tradition should be changed where it reflects discriminatory ideas (i.e., ideas that suggest or perpetuate an inferior position of women and girls). Reformatory practices are endorsed by religious women and men who try to improve gender inequalities “from within their respective religious traditions, for instance, by promoting and implementing alternative readings of the religious sources.”<sup>198</sup> Martha Nussbaum has documented several such efforts that show how religious traditions can be “powerful sources of protection for human rights, of commitment to justice, and of energy for social change” and points to an ever-growing dissent among women in religious and cultural communities around the world.<sup>199</sup>

Feminist religious reformers engaging in reformatory practices believe that women should not be disadvantaged simply because they are women and that meaningful actions towards gender equality require critically debating traditional discriminatory ideas about women.<sup>200</sup> They question patriarchal religious positions with the goal of proving that religious and cultural values can and should be relied upon to end discrimination and to empower women. Reformist individuals insist on the possible “compatibility of religion and rights, faith and freedom,”<sup>201</sup> and attempt to achieve what Raday defines as “[e]qual . . . religious personhood” within their communities.<sup>202</sup> To put it another way, women reformers fight for their religious freedom to pursue and live by new, more-equal interpretations of religion or tradition.

One example of reformist group are reformist Jews who lead in their understandings of Jewish tradition to allow equality during marriage and divorce, and in prayers and rituals customarily reserved for men.<sup>203</sup> It is the path chosen by Muslim human rights reform movements around the world that challenge traditional religious laws to recognize women’s equality by reinterpreting Islamic law.<sup>204</sup> In Morocco, such reformist movements led to a new Family Law Code that was adopted in 2004 and which recognized husbands and wives as equals, an equal minimum marriage age for men and women of eighteen, and equality during divorce.<sup>205</sup> The new code essentially legitimized reformatory practices that were previously pro-

198. BIELEFELDT ET AL., *supra* note 6, at 371.

199. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 178 (2000).

200. Sunder, *supra* note 6, at 283.

201. *Id.*

202. Raday, *supra* note 5, at 704.

203. See HALPERIN-KADDARI & YADGAR, *supra* note 72, at 3.

204. See SISTERS IN ISLAM, MUSAWAH, *GLOBAL MEETING FOR EQUALITY AND JUSTICE IN THE MUSLIM FAMILY: SUMMARY OF PROCEEDINGS 20* (2009), <https://www.musawah.org/wp-content/uploads/2019/02/Global-Meeting-KL-Feb2009-Summary-of-Proceedings-EN.pdf> [<https://perma.cc/PB5F-4JN7>].

205. See Sunder, *supra* note 6, at 288–89.

hibited and also inspired discussion in many Muslim countries around the world.<sup>206</sup> In 2009, more than 250 participants from forty-seven countries gathered for a historic global conference in Kuala Lumpur to launch Musawah: a Global Movement for Equality and Justice in the Muslim Family.<sup>207</sup> Musawah is one of the most influential movements in the Muslim world. It advances feminist religious laws and reformative practices and encourages women to read and interpret the Qur'an themselves—as opposed to just adhering to the rules that were developed centuries ago by men only—so as to discover new, perhaps more equal, ways to observe Islamic tradition.<sup>208</sup> Zainah Anwar, the famous Muslim activist and director of Musawah, expressed the spirit behind these ideas in her opening remarks at the conference saying:

We are activists, academics, policy makers, Members of Parliament, judges, entrepreneurs, professionals—all leaders, all shakers and movers, with the courage of our convictions to demand and create a better life and a better world. Who says Muslim women are oppressed, discriminated, silenced and victimized? We are not and we refuse to be. . . . [W]e are here . . . because we want to tell the world, we want to tell our leaders[,] that we will no longer accept the use of Islam to justify discrimination against women. . . . [E]quality is possible within Islam. . . . [We need to] come together to think, to feel, to question what it means to be Muslim in the twenty-first century and what it means to be a feminist within a Muslim context.<sup>209</sup>

In her powerful way, Anwar voices the convictions and aspirations of many reformist women, Muslim and non-Muslim.<sup>210</sup> Reformative practices and reform branches are not only existent in all traditions and religions but are widespread and continue to grow.<sup>211</sup> As Shachar observes,

[t]he challenges for feminist and other equity-seeking religious interpreters are significant. Beyond gaining access to the historically male dominated “temple of knowledge,” they must work within the tradition’s hermeneutic horizons so that their re-interpretative claims cannot be dismissed as “inauthentic.” This path of change-from-within may take years to achieve, but the winds of change are already blowing through the world’s major religious traditions.<sup>212</sup>

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206. See Zainah Anwar, Musawah Project Dir., Opening Speech at the Global Meeting for Equality and Justice in the Muslim Family 3 (Feb. 14, 2009) (transcript available at <http://arabic.musawah.org/sites/default/files/Opening%20Speech%20by%20Zainah%20Anwar%2014%20February%202009.pdf> [<https://perma.cc/H85A-77LU>]).

207. SISTERS IN ISLAM, *supra* note 204, at 1.

208. See *id.* at 8-9, 17.

209. Anwar, *supra* note 206, at 1-4.

210. See Raday, *supra* note 5, at 704 (“That women rebel against patriarchal standards that disadvantage them in traditionalist societies is an empirical fact.”).

211. See *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, ¶ 61 (“The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority.”).

212. Ayelet Shachar, *Entangled: Family, Religion and Human Rights*, in HUMAN RIGHTS: THE HARD QUESTIONS 115, 127 (Cindy Holder & David Reidy eds., 2013).

This reality demands recognition and acknowledgment of the international community. It signifies the change that women are leading in every region of the world, and that it cannot be enough to formally address only harmful practices that disadvantage women.

Reformative practices, which are intended to create equal rights within religious denominations, involve distinct challenges. Indeed, the question that comes to mind is: If reformative practices enhance the idea of equality, then what is the challenge for states? The answer is simple. Although reformative practices do not constitute risks in themselves, women and men face a great risk for merely observing them. This vulnerability is most apparent where a certain religion is recognized as the state religion, religious laws receive jurisdiction in family law matters, or a dominant religious group enjoys privileges—that is, the vulnerability is most apparent in states that do not fully separate church and state.<sup>213</sup> Some scholars have recently described some of the risks to Jewish and Muslim religious feminists in Israel, noting that women have “found themselves faced with accusations of disloyalty and sedition. . . . The [Islamic] religious opposition [in Israel] had even reached the point of issuing a fatwa (a religious verdict) against . . . women activists.”<sup>214</sup> Such religious opposition, especially in the form of a religious verdict, creates a genuine risk for these reformists.

Anwar articulated well how dissenting religious women are being perceived as disloyal within their communities and the alarming consequences of the opposition that they meet, explaining that:

Very often Muslim women who demand justice and want to change discriminatory laws and practices are told, “this is God’s law” and therefore not open to negotiation and change. To question, challenge, or demand reform will supposedly go against Shari’ah, weaken our faith in God and lead us astray from the straight path. We are often accused of being westernized elites, anti-Islam, anti-Shari’ah, women who have deviated from our faith—our aqidah, and our iman is weak. Reports are made against us to the police, to the religious authorities to take action against us, to silence us, to charge us for insulting Islam, to ban our groups.<sup>215</sup>

The threat to rights of religious reformers extends beyond the expected internal opposition that their reformist claims generate and is also political in nature. For instance, the struggle of the Women of the Wall in Israel to hold men-like prayers at the Western Wall in Jerusalem is one that continues to involve frequent violence of opposing orthodox groups.<sup>216</sup> Political leaders have also disapproved of these non-traditional prayers of women that allegedly offend ancient Jewish practices.<sup>217</sup> State regulations of holy sites in Israel add another difficulty as they require that

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213. By contrast, in the U.S., for example, where religion must not be established in any way, reform movements thrive.

214. HALPERIN-KADDARI & YADGAR, *supra* note 72, at 42-43.

215. Anwar, *supra* note 206, at 2.

216. See THE ADVISORY TEAM: RECOMMENDATIONS, *supra* note 17, at 3.

217. See HALPERIN-KADDARI & YADGAR, *supra* note 72, at 916-17 (discussing similar political opposition that serves to discourage Muslim women); see also Ruth Halperin-Kaddari & Marsha A. Freeman, *Backlash Goes Global: Men’s Groups, Patriarchal Family*

visitors show respect to the traditional religious sentiments of believers and thus have been used to block the practices of reformist believers at the Western Wall as well as any future opportunity to advance equal reformative practices (that clearly cannot be considered traditional) at the site.<sup>218</sup> Muslim reformers in India have suffered from similar religious and political resistance when trying to ensure fair maintenance to women, equal marriage, and inheritance rights.<sup>219</sup> They, and many other women reformers around the world, continue to be discriminated against by religious laws while their reformative practices are discouraged and oppressed.<sup>220</sup> Martha Nussbaum explores the long battles of reformers in India and concludes that although gender equality is recognized in Indian laws, state “provisions are weakly enforced, and the current climate of Hindu fundamentalism and conservatism makes the future very unclear. . . . Free exercise and sex equality appear, at least sometimes, to be on a collision course.”<sup>221</sup>

However, beyond these practical risks to the rights of reformers, there is often also a conceptual barrier of understanding that reformative efforts are protected by the right to freedom of religion or belief. Nussbaum’s words reflect the crux of the matter. The idea that adherence to religious traditional laws is protected by the free exercise of religion while women’s reformative practices are protected by the right to gender equality is regrettably common. Since the goal of achieving equality is what is motivating reformative practices, the recognition that reformative practices are protected by the right to freedom of religion or belief is often overlooked. Certainly, when harmful practices are the only practices defined in international documents, coupled with the fact that freedom of religion or belief is not specifically recognized as a woman’s right in CEDAW, it is not surprising that there is a tendency to focus on the potentially negative influence that religious practices—or the exercise of religious rights—might have on women.

In fact, Bielefeldt warns that the right to freedom of religion or belief and women’s right to gender equality are treated as “two essentially contradictory human rights norms.”<sup>222</sup> He therefore speaks of the need to find synergies between the rights. Nonetheless, he too fails to discuss women’s own belief rights. Beyond any synergy between the rights, the decision of a woman (and a man) to adopt a certain set of beliefs and values, whether traditional or reformist, is first and foremost ensured by her right to freedom of religion or belief. Women may well deserve protection of their right to gender equality, especially when pursuing reformative practices, but not

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*Policy, and the False Promise of Gender-Neutral Laws*, CANADIAN J. WOMEN L., 165, 165 (2016) (describing present resistance to feminist work in global and local contexts).

218. See THE ADVISORY TEAM: RECOMMENDATIONS, *supra* note 17, at 18.

219. See NUSSBAUM, *supra* note 199, at 172-73 (detailing the struggle of Muslim reformers).

220. See *id.* at 170-71.

221. *Id.* at 174.

222. *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6, at 2.

at the expense of their right to freedom of religion or belief. This latter right secures their unconditional freedom to have, adopt, or change any religion or belief as they may desire, as well as the freedom to exercise this religion or belief as long as their actions do not violate the fundamental human rights of others or are otherwise harmful to a democratic society.

The conceptual misperceptions by which equality and freedom of religion are treated as opposites have already been recognized in other contexts,<sup>223</sup> but the important argument here is that the discussion should revolve around the protection of women's belief liberties. This also highlights the importance of defining reformative practices as such and declaring that they are also protected by the right to freedom of religion or belief as religious manifestations. This understanding is important since the right to equality does not really provide the same extensive protection for women as the right to freedom of religion or belief does. The right of women to equality is an abstract right that is complex and especially disputed in religious contexts where women have very different ideas about the meaning of religious rules and religious practices, and also very different views about whether equality can serve to restrict or advance their religious rights.

What is it that states ought to be doing to protect reformative practices in light of these challenges and misperceptions? Unfortunately, treaty bodies make little to no reference to reformative practices or to the risk that their adherence places on women. It is mainly the U.N. Special Rapporteur on Freedom of Religion or Belief that provides some non-binding but concrete guidelines on the obligations of states to protect reformist observers and communities. In 2013, Bielefeldt, who held the aforementioned title, issued a report which, *inter alia*, covers synergies between the right of women to equality and the right to freedom of religion or belief.<sup>224</sup> His report explained the important role of the right to freedom of religion or belief in helping to promote women's equality and to "open up religious traditions to systematic questions and debates."<sup>225</sup> He specifically notes that "freedom of religion or belief includes the right of internal dissidents,

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223. See GHANA, *supra* note 103, at 5.

224. See generally *Interim Report of Special Rapporteur on Freedom of Religion or Belief*, *supra* note 6.

225. *Id.* ¶ 28.

In discourses on religious issues everyone should have a voice and a chance to be heard, from adherents of conservative or traditional interpretations to liberal critics or reform theologians. However, by also empowering groups who traditionally experience discrimination, including women and girls, freedom of religion or belief can serve as a normative reference point for questioning patriarchal tendencies as they exist in different religious traditions. This can lead to more gender-sensitive readings of religious texts and far-reaching discoveries in this field. In virtually all traditions one can indeed find persons or groups who make use of their freedom of religion or belief as a positive resource for the promotion of equality between men and women, often in conjunction with innovative interpretations of religious sources and traditions. This accounts for the possibility of direct synergies between freedom of religion or belief on the one hand and policies for promoting the equal rights of women on the other. Impressive examples of initiatives undertaken by women and men of different

including women, to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time."<sup>226</sup>

Women reformers do indeed deserve the protection of Article 18 of the ICCPR—a protection that is much stronger than that of the right to equality. Therefore, the fact that religious, reformist women are threatened for merely holding their beliefs<sup>227</sup> is not only a potential violation of several human rights laws, but also a blunt violation of their very right to believe, which should be unconditionally protected.<sup>228</sup> Their religious convictions, however controversial or non-traditionalist, must never be limited. Any measure, act, or policy that could affect their freedom to believe or that is meant to impose other beliefs or religions on them is illegitimate. On this topic, Bielefeldt further adds that “[i]n situations in which internal dissidents or proponents of new religious understandings face coercion from within their religious communities . . . the State is obliged to provide protection.”<sup>229</sup> He emphasizes that “respect by the State for the autonomy of religious institutions can never supersede the responsibility of the State to prevent or prosecute threats or acts of coercion against persons (e.g., internal critics or dissidents), depending on the circumstances of the specific case.”<sup>230</sup>

Certainly, women's *reformative practices* are protected by the right to manifest a religion or belief. Limitations are supposedly allowed pursuant to Article 18(3).<sup>231</sup> However, since reformative practices are based on the belief that women and men are equal and that discrimination against women should be eliminated, it is hard to imagine a convincing enough justification to limit them. It should really be the objective of states to advance reformative practices and not at all to limit them. To follow the logic of the Special Rapporteur, states should find ways to empower women and girls since they can potentially “lead to more gender-sensitive readings of religious texts and far-reaching discoveries in this field.”<sup>232</sup> Such reformist endeavors, he contends, would reveal that freedom of religion or belief can indeed “serve as a normative reference point for questioning patriarchal tendencies as they exist in different religious traditions.”<sup>233</sup> In fact, the rapporteur calls on states to adopt the holistic approach that underlines “the positive interrelatedness” between women's equality and freedom of religion or belief, and to maintain the principle adopted at the

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religious persuasions clearly show that synergetic efforts in this regard actually exist and should not be underestimated.

*Id.*

226. *Id.* ¶ 60.

227. *See id.*

228. *See id.* ¶ 56.

229. *Id.* ¶ 60 (noting that threats or acts of coercion against a person may affect “the *forum internum* dimension of freedom of religion or belief, which has an unconditional status.”).

230. *Id.*

231. *See id.* ¶ 60.

232. *Id.* ¶ 28.

233. *Id.*

World Conference on Human Rights, held in Vienna in 1993, that “all human rights are universal, indivisible[,] . . . interdependent and interrelated.”<sup>234</sup> He strongly emphasizes the positive implications of reformist initiatives seeing them as “impressive examples” that demonstrate “the possibility of direct synergies between freedom of religion or belief on the one hand and policies for promoting the equal rights of women on the other.”<sup>235</sup>

Protection of reformative practices fosters an understanding of the right to freedom of religion or belief as a vehicle for enhancing women’s equal status in society. States need to recognize their importance by providing adequate protection for reformist believers.<sup>236</sup> Moreover, in enhancing protection of reformative practices, states have several other obligations with respect to reformists, including ensuring their representation and participation in public discussions over religious issues<sup>237</sup> and allowing the establishment of their religious institutions.<sup>238</sup> The rapporteur reminds states in this regard that freedom of religion or belief includes the right “to establish new religious communities and institutions,” which, in the case of reform branches, means that women could actually have “better opportunities to achieve positions of religious authority.”<sup>239</sup>

Freedom of religion or belief is a right that can serve women, especially when asserting their right to adopt reformist religious ideas and to exercise reformative practices. The need to speak about women’s religious rights—as opposed to synergies between equality and the right to freedom of religion—and reframe the discussion is important since the reference to synergies is too abstract and can be confusing in itself. When used to direct states in their actions, it can complicate implementation endeavors. Aside from the fact that it is substantively a discussion that revolves around women’s set of beliefs—whether religious, liberal, reformist, or atheist—and should therefore concentrate on women’s right to freedom of religion or belief, it is also conceptually much simpler to refer to women’s belief liberties than to theoretical “synergies.”

The discussion about women’s belief liberties is especially crucial in the context of reformative practices, since it is in these contexts in particu-

234. *Id.* ¶ 69 (quoting World Conference on Human Rights, *supra* note 78, ¶ 5).

235. *Interim Report of Special Rapporteur on Freedom of Religion or Belief, supra* note 6, ¶ 28.

236. According to the rapporteur, in addition to enhancing the protection of reformative practices, states have several other obligations with respect to reformist observers (both men and women). For example, states must ensure reformist observers’ representation and participation in public discussions over religious issues and allow the establishment of religious institutions. In this regard, the rapporteur specifically requires states to ensure that everyone “have a voice and a chance to be heard” in discourses over religious matters, “from adherents of conservative or traditional interpretations to liberal critics or reform theologians.” *Id.* Regarding the right to establish religious institutions, the rapporteur notes that the “freedom of religion or belief includes the right to establish new religious communities and institutions.” *Id.* ¶ 61.

237. *See id.* ¶ 28.

238. *See id.* ¶ 61.

239. *Id.*

lar that women strive to promote equality and that there is a tendency to neglect the potential contribution of the right to freedom of religion or belief. In fact, for decades, feminist scholars attempted to convince states to ensure that dissenting women would have a right to exit their oppressive religious communities<sup>240</sup> or would have “access to constitutional equality,”<sup>241</sup> while the right to freedom of religion or belief could have offered women much more than that. Resorting to freedom of religion or belief, states cannot take any measure whatsoever that would impair women’s freedom to have a belief or religion of her choice, including such beliefs that are reformist in nature.<sup>242</sup> Women’s freedom to religious reformatory practices can theoretically be subject to restrictions; but, seeing how these practices aim to promote women’s equality and advance women’s equal dignity, it is doubtful that a state could genuinely find legitimate grounds for implementing such limitations. Thus, many feminist scholars seem to have compromised on a far less protected and recognized right (i.e., the right of women reformers to exit their religious groups), investing their efforts in establishing a right that may well tolerate gender discrimination in the name of religion.<sup>243</sup>

Lastly, a difficult question arises when there is a clash between the interests of women who want to follow reformatory practices and those of women who want to adhere to traditional ones. The case in Israel has been discussed here as an example of such a tension where orthodox women fiercely objected to the right of reformer women to hold reformatory practices in the women’s prayer section of the holy Western Wall site.<sup>244</sup> Orthodox religious women claimed that the reformatory practices (for example of bringing a Torah scroll to the women’s section) violate their own religious beliefs and would prevent them from holding their traditional prayers at the place.<sup>245</sup> It is indeed a serious claim that should be respected. Nevertheless, any action or measure taken by the state or any government authority should be based on the understanding that both

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240. See Raday, *supra* note 5, at 707 (claiming that religious women who seek to ensure their equal personhood within their religion, should be granted a right to exit religion or to claim equality within their religion).

241. *Id.* at 710 (“[W]omen who do dissent must have access to constitutional equality. This might be achieved, in some cases, by enforcing their rights to equal personhood within their communities but, more usually, by allowing them a right to exit into a civil framework that provides them with an optional and egalitarian position in life. Thus, where there is a clash between cultural practices or religious norms and the right to equality, it is the right to equality that must have normative hegemony.”).

242. See GHANEA, *supra* note 103, at 2.

243. See Sunder, *supra* note 6, at 282 (“So long as women may exit their religious or cultural groups and seek equality in the public sphere, law tolerates gender discrimination in the name of religion.”).

244. See *Protestors, Worshipers Skirmish at Western Wall During Female-Led Service*, TIMES ISR. (Aug. 2, 2019, 4:46 PM), <https://www.timesofisrael.com/protestors-worshippers-skirmish-at-western-wall-during-female-led-service/#gs.glvvtj> [https://perma.cc/4QXX-2M5C].

245. See Jodi Rudoren, *Standoff at Western Wall over Praying by Women*, N.Y. TIMES (May 10, 2013), <https://www.nytimes.com/2013/05/11/world/middleeast/3-ultra-orthodox-men-arrested-in-western-wall-standoff.html> [https://perma.cc/AHG2-WCL7].

these women's groups present legitimate concerns and have a right to practice their religion—be it by holding traditional or reformatory practices. The regulatory restrictions that are currently placed in the area prevent reformatory prayers and violate the right of reformer women to practice their religion. The proposal offered to build a separate prayer pavilion reflects the need to accommodate the rights of both sides and creates hope that acceptance from the Israeli government is not far. The fact that reformatory practices are based on the belief in women's equality does not give them priority, but it certainly requires special attention to the additional burden and threats that they suffer, and their rights deserve to be equally protected and recognized at both the international and national level.

## Conclusion

This Article has centered on the protection of women's belief liberties and the variety of women's religious practices. Women's global entitlement to the right to freedom of religion or belief has been widely compromised over the years. Since this right is not mentioned in CEDAW,<sup>246</sup> no global treaty body adequately and systematically supervises its implementation. Unfortunately, during the decades of progress in the recognition of women's rights, freedom of religion or belief has been viewed as an obstacle to women's advancement and as a threat to their equal status in society. As a result, whereas international human rights law appears to be substantial in the response to seriously harmful religious practices to women (like female genital mutilation or polygamy), it is less protective of women's own belief liberties.<sup>247</sup> Most global standards address crucial, yet extreme circumstances where women suffer from grave violations of their rights. In other contexts, and particularly those in which women seek protection of their traditional or reformatory practices, international norms are scarce. This means that, in the best of cases, governments and human rights advocates are left to solve significant challenges in the protection of women's belief liberties with little international guidance. The increasing complexities that liberal states face in upholding their obligation to promise gender equality while protecting the religious freedoms of women of diverse groups are largely unattended. From a domestic perspective, in this realm, the inability of international human rights bodies to specify comprehensive standards for the protection of the variety of women's belief aspirations has also created an opportunity for some states to either exploit the gap or develop national legal regimes that are detrimental to women.<sup>248</sup>

This Article, therefore, sought to point to possible ways to overcome these gaps and enhance the protection of women's belief liberties. It sought to clarify the set of international standards that should be applied in addressing tensions relating to women's right to freedom of religion or

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246. See generally G.A. Res 34/180, *supra* note 43.

247. See Elkayam-Levy, *supra* note 12; Tahzib-Lie, *supra* note 12, at 117.

248. See Joint General Recommendation, *supra* 11, ¶ 15.

belief. It has done so by offering a novel classification to aid states in tackling current challenges, calling to clearly distinguish between harmful, traditional and reformative practices of women. This distinction proves necessary for identifying the various factors that should guide states' response in each of these circumstances. It would not be an overstatement to say that the failure to distinguish between harmful and traditional practices—along with the general vague global demand to eliminate discriminatory practices—has caused chaos in national discussions over these issues and hampered the ability of liberal states to protect women's rights. It instigated fierce disputes regarding which practices deserve protection and which call for state intervention to protect the right to gender equality.<sup>249</sup>

Traditional practices, as this Article suggested, may appear to limit women's equality but do not amount to the severity of harmful practices and thus prompt serious dilemmas regarding whether they deserve intervention and require states' restrictions. When traditional practices are performed and defended by women themselves, reliance of states on gender equality justifications can seem not only paternalistic and condescending, but also patriarchal. In limiting women's traditional practices, states struggle with a somewhat circular obstacle where attempts to promote equality conflict with women's religious rights and their right not to be discriminated against on the basis of religion or belief. As discussed, unlike harmful practices, the right to manifest a religion or belief protects traditional practices of women even when they appear to be discriminatory or demeaning. States ought to respect the fundamental liberty of women to follow them. However, while states should generally not intervene to restrict women's traditional practices, they remain obligated to validate women's consent. They also cannot abandon their obligation to protect women's equal status in society. Although this may prove to be a complicated task, states must ensure robust legal safeguards to protect women's interests. The Canadian model offered by Ayelet Shachar, for example, that offered civil supervision and several review processes of decisions of religious tribunals to protect women who choose to use these religious forums,<sup>250</sup> illustrates such an endeavor. This is certainly true in cases in which coercion seems to be involved, but it is also true in situations in which women themselves defend traditional practices. Women's tacit or explicit approval of a certain traditional practice does not free states from their international obligation to eliminate discrimination against women.<sup>251</sup> States must still remain involved, design gender-sensitive policies and advance procedures that allow for supervision and create protec-

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249. See Aernout J. Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks*, 10 INT'L J. CONST. L. 153, 174 (2012).

250. See Shachar, *supra* note 159; see also Shirish P. Chotalia, *Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*, 15 CONST. F. CONSTITUTIONNEL 63, 63 (2006).

251. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures*, ¶ 12, U.N. Doc. CEDAW/C/GC/25 (2004).

tions that take into account the interests of different women within religious groups following these practices. Additionally, states cannot and should not assume that all women in a certain religious group agree to a practice adopted by their community.

The third type of practices identified are reformative practices, which attempt to promote equality within religion. These practices question traditional and cultural norms about the role of women in our society and are based on the belief that women and men are equal. Reformist women believe that religious rules should be reinterpreted to reflect egalitarian ideas. New practices synthesizing religious faith and equality norms have been shown to require special protection due to the often-violent objections that they attract, which ought to be taken into consideration as well. Although reformative practices do not create risks in and of themselves, women and men face a great risk for merely observing them.<sup>252</sup> The threat to rights of religious reformers extends beyond the expected internal opposition from their communities and into the political arena, especially since traditional religious groups usually enjoy greater political power.<sup>253</sup> Reformist women thus confront many challenges and obstacles in their journey to full enjoyment of their religious rights. Hence, states need to devise special measures to protect the fundamental right of religious reformers to hold a religion or belief of their choice.

When sensitive clashes arise between the rights of women to exercise traditional practices and the rights to exercise reformative practices, states ought to find a solution that promises to protect the religious rights of all believers concerned. One example is the solution suggested in Israel to resolve the tensions between orthodox women and reformist women: building an additional platform to create two separate prayer sections near the Western Wall in Jerusalem for both congregations.<sup>254</sup> This proposed solution reflects the delicate balance and nuanced understanding that the rights of both groups should be secured by finding creative solutions for coexistence and pluralism between different religious groups.

Finally, the way forward offers many opportunities since much needs to be done to improve international oversight of women's belief freedoms and to create robust global benchmarks and guidelines to also ensure the protection of the right to gender equality. Certainly, the inclusion and empowerment of women through the right to freedom of belief is a necessary, pragmatic antidote to the marginalization of women's beliefs and free-

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252. See *Women of Wall Forced to Move Service Amid 'Violent' Ultra-Orthodox Protest*, TIMES ISR. (Mar. 8, 2019, 10:54 AM), <https://www.timesofisrael.com/women-of-wall-forced-to-move-service-amid-violent-ultra-orthodox-protest/#gs.gm4kxh> [<https://perma.cc/96XB-SQ8J>].

253. See Isabel Kershner, *Israel Faces Uproar Abroad as Netanyahu Yields to Ultra-Orthodox Jews*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/world/middleeast/israel-benjamin-netanyahu-ultra-orthodox-western-wall.html> [<https://perma.cc/YQ7Z-DHMF>].

254. See Oren Libermann, *Israel to Expand Who Can Pray at Holy Western Wall*, CNN WORLD (Feb. 1, 2016, 5:24 AM), <https://www.cnn.com/2016/01/31/middleeast/western-wall-israel-women/index.html> [<https://perma.cc/3FAZ-DMEJ>].

dom of choice. The role of international law may not always be to resolve the tensions between women's rights and religious norms, but it can shift the debate in ways that place greater power in the hands of international bodies responsible for monitoring the implementation of women's rights and in the hands of those who believe in the power of global mechanisms and the promise that women should pursue their chosen beliefs freely.