A COMPARATIVE ANALYSIS ON THE CONCEPT OF FREEDOM OF RELIGION UNDER THE SHARI'AH AND INTERNATIONAL LAW

By

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DECLARATION

I declare that the work in this thesis entitled *"A Comparative Analysis on the Concept of Freedom of Religion under the Shari'ah and International Law"* has been carried out by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

_____	_____	_____
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CERTIFICATION

This Thesis entitled *"A Comparative Analysis on the Concept of Freedom of Religion under the Shari'ah and International Law"* by Abdullahi BELLO meets the regulations governing the award of the degree of Master of Laws - LL.M of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

To Allah (S.W.T.) for the bounties of mercy He bestows on me; to my parents, to my dear wife Musaiba Mustapha Misri and to all the people who in one way or the other contributed in seeing through my education at this level; and also to anyone interested in the subject.

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ABSTRACT

This study analyzes the compatibility of Shariah with International Law on freedom of religion. As a subject of colossal complexity and variation, detailed examination is restricted to the highly contentious issues of the right to change religion (otherwise termed apostasy in Islamic law), the religious rights of non-Muslims (Dhimma) in an Islamic State, relations of law and religion (state religion), blasphemy/defamation of religion, and the application of the doctrine of jihad in defence of the Islamic faith, etc. Today, the serious disregard and infringement of freedom of religion by both State and non-State actors has kindled hatred and caused violence among people, as evidenced by severe and systematic persecution, domination and suppression by one religion or sect over the other using the instrumentality of State power in many countries across the globe. Many instances abound on the oppressive treatment and discrimination of members of minority religion or faith within a nation; arbitrary killing and violence to the life and properties of the holders of certain beliefs or sects; willful destruction of or damage to places of worship and other sacred sites of cultural and religious memory and learning in many parts of the world. In view of this, the main objective of this work therefore, is to examine what comparable or divergent visions and precepts underlie Shari'ah law and international law in providing for freedom of religion given the fact that as to Shariah, preserving the Islamic faith is among its fundamental principles and as to international law, promotion of tolerance and friendly relations forms its very basis. To achieve this, doctrinal method of legal research was adopted, and reliance was placed on sources of information such as the primary and secondary sources of Islamic law as well as the sources of international law on the subject. It is argued that while international law contemplate protection of freedom of religion only of recent, the Shariah as a system of law and religion was the first to recognize religious toleration right from the 7th Century A.D. and in view of this, it was observed that religious accommodation in Islamic tradition is only tenable under Islamic Rule than in democracy, socialism or communism, therefore a return to Islamic Khilafah system was advocated. It was further submitted that freedom of religion in its international law conception is far from being universal and remain the most contested freedom in view of its failure to recognize other legal and cultural traditions, the Shariah in particular. The findings reveal that rules of international law related to freedom of religion are to a large extent, contradictory to those found under the Shari'ah, it being the formulations of international standards remain largely reminiscent of Western as well as Judeo-Christian traditions to the exclusion of Islamic particularities. Consequently, much of the current legal problems associated with violations of freedom of religion in Western countries as well as by Muslim majority countries are argued as being partly due to the existent doctrinal incongruence between the two systems of laws. The study concludes with the view that attainment of "universal" standards on protection of freedom of religion is possible, only if the international community appraises itself of the relevance of Shariah within international human rights discourse as an alternative legal tradition.

TABLE OF ABBREVIATION

1	AP	Additional Protocol
2	AU	African Union
3	CRC	Child Rights Convention
4	EU	European Union
5	ECtHR	European Court of Human Rights
6	GC	Geneva Convention
7	HR	Human Rights
8	ICC	International Criminal Court
9	ICCPR	International Covenant on Civil and Political Rights
10	ICESCR	International Covenant on Economic, Social and Cultural Rights
11	ICL	International Criminal Law
12	ICRC	International Committee of the Red Cross
13	ICTR	International Criminal Tribunal for Rwanda
14	ICTY	International Criminal Tribunal for the former Yugoslavia
15	IDP	Internally Displaced Persons
16	IHL	International Humanitarian Law
17	IHRL	International Human Rights Law
18	ILC	International Law Commission
19	IRL	International Refugee Law
20	OAS	Organization of American States
21	OIC	Organization of Islamic Countries/Conference
22	POW	Prisoners of War
23	RF	Religious Freedom
24	UDHR	Universal Declaration of Human Rights
25	UK	United Kingdom
26	UN	United Nations
27	US	United States (of America)

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INTERNATIONAL INSTRUMENTS

1 African Charter on Human and Peoples' Rights of 1981

2 American Convention on Human Rights **1969**

3 American Declaration on the Rights and Duties of Man 1948

4 Cairo Declaration of Human Rights in Islam 1991

5 **Convention on the Elimination of All Forms of Discrimination Against Women 1979**

6 Convention on the Prevention and Punishment of the Crime of Genocide **1948**

7 **Convention on the Rights of the Child 1989**

8 Convention Relating to the Status of Refugees of 1951

9 **Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief** of 1981

10 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992

11 European Convention on Human Rights and Fundamental Freedoms of 1950

12 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949

13 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949

14 Geneva Convention III Relative to the Treatment of Prisoners of War of 1949

15 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949

16 General Comment No. 22 on The right to freedom of thought, conscience and religion (Art. 18), Human Rights Committee, 30 July 1993

17 **International Covenant on Civil and Political Rights [**ICCPR**] (1966)**

18 **International Covenant on Economic, Social and Cultural Rights (**1966**)**

19 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

20 International Convention on the Elimination of All Forms of Racial Discrimination1965

21 Statute of the International Criminal Court, 1998

22 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, (1984)

23 United Nations Charter (1945)

24 Universal Declaration of Human Rights (1948)

25 United States International Religious Freedom Act, 1998

26 United States Treaty with Netherlands 1782

27 Vienna Convention on the Law of Treaties [VCLT] of 1969

28 Virginia Declaration of Rights 1776

29 Versailles Peace Treaty 1919

30 Westphalia Peace Treaty 1648

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31 Companies and Allied Matters Act, Cap. C20, LFN, 2004 – SS 26, 590-612

32 Companies Income Tax Act, Cap. C21, L.F.N. 2004 – SS 23(1)(c), 25(5)(c)

33 Constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011) Cap. C23, L.F.N. 2004 – SS 4(6), 5(2), 6(2), 10, 38, 40, 42, 45, 275-277

34 Criminal Code Act, Cap 77, LFN, 1990; Cap C38, LFN, 2004 – ss 204-206

35 Penal Code Act, Cap 345, LFN, 1990; Cap P3, LFN, 2004 – ss 210-213

36 Public Holidays Act, Cap. P40, LFN 2004

37 Zamfara State Sharia Penal Code, No. 10 of 2000, sections 400-406

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1 Association Ligue des Musulmans de Suisse and Others v. Switzerland (no. 66274/09) 28.06.2011 (inadmissibility decisions) European Court of Human Rights

2 Cantwell v. Connecticut (1940) 310 U.S. 296.

3 Civil Liberties Organisation v. Chad, African Commission on Human and Peoples' Rights, Communication No. 74/92, 18th Ordinary Session, Praia, 11 October 1995, 9th Annual Activity Report, paras. 21–22

4 Commissioner. H.R.E. v. Lakshmindra (1954), S.C.A. 415 (432).

5 Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Communication Nos. 140/94, 141/94 and 145/95, 26th Ordinary Session, Kigali, 1–15 November 1999, 13th Annual Activity Report 1999–2000, Doc. AHG/222 (XXXVI), Annex V, paras. 41–42.

6 Dahlab v. Switzerland (no. 42393/98) 15.02.2001 (inadmissibility decision) European Court of Human Rights[1]

7 Ouardiri v. Switzerland (no. 65840/09) 28.06.2011 (inadmissibility decisions) European Court of Human Rights

8 R. v. Chief Metropolitan Stipendiary Magistrate, ex Choudhury, [1991] 1 All ER 306

9 United States v. Kauten, 33 F.2d, 703, 708 (2d Cir. 1943)

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10 Alkamawa v. Bello (1998) 6 SCNJ 127

11 Anzaku v Governor of Nassarawa State [2006] All FWLR (Pt 303) 308

12 Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo (2001) FWLR (pt. 44) 542

13 Ojiegbe v. Ubani (1961) 1 All NLR 227

14 Uzoukwu v Ezeonu [1991] 6 NWLR 708.

[1] *Available online at* http://www.echr.coe.int/NR/rdonlyres/80119CA2-3425-43D9-9FEB524829C637B1/0/FICHES_Liberté_religion_EN.pdf [accessed on the 13th February 2012].

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life.[2] The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces the world has ever known. But its full realization can come about only when the oppressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through cooperative policies; and when methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as on the national level.[3]

Islamic law is, among all other legal systems, the first religious and legal order to embrace the idea of religious tolerance and peaceful co-existence between different faiths within the jurisdiction of an Islamic State. As early as 7th Century AD when Prophet Muhammad (saw) reached Medina following his forceful emigration from Mecca due to severe, persistent and systematic forms of persecution directed against the earlier Muslims, the Islamic State at Medina has by law, recognized the religious co-existence of Muslims with the then Jewish and Christian communities alongside Islam.[4] An established legal framework in the form of a

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[2] Wallace, E. G. Justifying Religious Freedom: The Western Tradition, *Pennsylvania State Law Review* (2009) Vol. 114, No. 2, p. 486

[3] Krishnaswami, A. Study on Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) New York, p. vii-viii *available online at* http://iiss.berkeley.edu/files/2011/06/Krishnaswami_19601.pdf (last visited on the 6/03/2013)

[4] Adnan ibn Muhammad ibn Abd al-Azeez al-Wazzan, *Muasu'atu Huquq al-Insan fi al-Islam wa Simatiha fi al-Mamlakat al-Arabiyyah al-Sa'udiyyah*, Al-Resalah Publishing House, Beirut, Lebanon (2005, 1st ed.) Vol. 4, p. 40; Rehman, J. Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, *International Journal on Minority and Group Rights* (2000) Vol. 7, pp. 139 – 65 at 51; Jonathon, W. M. The *Umma* of Democracy, *Security Dialogue*, (2006) Vol. 37, No. 4, pp. 493-494; *Imad-ad-Dean Ahmad*, American

Charter (*Dustur al-Medina*) provides for special alliance between Muslims and non-Muslims spelling out specifically the rights and obligations of all the parties thereto.[5] During this period, non-Muslims, especially the people of the book (*ahl al-Kitab*) acquired a certain degree of tolerance to practice their religion. Even where there is a declaration of war by or against the Muslims, either for the defensive or offensive motives, the protection of places of worship as well as respect for the religious convictions and practices of non-Muslim enemies are legal norms protected under Islamic law.[6]

Principally, the provisions of Qur'an 2:256 which provides to the effect that no compulsion in religion is generally taken to be the definitive ruling under Islamic law on freedom of religion. However, the tune of divergent juristic interpretations that this verse of the Holy Qur'an has attracted from the earlier classical Muslim jurists to modern generations, especially the view that it has been abrogated by the verses of the sword has left discussion on freedom of religion under Islamic law to be a rather topical issue. This gave room for a careful consideration of this area of Islamic law, more so in the presence of Western conception of human rights that seeks to protect freedom of religion as a fundamental freedom of the individual against State coercion in matters of belief. In particular, the pressing aspiration of the Western Judeo-Christian tradition of today is a move towards the protection of the individual's right to change his/her religion or belief independent of any State coercion as is today enunciated in the so-called principles of international law.

Islam sanctions the co-existence of other forms of beliefs alongside Islamic monotheism but emphatically asserts the Islamic monotheism as the only true and approved form of worship.

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and Muslim Perspectives on Freedom of Religion, *University of Pennsylvania Journal of Constitutional Law* (2006) Vol. 8, No. 3, p. 355; Bambale, Y. Y. *Crimes and Punishments under Islamic Law,* Malthouse Press Ltd., Lagos (2003) p. 77

[5] al-Mubarakpuri, S. *Ar-Raheeq Al-Makhtum [The Sealed Nectar]* Dar Ibn Khaldun (n.d.) pp. 145-146 (137); al-Tha'alaby, A. *Al-Risalah al-Muhammadiyyah*, Dar Ibn Kathir, Beirut, (n.d.) p. 134

[6] Adnan ibn Muhammad, op cit., Vol. 4, p. 40-85

Islamic law has shown more tolerance to other forms of beliefs and had further bestowed on people the freedom of choice necessary for the rational and philosophical understanding and acceptance of the Islamic belief than an outright coercion and compulsion.

The Prophet Mohammed (saw) issued a code of conduct to his followers in *Najran* in which he said:

> To the Christians of *Najran* and its neighbouring territories, the security of God and the pledge of Mohammed the Prophet, the Messenger of God, are extended for their lives, their religion, their land, their property — to those thereof who are absent as well as to those who are present — to their caravans, their messengers and their images. The *status quo* shall be maintained; none of their rites [religious observances] and images shall be changed. No bishop shall be removed from his bishopric, nor a monk from his monastery, nor a sexton from his church ... For what in this instrument is contained they have the security of God, and the pledge of Mohammed, the Prophet forever, until doomsday, so long as they give right counsel [to Moslems] and duly perform their obligations, provided they are not unjustly charged therewith.[7]

Thus, on a historical note, Muslim rulers have generally exercised tolerance in the treatment of non-Muslim subjects, particularly in the matter of religious beliefs.[8] Any oppression that might have soiled the otherwise tolerant record of Muslim rulers was mainly attributable to political factors which find little support in the principles of Islamic law.[9] The practice of early Islamic leaders, particularly the Rightly-Guided Caliphs, was consistently determined by the Qur'anic norms which seek to protect the integrity of the individual conscience.

History has it that movements towards greater measure of freedom and tolerance through the ages have been advanced in favour of religious freedom. Twenty-three centuries ago, King Asoka, the patron of *Buddhism*, recommended to his subjects that they should act in

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[7] Quoted in Khairullah, Ibrahim A., *The Law of Inheritance in the Republics of Syria and Lebanon,* American Press, Beirut, 1941, p. 316

[8] Kamali, M. H. *loc. cit.,* p. 91; Rehman, J. Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, op cit., pp. 139–65 at 51

[9] Mutawalli, *loc. cit.*, at p. 287

accordance with a principle of toleration which sounds as alive today as when it was propounded:

> ... Acting thus, we contribute to the progress of our creed by serving others. Acting otherwise, we harm our own faith, bringing discredit upon the others. He who exalts his own belief, discrediting all others, does so surely to obey his religion with the intention of making a display of it. But behaving thus, he gives it the hardest blows. And for this reason concord is good only in so far as all listen to each other's creeds and love to listen to them. It is the desire of the king, dear to the gods, that all creeds be illumined and they profess pure doctrines...[10]

St. Thomas Aquinas, a leading exponent of Catholicism, taught as early as the thirteenth century, that it was a duty of Governments to uphold freedom of dissident religions before the law and to avoid the scandals and dissensions which suppression of these liberties and guarantees would entail.[11] The sixteenth-century Catholic authority, Suârez, was no less emphatic when he wrote: "The temporal power of the Prince does not extend to the prohibition of the religious rites [of dissidents]; no reason for such prohibition can be advanced, save their contrariety to the true Faith, and this reason is not sufficient with respect to those who are not subject to the spiritual power of the Church."[12]

The doctrine of tolerance was enunciated with particular clarity by John Locke, in his first *Letter concerning Toleration.* In this letter, published in 1689, the year after the English revolution, he wrote:

> Thus if solemn assemblies, observations of festivals, public worship be permitted to any one sort of professors, all these things ought to be permitted to the Presbyterians, Independents, Anabaptists, Armenians, Quakers, and others, with the same liberty. Nay, if we may openly speak the truth, and as becomes one man to another, neither pagan nor Mahometan nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion ... And the commonwealth which embraces indifferently all men that are honest, peaceable, and industrious, requires it not. Shall we suffer a pagan to deal with trade with

[10] Ibid, p. viii
[11] Ibid
[12] Krishnaswami, A. op cit, p. 2

> us, and shall we not suffer him to pray unto and worship God? If we allow the Jews to have private houses and dwellings amongst us, why should we not allow them to have synagogues? Is their doctrine more false, their worship more abominable, or is the civil peace more endangered by their meeting in public than in their private houses? But if these things may be granted to Jews and pagans, surely the condition of any Christians ought not to be worse than theirs in a Christian commonwealth.
>
> ... If anything passes in a religious meeting seditiously and contrary to the public peace, it is to be punished in the same manner, and no otherwise than as if it had happened in a fair or market. These meetings ought not to be sanctuaries for factious and flagitious fellows. Nor ought it to be less lawful for man to meet in churches than in halls; nor are one part of the subjects to be esteemed more blameable for their meeting together than others.[13]

In another passage of the same letter, Locke enunciated another idea which has a modern ring about it:

> No man by nature is bound unto any particular church or sect, but everyone joins himself voluntarily to that society in which he believe she has found that profession and worship which is truly acceptable to God. The hope of salvation, as it was the only cause of his entrance into that communion, so it can be the only reason of his stay there ...A church, then, is a society of members voluntarily united to that end.[14]

It would appear that Locke's theory of toleration was meant to be universal in its applicability. However, it should be borne in mind that in another passage of the same letter, he specifically excludes Roman Catholics while arguing that the State should offer equal protection to members of the Established Church, to Protestant dissenters, and even to Jews, Muslims and pagans. Furthermore, he was definitely of the view that free-thinkers should be proscribed and not allowed to enjoy any rights or privileges. But whatever their limitations, Locke's writings have a considerable interest: they represent the first attempt to present a theory under which individuals and groups of individuals are entitled to claim freedom of thought, conscience and religion as a legal right. Furthermore, Locke made the distinction between freedom to maintain or to change religion or belief on the one hand and freedom to manifest religion or

[13] Quoted in Krishnaswami, A. Op. Cit., p. 3
[14] Ibid

belief on the other, and expressed the view that whereas freedom to maintain one's religion or belief cannot be restrained, freedom to manifest religion or belief is subject to limitation by the State in the same manner, and no otherwise, as freedom to exercise any other civil right.[15]

The modern conception of Hunan Rights [HR] under the platform of which ***"freedom of thought, conscience and religion"*** obtains seeks to secure, guarantee and protect for all people their religious freedom under both international and domestic law.[16] The protection of religious minorities, for example, was a feature of numerous European Peace Treaties from Westphalia in 1648 to Versailles in 1919. The United Nations (UN) as an intergovernmental organization has the international mandate to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, gender, language, or religion.[17] As such, there are numerous HR instruments of international character under the UN system as well as at regional and national levels which have provisions relating to religious freedom.

1.2 STATEMENT OF THE RESEARCH PROBLEM

In certain periods of history, organized religions have displayed extreme intolerance, restricted or even denied human liberties and curtailed freedom of thought. In other periods, proponents of certain philosophical teachings have displayed similar intolerance towards all theistic religions or beliefs. However, such manifestations of intolerance by organized religions or beliefs were usually the result of traditions, practices and interpretations built up

[15] Ibid

[16] See Article 18, Universal Declaration of Human Rights (**UDHR**) of 1948; Article 18, 4(2) of the International Covenant on Civil and Political Rights (**ICCPR**) of 1966; Article 13 (3) & (4) International Covenant on Economic, Social and Cultural Rights (**ICESCR**) of 1966; 1981 UN Declaration on the Elimination of All Forms of Religious Intolerance and Discrimination; Article 8, African Charter on Human and Peoples' Rights.

[17] Article 1-3 of the United Nations Charter, 1945

around them; often the followers of a religion or belief considered it to be the sole repository of truth and felt therefore that their duty was to combat other religions or beliefs.[18]

While it has been a well-established principle of international human rights law as codified in the Universal Declaration of Human Rights [UDHR] and International Covenant on Civil and Political Rights [ICCPR] that every person has the right to freedom of thought, conscience and religion, and freedom, either alone or in community with others, and in public or private, to manifest his/her religion or belief in teaching, practice, worship and observance. But today, the serious disregard and infringement of freedom of thought, conscience and religion by both State and non-State actors has kindled hatred and caused violence among people and nations, as evidenced by domination, suppression and persecution by one religion or sect over the other using the instrumentality of State power. This is much more common where there is a declaration of State religion. Many instances abound on the oppressive treatment of members of minority religion or faith within a nation; arbitrary killing and violence to the life and properties of the holders of certain beliefs or sects; willful destruction of or damage to places of worship and other sacred sites of cultural and religious memory and learning in many parts of the world; etc.

The international community witnesses manifestations of religious intolerance and the existence of severe forms of discrimination in many parts of the world labeled against individuals and groups on the bases of their faith especially in the grant of permission to establish, maintain, and fully use institutions for religious purposes; denial of access to places of worship in situations of emergency; a ban by some States on the wearing in public of some form of distinctive religious symbols, clothing and appearance. Persecuted groups, to name just a few, included *Baha'is* and Sufis in Iran**;** Christians in Egypt**;** *Ahmadis* in Indonesia and

[18]Krishnaswami, A. Op. Cit., p. 1

Pakistan; Muslims in a range of countries, including in Europe; Tibetan Buddhists, Christians, and *Uighur* Muslims in China**;** and Jews in many parts of the world.[19]

The international community today witnesses also instances of severe religious persecution especially the curtailment by some States of the freedom of practicing other religions within their jurisdiction. There exists oppressive treatment of other sects that are considered unacceptable. For example, in many asylum cases, fear of persecution of the *Shiite*, *Baha'i*, *Ahmadiyyah* Muslims was asserted.[20] The growing number of violations of the fundamental right to freedom of religion that are occurring in numerous countries around the world, specifically the right to choose one's religion and change one's religious affiliation. Forced religious conversions and punishment for voluntary conversions are commonplace in many countries. Laws against apostasy, blasphemy, or proselytizing are used in conjunction with anti-conversion laws to create an atmosphere hostile to members of the majority faith who voluntarily convert to another religion.[21]

Often times, states had over excessively sought to enforce the provisions of a particular law thereby occasioning harm and violence on adherents of other minority religions.[22] At times, deliberate and systematic policies are developed with intent to oppress and persecute members of minority religions. Switzerland in the year 2009 sought to introduce a policy to ban minarets in its country;[23] France and Turkey had already initiated a ban on wearing religious

[19] *International Religious Freedom Report for 2011*, United States Department of State, Bureau of Democracy, Human Rights and Labour available online at http://www.state.gov/documents/organization/192653.pdf

[20]See the U.S. International Religious Freedom Report 2008, US Department of State available online at www.state.gov.us

[21] See the Report of the European Centre for Law and Justice (ECLJ) and the American Center for Law and Justice (ACLJ) titled *International Legal Protection of the Right to Choose One's Religion and Change One's Religious Affiliation,* September 2007 available online at http://eclj.org/pdf/070911_eclj_aclj_report.pdf

[22] Krishnaswami, A. op. cit., at p. 23

[23] Several Complaints against Switzerland have been filed before the ECtHR concerning the ban on the construction of minarets following the popular vote of 26 November 2009 in Switzerland to prohibit

headscarf in public. Above all, the research intends to look into the perspective of the sharia and international (human rights) law while redressing the problems of religious intolerance, religious persecution and discrimination; issues of proper relation between Church and State, i.e., relationship between religious and state institutions; the ever growing instances of religious crisis/violence and the role of religious policy and legislation vis-à-vis State/Security agencies abuses/violations of religious rights.

1.3 AIM AND OBJECTIVES OF THE RESEARCH

The principal aim of this research is to comparatively analyze freedom of religion under the sharia and international law. The research seeks to achieve the following objectives:

1. To examine the legal framework on freedom of religion under the Shariah and international law with a view to establishing the complementarities or otherwise of the two systems of laws.
2. To provide an appraisal on the nature, imports and implication of religious freedom in the light of current international controversy over the compatibility of sharia and human rights.
3. To highlight the most topical legal issues and challenges before the international community regarding the protection of freedom of religion under the two systems of law.

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the building of minarets. See for example, the complaint of **Association Ligue des Musulmans de Suisse Others v. Switzerland (No. 66274/09)** 28.06.2011 (inadmissibility decisions) and **Ouardiri v. Switzerland (No. 65840/09)** 28.06.2011 (inadmissibility decisions). In these complaints, ECtHR declared their applications inadmissible, on the ground that they could not claim to be the "victims" of a violation of the Convention.

1.4 RESEARCH METHODOLOGY

To realize the set out objectives of the research, doctrinal method of legal research was employed. Recourse was made to published legal materials and documents written on the subject. Therefore, reliance was made on international legal instruments vis-à-vis the provisions of Shari'ah Law on the subject.

1.5 SCOPE OF THE RESEARCH

This study addresses the Human Rights aspect of freedom of religion under the Shari'ah and International Law. In doing so, we limited our enquiry by undertaking an analysis on the legal framework that obtains on global level on the subject as contained in multilateral treaties. In sum, we have considered the jurisprudence on the subject as developed over the years under the United Nations system.

With regard to the Islamic law point of view, the study is limited to the interpretation of Shari'ah as understood by the four Sunni Schools of Islamic law; and as such, we undertakes a review of the writings of classical and modern Islamic scholars and compares them with the Western literature on the subject.

By and large, our examination of the subject was restricted to the highly contentious issues of Islamic law – the right to change religion (otherwise termed apostasy in Islamic law), the rights of non-Muslims (*Dhimma*) in an Islamic State, relations of law and religion (state religion), blasphemy/defamation of religion, application of the doctrine of jihad in defence of the Islamic faith, etc.

1.6 LITERATURE REVIEW

Religious freedom is a very topical issue of concern to both theists and atheists. A lot has been written on the subject particularly at international level ranging from books, articles to seminar and research papers. Literatures from Islamic law perspective consider freedom of religion from the point of view of rights of non-Muslims (*Dhimmi*) in an Islamic State vis-à-vis the operation of the doctrine of jihad under Islamic international law (*as-Siyar*).

As far as Islamic law is concerned, non-Muslims under the Shari'ah have a sufficient degree of religious freedom recognized and protected in an Islamic State. Several classical or earlier Muslim jurists have exposited on this subject. To mention but few are Al-Shaibani;[24] Abu Yusuf;[25] Al-Kasani;[26] Ibn Hazm;[27] Ibn Qudamah;[28] Al-Sarakhsy;[29] Ibn Taymiyyah;[30] Ibn Qayyim,[31] etc. Among the several legal issues conversed by these earlier Muslim jurists are the rights of *Dhimmah*, *al-Musta'amin*, rules relating to *jizyah* and *Kharaj*, the criteria of *Dar al-Islam* and *Dar al-Harb*, legal rulings concerning *al-Murtaddin* (apostates), conclusion of *Sulh* (truce agreement), sanctity of places of worship, etc. These works forms parts of the classical juristic exposition on the subject, only that with the passage of time, the downfall of Islamic state and the adoption of modern as well as Western nation-state; the relevance of the application of some of the views articulated therein jurisprudential reconsideration, i.e., these works may fall short of being ideal law to the modern time, unless and until opportunity for Islamic Rule is restored.

[24] Al-Shaibani, *Kitab al-Siyar al-Saghir* and *Kitab al-Siyar al-Kabir*
[25] Abu Yusuf, *Kitab al-Kharaj*
[26] Al-Kāsānī, Alā al-Dīn *Badā'i al-Sanā'i fī Tartīb al-Sharā'i,* Dār al-Kitāb al-Arabī, Beirut (1982) pp.
[27] Ibn Hazm, *al-Muhalla*, Vol. 6
[28] Ibn Qudamah, *al-Mughni wa al-Sharh al-Kabir*, Vol. 10
[29] Al-Sarakhsy, *Al-Mabsud*, Vol. 3
[30] Ibn Taymiyyah, *al-Jawab al-Sahih fi man Baddala Din al-Masih*, Vol. 1,
[31] Ibn Qayyim, *Ahkan ahl al-Dhimmah*

As to jihad**, Ibn Taymiyyah,**[32] in one of his works which is a manuscript devoted to the treatment of the justifications for war, discusses at some length and persuasively explains the evidences from the Qur'an and the tradition of the Prophet supporting the position of the majority of Muslim jurists, i.e., the Hanafi, Maliki and Hanbali, that jihad is permissible only in case of aggression by the enemy against Muslims, rejecting the position maintained mainly by al-Shafiʿi and some Hambali jurists that unbelief in itself is a justification for jihad. Similarly, **Abu Zahrah**[33] also supports the permissibility of jihad in cases of aggression and religious persecution against Muslims and when an enemy prevents Muslims from preaching Islam. **Shaykh Yusuf al-Qaradawi**[34] while following the same line of thought as Ibn Taymiyyah and Abū Zahrah on the issue of jihad, augments that at present, there are three kinds of jihad: (1) the liberation of occupied Muslim countries; (2) peaceful attempts to change the current Muslim regimes that permit acts that are absolutely prohibited in Islam; and (3) preaching Islam to the rest of the world in their languages via the Internet, radio and satellite channels as well as written publications.

Abul A'la Maududi,[35] in a monograph titled "*Human Rights in Islam*" chastises the often over exaggerated norms of human rights, noting that Westerners had no concept of human rights and civil rights before the seventeenth century. Even after the seventeenth century the philosophers and the thinkers on jurisprudence though presented these ideas, the practical proof and demonstration of these concepts can only be found at the end of the eighteenth century in the proclamations and constitutions of America and France. That after this, there

[32]Ahmad ibn Abd al-Halīm ibn Taymiyyah, *Qāʿidah Mukhtasarah fī Qitāl al-Kuffār wa Muhādanatihim wa Tahrīm Qatlihim li-Mujarrad Kufrihim: Qāʿidah Tubayyn al-Qiyam al-Sāmiyah lil-Hadārah al-Islāmiyyah fī al-Harb wa al-Qitāl*, ed. Abd al-Azīz ibn Abd Allah ibn Ibrāhīm al-Zayd Āal Hamad (Riyadh: N.p., 2004/1424).

[33]Muhammad Abū Zahrah, *Al-ʿAlāqāt al-Dawliyyah fī al-Islām* (Cairo: Al-Dār al-Qawmiyyahlil-Tibāʾahwa al-Nashr, 1964/1384), pp. 47-52, 89-94.

[34] al-Qaradawi, Y. *Fiqh al-Jihād: Dirāsah Muqāranah li-Ahkāmih wa Falsafatih fī Daw al-Qur'ān wa al-Sunnah* (Cairo: Maktabah Wahbah, 2009), Vol. 2, pp. 1183-1197.

[35]Maududi, A. A. *Human Rights in Islam* (1976), *available online at at* http://www.islam101.com/rights/index.htm (accessed on the 13th February 2012).

appeared a reference to the basic human rights in the constitutions of different countries. But more often the rights which were given on paper were not actually given to the people in real life. Citing Qur'an 2:256, Maududi stated that Islam gives the right to freedom of conscience and conviction to its citizens in an Islamic State and that though there is no truth and virtue greater than the religion of Truth- Islam, and Muslims are enjoined to invite people to embrace Islam and advance arguments in favour of it, they are not asked to enforce this faith on them. No force will be applied in order to compel them to accept Islam. Whoever accepts it he does so by his own choice.

Muhammad Adnan[36] a contemporary Muslim scholar from Saudi Arabia in his encyclopedic work on human rights in Islam, has exposited enormously on various aspects of freedom of religion in Islamic law as it relates to non-Muslims. He reflected the classical position that change of religion (*riddah*) and blasphemy are crimes that attract death penalty citing the consensus of Muslim jurists on the issues.[37] He further discussed the role of Islamic law in protecting the legal rights of *Ahl Dhimmah* with elegant categorization under various headings, e.g., their rights at the time of peace which includes among other things, religious rights;[38] obligation of *jizyah*;[39] political rights;[40] etc. While advancing the view that peace is the default basis of relationship between Muslims and non-Muslims,[41] he also set out wartime related rights such as protection of places of worship,[42] acceptance of armistice (*Sulh*) from non-Muslims,[43] prohibition on killing civilian persons such as women and children,[44] humane

[36] Adnan ibn Muhammad ibn Abd al-Azeez al-Wazzan, *Muasu'atu Huquq al-Insan fi al-Islam wa Simatiha fi al-Mamlakat al-Arabiyyah al-Sa'udiyyah*, Al-Resalah Publishing House, Beirut, Lebanon (2005, 1st ed.) Vol. 4, p. 40-
[37] Ibid, Vol. 6, pp. 65-68
[38] Ibid, Vol. 4, pp. 54-76
[39] Ibid, Vol. 4, pp. 43-54
[40] Ibid, Vol. 4, pp. 76-84
[41] Ibid, Vol. 4, p. 85
[42] Ibid, p. 92
[43] Ibid, p. 89
[44] Ibid, p. 87

treatment of prisoners of war,[45] grant of *Aman* (safe conduct),[46] prohibition of mutilation and burial of dead bodies,[47] etc. On the whole, the author's contribution may be seen as pacesetter among modern scholars in terms of comprehensive treatment of Islamic laws relating to human rights; nonetheless, the approach and methodology emphases largely historical context in that, some of the purely modern legal issues on the topic have been circumvented.

Khalid Abou El Fadl[48] suggests that the historic purpose of the shari'ah of fulfilling the welfare of the people constituted by necessities (*daruriyyat*), needs (*hajiyyat*) and luxuries (*Kamaliyyat*) could ground a systematic theory of individual's rights based on the five basic values of the *daruriyyat* (e.g., religion, life intellect, honour and property). Under such a system, it was argued by the author that protection of the basic value of religion could be achieved by religious liberty rights. This contribution is however much more theoretical to assume that the protection of religion (*hifz al-Din*) could serve as the basis for contextualizing freedom of religion in Islamic law in view of the fact that it has the tendency of overlooking the very fact that protection of religion (*hifz al-Din*) encompasses among other things the employment of certain mechanisms such as jihad and the punishment of apostates to preserve the Islamic faith.

Majid Khadduri's *War and Peace in the Law of Islam* and his translation of Al-Shaybānī's work under the title "*The Islamic Law of Nations: Shaybānī's Siyar"*[49] remain one of the main sources for Western researchers on the subject. His expressed ideas on jihad have had a decisive influence on the current Western literature, despite the fact that he discusses mainly

[45] Ibid
[46] Ibid, p. 88
[47] Ibid
[48] Abou El Fadl, K. *The Human Rights Commitment in Modern Islam*. In: Joseph Runzo, Nancy M. Martin and Arvind Sharma (eds.) *Human Rights and Responsibilities in the World Religions,* Oneworld Publications, Oxford, England (2003) pp. 332-333
[49] Khadduri, M. *War and Peace in the Law of Islam,* Baltimore, MD.: Johns Hopkins University Press, (1955), p. 51.

classical Muslim jurists and historians and even then not in a manner that fairly reflects the diversity of their opinions. It is quite easy sometimes to trace the influence of his ideas, and even his vocabulary, in current Western literature. Whether this influence is acknowledged or not, many writers have accepted without question some of his mistaken ideas and his hostile presentation of jihad in particular, and the classical theory of Islamic international relations, in general. But his work remained rather hostile for his stereotyped conclusions on jihad.[50]

The core of Khadduri's understanding of jihad can be found in the following words: "The jihad was therefore employed as an instrument for both the universalization of religion and the establishment of an imperial world state." He adds that "jihad may be regarded as Islam's instrument for carrying out its ultimate objective by turning all people into believers, if not in the prophethood of Muhammad (as in the case of *dhimmis*), at least in the belief in God." However, he writes in another work that jihad was the instrument for "achieving Islam's ultimate objective, namely, the enforcement of God's law (the *Shari'a*) over the entire world."[51] In fact, Khadduri does not explain how and from where he deduced these various interpretations of jihad. He seems sometimes to be mainly trying to give an interpretation for the objectives of what he calls "the expanding Muslim state" during the first century of the Islamic era rather than interpreting the jurists' understandings of jihad. In other words, he sometimes confuses Muslim history with Islamic law and unfortunately does not adequately refer to the classical Islamic law books of the various schools. Perhaps the wide acceptance of his understanding of jihad in Western literature relates partly to the way he reduces such complex subject to such simple ideas.

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[50]See Abdul Hamid A. Abu Sulayman, A. A. *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, International Institute of Islamic Thought, Herndon, VA (1993/1414, 2nd& Rev. ed.), pp. 20-24; Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law*, Studies in Religion and Society, Vol. 53 (Edwin Mellen Press, Lewiston, NY 2001), pp. 13, 37, 39, 49, 72, 75, 80.

[51] Khadduri, M. "Islam and the Modern Law of Nations", *American Journal of International Law*, Vol. 50, No. 2, Apr. 1956, p. 359.

However, unlike the approach of some scholars who tend to argue positively for the right to change of religion in Islam in view of their confined understanding that the Qur'an mentions no temporal punishments for apostates, Majid Khadduri in another work has acknowledged that to turn one back from Islam after adopting it is apostasy.[52]

Prof. Abdurrahman I. Doi[53] had immensely conversed on non-Muslims rights under the Shari'ah. The learned author elucidated clearly that, apart from the rights and obligations involving worship, non-Muslims are equal to Muslims with respect to all other rights and obligations related to social life and the rights of citizens in an Islamic State. That Islamic view of freedom of religion and religious worship as expressed in Qur'an 2:256 *"let there be no compulsion in religion: truth stands out clear from error…"* shows that compulsion in the matter of religious worship is incompatible with the religion of Islam because every religion depends upon faith and will, and these would be meaningless if they are induced by force.[54] That Shari'ah has enshrined in itself the principles of Islamic International Law right from its inception and as early as 150 years after the Hijra. It regulated the conduct and behaviour of the Muslim state in war, peace and neutrality.[55] That the general concepts of conventional international law restricts its jurisdictional applications to nations only but the concepts of Islamic international law in the Shari'ah regulated not only the conduct of the Muslim state with other states, but also relationship with non-Muslim states and non-Muslim individuals living in the Muslim state. That the fundamental difference between HR in Islam and those of the famous UDHR is that, the former is binding on every Muslim state while the later are mere declaration binding on no state or country. That states which voluntarily signs ICCPR and ICESCR as seen in recent times, although legally bound by its provisions have not

[52] Khadduri, M. *The Islamic Conception of Justice*, Baltimore, MD.: Johns Hopkins University Press, (1984), p. 239.
[53] Doi, A. I. *Non-Muslims under the Shariah,* Ta-Ha Publishers Limited, London (1983) pp. 29-30
[54] Ibid at p. 73-74
[55] Ibid at p. 16-18

implemented all the rights therein. That as far as human rights are concerned, in Islam, they are taught to every Muslim through the divine scriptures which provide necessary guidance to the believers to develop all his faculties in a manner that will benefit him for his great task as the vicegerent of Allah on earth. Despite the authors penetrating and contextual contribution to the subject, he had not highlighted on how does the established principles of the Shari'ah he outlined being the law has affected contemporary setting in Muslim countries.

Abdul-Rahman al-Sheha,[56] while discussing the preservation of the five essential necessities of life (i.e., *maqasid al-shariah*), he echoed the view that Islam aimed at achieving a balance between protecting the rights of the individual and the rights of the society collectively and that one way of achieving this goal is by providing the essential necessities that ensure for the individuals their full rights without damage to the public good. Among these essential necessities is preservation of the divine religion of Islam (*hifz al-Din*).[57] The author first re-examined the position of religion in Western societies, that for secular societies, religion is considered purely a private affair; public life was designed to be legally guided by secular principles and institutions and never by religion or religious law. The argued that it must remember that the development of secularism itself was a reaction to the extravagances and conflicts of the Christian Churches and various Monarchs and Kings in Europe.[58] Thereupon he proceeded to consider the sensitive subject of "Jihad". Citing the provisions of Qur'an 2:193,[59]he stated "the summary about Jihad is that fighting is allowed for Muslims for protection against aggression, exploitation and suppression, and yet in this all transgressions are prohibited."[60] That by Jihad, the religion of Islam with its ultimate truth, justice and

[56] al-Sheha, A. *Human Rights in Islam and Common Misconceptions*, (ed.) Abu Ayoub Jeromē Boulter and Abdurrahman Murad (nd). An online publication available at
[57] Ibid, p. 10
[58] Ibid, p. 17
[59] Qur'an 2:190 provides: "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loves not transgressors."
[60] al-Sheha, A. op cit., p. 18

goodness is protected, and the Muslims themselves are defended from those that wish them harm.[61]

He further elucidated on the philosophy of jihad saying Jihad is legislated not to force people against their own will to join Islam, but rather as a tool and mechanism to help maintain the peace that allows for the peaceful spread of the message about the religion of monotheism, justice and equality to the entire world and protect it against attack. After people receive the message, it is up to them to accept Islam or choose otherwise. The essential purpose of Jihad is to open the way for peaceful propagation of the Message of Islam to people.[62]

Pertinently, al-Sheha also mentioned that the belief and religious practices of the non-Muslim residents in an Islamic state are respected to the legal limit.[63] That "the non-Muslim residents of an Islamic state are required to pay a minimal tax called "Jizyah" which is a specific type of head-tax collected from individuals who do not accept Islam and desire to keep their religion while living in an Islamic state and under Islamic rule".[64] Citing a provision of the Holy Qur'an,[65] he stated that Islam forbids the conversion of non-Muslims to Islam by force. This does not mean that Muslims should not call others to join the Islamic monotheistic faith by delivering the Message of Allah to people but indicates that Muslims should call to Islam in a wise, kind and comely manner. Islam has an international mission and it is neither a regional nor ethnical call. But the guidance is in the Hands of Allah alone and not in the hands of people.[66] That Muslim history has numerous examples of the tolerance shown to non-

[61] Ibid
[62] Ibid, p. 19
[63] Ibid, pp. 23-24
[64] Ibid p. 24
[65] Qur'an 10:99 which provides: "If it had been your Lord's Will, they would all have believed, all who are on earth! Will you then compel mankind against their will to believe".
[66] al-Sheha, A. op cit., p. 91

Muslim subjects, while many other societies were intolerant towards Muslims and even their own people.[67]

From the conventional international law perspective, one of the earliest attempt to study discrimination in matters of religion was that conduct by Special Rapporteur **Arcot Krishnaswami**[68] under the auspices of the UN sub-commission on prevention of discrimination and protection of minorities. In conducting the study, the author concerned himself with the *de facto* as well as the *de jure* situation prevailing in different countries of the world. The study was an attempt to clarify the content of the concept of non-discrimination in respect of the right to freedom of thought, conscience and religion. However, this study comprehensive as it is and predating even the adoption of ICCPR, it perpetuates historical antecedents from the Judeo-Christian traditions in total neglect of Islamic traditions. In that, it was tilted more towards addressing atrocities committed in this regard within the Western context of achieving secularism.

Ann Elizabeth Mayer,[69] one of the principal contributors and advocates of freedom of religion in international law, writes with reference to apostasy: "The Islamic human rights schemes ... are evasive on the question of protections for freedom of religion ... The failure of a single one of these Islamic human rights schemes to take a position against the application of the shari'a death penalty for apostasy means that the authors of these schemes have neglected to confront and resolve the main issues involved in harmonizing international human rights and shari'a standards." Her argument therefore depicts punishments of apostasy as religious freedom violation and further underlies incongruence between international law and Islamic law on the subject in so far as apostasy remains an offence in Islamic law.

[67] Ibid, p. 118

[68] Krishnaswami, A. Study on Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) New York, p. vii-viii *available online at* http://iiss.berkeley.edu/files/2011/06/Krishnaswami_19601.pdf (last visited on the 6/03/2013)

[69] Mayer, A. E. *Islam and Human Rights*, Pinter Publishers, London, 1991, pp. 186-187

Javaid Rehman,[70] an international law scholar in one of his articles, states that, although the International Bill of Rights represent strong commitments undertaken by the international community and give the appearance of a strong consensus on issues regarding freedom of religion and protecting the rights of religious minorities, the reality is that much of this consensus is superficial as there are serious inconsistencies and disagreements both in the meaning and in the substance of the right to freedom of religion.[71] He identified lack of consensus on the definition of 'religion', and that other segments of substantial controversy on freedom of religion and where international law has faltered is the issue of 'freedom to change one's religion or belief'.[72] That one stumbling-block in attaining consensus on the issue of the freedom of religion has been the position of states which purport to follow the *Sharia*.[73]

So also, **Javaid Rehman and Shaheen Sardar Ali**[74] in their paper on the concept of Jihad in Islamic international law, depicted the argument that Islamic law has been equated with fanatism, intolerance, violence and wars of aggression and that the classical jihad ideology is often deployed to cast doubt on the compatibility of Islam with modern norms of international law as enunciated in the UN Charter.[75] They further allude to the criticism that the totality of jihad ideology represents a religiously sanctioned aggressive war to propagate or defend the Islamic faith.[76] To adjust this position, these authors have incredibly taken the view that apart from the Qur'an and *Sunnah*, all other sources of Islamic law are devised by human

[70] Rehman, J. Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, *International Journal on Minority and Group Rights* (2000) Vol. 7, pp. 139 – 65
[71] Ibid, p. 145, 149
[72] Ibid, p. 146
[73] Ibid, p. 150
[74] Ali, S. S. and Rehman , J. The concept of Jihad in Islamic international law, *Journal of Conflict and Security Law* (2005) Vol. 10, No. 3, 321 – 343.
[75] Ibid, pp. 321-322
[76] Ibid, pp. 328-330

knowledge and endeavor,[77] therefore they rejected the arguments that Islamic law is divine law and unchangeable and tend to emphasize developing alternative legal reasoning compatible with present day requirements of coexistence. Their contribution was therefore directed towards reinterpretation of Islamic law as it ought to be (to suit modern Western disorders) rather than espousing Islamic law as it is known in Islamic jurisprudence.

Muhammad Zafrullah Khan,[78] a onetime Judge and President of the *International Court of Justice* (ICJ) at The Hague, has attempted putting forward Islamic perspective to the UDHR. As to Article 18 of UDHR, his remarks on Islamic law permitting change of religion are highly reproaching. The author advanced the view that "claiming to be the truth, it [Islam] invites everyone to believe in its doctrine and to practice its teachings and does not encourage disbelief or a hypocritical profession of belief. Should anyone cease to believe in Islam, he does not thereby incur any legal penalty."[79] The author went further to elucidate this assertion saying that, it is only if, along with change of faith, or in consequence of it, one indulges in activities which constitutes an offence, that one would be punishable for such an offence in the same manner and to the same degree in which he would have been liable had he been guilty of the offence without any change of faith, i.e., that change of belief unconnected with hostilities is not punishable in Islamic law.[80] He went further to castigate punishment of apostasy as nullifying the provisions of the Qur'an on freedom of conscience.[81] The explanation for this egregious and differing exposition of the writer is not far-fetched, given the fact that he belongs to the *Ahmadiyyah* sect in Pakistan; given also the Western influence on him through his active participation in the drafting of the UDHR and his role in being onetime President of the Seventeenth General Assembly session of the UN, Judge and

[77] Ibid, p. 327
[78] Zafrullah, M. K., *Islam and Human Rights,* Islam International Publications Ltd, Islamabad, (1999, 5th ed.) pp. 113-120
[79] Ibid, p. 116
[80] Ibid
[81] Ibid, p. 136 & 139

President of the ICJ; and given also that his write-up was of post UDHR era, therefore tilted towards the fallacy of interpreting Islamic law from within in the light of the UDHR (at least to secure a position for his dissident sect against persecution) than a fair presentation of the legal standpoint of Islamic law on the issue.

Imad-ad-Dean Ahmad[82] *had* acknowledged that free exercise of religion is well established in Islamic law as evidenced in classical Islamic civilization (7^{th} – 15^{th} Century) than in medieval Europe;[83] that "in the case of the free exercise of religion, there is no question that the freedom of religion, at least of the People of the Book, is hardwired into Islamic law".[84] The misdemeanors of the author started to manifest with somewhat his misconceived view that "the question is not whether free exercise is part of Islamic law, but what are its limits?" The author went ahead to identify as issues of concern, such questions as regards prohibition of proselytism, apostasy, blasphemy as well as the paternalistic role of ideal Islamic State (i.e., its police power) in obliging non-Muslims to submit to Islamic public order.[85]

Imad-ad-Dean was also on a tour of misguidance when he submit out of mistaken belief of accepting current state practices in some Muslim countries (e.g., in Saudi Arabia) than the ideal situation under an Islamic State to say that separation between "state" and "religion" can benefit the two. Fallaciously, his submission was that "an Islamic state can never restrict itself to being the state of "Islam", but becomes the state of a particular interpretation of Islam, putting at risk not only the religious minorities, but the majorities as well.[86] Further still, the author out of delusion, calls for the acceptance by Muslims of the American example of secularism rather than that of French. His argument was that, although religion and politics

[82] Imad-ad-Dean, A. American and Muslim Perspectives on Freedom of Religion, *University of Pennsylvania Journal of Constitutional Law* (2006) Vol. 8, No. 3, p. 355
[83] Ibid, p. 355
[84] Ibid, p. 362
[85] Ibid, pp. 362-363
[86] Ibid, pp. 363-365

may not be completely separated in the Islamic tradition, there ought to be no establishment by Muslim countries of "state religion", the state itself must maintain absolute neutrality among religious communities and must not dictate religious practices or beliefs, neither to religious minorities nor to the dominant religious communities. This is in our view, an apparent negation of the basic characteristic of an Islamic state and the direct command of Allah (swt) as to the concept of *al-Amr bil-Ma'aruf wa an-Nahyu anil-Munkar* (enjoining what is good and forbidden what is evil).[87] This attempted revisionism of the author takes the argument to nowhere as the original clash between Western and Islamic legal and religious traditions cannot be circumvented in this way as envisaged by the author. Law, state and religion are one and continue to be one institution in the Islamic tradition; the state derives its legitimacy through religious institution; and the state shall at all times, strive to ensure the establishment of the Islamic faith.

Prof. Muhammad Hashim Kamali[88] has also attempted to provide contemporary discussion on freedom of religion in Islamic law, but he undermines Islamic sources in favour of current debates on the subject. The author first identified freedom of religion as the most sensitive and controversial of all individual liberties but he went on to perpetuate the misleading argument that the Holy Qur'an is silent on the question of death penalty, alluding also to the incredible argument as to the weakness of the chain of transmission (*isnad*) of the Hadith on "whoever changes his religion shall be killed". The impression therefore is that, chance of religion is not a punishable offence in Islamic law. He accredited the argument that the Prophet (saw) and his Companions never sentenced anyone to death solely for the renunciation of the Islamic faith. Contrary to this misjudgment, it was evident that the Prophet (saw) has in fact sentenced to death Abd Allah ibn Abi Sarh for apostasy even though the sentence was not actually

[87] See Qur'an 22: 41 which provides: "Those who, if we give them power in the land, establish the Salah, enforce the Zakah, and enjoin the good and forbid the evil … "
[88] Kamali, M. H. *Freedom of Expression in Islam,* Islamic Texts Society, Cambridge (1997, Rev. ed.)

executed and the apostate Muqayyis ibn Sababa was actually executed but the fact that he was also a murderer blurs his case.[89]

Abdullahi Ahmad An-Na'im,[90] in one of his articles has articulated a framework as to what he called mediation of the public role of Shari'ah in present Islamic societies with particular focus on Northern Nigeria whereby the author sought to emphasize on the need for balancing competing claims instead of asserting either the categorical fusion of Shari'ah and the state or its total exclusion from the public domain.[91] He capitalized on the re-introduction of the Shari'ah in Northern Nigeria following the pioneer effort of Zamfara State in 1999. The author argued that the "… confusion, misunderstanding, and suspicion surrounding Shari'ah are partly due to the fundamental ambiguity of demands by the Muslims of the Northern Nigerian states which tends to attract negative reactions from Christians and other citizens of Nigeria."[92] He further outlined his so-called ambiguity of the demands by the Muslims to the practice of Shari'ah in Nigeria, he stated:

> Since we are only concerned with the demands of some of the Muslims of Northern Nigeria that Shari'ah should be enforced by the State, the question is which aspects of this vast legal and ethical tradition are Muslims demanding should be enforced as a matter of positive state law and official policy? Does this includes such aspects of the Shari'ah as the *dhimmah* system, whereby Christian Nigerians would be relegated to the status of second-class citizens in their own country? Will those subscribing to non-scriptural beliefs (commonly known now as Traditional African Religions) who are deemed to be unbelievers by shari'ah, not be accepted as legal persons at all except under the discretionary status of temporary safe conduct (*aman*)? Are Muslims calling for state enforcement of shari'ah law of apostasy (*riddah*), whereby a Muslim who repudiated his or her belief in Islam is subject to the death penalty? Are they calling for the legal prohibition of charging or receiving interest on loans (*riba*), and speculative contracts (*qarar*), thereby outlawing modern banking and insurance contracts? To reiterate: the question is whether

[89] See Ibn Taymiyya, *al-Sarim al-Maslul ala Shatim al-Rasul,* p. 791-793; Ibn Abd al-Barr, *Durar fi Ikhtisar al-Siyar*, p. 219

[90] An-Na'im, A. A. The Future of Sharia and the Dabate in Northern Nigeria In: Ostien Phillip, Jamila M. Nasir and Franz Kogelmann (eds.) *Comparative Perspectives on Sharia in Nigeria,* Spectrum Books Ltd., Ibadan (2005) pp. 327-357

[91] Ibid, p. 327

[92] Ibid, p. 328

> the state should enforce these aspects of Shari'ah as a matter of positive law or official state policy, and not whether Muslims Nigerians are free, for example, to refrain from interest-based banking or insurance contracts.[93]

Contrary to the author's understanding of Shari'ah, neither historical nor legal traditions of the Shari'ah is known to relegate the status of non-Muslims neither to that of second-class citizens nor of been deprived of legal personality? Thus, to seek to correlate this position as the implications of the applications of Shari'ah in Nigeria to non- Muslins, is no doubt, a deadly uncorroborated criticism that could ever not be allowed to be advanced as the factual legal position. The author may therefore be seen as an architect of incitement and a proponent of distortion seizing an opportunity to say in respect of Shari'ah in Nigeria, things that he could dare not say in his country Sudan. He went out of context and in disregard of Nigeria's legal history in seeking to revitalize the Western criticism of the Shari'ah to the Nigerian environment, i.e., objections on *Dhimma* system, enforcement of the law of apostasy, Muslims' right to interest free banking, etc.

However, the totality of An-Na'im's negative image of the Shari'ah plus his personal commitment to its re-interpretation[94] makes most of his works including this one, a tool for incitement and affront to Shari'ah rather than an intellectual contribution to the debate for the application of Shari'ah in Nigeria. Of particular concern was his fundamental likening of the demand for the application of the Shari'ah in Northern Nigeria as an invitation to civil war. In the author's words: "a demand for the application of the totality of the Shari'ah would be tantamount to an invitation to civil war"[95]

An-Na'im tried drawing a line of distinction as to public-private divide to the practice of Shari'ah , i.e., a dichotomy between *Fiqh al-Muamalat* and *Fiqh al-Ibadat wal Aqidah* while

[93] Ibid, p. 329
[94] See An-Na'im, A. A. *Toward An Islamic Reformation: Civil Liberties, Human Rights, And International Law*, Syracuse University Press, (1990)
[95] Ibid, p. 330

trying to argue that matters of belief and worship (seen by the West as pertaining to private domain for the individual) has been preserved in Nigeria for the Muslims. The Shari'ah and its practice by Muslims for centuries was known to encompass all facets of human life with no room separation between public-private nor spiritual-mundane affairs. Contrary to the secular and atheistic arrangements that An-Na'im is calling on the Nigerian Muslims to allude to, if there was anything as a matter of precedent for Nigerian Muslims to emulate from his homeland – Sudan, is to press for not only the total application of all aspects of the Shari'ah in Nigeria but a constitutional arrangement as to its declaration as state religion.

James A. R. Nafziger[96] in his work is of the view that religion and international law often appear to be congruent. Religious institutions and doctrine have helped shape and develop modern international law. For example ... all of the major religions propound a Golden Rule - treat others as you would like to be treated - that is the basis of reciprocity ... that has shaped humanitarian legal doctrine. Personal redemption by acceptance ... may help explain "positivism's preoccupation with consent" [e.g., a treaty-based agreement or that a State cannot be forced to appear before the International Court of Justice without its consent]; and the rules and principles of state succession may be rooted in the historic need of a religiously defined polity to attribute an implied choice of permanent exclusion to an untolerated ethnic order or other excluded group. International environmental law is rooted in the basic Judeo-Christian values, as is the concept of a 'common heritage of mankind,' which has at times influenced international environmental law, the law of the sea, cultural property law, the law of outer space and the legal status of Antarctica.

Sometimes, however, religion and positive international law are anything but congruent. They may even be in conflict. For example, prohibitions on whaling by national and international

[96] James A. R. Nafziger, *The Functions of Religion in the International Legal System.* In: Mark W. Janis & Carolyn Evans (ed.), Religion and International Law (1999) at 159–165

agencies, for the best of environmental reasons may conflict with indigenous religious practices. Prescriptions to protect the rights of women have been rejected by some Islamic traditions.[97] Although the author tries to establish the compatibility of religion with modern international law, he also acclaimed that it's rooted in the basic Judeo-Christian values and that it also at times conflicts with religion, citing its differing standing to Islamic tradition. Thus, it is wondered whether international law remains truly universal amidst its influence by Judeo-Christian tradition.

Prof. M. T. Ladan[98] had of recent, also exposited thoroughly on human rights and its protection. He argued that freedoms of thought, conscience, religion or belief are fundamental freedoms which may not be suspended even in states of emergency. That the same protection is due to religious believers as to non-believers and that no one may be discriminated against because of his/her religion or belief nor forced to adhere to any other. It is quite noteworthy that his contribution important as it is emphasizes more on the protection of religious freedom in an armed conflicts situation which is more of a general and skeletal nature that to give it a flesh demands a further study in this direction.

Nigerian authors from constitutional law perspective to mention but few are the learned constitutional law lawyers like **Nwabueze**[99] who have highlighted the correlation between the restriction on religious freedom and the right thereto while restating the provisions of the independence Constitution. His scant commentary on the subject remained an obstacle to a vivid understanding of the Nigerian aspects of religious freedom. Furthermore, his restatement that religious freedom is subject to laws that are reasonably justifiable in a

[97] E.g., such as those that were developed and codified in the Convention for the Elimination of All Forms of Discrimination Against Women [CEDAW]

[98] Ladan, M. T. , *Materials and Cases on Public International Law*, Ahmadu Bello University Press Ltd., ABU Zaria, Nigeria (2008) p. 261

[99] Nwabueze, B. O. *Constitutional Law of the Nigerian Republic*, Sweet and Maxwell, London (1964) p. 362

democratic state in the interest of defence, public safety, public order, public morality or public health are without elucidation as to what they are and what constitute them in Nigeria. Pertinently, his commentary dwelt much on the case of *Ojiegbe v. Ubani*[100] where he considered as valid and therefore non-discriminatory the setting up of election day on Saturday during the 1958 Federal Election held in December 12, 1958 to the House of Representatives in Aba constituency which members of the Seventh Day Adventist (being religious minorities) protested against as being incompatible with the ethics of their religious belief and a deprivation of their right to vote. Nwabueze's opinion is with respect, reminiscent of discrimination and irreconcilable with the Seventh Day Adventist's fundamental right to freedom of religion on the one hand and the right to vote as citizens of Nigeria.

Peter Oluyede[101] another Nigerian author canvassed scantly on the right to freedom of thought, conscience and religion and his work is more a restatement of the provisions of the 1979 Constitution on the subject.[102] The learned author counts on the statement of Mr. Justice T. A. Aguda when he said:

> In so far as freedom of religion is concerned many Nigerians like myself have developed great doubts if this freedom is not being carried so far as to amount to an abuse in some cases. Many so-called Christian Churches have been established mainly as profitable trades and in some cases as a means of perpetuating incredible fraud on credulous followers. On the other hand the extremism of some Muslims in the name of freedom of religion has led to blood-shed in recent years. The country was of course quite right in proscribing these extremist sects recently since they denied others the same freedom they are claiming for themselves.

His two page commentary on the subject did not permit him to expose the basic attributes of religious freedom, bring forth the insight on the positive and negative aspect of the right and the perceived restrictions thereto under the 1979 Constitution. Perhaps, to the extent that we

[100] (1961) 1 All NLR 227
[101] Oluyede, P. A. *Constitutional Law in Nigeria,* Evans Brothers (Nigeria Publishers) Limited, Ibadan, Nigeria (1992) p. 157-158
[102] See section 35 of the 1979 Constitution of the Federal Republic of Nigeria

are unable to trace a revised edition of the text, it is noteworthy that his work though authorative as it is on Constitutional Law in Nigeria, it remain outdated in the presence of the operative 1999 Constitution and its amendments.

Hari Chand,[103] had also attempted a vivid discussion on the subject of human rights and its protection in Nigeria. He had exposited on religious freedom although in his five page commentary, after restating the provisions of the 1979 Constitution[104] and relying on the view taken by the learned author Nwabueze on the case of *Ojiegbe v. Ubani*[105] setout above, he end up with a review of American case law on the subject. While his work can be said to be an enormous and reliable one as he had highlighted internal enforcement mechanisms and remedies available to the victims of HR violation in Nigeria and the procedural steps towards obtaining same, some key aspects of religious freedom are missing in the work. For example, no discussion on conscientious objection (to compulsory military service, blood transfusion, abortion, usury, etc); discrimination on religious grounds and religious intolerance were also not discussed especially their peculiarities in Nigerian heterogeneous society. Similarly, to the extent that we are unable to trace a revised edition of the text, it is noteworthy that the text though authorative, due to time lapse, it remain outdated in the presence of the operative 1999 Constitution and its amendments as well as the recent Fundamental Human Rights Enforcement Procedure Rules.[106]

To conclude this subheading, one fundamental observation with regard to some literatures on freedom of religion under Islamic law and international law as presented above is that, since the adoption of the UDHR in 1948, most literatures as to Islamic law perspective are soiled

[103] Chand, H. *Fundamental Rights in Nigeria,* Unico Press, Jos, Nigeria (1980, 1st Ed.) pg 31-36
[104] Section 35 and 42 of the 1979 Constitution of the Federal Republic of Nigeria
[105] (1961) 1 All NLR 227
[106] See the Fundamental Rights (Enforcement Procedure) Rules (2009) which is a land mark achievement in the enforcement of HR in Nigeria as it had removed the requirement of *locus standi* in the prosecution of HR violation in Nigeria to the extent that even NGOs can move the courts for the protection of HR of a citizen violated in Nigeria. See specifically, Order XIII.

with selectivity in the use of evidence, senseless criticisms (by the West and some unscrupulous Muslims from within) on Islamic law and corresponding apologetic responses thereto, and a desire for reinterpretation of Islamic law to attain universality of human rights. These approaches have however rendered most contemporary literatures on the subject less reliable and continue to pose challenges to a dialogue among the two systems of laws. However, the gap remains that earlier writers on the subject were unable to employ Islamic relativism to (re)establish the long standing sharia justice in protecting the right to freedom of religion which is comparatively unique and best suited to the resolution of current international or global out cry on religious freedom dilemma in almost all countries of the world.

1.7 JUSTIFICATION/SIGNIFICANCE OF THE RESEARCH

Knowledge of the laws relating to freedom of religion is of use to the many actors involved in the application of Shariah law and the enforcement of international human rights, such as governmental authorities, international organizations and individuals. Thus the research would be of benefit to adherents of different religions in many parts of the globe especially those living in Nigeria in appraising themselves on the rules of Shari'ah and international law on the subject of study; States in the formulation and implementation of policies; Human Rights Defenders; Judges and Advocates as stakeholders in the protection and promotion of fundamental rights; etc.

Religious unity through governmental compulsion in today's life seems untenable as across every society in the world today, you find people or native citizens with different sorts of ideological beliefs and orientation about religion – some theists with strong religious devotion, some atheists, some secularists, etc, whose interests are always aiming towards parallel directions. Thus, suppression of or a neglect of each of these sorts of interests by the States as well as by the citizens in their inter-personal relationships will result in serious

conflicts in a pluralistic society as each tends to assert rationality and superiority of his own beliefs over that of others. To avoid or reduce a tendency of such a conflict from being arising in a society like Nigeria, the research highlights the minimum standards of religious tolerance and the needs of embracing same in Nigeria.

That mere presence of a law alone without it having formed the convictions of the people to whom it was designed to apply would be of no practical effects in achieving its desired goals. For that, religious freedom must be seen to have permeated the minds of the citizens more especially law enforcement and administrative personnel, for, if they become much better acquainted with its precepts and attributes, it is expected that these efforts would help reduce the level of atrocities being committed against cultural and religious practices in armed conflict and that these may also further help minimize the effects of armed conflict on protected persons as conceived by international humanitarian law.

1.8 ORGANIZATIONAL LAYOUT

To achieve the stated objectives of this research, the thesis was structured into five chapters. Each chapter addresses certain identified problem areas on religious freedom as envisaged in our statement of problem.

Chapter One: primarily dealt with the General Introduction identifying the Statement of the Problem, Aims and Objectives of the Research, Scope and Limitations, Literature Review, Justification/Significance of the Research and Organizational Layout.

Chapter Two: provides a comparative overview on the compatibility of sharia with international [human rights] law highlighting arguments for and against this debate while focusing on its impacts on freedom of religion.

Chapter Three: discusses the Concept of Freedom of Religion in Shari'ah h law highlighting the meaning of the concept "Religion" within the Islamic law perspectives and the underlying

meaning of “Religious Freedom”; the legal framework on religious freedom under the Shari’ah; the nature and scope of religious freedom under the Shari’ah; and the elements and attributes of religious freedom under Islamic law.

Chapter Four: discusses the Concept of Freedom of Religion in International Law highlighting the meaning of the term “Religion”; the legal framework on religious freedom in International law; the nature and scope of religious freedom; etc. The chapter also identified the elements of religious freedom in international law.

Chapter Five: basically provides for the comparative analysis on the two systems of laws nothing some of their principal areas of convergence and divergence on freedom of religion.

Chapter Six: is the final chapter and it contained the summary of all the preceding chapters from chapter One to chapter Four. It also contains the Observations and Recommendations as to solutions to the problems and issues that have to do with religious freedom. The chapter also gives the concluding remarks on the work.

CHAPTER TWO
A COMPARATIVE OVERVIEW ON THE COMPATIBILITY OF SHARIA AND [INTERNATIONAL] HUMAN RIGHTS LAW

2.1 INTRODUCTION

This chapter introduces the raging debate on the compatibility of sharia with human rights. The chapter provides a comparative overview on the hotly contested issues that surrounds the basic arguments for and against the homogeneity of the rules of sharia as a divine and universal legal system with that of secular norms of international human rights law. Two major and/or dominant perspectives were considered – the apologetic and the puritan viewpoints, i.e., the apologetic who accepts human rights from the points of view of Islamic sharia and the puritan who sees the modern international human rights movement as a sort of monolithic western cultural aggression emanating from Judeo-Christian world against third-world countries.

It is good to note that both Muslim and non-Muslim scholars and institutions have tried to respond to these issues and two predominant orientations of Muslim intellectual response to the question of human rights, namely: apologetic and puritanic are discernible.[107] The apologetic orientation consists in "an effort by a large number of Islamists to defend and salvage the Islamic system of belief and tradition from the onslaught of westernization and modernity by simultaneously emphasizing both the compatibility and the supremacy of Islam". On the other hand, the puritan paradigm regards Islam as perfect and which perfection meant that "ultimately Islam does not need to reconcile itself or prove itself compatible with any other system of thought".[108] In other words, puritanism "insists on an Islamic particularity and uniqueness and rejects all universalism except the universalism of Islam."[109]

[107] Fadl, K. A. (2010). *The Human Rights Commitment in Modern Islam,* op cit, p. 118
[108] Fadl, *Op.cit*., p.121.
[109] Ibid

2.2 ARGUMENTS OF THE PROPONENTS OF COMPATIBILITY

The hotly contested and outraging debate of the compatibility or otherwise of sharia and human rights has been in recent years, the focus of attention at both local and global forums of which numerous scholars who have produced varying responses and advanced conflicting and competing views. It has been argued that "sharia law is not only compatible with human rights but also the most effective way to achieve human rights."[110] However, it seems that "of all the moral challenges confronting the problem of human rights is the most formidable".[111]

Citing the Oslo Coalition as an example, some writers in the field of freedom of religion were of the view that there is today a dialogue rather than "cold war" between different political systems (sharia states, communist states, secular democracies, etc.) including also in the field of human rights.[112] Thus, in line with these developments, it is stated that Egypt's ratification of the ICCPR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was said to be made on the assumption that they are compatible with Islamic law.[113]

Critics of Islam like Lupp advanced the view that "Islamic fundamentalism in its various modern forms poses a challenge to international human rights norms."[114] Be that as it may, in spite of the argument that "human rights violations in Muslim countries are not due to sharia law but are mainly exercised by the state and dates back to the post-colonial era," relatively recent happenings around the world to which Islam is connected seem to fuel the hotly

[110] See Ezzat, H. R. (2004). "Dear Emran" in Qureshi, E. & Ezzat, H. R. An online article available at http://www.qantara.de/webcom/show_article.php/-c-373/-nr-6/i-html Retrieved on 31-05-10

[111] See Fadl, K. A. (2010). *The Human Rights Commitment in Modern Islam,* An online article available at http://www.musawah.org/docs/pubs/wanted/wanted -KAEF-EWpdf.

[112] Forum 18, *Freedom of Religion: A Report with Special Emphasis on the Right to Choose Religion and Registration Systems*, Oslo February 2001, pp. 7-8

[113] Forum 18, *Freedom of Religion: A Report with Special Emphasis on the Right to Choose Religion and Registration Systems*, Oslo February 2001, pp. 79

[114] Lupp, J.S. (2004). *Human Rights and Islam*. An online article available at www.crvp.org/book/series04/IVA accessed on 09/08/11

debated issue of whether or not Islam is amenable to human rights idea.[115]K. A. Fadl had outlined some of the major challenges and areas of contention between sharia and human rights with particular reference to freedom of religion among which are the issue of the death sentence issued against Salman Rushdie for the publication of the *Satanic Verses*; the allegation of stoning and imprisonment of rape victims in Pakistan; the allegation of public flogging, stoning and decapitation of criminal offenders in Sudan, Iran, and Saudi Arabia; the alleged degradation of women by the Taliban; and the destruction of the Buddha statues in Afghanistan are some of the recent Islamic practices that have struck the world as offensive and even shocking in terms of the right to freedom of religion or belief.[116]

As Machowski holds, "there appears to be a strong ambiguity towards the issue of human rights stemming from possible multiplicity of understandings of fundamental Islamic texts".[117] But does the promulgation of the United Nations *Universal Declaration of Human Rights* of 1948 serve as the basic source of human rights that outdates and supersedes the sharia? Some of the reactions, positive or negative to the tenets and implications of the UDHR revolves around the consideration of whether or not the notion and respect for human rights are embedded in Islamic religious practice and doctrines *ab initio* and thus predate the UDHR. In other words, can the idea of human rights be deciphered from the original sources of Islamic teachings?

In line with the apologetic view, it is believed that "Islam liberated women, created a democracy, endorsed pluralism, and protected human rights, long before these institutions

[115] ORAEGBUNAM, Ikenga K.E HUMAN RIGHTS JURISPRUDENCE UNDER ISLAMIC LAW: A CRITICAL REVIEW OF CONTENDING CONCEPTIONS, *Sacha Journal of Human Rights*, Volume 2 Number 1 (2012); pp. 48-68 at pp. 48-49

[116] Ibid

[117] Machowski, M. (2010). *(In)Compatibility of Human Rights and the Islamic Doctrine: Implications for the Future of Human Rights in the World of Islam*. An online article available at www.mathhewmachows.ki.com/2010/07/humanrightsin-Islam.html Retrieved on 05-08-11

ever existed in the West".[118] Even western compatriots like Bielefeldt alludes that the concept of human rights "is not exclusively western cultures."[119] According to Fadl, "a common heuristic device of apologetics was to argue that any meritorious or worthwhile modern institutions were first invented and realized by Muslims." Hence, apologists generated a large body of literature that claimed Islam's inherent compatibility with international human rights or even claimed that Islam constituted a fuller and more coherent expression of human rights.[120] It is in line with this practice that Khan has written an excellent book that compares all the articles of the UDHR with the Qur'anic teachings.[121]

Furthermore, it is in accord with the above frame of mind that Zulhuda maintains that "the protection of human fundamental rights is an inherent principle of Islamic teaching….".[122] He writes that the Cairo Declaration of Human Rights in Islam believes that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that "the concept of human rights as understood in modern paradigm is not foreign notion". Zulhuda observes that the Cairo Declaration has incorporated almost all essential rights as stipulated also in the UDHR. Accordingly, The Declaration consists of 25 articles stipulating essential human rights like equality in dignity and rights being the subjects of God (art. 1); right to life (art . 2); women's rights (art. 6); children's rights and good standard of living (art. 7). Whereas the equality before the law is also provided in art. 8; right to liberty (art. 11); freedom of movement (art. 12); right to work (art. 13); and right to ownership (art. 15).[123]

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[118] Ramadan, T. (2001). *Islam, the West and the Challenges of Modernity Markefield: Islamic Foundation*,pp.286-287.
[119] Biefeldt, H. (1995). "Muslim Voices in the Human Rights Debate" in *Human Right Quarterly Vol. 17, No.4*, p.54.
[120] Fadl, K. A. (2010). *The Human Rights Commitment in Modern Islam*, op cit, p. 118
[121] Shah, M. D. (2010). *The Universal Declaration of Human Rights and Islam*. Available online at http://ahamdiyyatimes.blogspot.com/2010/01/unviersal-declaration-of-human-rights_23.html. Retrieved on 17-09-10
[122] Zulhuda, S. (1997). *General Survey of Human Rights: A Comparative Perspective*. Available online at www.islamic-world.net/islamic-state/right-survey.htm retrieved on 09-10-11
[123] Ibid

However, it is observed that the right to freedom of peaceful assembly and association which is article 20 of UDHR is not embodied in the Cairo Declaration and conversely, the specific inclusion of usury *(riba)* in the Cairo Declaration does not have place in the UDHR". Nonetheless, three fundamental differences between the Cairo Declaration and the UDHR are noted: first is that the different perspectives are used in perceiving the human rights notion in each of these declarations. The UDHR is very much colored by the concept of natural law from the Greek philosophy, while the Cairo Declaration is based on the Islamic concept and Islamic worldview. Secondly, the UDHR presumes inherent human right due to the birth per se; the Cairo Declaration on the other hand, affirms the inherent human rights in a person for his status as God's vicegerent in this world. Thirdly, the UDHR is an ungoverned covenant and falls in the domain of international law. In one way or another, the UN can do many things to uphold any enforcement and to act against violations. The Cairo Declaration, on the other hand, seems poor in terms of having an enforcement monitoring body; in this sense it is far less practical than the UDHR.[124]

Hence article 24 of the Cairo Declaration states that "all the rights and freedoms stipulated in this Declaration are subject to the Islamic sharia". In the same vein, article 25 of the Cairo Declaration provides that "the Islamic sharia is the only source of reference for the explanation or clarification to any of the articles of this Declaration". The implication is that every discussion on the issue of human right in Islam is subjected neither to the provisions of international law nor to those of any national constitution but rather to the sources of Islamic sharia. Sharia then becomes, in Kelsen's language, the *grundnorm* for every discussion of human rights in Islam. Be that as it may, Machowski observes that article 5 of the Declaration, although consistent with the established human rights nomenclature, safeguards

[124] Ibid

the right of marriage "with no restrictions stemming from race, colour or nationality" alone.[125] He notes the effect that the Declaration is clearly discriminatory with regard to the categories of faith by comfortably excluding religion from the aforementioned restrictions. In the same way, he observes that article 10 not only presupposes the superiority of Islam over other religions, but also indicates the potential for criminalization of non-Islamic missionary activities. It presupposes the fact that apostasy in Islam is forbidden. As if this is not enough, Qureshi suggests that "by article 11, the Declaration maintains a different official approach of Muslim countries to civil and political rights distinguishable from that of non- Muslim countries by reason of their reliance on sharia rules".[126]

As ORAEGBUNAM has argued,[127] another attempt in the Muslim world to show the compatibility of Islam with the global human rights concern today is the promulgation of the Universal Islamic Declaration of Human Rights (UIDHR) in1981. The UIDHR contains 23 articles in which various human rights and freedoms are provided for. They include in ascending order the right to life, right to freedom, right to equality and prohibition against impermissible discrimination, right to justice, right to fair trial, right to protection against abuse of power, right to protection against torture, right to protection of honour and reputation, right to asylum, rights of minorities, right and obligation to participate in the conduct and management of public affairs, right to freedom of belief, thought and speech, right to freedom of religion, right to free association, right to economic order and its consequences, right to protection of property, workers' right to good status and dignity, right

[125] Machowski, M. (2010). *(In)Compatibility of Human Rights and the Islamic Doctrine: Implications for the Future of Human Rights in the World of Islam*. Available online at: www.mathhewmachows.ki.com/2010/07/humanrightsin-Islam.html retrieved on 05-08-11.

[126] Quareshi, E. (2004). *Are sharia laws and Human Rights compatible? An online Article available at www.quantara.de.webcom/show_articleptp Retrieved on 31-05-11.*

[127] ORAEGBUNAM, Ikenga K.E, op cit., p. 55

to social security, right to found a family and related matters, married women's' right to education, right to privacy, right to freedom of movement and residence.[128]

In line with Fadl's apologetic categorization, the Foreword to the Declaration states that "Islam gave to mankind an ideal code of human rights fourteen centuries ago", which "rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice". The Foreword goes on to hold that "human rights in Islam are firmly rooted in the belief in God, and God alone is the law Giver and the source of all human rights". Similarly, it is categorically stated that "human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order". It is further enjoined that since the UIDHR "is based on the Quran and the Sunnah" and hence, "by virtue of the divine source and sanction, these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated".[129]

Maududi is convinced of this divine source of human right when he said:

> …when we speak of human rights in Islam we really mean that these rights have been granted by God; they have not been granted by any king or by any legislative assembly. The rights granted by the kings or the legislative assemblies can also be withdrawn in the same manner in which they are conferred. The same is the case with the rights accepted and recognized by the dictators. They can confer them when they please and withdraw them when they wish; and they can openly violate them when they like. But since in Islam human rights have been conferred by God, no legislative assembly in the world, or any government on earth has the right or authority to make any amendment or change in the rights conferred by God. No one has the right to abrogate them or withdraw them. Nor are they the basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like philosophical concepts which have no sanctions behind them.[130]

[128] ORAEGBUNAM, Ikenga K.E op cit, p. 55
[129] See the preamble to the Universal Islamic Declaration of Human Rights (UIDHR) 1981
[130] Maududu, A. (1983). *Human Rights in Islam*, The Islamic Foundation, London, p.15

Maududi had challenged the claim that the world got the concept of the basic human rights from the Magna Carta of Britain. He maintains that "until the seventeenth century no one even knew that the Magna Carta contained the principles of Trial by Jury, Habeas corpus, and the controlvof parliament on the Right of Taxation". Maududi claims that since "the framers of the Magna Carta were not conscious of all these concepts which are now being attributed to them," it means that, "the Westerners had no concept of human rights and civic rights before the seventeenth century". It is therefore held that basic rights "are part and parcel of Islamic faith. Every Muslim or administrators who claim themselves to be Muslims will have to accept, recognize and enforce them". The universal character of the basic rights is equally underscored.[131]

The first thing that we find in Islam in this connection is that it lays down some rights for man as a human being. In other words, it means that every man whether he belongs to this country or that, whether he is a believer or unbeliever, whether he lives in some forest or is found in some desert, whatever be the case, he has some basic human rights simply because he is a human being, which should be recognized by every Muslim. In fact it will be his duty to fulfill these obligations.[132] Islamic enforcement of human rights has also been compared by Maududi with what obtains with regard to the United Nations UDHR:

> In the middle of the present century, the United Nations, which can now be more aptly and truly described as the Divided Nations, made a Universal Declaration of Human Rights, and passed a resolution against genocide and framed regulations to check it. But as you all know, there is not single resolution or regulation of the United Nations which can be enforced. They are just an expression of a pious hope. They have no sanctions behind them, no force, physical or moral to enforce them…[133]

Machowski moderately shares the above stated view of Maududi on enforcement of the UDHR when he observes that "the universal human rights, as the basis of global morality, are

[131] ORAEGBUNAM, Ikenga K.E op cit., p. 56
[132] Maududu, A. (1983). *Human Rights in Islam*. London: The Islamic Foundation, p.19.
[133] Maududi, A. (1983). Human Rights in Islam. London: The Islamic Foundation, p.15. p. 20

certainly not effectively enforced yet" though he believes that "the idea of their existence and their legitimacy grows stronger in people's minds all across the national and cultural boundaries."[134]

More still, a human right group called: *No to Political Islam Campaign* follows the apologetic model by arguing that "Islam was the first to affirm human rights and urge for the respect and upholding of these rights by those who are in power". For this reason, the group believes "the rights of the individual and the group were considered in Islam's teaching as divine rights".[135] It puts it more poignantly: The notion of right constitutes the focal point of legislation in Islamic sharia. Therefore, human rights in Islam are Allah's rights and be observed and exercised in the best manner possible, in order to achieve purity of worship, total subjugation and obedience to the Almighty, and full compliance with His teachings. Hence, it is strongly claimed that "the Islamic concept of human rights thus ascends to the sublime status of an act of worship, these rights being in Islamic sharia no less than religious duties". It is more elaborately put thus: Right then is a constant which deepens faith in all rights, individual or collective, and strengthens certainty and conviction that human rights spring from the core of Islamic teaching. This affirms the conviction that human rights in Islam are the cornerstone that upholds Muslim society. They are not constitutional or political rights only, they are not the intellectual result of a phase in the development of the human mind, nor are they natural rights as stipulated in organic laws. They are in fact duties of faith, entrusted to the individual and the society; each within their domain and depending on their degree of responsibility.[136]

It is further argued: If the Universal Declaration on Human Rights, adopted by the General Assembly of the United Nations Organization on 18 Safar 1369/10 December 1948, has

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[134] Machowski, M. (2010). *(In)Compatibility of Human Rights and the Islamic Doctrine: Implications for the Future of Human Rights in the World of Islam*. Available online at: www.mathhewmachows.ki.com/2010/07/humanrightsin-Islam.html retrieved on 05-08-11.
[135] No to Political Islam Campaign (NPIC) (2003). *Islam and Human Rights*.
[136] Ibid

covered the rights of contemporary men, the Islamic conception of these rights goes beyond the time difference, Islam having affirmed them fourteen centuries ago and elevates them from a status of "rights" to that of "necessities" and to the level of "duties and obligations".[137]

On a distinct note of triumphalism, it has been asserted that in terms of human rights issues, Islam is the best thing that has ever happened to humanity:

> From the all-encompassing perspective of human rights and with such deep understanding of the objectives of sharia, it is clear that Islam guarantees what no other religion, school or philosophy can claim to guarantee. It is also clear that the depth of the Islamic conception of human rights has no equal in its authenticity and harmony with human instinct. The simple reason for this is that these teachings were inspired by Allah in his bounty and mercy towards humanity.[138]

What is manifest in these later opinions is not only that basic rights are granted by God but also that the rights are ingrained in the rights of Allah and thus evoke the idea of responsibility, obligations or duties rather than rights *per se*. Abdillah corroborates this view when he notes that "religious teachings generally emphasize obligations rather than rights. Rights will be achieved if the individual fulfills his obligations and responsibilities".[139] This accordingly "accounts for why although since the beginning Islam has recognized the existence of human right formulated by the classical religious scholars as 'necessities' and needs' that must be catered for and protected in human life, yet the term 'human rights' did not become popular in Muslim societies until the end of World War II".[140] Hence, there is an observation that "many critics of UDHR, especially Muslim scholars, argue that the whole idea of UDHR is 'un-Islamic', because Islam stresses on responsibilities and not on rights".[141] He regrettably notes that the attempt to sell this idea of responsibility to the United Nations

[137] Ibid
[138] Ibid
[139] Abdillah, M. (2008). "Ways of Constitution Building in Muslim Countries" in Krawiets, B. & Reifeld, H. *Islam and the Rule of Law: Between Sharia and Secularization*. Berlin: Konrad-Adenauer-stiftung, p. 55.
[140] Ibid
[141] Salman, A (2001). *Human Rights and Islam: Some Points of Covergence and Divergence*. Retrieved on 08-07-11 from http://www.renaissance.com.pk/octyipo2y1.html.

failed when the Universal Declaration of Human Responsibility prepared in September 1997 as a commemoration of the fiftieth anniversary of UDHR could not be endorsed by United Nations General Assembly. Yet, elaborate discussions have been done on the difference between the rights of God and the rights of man:

> The rights of God (huquq Allah) are rights retained by God, as God's own through an explicit designation to that effect. These rights belong to God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violations. These rights are, so to speak, subject to the exclusive jurisdiction and dominion of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for the handling of acts that fell in God's jurisdiction. In addition, in the juristic theory, all rights not explicitly retained by God accrue to the benefit of human beings. In other words, any right (haqq) that is not specifically and clearly retained by God becomes a right retained by people. These are called huquq al-'ibad, huquq al-nas, or huquq al-adamiyyin. Importantly, while violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people…[142]

There is equally a position by some jurists which holds that "if the rights of God and those of people (mixed rights) overlap, the rights of people should, in most cases, prevail".[143] Accordingly, this was justified on the basis of the fact that humans need their rights, and need to vindicate those rights on earth, whereas God asserts his rights only for the benefit of human beings, and in all cases God can vindicate his rights in the hereafter if need be.[144] The implication is that a claimed right of God may not be used to violate the rights of human beings as God is capable of vindicating whichever rights God wishes to vindicate in the hereafter.[145]

The above attempt to classify rights in Islam is not an isolated case. Safi had earlier observed that "the widely accepted theory of right among Islamic jurists divided rights into three

[142] Fadl., *Op.cit*., pp.151-152.
[143] Ibid, p. 112
[144] Ibid, p. 153
[145] Ibid

types".[146] Citing A1-1z bin Abdul Salam (d. 660 AH), Safi adumbrates the three types of rights: (1)Rights of God (Huquq Allah) – These consist of all obligations that one has to discharge simply because they are divine commands, even when the human interests or utilities in undertaking them are not apparent, such as prayers, fasting, hajj, etc; (2) Rights shared by God and his servants (Huquq Allah wa al-Ibad) – These include acts that are obligatory because they are demanded by God, but they are also intended to protect the public, such as *hudud* law, jihad, zakat, etc., and (3) Rights of God's servants (Huquq-al'-'Ibad) – These are rights intended to protect individual interests, such as fulfilling promises, paying back debts, honoring contracts. Still people are accountable for their fulfillment to God.[147]

However, unlike Fadl's observation in which for some jurists the rights of people can sometimes override those of God, Safi believes that "people in their exercise of rights are ultimately answerable to God in all their dealings".[148] Fadl's observation is nonetheless corroborated by Yakubu who notes that "the main distinguishing feature of rights from the Islamic law perspective is that, while some rights are due to Allah alone, others, though due to Allah, the rights of human beings are dominant".[149]

M. T. Ladan has graphically outlined the human rights provisions in the primary and other sources of Islamic law. He groups them into three, namely, rights of all human beings, rights of citizens, and rights of women. It is argued that "under the sharia, every person irrespective of his/her country of origin, religion, race, sex, age or colour, has some basic human rights simply because he or she is a human being, who should be respected by every Muslim".[150]

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[146] Safi, L. M. (2009). *Human Rights and Islamic Legal Reform*. Retrieved on 12-08-10 from http:///www.witnesspioneer.org/vil/Articles/shaia/human3.pdf.
[147] ibid
[148] Ibid
[149] Yakubu, D. (2007). "Socio-Economic Rights under Islamic law", *Kogi State University Law Journal*, vol. 1, No. 1, p.64.
[150] Ladan, M. T. (2002). "Women's Rights and Access to Justice under the Sharia in Northern Nigeria" in Ezeilo, J. and Afolabi, A. K. (eds.) (2002). *Sharia and Women's Human Rights in Nigeria: Strategy for Action*. Abuja, pp. 37-47

Ladan maintains that the first and the foremost basic right is the right to live and respect human life. The Koran lays it down: "Whoever kills a human being for any reason like manslaughter or corruption on earth, it is as though he had killed all mankind".[151] On yet another note, the Koran says: "Do not kill a soul which Allah has made sacred except through the due process of law…". (Koran 6:15). And in the Hadith, it is read: "The greatest sins are to associate something with God and to kill human beings" (Hadith). Thus, save in the due process of law, the life of any person should not be taken by anybody. Indeed to underscore the sacredness of life, the Koran says: "And whoever saves a life, it is as though he had saved the life of all mankind" (Koran, 5:32).

The right to justice has also been regarded as a very important and valuable right which the sharia has given to every person as a human being. The Koran lays it down: "Do not let ill-will towards any person incite you so that you swerve from dealing justly. Be just, that is nearest to heedfulness" (Koran, 5:8). It further says: "you who believe stand steadfast before God as witness for truth and fair play" (Koran, 4:135). Another right that is provided for is that of equality of human beings and freedom from discrimination. The sharia not only recognises absolute equality between persons irrespective of any distinction of sex, colour, race or nationality, but makes it an important and significant principle, a reality. Hence in the Holy Koran, Allah says: "O mankind, we have created you from a male and female. And we set you up as nations and tribes so that you may be able to recognize each other" (Koran 49:13). This has also been exemplified in one of the sayings of the Prophet: "….You are all the children of Adam, and Adam was created from clay".[152]

Therefore no person should be discriminated against on the ground of the colour of skin, place of birth, gender, race or the nation in which he/she was born. About right to freedom from

[151] See Qur'an 5:32
[152] Ladan, M. T. op cit., p. 38

slavery and inhuman treatment**,** the prophet is reported to have said: "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is who enslaves a free man, then sells him, eats this money".[153] Therefore, save in the case of prisoners of war, the sharia has clearly and categorically forbidden the primitive practice of capturing a free man or woman to make him/her a slave or to sell him/her into slavery.

Sharia is seen also as extolling the right to co-operate and not to co-operate. The sharia is seen as prescribing a general principle of paramount importance and universal application saying: Co-operate with one another for virtue and heedfulness and do not co-operate with one another for the purpose of vice and aggression" (Koran 5:2). This means that one irrespective of gender, race, colour, nationality has the right to or not to the co-operation of a fellow Muslim depending on the rightness or wrongness of his/her act. Right to freedom from want and deprivation constitutes another guarantee under the sharia. The Holy Koran says: "And in their wealth, there is acknowledged right for the needy and destitute" (Koran, 51:19). Therefore, according to these wordings, without discrimination anyone who asks for help and anyone who is suffering from deprivation have a right in the property and wealth of the Muslim.

Apart from the above group of rights, Ladan outlines what he refers to as rights of citizens in an Islamic state. While the above discussed rights belong to all human beings irrespective of religion, the rights of citizens are restricted to Muslims in an Islamic state. Thus, sharia guarantees to all citizens, including children and women, certain fundamental rights in an Islamic state. Right to security of life and property occupies the prime position. Prophet of Islam says: "Your lives and properties are forbidden to others till you meet your Lord on the

[153] Reported by Al-Bukhari and Ibn Majah, in Ladan, 2002.

Day of Judgement".[154] Again, the Holy Koran says: "Anyone who kills a believer deliberately will receive as his reward to live in Hell forever. God will be angry with him and curse him, and prepare dreadful torment for him" (Koran, 4:93). And concerning property, the Koran says: "Do not devour one another's wealth by false and illegal means (Koran 2:188). The Prophet's address also prohibited any encroachment upon the honour, respect and chastity of all citizens regardless of age, sex, or colour. This is a call for respect for the right to protection of honour. The following verses of the Koran are also quite illustrative: "You who believe, do not let one (set of) people make fun of another set; Do not defame one another; Do not insult by using nicknames; and do not backbite or speak ill of one another" (Koran 49:11-12). Right to Privacy of Life is also guaranteed**.** Sharia prohibits undue interference or encroachment on the privacy of his/her life. The Koran says: "Do not spy on one another" (Koran, 49:12), and "do not enter any house except your own homes unless you are sure of their occupant's consent" (Koran; 24:27).

Sharia also prohibits unlawful arrests or detention of anyone. This is the provision for right to personal liberty. It is thus related in the Hadith that once, the Prophet was delivering a lecture in the Mosque, when a man rose during the lecture and said: "O Prophet of God, for what crime have my neighbours been arrested?"(Hadith).The Prophet heard the question and continued his speech. When the man rose and repeated the question twice, the Prophet ordered that the man's neighbours be released. The reason for this, as reported, is that the Police officer present in the Mosque at that time did not furnish any reason for the arrests. Equally, sharia claims to hold in high esteem the Right to Freedom of Expression. In this connection, the Prophet says: If anyone of you comes across an evil, he should try to stop it with his hand using reasonable force, if he is not in a position to stop it with his hand, then he should try to stop it by means of his tongue (meaning he should speak against it). If he is not even able to

[154] Prophet's *Farewell Hajj*,in Ladan, 2002.

use his tongue, then he should at least condemn it in his heart. This is the weakest degree of faith.[155]

Sharia also guarantees the right to freedom of association, formation of parties or organisation. This is however exercised for propagating virtue and righteousness and not for mischief. Thus, the Koran says: "let there be a community among you who will invite people to do good, command what is proper and forbid what is improper, those will be prosperous" (Koran 3:104). Again, the Koran guarantees freedom of religion when it says: "There should be no coercion in the matter of faith" (Koran, 2:256). Specific Rights of Women under the Sharia make up the third group of rights guaranteed under Islamic law according to Ladan. They include the right to equal dignity and value, right to education, right to custody of children, right to be treated justly, right to maintenance, and right to respect to chastity. Under the sharia, women are guaranteed the above specific rights because of their special responsibilities and status in the eyes of Islam.

2.3 ARGUMENTS OF THE OPPONENTS OF COMPATIBILITY

On the other side of the debate lies the arguments put forwards by opponents of compatibility of human rights with Islam as advanced by those of the puritanist perspective. First and foremost, "puritanism resisted the indeterminacy of the modern age by escaping to a strict literalism in which the text became the sole source of legitimacy".[156] In many respects, "the puritan movement reproduced the mental sets adopted by the apologetic movement".[157] Hence, specifically on the issue of human rights, Fadl observes thus:

> As to the issue of universal human rights, it is not entirely accurate to describe the puritan orientation as exceptionalist because the puritans did not seek a relativist or cultural exception to the universalism of human rights. Rather, the puritan claim was that whatever rights human beings are entitled to enjoy, they are entirely within the purview of sharia law. It is important to realize

[155] Reported by Imam Muslim as cited in Ladan, 2002 .
[156] Fadl, *Op.cit*., p,120.
[157] *Ibid*., p.121.

> that the puritans did not deny, in principle, that human beings have rights; they contend that rights could not exist unless granted by God. Therefore, one finds that in puritan literature there is no effort to justify international rights on Islamic terms but simply an effort to set out the divine law, on the assumption that such a law, by definition, provides human beings with a just and moral order.[158]

One could therefore see from the above observations that like the apologists, the puritans view human rights as deriving from God, but unlike the apologists, who try to mimic the western paradigm in modeling Islamic human rights instruments, the puritan effort is purely anti-western and sees Islamic scholars who aim at reconciliation "as suffering from "Westoxification", and consequently treated as betrayers of the Islamic tradition". No wonder it is poignantly put: …the most noticeable aspect regarding the puritan determinations was their reactive nature….Puritanism understood and constructed Islam only through the prism of seeking to be culturally independent from the West. As such, its primary operative mode was to react to western supremacy in the modern world by, effectively, constructing Islam into the antithesis of the West, or at least the antithesis of the essentialist view of the West.[159] There is no doubt that this reactive stance shaped much of the puritan discourse on the idea of universal human rights.[160]

Thus, international human rights were opposed on these grounds alone as they are seen as distinctly western in origin. In fact, "in the decades since the Declaration, the term 'human rights' has become an integral part of both political and popular discourse particularly among Western, and western educated persons".[161] Too, Lupp observes that "many voices have been raised in recent times asserting that human rights concepts are Western, and therefore do not apply to Islamic countries".[162] Perhaps this is why Panikkar argues that "though the Universal

[158] *Ibid*., p.122.
[159] *Ibid*., p.123.
[160] Ibid
[161] Hassan, R. (2008). *Are Human Rights Compatible with Islam?* Retrieve on 01-10 09 from http://www.religiousconsultation.org.hassan2.html.
[162] Lupp, *Op.cit*.

Declaration of Human Rights is called 'universal', it was articulated along the lines of historical trends of the western world during the last three centuries, and a certain philosophical anthropology of individualistic humanism which helped justify them".[163] Khomeini bitterly maintains that "what they call human rights is nothing but a collection of corrupt rules worked out by Zionists to destroy all true religions".[164] He adds further that "when we want to find out what is right and what is wrong we do not go to the United Nations; we go to the Holy Koran".[165] For Amjad-Ali, "the concept of universal human rights embodies values which do not only conflict with other strongly held values and conceptions but which are incompatible with and subversive of certain forms of society and social institutions".[166]

Shah notes that "many of the ideas in the Declaration were borrowed from the English liberal political philosopher John Locke".[167] In fact, for Machowski "many Arab nations object to the idea of universality of all human rights, as stipulated in the universal Declaration of Human Rights".[168] Pollis and Schwab in holding that human rights is a western construct with limited applicability write that "unfortunately, not only do human rights set forth in the Universal Declaration reveal a strong western bias, but there has been a tendency to view human rights ahistorically and in isolation from their social, political and economic milieu".[169]

It goes without saying that many Islamists claim that the UDHR is an attempt to force western standards and ideals on to others who do not share them. Mayer quotes the statement of the Iranian Deputy Foreign Minister after the 1993 Human Right Conference in Vienna, that

[163] Pannikkar, R. (1989). "Is the Notion of Human Rights a Western Concept? In *Breakthrough*, Spring 1989, p.31.
[164] Khomeini, A. (2003) in No To Political Islam Campai. *Islam and Human Rights*.
[165] *Ibid.*
[166] Amjad-Ali, C. (1996). "Human Rights and Spirituality" in *Human Rights Solidarity*, vol. 6. No. 2.
[167] Shah, M. D. (2010). *The Universal Declaration of Human Rights and Islam*. Retrieved on 17-09-11 from http://ahamdiyyatimes.blogspot.com/2010/01/unviersal-declaration-of-human-rights_23.html.
[168] Machowski, *Op.cit*.
[169] Pollis & Schawah, (1996). "Human Rights: A Western Construct with Limited Applicability" in *Human Rights Solidarity*, vol. 6, .No. 2.

"human right has come to mean Western culture and that human right is a tool for western powers to whitewash their intervention and aggression against the weaker countries".[170] Mayer equally records the comments of the Saudi Arabian Minister of the Interior just before the conference:

> The democratic system that is predominant is not a suitable system for the peoples of our region. Our people's make-up and unique qualities are different from those of the rest of the world. We cannot import the methods used by people in other countries and apply them to our people. We have our Islamic beliefs that constitute a complete and fully integrated system. … In my view, Western democracies may be suitable in their own countries but they do not suit other countries.[171]

Naceri gives an instance of a difference between an Islamic view and a western idea:

> The Universal Declaration of Human Rights was for complete equality for man and women. For us, women are equal to men in law, but they are not the same as men, and they can't be allowed to wonder around freely in the streets like some kind of animal.[172]

Mayer similarly notes of a news report from Jeddah after receiving criticism from Amnesty International concerning the Saudi Arabian government's human rights record:

> Amnesty officials are secularists and atheists. They could not infiltrate into the kingdom to spread their venomous ideas. Now they wanted to tarnish the image of shariah. The enemies of Islam are using Amnesty in their worldwide anti-Islam campaign … They say at international forums that they respect Islam and Muslims but hide their hatred and vengeance against Islam and Muslims. We have to take precautions against these enemies. And all Muslim countries should implement shariah. Let the enemies of Islam die of rage.[173]

In the same vein, it is strongly believed that "the Declaration was a product of Western liberal ideology" and poses the question "can we really expect non-western peoples to embrace the international human rights instruments which are by and large western in character?".[174] No wonder there is a suggestion that "because UDHR is rooted in the political culture of Western

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[170] Mayer, A.E. (1994). "Universal Versus Islamic Human Rights: A clash of Cultures or a clash with a construct?" in *15 Michigan Journal of International Law 307,* pp.318-319.
[171] *Ibid.*, pp.319-320.
[172] Naceri, M (2003) in No To Political Islam Campaign. *Islam and Human Rights*.
[173] Mayer, *Op.cit*., p.320.
[174] Cobbah, J.A.M. (1987). "African Values and the Human Rights Debate: An African Perspective", in *9 Human Rights Quarterly*, p. 309.

society and is informed by the philosophical outlook of western liberation, its application in other societies requires that the universal validity of its principles is made evident to other peoples, particularly those whose world views and historical experiences are different from the west's".[175]

Perhaps, this is why Sorough maintains that even though "today, they are popular ideas that are compatible with Islam…, such issues like democracy and human rights did not exist in early Islamic society".[176] Accordingly, Safi is of the view that "for a modern human rights tradition to take hold in modern Muslim society it should be rooted in the moral religious commitments of Muslims".[177] All the above instances of Islamic antipathy with the West seem to constitute what Huntington calls "clash of civilizations".[178] A number of views have however appeared on the reasons for this thought-form. Anderson opines that colonialism and its accompanying institution of orientalism had not only played a pivotal role in undermining the traditional institutions of Muslim learning and jurisprudence, but it had also posed a serious challenge to traditional Muslim epistemologies of knowledge and the sense of moral values".[179] This view is corroborated thus:

> Although international human rights law was enshrined in various treaties during a period in which most Muslim countries had gained political independence, the experiences of colonialism and postcolonialism influenced the Muslim intellectual response in several important respects. Muslims did not first encounter Western conceptions of human rights in the form of the Universal Declaration of Human Rights (UDHR) 1948, or in the form of negotiated international conventions. Rather, they encountered such conceptions as part of the 'White Man's Burden' or the 'civilizing mission' of the colonial era, and as a part of the European natural law tradition, which was frequently exploited to justify imperialistic policies in the Muslim world. This experience has had a significant impact on the understanding of human rights in the Muslim social imagination, and on the construction of Islamic

[175] Safi, L. M. (2009). *Human Rights and Islamic Legal Reform*. Retrieved on 12-08-10 from http:///www.witnesspioneer.org/vil/Articles/shaia/human3.pdf
[176] Sorough, K. (1997). "Iranian Intellectual Says Islam and Human Rights Must Go Together" in *The Boston Globe*, March 31, p. 4
[177] Safi, *Op.cit*.
[178] Huntington, S (1998). "The Clash of Civilizations" in *Foreign Affairs*, Summer, p.138.
[179] Anderson, J. N.D. (1976). *Law Reform in the Muslim World*. London: Athlone, p.10.

> discourses on the subject. The most important, among Muslim intellectuals, was the perception that the human rights field is thoroughly political, and that it is plagued by widespread Western hypocrisy…[180]

It is also argued that "the strong opposition of Islam to the culture of human rights is deeply embedded in the historical perspective and the relationship the Islamic world has had with Western civilizations".[181] Similarly there is a belief that "Islamic concepts of human rights were strongly affected by the history of the region and are extremely long tradition of distrust between the Christian West and the Muslim East".[182] A fillip is added to this suggestion to the effect that "the current contempt of human rights in Arab world is not so much an opposition to the idea of those rights but rather a reaction to negatively perceived cultural and political compact of the West".[183] Allied to these reasons is the one offered by Hassan who reports the assumption of some human rights advocate that "human rights can exist only within a secular context and not within the frame work of religion".[184] Substantiating this, he writes:

> Underlying the stance that the concept of human rights is fundamentally secular, and, therefore, outside of, and even antithetical to, the worldview of religion, is – of course – a certain view of religion in general, or of particular religions. In Muslim countries such as Pakistan, for instance, it is often remarked by secular-minded proponents of human rights that it is not meaningful to talk about human rights in Islam because as a religious tradition, Islam has supported values and structures which are incompatible with the assumptions which underlie the Universal Declaration of Human Rights.[185]

A number of scholars have offered some critique of the above Islamic approach of taking a cue from UDHR apologetically or puritanically. For instance, Mayer discusses the UIDHR and compares its provisions with those of the UDHR:

> The UIDHR has been published in two versions: in Arabic and in English. We are told in the English version that the Arabic text is definitive. What is not at all evident is that the Arabic version is actually different from the

[180] Fadl, *Op.cit*., pp.117-118.
[181] Dalacoura, H. (1998). *Islam, Liberalism and Human Rights: Implications for International Relations*. London and New York: I.B. Tauris Publ, p.41.
[182] Machowski, *Op.cit*.
[183] *Ibid.*
[184] Hassan, *Op.cit.*
[185] Ibid

> English in several respects, with the Arabic version being substantially more conservative in tone. In no sense would the English version be acceptable as a certified translation of the Arabic. One is left with the impression that the wording of the English version has been watered down for Western consumption.[186]

Again, writing in relation to the Cairo Declaration on Human Rights in Islam, it is observed generally that:

> The Islamic human rights schemes…are the products of the political contexts in which they emerged. Their Islamic pedigrees are dubious and the principles they contain do not represent the results of rigorous, scholarly analyses of the Islamic sources… Instead, they seem largely shaped by their conservative author's negative reactions to the model of freedom in Western societies.[187]

It is further noted that this Declaration is more impressive for what is omitted than for what it includes. In particular it offers no support for freedom of religion or belief.[188] Moreover, reacting to the apologetic methodology of composing Islamic versions of human rights declaration in an effort to mimic the UDHR, Fadl argues extensively:

> …these rights were not asserted out of critical engagement with Islamic texts or the historical experience that generated these texts or even out of a genuine ideological commitment or a rigorous understanding of the implications of the rights asserted. Rather, they were asserted primarily as a means of resisting the deconstructive effects of Westernization, affirming self-worth, and attaining a measure of emotional empowerment. The apologetic orientation raised the issue of Islamic authenticity in relation to international human rights, but did not seriously engage it. By simply assuming that Islam presented a genuine and authentic expression of international human rights, the apologetic orientation made those international rights redundant.[189]

It is further noted that it is the above attitude that "led to an artificial sense of confidence, and an intellectual lethargy that neither took the Islamic tradition nor the human rights tradition very seriously".[190] For him, "one of the serious consequences of this orientation was that, to

[186] Mayer, A. E. (1999). *Islam and Human Rights: tradition and politics*, 3rd Ed. Boulder. Westview, p. 125.
[187] Ibid
[188] Ibid
[189] Fadl, *Op. cit*., p.119
[190] *Ibid*

date, a serious analytical Islamic discourse on human rights has not emerged".[191] Hence, "one notices a near-complete absence of any systematic philosophical and theological treatment of the issue of human rights in Islam", and "contemporary Islamist approaches remained superficial".[192]

Fadl's opinion is corroborated by Salman who does not favour what he calls the "arm-twisting efforts of some modern Muslim jurists trying to adapt the script (of UDHR) to prove human rights in Islam".[193] He rather advocates for "a reinterpretation which for him is a welcome sign and should be continued at all risks".[194] However that may be, it appears that "the greatest obstacle to human rights under Islam is its strong adherence to the Sharia". This argument is further stretched:

> Many aspects of the sharia are inimical to the ideas enshrined in the UDHR. In an Islamist state no individual or group of people can have any rights that do not conform to the tenets of the Sharia. Oppression, intimidation, lack of freedom, and ferocious censorship and public executions are the undeniable facts of life in many Islamic societies. The UDHR enumerates the rights of the individual that governments are obliged to protect. But the political Islam is opposed to any concept of individual freedom that is not subordinate to its brutal interpretation of the sharia…Perhaps the most unsavory aspect of Islamic law from a human rights perspective is the severity of the punishment it prescribes. Like the most prurient voyeur, the sharia pries into every aspect of private life and condemns with utmost violence any conduct that fails to conform to the narrow standards of acceptable 'family' behavior. Adultery, or indeed any behavior that fails to conform, is punishable by flogging, amputation or stoning to death. Homosexuality, too, is forbidden and punishable by flogging, sometimes to death. To add to the inhumane nature of the executions, they are frequently carried out in public – to act as a warning to others.[195]

Perhaps, the above observations are a consequence of Islamic curtailed vision of and respect for international human rights. Certainly, the central feature of the Cairo Declaration is its implicit conception of international human rights in the civil and political arena as excessive –

[191] *Ibid*
[192] *Ibid*
[193] Salman, *Op.cit*.
[194] *Ibid*
[195] No to Political Islam Campaign, *Op. Cit.*

with the concomitant need for Islamic criteria to restrict and reduce them.[196] Lupp observes that after asserting that "fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion, the authors proceed to enumerate rights and freedom on which Islamic quantifications have been imposed, indicating that in reality the authors saw in Islam justifications for restricting or denying rights and freedom".[197] The above Islamic schemata on human rights have been widely criticized:

> Such Islamic versions of human rights have tended in most respects to fall far below the standard of protections for civil and political rights guaranteed under the International Bill of Human Rights. Protections of religious freedoms and guarantees of full equality and equal protection of the law for women and religious ministries have been notably absent.[198]

The provisions of the UDHR have questionable Islamic roots as the provisions "have either a tenuous or nonexistent connection to the Islamic sources or Islamic tradition".[199] It is discovered that in areas where modern human rights provisions address issues not prefigured in the Islamic legal legacy, these schemes may resort to outright borrowing from selected international human rights provisions but with a distinctive twist. They subordinate the borrowed international human rights provisions to newly fashioned Islamic derogation clauses, circumscribing them by subjecting them to Islamic conditions.[200] Mayer (1994:325) offers yet a more vitriolic attack on Islamic human rights schemes. She notes that:

> Because the permissible scope of the Islamic qualifications was left undefined by the authors of the new Islamic human rights schemes and because there were no settled historical guidelines for how to integrate Islamic conditions with modern human rights norms, the Islamic qualifications in practice left governments free to determine the scope of the rights provided and potentially to nullify the rights involved.[201]

In a *reductio ad absurdum* argument, Mayer questions "why granting the government of a modern nation state, an institution borrowed from the West and unknown in Islamic tradition,

[196] Lupp, *Op.cit*.
[197] *Ibid*
[198] Mayer, 1994, p.324.
[199] *Ibid*., p.325.
[200] *Ibid.*
[201] *Ibid*

such great latitude in defining the grounds for denying and restricting rights should be deemed appropriate in a system based on Islam".[202] It is our conviction that it is the variety of the resultant national sensibilities that occasion diverse and even opposing approaches and attitudes to human rights issues in many an Islamic enclave. The implication is that there is no monolithic view of Islam in relation to human rights, which attitude begs the question of who actually speaks for Islam. Hence, there seems to be no real consensus on the part of Muslims that their religion mandates a culturally distinctive approach to rights or that it precludes the adoption of international human rights norms".[203]

There is, however, no doubt that the dogma of the Shariah law on apostasy vis-à-vis the prohibition of conversion from Islam to another religion, is not compatible with the international human rights standards – when Shariah is implemented in the internal law system f a given country, as well as when the dogma in any other way is supported by the authorities. In this aspect, it is of course a special human rights problem when the state declares that the Sharia law is the source of legislation, as in Egypt, Pakistan and the northern states of Nigeria.[204]

2.4 CONCLUSION

A review of scholarly works on Islam and human rights reveals widely conflicting conceptions that range from the liberals that are pro-compatibility to the most conservative that sees the uniqueness of the sharia as establishing Islamic relativism as opposed to the articulated universalism of human rights. Therefore, the rules and principles of international human rights law are only acceptable by the conservative Muslim scholars to the extent of their uniformity with the sharia and that by no token can the sharia be subjected to the test of

[202] *Ibid*
[203] *Ibid*., p. 309
[204] Forum 18, *Freedom of Religion: A Report with Special Emphasis on the Right to Choose Religion and Registration Systems*, Oslo February 2001, pp 95-96

modernity in the name of human rights but rather, rules and principles of human rights must derive their doctrinal essence from religious doctrine of the sharia.

CHAPTER THREE
FREEDOM OF RELIGION IN ISLAMIC LAW

3.1 INTRODUCTION

This chapter discusses freedom of religion under the sharia. It focuses on the right of non-Muslims to the practice of their religion while resident within the jurisdiction of an Islamic state. The chapter has also examined the modern day contested issues of apostasy by Muslims and its attendant consequences as part of the rudiments of freedom of religion from the sharia perspective.

It is pertinent to note that while Islamic law is a comprehensive legal system of its own, understanding the perspective, i.e., the branches of the law under which Muslim jurists had anchored their discussion on topic of freedom of religion are of some importance. First the issues of freedom of religion may be observed to be a matter within the scope of the principal sources of the sharia, i.e., the Holy Qur'an and Hadith. In that, the exegetists (*mufassirun*) have in their interpretation of the Holy Qur'an within the framework of Qur'anic studies (*Ulum al-Qur'an*) while applying the special rules governing this field had highlighted that several verses of the Holy Qur'an provides for freedom of religion in Islamic law.

The field of Islamic history (*Sirah*) is also with an account of the historical development or rather struggle that the Islamic faith encountered at the hands its adversaries as well as the well documented stages that Islam went on down to the point of its stronghold. Thus, this branch of Islamic law help in understanding and application of Islamic law, as it sheds light as to when a particular legal ruling (*hukm*) of the sharia'ah was revealed (in Meccan or Medinan period), the reason(s) or circumstances for its revelation (*as-Baab an-Nuzuul*), the relevance and application of the principle of abrogation (*Nasikh wal-Mansukh*), etc.

It is pertinent to further mention that discussion on the subject is more prominent in the field of *Fiqh* and *Usul al-Fiqh,* i.e., the field of Islamic jurisprudence. Under this, discussion of it vastly cut-across certain sub-branches such as under the law of crimes (*hudud*) wherein consideration of the offences of apostasy (*riddah*) and blasphemy is eminent; the chapters on *Jihad* and *Siyar, Jizyah or Kharaj; etc*. To the scholars of *Usul al-Fiqh*, particular interest was dedicated to protection of the Islamic faith and discussion was more under the famous five essential purposes (*maqasid*) of the *shari'ah,* especially under the principle of *Hifz al-Din* (preservation and protection of the Islamic faith).

3.2 ISLAMIC CONCEPT OF FREEDOM OF RELIGION

Din is the Arabic term for religion, and Islam is defined by the Holy Qur'an to be the only true religion in the sight of Allah. The Qur'an put it in explicit terms that *"truly the religion with Allah is Islam"*.[205] The Islamic faith is known to be a complete submission to the commands and will of Allah the Almighty for guidance and worship and the acceptance of His revelations as true.[206] *Din* (religion) in its Islamic sense encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of humankind. Thus, the Islamic concept of religion is unique in the broadest sense of the word as to cover all aspects of human life for the Muslims.[207]

But it should be borne in mind that Islam has been the true universal religion of God.[208] The Islamic concept maintains that religion is not only a spiritual and intellectual necessity but

[205] See Qur'an 3:19
[206] See Qur'an 2:12; Qur'an 2: 177
[207] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 287; Khurshid, A. Islam – Our Choice, Muslim World League, Mecca Printing and Information Est., Mecca p. 11; Roberts, D.S. *Islam: A Westerner's Guide-From Business and the Law to Social Customs and Family Life*, Hamlyn, London (1981) pp. 67-68.
[208] See Qur'an 9:33; See also Muhammad ibn Idris al-Shāfi'i, *Al-Umm*, Dār al-Ma'arifah, Beirut [1973], Vol. 5, pp. 397-398; Abd al-Ati, H. *Islam in Focus*, American Trust Publication, Indianapolis, Indiana, (1975) p. 30; Abdul-Rahman al-Sheha, *Human Rights in Islam and Common Misconceptions* [undated] **(**Edited by: Abu Ayoub Jeromē Boulter and Abdurrahman Murad, (*Revised Edition*) p. 98

also a social and universal need. It is not to bewilder man but to guide him.[209] Allah (swt) says in the Holy Qur'an: "Verily the religion with God is Islam…"[210] The Holy Qur'an also provides "…And if anyone desires a religion other than Islam, never will it be accepted of him; and in the Hereafter he will be in the ranks of those who have lost (all spiritual good)[211].

It is one of the manifestations of personal liberty for an individual to have the freedom to profess the religion or belief of his choice without any form of coercion, compulsion or undue influence from any source of authority. Thus, freedom of religion in its Islamic context implies that non-Muslims are not compelled to convert to Islam, nor are they to be hindered from practicing their own religious rites within an Islamic territory.[212]

The Islamic view of freedom of religion and worship is generally expressed in the Qur'anic verse "let there be no compulsion in religion, truth stands out clear from error."[213] From the legal provisions contained in this verse of the Holy Qur'an, compulsion in the matter of religious worship as regards an individual's freedom of choice is contrary to the teachings of Islam because religion depends upon faith and will, and these would be meaningless if they are induced by force.[214] According to Islamic belief, Truth and Error have been so clearly shown up by the Mercy of Allah that there should be no doubt in the minds of any person of good-will as to the fundamentals of faith. No compulsion is therefore necessary to change people by force from one religion to another; hence Islam prescribes proselytism (*Da'awah*)

[209] Abd al-Ati, H. op cit., at 32
[210] Qur'an, 3:19
[211] Qur'an, 3:85
[212] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Adnan ibn Muhammad ibn Abd al-Azeez al-Wazzan, *Muasu'atu Huquq al-Insan fi al-Islam wa Simatiha fi al-Mamlakat al-Arabiyyah al-Sa'udiyyah*, Al-Resalah Publishing House, Beirut, Lebanon (2005, 1st ed.) Vol. 4, pp. 54-76; Doi, A. I. *Non-Muslims under the Shariah*, Ta-Ha Publishers Limited, London (1983) pp. 73-74; Kamali, M. H. *Freedom of Expression in Islam*, Islamic Text Society, London (1996) p. 87
[213] Qur'an 2:256
[214] Ibn Kathir, Tafsir ibn Kathir, Vol. 2, p. 444; Al-Tabari, Tafsir al-Tabari, Vol. 5, pp. 407-408

to invite people to the right path and anybody can accept it on the basis of its rationality and truthfulness irrespective of race, creed, colour or national traditions and customs.[215]

However, if it had been the plan or will of Allah to grant the limited free-will that He has granted to mankind, He could have made the entire humankind alike. In that case, all would have had certain faith. In the actual word, man has been endowed with various faculties so that he should strive and explore, and bring himself into harmony with Allah's will. The acceptance of Islam is a matter of free-will. The Holy Qur'an emphasizes on this point thus: "if it had been your Lord's will, they would all have believed, all who are on earth. Will you then compel mankind against their will to believe?"[216]

As far as the precepts of the Shari'ah are concerned, man is left to his own free choice in acceptance of the Truth. Faith is not commanded on the basis of authority, but is invited on the basis of understanding[217] as the Holy Qur'an provided thus: "*This is a Book that We have revealed to you, full of blessings, that they may reflect over its verses, and that those gifted with understanding may take heed*"[218]. There is general free will to believe or to reject. The Holy Qur'an puts it in these terms: *"Say to them: it is the Truth from your Lord; therefore let him who will, believe, and let him who will, disbelieve…*"[219] But of course, though the choice is free, the consequences of the choice follow in accordance with divine law as no one is forced.

The main thrust of the Qur'anic teaching on religious freedom is therefore the understanding that religious belief in Islam are founded on conviction and considered choice, rather than

[215] Ibn Kathir, Tafsir ibn Kathir, Vol. 2, p. 444; Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Sayyid Qutb, al-Salam al-Alamii wa al-Islam, p. 130-33; Abu Zahrah, al-Alaqat al-Dawliyyah fi al-Islam, p. 92; Wahbah al-Zuhaili, al-Alaqat al-Dawliyyah fi al-Islam, p. 30-32; Doi, A. I. op cit., at p. 74
[216] Qur'an 10:99
[217] Qur'an 12:109
[218] Qur'an 38:30
[219] Qur'an 18:30

upon compulsion. The Shari'ah bars compulsion in religion as it is incompatible with the courteous methods of persuasion that the Qur'an prescribes for the propagation of Islam.[220]

It is therefore to state that from the foregoing discussion, it would be indiscreet to assume that Islam spread by the sword. Even some Western orientalists like Thomas Arnold in his conclusion was of the view that the perception that Islam was imposed by the sword is inaccurate and far from the truth.[221] Arnold has advanced the theme that Christian historians have obscured the genuine missionary character of Islam and have instead laid emphasis on the use of the sword as the principal instrument in its propagation.[222] So, little is there in the statement that Islam makes progress only by the force of arms that one can see the opposite of this in the history of Islam in Africa, the Middle East and elsewhere [223]. With reference to the spread of Islam in Palestine and Syria, Arnold commented: "That force was not the determining factor in these conversions may be judged from the amicable relations that existed between the Christian and the Muslim Arabs."[224] To quote Arnold:

> From the examples given above of the toleration extended towards the Christian Arabs by the victorious Muslims of the first century of the Hijrah and continued by succeeding generations we may surely infer that those Christsian tribes that did embrace Islam did so of their own choice and free will. The Christian Arabs of the present day, dwelling in the midst of a Muhammadan population are a living testimony of this toleration.[225]

And now tardily, it has been recognized generally by scholars that the rise of Islam was not due mainly to the sword in the outstretched arm of the Arab, but the teaching and personality of Muhammad (saw), as one of the greatest benefactors of humanity.[226] The practice of early

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[220] See Qur'an 16: 125; Qur'an 29: 46
[221] Arnold, T.W. *The Preaching of Islam: A History of the Propagation of the Muslim Faith*, Constable & Company, London (1913, 2nd ed.) p. 46
[222] Ibid
[223] Ibid
[224] Ibid, at pp. 47-48
[225] Ibid at pp. 51-2.
[226] Fyzee, A. A. A. The Reinterpretation of Islam, *University of Malaya Law Review* (1959) Vol. I, pp. 39-57 at 39

Islamic leaders, particularly the Rightly-Guided Caliphs, was consistently determined by the Qur'anic norms which seek to protect the integrity of the individual conscience. Abu Zahrah and Mutawalli, among others, are both explicit on this point. According to the former, "the early Muslims showed great care and sensitivity not to compel anyone in the matter of religion".[227]

It was reported that Caliph Umar had an encounter with an elderly Christian woman whom he invited to accept Islam but she refused. While in Syria, 'Umar was brought water for *wudu'* and said afterwards: "I never tasted sweeter water, from where did you get it?" They pointed him to the house of an elderly woman. He went and said to her: "Old woman, surrender and you shall be safe! Muhammad came with the truth from Allah." She uncovered her snow-white hair and said: "Now? With one foot of mine in the grave?" Whereupon `Umar said: "O Allah, bear witness!" i.e. bear witness that I tried.[228] At this, the Caliph fearing that his invitation might have amounted to compulsion reinstated that there must be no compulsion in religion, righteousness has been explained and distinguished from misguidance. Thus, Umar Caliph expressed the point that only God Most High can prevail upon the hearts and minds of people in matters of faith.[229] These precedent and attitude of the Rightly-Guided Caliph reflects the correct understanding of the norms of the *Shari'ah* which clearly recognize the freedom of religion and proscribe all oppression and violation of the integrity of this freedom.[230]

Similarly, freedom of religion and religious worship of the non-Muslims was also clearly spelt out in the Prophet's (saw) treaty with the Jews of Medina wherein it was provided that: "To Muslims their religion and to Jews their religion … that there should be benevolence and

[227] Kamali, M. H. op. cit., p. 91
[228] Ibn Hazm, *Al-Muhalla* , Vol. 11, p. 196; al-Daraqutni, *Sunan Daraqutni ("Bab al-Wudu min al-Maa min Ahl al-Kitab"*) Vol. 1, p. 32, al-Bayhaqi, *Sunan al-Bayhaqi* Vol. 1, p. 32
[229] Abu Zahrah, *Tanzim al-Islam li al-Mujtama'a*, op cit., at p. 192.
[230] Mutawalli, *Mabadi'*, op cit, at p. 287

justice … The Jews are a community in alliance and a community forming part of the believers".[231] In the lifetime of the Prophet (saw), the Muslims also entered into a treaty with the Christians of *Najran* in Yemen. The Prophet granted to the Christians not only the security of the person and property of the inhabitants, but had also left the entire authority to nominate their bishops and priests to the community itself.[232]

Additionally, in the sixth year of the *Hijrah*, the Prophet (saw) acting on these guiding principles, granted to the monks of St. Catherine, near Mount Sinai, and to all Christians, a Charter wherein the rights of non-Muslims under the political dispensation of the Muslims were recognized and protected. The terms of the Charter briefly put is that, non-Muslims are not to be unfairly taxed; no bishop is to be driven out of his bishopric; no Christian was to be forced to reject his religion; no monk was to be expelled from his monastery; no pilgrim was to be detained from his pilgrimage; nor were the Christian Churches to be pulled down for the sake of mosques or houses for Muslims; Christian women married to Muslims were to enjoy their own religion.[233]

3.3 LEGAL FRAMEWORK ON FREEDOM OF RELIGION UNDER ISLAMIC LAW

The Qur'an and Sunnah, the two principal sources of Islamic law and the practice of Muslim heads of States (*Khalifa*), clearly establish the religious rights and privileges of *Dhimmis* (non-Muslims) living in *Dar al-Islam*. The Qur'an and the Sunnah contain numerous references to the legal protection and preservation of the religious freedom of non-Muslims in an Islamic State. The Holy Quran altogether excludes compulsion from the sphere of religion. It lays down in the clearest words: "There is no compulsion in religion — the right way is indeed clearly distinct from error."[234]

[231] Hamidullah, *Introduction to Islam*, IIFSO publication, Kuwait, p. 171
[232] Amir Ali, *The Spirit of Islam*, Ta-Ha Publishers, London (1922), p. 273
[233] Ibn Hisham, *Sirat ibn Hisham*, p. 718
[234] Qur'an 2:256

This Qur'anic verse has attracted several interpretations. First, it has been opined by some Muslim jurists that the legal injunctions contained in this verse have been abrogated by the verse of the sword, i.e., Qur'an 9:5 which is to the effect that unbelievers are to be killed wherever they are found.[235] Imam al-Tabary said that some later Muslim jurists are of the view that Qur'an 2:256 was abrogated as it were reveled prior to the command on fighting (*jihad*).[236] Qurtubi stated that Qur'an 2:256 has been abrogated because the Prophet (saw) had actually compelled the Arab pagans into accepting Islam and has fought them and accepting nothing from them other than Islam.[237] Along these lines, some Muslim jurists held the view that Qur'an 2:256 was abrogated by Qur'an 9:74 and this is the view of Ibn Mas'ud, Suleiman Ibn Musa.[238] Ibn Kathir said that Qur'an 2:256 has been abrogated by the verse of the sword thereby obliging all other nations to accept Islam, pay the *Jizyah* or be fought till they accept this arrangement and that this is the meaning of the verse "there is no compulsion in religion".[239] This view was further buttressed by the provisions of Qur'an 9:73 and 9:123.[240] It can be observed that those Muslim jurists who adopt the view that Qur'an 2:256 has been abrogated have regarded all non-Muslims by default as entitled to the option of accepting Islam or being fought.[241]

The second major juristic view regarding the interpretation of Qur'an 2:256 is that in view of its *asbab al-Nuzul* (circumstance or reason) for its revelation, Qur'an 2:256 was specifically revealed concerning the incident of *ahl al-Kitab* (people of the book) at whose custody was

[235] Al-Wahidy, *Asbaab an-Nuzul*, p. 96; *Tafsir al-Qurtubi*, Vol. 2, pp. 351-352; Ibn Hazm, al-Muhalla, Vol. 11, p. 196
[236] Al-Tabarī, Muhammad ibn Jarīr. *Jāmi' al-Bayān 'an Ta'wīl Āy al-Qur'ān*, Dār al-Fikr, Beirut (1984-5/1405) Vol. 13, pp. 9-15 [hereinafter referred to as *Tafsir al-Tabary*]
[237] Nazariyyah al-Harb, p. 123; Ibn Hazm, al-Muhalla, Vol. 11, p. 196
[238] Al-Qurtubī, Muhammad ibn Ahmad al-Ansārī *Al-Jāmi' li-Ahkām al-Qur'ān*, Dār al-Sha'ab, Cairo (n.d.) Vol. 3, pp. 280 [hereinafter referred to as Tafsir al-Qurtubi]
[239] Ibn Kathīr, Ismā'īl ibn Umar *Tafsīr al-Qur'ān al-Azīm*, Dār al-Fikr, Beirut (1980-1/1401), Vol. 1, p. 311 [hereinafter referred to as Tafsir Ibn Kathir]; Fakhr al-Razi, *Ja'mi al-Bayan*, Vol. 8, p. 16
[240] Al-Wahidy, Kitab al-Nasikh wal Mansukh, p. 16
[241] Nazariyyah al-Harb, p. 124

the children of *Ansar* who intended forcing their children at the hand of the Jews into accepting Islam but was not allowed to do so. This view was based upon the *asbab al-Nuzul* of Qur'an 2:256 regarding the Jewish tribe of *Banu Nadir* and the people of *Ansar*.[242]

It was reported that before the coming of Islam, the people of Medina by custom, used to place the custody of their young children at the hand of the Jews due to vows undertaken by women whose offspring die one after the other. But upon the coming of Islam and when the Prophet (s.a.w.) expelled the Jewish tribe of *Banu Nadir* from Medina, the Jews wanted to take the children of *Ansar* who were made Jews because of the custom.[243] The people of Medina raised alarm over their children at the hands of the Jews about to leave Medina. When the *Ansar* consulted the Prophet (s.a.w.) as to whether they can compel their children into accepting Islam as the *Anasr* only placed such children at the hand of the Jews because of their expectation that the Jewish religion was of some superiority above the then existing religions, with the coming of Islam, do we not then compel them to Islam. This incidence was identified as the basis for the revelation of Qur'an 2:256.[244]

The above position was reported to have occurred at the earlier stage of the development of the Islamic empire, i.e., it was something that happened before the legal injunction of jihad including fighting *ahl al-Kitab* and the further legal requirement from non-Muslims either to accept Islam or to pay the *Jizyah* was revealed in the 8th year after *Hijra*.[245] If this position were to be taken as the applicable law under the Shari'ah, then it is indicative of absence of compulsion in matters of religion in respect of *ahl al-Kitab* inclusive of *Zoroastrians* only by

[242] Ibn Hazm, al-Muhalla, Vol. 11, p. 196; Al-Wahidy, *Asbaab an-Nuzul*, p. 96; *Tafsir al-Qurtubi*, Vol. 2, pp. 351-352; Tafsir al-Tabary, Vol. 3, p. 16
[243] Bambale, Y. Y. *Crimes and Punishments under Islamic Law*, Malthouse Press Ltd., Lagos (2003, 2nd ed.) p. 78
[244] Tafsir al-Tabary, Vol. 3, p. 16; Tafsir al-Qurtubi, Vol. 3, pp. 280
[245] Nazariyyah al-Harb, p. 123

virtue of the Prophetic tradition authorizing acceptance of *Jizyah* from them.[246] The legal position became therefore that, non-Muslims are at option of accepting Islam or accepting the obligation to pay *Jizyah* as the applicable law on *ahl al-Kitab.*[247] Thus, the juristic view as to Qur'an 2:256 referring solely to *ahl al-Kitab* has been rendered or challenged as being weak by some Muslim jurists in view of the presence of the provisions of Qur'an 2:193 which command the Muslims to fight all people until they accept no religion other than that of Islam.[248]

Thus, all other people other than Jews, Christians and Zoroastrians, the legal position of their religious freedom under the Shari'ah is by default restricted to the two clear-cut options of either accepting Islam or being fought although some Muslim jurists are of the view that *Jizyah* is to be accepted from the categories of all unbelievers to the exception of *Quraish.*[249] This view has thus rendered the options available to unbelievers to be three – either acceptance of Islam, payment of *Jizyah* or been fought.

The lessons to be derived from the various juristic interpretations given to Qur'an 2:256 is therefore the classification of people in matters of faith into three different categories with an attendant legal consequence resulting thereby. First, as to those whose religion is backed by divine text, they are to be called upon to accept Islam otherwise they may be obliged to pay the *Jizyah* as per the provisions of Qur'an 9:29. These categories of people are those whom by the authority of a Prophetic Hadith are to be driven out of the Arabic peninsula largely due to

[246] Al-Shawkānī, Muhammad ibn Alī ibn Muhammad, *Nayl al-Awtār: Min Ahādīth Sayyid al-Khyār Sharh Muntaqā al-Akhbār*, Dār al-Jīl, Beirut (1973), Vol. 8, p. 213; Ibn Mālik, Anas *Muwatta' al-Imām Mālik,* Ed. Muhammad Fū'ād Abd al-Bāqī, Dār Ihyā' al-Turāth al-Arabī, Cairo (n.d.) Vols. 2, p. 262

[247] Al-Ulusy, *Ruhul Ma'ani*, Vol. 3, p. 13; Ibn Kathir, Tafsir Ibn Kathir, Vol. 1, p. 310; Al-Wahidy, *Kitab As-Baab An-Nuzuul, pp. 66-49*; Al-Suyudi, *Lubaab al-Nuquul fi As-Baab An-Nuzuul*;

[248] Ibn al-Arabī, Muhammad ibn Abd Allah, *Ahkām al-Qur'ān*, Ed. Muhammad Abd al-Qādir Atā, Dār al-Kutub al-Ilmiyyah, Beirut (2002, 3rd ed.) 4 Vols. 1, p. 233; Al-Ulusy, *Ruhul Ma'ani*, Vol. 3, p. 13

[249] Al-Shawkānī, Muhammad ibn Alī ibn Muhammad, *Nayl al-Awtār: Min Ahādīth Sayyid al-Khyār Sharh Muntaqā al-Akhbār*, Dār al-Jīl, Beirut (1973), Vol. 8, p. 214; Al-Buhūtī, Mansūr ibn Yūnus ibn Idrīs, *Kashshāf al-Qinā' an Matn al-Iqnā'*, Ed. Hilāl Misīlhī Mustafā Hilāl, Dār al-Fikr, Beirut (1981-2/1402) Vol. 3, pp. 118

their treachery against the Muslims and the Islamic State in Medina.[250] Secondly, legal ruling regarding unbelievers (polytheists) which was of two categories: ruling concerning polytheist within the Arabic peninsula and those outside it. As to polytheists within the Arabic peninsula, their legal position by default is the two options of acceptance of Islam or been fought. This view is held in accordance with Qur'an 9:1-5.[251]

Notwithstanding the above stated divergent juristic views, the Arabic term for unbelievers (*al-Mushrikun*) is a term that encompassed *ahl al-Kitab* (people of the book), *ahl al-Authan* (polytheists) who are all of the same footing regarding their unbelief to the message of Islam. In line with this, the Prophetic command was to "drive out all unbelieves from the Arabic peninsula" and this ruling has not circumscribe either Arabs or *ahl al-Kitab* but that they are in fact those on whom the ruling applies.[252] It was therefore historically established that the practice is that, Muslims had conquered Rome and Persia and the like, thereby collecting *Jizyah* from them and placing upon them the obligation of remitting *Kharaj* (tax) to the Islamic State although they are people of faith.[253]

Also the following Qur'anic verse which was addressed to the Prophet reinforces the individual's freedom in matters of conscience. It states thus: *"Had thy Lord willed, everyone on earth would have believed. Do you then force people to become believers?*"[254] This verse refers to the deep anxiety felt by the Holy Prophet that people should embrace the message brought by him. This latter passage of the Qur'an is a *Meccan* text which was revealed at an

[250] Al-Māwardī, Alī ibn Muhammad ibn Habīb *Kitāb al-Ahkām al-Sultāniyyah wa al-Wilāyāt al-Dīniyyah*. Ed. Ahmad Mubārak al-Baghdādī, Maktabah Dār ibn Qutaybah, Kuwait (1989/1409) p. 212
[251] Tafsir al-Tabary, Vol. 3, p. 16; Tafsir al-Qurtubi, Vol. 3, pp. 280. Some Islamic exegetist are of the view that polytheists are to be expelled from the vicinity of Mecca alone not the larger Arabic peninsula relying on Qur'an 2:193 although they still maintained the view that they are to be expelled out of the Arabic peninsula by virtue of the provisions of Qur'an 8:39, see Ibn Hazm, *Al-Muhalla*, Vol. 7, p. 346
[252] Ibn Hajar, *Fath al-Baari*, Vol. 8, p. 170
[253] Ibn Kathir, Tafsir Ibn Kathir, Vol. 1, p. 310; Tafsir al-Tabary, Vol. 3, p. 16; Tafsir al-Qurtubi, Vol. 3, pp. 280; Al-Ulusy, *Ruhul Ma'ani*, Vol. 3, p. 13; *Subul-us-Salam*, Vol. 4, pp. 46-47
[254] Qur'an 10:99

early stage in the advent of Islam. This was later followed and confirmed, after the Prophet's migration to Medina, by the afore-mentioned verse in *Surat al-Baqarah*.[255] Thus, the Quran provides therefore that, it is in the natural order of things that while some people believe, others do not.[256]

Similarly, the provisions of Qur'an 109:6 is among the most widely quoted Qur'anic verse on freedom of religion in Islamic law. It provides: *"To you be your religion, and to me be my religion"*. However, the verse was a call to the Prophet (saw) from the then polytheists[257] of Mecca for him to agree to worship according to their faith and for them also to worship according to the Islamic faith, i.e., reciprocally for one year.[258] Thus, contrary to the context in which modern scholars quote it, what the verse establishes was a refutation to such a call and reaffirmation of the Islamic faith as opposed to polytheism.[259] The revelation of Qur'an 109:6 was said to have occurred before the commandment on the use of force (jihad) therefore that the verse has been abrogated by the verses of the sword.[260] It is further said by some Muslim jurists that the whole chapter has been abrogated, while some opined that it does not contain legal ruling (*ahkam*) but is narrative (*Khabar*) only.[261] That in line with this later interpretation, such unbelievers (polytheists) had been actually fought by Muslims in the battle of *Badr*.[262] Therefore, the context of the verse means that Muslims shall hold firmly

[255] Qur'an 2:256
[256] *Tafsir al-Tabary*, Vol. 12, p. 298; Al-Qurtabi, *Tafsir al-Qurtabi*, Vol. 11, p. 56; Ibn Kathir, Tafsir Ibn Kathir, Vol. 7, p. 404
[257] E.g., Al-Walid ibn Mughira, al-Aas ibn Wa'il, al-Aswad ibn al-Muddalib, Umayyah ibn Khalaf.
[258] Al-Wahidy, *as-Baab an-Nuzuul*, p. 505; *Tafsir al-Tabary*, Vol. 24, pp. 702-703; Al-Tabary, *Tarikh al-Tabary*, Vol. 2, p. 337; Al-Suyudi, *al-Darar al-Mansur*, Vol. 6, p. 404; Al-Qurtabi, *Tafsir al-Qurtabi*, Vol. 22, p. 536; *Tafsir al-Baqhawy*, Vol. 4, p. 535; Ibn Hisham, *Sirat ibn Hisham*, Vol. 1, p. 362
[259] Ibn Kathir, Tafsir Ibn Kathir, Vol. 14, p. 486; Ibn Hajar, Fath al-Baari, Vol. 8, p. 733
[260] Al-Qurtabi, Tafsir al-Qurtabi, Vol. 22, p. 537
[261] An-Nuhas, al-Naasikh wa al-Mansukh, Vol. 3, pp. 154-155; Zaad al-Maseer, Vol. 9, p. 254
[262] Tafsir al-Tabary, Vol. 24, p. 702

unto their religion and not delve into that of disbelievers who also keenly holds unto their religion.[263]

The following verse of the *Quran* is also cited in support of freedom of religion in Islam and against forced conversion to Islam:

> And had it not been for God's repelling some men by means of others, cloisters, churches, oratories and mosques, wherein God's Name is oft mentioned, would have been demolished.[264]

From the perspective of *Sunnah*, one of the famous *Hadith* the interpretation of which becomes controversial especially by modern scholars is that which proclaims *"kill whoever changes his religion"*[265]. Similar *Hadith* is the one often quoted in support of the death penalty for apostasy, which is as follows:

> The blood of a Muslim who professes that there is no god but Allah and that I am His Messenger, is sacrosanct except in three cases: a married adulterer; a person who has killed another human being; and a person who has abandoned his religion, while splitting himself off from the community (*mufariq lil-jama'ah*).[197]

Another Prophetic Hadith is to the effect that no two religions shall be allowed to co-exist in the Arabic peninsula.[266]

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[263] Ibid at p. 703
[264] Qur'an, 22:40
[265] Bukhari, Hadith No. 3017 & 6922; Musnad Ahmad, Vol 1, Hadith No. 214 & 282; Sunan Abu Dawud, Hadith No. 4351; Ibn Majah, Hadith No. 2530; Sunan Tirmidhi, Hadith No. 1408; Nisaa'i, Vol. 7, Hadith 104
[266] Sahih al-Bukhary ma'a Irshad al-Saary, Vol. 6, pp. 463, Vol. 6, pp. 263; Al-Bukhārī, Muhammad ibn Ismā'īl, *Al-Jāmi' al-Sahīh al-Mukhtasar*. Ed. Mustafā Dīb al-Baghā, Dār ibn Kathīr, Beirut (1987/1407) 3rd ed., Vol. 4, p. 181; Ibn Hajar al-Asqalānī, Ahmad ibn Alī *Fath al-Bārī Sharh Sahīh al-Bukhārī*. Ed. Muhib al-Dīn al-Khatīb, Dār al-Marifah, Beirut (n.d.) Vol. 8, p. 170

3.4 NATURE AND SCOPE OF FREEDOM OF RELIGION IN ISLAMIC LAW

Freedom of religion in its Islamic context implies that non-Muslims, i.e., the *Dhimmi* and those with divinely-revealed Book (Christians and Jews) are not compelled to convert to Islam, nor are they to be hindered from practicing their own religious rites.[267] Freedom of belief, like all other freedoms, operates as a safeguard against the possible menace of oppression from superior sources of power.[268] This is also essentially true of the Islamic concept of this freedom as it can be observed that no power of any kind in the Islamic state may be employed to compel people to embrace Islam.[269]

Pertinently, if freedom of conscience and religious worship is not forced on the individual under the Shari'ah, what then are the place of *jihad* and the alleged spread of Islam by the sword? First of all, the expansion and propagation of Islam started initially by means of peaceful preaching and persuasion. A decade after the advent of Islam, persecution of the Prophet Muhammad and his early companions and followers gained momentum. To avoid further persecution, they fled (emigrated) from Makkah to Madina in 622 AD.[270] At *Madina*, although the first Muslim State was established, interference of the Meccans continued and Muslims lived under persistent fear of invasion from the non-Muslim forces surrounding them. It was at that time, that the doctrine of *jihad* in the sense of use of force gained currency, with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group. Thus, *jihad* in the sense of 'holy war'

[267] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Kamali, M. H. *Freedom of Expression in Islam*, Islamic Text Society, London (1996) p. 87; See also Abu Zahrah, *Tanzim al-Islam li al-Mujtama'*, p.190

[268] Kamali, M. H. op cit., p. 87

[269] Abd Ati, H., A. *Islam in Focus*, op. cit., at p. 34; Fathi 'Uthman, *Huquq al-Insan Bayn al-Shari'ah al-Islamiyyah wa'l-Fikr al-Qanuni al-Gharbi*, p. 91.

[270] Shaheen S. A. and Javaid R., op. cit., p. 331

was established essentially as a means of self-defence to preserve and protect the Islamic faith.[271]

Some scholars have argued that jihad is essentially defensive in nature, whereas others are inclined to consider it as including an offensive or aggressive element.[272] It is submitted that the truth probably lies somewhere in between the two extremes, i.e., in the middle. Originating from the premise of peaceful propagation of the Islamic faith and resort to war only as a measure of self-defence, the doctrine went through a change when the persecution of Muslims by the Makkans leads to their emigration to Medina. *Jihad* (in the sense of use of force) was established and permitted to protect Muslims and to ensure their right to practice their religion.[273]

Given the above variety of rights that obtains under international law today on religious freedom, does it follow that the Shari'ah recognizes the same, similar or divergent corpus of religious rights under its conception of freedom of religion. Well, an analysis of the primary sources of the Shari'ah in the light of the juristic interpretation thereto indicates the following categories of legal issues relating to religious freedom within the Islamic context. These include absence of compulsion in matters of religion (i.e., acceptance of Islam);[274] religious conversion and apostasy (change of religion); the liberty of non-Muslims to maintain religious beliefs or creeds including the protection of their life and property under the obligation of paying the *Jizyah* (poll tax);[275] the liberty open to non-Muslims within an Islamic State to

[271] Ibid, p. 332
[272] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 17; Sayyid Qutb, al-Salam al-Alamii wa al-Islam, p. 130-33; Abu Zahrah, al-Alaqat al-Dawliyyah fi al-Islam, p. 92; Wahbah al-Zuhaili, al-Alaqat al-Dawliyyah fi al-Islam, p. 30-32; Mahmassani and Hamidullah are among modern writers subscribing to the view that Islam only permits war in self-defence, while Khadduri and Abdullahi Ahmed An-Na'im levied the criticism that Islam permits use of force for propagation of faith which means that it is inherently aggressive in nature.
[273] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, pp. 16-19; Mahmassani, *op. cit.*, p. 277–279.
[274] Qur'an 2:256; 10:99
[275] Qur'an 9:4

apply their personal laws within their community;[276] Jihad to defend the Islamic Religion; capital punishment for blasphemy and defamation of Islam; sanctity and inviolability of places of worship; etc.

3.5 ATTRIBUTES OF FREEDOM OF RELIGION IN ISLAMIC LAW

Understanding freedom of religion in Islamic requires reflection on certain integral aspects of it, especially those that mark its key features in the Islamic tradition as against other legal and religious traditions. Among these are the contested issues of change of religion (apostasy), Jihad in defence of Islam, defamation of religion, fusion of the institution of law and religion (i.e., state religion), etc.

3.5.1 RIGHT TO CHANGE RELIGION

The basic teaching of the Shari'ah is that there is no forcible conversion to Islam; the golden rule being *"there is no compulsion in religion*."[277] While the general rule is that Islam does not permit the use of force for its acceptance, it prohibits *riddah* (change of religion), i.e., apostasy - because it is treachery for a person to apostatize from Islam. Apostasy is renunciation of Islam, committed voluntarily by a Muslim, either by words or by acts.[278] Apostasy if permitted will destroy Islam itself and its established rubrics and regulations thereby causing chaos to the institution.[279]

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[276] It is worth noting that, the Islamic legal system is the first to recognize the idea of religious and legal pluralism right from 7th Century AD, in that, Islamic law introduced for the first time in history, a framework whereby in Medina, both Muslims and non-Muslims co-existent within the Islamic State with each faith maintaining a community. This setting gave birth to the development of the personality principle in which believers are governed by their personal laws according to the dictate of their religious text.

[277] Qur'an 2:256

[278] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 286; Wahbah Al-Zuhaili, *Fiqh al-Islam wa adillatuhu*, Vol. 7, p. ; Salih abd al-Samii al-Abii al-Azhari, *Jawahir al-Iklil Sharh Mukhtasar Khalil*, Vol. 2, p. 279Bambale, Y. Y. *Crimes and Punishments under Islamic Law,* Malthouse Press Ltd., Lagos (2003) p. 74

[279] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 291; Bambale, Y. Y. *Crimes and Punishments under Islamic Law,* Malthouse Press Ltd., Lagos (2003) p. 74; Mahmassani, loc. cit., p. 287

Change of religion is an act punishable in Islamic law. Thus, issues that has to do with the legal consequences of the act of apostasy is among the major topical issues of concern within religious freedom discourse, especially by Westerners who perceived the Shari'ah as limiting freedom of religion in this regard.[280] The argument is that, first of all, if there is no compulsion in religion, why capital punishment for the apostate? Secondly, the problem further posed by modern scholars is how apostates shall be dealt with under the *shari'ah,* i.e., whether the *shariah* has prescribed a temporal punishments on apostates.

While it is generally agreed that a conversion to Islam has to be voluntary, the majority of Muslim scholars agree that once a person becomes a Muslim, a change of religion is not permissible. In that, it was a settled legal issue among Muslim jurists to the extent that there exist *ijma`* among the *Sahaba* that the punishment of apostasy is death.[281] What remain a matter of disagreement is whether an apostate shall be required to repent or not and the likely period of time for such a repentance as well as whether a woman who apostates is to be killed. The majority among the Muslim jurists are of the view that an apostate shall be required to repent and except to Abu Hanifa, a woman shall also be killed.[282] But if an apostate further joins the enemies to fight the Muslims, then there is no requirement of offering respite to him to repent.[283]

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[280] For example, Ann Elizabeth Mayer, *Islam and Human Rights*, Pinter Publishers, London, 1991, pp. 186-187 writes with reference to apostasy: "The Islamic human rights schemes ... are evasive on the question of protections for freedom of religion ... The failure of a single one of these Islamic human rights schemes to take a position against the application of the shari`a death penalty for apostasy means that the authors of these schemes have neglected to confront and resolve the main issues involved in harmonizing international human rights and shari`a standards."

[281] Ibn Hazm, al-Muhalla, Vol. 11, pp. 188-197; Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Vol. 2, p. 459; Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 289; Al-Jawhari, *Nawadir al-Ijma;* This is mentioned in Ibn Qattan's encyclopedia of Ijma`; Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam*, Ashgate, Aldershot, (2004) p. 36.

[282] Ibn Hazm, al-Muhalla, Vol. 11, pp. 188-189; Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Vol. 2, p. 459; Salih abd al-Samii al-Abii al-Azhari, Jawahir al-Iklil Sharh Mukhtasar Khalil, Vol. 2, p. 280

[283] Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Vol. 2, p. 459

Several verses of the Qur'an refer to acts of renunciation of faith. This includes the following legal authorities. The Holy Qur'an 5:33 provides:

> The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom.

Qur'an 3:56 provides: *"As for those who committed apostasy, then Allah shall torment them with a terrible torment both in the world and in the next life*." Qur'an 9:61 provides: "...*Those who vex the messenger of Allah, for them there is a painful doom."* Qur'an 33:57 also provides: *"Lo! those who malign Allah and His messenger, Allah hath cursed them in the world and the Hereafter, and hath prepared for them the doom of the disdained*." Qur'an 88:22-24 provides: "*You are not at all a ward over them except those who turn back and commit apostasy, after which Allah shall punish them with the greatest punishment."*

The Sunnah has also indicated clearly the punishment to be mated out to apostates. The Holy Prophet (saw) was reported to have said: *"whoever changes his religion, kill him*". In another Hadith, the Prophet (saw) was reported to have said:

> "The blood of a Muslim is illicit to shed except for one of three reasons: a married adulterer must be stoned; one who wilfully commits murder must be put to death; and a man who comes out of Islam and fights Allah and His Prophet must be put to death or crucified or banished from the earth."[284]

Notwithstanding this clear legal ruling, some modern writers, perhaps, out of mischief and pleasing the West, tend to hide under the fact this Hadith seemed solitary (*ahad*) to attribute weakness in its transmission (*isnad*) and thus dismiss its authority for the death penalty on apostates. For example, Kamali while agreeing with Rahman entertained the allegation that *"neither the Prophet (saw) himself nor any of his Companions ever compelled anyone to*

[284] Reported by Bukhari, Sahih Bukhari, Hadith No. 6878; Sahih Muslim, Hadith No. 1676; see also Ibn Rajab, *Jami'i al-Ulum wa al-Hikam fi Sharh Khamsiyna Hadithan min Jawami'i al-Kalim,* (nd) p. 183

embrace Islam, nor did they sentence anyone to death solely for renunciation of the faith".[285] That it is a matter between a person and his Creator, and its punishment is postponed to the day of judgment. Contrary to this baseless allegation, the Prophet (saw) have indeed sentence to death Abd Allah ibn Sa`d ibn Abi Sarh for apostasy, even though he was never actually executed.[286] Similarly, the apostate Muqayyis ibn Sababa was executed although his own case involves also another crime of murderer which blurs his case as to whether he was punished for apostasy.[287]

As to whether the shari'ah has prescribed a temporal punishment on apostates, the general body of Muslim scholars is of the view that there are two courses open to an apostate from Islam. He/she is first invited to return to Islam. If he/she fails to comply, he/she is then liable to capital punishment on the basis of a *Hadith* of the Prophet which says "He who changes his religion must be killed".[288] There is agreement on the binding force of this ruling among the Imams of the Four Schools except on two things as to gender and timing before the ruling of execution is enforced. Imam Abu Hanifa exempting women from execution and jailing them for life due to the Prophetic command not to kill the women of enemy combatants in time of war.[289]

If apostasy is collective and is accompanied by secession or desertion to the enemy, then it justifies declaration of war. In such a case, it is equivalent to rebellion and discord (*fitnah*), which, in terms of the *Quran*, is worse and more serious than murder.[290]

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[285] Kamali, H. M. op cit.,
[286] Ibn Taymiyya, Sarim Maslul ala Shatin Al-Rasul, p. 791-793; Ibn Abd al-Barr, Durar fi Ikhtisar al-Siyar, p. 219
[287] Critique of M. H. Kamali article 'Freedom of Expression in Islam' by GFH available online at
[288] Ibn Hazm, al-Muhalla, Vol. 11, pp. 129 & 104; Ibn Qayyim al-Jawziyyah, *Zad al-Ma'ad, p. 45.* But according to Hanafi School, women apostates are not liable to capital punishment.
[289] Ibn Hazm, al-Muhalla, Vol. 4, p. 316; Ibn Taymiyyah, Majmu' al-Fatawa, Vol. 32, pp. 276 & 279, Vol. 35, pp. 105-107
[290] *Quran*, 2:191, 217

But to some modern scholars like Badr, Kamali, An-Na'im, etc., they states that, according to the true interpretation of the *Quran*, not mere renunciation of Islam but becoming an enemy of Muslim society and state was punishable.[291] That nowhere in the Qur'an was death penalty for the apostates was mentioned. As Badr describes it, apostasy was more a political question than anything else, comparable in modern laws with treason. It was withdrawal from Islam, taking action against the Islamic nation in a treasonous sense, as opposed to the individual's choice of adopting a different type of belief.

The right to maintain a particular religion according to the dictate of one's conscience is exemplified by the Shari'ah when we consider its position regarding non-Muslim women of the *ahl al-Kitab* (people of the book) who are married to Muslims. The non-Muslim women of the *ahl al-Kitab* if married to Muslims are not forced to convert to Islam. Even after the marriage, the woman may choose to retain her faith with the right to practice her religion, celebrate her festivals without any compulsion from her husband. Indeed, the Shari'ah has made it lawful to marry non-Muslim women of the *ahl al-Kitab* despite being non-Muslims thereby opening the door for religious co-existence while curtailing avenues for hatred and discrimination.[292]

The liberty of conscience and religion is so much emphasized in the Shari'ah that even if a non-Muslim minor is taken as a prisoner of war along with his parents, the child still has the right to maintain the religion of his fore-father, even if his parents die later. The right of *Dhimmi* minor is fully protected in this regard.[293]

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[291] Badr, *op. cit.*, p. 76, believes that the concerns of those Muslim delegates at the United Nations who, during the discussions leading to the adoption of the Universal Declaration of Human Rights in 1948 wanted to avoid the term 'to adopt', in that instrument was because they did not want to encourage change of religion from Islam to another. These Muslim representatives were concerned on the basis of lessons of the last century where Muslims were converted by missionaries of imperial powers. Badr believes this to be a political question.

[292] Qur'an 5:5

[293] Al-Sarakhsi, *Sharh al-Siyar al-Kabir*, Vol. 4, p. 368, 372

3.5.2 STATE RELIGION IN ISLAMIC LAW

Islam is a comprehensive religion. It is not limited to rituals at an individual level. It is not a "religion" in the common and distorted meaning of the word, confining its scope to the private sphere of human life. It is rather a complete way of life catering all the fields of human existence, providing guidance for all walks of life, be it individual or social, moral and material, economic and political, legal and cultural, national and international.[294] The command of the Qur'an is the acceptance of the fold of Islam without any reservation and to follow the guidance of Allah in all fields of life.[295] Thus, Islam is an all-embracing way of life and does not leave out any field of human existence for the Muslims to be governed roughshod by satanic forces.[296]

In Islam, law is not distinct from religion. The two streams flow together in a single channel and are indistinguishable. What is distinctive to Islam is that the sacred sources of Shari'ah contain principles regulating not only the moral and ethical norms of behavior of the individual in the family and society but also his personal, economic and social life.[297] In the eyes of believers, Islam is not simply a religious system but a "way of life".[298] Allah the exalted has revealed His divine guidance to humanity, made certain things permissible and others prohibited, commanded people to observe His injunctions and to judge according to them. If they do not do so, then they commit disbelief, aggression, and transgression.[299]

Nowadays, legal separation between the secular and the sacred has been propagated and it has thus become the norm in Western jurisprudence. Western societies have been constantly

[294] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 287; Khurshid, A. Islam – Our Choice, Muslim World League, Mecca Printing and Information Est., Mecca p. 11
[295] See Qur'an
[296] Khurshid, A. op cit., at p. 12
[297] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 2, p. 287; Fyzee, A. A. A. The Reinterpretation of Islam, *University of Malaya Law Review* (1959) Vol. I, pp. 39-57 at 39
[298] Primakov, E. M. Islam and Processes of Social Development of Foreign Countries in the East, *Soviet Law and Government* (A Journal of Translations) spring (1981) Vol. XIX, No. 4, pp. 3-23 at p.5
[299] Al-Qaradawi, Y. *Al-Hulul Al-Mustawrada Wa-Kayfa Janat 'Ala Ummatina* (1971) pp. 113-14.

trumpeting the idea that all religions are equal, thereby showing religion to be irrelevant, the effect of which is that all religions are made to seem equally unimportant. The voice of faith has been made to seem a private matter, a matter of conscience, a matter for the individual alone. In this sense, it has become a generally accepted view in Western societies that anyone can believe whatever he wants, as long as he doesn't harm anyone else. It wouldn't really matter whatever one worships, because religious beliefs, according to this idea, are all irrelevant.[300]

Yusuf al-Qaradawi has argued that as Islam is a comprehensive system of worship (*ibadah*) and legislation (*shari'ah*), the acceptance of secularism means abandonment of *shari'ah*, a denial of divine guidance and a rejection of God's injunctions. That, it is indeed a false claim that *shari'ah* is not suitable to the requirements of the present age.[301] The acceptance of a legislation formulated by humans means a preference for humans' limited knowledge and experiences over the divine guidance. For this reason, the call for secularism among Muslims is atheism and a rejection of Islam. Its acceptance as a basis for rule in place of *shari'ah* is clear apostasy.[302]

While commenting on why secularism is tantamount to apostasy for Muslims, Qaradawi further elaborates on the distinction. Secularism may be accepted in a Christian society but it can never enjoy a general acceptance in an Islamic society. Christianity is devoid of a *shari'ah* or a comprehensive system of life to which its adherents should be committed. The New Testament itself divides life into two parts, one for God, or religion, the other for Caesar, or the state. The Christian theological *maxim* is: "Render unto Caesar things which belong to

[300]Andrew F. M. Islamic Discussions of Secularism, *Cardozo Law Review* (2009) Vol. 30, No. 6, pp. 2832
[301] Al-Qaradawi, Y. *Al-Hulul Al-Mustawrada Wa-Kayfa Janat 'Ala Ummatina* (1971) pp. 113-14.
[302] Ibid

Caesar, and render unto God things which belong to God"[303]. As such, a Christian could accept secularism without any qualms of conscience. Furthermore, Westerners, especially Christians, have good reasons to prefer a secular regime to a religious one. Their experience with "religious regimes" - as they knew them - meant the rule of the clergy, the despotic authority of the Church, and the resulting decrees of excommunication and the deeds of forgiveness, i.e. letters of indulgence.[304]

3.6 RELIGIOUS RIGHTS OF *DHIMMI* (NON-MUSLIMS)

The term *Dhimmah* literally means *al-Ahd* (pledge), *al-Daman* (guarantee), and *al-Aman* (safety). It legally refers to an agreement (*aqd*) wherein the *Dhimmi* pays a poll tax (*jizyah*) to enter into a contract of protection under which he is permitted to reside peacefully within Muslim lands and preserve his faith commitments.[305] The contract of protection, or the *aqd al-Dhimma,* is a politico-legal device that embraces the content of the *dhimmi* rules, outlining the terms under which the *dhimmi* lives in the Islamic polity and the degree to which his difference will be accommodated or not.[306]

Non-Muslims are called *Dhimmis* because they are under the pledge of Allah, the pledge of the messenger of Allah and the pledge of the Muslim community, consequently they can live under the protection of Islam. The *Dhimmis* from this point of view are *ahl Dar al-Islam* (the people of the abode of Islam)[307] and hence the possessors of *al-Jinsiyyah al-Islamiyyah* (Islamic nationality).[308]

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[303] Matthew 22:21
[304] Al-Qaradawi, Y. *op. cit.,* pp. 113-14.
[305] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 48; Al-Qardawi, Yusuf *Ghayr al-Muslimin fi Mujtama'a al-Islami,* Cairo (1977), p. 7
[306] Anver M. E. Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance **(**2010) P. 1
[307]Al-Sarakhsi, *Sharh al-Siyar al-Kabir,* Vol. 1, p. 140; Ibn Qudamah, *Al-Mughni,* Vol. 5, p. 516; Al-Nasani, *Al-Bada'iwalSanai,* Vol. 5, p. 281
[308]Audah, Abd al-Qadir, *Al-Tashri al-Janai al-Islam,* Vol. 1, p. 307; Zaidan, Abd al-Karim, *Ahkam al-Dhimmiyyin wal Musta'mmin fi Dar al-Islam,* pp. 63-66

The Muslim jurists have classified the non-Muslim citizens under different categories and the most prevalent view is that there are the first three kinds of non-Muslims who may be found in any Islamic State.[309] This are the *Dhimmis* who are the *Ahl al-Dhimmah* or those who accept the hegemony of a Muslim State whose matters are to be decided with the terms of the appropriate treaty. Muslim State is duty bound to reciprocally abide by all the terms of such treaty. The second category is the 'conquered people' who are those non-Muslims that fought against Muslims until they were defeated and overpowered. They automatically become the *Dhimmah* or responsibility of Muslim State. They will pay a fixed amount of *Jizyah* and their lives, property, honour and places of worship will be protected in lieu thereof. The third category is those non-Muslims who clearly happen to be residing in the Muslim State, i.e., non-Muslims residing temporarily in a Muslim country and resident aliens who have opted voluntarily to live in a Muslim State.[310]

In an Islamic State where Muslims happens to be overwhelming majority, Muslims shall not interfere with the personal rights of the non-Muslims. They will have full freedom of conscience and belief and will be at complete liberty to perform their religious rituals and celebrate their religious festivals and ceremonies.[311] *Dhimmis* enjoy complete religious, administrative and political freedom, a right guaranteed to them in return for their loyalty and the payment of a reasonable tax called *Jizyah* which will be utilized in the defence and administration of the State.[312] In accordance with these rights, *Dhimmis* are allowed to retain their religious laws to govern their own affairs without having been subjected to the Shari'ah of Islam, for example, consuming wine and alcohol (*shurb al-khamr*) which is prohibited

[309]Maududi, Abul A'ala, *Rights of Non-Muslims in Islamic State,* Lahore (1976) p. 6; Hamidullah, M. *Muslim Conduct of State,* Lahore (1973) p. 112
[310] Doi, I. A. op cit., at 23
[311] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Doi, A.I. op cit at p. 81
[312] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Abu Zahrah, M. *Al-Jarimah wal Uqubah fil Fiqh al-Islam*, Dar al-Fikr al-Arabi, (undated) p. 189

under Islamic law is allowed for non-Muslims.[313] For jurists like al-Ghazali and al- Kasani, the *dhimmis* are entitled under the contract of protection to have their own traditions respected. To al-Ghazali, when *dhimmis* enter the contract of protection, the contract's terms do not include their liability for consumption of alcohol or pork because their own tradition permits consumption of such items.[314] Likewise, al-Kasani maintained that *dhimmis* can consume alcohol and pork because their tradition allows them to do so.[315] Thus, apart from the rights and obligations involving worship, they are equal to Muslims with respect to all other rights and obligations related to social life and other rights of the citizen.[316] They are treated fairly with Muslims in matters relating to the administration of criminal justice as well as succession, i.e., a Muslim would not inherit his *Dhimmi* relative and vice versa.[317]

Under the reign of Caliph Umar (RA), he granted full freedom of religion to the Christian population of *Ilya* as recorded by the famous Islamic historian Al-Tabari:

> They were granted safety of their lives, their property, their churches, their crosses and all their religious relics. No one could ever destroy their churches or decrease any portion of it or desecrate their crosses or confiscate their property or hate them for their religion or harm any of their followers. No Jew will be allowed to live with them in *Ilya* (due to age old hostility between the Jews and Christians during that period).[318]

Likewise, Khalid bin al-Walid, the famous companion of the Prophet (saw) had granted the following freedom to the people of *Anat*:

> They the Christians may blow their *Naqus* at any time they pleased either during the day or night except at the time of the five daily prayers of the Muslims (living in that area so as not to disturb them while they offered their

[313] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Husayn Hāmid Hassān, *Nazariyyat al-Maslaha fī al-Fiqh al-Islāmī,* Dār al-Nahda al-Arabiyya, Cairo, (1971), p. 73.
[314] Abu Hamid al-Ghazali, *al-Wasit fi al-Madhhab,* Dar al-Kutub al-'Ilmiyya, (2001) *Vol.* 4, p. 152
[315] Al-Kāsānī, *Badā'i al-Sanā'i,* Vol. 9, P.292; See also, Sahnūn ibn Sa'īd al-Tanūkhī, *al-Mudawwana al-Kubrā,* Dār 'ādir, Beirut (n.d.), Vol. 6, p. 270
[316] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Doi, A.I. op cit at p. 29
[317] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11
[318] Al-Tabari, *Tarikh al-Tabari*, Vol. 3, p. 609

> prayers). They might, if they liked, take out the processions of their crosses during their religious festivals.[319]

The practical example of fair treatment of non-Muslims in matters of their religion was further illustrated by Caliph Umar (RA) when he visited Jerusalem. Upon entering Jerusalem, Umar went straight to the temple of David where he offered his *Salat* (prayers) under Prophet *David's* Arch. Then he visited the biggest Christian church in the company of the priest. In the meantime, time for the next prayer came. The priest asked him to say his prayer at the church. The priest was taken aback and was most surprised when Umar expressed his wishes not to do so. Umar hastened to explain: "If I do pray at the church, I am afraid the Muslims may, one day makes this an excuse for taking over the church from you." When the priest heard the explanation, he admired the Caliph and Muslims.[320]

Non-Muslims under Islamic rule are considered and recognized as a community of its own within an Islamic State (otherwise known as the millet system) and tolerated as such to practice their religion within their community even though such practices are, in the Islamic ideology classified as unbelief. Within this setting, Islamic law is not inquisitive about religious acts performed by non-Muslims within their community. The mechanism of accommodating religious diversity in Islamic law is much manifest in this regard than in any other set of religious or secular law. It was only in an Islamic setting (rule according to sharia) that religious minorities are tolerated to the maximum.

Within their community, non-Muslims have every right under the Shari'ah to keep their own languages and customs, to open their own communal centers of learning and to be visited by missionaries of their own faith.[321] They are free to carry out missionary activities and to

[319]Abu Yusuf, Ya'qūb ibn Ibrāhīm al-Ansārī. *Kitab al-Kharaj (Islamic Revenue Code)*. Trans. Abid Ahmad Ali, Islamic Book Centre, Lahore (1993, 2nd ed.) p. 146

[320] See Hisham, A. S. *Al-Khulafa al-Rashidun*, Maryland (1955), p. 36 cited by Doi, A.I. op cit at pp. 78-79

[321]Picketall, M. *Cultural Side of Islam*, Lahore (1976), p. 113

propagate their faith. In fact, the Jews of Medina had set up their own religious and educational institution called *Bait al-Madras* during the time of the Prophet (saw). The Jewish and Christian educational institutions were left to their communities to manage their affairs during the Umayyad and the Abbasid Caliphates.[322]

As to Sabbath (religious holidays), in an Islamic setting, it is the right of non-Muslims who work in an Islamic State to be granted such religious holidays as to enable them practice or observe the tenets of their own religion. The Shari'ah emphasizes on giving due respect to the rights of non-Muslims working in an Islamic society. A Jew will be given free time on Saturday since he believes that it is Sabbath day and he should not work. The Hambali jurists opined that they should be exempted from work on Sabbath day basing their argument on the Hadith narrated by al-Nasa'i and al-Tirmidhi: "And you are Jew. It is incumbent that you should not transgress the regulations of the Sabbath day".[323] Similarly, the Christians will enjoy the same privilege and will be allowed to go to their churches on Sunday.

Even during the Ottoman empire, the various sects of Christians were represented in the Council of the Muslim Turkish Empire by their patriarchs, on the provincial and district councils by their bishops, in the village council by their priests, whose words was always taken without question on things which were the sole concern of the Christian community.[324]

Furthermore, as a community, non-Muslims have been accorded by the Shari'ah the liberty to apply their personal laws in matters relating to marriage and divorce. In that, all forms of marriages and divorce which might have been contrary to Islamic law are lawful for the non-Muslims, if such marriages are permitted by their respective religious and legal traditions.[325] In the personal matters, Shari'ah law will not interfere except when a non-Muslim specifically

[322] See Doi, A. I. op cit., at p. 52
[323] See Doi, A. I. op cit at p. 82
[324] See Doi, A. I. op cit., at pp. 79-80
[325] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Doi, A.I. op cit at p. 53

asks that the Shari'ah law should be applied to him. In case of a non-Muslim wife, she will continue to enjoy her rights and live as an adherent of her religion and celebrate her religious festivals even though her husband is a Muslim.[326]

In *Dar al-Islam*, the cases of non-Muslims are also to be decided by no one else but their co-religionists in accordance with their personal, traditional or religious law. The religious beliefs and practices of non-Muslims and their ecclesiastical law regarding their personal matters are to be strictly adhered to, and no Muslim Ruler is empowered to usurp their rights.

3.7 **JIHAD TO DEFEND THE ISLAMIC RELIGION**

The Shari'ah has prescribed certain rules to preserve the religion of Islam, guarantee its existence and protect it from extinction and aggression from its adversaries. These rules among others are in the field of jihad to fight those who stand on the way of Islamic propagation or tempt those who have believed to force them out of Islam and turn them back to disbelief (*Kufr*).[327]

The term *jihad* comes from the Arabic word *jahada*, literally meaning to struggle or exert but legally referring to fighting or waging war against the enemies.[328] The Prophet Muhammad (SAW) is believed to have stated that exertion of force in battle is a minor *jihad*, whereas self-exertion in peaceful and personal compliance with the dictates of Islam (constitutes) the major or superior *jihad*.[329] The Prophet Muhammad (SAW) is also reported to have said that the 'best form of *jihad* is to speak the truth in the face of an oppressive ruler.[330]

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[326] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11; Doi, A.I. op cit at p. 53

[327] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, pp. 16-19

[328] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 19; Muhammad Bakr Isma'il, *al-Fiqh al-Wadih min al-Kitab wa al-Sunnah ala al-Mathahib al-Arba'a*, Dar al-Manar, Al-Qahirah (1997, 2nd ed.) Vol. 3, pp. 178-179

[329] Muhammad al-Ghazālī, *Ihyā' 'Ulūm al-Dīn*, Vol. 2, p. 343; Ahmad ibn Alī al-Rāzī al-Jasās, *Ahkām al-Qur'ān*, Vol. 1, p. 328, Vol. 2, p. 287, Vol. 4, p. 43.

[330] See, for example, ibn Hajar al-Asqalānī, *Fath al-Bāri Sharh Sahīh al-Bukhārī*. Vol. 13, p. 53; Alā al-Dīn Alī al-Muttaqī ibn Husām al-Dīn, *Kanz al-'Ummāl fī Sunan al-Aqwāl wa al- Af'āl*, Vol. 3, p. 30 (Hadīths numbers 5510, 5511 and 5512); Ahmad ibn Hanbal, *Musnad al-Imām Ahmad Ibn Hanbal*

It is contended that the advent of Islam especially if compared with its historical age brought forth a peaceful revolution. Islam set peace as the perfect social and legal ideal. War was strictly regulated and limited by compulsory legal rules based on sacred texts and equitable principles. Many Muslim scholars cite provisions from the *Quran* and *Hadith* to put forward the argument that in the Islamic tradition (unlike popularly held belief); war is an aberration and a condition which may be resorted to only under unavoidable circumstances.[331] The view advanced by the Muslim jurists is that Islam's relations with other nations – as expounded by the Prophet Muhammad (SAW) was based on the principle of peaceful and non-hostile relations among nations.[332] The *Quran* states that "And if they incline to peace, incline thou also to it, and trust in God."[333] In another verse, the Qur'an provides; "So do not falter, and invite to peace when ye are the uppermost. And God is with you, and He will not grudge (the reward of) your actions.[334] The fact that peace is the preferred state of affairs is further borne out by the following *Quranic* verse:

> And make ready for them all ye can of armed force and of horses tethered, that ye may dismay the enemy of God and your enemy and others besides them whom ye know not: God knoweth them. And whatsoever ye spend in the path of God, it will be repaid to you in full, and ye will not be wronged. And if they incline to peace, incline thou also to it and trust in God. Lo! He is the Hearer, the Knower.[335]

The expansion and propagation of Islam started initially by means of peaceful preaching and persuasion by the Prophet (saw). But for almost a decade after the advent of Islam, persecution of the Prophet Muhammad and his early companions and followers gained

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Vol. 4, p. 315 (Hadīth number 18850); Badr al-Dīn Mahmūd ibn Ahmad al-Aynī, *'Umdah al-Qārī: Sharh Sahīh al-Bukhārī* , Vol. 10, p. 224, Vol. 15, p. 166; Ahmad ibn Shu'ayb al-Nasā'ī, *Sunan al-Nasā'ī al-Kubrā*, Vol. 4, p. 435 (Hadīth number 7834)

[331] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, pp. 5-8, 10,

[332] al-nazariyyah al harb

[333] *Quran* 8:61; 4:90

[334] *Quran* 66:35

[335] *Quran* 8:60–61.

momentum.[336] To avoid further persecution, Muslims fled from *Makkah* to *Madina* in 622 A.D. an event known as *Hijra* (emigration) which also marks the beginning of the Islamic calendar. At Medina, although the first Muslim State was established, interference of the *Makkans* continued and Muslims lived under persistent fear of invasion from the non-Muslim forces surrounding them. It was at that time, that the doctrine of *jihad* in the sense of armed conflict gained currency, with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group was revealed. Allah, the Exalted, says in the Glorious Qur'an: "And permission to fight (against disbelievers) is given to those (believers) who are fought against, because they have been wronged …"[337] in another verse, the Qur'an provides: "And fight them on until there is no more tumult or oppression, and there prevails justice and faith in Allah altogether and everywhere; but if they cease, verily Allah does see all that they do.[338] Thus *jihad* in the sense of use of force was established essentially as a means of self-defence to protect the Islamic faith.[339]

Consequently, the institution of jihad is one of the techniques available under the Shari'ah for preservation of the Islamic faith. Essentially, the *Maqasid* (purposes) and the *Hikam* (wisdom) of instituting jihad in defence of the religion of Islam are primarily promulgated to fight those who stand in the way of Islamic propagation or tempt those who have believed in Islam to force them out of it or even stop them from listening to Islamic preaching. These are among the primary purposes that jihad is meant to fulfill in Islamic law.[340] Jihad is legislated not to force people against their own will to join Islam, but rather as a tool and mechanism to help

[336] Qur'an 8:30; see also Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, pp. 16-19; Muhammad Bakr Isma'il, *al-Fiqh al-Wadih, op cit.,* Vol. 3, pp. 180-181
[337] Qur'an 22:39
[338] Qur'an 8:39
[339] Qur'an 22:39; 2: 190-193; see also Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 16-19 [this author citing the provisions of Qur'an 2:13-14 and Q9:36, he argued (at p. 18) that the whole battles of the Prophet (saw) are all fought out of self-defence]
[340] Muhammad Bakr Isma'il, *al-Fiqh al-Wadih, op cit.,* Vol. 3, pp. 186-187

maintain the peace that allows for the peaceful spread of the message about the religion of monotheism, justice and equality to the entire world and protect it against attack. After people receive the message, it is up to them to accept Islam or choose otherwise. The essential purpose of Jihad is to open the way for peaceful propagation of the Message of Islam to people.[341]

The earlier battles fought by the Muslims especially with the two world powers of that era, i.e., the Roman and Persian empires outside the Arabian world is indicative of the defensive purpose of embarking upon jihad in defence of the religion of Islam. These two former empires have dominated the inhabitants of many lands with their ideologies, beliefs and values ruling them with authoritarian government. Therefore, they denied their subjects certain basic human rights such as the rights to freedom of culture and religion. So with the coming of Islam, all avenues of contact and communication that would enable their subjects to be in contact with Islam become infeasible. The only necessary option open to the Muslims to gain the spread of Islam at that time was to enter and conquer these imperialist territories so as to free their oppressed subjects availing them of the chance of getting contact with Islamic civilization.[342]

It is pertinent to mention here that this days, the classical *jihad* ideology is often used to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations Charter. Much confusion stems from the fact that Islamic laws of armed conflict has not received due attention in Western legal scholarship and the fact the concept of *jihad* as central to the Islamic view of freedom of religion has hindered the expected parity of international law with Islamic law on freedom of religion.[343]

[341] Abdul-Rahman al-Sheha, op cit., p. 19
[342] Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 19
[343] See Boisard, M. A. On the Probable Influence of Islam on Western Public and International

3.8 DEFAMATION OF RELIGION

The Islamic faith has tolerated other monotheistic faiths notwithstanding their contradictory doctrinal foundation to that of the Islamic religion.[344] These other faiths have been accommodated and allowed to co-exist side-by-side as a community of their own within an Islamic State on the footing of dialogue and mutual respect to one-another's beliefs. Muslims are thus under the legal obligation to respect other people's religion and as well, others must also respect the religion of Islam. Muslims have also been commanded not to abuse or speak ill of the non-Muslim's religious leaders or saintly persons, nor say anything insulting to other religions.[345] All discussions and conversations are to be on the footing of candid and courteous dialogues.[346]

Under Islamic law, the universal truth of the Islamic religion is established, the impeccable character of the Holy Prophet Muhammad (saw) was also established beyond doubt, the holiness of the Islamic scripture – the Holy Qur'an was also well-established; therefore, any attempt to ridicule or render any of these profane is seen in Islam as a plot subvert the Islamic faith and hurt Muslim's sensibilities in this regard as a tactic to detract people from the truth. This is what is characterized in Islamic law as blasphemy or defamation of religion. Thus, right from the onset, Islamic law has never been indifferent with the issue of insult and defamation of religion.

A strict liability rule exist under the Shari'ah that none is allowed to commit acts of insult or defamation (*ad-Da'an fi ad-Din)*, orally or in writing directed against either the Almighty Allah, the Holy Prophet Muhammad (SAW) or upon any of the basic teachings and precepts of Islam in terms of its laws by assimilating or belittling Islamic tenets with something that

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Law, *International Journal of Middle East Studies,* (1980) Vol. 11, p. 429; Bassiouni, M. C. Protection of Diplomats Under Islamic Law, (1980) 74 *AJIL* 609

[344] Qadi Iyad, *Kitab al-Shifa bi Ta'arif Huquq al-Mustafa*, Vol. 2, p. 569

[345] Qur'an 6:107

[346] Qur'an 29:46; See also Sayyid Sabiq, Fiqh al-Sunnah, Vol. 3, p. 11

doesn't befit it.[347] To do so is a criminal offence punishable with death. Ibn Taymiyyah said, whoever curses the Prophet (saw) whether a Muslim or non-Muslim, shall be killed. This legal ruling is the consensus of the majority Muslim jurists.[348] Ibn Munzir said, it is the *ijma'* of Muslim jurists that whoever curses the Prophet (saw) shall be executed.[349] This is also the opinion of Imam Malik, Ahmad ibn Hambal, Shafii and Abu Hanifa.[350]

To buttress this legal ruling, Muslim jurists cite the provisions of Qur'an 9:12 and the several examples of the execution of blasphemous convicts during the lifetime of the Prophet (saw). The Holy Qur'an provides that if non-Muslims attack the religion of Islam with condemnation and denigration, such non-Muslims (*Dhimmis*) should be fought so that they may stop such an evil deeds.[351] The practice of the Prophet (saw) established the killing of Ka'ab ibn Ashraf;[352] Abu Rafi'i; Abdullah ibn Khadar and his two singing slave girls; Sarah Maulati Abi Lahab;[353] Huwairis ibn Naqib; Uqbah ibn Abu Mu'aid and An-Nadar ibn Harith;[354] etc.

Qadi Iyad said, it is the opinion of the Maliki school that whoever says anything that belittle the Prophet (saw) shall be executed without any warning (*taubah*). Ibn Atab said, the Qur'an and *Sunnah* imply that whoever seeks to harm the Prophet (saw) or belittle him, shall be executed however minute the outrageous act might be.[355] Qadi Iyad further elaborated that

[347] Ibn al-Arabi, *Ahkam al-Qur'an*, Vol. 2, p. 893
[348] Ibn Taymiyyah, *as-Sarim al-Maslul ala Shatin al-Rasul*,
[349] Ibn al-Munzir, *al-Ishraf*, Vol. 2, p. 244
[350] al-Qurtubi, *Tafsir al-Qurtubi*, Vol. 10, p. 123
[351] See Qur'an 9:12; see also An-Nuhas, Ma'ani al-Qur'an, Vol. 3, p. 188
[352] Qadi Iyad, *Kitab al-Shifa bi Ta'arif Huquq al-Mustafa,* Vol. 2, pp. 565-566. Ka'ab ibn Ashraf is an eloquent poet that used to speak against the Prophet (saw) and Muslims; he would go to mecca and present to them his poetry defaming the Prophet (saw).
[353] The said two singing slave girls and Sarah Maulati Abi Lahab are women and that women in Islamic law are ordinarily not to be killed in war, but to indicate the severity of the offence of blasphemy, they have been executed as an exception to the general rule.
[354] These two men are among the 70 prisoners of war at the hands of the Muslims in the battle of Badr, but they have been singled out for execution for their blasphemous poetry against the Prophet (saw). An-Nadar ibn Harith is the one who used to hold sessions next to the Prophet (saw) to compete with him, he travels to Persia to learn stories and then come back and tell the disbelievers, listen, Muhammad (saw) is telling you stories, I have some better tales to tell you, come and listen to me.
[355] Qadi Iyad, *Kitab al-Shifa bi Ta'arif Huquq al-Mustafa,* Vol. 2, pp. 565-566

there were no known difference of opinion among earlier Muslim generations on these legal ruling. This means that there was an *ijma'* on it, and it is well-known in Islamic law that *ijma'* is a source of legal authority in Islamic law.[356]

Ibn Taymiyyah has argued that this penalty of capital punishment against blasphemous act is mandatory (*wajib*) and if there is any other practice other than execution, it might be the perpetrator had repented before been killed.[357] If it is a *Dhimmi* that commits the outrageous act of blasphemy (*Sabb*), this criminal act nullifies his *Dhimmitude* (covenant) with the Muslims and he shall be executed. That is, it acts as breach of treaty obligation in Islamic law and this is the majority view among Maliki School and Shafii.[358] This is based upon the fact that the essence of the covenant of *Dhimmah* by the Muslim authority was never meant to include or sanction acts of blasphemy or defamation of religion.[359] The blood of a *Dhimmi* (covenanted person) killed for defamation of religion is nullified, meaning no *Diyyah* would be paid on him.[360]

3.9 CONCLUSION

Thus, in concluding this chapter, it may be observed generally that in the history of Islam, Muslims have never interfered with the religious affairs of non-Muslims under any Islamic government from the 7th Century AD down to the cessation of the Ottoman Empire around 1919. And even if there were examples of perceived intolerances, they should be attributed to individual human weaknesses as they abound among all religious groups as well as excesses resulting from repressive response to colonization.

[356] Ibid
[357] Ibn Taymiyyah, *as-Sarim al-Maslul ala Shatin al-Rasul*, p. 182
[358] Ibn al-Arabi, *Ahkam al-Qur'an*, Vol. 2, p. 893
[359] al-Qurtubi, *Tafsir al-Qurtubi*, Vol. 10, p. 125
[360] See Sunan ad-Daraqudni, Hadith No. 3195

CHAPTER FOUR

FREEDOM OF RELIGION IN INTERNATIONAL LAW

4.1 INTRODUCTION

Freedom of religion as a human right issue in international law is principally governed by certain branches of the international legal order. It falls within the domain of International Human Rights Law [IHRL], International Humanitarian Law [IHL] and International Criminal Law [ICL]. Even under IHRL alone, several human rights treaties combine to provide for the legal framework on freedom of religion in international law.

The purpose of this chapter is therefore to set forth the meaning, nature and scope of the concept of *Freedom of Religion* as provided for in international law, particularly as developed over the years by human rights instruments. This is to lay the foundation for its comparison with what obtains under the Shariah, it being that the focus of this research work. Thus, the precept of this chapter is to highlight the basic principles of the right to freedom of religion in international law and our discussion would therefore be confined to rules of public international law that relates to the subject.

4.2 INTERNATIONAL RECOGNITION OF THE CONCEPT OF FREEDOM OF RELIGION

The idea that all persons possess natural rights had its beginnings in late medieval Christian thought as is the idea of human rights which is implicit in the Judeo-Christian tradition, especially in its recognition that each person is created in the image of God and in its fundamental commands to love God supremely and to respect the person and property of our neighbor.[361] This doctrine was important for the development of a regime of religious freedom, which requires a theory of rights that emphasizes the importance of individual

[361] Wallace, E. G. Justifying Religious Freedom: The Western Tradition, *Pennsylvania State Law Review* (2009) Vol. 114, No. 2, p. 541

freedom, dignity, and conscience.[362] Brian Tierney makes a convincing case that "the origin of the later natural rights theories is to be found in the Christian jurisprudence of the late twelfth century, especially in the works of the canonists of that era."[363] He writes that "[t]he idea of natural rights grew up—perhaps could only have grown up in the first place—in a religious culture that supplemented rational argumentation about human nature with a faith in which humans were seen as children of a caring God."[364]

The sixteenth-century Reformation although it did little to end the intolerance and persecution of the middle ages, it has brought revolt against the authority of a unified Christendom, spawned multiple new religious groups, and helped recover what it meant to be a true Christian by shifting attention away from liturgies and doctrinal uniformity in nonessential matters and back to fundamental Christian virtues such as piety, humility, love, and forbearance.[365] Reformation was "at its core, a fight for religious liberty—liberty of the individual conscience from intrusive canon laws and clerical controls, liberty of political officials from ecclesiastical power and privilege, liberty of the local clergy from central papal rule and oppressive princely controls."[366]

Thus, even before the concept of freedom of thought, conscience and religion was recognized in national law, the practice evolved of making treaty stipulations ensuring certain rights to individuals or groups professing a religion or belief different from that of the majority in a given country. Such treaty stipulations date back to the time when law was felt to be personal

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[362] Ibid

[363] Brian Tierney, *Religious Rights: A Historical Perspective*, *in* Noel B. Reynolds and W. Cole Durham, Jr. eds., Religious Liberty in Western Thought, (1996), at 34.

[364] Ibid, at 343

[365] Wallace, E. G. Justifying Religious Freedom: The Western Tradition, *Pennsylvania State Law Review* (2009) Vol. 114, No. 2, p. 543

[366] John Witte, Jr., *Moderate Religious Liberty in the Theology of John Calvin, in* Noel B. Reynolds and W. Cole Durham, Jr. eds., Religious Liberty in Western Thought, (1996), at 119.

rather than territorial, and to follow an individual even when he lived in a country other than his own.[367]

One of the most important treaties granting such "capitulations" was signed in 1536 by Francis I of France and Suleiman I of the Ottoman Empire, which allowed the establishment of French merchants in Turkey, granted them individual and religious freedom, and provided that consuls appointed by the King of France should judge the civil and criminal affairs of French subjects in Turkey according to French law, with the right of appeal to officers of the Sultan for assistance in carrying out their sentences. This treaty became the model for many later treaties of this sort as the capitulation system spread during the seventeenth, eighteenth and early nineteenth centuries.[368]

At a later date, somewhat similar procedures were followed as a means of settling disputes which arose out of the Reformation. For example, the Treaty of Osnabruck, signed in 1648 at the end of the Thirty Years' War, stipulated a certain degree of toleration for Protestants in Catholic States and for Catholics in States which had established a Reformed Church; but it did not go so far as to provide for freedom of thought, conscience and religion for all individuals and groups. Later, under the Treaty of Berlin of 1878, the great European Powers compelled the newly recognized independent and autonomous States of Bulgaria, Montenegro, Romania and Serbia, as well as the Ottoman Empire, to assure religious freedom to all their nationals.[369]

The problem of protection of religious groups and their members came up again at the Paris Peace Conference, after the First World War. Provisions dealing with the protection of

[367] Goadby, F. M. Religious Communities and Courts in Palestine, *Tulane Law Review* (1934) Vol. VIII, No. 2, pp. 215-235 at p. 215; Liebesny, H. J. Comparative Legal History: It's Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions, *The American Journal of Comparative Law* (1972) Vol. 20, No. 1, pp. 38-52 at p. 39-40
[368] Krishnaswami, A. op. cit., p. 11
[369] Treaty of Berlin of 1878; see also Krishnaswami, A. op. cit., at p. 12

minorities, including religious minorities, were either included in peace treaties with some of the defeated countries (Austria, Bulgaria, Hungary and Turkey), or were dealt with in special treaties with certain new or enlarged States (Czechoslovakia, Greece, Poland, Romania and Yugoslavia). Later, some countries (Albania, Estonia, Latvia, Lithuania and Iraq) made declarations to the Council of the League of Nations containing similar provisions. These instruments, while primarily intended to protect minorities, including religious minorities, often contained provisions applicable to all nationals of the country concerned, or even to all its inhabitants.[370] The instruments were placed under the guarantee of the League of Nations; however, it should be noted that the guarantee applied only in respect of members of racial, religious or linguistic minorities.[371]

During the Second World War, the need to assure freedom of religion was affirmed in several important statements on the aims of the war. Thus in a joint declaration of 1 January 1942, the allied leaders stated their conviction "that complete victory over their enemies is essential to defend ... religious freedom and to preserve human rights and justice in their own lands as well as in other lands".[372]

When the Charter of the United Nations was being drafted in San Francisco in 1945, proposals or amendments suggesting the inclusion of detailed provisions on the right to freedom of thought, conscience and religion — or at least certain aspects of this right — were submitted by Chile, Cuba, New Zealand, Norway and Panama.[373] However, the UN Charter refers to "human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion", only in general terms.[374] The Universal Declaration of Human Rights,

[370] Ibid at p. 15
[371] Ibid
[372] Article 1(3), UN Charter of 1945
[373] Ibid at p. 17
[374] Ibid

adopted on 10 December 1948, is more explicit: in Article 18, it states that *"Everyone has the right to freedom of thought, conscience and religion..."*

Certain aspects of this right were recognized in diplomatic instruments concluded at the end of the Second World War; for example, all the treaties of peace concluded in Paris on 10th February 1947 provide that each former enemy country is to take "all measures necessary to secure to all persons under its jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom ... of religious worship ..."[375]

Freedom of thought, conscience and religion has also been recognized in international instruments of a regional character, such as the American Declaration of the Rights and Duties of Man, adopted at the ninth International Conference of American States, held in Bogota in 1948, and the European Convention on Human Rights, adopted and signed at the sixth session of the Committee of Ministers of the Council of Europe in Rome on 4 November 1950. Similarly, the Organization of African Unity (OAU) now African Union (AU) has by 1981 adopted the African Charter on Human and People's Rights.

The European Convention is particularly interesting since its provisions — modeled on those of the Universal Declaration of Human Rights — are binding upon the countries which have

[375] Treaty of Peace with Bulgaria, article 2; Treaty of Peace with Finland, article 6; Treaty of Peace with Hungary, article 2, para. 1; Treaty of Peace with Italy, article 15; Treaty of Peace with Romania, article 3, para. 1. An identical provision is to be found in the Treaty for the re-establishment of an independent and democratic Austria of 15 May 1955, article 8. The treaties with Hungary and Romania, as well as the Austrian Treaty, contain also certain non-discrimination clauses which prohibit, *inter alia,* discrimination on the ground of religion. The Peace Treaty with Japan of 8 September 1951 does not contain similar provisions. However, the preamble to the Treaty includes a clause under which "Japan for its part declares its intention... in all circumstances, to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights..."

ratified it, and since it provides for a system of implementation by the European Court of Human Rights whose decisions is of supranational efficacy.[376]

4.3 MEANING OF THE TERM "RELIGION" IN INTERNATIONAL LAW

Defining the term "religion" at the international level is not an easy task in view of the prevalence of theistic, atheistic and none theistic beliefs in existence in the world today.[377] The legal constrain in defining "religion" is further buttressed by the fact that of recent, some new religious movements come to the law seeking legal recognition as religious communities or groups.[378] These challenges tend to defy a universally accepted definition to the term "religion" under international law.

To some, any attempt to define "religion" under international law would violate religious freedom and may imply exclusion of other forms of beliefs from that domain especially that of minorities as the term could not be compressed into a few words.[379] Thus, in many respects, "religion" is a fluid concept evolving overtime and varying between different cultures and different political systems.[380]

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[376]Ibid at p. 17

[377] Jeremy, J. Building Cohesion in Religious Diverse Society: Religious Vilification, Discrimination and Liberty, (1997) 19 (3) *Migration Action* 31, p. 31.

[378]Polamino, R. The Concept of Religion in the Law: European Approaches. A paper delivered at the Conference on State-Church Relations in Europe: Contemporary Issues and Trends at the Beginning of the 21st Century, Brastislava, 8-10 November 2007. Of recent, the UN Human Rights Committee (in its General Comment No 22 on Article 18 of ICCPR, para. 2) considers that the right to freedom of religion in Article 18 of ICCPR is not limited in application to traditional religions and no discrimination should be allowed on the fact that a particular religion is newly established.

[379] Weiss, Privilege, Posture and Protection: "Religion" in the Law, *Yale Law Journal* (1964) Vol. 73, 593 at 604 ("[A]ny definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be ..."); See also Judge Augustus Hand's declaration in United States v. Kauten, 33 F.2d, 703, 708 (2d Cir. 1943) that a definition of religion is unnecessary since the content of the term was found in the history of the human race and could not be compressed into a few words.

[380] See the Australia's Human Rights and Equal Opportunity Commission's Commentary on Article 18 of UDHR/ICCPR tagged "Article 18 Freedom of Religion or Belief", Commonwealth of Australia 1998.

Although many international and regional human rights instruments guarantee rights related to freedom of religion or belief, none attempts to define the term "religion". It defies acceptable definition in both international and domestic legal instruments. It has been observed that the "effort to define religion is as old as the academic study of religion itself."[381] In fact, "dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way".[382] Needless to say, no one definition of religion has garnered a consensus, and the definitional enterprise, as well as the debate over the very need for definitions, continues in full vigor[383].

While academics have the luxury of debating whether the term "religion" is hopelessly ambiguous, judges and lawyers often do not. Asylum-case adjudicators, for example, may be called upon to decide whether there is a "well-founded fear of being persecuted for reasons of … religion" regardless of whether the 1951 Refugee Convention offers a definition.[384] Similarly, judges on the European Court of Human Rights may be required to give meaning to the term "religion" for purposes of interpreting Article 9 of the European Convention. Judicial decisions about what constitutes religion make a very real difference in the lives of persons who may or may not obtain refugee status, or in the economic viability of a group that may or may not be recognized as a tax-exempt religious association.

[381] Brian C. Wilson, *From the Lexical to the Polytheist: A Brief History of the Definition of Religion*, *in* What is Religion? 141–42 (Thomas A. Indinopulos & Brian C. Wilson eds., 1998) cited in Gunn, J. T. Op. Cit at p. 3

[382] Gunn, J. T. The Complexity of Religion and the Definition of "Religion" in International Law, *Harvard Human Rights Journal*, (200...) Vol. 16 No. ..... available online at http://www.law.harvard.edu/students/orgs/hrj/iss16/gunn.pdf (assessed on the 19/4/2012/ by 2:38 AM)

[383] Brian C. Wilson, *From the Lexical to the Polytheist: A Brief History of the Definition of Religion*, *in* What is Religion? 141–42 (Thomas A. Indinopulos & Brian C. Wilson eds., 1998) cited in Gunn, J. T. op. cit at p. 3

[384]1951 Refugee Convention, Art. 1-2.

The UN through its Human Rights Council under the mandate of the *Special Rapporteur on Freedom of Religion or Belief* had attempted a definition of the term "religion".[385] It was thus considered that the Latin root of the term religion, *religare*, means "binding together" the human and the divine. On the basis of that root, religion is a system within whose setting a community of men and women is linked by a set of beliefs, practices, behaviour patterns and rituals, which establish a connection between the individual and holy life. It was not until much later that definition of religion refers to a belief in a supreme being as the central characteristic of religion.

However, from the perspective of some major ancient religions, 'religion' is a feature of every human society irrespective of its state of development, be it extremely primitive. There does not appear to be a complete or single definition of religion and discussion of its origins is still shrouded in vagueness.[386]All one can do is identify religions' common traits, at least the most important ones. It is often difficult to distinguish secular ritual from religious experience, both being so closely entwined. Even magic is sometimes linked with religion and it is difficult to distinguish the sacred from the profane.

As explained by the Human Rights Committee in its **General Comment 22**[387] on freedom of religion, which right is established by Article 18 of the International Covenant on Civil and Political Rights [ICCPR], the terms "belief" and "religion" have to be broadly construed. That provision of Article 18 of ICCPR protects theistic, non-theistic and atheistic convictions. It is

[385] See UN Doc. No. E/CN.4/2002/73/Add.2, para. 6-12
[386] Syed Hussein Alatas, Problems of Defining Religion, *International Social Science Journal*, vol. 29, No. 2, 1977, p. 214.
[387] General Comment No. 22 on the right to freedom of thought, conscience and religion (Art. 18), Human Rights Committee, 30 July 1993 (UN Doc. No. HRI/GEN/1/Rev.3). Available online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument (last visited on the 6/03/2013 by 2:36 PM)

not limited to traditional religions or beliefs but applies also to religions and beliefs that are newly established as well as to those of religious minorities.[388]

Legal rulings have stated that there are two criteria for determining the existence of a religion: belief in a supernatural being, thing or principle and acceptance of rules of conduct which give effect to such belief.[389] Any organization whose beliefs or practices is a revival of, or resembles, earlier cults could thus claim to believe in a supernatural being or beings, or in an abstract entity or god, and would be regarded as religious. Hence orthodoxy, number of followers, worshippers or longevity does not constitute criteria for establishing the existence of a religion. The credibility and sincerity of an individual's beliefs and the fact of their not being illegal or contrary to clearly defined public policy have, however, been accepted as prerequisites for the protection of asserted religious beliefs.[390]

Religion was given interpretative content by sociological and philosophical writers as well as by judges in the light of the proceedings and actions of many administrative bodies and judicial tribunals across the various sub-regions of the world. Of particular importance is that, an acceptable definition must be neutral towards the varieties of religious experience and this goal is best attained by attempting to describe religious experience. The requirements suggested by Edgar Brightman for the philosophical study of religion are equally applicable to the quest for legal definition of religion:[391]

> The definition of religion with which philosophy may start should, therefore, be one which notes not merely the characteristics of the definer's own religion, but rather those which are common to all persons and groups who experience what they regard as religion. This description should be purely descriptive; that

[388] Ibid, at p. 36, para. 2
[389]See Australian High Court ruling cited in the report of the Special Rapporteur on religious intolerance (UN Doc. No. E/CN.4/1998/6/Add.1, para. 12).
[390]See United States Supreme Court ruling referred to in the report of the Special Rapporteur on religious intolerance (E/CN.4/1999/58/Add.1, para. 8).
[391] Hall, T. L. The Sacred and the Profane: a First Amendment Definition of Religion, *Texas Law Review* (1982) Vol. 61, No. 1, p. 161

> is, it should be quite neutral to the normative question whether religion as it has been bears any resemblance to religion as it ought to be. A proper descriptive definition, then, is neutral to all inquiries on whether religion is true or false, helpful or harmful, illusory or veridical. It will contain solely a concept of what religion has actually been, and like any good definition, will distinguish the *definiendum* from all other terms with which it might be confused.[392]

Thus, a definition of "religion" may not simply be neutral, but may contain an appropriate societal value judgment regarding particular beliefs or actions with "good" beliefs being characterized as "religions" and "bad" beliefs being characterized as "cults" or "heresies."[393]

4.4 LEGAL FRAMEWORK ON FREEDOM OF RELIGION IN INTERNATIONAL LAW

The struggle for religious freedom has been on-going for centuries, and has led to innumerable, tragic conflicts. The twentieth century has seen the codification of common values related to freedom of religion and belief, though the struggle has not abated. There are many international legal instruments on Religious Freedom under international law that spells out in detail the meanings of religious freedoms and the paramount requirement of protection for persons of all religious backgrounds. These legal instruments encompass legally binding treaties and non-binding standards (soft-law) mostly under the auspices of the United Nations.[394]

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[392]Brightman, E. A Philosophy of Religion (1940) 14-15 quoted in Hollingsworth, Constitutional Religious Protection: Antiquated Oddity or Vital Reality? *Ohio State Law Journal* (1972) 15 at 32.

[393]Gunn, J. T. Op. Cit., at p. 9

[394] The legal status of the international instruments set out hereunder varies, whereas international treaties variously referred to as Covenants, Conventions, Statutes or Protocols are legally binding for those States that ratify or accede to them, other instruments such as Declarations, Principles, Guidelines, Standard Rules and Recommendations have no binding legal effect in international law; nevertheless, these instruments have an undeniable moral force and provide practical guidance to States in their conduct. Their efficacy is as articulated by the UN Secretary General Kofi Anan that *"The value of such instruments rests on their recognition and acceptance by a large number of States and, even without binding effect, they may be seen as declaratory of broadly accepted goals and principles within the international community."* See the forward by the UN Secretary General Kofi Anan to document titled **Human Rights: A Compilation of International Instruments**, UN Doc ST/HR/1/Rev. 6 (Vol. I/Part 2), United Nations, New York and Geneva, 2002, p. xi

These treaties fall within the scope of various branches of international law in such areas as International Human Rights Law [IHRL], International Humanitarian Law [IHL], International Criminal Law [ICL], International Refugee Law [IRL] as well as the rights of minorities and vulnerable groups such as women, children, disabled persons, internally displaced persons [IDP], persons deprived of their liberty, etc., whose rights are within the larger context of IHRL, each with a particular legal or non-binding instrument providing specifically for the rights of these group of persons as vulnerable groups. Prominent among these laws that we intend to consider in our discussion are:

a) The United Nations Charter of 1945

The United Nation [UN] as an intergovernmental organization was established under its Charter of 1945 which is its constituent treaty, and all members to the UN are bound by its articles.[395] Among the principal purposes of the UN is promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or **religion**.[396]

The UN Charter sets forth principles which commit its member States to "respect human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[397] So, by the very nature of this obligation, States had on their becoming State Party to the UN, undertaken to respect the principles set forth in the Charter to which protection and promotion of human rights and fundamental freedoms is among the principal purposes of the UN.

[395]Most countries in the world have now ratified the Charter. One notable exception is the Holy See, which has chosen to remain a permanent observer state and therefore is not a full signatory to the Charter.
[396]See the UN Charter of 1945, Art. 1
[397]See the UN Charter, Art. 55

b) Universal Declaration of Human Rights [UDHR], 1948[398]

The modern approach to the protection of religious freedom traces its roots to the *Universal Declaration of Human Rights* of 1948 [UDHR].[399] The Universal Declaration was passed by the United Nations General Assembly and is thus not a binding treaty, but it has become an important reference point for the protection of universal human rights and may have become customary international law.[400] A number of the Universal Declaration's provisions are relevant to religious freedom, but the most significant provisions are Articles 2 and 18. Article 2 prohibits discrimination on a number of bases, including religion. The prohibition of discrimination on the basis of religion is reflected in a wide range of international treaties and other instruments.[401]

Article 18 of the Universal Declaration is the key provision protecting freedom of religion or belief. It reads:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

[398]available at OHCHR website at http://www.unhchr.ch/udhr/index.htm
[399]GA Res 217A (III), UN GAOR, 3rd sess, 183rd plenmtg, UN Doc A/RES/217A (III) (1948)
[400] See Oscar Schachter, *International Law in Theory and Practice* (1991) ch 15.
[401]See, For example, *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93, arts 1–2, 5 (entered into force 22 May 1962); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, art 5(vii) (entered into force 4 January 1969) ('ICERD'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2, 4, 18, 20, 24, 26–7(entered into force 23 March 1976) ('ICCPR'); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36 UN GAOR Supp(No 51), 36th sess, 73rd plenmtg, arts 1–8, UN Doc A/36/684 (1981) ('1981 Declaration'); *Declaration on Race and Racial Prejudice*, UNESCO Gen Conf Res 3/1.1/2, 20th sess, art 3, UN Doc E/CN.4/Sub.2/1982/2/Add.1, annex V (1982); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2, 14, 20, 29 (entered into force 2 September 1990) ('CROC'); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, annex, 47 UN GAOR Supp (No 49), arts 1–2, 4, UN Doc A/47/49 (1992).

c) International Covenant on Civil and Political Rights [ICCPR], 1966[402]

Unlike the UDHR, the ICCPR is a legally binding treaty in international law and it is of multilateral character in its application. It creates binding obligations on States that become parties to it. The most relevant provisions of ICCPR on religious freedom are Articles 2, 4, 18, 26 and 27. Article 18 reads:

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

As the realizations of the rights of religious minorities are among the key issues of concern before the international community, the ICCPR has also echoed the rights of religious minorities in Article 27. Article 27 of the ICCPR provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

However, there are some other provisions that are of complementary role to the main provisions of Article 18, i.e., Article 4 which reinforces the non-derogatory status of religious freedom; Article 26 on general prohibition of discrimination before the law including on the ground of religion; Article 27 of the ICCPR which provides that religious minorities should not be denied the right to profess and practice their own religion; Article 19 on freedom of

[402]International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

expression; Article 21 on freedom of association; and Article 22 on freedom of assembly. Article 18 of ICCPR is wider in scope and context than that of UDHR although it is largely a legal formulation of the UDHR and follows closely its precepts.

d) International Covenant on Economic, Social and Cultural Rights [ICESCR] of 1966[403]

This treaty had also substantially talked of aspects of religious freedom while making provisions for the right to education. It has recognized the liberty of parents to cater for the religious educations of their wards in private and sectarian schools while seeking for a universal, free and compulsory primary education. The relevant paragraphs of Article 13(3) of the ICESCR which provides: *"The States Parties to the Covenant undertake to respect the liberty of parents and, when applicable, legal guardians, to … ensure the religious and moral education of their children in conformity with their own convictions."*

e) The Four Geneva Conventions[404] of 1949 and their Additional Protocols[405]

Modern international humanitarian law is mainly embodied in the four Geneva Conventions of 1949. Some of the principal provisions of these conventions are to the effect that protected persons enjoy certain religious rights in such terms as to the right to practice their religion and to receive spiritual assistance from ministers of their faith.[406] Equally**,** internees have the right to be granted the liberty to enjoy complete latitude in the exercise of their religious duties,

[403]International Covenant on Economic, Social and Cultural Rights (ICESCR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

[404] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of the Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[405]Additional Protocol I to the Geneva Conventions of 12 August 1949, and relative to the Protection of victims of international armed conflicts; Additional Protocol II to the Geneva Conventions of 12 August 1949, and relative to the Protection of victims of non-international armed conflicts; Additional Protocol III to the Geneva Conventions of 12 August 1949, and relative to the adoption of additional distinctive emblem.

[406]Geneva Convention IV, Art. 38

including attendance at the services of their faith.[407] Ministers of religion who are interned are be allowed to minister freely to the members of their community and Ministers of religion have the liberty to have correspondence on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith.[408] Religious personnel are specifically afforded protection in the theatre of armed conflict and are accordingly given the right to provide spiritual assistance to the wounded, the sick and the dying and to officiate at burials.[409]

In situations of occupation, the Occupying Power is required to the fullest extent of the means available to it, to ensure the provision of objects necessary for religious worship and to accept consignments of books and articles required for religious needs and to facilitate their distribution in the occupied territory.[410]

In non-international armed conflicts, the convictions and religious practices of all persons who are not taking a direct part in hostilities must be respected and children must be able to receive religious and moral education.[411]

f) Child Rights Convention [CRC] 1989[412]

Among the fundamental freedoms guaranteed by the Child Rights Convention includes provisions on the rights of the child on religious freedom which are akin to that of the UDHR

[407]Geneva Convention IV, Art. 93
[408]Geneva Convention III, Arts. 34-37; Geneva Convention IV, Arts. 86 and 93
[409]Geneva Convention I, Art. 28; Geneva Convention II, Art.37; Geneva Convention III, Arts. 35-7; Geneva Convention IV, Arts. 17; 58; 93
[410]Additional Protocol I, Art. 69; Geneva Convention IV, Art. 58
[411]Additional Protocol II, Arts. 4(1); 4(3)(a)
[412]Convention on the Rights of the Child (CRC), Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, arts 2, 14, 20, 29.

and ICCPR. The relevant provisions of the CRC include Article 14 (1): "States Parties shall respect the right of the child to freedom of thought, conscience and religion."[413]

Article 30 of the CRC further provides: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language. The above provisions of the Child Rights Convention [CRC] reinforces the rights of a child to the ***freedom of thought, conscience and religion*** and the liberty of parents and legal guardians thereto as well as the obligations of States in recognizing and respecting this right.

g) Convention relating to the Status of Refugees, 1951[414]

Article 4 of this Convention provides: "The Contracting State shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children." Article 33 is more explicit and relevant to the protection of refugee's religious freedom as it provides for the famous principle of non-refoulment. Article 33 states: "No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[413] Art. 14, CRC

[414]Convention Relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 and entered into force on 22 April 1954.

h) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[415]

Article 12 (1) of this Convention provides: “Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion.” Article 12 (4): "States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

i) The Genocide Convention[416]

The Genocide Convention requires states to prohibit any act committed “with intent to destroy, in whole or in part, a national, ethnic, racial or **religious** group.” This convention prohibits discriminatory form of aggression that may destroy the dignity of certain religious group and treat them less than human.

[415]International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), Adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003.

[416] 1958 Convention on the Prevention and Punishment of the Crime of Genocide

4.5 NATURE, MEANING AND SCOPE OF FREEDOM OF RELIGION IN INTERNATIONAL LAW

The basic idea of freedom of religion is that no one, especially the government, is allowed to force religion on anyone or prohibit anyone from practicing a particular religion against the dictate of one's conscience. To force people to support a religion or profess belief in a religious tenet is as much a violation of one's civil rights as is preventing one from practicing a particular religion.[417] Freedom of religion is freedom of the individual conscience against the State. It means that State institutions, be it legislative or executive should not establish a religion nor enforce the legal observance of it by law or compel people to worship God in any manner contrary to the dictate of their conscience.[418]

Freedom of religion is a fundamental freedom that has attained the status of *jus cogens* (pre-emptory norms) in international law, i.e., it is subject to neither suspension nor derogation by States in all times and situations.[419] This means that States may not persistently object to *jus cojens* norms which prevail over all competing principles of treaty and customary international law.[420]Freedom of religion is both an individual as well as a group right. It is an individual right in the sense that it belong to the category of civil and political rights which are termed first generation rights in international human rights law. It is a group right because

[417]Chris Allen, *Freedom of Religion*, (1992) an online article by Utah Humanists *available at* www.humanitsofutah.org

[9] *See* T. J. GUNN, "The Complexity of Religion and the Definition of 'Religion' in International Law", *Harvard Human Rights Journal*, vol. 16 (2003), 189-215.

[418] Corwin, E. S. The Supreme Court as National School Board, *Law and Contemporary Problems* (1949) Vol. 14, No. 1, p. 11

[419] See ICCPR, art. 4(2); The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights [herein referred to as "the Siracusa Principles"], UN Doc. E/CN.4/1984/4 (1984), para. 58; Danchi, P. G. U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative, *Columbia Journal of Transnational Law* (2002-2003) Vol. 41, pp. 75-78. Interestingly, the African Charter on Human and Peoples' Rights contains no derogation clause, but limitations are possible on the basis of Article 27(2), which states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". In practice, this has been strictly interpreted by the *African Commission on Human and Peoples' Rights*.

[420]See Article 26-27 of the 1969 Vienna Convention on the Law of Treaties [VCLT]

its observance is always portrayed in congregation or community with others more particularly when proclaimed by minorities.[421] It is in this sense that freedom of religion intersects with other fundamental freedoms as, while giving effect to one's religious rights, complementarities of freedoms of expression, association and assembly must always be activated by the individual or group in order to adequately enjoy religious freedom.

In its protection, religious freedom encompasses both positive and negative State obligations. In that, in some instances, some of the rights inherent in religious freedom demands abstention or inaction by States and non-State actors from encroaching upon the absolute freedom of the individual to hold any form of religion or belief. Likewise, it also demands positive actions from States and non-State actors in ensuring the realization by the individual or groups of their right to maintain practice and observance of the tenets of their religious beliefs. To this end, the need arises for such positive obligations from States and non-State actors to exhibit tolerance, non-discrimination, accommodative and pluralistic platforms towards the proclaimants of this right.

Today, in most countries of the world, the right to freedom of thought, conscience and religion is recognized, either by national constitutions or by law.[422] It must therefore be acknowledged to be a fundamental right as well as constitutional right in almost all countries of the world that has adopted democracy. It is thus a matter of constitutional law within domestic legal order and that is protected as a constitutional right.

[421]See the UN Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); See also Article 18 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

[422]In Nigeria, for example, sections 10 & 38 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011) are prominent in providing for protection of freedom of religion. Similarly, see sections 7 of the *Child Rights Act,* No. 6 of 2003; Article 8 of the *African Charter on Human and Peoples' Rights*, Cap. A9, LFN 2004; etc

As to its scope, religious freedom encompasses several rights that are subject to international treaty, custom and case laws. Since the UDHR and ICCPR, the attempt to develop an enforceable human rights instrument related to freedom of religion and belief has been unsuccessful[423]. From the various legal frameworks considered above, the following are some of the prominent body of rights that are at stake within religious freedom discourse in international law, that is to say:

- Right to personal freedom to hold any form of thought, conscience, religion or belief;
- Right to have a religion or whatever belief of one's choice including the right of choosing and changing one's religious commitment;
- Right either individually or in community with others, in private or public, to manifest a religion or belief through worship, observance, practice and teaching;
- Right not to suffer coercion that impairs the freedom to choose a religion or belief;
- Right of States to limit the manifestation of a religion or belief if based in law, and only as necessary to protect public safety, order, health, morals and the fundamental rights and freedoms of others including State laws regulating religious registration, assembly and association;
- Right of parents or legal guardians to bring-up their children in their religion or belief;
- Right to worship and assemble for this purpose, and to establish and maintain places of worship;
- Right to establish and maintain appropriate charitable or humanitarian institutions including the right to solicit and receive voluntary financial and other contributions for these purposes;

[423]STUDY GUIDE: Freedom of Religion or Belief (2003) University of Minnesota Human Rights Center available online at http://www1.umn.edu/humanrts/hrcentre.htm (accessed on the 15/3/2012 by 10:45 AM)

- Right to make, acquire, use and disseminate publications and materials related to religion including religious rites and customs;
- Right to teach a religion or belief in places suitable for these purposes;
- Right to train, appoint, elect or designate religious leaders;
- Right to observe days of rest (Sabbath) and celebrate holidays and ceremonies;
- Right to establish and maintain communication with individuals and communities at national and international levels.

4.6 ELEMENTS OF THE RIGHT TO FREEDOM OF RELIGION IN INTERNATIONAL LAW

Over the years, the widely held view regarding freedom of religion is that it encompasses two broad aspects, the first being the right to have, maintain or adopt any form of religion or belief, which is in the nature of things absolute. The second is the right to manifest one's religion or belief, which may be subject to certain limitations by the State. The first aspect of the right to freedom of religion being *forum internum* (right to hold or conceive any form of belief) poses no legal problems than the second aspect which for practical purposes, require the complementarity of certain other rights for its full enjoyment.

It is in respect of these second aspect that certain other elements of the right to freedom of religion and the right to manifest one's religion or belief as to its practice, observance, teaching and worship comes to play. Thus, the basic elements of the right to freedom of religion includes the right to practice, observance, teaching and worship which eventually requires freedom of expression, freedom of association and assembly, right to land, freedom from torture and other cruel, inhuman or degrading treatment or punishment.

4.6.1 RIGHT TO HAVE, ADOPT OR CHANGE ONE'S RELIGION

The questions related to change of religion are at the very heart of the dictates of freedom of religion or belief. Violations and limitations of this aspect of the right to freedom of religion are unacceptable by the international standards even though it still occurs too often than one may imagine. The UDHR together with ICCPR in Article 18 has provided specifically that everyone has the right to freedom of thought, conscience and religion; and that this right includes freedom to have or to adopt a religion or belief of one's choice including the right to change one's religion or belief.[424] Moreover, the ICCPR in Article 18(2) provides: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." Similarly, the 1981 Declaration[425] of the General Assembly provides that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice ..."[426] The 1981 Declaration further provides that "No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."[427]

In its efforts to give effects to the provisions of the UDHR and that of the ICCPR, the UN Human Rights Committee in its General Comment 22 emphasizes further on this rights more so in explicit terms. It provides thus:

> Article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice … The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[428]

[424] Article 18(1), UDHR & ICCPR
[425] The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.
[426] Ibid, Article 1(1)
[427] Ibid, Article 1(2)
[428] Human Rights Committee general comment 22, Para. 3 & 5

It is now established that religious freedom cannot be dissociated from the freedom to change religion. It is considered that the 1948 and 1981 Declarations and the International Covenant on Civil and Political Rights, although they varied slightly in wording, all meant precisely the same thing: that everyone had the right to leave one's religion or belief and to adopt another, or to remain without any at all. This meaning is implicit in the concept of the right to freedom of religion regardless of how the concept was presented.

Similarly, Article 18(2) of ICCPR bars coercion that would impair the right to have or adopt a religion or belief, 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. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the ICCPR, are similarly inconsistent with article 18(2).[429]

The UN Special Rapporteur on freedom of religion or belief have addressed the issue of conversion in a number of communications, in which there has been an alleged infringement on the freedom to change, maintain or adopt a religion or a belief. There were a number of cases of persons being arrested because of their beliefs, and where there had been an attempt to force them to renounce or abandon their faith. This has been the case in communications sent to the Governments of China, Saudi Arabia, the Lao People's Democratic Republic, Egypt, and Turkmenistan.[430] This types of infringements are unacceptable forms of violations of the right to freedom of religion or belief because, in essence, they limit or tend to limit the freedom of thought or conscience itself (or what is called the "*forum internum*"), which,

[429] General Comment No. 22, para. 5
[430]See UN Doc No. E/CN.4/2005/61, paras. 45-47

according to the main international instruments, forms the part of the right to freedom of religion or belief that is not susceptible to any limitation.

4.6.2 THE RIGHT TO MANIFEST ONE'S RELIGION OR BELIEF

This aspect of freedom of religion encompasses several rights that collectively put together ensures to the individuals and groups, their rights to manifest their religion or belief in practice, observance, teaching and worship. The international bill of rights emphatically provided that everyone shall have the right either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.[431] To this end, 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.[432]

Pertinently, the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.

The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language, customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as freedom to choose their religious leaders, priests and teachers, the freedom to

[431]See Article 18 (1) of the ICCPR; Article 18, UDHR
[432] See Article 18 (3) of the ICCPR

establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[433]

4.6.3 STATE RELIGION

The term "state religion" refers to a situation whereby the government of a particular country officially adopts or subscribes to a particular religion or belief as the only recognized or favoured religion or belief. This is usually done by way of constitutional arrangement. In States with a range of religious and ethnic identities, the constitutional profession of an official religion as the "state religion" may be politically or historically justified, but by its very nature, it carries the seed of aggravated discrimination. However, if in its Constitution, the State professes its adherence to a particular faith, some will see the mere profession of that faith - whatever the good intentions of the State - as a form of discrimination against the ethnic or religious minority or minorities.[434] Therefore, when the State itself announces its religion in its Constitution, the law ceases to reflect the ethnic and religious variety of the society, and the way is opened to arbitrary action and intolerance."[435]

Without addressing the question of whether a "state religion" is a system that is compatible with human rights, the Special Rapporteur has noted that in a few States, legislation has been adopted that recognizes certain religions and not others or that institutes a different status among certain categories of religions. While the Special Rapporteur has not been provided with sufficient information suggesting that in any of these cases the legislation actually causes violations of the right to freedom of religion or belief, she is of the opinion that the legalization of a distinction between different categories of religion is liable to pave the way for future violations of the right to freedom of religion or for discrimination on the basis of

[433]Human Rights Committee General Comment 22, Para. 4

[434] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/CONF.189/PC.1/7, paras. 119-120

[435] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/CONF.189/PC.1/7, paras. 119-120 at 120

religion or belief. On this question, the Special Rapporteur stated that "the principle of freedom of religion or belief, as enshrined in international human rights law, is difficult to reconcile with a formal or legal distinction between different kinds of religious or faith-based communities insofar as such a distinction in their status must imply a difference in rights or treatment, which may, in some cases, constitute discrimination that is incompatible with the exercise of human rights"[436]

Moreover, aggravated discrimination tends to intensify or become more likely to occur when the State itself officially adopts the religion of the majority or of the ethnically dominant minority, or subscribes to a particular ideology. The State religion or the religion of the State is not, of course, a characteristic of the religion, but of the State. In the area of legislation, moreover, some States adopt clearly discriminatory provisions, in order to impose the constitutionally established religion or ideology, and therefore a particular vision of society and of the universe, on members of ethnic or religious minorities.

This is no doubt one of the most unacceptable violations of an individual's right to have and practice his religion and that of his ancestors. It is true, as the Special Rapporteur has noted, that "States which are or claim to be based on religion may be either exclusive - for the benefit of the predominant religion alone - or open and respectful vis-à-vis other religions".[437]

Human Rights Committee in its general comment 22 Para. 9 states:

> "The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-

[436]Report on the country visit of the Special Rapporteur on freedom of religion or belief to Romania (UN Doc. E/CN.4/2004/63/Add.2), para. 94; See the *Rapporteur's Digest on Freedom of Religion or Belief*, **p. 60**

[437] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. (E/CN.4/1998/6, para. 42); ee the Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/CONF.189/PC.1/7, paras. 119

> believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups … States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous."[438]

If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[439]

An official or State religion in itself is not opposed to human rights. The State should not, however, take control of religion by defining its content, concepts or limitations, apart from those which are strictly necessary, as provided in. the 1981 Declaration as well as in the ICCPR.[440] On 20 July 1993, the Committee on Human Rights adopted General Comment No. 22 concerning article 18 of the Covenant, in which it expressed the opinion that the right to freedom of thought, conscience and religion was far-reaching. The Committee also pointed out that limitations on the freedom to manifest a religion or belief are authorized only if prescribed and are necessary to protect public safety, order, health or morals or the

[438] **Human Rights Committee general comment 22** Para. 10; Also see the *Rapporteur's Digest on Freedom of Religion or Belief*, **p. 59**

[439] Human Rights Committee general comment 22 Para. 10; Also see the *Rapporteur's Digest on Freedom of Religion or Belief*, **p. 59**

[440] Article 1(3) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; Article 18, of the International Covenant on Civil and Political Rights

fundamental rights and freedoms of others, and are applied in such a manner that would vitiate the right to freedom of thought, conscience and religion."[441]

In his country visit to the Islamic Republic of Iran, the Special Rapporteur has indicated that a State religion is not, in itself, in contradiction with human rights. However, this state of affairs which is consecrated by the Iranian Constitution - should not be exploited at the expense of the rights of minorities and the rights associated with citizenship, which imply that citizens should not be discriminated against on grounds such as, inter alia, religion or belief. From this standpoint, the concept of Islamic criteria as set forth in the Constitution of Iran should be precisely defined in regulations or legal texts without, however, giving rise to discrimination among citizens."[442]

The Special Rapporteur observes that the existence of a State religion is not in itself incompatible with human rights. However, this situation, which in the case of Greece is sanctioned by the Constitution, must not be exploited at the expense of the rights of minorities and the rights linked to citizenship, which imply prohibition of discrimination among citizens on the grounds, inter alia, of considerations relating to religion or belief."[443]

4.7 IS FREEDOM OF RELIGION IN INTERNATIONAL LAW PERMISSIBLE OF ANY LIMITATION AND/OR DEROGATION?

Derogation refers to a situation whereby in a declared and legitimate state of emergency, States undertakes measures which aims at restricting or suspending the enjoyment of certain human rights by its citizens that are internationally guaranteed by the international bills of rights. Such derogations are permitted only to the extent necessary for the situation and may

[441] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, Country visit to Pakistan, UN Doc. E/CN.4/1996/95/Add.1, para. 81; Human Rights Committee general comment 22 Para. 9; Also see the *Rapporteur's Digest on Freedom of Religion or Belief*, **p. 59**

[442] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, Country visit to the Islamic Republic of Iran, UN Doc. E/CN.4/1996/95/Add.2, para. 88

[443] See the Report of the UN Special Rapporteur on Freedom of Religion or Belief, Country visit to Greece, UN Doc. A/51/542/Add.1, para. 132

never involve discrimination based on race, colour, sex, language, religion or social origin.[444] As a matter of principle, any such derogation must be reported to the Secretary-General of the United Nations.[445]

However, in accordance with Article 4(3) of the ICCPR, certain categories of human rights (religious freedom inclusive) are non-derogable rights. Such rights are designed not to be suspended or restricted even in situations of war or armed conflict. In addition, even in times of armed conflict where International Humanitarian Law [IHL] applies, human rights law continues to apply affording protection to individuals and groups regarding these sets of rights that are considered non-derogable. Specifically, the ICCPR in Article 4(1) & (2) provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. No derogation from articles ... 18 may be made under this provision.

Interestingly, the African Charter on Human and Peoples' Rights contains no derogation clause, but limitations are possible on the basis of Article 27(2), which states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".[446]

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[444] See Article 4, ICCPR

[445] See the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984). Interestingly, the 1989 Child Rights Convention in Article 14 contains no derogation clause and the African Charter on Human and Peoples' Rights contains no derogation clause, but limitations are possible on the basis of Article 27(2), which states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". In practice, this has been strictly interpreted by the African Commission on Human and Peoples' Rights.

[446] Article 27(2), African Charter on Human and Peoples' Rights; See also decisions of the *African Commission on Human and Peoples' Rights* in *Civil Liberties Organisation v. Chad*, Communication No. 74/92, 18th Ordinary Session, Praia, 11 October 1995, *9th Annual Activity Report*, paras. 21–22 and *Constitutional Rights Project v. Nigeria*, Communication Nos. 140/94, 141/94 and 145/95, 26th Ordinary Session, Kigali, 1–15 November 1999, *13th Annual Activity Report 1999–2000*, Doc.

On the other hand, regarding limitations on religious freedom, Article 29(2) of the UDHR states that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". The Article further states that "everyone has duties to the community" and that the rights and freedoms proclaimed in the Declaration "may in no case be exercised contrary to the purposes and principles of the United Nations".[447]

The statement that limitations, in order to be legitimate, must be enforced solely for one or several of the purposes mentioned in article 29 of the UDHR means that not only the acts of the executive and of the subordinate authorities, but the law itself, should not be unduly restrictive of the right to freedom of thought, conscience and religion. The first purpose enumerated in the article, for which a limitation is permitted, is to secure "due recognition and respect for the rights and freedoms of others".[448] This means that, since it has already been recognized that freedom to maintain or to change one's religion or belief should not be impaired, precedence should be given to this freedom whenever it comes into conflict with any practice of a religion or belief which would lead to its disregard.

Furthermore, in a multi-religious society, certain limitations on religious practices, or on customs which owe their origin to religious doctrines, may be necessary in order to reconcile the interests of different groups, notably minorities and the majority. Such limitations should not be of such a nature as to sacrifice minorities on the altar of the majority, but to ensure a greater measure of freedom for society as a whole.

AHG/222 (XXXVI), Annex V, paras. 41–42. In these two cases, it was confirmed that no derogation was possible under the African Charter on Human and Peoples' Rights.

[447] Article 29(3), UDHR

[448] Article 29(2), UDHR

Legitimate limitations upon the right to freedom of thought, conscience and religion can also be imposed, according to article 29 of the UDHR, "for the purpose ... of meeting the just requirements of morality, public order and the general welfare in a democratic society". The use of these terms indicates a consensus of opinion that the exercise of the right could be limited only in the interests of the common good of society.

While the legitimate limitations set forth in article 29 apply equally to all rights and freedoms proclaimed in the Declaration, it must be stressed again that the right to freedom of thought, conscience and religion has a distinctive character because the demands of various religions and beliefs on their followers are so far from identical.

Finally, in any discussion of the permissible limitations on the right to freedom of thought, conscience and religion, account must also be taken of the fact that even though each of the several limitations taken by itself may be considered to be permissible, the whole complex of limitations when taken together may be such as to render the exercise of the right nugatory. That is why article 29, after setting forth the grounds on which limitations are permissible, uses the term "in a democratic society" — a term which should of course be construed as referring to a society in which human rights and fundamental freedoms are ensured. The same idea is brought out more comprehensively, and in even sharper focus, in article 30 of UDHR, which states that nothing in the Declaration "may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".[449] Clearly this article interdicts not only public authorities but also "any group or person" from engaging in activities aimed at the destruction of a human right or fundamental freedom. Thus the expression "in a democratic society" in article 29 and the provisions of article 30 may be said to constitute restrictions on the permissible limitations.

[449] Article 30, UDHR

CHAPTER FIVE

COMPARATIVE ANALYSIS ON THE RIGHT TO FREEDOM OF RELIGION UNDER THE SHARIA AND INTERNATIONAL LAW

5.1 INTRODUCTION

This chapter comparatively provides for the summary of the analysis on the foregoing discussion in the previous chapters, noting the major areas of similarities and differences between the two systems of laws, i.e., the perspectives of Shari'ah and international law on the concept of freedom of religion. While employing a comparative method in our approach, our intention is not to gauge either the principles of Shari'ah in the light of that of international law nor vice versa. Our focal point is an effort to understand how mutual the two systems of law are in reinforcing the norms of religious freedom and the approach taken by each of the two systems in that regard.

The research work has in chapters two and three examined the concept of freedom of religion under the two systems of laws separately, and some of the existing human rights concerns that continue to pose controversies before the international community as far as freedom of religion under the Shari'ah and international law is concerned have been considered therein.

In chapter one, after laying a background to the study and the major problems highlighted in the research, which includes instances of widespread disrespect by States of their duties and obligations under international human rights law treaties, and in particular by Islamic States of their obligation to follow the rules of the Shari'ah in addition to any other treaty obligation they might have voluntarily entered into under international law to respect the religious freedom of individuals and groups within their jurisdiction. Below is the analysis on vital points of concern under the two systems of laws.

5.2 ON DEFINITION OF THE TERM 'RELIGION'

On the definition of the term "religion," the freedom of which has been the subject of debate among several legal cultures and civilizations, the two systems of laws are in stark contrast to each other. While Islamic law has uniquely considered Islam to be the true religion and approved form of worship, and has further made it to be its primary concern in all subjects of discussion for the Muslims in all facets of their life, international law (in particular, IHRL) loss any standpoint of view on what the legal definition of religion could be but reference is made to religion as the focus of protection in relation to the right of the individual to maintain freedom of conscience and belief in whatever form or manner - be it theistic, atheistic or non-theistic. In fact, IHRL and IHL see the relevance of the rights of the individual to maintain his personal convictions and religious practices even in war situation, and has accordingly provided for respect and protection to such religious convictions and practices. In that, the recognition of these rights are even protected as a war crime if individuals or groups of individuals as protected persons in IHL are forcefully made to convert to other religions in armed conflict situation.[450]

However, international law primarily protects individuals in the exercise of their freedom of religion and not "religion" *per se*. To this end, over the years and to date, international law had never considered defining the term "religion", yet, international law places its concern over a right to freedom of religion whenever a claim by an individual or groups of individuals asserts certain forms of beliefs however theistic, atheistic and non-theistic they are in content.

[450] The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) includes provisions permitting prosecution of individuals responsible for "seizure of, destruction or wilful damage done to institutions dedicated to religion" as a war crime (article 3(d) ICTY); genocide when committed with the intent, in whole or in part, a religious group (article 4(2) ICTY, article 2(2) ICTR); and religious persecution as a crime against humanity (article 5(h) ICTY, article 3(h) ICTR). Under Article 8(2)(b)(ix) and Article 8(2)(e)(iv) of the Rome Statute, the ICC Office of the Prosecutor (OTP) may address religious persecution by prosecuting individuals for the war crime of "Intentionally directing attacks against buildings dedicated to religion … provided they are not military objectives…" in international and non-international armed conflicts.

This is more so by the secular position assumed by international law in its supposed neutrality to all religions and beliefs both in its practice and development.[451] For reasons, perhaps, of the modern day existence of theistic, atheistic and non-theistic beliefs to which an ever emerging religious movements in need of legal recognition as religious communities and groups is on the increase, religion in the international law perspective seem to encompass all sorts of beliefs, be it theistic, atheistic and non-theistic.[452]

For these conception to be the articulated standard under international law, it is observable that this approach is exclusionary to the Muslims and the Islamic world generally and it may be viewed as a direct attempt to insinuate Muslims into accepting not only a secular proposition but atheistic and non-theistic beliefs, values or ways of life that would ever remain opposed to the spirits of Islamic law (*maqasid al-Sharia*). This is because; the Sharia recognizes religious beliefs of theistic origin and approves only Islamic monotheism contrary to any form of atheistic beliefs that is by all means a nugatory belief. Further to this, it is also observable that the Islamic framework of tolerance and accommodation is only extensive to theistic religions, in particular the people of the book, i.e., Jews and Christians as against idolaters.

It is worthy of mention here that, while in the West, religion is largely seen as a system of beliefs that falls within the domain of private concern of the individual; in Islam, religion is both a system of belief (*iman*) and a way of life (*minhaj*).[453] In view of the fact that western philosophy relegates the role of religion in regulating public life, the result of the Protestant Reformation was that a dichotomy was established between religious institutions on the one

[451] Danchin, P. G. The Emergence and Structure of Freedom of Religion in International Law, *Journal of Law and Religion (……) Vol. XXIII, p. 456 at 457*
[452] See General Comment No. 22, para. 2
[453] Mawdudi, A. A. The Islamic Movement: Dynamics of Values, Power and Change, Khurram Murad (ed.) 1984 pp. 79–81 cited by *Oba, A. A.* "Religious and Customary Laws in Nigeria" *Emory International Law Review,* (2011) Vol. 25, pp.881

hand and public or state institutions on the other hand. In consequence, the value of religious law in the West became limited to canon commandment, which is now merely the law regulating the affairs the Church and other ecclesiastical matters. In contrast to this background, Islamic law is a full-fledged legal system in the same manner as common law and civil law besides its embodiment canon commandment.

One particular misconception if not a blatant misrepresentation is labeling Islamic law as "religious law" solely to delimit the scope of its application from public to private spheres of life. The implication is trying to narrow the understanding of the term "religion" under Islamic law to be within the specter of Western ideals (who considers religion as a matter of individual conscience) thereby deprive Muslims of the right to manifest publicly the fundamental teachings of their religion, such as wearing the Hijab, a right deprived to the Muslim women in some European countries.[454] In the Islamic law context, "religious law" would refer only to the laws relating to worship (*ibadat*) as distinct from the laws relating to human interactions (*muamalat*).[455]

Whereas the notion of "religious law" is traceable to Western perceptions of religion, there exist clear points of difference between Western and Islamic conceptions of religion. Islamic law is not a religious law as is Canon law. The confusion stems from the fact that Islamic law does cover religious duties and obligations, an arrangement that other world legal systems lacks. Therefore, Islamic religion as well as Islamic law comprises two main divisions, *ibadat* and *muamalat*. The *ibadat* aspects of the law meaning rituals, concerns purely religious

[454] E.g., in Turkey and France, it was for bidden to wear religious symbols in public schools and government institutions.

[455] Mawdudi, A. A. The Islamic Movement: Dynamics of Values, Power and Change, Khurram Murad (ed.) 1984 pp. 79–81 cited by *Oba, A. A.* "Religious and Customary Laws in Nigeria" *Emory International Law Review,* (2011) Vol. 25, pp.881

matters whereas the *muamalat* meaning transactions deals with all those subjects which make up the only content of other legal systems.[456]

It is thus observed that the Islamic perception of *Din* (religion) contrasts sharply with the perspective taken by international law on the term "religion", and although none of the international legal instruments has contemplated the definition of the term "religion", yet freedom of religion today at the international level is broadly construed to include theistic, atheistic and non-theistic beliefs in a wider context as against what obtains under Islamic law.[457] Along these lines, international law promotes freedom of religion and freedom from religion, i.e., secularism is inherently endorsed as the standard and that religion and irreligion is placed on an equal footing as determining one's religion is essentially conceived not to be the business of the law.

But contrary to these perception, the Shari'ah exclusively regard, uphold and asserts the absolute superiority of not only its theistic but monotheistic form of belief (in the existence of One single deity-Allah) thereby asserting Islam as the only correct and divinely sanctioned and approved form of religion as far as the Muslim faith is concerned. Any form of belief short of this approved Islamic monotheism is regarded by the Shari'ah as an act of *Kufr* (disbelief) and the holder of such belief ultimately an unbeliever (*Kaafir*). This notion of belief and disbelief divide seems to be used as a mechanism of religious test under the *Shari'ah* necessary to the enjoyment of certain rights and privileges in Islamic law.

It is worth noting that, although monotheism and in particular Islamic monotheism is the standard in Islam on what constitute religion, nevertheless, in Islam, some forms of theistic beliefs in particular those held by *Ahl al-Kitab* (the people of the Book) have been recognized

[456] Badr, G. M. Islamic Law: Its Relation to Other Legal Systems, *American Journal of Comparative Law* (1978) Vol. 26, 187-198, at 188

[457] See General Comment No. 22 on the right to freedom of thought, conscience and religion (Art. 18), Human Rights Council, 30 July 1993, (UN Doc. No. HRI/GEN/1/Rev.3), p. 36, para. 2

by the Shari'ah as having certain elements of divinity in them and these forms of religions are accorded some degree of toleration as parts of *Abrahimic* faith. *Ahl al-Kitab* enjoys sufficient degree of toleration under the Shari'ah especially if they are under the status of *Dhimmi* (non-Muslims living in an Islamic State) and they are as well granted certain rights and privileges to practice their religion while under the political protection by the Muslim majority upon the obligation of paying the *Jizyah*.

It can be understood that, right from this point, explicit and implicit conflicts arises between Islamic legal culture and that of the West in terms of the concept of "religion" the shadow of which may pave way for resort to the use of 'cultural relativism'[458] at all times by Muslims and Islamic nations in their human rights practices which should remain the standard rather than exception.

This is because, any human rights norm relating to freedom of religion that is being developed under international law which is secular in context and destructive of the Islamic monotheism would have little or no chances of prospect regardless of any legal importance attached to it in international law, as *Hifzul Din* (preservation of the religion) of Islam is by its self, one of the cardinal principles and objectives of Islamic law, i.e., *Maqasid al-Shari'ah*. Thus, from this view point, the Muslim-West dichotomy may continue to exist as the institution of the Shari'ah (as a legal order) comprising both law and religion would remain opposed to secular ideals that seeks to liberate 'law' from the so-called shackles of 'religion'.

[458] Cultural relativism is among the major obstacles to the "universal" validity of modern human rights norms. The concept entails the reflection of the socio-cultural aspirations and identities of people in their human rights practices, i.e., the validity and enforceability of human rights norms is dependent upon its compatibility with the culture, traditions, religion or level of development of the people in a given locality. Typical example includes areas of religious freedom and women's rights, e.g., issues of apostasy and blasphemy laws in some religious cultures as impediments to the full realization of the rights of the individual to change his religion or to express himself free from any religious bounds; the practice of female genital mutilation [FGM] as a religious rite without due regard to it being outlawed as a form of violence against women in feminism jurisprudence.

Arguments of this kind may be said to be what inspired the Iranian representative to the United Nations General Assembly *Sa'id Rajaie-Khorassani* in 1981 to have articulated the position of his country regarding the Universal Declaration of Human Rights, by saying that the UDHR was "a secular understanding of the Judeo-Christian tradition", which could not be implemented by Muslims without trespassing unto Islamic law.

The above position could be said to be the factor that affects the observance in good faith (i.e., positively) by non-Western countries of their international human rights treaty obligations even though voluntarily entered into as ahead of these international treaty obligations, there is already in place, especially for the Muslims, the rules of the Shari'ah which are of *"self and supra imposed"* character given its bindingness among all Muslims.

5.3ON LEGAL FRAMEWORK

While variations in the religious histories of the Western and Islamic worlds has contributed significantly to the divergence in the respective formulations of freedom of religion in Islamic law and Western societies, the unimpeachable truth is that Islamic law is the first legal order to embrace the idea of freedom of religion even if its scope and content remain subject to debate among Western orientalists as not satisfying their secular expectation.

It is observable that from the substantive law on freedom of religion in Islamic law, the totality of the divergent juristic opinions offered on the Qur'anic verses and *ahadith* make freedom of religion under Islamic law a somewhat contested matter compared with what obtains under international law. Notwithstanding this, toleration has been offered on practical terms to non-Muslims within the jurisdiction of an Islamic State as against the position under conventional international law where the religious rights of minorities remain largely abstract principles still in the process of evolution.

While we talk of the development of the law on the protection of religious minorities in Islamic law as an established principle since 7th Century AD, it was only of recent; perhaps with the coming of the UDHR and afterwards, that the rights of religious minorities gained momentum in Western societies. Besides the provisions of Article 27 of the ICCPR,[459] other provisions on religious minority rights are mere declarations of the General Assembly,[460] therefore devoid of any legal force in international law. Even the provisions of the ICCPR & ICESCR that is treaty based and that of UDHR which is a non-binding standard, are far from the reality in successfully articulating universal consensus on issues regarding freedom of religion and protecting the rights of religious minorities. In reality, much of these provisions of international laws are superficial as there are serious inconsistencies and disagreements both in the meaning and in the substance of the right to freedom of religion they seek to protect.[461]

As was earlier indicated, the legal framework on freedom of religion in international law starting from the UN Charter,[462] down to the UDHR,[463] ICCPR,[464] ICESCR[465] all reiterate respect for fundamental rights and freedoms for all without adverse distinctions of which the values of equality, tolerance and non-discrimination can be distilled therefrom. But it should be borne in mind that, although toleration has been argued to be the basis of freedom of religion, the concept of tolerance within the UN human rights system is, on a critical note,

[459] Article 27 of the ICCPR provides: "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
[460] See the Declaration on the Elimination of All forms of Intolerance and of Discrimination based on Religion or Belief (1981) and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious Minorities (1992)
[461] Rehman, J. Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, *International Journal on Minority and Group Rights* (2000) Vol. 7, pp. 139 – 65 at 145
[462] Articles 1(3), 55(c) UN Charter of 1945
[463] See Article 2, UDHR
[464] See Article 2, ICCPR
[465] See Article 2, ICESCR

nothing more than a call for the tolerance of the voices of secularism if not atheism than accommodating religious dissidents within the framework of coexistence. The human rights perspective to tolerance is that which advocates secularism to reign over the divine prescription of the Shariah in the sense that religion is relegated to the background and tagged as antithesis to the universality of human rights. In short, these ideas are the product of Western philosophical and political views that are inapplicable under Islamic law.[466]

In that, the idea of equality of religions, desire for neutrality to be bestowed by Muslim State authorities to all religions within their jurisdiction and the fundamental idea of accepting the right to change religion as articulated by the West has been injected on Muslims through the international bill of rights – a philosophy which is without doubt, not only secular but atheistic in nature. Therefore, the elite in Muslim countries has been influenced into accepting such a profane arrangement of being "state parties" to international legal instruments on the subject of freedom of religion, a position that Muslim populace remain opposed to thereby manifesting their avowal around the globe through persistent movements for the restoration of the application of the Shariah in Muslim lands.

To illustrate further, the basic presupposition behind the two systems of laws is that, parts of the significant difference between the law of freedom of religion under the United Nations' Human Rights system and the Islamic law position is that, the UDHR & ICCPR is based on Western philosophy manifest in the concepts of individuality, liberty, equality and constitutional democracy which largely originate from Judaeo-Christian principles particularly in the works of John Locke and John Stuart Mill.[467] Thus, the development of the Western legal traditions from its origin in the late eleventh and twelve centuries through the

[466] Mayer, A. E. Universal Versus Islamic Human Rights: A Clash of Cultures, or a Clash with a Construct?, *Michigan Journal of International Law*, (1994) Vol. 15, 307 at 315-322

[467] Abrams, P. Reservations About Women: Population Policy and Reproductive Rights, *Cornell International Law Journal*, (1996) Vol. 29, p. 25

revolutions in England, United States, Germany and France down to the Russian Revolution largely characterized by church-state complexities, no doubt, influences the emergence of the law of freedom of religion in international law. In that, freedom of religion in its international law conception is nothing but the codification of the legal teachings of protestant reformation, the enlightenment and early American constitutionalism which bears no relevance with Islamic legal and cultural traditions.[468]

Furthermore, the law on freedom of religion in international law is merely a treaty-based legal framework which is essentially consensual in character,[469] whereas the law relating to freedom of religion in Islamic law is a divine ordainment embodied in the Holy Qur'an and complemented by the *Sunnah* of the Prophet (saw). By being consensual, it implies that the application of the rules of international law (in particular those relating to freedom of religion) may at any point be withdrawn even if the formal procedure for doing so might not have been complied with.[470] Short of allowing outright breach, it is procedurally provided in the law of treaties in international law that States may enter a 'reservation' to the application of certain rules (or articles) in a given treaty if a State considers such rules unsatisfactory.[471] Additionally, rules of international law on freedom of religion as contained in treaties are also subject to amendments. All these characteristics of treaty law, taken together as a whole, are quite contrary to the fundamental nature of the legal obligations of the rules of shari'ah on freedom of religion in terms of its perpetual, eternal, and immutable character as well as its binding force on Muslims and Islamic States independent of any procedural requirement of consent to be bound or latitude for modification.

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[468] See Mayer, A. E. Universal Versus Islamic Human Rights: A Clash of Cultures, or a Clash with a Construct?, *Michigan Journal of International Law*, (1994) Vol. 15, 307 at 315-322; Shaw, M. N. *International Law*, Cambridge University Press, Cambridge (2008, 6th ed.) pp. 22-23, 27, 39 268

[469] Article 46, Vienna Convention on the Law of Treaties, 1969

[470] Treaties in international law are not necessarily permanently binding upon the signatory parties; there exists an option for withdrawal, suspension or termination of a treaty.

[471] Article 2, Vienna Convention on the Law of Treaties, 1969

Further still, unlike under international law where consent to be bound by an international covenant must be indicated by signature, ratification or accession, Islamic law carries with it 'self and supra-imposed' legal obligations on Muslims and Islamic States. By virtue of being a Muslim, the observance of the rules of shariah is a binding obligation upon every individual. So also, an Islamic State doesn't qualify itself as such, unless and for such purposes that it is meant to uphold Islamic doctrines and institutions, doing so the only source of legitimacy of a given Islamic rule on earth.[472] This legal obligation upon an Islamic State is never a consensual matter at the disposal of the whims and caprices of designated elite at the expense of the religious interests of the *ummah* but rather a mandatory legal and religious obligation to be fulfilled by Islamic authorities. The development and application of the rules of international law is therefore State centric (i.e., much emphasis on the role of States) whereas the rules of Islamic law permeates States and individuals (i.e., it emphasises not only State obligations but also individual responsibility).[473] Thus, in view of the divine sanctity of the rules and principles of Islamic law and the consensual character of the rules of international law, it is argued that Muslims and Islamic States shall only agree to the dictates of international law on freedom of religion to the extent that it suits the law of Allah (swt), i.e., the Shariah.

In consequence of the above analysis, while in Islamic law, its sources on human rights are founded on the Qur'an and Hadith, the foundation of the Islamic law on freedom of religion is accordingly *shariah* based and is therefore perpetual, eternal, immutable and above all divine in origin. On the other hand, international law, in particular its rules on freedom of religion are ever evolving, dynamic, partly derogable and lacking practical enforcement.[474] It is thus not

[472] Qur'an 22: 41
[473] Doi, I. A. op cit., at pp. 16-17; Maududi, Abul A'la, *Human Rights in Islam* (1976), *available at* http://www.islam101.com/rights/index.htm
[474] See Shaw, M. N. international Law, Cambridge University Press, Cambridge (2008, 6th ed.) p. 265

easy to understand how these two systems of laws may be said to be compatible in view of their fundamental disparity from the point of view of their legal framework.

5.4ON NATURE, MEANING AND SCOPE OF FREEDOM OF RELIGION

On the meaning, nature and scope of freedom of religion under the two systems of laws, essentially, freedom of religion in its international law conception entails the individual's freedom of conscience against State coercion in matters of belief, i.e., no state or governmental authority can exercise power to impose certain religious beliefs to persons against the dictate of their conscience. That State institutions, be it legislative or executive should not establish a religion nor enforce the legal observance thereof by law or policy as to compel people to worship God in any manner contrary to the dictate of their conscience.[475] In some instances, some of the rights inherent in religious freedom demand abstention or inaction by States and non-State actors that may result from encroachment upon the absolute freedom of the individual to hold any form of religion or belief. Likewise, it also demands positive actions from States and non-State actors in ensuring the realization by the individual or groups of individuals their right to maintain practice and observance of the tenets of their religious beliefs. To this end, the need arises for the discharge of such positive obligations by States and non-State actors in terms of practical exhibition of tolerance, non-discrimination, accommodative and pluralistic platforms towards the proclaimants of this right.

Freedom of religion in its Islamic law context implies that non-Muslims as protected persons within the jurisdiction of an Islamic State are not compelled to convert to Islam, nor are they to be hindered from practicing their own religious rites as a religious community of their own.[476] The Islamic view of freedom of religion and worship is expressed in the Holy Qur'an

[475] Corwin, E. S. The Supreme Court as National School Board, *Law and Contemporary Problems* (1949) Vol. 14, No. 1, p. 11
[476] Kamali, M. H. *Freedom of Expression in Islam*, Islamic Text Society, London (1996) p. 87

in the following verse of Surah al-Baqarah: "Let there be no compulsion in religion, truth stands out clear from error."[477]From the legal provisions contained in this verse of the Holy Qur'an, compulsion in the matter of religious worship is incompatible with the religion of Islam because religion depends upon faith and will, and this would be meaningless if it is induced by force.

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Freedom of religion in international law and in particular international humanitarian law entails respect for the religious convictions and practices of all protected persons by High Contracting parties and occupying powers. In this regard, protected persons enjoy certain religious rights in terms of the right to practice their religion and to receive spiritual assistance from ministers of their faith.[478] Equally**,** internees have the right to be granted the liberty to enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith.[479] Ministers of religion who are interned should to be allowed to minister freely to the members of their community and the liberty to have correspondence on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith.[480] Religious personnel are specifically afforded protection in the theatre of armed conflict and are accordingly given the right to provide spiritual assistance to the wounded, the sick and the dying and to officiate at burials.[481]

In situations of occupation, the Occupying Power is required to the fullest extent of the means available to it, to ensure the provision of objects necessary for religious worship and to accept consignments of books and articles required for religious needs and to facilitate their

[477]Qur'an 2:256
[478] Article 38, Geneva Convention IV;
[479] Article 93, Geneva Convention IV
[480] Geneva Convention III, Arts. 34-37; Geneva Convention IV, Arts. 86 and 93
[481] Geneva Convention I, Art. 28; Geneva Convention II, Art.37; Geneva Convention III, Arts. 35-7; Geneva Convention IV, Arts. 17; 58; 93

distribution in the occupied territory.[482] In non-international armed conflicts, the convictions and religious practices of all persons who are not taking a direct part in hostilities must be respected and children must be able to receive religious and moral education.[483]

As far as the scope of the rights and interests sought to be protected under freedom of religion, certain salient areas of divergence between the two systems of laws are of significance. These may include questions surrounding apostasy under Islamic law which carries capital punishment amidst the international community's concern for the abolition of the death penalty;[484] the question of defamation of religion under Islamic law which may by itself be a *casus belli* (causes of war) as against what obtains in international law where freedom of expression knows no such frontiers;[485] the role of the concept of jihad in defence of the religion (of Islam) and its Western critics especially its relevance to the discussion on the use of force under international law; etc. These issues of apostasy and defamation of religion (blasphemy) attracts capital and corporal punishment in Islamic law and are seen to be human rights violations of the individuals under international law. These issues are among the subjects of discussion in IHRL[486] within the framework of the Convention Against Torture [CAT].[487]

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[482] Art. 69, Additional Protocol I to the Geneva Conventions of 1949 relative to the Protection of victims of international armed conflicts of 1977; Geneva Convention IV, Art. 58

[483] Additional Protocol II, Arts. 4(1); 4(3)(a)

[484] Already, under international law, there is in existence the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of Death Penalty.

[485] See Qur'an 9:107 which provides to the effect that if unbelievers commit acts of blasphemy against the religion of Islam, their leadership should be fought.

[486] See **ICCPR,** Art. 7 provide "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."; See also **Commission on Human Rights resolution 2005/40** 4.f: The Commission on Human Rights urges States, "To ensure that no one within their jurisdiction is deprived of the right to life, liberty, or security of person because of religion or belief and that no one is subjected to torture or arbitrary arrest or detention on that account, and to bring to justice all perpetrators of violations of these rights;".

[487] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

In a Report[488] by the UN Special Rapporteur on freedom of religion and belief upon the country visit to Nigeria in 2006, issues of this kind have been raised. Probably the most often advanced question is the compatibility of certain forms of punishment prescribed by sharia penal codes with international human rights law, in particular those provisions that prohibit torture or cruel, inhuman and degrading treatment or punishment.[489] In this regard, in addition to the Human Rights Committee which stated in its general comment No. 20 that the prohibition of torture and cruel, inhuman or degrading treatment or punishment contained in article 7 of the ICCPR extends to corporal punishment, other United Nations human rights mechanisms have, on numerous occasions, declared the incompatibility of such forms of punishment with human rights provisions prohibiting torture and other forms of ill treatment.[490]

The Special Rapporteur was of the opinion that punishments such as stoning or amputation constitute, if not torture, at least cruel, inhuman and degrading treatment.[491] The Special Rapporteur considers that the legal systems such as have been adopted by a number of states in Nigeria contain provisions that raise concern in terms of human rights. That certain forms of punishment contained in the sharia penal codes, such as amputation or stoning, constitute treatment that is contrary to so-called universally recognized norms prohibiting torture and other degrading, cruel and inhuman treatment or punishment, including international conventions to which Nigeria is a party. Finally, the Special Rapporteur considers that the possibility, at least in theory, that Muslims could be convicted and sentenced to death because

[488] See UN Doc. E/CN.4/2006/5/Add.2, paras. 67-68 and 100 (country visit to Nigeria)
[489] See UN Doc. E/CN.4/2006/5/Add.2, paras. 67
[490] See for instance, the report of the Special Rapporteur on torture submitted to the Commission on Human Rights at its fifty-third session (E/CN.4/1997/7, para. 6); concluding observations of the Committee against Torture on the initial periodic report of Saudi Arabia, 12 June 2002 (CAT/C/CR/28/5, para. 4 (b)); report of the Special Rapporteur on violence against women, its causes and consequences, submitted to the Commission on Human Rights at its fifty-ninth session (E/CN.4/2003/75, para. 68) and (E/CN.4/2003/75/Add.1, para. 460).
[491] See UN Doc. E/CN.4/2006/5/Add.2, paras. 68

they converted to another religion would constitute a clear violation of the right to freedom of religion or belief.[492]

While the concept of defamation of religion (and blasphemy) is unknown to, or at least, not legally recognized within the scope of religious freedom in international law, this concept is well entrenched and forms parts of the rudiments of freedom of religion in Islamic law. No form of contemptuous insult to the religion of Islam in the name of freedom of expression is tolerable to Muslims in view of its grave profanity against the sensibilities of the Muslims without just cause or excuse. These kinds of criminal acts under the Shari'ah are un-condonable in any respect and are visited with strict liability that carries capital punishment.

As to jihad (in defence of religion), it was earlier discussed that Islam is the way of life for the Muslims and that no undue encroachment or obstacle into the path of Islam could be allowed to stand thereby hindering Muslims from propagating Islam. Such obstacles or encroachment must be dispersed and dispelled through jihad and the duty to do so is at the hands of the Muslims by employing the mechanism of jihad. The Shari'ah has thus placed upon Muslims the legal obligation to employ jihad in defence of Islam, promoting and preserving it against all sorts of corruption and aggression that may stand in the path of its progress in terms of the right to proselytism (*Da'awah*).

5.5ON THE RIGHT TO CHANGE RELIGION

As to the right to change one's religion, the standard in international law is that, freedom of religion is basically hinged upon the rights of the individual to have, adopt or change any religion, i.e. the right to change one's religion free from any form of coercion from any source of authority that would impair one's freedom of conscience. Change of religion is typically among what constitutes apostasy under Islamic law. So, while the Shari'ah always welcomes

[492] See UN Doc. E/CN.4/2006/5/Add.2, paras. 100

conversion to Islam out of free will of the individual as there is no compulsion in religion,[493] the Shari'ah retrospectively abhors acts of apostasy committed against the religion of Islam. Although this being the law, issues surrounding Islamic law concept of apostasy is of such a serious rapprochement in modern day human rights discourse as regards the treatment meted out on apostates, i.e. capital punishment. Despite the fact that Islam is seen by the West to be curtailing freedom of religion for punishing apostates, the reality is that Islam is not the only religion in which apostasy is religiously disapproved even though recent changes might have establish otherwise as in the case of Christianity.[494]

It has been earlier shown that under international law, Articles 18 of the UDHR and ICCPR seeks to set the standard for the international community that everyone shall have the right to freedom of thought, conscience and religion and that this right shall include freedom to have or to adopt a religion or belief of one's choice.[495] This articulation of freedom of religion was meant to encompass the inherent right of the individual to change his religion independent of any possible acts of coercion from State authorities. The law is explicit that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.[496] In fact, the use of the terminology "to have" was meant to encompass change of religion and it was carefully and neutrally selected in response to the challenges posed by Islamic state parties that, under Islamic law change of religion, i.e., apostasy is never allowed and the provision therefore inimical to the Islamic Sharia.

[493] Qur'an 2:256
[494] See Declaration on Religious Freedom (*Dignitatis Humanae*) on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, promulgated by His Holiness Pope Paul VI, December 7, 1965 *available online at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vatii_decl_19651207_dignitatishumanae_en.html.
[495] Articles 18(1) of UDHR & ICCPR
[496] Articles 18(2) of UDHR & ICCPR

The standard under the Shariah as was earlier indicated is that, whoever changes his religion, must be killed. This position of the Shariah highlights apparent contradiction with what obtains under international law and this contradiction remains unresolved to date. Thus, it may not be out of place to argue that movement for the abolition of death penalty serve as an underground tactic towards the elimination of the practice of Islamic criminal law wherein change of religion is punished as a *hudud* crime.

However, while quite disgruntled, the forces of atheism have criticized the stand taken on the use of the supposedly neutral terminologies of the ICCPR "to have" or "to adopt" which comes about in response to the challenges posed by Islamic state parties and now it is advocated that the interpretation of freedom "to have" or "to adopt" a religion or belief of one's choice under the UN human rights system explicitly embrace change of religion. This view has been reflected by the UN Human Rights Committee in its General Comment 22 which emphasizes on these rights in explicit terms than in the UDHR and ICCPR. It provides that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[497] Similarly, several UN resolutions are directed towards emphasis on the right to change religion.[498]

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[497] Human Rights Committee General Comment 22, Para. 3 & 5

[498] Human Rights Council Resolution 6/37 titled *"Elimination of all forms of intolerance and of discrimination based on religion or belief"*,(*34th meeting 14 December 2007) which urges* States:

Paras: 9(*a*) To ensure that their constitutional and legislative systems provide adequate and effective guarantees of freedom of thought, conscience, religion and belief to all without distinction, inter alia, by the provision of effective remedies in cases where the right to freedom of thought, conscience, religion or belief, or the right to practice freely one's religion, **including the right to change one's religion or belief, is violated**;

Paras: 9(*i*) To ensure that, on account of religion or belief or the expression or manifestation of religion or belief, no one within their jurisdiction is deprived of the right to life, liberty or security of person, subjected to torture or arbitrary arrest or detention, or denied the rights to work, education or adequate housing, as well as the right to seek asylum, and to bring to justice all perpetrators of violations of these rights;

While apostasy is regarded as a crime under Islamic law and carries the death penalty in various Muslim-majority States, judicial punishment of apostasy has drawn international criticism of the States involved.[499] This has led to the continued examination by various international actors (including the UN Commission on Human Rights) of the relationship between Islamic law (as practiced in various Islamic States) and international human rights standards for decades. Unsurprisingly, a growing body of literature on human rights and the punishment of apostasy have emerged, which forms part of a wider body of scholarship on the relationship between Islam and human rights most of which directed towards reinterpretation of Islamic law to do away with the crime of apostasy.[500]

In the West, "the concept of apostasy as a criminal offense seems outmoded, so people … do not tend to think of the freedom to change religion as a central concern of provisions guaranteeing religious freedom."[501] In fact, as one writer opined, apostasy is one of the most difficult of all religious freedom measures for a nation to achieve, and until it has eliminated blasphemy laws and punishment for apostasy, one cannot say that religious freedom has been achieved.[502]

But on the other hand, in almost all Muslim States where the classical approach of the established schools of Islamic jurisprudence is followed, apostasy is, at least in theory, an offence punishable by death - unless legislation provides otherwise. Apostasy is punishable by

[499] See El-Awa, M. S. *Punishment in Islamic Law: A Contemporary Study* (2000) 49-50, 53.
[500] See for example: David A. Jordan, 'The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence' (2003) 9 *Wash. & Lee Race & Ethnic Anc. L.J.* 55, 62; Baderin, M. *International Human Rights Law and Islamic Law* (2003) 123-124, 128; Ann Elizabeth Mayer, Universal Versus Islamic Human Rights: A Clash of Cultures, or a Clash with a Construct?, *Michigan Journal of International Law*, (1994) Vol. 15, 307 at 315-322 ; Hilmī Zaawāttī, *Is Jihād a Just War?: War, Peace, and Human Rights Under Islamic and Public International Law* (2001); Mohammed Adeb al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (2009),199- 200; Mohamed Charfi, *Islam and Liberty: The Historical Misunderstanding* (2005) 51; etc.
[501] Mayer, A. E. *Islam and Human Rights: Tradition and Politics*, Westview Press, Boulder (1999 3rd ed.), p. 167
[502] Melinda A. Haring, *The Right to Change One's Religion: Apostasy as the Litmus Test for Religious Freedom in Iraq and Afghanistan's Constitutions*, p. 5. An online article available at http://www.bc.edu/content/dam/files/schools/cas_sites/polisci/pdf/The_Right_to_Change.pdf

death in Saudi Arabia, Somalia, Qatar, Yemen, Iran, Sudan, Afghanistan, the Comoros Islands and Mauritania.[503] In various other Muslim countries, apostasy is theoretically a capital crime but the death penalty is not actually imposed. In some instances, although the death penalty is passed, it is commuted on appeal or at times lesser penalties imposed.[504]

5.6ON THE RIGHT TO MANIFEST ONE'S RELIGION

For secular societies, religion is considered purely a private affair. Public life is perceived to be legally guided by secular principles and institutions and never by religion or religious law. It must be remembered that even the development of secularism itself was a reaction to the extravagances and conflicts of the Christian Churches and various Monarchs and Kings in Europe.[505]

Concerning the right to manifest one's religion, secular authorities have developed a theory of belief-practice dichotomy as expressed long ago by Locke and emphasized in a decision of the Supreme Court of the United States of America in *Cantwell* v. *Connecticut*[506] while interpreting the First Amendment to the United States Constitution, which read in part as follows:

> The First Amendment forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organizations or form of worship as the individual may choose cannot be restricted by law . . . Thus the amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be.[507]

This means that, State authorities shall have the power to curtail the practice of certain beliefs however fundamental they might be in the minds of believers in attempt at balancing certain state interests. This aspect of the right to freedom of religion is the most contested one

[503] Ibid
[504] See Ben Clarke, Law, Religion and Violence: A Human Rights-Based Response to the Punishment of Apostasy by State and Non-State Actors, *Adelaide Law Review* (2009) Vol. 30, No. 1, p. 19
[505] Shaw, M. N. international Law, Cambridge University Press, Cambridge (2008, 6th ed.) pp. 22-27; Abdul-Rahman al-Sheha, *Human Rights in Islam and Common Misconceptions* [undated] **(**Edited by: Abu Ayoub Jeromē Boulter and Abdurrahman Murad, *Revised Edition*
[506] (1940) 310 U.S. 296.
[507] Quoted in Krishnaswami A., op cit., at 16

especially due to attempts by some States that have demarcated a line between what they consider private and public manifestation of one's religion. France and Turkey are however very prominent in banning wearing of conspicuous symbols of religious affiliation. Students are being expelled from schools for failure to comply. For example, in the cases of **Dahlab v. Switzerland**[508] Ms Dahlab, a primary-school teacher who had converted to Islam, complained of the school authorities' decision to prohibit her from wearing a headscarf while teaching, eventually upheld by the Federal Court in 1997. She had previously worn a headscarf in school for a few years without causing any obvious disturbance. The Court declared the application inadmissible, holding that the measure had not been unreasonable, having regard in particular to the fact that the children for whom Ms Dahlab was responsible as a representative of the State were aged between four and eight, an age at which children were more easily influenced than older pupils. Additionally, several Complaints against Switzerland have been filed before the ECtHR concerning the ban on the construction of minarets. Following the popular vote of 26 November 2009 in Switzerland to prohibit the building of minarets, the Court received a number of complaints. In **Association Ligue des Musulmans de Suisse and Others v. Switzerland**[509] **and Ouardiri v. Switzerland,**[510] the applicants, a former spokesman for the Geneva Mosque in the first case and three associations and a foundation in the second, complained that the constitutional amendment in Switzerland prohibiting the building of minarets was incompatible with the Convention. The Court declared their applications inadmissible, on the ground that they could not claim to be the "victims" of a violation of the Convention.

[508] **(no. 42393/98)** 15.02.2001 (inadmissibility decision) [European Court of Human Rights, Press Unit, Factsheet - Freedom of religion, p. 5 *available online at* http://www.echr.coe.int/NR/rdonlyres/80119CA2-3425-43D9-9FEB 524829C637B1/0/FICHES_Liberté_religion_EN.pdf]

[509] **(no. 66274/09)** 28.06.2011 (inadmissibility decisions) [European Court of Human Rights, Press Unit, Factsheet - Freedom of religion, p. 6

[510] **(no. 65840/09)** 28.06.2011 (inadmissibility decisions) [European Court of Human Rights, Press Unit, Factsheet - Freedom of religion, p. 6

In all the above examined cases, a double-standard could be observed in the European Court of Human Rights [ECHR] decisions when the matter pertains to public manifestation of Islam by Muslims. None of the applications that concern Muslims' right to manifest their religion as citizens in their respective countries and as community citizens of the EU was upheld. It being that, no matter how well established a particular religious practice might be to the believers, the forces of secularism outweighs one's religious rights it being an individual concern.

The basic idea is the articulation of the secular principle that state authorities shall maintain neutrality towards all religions. Thus, the idea that religious neutrality might take precedence over the right to manifest one's religion is a position that offends against Islamic law and to some extent, a form of targeted harassment against Muslims. To the Muslims, Islam is the original human nature (*fitra*) and that to deny the practice of Islam to a Muslim is to deny one's own identity.

5.7 ON STATE RELIGION (LAW AND RELIGION)

Today, as regards Islam, the greatest difficulty is that Shari'ah embrace both law and religion. A manifestation of this thought as to Islam embodying both religion, law and morality for the Muslims forms parts of the basic idea behind Islam operating as the established or the 'state religion' in Islamic territories and in almost most of the present Muslim States of the Asian and African regions of the world today. There are about 46 States where Muslims form the majority of the population. Of these, 15 have declared Islam the religion of the State and 5 are designated Islamic Republics.[511] Nonetheless, unlike what the practice is in European countries, the adoption of a policy of 'state religion' by the Shari'ah in its political system of administration does not by itself wiped out *Dhimmi's* co-existence with the Muslims in an ideal Islamic State. In fact, history has it that Islamic law has accorded a greater measure of

[511] See Baderin, A. A Macroscopic Analysis of the Practice of Muslim States Parties to International Human Rights Treaties: Conflict or Congruence? *Human Rights Law Review* (2001) Vol. 1, pp. 265, 265.

tolerance towards non-Muslims than any other legal and political systems in the world as at the time when the Islamic empire emerged.

In the West, democratic norms insist that the "state" is one and "religion" another entity and therefore the laws of a State are of equal application to all citizens vis-à-vis all religions. The idea propagated is that, law is impersonal being the objective rules which the State shall apply to all its citizens without exception. But on the contrary, religion is based on the personal experience of the individual, and its appeal is personal, immediate and intuitive. In that, while religious laws, rituals and their trappings can be of general application in a community, the inner core of belief is exclusively personal. Therefore, no state can compel religious allegiance as it can enforce its laws. Hence, the well-known dicta of the law that before the law, all religions are equal; that the question of a particular belief is an objective fact as far as the court is concerned, to be proved or disproved as any other fact, and that the court cannot be called upon to determine the truth or otherwise of a religious belief.[512]

5.8 ON DEFAMATION OF RELIGION

Defamation of religion is essentially a blasphemous insult, denigration or vilification directed against the basic teachings or established doctrines of a particular religion. In the sphere of freedom of thoughts, it was now contemplated in the West that an individual has every liberty under the pretext of freedom of expression to say anything that comes to mind irrespective of any frontiers coming from state authorities.[513] This is quite antithetical to the position under Islamic law where the liberty of the individual to express oneself is ethically circumscribed to

[512] Fyzee, A. A. A. The Reinterpretation of Islam, *University of Malaya Law Review* (1959) Vol. I, pp. 39-57 at 40

[513] See Article 19 of ICCPR which provides: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (*a*) For respect of the rights or reputations of others; (*b*) For the protection of national security or of public order (*ordre public*), or of public health or morals.

such expressions that are moral, honest and candid enough to promote the goodness of humankind in both here and hereafter.

And, in exercise of the right to freedom of expression, some senseless and fatal criticisms directed against Islam and the personality of Prophet Muhammad (saw) has been perpetrated over the years. To counteract evil forces of this kind, Islamic law has provided a framework wherein Muslims are entitled to propagate their religion as well as to defend it against attack or seditious provocation. And this is so regardless of whether such provocation or insult is lunched by Muslims or by others.[514] Accordingly, any form of insult perpetrated against Islam is an unpardonable crime visited with the severest penalty that justifies taking one's life.[515]

While the Shari'ah has preserved freedom of expression, the bounds to this freedom is confined to such positive expressions that does not directly or impliedly seek to negate the truthfulness or distort the image of the religion of Islam or its eminent personalities like Prophet Muhammad (saw). This could be appreciated in instances where even when an intellectual discourse between Muslims and non-Muslims is staged, the Holy Qur'an offers an ethical standard to be observed by Muslims, i.e., all arguments should be on the footing of respect and understanding, in the best manner of approach rather than upon contempt.[516] Therefore, if anyone, whether a Muslim or non-Muslim utters insulting words against Islam, he has in reality betrayed his pledge of security with Muslims and has rendered himself susceptible to execution.

Moreover, respect for religious convictions and practices and the prohibition of acts of blasphemy is among the core elements of the right to freedom of religion under Islamic law. That is why even the modern or today's Islamic States are in their national laws reflective of

[514] Abu Zahrah, *Tanzim al-Islam li'l-Mujtama'a*, op cit, p.190
[515] Qadi Iyad, *Kitab al-Shifa bi Ta'arif Huquq al-Mustafa,* Qudes Publishers, Cairo, Egypt (4th ed., 2010) Vol. 2, pp. 261-263; pp. 275-276; pp. 294-295; pp. 301-303
[516] Qur'an 29:46; 16: 125

the concept of defamation of religion. At the inter-State level under the auspices of the Organization of Islamic Countries [OIC], the 1991 Cairo Declaration of Human Rights in Islam has also explicitly provided for the protection of religious freedom and defamation of religion has been expressly prohibited.[517] The argument for this is not far fetch, the gravity of the sensibilities (feelings) occasioned on Muslims upon any act of insult or denigration of their religion is of such a high tune as to have the capability of inciting provocation that may result in generalized tension globally. The Salman Rushdie affair, the 2005 Danish cartoon on the Prophet Muhammad (SAW) and that of the 2012 American film are typical examples. Actions of this sort are enough to be causes of jihad in Islamic law.

It is pertinent to mention here that over the past three decades, the OIC and its member States have been struggling to gain international recognition of the concept of defamation of religion under the UN human rights system to be reflected in international legal instrument. Short of being reflected in an international treaty, several Resolutions have been passed by the UN General Assembly, UN Commission on Human Rights [UNCHR] and UN Human Rights Council [UNHRC]. But on the contrary, the US and its allies remain strictly opposed to this movement on the pretext of defending liberal democracy that confers freedom of thought and expression to the individual and seeing these as an attempt to circumscribe freedom of expression.[518] The US remained totally unconcerned to the sensibilities sought to be protected by Muslims and Islamic States under the efforts of the OIC not until in the year 2012 when the US happened to be the victim of such sensibilities following the killing of its ambassador in Libya due to violence connected with the blasphemous film by an American national.

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[517] See Articles 4, 10 of the Cairo Declaration of Human Rights in Islam

[518] See International Religious Freedom Report 2009, p. 4-6. Released by the U.S. Department of State, Bureau of Democracy, Rights and Labor, Office of International Religious Freedom in coordination with the Bureau of Public Affairs, October 2009; See also the Report of the European Centre for Law and Justice (ECLJ) and the American Center for Law and Justice (ACLJ) titled *International Legal Protection of the Right to Choose One's Religion and Change One's Religious Affiliation,* September 2007 available online at http://eclj.org/pdf/070911_eclj_aclj_report.pdf

In 1999, the UNCHR received a draft resolution titled 'Defamation of Islam' from the OIC. After some amendments, this text was adopted by the UNCHR under the title 'Defamation of Religions'.[519] In 2002, the UNCHR adopted a resolution, drafted by the Organization of the Islamic Conference (OIC), representing 56 States, titled "Combating Defamation of Religions."[520] The Resolution expressed alarm at "the serious instances of intolerance, xenophobia, discrimination and acts of violence based on religion or belief in the aftermath of the September 11" attacks on the United States. The Resolution, in a variety of versions, was adopted by the UNCHR in 2002, 2003, 2004, and 2005[521] and by the UNHRC in 2006, 2007, 2008 and 2009[522] respectively. Similar resolutions were adopted by the UN General Assembly in 2005, 2007 and 2008.[523]

These UN resolutions have stated that defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of their adherents. The proponents of the resolutions have therefore argued that restrictions on freedom of expressions are necessary to ensure respect for religions; or that, in the words of Pakistan, proposing the 2009 resolution to the HRC, a "delicate balance" has to be struck between freedom of expression and respect for religions. These resolutions on "combating defamation of religions" have used a variety of other terms in describing the concept of defamation of religion that has the tendency of inciting hatred such as "negative" or "deliberate" stereotyping and the "frequent and wrongful association of Islam with human rights violations and terrorism".[524] The proponents of these resolutions argue that they will enhance freedom of religion and prevent human rights

[519] See UNHCR Resolution 1999/82 of 30 April 1999
[520] See UNHCR, 58th Sess., 39th mtg., UN Doc. E/CN.4/RES/2002/9 (2002)
[521] See UNHCR, 58th Sess., 39th mtg., UN Doc. E/CN.4/RES/2002/9 (2002); UNHCR, 59th Sess., 47th mtg., UN Doc. E/CN.4/RES/2003/4 (2003); UNHCR, 60th Sess., 45th mtg., UN Doc. E/CN.4/RES/2004/6 (2004); UNHCR, 61th Sess., 44th mtg., UN Doc. E/CN.4/RES/2005/3 (2005)
[522] See G.A. Res. 60/150; UN Doc. A/Res/60/150; G.A. Res. 61/164; UN Doc. A/Res/61/164; UN Doc. A/HRC/RES/4/9 (30 April 2007).
[523] G. A. Res. 60/150 (UN Doc. A/Res/60/150); G.A. Res. 61/164 (UN Doc. A/Res/61/164)
[524] See http://www.undemocracy.com/A-RES-62-154.pdf

violations, while critics have compared the resolutions to "blasphemy laws" that violate freedom of belief by criminalizing criticism of religion.[525]

On a critical note, blasphemy laws under a variety of names have been traditional in many countries in Europe, the Muslim World, and across many parts of the former British Empire.[526] In the Anglo-Saxon setting, the law of blasphemy was not uniformly applicable to all. In Britain, for example, the unwritten English common law governed matters of blasphemy and this applied only to protect Christianity.[527] Indeed, Britain only repealed its blasphemy law in 2008, and Ireland introduced a new blasphemy law in 2009. Blasphemy laws protect religion - almost always a single state-endorsed religion from criticism and insult. In some cases, including Pakistan and Saudi Arabia, blasphemy is still punishable by death.[528] In Nigeria, for example, the Penal Code Act,[529] the Criminal Code Act[530] and the Sharia Penal Code Laws[531] (of various States in the North that have adopted the Sharia) have accordingly provided for the prosecution and punishment of persons found guilty of committing certain religious offences inclusive of destruction and desecration of places of worship.

[525] *Mats TUNEHAG*, Global Trends, Concerns and Recommendations Regarding Freedom of Speech & Religion, World Congress of Families VI, Madrid, Friday 25th of May – 2012, pp. 1-10
[526] See The *International Religious Freedom Report 2011*, United States Department of State, Bureau of Democracy, Human Rights and Labor, pp. 1-4
[527] See R. v. Chief Metropolitan Stipendiary Magistrate, ex Choudhury, [1991] 1 All ER 306
[528] See Matt Cherry and Roy Brown, *Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy*, A Policy Paper by International Humanist and Ethical Union, (2009), p. 11 available online at www.iheu.org (last visited April 2012)
[529] Cap 345, LFN, 1990; Cap P3, LFN, 2004 – ss 210-213
[530] Cap 77, LFN, 1990; Cap C38, LFN, 2004 – ss 204-206
[531] Zamfara State Sharia Penal Code, No. 10 of 2000, sections 400-406

CHAPTER SIX
CONCLUSION

6.1 SUMMARY

This study has comparatively analyzed the interplay between the two systems of laws, i.e., Shari'ah law *vis-à-vis* international law on the fundamental freedom of the individual to freedom of religion. The Shari'ah has legally subscribes to freedom of religion, since Islam itself began by inviting and persuading people to embrace it on the merit of its rationality and truth.[532] The practice of Shari'ah law (as exhibited in the earlier state practice of the renown Islamic State in Madina in the 7th Century AD down to the former Ottoman Empire) remained one of the first legal systems in the world that portrayed regard for the rights of religious minorities within its jurisdiction in terms of religious toleration. Among the most notable differences between classical and modern interpretation on freedom of religion under the Shari'ah is that, some of the earlier writers were of the legal opinion that many Qur'anic verses which some modern-day Islamic scholars rely on as affirming freedom of religion have subsequently been abrogated or superseded by other Qur'anic verses of a more restrictive nature regarding the concept of jihad.

Chapter two has in a nut-shell, discussed the concept of freedom of religion in its Islamic law perspective. It has been identified that protection of freedom of religion in Islamic law is hinged upon certain fundamental principles that includes absence of compulsion in matters of belief. As a matter of principle, the Shari'ah reserves no right for change of religion, it therefore prescribes the punishment for an apostate and that of those who commit blasphemy against the Islamic faith. The Islamic jurists have expatiated that an act of aggression by way of apostasy committed against the religion of Islam attracts capital punishment.

[532]Qur'an 2:256

Under the Shariah, the conclusion of agreements (*Dhimma*) serves as the basis of legal relationship between Muslim authorities and non-Muslims in an Islamic State. Such a treaty relation may be built upon the contract of *Sulh* (peace agreement), *Aman* (safe conduct), *Dhimma* pact, etc., all of these forms of agreements are meant to act as sanctity against the life and property of non-Muslims in general while preserving to them their freedom of worship. These provides for unique legal relationship of peaceful co-existence among adherents of different religions specially recognized as religious communities. It is however not without certain limitations, as acts of treachery, blasphemy and defamation directed against Islam and its eminent personalities are considered to be outright breach of treaty obligation and an open declaration of hostility against Muslims, therefore justifying the use of force (*jihad*) in defence of the Islamic faith.

Freedom of religion in its Islamic context indicates the rights of non-Muslims to the practice of their religion within the territory of an Islamic State. The legal means for the realization of this freedom under Islamic law and in an Islamic State further requires the fulfillment of certain legal obligations by non-Muslims. It is understood that, while living in an Islamic State, non-Muslims are obliged to remit *Jizyah* to the Islamic authorities *in lieu* of their protection and eventual safeguard of their freedom of worship.

Chapter three provides an overview on the concept of freedom of religion in international law. This right is recognized under a range of international instruments and resolutions, including United Nations General Assembly declarations, international human rights law treaties, and general comments of the ICCPR Human Rights Committee.

It is a general rule in International Human Rights Law [IHRL] that everyone is entitled to freely practice his/her religion and observe his/her religious and cultural practices without

coercion or interference from the State and non-State actors.[533] In addition, International Humanitarian Law [IHL] under the 1949 Geneva Conventions[534] and its Additional Protocols[535] has recognized religious freedom, preserves and respects religious convictions and practices of civilians and persons *hors de combat*, persons deprived of their liberty, and grant to religious personnel (chaplains) legal protection for the conduct of spiritual activities in armed conflict. These categories of persons are collectively termed protected persons in IHL whose religious convictions, practices, manners and customs are to be duly respected and protected by belligerent parties in armed conflict. IHL has also further recognize the liberty of protected persons to the enjoyment of their religious freedom in particular, their access to places of worship and the protection accorded to places of worship against any form of attack, damage or destruction being civilian objects.

Freedom of religion in international law recognizes the ultimate right of individuals to change his religion as well as the right to its practice in teaching (proselytism), observance, practice and worship. As is evident from the preceding discussion, the right to freedom of religion provides the foundation for a human rights-based analysis of punishment of apostasy, thus castigating a non-Western legal tradition that penalizes apostasy.

[533] UDHR, Art. 2, 18; ICCPR, Art. 2, 18, 26-27; ICESCR, Art. 13; CRC, Art. 14, 30; 1951 Refugee Convention, Art. 4, 33; 1990 Migrant Workers Convention, 12; 1981 Declaration of the General Assembly.

[534]1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Articles 15(3), 17, 24, 28, 38-44, 53-54; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Articles 18(2), 36-37, 41-45; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Articles 34-37, 72, 120(4); 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Articles 17, 18-22, 23-24, 27, 38(3), 45(4), 50(3), 58, 59, 76(3), 86, 93, 108, 130(1), 142.

[535]Additional Protocol I relative to the Protection of victims of international armed conflicts, Articles 8(1), 15(5), 18(4), 34, 38, 48, 51(4), 53, 57, 69, 70, 75(1), 78(2), 85(3)(b) & 85(4)(d); Additional Protocol II relative to the Protection of victims of non-international armed conflicts, Articles 4(1) & 4(3)(a), 5(1)(c), 16.

While the right to freedom of religion is a fundamental human right as expressed in Article 18 of the ICCPR, this right is not absolute.[536] In the case of the freedom to manifest ones religion or beliefs, this right may be subject to such limitations as are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.[537] But as far as international law is concerned, such limitations do not include a right to take measures to punish those who exercise the right to freedom of religion by changing or abandoning their religion.[538]

UN human rights bodies have adopted the view that the punishment of persons who depart from Islam cannot be reconciled with fundamental human rights standards. The Human Rights Committee's General Comments on the ICCPR states that all human beings, regardless of who they are and where they live, have the right to:

> … choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views ... Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, 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.[539]

The Human Rights Committee has also made clear that the ICCPR does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference from the State.[540] This bold statement is meant to counter the practice of Muslim States in this regards where change of religion is visited with criminal sanction, i.e., death penalty.

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[536] Baderin, M. op cit., *at* 124,
[537] See Article 18(3), ICCPR
[538] See section 126 of the *Sudan Criminal Act* 1991, which recognizes the crime of apostasy as punishable by death. Sudan has explained this law by stating that those who commit apostasy are a danger to the fabric of society and are akin to traitors. See UN Doc\A\46\40 (1991), p127.
[539] Human Rights Committee, General Comment No. 22, para. 5; See also UN Doc No. E/CN.4/2005/61,para 47.
[540] Ibid, at para . 3.

6.2 OBSERVATIONS

From the foregoing discussions, the following observations have been decisively noted and recommendations thereto accordingly submitted. Principally, the discussion so far discovered that:

6.2.1 IT IS ISLAMIC RULE AND ONLY IT THAT QUARANTEES FREEDOM OF RELIGION FOR NON-MUSLIMS IN AN ISLAMIC STATE

It is observed that as at the time when Islamic law set global example on religious freedom protection, the system of government in operation was neither democracy, socialism nor communism but the Islamic system of administration. Thus, the Islamic framework of tolerance is indispensably allied to Islamic Rule. Even though the Islamic *Dhimmi* system coupled with the legal obligation of the payment of Jizyah is among the prerequisite legal conditions that assures freedom of religion in an Islamic State under Islamic Rule while administering the Shari'ah, it was such a system that has practically guaranteed religious minorities their fundamental rights in Muslim lands from 7th Century down to the fall of the Ottoman Empire in 1924. Notwithstanding contemporary criticisms directed against the *Dhimmah* system along with the attendant Jizyah obligation, a return to this classical legal arrangement under Islamic law is indispensable for the protection of the religious freedom of non-Muslims in Islamic countries. The then Islamic State of Medina under the reign of the Prophet (saw) and under the four rightly-guided Caliphs down to later Muslim dynasties has set the example worthy of emulation. The leadership provided by these earlier muslim generations largely characterize the Islamic system as the most tolerant one amidst other legal systems in history. Therefore, a return to the Islamic *Khilafah* system whereby a complete administration of Shariah law is maintained is crucial to the protection of freedom of religion of non-Muslims and/or minorities living in Muslim countries.

6.2.2 SELECTIVE USES OF ISLAMIC PROOFS TO JUSTIFY "CHANGING ISLAMIC LAW [ON FREEDOM OF RELIGION] FROM WITHIN"

It is observed also that, there exists in the present generation, a widespread selective use of evidence in a negative and misrepresentative form among modern writers on the subject of freedom of religion from the Islamic law perspective which is meant to justify reinterpretation of Islamic law. To mention one prominent example, it is asserted using some evidences from the Qur'an and Hadith in neglect of other evidences to say that nowhere does the Qur'an mentions temporal punishments for apostates, thus tending to establish the illegality and inappropriateness of Islamic criminal law in punishing apostates, an assertion contrary to its established legality in the *Sunnah* and practices of the Muslim caliphates. Some uses are in the context of senseless criticisms against the Shariah while others are in the context aimed at pleasing the West and "changing Islamic law from within". Selectivity and reliance not only on minority but feeble interpretations to justify, by all means, the parity of Shariah with the legal norms of secular international law on the subject of freedom of religion. The result is the drawn line of demarcation between liberal and extremist interpretation of Islamic law as it ought to be, the attendant consequences being upsetting the application of Islamic law in Muslim countries. This negative approached by the so-called liberal Muslim scholars as agents of the West is backed by the effort towards re-interpretation of Islamic law to be in conformity with Western ideals (using some unscrupulous Muslims from within and non-Muslim legal writers alike) rather than presenting Islamic law as it is (known in Islamic jurisprudence) but as it ought to be. This attitude among scholars has hampered the proper understanding and appreciation of the peculiarities of the Islamic concept of freedom of religion. Such scholars of the kind invoke the law (Shariah) in piecemeal fashion without due attention to the details embedded in complex legal argument surrounding a particular principle of the law nor taking onboard the spirit (*maqasid*) of the Shariah in their discussions. The ultimate result is thus, misrepresenting Islamic law as inappropriate to the modern time and

impractical to govern humanity. Further still, such consequences include dislodging the expected dialogue that might be attained between Islamic law and international law.[541] This has been a blatant revisionism effort against the Shariah. To cite an example, the writings of some of these so-called Islamic scholars are therefore indicative of this approach, e.g., Javaid Rehman;[542] A. A. An-Na'im;[543] Majid Khadduri;[544] M. H. Kamali;[545] Bassiouni;[546] etc.

6.2.3 EXISTENCE OF THE FALLACY OF "UNIVERSALISM" AND "WESTERN MONOLITISM" IN THE IDEA OF FREEDOM OF RELIGION IN INTERNATIONAL LAW

It is also observed that, there exists widespread predominance of Judeo-Christian tradition (monolithic Western conception) in the idea of freedom of religion in international law. Given the complexity of human existence and the rich diversity of religious and cultural traditions that have developed on this planet, it is hard to believe that any one legal tradition, in particular, that international law has found all the answers, i.e., it has developed an exhaustive set of all the best legal tools for dealing with all the complex facets of the human condition as it pertain to freedom of religion.

The scramble for membership to the international community of states under the UN system by non-Western countries, in particular, Islamic countries had the effect of bringing with them

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[541] Maurits Berger, *Islamic Views on International Law*. In: Meerts, P. (ed.) *Culture and International Law*, Hague Academic Coalition, Hague, Netherlands (2008) p. 107

[542] Rehman, J. Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities, *International Journal on Minority and Group Rights* (2000) Vol. 7, pp. 139 – 65 at 51; Shaheen Sardar Ali and Javaid Rehman, The Concept of *Jihad* in Is lamic International Law, *Journal of Conflict & Security Law* (2005), Vol. 10 No. 3, 321–343

[543] An-Na'im, A. A. *Toward An Islamic Reformation: Civil Liberties, Human Rights, And International Law*, Syracuse University Press, (1990) p.; An-Na'im, A. A. The Future of Sharia and the Dabate in Northern Nigeria In: Ostien Phillip, Jamila M. Nasir and Franz Kogelmann (eds.) *Comparative Perspectives on Sharia in Nigeria*, Spectrum Books Ltd., Ibadan (2005) pp. 327-357; AA An-Na'im, Religious Minorities under Islamic Law and the Limits of Cultural Relativism *Human Rights Quarterly* (1987) 9 p. 1

[544] Majid Khadduri, *War and Peace in the Law of Islam*, Baltimore, MD.: Johns Hopkins University Press, (1955), p. 51; Majid Khadduri, Islam and the Modern Law of Nations, *American Journal of International Law*, (1956), Vol. 50, No. 2, p. 359.

[545] Kamali, M. H. *Freedom of Expression in Islam*, Islamic Text Society, London (1996) p. 87

[546] Bassiouni, M. C. Protection of Diplomats Under Islamic Law, *American Journal of International Law*, (1980) Vol. 74, p. 609. Available online at http://www.jstor.org/pss/2201651

a wide variety of religious and cultural traditions quite distinct from that of other nations.[547] It is thus argued that, in view of these developments, and should the international community be receptive of diversity, it could have since paved the way for changed circumstances as to render it imperative, a shift in international law conception of freedom of religion from its dominance of Judeo-Christian tradition to that of multicultural religious traditions, to which Islamic law is one system to be reckoned with.

Thus, contrary to the widely proclaimed vision of the "universalism" of human rights, the international community of States are yet to attain any universal consensus on the standards of religious freedom applicable globally due partly to the realities of Western-Islamic worlds dichotomies regarding the rejected notion of the right to change religion, equality among all religions, secularism and its norms of Church-State separation and the concept of fusion of law and religion obtainable in Islamic law. Therefore, the articulation of the principles of international law as contained in Articles 18 of UDHR and ICCPR as forming universal standard for the international community is far from reality. The inconsistent 'state practices' of some States especially resort to the use of cultural relativism with respect to their human rights practices; objections by some Muslim States (by way of reservations) to certain human rights provisions envisaged in international bill of rights including Articles 18 and even non accession by some States mainly for incompatibility with the *Shari'ah* are issues at point. Further to this, the presence of 'state religion' in some States operated as a hindrance to the attainment of global standards on religious freedom, as the religious views of the majority is always having some special status over that of minority religions in such States**.** This is further buttressed by the elements of politics or political tests applied by some States in their

[547] See for example, Mark W. J. and Carolyn E. (eds.) Religion and International Law, Martin Nijhoff Publishers, Boston, (1999) pp. 321-322

proclamation of religious freedom.[548] Conflicts of interests of these kinds make religious freedom policies vulnerable to instability whenever political waves changes to reflect current political ideology and propaganda of a particular religious or secular group.

6.2.4 WHILE INTERNATIONAL LAW REMAIN PURELY SECULAR IN CONTENT, SHARI'AH IS FOREVER AN EMBODIMENT OF LAW AND RELIGION

It is observed that the shari'ah is an embodiment of law and religion, therefore supportive of the idea of "state religion" within Islamic framework. As for the Muslims, religious freedom is the right to live as a Muslim, not just in private affairs, but also in public ones. It is for the preservation of this right that the Muslims must undertake jihad against any form of religious persecution that entail denial of their fundamental right to the practice of their religion. To this end, the notion of separation of law and religion, thereby making law the concern of the State and religion within the realm of private domain of the individual is against the dictates of the shari'ah. The Islamic fusion of law and religion is fundamentally among the unique characteristics of the shari'ah. This unique feature of Islamic law is what, in our view, would mandate Muslims especially in Nigeria, to strongly reassert their legal right of self-determination to the full application of shari'ah against the now existing *Kufr* system whereby Islamic law is relegated to the perils of *customary law*[549] and further reduced within the ambit of personal status.[550] Additionally, the arguments by proponents of re-interpretation of Islam as to shariah being amenable to change to embrace modern Western democracy whereby a

[548] For example, the U.S. since 1998 (and now Canada) proclaims protection of freedom of religion as part of their foreign policy objectives. US in particular have in 1998 passed the *International Religious Freedom Act* imposing upon itself the mandate of monitoring religious freedom violations globally.

[549] But thanks to the efforts of some legal luminaries in Nigeria whose essay has started to influence a change in public perception about "Islamic law" as an independent legal system away from the so-called customary law. See for example, Sa'adu, Y. K. "Islamic Law is NOT Customary Law", *Kwara Law Review*, (1997) Vol. 6, pp. 136 – 150; Aboki, Y. "Does the Definition of Customary Law include Islamic Law?" *Al-Nur (The Light)* (1999) Vol. 1, pp. 67–89; Kelani, L. A. "Islamic Law and the Customary/Native Law: A Line of Distinction", *Unilorin Shariah Journal*, (2000) Vol. 1, pp. 43 – 55 and *Oba, A. A.* "Religious and Customary Laws in Nigeria" *Emory International Law Review*, (2011) Vol. 25, pp.881. See also Alkamawa v. Bello (1998) 6 SCNJ 127

[550] See Sections 262 & 277, Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011) which limited the jurisdiction of the Sharia Courts of Appeal to Islamic personal status only.

wall of separation between law and religion is indispensable is against the spirit of the shari'ah let alone to be allowed to stand or gain ground as a constitutional arrangement in Muslims' lands but to be vigorously fought to the latest possible means – a legal task incumbent upon Muslims. The presupposed religious pluralism sought to be adopted in the Nigerian Constitution out of Western model of secularism is not only detrimental but oppressive to Muslims in Nigeria, as it demanded for the Muslims a sacrifice of vital aspect of their faith (the Sharia) in the pretext of coexistence.

6.2.5 *PRACTCE OF SHARIAH FORMS THE RELIGIOUS FREEDOM CONCERN FOR MUSLIMS BEFORE THE INTERNATIONAL COMMUNITY*

The legal quest for the application of shariah forms the principal religious freedom concern for Muslims before the international community. Shari'ah defines Muslims' way of life. The struggle for this freedom was evident from the various movements for the (re)introduction of Islamic law otherwise termed by the West as Islamization in some Muslim countries. The Iranian revolution, the idea of setting up Islamic regime in Afghanistan, Pakistan, Sudan, Somalia, Nigeria, etc., are some examples. More so, even in the West, movements for the legal recognition of the application of the rules of the shariah to Muslims as an alternative to Western legal systems is not only underway but getting rooted in UK, Canada, etc., where in the name of freedom of religion, Muslims have demanded Islamic family arbitration, Islamic banking, *Halal* meet and slaughter houses, etc. Additionally, the approach of Cairo Declaration of Human Rights in Islam and that of Universal Islamic Declaration establishes subjecting human rights to the sovereignty of Shari'ah law.[551]

[551] See Articles 23 & 24 of the Cairo Declaration of Human Rights in Islam

6.2.6 PROTECTION OF MUSLIM'S RIGHT TO FREEDOM OF RELIGION JUSTIFIES THE USE OF FORCE (JIHAD) IN DEFENCE OF ISLAM

Additionally, freedom of religion in its Islamic context is an integral aspect of the Islamic law of war and peace to the extent that acts of persecution directed against Muslims is by itself a justification for a resort to jihad (the use of force) under Islamic law to defend the religion of Islam. Thus, the justification for jihad in Islamic law has evolved around protecting the freedom to practice, apply and preach Islam. This being the case, it is observed that there exist an impressing need for the international community to recognize resort to jihad as the Muslim's perspective and/or legal basis for humanitarian intervention by the use of force for the preservation and protection of their fundamental freedom to the practice of the Shariah in the contemporary setting.

6.3 RECOMMENDATIONS

6.3.1 *RETURN TO ISLAMIC KHILAFAH SYSTEM BY ISLAMIC COUNTRIES*

True religious freedom can only obtain under Islamic Rule (*Khilafah System*), for it is only under a Rule according to the dictates of the Shari'ah that people other than Muslims within the Islamic State will be allowed to follow their own creeds under a special arrangement of a treaty (*Sulh*), *Dhimma* pact, safe conduct (*Aman*), etc. Therefore, employing the process of self-determination, Muslims must unite themselves and seek a return to the Islamic *Khilafah* system whereby the Islamic framework of religious accommodation avails Muslims of the liberty to the full implementation of the Shari'ah and for non-Muslims of the freedom to practice their religion. The presently existing Organization of Islamic Countries [OIC] should be revived by Muslims and Islamic countries towards strengthening the goals of establishing Islamic *Khilafah* system in Islamic countries independent of any alliance with other un-Islamic intergovernmental organizations.

6.3.2 HOLISTIC APPROACH TOWARDS RESEARCH AND SCHOLARSHIP IN THE FIELD OF ISLAMIC LAW

Holistic approach towards undertaking research and scholarship in the field of Islamic law is indispensable for the attainment of harmony and universalism in the articulations of the norms of freedom of religion for the international community. Public international institutions and organizations, the media (local and international) should remain neutral in their reporting and documentation of religious issues across the globe and not be agents of propaganda, Xenophobia and Islamophobia as these institutions did have a role to play in either preventing or exacerbating instances of religious hatred, incitement or even violence. The practice of concealing the elegance and considerably rich culture of tolerance and accommodation known with Islamic tradition and capitalizing on stereotypes and prejudices motivated by Western imperialism trying to inject westernization on Muslims is highly awful and shall imperatively be desisted if parity of international law and the Shariah is ever desired to hold sway. The practice whereby Islamic countries are tagged as countries of particular concern on religious freedom violations or an instance whereby Islam as a religion is associated with violence is offensive and shall be stopped.

6.3.3 ***REMEDYING THE FALLACY OF UNIVERSALISM NECESSITATES DEPARTURE FROM THE CURRENT JUDEO-CHRISTIAN CONCEPTION IN THE IDEA OF FREEDOM OF RELIGION TO DUE RECOGNITION OF SHARI'AH AS A NON-WESTERN CULTURE AND LEGAL TRADITION***

Although it may seem indiscreet to assume that there are no commonalities between diverse traditions, universal human rights related to freedom of religion is only possible, if the concept of universalism takes cognizance of other non-Western legal, cultural and religious traditions, in particular the Islamic particularism (the Sharia). If the international community is serious about protection of freedom of religion globally, it must maintain concern and take further steps to recognize the relevance and role of Islamic legal system within international human rights discourse as an alternative to the Western dominated international law. Viable

solutions to the persistent international problems related to freedom of religion need therefore compel recourse to other legal systems and in particular, the Islamic law perspective as an alternative solution for humanity. As Islamic law have, in both theory and practice, demonstrated its commitment to the protection of legal rights of religious minorities – a framework that recognizes diversity of faith communities centuries before the development of the current international legal order.

As described throughout this work, the so-called right to change religion as the *litmus test* behind freedom of religion remained a rejected ideology in Islamic law and therefore strongly denounced by ever conscious Muslims and Islamic States because it conflicts with Islamic religious and cultural traditions.

In the interim, some two principal courses of action are, in our view, open to Muslims and Islamic states in dealing with situations of this kind about securing the role of sharia within the international community. First, Muslims and Islamic states shall consistently demand for the interpretation of international legal provisions on freedom of religion as supportive of group right to self-determination on the basis of religious identity. Secondly, Islamic countries and Islamic organizations should further emphasize on non-ratification of international treaties that are inimical to Islamic law or, at least, setting forth reservations on aspects of the law (e.g. Articles 18 of the UDHR and ICCPR) that contravenes the established principles of the Sharia. This is because, while ratification or accession to an international treaty is consensual, observance of its attendant legal obligation is beyond the consensual desires of a state party. The implications of any proposed treaty at the international level shall, first of all be digested by Muslim experts and the result of their findings timely communicated to the *ummah* for their immediate (re)action. In this connection, the practice of Saudi Arabia in refusing to sign the UDHR is applaudable and Muslim countries should emulate this practice.

6.3.4 EMBODIMENT OF LAW AND RELIGION IN SHARI'AH IS IMMUTABLE, THEREFORE, THE SHARIAH NEEDS NO REFORM AS THERE HAS NEVER BEEN A COMPLETE SEPARATION OF LAW FROM RELIGION EVEN IN WESTERN SOCIETIES

History has it that even in Western societies from antiquity to current modernity amid various historical transformations, some of which have been revolutionary, law and religion have never been completely separated. They have never been so independent as to achieve complete autonomy from each other. Religion has essentially been embodied in modern legal systems, even in those that have aspired to privatize religion. Religions are therefore embedded in daily practices in various regions, from the Middle East through Africa to Europe, from Latin America to North America and Asia, in Western regimes and post-communist regimes alike. It would therefore remain outright hypocrisy for international law (and international law scholars) to require ascendancy of international law over religious laws, in particular the Shariah by seeking its reinterpretation.

Therefore, it is submitted that maintaining the Islamic tradition of fusion of law and religion is indispensable for the attainment of cross-cultural dialogue necessary for identifying common grounds between the two systems of laws now and in the nearby future. Any attempt or project whose theses is short of recognizing this basic truth about Islamic law is misleading and thus bound to fail. In line with this, Muslim countries and Muslim scholars should endeavor to strive consistently to resist international call for reform of their laws to be in conformity with the so-called international standards thereby engineering movements for the reinterpretations of Islamic law by way of legislative reforms. These efforts are partly in response to the perceived threats posed by Islamic law to the universal validity of some articulated international human rights (in particular freedom of religion). In view of the divine and immutable character of Islamic law especially on matters of faith, the possibility of its reformation is quite untenable to hold sway for secular international standards. On other hand,

in view of the positivistic nature of international law, Muslim scholars and States shall emphasize on the amendment of rules of international on freedom of religion to suit the particularities of the Sharia as a precondition for its acceptance by Muslims. Otherwise, such rules of international law shall be considered as mechanisms meant to countenance Islamic law and thus to be vigorously disputed, e.g., the ideology for the abolition of the death penalty wherein apostasy and blasphemy attracts death penalty in Islamic law.

6.3.5 W*HEN IN THE STATUS OF MINORITIES, MUSLIMS SHOULD EMBRACE FREEDOM OF RELIGION IN ITS INTERNATIONAL LAW PERSPECTIVE AS A SHIELD AS WELL AS A SWORD*

Muslims and Islamic countries should see freedom of religion in its international law perspective as both a shield and a sword. When in the status of minorities, Muslims should embrace Freedom of Religion in un-Islamic environments as a sword that would fight for their shield from getting atheistic beliefs and practices been imposed on them. Thus, if carefully and consistently activated by Muslims especially those living in the West as minorities, freedom of religion in its international law conception could serve as a sword to advance the struggle for the legal recognition and application of rules of shariah as a matter of religious freedom in non-Muslim majority countries. To achieve this, it requires an aggressive and systematic effort against possibility of double standard from being played against Muslims especially as minorities. It is the case in the European Union that the European Court of Human Rights [ECtHR] always turndown applications by Muslims seeking to protect their freedom of religion under Article 9 of the European Convention. Several cases of the ECtHR jurisprudence lend credence to this criticism and mean a lesson to Muslims.

6.3.6 PROTECTION OF FREEDOM OF RELIGION IN ISLAMIC LAW JUSTIFIES HUMANITARIAN INTERVENTION BY THE USE OF FORCE

While in the idea of international law, humanitarian intervention by the use of force is legitimate for the protection of fundamental rights and freedoms, as it has been earlier noted that the practice of the Shariah forms the fundamental rights and/or freedom for concern to the Muslims before the international community, it is thus submitted that, Muslims as well as Islamic States as members of the international community has every right to embark on jihad to stop religious persecution of Muslims and to prevent violations of the Shariah in Muslim countries.

Therefore, if the protection of human rights and fundamental freedoms can justify humanitarian intervention by the use of force in international law, and if protection of freedom of religion in Islamic law justify the use of force under Islamic international law (*as-Siyar*), then, the writer is of the view that Islamic countries as members of the UN has the legal foundation to embark on unilateral humanitarian intervention by the use of force in defence of Islam even extraterritorially for the preservation of the integrity of the Shariah before the international community. In instances of widespread religious persecution of Muslims, as in Palestine, there may well be no help unless help comes from outside. This option should be seen as an extension of the exception to the use of armed force embodied in Articles 2(4) and 42 of the UN Charter, in that, a situation of gross human rights abuses perpetrated against Muslims shall be viewed as a threat to international peace and security and therefore justifying international humanitarian intervention as a response to such a threat. This is one way of bypassing the practical impediment of UN Security Council authorization without violating international law.

5.4 CONCLUSION

The overall analysis carried out in this research work indicates that both Islamic law and international law has recognized the value of protecting freedom of religion as a legal right. At the heart of religious freedom lies two important virtues, tolerance and non-discrimination (neutrality). Should these two virtues be found adequately in place in any political setting, a much more positive expectation is that sufficient degree of religious freedom exists, otherwise whatever kind of legal framework, policy or legislation that obtains for religious freedom purposes in a given State, it would remain a lip service if not a mere political propaganda. Allied to this, is that the protection of the rights of religious minorities remain a cornerstone and topmost issue of concern and challenge before the international community of States in the current wave over the international protection of religious freedom. In many armed conflicts in which gross and systematic violations of religious freedom is perpetrated, religious minorities are mostly the most affected victims of such violations.

Experience has shown that men of different creeds can live together peacefully if each is allowed to live by the religious faith each thinks right and no coercion against religious beliefs is attempted. Thus, denials of religious freedom always result in religious crisis which breeds loss of lives and limbs. This poses a negative impact on international community's concern over the attainment of global peace and security a condition relative to the protection of fundamental rights and freedom for all without distinction including on religious grounds.

Issues that has to do with religion or beliefs and the right thereto are as fundamental in the minds of believers as his/her life that humankind always portrays sacrificing sacrosanct life than his individual belief. This stance has over the years costs many lives than one could ever imagine in the past religious wars over the centuries. This has eventually culminated in to the adoption of secular footing by modern States on religious matters and an explicit recognition of freedom of religion for all without (at least in theory) any form of discrimination. It was for

these reasons that certain legal regimes at the international level recognize the fundamental nature of freedom of religion as to permit no derogation even in extreme situations of emergency or armed conflict. This is in view of the sensitive and delicate capability of religion, to either bridge together or break apart any society; and unless reduced within the bounds of law with adequate care and attention by State authorities in seeing to the practical realization of the religious rights of all individuals within its boundaries, at both times of peace and armed conflict, global peace and security would continue to be threatened by forces fuelled by religious anxieties plus the possibility of reoccurrence of the bitter and conscience shaken past experiences.

Thus, as the international community of States has not yet tackled issues of 'state religion' and 'established church' found in some States, then the viability of an international standard on freedom of religion is hardly attainable as 'state practice' will always depict the contrary.

However, long lasting solution and progress would be recorded by the international community in matters of freedom of religion or belief if States open the door and submits issues of religious freedom to the domain of religious pluralism through the mechanisms of inter-faith dialogues while recognizing the deep cultural and legal diversities existing within various nations. Moreover, the sooner some States give up political derives and imperialistic foreign policies and pave the way for neutrality to reign in their recognition and response to the diverse cultures and civilizations of the world, the more chances of success towards global religious freedom manifestation would be attained by the international community in both time of peace and war and the less outrageous would forces of religious intolerance and discrimination persist.[552]

[552] For example, United States was known to be promoting religious freedom as the antidote to religious extremism and terrorism, and thus its promotion in parts of the world where intolerance is

The Shari'ah is to some extent, compatible with the modern day human rights norms that relates to freedom of religion but that the Shari'ah being a divine law, is opposed to any form of positivistic approach to law reform so far as the immutable aspects of the Shari'ah is concerned, of which aspects of freedom of religion is inclusive. So, under the Shari'ah, no form of *Ijtihad* (deductive reasoning of individual Islamic jurist) could be performed on matters of creeds as to contradict or derogate from the divine sanctity of the Qur'anic and prophetic injunctions just on mere pursuit of embracing modernity or pleasing the West. Pertinent to this, the inherent fusion of law and religion (Church and State) in Islam amplify the stance of Shari'ah in rejecting any legal development in the world today that explicitly or implicitly contravenes the philosophy the Shari'ah itself. So therefore, modern movement for the incorporation of human rights norms by Muslim States in their legal structures would remain quite opposed by Muslims as incompatible with Islamic law.

Finally, members of different creeds would religiously live together peacefully in both the times of peace and in times of armed conflict, if each is allowed to hold unto the beliefs he/she thinks fit or right without the least measure of coercion from any authority. While international law recognizes both freedom of religion and freedom from religion, Shari'ah upholds freedom of religion alone. As international law developed upon secular footing and principles and remained indifferent to the promotion of any religion, Shari'ah law is unique in its embodiment of both secular and divine conception to which law and religion or 'Church and State' are one and the same institution under the guidance of divine entity as far as the Shari'ah is concerned.

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ripe, is vital to America's national interests. See Farr, Thomas F. "Diplomacy in an Age of Faith." A Lecture to the Ethics and Public Policy Center, May 6, 2008. Available at: http://www.eppc.org/docLib/20080506_Farr_EPPC_transcript111.doc

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