

**THE RIGHT TO RELIGIOUS  
FREEDOM UNDER INTERNATIONAL  
HUMAN RIGHTS LAW AND ISLAMIC  
JURISPRUDENCE:  
A RE-INTERPRETATION**

*Doctor in Philosophy  
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2022*

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## DECLARATION

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Sahar Ahmed, PhD in Law, 2022

## SUMMARY

This thesis examines the Right to Freedom of Religion under the International Human Rights legal regime and Islamic jurisprudence. It does so in order to highlight the shortcomings of the way this right is interpreted under both systems, leaving religious minorities disadvantaged and further marginalised.

The thesis is divided into two sections; Section One on International Human Rights Law and Section Two on Islamic Law. The first section is further divided into three chapters. Chapter 1 provides an overview of the *status quo* and the different legal mechanisms and instruments that exist within the international human rights framework, which cover and protect the Right to Freedom of Religion. It gives a brief account of the history of the evolution of the right in what we know as the 'Western world', analysing various historically important moments that contribute to the international legal development of the right's main defining features. Chapter 2 goes on to examine the way the right is interpreted and adjudicated by the European Court of Human Rights and the Human Rights Committee, and contextualises the current judicial treatment of Article 9 of the European Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights, respectively. It specifically focuses on cases involving Muslim women and their right to veil, and uses cases involving Sikh men and their right to wear turbans as a manifestation of their religion, as comparators due to the similar racialisation and 'othering' the two communities face. The conclusion the chapter reaches is that the 'secular' system of rights is in fact, not so secular after all, because its conception of 'religion' is highly influenced and informed by liberal Protestant Christian ideals of 'faith' and its 'appropriate' manifestation, with overt expressions of faith are seen as unnecessary in some cases, and secondary to national narratives, in others. Chapter 3 proposes a solution to this problem by suggesting that that we go back to the intention of these international treaties and look at the *travaux préparatoires* and seeing that even though a very specific kind of Christianity is infused in the way EU and the West currently think of and adjudicate on religion, the intention of the drafters was always for plurality, equality, and the protection of people belonging to religious minorities. Section 1 is, therefore, suggesting to go 'back to the source' as an approach for reform.

Section 2 is divided into two chapters. Chapter 4 explains what Islamic Law is and what

the terms '*Shari'ah*' and '*fiqh*' mean, and why these definitions are important for the advancement of this thesis. It then explains some of the contemporary understandings of religious freedom and the rights of religious minorities found under Islamic jurisprudence, and why those are problematic. It illustrates that Islamic Law is not, as it stands, particularly well-equipped to harmonise with International Human Rights Law, in general or on freedom of religion, in particular. Current interpretations of Islamic jurisprudence do not align well with modern conceptions of equality, justice, and rights, and merely waxing lyrical about Islam's glorious past will not alleviate the very real oppression being faced by religious minorities in Muslim majority countries, today. Chapter 5 then goes on to suggest a way of reinterpreting the right of religious minorities under Islamic Law by, once again, going 'back to the source', in this case, the Qur'an. Chapter 5 goes to great pains to explain that plurality and justice and fairness are at the heart of the Qur'anic injunctions of religious freedom and rights of religious minorities.

The thesis, therefore, concludes that neither is the International Human Rights system on the Right to Freedom of Religion perfect, nor is the one found under Islamic *fiqh*. Both systems are flawed, but both systems are also just different from one another. The thesis proves that both systems are, by their own admissions, falling short and need significant reform for their own sakes and their own internal functioning in a modern world. And thus the thesis is identifying a way of reform, which if done along particular lines, not only results in two more robust, healthy legal systems that adhere more honestly to the tenets of their foundational texts, but also results in systems that are suddenly better-equipped to cooperate. This cooperation would require significant political will but could in theory increase Muslim postcolonial people's trust of and active participation in a more equitable International Human Rights legal regime, but also would remove one big source of plausible deniability for States whose governments/leaders dishonestly use Islam and cultural relativism as an excuse for failing their citizens in regards to their human rights.

## DEDICATION

*Alaisallahu Bi Kafin Abdahu*

*Is not Allah sufficient for His servant? (Qur'an 39:36)*

Indeed, my faith leads me to believe He is and will be when I find myself alone and wanting. But I am blessed to have never needed to find out. I have never been alone or wanting, for my parents have always been with me, by my side.

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- UNHCR, Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, Mission to Vietnam, A/HRC/28/66/Add.2
- UNHCR, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, E/CN.4/2006/5
- UNHCR, Report of the Special Rapporteur on the implementation of the Declaration on the Elimination of all forms of intolerance and of discrimination based on religion or belief: visit to the Islamic Republic of Iran, E/CN.4/1996/95/Add.2
- UNHRC, ICCPR: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, France, CCPR/C/FRA/CO/4
- UNHRC, ICCPR: General Comment No. 34 CCPR/C/GC/34.
- Vienna Declaration and Program of Action (A/CONF.157/23 1993)

### **Regional Human Rights Bodies Documents**

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (Copenhagen 1990)

- Document of the Thirteenth Meeting of the Ministerial Council (Ljubljana 2005), Decision No 10/05 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding
- Document of the Fourteenth Meeting of the Ministerial Council (Brussels 2006), Decision No 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding
- OSCE 'Freedom of religion or belief' <<https://www.osce.org/odihr/freedom-of-religion-or-belief>> accessed 28 September 2021.

### **National Legislation**

#### *France*

- Constitution of the Fifth Republic, 1958
- Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat.
- Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.
- Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.

#### *Nigeria*

- Zamfara State of Nigeria Law No.6 of 8 October 1999.

#### *Pakistan*

- The Constitution of Pakistan, 1973
- Enforcement of Shari'ah Act, 1991
- Constitution (15<sup>th</sup> Amendment) Act, 1998

#### *United Kingdom*

- Act of Uniformity, 1662
- Employment Act, 1989

## INTRODUCTION

The last few months alone of this thesis being completed saw such a flurry of development related to the subject of ‘freedom of religion’ that anyone keeping track would be justified in thinking this is an extremely unwieldy topic. On the 7th of March, 2021, Switzerland voted in favour of banning face coverings, including the wearing of the *burqa* and *niqab*, in public, following a referendum which saw campaign posters reading ‘Stop radical Islam!’ and ‘Stop extremism!’ featuring a woman in a black *niqab*.<sup>1</sup> Not too far from Switzerland, France passed the ‘Anti-Separatism Act’ to ‘battle Islamist extremism’<sup>2</sup> in July, 2021, which amongst other things facilitates the suspension or closure of Islamic private schools and severely restricts home-schooling, which *de facto* forces Muslim parents to send their children through the public secular education system where overt religious symbols like the headscarf are forbidden. It targets Muslim-run NGOs and forces organisations seeking public funds to sign a ‘Republican contract’, agreeing to abide by the country’s *laïcité* secularism.<sup>3</sup> And this is the ‘watered-down’ version of the Bill which was initially introduced to the French Senate,<sup>4</sup> which sought to also ban girls under the age of 18 from wearing the *hijab* in public spaces (which if passed would have been just the most recent in a number of legislative measures introduced in France to curtail Muslim women’s clothing).<sup>5</sup>

In the midst of all this, the European Union’s Court of Justice passed a judgment<sup>6</sup> which held that ‘a prohibition on wearing any visible form of expression of political, philosophical or religious beliefs in the workplace may be justified by the employer’s need

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<sup>1</sup>‘Swiss voters back proposal to ban full-face veils in public places’ *France24.com* (7 March 2021) <<https://www.france24.com/en/europe/20210307-swiss-vote-on-proposal-to-ban-full-face-veils-in-public-places>> accessed 20 September 2021.

<sup>2</sup>‘France’s lower house approves anti-separatism bill to battle Islamist extremism’ *France24.com* (23 July 2021) <<https://www.france24.com/en/live-news/20210723-france-s-lower-house-approves-separatism-law-to-battle-islamist-extremism>> accessed 20 September 2021.

<sup>3</sup>‘France’s anti-separatism bill deemed constitutional with only minor changes’ *RFI.fr* (14 August 2021) <<https://www.rfi.fr/en/france/20210814-france-s-anti-separatism-bill-deemed-constitutional-with-only-minor-changes-islamism-secularism>> accessed 20 September 2021.

<sup>4</sup>‘L’interdiction du port du voile par les mineures dans l’espace public votée par le Sénat’ *Public Senat* (31 March 2021) <<https://www.publicsenat.fr/article/parlementaire/l-interdiction-du-port-du-voile-par-les-mineures-dans-l-espace-public-votee>> accessed 20 September 2021.

<sup>5</sup>RA Costello and S Ahmed, ‘Privacy at the Margins: France’s New Ban on the Hijab’ Oxford Human Rights Hub Blog (16 April 2021) <<https://ohrh.law.ox.ac.uk/privacy-at-the-margins-frances-new-ban-on-the-hijab/>> accessed 20 September 2021.

<sup>6</sup>Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ* (Grand Chamber, 15 July 2021)

to present a neutral image towards customers or to prevent social disputes'.<sup>7</sup> This justification was limited by specifying that it 'must correspond to a genuine need on the part of the employer and, in reconciling the rights and interests at issue, the national courts may take into account the specific context of their Member State and, in particular, more favourable national provisions on the protection of freedom of religion.'<sup>8</sup>

Elsewhere, in the Muslim-majority world, August 2021 saw the Taliban come back into power in Afghanistan after the withdrawal of the American and other NATO forces, signalling the start of a crisis for gendered and religious minorities. The news was full of stories of people trying to escape the country, and the accounts of Hazara Shias, an ethnic and religious Afghani minority who have faced horrific persecution at the hands of the Taliban in the past, were particularly poignant.<sup>9</sup> Unfortunately, thousands of them crossed over into Pakistan, which has its own chequered history in terms of how its Hazara Shias have been treated,<sup>10</sup> along with other religious minorities. A report from July of the same year claimed that there has been a further increase in the persecution faced by Ahmadi Muslims in Pakistan, with a spike in killings and blasphemy charges levelled against members of the religious community.<sup>11</sup>

This is all to say that this is a particularly fraught time for religious minorities. In Europe and much of the 'Western' world, where secular laws and rights and freedoms are supposed to protect minorities, Muslims are facing increasing Islamophobia.<sup>12</sup> In fact, as Fox explains, neoliberal democracies are the most to blame for the rise in government-based religious discrimination more generally, and against Muslims and Jews, specifically.<sup>13</sup> In

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<sup>7</sup>Court of Justice of the European Union, 'Judgment in Joined Cases C-804/18 and C-341/19WABE and MH Müller Handel' *Press Release No 128/21* (15 July 2021) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210128en.pdf>> accessed 20 September 2021.

<sup>8</sup>Ibid.

<sup>9</sup>'Hazara Shias flee Afghanistan fearing Taliban persecution' *The Guardian* (29 August 2021) <<https://www.theguardian.com/world/2021/aug/29/hazara-shias-flee-afghanistan-fearing-taliban-persecution>> accessed 20 September 2021.

<sup>10</sup>"'Every year we dig mass graves': the slaughter of Pakistan's Hazara' *The Guardian* (5 April 2021) <<https://www.theguardian.com/global-development/2021/apr/05/mass-graves-pakistan-shia-minority-hazara-slaughter-imran-khan>> accessed 20 September 2021.

<sup>11</sup>"'When the blood starts': Spike in Ahmadi persecution in Pakistan' *Al-Jazeera* (26 July 2021) <<https://www.aljazeera.com/news/2021/7/26/ahmadi-persecution-pakistan-blasphemy-islam>> accessed 20 September 2021.

<sup>12</sup>Narzanin Massoumi, Tom Mills, and David Miller (eds), *What Is Islamophobia? Racism, Social Movements and the State* (Pluto Press 2017).

<sup>13</sup>Jonathan Fox, *Thou Shalt Have No Other Gods before Me: Why Governments Discriminate against Religious Minorities* (CUP 2020); Sahar Ahmed, 'Commissioned Book Review: Jonathan Fox, *Thou Shalt Have No Other Gods before Me: Why Governments Discriminate against Religious Minorities*, (2020) 19(3) *Political Studies Review* 15.

Muslim-majority and Islamic countries, both Muslim and non-Muslim religious minorities continue to be marginalised in the name of religious edicts and mandates.

Surprisingly (or, unsurprisingly, depending on who you ask), there is no shortage of legal protections for religious minorities and their right of religious freedom, anywhere in the world. As will be discussed in chapter 1, there is a plethora of laws-based protection that exists in all of the countries named hereinabove. The Constitution of Pakistan protects the right of religious freedom of all its citizens<sup>14</sup> just as France's does.<sup>15</sup> And yet we constantly see people, especially women and other gendered and sexual minorities, have their rights to manifest their religious beliefs, their rights to pray and worship, violated. The 'West' blames the backward 'Other', the racialised Muslim, for ruining the secularity of its liberal democracies,<sup>16</sup> and points to Muslim-majority countries to highlight just how intolerant Islam and its adherents are. Muslims, on the other hand, (for example, in Pakistan) point to the 'West' to highlight how poorly they are treated, citing growing Islamophobia,<sup>17</sup> all while inciting further violence in Muslim-majority countries against their own religious minorities through increasing right-wing rhetoric.<sup>18</sup>

The burden, so far, has been squarely on Muslims to prove how tolerant and accepting Islam is, and how, in fact, as a system of law, it is perfectly in harmony with international human rights standards. Islamic legal scholars like Mashood Baderin,<sup>19</sup> Abdullahi An-

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<sup>14</sup>The Constitution of Pakistan, 1973, article 20.

<sup>15</sup>Constitution of the Fifth Republic, 1958, article 1.

<sup>16</sup>Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2020).

<sup>17</sup>Asad Hashim, 'Pakistan's Imran Khan urges Muslim unity against Islamophobia', *Al-Jazeera* (29 October 2020) <<https://www.aljazeera.com/news/2020/10/29/pakistans-khan-calls-for-muslim-unity-against-islamophobia>> accessed 20 September 2020.

<sup>18</sup>Ashali Varma, 'Imran Khan rants about Islamophobia as Pakistan crumbles', *The Times of India* (2 November 2020) <<https://timesofindia.indiatimes.com/blogs/no-free-lunch/imran-khan-rants-about-islamophobia-as-pakistan-crumbles/>> accessed 20 September 2020.

<sup>19</sup>Mashood Baderin, *International Human Rights and Islamic Law* (OUP 2003); Baderin, 'Identifying Possible Mechanisms Within Islamic Law for the Promotion and Protection of Human Rights in Muslim States,' (2004) 22(3) *Netherlands Quarterly of Human Rights* 329; Baderin, 'Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives' (2007) 4(1) *Muslim World Journal of Human Rights* 329; Baderin, 'Human Rights and Islamic Law: The Myth of Discord,' (2005) 10 *European Human Rights Law Review* 165; Baderin, 'Dialogue Among Civilisations as a Paradigm for Achieving Universalism in International Human Rights: A Case Study with Islamic Law' (2001) 2(2) *Asia Pacific Journal on Human Rights and the Law* 1.

Na'im,<sup>20</sup> and Hashim Kamali,<sup>21</sup> have been using human rights standards like the Universal Declaration of Human Rights, to at various points of their academic careers,<sup>22</sup> show the possibility of reading Islamic norms and human rights norms *together*, in conjunction with each other, complementing each other. They have done this to make each side more palatable to the other. And it truly is a commendable feat; to try and make opposing sides see eye to eye, to explain away their differences as simply being 'two sides of the same coin', is a difficult task. Unfortunately, it doesn't solve the inherent problem – that the 'disconnect'<sup>23</sup> so frequently referred to between these two systems is not one of misunderstanding. Islamic law is not, as it stands, particularly well-equipped to harmonise with international human rights, in general or on freedom of religion in particular. But neither is the International Human Rights legal regime, and that needs recognition. Both systems are flawed, but both systems also have to contend with being simply different from one another.

This thesis' research question proposes a reinterpretation of both systems by going 'back to the basics'- i.e. the Qur'an and the 'intention' behind the drafting of the international instruments in question: the *travaux préparatoires* of the Universal Declaration of Human Rights, the International Covenant on Civil and Political and Rights, and the European Convention on Human Rights. The thesis is not suggesting that the Qur'an is analogous to international treaties; rather it uses both the Qur'an and the UDHR, ICCP and ECHR as 'source material' in order to reinterpret and re-evaluate the way religious freedom is adjudicated and legislated on, which does in a sense put them on a contextual parallel.

To be fair, this is not a novel approach and this thesis is inspired by the Islamic feminist ideology and discourse. Islamic feminism, a 'conjunction that was unsettling'<sup>24</sup> to many

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<sup>20</sup>Abdullahi A An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9(1) Human Rights Quarterly 1; An-Na'im, 'What Do We Mean by Universal?' (1994) 23 (4/5) Index on Censorship 120; An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990); An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 ASIL Proceedings 95; An-Na'im, 'The Universality of Human Rights: An Islamic Perspective' in Ando N (ed), *Japan and International Law: Past, Present and Future* (Kluwer Law International 1999) 311; An-Na'im, 'Toward an Islamic Hermeneutics for Human Rights' in An-Na'im et al (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (WB Eerdmann 1995) 229.

<sup>21</sup>MH Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Islamic Texts Society 2003) Chapter 1; Kamali, *The Dignity of Man: An Islamic Perspective* (Islamic Texts Society 2002); Kamali, 'Freedom of Religion in Islam' (1992) 21 Capital University Law Review 63.

<sup>22</sup>It is worth noting that of the three Islamic legal scholars mentioned, Abdullahi An-Na'im is perhaps the one to have 'switched' sides the most, going back and forth between having a 'harmonistic' and a 'divergent' view on the relationship between Islamic Law and Human Rights.

<sup>23</sup>EA Mayer, *Islam and Human Rights: Tradition and Politics* (5th edn, Westview 2007).

<sup>24</sup>Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism', (2006) 32(1) Critical Inquiry 629.

religious conservatives and some Muslim, secular feminists,<sup>25</sup> rose in prominence after the 11th September, 2001 attacks and the ‘War on Terror’ when the US and its allied forces tried to partially justify their invasions of Afghanistan and Iraq in order to promote ‘freedom’ and ‘women’s rights’. This, combined with the double standards employed by the allied forces in promoting UN sanctions, highlighted how both International Human rights and feminist ideals can be manipulated in the cause of Imperialism.<sup>26</sup> This was also a turning point for Islamic reformist theologians, scholars, and activists, who, in the face of decades of having right-wing religious governments in Muslim countries who invoked *Shari‘ah* in order to clamp down on ‘secularisation’ and ‘Westernisation’ inspired women’s rights movements, ‘brought the classical *fiqh*<sup>27</sup> texts out of the closet, exposing them to unprecedented critical scrutiny and public debate.’<sup>28</sup> As Mir-Hosseini points out:

A new wave of Muslim reform thinkers started to respond to the Islamist challenge and to take Islamic legal thought onto new ground. Using the conceptual tools and theories of other branches of knowledge, these thinkers have extended the work of previous reformers and developed further interpretive-epistemological theories. What distinguishes them from their predecessors is that instead of seeking an Islamic genealogy for modern concepts like equality, human rights and democracy, they focus on how religion is understood, how religious knowledge is produced and how rights are constructed in Muslim legal tradition.<sup>29</sup>

Islamic feminists like Amina Wadud,<sup>30</sup> Azizah Al-Hibri,<sup>31</sup> Riffat Hassan,<sup>32</sup> Fatima

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<sup>25</sup>Including Asma Jahangir (b. 1952- d. 2018), who served as Special Rapporteur on freedom of religion or belief from 2004 to 2010, and is referred to multiple times throughout this thesis in that capacity.

<sup>26</sup>A contemporary exploration of this double standard in light of the Swiss referendum and how feminism has let down Swiss Muslim women, is undertaken by Hasret Cetinkaya – H Cetinkaya, ‘Feminist solidarity after the Swiss referendum: Islamophobia and the politics of veiling’ *Engenderings, the LSE Gender Blog* <<https://blogs.lse.ac.uk/gender/2021/04/26/feminist-solidarity-after-the-swiss-referendum-islamophobia-and-the-politics-of-veiling/>> accessed 20 September 2021.

<sup>27</sup>See chapter 4 for a definition of *fiqh*.

<sup>28</sup>Ziba Mir-Hosseini, ‘Muslim Legal Tradition and the Challenge of Gender Equality’, in Mir-Hosseini, Al-Sharmani, and Rumminger (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015) 28.

<sup>29</sup>Ibid.

<sup>30</sup>Amina Wadud, *Quran and Woman: Rereading the Sacred Text from a Woman’s Perspective* (OUP 1999).

<sup>31</sup>Azizah Al-Hibri, ‘A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?’ (1982) 5(2) *Women’s Studies International Forum* 207.

<sup>32</sup>Riffat Hassan, ‘Feminism in Islam’, in *Feminism and World Religions* (Arvind Sharma and Kate Young eds, SUNY Press 1999) 248–78.



Mernissi,<sup>33</sup> Kecia Ali,<sup>34</sup> and Asma Barlas,<sup>35</sup> amongst others, started challenging the anachronistic and patriarchal interpretations of the *Shari‘ah* and translating it into policy. ‘Women were now finding ways to sustain a critique, from within, of patriarchal readings of the *Shari‘ah*, and of the gender biases of *fiqh*<sup>36</sup> texts.’<sup>37</sup> I find this inspiring. The question at the heart of the conception of this thesis was therefore, led by the scholarship on Islamic feminism: why can’t that which Islamic feminists did for gender justice and equality, also be done for the hostile and intolerant interpretations of Islamic law *vis-à-vis* the rights of religious minorities?

To be sure, the Islamic feminist model is not without its flaws. Aysha Hidayatullah’s interventional critique of it, in the form of her ground-breaking ‘Feminist Edges of the Qur’an’<sup>38</sup> is a formative text and only further informs the social and gender-justice-achieving intention of Islamic feminism. I am also moved and guided by Islamic Liberation Theology and the way it has informed Black Muslim scholarship and intervention to address not only the racial inequities in modern day society<sup>39</sup> but also apartheid South Africa.<sup>40</sup>

However, whilst this thesis takes its inspiration from Islamic exegetes, it is not a Religious Studies thesis, and doesn’t pretend to be. This thesis’ central research question revolves around the law on the Right to Freedom of Religion, our understanding of it, and how we can change our understanding of it in order to better protect our religious minorities. In order to answer this question, this thesis is divided into two sections:

Section 1 on International Human Rights Law, which has the following chapters;

Chapter 1, titled ‘Freedom of Religion or Belief: Underlying Principles and Concepts’ provides an overview of the *status quo* and the different legal mechanisms and instruments

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<sup>33</sup>Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women’s Rights in Islam* (Basic Books 2006)

<sup>34</sup>Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Quran, Hadith, and Jurisprudence* (Oneworld 2006).

<sup>35</sup>Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Quran* (University of Texas Press 2019).

<sup>36</sup>See chapter 4 for a discussion of the differences between *fiqh* and *Shari‘ah*.

<sup>37</sup>Ziba Mir-Hosseini, ‘Muslim Legal Tradition and the Challenge of Gender Equality’, in Mir-Hosseini, Al-Sharmani, and Rumminger (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015).

<sup>38</sup>Aysha A Hidayatullah, *Feminist Edges of the Quran* (OUP 2014).

<sup>39</sup>Shadaab Rahemtulla, *Quran of the Oppressed: Liberation Theology and Gender Justice in Islam* (OUP 2017).

<sup>40</sup>Farid Esack, *Quran, Liberation and Pluralism: An Islamic Perspective of Interreligious Solidarity Against Oppression* (Oneworld 1997).

that exist within the International Human Rights framework, which cover and protect the Right to Freedom of Religion. It gives a brief account of the history of its evolution in what we know as the ‘Western world’, analysing various historically important moments that contribute to the international legal development of the right’s main defining features.

Chapter 2, titled ‘Analysing the Current Status of the Right to Freedom of Religion under International Human Rights Law’ goes on to examine the way the right is interpreted and adjudicated by the European Court of Human Rights and the Human Rights Committee, and contextualises the current judicial treatment of Article 9 of the European Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights, respectively. It specifically focuses on cases involving Muslim women and their right to veil, and uses cases involving Sikh men and their right to wear turbans as a manifestation of their religion, as comparators due to the similar racialisation and ‘othering’ the two communities face. The conclusion the chapter reaches is that the ‘secular’ system of rights is in fact, not so secular after all, because its conception of ‘religion’ is highly influenced and informed by a liberal Protestant Christian understanding of ‘faith’ and its ‘appropriate’ manifestation, where overt expressions of faith are seen as unnecessary in some cases, and secondary to national narratives, in others.

Chapter 3, titled ‘Addressing the gap between Intention and Manifestation’ then uses this jurisprudential context in order to address the problems raised in Chapter 2, by using a ‘good faith’ or *pacta sunt servanda* principle for interpretation of the *travaux préparatoires*. The chapter suggests that the HRC’s jurisprudence, whether intentionally or unintentionally, appears to already employ such an interpretation when deciding cases involving an infringement of the right to freedom of religion, by placing the interests of the claimant at the centre, in order to protect their religious freedom with all its many moving parts, no matter what. It goes on to explain that by favouring Member States’ own national interests in furthering particular and exclusive interpretations of secularism, the European Court ends up disadvantaging and further marginalising its minority populations, going directly against the intention of the original drafters of the ECHR, as evidenced from the *travaux préparatoires*. The chapter therefore concludes Section 1 by suggesting that in order to reach more pluralistic and equitable decisions, International Human Rights Law and its proponents need to go ‘back to the source’. This will not only bring back religious minorities such as Muslims, from the margins of society but also help them have more faith (pun not intended) in the ‘secular’ system of human rights.

Section 2, on Islamic Law, picks up from this to do the following:

Chapter 4, titled ‘Freedom of Religion and Islamic Jurisprudence’ explains what Islamic Law is and what the terms ‘*Shari’ah*’ and ‘*fiqh*’ mean, and why their roles in the structure of Islamic law are important for the advancement of this thesis. It then explains some of the contemporary understandings of religious freedom and the rights of religious minorities found under Islamic jurisprudence, and why those are problematic. It illustrates that Islamic Law is not, as it stands, particularly well-equipped to harmonise with International Human Rights Law in general, or on freedom of religion in particular. The interpretations that are in use today do not align well with modern conceptions of equality, justice, and rights, the thesis shows that this is rooted not in misunderstanding but in fundamental difficulties with the underlying texts, i.e. the Qur’an and *Sunnah*.

Chapter 5, titled ‘The Qur’an and the Other: Toward a New Understanding’ then provides that reinterpretation, by once again, going ‘back to the source’ – the Qur’an – to provide context and a re-evaluation to the various Qur’anic edicts on religious freedom and the rights of religious minorities. By doing so, the chapter proves that such a re-reading puts what we popularly understand as ‘Islamic Law’ in line with modern postulates of plurality, justice, and equality, improving its compatibility with so-called secular systems of law, and thereby protecting the rights of religious minorities in Muslim-majority countries by providing them unhindered access to Human Rights, if they wish to employ that system for their benefit.

The thesis, therefore, concludes that neither is the International Human Rights system on the Right to Freedom of Religion perfect, nor is the right as found under Islamic *fiqh*. Both systems are flawed, but it is also important to distinguish between what are flaws and what are mere differences the two systems exhibit. The thesis proves that both systems are, by their own admissions, falling short and need significant reform for their own sakes and their own internal functioning in a modern world. And thus the thesis is a critique from within: identifying a way of reform, which if done along particular lines, not only results in two more robust, healthy legal systems that adhere more honestly to the tenets of their foundational texts, but also results in systems that are better-equipped to cooperate. This cooperation would require significant political will, but could in theory increase Muslim postcolonial peoples’ trust of, and active participation in, a more equitable International

Human Rights legal regime. Furthermore, such cooperation would remove one big source of plausible deniability for States whose governments and leaders dishonestly use Islam and the argument of cultural relativism as an excuse for failing their citizens in regards to their human rights.

A note on methodology: in order to carry out the Qur'anic analysis that has been done in chapters 4 and 5, it is important to note which edition of the Qur'an has been used. Whilst yes, the Arabic text of each copy is identical, translations naturally differ. Therefore whilst Mawlana Sher Ali's English translation of the Qur'an has been used to inform a lot of the analysis being done, Muhammad Asad's English translation is the version used throughout for references and quotes, and specifically in terms of the system of numbering verses of the Qur'an. Each chapter of the Qur'an begins with the *Bismillah*; Mawlana Sher Ali's translation counts the *Bismillah* as verse no.1 for each chapter, whereas Muhammad Asad's translation, like most other editions of the Qur'an available with an English translation, does not count the *Bismillah*, and starts numbering with the following verse of each chapter as verse no 1. In order to avoid confusion between the prevalent version of numbering and this thesis, Muhammad Asad's approach to numbering verses is used.

Further informing the methodology are a number of caveats that are important to frame this thesis. This thesis does not do an extensive examination of the entire system of International Human Rights Law as it pertains to the Right to Freedom of Religion. That has been done extensively by scholars in the past – for example, Carolyn Evans' *Freedom of Religion under the European Convention on Human Rights*, amongst others. Neither is this thesis looking at every instance of a case involving a person of a religious minority; the process of elimination which informed the choice of cases to focus on was very much about identifying cases involving Muslims, and 'Muslim-adjacent' cases, i.e. cases involving overtly-racialised religious minorities: for example, the Sikhs. Whilst this of course limits the scope of this thesis and the research undertaken to inform it, this is an intentional choice. As this thesis is meant to be an exploration of the way Muslim minorities are viewed through international court systems, in order to inform the reinterpetive exercise undertaken for Islamic jurisprudence in Section 2, as a comparator.

This also has led to the conscious choice not to examine the numerous registration cases brought under national and international law in recent years, among them the issues of New Religious Movements, Scientology in Germany, and Jehovah's Witnesses in Eastern

Europe, for example. These cases invariably involve the question of what is a religion, what gets to *count* as a religion. This is certainly a pertinent and interesting area of legal study, but it asks a distinctly different question to the one being asked in this thesis. In other words, registration cases relate to the Right to Freedom of Religion in terms of substantive definition – whether these communities count, legally and/or sociologically, as religions, and whether they are dealt with equitably in law regarding this question. This thesis however focuses on religious groups that have already overcome that particular hurdle, and have gained universal legal acknowledgement as valid, ‘official’ religions. The thesis then looks at what happens when people from those recognised religious minorities take cases alleging their freedoms have been unduly curtailed. Religious registration cases, therefore, are not relevant to the question at hand.

It is also important for the purposes of the methodology to explain the reasoning behind the conscious choices made with regard to Section 2 – Islamic Law. While there are references to specific Muslim-majority countries throughout the thesis (with Pakistan admittedly making more than one appearance, entirely due to my inherent interest and familiarity with the country, being from Pakistan myself) it was a conscious choice not to focus on any one specific Muslim-majority country, or on any particular country that espouses Islamic law, as a case study. The reasoning behind this was that Muslim-majority countries are far too vast in their differences and far too spread out over the world for any meaningful comparison to be made through case studies purely on the basis that these countries follow Islam, or that their majority population is Muslim. Any comparison in such a case would be purely superficial, and wouldn’t pay any heed to the very real cultural, geographical, and linguistic differences that exist between these societies. Yes, religion is a commonality, but even the way religion is practiced is inherently different from country to country. In fact, any conversation around comparing the way Islam is practiced in one part of the world versus another always ends up in unhelpful conversations of *whose* Islam or *which* Islam, since the varied practices of each country are so heavily influenced by that nation’s context and history. So, it made much more sense for the purposes of this thesis to focus on the theory, and on a theoretical study of the jurisprudence, by examining the Qur’an as the source text. This avoids the aforementioned pitfalls that come to the fore when looking at case studies.

In the introduction to their book *Communities of the Qur'an: Dialogue, Debate and Diversity in the 21st Century*, Emran El-Badawi and Paula Sanders talk about how groups of

self-identifying Muslims who form amongst themselves a community – whether that is around nationalistic or linguistic lines, gender or sexuality, sectarian or racial lines – are all different but equal communities of the Qur’an. And each such community uses the interpretations laid down by jurisprudence in its own way, to practice religion in a meaningful everyday manner. With so many communities of the Qur’an (to borrow their term) existing around the world, it would be intellectually lazy to try and position these communities – whether they be countries or local minority communities – as equal comparators. This is why this thesis does not do that. Furthermore, these Muslim communities around the globe, in all their variety and diversity, all agree on one point – the acceptance of the same text of the Qur’an as the fundamental building block of faith and Islamic jurisprudence. As a result of this consensus, the work done in this thesis, having focused on that universally-recognised and foundational text, has equal validity to all these communities. (Or at least that is to be hoped..!)

Perhaps a final word on what this thesis does not do. This thesis does not intend to create a hierarchy between the two competing systems of International Human Rights Law and Islamic Law. I believe that is a false dichotomy to create and insists on ‘awarding’ one system as better than the other. Human Rights as a normative and legal system has much to be celebrated- any system that champions the freedoms of all people would. But there is much credence to the argument that the system, as it exists, has been co-opted by neoliberal and capitalist forces, advantaging richer and more politically powerful countries, over poorer and less ‘important’ ones.<sup>41</sup> The criticism that International Human Rights Law has no teeth and is therefore bound to be a failure<sup>42</sup> is also valid and this thesis does not attempt to challenge or agree with either of these arguments. The limitations of the Human Rights model are many. But it would be naïve to say that the protection that Human Rights Law is intended to provide is not required in many parts of the Muslim-majority world. Those cultural relativists who argue against Human Rights in favour of (in this case) Islamic Law and cultural practices tend to sit in particularly privileged positions and are unaffected by the day-to-day realities of religious minorities on the ground. It doesn’t take long to ask an Ahmadi man or a Christian woman, in Pakistan, what they think of the protection being afforded to them under the system they currently live in, and have them say it has failed them. Human Rights Defenders in countries like Pakistan rely on international human rights norms, laws, and organisations, to make the case for increased freedoms and rights for the

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<sup>41</sup>Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2019).

<sup>42</sup>Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014).

most marginalised. White academics in the Ivory Tower, or even Brown second-generation Muslim immigrant academics in the Ivory Tower, who have not experienced the persecution carried out in the name of their faith 'back home', are in no position to criticise those who call for increased international human rights based intervention.

And yet, the Western Human Rights legislative and judicial framework continually falls short of its own benchmark too, as it continues to foster the conception that Muslims, Islam, and *Shari'ah* are all one and the same, and are all inherently incompatible with said Western human rights framework- a conception rooted entirely in Islamophobia and racism.

So, as this thesis begins its substantive section of research, it is worth mentioning that its aim – through the framing of its central research question – has been to find a way to better protect the Right to Freedom of Religion of religious minorities, be they Muslims in Europe or Christians in Indonesia. As someone who is a religious minority wherever she goes, I am an epistemological authority on the lived experience of such a person, and while this thesis is a work of objective and qualitative research, it is also an ode to my lived identity as a Pakistani Ahmadi Muslim legal scholar.

**SECTION 1**  
**INTERNATIONAL HUMAN RIGHTS LAW**



## Chapter 1

### Freedom of Religion or Belief: Underlying Principles and Concepts

#### 1.1 Philosophical Underpinnings

Do human rights have religious foundations? Among philosophers and theologians, the question tends to invite two standard replies. Some accept the boundary between the secular and the religious, and say that the universal protection of freedoms, possessions, and duties associated with human rights extend beyond any religious system. Others are impressed by arguments suggesting that the moral standards within human rights are inherently religious.

The purpose of this question is to allow a rounded historical and philosophical understanding of the origins of human rights in general, and the Right to Freedom of Religion in particular. As Chapter 2 and 3 of this section will further elucidate, this section advances the argument that the Right to Freedom of Religion, as it is currently judicially interpreted, is understood by the courts through a liberal Protestant Christian lens. This will call into question the so-called secularity of the Right to Freedom of Religion specifically, but also the secular conception of International Human Rights Law more generally. For this purpose, it is important to at least have a cursory contextual base as to whether or not human rights themselves have religious foundations.

The realisation of human rights in some regions of the world today not only requires the support or aid of religion but, as explored later in this section, the way judges in some international and regional legal systems interpret the Right to Freedom of Religion invariably draws on religious principles or apparently secular principles infused with a historically religious ethos.

Most human rights theorists are rather suspicious of strictly religious conceptions of human rights. For when it comes to theory, they usually feel more in sympathy with lawyers or philosophers than theologians. As far as possible, too, they try to avoid any reference to religious texts and to restrict themselves to legal documents, if not secular ethics. However, within certain cultural contexts it seems hardly possible to avoid religion. For instance, in Cambodia after the Khmer Rouge, the only way to implement human rights was to frame

them in terms of compassion, tolerance, and nonviolence – the values of Buddhism<sup>1</sup> (the irony here of course being that this same Buddhism has been weaponised and armed with an ethnic and nationalised violence against the Rohingya). In post-apartheid South Africa as well, the practice of human rights took the form of truth and reconciliation which, inspired by Bishop Desmond Tutu, reflected the Christian values of confession and forgiveness.<sup>2</sup> A theorist who is suspicious of religion may characterise these examples as the mere expression of rights in countries that have not yet adopted human rights initiatives. More probably the theorist will say that expressing rights in religious terms is simply a hermeneutical exercise. Furthermore, albeit that religion sometimes rationalises human rights, they are by no means rational because of religion.<sup>3</sup>

The problem of human rights and religion has also arisen in connection with dignity, the inherent value of human beings as such. Some religiously minded theorists say that the very concept of dignity is inescapably religious, and because it serves as the foundational constituent of most human rights documents, human rights rest on an implicitly religious concept.<sup>4</sup> Others object strongly to this mode of argumentation on the grounds that human rights are the result of a revisionary morality or the creation of a new global ethic, one that stems from the Universal Declaration of Human Rights (UDHR) in the twentieth century.<sup>5</sup>

Whether human rights can be said to have religious foundations depends of course on the historical form of 'human rights' about which one is speaking. On the one hand, one could speak rather loosely of the international rights that we recognise today as the realisation of human rights found in the many religious, philosophical, and cultural traditions of the world at large. On the other hand, one could speak more narrowly of those international rights as the modern formulation of human rights as promulgated by the UDHR only after World War II. Unless stated otherwise, this thesis takes the liberty to use the term 'Human Rights' to reference the latter, since human rights were not definitively formulated until the UDHR. Jacques Maritain, a philosopher and drafter of the UDHR, quipped that the interesting question about human rights is not what they are – they are the rights outlined by

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<sup>1</sup> Bryan Turner, 'Violence, Human Rights, and Piety: Cosmopolitanism versus Virtuous Exclusion in Response to Atrocity' in T Brudholm and T Cushman (eds), *The Responses to Mass Atrocity* (Cambridge University Press, 2009) 253.

<sup>2</sup> Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge University Press 2000) 119-141.

<sup>3</sup> Jerome J Shestack, 'The Philosophical Foundations of Human Rights' (1998) 20(2) *Human Rights Quarterly* 206.

<sup>4</sup> Michael Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998).

<sup>5</sup> Paul Kurtz, *Forbidden Fruit: The Ethics of Secularism* (Prometheus Books 2008) 234.

the UDHR – but rather why we should all agree to them.<sup>6</sup>

The liberties and protections of human rights apply to all persons by virtue of their being human. Human rights also apply to all states and communities due to the fact that the UDHR has been accepted by virtually all states and further elaborated in a series of widely ratified treaties. Of course, it is precisely because these points concern universal possession and not universal enforcement that much more needs to be said. To be sure, human rights allow space for relativistic practice at the local level in the sense that sovereignty permits states to enforce them as they see fit. But clearly, state sovereignty and cultural traditions make human rights practice relative to state and culture. Taken together, human rights are universally possessed but locally enforced.

This notion can be misunderstood in one of three ways. Some might accept relative universality at face value and infer that religion everywhere serves as a vehicle for human rights. Such a Panglossian outlook would nevertheless fail to see that groups in many parts of the world today feign religiously inspired human rights initiatives to achieve the very opposite of human rights. Consider by way of example the yeshivot movement in Israel. As an outgrowth of Israeli settlement, the *yeshivot* movement was intended to defend the rights of Israelis. Yet over the years, it has become exploitative of religious and democratic institutions, promoting the human rights of Israelites above those of Palestinians, whose full range of movement has been significantly restricted.<sup>7</sup> While several other examples could be given, the point here is that religion can indeed serve as a local way – and perhaps one of the most effective ways – to realise human rights, but not in all cases.

Others might regard relative universality as a trivial point that is perhaps too obvious to be worth discussing. After all, whatever is found everywhere must be realised somewhere. The problem with this outlook is that it confuses a normative prescription and its practice with an ontological description and its identification. Simply put: human rights are not widespread objects to be found anywhere, but rather universal prescriptions to be practiced somewhere, namely local communities.<sup>8</sup>

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<sup>6</sup> See John Witte Jr and M Christian Green, 'Introduction' in J Witte Jr and MC Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2011) 6.

<sup>7</sup>R. Scott Appleby, 'Religion, Violence, and the Right to Peace' in J Witte Jr and MC Green (eds), *Religion and Human Rights. An Introduction* (Oxford University Press 2012), 351- 352.

<sup>8</sup> As a sidenote, given the philosophical nature of my discussion, it should be noted that this thesis shall not deal with some of the more fascinating concepts related to religious perspectives on statehood and governance. For instance, the thesis shall not consider whether government interests are legitimate under religious freedoms; whether religion can improve social cohesion within states; or whether religious

Finally, others might take relative universality to mean that it is unreasonable for us to expect other states to adopt the same human rights as our own. A person who adopts this perspective, however, is at the risk of reducing relative universalism to cultural relativism. Accordingly, they may infer the following:

If it is valid that there is no universal concurrence as to the meaning of human rights... then provisions of the Universal Declaration of Human Rights in states that do not accept its underlying values are bound to fail.<sup>9</sup>

If so, such a person may be literally rejecting human rights, taking cultural relativism to its logical – or illogical – conclusion: that is, if culture alone provides standards of evaluation, whatever a culture says is right, *is right*. This argument is not defending cultural relativism however, as that would require defending the view that human rights are absolutely relative. Cultural relativism commits the following fallacies, among others: it reduces the term 'right' to 'culture,' it ignores the fact that cultures change, and it countenances intolerant acts, even abuse. By contrast, what is being argued is the rather simple view that human rights are universal prescriptions that necessarily get instantiated in ways that make sense to local communities.

Another name often used for the local enforcement of human rights is *overlapping consensus*, or the family resemblance of particulars with regard to a universal. It refers to any common concept found in seemingly disparate doctrines. An example from philosophy might be the political conception of 'justice as fairness' found in Rawlsian ethics, Kantianism, and Confucianism. With regard to human rights, overlapping consensus refers to the different modes by which universal prescriptions translate into local cultures but maintain agreement with the universal standard. To lend credence to this point, consider the controversial issue of traditional Asian religious values. Since the conception of human rights, some intellectuals from Asia have insisted that Asian values are different from those of the West and should be respected.<sup>10</sup> This has usually involved the rejection of so-called

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organizations have more or fewer freedoms than secular ones. The present issue is with regard to the relative foundation of religion for human rights, not with regard to its foundation for all matters concerning state governance.

<sup>9</sup> Adamantia Pollis and Peter Schwab, *Human Rights: Cultural and Ideological Perspectives* (Praeger Publishers 1980) 1.

<sup>10</sup> Jack Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* (Blackwell Publishing 2007) 104-109.

*individualistic* human rights in place of communal values inherent to Asian culture. At first blush, the values of the East and the West do seem to diverge over the duties of the state and the rights of individuals. However, Amartya Sen has provided a detailed examination of Asian philosophies to demonstrate that there is an overlapping consensus between human rights and Confucianism, Buddhism, Hinduism, and Islam.<sup>11</sup> What this entails is that there are foundations in Asian cultures on which individuals can and do make culturally relevant claims for human rights. Further, it entails that human rights can manifest themselves on multiple grounds. This is indeed how human rights usually get adopted around the globe: each culture negotiates human rights and local norms to implement the former within the latter.<sup>12</sup>

This bears greatly on the question of religion in at least two ways. First, if different religions share a common consensus with human rights and are necessary for their enforcement, then religion is fundamental to human rights. However, given relative universality, we cannot leave it at that, for that would ignore the universal side of human rights. To illustrate, if enforcing human rights requires religion in (say) Pakistan, then religion is fundamental to human rights relative to Pakistan. This is simply to say that human rights are universals whose origin is the UDHR, but whose instantiation can take on any number of particular doctrines, even religion.

With regard to the conceptual foundation of human rights, perhaps the most striking case for religion centres on the concept of dignity. To illustrate, consider the conclusion that follows from the following two premises. Firstly, the very idea of human rights is an exposition of the belief that human beings have dignity. This point was aptly expressed by one of the most influential contributors to the UDHR, Dr Charles Malik, when he said: ‘the Declaration... is the definitive explication of the pregnant phrase of the preamble, *the dignity and worth of the human person*.’<sup>13</sup> But, secondly, the notion of dignity is derived from the *Imago Dei* in theology: the doctrine that human beings are created in God's image and have inherent moral worth accordingly.<sup>14</sup> Thus, dignity makes sense only in light of theology. If so, human rights are meaningless without religion.

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<sup>11</sup> Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

<sup>12</sup> Richard A. Wilson, ‘Culture and Rights: Anthropological Perspectives’ in J Cowan, MB Dembour and RA Wilson (eds), *Culture and Rights* (Cambridge University Press 2001) 6 .

<sup>13</sup> Charles Malik, ‘International Bill of Human Rights’ (1948) 5 United Nations Bulletin.

<sup>14</sup> Ethna Regan, *Theology and the Boundary Discourse of Human Rights* (Georgetown University Press 2010) 8.

Michael Perry has defended a version of this argument. In his inquiry on human rights, Perry has suggested that the UDHR's conception of human rights rests on the premise that every human being has dignity. However, the UDHR does not attempt to define dignity, but rather presumes that all human beings possess it, which is problematic. Perry argues that if dignity is the belief that every person has intrinsic worth, dignity is 'the conviction that every human being is sacred.'<sup>15</sup> After all, no secular view can justify the belief that all humans possess intrinsic moral worth as such. The only system that can make such a conviction intelligible is religion, making dignity inescapably religious. And if the foundational constituent of human rights is dignity, then so too are human rights inescapably religious.

Though Perry claims that his view is not meant to defend any particular religious perspective, it raises a common objection made by theologians who support human rights. A recent example might be Jeffrie Murphy's argument that human rights are meaningless if dignity is detached from a religious worldview.<sup>16</sup> A similar argument is Max Stackhouse's contention that if human rights are to have any meaning at all, they must stand above any political authority, which requires the divine.<sup>17</sup> While many others could be mentioned, it is worth noting that several prominent theologians make similar claims based on the belief that the *Imago Dei* is essential to dignity and seems to come from the Judeo-Christian tradition.<sup>18</sup> Lurking here is an important criticism from religiously minded individuals that is very important for the conceptual foundation of human rights: without a secular equivalent to the *Imago Dei*, human rights seem to require religion.

The historical tradition leading up to human rights and especially natural law is replete with religious concepts. And for that reason alone, we can say that religion plays a role in human rights. After all, as historian Paul Gordon Lauren remarks: 'Religious belief provided [at least] one source of tributaries into the ever expanding and evolving river of thought about what would eventually be described as international human rights.'<sup>19</sup> Cassese argues that the legal source of International Human Rights begins solely with the UDHR and respective international courts, including the Nuremberg Trials and subsequent international

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<sup>15</sup>Perry (n 4) 11.

<sup>16</sup>Jeffrie G Murphy, 'The Elusive Nature of Human Dignity' (2007) 9(3) *The Hedgehog Review* 20.

<sup>17</sup>Max Stackhouse, 'Why Human Rights Need God: A Christian Perspective' in E Bucar & B Barnett (eds), *Does Human Rights Need God?* (Eerdmans Publishing Company 2005) 25-40.

<sup>18</sup>See David Hollenbach, *The Common Good and Christian Ethics* (Cambridge University Press 2002); Jurgen Moltmann, *On Human Dignity: Political Theology and Ethics* (SCM Press 1984); and George Newlands, *Christ and Human Rights: The Transformative Engagement* (Ashgate 2006).

<sup>19</sup>Paul G Lauren, *The Evolution of International Human Rights* (University of Pennsylvania Press 2003) 10.

tribunals.<sup>20</sup> Yet the argument from history asserts that one of the conceptual sources of human rights is religion, specifically its influence on the history of individual rights in the West.<sup>21</sup> Put simply, the history of individual rights prior to the UDHR, which included ancient, medieval, and renaissance philosophy, assumed that God was the source of all rights. Furthermore, this tradition informed the thought behind the UDHR, despite its overtly secular depiction. Thus, although seemingly divorced from religion, human rights assume a religious tradition that informs its conceptual foundation – and largely a liberal Protestant one, as will be discussed in a later chapter.

If we presume that human rights emerge from the history of individual rights in the West, then we must turn to the history of natural law, the view that moral order is evident in the nature of the cosmos or human beings. If we do this, there is a controversial question that has to be settled. That is: does natural law include rights that are both similar to human rights and religious in origin? This question marks the parting of ways among historians. On the one hand, there is the view that many humanitarian movements, most notably – and almost exclusively – Abolitionism, preceded human rights and stemmed from natural law and Judeo-Christian values.<sup>22</sup> On the other hand, there is the view that growth in moral sensibility throughout history has been the product of economic transformations, namely, the rise of capitalism in the West, which, among other things, led to the humanitarian movements of the nineteenth-century.<sup>23</sup> Perhaps no other movement in history contributed more directly to human rights than humanitarianism in the nineteenth-century; but whether it was the result of religion or socio-economic transformation remains an open question.

## 1.2 Historical underpinnings

### 1.2.1 *How far back do we go?*

Freedom of religion is one of the oldest and most controversial of all human rights and has been the object of international concern from the very beginning of the modern international state system.<sup>24</sup> Commenting on the approach of the Romans, the historian Edward Gibbon cynically observed that:

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<sup>20</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 5-14.

<sup>21</sup> Michael Freeman, *Human Rights* (Blackwell Publishers 2002) 10.

<sup>22</sup> Lauren (n 19) 35-46.

<sup>23</sup> Thomas L. Haskell, 'Capitalism and the Origins of the Humanitarian Sensibility, Part 1' (1985) 90(2) *The American Historical Review* (1985) 339.

<sup>24</sup> See Arthur Nussbaum, *A Concise History of the Law of Nations* (rev ed, Macmillan 1954); Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) Chapter 2.

The policy of the emperors and the senate, as far as it concerned religion, was happily seconded by the reflections of the enlightened, and by the habits of the superstitious, part of their subjects. The various modes of worship which prevailed in the Roman world were all considered by the people as equally true; by the philosophers as equally false; and by the magistrate as equally useful. And thus toleration produced not only mutual indulgence, but even religious concord.<sup>25</sup>

Christianity, however, posed a difficult problem. Like Judaism, it was monotheistic and claimed universal validity, and was hence intolerant of other religious practices. Unlike Judaism, however, it was not exclusive and became a proselytizing religion that challenged the religious pluralistic *status quo*. It was this, rather than the substance of Christian belief per se, that best explains the official Roman policy that veered between toleration and persecution. The crucial turning point came with the Edict of Toleration issued by Galerius on his deathbed in 311, which granted Christians the indulgence of ‘the rights to exist again and to set up their places of worship; provided always that they do not offend against public order.’<sup>26</sup> This was followed by the accession of Constantine to the throne of the Western Empire. In 313, Constantine promulgated the Edict of Milan, which provided that:

All who choose [the Christian] religion are to be allowed to continue therein, without let or hindrance and are not in any way to be molested... At the same time all others are to be accorded the free and unrestricted practices of their religions; for it accords with the good order of the realm and the peacefulness of our times that each should have the freedom to worship God after his own choice; and we do not intend to detract from the honour due to any religion or its followers.<sup>27</sup>

Once Christianity was established as the official religion of the Roman Empire,<sup>28</sup> it became necessary to forge an understanding between the dictates of faith and imperial imperatives. It is rather disquieting to note that, having struggled to establish freedom for

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<sup>25</sup> Edward Gibbon, *The Decline and Fall of the Roman Empire* (David Womersley ed, Allen Lane 1994), Chapter 2; first published in 1776.

<sup>26</sup> See Henry Bettenson and Chris Maunder (eds), *Documents of the Christian Church* (3rd edn, OUP 1999) 16. The Edict also put Christians under a duty to pray for the Emperor and Empire.

<sup>27</sup> Ibid 17.

<sup>28</sup> Ibid 24. As a result of the Edict of Thessalonica (380 AD).



their beliefs, the interest of many theologians then shifted to the question of how the resources of the Empire could be used to deny others that same freedom.

Central to the *modus vivendi* that was forged between the Christian church and the state was the Roman-law notion of the ‘just war’. Cicero, for example, had considered that ‘no war is just unless it is waged after a formal demand for restoration, or unless it has been formally announced and declared beforehand.’<sup>29</sup> The essence of the doctrine was the commission of a wrong, which, if not put to rights, would justify the use of force as the legally appropriate sanction. It came to be understood, however, that such formalities could only apply between peoples organised into civilised societies.<sup>30</sup> As far as Roman law was concerned, however, the worship of other gods was not a wrong and could therefore neither provide a cause of war nor justify the removal of the worshippers from the class of civilised societies. Augustine, whose writing developed the idea that the state could act as the guardian of the moral order – the Christian moral order – drew on this tradition.<sup>31</sup> Aquinas reworked this in the thirteenth century, concluding that a just war required ‘right authority’, a ‘just cause’, and a ‘right intent’.<sup>32</sup>

This provided the framework for subsequent consideration of the question whether differences of religion were in themselves a just cause of war, which became a matter of particular interest in the wake of the Spanish conquest of the New World, the legality of which was examined by the Spanish writer Francisco de Victoria (1492-1546) in *De Indis*. Rejecting the claim that the emperor or the pope enjoyed a pre-existing jurisdiction, temporal or spiritual, over the New World, de Victoria considered a number of other arguments, including whether the conquest was justified on the grounds that the Indians had refused to accept the Christian faith when it had been preached to them. He accepted that the Indians were bound to listen to the preaching of the faith, and that they would commit a mortal sin if they refused to accept it, if it were presented 'not once only and perfunctorily, but diligently

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<sup>29</sup>Marcus Tullius Cicero, *Cicero on Moral Obligation. a New Translation of Cicero's De Officiis* (J Higgenbotham trans, Faber & Faber 1967) , book 1, sec. 36.

<sup>30</sup>Cicero, *On the Commonwealth and On The Laws* (James EG Zetzel ed, CUP 1999) book 1, sec 25; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome Vol 2* (Macmillan 1911) 195.

<sup>31</sup>Deane concludes that Augustine came to the position that ‘the church had a duty as well as a right to ask the State to punish heretics and schismatics per se, while Christian Kings had an obligation to use their power to protect and support the Church against heresy and schism as well as against paganism’ (Herbert A Deane, *The Political and Social Ideas of St Augustine* (Columbia University Press 1963) 214-15). This did not extend to forcible conversion.

<sup>32</sup>Thomas Aquinas, *Summa Theologiae: A Concise Translation* (Timothy McDermott ed, Eyre and Spottiswoode 1989) pt 2-3, 40.

and zealously'; but he did not believe that such a refusal justified making war.<sup>33</sup> Moreover, he asserted that 'Christian Princes cannot, even by the authorisation of the Pope, restrain the Indians from sins against the law of nature or punish them because of their sins' for 'it would be a strange thing that the Pope, who cannot make law for unbelievers, can yet sit in judgment and visit punishment upon them.'<sup>34</sup> Thus when, in *De Iure Belli*, de Victoria considered the causes of a just war, his first proposition was 'Difference of Religion is not a cause of just war.'<sup>35</sup>

This position rapidly became the orthodoxy. Alberico Gentili (1552-1608), an Italian Protestant who had fled Italy to escape the Inquisition,<sup>36</sup> was equally clear that wars waged with religion as their sole motive were unjust. This was because a just war could only be waged as a response to a wrong, and 'since the laws of religion do not properly exist between man and man, therefore no man's rights are violated by a difference in religion, nor is it lawful to make war because of religion....Therefore a man cannot complain of being wronged because others differ from him in religion.'<sup>37</sup> He took the enlightened view that:

Religion is a matter of the mind and of the will, which is always accompanied by freedom... Our minds and whatever belongs to our mind are not affected by any external power or potentate, and the soul has no master save God only, who alone can destroy the soul. Do you understand? Yet hear still one more thing. Religion ought to be free.<sup>38</sup>

Thus he argued that a conqueror ought not to impose his religion on a defeated people

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<sup>33</sup> Francisco De Victoria, *De Indis et De Iure Belli Reflectiones* (Ernest Nys trans, WS Hein 1995) sec 1, ss 7-15

<sup>34</sup> *Ibid* s. 15.

<sup>35</sup> De Victoria, (n 33) s. 10. Nevertheless, Victoria made it clear that he endorsed the view that Christians had a right to preach the gospel to unbelievers and should they be resisted, 'the Spaniard...may preach it despite their unwillingness and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the gospel.' Converts could be protected, by means of war if necessary, from attempts to reconvert them to their previous religion and, should a large number become converted, then the Pope might place a Christian rule over them (*De Indis*, sec. 3, ss. 9-14). As Ortega puts it, 'Victoria rejected the notion of a just religious war...However, in his absolute belief in the religious and cultural supremacy of Christianity, Victoria left the Indians little scope to exercise this freedom of choice' (Martin C Ortega, 'Victoria and the Universalist Conception of International Relations' in *Classical Theories of International Relations* (ed Ian Clark and Iver B Neumann, Macmillan 1996) 109-10).

<sup>36</sup> See Gesina HJ Van der Molen, *Alberico Gentili and the Development of International Law* (2nd edn, AW Sijthoff 1968) 245-56.

<sup>37</sup> Alberico Gentili, *De Iure Belli* (John Carew Rolfe, Hein 1995) book 1, chapter 9.

<sup>38</sup> *Ibid*.

in preference to their own.<sup>39</sup> However, he also rejected the use of force to maintain the practice of religion within a state, arguing that ‘if truly the profession of a different form of religious belief by their subjects does not harm princes, we are [...] unjust [...] if we persecute those who profess another religion than our own’<sup>40</sup> and that ‘violence should not be employed against subjects who have embraced another religion than that of their ruler’<sup>41</sup> though subject to the qualification ‘unless the state suffer some harm in consequence.’<sup>42</sup> In short, Gentili not only rejected the claim that religious differences could justify wars between states, he also called for the toleration of religious differences within states. In the turbulent world of the late Reformation and the wars of religion that it spawned, this was more of a plea than an observation, but in making it, Gentili prefigured the emergence of the “secularised” society of nations which is usually associated with the Peace of Westphalia<sup>43</sup> that ended the Thirty Years War in 1648.

### 1.2.2 Religion and ‘Civilised’ Europe

A principle of tolerance of other religions was already recognised by several religions in antiquity.<sup>44</sup> But the emergence of a legal principle of religious freedom parallels the emergence of international law itself. Initially, this freedom was recognised only as a freedom of the ruler to choose the religion of his territory: *cuius regio eius religio*. The Peace of Augsburg (1555) gave Lutheran princes the same status as Catholic princes and let the lay princes decide which of the two religions to adopt within their territories (with limited concession to those people already Lutheran to continue observing their faith) and gave the Lutheran Church self-governance. The Peace of Westphalia Treaties in 1648 concluded the Thirty Years War by setting up a regime of states with different Protestant faiths, obliging them to respect the diverging religious beliefs of individuals subject to their jurisdiction.<sup>45</sup> The state borders no longer paralleled the religious border, and religious freedom in a true sense was recognised. The authority of the sovereign under this regime was no longer seen to emanate from divinity but from the will of people. Thus, legal positivism in international law was born. The Treaty of Westphalia guaranteed freedom of religion for three religions

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<sup>39</sup>Ibid book 3, chapter 11, sections 558-60. Should the defeated peoples have no religion, however, the matter would be different and ‘the victor...may most justly compel to change conduct which is contrary to nature.’

<sup>40</sup>Ibid book 1, chapter 10, section 69.

<sup>41</sup>Ibid section 72.

<sup>42</sup>ibid chapter 11, section 78.

<sup>43</sup>Comprising the Treaty of Münster (France and the Empire), 1, CTS 271, and the Treaty of Osnabrück (Sweden and the Empire), 1, CTS 119.

<sup>44</sup>DJ Bederman, *International law in Antiquity* (Cambridge UP 2001) 48-85.

<sup>45</sup>M Evans, *Religious Liberty and international law in Europe* (Cambridge University Press 1997) Chapter 2; WA McDougall, ‘Religion in world affairs: Introduction’ (1998) 42(2) *Orbis* 159.

(the Calvinist, Lutheran and Catholic Christian faiths). The Union of Utrecht (1579), which later became the Constitution of The Netherlands, had already guaranteed general freedom of religion. So, international law developed a right of religious freedom, but religious freedom, in turn, was pivotal to the development of international law.

Protection of religious minorities through bilateral treaties continued after the Peace of Westphalia, which modified the previous rule of *cuius regio eius religio*, the freedom of the ruler to choose the religion of his territory. Bilateral treaties since the 17<sup>th</sup> century incorporated religious protection clauses, usually on a basis of reciprocity between the signatories.<sup>46</sup> Religious rights were, in some cases, a condition for territorial arrangement or recognition of states.<sup>47</sup> This development in international law was the practical manifestation of the contemporary liberal philosophy, which wished to distinguish religion from state in order to avoid conflict.<sup>48</sup> Since the Ottoman Empire, the Muslim powers too accepted these principles of European international law including full recognition of non-Muslim states, abandoning the *Shari'ah* principles of non-recognition of non-Muslim states and of a permanent state of war with such states.<sup>49</sup>

The era of modern protection of freedom of religion started after the First World War, with the League of Nations and the Minority Treaties. The Covenant of the League of Nations did not include a proposed Article (Draft Article 20) prohibiting the parties from interfering with religious exercise. A set of minority treaties was entered into.<sup>50</sup> Typical among these was the 1919 Minorities Treaty between the Principled Allied and Associated Forces and Poland,<sup>51</sup> which committed Poland to non-discrimination of (among others) religious minorities, equal funding for educational, religious and charitable causes of minorities, and specifically Jewish education (an arrangement which failed in practice),<sup>52</sup> as well as an undertaking not to disadvantage Jews because of Sabbath observance. The treaty was monitored by the Council of the League of Nations. The structure of the treaty was

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<sup>46</sup>Such as the Treaty of Vienna (1606) and the Treaty of Carlovitz (1699) between Austria and Turkey (22 CTS 219). See also AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 110-111.

<sup>47</sup>N Lerner, 'Religious human rights under the United Nations' in J van der Vyver and J Witte Jr (eds), *Religious Human Rights in Global Perspective Vol II - Legal Perspectives* (Nijhoff 1996) 94.

<sup>48</sup>This will be discussed in greater detail in chapter 2.

<sup>49</sup>An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press 1990) Chapter 6.

<sup>50</sup>F Capotorti, Study of the rights of persons belonging to ethnic, religious and linguistic minorities (E/CN.4/Sub.2/384/Rev.1, 1979) 18. See full list in H. Lauterpacht (ed.), *Oppenheim's international law*, vol I (Longman 1948) 713 fn 1.

<sup>51</sup>Treaty Series, No. 8 (1919). Reprinted in J. Robinson et al, *Were the Minority Treaties a Failure?* (Institute of Jewish Affairs 194) appendix 1.

<sup>52</sup>Ibid 73.

triangular: Poland's obligations towards the minorities were explicitly deemed international obligations between the signatories. The members of the Council of the League of Nations, and not the minorities themselves, were accorded the right to bring infractions to the attention of the Council or, ultimately, to the Permanent Court of International Justice.

Following the Second World War, it became clear that the League of Nations' method of upholding religious freedom through group protection had collapsed. This was due to its failure of enforcement, and ultimately, to its use by Hitler as a pretext for the invasion of Poland, and start of the Second World War.<sup>53</sup> The approach to the protection of human rights in the international arena changed from a minorities protection approach to a conception of universal individual rights as manifested in the early documents of the United Nations.

### 1.3 Overview of Contemporary International Human Rights Mechanisms

This section endeavours to provide a brief overview of International Human Rights mechanisms, which deal, *inter alia*, with issues related to freedom of religion or belief. This overview focuses on the various human rights mechanisms established within the United Nations system, more specifically, and the major regional human rights bodies more generally.

#### 1. *United Nations Charter-Based Bodies*

Already before the foundation of the United Nations Organisation, the US President Franklin D. Roosevelt in his 1941 Annual Message to Congress looked forward to a world founded on four freedoms, including 'freedom of every person to worship God in his own way- everywhere in the world'.<sup>54</sup>

##### 1.1. General Assembly

The Charter of the United Nations, which was signed in San Francisco in 1945, takes the UN General Assembly to initiate studies and make recommendations for the purpose of 'assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'<sup>55</sup>

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<sup>53</sup>PM Taylor, *Freedom of Religion: UN and international human rights law and practice* (Cambridge UP 2005)

<sup>54</sup>Franklin D Roosevelt, *Annual Message to Congress* (State of the Union Address, 6 January 1941)

<sup>55</sup>Charter of the United Nations (1945), at 13(1)(b). See also similar references in its articles 1(3), 55(c), and 76(c).

### 1.2. Economic and Social Council

In addition, article 62 of the Charter of the United Nations gives the Economic and Social Council the functions and powers to ‘make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all’ as well as to ‘prepare draft conventions for submission to the General Assembly’.

### 1.3. Commission on Human Rights

In 1946, the Economic and Social Council set up the Commission on Human Rights and determined that its work should primarily be directed towards submitting proposals, recommendations, and reports regarding an international bill of rights, international declarations or conventions, the protection of minorities, and the prevention of discrimination on grounds of race, sex, language, or religion.<sup>56</sup> From 1947 to 1948, delegates to the United Nations drafted the UDHR, which in article 18 proclaims everyone’s right to freedom of thought, conscience, and religion. Furthermore, the drafters in the Commission on Human Rights, under the chairpersonship of Eleanor Roosevelt,<sup>57</sup> alluded in the preamble of the UDHR to Franklin D. Roosevelt’s Four Freedoms Address by stating that ‘the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.’

### 1.4. Sub-Commission

While the Commission on Human Rights consisted since 1947 of States’ delegates,<sup>58</sup> the members of its subsidiary organ, the Sub-Commission on Prevention of Discrimination and Protection of Minorities served in their individual capacity as experts, i.e. independent of their Governments. The Sub-Commission was tasked to examine what provisions should be adopted in defining the principles to be applied in the field of the prevention of discrimination on grounds of race, sex, language, or religion, and in the field of the protection of minorities.<sup>59</sup>

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<sup>56</sup> Resolution of the Economic and Social Council of 16 February 1946 on the establishment of a Commission on Human Rights (E/27 1946) Section A, para 2.

<sup>57</sup> Eleanor Roosevelt was married to the 32nd US President, Franklin D Roosevelt (1882-1945).

<sup>58</sup> However, the Preparatory Committee in 1946, also referred to as the ‘Nuclear Commission on Human Rights’, consisted of nine members who were appointed in their individual capacity for a term of office until 31 March 1947 (E/27 (n 56) Section A, para 6).

<sup>59</sup> Commission of Human Rights, *Report to the Economic and Social Council on the First Session of the Commission* (E/259 1947) para 19(a). Economic and Social Council decision 1999/256 (E/1999/99(supp)) renamed it as ‘Sub-Commission on the Promotion and Protection of Human Rights’, which was replaced in 2007 by the ‘Advisory Committee’ pursuant to Human Rights Council resolution 5/1 (A/HRC/RES/5/1).

In 1956, the Sub-Commission appointed its member from India, Arcot Krishnaswami, as Special Rapporteur, who finalised three years later his Study of Discrimination in the Matter of Religious Rights and Practices.<sup>60</sup> In this seminal study, Krishnaswami suggested 16 Basic Rules, some of which became the blueprint for subsequent draft provisions on freedom of religion or belief. In 1962, the General Assembly in its resolution 1779 (XVII) considered it essential to recommend further specific effective measures to eliminate religious intolerance. Initially, two separate documents (a declaration and convention) were envisaged. However, the complexity and sensitivity of the issues raised led the General Assembly, in its resolution 3027 (XXVII), to accord priority to the completion of the declaration before resuming consideration of the draft international convention. After an arduous drafting history over almost twenty years, the Declaration on the Elimination of All Form of Intolerance and of Discrimination Based on Religion or Belief was ultimately adopted in 1981.

Two years later, the Sub-Commission appointed its member from Costa Rica, Elizabeth Odio Benito, as Special Rapporteur in order to report on the various manifestations of intolerance and discrimination on the grounds of religion or belief in the contemporary world, to identify their root causes and to recommend specific measures, with special emphasis on action that can be taken in the field of education. Odio Benito submitted three reports to the Sub-Commission until her mandate was discontinued.<sup>61</sup>

### *1.5. Special Procedures*

In 1986, the Commission on Human Rights created the separate mandate of a Special Rapporteur on religious intolerance in order to examine incidents and governmental actions which are inconsistent with the provisions of the 1981 Declaration and to recommend remedial measures, including the promotion of a dialogue between communities of religion or belief and their Governments.<sup>62</sup> In 2000, the mandate title was changed to ‘Special

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<sup>60</sup>Arcot Krishnaswami, Study of discrimination in the matter of religious rights and practices (E/CN.4.Sub.2/200/Rev.1 1960).

<sup>61</sup>E Odio Benito, Elimination of all forms of intolerance and of discrimination based on religion or belief : preliminary report (E/CN.4/Sub.2/1984/28 1984); Benito, Elimination of all forms of intolerance and of discrimination based on religion or belief : progress report (E/CN.4/Sub.2/1985/28 1985); and Benito, Elimination of all forms of intolerance and discrimination based on religion or belief : study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief E/CN.4/Sub.2/1987/26 1986).

<sup>62</sup>Commission on Human Rights resolution 1986/20 (E/CN.4/RES/1986/20).

Rapporteur on freedom of religion or belief'.<sup>63</sup> Since the mandate's establishment, Angelo Vidal d'Almeida Ribeiro (from March 1986 to March 1993),<sup>64</sup> Abdelfattah Amor (from April 1993 to July 2004),<sup>65</sup> Asma Jahangir (from August 2004 to July 2010), Heiner Bielefeldt (from August 2010 to October 2016) and Ahmed Shaheed (since November 2016), have submitted altogether more than 100 reports, totalling over 5,000 pages.<sup>66</sup> These reports are either thematic or country-specific. While thematic reports aim at clarifying systematic questions in the understanding of freedom of religion or belief, country-specific reports are based on observations made during formal country visits or in allegation letters.

The Commission on Human Rights has created further thematic and country-specific Special Procedures mandates which deal directly or indirectly with religious issues in their thematic or mission reports as well as in their allegation letters or urgent appeals to Governments. The term 'Special Procedures' encompasses Special Rapporteurs, Independent Experts and Special Representatives of the Secretary-General (i.e. individual mandate-holders) as well as Working Groups (which are composed of five members from different regional groups). Mandates pertinent to this thesis include the Special Rapporteurs on minority issues; on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; on freedom of opinion and expression; on freedom of peaceful assembly and association; on human rights while countering terrorism; on the rights of indigenous peoples; migrant; and internally displaced persons; on the situation of human rights defenders; on the rights to adequate housing; health; food; and education; in the field of cultural rights; on extrajudicial, summary or arbitrary executions; on torture and other cruel, inhuman or degrading treatment or punishment; on violence against women; as well as the Working Group on arbitrary detention; and the Working Group on the issue of discrimination against women in law and in practice.

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<sup>63</sup>Commission on Human Rights resolution 2000/33 (E/CN.4/RES/2000/33), endorsed by Economic and Social Council decision 2000/261 (E/2000/23 (Part I)), and welcomed by General Assembly resolution 55/97 (A/RES/55/97).

<sup>64</sup>In addition to his mandate as UN Special Rapporteur, Angelo Vidal d'Almeida Ribeiro was also a member of the European Commission of Human Rights from 1990 to 1992.

<sup>65</sup>In addition, Abdelfattah Amor was also a member of the Human Rights Committee from 1 January 1999 until his death on 2 January 2012 (and its Chairperson from 2003 to 2005 as well as a member of its Bureau from 1999 to 2003 and from 2007 to 2009). This temporary overlap of Special Procedures and Treaty Body mandates, the mutual cross-referencing and various forms of cooperation, e.g., in the context of the Rabat Plan of Action (A/HRC/22/17/Add.4), disprove Taylor's assertion that '[i]n reality, there is little interaction between the Human Rights Committee and the different special rapporteurs' (Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 16).

<sup>66</sup>See Michael Wiener, 'The Mandate of the Special Rapporteur on Freedom of Religion or Belief- Institutional, Procedural and Substantive Legal Issues' (2007) 2 Religion and Human Rights 3; and Michael Wiener, 'Interpretation of the 1981 Declaration through the Mandate Practice of the United Nations Special Rapporteur on Freedom of Religion or Belief' in Malcolm D Evans, Peter Petkoff, and Julian Rivers (eds), *Changing Nature of Religion Rights under International Law* (OUP 2015) 51.



### *1.6. Human Rights Council*

In 2006, the Commission on Human Rights was replaced by the Human Rights Council as the inter-governmental body responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.<sup>67</sup> The Human Rights Council has annually adopted resolutions on ‘freedom of religion or belief’, on ‘combating defamation of religions’ (until 2010), and on ‘combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against, persons based on religion or belief (since 2011).<sup>68</sup> In 2006, it decided to establish an Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards, with the mandate to ‘elaborate, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination, filling the existing gaps in the Convention and also providing new normative standards aimed at combatting all forms of contemporary racism, including incitement to racial and religious hatred.’<sup>69</sup> Furthermore, the Human Rights Council has established various Commissions of Inquiry, Fact-Finding Missions and Investigations, whose reports often also refer to violations of freedom of religion or belief in the concerned country or territory.

### *1.7. Universal Periodic Review*

Since 2008, the reports of States, Special Procedures, Treaty Bodies, National Human Rights Institutions, and non-governmental organisations form the substantive basis for the discussions and recommendations of the Universal Periodic Review (UPR). This peer-review process, under the auspices of the Human Rights Council, provides the opportunity for all UN Member States to declare in cycles of four and a half years what actions they have taken, or intend to take, in order to improve the human rights situations in their countries and to fulfil their human rights obligations.

## *2. United Nations Treaty-Based Bodies*

Apart from the above-mentioned Charter-based human rights mechanisms, there are ten UN Treaty Bodies composed of independent experts, who serve in their personal capacity

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<sup>67</sup>General Assembly resolution 60/251 (A/RES/60/251).

<sup>68</sup>See Marc Limon, Nazila Ghanea, and Hilary Power, *Combatting Global Religious Intolerance: The Implementation of Human Rights Council Resolution 16/18* (Universal Rights Group 2014).

<sup>69</sup>Human Rights Council decision 3/103 (A/HRC/DEC/3/103).

and monitor implementation of the core International Human Rights treaties.<sup>70</sup> States which have ratified or acceded to such an international treaty are legally bound to implement its provisions. Religious issues have been discussed in numerous concluding observations, views on individual complaints, and general comments/recommendations of the Human Rights Committee (monitoring the ICCPR), the Committee on Economic, Social, and Cultural Rights (monitoring the ICESCR), the Committee on the Elimination of Racial Discrimination (monitoring the ICERD), the Committee on the Elimination of Discrimination against Women (monitoring the CEDAW), the Committee against Torture (monitoring the CAT), the Committee on the Rights of the Child (monitoring the CRC), the Committee on Migrant Workers (monitoring the ICMW), the Committee on the Rights of Persons with Disabilities (monitoring the CRPD), the Committee on Enforced Disappearances (monitoring the ICPPED), and the Sub-Committee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (established pursuant to the OPCAT). Apart from the latter Sub-Committee, the other Treaty Bodies usually do not conduct country visits, unlike for example Special Procedures mandate-holders.

The main tasks of Treaty Bodies concern the assessment of the implementation of the respective convention in various States Parties within the reporting cycle (through issuing ‘concluding observations’) and the adoption of the Views on cases filed by individuals who claim that their human rights have been violated (‘individual communications’). Based on their jurisdiction, the Treaty Bodies issue general comments (sometimes also called ‘general recommendations’) in which they specify their understanding of provisions within the convention under their oversight. Through the work of Treaty Bodies, and in particular through general comments/recommendations, the conventions become ‘living instruments’, interpreted in the light of new developments and in response to individual cases. With regard to religious issues, it is worth highlighting the Human Rights Committee’s general comments no.22 (on freedom of thought, conscience or religion), no. 23 (on the rights of minorities), and no. 34 (on freedom of opinion and expression), CERD’s general recommendations no. 35 (on combating racist hate speech) as well as joint general recommendation/general comment no.31 of the Committee on the Elimination of Discrimination Against Women and no.18 of the Committee on the Rights of the Childs (harmful practices).

The General Assembly, in its resolution 68/268 on strengthening and enhancing the

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<sup>70</sup>See OHCHR, ‘Monitoring the Core International Human Rights Treaties’ <<https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx>> accessed 22 September 2021.

effective functioning of the human rights treaty body system, reaffirmed that ‘the full and effective implementation of international human rights instruments by States parties is of major importance for the efforts of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms and that the effective functioning of the human rights treaty body system is indispensable for the full and effective implementation of such instruments’.

### *3. United Nations Secretariat*

#### *3.1. High Commissioner for Human Rights*

In 1993, the post of the United Nations High Commissioner for Human Rights, with a mandate to promote and protect the effective enjoyment by all, of all human rights, was created by the General Assembly. Its resolution 48/141, referring to the Vienna Declaration and Programme of Action, decided that the High Commissioner shall ‘[b]e guided by the recognition that all human rights- civil, cultural, economic, political, and social- are universal, indivisible, interdependent and interrelated.’

The Office provides substantive and logistical support for the United Nations human rights mechanisms, including Treaty Bodies and the Special Procedures of the Human Rights Council. Enhancing equality and countering discrimination, including on grounds of religion, is one of the Office’s thematic priorities.<sup>71</sup> It also supports the progressive development of International Human Rights Law and organised, for example, a series of expert workshops in various regions of the world, which culminated in 2012 in the adoption of the Rabat Plan of Action on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>72</sup>

#### *3.2. Office on Genocide Prevention and the Responsibility to Protect*

In 2004, Secretary-General Kofi Annan appointed a Special Advisor on the Prevention of Genocide, with a mandate to ‘(a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning to the Secretary-General,

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<sup>71</sup>See OHCHR, Management Plan 2014-2017: Working for Your Rights (UN 2013).

<sup>72</sup>Annual report of the United Nations High Commissioner for Human Rights (A/HRC/22/17/Add/4 2013) annex, appendix.

and through him to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes.<sup>73</sup>

In 2008, Secretary-General Ban Ki-moon furthermore appointed a Special Advisor on the Responsibility to Protect, in order to contribute to the conceptual development and consensus-building with regard to the concept of the ‘responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’, as contained in the 2005 World Summit Outcome Document.<sup>74</sup> The Office on Genocide Prevention and the Responsibility to Protect has published a tool for prevention, entitled ‘Framework of Analysis for Atrocity Crimes’, whose risk factors and indicators include references to religious events, identity, traditions, symbols, and property.<sup>75</sup> The two Special Advisors have also cooperated with OHCHR and Special Procedures, for example, in the context of the Rabat Plan of Action as well as through joint visits and statements.

#### *4. Regional Human Rights Bodies*

In addition to the above-mentioned United Nations human rights mechanisms, regional organisations have also created their own regional human rights bodies, which *inter alia* deal with freedom of religion or belief. However, the standards and objectives of the regional human rights bodies sometimes differ markedly from the universal human rights instruments and mechanisms.

##### *4.1. Europe*

Several intergovernmental or supranational organisations in Europe have adopted regional standards and set up human rights bodies pertinent also to freedom of religion or belief: the Council of Europe (CoE), the European Union (EU), and the Organisation on Security and Co-operation in Europe (OSCE).

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<sup>73</sup>UN Secretary General, Letter dated 2004/07/12 from the Secretary-General addressed to the President of the Security Council (S/2004/567 2004) annex.

<sup>74</sup>See 2005 World Summit Outcome (A/RES/60/1 2005) paras 138-139; UN Secretary General, Letter dated 2007/08/31 from the Secretary-General addressed to the President of the Security Council (S/2007/721 2007).

<sup>75</sup>Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes- A Tool for Prevention (UN 2014).

The jurisdiction of the CoE's European Court of Human Rights, based in Strasbourg, extends to all matters concerning the interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) and the Protocols thereto.<sup>76</sup> In addition, the Charter of Fundamental Rights of the EU, which has the status of primary EU law since 1 December 2009, has been cited in numerous judgments of the Court of Justice of the European Union, based in Luxembourg. Insofar as the Charter of Fundamental Rights of the EU contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR.<sup>77</sup> Article 9 of the ECHR and Article 10 of the Charter of Fundamental Rights of the EU both guarantee freedom of thought, conscience, and religion, including freedom to change one's religion or belief (thus reiterating the wording of article 18 of the UDHR).

Furthermore, the Final Act of the Conference on Security and Co-operation in Europe, concluded at Helsinki on 1 August 1975, provides that '[t]he participating States will respect human rights and fundamental freedom, including the freedom of thought, conscience, religion, or belief, for all without distinction as to race, sex, language or religion.'<sup>78</sup> In 1990, the participating States explicitly reaffirmed that the right to freedom of thought, conscience, and religion 'includes freedom to change one's religion or belief'.<sup>79</sup> The Ministerial Council of the OSCE has tasked the Office for Democratic Institutions and Human Rights (ODIHR) to continue providing support to the participating States, upon their request, in their efforts to promote freedom of religion or belief,<sup>80</sup> and to further strengthen the work of the ODIHR's Advisory Panel of Experts on Freedom of Religion or Belief in providing support and expert assistance to participating States.<sup>81</sup> The twelve members of the Advisory Panel of Experts have issued pertinent guidelines, e.g. on the review of legislation pertaining to religion or belief, on teaching about religions and beliefs in public schools, and on legal personality of

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<sup>76</sup>Article 32(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos 11 and 14 (ECHR).

<sup>77</sup>Article 52(3) of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights of the EU).

<sup>78</sup>Conference on Security and Co-Operation in Europe, Final Act (Helsinki 1975), Declaration on Principles Guiding Relations between Participating States, principle VII, para 1.

<sup>79</sup>Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (Copenhagen 1990), para 9.4.

<sup>80</sup>Document of the Thirteenth Meeting of the Ministerial Council (Ljubljana 2005), Decision No 10/05 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, para 6.3.

<sup>81</sup>Document of the Fourteenth Meeting of the Ministerial Council (Brussels 2006), Decision No 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, para 14(b).

religious or belief communities.<sup>82</sup>

#### *4.2. Americas*

The Inter-American Commission on Human Rights, based in Washington D.C., and the Inter-American Court of Human Rights, based in San José, have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties to the American Convention on Human Rights.<sup>83</sup> The latter notably includes article 12 on freedom of conscience and religion, which similar to the UDHR and ECHR explicitly refers to the freedom to change one's religion or beliefs. Furthermore, Article 13(5) of the American Convention on Human Rights provides that any advocacy of national, racial or religious hatred that constitutes incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of religion shall be considered as offences punishable by law.

#### *4.3. Africa*

The African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights (Banjul Charter) in order to promote these rights and ensure their protection in Africa.<sup>84</sup> In 2004, the Protocol to the Banjul Charter entered into force, establishing the African Court on Human and Peoples' Rights with a jurisdiction on all cases and disputes submitted to it concerning the interpretation and application of the Banjul Charter, its Protocol and any other relevant human rights instrument ratified by the States concerned.<sup>85</sup> Article 8 of the Banjul Charter guarantees freedom of conscience as well as the profession and free practice of religion. The Banjul Charter neither refers to the term 'belief' nor to the freedom to change one's religion or belief.

#### *4.4. South East Asia*

In 2009, the Association of South East Asian Nations created the ASEAN Intergovernmental Commission on Human Rights. It has a mandate to 'promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities' and it shall be guided by 'respect

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<sup>82</sup>See OSCE 'Freedom of religion or belief' <<https://www.osce.org/odihr/freedom-of-religion-or-belief>> accessed 22 September 2021.

<sup>83</sup>Article 33 of the American Convention of Human Rights.

<sup>84</sup>Article 30 of the African Charter on Human and Peoples' Rights (Banjul Charter).

<sup>85</sup>Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity'.<sup>86</sup> This contrasts with the formulation of the Vienna Declaration and Programme of Action, which stresses that '[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'<sup>87</sup>

#### *4.5. Organisation of Islamic Cooperation*

In 2011, the (cross-regional) Organisation of Islamic Cooperation (OIC) established the Independent Permanent Human Rights Commission with the objective to 'advance human rights and fundamental freedoms in [OIC] Member States as well as the fundamental rights of Muslim minorities and communities in non-member States in conformity with the universally recognised human rights norms and standards and with the added value of Islamic principles of justice and equality.'<sup>88</sup> The Independent Permanent Human Rights Commission exercises its function in accordance with the provisions of the OIC Charter, which in its Article 1 indicates as objectives '11. To disseminate, promote, and preserve the Islamic teachings and values based on moderation and tolerance, promote Islamic culture and safeguard Islamic heritage; 12. To protect and defend the true image of Islam, to combat defamation of Islam and encourage dialogue among civilisations and religions [...]'.<sup>89</sup>

However, such an approach of protecting the reputation of religion(s) as such (in particular Islam), rather than protecting the rights of human beings in the area of religion or belief, is clearly at variance with the human rights approach and would even turn freedom of religion or belief upside down.<sup>89</sup> This criticism is also shared by numerous Muslim intellectuals and human rights defenders. Moreover, particularistic limitations may undermine the recognition of human rights and their universal, indivisible, interdependent, and interrelated nature. The above-mentioned examples show the risks of possible relativistic tendencies of some regional standards and mechanisms which are not in full compliance with International Human Rights Law, as it currently stands.

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<sup>86</sup>Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, paras 1.4 and 2.1(g).

<sup>87</sup>Vienna Declaration and Program of Action (A/CONF.157/23 1993) chapter I, para 5.

<sup>88</sup>Rules of Procedure of the OIC Independent Permanent Human Rights Commission (IPHRC) Rule 2(2).

<sup>89</sup>Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 Human Rights Quarterly 33, 42.

#### 1.4 The Normative Core of Freedom of Religion or Belief

There are certain core values that will be protected and features a regime will exhibit if freedom of religion or belief is respected. These constitute a set of minimum standards; obviously, many systems go much further in building genuine cultures of tolerance and mutual respect.

Freedom of religion or belief, in its current historical form, is a universally applicable human right codified in International Human Rights instruments. At the normative level, it has been clear from the beginning of the modern human rights era that freedom of religion or belief is a fundamental right,<sup>90</sup> and indeed one of the preeminent fundamental rights. Emerging from the ashes of the Second World War, the right has been articulated most authoritatively in article 18 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Individuals – all human beings everywhere in the world – are the primary holders and beneficiaries of this freedom; states – ideally under continual critical scrutiny by informed citizens – are the primary addressees and thus the primary holders of the correlative obligations. Beyond the religious freedom and the ICCPR, key elaboration and specifications of the Human Right to Freedom of Religion or Belief are provided by, *inter alia*, the 1981 Declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the CSCE, and the United Nations Human Rights Committee General Comment No 22 (48) provides normative substance to article 18 of the ICCPR.

The normative core of the Human Right to Freedom of Religion or Belief may be condensed to eight components:

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<sup>90</sup>One clear sign of this is the fact that religious freedom protections are nonderogable.



1. *Internal Freedom*: everyone has the right to freedom of thought, conscience and religion; this right includes freedom for all to have, adopt, maintain or change<sup>91</sup> religion or belief.<sup>92</sup>
2. *External Freedom*: everyone has the freedom, either alone or in community with others, in public or private, to manifest his or her religion or belief in teaching, practice, worship and observance.<sup>93</sup>
3. *Noncoercion*: no one shall be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.<sup>94</sup>
4. *Non-discrimination*: states are obliged to respect and to ensure to all individuals within their territory and subject to their jurisdiction the Right to Freedom of Religion or Belief without distinction of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national or other origin, property, birth, or other status.<sup>95</sup>
5. *Rights of parents and guardians*: states are obliged 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, subject to providing protection for the rights of each child to freedom of religion or belief consistent with the evolving capacities of the child.<sup>96</sup>
6. *Corporate freedom and legal status*: a vital aspect of freedom of religion or belief, particularly in contemporary settings, is for religious communities to have standing and institutional rights to represent their rights and interests as communities. That is, religious communities themselves have freedom of religion or belief, including a right to autonomy in their own affairs. While religious communities may not wish to

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<sup>91</sup>While the notion that freedom of religion or belief includes the right to “have or adopt” a religion is undisputed, there has been considerable controversy about whether it includes the right to “change”. See, for example, John P Humphrey, ‘Political and Related Rights’ in *Human Rights in International Law: Legal and Policy Issues* (ed Theodor Meron, Clarendon Press 1984) 171, 179; Richard B Lillich, ‘Civil Rights’ in *Human Rights in International Law: Legal and Policy Issues* (ed Theodor Meron, Clarendon Press 1984) 115, 159; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (NP Engel 1993) 316; Karl Josef Partsch, ‘Freedom of Conscience and Expression, and Political Freedoms’ in *The International Bill of Rights: The Covenant on Civil and Political Rights* (ed Louis Henkin, Columbia University Press 1981) 209, 211.

<sup>92</sup>The HRC General Comment to article 18 of the International Covenant on Civil and Political Rights (ICCPR 1966) clarifies that, ‘Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.’ The human right to freedom of religion or belief is therefore intended to equally protect believers and nonbelievers, religions and beliefs.

<sup>93</sup>ICCPR, art. 18(1); ECHR, art. 9(1).

<sup>94</sup>ICCPR, art. 18(2).

<sup>95</sup>Antidiscrimination norms, and in particular, norms that bar discrimination on the basis of freedom of religion or belief, pervade the key international instruments. See, for example, UDHR, art 2; ICCPR, art 2(1); ECHR, art 14; etc.

<sup>96</sup>ICCPR, art. 18(4); Convention on the Rights of the Child (CRC) ([ST/DPI/1101 1989) art. 14.

avail themselves of formal legal entity status, it is now widely recognised that they have a right to acquire legal entity status as part of their Right to Freedom of Religion or Belief and in particular as an aspect of the freedom to manifest religious beliefs not only individually, but in community with others.<sup>97</sup>

7. *Limits of permissible restrictions on external freedom*: freedom to manifest one's religion or belief 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 of others.<sup>98</sup>
8. *Nonderogability*: states may make no derogation from the Right to Freedom of Religion or Belief, not even in times of public emergency.<sup>99</sup>

These eight components of the Human Right to Freedom of Religion or Belief can be identified from amongst the complex body of mutually supporting, internationally codified, human rights norms. When applied to particular contexts and for practical purposes, these norms may need further interpretation and elaboration.

As the enumeration of the core elements of freedom of religion or belief makes clear, this is a complex right, containing sub-elements that overlap with a variety of values protected by other human rights. This has led to tendencies to interpret freedom of religion or belief through the conceptual filter of other norms to which the various sub-elements of religious freedom are linked, such as equality or freedom of expression or the rule of law. Some have gone even further, recommending that freedom of religion be reduced to or

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<sup>97</sup>The key treaty language from the ICCPR states that the right to 'freedom of thought, conscience and religion...shall include...freedom, either individually *or in community with others* and in public or private, to manifest his religion....' ICCPR, art. 18 (emphasis added). See, for example, *Metropolitan Church of Bessarabia v. Moldova*, ECtHR, App. No. 45701/99, 13 December 2001.

<sup>98</sup>ICCPR, art. 18(3); ECHR, art. 9(2); UN Human Rights Committee, General Comment No.22 (48), adopted by the UN Human Rights Committee on July 20, 1993, (UN Doc. CCPR/C/21/Rev.1/Add.4 1993), reprinted in UN Doc.HRI/GEN/1/Rev.1 at 35 (1994). It is important to emphasise that while some limitations on the scope of freedom of religion or belief are necessary, they are to be construed very narrowly in order to maximise the scope of the freedom. Failure to understand the strictly limited nature of the limitations can itself pose a hazard to the freedom, defeating the purpose of legally codifying the freedom. This is explored in more detail in chapter 2 and 3 of this thesis.

<sup>99</sup>ICCPR, art. 4(2). The right to freedom of religion or belief was not listed among the nonderogable rights under the ECHR, but all parties to the ECHR have subsequently ratified the ICCPR, and are thereby obligated to recognise the nonderogable character of the right to freedom of religion or belief. ECHR, art. 15(1) provides that derogations are permissible 'under this Convention [only] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' Thus, freedom of religion or belief would now appear, at least indirectly, to be a nonderogable right under the ECHR. Of course, the fact that the right to freedom of religion or belief is nonderogable does not mean that limitations may not be imposed on manifestations in that limited range of circumstances where the limitations clauses of international instruments permit. This is not, however, as simplistic as it is made out to be. The right to manifest ones religion or belief in Europe is an especially fraught subject, and will be explored in more detail in chapter 2.

supplanted by one of these other norms. These tendencies impoverish our understanding of freedom of religion or belief and fail to understand the extent to which the differing values constitute a seamless web crucial as a whole to protecting the fragile yet vital interactions of belief, action, and community that constitute belief systems.

Clearly, facilitating the Human Right to Freedom of Religion or Belief is not limited exclusively to providing legal protection for the eight core components identified above. Furthermore, there is more to freedom of religion or belief than human rights protection. Many countries provide additional, more concrete protections in their constitutional or legal orders. Such national elaborations are largely shaped by the religion-state structure, which stretches from various forms of ‘separation’ through to establishment of religion and identification of the state with a particular religion. The institutional configuration of religion-state relations reflects diverse histories, cultures, and political compromises. The core values protected under the auspices of freedom of religion or belief allow for a broad range of options in the ways that different states structure the relationship with religion, belief communities, and individual believers.<sup>100</sup> However, there is a core set of values, including at least the eight identified above, that constitute the minimum requirements for protection of the universal Right to Freedom of Religion or Belief.

The large majority of the world’s nations, including those containing the overwhelming majority of the world’s population, have ratified the key international instruments affirming this right. Even if this were not the case, however, the Right to Freedom of Religion or Belief is so fundamental and so widely accepted that it is generally held to be protected as part of customary international law.<sup>101</sup>

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<sup>100</sup>See UN Human Rights Committee, General Comment 22 (48), para 9.

<sup>101</sup>See, for example, Philip Alston, ‘The Universal Declaration at 35: Western and Passé or Alive and Universal?’ (1983) 31 *The Review of the International Commission of Jurists* 60, 69 (arguing that the Universal Declaration is customary law); Richard Bilder, ‘The Status of International Human Rights Law: An Overview,’ in *International Human Rights Law and Practice* (ed James Tuttle, American Bar Association 1978) 1, 8; Derek Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief,’ [2002] *BYU Law Review* 217, 230; Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 19; John Humphrey, *No Distant Millennium: The International Law of Human Rights* (UNESCO 1989) 155; John Humphrey, ‘The International Bill of Rights: Scope and Implementation,’ (1976) 17 *William and Mary Law Review* 527, 529; Richard B Lillich, ‘Civil Rights,’ in *Human Rights in International Law: Legal and Policy Issues* (ed Theodor Meron, Clarendon Press 1984) 115, 116; AH Robertson and JG Merrills, *Human Rights in the World* (3rd edn, Manchester University Press 1989) 96; Louis B Sohn, ‘The Human Rights Law of the Charter’ (1977) 12 *Texas International Law Journal* 129, 133; Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Nijhoff 1996) 184-85; Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), 237-38; Hurst Hannum, ‘The Status of the Universal Declaration of

## 1.5. Conclusion

There are a few key points to be taken from this discussion of the foundations and principles of human rights legislation. Firstly, human rights as a philosophical concept did not come into existence *ex nihilo* in 1948 with the creation of the UDHR, nor did it come into being with Franklin's Four Freedoms address or any other singular moment in time. Rather, as this chapter has shown, human rights are the product of European history: a history of religious wars, religious treaties, and the gradual development of both a legal and philosophical field of thought on this topic. Secondly, this conception of human rights is not neutral. They have been formulated since the 40s with as great a degree of universality and applicability as possible, endeavouring to leave sufficient scope to allow states to implement them in their own ways, according to the laws of the land and the customs and mores of its people; however (as will be discussed in Chapter Two) their original conception does stem in form from a particular Liberal, Protestant, Western European mode of thought, and this heritage has influenced the current form human rights take, both in terms of freedom of religion and more generally.

There's nothing wrong *per se* with human rights having this heritage, but it would be a mistake to act, as often happens in the political rhetoric, as if human rights are an infallible structure, neutral and perfectly devoid of bias. As this thesis analyses the Right to Freedom of Religion under both the human rights regime and Islamic jurisprudence, it is essential and more honest to recognise the cultural pressures and sometimes *ad-hoc* historical expediencies that have shaped human rights. A sensible and proper analysis of human rights cannot be achieved without a frank and clear understanding of its genesis, which is what this chapter has achieved.

Similarly, it must be acknowledged that a legal Right to Freedom of Religion has only recently been conceptualised with a long-term, universal applicability in mind. As discussed above, for every theorist and religious scholar to shape the discourse on this topic, there have been many more laws, Imperial edicts, and treaties signed that have affected the development of the concept of religious toleration, and religious plurality, and of the latter, the vast majority were political expediencies, designed more to give peace and political stability in the moment, and not particularly with far-future implications in mind. Again, this occasionally *ad-hoc* evolution must be taken into account when considering human rights,

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Human Rights in National and International Law' (1995/1996) 25 Georgia Journal of International and Comparative Law 287, 317-52.

to allow it room to develop further to serve the needs of the modern world. This chapter has laid out this evolution. We saw as a starting point Emperor Constantine's admission of Christianity into the list of permissible religions: a case of a State speaking directly to its citizens, without consideration for the outside world. In due course this evolved, as an outward-looking consideration of the Other became necessary for polities to manoeuvre, and Spain's conquests in Central America, for instance, gave rise post-facto to De Victoria's considerations of the limits of the Pope's power and the extent to which a state might justifiably exert control on the beliefs of non-citizens or non-coreligionists. From this, again as a result of short-term political necessity and European turmoil, we begin to see bilateral treaties recognising minority religious rights and a primitive international enforcement mechanism with the 1919 Minorities Treaty. The most recent development in the modern era has been the near-universal adoption of Human Rights principles that leave wiggle room for state application but that feature an international legal mechanism for monitoring and enforcement.

The chapter has also demonstrated why a Right to Freedom of Religion is vital as a standalone right – not only because religious communities may be more likely to distance themselves from a generic right to dignity – perhaps under the extremely understandable conviction that their religion provides a right and a guarantee of dignity better than any far-off international court could – but also because, as argued above, a more general right (e.g. to freedom of expression) would be inadequate for providing protection in the face of the complicated and fragile web of forces that constitute belief. Religion throws up thorny questions of jurisdiction, individualism, communalism, and conviction. Religion also brings complicated power dynamics to the fore: between the individual and their communities, the individual and the State, and religious institutions and the State, to name but a few. Consider also the right to coexist alongside other individuals, institutions and states with different, equally deeply-held beliefs, and it becomes clear that a dedicated Right to Freedom of Religion is essential to provide a framework for all human beings to safely enjoy freedom of religion.

This chapter has also provided an overview of the international legal instruments that exist, and the framework that exists to protect the Right to Freedom of Religion. Following which, Chapter 2 will now look at specifically the way the ECtHR has interpreted the Right to Freedom of Religion and how the UNHCR has interpreted the same in its own jurisdiction. Despite the fact that this chapter mentions other regional mechanisms, e.g. the Inter-

American Commission on Human Rights and the African Commission on Human and People's Rights, this thesis focuses on Europe and the UN for several reasons. Firstly, because the UN (despite not having an enforcement mechanism, unlike other regional legal systems) has the greatest membership, and the most 'international' reach. As a result of its near-universal acceptance, the UN is seen as the standard flag-bearer of human rights, and its champion. Europe is discussed because it has the most expansive jurisprudence on the subject: of all the regional courts, the European Court of Human Rights has adjudicated on the Right to Freedom of Religion the most. This is a practical reason – another reason is rooted purely in imperialism: because of what Europe is, what it represents, and its inherent 'whiteness', Europe is seen internationally as the bastion of human rights. It's the standard by which other jurisdictions measure themselves. Because of this, Europe is also where we hear the most about in popular narratives as European freedom of religion cases are in the media and news all the time. Recent cases that involve Muslim women and the right *vis-à-vis* clothing has taken up an inordinate amount of time on the airwaves all over the world, a topic discussed at length in chapter 2. Europe also functions as a flashpoint for religious and racial tensions, and their framing in law. Europe has the fastest-changing demographic on earth in terms of Muslim populations. Having developed a sizeable Muslim population over a very short amount of time, and that to a large extent as a result of an uncomfortable colonial legacy, seeing Europe get to grips with this unprecedented demographic shift through its jurisprudence on the Right to Freedom of Religion provides ample food for thought for this thesis.

## CHAPTER 2

### **Analysing the Current Status of the Right to Freedom of Religion under International Human Rights Law**

#### **2.1. Freedom of Religion in the European Court of Human Rights: Article 9 contextualised through the Court's jurisprudence**

##### **2.1.1. Introduction**

Europe has had a long-standing and difficult relationship with religion for many centuries, many times being the source of conflict and war, and the continent 'has witnessed one after another fierce religious struggle.'<sup>1</sup> And although there are no longer the kind of 'violent conflicts that once had their origins in religious enmity'<sup>2</sup> which took place in the sixteenth and seventeenth centuries, contemporary Europe's relationship with religion remains complicated, albeit taking on a different hue and colour. The questions raised, being fuelled by the ongoing debate over religion's place in European integration, cultural and religious diversity, and what it 'means' to be European,<sup>3</sup> are often left to the European Court of Human Rights to answer.<sup>4</sup>

With the context of all the religious (and otherwise) wars that have shaped Europe and the European 'project' in to what it is today, it would be incomplete to simply say that 'religion' has played an integral part in this formation of modern Europe, without pointing out *which* religion, in specific. 'Europe is suffused with Christianity, or at least memories of its past influence'<sup>5</sup> and this 'Christian heritage is essential to the civilizational identity of Europe'<sup>6</sup>, therefore to vaguely credit all 'religion' for the cultural, political, and legal imprint

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<sup>1</sup>Mark Weston Janis, 'The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law' (2015) 4 Oxford Journal of Law and Religion 75; Peter Cumper & Tom Lewis, 'Introduction: Freedom of Religion and Belief- The Contemporary Context' in Cumper & Lewis (eds), *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar 2012).

<sup>2</sup>ibid Cumper and Lewis.

<sup>3</sup>ibid; '[A] number of the most controversial issues associated with the ongoing project of European integration have indeed involved deep disagreement about the role of religion in politics and public life.'" Lucian Leustean & John Madely, 'Religion, Politics and Law in the European Union: an Introduction' (2009) 37(1/2) Religion, State and Society 3.

<sup>4</sup>Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) 32 Michigan Journal of International Law 663, 744- 'Since 2001, the Article 9 jurisprudence of the European Court of Human Rights has raised anew the question of the relationship between religion and the public order.'

<sup>5</sup>Andrew Higgins, 'A More Secular Europe, Divided by the Cross' *The New York Times* (Bratislava, 17 June 2013)

<sup>6</sup>Danchin (n 4) 689.

that Christianity has left on Europe would be an intellectual disservice because the ‘history of Europe and Christianity are inextricably entwined’<sup>7</sup> – no one aspect of either can be explained without an explanation of the other as well. But on a continent as religiously diverse as Europe, that claims to be committed to the idea of religious and cultural equality,<sup>8</sup> having a historical hegemony of one predominant religion which informs much of its present understandings of law, culture, and society, is bound to create some tension- is equality truly possible when our conception of equality is heavily influenced by a particular theological and philosophical strain of knowledge?

Whilst answering that question is interesting from its own isolated perspective as well, it becomes even more pertinent in the context of this thesis as a whole. The aim of this thesis from the very start has been to examine whether a reinterpretation of Islamic jurisprudence on the Right to Freedom of Religion can address its disconnect with the right as it exists under International Human Rights Law. With Europe having played a pivotal role in our conceptualisation of modernity and its inextricable facets in the form of democracy, the nation-state, human rights, and civilisation,<sup>9</sup> an examination of the right as it exists in Europe today is critical for our understanding of what the Right to Freedom of Religion is presently. Indeed, it becomes a necessary tool to predict where this right will go from here as well. Answering the aforementioned question in the preceding paragraph becomes even more important when we realise that the forum which has generated the most substantive jurisprudence on religion and its adherents’ place in society (i.e., the European Court of Human Rights) is also one of the more heavily criticised ones.<sup>10</sup> This brings us back to the major contention being advanced by this thesis- Christianity and its overwhelming influence on Europe’s legal progression. In other words, this thesis contends that the way the European Court understands religion isn’t secular, it’s inherently Christian. In furtherance of the thesis, this chapter will unpick how Christian-oriented secularism has influenced judgments on the

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<sup>7</sup>Camil Ungureanu, ‘Europe and Religion: An Ambivalent Nexus’ in Lorenzo Zucca & Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012).

<sup>8</sup>Lourdes Peroni, ‘On Religious and Cultural Equality in European Human Rights Convention Law’ (2014) 32(3) *Netherlands Quarterly of Human Rights* 231.

<sup>9</sup>A philosophical discussion of the meaning of these terms is beyond the scope of this thesis. However, it must be pointed out that this statement is based on certain inherently problematic assumptions that conflate ‘democracy, the nation-state, human rights, and civilisation’ as being intrinsically ‘European’ or ‘Western’. Whilst Section 2 of this thesis discusses the role Islam has played in the development of the ideals of modern-day human rights, it does not seek to dismantle the established conceptions of these ‘ideas’ as being developed by the ‘West’.

<sup>10</sup>‘Over the past 20 years the European Court of Human Rights has evolved into a conspicuous, often contentious, force in the multilevel battles over the place of religion in the European public sphere.’- Effie Fokas, ‘Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence’ (2015) 4 *Oxford Journal of Law and Religion* 54.



## Right to Freedom of Religion.

Although an extensive study of the evolution of Christianity in its many forms in European law and society is beyond the scope of this thesis, acknowledgment of the aforementioned tension does lead us to the inevitable question then as to how this tension between Europe's Christian past and its current diversity can be resolved, in the context of one of the aspirations of modern and liberal Europe – not to discriminate when it comes to religion.

It has been argued elsewhere also that the ratification of the European Convention on Human Rights<sup>11</sup> [hereinafter the ECHR], of which Article 9 protects freedom of thought, conscience, and religion, was a 'notable but incomplete step towards resolution'<sup>12</sup> of this tension. This section, therefore, examines this tension and suggests that a resolution of this tension can only come about if the European Court of Human Rights [hereinafter the ECtHR or the Court] adopts a more critical approach to the concept of 'religion' as found in Article 9 of the ECHR. It is argued through an analysis of the different jurisprudence on Article 9 and the seminal legal principles utilised by the Court in order to reach what it deems are inclusive human rights-based decisions, that the Court's conception of 'religion' in legal terms is limited to the idea of 'belief',<sup>13</sup> which very specifically privileges Christianity (and more specifically a liberal Protestant version of Christianity) over other overtly communitarian religions which visibly and obviously 'manifest' themselves, e.g., Islam and Sikhism, (and even to some extent Catholicism and Orthodox Christianity).<sup>14</sup> Therefore, the section argues that there is always going to be an inherent bias in favour of (liberal Protestant) Christianity in how the Court understands what religion is and what its 'manifestation' means to different adherents.

It has been occasionally suggested that any examination of religion within the law should not be to discover 'how the term religion *is* used, whether in the world at large or in the legal community, but to know how the term religion *should* be used, in the interpretation, the application, and the justification of a fundamental freedom.'<sup>15</sup> However, this section

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<sup>11</sup>Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4 1950, 213 UNTS 222

<sup>12</sup>Aaron Petty, 'Religion, Conscience, and Belief in the European Court of Human Rights' (2016) 48(4) *George Washington International Law Review* 807.

<sup>13</sup>*Ibid.*

<sup>14</sup>However the focus of this thesis is on Islam and will confine itself to Islam's bearing on the matter.

<sup>15</sup>Timothy Macklem, 'Reason and Religion' in Peter Oliver et al (eds), *Faith in Law: Essays in Legal Theory* (Hart Publishing 2000).

disagrees with this idea and aims to examine how the term religion itself is used, as without doing so it is impossible to suggest how it should be used. And whilst it acknowledges and appreciates that at no point does the Court explicitly favour a liberal Protestant version of Christianity (as to do so would completely negate the purpose of the ECHR<sup>16</sup> and Article 14<sup>17</sup> within it) it does suggest that the way the Court interprets Article 9 and tries to reconcile it with the simultaneous and diametrically opposing claims of states and their religiously diverse citizens, betrays that it is informed by a Christian understanding of religion, thereby essentially furthering the tension between what the liberal human-rights objective of protection of freedom of religion is and the conceptual and practical implementation (or lack thereof) of it.

As a preliminary point, it should be noted that this section (or rather, this entire thesis) does not devote much discussion to the conceptual difficulties of defining religion. Whilst it is recognised that this is a legitimate area of scholarship, as this section focuses on the ECHR, the working approach of the Court is followed for the purposes of the present discussion. As Sir Nicholas Bratza posits, the lack of definition on religion is not the main source of controversy in the Article 9 jurisprudence:

The Commission and Court, in common with the Human Rights Committee under the International Covenant on Civil and Political Rights, have conspicuously avoided any definition of the term, for obvious reasons. The difficulties of achieving a definition that is flexible enough to embrace the immense range of world faiths but, at the same time, precise enough to be capable of practical application would almost certainly prove insuperable. Fortunately, in practice, the lack of a definition has not been problematic. This is largely because, as I have stated, Article 9 protects

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<sup>16</sup>Preamble ‘...Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;....’ (n 11).

<sup>17</sup>Article 12- Prohibition of discrimination- ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ (n 11).

both 'religion' and 'belief'.<sup>18</sup>

### ***2.1.2. Religious freedom in Europe in a historical context***

Before we can consider the nature of protection afforded by Article 9 of the ECHR, it is useful to bear in mind the impact of the European historical experience of religion. A more detailed discussion of this has been undertaken in Chapter 1. However, for the purpose of added clarity, a brief reiteration is necessary to better contextualise the emergence of the Right to Freedom of Religion.

Waldron argues cogently that any conceptual study of rights must be grounded in normative analysis, because 'justificatory argument in political theory and jurisprudence must precede conceptual analysis.'<sup>19</sup> Given that religion is such an ancient force, the context of history cannot be ignored when exploring the normative reasons for religious freedom. Indeed, it is further submitted that part of the weakness of the ECtHR jurisprudence on religion is the Court's failure to articulate a coherent justification for the imperative to protect religious freedom.<sup>20</sup> Hence, both the impact of history on religious freedom in Europe, and its status under Article 9 ECHR are considered thereby in this section.

The emergence of religious freedom in Europe was a reaction to centuries of religious

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<sup>18</sup>Sir Nicolas Bratza, 'The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights,' (2012) 14(2) Ecclesiastical Law Journal 256.

<sup>19</sup>Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press 1993) 153.

<sup>20</sup>Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 22.

conflict<sup>21</sup>, persecution<sup>22</sup> and war.<sup>23</sup> Even so, the journey to toleration<sup>24</sup> has been motivated by expediency: tolerating other faiths brought significant political<sup>25</sup> and economic<sup>26</sup> advantages. It has been argued elsewhere that this produced two consequences. First, because of the experience of history, human rights law has focused on the freedom to live

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<sup>21</sup>The history of the early Christian Church in Europe was marked by division, such as the Great Schism of 1054, splitting the Roman Catholic Church from the Eastern Orthodox Church. Within its own confines, Christianity was fractious and fragmented, with little prospect of reform for dissenters. Both the Roman Catholic and Orthodox Churches were wedded to the maxim *error has no right*: the universality of Christianity corresponds with the church's monopoly over divine truth, and its corresponding rights to vindicate its status through persecution. See, for example, Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press, 2013).

<sup>22</sup>Saint Thomas Aquinas wrote that heretics deserved 'not only to be separated from the Church, but also to be eliminated from the world by death.' - RW Dyson (ed), *Aquinas: Selected Political Writings* (Cambridge University Press 1959) 77. Also consider that the Fourth Lateran Council endorsed the execution of heretics throughout the Middle Ages. In 1215, it proclaimed, 'Secular authorities, whatever office they may hold, shall be admonished and induced and if necessary compelled by ecclesiastical censure...to take an oath that they will strive...to exterminate in the territories subject to their jurisdiction all heretics pointed out by the Church.' See Brian Tierney, 'Religious Rights: A Historical Perspective,' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspectives: Religious Perspectives* (Kluwer Law International 1996) 17-18.

<sup>23</sup>Consider the scope and length of The Thirty Years War (1618-1648), which involved all the principal European powers. Initially, what began as a sectarian clash for dominance between Roman Catholicism and Protestantism would shift to a resurgence of the traditional rivalry between the Hapsburg and Bourbon monarchies. War was ended by a series of treaties, the product of negotiation by the major powers at Osnabrück and Münster in Westphalia. The Peace of Westphalia is viewed as a pivotal turning point in the struggle for religious freedom within the Holy Roman Empire. For further discussion of the Thirty Years War, see, for example, J. P. Cooper (ed), *The New Cambridge Modern History Volume 4: The Decline of Spain and the Thirty Years War, 1609-48/49* (Cambridge University Press 1987)

<sup>24</sup>Christianity has been significantly criticised for its inertia on religious liberty. See, Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press 2005), 1: 'Of all the religions, past and present, Christianity has been by far the most intolerant.' Similar views are expressed in CE Curran, 'Religious Freedom and Human Rights in the World and the Church: A Christian Perspective,' in Leonard Swidler (ed), *Religious Liberty and Human Rights* (Ecumenical Press 1986), 143: 'Western Christianity...has taken a long time and a torturous path to arrive at its acceptance of religious liberty and fundamental rights...In general, Roman Catholic and mainstream Protestant Christianity contributed to little or nothing to the original acceptance of religious liberty in the West. The Christian churches and Christian theology arrived on the scene both late and breathless.' For a defence of the role Christian theology played in promoting religious toleration, see L Johnston, 'Religious Rights and Christian Texts,' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspectives: Religious Perspectives* (Kluwer Law International 1996) 65, 68

<sup>25</sup>Malcolm Evans, *Religious Liberty and International Law* (Cambridge University Press 1997), 45: The Religious Peace of Augsburg (1555) has been described as marking 'an important point in the evolution of religious liberty within Europe.' By that time, the Protestant Reformation had taken hold in Germanic territories, with the consequence that the charge of heresy against Lutherans proved to be ineffective in controlling religious behaviour. The Peace therefore served a pragmatic political purpose, in that it recognised that Lutheran princes should enjoy a status equal to that of the Catholic princes within the Empire and provided lay princes with the discretion to determine which of the two religions would be adopted in their territories. Hence, religious diversity was tolerated for the benefit of territorial integrity of the Empire.

<sup>26</sup>Interestingly, European powers did enjoy good trade relations with the Ottoman Empire. Even during the Ancient Roman Empire, there was evidence of tolerance for economic advantage: in 532AD, the Roman Empire Justinian entered into a treaty with Chosroes I of Persia, which guaranteed Christians in Persia the right to freedom of worship. See Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1954), 48.

without coercion or propaganda<sup>27</sup>; in other words, a negative right to prevent State interference with religion. Such an approach shares much with the Lockean model of toleration.<sup>28</sup> Locke's approach<sup>29</sup> to religious liberty can be summarised into three principles<sup>30</sup>: first, toleration is seen as a prudential, not principled, policy<sup>31</sup>; second, church and state are divided<sup>32</sup>, and third, forced faith is no faith at all<sup>33</sup>. This preoccupation with negative liberty might rationalise the deficiencies in the ECHR jurisprudence on matters of positive liberty, like a right to manifest belief.

Cox argues that 'having regard to the secularisation of Europe from a situation where religion was so mercilessly protected and enforced by law in so many countries leading to untold suffering of individuals as well as to wars between countries',<sup>34</sup> it becomes apparent that protecting the individual from coercion is the primary driver in the development of religious rights.

The second consequence is that religion is viewed in Europe with suspicion, being perceived as a historical source of great suffering. Paradoxically, (and this is the main crux of this section), Christianity remains the predominant religion in Europe<sup>35</sup>, and is accorded a position of privilege – whilst observance is on the decline, Christianity remains engrained in social and cultural life.<sup>36</sup> To further explain this, it is important to reconcile with the fact that the popular understanding of religion in both medieval and modern Europe has always

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<sup>27</sup>Consider that it was not until 1993 that the issue of Article 9 was first addressed directly the ECtHR in *Kokkinkas v Greece* App. No. 14307/88 (Commission Decision, 25 May 1993) despite entering into force in 1953

<sup>28</sup>John Locke, 'A Letter Concerning Toleration,' in David Wooton (ed), *John Locke: Political Writings* (Hackett Publishing 1993) 393-394.

<sup>29</sup>Locke was all too familiar with the prevalence of religious persecution and its impact on society, having fled to Holland in exile in 1682 as his questioning of authority marked him as a radical. His focus is instructive, in so far as he calls for an end to persecution based on Christian theology, rather than mere political expediency or economic advantage. It is important to note, however, that Locke's theory of toleration only applies to the diversity of worship within the Protestant religion: it explicitly does not apply to Catholicism, as it is precisely the fear of a Catholic takeover of England which prompted Locke to call for unification between the Anglican and non-conformist Protestant churches. The term 'non-conformist' in this context refers to Presbyterians, Congregationalists, Baptists, and Quakers as defined by the Act of Uniformity 1662. Non-conformists referred to Protestant believers not affiliated with the official Church of England

<sup>30</sup>David Mellroy, 'Locke and Rawls on Religious Toleration and Public Reason,' (2013) 2(1) *Oxford Journal of Law and Religion* 1, 3-6

<sup>31</sup>*Ibid* 3.

<sup>32</sup>Locke (n 28) 393.

<sup>33</sup>*Ibid* 410.

<sup>34</sup>Neville Cox, 'Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech,' (2014) 62(3) *The American Journal of Comparative Law* 739-774

<sup>35</sup>Gwyneth Pitt, 'Religion or Belief: Aiming at the Right Target?' in H. Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press, 2007) 203.

<sup>36</sup>*Ibid*.

been Christianity.<sup>37</sup> As McCrea explains, ‘the first time medieval chroniclers described an event as ‘European’ was the victory of Christian Frankish forces over a Muslim army at Poitiers in 732....with the crusades of the eleventh century, Western Christianity became synonymous with a European identity which defined itself against the Islamic and Byzantine Orthodox Christian civilizations to its south and east...’<sup>38</sup> However, despite the obvious importance Christianity had to medieval Europe as evidenced above, it has also shaped modern European notions of religious liberty. With the development of the modern nation state after the Peace of Westphalia, the Treaty of Münster guaranteed ‘the free Exercise of their Religion, as well in publick Churches, at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God’<sup>39</sup> thereby formulating one of the earliest notions of the Right to Freedom of Religion in a modern state.<sup>40</sup>

However, as Talal Asad argues, this freedom of religion was really one of the first articulations of the segregation of the public and private conceptions of ‘belief’ – in order for there to be true plurality and tolerance in the modern state, religion had to be redefined as ‘belief’, something which is private and concerns the individual, not the public sphere;<sup>41</sup> something which cannot be seen and is thereby easier to ‘tolerate’. Religion, as it had been understood prior to this (predominantly through the visibility and tangible presence of the Catholic Church in Europe), was always inherently diametrically opposite to this concept. ‘Religion’ was harder to tolerate because it was ‘public’ and could only be made more palatable if it became a ‘private’ affair- if it became (or was reconceptualised, rather) as internal ‘belief’. This was an inherently Protestant value- the internalization of belief.<sup>42</sup> More than just this absorption of Protestant Christian values, the concept of freedom of religion was further problematized by the fact that the proclamation of this concept came not just from an abstraction that was the modern nation state but actively through the auspices and the authority of the church, as separation of church and state was not a direct by-product of this articulation of the concept of freedom of religion. They were inextricably intertwined

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<sup>37</sup>Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2010).

<sup>38</sup>*Ibid* 18.

<sup>39</sup>Treaty of Munster, article XXVIII, 24 Oct 1648, 1 CTS 271

<sup>40</sup>Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belnap Press 2003).

<sup>41</sup>Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press 1993)

<sup>42</sup>*Ibid*; Danchin (n 4) 708 – ‘Secularism has historically entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a particular normative conception of religion (that is largely Protestant Christian in its contours’; Also Peter Danchin, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ (2008) 49(2) *Harvard International Law Journal* 249.

and so when the ‘state’ called for ‘tolerance’ and for freedom of religion and belief, it was the majoritarian religion which was ‘allowing’ for tolerance and plurality of religious thought for the sake of much-needed peace.

With the advent of the secular ‘idea’ of human rights and international law based on its premise,<sup>43</sup> which many have argued has a ‘clear religious heritage’ and ‘sometimes even speaks in what could be heard as religious language<sup>44</sup> (as has been examined elsewhere in this chapter)<sup>45</sup>, European legal systems were now considered ‘universal’ and far removed from their Christian roots.<sup>46</sup> However, the silent foundation of their Christian influences remained, which leads this discussion on to the major hypothesis of this chapter, Article 9 of the ECHR.<sup>47</sup> In other words, the so-called secular system of the ECtHR is not so secular – this chapter will show that, though the fundamentals of Article 9 (and the ECHR more broadly) were laid down with a pluralist and universalist intent, its interpretation in the Court has tended to be influenced by the Court’s understanding of what religion is – an inherently Christian, Protestant understanding.

There is a clear contradiction in terms inherent in the above – the European discourse promotes theoretical even-handedness towards all religions, yet fails to recognise the unconscious bias towards the Occidental. This bias, which is explained in more extensive detail in section 2.1.4. of this chapter, is essentially a bias towards the ‘internal’ aspect of religion, the belief, thereby creating a false dichotomy of sorts wherein the internal facets of faith and external manifestations of that faith are understood as two separate phenomena. As illustrated hereinbelow through examples of Muslim and Sikh<sup>48</sup> adherents, this forced

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<sup>43</sup>As has been discussed and explained in the preceding section 2.1 ‘Freedom of Religion at the United Nations: Contextualisation of the Right under the UDHR and the ICCPR’ of this chapter.

<sup>44</sup>Petty (n 12).

<sup>45</sup>See 2.1.3.i. of this chapter.

<sup>46</sup>Lucia Faltin, ‘Introduction: The Religious Roots of Contemporary European Identity’ in Lucia Faltin & Melanie Wright (eds), *The Religious Roots of Contemporary European Identity* (Continuum 2007).

<sup>47</sup>There are three provisions of the ECHR that deal with religion, articles 9, 14 (ensures ECHR rights are free from religious discrimination), and 2 of the first Protocol (which gives parents the right to regulate the religious education of their children). However, only article 9 will be dealt with as discussion on the remaining two is outside the parameters of this research project.

<sup>48</sup>Though this thesis focuses on Islam, this chapter will use examples of Sikh claimants as well as Muslim, for a number of reasons. Firstly, along with veiled Muslim women, turban-wearing Sikh men are the most visibly othered group in Europe. Secondly, the Sikh religious injunction to wear a turban parallels usefully with Islam’s injunction on women to cover their heads, in terms of both being religiously-mandated expressions of faith that blur the line between *forum externum* and *forum internum*; and thirdly because Sikhs are often seen as racially analogous to Muslims in the European conception and are subjected to similar discrimination. See Simran Jeet Singh ‘9/11-era ignorance of Islam is infecting the age of Isis. We should know better’ *The Guardian* (9 September 2014) <<https://www.theguardian.com/commentisfree/2014/sep/09/ignorance-islam-isis-hate-crimes>> accessed 22 September 2021; see also the text to n 91 of this chapter. See also, Suhraiya Jivraj and Didi Herman, “‘It

exclusivity of one from the other, fails to recognise the internal dimension of faith which many external practices of ‘Eastern’ (or rather, non-Protestant and even to a large extent non-Christian) religions are an intrinsic part of, most specifically, with certain external practices being deemed to be essential to reach ‘salvation’ and reward in the ‘hereafter’ (an obvious example of this is the practice of wearing the *hijab* or other forms of modesty covering that Muslim women practice). This ‘bias’ is evidenced from not only the Court’s jurisprudence but also the legal principles it embodies, which are examined hereinbelow.

### ***2.1.3. Article 9 of the European Convention on Human Rights***

One of the main purposes of the ECHR, as Carolyn Evans explains quoting the Convention’s Preamble, ‘was to “take the first step for the collective enforcement of certain rights stated in the Universal Declaration.”’<sup>49</sup> Therefore, Article 9 is not only heavily influenced by Article 18 of the Universal Declaration,<sup>50</sup> but has almost the exact same wording.

Article 9 provides:

1. 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 worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

More than the text, however, perhaps the more interesting thing about Article 9 is the

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is difficult for a white judge to understand”: orientalism, racialisation, and Christianity in English child welfare cases’ (2009) 21 *Child and Family Law Quarterly*, 283.

<sup>49</sup>Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 8.

<sup>50</sup>UNGA Res 217 (III) A, Universal Declaration of Human Rights, 10 Dec 1948, Article 18- ‘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.’



comparatively short time the Court has had to develop its jurisprudence on it.<sup>51</sup> This is because of a now defunct feature of the way the European institutions were structured. The European Commission for Human Rights, a body subordinate to the Court itself, acted in a ‘screening’ capacity for the Court. It disposed of many of the cases that came before it, deciding that they were inadmissible if it felt that the facts presented to it did not reveal a violation of any of the Convention rights.<sup>52</sup> It served in this capacity till 1998. However, for the purposes of Article 9 and the cases brought under it, the Commission did more than just ‘screen’ cases – it effectively blocked them altogether. Prior to 1989, the Commission decided that ‘in almost all cases brought under Article 9... the facts at stake did not disclose any appearance of violation [...] applications, therefore, were deemed inadmissible and never reached the Court.’<sup>53</sup> As a result, the Court has had a significantly shorter time span in which to develop its jurisprudence, which has had a marked effect in how it has evolved.<sup>54</sup> This becomes a relevant (even if somewhat tangential) point when considered alongside the long and deeply embedded history of Christianity within understandings of what religion and its freedom entails. For a system which has such a strong Christian ethos running through it (whether deliberate or not), not allowing it sufficient time to evolve and in a sense, *mature* its jurisprudence, will have a serious impact on how it perceives and thereby decides, cases involving religion. With this context in place, this chapter turns to analyse the doctrines that the Court has since employed in order to adjudicate on Article 9 claims.

### **2.1.3.i. *The legal distinction between the internal and the external (forum internum v forum externum)***

#### a) Overview

A prime example of the aforementioned inherent contradiction between the Court

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<sup>51</sup>Carolyn Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Architecture’ (2010) 26 *Journal of Law and Religion* 321, ‘in a relatively short period, the Court has been pushed to develop a jurisprudence of religious freedom to deal with increasingly complex and controversial cases.’

<sup>52</sup>Brett Scharffs, ‘Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives’ (2010-11) 26(1) *Journal of Law and Religion* 249.

<sup>53</sup>Julie Ringelheim, ‘Rights, Religion, and the Public Sphere: The European Court of Human Rights in Search of a Theory?’ in Lorenzo Zucca & Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012).

<sup>54</sup>Alice Donald, ‘Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?’ (2013) 2 *Oxford Journal of Law and Religion* 50, 51- Article 9 is ‘insufficiently and erratically protected in the courts’; Janis (n 1)76 – ‘For the two decades after *Kokkinakis*, the Strasbourg Court has had very little success in charting a steady course for the interpretation and application of Article 9. It is commonplace to remark that the court’s case law on religious freedom is inconsistent.’

wanting to enforce equality and its ingrained bias towards Protestant Christianity is contained in Article 9 itself, and finds its articulation within a seminal tool of legal theory which the Court employs, dividing belief (*forum internum*) from practice (*forum externum*). ‘Parlaying sixteenth-century theology into legal jargon, the *forum internum/forum externum* divide artificially splits religion into constituent components, privileging belief over other modes of religiosity’<sup>55</sup> and as Petkoff suggests, ‘it is almost inconceivable to consider freedom of religion or belief without coming across at least one reference to *forum internum* and *forum externum*.’<sup>56</sup> Whilst the legal significance of this division is discussed below, what is relevant to note here in this context at the moment, is that the privileging of the *forum internum* is based on Protestant teaching.

There are two Christian doctrines that deal with the internal vs external dichotomy of the Christian faiths. The one most pertinent to the discussion at hand is the Protestant doctrine of *sola fide*, the doctrine that salvation is achieved by faith alone, and that good works, while evidence of faith, are not in themselves a method of spiritual salvation.<sup>57</sup> Catholic and Orthodox Christian Churches diverge from Protestant faiths on this point, to a greater or lesser degree; the second doctrine is Catholic doctrine, which holds that salvation is achieved solely by God granting spiritual grace. Thus for Catholics faith alone is not enough, as God’s grace must be granted in addition to ensure spiritual salvation. (But is interesting to note that the retired Pope Benedict XVI stated that with certain caveats ‘Luther’s phrase “faith alone” is true[...]’<sup>58</sup> thus making the theological gap very small indeed.) The point of this in relation to the matter at hand, however, is that all major Christian denominations (Catholic, Protestant, and Orthodox branches) have a clear delineation between the inward holding of faith, and the outward expression of faith. The mechanisms of salvation in Christian theology differ from tradition to tradition but Catholic and Protestant churches both believe that salvation is achieved in the inward dimension, the *forum internum*. The *forum externum* of Christian belief, the material expressions of belief through signifiers, good works, or other means, is secondary for the purposes of salvation.

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<sup>55</sup>Petty (n 12) 831.

<sup>56</sup>Peter Petkoff, ‘Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights’ (2012) 7(3) Religion and Human Rights 183.

<sup>57</sup>Michael Allen, *Reformed Theology* (Bloomsbury Academic 2010) 77.

<sup>58</sup> Benedict XVI ‘General Audience, St. Peter’s Square’ (Wednesday, 19 November 2008) <[https://www.vatican.va/content/benedict-xvi/en/audiences/2008/documents/hf\\_ben-xvi\\_aud\\_20081119.html](https://www.vatican.va/content/benedict-xvi/en/audiences/2008/documents/hf_ben-xvi_aud_20081119.html)> accessed 26 September 2021.

The historical explanation for the segregation of belief and practice, as explained earlier, can be traced back to the Reformation.<sup>59</sup> In reaction to the Catholic emphasis on symbolism and decorative arts<sup>60</sup>, perceived as indulgent by the likes of Martin Luther<sup>61</sup>, the Protestant view in Middle European history was that the inner sphere was the authentic location for belief:

One of the effects of the Protestant Reformation and subsequent secularization of Europe was the emergence of belief as the authentic site of religion, such that disciplinary practices of the body—once considered, even by Christian authorities, as integral to cultivating the ethical/religious dispositions necessary to proper piety—came to be thought of as second-order expressions of belief.<sup>62</sup>

This accords with the emphasis on texts in Protestantism.<sup>63</sup> However, it is pertinent to keep in mind here that Catholicism, despite being clearly at odds with this new and reformed heavily Protestant version of secularism, still remains a beneficiary of this bias towards the internal because compared to other non-Christian faiths, it is still much more inclined to be an internalised belief system. Furthermore, due to being a Christian faith, it is one that is familiar to Europe. The European Court and indeed Europe in general, understands it. Therefore, in a situation where a European state finds itself legislating against, or where a European court finds itself deciding against, the unfamiliar because it just does not understand its ethos, it is rarely ever Catholicism that is on the receiving end of such decisions. As a consequence, whilst secularists might argue that the restriction on manifestations of belief developed as a means of ensuring pluralism and tolerance, it is more

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<sup>59</sup>Mayanthi L Fernando, 'Belief and/in the Law,' (2012) 24(1) *Method and Theory in the Study of Religion* 71, 76.

<sup>60</sup>A key grievance of Protestant reformers was the Catholic tradition of iconography, particularly in its veneration for Mary, the Virgin Mother of Christ, as well as the saints. This break manifested itself in the practice of Reformation Iconoclasm, whereby the Third Commandment prohibition on idolatry was invoked so as to purge former Catholic Churches of the statues, sculptures, stained glass windows and images. This grievance can also be traced into the change in Christian Art. From the Reformation onwards, Protestant Christian Art differed in respect of the shift from depictions of Christ, the Passion, and the Virgin, to more depictions of Biblical stories, which emphasised individual redemption through grace. See Helen de Borchgrave, *A journey into Christian Art* (Lion 1999).

<sup>61</sup>Martin Luther, in his 95 Theses, consistently emphasised the need to break away from wealth and opulence in the Catholic Church, not least in the Papal discretionary grant of indulgences, but even in broader terms: 'The true treasure of the church is the most holy gospel of the glory and grace of God. But this treasure is naturally most odious, for it makes the first to be last,' (Theses No. 62 and 63) in Stephen J Nichols (ed), *Martin Luther's Ninety Five Theses* (Presbyterian & Reformed Publishing Company 2002).

<sup>62</sup>Fernando (n 59) 76.

<sup>63</sup>*Ibid.*

likely that the European divorce between belief and action is itself derived from a religious teaching.<sup>64</sup> Here, the Occidental bias permeates throughout the European psyche as well as into the very formulation of rights in the ECHR itself.

That is further corroborated when one considers the lasting influence of the Enlightenment, an era of seismic cultural and intellectual change from tradition in favour of rationality, science and truth<sup>65</sup>, particularly as it provided the catalyst for rights theory. Consider, for example, that Immanuel Kant, a central figure in European philosophy, argues coherently in *Religion and Rationale Theology* that the appropriate location for religion is in the private sphere: religion's realm of influence 'must be inner and moral, not statutory or coercive.'<sup>66</sup>

Tensions between the Occidental and the 'Other' are more likely to crystallise when new communities are measured against European standards. Accordingly, the influx of Muslim communities in Europe precipitates a clash of Occidental values with Islamic religiosity. As Zwamborn writes, Muslim populations 'practise and promote their religion in a more prominent and public fashion, going against the general trend among the Christian denominations which is to see one's religion as a private, publicly less prominent issue.'<sup>67</sup> This may rationalise why the ECtHR does not adequately protect Islamic religiosity. Socially, devout Muslims seem suspicious to a continent challenged by religion yet inextricably linked to Christianity. Legally, Muslims are disadvantaged since their religiosity is unintelligible to European thinking.

### b) Forum Internum

The *forum internum* is the internal, the freedom to believe. It 'represents the sphere of 'inner conviction' and as such is absolutely inviolable'<sup>68</sup> and is protected by Article 9(1) of the ECHR. The Court has repeatedly, through its jurisprudence, made it clear that the

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<sup>64</sup>For further support for the notion that Protestantism played a significant role in shaping current attitudes towards religious toleration, see Stanley Fish, *The Trouble with Principle* (Harvard University Press, 2001) cf. Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, 2008).

<sup>65</sup>Roger Scruton, *A Short History of Modern Philosophy*, (Routledge, 2001), 4.

<sup>66</sup>Allen W Wood and George Di Giovanni (eds), *Immanuel Kant: Religion and Rational Theory* (Cambridge University Press 1996), xiv.

<sup>67</sup>Marcel Zwamborn, 'The Netherlands' in Isabelle Chopin, Janet Cormack and Jan Niessens (eds), *The Implementation of European Anti-Discrimination Legislation: Work in Progress* (Migration Policy Group, 2004) 144.

<sup>68</sup>Malcolm Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe Publishing 2009) 8.

‘internal dimension of religious freedom is absolute, while the external dimension [is] by its very nature relative.’<sup>69</sup> It is clear from the Court’s judgments that the scope of this inner sphere extends to the ability to leave a religious community<sup>70</sup> as well as the freedom from compulsion to commit acts against personal conscience.<sup>71</sup> Whilst Article 9(1) is not capable of restriction through the usual limitation process<sup>72</sup>, interestingly, no prohibition on derogation appears in the ECHR, which might have prompted the rather bizarre case of *Riera Blume and others v Spain*<sup>73</sup> concerning the Spanish government’s attempts to, what was ominously termed, ‘de-programme’ certain individuals, who allegedly belonged to a dangerous sect. The ECtHR held that there was a clear violation of their right to liberty protected by Article 5, and so did not go on to consider the Article 9 issue. Even so, it would be extremely difficult to consider a situation in which derogation from Article 9(1) could be made out, though perhaps ‘not inconceivable’<sup>74</sup> for a State to attempt to restrict or change an individual’s belief when the matter concerned what is colloquially referred to as ‘brain-washing’. Nonetheless, it does seem that for all intents and purposes, the lack of State practice on derogation indicates that Evans’<sup>75</sup> formulation is correct: that the right to believe is inviolable under the ECHR.

In terms of the normative justification for an absolute right to personal belief, the ECtHR has itself alluded to the historical scars of indoctrination, propaganda and state coercion in *Kosteski v The Former Yugoslav Republic of Macedonia*<sup>76</sup>, finding that the ‘notion of the State sitting in judgment on the state of a citizen’s inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions.’<sup>77</sup>

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<sup>69</sup>Javier Martinez-Torron, ‘Limitations on Religious Freedom in the Case Law of the European Court of Human Rights’ (2005) 19(2) *Emory International Law Review* 587

<sup>70</sup>*Darby v Sweden*, App No 11581/85 (Commission Decision, 23 October 1990)

<sup>71</sup>*Buscarini and Others v San Marino*, App No 24645/94 (ECtHR, 18 February 1999): the swearing of an oath upon election to Parliament which made reference to the “Holy Gospels” was not necessary in a democratic society, as the Court at para 39 held that it ‘would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs.’ In fact, earlier judgements of the Court, (e.g. *Valsamis v Greece*, App no 21787/93, (Commission Decision of 18 December 1996) which involved a child of Jehovah’s Witness parents who was forced to take part in a school parade celebrating the state’s military, for which the court found no interference with the child’s Article 9 rights) further prove the Court’s preference to the *forum internum*. The student could still be a believing Jehovah’s Witness irrespective of whether they were forced to attend an event against their religious convictions.

<sup>72</sup>The limitation clauses found in Article 8 through to 11 ECHR, wherein certain State interferences will not be a violation of the Convention if it can be demonstrated that they were in accordance with, or prescribed by law; pursued a recognised legitimate aim and were necessary in a democratic society. cf. Article 9(2), which makes it clear manifestations of belief, can be lawfully restricted

<sup>73</sup>*Riera Blume and others v Spain*, App No 37680/97 (ECtHR, 19 October 1999)

<sup>74</sup>Evans (n 68)

<sup>75</sup>*Ibid.*

<sup>76</sup>*Kosteski v The Former Yugoslav Republic of Macedonia*, App No 55170/00 (ECtHR, 13 April 2006)

<sup>77</sup>*Ibid* para 39.

### c) Forum Externum

*Forum externum* is the external, essentially the freedom to ‘manifest’ beliefs and is capable of restriction as articulated in Article 9 (2). In *Kokkinakis v Greece*, the Court explained the different levels of protection for the ‘inner’ and ‘outer’ aspects of the right:

...it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.<sup>78</sup>

Therefore, the needs of the state and those of society can objectively justify the restriction of the individual’s desire to externalise their beliefs. However, interestingly, the Court did go on to say in the same case that the right to manifest one’s beliefs was significant because ‘bearing witness in words and deeds is bound up with the existence of religious convictions.’<sup>79</sup>

Article 9(2) recognises four types of external manifestation- worship, teaching, practice, and observance. This does not mean, however, that every demonstrable gesture of religious belief qualifies as being such for the purposes of Article 9. In the case of *Arrowsmith v United Kingdom*<sup>80</sup>, the term ‘manifestation’ was held to not cover each action motivated or influenced by religion or a belief.<sup>81</sup>

The case law makes clear that such matters as proselytism, general participation in the life of a religious community, and the slaughtering of animals in accordance with religious prescriptions are readily covered by the term. However, a distinction must be drawn between an activity *central* to the expression of a religion or belief, and one which is merely *inspired*

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<sup>78</sup>*Kokkinakis v Greece*, App No 14307/88 (Commission Decision, 25 May 1993) para 30

<sup>79</sup>*Ibid* para 31.

<sup>80</sup>*Arrowsmith v The United Kingdom*, App No 7050/75 (Commission Decision, 5 December 1978).

<sup>81</sup>*Ibid* para 71-72, it was held that Article 9 (2) did not cover the distribution of literature critical of the British government’s military involvement in Northern Ireland, even though it was distributed by a committed pacifist. The Commission stated that whilst her ‘pacifism as a philosophy...falls within the ambit of the right to freedom of thought and conscience’, the action in question opposed government policy and so was not a manifestation of belief. Similarly, the case law is clear that distribution of anti-abortion material outside an abortion clinic will not constitute a manifestation of belief, because the material in question, even though inspired by the protestor’s personal conscience and morality, advises women not to undergo an abortion, as seen in *Knudsen v Norway*, App No 11045/84 (Commission Decision, 8 March 1985)

or even *encouraged* by it.<sup>82</sup>

Therefore what counts as manifestation, according to the Court, is complex and strongly dependent on the individual circumstances of each case. However, the judgments do enunciate a test of ‘sufficient nexus’ between the inspiring belief and the action in question. In the case of *Van den Dungen v The Netherlands*<sup>83</sup> the Commission stated that ‘[Article 9] protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief.’<sup>84</sup> The same was reiterated in the case of *Pretty v UK*<sup>85</sup> where the Court further clarified that ‘the actions must “actually express” the belief concerned, or must be “intimately linked” to these...there must be a direct link between the belief and the action.’<sup>86</sup>

It is important to recognise this *internum/externum* distinction, because this understanding of the *forum internum* as the more important dimension of faith (insofar as it, and not the *forum externum*, can assure eternal life and salvation after death), runs deep in European Christian culture; it informs European and Christian understandings of how faith is structured, and what parts of faith are privileged above other parts. It is vital to recognise that this is therefore not a neutral or unbiased understanding of how religions work, but is a biased understanding, which takes the dominant spiritual tradition of the Member States of the ECHR and assumes this maps seamlessly onto other religions, because this bias goes unrecognised, as the Court has convinced itself of its ‘secularity’ even though that secularity is heavily influenced on a cultural level by Christian theology. It must be stated outright too that not only do other faiths not possess the concept of salvation through faith alone (with many faiths proclaiming that salvation can only be achieved by right living, or by outward manifestations of faith) but that the very distinction of internal and external elements of faith is inapplicable to many non-Christian religions. As a result, to adjudicate on non-Christian worship according to a Christian rubric is misguided at best, and harmful to the religious freedoms of non-Christian believers, at worst.

The issue of Islamic veiling is a particularly important one in this context. The recent

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<sup>82</sup>Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge 2012)

<sup>83</sup>*Van den Dungen v The Netherlands*, App No 22838/93 (Commission Decision, 22 February 1995) para 1

<sup>84</sup>*Ibid.*

<sup>85</sup>*Pretty v UK*, App No 2346/02 (ECtHR, 29 April 2002).

<sup>86</sup>Howard (n 82).

decisions of the Court indicate that the Court accepts that the wearing of a veil for Muslim women, or a turban for Sikh men, constitutes manifestations for the purposes of Article 9. As Evans observes in the case of *Şahin v Turkey*<sup>87</sup>, the Court ‘chose not to draw on the distinction in the *Arrowsmith* case between acts which are motivated by religion or belief but fall short of being a manifestation of religion or belief.’<sup>88</sup> Instead, when dealing with a case that involves attire, the Court presumes that there *is* a manifestation and acknowledges that there *is* interference in that manifestation and then considers whether that interference is justified. We observed this in the case of *Mann Singh v France*<sup>89</sup> where an observant Sikh lost his claim to appear in his driver’s licence photograph with his turban<sup>90</sup> and with the numerous cases of Muslim women wearing the *hijab* and/or the *niqab*.

*d) Difficulties arising from the Forum Internum/Forum Externum dichotomy*

Effectively, and as mentioned hereinabove as a forced or false dichotomy, ‘the Court has construed freedom of religion in terms of a binary opposition between belief and practice.’<sup>91</sup> In theory, this does not seem problematic or controversial- the Court is doing what it is supposed to, it is protecting the individual’s right to believe or to not believe. The problem arises when one dissects what this means for adherents of minority religions in Europe. In dividing religiosity, the Court is not being ‘religiously neutral’ but is in fact making assumptions (based on its internalised Christianity) about the ‘ordinary forms of religious practice and the proper scope of political action.’<sup>92</sup>

Danchin suggests that ‘in the conditions of the modern state, religion is thus imagined as having two dimensions: insofar as religion involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; insofar as it involves matters of conscience, it is imagined as occupying- in a state of inviolable freedom- the private sphere of personal belief, sentiment, and identity.’<sup>93</sup> Petty

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<sup>87</sup>*Leyla Şahin v Turkey*, App no 44774/98 (ECtHR, 10 November 2005).

<sup>88</sup>Evans (n 68).

<sup>89</sup>*Mann Singh v France*, App no 4479/07 (ECtHR, 13 November 2008).

<sup>90</sup>Although he was eventually vindicated by the UN Human Rights Committee which held, completely in opposition to the Court, that prohibiting a Sikh to wear a turban on the identity photograph, without convincingly explaining how such a measure is necessary for guaranteeing the public safety, violates his right to manifest his religion- *Singh v France* (HRC, CCPR/C/108/D/1928/2010, 26 September 2013)

<sup>91</sup>Lourdes Peroni, ‘Deconstructing “Legal” Religion in Strasbourg’, (2014) 3 Oxford Journal of Law and Religion 235.

<sup>92</sup>Richard Moon, ‘Christianity, Multiculturalism, and National Identity: A Canadian Comment on *Lautsi and others v Italy*’ in Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Nijhoff 2012); Ringleheim (n 53) 293 ‘Underlying the Court’s case law is the idea that religion is primarily an inward feeling; a matter of individual conscience.’

<sup>93</sup>Danchin (n 4) 262.



concedes that ‘it is not clear from the case law whether this polarity is consciously intended, or merely the result of assumptions about the nature of religion in general’<sup>94</sup>; however irrespective of what the intention behind doing so is, the very real effect is the complete ‘Otherisation’ of religions and adherents of those religions for whom the external is an integral component of the internal.

From the perspective of, for example, deeply observant Muslims or Sikhs, this separation of belief and practice is wholly artificial; this phenomenon of artificiality must be considered. In Islam, the link between action and intention is fundamental to understanding the prevalence of visible religiosity. One of the most prominent sayings of Muhammad provides that

Actions are according to intentions, and everyone will get what was intended. Whoever migrates with an intention for Allah and His messenger, the migration will be for the sake of Allah and his Messenger. And whoever migrates for worldly gain or to marry a woman, then his migration will be for the sake of whatever he migrated for.<sup>95</sup>

This *hadith*, amongst many others, emphasises the connection between the physical external world, and the mental internal state. Therefore, observant Muslims are called to intend every action for the sake of Allah- intention cannot be severed from consequences. Furthermore, Islam stresses the relationship between body and mind. So for a Muslim woman who views her *hijab* as her eventual salvation and redemption before God (or to put it even more plainly, her path to Heaven), she does so because covering herself (whether her hair or her body) becomes an act of shielding the heart from impurities. Therefore, the Muslim woman’s ultimate goal of veiling is righteousness of the heart.<sup>96</sup> The external *is* salvation, in that case, unlike Protestants and even other Christians, for whom the internal leads to salvation.

To further clarify the aforementioned, due to the inextricability of the internal and external for Muslims, many religious obligations *require* adherents to display their faith. Therefore, religious expression becomes a much more complex and multifaceted medium

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<sup>94</sup>Petty (n 12) 833.

<sup>95</sup>*Hadith* I, as narrated on the authority of Amir al-Mu'minin and Abu Hafs 'Umar bin al-Khattab.

<sup>96</sup>Mirza Tahir Ahmad, *Islam's Response to Contemporary Issues* (Islam International Publications Ltd 1992).

compared to other forms of expression, as observant adherents feel a *compulsion* to adopt certain customs or adhere to certain regulations so as to fulfil their belief. Religious expression ceases to thereby be an option, like for example, political expression. An observant adherent cannot sustain a distinction between the internal belief and outward practice because their very beliefs mandate active practice of said belief. Ironically, considering the discussion here is on the freedom of religion, for the observant adherent there is no freedom to externalise belief, there is instead a duty to do so. Therefore, no matter how much the law may distinguish between the ‘internal’ and the ‘external’, whilst privileging the internal, for an observant Muslim woman who wants to cover her head, her internal belief system is indivisible and intertwined with her external manifestation of said belief system.

France has become the epicentre of the European debates around the veil through its enactment of three controversial laws. The first, enacted in 2004, bans the wearing of religious symbols and clothing, including the Islamic headscarf, in public schools.<sup>97</sup> The law is based on the recommendations of the Stasi Commission Report, which stated that ‘young girls are pressured into wearing religious symbols’ and that ‘[t]he familial and social environment sometimes forces on them a choice that is not theirs’.<sup>98</sup> The second, enacted in 2010, banned the wearing of the *burqa*- a traditional garment that veils both face and body- in public. French lawmakers endorsed the position that France ‘cannot accept to have in our country women who are prisoners behind netting, cut off from all social life, deprived of identity... That is not the idea that the French Republic has of women's dignity’.<sup>99</sup>

Though couched in neutral terms, the legal ban on manifest religious symbols and veils in France has had a disproportionate impact on Muslim women. Initially, the 2004 law only prohibited overtly manifest markers of religious affiliations. However, the Ministry of Education subsequently issued a decree clarifying that ‘The prohibited signs and dress are

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<sup>97</sup>On 15 March 2004, the French Parliament enacted Law No. 2004-228, and inserted a new article (L. 141-5-1) in the Education Code which provides: ‘In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be proceeded by dialogue with the pupil’: Loi no 2004-228 du 15 mars 2004 encadrent, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, Journal Officiel de la République Française [JO] [Official Gazette of France], 17 March 2004, 5190.

<sup>98</sup>Susanna Mancini, ‘The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence’ (2009 30(6) Cardozo Law Review 2648.

<sup>99</sup>Former French president Nicolas Sarkozy, quoted in Vaiju Naravane, ‘The Burqa Debate Splits France’, *The Hindu* (14 July 2009); See also Melanie Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil Was Banned* (Springer International Publishing 2016).

those by which the wearer is immediately recognizable in terms of his or her religion, such as the Islamic veil, whatever its name, the kippah or a crucifix of manifestly exaggerated dimensions'.<sup>100</sup> The legal terminology is indicative of the stark socio-political bias which underlies a ban that has come to be reified as secular and impartial. Not only do the stipulated exceptions reflect the practices of the dominant religious community, but the very fact that ostentatious symbols of faith are not permitted to be worn in public is reflective of a religious and cultural ethos where such expression of selfhood, identity and community is not a common or pervasive aspect of popular religious or cultural practice. Here the benevolent rhetoric of purported equality across different cultures and religions actually signifies 'the same as' the dominant culture/religion, and raises concerns of subordination and coercion amongst religious and/or cultural minorities.<sup>101</sup> The literal and psychological impact of the ban has been felt overwhelmingly by Muslim girls and young women who veil, and who have at times been compelled to attend privately run religious schools rather than remain in the state school system.<sup>102</sup> However, it is pertinent to note that following the passing of the Anti-Separatism Act of 2021 this option is no longer available for Muslim girls and young women who had been attending private Islamic schools, or even home-schooling, in order to avoid the ban on veiling in public schools. As explained in the thesis introduction, this new law has specifically targeted the running and functioning of private Islamic schools, with many having to shut down, and the conditions on home-schooling have become more stringent, thereby forcing most school going Muslim girls to resort to public schooling, while unveiled, once again.

This ban indirectly ended up having an impact on the Sikhs living in Paris because they could no longer wear their turbans in school as well; Parisian Sikhs protested the law and the unintended effect it was having on them;<sup>103</sup>

Jaswant was outraged by the law, which would require Sikh boys to remove their turbans in public school. He declared that the five Ks of Sikhism, including *kesh*, or uncut hair, 'are not optional- they are the faith

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<sup>100</sup>Mancini (n 98) 2646.

<sup>101</sup>Ibid., Mancini argues that in the jurisprudence of the ECtHR, Christian norms are taken to reflect the neutral standard and Islam provides the irreconcilable other. See also, Carlo Invernizzi-Accetti, 'Is the European Union Secular? Christian Democracy in the European Treaties and Jurisprudence', (2018) 16 Comparative European Politics.

<sup>102</sup>Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2007).

<sup>103</sup>John Henley, 'French Sikhs threaten to leave country,' *The Guardian* (23 January 2004).

[*ils sont la foi*]’ ... ‘When a Sikh cuts his hair, his beard,’ Jaswant contended, ‘soon, he begins to eat meat, to drink alcohol... He loses his soul’ [*il perd son âme*]... the practice of cutting one’s hair would destabilise one’s ethical self and one’s relationship with the Divine.<sup>104</sup>

Therefore, the Sikh turban is not an ‘optional’ symbol of Sikh religiosity, as the French ban tried to justify it. It is ‘a necessary practice constitutive of being Sikh.’<sup>105</sup> Expression is not a choice, but rather a religious injunction. However, it is painfully apparent that belief, as opposed to practice, ‘has emerged as the privileged site for religion, and as a consequence, rendered some forms of ethical life...incommensurable with and unintelligible to secular-modern law and politics.’<sup>106</sup>

There were many political commentators who defended this ban by France. Whilst recognising and acknowledging interference by the State, they assumed no violation because they misunderstood religious expression as being merely symbolic (much as it is in liberal Protestantism). According to Fernando, this betrays the inability of human rights law to understand religion in its entirety- she calls it ‘unintelligible’ because ‘banning a practice like veiling does not constitute a violation of religious liberty because if the practice-as-sign ostensibly has no effect on the believer’s conscience, neither would its disappearance.’<sup>107</sup> France, its particular brand of ‘secularism’ and its problems with ‘manifestation’ of religion are discussed in more detail below (See text to note 197 and following paragraphs).

### ***2.1.3.ii. The ECtHR’s Seminal Doctrines***

#### ***a) The interaction of the margin of appreciation and the doctrine of consensus***

Whilst the Court has many characteristics and mechanisms that render its decisions prone to scrutiny (like the doctrines of *forum internum* and *externum* discussed hereinabove), the four main principles or doctrines that have informed the reasoning behind the Court’s decisions are the principles of subsidiarity, the doctrine of margin of appreciation, and the principles of consensus and pluralism. Although there is endless scholarship on the legal theories the Court employs to reach its judgments, Effie Fokas presents an interesting

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<sup>104</sup>Fernando (n 59) 73.

<sup>105</sup>Ibid.

<sup>106</sup>Ibid 72.

<sup>107</sup>Ibid.

paradigm through which to view them.<sup>108</sup> Fokas presents her ‘matrix’ in the context of the debates on religion in Europe having encompassed ‘the place, role, and rights of the “Christian majority” (however passively and vicariously Christian it may be in most of Europe) in relation to a plurality of minority religion that are present in Europe.’<sup>109</sup> The principle of subsidiarity, a fundamental aspect of the ECHR,<sup>110</sup> and ‘in fact a religious-originated – Roman Catholic – concept suggesting that a matter ought to be handled by the smallest, lowest, or least centralised authority capable of addressing the matter effectively,’<sup>111</sup> requires that each contracting state of the ECHR is responsible for securing the rights and freedoms protected under it, even though certain standards have to be universally observed by all such contracting states. The relationship of this principle with the doctrine of the ‘margin of appreciation’ is particularly important as it has been argued previously that this doctrine was developed by the Court for the specific purpose of reconciling the possible tension that would exist between the concepts of universality and subsidiarity.<sup>112</sup>

This ‘margin of appreciation’ gives states a ‘margin’ in determining whether a particular restriction of a right is ‘necessary in a democratic society’.<sup>113</sup> It is based on the Court’s assumption that ‘By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.’<sup>114</sup> The ‘margin of appreciation’ in the context of religious freedom tends to be particularly wide<sup>115</sup> which allows states a substantial amount of leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. However, it is important to highlight this for what it really is – ‘an exit for the Court from certain culturally and

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<sup>108</sup>Effie Fokas, (n10) 54.

<sup>109</sup>Ibid 55.

<sup>110</sup>Ibid 54.

<sup>111</sup>Ibid 58.

<sup>112</sup>Susanna Mancini, ‘The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty’ (2010) 6(1) *European Constitutional Law Review* 6.

<sup>113</sup>Evans (n 24); Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65 *International and Comparative Law Quarterly* 21; R StJ MacDonald, ‘The Margin of Appreciation’ in MacDonald et al (eds), *The European System for the Protection of Human Rights* (Nijhoff 1993), ‘the margin of appreciation provides the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.’

<sup>114</sup>Handyside v United Kingdom.

<sup>115</sup>Evans (n 25) 142.

politically sensitive issues'<sup>116</sup> which is 'symptomatic of its difficulty in dealing with them [religion cases].'<sup>117</sup> In fact, Fokas goes on to say that the variability by which the margin of appreciation is applied by the Court on religious freedoms issues threatens to undermine not just the Court's commitment to pluralism but also ultimately, the legitimacy of the Court.

'Consensus' as a principle was introduced by the Court in 1984 in *Rasmussen v Denmark*<sup>118</sup> where it declared that 'the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the law of the Contracting States.'<sup>119</sup> It has been argued by Benvenisti that when the consensus doctrine is combined with the margin of appreciation doctrine, it 'is inappropriate when conflicts between majorities and minorities are examined.'<sup>120</sup> Furthermore, he has stressed that,

a wide margin of appreciation is appropriate with respect to policies that affect the general population equally, such as restrictions on hate speech (which are aimed at protecting domestic minorities), or statutes of limitations for actions in tort. On the other hand, no margin is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association, when their educational opportunities are restricted by the State, or when the allocations of resources creates differential effects on the majority and the minority. Acquiescing to the margin of appreciation in the latter cases assists the majorities in burdening politically powerless minorities.'<sup>121</sup>

Benvenisti goes on to clarify, 'In the jurisprudence of the ECtHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions. Minority values, hardly reflected in national

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<sup>116</sup>Fokas (n 10)

<sup>117</sup>Ringelheim (n 53) 306.

<sup>118</sup>*Rasmussen v Denmark*.

<sup>119</sup>*Ibid.*

<sup>120</sup>Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998) 31 *International Law and Politics* 851.

<sup>121</sup>*Ibid.*

policies, are the main losers in this approach.’<sup>122</sup> As per Paolo Ronchi, ‘in the mid-1990s, Lord Lester affirmed that the margin of appreciation “has become as slippery and elusive as an eel”. Now consensus, too, has become as slippery and elusive as the margin.’<sup>123</sup>

*b) ‘Secularism’ in the Court’s doctrines and the hegemony of religious majorities*

It has already been discussed how, up until the twenty-first century, most European nation-states displayed some form of governmental favouritism towards official or national religions, and thereby granted only asymmetric rights to religious minorities.<sup>124</sup> However, principles of religious freedom and non-discrimination which received high attention in post war human rights discourse<sup>125</sup> contained strong normative reasons for an institutional separation of state and church as well as for state neutrality towards religions- i.e., for some form of ‘secularism’.<sup>126</sup> A detailed study of secularism isn’t within the ambit of this thesis, however for the purposes of our current discussion, it is relevant to highlight that ‘secularism’ comes in different versions, a prominent distinction being between ‘assertive’ secularism, where the state strives to enforce additional principles of individual emancipation and civic integration, and ‘passive’ or more pertinently ‘liberal-pluralist’ secularism, in which the state allows for deeper forms of diversity.<sup>127</sup> The relevance of this becomes apparent as we unpack some of the more prominent judgments of the Court which have used varying shades of ‘secularism’ to justify their decisions, couched in terms of the margin of appreciation.

The origins of this can be traced back to when the Convention was first drafted and how different member states had entirely different ideas about what the Convention would entail and how these varying political interests left a strong imprint on the Court’s institutional structure and legal doctrine.<sup>128</sup> For instance, many states, particularly Great

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<sup>122</sup>Ibid.

<sup>123</sup>Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) 13 (3) Ecclesiastical Law Journal 286, 287.

<sup>124</sup>Brian J Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*, (Cambridge University Press 2011); see also Jonathan Fox, *A World Survey of Religion and the State* (Cambridge University Press 2008)

<sup>125</sup>Matthias Koenig, ‘Institutional Change in the World Polity- International Human Rights and the Construction of Collective Identities’, (2008) 23(1) International Sociology 95

<sup>126</sup>Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011); see also Martha Nussbaum, *Liberty of Conscience: In Defence of America’s Tradition of Religious Equality* (Basic Books 2008)

<sup>127</sup>Ahmet Kuru, *Secularism and State Policies toward Religion: The United States, France and Turkey* (Cambridge University Press 2009).

<sup>128</sup>Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010)

Britain, never thought the Convention would actually have any real repercussions on domestic law, seeing it mostly just as an external sign of Europe's commitment to human rights and democracy.<sup>129</sup> 'Indeed, most ratifying governments at the time assumed that the Court would refrain from active judicial intervention in domestic affairs.'<sup>130</sup> These political origins were initially reflected in the institutional weakness of the Court. However, with time, they also became inscribed into the Court's legal doctrine, specifically the 'margin of appreciation' – member states always expected to get their way when it came to the Court.<sup>131</sup> Furthermore, the drafters of the Convention (and more specifically, Article 9) saw the protection of religious freedom as a constitutive component of their vision of a European 'democratic society'<sup>132</sup> but in no way did they intend to delegate church-state relations to an International Human Rights court or to reduce the privileges granted to Christian churches. In fact, 'the drafters of the Convention, many coming from the European Movement, leaning towards Christian democracy and sharing Catholic ideas of personalism, wanted rather to protect Christian civilization through commitment to human rights and democracy.'<sup>133</sup> Most interestingly, the *travaux préparatoires*, when addressing the implementation of Convention rights in domestic law and elaborating an additional right to education, explicitly paid tribute to the *status quo* of church-state relations, notably in Norway and the U.K.<sup>134</sup> Even more interestingly (and perhaps surprisingly), it was the Turkish delegates in the drafting committee who considerably influenced the final wording of Article 9 (2), calling for limitations on religious freedom in light of the 'stubborn resistance of Muslim orders against reform and modernisation.'<sup>135</sup> Turkey was also the only member state where political elites were having to face a strong religious power rival and were interested, therefore, in having an 'assertive' brand of secularism enforced by the Court. Other European governments had no interest (and made it evident) in having the privileged status of religious majorities curtailed and in fact, in complete contrast to any curtailment, the member states of the European Union repeatedly affirmed the principle of subsidiarity.<sup>136</sup>

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<sup>129</sup>A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001)

<sup>130</sup>Mikael Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the crossroads of international law and politics,' (2007) 32(1) *Law and Social Inquiry* 137.

<sup>131</sup>Matthis Koenig, 'Governance of Religious Diversity at the ECHR' in Jane Bolden and Will Kymlincka (eds), *International Approaches to the Governance of Ethnic Diversity* (Oxford University Press 2012).

<sup>132</sup>*Ibid.*

<sup>133</sup>*Ibid.*; see also Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge University Press 2010), and Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001).

<sup>134</sup>Simpson (n 129).

<sup>135</sup>Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997).

<sup>136</sup>For example, the Treaty of Amsterdam includes an article that reads, 'The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the



How have these factors affected the judicialization of religion, however? As stated hereinabove<sup>137</sup>, it is important to remember that till 1989, the Court was not even dealing with Article 9 cases, and it was not till 1993 in the seminal case of *Kokkinakis v Greece*<sup>138</sup> that the Court started issuing Article 9 decisions. The Court showed strong judicial restraint in the area of church-state relations over the first four decades of its existence. Of the fifty or so applications that were filed with what then still was the Commission, not a single one provoked a final judgment finding a violation of Article 9.<sup>139</sup> Not only did the Commission and the Court apply the margin of appreciation doctrine extensively in the case-law on religious freedom, they also affirmed that the rights enshrined in the Convention were compatible with a variety of church-state relations.<sup>140</sup> Despite this increased engagement, there are certain very obvious themes that become apparent, which Koenig argues are moving towards more secularist approaches<sup>141</sup> (which this hypothesis sees as superficially secular, as the Court's conception of what counts as 'secular' is, as argued, deeply Christian and thereby not really 'secular' in the sense of plurality). He sees this through a 'three-step' evolution of the Court's jurisprudence. The first step, according to Koenig, involves a broad definition of religious freedom which works in favour of majority religions over negative religious freedom claims, evidenced in the case of *Otto-Preminger-Institut v Austria*,<sup>142</sup> which was the most obvious refusal of the Court to touch upon the hegemony of religious majorities in which the Court maintained 'asymmetric'<sup>143</sup> blasphemy laws, and found in favour of the state and its right to seize and forfeit a film considered offensive to Christians. The Court held, at para 56,

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelmingly majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner [...]. In all

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Member States. The Union equally respects the status of philosophical and non-confessional organisations.' Official Journal of the European Communities, C 340, 10 November 1997, 133.

<sup>137</sup>See text to n 53.

<sup>138</sup>*Kokkinakis v Greece*

<sup>139</sup>Anat Scolnicov, 'Does Constitutionalism Lead to Secularisation?', in Ira Katznelson and Gareth Stedman Jones (eds), *Religion and the Political Imagination* (Cambridge University Press 2010) 295-313

<sup>140</sup>*Darby v Sweden*, (Commission Decision dated 11 April 1988, 'a State Church system cannot in itself be considered to violate Article 9 of the Constitution.'

<sup>141</sup>Koenig (n 131); Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55(4) *International and Comparative Law Quarterly* 929.

<sup>142</sup>*Otto-Preminger-Institut v Austria*, App no 13470/87 (ECtHR, 20 September 1994)

<sup>143</sup>Fokas (n 10).

circumstance of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

This judgment is interesting (and potentially problematic) because the Court tends to use the margin of appreciation doctrine in the language of ‘deference to state policy’ but in this case, the Court very clearly uses the language of ‘majorities’ instead. The aim, at all times, was to prevent offense to the majority. Turkey is overwhelmingly Muslim but whenever the margin of appreciation is applied widely in cases against Turkey (as will be explained below in the following section, *c)Embracing’ Secularism when confronted by Islam*), deference is always made to Turkey’s state policy. ‘Majoritarian’ sentiments are not considered. This is just one of the many ways highlighted so far where the prevalent Christian bias of the Court becomes apparent.

Many scholars have interpreted the dearth of case-law on religious freedom as indicating a reluctance among the judges to touch upon the status of Christian majorities.<sup>144</sup> And it is conspicuously striking that the Court also upheld the government’s right to protect Christianity from defamation in another free speech case (*Wingrove v United Kingdom*)<sup>145</sup> whilst Muslim claims to apply the very same British blasphemy laws to prohibit the defamation of Islam in the Salman Rushdie’s *Satanic Verses* case, were declared inadmissible.<sup>146</sup> It is, therefore, fair to suggest that, as Koenig puts it, ‘throughout the first four decades the ECtHR left the remnants of European confessionality largely untouched and refrained from promoting any form of institutional secularisation.’<sup>147</sup> This thesis’ claims that the Court did indeed do so, but at the expense of minorities and non-Christian adherents of religion. And whilst the Court has now started actively issuing judgments and holding states to be in violation of Article 9, most have been against Eastern European states, both with Orthodox and Catholic majorities, compared to Western European (with a liberal Protestant ethos in place) states, despite the latter having more applications filed against them.<sup>148</sup>

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<sup>144</sup>Marie-Benedicte Dembour, ‘The Cases that Were Not to Be: Explaining the Dearth of Case Law on Freedom of Religion in Strasbourg,’ in Italo Pardo (ed), *Morals of Legitimacy: Between Agency and the System* (Berghahn 2000) 205-27.

<sup>145</sup>*Wingrove v United Kingdom*, no 17419/90, 25 November 1996.

<sup>146</sup>*Choudhry v United Kingdom*, no 17439/90, Commission Decision of 3 March 1991. For a general discussion on the whole Satanic Verses affair, see MM Slaughter, ‘The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech’, (1993) 79(1) *Virginia Law Review* 153-204.

<sup>147</sup>Koenig (n 131).

<sup>148</sup>*Ibid.*

*c) 'Embracing' Secularism when confronted by Islam*

The second step, according to Koenig, reflects a tendency of the Court to uphold 'secularism'<sup>149</sup> in cases about Islam, predominantly by Muslim women. Male and female bodies have not only been cast as naturally different but have also consistently been displaced onto a First and Third World divide, where cultural difference, tradition and antiquity have been historically equated with backwardness and primitiveness.<sup>150</sup> These assumptions about culture, gender difference and 'Otherness' continue to underpin the politics of the contemporary moment, including dominant accounts of modernity more generally, and human rights discourses of gender equality more specifically. The colonial past and its linked discourses are integral to the current understanding of the male and female 'Other' in human rights frameworks, the latter of which are viewed as the contemporary saviour of victims of barbaric traditions presented and practiced as essential, natural and or divinely ordained.<sup>151</sup> The projection of human rights as a freedom project, designed to bring about women's liberation, works alongside the assumption that traditional culture is an inherently regressive and intractable feature of the developing world, and a central obstacle to the realization of the universal right to gender equality. This assumption is actively sustained in contemporary human rights advocacy on gender equality, within which veiling is regarded as a cultural practice that always subjugates women and/or erases agency and where freedom is reflexively understood and presented in purely liberal terms – that is, freedom *from* the veil.

The tension between Human Rights and 'Otherness' has explicitly played out over the past two decades in a series of decisions from the European Court of Human Rights concerning the veil. One of the best known and most publicized cases is *Şahin v. Turkey*, in which a university lecturer in Istanbul brought a challenge under the European Convention on Human Rights<sup>152</sup> regarding the validity of a circular issued by the vice chancellor of Istanbul University.<sup>153</sup> The circular directed that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. In March

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<sup>149</sup>It is important to point out that Koenig has not suggested that the secularism of the Court is superficial or rather, artificial. The criticism of the 'hyper-secularity' applied by the Court in this second test, as explained by Koenig, is advanced by the hypothesis of this thesis.

<sup>150</sup>See Saba Mahmood, *Politics of Piety* (Princeton University Press 2012); Suhraiya Jivraj, 'Interrogating religion: Christian/secular values, citizenship and racial upliftment in governmental education policy' (2013) 9(3) *International Journal of Law in Context*, 318.

<sup>151</sup>Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001)(1) 42 *Harvard International Law Journal* 201.

<sup>152</sup>ECHR, 4 November 1950, 213 UNTS 221

<sup>153</sup>*Leyla Şahin v Turkey* App no 44774/98, (ECtHR, 10 November 2005). See Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights', (2006) 7(1) *Melbourne Journal of International Law* 52.

1998, the applicant was refused access to sit an exam on one of the subjects that she was studying because she was wearing the Islamic headscarf. Subsequently, on the same grounds, the university authorities refused to enrol her in a course and admit her to various lectures and exams. The faculty also issued her with a warning for contravening the universities rules on dress, and then suspended her from the university for a semester, as she had taken part in an unauthorized assembly that had gathered to protest against the warning. The applicant claimed that the circular violated several of her rights, including her Right to Freedom of Religion under article 9 of the ECHR, which encompassed the manifestation of religion or belief.

The Court upheld the ban on the wearing of headscarves at Istanbul University on the grounds that the impugned circular was consistent with the principles of secularism and equality in Turkey, in particular, the right to gender equality. Quite specifically, the Court held that there had been no violation of Article 9 (freedom of thought, conscience and religion, including the manifestation of religion or belief); Article 8 (right to respect for private and family life); Article 10 (freedom of expression); Article 14 (prohibition of discrimination); or Article 2 (right to education) of Protocol No. 1 to the ECHR. The circular was held to be consistent with the Turkish Constitutional Court's ruling that authorizing students to 'cover the neck and hair with a veil or headscarf for reasons of religious conviction' in universities was contrary to the Constitution.<sup>154</sup> The Court also stated that such interventions were designed to protect the individual not only against arbitrary interference by the state, but also from external pressure by extremist movements.<sup>155</sup> Implicit in this position is a reinforcement of the widely held assumption that women are *always* coerced into wearing headscarves, and that Muslim women lack agency, are invariably victims of their traditional culture and are awaiting rescue from subservience through a liberal rights intervention.

The Court accepted the government's argument that the restriction on wearing the headscarf was integral to gender equality and maintaining secularism. Given the Court's finding that gender equality was 'one of the key principles underlying the Convention',<sup>156</sup> and that the practice of wearing the headscarf violated this principle, there was almost no

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<sup>154</sup>Ibid para 78.

<sup>155</sup>Ibid para 109. See Karima Bennoune, 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law', (2007) 455(2) Columbia Journal of Transnational Law 367.

<sup>156</sup>Şahin para 107, 114, 115.

scope for Şahin to argue that the ban itself constituted sex discrimination. In her dissent, Justice Tulken pointed out both the paternalism of and the contradiction in using the logic of sexual equality to prohibit a woman from wearing the veil when, in the absence of proof to the contrary, she had freely adopted it. With respect to Turkey, the Court has long continued to protect the *status quo*. Of more than a hundred applications under Article 9 filed against Turkey, only five of them have been upheld, with two of them coming from Jehovah's Witnesses.<sup>157</sup> The Court repeatedly sides with the 'secular' political elite of Turkey by embracing the aforementioned 'assertive' form of secularism.

The case where this has been most visible, and in which the Court actually developed an influential line of justification which it subsequently used in many headscarf cases,<sup>158</sup> including the Şahin case, was the case of *Refah Partisi v Turkey*<sup>159</sup>. The case concerned the dissolution of a political party by the Turkish Constitutional Court on the grounds of protecting human rights and democratic values. The party was an Islamic, right-wing party, and was part of the ruling coalition, with 22% of the Turkish vote. Many of its members had been expelled from the party previously for having made inciteful statements. The Turkish Constitutional Court held that the party supported the wearing of headscarves in schools and intended to introduce Islamic principles and *Shari'ah* Law, going against the Turkish secular order and democracy. The Court unanimously upheld the dissolution of the Refah Partisi Party. The Grand Chamber stated in its judgment that 'an attitude that fails to respect [secularism] will not necessarily be protected under Article 9 of the Convention's protection of freedom of thought and religion.'<sup>160</sup> The Grand Chamber centred its argument on the Welfare Party's proposal to re-introduce Islamic law in some policy domains, accepting the government's interpretation of such a proposal as a threat to public order in a 'democratic society'; that threat constituted a 'pressing social need' which justified party prohibition. That the Turkish state's promotion of secularism (*laiklik*) was seen as a legitimate defence against anti-pluralistic religious movements reflects the discursive link between democracy

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<sup>157</sup>European Court of Human Rights, Press Country Profile: Turkey (August 2021) <[https://www.echr.coe.int/Documents/CP\\_Turkey\\_ENG.pdf](https://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf)> accessed 22 September 2021.

<sup>158</sup>For critical scholarly commentary on the Court applying this line of justification to headscarf cases, see, Benjamin Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v Turkey*' (2005) 91(1) Cornell Law Review 129; Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', (2011) 32 (4) Michigan Journal of International Law 662; Jill Marshall, 'Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate', (2008) 30(3) Human Rights Quarterly 631; Ali Ulusoy, 'The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Law', (2007) 9(4) European Journal of Migration and Law, 419-33.

<sup>159</sup>*Refah Partisi v Turkey*, App no 41340/98, 41342/98 and 41344/98 [ECtHR, 13 February 2003].

<sup>160</sup>*Ibid.*

and pluralism.<sup>161</sup>

The first case where the Court had to address the visibility of Islam<sup>162</sup> was *Dahlab v Switzerland*.<sup>163</sup> The applicant, a primary school teacher, decided to wear a headscarf after converting to Islam, as she believed that the Qur'an required her to dress modestly in the presence of men and male adolescents. She had been wearing the headscarf to work for five years, before being asked to remove it by the Director General of Primary Education of the Canton of Geneva, on the basis that it breached a provision of the Public Education Act, which precluded teachers from wearing obvious means of religious identification. Interestingly, it appears that no parent complained to the school about the applicant's headscarf.<sup>164</sup> The applicant relied on Articles 9 and 14, alleging she had been discriminated on the basis of her sex, in so far as a man belonging to the Muslim faith could teach at a state school without being subject to any form of prohibition, while she had to refrain from practicing her religion; That is, that she was not allowed to wear a headscarf, although she held the same beliefs. The Court held that the ban would be just as valid for any male teacher who wore clothing that identified him as Muslim, and therefore the prohibition on Muslim women was not disparate in nature.<sup>165</sup>

The Swiss Government made two arguments in respect of legitimate aim. First, it argued that the applicant's position could be distinguished from that of pupils attending State schools; whilst student might adopt religious dress, the applicant, as an employee of the State, was required to be neutral, and State schools, as a matter of principle, were nondenominational, so as to ensure all religious beliefs were respected. Second, the

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<sup>161</sup>Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', (2007) 3 European Constitutional Law Review 367; Francoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v Pluralism', (2009) 30(6) Cardozo Law Review 2574.

<sup>162</sup>It was the first one before the Court, but not the first time that restrictions on Islamic headgear were discussed. *Karaduman v Turkey*, App No 16278/90 (Commission Decision, 1 January 1993) was an admissibility decision before the now-defunct European Commission of Human Rights. The Applicant, a university graduate, was prevented from obtaining a certificate confirming her results because university regulations mandated that students submit a photograph with their head uncovered. The Applicant refused to comply, since she interpreted her faith to require her to cover her hair. She instituted proceedings against the State, alleging breaches of Articles 9 and 14 ECHR. The Commission dismissed the Applicant's claim, on the basis that the Article 9 claim was manifestly ill-founded, according to Article 27(2) ECHR and the Article 14 claim failed to comply with the rule on exhaustion of domestic remedies.

<sup>163</sup>*Dahlab v Switzerland*, App no. 42393/98 [ECtHR, 15 February 2001]

<sup>164</sup>*Ibid* para 1.

<sup>165</sup>The holding in *Dahlab* was reaffirmed in the *Şahin* case, as well as in *Dogru v France* where the same court upheld the 2004 French law banning the wearing of headscarves in French public schools; *Dogru v France* (2009) 49 EHRR 8. See also *Ebrahimian v France*, App, 64846/11 ECtHR 2015, upholding the secular (neutral) workplace rule on the unveiled dress code over the applicant's interest in not having the expression of her religious beliefs curtailed.

Government argued that the protection of rights of others included a right of children to be free from the proselytising influence of a teacher's headscarf. Lerner distils the matter as a 'captive audience case'<sup>166</sup> wherein the Government's concern is for the very young children under the authority of Ms Dahlab, who may be particularly susceptible to influence or indoctrination.

Although the applicant's claim was inadmissible, the reasoning of the ECtHR has been described as 'a critical point in the development of the ECHR jurisprudence on "Islamic headscarves."' <sup>167</sup> The ECtHR did not follow *Karaduman*, and accepted that there had been an interference. However, it went on to find that no violation of Art.9 had occurred since the restriction could be justified by reference to the children's right to be educated freely from proselytising influence and gender equality. In terms of the discrimination claim, the ECtHR rejected the applicant's contention that the comparator should be a Muslim man, but rather a man 'of a different faith,' a not entirely persuasive finding at all. Accordingly, there was no violation of Article 14.

To return to the *Şahin* case: very similarly, the Turkish Government rejected the charge of violation, relying heavily on the constitutional principles of the Republic, specifically secularism (*laiklik*) and Atatürk nationalism, which together aim to secure a modern Turkish society. The headscarf presented a challenge to those integral norms, as it was associated with 'religious fundamentalist movements,'<sup>168</sup> that threaten Turkish secularism. The Grand Chamber was persuaded by the argument that the headscarf had an effect on those who chose not to wear it, and held that the restrictions were a proportionate means of upholding public order and protecting the rights of others. The ECtHR accorded the Turkish Government a wide margin of appreciation, because there was a diversity of approaches in Europe on the question of religious dress.<sup>169</sup> It also accepted that the principles of secularism and gender equality were worth protecting, and approvingly cited a passage from *Dahlab*, which indicated the headscarf was not compatible with equality.<sup>170</sup>

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<sup>166</sup>Natan Lerner, Religion, Beliefs and International Human Rights (Orbis 2000) 110.

<sup>167</sup>Anastasia Vakulenko, "'Islamic Headscarves' and the European Court of Human Rights: an Intersectional Perspective,' (2007) 16 Social & Legal Studies 183, 188.

<sup>168</sup>Leyla Şahin v Turkey, para 90-93.

<sup>169</sup>Ibid para 109.

<sup>170</sup>Ibid para 111.

Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court[...], which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.<sup>171</sup>

In these cases, the Court's reasoning pits a progressive secular ideal against what in the West is generally perceived and presented as a premodern and oppressive religious order. This binary obscures the majoritarianism that is advanced in and through the discourse of secularism, and which aggressively associates gender equality with the unveiled woman. There is an overwhelming emphasis on a formal approach to equality, which holds that Muslim women who practice veiling should be treated the same as all other (unveiled) women. This logic is based on two confident liberal assumptions: that *all* veiled Muslim women are oppressed by the practice; and that Muslim women's systematic observance of certain religious practices is *always* an explicit obstacle to their realization of gender equality. These Rights interventions do not disrupt the normative assumptions about gender and culture which make these cases so contentious. The cases described above exemplify how otherness is bound up in gender and racial identity. That identity as it relates to veiling has as yet never been properly addressed in the Court, as unquestioned liberal assumptions about veiling as an inherently oppressive practice have always forestalled this question.

The veil cases serve as confirmation of the prevalent view that regards Islam as essentially authoritarian, regressive and oppressive to women. It reproduces the deeper liberal assumptions that religion in the non-Western world exists through ancient systems of entrenched conformity, its adherents bound in unquestioning obedience to revelation and exegesis, with the associated rules for human conduct laid out in foundational texts to which believers subscribe without any impulse to interrogate, debate, deconstruct or reconstruct. The legal and, at times, even social response to the traditional practice of veiling is used to

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<sup>171</sup>Ibid para 116.



homogenize, essentialise and demonize an entire religion, and to implicitly project Muslim men or proponents of such practices as illiberal, misogynistic and fundamentalist. At the same time, the veiled Muslim woman is considered a victim of her culture or religion, having no agency, and being uncritical of the custom. However, the very terms of equality within liberal logic are what deny her this agency. If she *chooses* to wear the veil, the choice is either regarded as an outcome of false consciousness and thereby hypocritical and irrelevant, or interpreted as a belligerent act of personalized dissent that refuses to comply with the reasonable demands of liberal secular democracy. Her choice to wear the veil is stuck within this binary, and the complexity of the personal rationale behind the choice is never fully attended to. Choosing to veil rather than not to is, according to liberal constituencies, choosing incarceration over autonomy – and hence no choice at all; a choice that polices women's sexuality and sociality and reinscribes existent gender roles is not a choice, and contravenes the norms of liberal equality and freedom. Gender equality is defined by and aligned with majority political ideals, which are understood as chosen, and thus axiomatically associated with the autonomous, unveiled female subject.<sup>172</sup>

Therefore, from the analysis of *Şahin*, *Dahlab*, and various subsequent cases from Turkey, but also cases from France where headscarf-wearing schoolgirls had sought remedy against their expulsion from public schools before and after the 2004 law against ostentatious religious signs,<sup>173</sup> it is fair to suggest that the Court considers an assertively secularist conception of the public sphere (keeping closely in line with liberal Protestant ideas of the delineation of the public and private, as discussed throughout this chapter) not only as fully compatible with the Convention but even as the preferential model for dealing with Islam, if not religion *per se*.<sup>174</sup>

#### d) Radical shift?

The third and last step in the evolution of the Court's jurisprudence, as per Koenig, reverses the aforementioned secularism argument related to Islamic cases, on to cases involving Christian majorities, thereby ceasing to protect majority religions and actively

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<sup>172</sup>Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press 2012)

<sup>173</sup>*Kervanci v France*, *Dogru v France*, *Aktas v France*, *Bayrak v France*, *Gamaleddyn v France*, *Ghazal v France*, *J Singh v France*, *R Singh v France*.

<sup>174</sup>Langlaude (n 141); Veit Bader, 'Constitutionalising Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "Secularism"' (2010) 6(3) *Utrecht Law Review*, 8.

influencing church-state relations.<sup>175</sup> Fokas explains this phenomenon through an analysis of the case of *Lautsi v Italy*.<sup>176</sup> The *Lautsi* case involved a claim brought under Art.9 complaining about the display of a crucifix on the wall of all the classrooms in a state school, which the applicant's children attended. The applicant considered the display of the crucifix to be contrary to the principle of secularism, which is how she wished to bring up her children. At the Chamber level, in 2009, the Court applied a relatively narrow margin of appreciation in not allowing the Italian state to decide for itself whether it considered the presence of a crucifix in the classroom a violation of the applicant's right to religious freedom (in this case, freedom from religion). This was seen as an immediate threat to what was conceived by many as a national tradition, 'reflecting historical relations between religion and the state now embedded in national culture'<sup>177</sup> and would have affected every public school in a large number of Contracting States, on a highly sensitive topic (the removal of crucifixes, as evidenced from the *Eweida and others v UK* cases,<sup>178</sup> proved to be deeply emotive). However, once the case reached the Grand Chamber level, the Court held the crucifix in the classroom to be a seemingly 'harmless' symbol due to its 'passive' nature. (This is deeply problematic as it segregates symbols, as evidenced from the *Şahin* case, and even more so in the *SAS v France* case,<sup>179</sup> on a basis of 'harm' to the majority- the difference being striking. A symbol of a religion the Court has historically never understood is seen to potentially cause 'harm' to other students by negatively influencing them, whereas a symbol of a majoritarian religion that informs the Court's ingrained ethos is seen as innocuous).<sup>180</sup> The Court, therefore, returned to a very wide margin of appreciation. The Chamber's decision in *Lautsi* could have been heralded as revolutionary, just as *Kokkinakis* was when the Court held in para 31 of its decision, 'As enshrined in article 9, freedom of thought,

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<sup>175</sup>Koenig (n 131).

<sup>176</sup>*Lautsi v Italy*, App no 30814/06 (ECtHR, 27 July 2009 and 18 March 2011) - Chamber decision issued in 2009, whilst the Grand Chamber decision was issued in 2011

<sup>177</sup>Fokas (n 10) .

<sup>178</sup>*Eweida and others v UK*, App nos 48420/10, 59842/10 and 36516/10 (ECtHR, 15 January 2013); Ronan McCrea, 'Religion in the Workplace: Eweida and Others v United Kingdom' (2014) 77(2) *Modern Law Review* 277.

<sup>179</sup>*SAS v France*, App no 43835/11 [ECtHR, 1 July 2014]

<sup>180</sup>Ronan McCrea, 'The Ban on the Veil and European Law' (2013) 13 *Human Rights Law Review* 57; Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3(1) *Oxford Journal of Law and Religion* 2; Sune Laegaard, 'Burqa Ban, Freedom of Religion and 'Living Together'' (2015) 16 *Human Rights Review* 203; Mohammad Mazher Idriss, 'Criminalisation of the Burqa in the UK' (2016) 80(2) *Journal of Criminal Law* 124; Robert Wintemule, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusal to Serve Others' (2014) 77(2) *Modern Law Review* 223; Francois-Xavier Millet, 'When the European Court of Human Rights Encounters the Face' (2015) 11(2) *European Constitutional Law Review* 408; Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2007); Malcolm Evans, 'And Should the First be Last?' [2015] *Brigham Young University Law Review* 531- a lot has been written on the so-called 'burqa ban' specifically, dealing with which in isolated and focused detail is beyond the scope of this chapter. However, it is briefly dealt with further on, in the text to n 185.

conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.’<sup>181</sup> However, the Grand Chamber’s decision has been seen by many as a radical shift from the Court’s initial conception of the state duty of neutrality and impartiality<sup>182</sup> and consequently an increasing tendency<sup>182</sup> to avoid religion-related questions by deferring to the margin of appreciation.

This is clearly evidenced in three of the more recent judgments of the Court, which were decided in favour of the states in question by heavy reliance on the margin of appreciation. The first of these is the case of *Sindicatul Pastoral v Romania*<sup>183</sup> in which the applicant was a group of Romanian Orthodox priests who were seeking to form a trade union against the wishes of their religious leaders. The applicant argued that the state’s refusal of its application for registration as a trade union infringed their right to form a trade union, protected by Article 11<sup>184</sup> of the Convention. The Court agreed with the state that its refusal to register was due to its desire to remain uninvolved in the organisation and functioning of the Romanian Orthodox Church, and was thereby remaining neutral.<sup>185</sup> The Court thereby ended up supporting the religious autonomy of the majority religion.

The second relevant case for the purposes of our ongoing discussion is the case of *Fernandez Martinez v Spain*.<sup>186</sup> This case involved a teacher of a course in Roman Catholic religion and ethics in a state school, who was a priest and was married, and who claimed that the non-renewal of his employment contract was due to the unwanted publicity given to his family and personal life as a married priest. The Court ruled in favour of the state and the religious autonomy of the Spanish Catholic Church.

It was the third case, however, which proved to be the most controversial (and for

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<sup>181</sup>Kokkinakis (n 78).

<sup>182</sup>Hin-Yan Liu, ‘The Meaning of Religious Symbols after the Grand Chamber Judgment in *Lautsi v Italy*’ (2011) 6(3) Religion and Human Rights 253.

<sup>183</sup>*Sindicatul Pastoral cel bun v Romania*, App no 2330/09 [ECtHR, 12 February 2013]

<sup>184</sup>Article 11 on the Freedom of Assembly and Association.

<sup>185</sup>*Sindicatul* (n 183), written comments of third-party interveners- ‘Just as an individual must be absolutely free to organise her own beliefs, a church or other religious body must also be free to organise the people who personify its beliefs.’

<sup>186</sup>*Fernandez Martinez v Spain*, App no 56030/07 (ECtHR, 12 June 2014)

the purposes of the hypothesis being advanced by this chapter, most relevant), both raising new critiques to do with the Court's reasoning, and reinforcing old ones to do with differential treatment of Islam as a minority faith. In 2010 a law popularly described as the 'burqa ban' was enacted in France, which outlawed the public wearing of the full veil or *burqa*.<sup>187</sup> One lawmaker specifically stated that 'it is our living together based on the Spirit of the Enlightenment that is violated' by the *burqa*.<sup>188</sup> Such statements reinforce the stigma that attaches to the wearing of the veil within the liberal ethos, once again reinforcing the singular view that Islamic religious practices are subordinating, misogynistic and utterly repressive in relation to women. The position further reproduces the common societal belief that Muslim women are *always* coerced into wearing the veil – with the rhetoric of gender equality obscuring the liberal democratic state's coercive act of banning the practice. Such skewed conviction completely forecloses any possibility of accepting the rationale that some women are, in fact, *not* oppressed by the veil; That such practitioners actively desire to veil, and are freely exercising personal choice in this regard.

The 'burqa ban' was challenged in *SAS v France*<sup>189</sup> as a violation of the claimant's rights under various articles of the ECHR, although the Court focused primarily upon articles 8, 9 and 14.<sup>190</sup> The government's central argument was based on public safety concerns, as well as 'respect for the minimum set of values of an open and democratic society', which includes gender equality, human dignity and 'respect for the minimum requirements of life in society' or 'living together'.<sup>191</sup> Interestingly, the Court rejected some of these arguments, which had been successful in earlier cases. The Court did not accept the argument that the ban advanced the legitimate aims of gender equality and human dignity, partly for the reason that the practice itself was being defended by the woman wearing the *burqa*. The Court simply accepted that the *burqa* was a choice, avoiding the essentialism and paternalism of earlier cases, and that, as highlighted in Justice Tulken's dissenting judgement in the *Şahin* case, the ban disregarded the wearer's choice as well as the meaning attributed to the veil by the applicants. The Court also rejected the argument that the ban advanced human dignity, stating that there was no evidence that the women who wore the *burqa* were expressing a

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<sup>187</sup>Loi no.2010-1192 du 11 octobre 2010. ; see also Alia Al-Saji, 'The Racialisation of Muslim Veils: A Philosophical Analysis' (2010) (36) 8 Philosophy and Social Criticism 875-902.

<sup>188</sup>Suzanna Mancini, The Tempting of Europe, The Political Seduction of the Cross; A Schmidtian reading of Christianity and Islam in European Constitutionalism' in *Constitutional Secularism in an Age of Religious Revival* (eds Suzanna Mancini and Michel Rosenfeld, Oxford University Press 2014) 114.

<sup>189</sup>SAS v France.

<sup>190</sup>*SAS v France* 2015 60 EHRR 11.

<sup>191</sup>*Ibid* para 82, 116,121.

form of contempt towards others or seeking to offend the dignity of others.<sup>192</sup>

In a similar vein, the Court rejected the public safety argument, finding it had not been established that the veil posed a general threat to public safety, and holding that the ban was therefore disproportionate.<sup>193</sup> Instead, the Court's decision relied upon the government's justification of 'respect for the minimum set of values of an open and democratic society' or 'living together' as a legitimate ground for restrictions on the right to manifest religion or belief under Article 9. As this ground is not explicitly articulated as such in the Convention -that is, under either article 8(2) or 9(2)<sup>194</sup> - the Court interpreted it as falling within the broad 'protection of the rights and freedoms of others'.<sup>195</sup> Thus, even if the claimant wore the veil freely, and as an exercise of her choice and liberty of expression, the ban would still be justified on the basis of the Court's reasoning that it was incompatible with the democratic precept of 'living together'.

In upholding this justification, the Court's analysis focused on the face, stating that it plays an important role in the civility of social interactions and open interpersonal relationships. These were important markers of the community life of a society, and thus the wearing of the *burqa* in public was 'incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together"'.<sup>196</sup> The Court accepted the findings of a parliamentary commission tasked with drafting a report on the wearing of the *burqa* in France, which described the practice as being at odds with the values of the Republic, a denial of fraternity and 'constituting the negation of contact with others and a flagrant infringement of the French principle of living together'.<sup>197</sup>

This ruling privileges the concept of 'living together' over and above the right to manifest religion. Hence it is a cause for concern, as it reflects the assimilationist impulse that underscores the enforcement of the ban under the right to gender equality, even though the decision was not explicitly based on this right. The Court's holding further underscores

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<sup>192</sup>Ibid para 120.

<sup>193</sup>Ibid para 139.

<sup>194</sup>Art. 8 ECHR provides for the respect of family and private life, subject to 8(2) which states 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

<sup>195</sup>SAS para 117, 121, 122. Similar arguments were presented by Belgium in a challenge to the State's ban on the full-face veil in *Belcacemi v Belgium*, App no. 37798/13 ECtHR 2017.

<sup>196</sup>SAS para 153.

<sup>197</sup>Ibid para 17.

the unstated religious majoritarianism that informs the requirements of ‘living together’, where manifestations of belief in the form of displays of the cross, or recognition of Christian holidays in the secular calendar, or state support for Christian denomination schools in France, remain unscrutinised yet continue to inform the principle of secularism or *laïcité*, the declared cornerstone of the French Republic. ‘Living together’ operates exclusively in one direction – that is, in favour of majoritarianism – and remains somewhat problematic, given that it is not a right recognized under the terms of the ECHR. Nevertheless, juridical approval of this concept demands compliance by Muslim women who are French citizens. It does not require any simultaneous obligation on the part of the majority to work through socio-cultural prejudice and find ways to ‘live together’ equally with, for example, a Muslim woman for whom wearing the veil is an inherent aspect of subjectivity and a crucial signifier of her existential, ethical and spiritual commitments.

In these legal interventions, freedom is displaced onto a binary between one’s particular cultural identity and the political concept of gender equality, the latter of which falls within the orbit of liberal sociality generally, and within the more ‘far-fetched and vague idea’ of ‘living together’ in particular.<sup>198</sup> Within this paradigm, the veil symbolizes the ultimate subordination of women, and its ban or removal is evidence of liberation and the reestablishment of a cherished secular ideal. The debate on women’s autonomy and entitlements is framed by certain assumptions about freedom in the context of gender equality – as being unequivocally associated with the unveiled body, in contrast to the corresponding association of non-freedom with the veiled body. Veiling is categorized as a barbaric practice of the ‘Other’; criminalization of the veil and its adherents thus becomes a justifiable response. These cases perpetuate the earlier colonial fetish with the veil, and the characterization of its removal as an act of freedom liberating oppressed Muslim women from their oppressive Muslim culture, and from oppressive Muslim men.<sup>199</sup>

And so perhaps there has been a ‘shift’ in the Court’s jurisprudence, just not the kind of radical shift of which Koenig is a big proponent, when he insists that the Court’s activism has now moved from a long reach of a Christian establishment in Europe to become secularised through judicial power. This hypothesis still maintains that any shift, if at all, has

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<sup>198</sup>Ibid, Joint Partly Dissenting Opinion of Judges Nußburger and Jäderblom. See also Laegaard (n 178); Ilias Trispiotis ‘Two Interpretations of Living together in European Human Rights Law’ (2016) 75(3) *The Cambridge Law Journal* 580-607.

<sup>199</sup>Frantz Fanon, *A Dying Colonialism* (Grove Press 1965) 36-38; See also Daniel Gordon ‘“Civilisation” and the self-critical Tradition’ (2017) 54(2) *Society* 106.

been to further ‘Otherise’ non-Christian minority religions in Europe.

The case of *Ahmet Arslan and others v Turkey*<sup>200</sup> involved the criminal conviction of members of a religious group for wearing their religious attire in public, outside a mosque in Ankara. The clothing in question was conspicuous and distinctive, and they were arrested after having been walking the streets. In addition, when appearing in their local court, the applicants once again wore their specific religious attire and after refusing to take it off following a request from the court to do so, they were all convicted. The Court, however, unlike most of its decisions discussed hereinabove, held that the interference with the applicants’ freedom to manifest their religious belief had not been based on sufficient reasons and found the state to be in violation of article 9. The Court distinguished other such cases (notably, the *Şahin* case) on the basis that this case concerned the criminalization of wearing religious garments in public areas, as opposed to public establishments, where religious neutrality might take precedence over the right to manifest one’s religion (as it did in *Şahin* and also *Dahlab*). The Court also concluded that the applicants expressed their religious convictions in a way that could not be regarded as a threat to public order (though this begs the question- how was the *hijab* a threat if this overtly distinctive religious attire was not?).

It is also worth noting that even though the Ahmet Arslan case is seen as an outlier and thereby one that follows the doctrine of plurality, the fact that the Court chose to distance itself from the question of religious clothing in public institutions and declined to take the opportunity to address it, further involved it in the perpetuation of the disproportionate and unfair burden on religious minorities (as all the cases that have since followed have proven).<sup>201</sup>

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<sup>200</sup> *Ahmet Arslan and others v Turkey*, App no 41135/98 [ECtHR, 23 February 2010]

<sup>201</sup> It is also worth noting that in *Ahmet Arslan*, the Court was not confronted with the gender argument, unlike in *Dahlab* where the Court made statements such as the headscarf ‘appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality’. There are many arguments worth exploring about the intersectionality of gender, religion, and very importantly race (as the women who are affected by policies such as the ‘*burqa* ban’ are predominantly women of colour), however, as interesting such a study may be, it is beyond the purview of this thesis. There have been some interesting articles written on the subject, however: see Annie Bunting, ‘Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies’ (1993) 20(1) *Journal of Law and Society* 6; Eva Brems, ‘Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-Law of the European Court of Human Rights’ in Foblets, Renteln et al (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant 2009); Maleiha Malik, ‘The “Other” Citizens: Religion in a Multicultural Europe’, in Camil Ungureanu and Lorenzo Zucca (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012); Lourdes Peroni, ‘Religion and culture in the discourse of the European Court of Human Rights: the risks of stereotyping and naturalising’ (2014) 10(3) *International Journal of Law in Context* 195.

Having summarily looked at this supposed exception to the rule, what does *Ahmet Arslan* really prove? Not much. Whilst it illustrates that the Court does in certain circumstances adopt a narrow margin of appreciation and that it has in some cases found against the state, the overwhelming majority of cases do the opposite. In fact, *Ahmet Arslan* proves to be problematic on other fronts, raising with it questions about the Court's inability to deal with intersectionality and the 'double axis' theory of equality<sup>202</sup> (that the aggrieved in question is not *just* a Muslim or *just* a woman, but is in fact a 'Muslim woman'), furthering its outdated views on Muslim women in Europe by its silence on the ban of religious headwear in public institutions, which eventually culminated in the regressive *SAS* judgment.

*e) Underlying assumption in the Court's doctrines*

The arguments raised in this section might be challenged by suggesting that by constantly deferring to state policy through the margin of appreciation logic, the Court defers to either secularism (in the case of France and Turkey, for example), or if religion is relevant (for example Italy), then to Christianity. This does not mean, as this thesis suggests, that the Court intends to favour Christianity; it favours the state and if the state just so happens to be Christian, that is not the Court's fault.

Whilst this is correct to a certain extent, (in that the margin of appreciation doctrine does defer to state policy and yes, the Court does not have a say in what the State prefers as part of its own policies), this section argues consistently that the margin of appreciation is merely *one* tool that the Court employs which indirectly allows for Christianity to be favoured. The Court has put in to place multiple such tools or doctrines that do this and the end result means one of two scenarios usually present themselves- 1) either the indirect result ends up favouring Christianity, whether that is the religion of the applicant or the state, thereby automatically meaning minority religions end up losing out or, 2) the Court has in place inherently Christian-oriented tools, that are in their essence favourable towards a liberal-Protestant Christian understanding of what faith is and how it manifests – which disadvantages faiths that do not map neatly onto the Protestant model of faith. Therefore, this thesis argues that the Court does not need to actively state that it is biased in favour of liberal-Protestant Christianity, it does so passively by employing doctrines it has had in place

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<sup>202</sup>See e.g. Jane Bailey, 'Getting at Equality: Research Methods Informed by the Lessons of Intersectionality' (2019) 18 *International Journal of Qualitative Methods* 1.



for years, which were originally developed from inherently Christian values/ideals- the biggest example of which is the concept of *forum internum*. The Court's understanding of what 'religion' is, what informs this understanding, is Christian. It finds it *easy* to defer to a state that does business the 'Christian' or in other words, the 'secular' way<sup>203</sup> It will be worth observing, however, how the Court chooses to 'defer' to Turkey in the event that Turkey's state policies change from its 'assertive' Kemalist secularism to a more Islam-inclined value system, something that is not very far-fetched considering the current government in power and its aggressive right-wing Islamic agenda.

#### **2.1.4. The Court's conception of Islam**

Whilst the discussion on Europe and how it in itself 'manifests' religion through the application of Article 9 is seemingly endless, it is worth mentioning the case of *Refah Partisi* again, as it raises some very important questions in relation to many suppositions we have been taking for granted, not just through the course of this section, but in how we frame the discourse around Islam in Europe. Not only was the decision of the Grand Chamber extremely significant in terms of negating the popular mandate of a people who democratically elected a political party in to power, it is also noteworthy because of how the Court broke with past precedent and analysis. Why would the Court do this? David Schilling suggests it was a 'response to an overall European concern about a political Islamic regime arising in Turkey. By upholding the Turkish Constitutional Court's decision, the ECHR sought to eliminate this perceived threat to the security of Europe.'<sup>204</sup> If we respond to the accusations of the inherent mistrust and hostility towards a political and social Islam found in Europe and thereby the European Court, by arguing that the decision in *Refah Partisi* is the true outlier because it involved a real and imminent danger of an 'extremist' party taking control over a country within Europe, which wants to join the European Union, potentially endangering the lives of many, we are still left with the gaping hole that is *SAS*, *Leyla Şahin*, *Ebrahimian*,<sup>205</sup> and *Dahlab* (and even *Mann Singh*, with the 'Otherisation' of Sikhs having a lot to do with their perceived link to Islam).<sup>206</sup>

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<sup>203</sup>See Section 2.1.1. above for discussion on the Christian heritage underpinning European secularism which allows a blurred understanding amongst European citizens as to what is actually secular, and what merely seems secular and passive because of its familiarity. See also section on the cross in classrooms, text to n 174.

<sup>204</sup>David Schilling, 'European Islamophobia and Turkey- *Refah Partisi (The Welfare Party) v Turkey*' (2004) 26(3) *Loyola of Los Angeles International and Comparative Law Review* 501.

<sup>205</sup>*Ebrahimian v France* (n 165)

<sup>206</sup>Peroni (n 201)

Whether it is because the Court does not understand multiple conceptions and realities of lived religion informed by its internalized appreciation and knowledge of Christianity, or whether the political climate in modern Europe essentialises ‘difference’ as opposed to ‘diversity’, we are left with a supranational tribunal tasked with answering some of the most complex questions facing us today, that refuses to engage with a vast proportion of its citizenry. The European Convention on Human Rights, as applied by the Court, has been described ‘as the most effective human rights regime in the world’<sup>207</sup> but when it comes to interpreting the inextricable milieu that is religion, discrimination, equality, and diversity, it not only falls short, it cripples itself.

## **2.2. Freedom of Religion at the United Nations: Article 18 contextualised through the Committee’s jurisprudence**

Section 2.2 deals with Freedom of Religion at the HRC and jurisprudence pertaining to Article 18, with the aim of teasing out a through-line of thinking and the Committee’s intent in its rulings, as was done above for the ECtHR. This will inform the comparative analysis in Chapter 3 to allow us to consider the strength and weaknesses of European and international Human Rights jurisprudence, towards the thesis goal of providing a different interpretation of the Right to Freedom of Religion to make it more inclusive.

### **2.2.1. Religion or Belief under the Covenant on Civil and Political Rights**

The 1966 International Covenant on Civil and Political Rights is one of the most important universal treaties on human rights. The Covenant protects, in the form of a legally binding international treaty ratified by three quarters of all states in the world,<sup>208</sup> a large part of the rights enshrined in the 1948 Universal Declaration of Human Rights. Many of these rights are also protected by the International Covenant on Economic, Social and Cultural Rights, a sister covenant to the Covenant on Civil and Political Rights. In some areas, the two covenants fail to protect certain rights included in the Declaration.<sup>209</sup> In other respects, the two covenants represent a progressive development in the understanding of human rights, since they include rights that are not mentioned in the Universal Declaration.<sup>210</sup>

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<sup>207</sup>Wojciech Sadurski, ‘Partnering with Strasbourg: Constitutionalism of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgements’ (2009) 9(3) Human Rights Law Review 397, 403.

<sup>208</sup>The Human Rights Committee has consistently taken the position that once the population of a territory finds itself protected by the Covenant, state succession or other forms of transfer of sovereignty over the territory do not affect the applicability of the Covenant.

<sup>209</sup>See Universal Declaration of Human Rights, art. 17 (property), and art. 14 (asylum).

<sup>210</sup>See ICCPR, art. 27 (rights of members of minorities).

Freedom of thought, conscience, and religion is protected by article 18 of the Covenant on Civil and Political Rights and reads as follows:

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

Paragraphs 1 and 2 cover a wide range of the various dimensions of freedom of religion or belief. Paragraph 3 allows for and conditions possible limitations on certain but not all dimensions of the said freedom, namely those dimensions that amount to the 'manifestation' of religion or belief. For instance, the 'internal dimension,' the individual right to have or adopt a religion or belief, is not subject to limitations. Paragraph 4 includes a special clause on religious education.<sup>211</sup>

Within the framework of the Covenant, article 18 is the main provision related to freedom of religion or belief. Other provisions, however, add important elements to the protection of this freedom. As article 18 is listed in article 4, paragraph 2,<sup>212</sup> freedom of religion is among the nonderogable rights under the Covenant. These provisions of the Covenant cannot be derogated from during a state of emergency that threatens the life of the nation. The non-discrimination clauses in article 2, paragraph 1, and article 26 specifically

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<sup>211</sup>ICCPR, art. 18(4) is similar to ICESCR, art. 13(3). This is one of the issues where there is considerable interdependence between the two 1966 Covenants.

<sup>212</sup>ICCPR, art. 4(1) provides for derogation from obligations under the Covenant 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ... provided that such measures are not inconsistent with [States Parties'] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' Article 4(2) states, 'No derogation from articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

mention religion as one of the prohibited grounds for discrimination. A similar reference to religion is made in the rights of the child provision in article 24, paragraph 1.<sup>213</sup> Further protection is afforded through the minority rights clause in article 27, under which members of ethnic, religious, or linguistic minorities shall not be denied, *inter alia*, the right to profess and practice their own religion in community with the other members of the group.<sup>214</sup>

Article 18 of UDHR guarantees the ‘freedom to change’ one's religion or belief as an indispensable component of freedom of religion or belief:

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.

Using different language, article 18(1) of the ICCPR includes ‘freedom to have or adopt a religion or belief of his choice’. Obviously, the word ‘choice’ does not make any sense unless it includes the possibility of changing one's orientation and adherence. Moreover, article 18(2) of the ICCPR, *inter alia*, serves the purpose of further reinforcing the right to change, by insisting that ‘[n]o one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice’. Article 1 of the 1981 Declaration refers to everyone's ‘freedom to have a religion or whatever belief of his choice’. In comparison to the ICCPR the formulation is shorter, as it lacks the verb ‘adopt’. At the same time, article 8 confirms that ‘[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights’, thereby indirectly endorsing the right to change.

As early as 1987, the then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Elizabeth Benito, concluded that while these provisions varied slightly in wording, they ‘all meant precisely the same thing: that everyone

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<sup>213</sup>Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property, or birth, the right to such measures or protection as are required by his status as a minor, on the part of his family, society and the State’ (ICCPR, art. 24[1]).

<sup>214</sup>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’ (ICCPR, art. 27).

has the right to leave one's religion or belief and to adopt another, or to remain without any at all.<sup>215</sup> This is an important clarification, since reluctant governments may feel tempted to take the differences in formulations as a pretext to question the right to change in general. The Human Rights Committee has taken a firm position in this respect. In its general comment no. 22, adopted in 1993, the Human Rights committee uses the verb 'replace' which serves as an obvious equivalent of the term 'change': '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 to retain one's religion or belief'.<sup>216</sup> The right to convert could not have been confirmed in clearer terms.

The reference made in the just quoted sentence to 'atheistic views' accounts for a broad, inclusive understanding of freedom of religion or belief which follows from the universalistic nature of this human right. As the Human Rights Committee points out, article 18 of the ICCPR protects 'theistic, nontheistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed.'<sup>217</sup> The general comment furthermore refers to non-traditional religions which it includes on an equal footing with traditional religions: 'Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.'<sup>218</sup> This broad, inclusive understanding must also guide the various issues that may occur in the context of the right to adopt, change, or renounce a religion or belief. Accordingly, changes can go in all different directions, not only towards embracing the dominant religion of a country. Just as individuals are free to replace their previous religion by another religion, they may adopt atheistic or agnostic views or choose to remain indifferent with regard to religious questions. And just as they have the right to convert to traditional denominations, they may also join new religious movements or new branches within traditional religions. Moreover, from a legal perspective, there is no legitimate normative difference between conversion and reconversion, and no limitation on how many times this may be pursued.

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<sup>215</sup>E/CN.4/Sub.2/1987/26, para 21.

<sup>216</sup>HRI/GEN/1/Rev.9, 205, para 5. During the *travaux préparatoires* of General Comment no. 22 (CCPR/C/SR.1162, para 11), Committee member Herndl noted two main aspects of articles, 18 of the UDHR and of the ICCPR, i.e., 'the right to have a religion and change it, and the right to manifest one's religion.'

<sup>217</sup>HRI/GEN/1/Rev.9, p 205, para 2.

<sup>218</sup>Ibid.

The special rank attributed to the right to change is reflected in the unconditional protection provided for the *forum internum*. While external manifestation of one's freedom of religion or belief can possibly be limited in accordance with the criteria set out in article 18(3) of the ICCPR, the inner nucleus of a person's conviction does not allow for any coercive restrictions whatsoever, not even in situations of conflict or a public emergency. This is the precise and strong meaning of the 'no coercion' provision of article 18(2) of the ICCPR. The prohibition of conversion is one of the few strictly unconditional norms entailed in International Human Rights Law, comparable in this regard to the unconditional bans on slavery and torture. According to article 18(2) of the ICCPR, everyone's freedom to have or to adopt a religion or belief of their own choice falls within the realm of the *forum internum* thus benefiting from the unconditional status accorded to the inner dimension of freedom of religion or belief. Again, this has been reaffirmed by the Human Rights Committee which in its general comment no 22 emphasizes: 'Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or to adopt a religion or belief of one's choice. These freedoms are protected unconditionally [...]'<sup>219</sup>

Like few other provisions within the ICCPR, the right to change one's religion or belief thus demands apodictic respect, since any violation would amount to a direct negation of the due respect for everyone's human dignity. Accordingly, the State is strictly obliged to refrain from any infringements in this regard. The obligation to respect the right to change furthermore requires reforms aimed at removing any obstacles, as they may exist in a country. This can include repealing punishments directly or indirectly targeting converts or those wishing to convert, abolishing administrative restrictions against the right to change, enacting reforms in family laws with a view of accommodating specific needs of converts, safeguarding respectful treatment of children of converts in school education, and eliminating all forms of direct or indirect discrimination against converts in public institutions. Moreover, special attention is needed to ensure the principle of non-coercion in institutions that expose persons to increased risks of pressure from guardians, superiors or peers, such as the military, police forces, or penitentiary institutions.<sup>220</sup> In this context it is worth emphasizing that the notion of 'coercion' cannot be confined to the use or threat of

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<sup>219</sup>Ibid para 3.

<sup>220</sup>See *Larssis and Others v Greece*, App nos 23372/94, 26377/94, and 26378/94 (ECtHR, judgment of 24 February 1998).

physical force or penal sanction employed to prevent people from changing their religion or belief. As the Human Rights Committee has underlined, it also includes ‘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 Covenant’.<sup>221</sup>

State obligations are not confined to respecting the right to conversion in State institutions and State activities. States have furthermore a responsibility to provide effective protection for converts or those wishing to convert, against infringements enacted by non-State actors. Such third party infringements can include harassment, societal discrimination, and threats or acts of violence. They can emanate from society at large or from members of the convert’s previous communities, possibly even their own family. Rapid and effective protective measures are crucial to avoid the impression that converts could be attacked with impunity.

Article 18(2) of the ICCPR is an example of an unconditional norm, and the formulation used is strikingly similar to the language used to ban slavery and torture. The Human Rights Committee corroborates this apodictic understanding in its general comment no. 22 by emphasizing that article 18 ‘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 [...]’.<sup>222</sup> Incidentally, the same holds true for article 19(1) of the ICCPR which concerns freedom of opinion, i.e., also in the *forum internum*. Here again, the Human Rights Committee points out in its general comment no. 34 that ‘[t]his is a right to which the Covenant permits no exception or restriction’.<sup>223</sup> Both norms jointly protect human beings in their freedom to develop their own independent thinking, to form their own personal opinions, and to build their own identity shaping religious or non-religious convictions.

UN Treaty Body case law on the unconditional prohibition of coercive interferences with a person's freedom to have or adopt a religion or belief of his or her choice has to date been rare. However, in its Views on a communication submitted by Yong-Joo Kang, the Human Rights Committee condemned the ‘ideology conversion system’ which had existed

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<sup>221</sup>HRI/GEN/1/Rev.9 205 para 5.

<sup>222</sup>Ibid para 3.

<sup>223</sup>CCPR/C/GC/34, para 9.

in the Republic of Korea until 1998 as a grave human rights violation. Mr. Yong-Joo Kang, a political dissident, who was considered as a communist by the Government of the Republic of Korea, claimed that ‘[t]he coercion to change his thought and conscience that he had suffered as a result of his classification and the withholding of benefits, as well as the absence of possible parole unless he “converted”, amount to violations of his right to hold beliefs of his own choice, without interference’.<sup>224</sup> The Human Rights Committee came to the conclusion that his cruel treatment culminating in solitary detention for 13 years violated various human rights, including the claimant's freedom of thought, conscience, religion, or belief. The Committee stressed ‘that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18 paragraph 1, and 19, paragraph 1, both in conjunction with article 26’.<sup>225</sup>

The Special Rapporteurs on freedom of religion or belief addressed the prohibition of coercion on various occasions, especially in the context of country visits. When visiting the Islamic Republic of Iran, Abdelfattah Amor criticised that converts away from Islam lived under circumstances of pressure and close surveillance.<sup>226</sup> In the Maldives, Asma Jahangir observed that converts from Islam, although not formally charged with apostasy, ‘have been detained and subjected to coercion in order to encourage or force them to reaffirm their fate in Islam’.<sup>227</sup> In her discussion of anti-conversion laws in India, Jahangir criticised tendencies ‘to compel believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert’.<sup>228</sup> In Cyprus, Bielefeldt heard that Orthodox Christian practices, including holding confessions, at times took place in the context of school education, i.e., on the premises of schools and during regular schooling hours. Bearing in mind the specific situation of compulsory school education and depending on the age of students and other circumstances, he stressed that this practice, while being problematic in any case, might even amount to an encroachment of the *forum internum* dimension of freedom of religion or belief.<sup>229</sup> During his visit to Vietnam he came across credible allegations that followers of certain religious groups, such as the people following

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<sup>224</sup> *Yong-Joo Kang v Korea* Comm no 878/1999 (Human Rights Committee, views of 15 July 2003) CCPR/C/78/D/878/1999 para 3.2.

<sup>225</sup> *Ibid* para 7.2.

<sup>226</sup> See E/CN.4/1996/95/Add.2, para 74.

<sup>227</sup> A/HRC/4/21/Add.3 para 33.

<sup>228</sup> A/HRC/10/8/Add.3 para 52.

<sup>229</sup> See A/HRC/22/51/Add.1 para 63.



the teachings of Duong Van Minh, had been requested by local authorities to renounce their faith orientation.<sup>230</sup> Members of non-registered groups of Cao Dai, a religion merely existing in Vietnam, reportedly faced pressure to join the officially recognized communities of Cao Dai.<sup>231</sup>

### **2.2.2. Forum Internum and Forum Externum at the Human Rights Committee**

The *forum internum* and *forum externum* do not exist as two clearly separated domains within religious life. Instead, one may assume that in reality they are interwoven. While a merely religious act would lack any visibility and thus would hardly become an issue of legal contention, a merely external act, by contrast, would amount to a mere conformism and might arguably even cease to be a manifestation of any serious religious (or non-religious) conviction. In practice, *forum internum* and *forum externum* closely belong together and should generally be seen in a continuum, as discussed earlier in Section 2.1.3.i.

What are the consequences of this insight for the application of article 18(2) of the ICCPR? Do we have to conclude that external manifestations of a person's religion or belief, when presumably originating from a profound internal conviction, should also directly benefit from the unconditional protection provided to the *forum internum*? Yes. This thesis believes we must. And in the communication *Hudoyberganova v Uzbekistan*<sup>232</sup> the Human Rights Committee also reached this conclusion, in sharp contrast with the ECtHR's decisions. The case concerned the exclusion of a Muslim woman, a student from the Tashkent State Institute for Eastern Languages, who due to her insistence on wearing a headscarf in public, had been expelled from her university. The headscarf worn had been referred to as a '*hijab*' by both parties – Uzbekistan's submissions observed that the Institute's internal regulations forbade students from wearing clothes 'attracting undue attention' or having 'the face covered (with a *hijab*)'.<sup>233</sup> The Human Rights Committee found that this violated her freedom of religion or belief, not only in the *forum externum*, but also in the *forum internum*. Concerning the *forum externum* the Committee stated 'that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion'.<sup>234</sup> The Committee

<sup>230</sup>See A/HRC/28/66/Add.2 para 74.

<sup>231</sup>Ibid para 49.

<sup>232</sup> *Raihon Hudoyberganova v Uzbekistan* Comm no 931/2000 (Human Rights Committee, views of 5 November 2004) CCPR/C/82/D/931/2000.

<sup>233</sup>Ibid paras 4.2, 6.2.

<sup>234</sup>Ibid para 6.2.

subsequently went on to consider ‘that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual’s freedom to have or adopt a religion’.<sup>235</sup> In the end, the Committee actually concluded ‘that the facts before it disclose a violation of article 18, paragraph 2’.<sup>236</sup>

Despite this overall conclusion, the decision in this case was far from unanimous. The conclusion was heavy with caveats, noting ‘the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning’.<sup>237</sup> These caveats might be an indication of a reluctance on the part of the majority of the Human Rights Committee as to the general applicability of their Views in this case. Three Committee members appended individual opinions stating that ‘[t]he facts of this case remain too obscure to permit a finding of violation of the Covenant’ and that Ms Hudoyberganova’s ‘statements fail to underpin her own allegations, and even contradict them’.<sup>238</sup> Furthermore, Committee member Sir Nigel Rodley went so far as to disassociate himself from the Committee’s decision of ‘duly taking into account the specifics of the context’, criticising the Committee’s decision ‘when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning’.<sup>239</sup> Committee member Ruth Wedgwood stressed the point that ‘a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student’s face would present a different set of facts’, although she did note that it was problematic to interfere with manifestations of personal religious belief of female students wearing a traditional *hijab* which covers only the hair and the neck.<sup>240</sup> Apparently, the Committee did not think the claimant specified exactly what kind of ‘*hijab*’ she wore and wanted specifics.<sup>241</sup>

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<sup>235</sup>Ibid.

<sup>236</sup>Ibid para 7.

<sup>237</sup>Ibid para 6.2.

<sup>238</sup>Ibid. See also the individual opinion by Committee member Ms Ruth Wedgwood and the dissenting opinion of member Mr Hipolito Solari-Yrigoyen.

<sup>239</sup>Ibid appendix, individual opinion by Committee member Sir Nigel Rodley.

<sup>240</sup>Ibid appendix, individual opinion by Committee member Ms Ruth Wedgwood.

<sup>241</sup>Ibid.

The unconditional protection provided in article 18(2) of the ICCPR has frequently been interpreted as privileging the ‘internal’ dimension of religious life over ‘external’ manifestations, which are themselves devalued as mere worldly affairs and pushed back in to second-order concerns. Roger Trigg contends that the distinction between *forum internum* and *forum externum* reflects a typically ‘Protestant’ understanding of religion as chiefly affecting the inner sanctum of an isolated individual.<sup>242</sup> This thesis has argued the same for the formulation, interpretation, and understanding of the Strasbourg jurisdiction on freedom of religion or belief under Section 2.1.3.i. And to be sure, these are not novel contentions. This argument that the current understanding of religious freedom in Europe and in the rest of the ‘Western’ world, is an inherently liberal Protestant one has been made before.<sup>243</sup> Religious studies scholars and academics<sup>244</sup> have been consistently trying to explain to the publics that when ‘religion’ is talked about in the popular vernacular in what we know as the ‘West’, whether within or outside the academe, it is firmly within the context of ‘Imperialism.’<sup>245</sup> A conversation between Ilyse Morgenstein Fuerst and Megan Goodwin, professors of Religious Studies at University of Vermont and Northeastern University, respectively, from their popular podcast ‘Keeping it 101: A Killjoy’s Introduction to Religion’ explain this hilariously and succinctly:

*Ilyse:* So the reason why we care about major and minor religions and imperialism is that, and here's your history for the day, nerds, in the 18th and 19th century, Europeans, white Europeans, predominantly white Christian Europeans and to boot white Protestant Europeans showed up and through the cunning use of flags and also guns and famine and genocidal practices and rape, set up world domination and as part of that defined who was legitimate and who wasn't. Some of this is based in scientific race theory. Some of this is based in colourism. A lot of this is

<sup>242</sup>Roger Trigg, *Equality, Freedom, and Religion* (Oxford University Press 2012) 100.

<sup>243</sup>Ronan McCrea, ‘Religion, Law and State in Contemporary Europe: Key Trends and Dilemmas’ in Marie-Claire Foblets et al (eds), *Belief, Law and Politics: What Future for a Secular Europe?* (Ashgate 2014) 92: ‘The individualised view of religious freedom [...] is most consistent with a Protestant vision of religion as primarily a matter of the individual’s belief and conscience.’

<sup>244</sup>See Carole M. Cusack, *Invented Religions: Imagination, Fiction and Faith* (Ashgate 2010); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2018); Jonathan Z. Smith, *Relating Religion: Essays in the Study of Religion* (University of Chicago Press 2004); Winnifred Fallers Sullivan, ‘Teaching religion: Refusing the Schempp myth of origins’ *The Immanent Frame* (15 August, 2015) <<https://tif.ssrc.org/2016/08/15/teaching-religion-refusing-the-schempp-myth-of-origins/>> accessed 19 September 2021.

<sup>245</sup>An expansive discussion on ‘Imperialism’ is outside the scope of this thesis, but for the purposes of the argument at hand, Edward Said’s definition is useful: ‘the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory.’ Edward Said, *Culture and Imperialism* (Chatto and Windus 1993).

based in enslavement and some of this still is based in what are now the modern disciplines of anthropology, sociology, study of religion, comp lit, psychology. So you're welcome. I'm coming for all of the humanities and most of the social sciences.

*Megan:* Wait, so you're telling me that even how we learn to learn about things is embedded in power structures?

*Ilyse:* Oh you betcha. In part because that's when the university gets started. That's when disciplines found. But mostly because this is when we create those knowledges. So world religions is developed as a theory. It is developed as a bunch of egghead scholars saying, okay, we know what Christians are, we are them, but we have some Christians we don't like – are they Christians? And then depending on the author they'll debate that. We all know what Jews are cause we super hate them because again, white Christian Protestants from Europe, they're not into us. They know what Muslims are because Christianity versus Islam is an argument that's kicking around at the time and they get confused when they show up in places like India and they see Muslims doing things that don't look like the Islam that they're used to from their leather arm chairs and Cambridge. But a bunch of dudes basically got together and independently and together wrote books that said what was an important religion and what was not an important religion? What are universal religions? What religions appeal to a universal spirit of mankind? And I use the gendered term here on purpose because they did; and which religions were ethnic, racial, local, which were evolutionarily superior and which were not. I want you to hear that soup of 19th century scientific racism and science happening alongside the development of these categories because that is exactly what happened.

*Megan:* So we start inventing categories like race at the same time that we start inventing categories like major religions?

*Ilyse:* We sure do.

*Megan:* Gross.

*Ilyse:* Yeah, it's really problematic and I think that where it gets complicated is again, it's not as if Islam is not a salient category. It is a salient category, but its borders are maybe not so hard up and reified with brick as these kinds of 'check one box and we know exactly what that means' kinds of categories would have us

believe.<sup>246</sup>

What Morgenstein Fuerst and Goodwin are, therefore, saying, is that as much as we may theorise on ‘religion’ using an inclusive and broad understanding, intellectual conceptions of what religion is and how it is perceived, and what makes it acceptable, are informed by these white, Protestant, European, understandings, rooted in imperialism.

While Religious Studies scholars may be having these conversations themselves, legal scholars largely tend to disagree. Bielefeldt, Ghanea and Wiener, amongst others, continue to argue that ‘article 18 of the ICCPR does not establish an abstract priority of the internal sphere to the detriment of external manifestations of convictions in the larger life-world, nor does it do so due to a particular religious rationale. Rather than reflecting such an abstract ranking, article 18 protects freedom of religion or belief in all its dimensions.’<sup>247</sup> They criticise the Human Rights Committee’s conclusion in its Views on *Hudoyberganova v Uzbekistan* as being ‘too quick’ and ‘not providing any reasons’.<sup>248</sup> They further say that following the example of *Hudoyberganova* could ‘encourage the extension of the unconditional protection provided under article 18(2) to virtually all external manifestations of a religion or a belief, as long as one can assume that these manifestations originate from a genuine internal conviction.’<sup>249</sup> The question that Bielefeldt et al don’t seem to address, however, is who gets to decide what a genuine internal conviction is? And if restricting a Muslim woman from wearing a *hijab* is a violation of her right to manifest her religion, which they do seem to agree with, then on what basis are they deciding that her wearing of her *hijab* is not due to a genuine internal conviction? These are some of the problems that arise within the interpretation of article 9 in the ECtHR’s jurisprudence, as well. The Human Rights Committee’s conclusion in *Hudoyberganova* illustrates that an evolution of the Right to Freedom of Religion within the International Human Rights legal regime, using an expansive and decolonised interpretation, is indeed possible. Instead of criticising this decision, legal scholars should be embracing it.

The various elements of the right to manifest one’s religion or belief ‘in worship, observance, practice and teaching’ largely overlap. There is no agreed, precise definition where

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<sup>246</sup>M Goodwin and I Morgenstein Fuerst, ‘episode 103: Major religions? Minor religions? Must we?’ in *Keeping It 101: A Killjoy’s Introduction to Religion* (podcast) <<https://keepingit101.com/e103>> accessed 19 September 2021.

<sup>247</sup>Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press 2017) 84.

<sup>248</sup>Ibid 85.

<sup>249</sup>Ibid 83.

for example ‘worship’ ends and where ‘observance’ or ‘practice’ sets in. Similarly, Special Rapporteur Jahangir noted that the Human Right Committee’s General Comment no.22 did not distinguish between the latter two elements and that it was ‘not clear whether the wearing of religious symbols falls under the category of “practice” or “observance”’.<sup>250</sup> By contrast, de Jong argues it would be important to stick to the distinction between ‘observance’ and ‘practice’ when applying freedom of religion or belief. In his view the concept of observance ‘refers to all those prescriptions that are inevitably connected with a religion or belief and protects both the right to perform certain acts and the right to refrain from doing certain things’ while ‘practice’ would concern manifestations that ‘are not prescribed, but only authorised by a religion or belief.’<sup>251</sup> Such a distinction resonates in many religious traditions and thus generally makes a lot of sense from the standpoint of religious phenomenology.

However, where precisely to draw the line between ‘observance’ and ‘practice’ very much depends on theological criteria which differ widely in various religious traditions and whose interpretation may even remain controversial between followers of one and the same religion or belief. Using this distinction in the application of freedom of religion or belief would thus imply taking a position concerning theological controversies. In the face of much interreligious and intrareligious diversity in interpretations, it may thus be wise not to insist on any conceptual differentiation between ‘observance’ and ‘practice’ in the application of freedom of religion or belief in order to avoid conflicting legal norms with contested theological positions. Instead, what matters under the various sub-categories of ‘manifestation’ should be left to the rights holders, i.e., human beings who may have most different understandings in this regard. It seems therefore advisable to use open categories which allow for the articulation of different religious interests and needs. Treating ‘observance’ and ‘practice’ as a conceptual continuum within the overarching concept of ‘manifestation’, without trying to draw fixed boundaries from outside, is the best way of facilitating such open articulation.

In this spirit, Jahangir cautioned against fixing the distinction between compulsory prescriptions (‘observance’) and mere authorisations (‘practice’) as this ‘may ultimately lead to problems when trying to determine who should be competent to consider this aspect of the individual’s freedom of religion or belief’, referring also to the concerns raised by Human Rights Committee member Rosalyn Higgins, that ‘it was not the Committee’s responsibility to

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<sup>250</sup>E/CN.4/2006/5 para 41.

<sup>251</sup>Cornelis D de Jong, *The Freedom of Thought, Conscience, and Religion or Belief in the United Nations (1946-1992)* (Intersentia Hart 2000) 105.

decide what should constitute a manifestation of religion' and that States should also not 'have complete latitude to decide what was and what was not a genuine religious belief.'<sup>252</sup> Drawing boundaries between the various elements of manifestation would be superfluous and ultimately even dangerous if conveying the message that religious life could simply be compartmentalised according to these concepts.

It would, likewise, also be problematic to read a hierarchy into the sequence of the four elements of manifestation (worship, observance, practice, and teaching). Different believers may of course attach more importance to some aspects of religious manifestations than to others. Given the vast inter- and intrareligious diversity in this field, it cannot be the business of State agencies, domestic courts or international bodies to try to settle this issue. While it may be tempting to get a 'clear picture' by citing religious leaders or experts and their views, this would precisely lead to stepping into the boundaries of the individual's freedom, thus, robbing the rights holders – i.e. all human beings – from setting up their own understandings and priorities. The insistence on having a clear overview of manifestations often stems from the authorities' interest to narrow down the scope of freedom of religion or belief in order to exercise control and oversight.<sup>253</sup>

Seeing the various elements of manifestation together- including the broad zones of overlap between them- opens a holistic perspective in which religious or belief-related life can best come to the fore in all its breadth and diversity. This gives human beings, who are the only rights holders in the framework of human rights, sufficient breathing space to come up with their own understandings of what important aspects of their religious or belief-related identities are, without imposing any unnecessary restrictions from outside.

Asma Jahangir devoted her last thematic report as Special Rapporteur to the Commission on Human Rights to the issue of religious symbols. In this report, she developed a set of general criteria to balance competing human rights. She did so in order to give some guidance for Governments who intend to regulate the wearing of religious symbols by guiding them in terms of the applicable International Human Rights standards and their scope. In this context, she listed several dos and don'ts for legislators and States when restricting or prohibiting religious symbols. The following are referred to by Jahangir as 'aggravating

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<sup>252</sup>See E/CN.4/2006/5 para 41, quoting the discussion of the Human Rights Committee's draft general comment no.22 on 24 July 1992, CCPR/C/SR.1166 para 48.

<sup>253</sup>See A/HRC/28/66/Add.1 para 30.

indicators' and are considered to be generally incompatible with International Human Rights Law:

1. The limitation amounts to the nullification of the individual's freedom to manifest his or her religion or belief;
2. The restriction is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved;
3. Limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles deriving exclusively from a single tradition;
4. Exceptions to the prohibition of wearing religious symbols are, either expressly or tacitly, tailored to the predominant or incumbent religion or belief;
5. In practice, State agencies apply an imposed restriction in a discriminatory manner or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women;
6. No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on this issue;
7. Use of coercive methods and sanctions applied to individuals who do not wish to wear a religious dress or a specific symbol seen as sanctioned by religion. This would include legal provisions or State policies allowing individuals, including parents, to use undue pressure, threats or violence to abide by such rules.<sup>254</sup>

Jahangir also listed the following 'neutral indicators', which according to her, do not tend to contravene International Human Rights standards, e.g. by violating the freedom of religion or belief of the claimant:

1. The language of the restriction or prohibition clause is worded in a neutral and all-embracing way;
2. The application of the ban does not reveal inconsistencies or biases *vis-à-vis* certain religious or other minorities or vulnerable groups;
3. As photographs on ID cards require by definition that the wearer might properly be identified, proportionate restrictions on permitted headgear for ID photographs appear to be legitimate, if reasonable accommodation of the individual's religious manifestation are foreseen by the State;

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<sup>254</sup>E/CN.4/2006/5 para 55.



4. The interference is crucial to protect the rights of women, religious minorities or vulnerable groups;
5. Accommodating different situations according to the perceived vulnerability of the persons involved might in certain situations also be considered legitimate, e.g., in order to protect underage schoolchildren and the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

But as Jahangir has noted herself, multiple times, these do's and don'ts are merely guidance and there must be a case by case assessment of the circumstances of any given situation, taking into account all human rights aspects that may be at stake.<sup>255</sup>

In its early jurisprudence, the Human Rights Committee had a rather cautious approach with regard to religious symbols. In 1989, in the case of *Karnel Singh Bhinder v Canada*, the Committee held that the requirement for federal employees of a coach yard to wear a hard hat in order to be protected from injury and electric shock would be justified under article 18(3) of the ICCPR. While the Committee did not further specify which of the grounds for limitation it thought to be in question, it also referred to the Canadian Supreme Court's arguments of safety consideration and *bona fide* occupational requirements. In addition, the Human Rights Committee rejected the claim that the legislation in fact was applied in a manner that discriminated against Sikh men who believe that their headwear should consist exclusively of a turban, since the Committee described the legislation as 'reasonable and directed towards objective purposes that are compatible with the Covenant.'<sup>256</sup>

Asma Jahangir did not explicitly criticise the Human Rights Committee's Views in *Karnel Singh Bhinder v Canada* but she implied the desirability of a more accommodating approach by emphasising that 'on a similar matter, another State enacted specific legislation exempting Sikhs from the requirement to wear safety helmets on construction sites and offering protection to Sikhs from discrimination in this connection.'<sup>257</sup>

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<sup>255</sup>See E/CN.4/2005/61, para 70; E/CN.4/2006/5, para 51; A/HRC/10/8, para 43; and A/HRC/16/53 para 42.

<sup>256</sup>*Karnel Singh Bhinder v Canada*, Comm no 208/1986 (Human Rights Committee, views of 9 November 1989) CCPR/C/37/D/208/1986 para 6.2.

<sup>257</sup>A/HRC/10/8 para 43, referring to Employment Act 1989, ss 11 and 12, of the United Kingdom of Great Britain and Northern Ireland.

### 2.2.3. *Case Law on Religion or Belief*

Still today, the Committee's case law under article 18 remains sparse, particularly in the core areas of freedom of religion or belief. Although the case law under article 18 itself is rather underdeveloped in quantitative or qualitative terms, it does demonstrate that other provisions of the Covenant include important dimensions related to the freedom of religion and belief.

In *William Eduardo Delgado Paez v. Colombia*,<sup>258</sup> the issue under article 18 was whether the transfer of a teacher who advocated 'liberation theology' from teaching religion to teaching other subjects constituted a violation of the teacher's rights under article 18. The Committee held that the transfer, which was initiated by the Catholic Church to which the complainant belonged, was not a violation of article 18. It explained that 'Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.'<sup>259</sup>

In the case of *MAB, WAT and AYT v Canada*,<sup>260</sup> the Committee dismissed a complaint brought by members of a newly established, allegedly religious, group claiming that their belief consisted primarily or exclusively of the worship and distribution of cannabis. In the Committee's view, this practice could not conceivably be brought within the scope of article 18 of the Covenant.

The case of *Coeriel et al. v. The Netherlands*<sup>261</sup> involved persons who had converted to Hinduism and who, in order to become Hindu priests, had sought to have their surnames changed. According to the complainants, the authorities' refusal to approve the name changes violated article 18 of the Covenant and constituted unlawful or arbitrary interference with their privacy under article 17.<sup>262</sup> The Human Rights Committee held that the regulation of surnames and the change thereof was eminently a matter of public order and that restrictions were therefore permissible under article 18, paragraph 3. Hence, the communication was declared inadmissible in relation to article 18.<sup>263</sup> However, the Committee found that a

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<sup>258</sup>William Eduardo Delgado Paez v. Colombia, Comm. No. 195/1985 (UN Human Rights Committee, 12 July 1990)

<sup>259</sup>Ibid para 5.7.

<sup>260</sup>*MAB, WAT and AYT v Canada*, Comm. No. 570/1993 (UN Human Rights Committee, 25 April 1994).

<sup>261</sup>*Coeriel et al v The Netherlands*, Comm. No. 453/1991 (UN Human Rights Committee, 31 October 1994).

<sup>262</sup>'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation' (ICCPR, art. 17[1]).

<sup>263</sup>*Coeriel et al v The Netherlands* para 6 .1.

violation of article 17 had been established:

In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The state party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the name had religious connotations and that they were not 'Dutch sounding'. The Committee found the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.<sup>264</sup>

In *Clement Boodoo v. Trinidad and Tobago*<sup>265</sup> the Committee found a violation of article 18 when a prisoner had been subjected to serious restrictions on his freedom to manifest religion:

As to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegations in paragraphs 2.3-2.6, the Committee concludes that there has been a violation of article 18 of the Covenant.<sup>266</sup>

In the field of religious education, the leading cases decided by the Committee are *Erkki Hartikainen et al. v. Finland*<sup>267</sup> and *Arieh Hollis Waldman v. Canada*.<sup>268</sup> The fact that

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<sup>264</sup>Ibid para 10.5.

<sup>265</sup>*Clement Boodoo v Trinidad and Tobago*, Comm. No. 721/1996 (UN Human Rights Committee, 2 April 2002).

<sup>266</sup>Ibid para 6.6.

<sup>267</sup>*Hartikainen et al v Finland*, Comm. No. 40/1978 (UN Human Rights Committee, 9 April 1981).

<sup>268</sup>*Arieh Hollis Waldman v Canada*, Comm. No. 694/1996 (UN Human Rights Committee, 3 November 1999).

only the first-mentioned case was actually decided under article 18 is indicative of the far-reaching interdependence between various provisions of the Covenant.

In *Hartikainen*, it was alleged that the then-applicable Finnish School System Act of 1968 violated article 18, paragraph 4, of the Covenant. The Act stipulated obligatory attendance in Finnish schools, requiring children whose parents were atheists to attend classes on the history of religion and ethics, the curriculum of which was to a high degree religious in nature. The Committee concluded with what can be described as a qualified non-violation. Although the teaching plan of history of religion and ethics was, at least in part, religious in character, the appropriate action available under article 18 of the Covenant was being taken to resolve nonreligious parents' and school children's concerns. According to the views of the Committee, instruction in the study of the history of religion and ethics was an appropriate substitute for religious instruction to students whose parents or legal guardians objected to religious instruction under article 18, paragraph 4 if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion.

The *Waldman* case is the prime example of the importance of the non-discrimination clause of article 26 for freedom of religion or belief. The case was brought to the Human Rights Committee by a Jewish parent who, at considerable cost, secured the education of his children in a private Jewish school in Ontario. In the same province at the same time, religious Catholic schools were funded as a part of the public school system, free of cost to the parents. The coexistence of secular schools and Catholic religious schools within the publicly funded school system was a result of a constitutional arrangement dating back to 1867 and was aimed at protecting the Roman Catholic minority in Ontario.

The Committee concluded that the differential treatment experienced by Mr. Waldman, a Jewish parent who wished to secure religious education for his children, compared to the treatment afforded to members of the Roman Catholic minority amounted to discrimination in violation of article 26. The Committee's views referred to the fact that neither the Roman Catholic community nor any identifiable subsection of that community was in a disadvantaged position compared to members of the Jewish community.<sup>269</sup> The Committee pointed out that the complainant did not send his children to a private religious

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<sup>269</sup>Ibid para 10.4.

school in order to secure private education for them, but because the publicly funded school system made no provision for his religious denomination. The Committee concluded:

[I]f a state party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.<sup>270</sup>

Also the case of *Malcolm Ross v. Canada*<sup>271</sup> related to schools. No violation of article 18 was found where a schoolteacher had been removed from a teaching position after a causal link had been established between the teacher's public statements concerning adherents of the Jewish faith and a 'poisoned school environment.' The Committee reasoned:

As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others.<sup>272</sup>

However, the Committee significantly shifted in its subsequent decisions, as seen from the discussion of *Hudoyberganova v Uzbekistan*. Further, in the case of *Bikramjit Singh v France*, which concerned the permanent expulsion of a Sikh student from the public school because he wore a mini-turban (*keski*),<sup>273</sup> the Human Rights Committee held that France 'has

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<sup>270</sup>Ibid para 10.6.

<sup>271</sup>*Malcolm Ross v Canada*, Comm. No. 736/1997 (UN Human Rights Committee, 18 October 2000).

<sup>272</sup>Ibid para 16.8.

<sup>273</sup>*Bikramjit Singh v France* Comm no 1852/2008 (Human Rights Committee, views of 1 November 2012) CCPR/C/106/D/1852/2008, para 2.3: 'The *keski* is a small light piece of material of a dark colour, often used as a mini-turban, covering the long uncut hair considered sacred in the Sikh religion. It is frequently worn by young boys as a precursor or alternative to a larger turban. The wearing of the turban is a

not furnished compelling evidence that, by wearing his *keski*, the author would have posed a threat to the rights and freedoms of other pupils or to order at the school'.<sup>274</sup> In its Views, the Human Rights Committee stressed the disproportionate nature of the student's permanent expulsion from the public school which led to serious effects on his education and did not seem necessary. While noting the 'assertion that the broad extension of the category of persons forbidden to comply with their religious duties simplifies the administration of the restrictive policy', the Human Rights Committee held that France had not shown 'how the sacrifice of those persons rights is either necessary or proportionate to the benefits achieved', thus violating Bikramjit Singh's freedom to manifest his religion.<sup>275</sup>

The Human Rights Committee's difference in approach from that of the European Court of Human Rights is incredibly apparent with the *Bikramjit Singh* case. Because in similar cases of *Jasvir Singh v France* and *Ranjit Singh v France*, the ECtHR found the applications to be inadmissible for being ill-founded because the Court considered the French restrictions to be in accordance with the law and to pursue the 'legitimate' aim of protecting the rights and freedoms of others and public order as well as for *laïcité*.<sup>276</sup> The Human Rights Committee has, however, stressed that 'respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols', such as a skullcap, headscarf, or turban.<sup>277</sup> Unlike the European Court of Human Rights, the Human Rights Committee does not leave a margin of appreciation to the States. Asma Jahangir in her thematic report on religious symbols has in fact cautioned that the margin of appreciation doctrine 'should not lead to questioning the international consensus that "[a]ll human rights are universal, indivisible, and interdependent and interrelated", as proclaimed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993'.<sup>278</sup>

### 2.3. Conclusion

Throughout this chapter, an analysis of case law has been undertaken regarding jurisprudence on the Right to Freedom of Religion in two different jurisdictions: the ECtHR

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categorical, explicit and mandatory religious precept in Sikhism. It is an essential component of the Sikh identity: to be Sikh is not to cut one's hair and, consequently, to wear a turban. Asking a Sikh to remove his turban is therefore tantamount to asking him to perform an impossible act. The *keski* (like the turban for adult men) is not meant as an external display of faith but is rather intended to protect the long uncut hair, which is considered as a sacred, inherent and intrinsic part of the religion.'

<sup>274</sup>Ibid., para 8.7.

<sup>275</sup>Ibid.

<sup>276</sup>*Jasvir Singh v France* App no 25463/08 (ECtHR, decision of 30 June 2009); and *Ranjit Singh v France*, App no 27561/08 (ECtHR, decision of 30 June 2009).

<sup>277</sup>CCPR/C/FRA/CO/4, para 23; and *Bikramjit Singh v France*, para 3.15, 8.6.

<sup>278</sup>E/CN.4/2006/5, para 59, referring to A/CONF.157/23 chapter 1, para 5.

(under Article 9 of the ECHR) and the UNHRC (under Article 18 of the ICCPR). A continuous theme has been found in the judgments of the ECtHR regarding the right to manifest one's belief in the form of religious headwear, which is that the Court tends to find in favour of state restrictions on religious headwear. This has been done without thoroughly examining the religious convictions of the applicants, as the Court has given over to the margin of appreciation instead, giving States an unusually wide margin in these cases.

What has also emerged is that this through-line holds true for Muslim and Sikh cases – not so much for the Christian ones, or the secularists. It has also revealed an unchallenged ideological basis – that Christian symbols are seen by the Court to be inherently passive and benevolent, and not incompatible with secularism, whereas non-Christian symbols, including headwear, are inherently antagonistic, and the judgments seem to suggest that it is justified to restrict non-Christian religious symbols because they are perhaps inherently proselytising objects in a way that a cross is not. Not only *Lautsi* but all the cases discussed above under the ECtHR have shown a definite tendency in the Court's judgments towards a particular kind of Christian-informed Protestant secularism, which is the result of Europe's religious heritage and that heritage's close entanglement with the development of European Law and International Law.

One of the fundamental tenets of this tendency is the use of the *forum internum v forum externum* distinction. As explained above, this is a uniquely Protestant understanding of religion and the division between faith and action, and one that owes a lot to the Protestant theological doctrine of *sola fide*. While Protestant Christians of different stripes may believe that the internal element of faith is enough to obtain salvation, that does not necessarily hold true for other faiths. The Court struggles to understand that that's not a valid distinction for many religions – in the words of Jaswant Singh quoted earlier, these practices 'are not optional- they are the faith [*ils sont la foi*]',<sup>279</sup>

The same Christian-rooted understanding cannot be identified to as great an extent in the HRC, for cultural reasons (as discussed earlier, it draws from a much more diverse group of Member States) as well as other considerations – for instance, as discussed previously, the HRC's decisions are not binding on Member States and that may make the Commission quicker to pass down uncomfortable decisions. But though that Christian

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<sup>279</sup>See text to n 104.

understanding of religion is not as pronounced in the HRC decisions discussed as it is in the ECtHR judgments, it is there nevertheless; consider for instance *Hudoyberganova*, which is a very useful parallel to the ECtHR's cases on the veil. In *Hudoyberganova* though the Committee found in favour of Ms. Hudoyberganova where the ECtHR had found against claimants in very similar cases, the individual comments of Committee members show how reluctant they were to arrive at that reasoning. It is also interesting to note that the Special Rapporteurs seem to have a more diverse understanding of the Right to Freedom of Religion than perhaps Committee members do, and in their reports and their comments, they seem to suggest a more wide-ranging protection is due under Article 18 than is reflected in the actual Committee decisions.

In Chapter 3 this gap between the two Courts will be examined with the intent to arrive at a reason for this divergence, and an analysis will be given on what can be learned more generally from the ECtHR and the HRC, about the strengths and weaknesses of the International Human Rights regime's protection of the Right to Freedom of Religion.



## CHAPTER 3

### Addressing the Gap between Intention and Manifestation

#### 3.1. Introduction - The Diverging Approaches of the European Court of Human Rights and UN Human Rights Committee

The Right to Freedom of Religion or Belief, as contained in the European Convention on Human Rights (ECHR)<sup>1</sup> and International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> has a common origin in the Universal Declaration of Human Rights (UDHR).<sup>3</sup> Despite these common origins, the European Court of Human Rights (ECtHR)<sup>4</sup> and UN Human Rights Committee (HRC)<sup>5</sup> have reached contradictory decisions in analogous cases concerning the right to manifest religion by wearing religious clothing, as explored in chapter 2. A small degree of variance must be expected between the approaches of the regional ECtHR and the international HRC. However, this should not compromise the intended universality of human rights standards. Consequently, it is necessary to consider whether these contradictory interpretations of the Right to Freedom of Religion or Belief are both compatible with a good faith interpretation of the right, which as explained hereinbelow, is essential not only for the purposes of clarity in interpretation but also necessary to truly realise the purpose of the right.

The rules of treaty interpretation reveal that human rights standards should be interpreted in good faith in accordance with the intentions of the parties.<sup>6</sup> This chapter identifies a good faith interpretation of the Right to Freedom of Religion or Belief by looking into the *travaux préparatoires* of the ECHR, ICCPR and UDHR. This reveals that the object and purpose of the Right to Freedom of Religion or Belief is to restrict state interference with matters of conscience, in particular if motivated by the preservation of the dominant or state ideology. The right was recognised to be of particular importance for religious

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<sup>1</sup>Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 005, entered into force 3 September 1953 (ECHR).

<sup>2</sup>International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976 (ICCPR).

<sup>3</sup>Universal Declaration of Human Rights GA Res. 217A (III), UN Doc A/810 at 71 (1948) (UDHR).

<sup>4</sup>*Mann Singh v France* App no 24479/07 (ECtHR 13 November 2008); *Jasvir Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Ranjit Singh v France* App no 27561/08 (ECtHR 30 June 2009).

<sup>5</sup>*Bikramjit Singh v France* Communication no 1852/2008 (HRC 4 February 2013); *Ranjit Singh v France* Communication no 1876/2009 (2011) 32 BHRC 275; *Mann Singh v France* Communication no 1928/2010 (2013) 36 BHRC 675.

<sup>6</sup>Arts 31–33 Vienna Convention on the Law of Treaties 1155 UNTS 331, entered into force 27 January 1980 (VCLT).

minorities, given their vulnerability to such interference. While the HRC's interpretation has been consistent with these aims, this thesis takes the view that the ECtHR has directly undermined them, as explored in detail in Chapter 2. By awarding States a wide margin of appreciation, the ECtHR has allowed States to interfere with the right to manifest religion, without evidence of the necessity and proportionality of such restrictions. This has led the ECtHR to legitimise a vision of state secularism that seeks to eliminate rather than protect religious freedom and prioritises what it deems to be 'secular' and Christian beliefs above minority beliefs. Were the ECtHR to interpret the right to manifest religion consistently with the good faith interpretation identified in this chapter, its jurisprudence is more likely to be consistent with that of the HRC.

Other scholarly work on this subject has focused on the use of the margin of appreciation in freedom of religion cases. Lewis, for example, has argued that the ECtHR does not adequately consider the necessity of the restriction on the applicants' rights,<sup>7</sup> whereas Evans has criticised the ECtHR for unquestioningly accepting 'the elevated position of secularism'.<sup>8</sup> In contrast, this thesis considers the broader picture by analysing the compatibility of the differing interpretations of the ECtHR and HRC. Although focused on the right to manifest religion, the conclusions drawn in this thesis have implications for the ECtHR's use of the margin of appreciation in cases concerning other Convention rights.

This chapter first employs the principles of treaty interpretation, in conjunction with the *travaux préparatoires* and subsequent interpretations. Second, the good faith interpretation is used to analyse the approaches of both the ECtHR and HRC in analogous cases concerning the right to manifest religion. The potential implications of the ECtHR adhering to a good faith interpretation of the right to manifest religion are elaborated. Third, it is argued that by permitting societal consensus to dictate the content of the right, the ECtHR has allowed the scope of the Right to Freedom of Religion to be narrowed to the extent that it does not achieve its original purpose.

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<sup>7</sup>T Lewis, 'What not to wear: religious rights, the European Court and the margin of appreciation' (2007) 56(2) ICLQ 395, 408–411. See, further, MD Evans 'Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 307; M Borovali 'Islamic headscarves and slippery slopes' (2009) 30(6) Cardozo Law Review 2593 at 2594.

<sup>8</sup>C Evans, 'Individual and group religious freedom in the European Court of Human Rights: cracks in the intellectual architecture' (2010–2011) 26 Journal of Law and Religion 331, 336. See further, M Evans, 'Human rights and the freedom of religion' in M Ipgrave (ed), *Justice & Rights – Christian and Muslim Perspectives* (Georgetown University Press 2009) 115.

### 3.1.1 *The principle of ‘good faith’ (pacta sunt servanda) in International Human Rights Law*

The principle of ‘good faith’ in law, which ‘manifests itself in international treaty law with the cloak of *pacta sunt servanda*’<sup>9</sup> is the fundamental legal principle, derived from natural law, but with reference to Roman law, that contracts entered into must be fulfilled in the spirit in which they were formed. It establishes a ground level of honesty and fair dealing, and thus a minimum ethical standard, for the law to work within. The principle is so fundamental that the International Court of Justice, in its 1974 ruling on the Nuclear Tests Case, declared good faith to be the governing principle of international law.<sup>10</sup> In other words, the ‘good faith’ principle upholds the spirit as well as the letter of the law, and obliges an interpretation that respects the intent behind the law’s drafting. It’s entirely appropriate then for international treaties such as the UDHR, the ICCPR, and the ECHR to be considered with a good faith approach, and it is this understanding, with respect to original intent, that will be used in the analysis that follows of the Right to Freedom of Religion. Lukashuk has cogently and excellently summarised the principle as follows:

- (1) States and other subjects of international law are obliged to fulfil in good faith their obligations under international law; these obligations arise both from the generally recognized purposes, principles and rules of international law and from treaties and nonuniversal custom consistent with international law.
- (2) Obligations contradictory to a peremptory rule of international law are not subject to fulfilment. In the event of a conflict between obligations arising from treaties and those of the members of the United Nations Organization under its Charter, obligations under the Charter shall prevail.
- (3) In exercising their sovereign rights, including the right to determine their laws and regulations, states should conform with their obligations under international law. **A state may not invoke the provisions of its municipal law as justification for failure to fulfil its obligations under international law.**
- (4) Nonfulfillment or unfair fulfilment of obligations under international law entails international legal responsibility.<sup>11</sup>

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<sup>9</sup> Talya Uçaryılmaz, ‘The Principle of Good Faith in Public International Law’ (2020) 68(1) *Estudios de Deusto* 1.

<sup>10</sup> *Nuclear Tests Case (Australia v France) (Merits)* [1974] ICJ Rep 253

<sup>11</sup> II Lukashuk, ‘The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law’ (1989) 83(3) *The American Journal of International Law* 513, 518. Emphasis added.

As the principle of good faith underpins both treaty law and the analysis given in this chapter, it is worth quoting Lukashuk's definition in full. Particular attention is drawn to point 3 of Lukashuk's formulation as this relates very significantly to the cases discussed in this and the preceding chapter.

### 3.2 Identifying the intention within the *travaux préparatoires*

The ECtHR and HRC have reached contradictory decisions in analogous cases concerning the right of Sikhs to manifest their religion by wearing the *keski* and turban.<sup>12</sup> The inconsistent interpretation of the right to manifest religion has the potential to undermine its universal protection and has implications for legal certainty. Consequently, it is not possible for both approaches to be 'correct'. It is, therefore, necessary to examine which approach is most consistent with a good faith interpretation of the right to manifest religion or belief. In accordance with Art 31(1) of the Vienna Convention on the Law of Treaties, 'the general rule', '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The ECtHR has also established the principle that limitations on Convention rights 'cannot justify impairing the very essence of the right'.<sup>13</sup> The concept of the 'essence of the right' has been interpreted to refer to 'an absolute indispensable core to the right which cannot be impaired regardless of the circumstances'<sup>14</sup> and, thus, should align with the right's object and purpose.

Recourse to the *travaux préparatoires* of human rights instruments facilitates the identification of a good faith interpretation of the right to manifest religion, by revealing the context of the adoption of individual rights and the intention of the parties. However, as human rights instruments are 'living instruments', the use of the *travaux préparatoires* must be approached with caution,<sup>15</sup> as it may result in a static and restrictive interpretation of the right.<sup>16</sup> Letsas has distinguished between the concrete and the abstract intentions of the

<sup>12</sup>Mann Singh v France, Jasvir Singh v France, Ranjit Singh v France (n 4); Bikramjit Singh v France; Ranjit Singh v France; Mann Singh v France (see n 5).

<sup>13</sup>Winterwerp v Netherlands App no 6301/73 (ECtHR, 24 October 1979) para 60.

<sup>14</sup>L Hoyano, 'What is balanced on the scales of justice? In search of the essence of the right to a fair trial' [2014] Criminal Law Review 4, 15.

<sup>15</sup>Sir H Waldock 'Third report on the Law of Treaties' [1964] ILC Yearbook vol II, 58 at para 21; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 72–79.

<sup>16</sup>*Feldbrugge v The Netherlands* (A/99) (1986) 8 EHRR 425 joint dissenting opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing para 24.

drafters in this respect: ‘they had a concrete idea of what human rights there are but it was their more abstract belief in the moral objectivity and universality of these rights that led them to draft the ECHR’.<sup>17</sup> The concrete intentions of the drafters are reflective of society in the ten drafting states of the ECHR in the late 1940s,<sup>18</sup> and, thus, do not assist the identification of a good faith interpretation of the right to manifest religion.<sup>19</sup> In contrast, the abstract intentions of the drafters, identified through the *travaux préparatoires*, reveal the object and purpose of human rights instruments.<sup>20</sup>

In this section the principles of treaty interpretation are used to establish a good faith interpretation of the right to manifest religion. The text of the right to manifest religion is considered separately from its context and object and purpose. The evidence provided by the *travaux préparatoires* will be considered alongside the subsequent interpretation of the content of the right by the ECtHR and HRC, in order to avoid the identification of a static interpretation of freedom of religion.

### **3.2.1 The text of the Right to Freedom of Religion or Belief**

The text of the Right to Freedom of Religion or Belief provides a useful starting point from which to identify a good faith interpretation of the right to manifest religion. Nonetheless, as the adoption of a strict textual approach to treaty interpretation has the potential to lead to a narrow understanding of the right, this must be supplemented with the consideration of its context, object and purpose.

The Right to Freedom of Religion or Belief is enshrined in Art 9(1) ECHR, Art 18 ICCPR and Art 18 UDHR. The text to all three are given in the previous chapter, but are virtually identical, with both Art 9 ECHR and Art 18 ICCPR having been based on Art 18 UDHR. The emphasis on ‘freedom’ indicates that the right is ‘primarily of a defensive nature’.<sup>21</sup> Consequently, its central component is protection from external interference in matters of conscience including state interference. By providing ‘the right to freedom of thought, conscience and religion’, the text of these rights indicates that all forms of belief, religious or otherwise, find protection. Although the *travaux préparatoires* to the ICCPR indicate that

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<sup>17</sup>Letsas (n 15) 70.

<sup>18</sup>Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

<sup>19</sup>Letsas (n 15) 74.

<sup>20</sup>Ibid 72.

<sup>21</sup>M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd edn, NP Engel 2005) 411.

the drafters did not agree as to whether ‘the word “belief” covered also secular belief’,<sup>22</sup> subsequent practice confirms that it does.<sup>23</sup>

The text of Art 9 ECHR, Art 18 ICCPR and Art 18 UDHR also reveals that the Right to Freedom of Religion or Belief comprises both the right to hold a belief and the right to manifest that belief, ‘in public or private’. Although the external manifestation of religion may be restricted in accordance with the limitations clauses, it remains a fundamental element of the right, as noted by Mr. Dehousse of Belgium during the drafting of the UDHR: ‘It would be unnecessary to proclaim that freedom [of religion] if it were never to be given outward expression; if it were intended, so to speak, only for the use of the inner man’.<sup>24</sup> Thus, the creation of the right to hold a belief was not considered by the drafters of human rights instruments to be sufficient to protect religious adherents. The right to manifest religion was deliberately included in human rights instruments in order to guard against unwarranted interference with the expression of that belief.

Four forms of manifestation expressly find protection under the Right to Freedom of Religion, namely, worship, observance, teaching and practice. Krishnaswami, in his 1960 report, explained that this was intended to encompass all conceivable manifestations of religion.<sup>25</sup> This has subsequently been interpreted expansively by the HRC in General Comment 22,<sup>26</sup> and, notably, both the ECtHR and HRC have recognised that head coverings constitute a protected manifestation of religion.<sup>27</sup>

The manifestation of religion is, nonetheless, subject to limitation in accordance with Art 9(2) ECHR and Art 18(3) ICCPR. These provisions were based on the generic limitation clause contained in Art 29(2) UDHR. The text of Art 9(2) ECHR and Art 18(3) ICCPR permits limitations to the right to manifest religion ‘in the interests of public safety, for the

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<sup>22</sup>Third Committee 15th Session (1960) UN doc A/4625 para 51 in MJ Bossuyt *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987).

<sup>23</sup>*Kokkinakis v Greece* (1994) App no. 14307/88 (judgment of 25 May 1993) para 31. See also, HRC, ‘General Comment No 22’ on ‘The Right to Freedom of Thought, Conscience and Religion (Art 18)’ UN doc CCPR/C/ 21/Rev.1/Add.4 para 2; A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN doc E/CN.4/Sub.2/200/Rev.1, p 1.

<sup>24</sup>UNGA Third Committee of the General Assembly, Record of 127th Meeting, held on 9 November 1948 UN doc A/C.3/SR.127, 395.

<sup>25</sup>Krishnaswami (n 23) 17; PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 221.

<sup>26</sup>HRC, General Comment no 22, para 4.

<sup>27</sup>*Dahlab v Switzerland* App no. 42393/98 (ECtHR, 15 February 2001); *Şahin v Turkey* App no 44774/98 (judgment of 10 November 2005) para 78. HRC, General Comment, para 4.

protection of public order, health or morals, or for the protection of the rights and freedoms of others'. These grounds for limitation were initially envisaged to be extremely narrow, with delegates at the drafting of the UDHR referring to human sacrifice, flagellation, savage mortification and death ritual as examples of when the manifestation of religion could be legitimately restricted.<sup>28</sup> This approach was subsequently reaffirmed by the Krishnaswami report which suggested a more expansive list of justifiable limitations: '[i]nto this category fall such practices as the sacrifice of human beings, self-immolation, mutilation of the self or others, and reduction into slavery or prostitution, if carried out in the service of, or under the pretext of promoting, a religion or belief',<sup>29</sup> polygamy,<sup>30</sup> 'rebellion or subversion'<sup>31</sup> and acts contrary to peace and security.<sup>32</sup> The ground of 'the protection of the rights and freedoms of others' was, accordingly, intended to prevent religious manifestation from infringing the concrete rights of individuals, elaborated in human rights instruments.

The ECtHR has subsequently accepted that 'it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.<sup>33</sup> Consequently, in the event of an irreconcilable clash between the rights of different groups, it may be justifiable to restrict individual religious freedom in order to protect 'the rights and freedoms of others'. However, by accepting that secularism,<sup>34</sup> understood as the separation between church and state, and 'living together'<sup>35</sup> justify the restriction of the right to manifest religion, the ECtHR has allowed the ground of 'the rights and freedoms of others' to be expanded beyond the original intentions of the drafters.

The evolution of the limitations clause and the ground of 'the rights and freedoms of others' is not problematic, provided that restrictions are compatible with the purpose 'for which they have been prescribed'.<sup>36</sup> The list of justifiable restrictions foreseen by the drafters of the UDHR is not an exhaustive list and represents a concrete rather than abstract understanding of the provision.<sup>37</sup> As suggested by Letsas, the evolution of this clause is

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<sup>28</sup>UNGA (n 24) 390–391.

<sup>29</sup>Krishnaswami (n 23) 29.

<sup>30</sup>Ibid 30.

<sup>31</sup>Ibid 29.

<sup>32</sup>Ibid 30.

<sup>33</sup>*Kokkinakis v Greece* (n 23) para 33.

<sup>34</sup>*Dahlab v Switzerland* (n 27); *Şahin v Turkey* (n 27) paras 109–110, 114; *Dogru v France* App no 27058/05, (ECtHR, 4 December 2008), para 72; *Aktas v France*, App no 43563/08 (ECtHR 30 June 2009).

<sup>35</sup>*SAS v France* App no 43835/11 (ECtHR, 1 July 2014), para 153.

<sup>36</sup>Art 18 ECHR.

<sup>37</sup>Letsas (n 15) 74.

permissible, provided that it does not impair the abstract intentions of the drafters.<sup>38</sup> The *travaux préparatoires* do, however, clearly reveal the abstract intention that the limitations clause be construed narrowly.

Furthermore, the text of Art 9(2) ECHR and Art 18(3) ICCPR indicates that once an interference with the right to manifest religion has been established, any restriction must be ‘necessary in a democratic society’. The state bears the burden of proof and must, therefore, demonstrate that the interference was justifiable and proportionate. The former UN Special Rapporteur on freedom of religion or belief has submitted:

[T]he burden of justifying a limitation upon the freedom to manifest one’s religion or belief lies with the state. Consequently, a prohibition of wearing religious symbols which is based on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual’s religious freedom.<sup>39</sup>

The ECtHR has accordingly established the principle of priority to rights<sup>40</sup> and, recognised that limitations on Convention rights ‘cannot justify impairing the very essence of the right’.<sup>41</sup> Similarly, the HRC has stressed that ‘[l]imitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Art 18’.<sup>42</sup> By requiring that the state provide evidence of the necessity of the interference, the text of the limitations clause reveals that priority should be afforded to the right to manifest religion.

### ***3.2.2 The context, object and purpose of the Right to Freedom of Religion or Belief***

Crawford has opined that ‘the language of treaties [...] will be read so as to give effect to the object and purpose of the treaty in its context’.<sup>43</sup> The context of the adoption of human rights instruments following the Second World War only requires brief introduction and is connected to their object and purpose. The preambles to the UDHR and ECHR reveal that

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<sup>38</sup>Ibid 72.

<sup>39</sup>UN Commission on Human Rights, ‘Civil and Political Rights, including the Question of Religious Intolerance – Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir’ (9 January 2006) UN doc E/CN.4/2006/5 para 53.

<sup>40</sup>*Belgian Linguistics Case (A/6)* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (1979-80).

<sup>41</sup>*Winterwerp v Netherlands* (n 13) 60.

<sup>42</sup>HRC (n 23) para 8.

<sup>43</sup>J Crawford, ‘Sovereignty as a legal value’ in J Crawford and M Koskeniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012) 123.



the atrocities committed during the Second World War motivated the adoption of universal human rights standards. Notably, the Preamble to the ECHR reaffirms that human rights ‘are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend’. Representatives at the drafting of the ECHR specifically recognised that democratic states were not immune from committing human rights abuses:

Montesquieu said: “Whoever has power, is tempted to abuse it”. Even parliamentary majorities are in fact sometimes tempted to abuse their power. Even in our democratic countries we must be on guard against this temptation of succumbing to reasons of state.<sup>44</sup>

The UDHR, ECHR and ICCPR were adopted to prevent a repeat of the atrocities committed during the Second World War and *ergo* to protect the individual from unwarranted state interference with the exercise of fundamental freedoms.

Human rights bodies have subsequently accepted the necessity of restrictions placed on political ideologies that are *prima facie* incompatible with this aim. Thus, although the European Commission on Human Rights has indicated that fascism, communism and neo-Nazi principles may fall within ‘belief’ for the purposes of Art 9 ECHR,<sup>45</sup> human rights bodies have consistently accepted that the restriction of the manifestation of these beliefs is necessary in a democratic society<sup>46</sup> and, in the case of political parties motivated by these ideologies, have held complaints to be an abuse of rights under Art 17 ECHR.<sup>47</sup>

The atrocities committed during the Second World War also informed the adoption of the Right to Freedom of Religion or Belief. The right had been enshrined in the national constitutions of many UN Member States prior to the adoption of international human rights

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<sup>44</sup>Statement of M Teitgen (France) at Consultative Assembly 1st Session, in Council of Europe Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights Volume I: Preparatory Commission of the Council of Europe, Committee of Ministers Consultative Assembly 11 May-8 September 1949 (Nijhoff 1975) 40.

<sup>45</sup>D Harris, M O’Boyle, E Bates and C Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 426.

<sup>46</sup>*X v Italy* (1976) 5 DR 83; *Hazar and Açik v Turkey* App no 31451/03 (ECtHR, 13 January 2009); *X v Austria* App no 1753/63 (Commission Decision of 15 February 1965).

<sup>47</sup>*Communist Party of Germany v the Federal Republic of Germany* App no 250/57 (ECommHR 20 July 1957); *BH, MW, HP and GK v Austria* App no 12774/87 (Commission Decision of 12 October 1989). See also, *MA v Italy* Communication 117/1981 (HRC 10 April 1984) para 13.3.

instruments.<sup>48</sup> Furthermore, the potential for the denial of freedom of religion to lead to international tensions had been recognised on an international stage and the rights of religious minorities had previously been included in peace treaties and the League of Nations minority protection regime.<sup>49</sup> This history of protecting religious freedom was influential during the drafting of the ECHR. The Italian representative, Mr. Cingolani, described freedom of religion as ‘the most sacred right of all’<sup>50</sup> while the Irish representative, Mr Everett, stressed that ‘[c]ivil and religious freedom are but two of the fundamental rights of man ... If the Council of Europe achieved no other end than the guarantee of those two rights, it will have justified its existence’.<sup>51</sup> Given the context of the adoption of human rights instruments and the prevalence of the right in national constitutions, the inclusion of the Right to Freedom of Religion or Belief in international human rights instruments was uncontroversial.

During the drafting of the UDHR and ECHR, representatives expressed particular concern about interference with the freedom of religion or belief of those who do not subscribe to the dominant religious or political ideology. The Dutch representative at the drafting of the UDHR noted that ‘in the seventeen and eighteenth centuries... those who practised a religion other than that of the head of the state had been persecuted in many countries’.<sup>52</sup> More contemporaneously, state representatives were concerned about state interference with freedom of religion or belief, motivated not only ‘Hitlerism’ and Fascism<sup>53</sup> but also by Communism in Eastern Europe.<sup>54</sup> In the context of Eastern Europe, Mr. Norton, the Irish representative to the Consultative Assembly of the ECHR, warned of ‘a new type of “ Statism”’ and in particular that:

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<sup>48</sup>ECOSOC ‘Commission on Human Rights Drafting Committee International Bill of Rights’ 11 June 1947 UN doc E/CN.4/AC.1/3/Add.1, 101–116.

<sup>49</sup>MD Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 55–57.

<sup>50</sup>Statement of Mr. Cingolani (Italy) at Consultative Assembly 1st Session in Council of Europe, (n 44) 62

<sup>51</sup>Statement of Mr. Everett (Ireland) at Consultative Assembly 1st Session in Council of Europe, (n 44) 102–104.

<sup>52</sup>Statement of Mr. Van der Mandele (The Netherlands) at ECOSOC, Record of 215<sup>th</sup> Meeting held on 25 August 1958 UN doc E/SR.215, 644.

<sup>53</sup>Statement of Mr. Wilson (United Kingdom) at ECOSOC, Commission on Human Rights Drafting Committee Second Session 21st Meeting, held on 4 May 1948 UN doc E/CN.4/AC.1/ SR.21, 7; UNGA, 145th Plenary Meeting 27 September 1948, p 189; Teitgen (n 44) 40; Statement of Mr. Kraft (Denmark) at Consultative Assembly 1st Session in Council of Europe (n 44) 66; Statement of Mr. Foster (United Kingdom) at Consultative Assembly 1st Session in Council of Europe (n 44) 96.

<sup>54</sup>Statement of Mr. Norton (Ireland) at Consultative Assembly 1st Session in Council of Europe (n 44) 128–130.

An effort is being made there to put out the light of the Church – not only of one church but of almost all churches. There, an effort is being made to say to men and women that they shall worship in the way prescribed by the state, and not in the way dictated by their own consciences.<sup>55</sup>

Thus, the drafting of the Right to Freedom of Religion or Belief reveals the intention to protect the religious from interference by the State and, notably, from restrictions or interpretations of religion informed by the prevalent religious or political ideology.

The Right to Freedom of Religion or Belief has not been interpreted to prohibit state religions or ideologies.<sup>56</sup> However, those who do not subscribe to these beliefs must not be disadvantaged in the exercise of this right. This view has been stressed by the HRC, in General Comment No 22:

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 Art 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.<sup>57</sup>

Similarly, the ECtHR has repeatedly stressed ‘the state’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs’,<sup>58</sup> in particular, in relation to the exercise of its powers.<sup>59</sup> Consequently, the existence of a state religion or ideology does not justify the unequal treatment of those who subscribe to a different ideology.

While the object and purpose of the right to manifest religion is state non-interference with the religious freedom of all individuals, the drafters of human rights instruments in the post-War period recognised that religious minorities were particularly vulnerable to such

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<sup>55</sup>Ibid.

<sup>56</sup>HRC (n 23) para 9. *Darby v Sweden* (1989) 56-A DR 166 annex to the decision of the Court, cited in C Evans *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) 80.

<sup>57</sup>HRC (n 23) para 10.

<sup>58</sup>*Şahin v Turkey* (n 27) para 107.

<sup>59</sup>*Metropolitan Church of Bessarabia v Moldova* App no. 45701/99 (judgment of 13 December 2001) para 116; *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* App no 40825/98 (ECtHR, 31 July 2008) para 97.

interference. The Chairperson of the drafting committee of the UDHR, Eleanor Roosevelt, opined that rather than providing targeted minority rights protection, ‘the best solution of the problem of minorities was to encourage respect for human rights’.<sup>60</sup> The delegation of the United Kingdom submitted that ‘the declaration already fully protected the rights of all minorities’, pointing, specifically, to the Right to Freedom of Religion as evidence of this.<sup>61</sup> The drafters of human rights instruments, thus, had the abstract intention that human rights standards should protect religious minorities from state interference.

The HRC has subsequently reiterated the importance of freedom of religion or belief for religious minorities and has ‘view[ed] with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they ... represent religious minorities that may be the subject of hostility on the part of a predominant religious community’.<sup>62</sup> Likewise, the ECtHR has emphasised that ‘[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it [freedom of religion or belief]’.<sup>63</sup> Consequently, the specific vulnerability of religious minorities to interference with this right has been recognised by both the drafters and monitoring bodies of human rights instruments.

### ***3.2.3 A good faith interpretation***

The text, context and object and purpose reveal that the central component of a good faith interpretation of freedom of religion or belief is non-interference with matters of conscience. This encompasses a requirement that states refrain from and prevent interference with the public and private manifestation of all religions and beliefs, without distinction. Furthermore, states must not prioritise a religious or political ideology above individual religious freedom, including minority beliefs and manifestations. While the right to manifest religion was intended to be construed widely, its limitation clause was intended to be construed narrowly. This, therefore, suggests that state non-interference and the equal treatment of different beliefs should be the default position. In fact, as has already been established, this is also the central core of the founding documents around which the UDHR and the ECHR

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<sup>60</sup>Statement of Mrs. Roosevelt (USA) at UNGA, Third Committee of the General Assembly, Record of 161st Meeting, held on 27 November 1948 UN doc A/C.3/SR.161, p 724. See also, Statements of Mr. Loufti (Egypt), Mrs. Mehta (India) and Mr. Lebeau (Belgium) at ECOSOC, Commission on Human Rights, Third Session, Summary Record of the 73rd Meeting held on 15 June 1948 UN doc E/CN.4/SR.73, 5–6.

<sup>61</sup>Statement of Mr. Davies (United Kingdom) at UNGA, Third Committee of the General Assembly, Record of 162nd Meeting, held on 27 November 1948 UN doc A/C.3/SR/162 pp 730–731.

<sup>62</sup>HRC (n 23) para 2.

<sup>63</sup>Kokkinakis v Greece (n 23) para 31.

were drafted.

### 3.3 Contradictory Decisions and Manifesting Belief

While the ECtHR has developed an extensive body of jurisprudence in relation to the right to manifest religion by wearing religious clothing, it was not until 2011 that the HRC was given the opportunity to engage fully with this issue. Between 2011 and 2013, the HRC decided the cases of *Bikramjit Singh v France*, *Ranjit Singh v France* and *Mann Singh v France*, concerning the right of Sikhs to wear the turban in identity documents and the *keski* to state schools.<sup>64</sup> These cases were directly analogous to the cases of *Mann Singh v France*, *Jasvir Singh v France* and *Ranjit Singh v France* that had previously been decided by the ECtHR.<sup>65</sup> Despite the similar background and wording of Art 9 ECHR and Art 18 ICCPR, the ECtHR and HRC reached contradictory decisions in these cases. This section first compares the mandates, jurisdiction and evolution of the case law of the ECtHR and HRC, in order to ascertain the extent to which key differences may explain this divergence. Second, the decisions of the ECtHR and HRC in the analogous cases are analysed against the identified good faith interpretation of the right to manifest religion.

#### 3.3.1 Comparing the ECtHR and the HRC

The divergence in the jurisprudence of the ECtHR and HRC may, in part, be explained by the evolution of the jurisprudence in this field, as well as the distinct roles and mandates of these bodies. The HRC has not had the opportunity to develop extensive case law in relation to freedom of religion generally,<sup>66</sup> or the right to manifest religion by wearing religious clothing, more specifically.<sup>67</sup> In contrast, the ECtHR's Art 9 case law has developed considerably since its decision in *Kokkinakis v Greece* in 1993,<sup>68</sup> and there is a significant

<sup>64</sup>*Bikramjit Singh v France*; *Ranjit Singh v France*; *Mann Singh v France* (n 5). See also Chapter 4, text pertaining to n 127; n 274; and n 87 respectively.

<sup>65</sup>*Mann Singh v France*; *Jasvir Singh v France*; *Ranjit Singh v France* (n 4).

<sup>66</sup>The HRC has primarily considered the right to freedom of religion in the context of education, (see for example, *Hartikainen v Finland* Communication no 40/1978 (HRC 9 April 1981); *Waldman v Canada* Communication no 694/1996 (1999) 7 IHRR 368; *Leirvåg v. Norway*, Communication no 1155/2003 (2004) 19 BHRC 635), compulsory military conscription (see, for example, *Muhonen v Finland*, Communication no 89/1981 (HRC 8 April 1985); *Brinkhof v The Netherlands*, Communication no 402/1990 (1994) 1–2 IHRR 1992; *Foin v. France* Communication no 666/1995 (1999) 7 IHRR 354), the registration of religious communities (see, for example, *Malakhovsky v Belarus*, Communication no 1207/2003 (2006) 13 IHRR 60) and indoctrination (*Kang v Republic of Korea* Communication no 878/1999 (2003) 10 IHRR 932).

<sup>67</sup>Prior to the recent cases, the HRC had considered this issue under Art 26 ICCPR in *Singh Bhinder v Canada*, Communication no 208/1986 (HRC 28 November 1989) and, under Art 18, in *Hudoyberganova v Uzbekistan* Communication no 931/2000 (2005) 19 BHRC 581. However, the State did not justify the restriction, as required by Art 18(3) ICCPR.

<sup>68</sup>*Kokkinakis v Greece* (n 23). See the Strasbourg Consortium for a comprehensive list of jurisprudence <<http://www.strasbourgconsortium.org/portal.case.php?pagelId=10>> accessed 19 September 2021.

body of jurisprudence concerning the right to manifest religion by wearing religious clothing.<sup>69</sup>

The ECtHR's early jurisprudence on religious clothing has significantly influenced the evolution of its subsequent jurisprudence. Principles established in cases concerning Turkey have subsequently been applied in cases concerning France, including *Jasvir Singh and Ranjit Singh* considered here.<sup>70</sup> Although the ECtHR is not bound by precedent and the French cases could have been distinguished from the Turkish cases on the basis of both the facts and the margin of appreciation, from the perspective of legal certainty it would appear to be preferable for the ECtHR to decide these cases consistently. The HRC, in contrast, did not have an established body of jurisprudence and, thus, was better able to evaluate *Bikramjit Singh, Mann Singh and Ranjit Singh*, considered here, on the basis of the evidence presented.

The differing jurisdiction and normative status of the jurisprudence of the ECtHR and HRC may also provide some explanation for the discrepancy between the analogous cases. The ECtHR has compulsory jurisdiction in respect of the 47 Member States of the Council of Europe, states which have a predominantly Christian or secular tradition.<sup>71</sup> In contrast, although the HRC only has jurisdiction to receive individual communications in respect of those states that have ratified Optional Protocol 1,<sup>72</sup> it hears cases concerning a more diverse range of states than the ECtHR. Nonetheless, with the exception of Monaco, Switzerland and the United Kingdom, all Member States of the Council of Europe have permitted individual communications to the HRC.<sup>73</sup>

The ECtHR issues legally binding judgments, in contrast to the non-binding 'views' of the HRC. Drzemczewski has argued that the ECHR is *sui generis* because the 'law

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<sup>69</sup>*Karaduman v Turkey* (1993) App No 16278/90; *Dahlab v Switzerland* (n 27); *Şahin v Turkey* (n 27); *Phull v France* (11 January 2005) App no 35753/03 ECHR 2005-I; *Köse and 93 others v Turkey* (24 January 2006) App no 26625/02 ECHR 2006-II; *Kurtulmuş v Turkey* (24 January 2006) App no 65500/01 ECHR 2006-II; *El Morsli v France* App no 15585/06 (ECtHR 4 March 2008); *Mann Singh v France* (n 4); *Dogru v France* (n 34); *Aktas v France* (n 34); *Jasvir Singh v France* (n 4); *Ranjit Singh v France* (n 4); *SAS v France* (n 35); *Ebrahimian v France* (26 November 2015) App no 64846/11 ECHR 2015.

<sup>70</sup>*Dogru v France* (n 34); *Aktas v France* (n 34); *Jasvir Singh v France* (n 4); *Ranjit Singh v France* (n 4).

<sup>71</sup>Albania, Turkey and Azerbaijan are notable exceptions.

<sup>72</sup>Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171, entered into force 23 March 1976.

<sup>73</sup>United Nations Treaty Collection, Chapter IV Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=en)> last accessed 19 September 2021.

transcends the traditional boundaries drawn between international law and domestic law'.<sup>74</sup> Consequently, the ECtHR has permitted states a margin of appreciation in cases where a clear consensus has not emerged in Europe,<sup>75</sup> to ensure that it does not overstep the boundaries of state sovereignty. Nonetheless, as recognised by the European Commission on Human Rights, excessive deference to state sovereignty has the potential to undermine the purpose of the ECHR.<sup>76</sup> The ECtHR should, therefore, ensure that the margin of appreciation does not prevent it from acting as the 'conscience' of Europe.<sup>77</sup>

In contrast, as the decisions of the HRC are not legally binding and it does not recognise the principle of the margin of appreciation, it is arguably less concerned with state sovereignty. This perhaps gives the HRC more scope than the ECtHR to reach decisions that are unpopular with states. However, in practice, this has also meant that states do not always comply with the decisions of the HRC.<sup>78</sup>

On the basis of these differences, some variance must be expected between the approaches of the regional ECtHR and the international HRC. Nonetheless, this should not lead to uncertainty over the scope of protected rights nor call into question the universality of rights.<sup>79</sup> It is, therefore, necessary to analyse the reasoning that has resulted in this discrepancy and consider the extent to which the two bodies' decisions are compatible with the identified good faith interpretation of the right to manifest religion.

### 3.3.2 Mann Singh (ECtHR) and Mann Singh and Ranjit Singh (HRC)

In *Mann Singh*<sup>80</sup> heard by the ECtHR and *Ranjit Singh*<sup>81</sup> and *Mann Singh*<sup>82</sup> heard by the HRC, the right of a Sikh man to manifest his religion by wearing a turban on a photograph affixed to an identification document was considered. Both bodies acknowledged that the

<sup>74</sup>A Drzemczewski, 'The sui generis nature of the European Convention on Human Rights' (1980) 29 ICLQ 54, 54.

<sup>75</sup>*Şahin v Turkey* (n 27) para 109. See also, *Dogru v France* (n 34) para 72.

<sup>76</sup>*X v United Kingdom*, Application No 4451/70, Report of the Commission of 1 June 1973, Series B no 16, 12, 31.

<sup>77</sup>Statement of Lynn Ungood-Thomas (United Kingdom) at Consultative Assembly 1<sup>st</sup> Session, in Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights Volume 2: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly 10 August–18 November 1949 (Martinus Nijhoff 1975) 174.

<sup>78</sup>HRC, 'Observations finales concernant le cinquième rapport périodique du France' UN doc. CCPR/C/FRA/CO/5 para 7.

<sup>79</sup>This also raises the issue of applicants undertaking forum shopping, which falls outside the scope of this thesis.

<sup>80</sup>*Mann Singh v France* (n 4).

<sup>81</sup>*Ranjit Singh v France* (n 5).

<sup>82</sup>*Mann Singh v France* (n 5).

requirement that the applicants appear without their turban in these photographs interfered with their right to manifest religion. Before the HRC, France sought to justify the interference on the grounds of ‘public order’ and ‘public safety’ under Art 18(3) ICCPR.<sup>83</sup> Despite recognising that the aim of the restriction was legitimate,<sup>84</sup> the HRC considered the proportionality of the restriction:

[T]he state party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the state party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits.<sup>85</sup>

The HRC also considered the potential for the initial interference to result in continuing violations of the applicants’ rights ‘because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks’.<sup>86</sup> By scrutinising the justifications given by the state for the restriction of the right to manifest religion, the HRC was able to assess the proportionality of the interference and, in particular, identify the potential for repeat violations to flow from the original restriction. On the basis of the lack of evidence of the necessity of the restriction, the HRC found a violation of Art 18 ICCPR. Thus, the HRC prioritised the applicants’ right to manifest their religion above the justifications given by the state. This approach conforms with the requirement that the state evidence the necessity of limitations and, thus, is compatible with a good faith interpretation of the right.

In contrast, in *Mann Singh v France*, the ECtHR found that the application was manifestly ill-founded and, therefore, inadmissible, on the basis that the state has a wide margin of appreciation in matters concerning ‘public safety’ and ‘public order’. In direct contrast to the HRC, the ECtHR accepted that the removal of the turban was necessary to allow the identification of the driver and avoid fraud,<sup>87</sup> despite the lack of evidence to

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<sup>83</sup>Ranjit Singh v France (n 5) para 5.3.

<sup>84</sup>Ibid para 8.4.

<sup>85</sup>Ibid.

<sup>86</sup>Ibid.

<sup>87</sup>Mann Singh (n 4).



support this conclusion. By not engaging with the necessity and proportionality of the restriction on the applicant's rights, the ECtHR, in effect, reversed the burden of proof under the limitations clause and placed the onus on the applicant to prove that the state had acted unreasonably. When the approach of the ECtHR is compared to that of the HRC, it becomes apparent that the margin of appreciation inhibited the ECtHR from examining evidence of the necessity of the restriction on the applicant's rights, as required by Art 9(2) ECHR. This is incompatible with a good faith interpretation of the right to manifest religion, as given above in section 3.2.2(c), which establishes that the grounds of limitations are to be construed narrowly and that the burden of proof lies with the state.

Had the ECtHR applied a good faith interpretation of the right, *Mann Singh* may have been decided differently. In the absence of evidence of the necessity of the restriction of religious freedom, the ECtHR should have prioritised the applicant's right, in line with the *travaux préparatoires*, and found a violation. Nonetheless, this outcome cannot be taken for granted. Had the case been found to be admissible, the adversarial process in the ECtHR may have given France the opportunity to provide additional evidence of the necessity of the interference with the applicant's right to manifest religion. In the event that this demonstrated that the removal of the turban made it easier to identify the applicant and helped to combat fraud, then the application of the margin of appreciation and a finding of no violation would be legitimate on the grounds of 'public safety' and 'public order'. However, a more rigorous decision-making process would have provided a more satisfactory outcome for the applicant<sup>88</sup> and been faithful to the idea that limitations to the right be narrowly construed and subject to the requirements of necessity and proportionality.

### 3.3.3 *Jasvir Singh and Ranjit Singh (ECtHR) and Bikramjit Singh (HRC)*

A similar comparison can be drawn between the cases of *Bikramjit Singh*<sup>89</sup> heard by the HRC, and *Jasvir Singh*<sup>90</sup> and *Ranjit Singh*,<sup>91</sup> heard by the ECtHR, involving the expulsion of the Sikh applicants from state schools in France for refusing to remove the *keski*. The expulsion of the applicants from school was pursuant to Loi no 2004- 228, which prohibits the wearing of ostentatious religious symbols in state schools in order to uphold the principle

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<sup>88</sup>This raises questions about the role of the ECtHR and whether it should act as a constitutional court or provide individual justice. This falls outside the scope of this thesis. See further, K Dzehtsiarou and A Greene, 'Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism' [2013](4) Public Law 710.

<sup>89</sup>*Bikramjit Singh v France* (n 5).

<sup>90</sup>*Jasvir Singh v France* (n 4).

<sup>91</sup>*Ranjit Singh v France* (n 4).

of *laïcité*.<sup>92</sup>

In *Bikramjit Singh*, the HRC considered that the prohibition on wearing religious symbols in state schools in order to uphold ‘the constitutional principle of secularism (*laïcité*)’<sup>93</sup> pursued the grounds of ‘the rights and freedoms of others’, ‘public order and safety’.<sup>94</sup> The HRC was willing to acknowledge the value of secularism: ‘the principle of secularism (*laïcité*), is itself a means by which a state party may seek to protect the religious freedom of all its population’.<sup>95</sup> However, it was ‘of the view that the state party has not furnished compelling evidence that by wearing his *keski* the author would have posed a threat to the rights and freedoms of other pupils or to order at the school’.<sup>96</sup> In particular, the penalty of expulsion from school was considered to be disproportionate and not based on the conduct of the applicant himself.<sup>97</sup> The HRC was, thus, not willing to accept that the restriction of the applicant’s right to manifest religion was justified by the pursuit of secularism alone. The HRC found a violation of Art 18 ICCPR as there was insufficient evidence of the necessity of the restriction, and the penalty for wearing the *keski* was disproportionate.

In the cases of *Jasvir Singh v France* and *Ranjit Singh v France*, the ECtHR built on its earlier jurisprudence concerning the restriction of the right to manifest religion on the basis of ‘the constitutional principle of secularism’<sup>98</sup> and found the claims to be manifestly ill-founded.<sup>99</sup> The ECtHR found that the expulsion of the applicants from state schools was not disproportionate to the aim pursued: ‘the protection of the rights and freedoms of others’ and ‘public order’ through the pursuit of secularist policies in state schools. Notably, the ECtHR did not consider whether the individual applicants posed a threat to ‘the rights and freedoms of others’, as the measures taken in pursuit of *laïcité* fell within the state’s margin of appreciation.<sup>100</sup>

The distinction between the ECtHR and HRC’s decisions can be attributed to the extent

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<sup>92</sup>Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de *laïcité*, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. The concept of *laïcité* is found in Art 1 of the French Constitution and refers to the separation of church and state. It is similar to secularism.

<sup>93</sup>*Bikramjit Singh v France* (n 5) para 8.2.

<sup>94</sup>*Ibid* para 8.6.

<sup>95</sup>*Ibid*.

<sup>96</sup>*Ibid* para 8.7.

<sup>97</sup>*Ibid*.

<sup>98</sup>*Dahlab v Switzerland* (n 27); *Köse and 93 others v Turkey* (n 69); *Dogru v France* (n 34).

<sup>99</sup>*Jasvir Singh v France* (n 4); *Ranjit Singh v France* (n 4).

<sup>100</sup>*Ibid*. For further discussion of the margin of appreciation see Chapter 4, text to n 106 and the subsequent section.

to which they were willing to engage with the necessity of restrictions justified by the pursuit of secularism. The HRC has questioned the necessity of restrictions in schools on the basis ‘that respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols’.<sup>101</sup> In contrast, the ECtHR has permitted France a wide margin of appreciation in the absence of an established consensus on this issue in Europe.<sup>102</sup> This has led the ECtHR to uncritically accept the legitimacy of restrictions of religious freedom justified by the pursuit of secularist policies.

Although secularism is not expressly mentioned as a ground for the limitation of the right to manifest religion, to the extent that this principle seeks to protect ‘the rights and freedoms of others’ and ‘public order’, it is possible to justify the extension of the limitations clause within a good faith interpretation. However, this is not by itself sufficient to establish that the restriction of the applicant’s rights is necessary in a democratic society. In order to prevent unnecessary state interference with religious freedom in line with a good faith interpretation of the right, the limitations clause must be construed narrowly and restrictions must be proportionate.

### 3.4 The Prioritisation of Secularism above Religious Freedom

A good faith interpretation of religious freedom requires that priority is afforded to the right itself and that the necessity of limitations is evidenced. In the context of secularism, Bielefeldt, the former UN Special Rapporteur on the freedom of religion or belief, has stressed that freedom of religion is a ‘first order’ principle, whereas ‘neutrality’ is a ‘second order’ principle, ‘[t]urning the order of things upside down and pursuing a policy of enforced privatization or societal marginalization of religions in the name of “neutrality” would thus clearly amount to a violation of human rights’.<sup>103</sup> This understanding has been confirmed in the ECtHR by Judge Bonello, who stressed that ‘secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance ... *are not values protected by the Convention*, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion’.<sup>104</sup>

<sup>101</sup>HRC, Concluding Observations of the Human Rights Committee – France UN doc CCPR/C/FRA/CO/4, 31 July 2008, para 23.

<sup>102</sup>*Şahin v Turkey* (n 27) para 109. See also *Dogru v France* (n 34) para 72.

<sup>103</sup>H Bielefeldt, ‘Freedom of religion or belief – a human right under pressure’ (2012) 1 Oxford Journal of Law and Religion 15, 32.

<sup>104</sup>*Lautsi and Others v Italy* (2012) 54 EHRR 3 Judge Bonello’s concurring opinion para 2.2. Emphasis added

However, in *Jasvir Singh* and *Ranjit Singh*, the ECtHR did exactly this. In cases concerning religious clothing the ECtHR has stressed that ‘an attitude which fails to respect that principle [secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Art 9 of the Convention’.<sup>105</sup> Contrary to a good faith interpretation, the ECtHR has prioritized the pursuit of secularism above individual religious freedom. As states are permitted a wide margin of appreciation, the ECtHR does not consider the necessity of restrictions on the applicants’ rights. This approach is particularly problematic as the ECtHR has not scrutinised the extent to which secularism, in practice, pursues one of the permissible grounds of restriction.

### 3.5 Secularism as the Protector of Individual Religious Freedom

The margin of appreciation afforded to France, in *Jasvir Singh* and *Ranjit Singh*, is based on the presumption that the pursuit of state secularism, through the separation of church and state, is compatible with Convention rights.<sup>106</sup> The ECtHR has accepted that state secularism complies with the role of the state as the ‘neutral and impartial organiser’.<sup>107</sup> Furthermore, McGoldrick has suggested that ‘both the ECtHR and HRC have accepted [secularism] seeks to protect the religious freedom of all its population’.<sup>108</sup> As noted by the ECtHR in *Kokkinakis*, limitations on the right to manifest religion may be necessary in order to reconcile the competing rights of different groups.<sup>109</sup> Thus, to the extent that secularism seeks to protect ‘the rights and freedoms of others’ by protecting individual religious freedom, restrictions on religious freedom can be justified.

However, while the HRC has scrutinised whether secularism does in fact pursue ‘the rights and freedoms of others’, the ECtHR has uncritically accepted this as a given. Yet, secularism is an ‘abstract principle’<sup>110</sup> and is open to competing interpretations.<sup>111</sup> Notably, the former UN Special Rapporteur on the freedom of religion or belief, Asma Jahangir, expressed concern. Her report to the UN in relation to France’s enforcement of secularism stated:

<sup>105</sup>*Dogru v France* (n 34) para 72. See also *Şahin v Turkey* (n 27) para 113–114.

<sup>106</sup>*Şahin v Turkey* (n 27), para 114.

<sup>107</sup>*Ibid* para 107. *Dogru v France* (n 34) para 106.

<sup>108</sup>D McGoldrick ‘A defence of the margin of appreciation and an argument for its application by the Human Rights Committee’ (2016) 65 ICLQ 21, 52.

<sup>109</sup>*Kokkinakis v Greece* (n 23) para 31.

<sup>110</sup>*Ebrahimian v France* (n 69) Dissenting opinion of Judge De Gaetano.

<sup>111</sup>R Adhar, ‘Is secularism neutral?’ (2013) 25 Ratio Juris 404.

[w]hile recognizing that the organization of a society according to this principle [secularism] may not only be healthy, but also guarantees the fundamental right to freedom of religion or belief, [the Special Rapporteur] is concerned that, in some circumstances, the selective interpretation and rigid application of the principle has operated at the expense of the right to freedom of religion or belief.<sup>112</sup>

Thus, the compatibility of secularism with the pursuit of the ‘rights and freedoms of others’ should not be taken for granted. ‘Benevolent secularism’, according to Adhar, ‘is a philosophy obliging the state to refrain from adopting and imposing any established beliefs ... upon its citizens’.<sup>113</sup> Although not strictly neutral,<sup>114</sup> as benevolent secularism seeks to uphold the freedom of religion or belief of individuals by promoting non-interference by the state in matters of conscience, this would appear to be compatible with a good faith interpretation of freedom of religion or belief.

In contrast, ‘hostile’ secularism says the state should actively pursue a policy of established unbelief’.<sup>115</sup> The goal of hostile secularism is the separation of church and state,<sup>116</sup> through the elimination of religion from the public sphere, rather than the protection of religious freedom. The restriction of individual religious freedom on the basis of hostile secularism is incompatible with a good faith interpretation of the right for a number of reasons. First, by prioritising the separation of church and state above individual religious freedom, hostile secularism does not seek to protect ‘the rights and freedoms of others’. Second, the elimination of religious manifestations from the public sphere is incompatible with the text of the right, which explicitly establishes ‘the right to manifest religion in public and in private’. Third, the pursuit of the separation of church and state as an inherent good is analogous to the pursuit of a political ideology.<sup>117</sup> Under a good faith interpretation of freedom of religion or belief, state interference with individual religious freedom must not be motivated by the preservation of state ideologies. Fourth, hostile secularism disadvantages minority religious practices which do not conform as easily as Christian and

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<sup>112</sup>ECOSOC ‘Civil and Political Rights, including the Question of Religious Intolerance: Report submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief Addendum 2 – Mission to France (18 to 29 September 2005)’ (8 March 2006) UN doc E/ CN.4/2006/5/Add.4, para 96.

<sup>113</sup>Adhar (n 111) 409.

<sup>114</sup>Ibid p 420.

<sup>115</sup>Ibid p 411.

<sup>116</sup>R Sandberg and N Doe, ‘Church-state relations in Europe’ (2007) 1(5) Religion Compass 561, 565.

<sup>117</sup>J Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Martinus Nijhoff 2010) 140.

secular manifestations to the privatisation of religion.<sup>118</sup> Thus, in Western Europe, the pursuit of hostile secularism disproportionately impacts religious minorities, contrary to the concerns and intentions of the drafters of human rights instruments. This suggests that the state is not neutral in exercising its powers, contrary to a good faith interpretation.

Adhar has also warned that '[a] benevolent secularism can, overtime, unerringly slide into a hostile secularism'.<sup>119</sup> Thus, restrictions on the right to manifest religion in order to uphold secularism should not be uncritically accepted, without oversight by human rights bodies. Yet, by permitting France a wide margin of appreciation in *Jasvir Singh* and *Ranjit Singh*, the ECtHR unquestioningly accepted that state secularism seeks to protect 'the rights and freedoms of others'. This is problematic from the perspective of a good faith interpretation as by interfering with religious freedom and seeking to eliminate religion from the public sphere, the prohibition on the wearing of 'ostentatious religious symbols' in schools pursues a vision of hostile secularism.

Although in *Bikramjit Singh* the HRC accepted that 'secularism (*laïcité*), is itself a means by which a state party may seek to protect the religious freedom of all its population',<sup>120</sup> it did not automatically accept that all measures adopted in the name of *laïcité* seek to uphold religious freedom. For the HRC, secularism is a tool by which to achieve religious freedom rather than an end in itself. Thus, while the HRC may be willing to accept restrictions on Art 18 ICCPR, justified by benevolent secularism, measures that pursue hostile secularism clearly contravene this right.

### **3.6 Religious Symbols as a Threat to 'The Rights And Freedoms of Others' and 'Public Order'**

If the state is able to demonstrate that the pursuit of secularism seeks to protect 'the rights and freedoms of others' or 'public order', in accordance with a good faith interpretation, it must still evidence the necessity of any restrictions imposed on this basis. The difference between the jurisprudence of the ECtHR and HRC can also be attributed to

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<sup>118</sup>Evans (n 7) 305; M Evans and P Petkoff, 'A separation of convenience? The concept of neutrality in the jurisprudence of the European Court of Human Rights' (2008) 36 *Religion, State & Society* 205; PG Danchin 'Islam in the secular nomos of the European Court of Human Rights' (2010–2011) 32(4) *Michigan Journal of International Law* 663, 689. See also the discussion of the Liberal-Protestant underpinnings of European secularism in Chapter 4, text to n 240, and subsequent section.

<sup>119</sup>Adhar (n 111) 415. See also I Leigh and R Adhar, 'Post-secularism and the European Court of Human Rights: or how God never really went away' (2012) 75 *Modern Law Review* 1064, 1083.

<sup>120</sup>*Bikramjit Singh v France* (n 5) para 8.6.

the extent to which the bodies were willing to accept that the presence of religion in the public sphere constituted a threat to ‘the rights and freedoms of others’ or ‘public order’.

The approach of the ECtHR to date has been motivated by the concern that those wearing religious symbols in the public sphere may be ‘seeking to provoke a reaction, proselytizing, spreading propaganda or undermining the rights of others’.<sup>121</sup> However, by attributing a meaning to religious symbols, the ECtHR prejudges the ‘threat’ posed by the individual to ‘the rights and freedoms of others’ and ‘public order’. The ECtHR has accepted that the crucifix ‘is an essentially passive symbol’,<sup>122</sup> whereas the *hijab* is a ‘powerful external symbol’.<sup>123</sup> In practice, this distinction has led to different results in cases concerning religious freedom. In *Eweida and Others v United Kingdom*<sup>124</sup> the ECtHR accepted that the right to manifest religion by wearing a crucifix, ‘is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others’.<sup>125</sup>

In contrast, in *Şahin*, the ECtHR accepted that restrictions on the *hijab* legitimately pursue the ‘aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others’.<sup>126</sup> Accordingly, the communication of the applicant’s religion through the wearing of a crucifix is necessary to sustain pluralism and tolerance in society, whereas the limitation of the *hijab* is necessary to achieve similar ends.

The ECtHR has found this distinction to be legitimate even when applicants have chosen to wear less ostentatious religious symbols such as the *keski* rather than the turban<sup>127</sup> and a bandana rather than a *hijab*.<sup>128</sup> The approach of the ECtHR has, thus, led to the presumption that while manifestations of Christianity are to be tolerated, manifestations of Islam and Sikhism can be legitimately viewed as a threat.

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<sup>121</sup>*Ebrahimian v France* (n 69) Partly concurring and partly dissenting opinion of Judge O’Leary. See also *Şahin v Turkey* (n 27) para 112.

<sup>122</sup>*Lautsi and Others v Italy* (n 104) para 72.

<sup>123</sup>*Dahlab v Switzerland* (n 27).

<sup>124</sup>*Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 36516/10, 51671/10 (ECtHR, of 15 January 2013) , para 94.

<sup>125</sup>*Ibid.*

<sup>126</sup>*Şahin v Turkey* (n 27) para 111.

<sup>127</sup>*Jasvir Singh v France* (n 4).

<sup>128</sup>*Dogru v France* (n 34).

In contrast to the ECtHR, no attempt has been made by the HRC to attribute meanings to religious symbols in order to justify their differential treatment. Furthermore, the diverse composition of the HRC,<sup>129</sup> coupled with the established principle that ‘the concept of morals should not be drawn exclusively from a single tradition’,<sup>130</sup> reduces the likelihood that the HRC will prioritise one ideology above others in the future.

In addition to imputing a meaning to religious symbols, the ECtHR has also been criticised by commentators,<sup>131</sup> and dissenting judges in the ECtHR<sup>132</sup> for not requiring evidence of the threat posed by individual applicants in cases concerning religious clothing. McGoldrick has argued that ‘[t]he threat comes not from the single individual but from the combined effect of all the religious individuals concerned’.<sup>133</sup> This understanding suggests that it is the presence of religious symbols in the public sphere, rather than the actions of individuals that poses a threat to ‘the rights and freedoms of others’ and ‘public order’. However, the threat posed by the presence of religious symbols is unsubstantiated. Indeed, Judge Power argued in *Lautsi*:

The display of a religious symbol does not compel or coerce an individual to do or to refrain from doing anything ... It does not prevent an individual from following his or her own conscience nor does it make it unfeasible for such a person to manifest his or her own religious beliefs and ideas.<sup>134</sup>

As the right to manifest religion explicitly encompasses public manifestations, the mere presence of religion in the public sphere cannot per se constitute a threat to ‘the rights and freedoms of others’. Moreover, the possible discomfort of the majority at the increased visibility of minority religious symbols in Western Europe cannot justify their elimination, as there is no right not to be offended within the ECHR.<sup>135</sup> It is submitted that the only threat posed by the presence of religious symbols in schools is to hostile secularism. However, as

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<sup>129</sup>Under Art 31(2) ICCPR, ‘[i]n the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems’.

<sup>130</sup>K Boyle, ‘Freedom of religion in international law’ in J Rehman and SC Breau (eds), *Religion, Human Rights and International Law: a Critical Examination of Islamic State Practices* (Martinus Nijhoff 2007) 43.

<sup>131</sup>See, for example, C Evans, ‘The “Islamic scarf” in the European Court of Human Rights’ (2006) 7(1) *Melbourne Journal of International Law* 52; Evans and Petkoff (n 115) 208.

<sup>132</sup>*Şahin v Turkey* (n 27) dissenting opinion of Judge Tulkens para 10; *Ebrahimian v France* (n 66) partly concurring and partly dissenting opinion of Judge O’Leary.

<sup>133</sup>McGoldrick (n 108) 52.

<sup>134</sup>*Lautsi and Others v Italy* (n 104) concurring opinion of Judge Power.

<sup>135</sup>*Handyside v United Kingdom* App no. 5493/72 (ECtHR 7 December 1976) para 49.



noted above, in its hostile form, secularism does not seek to protect ‘the rights and freedoms of others’ but rather seeks to eliminate religion from the public sphere. As this is not the purpose for which limitations were prescribed, and in the absence of a demonstrable threat to either ‘public order’ or ‘the rights and freedoms of others’, secularism does not justify the restriction of the right to manifest religion.

In *Jasvir Singh* and *Ranjit Singh*, the ECtHR did not require evidence of a threat posed by the individual applicants. This approach is incompatible with a good faith interpretation of the right as it undermined the intention that non-interference with religious freedom should be the default position, unless restrictions are proven to be necessary. In direct contrast, in *Bikramjit Singh*, the HRC was not willing to accept that secularism was sufficient to justify restrictions on the applicant’s right without evidence of ‘a threat to the rights and freedoms of other pupils or to order at the school’.<sup>136</sup>

### 3.7 Re-reading the *Travaux Préparatoires* in Cases Concerning Secularism

In practice, the HRC has prioritised the right to manifest religion above the pursuit of secularism in accordance with a good faith interpretation of the right. Measures that restrict religious freedom cannot be justified by secularism alone, but rather must respond to a threat posed by the individual manifestation of religion to ‘the rights and freedoms of others’ or ‘public order’. In contrast, as a result of the margin of appreciation, the ECtHR has adopted an uncritical approach when states have invoked secularism as the basis of the limitation of an individual’s religious freedom. This approach has been demonstrated to be incompatible with a good faith interpretation of religious freedom.

Had the ECtHR engaged with the necessity of restricting *Jasvir Singh* and *Ranjit Singh*’s rights, it is likely to have found a violation. The educational sphere has been central to the pursuit of *laïcité* in France since 1905.<sup>137</sup> However, prior to 2004 it was not considered necessary to impose blanket restrictions on the wearing of religious symbols by pupils in order to uphold this principle.<sup>138</sup> Therefore, the necessity of such measures must be questioned. The 2004 law signalled a shift towards a hostile form of secularism that seeks to eliminate religion from the public sphere rather than upholding individual religious freedom.

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<sup>136</sup>*Bikramjit Singh v France* (n 5) para 8.7.

<sup>137</sup>1905 Loi de Séparation des Églises et de l’État.

<sup>138</sup>While the Conseil d’Etat had given schools discretion in this respect following the 1989 affaire du foulard, it had expressly noted that religious symbols were not per se incompatible with *laïcité*. Avis du Conseil D’État Du 27 Novembre 1989, Sur le Port du Voile à L’Ecole.

In the absence of a demonstrable threat posed by the presence of religion in society, this restriction is incompatible with a good faith interpretation of the right to manifest religion.

This does not imply that states cannot invoke secularism as a justification for the restriction of religious freedom. Rather, the ECtHR should adopt a more nuanced approach and exercise a higher level of scrutiny when states invoke the secularism justification. The restriction of the manifestation of religion by state representatives, as in *Dahlab v Switzerland*<sup>139</sup> and *Ebrahimian v France*,<sup>140</sup> is a more complex issue which perhaps requires a degree of deference to the state's margin of appreciation. Such restrictions are more clearly linked to the separation of church and state than the restrictions in *Jasvir Singh* and *Ranjit Singh*. It is possible to envisage how such measures seek to ensure the neutrality of the state and its representatives and, thus, guarantee the freedom of religion or belief of all members of society. Nonetheless, such measures still pursue a form of hostile secularism, which seeks to eliminate religion from the public sphere. While those with a preference for a secular state may perceive that they are treated equally within such a system, those individuals who do not share this worldview may feel disadvantaged. As noted by Judge Power, '[n]eutrality requires a pluralist approach on the part of the state, not a secularist one. It encourages respect for all world views rather than a preference for one'.<sup>141</sup> Thus, while a margin of appreciation can be justified in cases concerning state representatives, this does not warrant complete deference and must go 'hand in hand with a European supervision'.<sup>142</sup> In particular, the ECtHR must monitor whether such measures disproportionately disadvantage minority religions.

### 3.8 Societal Consensus and Religious Diversity

It has been argued that the ECtHR's jurisprudence is inconsistent with a good faith interpretation of freedom of religion. This can be attributed to the award of a wide margin of appreciation, which has prevented the ECtHR from scrutinising evidence of the necessity of restrictions and the extent to which the measures in question pursue a permissible ground of limitation. This margin of appreciation has been justified on the basis of the lack of consensus in Europe regarding the role of religion in society.<sup>143</sup> Yet, at the time of the adoption of the ECHR, the drafters recognised the importance of the right to manifest

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<sup>139</sup>*Dahlab v Switzerland* (n 27).

<sup>140</sup>*Ebrahimian v France* (n 69).

<sup>141</sup>*Lautsi and Others v Italy* (n 104) Concurring opinion of Judge Power.

<sup>142</sup>*Şahin v Turkey* (n 27) para 110.

<sup>143</sup>*Ibid* para 109. See also, *Dogru v France* (n 34) para 72.

religion. Indeed, the French representative at the drafting of the ECHR, Mr. Teitgen, described freedom of religion or belief as an example ‘of the fundamental undisputed freedoms’.<sup>144</sup> Instead, the lack of consensus can be attributed to societal developments and, in particular, in the Western European context, decreased religiosity amongst the population,<sup>145</sup> alongside the discomfort of the majority with the visible presence of minority religions.

Although the ECtHR has not engaged in a detailed re-interpretation of the scope of the right to manifest religion on the basis of the living nature of the ECHR, by permitting states a wide margin of appreciation, the ECtHR has effectively widened the permissible limitations to the right. By referencing the lack of consensus concerning the role of religion in society,<sup>146</sup> the ECtHR suggests that societal developments can be used to reduce as well as extend the scope of rights. Evolutive interpretation goes to the heart of both the purpose of rights and the role of the Court.

Although evolutive interpretation allows societal change to influence the interpretation of Convention rights, it should not be employed in a manner that undermines the intention of the parties. *Letsas* has submitted that evolutive interpretation allows ‘evolution towards the moral truth of ECHR rights, not ... evolution towards some commonly accepted standard, regardless of its content’.<sup>147</sup> The purpose of human rights instruments is to protect individuals from the power of the state and the tyranny of the majority. If this purpose is to be given effect, human rights bodies must not unquestioningly ratify societal change and interpret rights on the basis of ‘present day conditions’. By prioritising the preferences of the majority above the purpose and content of the right, this approach would compromise the universality of human rights standards.<sup>148</sup> Instead, evolutive interpretation should be faithful to the object and purpose of rights, while ensuring their continuing relevance for contemporary European societies.<sup>149</sup>

The Right to Freedom of Religion or Belief was adopted by the ten (predominantly

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<sup>144</sup>Teitgen (n 44) 46.

<sup>145</sup>R McCrea *Religion and the Public Order of the European Union* (Oxford University Press 2010) 22–23.

<sup>146</sup>*Şahin v Turkey*, (n 27) para 109. See also *Dogru v France*, (n 34) para 72.

<sup>147</sup>*Letsas* (n 15) 79.

<sup>148</sup>E Benvenisti, ‘Margin of appreciation, consensus and universal standards’ (1998–1999) 31 *New York University Journal of International Law and Politics* 843, 844.

<sup>149</sup>*Letsas* (n 15) 79. See also Chapter 6 for an proposal to re-evaluate Islamic jurisprudence along similar principles.

Christian) drafting states of the ECHR in 1950, at a time when Western European societies were less diverse. However, the importance of protecting religious minorities from the tyranny of the majority and interference justified by the dominant state ideology was recognised. In practice, the ECtHR has afforded a higher level of protection to Christian and secular belief as they are perceived to be ‘passive’ or ‘neutral’. In contrast, visible manifestations of minority religious beliefs such as Islam and Sikhism, which were not prevalent in Western Europe at the time of the drafting of the ECHR, are rarely protected. Consequently, the scope of the Right to Freedom of Religion or Belief has not evolved to protect diverse religious groups but rather, through the limitations clause, has been narrowed in order to exclude them.

Similarly, in France *laïcité* was originally intended to protect individual religious freedom. However, Chadwick suggests that few have been willing to ‘openly grant *laïcité*’s guarantee of religious freedom to Islam’.<sup>150</sup> The cultural move from ‘benevolent’ to ‘hostile’ secularism in France appears to be underpinned by the discomfort of the majority with the visible presence of difference in society.<sup>151</sup> Accordingly, *laïcité* has increasingly been interpreted to justify the pursuit of social homogeneity through the elimination of religion from the public sphere.<sup>152</sup> However, the ECtHR has not engaged with this issue in its jurisprudence. Similar critiques could be made of the ECtHR’s decision in *SAS v France*, where it accepted that restrictions on the *burqa* were necessary to ensure ‘living together’,<sup>153</sup> despite recognising the Islamophobic nature of the debate that preceded the adoption of the law.<sup>154</sup> Given the concerns of the drafters that religious minorities are particularly susceptible to interference with religious freedom, it would be appropriate for human rights bodies to exert an extra level of scrutiny when there is any possibility that the preferences of the majority are being used to justify restrictions on the rights of minorities.

The recognition that there is not a consensus in Europe regarding the role of religion in society does not lead to the conclusion that the Right to Freedom of Religion or Belief is any less significant to religious individuals. If the ECtHR is to protect the ‘moral truth’<sup>155</sup> of

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<sup>150</sup>K Chadwick ‘Education in secular France: (re)defining *laïcité*’ (1997) 5(1) *Modern and Contemporary France* 47, 55–56.

<sup>151</sup>M Hunter-Henin, ‘Why the French do not like the Burqa: *Laïcité*: national identity and religious freedom’ (2012) 61 *ICLQ* 613, 615.

<sup>152</sup>Chadwick (n 150) 55.

<sup>153</sup>*SAS v France* (n 35) para 153.

<sup>154</sup>*Ibid* para 149.

<sup>155</sup>*Letsas* (n 15) 79.

the right to manifest religion, it must ensure that it is interpreted to encompass the increasingly diverse religious communities and practices found within the Council of Europe.

### **3.9 Conclusion**

Although the Right to Freedom of Religion or Belief in the ECHR and ICCPR has a common origin in the UDHR, the ECtHR and HRC have interpreted the permissible limitations to this right inconsistently. This is problematic from the perspective of the universality of human rights standards and legal certainty. This chapter has identified a good faith interpretation of the Right to Freedom of Religion or Belief and has used this to analyse the approaches of the ECtHR and HRC in analogous cases.

The identified good faith interpretation reveals that the Right to Freedom of Religion or Belief was intended to restrict state interference in matters of conscience, in particular if motivated by dominant political or religious ideologies. Religious minorities were recognised to be particularly vulnerable to such interference. Consequently, the drafters envisaged that the limitations clause would be construed narrowly and that states would be required to evidence the necessity and proportionality of any restrictions with reference to the grounds provided.

While the HRC's decisions are consistent with a good faith interpretation of the right to manifest religion, this chapter has evidenced that the approach of the ECtHR is incompatible with the aims of the drafters. The ECtHR has permitted states to restrict this right without requiring evidence of the necessity of the restriction and has allowed the purpose and role of secularism to go unquestioned. Thus, the ECtHR has legitimized restrictions which seek to protect a state ideology, (i.e. the strict separation of church and state) ahead of the concrete right. In effect, this has led Christian and secular beliefs to receive a higher level of protection under Art 9 ECHR than minority religious beliefs. This is incompatible with the intentions of the drafters and the identified good faith interpretation of the right.

The adoption of a good faith interpretation is unlikely to lead to absolute conformity between the decisions of the ECtHR and HRC, especially as in cases concerning the manifestation of religion by state representatives the award of a margin of appreciation to the state can be justified. Nonetheless, in theory, it should lead to higher degree of conformity

in terms of reasoning and in the outcome of the specific cases considered in this chapter. By requiring that the ECtHR engage with the necessity of restrictions, rather than simply deferring to the margin of appreciation, it would also result in a more satisfactory process for individual applicants. However, in practice, it is highly unlikely that the ECtHR will change its pre-existing lines of jurisprudence.

There is, nonetheless, the potential for the ECtHR to adopt an approach consistent with a good faith interpretation when cases are distinguishable on the facts from those previously decided. Recent controversies have concerned restrictions on the *hijab* imposed by private employers on the basis of secularism in Belgium and France<sup>156</sup> and the wearing of long skirts by Muslim pupils in state schools in France.<sup>157</sup> This would require that the ECtHR undertake a more nuanced consideration of both the evidence provided by the state and the compatibility of secularism with the object and purpose of the right to manifest religion. Were the ECtHR not to adopt a good faith interpretation in these instances and continue to allow states a wide margin of appreciation, this would suggest that visible symbols of minority religions cannot derive any protection under Art 9 ECHR.

Although the use of the margin of appreciation may be justifiable in some instances, this should not allow state power to go unchecked, otherwise the ECtHR would not be fulfilling its role as the ‘conscience’ of Europe.<sup>158</sup> If the ECtHR is to act consistently with this mandate, it must employ evolutive interpretation to ensure the continuing relevance of the right to manifest religion to European societies. Moreover, it must protect the rights of vulnerable and even unpopular individuals despite popularist and democratic demands that their rights be restricted. (The *Refah Partisi* case, in particular, is a salient example here.) This becomes increasingly important for Section 2 of this thesis which looks to expand on Islamic jurisprudence on the Right to Freedom of Religion.

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<sup>156</sup>*Baby Loup* case Cass Ass Plén 25 June 2014, (2014) Rec D 1386; Case C-157/15 Request for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 3 April 2015 — Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV (2015) 58 Official Journal of the European Union C 205/24, 17–18; Case C-188/15 Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v Micropole Univers SA (2015) 88 Official Journal of the European Union C 221/03, 2–3.

<sup>157</sup>BBC News, ‘France outcry over Muslim schoolgirl’s skirt ban’ 29 April 2015 <<http://www.bbc.co.uk/news/world-europe-32510606>> accessed 19 September 2021 .

<sup>158</sup>Statement of Lynn Ungood-Thomas (n 77). See also Chapter 4, section 2.1.3(a) for further discussion of the margin of appreciation and its differential application in relation to majority religions.

### 3.10 Conclusion to Section 1

As Section 1 of this thesis concludes, a summary of what has been discussed so far is presented below, along with what conclusions are drawn from it.

In chapter one, a contextual framework was laid down as to the Right to Freedom of Religion's historical and philosophical origins; this included an analysis of the right's inherently religious, inherently Christian heritage as well as a tracing of the development of legal mechanisms that attempted to enshrine this right throughout European history. This is a crucial analysis as these historical forces underpin the nature of the right and its formulation, without which the subsequent chapter cannot be fully understood. The chapter also gave a vital context to the cultural forces still at play in Europe when the right is being adjudicated on, which forces continue to play a role in judgments and in the formulation of state policies on religion, secularity and plurality which are so often the backdrop to cases brought before the ECtHR and the HRC. This section also looked at the development of the right itself, its constituent parts, and why a separate right is necessary rather than, for example, subsuming it under a broader right to dignity. This chapter also looks at the history of the Right to Freedom of Religion in the context of the 'Other', and the privileging of tolerance for various forms of Christianity in Europe (and to a much lesser extent, Judaism) contrasting with the treatment of non-Christian indigenous people in European colonies. This othering continues to inform the approach taken in Europe towards non-Christian religions and their practitioners. The understanding that the Right to Freedom of Religion has a Western, European, Christian underpinning is essential to understand why, as is discussed in chapter 2, the human rights regime is not as 'secular' or as neutral as it would like to think.

Chapter 2 built on chapter 1's definition of what the Right to Freedom of Religion entails, and examines the way the Right to Freedom of Religion is interpreted and adjudicated by both the European Court of Human Rights, under Article 9 of the ECHR, and the UN Human Rights Committee under Article 18 of the ICCPR. The chapter discussed the slow beginnings and relatively slight jurisprudence that has come out as a result of cases in both jurisdictions only having been admitted since the 90s. Several cases on expression of religion were considered, in both jurisdictions, pertaining to religious headwear. The chapter considered cases taken both by Muslim women and Sikh men, as there are pertinent parallels in terms of visibility, and in terms of the non-applicability of the *forum externum/forum internum* dichotomy to Islam and Sikhism. The concept of *forum internum* and *forum*

*externum* as it pertains to the Right to Freedom of Religion and expression of religion was discussed in depth, with a conclusion being drawn that this is a false dichotomy – the internal and external domains of religious life should rather be viewed as a continuum, as there is no clear distinction between the two, and religions like Islam and Sikhism do not make this distinction. This chapter also analysed the mechanisms the ECtHR has developed in terms of human rights cases (namely subsidiarity, margin of appreciation, consensus, and pluralism) and looked at their impact on judgments, with the most consideration given to the use of the margin of appreciation.

Chapter 3 built on the framework laid out by chapters 1 and 2, and analysed the gap in interpretation between the ECtHR and the HRC on the Right to Freedom of Religion. From an analysis of comparable cases on religious headwear in both jurisdictions, it has been shown that there is significant divergence in rulings, despite the fundamental right at question being essentially identical in both jurisdictions; furthermore this divergence is significantly greater than the normal small variance one would expect between two different courts' rulings on similar cases. This was traced to two main causes; firstly, as was discussed further in Chapter 2, the ECtHR's unintentional bias towards secularity and forms of religion that fit the Protestant mode of faith expression; and secondly, a needlessly broad application of the margin of appreciation in the case of the ECtHR which has precluded the Court from a critical analysis on the necessity of limitations on freedom of manifestation of religion, which is in line with a good-faith interpretation of the right, as has been the case, contrastively, in the HRC. (It is also worth noting that, as remarked above, the diverse composition of the HRC, coupled with the established principle that 'the concept of morals should not be drawn exclusively from a single tradition' reduces the likelihood that the HRC will prioritise one ideology above others.

The implications this has for human rights is twofold. Firstly, as has been discussed in this chapter and chapter 2, the Special Rapporteurs of the UN have acknowledged the human rights system's own internal flaws, which need to be addressed; this reform must include a return to the fundamental principles of the UDHR and the *travaux préparatoires* of the ECHR and the ICCPR for there to be a meaningful re-evaluation of how the right is interpreted, taking into account that the right inherently privileges plurality over secularity. It has been shown that 'hostile secularism', as discussed in this chapter, is harmful to religious plurality and the rights of religious minorities; it has also been shown that the right requires a broad interpretation of its applicability but a narrow interpretation of limitations,



with the onus on the state to justify such limitations of the right (see section 3.1.6 above).

Secondly, given that the previous Special Rapporteurs on Freedom of Religion have commented that Islamic jurisprudence, even as it stands, has valuable legal contributions to make *per se* to the International Human Rights regime, greater understanding between the two systems can only be to their mutual benefit. Such cooperation would also serve to legitimise the International Human Rights regime in the Muslim-majority world, and it is to be hoped that Muslims and the inhabitants of Muslim-majority countries would be more amenable to engage in a human rights process that recognises them, holds them as valuable, and that has been seen to interface constructively with Muslims living in the West as relates to fundamental rights.

After section 1's analysis of the Right to Freedom of Religion under the international legal regime, section 2 will look at the right under Islamic Law. Chapter 4 explains what Islamic Law is, and explains the important difference between *Shari'ah* and *fiqh*. Chapter 4 also looks at the Qur'anic verses that have functioned as the foundational texts for the development of Islamic jurisprudence around the rights of religious minorities and freedom of religion. The development of the jurisprudence itself is traced, along with a discussion of the historical context of the early Muslim community in Saudi Arabia, which functions as a cornerstone to our understanding of the social and political forces which shaped early Islamic jurisprudence. This is to be considered a parallel with the historical and philosophical analysis of the origins of the right in Europe, as given in chapter 1. Chapter 4 also discusses the problems inherent in the jurisprudence around the right, and looks at the approaches taken by various scholars such as Baderin and Kamali to try and harmonise Islamic jurisprudence on religious minorities with International Human Rights Law. This is also contrasted with the antagonistic approach taken by Mayer et al who are of the opinion that such a harmonisation is not achievable. Further, the chapter proposes that the harmonistic approach is too surface, and that the two systems are not compatible in their present forms. However it is proposed that a reworking of the Islamic jurisprudence on the Right to Freedom of Religion is possible, based on the work of Islamic feminists, who return to the fundamental sources and do a critical analysis of the jurisprudence as compared to their texts, privileging the Qur'an and *Sunnah* where the jurisprudence does not align. It is proposed that a reformed jurisprudence that is faithful to the intent of the Qur'an, read honestly and with respect to the social context of the time it was written, will result in a more equitable and pluralistic jurisprudence that would be in a much better place to cooperate with a

reformed, pluralistic human rights regime. In this way the approach proposed in Chapter 5 for Islamic jurisprudence parallels with and works in concert with the proposal in chapter 3 for human rights.

In chapter 5, an example of reinterpretation of the Islamic jurisprudence around the Right to Freedom of Religion is given. This chapter gives a detailed, close reading of the fundamental texts of Islamic jurisprudence, with reference to several early and influential exegetes. This chapter explains that plurality, justice, and fairness are at the heart of the Qur'an and its injunctions as to religious minorities, and that the exclusionary jurisprudence that has been based on these texts is founded on wilful misreading, or interpretations that privilege the political pressures at the time of the jurists' writing over the intent of the Qur'anic injunctions. The chapter concludes by suggesting that the example reinterpretation given could function as the foundation for a more pluralistic jurisprudence that would be fit for purpose and appropriate for interfacing better and more openly with International Human Rights legislation as discussed in chapter 4.

**SECTION 2**  
**ISLAMIC LAW**

## CHAPTER 4

### Freedom of Religion and Islamic Jurisprudence

#### 4.1. Human Rights<sup>1</sup> and Islamic Law<sup>2</sup>

Traditionally, a number of difficulties confront the discourse of human rights from an Islamic legal perspective. On the one hand is the domineering influence of the ‘Western’ perspective of human rights, which creates a tendency of always using ‘Western’ values as a yardstick in every human rights discourse.<sup>3</sup> While it is true that the impetus for the formulation of International Human Rights standards originated from the West, the same cannot be said of the whole concept of human rights, which is perceivable within different human civilisations.<sup>4</sup> Related to that is the negative image of Islam in the West. Often, some of the criminal punishments under Islamic Law and the political-cum-human-rights situation in many parts of the Muslim world today are, *inter alia*, cited by some Western analysts as evidence of lack of provision for or respect for human rights in Islamic Law.<sup>5</sup> This is part of what has been termed ‘Islamophobia’<sup>6</sup> in the West, which adversely affects views about human rights in Islam generally. In the academic realm there is also what Strawson has called

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<sup>1</sup>For detailed analysis of the theory of human rights, see, *inter alia*, M Cranston, *What Are Human Rights?* (Bodley Head 1973); A Rosenbaum (ed), *The Philosophy of Human Rights, International Perspectives* (Aldwych Press 1980); JJ Shestack, ‘The Jurisprudence of Human Rights’ in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues Vol 1* (Clarendon Press 1984) 69-113; J Donnelly, *The Concept of Human Rights* (Routledge 1985); RJ Vincent, *Human Rights and International Relations* (Cambridge University Press 1986); J Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 1989); ME Winston, (ed), *The Philosophy of Human Rights* (Wadsworth 1989); CS Nino, *The Ethics of Human Rights* (Clarendon 1991); and C Douzinas, *The End of Human Rights* (Hart 2000).

<sup>2</sup>For English-language analysis of Islamic law and jurisprudence, see, *inter alia*, S Ramadan, *Islamic Law: Its Scope and Equity* (s.n. 1970); AA Qadri, *Islamic Jurisprudence in the Modern World* (Taj 1986); AAB Philips, *The Evolution of Fiqh* (International Islamic Publishing House 1988); MH Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991); WB Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997); IAK Nyazee, *Theories of Islamic Law* (Islamic Research Institute 1998); and Nyazee, *Outlines of Islamic Jurisprudence* (Advanced Legal Studies Institute 2000).

<sup>3</sup>See e.g. AE Mayer, ‘Current Muslim Thinking on Human Rights’ in AA An-Na’im and FM Deng (eds), *Human Rights in Africa, Cultural Perspectives* (Brookings Institution 1990) 133, 148 (where she asserts that human rights ‘are principles that were developed in Western culture’ and suggests that Western culture should serve as the universal normative model for the content of International Human Rights Law). Also B Tibi, ‘The European Tradition of Human Rights and the Culture of Islam’ in *ibid*, 104, 105. For opposing views see e.g. ME Said, ‘Islam and Human Rights’ [January 1997] *Rowaq Arabi* 11, 13; R Manglapus, ‘Human Rights are not a Western Discovery’ (1978) 4 *Worldview*, 4, 6; and Y Kushalani, ‘Human Rights in Asia and Africa’ (1983) 4(4) *Human Rights Law Journal* 404.

<sup>4</sup>See e.g. Kushalani (n 3 above), and J Smith (ed), *Human Rights: Chinese and Dutch Perspectives* (Nijhoff 1996) for discussions on some different perceptions of the concept of human rights.

<sup>5</sup>See P Bannerman, *Islam in Perspective, A Guide to Islamic Society, Politics and Law* (Routledge 1988) 25. See also BA Robertson, ‘Islam and Europe: An Enigma or a Myth?’ (1994) 48(2) *Middle East Journal* 288.

<sup>6</sup>See AQ Tash, ‘Islamophobia in the West’ [November/December 1996] *Washington Report on Middle East Affairs* 28; and ‘Islamophobia’ in *BULLETIN, University of Sussex Newsletter* (7 November 1997) 16.

the ‘orientalist *problematique*’ by which ‘Islamic law is represented within Anglo-American scholarship as an essentially defective legal system’<sup>7</sup>, especially with regards to international law.<sup>8</sup>

On the other hand is the obstacle of static hard-line interpretations of the *Shari‘ah* and non-relative application of traditional Islamic jurisprudence on some aspects of inter-human relations. Islamic Law or *Shari‘ah* are both sometimes vaguely advanced by some Muslim countries as an excuse for their poor human rights record without exhaustive elaboration of the position of Islamic Law of the matter.

Due to the above difficulties, the concept of human rights under Islamic Law has often been discussed from either a reproachful or a defensive angle, depending on the leanings of the discussant. Piscatori has frowned at the defensive approach of most Muslim writers in the International Human Rights discourse.<sup>9</sup> We need to determine, however, whether the defensiveness is merely an apology in the face of genuine challenges posed by International Human Rights to Islamic Law, or reasonable defence against criticisms of Islamic Law for human rights situations in Muslim countries not necessarily justifiable even under the *Shari‘ah*. On one hand, it is undeniable that Western initiatives and modern challenges, which include the International Human Rights regime, have forced contemporary Muslim thinkers and intellectuals to strongly propose a review of some traditional Islamic jurisprudential views, especially in the area of international law and relations.<sup>10</sup> On the other hand, there have also been general erroneous reproaches of Islamic Law for the sometimes appalling attitudes or actions of some governments in Muslim countries which are not justifiable under *Shari‘ah*. At the end of a seminar on Human Rights

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<sup>7</sup>See generally J Strawson, ‘Encountering Islamic Law’ (1996) 1 (ns) University of East London Law Department Research Publications 1.

<sup>8</sup>Strawson, for instance, refers to Schacht’s very well-known work, *Introduction to Islamic Law*, which omits the discussion of Islamic international law because of what Schacht described as ‘its essentially theoretical and fictitious character and the intimate connection of the relevant institutions with the history of Islamic states...’ (see J Schacht, *Introduction to Islamic Law* (Clarendon Press 1964) 112). It is difficult to imagine how international law can stand without an ‘intimate connection of the relevant institutions’ of the State. As to the excuse of ‘its essentially theoretical and fictitious character’, this was in 1964 when, even in Western discourses, public international law had its own cynics as to whether it was really law or not, but this never ostracised public international law from the law books. Such approaches to Islamic law were some of the barriers, *inter alia*, which shut out Islamic law from contemporary international law discourses. See also generally EW Said, *Orientalism, Western Conceptions of the Orient* (Routledge 1978).

<sup>9</sup>See JP Piscatori, ‘Human Rights in Islamic Political Culture’ in K Thompson, (ed), *The Moral Imperative of Human Rights: A World Survey* (Washington University Press of America 1980) 139, 152-162; see also P Manzoor, ‘Humanity Rights as Human Duties’ [July 1987] *Inquiry* 34, 37-38.

<sup>10</sup>See e.g. AA AbuSulayman, *Towards an Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (International Institute of Islamic Thought 1993).

in Islam held in Kuwait in 1980, jointly organised by the International Commission of Jurists, the University of Kuwait and the Union of Arab Lawyers, the conclusion, *inter alia*, was that:

It is unfair to judge Islamic Law (Shari'a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law.<sup>11</sup>

While the theoretical arguments concerning the conceptual foundations of human rights may be difficult to settle, the indisputable fact is that International Human Rights are today not a prerogative of a single nation. They are a universal affair that concern the dignity and well-being of every human being. However, there is yet to emerge what we may call a 'universal universalism' in International Human Rights: what exists now has been described as 'provincialism masquerading as universalism'.<sup>12</sup> While the flagrant abuse of human rights in Muslim States under the pretext of cultural differences is unacceptable, the role and influence of the Muslim world in achieving a peaceful coexistence within the international community does permit Muslim states to question a universalism 'within which Islamic law (generally) has no normative value and enjoys little prestige'.<sup>13</sup> Since human rights are best achieved through the domestic law of states, recognition of relevant Islamic Law principles in that regard will enhance the realisation of International Human Rights objectives in Muslim States that apply Islamic Law fully or partly as State law.

Conversely, there is a need for the Muslim world also to acknowledge change as a necessary ingredient in law. The adaptability of *Shari'ah* must be positively utilised to enhance human rights in the Muslim world.<sup>14</sup> While Muslims must be true to their heritage, the noble ideals of International Human Rights can shed new light on their interpretation of

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<sup>11</sup> International Commission of Jurists, *Human Rights in Islam: Report of a Seminar held in Kuwait in December 1980* (Kuwait University 1982) 7.

<sup>12</sup> Strawson (n 7) 2, and also MW Mutua, 'The Ideology of Human Rights' (1996) 36(3) *Virginia Journal of International Law* 589, 592-593.

<sup>13</sup> See AE Mayer, *Islam and Human Rights, Tradition and Politics*, (3rd ed, Westview 1999) 41.

<sup>14</sup> See AZ Yamani, 'The Eternal Shari'a' (1979) 12 *New York University Journal of International Law and Politics* 205.

*Shari'ah*, their international relations and self-awareness within the legal limits of Islamic Law.

#### 4.2. Islamic Responses In International Human Rights Discourse

Halliday has identified four classes of Islamic responses to the International Human Rights debate. The first is that Islam is compatible with International Human Rights. The second is that true human rights can only be fully realised under Islamic Law. The third is that the International Human Rights objective is an imperialist agenda that must be rejected, and the fourth is that Islam is incompatible with International Human Rights.<sup>15</sup> There is a fifth noteworthy response omitted by Halliday, which is that the International Human Rights objective has a hidden anti-religious agenda.<sup>16</sup> Viewed critically, most of these responses are Muslim reactions to what is often described as the double standards of countries at the helm of International Human Rights promotion. The responses reflect the entrapment of human rights between humanitarianism and international politics, rather than actual disagreements with the concept of human rights in Islamic Law. We will now evaluate these responses within the perimeter of Islamic Law.

The view that Islam is compatible with human rights is the most sustainable within the principles of Islamic Law. This is not merely by vaguely or apologetically reading the Western notion of human rights into Islamic principles. The source and methods of Islamic Law contain common principles of good government and human welfare that validate modern International Human Rights ideals. Respect for justice, protection of human life and dignity, are central principles inherent in *Shari'ah* which no differences of opinion can exclude. They are the overall purpose of *Shari'ah* to which the Qur'an refers:

God commands justice, the doing of good, and liberality to kith and kin,  
and He forbids all shameful deeds, and injustice and rebellion: He instructs  
you, that you may receive admonition.<sup>17</sup>

The view that true human rights can only be fully realized under Islamic Law is

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<sup>15</sup>F Halliday, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' in D Beetham (ed), *Politics and Human Rights* (Blackwell 1995) 152, 154-155.

<sup>16</sup>See e.g. E Mortimer, 'Islam and Human Rights' (1983) 12(5) *Index on Censorship* 5.

<sup>17</sup>Qur'an 16:90. (henceforth abbreviated to "Q".) See MA Baderin, 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5(2) *The International Journal of Human Rights* 72, for further analysis of the compatibility between human rights and Islamic law.

exclusionist and may be criticized for the same egoism of the criticised exclusive Western perspective to human rights. Islam is not egocentric with respect to temporal matters but rather encourages cooperation (*ta'awun*) for the attainment of the common good of humanity.<sup>18</sup> Islam encourages interaction and sharing of perception. A Tradition of the Prophet Muhammed (PBUH)<sup>19</sup> advised Muslims to seek knowledge as far away as China, (a non-Muslim country) and in another Tradition he stated that wisdom is the lost property of a Muslim and he or she is most entitled to it wherever it may be found. All these point towards the recognition by Islam of possible complementary permissible routes to the betterment of humanity in temporal matters. AbuSulayman has thus observed that: '[t]he Islamic call for social justice, human equality [equity], and submission to the divine will and directions of the Creator requires the deepest and sharpest sense of responsibility, as well as the *total absence of human arrogance and egoism, both in internal and external communication*'.<sup>20</sup>

The view that the International Human Rights regime is an imperialist agenda is not peculiar to the Islamic discourse on human rights: it is common in the human rights discourses of all developing nations.<sup>21</sup> This results from the fear of neo-colonialism, and is a psychological effect of the past colonial experience that most developing nations experienced under Western imperialism. That fear is sometimes strengthened by the Western nations' insistence on defining human rights only in the Western perspective without consideration for the contribution and understanding of other cultures. Again, this stance illustrates a socio-political anxiety rather than a question of Islam's applicability within human rights, or *vice versa*, and can be set aside for the purposes of this discussion.

If we understand International Human Rights strictly as a universal humanitarian objective for the protection of individuals against the misuse of State authority and for the enhancement of human dignity, then the view that Islam is incompatible with it is very unsustainable. That is because the protection and enhancement of the dignity of human beings has always been a principle of Islamic political and legal theory. While there may be some areas of conceptual differences between Islamic Law and International Human Rights

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<sup>18</sup>See for instance Q5:5 '...Co-operate with one another in good deeds and piety but not in sin and enmity'.

<sup>19</sup>The abbreviation PBUH which means 'Peace be Upon Him', will not be repeated in writing after this first occurrence but shall be implied as repeated after every occurrence of the Prophet's name throughout this thesis.

<sup>20</sup>AbuSulayman (n 10) 54 (emphasis added).

<sup>21</sup>See e.g. Mutua (n 12) 589-657.



Law, this does not make them incompatible. It is sometimes also argued that human beings have no rights in Islamic Law but only to submit to God's commands.<sup>22</sup> That is also misleading. While it is true that human beings are to submit to God's commands, this does not mean that they have no inherent rights under Islamic Law. The principle of legality is a fundamental principle of Islamic Law whereby all actions are permitted except those clearly prohibited by *Shari'ah*,<sup>23</sup> which means that human beings have inherent rights to everything except for things specifically prohibited. To hold that humans have no rights but only obligations to God expresses a principle of illegality, which makes life very restrictive and difficult. That will be inconsistent with the overall objective of *Shari'ah*, (i.e. *maqasid al-Shari'ah*) which is the promotion of human welfare as will be analysed later.<sup>24</sup>

Most Muslim proponents of the incompatibility view are not really opposed to the concept of human rights *per se*. Their position only reflects a disappointment with, and protest against, Western hegemony and thus against any ideology considered as championed by Western nations. They often refer to the 'double standards' of the West and the general disparity in reactions to human rights abuses under 'Islamic' and 'non-Islamic' regimes as evidence of lack of sincerity in the International Human Rights regime.<sup>25</sup> For instance one Egyptian critic, 'Ismat Sayf al-Dawla, has been quoted as denouncing the UDHR in the following words:

I must admit that I am not a supporter of the *Universal Declaration of Human Rights* that the United Nations Organisation issued on December 10, 1948. Our history of civilisation has taught us to be wary of big and noble words as the reality of our history has taught us how big words can be transformed into atrocious crimes. We cannot forget that the initiators of the *Declaration of Human Rights* and the plain French citizens are the same people who shortly afterwards, and before the ink of the *Declaration* had dried up, organised a campaign and sent their forces under the

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<sup>22</sup>See e.g. E Rajace, *Islamic Values and Worldview: Khomeyni on Man, the State and International Politics* (University Press of America 1983) 42-45.

<sup>23</sup>See Ramadan (n 2) 68. See also AI Al-Shatibi, *The reconciliation of the fundamentals of Islamic law. Volume 2* (IAK Nyazee trans, Garnet Publishing 2015); Ibn al-Qayyim, *I'lam al-Muwaqqi'in 'An Rabb al-Alamin Vol 1* (Arabic) (Dar Al-Jil 1996) 71-72; and IAK Nyazee, *Theories of Islamic Law* (Islamic Research Institute 1998) 47-50 for a brief discussion of this principle of permissibility under Islamic law, as well as the opposing *Hanafi* view of the principle of illegality.

<sup>24</sup>See section 4.3.6 below.

<sup>25</sup>For example, in nearly all human rights communiqués or resolutions adopted at every Islamic conference, the question of Palestine comes up as an issue of double standards in international relations and law.

leadership of their favorite general, Napoleon, to Egypt. We must not forget either that the United Nations Organisation issued the *Universal Declaration of Human Rights* in the same year that it recognised the Zionist state that usurped Palestine and robbed its people of every right stipulated in the *Declaration*, including the right to life.<sup>26</sup>

According to Ridwan al-Sayyid, this position ‘stems... from the contradiction between word and deed among Westerners despite the beauty and truth of the word’.<sup>27</sup> Huntington has also drawn attention to this complaint by observing that:

Non-westerners... do not hesitate to point to the gaps between Western principle and Western action. Hypocrisy, double standards and, ‘but nots’ are the price of universalist pretensions. Democracy is promoted but not if it brings Islamic fundamentalists to power; nonproliferation is preached for Iran and Iraq but not for Israel;... human rights are an issue with China but not with Saudi Arabia;...Double standards in practice are the unavoidable price of universal standards of principle.<sup>28</sup>

Finally, the view that the International Human Rights objective harbours hidden anti-religious agenda also generates some suspicion among Muslims that, having separated the Church from the State in the Western world, the West intends the same for the Muslim world and through the ‘crusade’ of International Human Rights wants to replace the Islamic faith with a new international ideology of humanism in its effort to remove religiosity totally from the world order. This, as it may seem, is not an opinion canvassed only by governments in Muslim States but even by individual Muslims whom International Human Rights are intended to protect.

This indicates the need for continuous education and practical demonstration of sincerity and genuine commitment to the humanitarian ideals of International Human Rights, especially by the ‘big’ States at the helm of human rights promotion. Bielefeldt has stressed

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<sup>26</sup>See I Sayf al-Dawla, ‘Islam and Human Rights: Controversy and Agreement’ (1988) 9 *Minbar al-Hiwar* 33, 39, cited in R Al-Sayyid, ‘Contemporary Muslim Thought and Human Rights’ (1995) 21 *Islamochristiana*, 27, 28.

<sup>27</sup>Ibid Al-Sayyid 28.

<sup>28</sup>SP Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster 1996) 184.

in this regard that human rights ‘do not pretend to serve as a trans-historic yardstick, for measuring cultures and religions generally [...] are not, and should not be presented as, an international “civil religion”’ but should be presented as shedding ‘new light on the self-perception of cultural and religious communities because, the principle of human dignity, which has roots in many cultures, serve as the foundation for human rights.’<sup>29</sup>

#### **4.2.1. Universalism in International Human Rights Law**

The question of universalism in International Human Rights Law has been very intensely debated.<sup>30</sup> It is noted however that the ‘universality of’ human rights has often generally been confused with ‘universalism in’ human rights within the International Human Rights discourse. Although the two concepts are interrelated, each refers to a different aspect of the universalisation of human rights. An appreciation of the distinction between the two concepts is very important for a realistic approach to the question of universalism in International Human Rights Law.

‘Universality of’ human rights refers to the universal quality or global acceptance of the human rights idea while ‘universalism in’ human rights relates to the interpretation and application of the human rights idea.<sup>31</sup> The universality of human rights has been achieved over the years since the adoption of the UDHR in 1948, and is evidenced by the fact that there is no State today that will unequivocally accept that it is a violator of human rights. Today, all nations and societies do generally acknowledge the human rights idea, thereby establishing its universality. However, universalism in human rights has not been so achieved. Universalism connotes the existence of a common universal value consensus for the interpretation and application of International Human Rights Law. The current lack of such universal consensus is evidenced by the fact that universalism continues to be a subject of debate within the International Human Rights objective of the UN.<sup>32</sup> Universalism is often confronted by the cultural relativist argument at every opportunity in the International Human Rights discourse. For example during the Vienna Conference on Human Rights,

<sup>29</sup> H Bielefeldt, ‘Muslim Voices in the Human Rights Debate’ (1995) 17(4) *Human Rights Quarterly* 587, 616.

<sup>30</sup> See e.g. Symposium on ‘Universalism and Cultural Relativism: Perspectives on the Human Rights Debate’ (Human Rights at Harvard Symposium, 5 April 1997) 9. See also HJ Steiner, and P Alston, *International Human Rights in Context, Law Politics Morals* (2nd edn, Oxford University Press 2000) 366.

<sup>31</sup> Linguistically the suffix ‘-ism’ denotes its system, principle, result or practice. See J Pearsall, and B Trumble (eds), *The Oxford English Reference Dictionary* (2nd edn, Oxford University Press, 1996) 746 and 749.

<sup>32</sup> See Y Ghai, ‘Human Rights and Governance: The Asia Debate’ (1994) 15 *Australian Yearbook of International Law* 11. See also generally AD Renteln, *International Human Rights: Universalism Versus Relativism* (Sage 1990); JR Bauer and DA Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999); and also J Smith, (ed.), *Human Rights: Chinese and Dutch Perspectives* (Nijhoff 1996).

representatives of some African, Asian, and Muslim States challenged the present concept of universalism in International Human Rights as being West-centric and insensitive to non-Western cultures. Prior to the conference, a group of Asian States had adopted the Bangkok (Governmental) Declaration recognising the contribution that can be made by Asian countries to the International Human Rights regime through their diverse but rich cultures and traditions.<sup>33</sup> An NGO coalition from the Asia-Pacific region had also adopted the Bangkok NGO Declaration on Human Rights promoting the emergence of ‘a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures.’<sup>34</sup> Muslim States that apply Islamic Law also often advance similar arguments in respect of Islamic Law.<sup>35</sup>

When the UDHR was adopted by the UN General Assembly in 1948 it was very clear from the outset that the human rights it guaranteed were intended to be universal. Apart from it being titled a ‘Universal Declaration’, the General Assembly proclaimed it as ‘a common standard of achievement for all peoples and all nations’. The needs to promote respect for the rights through national and international measures and to secure their universal and effective recognition and observance was also identified in the Declaration.<sup>36</sup> The UN was then constituted of only 58 Member States.<sup>37</sup> Although none of the Member States opposed the human rights idea or its universalisation, eight of them (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, USSR, Ukrainian SSR, and Yugoslavia) abstained from voting for the adoption of the Declaration due principally to interpretational differences on some of its provisions.<sup>38</sup> While the number of abstaining States may have seemed insignificant, it was no doubt a signal of the possible interpretational

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<sup>33</sup>UN General Assembly, Report of the Regional Meeting for Asia of the World Conference on Human Rights (UN Doc. A/Conf.157/ASRM/8) Preambular para 2.

<sup>34</sup>See Challenges in the Bangkok NGO Declaration on Human Rights. Reproduced in (1993) 14 Human Rights Law Journal 352, 1st para.

<sup>35</sup>See e.g. Islamic Symposium in Human Rights, *Rome Declaration on Human Rights in Islam* (2000) 1<sup>st</sup> Principle and generally MA Baderin, ‘A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1(2) Human Rights Law Review 265.

<sup>36</sup>See paragraph 8 of the Preamble of the UDHR.

<sup>37</sup>Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Belarus, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Russian Federation, Saudi Arabia, South Africa, Sweden, Syrian Arab Republic, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia.

<sup>38</sup>In particular, Saudi Arabia had objected, *inter alia*, to the interpretation of the article on religious liberty (Art. 18) and the provision on equal rights in marriage (Art.16). See UN Official Records, 3rd Committee, 3rd Session, 1948-49, Pt.120, cited in D Little, J Kelsay, and A Sachedina, *Human Rights and the Conflict of Cultures* (University of South Carolina Press 1988) 33-52.

divergence ahead of the then emerging universal human rights initiative. Renteln has observed notably in this respect that all the eighteen drafts considered for the UDHR ‘came from the democratic West and that all but two were in English.’<sup>39</sup> She concluded that ‘(t)he fact that there were no dissenting votes should not be taken to mean that complete value consensus had been achieved’.<sup>40</sup>

One of the earliest indications of the need for a universal value consensus and thus a multicultural approach to the then emerging International Human Rights initiative was given in 1947 by the American Anthropological Association in its memorandum submitted to the UN Commission on Human Rights charged with the drafting of the UDHR. The Association had stated, *inter alia*, that:

Because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be *applicable* to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?... the problem is complicated by the fact that the Declaration must be of *world-wide applicability*. It must embrace and recognise the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings.<sup>41</sup>

The above observation was calling attention to universalism in human rights because it referred specifically to the ‘world-wide (that is, universal) applicability’ of the

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<sup>39</sup>Renteln (n 32) 30; See also H Tolley, *The UN Commission on Human Rights*, (Westview 1987) 20.

<sup>40</sup>Renteln *ibid* 30.

<sup>41</sup>American Anthropological Association, ‘Statement on Human Rights’ (1947) 49 *American Anthropologist* 539. Emphasis added. See also the 1999 AAA Declaration on Anthropology and Human Rights; and K Engle, ‘From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999’ (2002) 23(3) *Human Rights Quarterly* 536 for an analysis of the two statements.

Declaration. The UN Commission seemed however to have concentrated more on the universality of human rights at that early stage and not necessarily on the means of identifying a universal value for achieving the rights guaranteed by the Declaration- that is, universalism in human rights. It is in this context of universalism (not universality) that many publicists, in retrospect, contend that were the UDHR to be readopted, it would perhaps be impossible to reach the same unanimity in today's fragmented world of more than 190 culture-conscious Member States of the UN.<sup>42</sup>

It is discernible however that emphasising universalism by the UN Commission at that early stage in 1947 could have stalled the whole universal human rights initiative. Rather, the UDHR was drafted in very general terms to secure the support of all the States despite their different cultures. The seventh preambular paragraph to the Declaration however stated that 'a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.' But since the Declaration contained no ultimate interpretative organ, the interpretation of the rights declared was, more or less, left to the individual States, each interpreting the values within its cultural context. The controversy on universalism in human rights did not fully arise until human rights had established itself as a powerful catalyst in international relations championed strongly by Western States, and Western scholarship consequently projecting human rights as a strictly Western concept subject to complete West-oriented interpretations. This was met by counter arguments advocating a culturally relative interpretation of International Human Rights norms. Thus began the contending theories of universalism versus cultural relativism within the universal human rights objective of the UN, which has resulted in a sort of paradox.

#### ***4.2.2. The paradox of universalism and cultural relativism***

The theory of universalism is that human rights are the same (or must be the same) everywhere, both in substance and application. Advocates of strict universalism assert that International Human Rights are exclusively universal. This theory is mostly advocated by Western States and scholars who present universalism in human rights through a strict Western liberal perspective. They reject any claims of cultural relativism and consider it as an unacceptable theory advocated to rationalise human rights violations. Scholars who argue that human rights were developed from Western culture also often argue that Western norms

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<sup>42</sup>See e.g. AA An-Na'im, 'Universality of Human Rights: An Islamic Perspective' in N Ando (ed), *Japan and International Law: Past, Present and Future* (Kluwer 1999) 311, 318-319.

should always be the universal normative model for International Human Rights Law.<sup>43</sup> Advocates of this exclusive concept of universalism usually seek support for their argument in the language of International Human Rights instruments, which normally state that ‘every human being’, ‘everyone’, or ‘all persons’ are entitled to human rights. While it is trite that the language of International Human Rights instruments generally supports the theory of universalism, present State practice hardly supports any suggestion that in adopting or ratifying International Human Rights instruments, non-Western State Parties were indicating an acceptance of a strict and exclusive Western perspective or interpretation of International Human Rights norms.<sup>44</sup> One may observe in this regard that Article 31(2) of the ICCPR, for instance, provided that in electing members of the Human Rights Committee ‘consideration shall be given to equitable geographical distribution of membership and to the *representation of the different forms of civilization and of the principle legal systems*’ of the State Parties. It is arguable that this recognises the need for an inclusive and multi-civilizational approach in the interpretation of the Covenant.<sup>45</sup>

The theory of cultural relativism is thus advocated mostly by non-Western States and scholars who contend that human rights are not exclusively rooted in Western culture, but are inherent in human nature and based on morality. Thus human rights, they claim, cannot be interpreted without regard to the cultural differences of peoples. Advocates of cultural relativism assert that ‘rights and rules about morality are encoded in and thus depend on cultural contexts’.<sup>46</sup> The theory emanates from the philosophy of the need to recognise the values set up by every society to guide its own life, the dignity inherent in every culture, and the need for tolerance of conventions though they may differ from one’s own.<sup>47</sup> Cultural relativism is thus conditioned by a combination of historical, political, economic, social, cultural, and religious factors and not restricted only to indigenous cultural or traditional differences of people.

A critical evaluation of both theories reveals that, on the one hand, the theory of

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<sup>43</sup>See e.g. AAD’Amato, *Collected Papers, International Law Studies Vol 2* (Kluwer 1997) 139-40; and Mayer, E.A., ‘Current Muslim Thinking on Human Rights’ in AA An-Na’im, and FM Deng (eds), *Human Rights in Africa, Cultural Perspectives* (Brookings 1990) 131, 147-148.

<sup>44</sup>Baderin (n 35).

<sup>45</sup>Emphasis added. The same provision can be found in Art. 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) on the election of the members of CERD. Also Art. 9 of the Statute of the International Court of Justice (1945) provides for ‘the representation of the main forms of civilisation and of the principle legal systems of the world’ in the election of its judges.

<sup>46</sup>Steiner and Alston (n 30) 366.

<sup>47</sup>M Herskovits, *Man and His Works* (Knopf 1950) 76.

cultural relativism is prone to abuse and may be used to rationalise human rights violations by different regimes. It admits of pluralistic inputs, which, if not properly managed, can debase the efficacy of human rights. On the other hand, the current values projected for the interpretation of International Human Rights Law by advocates of strict universalism have been criticised as purely Western and not really universal.<sup>48</sup> The present theory of universalism is itself thus criticized as being culturally relative to Western values.<sup>49</sup> That is the paradox, whereby the controversy between universalism and cultural relativism actually portrays a situation of cultural relativisms.

To most of the former colonies, Western values are essentially being used as the universal repugnancy test for the interpretation of International Human Rights Law in the same way colonial laws and customs were used in colonial periods to eliminate local laws.<sup>50</sup> The question has thus often been raised as to whether the theory of strict universalism in human rights is not another ‘form of neo-colonialism serving to strengthen the dominance of the West.’<sup>51</sup> The ideals of universalism in International Human Rights Law need therefore to be advanced in a manner that escapes charges of cultural imperialism within non-Western societies.

A supposed coherent and homogeneous notion of a ‘Western’ human rights tradition is however also misleading and must therefore be embraced with caution. It is contestable whether there is, in fact, a complete homogenised legal interpretation of human rights among ‘Western’ States. For example, there is evidence from the practice and case law of the European regional human rights mechanisms that ‘Western’ States do also differ in some cases on the scope of some human rights principles. (See chapters 2 and 3 for a full examination of this divergence within the Western human rights system *vis-à-vis* the Right to Freedom of Religion.) While there is certainly a wide area of consensus in human rights traditions among ‘Western’ States, this does not in practice always translate into a single homogeneous ‘Western’ human rights approach in relation to universalism in International Human Rights Law.

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<sup>48</sup> Mutua (n 12) 592-593.

<sup>49</sup>Ibid.

<sup>50</sup> OA Obilade, *The Nigerian Legal System* (Spectrum Law 1979) and AEW Park, *The Sources of Nigerian Law* (Sweet and Maxwell 1963) for analyses of the application of the repugnancy principle in the Nigerian legal system. See also AN Allot, *New Essays in African Law* (Butterworths 1970).

<sup>51</sup>R Higgins, ‘The Continuing Universality of the Universal Declaration’ in P Baehr et al (eds.) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Royal Netherlands Academy of Arts and Sciences 1999) 17, 19.



Universalism in International Human Rights Law demands the evolution or identification of a universal consensus in the interpretation of human rights principles. This calls for a multicultural or cross-cultural approach to the interpretation and application of the International Human Rights principles in a manner that will not reduce its efficacy but leads to the realization of an inclusive theory of universalism. The American Anthropological Association had argued in its earlier quoted comment to the Human Rights Commission that International Human Rights should ‘...not be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people’.<sup>52</sup> An-Na’im has also reiterated that ‘Any concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures.’<sup>53</sup> That argument continues to be advanced today mostly by non-Western States. There is thus a need for an objective evaluation of what every civilization can contribute to universalism in International Human Rights Law. Presumptions of cultural inferiority must be avoided and justifications on cultural differences must be examined and critically evaluated within the parameters of human dignity with a view to evolving an inclusive universalism in International Human Rights Law.

Whatever definition or understanding we ascribe to human rights, the bottom line is the protection of human dignity. There is perhaps no civilization or philosophy in today's world that would not subscribe to that notion. Thus it may only be difficult, but not impossible to evolve a universally acceptable conception in that respect. There is need for sincere and justificatory cross-cultural evaluations of human dignity with a view to evolving international moral values which no repressive regime may find easy to circumvent in the business of State governance.

#### ***4.2.3. Relevance of Islamic Law to universalism in International Human Rights Law***

The relevance of Islamic Law in the quest for an inclusive universalism that will ensure the full realization of International Human Rights in the Muslim world is, in view of the number of Muslim States in the international legal order, quite obvious. This has often been practically demonstrated by references to Islamic Law in the arguments and reports of

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<sup>52</sup>American Anthropological Association (n 41)

<sup>53</sup>AA An-Na’im, ‘What Do We Mean By Universal?’ (1994) 23 (4/5) Index on Censorship 120. See also AA An-Na’im, (n 42) 314-19.

Muslim States to UN charter and human rights treaty committees.<sup>54</sup> The general relevance of Islamic Law in international law is also demonstrated by the existence of a 'Committee on Islamic Law and International Law' amongst the international committees of the International Law Association (ILA). Notably, the Committee for instance proposed in its report after the ILA London Conference in July 2000, 'to contribute to the advancement of International Law on asylum and refugees by incorporating some aspects of Islamic Law on asylum in International Law.'<sup>55</sup>

Mayer has however observed that there is a general indifference to the Islamic tradition within International Human Rights literature and that '[q]uestions of Islamic law are only occasionally mentioned in scholarly writing on International Human Rights- for the sake of comparison with international norms or to illustrate the problems of introducing international norms in areas of the developing world.'<sup>56</sup> Thus while Islamic Law is recognised as a factor relevant to the introduction of international norms in Muslim areas of the developing world, legal scholarship on the subject has not been projected strongly enough to achieve effective harmonization of the differences in scope between Islamic Law and International Human Rights Law.

It is noteworthy however that the ILA adopted Resolution No. 6/2000 after the London Conference acknowledging that '...aspects of Islamic Law are protective of human rights' and requested its Committee on Islamic Law and International Law 'to continue its work on the contribution of Islamic Law to the development of International law by undertaking further studies, with a view of reporting on that work to the 70th conference to be held in New Delhi in 2002.'<sup>57</sup>

More than just establishing a religious and legal order, Islam is an institution of legitimacy in many states of the Muslim world. Many regimes in the Muslim world today seek their legitimacy through portraying an adherence to Islamic Law and traditions. Thus any attempt to enforce international or universal norms within Muslim societies in ignorance or disregard of established Islamic Law and traditions creates tension and reactions against the secular nature of the international regime, no matter how humane or lofty such

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<sup>54</sup>Baderin (n 35).

<sup>55</sup>International Law Association, London Conference: Final Report of the Committee on Formation of Customary (General) International Law (London, July 2000).

<sup>56</sup>Mayer (n 13) 41.

<sup>57</sup>International Law Association (n 55).

international norms may be. For example the representative of the Islamic Republic of Iran, Said Raja' i-Khorasani at the 65th meeting of the Third Committee during the 39th Session of the UN General Assembly on 7 December 1984, had argued in defence of alleged violation of human rights by his country that the new political order in Iran was:

in full accordance and harmony with the deepest moral and religious convictions of the people and therefore most representative of the traditional, cultural, moral and religious beliefs of Iranian society. It recognised no authority... apart from Islamic law... (therefore) conventions, declarations and resolutions or decisions of international organisations, which were contrary to Islam, had no validity in the Islamic Republic of Iran.<sup>58</sup>

Conversely, accommodation of Islamic Law is also often seen in International Human Rights circles as accommodating a constraint on freedoms, liberties, and human rights generally. The assumption is that it is impossible to realise human rights within an Islamic legal dispensation. For example when one of the States in the Federal Republic of Nigeria promulgated a law in 1999 for the full application of Islamic Law within its jurisdiction<sup>59</sup> many human rights groups both within and outside the country expressed fears that such application of Islamic Law would adversely constrain fundamental human rights and freedoms within the jurisdiction of the State.<sup>60</sup> Similar fears were expressed by human rights groups in 1998 when the government of Pakistan proposed a constitutional amendment Bill to its Parliament seeking to make the Qur'an and *Sunnah* the supreme law of Pakistan.<sup>61</sup> Such apprehension is believed to have also contributed to the abortion of the democratization

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<sup>58</sup>UN General Assembly, 39th Sess., Third Committee, 65th Mtg, 7 December 1984, A/C.3/39/SR.65. Note however that the Deputy Permanent Representative of Iran to the UN, Mr Ziaran, declared at the Third Committee of the 53<sup>rd</sup> Session of the General Assembly in November 1998 that: '(t)he government of the Islamic Republic of Iran is fully committed to the promotion of human rights.' This commitment, he further observed, 'is not out of political expediency rather it stems from the supreme teachings of Islam' and that 'the government of the Islamic Republic of Iran would extend its full co-operation to the human rights mechanisms' of the UN. See statement by H.E. Mr Bozorgmehr Ziaran at the Permanent Mission of the Islamic Republic of Iran to the UN Website.

<sup>59</sup>Zamfara State of Nigeria Law No.6 of 8 October 1999.

<sup>60</sup>Similar fears were raised in 1979 and 1989 during the debates on provisions for a *Shari'ah* Court of Appeal in the Nigerian Constitution. G Basri, *Nigeria and Shari'ah: Aspirations and Apprehensions* (Islamic Foundation 1994).

<sup>61</sup>Constitution (15th Amendment) Act 1998 (Pakistan). The Bill was passed by the National Assembly on 9 October 1998. But the Senate has not voted on it before it was suspended by the Musharraf regime that took power in October 1999. However, there is an Enforcement of *Shari'ah* Act of 1991 already in force, Art. 3(1) of which provides that, 'The Shari'ah, that is to say the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan'.

process in Algeria in 1992 through a military takeover, when it appeared that the Islamic Salvation Front (FIS) would emerge victorious in the overall elections. According to Bassam Tibi: ‘If the FIS were to come to power, the first measure it would have taken would have been to abolish the constitution and declare *nizam al islami* [Islamic system of government based on *Shari‘ah*].’<sup>62</sup>

While the political and legal philosophy of Islam may differ in certain respects from that of the secular international order, it does not necessarily mean a complete discord with the International Human Rights regime. Removing the traditional barriers of distrust and apathy would reveal that diversity is not synonymous to incompatibility. Mayer has observed that:

The Islamic heritage offers many philosophical concepts, humanistic values, and moral principles that are well adapted for use in constructing human rights principles. Such values and principles abound even in the pre modern Islamic intellectual heritage.<sup>63</sup>

It is those Islamic humanistic concepts and values of *Shari‘ah* that need to be fully revived for the realization of International Human Rights within the application of Islamic Law in Muslim States.

Judge Weeramantry, formerly of the International Court of Justice, has also observed in his penetrating work, *Justice Without Frontiers: Furthering Human Rights*, that although Locke, the founding father of Western human rights, never attended most of his lectures as a student at Oxford, ‘he assiduously attended only the lectures of Professor Pococke, the professor of Arabic studies.’ According to the learned judge: ‘Those studies may well have referred to Arabic political theory including the idea of rights that no ruler could take away, subjection of the ruler to the law, and the notion of conditional rulership.’ He concluded that: ‘When Locke proclaimed his theory of inalienable rights and conditional rulership, this was new to the West, but could he not have had some glimmerings of this from his Arabic studies?’<sup>64</sup>

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<sup>62</sup>B Tibi, ‘Islamic Law/Shari‘a and Human Rights: International Law and International Relations’ in T Lindholm and K Vogt, (eds), *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Nordic Human Rights Publications 1993) 75, 76.

<sup>63</sup>Mayer (n13) 43.

<sup>64</sup>CG Weeramantry, *Justice Without Frontiers: Furthering Human Rights Vol 1* (Kluwer Law 1997) 139-140.

The wide gap that still exists between the theory and reality of the universal protection of human rights<sup>65</sup> indicates that universalism in International Human Rights Law is not yet a *fait accompli*. The evolution of International Human Rights has therefore not reached the end of its history yet. With the recognition that International Human Rights Law is aimed at the enhancement of human dignity and the promotion of human welfare, it is submitted that Islamic Law rather than contradicting it, should be able to contribute to the realization of its ideals and also to the achievement of its universal observation, especially in the Muslim world. What is required, as observed by one writer, is an analysis ‘from within by a Muslim intellectual who can engage in dialogue with the traditionally educated scholars of Islamic jurisprudence’,<sup>66</sup> comparatively with International Human Rights Law in a manner that facilitates better understanding and appreciation between the two legal regimes.

### 4.3. What is Islamic Law?

Traditionally, Islamic Law is not, strictly speaking, monolithic. Its jurisprudence accommodates a pluralistic interpretation of its sources, which does produce differences in juristic opinions that can be quite significant in a comparative legal analysis. Afshari has thus argued that ‘(w)hen reference is made to “Islamic law”, a host of diverse positions... comes into the picture.’<sup>67</sup>

The complexity of Islamic Law does not however make it indeterminable. The differences of the jurists and schools of Islamic jurisprudence represent ‘different manifestations of the same divine will’ and are considered as ‘a diversity within unity.’<sup>68</sup> This depicts recognition of the inescapable pluralism that exists within human society. According to Breiner, Islam ‘refuses the temptation to find unity only in uniformity, even in matters of law’.<sup>69</sup> The appreciation of differences, Breiner continued, is an ‘important principle of Islamic law, one quite different from the assumptions of Roman law inherited throughout most of Europe’.<sup>70</sup> There is in fact an Islamic jurisprudential maxim that says:

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<sup>65</sup>JS Watson, *Theory & Reality in the International Protection of Human Rights* (Transnational 1999).

<sup>66</sup>A Sachedina, ‘Review of Abdullahi An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*’ (1993) 25(1) *International Journal of Middle East Studies*, 155, 155-157.

<sup>67</sup>R Afshari, ‘An Essay on Islamic Cultural Relativism in the Discourse of Human Rights’ (1994) 16(2) *Human Rights Quarterly* 235, 271; Lawyers Committee on Human Rights, *Islam and Justice* (Lawyers Committee for Human Rights 1997) 18, where Azziman also stated that when people talk about *Shari’ah* or Islamic law he really does not know what is meant.

<sup>68</sup>Kamali (n 2) 169, and Hallaq (n 2) 202.

<sup>69</sup>B Breiner, ‘A Christian View of Human Rights in Islam’ in B Breiner (ed), *Two Papers on Shari’ah* (Centre for the Study of Islam and Christian-Muslim Relations 1992) 3.

<sup>70</sup>*Ibid.*

‘The blessing of the Muslim community lies in the jurists’ differences of opinion’.<sup>71</sup>

Law is ultimately the product of its sources and methods, and Islamic Law is not an exception to that fact. It is important therefore to distinguish between *Shari‘ah* as the source from which the law is derived and *fiqh* as the method by which the law is derived and applied.<sup>72</sup>

#### 4.3.1. Nature of Islamic Law

There is often a traditional misconception about Islamic Law being wholly divine and immutable. This usually arises from a non-distinction between the sources and methods of Islamic Law. Distinguishing between *Shari‘ah* and *fiqh* is very significant for a proper understanding of the nature of Islamic Law. Although either of the terms ‘*Shari‘ah*’ and ‘*fiqh*’ is often referred to as Islamic Law, they are not technically synonymous.

Literally *Shari‘ah* means ‘path to be followed’ or ‘right path’<sup>73</sup> while *fiqh* means ‘understanding’.<sup>74</sup> The former refers principally to the sources while the latter refers principally to the methods of Islamic Law. In the strict legal sense *Shari‘ah* refers to the corpus of the revealed law as contained in the Qur’an and in the authentic Traditions (*Sunnah*) of the Prophet Muhammad. It differs in this sense from *fiqh* because *Shari‘ah* refers here to the primary sources of the law, which is textually immutable. *Fiqh* on the other hand refers to methods of the law, that is, the understanding derived from, and the application of the *Shari‘ah*, which may change according to time and circumstances.<sup>75</sup> In other words, *fiqh* and Islamic jurisprudence are one and the same. The significance of this distinction with respect to the Islamic Law arguments advanced here are:

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<sup>71</sup>The maxim says: ‘*Rahman al-Ummah fi Ikhtilaf al-A‘immah*.’ This indicates that the jurists’ differences of opinion in the interpretation of legal sources on certain matters offer a broad and equally legal scope from which judges may appropriately choose the most compassionate and beneficial opinion from time to time in cases before them. It was on the basis of this that the Islamic legal principle of ‘*takhayyur*’ or ‘*takhyir*’ (eclectic choice) was evolved and advocated to allow for unification or movement within the different schools of Islamic jurisprudence. NJ Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago 1969) 20-39 and Hallaq (n 2) 210. A 15<sup>th</sup> century Islamic jurist, Abu Abdullah al-Dimashqi, wrote a jurisprudential book entitled ‘*Rahmah al-Ummah fi Ikhtilaf al-A‘immah*’ in which he listed the legal consensus and dissension of the classical Islamic jurists (republished by Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon (1995)).

<sup>72</sup>MH Kamali, ‘Law and Society: The Interplay of Revelation and Reason in the Shari‘ah’ in JL Esposito, *The Oxford History of Islam* (Oxford University Press 1999) 107.

<sup>73</sup>AR Doi, *Shari‘ah: The Islamic Law* (Noordeen 1984) 2.

<sup>74</sup>In Q45:18 the word Shari‘ah is used as ‘straight path’ or ‘right way’- ‘Then We put you on a right way [*Shari‘ah*] of the affairs, so follow it...’ and the Prophet Muhammad used *fiqh* in one of his sayings to mean ‘understanding’- ‘To whomsoever God wishes good, He gives the understanding (*fiqh*) of the faith’. *Fiqh* is also used in the Qur’an to mean understanding. E.g., Q9:87; Qadri (n 2) 15,17.

<sup>75</sup>Ramadan (n 2) 36; Philips (n 2) 1-4.

1. *Shari'ah* as a source of Islamic Law is divine in nature and thus immutable, while *fiqh*, as the understanding, interpretation, and application of the *Shari'ah*, is a human product that may change according to time and circumstances; and
2. *Shari'ah* broadly covers the moral, legal, social, and spiritual aspects of the Muslims' life, while *fiqh* mostly covers the legal or juridical aspect of the *Shari'ah* as distinguished from the moral.<sup>76</sup>

Islamic Law thus consists of two component parts: (i) immutable divine revelation termed *Shari'ah* and (ii) human interpretation of the *Shari'ah* termed *fiqh*. 'Abd al 'Ati has correctly observed that 'confusion arises when the term *Shari'ah* is used uncritically to designate not only the divine law in its pure principle form, but also its human subsidiary sciences including *fiqh*'.<sup>77</sup> We will now examine the characteristics of these two component parts of Islamic Law.

#### 4.3.2. Sources of Islamic Law - Shari'ah<sup>78</sup>

The Qur'an and the *Sunnah* primarily constitute both formal and material sources of Islamic Law. Their nature as formal sources of Islamic Law emanates from their being divine and quasi-divine revelations respectively, which Muslims must religiously obey and follow. Their nature as material sources of Islamic Law follows from the fact that they contain the corpus of the revealed law. The Qur'an is the principal source and is believed by Muslims to be the exact words of God revealed to the Prophet Muhammad over a period of approximately twenty-three years for the guidance of humanity.<sup>79</sup> It is not strictly a constitutional code, but more specifically described by God as a book of guidance.<sup>80</sup> Out of its approximately 6,666 verses, which cover both the spiritual and temporal aspects of life, Muslim jurists estimate between 350 to 500 verses contain legal elements,<sup>81</sup> while according

<sup>76</sup>Note however as pointed out by Kamali that 'There is often [...] a relationship between strict compliance to a legal duty and the Islamic concept of moral excellence'. MH Kamali, *Freedom of Expression in Islam*, (Revised edn, Islamic Texts Society 1997) 27; and Kamali (n 72) 109.

<sup>77</sup>H 'Abd al 'Ati, *The Family Structure in Islam* (American Trust Publications 1977) 14.

<sup>78</sup>The approach adopted here deviates from the traditional classification of the Qur'an, *Sunnah*, *Ijma* and *Qiyas* as main sources of Islamic law, a classification which Ramadan has rightly observed, 'is by no means a decisive or authoritative one.' - Ramadan (n 2) 33. The approach here distinguishes from the sources of the law (i.e. Qur'an and *Sunnah*) from the methods of the law (i.e. *Ijma*, *Qiyas*, *Ijtihad*, etc.) to avoid the traditional misconception of the whole of Islamic law as being strictly divine and immutable.

<sup>79</sup>Q26:192 which says 'Verily this is a Revelation from the Lord of the Worlds' and Q45:2 which says 'The revelation of The Book is from God, The Exalted in Power, Full of Wisdom'.

<sup>80</sup>Q2:2 which says 'This is the Book: In it is guidance sure, without doubt, to those who fear God'.

<sup>81</sup>Kamali (n 2) 19-20, 41.

to Coulson: ‘No more than approximately eighty verses deal with legal topics in the strict sense of the term’.<sup>82</sup> This, conceivably, anticipates the application of some juridical principles to extend the few strictly legal verses to cover the dynamic and expansive nature of human life. However, those verses that may be viewed largely as moral rules also constitute the basis for every Islamic legal principle.<sup>83</sup>

The words of the Qur’an are, to Muslims, immutable and from it ‘springs the very conception of legality’<sup>84</sup> in Islam. The Qur’an forms the foundation or the basic norm of Islamic Law, the *grundnorm*, as Kelsen calls it. However, while legal texts are very significant as material sources in every legal system, their interpretation is what actually constitutes law at every point in time. (This point will be of vital importance in underpinning the arguments of this and the following chapter.) The text of the Qur’an is divine, but its application has been through human interpretation since revelation. The Prophet Muhammad (being the receiver of its revelation) was obviously in the best position to interpret the Qur’an during his lifetime, and he did so in his dual role as a Prophet and a judge. His elucidation of some verses of the Qur’an formed the initial basis of what came to be known as his *Sunnah* or Traditions.

The *Sunnah* as a source of law consists of the Prophet’s lifetime sayings, deeds and tacit approvals on different issues, both spiritual and temporal. The *Sunnah* developed from the need for elucidation, by the Prophet, of some Qur’anic verses, supply of details to some general provisions of the Qur’an and instructions on some other aspects of life not expressly covered by Qur’anic texts. Thus Imam al-Shafi’i, the eponym of the Shafi’i school of Islamic jurisprudence,<sup>85</sup> had stated that:

The Sunnah of the Prophet is of three types: first is the Sunnah which prescribes the like of what God has revealed in His Book; next is the Sunnah which explains the general principles of the Qur’an and clarifies the will of God; and last is the Sunnah where the Messenger of God has ruled on matters on which nothing can be found in the Book of God.<sup>86</sup>

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<sup>82</sup>NJ Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 12.

<sup>83</sup>Although law and morals are not fully merged in Islamic law, they are also not strictly separated as understood in the theory of positivism in Western legal philosophy. Kamali (n 72) 27.

<sup>84</sup>Ramadan (n 2) 42-43.

<sup>85</sup>The development of the Schools of Islamic jurisprudence is explained below.

<sup>86</sup>M Shafi’i, *al-Risalah* (2nd edn, Islamic Texts Society 1983) 52-53. English translation cited in Kamali (n 2) 63.



The role of the *Sunnah* as a source of law is supported in the Qur'an itself.<sup>87</sup> The Qur'an and the *Sunnah* thus formed the only sources of law from the Prophet's lifetime. Ramadan has therefore observed that 'the structure of Islamic Law – the *Shari'ah* – was completed during the lifetime of the Prophet, in the Qur'an and the *Sunnah*'.<sup>88</sup> An illustrative evidence of the Qur'an and the *Sunnah* being sources of Islamic Law from the time of the Prophet Muhammad is the well-known Tradition in which the Prophet was reported to have asked one of his companions named Mu'adh ibn Jabal, when he deployed the latter as a judge to Yemen, as to what would be his source of law in deciding cases. Mu'adh replied: 'I will judge with what is in the book of God (Qur'an)'. The Prophet then asked: 'And if you do not find a clue in the book of God?'. Mu'adh answered: 'Then with the *Sunnah* of the Messenger of God'. The Prophet asked again: 'And if you do not find a clue in that?'. Mu'adh replied: 'I will exercise my own legal reasoning'.<sup>89</sup> The Prophet was reported as being perfectly satisfied with these answers by Mu'adh, which signified an approval by the Prophet.

The general rule on the application of the Qur'an and *Sunnah* as main sources of Islamic Law is that in case of any irresolvable conflict between a verse of the Qur'an and a reported *Sunnah*, the former prevails, because of its indubitable authenticity in Islamic Law.<sup>90</sup>

*Sunnah*'s secondary role as a source of Islamic Law is seen in the tradition of *Sunnah*'s analysis with respect to authenticity and, therefore, validity. While Muslims believe generally that the *Sunnah* also has elements of divine inspiration, they appreciate that not every reported Tradition is authentic. The political differences between the fourth Caliph, Ali and Mu'awiyah in the middle of the first century of Islam, which led to the emergence of factions among the Muslims, led to the emergence of fabricated statements and distorted Traditions attributed to the Prophet.<sup>91</sup> A conscientious and critical technique of authenticating the *Sunnah* was thus developed which eventually culminated in the emergence of the six recognised and authentic books of *Sunnah* in the Sunni School in the

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<sup>87</sup>Q3:31 and Q33:21.

<sup>88</sup>Ramadan (n 2) 36.

<sup>89</sup>Abu Dawud, *Sunan Abu Dawud Vol III*, (A Hasan trans, Ashraf 1984), 1019, *Hadith* No.3585. Mu'adh is reported in this Tradition to have used the words '*ajtahidu ra'iy*' meaning 'I will exert my own reasoning' as a legal method of Islamic law.

<sup>90</sup>Kamali (n 2) 59.

<sup>91</sup>Ibid, 65-68.

third century of Islam.<sup>92</sup>

In applying a *Sunnah*, the two main questions that needs to be answered are whether the *Sunnah* is authentic and if so whether it is obligatory. The first question is basically a question of fact that is usually considered on the basis of the evidence adduced to support it in accordance with laid down criteria for the verification of Prophetic Traditions. The second question is a question of law depending, *inter alia*, on the context and language of the particular Tradition.

#### 4.3.3. *Methods of Islamic Law- Fiqh*

The passage of time and the expansion of Islam after the demise of the Prophet brought many new cases that were not directly covered by the Qur'anic texts or the Prophetic Traditions. On the authority, *inter alia*, of the Tradition of Mu'adh ibn Jabal quoted earlier above, the concept of *ijtihad* (legal reasoning) was developed as a method of Islamic Law from which later emerged the legal methods of *Ijma* (juristic consensus) and *Qiyas* (legal analogy) as well as doctrines such as *Istihsan* (juristic preference), *Istislah* or *Maslahah* (welfare), *'Urf* (custom), *Darurah* (necessity), through which the formal sources could be extended to cover new developments of life. These methods, which are usually considered as secondary or subsidiary sources of Islamic Law, were products of human reasoning, an indication of the recognition of human reasoning in the Islamic legal process from the earliest period of Islam. The methods were applied to new cases not expressly covered by the Qur'anic texts or the *Sunnah*, and also facilitated the adequate interpretation and application of those two sources to suit the different and changing circumstances of human life. Thus, while the revealed sources of Islamic Law (that is, *Shari'ah*) was completed with the demise of the Prophet, the evolved methods of Islamic Law were to be the vehicle by which the jurists would transport the *Shari'ah* into the future. In the words of Qadri, 'the jurists are emphatic in saying that though God has given us a revelation He also gave us brains to understand it; and He did not intend to be understood without careful and prolonged study'.<sup>93</sup> Careful and prolonged study helps to prevent misapplication of the methods, but it

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<sup>92</sup>The six authentic Sunni books of the collections of the Prophet's Traditions are those by al-Bukhari (d.870 AD), Muslim (d.875 AD), Abu Dawud (d.888 AD), al-Tirmidhi (d.892 AD), al-Nasa'i (d.915 AD), and Ibn Majah (d.886 AD). Muslims are divided into the two main groups of Sunni and Shi'ah. The Sunni are the majority while the Shi'ah constitute about 10 per cent of the world <sup>Muslim</sup> population. The Shi'ah group developed from a schism among the Muslims during the Caliphate of Ali. The Shi'ah also have their own different collections of the Prophet's Traditions, such as *al-Kafi*, by Abu Ja'far al-Kulayni al-Razi (d.939 AD) and *al-Istibsar* by Abu Ja'far al-Tusi (d.971 AD).

<sup>93</sup>Qadri (n 2) 199.

is worth stressing that it is an accepted tenet of Islamic Law that, while the Qur'an (and, with the caveats in section 4.3.2, *Sunnah*) are divine and perfect texts, *fiqh* is a series of processes devised by human hands, and subject to human fallibility. Therefore *fiqh* is open to evolution, reconsideration, and re-evaluation.

With the expansion of Islam and its establishment within different cultures outside Arabia, about 500 schools of legal reasoning developed in the early years. However, most of them disappeared and others merged by the beginning of the third century of Islam. Four Sunni Schools of jurisprudence survive up to the present times. They are the *Hanafi* School (prevalent in Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Iraq, and Libya), the *Maliki* School (prevalent in North Africa, West Africa, and Kuwait), the *Shafi'i* School (prevalent in Southern Egypt, Southern Arabia, East Africa, Indonesia, and Malaysia) and the *Hanbali* School (prevalent in Saudi Arabia and Qatar). Other schools of jurisprudence also emerged from within the *Shi'ah* tradition, the major ones being the *Ithna 'Ashari* or Twelvers (prevalent in Iran and Southern Iraq), the *Zaydi* (followed in Yemen), the *Ismaili* (followed in India) and the *Ibadi* (followed in Oman and parts of North Africa).<sup>94</sup>

All the schools of Islamic jurisprudence generally recognise the Qur'an and *Sunnah* as the primary sources of Islamic Law. The differences of opinion on particular matters result from their different interpretations of some Qur'anic verses and Prophetic Traditions. The different views of jurists on certain matters reflected their sensitivity to the different cultures of the different provinces within which the schools of jurisprudence flourished.<sup>95</sup> To control the divergence in interpretation of the sources and also to regulate the legal process, the jurisprudence of the established schools on both the aspects of worship (*ibadat*) and inter-human relations (*mu'amalat*) compiled in form of legal treatises became accepted as the established material sources of Islamic Law. By the tenth century it was thought that the established schools of jurisprudence had fully exhausted all the possible questions of law and that the necessary material sources of Islamic Law were fully formed.<sup>96</sup> The utilization of the doctrine of independent legal reasoning (*ijtihad*) consequently diminished and this led, by the thirteenth century, to what was termed as 'closing the gate of legal reasoning

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<sup>94</sup>G Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 2.

<sup>95</sup>A Daura, 'A Brief Account of the Development of the Four Sunni Schools of Law and Some Recent Developments' (1968) 2 *Journal of Islamic and Comparative Law*, 1.

<sup>96</sup>See K Abou El Fadl, *Reasoning with God: Reclaiming Shariah in the Modern Age* (Rowman & Littlefield 2014).

(*ijtihad*) and opening that of legal conformism (*taqlid*).’ Islamic Law thus became restricted largely to the application of the legal findings of the jurists as recorded in the legal treatises of the established schools of jurisprudence dating back to the tenth century.<sup>97</sup> This cultural shift led to Muslims being abiding by the rulings of any one of the schools of jurisprudence, but were not generally allowed to exercise independent legal reasoning on any matter. This brought a halt, or at least a slowdown, to the dynamism that had been injected into Islamic Law from its inception, and that, according to Iqbal, ‘reduced the Law of Islam practically to a state of immobility’.<sup>98</sup> Although many contemporary scholars have challenged the notion of the closing of the gate of *ijtihad*,<sup>99</sup> the legal conformism (*taqlid*) of following the rulings of the jurists of the very early period of Islam continues to this day. The jurisprudence (*fiqh*) of the established schools found in their treatises dating from the tenth century are today held as the corpus of Islamic Law and portrayed as the immutable *Shari‘ah*. In respect to which Ramadan has rightly observed that:

the invariable basic rules of Islamic Law are only those prescribed in the Shari‘ah (Qur’an and Sunnah), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the Shari‘ah and open to reconsideration...<sup>100</sup>

While legal conformism (*taqlid*) is not in itself an undesirable practice, it must be distinguished from blind conservatism that does not allow for a reflective and contextual application of classical precedents. It is a necessary methodology of Islamic Law, especially for lay persons not qualified in the science of Islamic jurisprudence. Nyazee has observed that legal conformism (*taqlid*) ‘as distinguished from blind conservatism, ...is a legal method for ensuring that judges who are not fully qualified *mujtahids* may be able to decide cases in the light of precedents laid down by independent jurists’.<sup>101</sup> That neither places unnecessary restrictions on the development of new theories of interpretation nor prevents qualified judges or jurists from exercising their own independent *ijtihad* when necessary.

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<sup>97</sup>Kamali (n 2) 114-115.

<sup>98</sup>M Iqbal, *The Reconstruction of Religious Thought in Islam* (5th edn, Institute of Islamic Culture Lahore 1951) 148.

<sup>99</sup>W Hallaq, ‘Was the Gate of Ijtihad Closed?’ in W Hallaq (ed), *Law and Legal Theory in Classical and Medieval Islam* (Variorum 1995) 3-41.

<sup>100</sup>Ramadan (n 2) 209-210.

<sup>101</sup>IAK Nyazee, (trans), *The Distinguished Jurist’s Primer, Bidayat al-Mujtahid wa Nihayat al-Muqtasid* by Ibn Rushd, Vol 1 (Garnet 2000) xxxv.

Nyazee has further observed that Islamic jurists do ‘maintain that if a person has the necessary ability, it is binding upon him to follow his own opinion...The only requirement is that he must declare his principles of interpretation so that other jurists should be able to judge his competence’.<sup>102</sup>

#### **4.3.4. *Spiritual and temporal aspects of Islamic Law***

As already observed above, the provisions of *Shari‘ah* broadly cover all aspects of human life. However, through the methods of Islamic Law the jurists have categorised Islamic Law into two broad spheres. The first sphere embodies spiritual rulings regulating religious observance and acts of worship. This is generally referred to as *ibadat* and concerns the direct relationship between an individual and God. The second sphere embodies temporal laws regulating inter-human relations and the temporal affairs of this world. This is generally referred to as *mu‘amalat* and generally promotes the realization of the common good (*ma‘ruf*) of humanity. While the jurisprudence on the spiritual aspects is considered to be fully settled and mostly unchanging, the same is not true of the temporal aspects. It is in this sphere of temporal affairs that the arrest in the dynamism of Islamic jurisprudence is greatly felt. The traditional jurisprudence (*fiqh*) of the established schools on some aspects of inter-human relations has been overtaken by the dynamic nature of human life and thus created some lacunae that must be revisited in Islamic legal and political thought.<sup>103</sup>

The need to rejuvenate the methods of Islamic Law to generate a more encompassing and realistic jurisprudence to meet contemporary challenges became evident from the nineteenth century with the intimate interaction between the East and the West. That urge continues today. The advancement and developments of modern life have affected inter-human relations in many ways which Islamic Law needs to address from contemporary perspectives. The challenges of International Human Rights Law is one of such developments. Due to the erroneous impression (both from without and from within Muslim communities) that the traditional opinions of the established schools of Islamic jurisprudence were totally immutable, Muslims were hesitant in formally accepting the need for a reappraisal of the methods of Islamic Law and of the established views of its early great jurists. Nevertheless, Islamic legal scholarship aimed at a formal, adequate and cohesive reappraisal of the methodology of Islamic Law in the light of contemporary challenges has been going on since the late nineteenth century with general contributions from many

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<sup>102</sup>Ibid.

<sup>103</sup>Hallaq (n 2) 209-210.

Muslim scholars and intellectuals.<sup>104</sup> However, the stagnation from the thirteenth century continues to eclipse the great legacy of the earliest Islamic jurists that developed Islamic Law into a most dynamic legal system from which even the West was a borrower in the Middle Ages.<sup>105</sup>

#### 4.3.5. *Scope and purpose of Islamic Law*

Today, Islamic Law continues to be formally applied in many parts of the Muslim world as interpreted by the classical *Sunni* schools of Islamic jurisprudence (with regards to *Sunni* Muslims) and the classical *Shi'ah* schools (with regard to *Shi'ah* Muslims). A static and immoderate application of some of the traditional interpretations of *Shari'ah* can however constrain the scope of Islamic Law for present times. Research shows<sup>106</sup> that the earliest Islamic jurists had utilised the methods of Islamic Law within the scope of *Shari'ah* in an evolutionary and constructive manner that prevented any unwarranted circumscription upon humans living during their times. Such evolutionary and constructive methodology is more relevant today than, perhaps, ever before.

It is important to recognise the fundamental object and purpose of *Shari'ah* (*maqasid al-Shari'ah*), which has been identified as promotion of human welfare and prevention of harm (*maslahah*);<sup>107</sup> recognising this basic principle is an integral approach for realising the proper and benevolent scope of Islamic Law. In his discussion of al-Shatibi's theory of the object and purpose of *Shari'ah*, Hallaq emphasises, *inter alia*, al-Shatibi's view that the 'original intention of God in revealing the law (is) to protect the interests of man (both mundane and religious)'.<sup>108</sup> God says in the Qur'an, 'To each among you have We prescribed a Law (*shir'ah*) and an Open Way (*Minhaj*)', that is, an approach for its application.<sup>109</sup> The *maqasid* approach of interpreting and applying *Shari'ah* is thus recognised as guaranteeing the full equity of Islamic Law.

In his analysis of the scope and equity of Islamic Law, Ramadan identified six

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<sup>104</sup>M Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Ridwa* (California University Press 1966); JJ Donohue and JL Esposito (eds), *Islam in Transition: Muslim Perspectives* (Oxford University Press 1982); Hallaq (n 2) 207-254.

<sup>105</sup>Makdisi (n 72) 290-291.

<sup>106</sup>See Martin Nguyen, *Modern Muslim Theology: Engaging God and the World with Faith and Imagination* (Rowman and Littlefield 2019)

<sup>107</sup>Al-Shatibi (n 23); and MK Masud, *Shatibi's Philosophy of Islamic Law* (Islamic Research Institute 1995) 151.

<sup>108</sup>Hallaq (n 2) 181 and 180-87 for discussion of al-Shatibi's theory of the *Maqasid al-Shari'ah* generally.

<sup>109</sup>Q5:48.

important characteristics of Islamic Law deducible from a thorough study of the Qur'an, the *Sunnah* and the works of classical Islamic jurists. They are as follows:

1. The formal sources of Islamic Law, namely the Qur'an and *Sunnah* 'are basically inclined towards establishing general rules without indulging in much detail'. This makes room for a wider application of the legal sources through the legal methods for the best benefit of humanity.
2. Qur'anic 'texts were directly meant to deal with actual events [and] Presupposition was basically excluded from' the legislative philosophy of Islamic law. This characteristic, Ramadan observes, is a method of realism which 'is apt to minimise the definite limitations imposed on human dealings', which in essence make things easier for humanity. This ties in to point no. 3, *viz*:
3. 'As a rule, everything that is not prohibited is permissible.' In explaining this rule Ramadan rightly observed that: 'Islamic Law was not meant to paralyse people so that they might not move unless allowed to. Man on the contrary, is repeatedly called upon by the Qur'an to consider the whole universe as a Divine grace meant for him, and to exhaust all his means of wisdom and energy to get the best out of it'.
4. 'Even in the field of prohibition, the Qur'an sometimes used a method which could gradually meet a growing readiness in the society where the revealed enjoinders were to be implemented.' This is the so-called principle of gradualism (*tadrij*) by which legislation was gradually upgraded in view of societal circumstances. Thus social circumstances are not overlooked in the development of the law.
5. 'All that the Qur'an and the *Sunnah* have prohibited becomes permissible whenever a pressing necessity arises.' This is based on the doctrine of necessity (*darurah*) by which all Islamic jurists generally agree that 'necessity renders the prohibited permissible'.
6. 'The door is wide open to the adoption of anything of utility, of whatever origin, so long as it does not go against the texts of the Qur'an and the *Sunnah*.'<sup>110</sup>

Apart from many other Qur'anic verses and Prophetic Traditions in support of the above characteristics of Islamic Law, the following Qur'anic verses succinctly summarises the benevolent nature of Islamic Law:

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<sup>110</sup>Ramadan (n 2) 64-73.

...For He commands them what is just and forbids them what is evil; He allows them as lawful what is good and prohibits them from what is bad. He releases them from their heavy burdens and from the yokes that are upon them.<sup>111</sup>

Thus, the overall objective and purpose of *Shari'ah* is the promotion of human welfare and prevention of harm (*maslahah*), which must always be kept in mind in both its interpretation and application as Islamic Law.

#### **4.3.6. Promotion of human welfare and prevention of harm- Maslahah**

Among the different doctrines and principles established by the founding jurists for an intelligible application of Islamic Law, *maslahah* is considered as the most viable means of bringing the ideals of Islam closer to realization for all time. Kamali has observed that:

The doctrine of *maslahah* is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government, and to help develop the much needed public confidence in the authority of statutory legislation in Muslim societies. The doctrine of *maslahah* can strike balance between the highly idealistic levels of expectation from the government on the part of the public and the efforts of the latter to identify more meaningfully with Islam.<sup>112</sup>

The doctrine was originally introduced by Imam Malik, the eponym of the *Maliki* school of Islamic jurisprudence, and later developed further by jurists such as al-Ghazali and al-Tufi of the *Shafi'i* and *Hanbali* schools respectively. The fourteenth century *Maliki* jurist, Abu Ishaq al-Shatibi, further developed the concept as a 'basis of rationality and extendibility of Islamic law to changing circumstances (and also) as a fundamental principle for the universality and certainty of Islamic law'.<sup>113</sup> It is an expedient doctrine of Islamic Law acknowledged today by Islamic legalists as containing 'the seeds of the future of the *Shari'ah* and its viability as a living force in society'.<sup>114</sup>

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<sup>111</sup>Q7:157.

<sup>112</sup>MH Kamali, 'Have We Neglected the Shari'ah-Law Doctrine of Maslahah?' (1988) 27(4) *Islamic Studies* 287, 287-288.

<sup>113</sup>Masud (n 107)

<sup>114</sup>Kamali (n 2)



The term *maslahah* literally means ‘benefit’ or ‘welfare’ and is generally used under *Maliki* jurisprudence, in a narrower sense, to express the principle of ‘public benefit’ or ‘public welfare’ and often qualified as ‘*maslahah mursalah*’ (literally meaning ‘released benefit’) when such benefit is not tied down to specific textual authority but based on consideration of collective well-being. *Maslahah* has in that sense often been understood to connote ‘*maslahah al-ummah*’, that is, the benefit or welfare of the Muslim community as a whole. However, the utilization of *maslahah* to achieve collective/communal benefit or welfare does not necessarily preclude its broader application to protect the rights and welfare of individuals. The general concept of *maslahah* also accommodates what may be called ‘*maslahah shakhsiyyah*’, that is individual benefit or welfare, to ensure the protection of human rights.

While human rights specifically aim at protecting the rights of individuals, the ultimate aim is equally to guarantee the benefit and welfare of human beings as a whole wherever they may be. Protecting the welfare of individuals does ultimately ensure communal/public welfare and *vice versa*. This makes the doctrine of *maslahah* very relevant in the discussion of human rights under Islamic Law.

In relating *maslahah* to the overall objective of the *Shari'ah* (*maqasid al-Shari'ah*), al-Shatibi, building on al-Ghazali’s theory, has advanced a three-tier hierarchical classification for the determination of its scope. On the first and highest level are those benefits considered as indispensable benefits, consisting of what has been described as the five universals,<sup>115</sup> namely: protection of life, religion, intellect, family, and property. Due to their indispensability they must not only be promoted but also protected. Some contemporary Muslim scholars equate these with fundamental rights.<sup>116</sup> On the second level are those considered as necessary benefits. These are supplementary to the first category and consist of those benefits the neglect of which may cause hardship to life, but the upholding of which does not lead to the collapse of society. They ensure accommodation of the necessary changes in life within the law and thereby make life tolerable. The third level are those considered as improvement benefits and consist of those things that improve and embellish life generally and thereby enhance the character of the *Shari'ah* generally.

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<sup>115</sup>Hallaq (n 2) 16.

<sup>116</sup>MH Kamali, ‘Fundamental Rights of the Individual: An Analysis of *Haqq* (Rights) in Islamic Law’ (1993) 10(3) American Journal of Islamic Social Sciences 340, 362.

Against the background of the nature and evolution of Islamic Law established above, the doctrine of *maslahah* is thus advocated in this study as a veritable Islamic legal doctrine for the realization of International Human Rights within the dispensation of Islamic Law. This is based on the understanding, earlier expounded, that International Human Rights has a universal humanitarian objective for the protection of individuals against the misuse of State authority and for the enhancement of human dignity. Relying on the doctrine of *maslahah* within the ample scope of *Shari'ah* in deriving legal benefits and averting hardship to the human person, as endorsed by the Qur'anic verse that: 'He [God] has not imposed any hardships upon you [humans] in religion',<sup>117</sup> is beneficial to the advancement of the thesis.

This utilization of *maslahah* in relation to the *maqasid al-Shari'ah* will accommodate the principle of eclectic choice, to facilitate movement within the principle schools of Islamic jurisprudence as well as consideration of the views of individual Islamic jurists to support alternative arguments advanced on topical issues.

Interpretations of the *Shari'ah* in the Muslim world today may be classified into the main divisions of 'traditionalist' and 'evolutionist'. The 'traditionalists' are those who see value in a tenacious adherence to the classical interpretations of *Shari'ah* as laid down from the tenth century in the legal treatises of the established schools of Islamic jurisprudence. They are also sometimes referred to as 'conservatives' or 'hardliners' due to their often strict 'back looking' adherence to the classical legal treatises and 'non-forward looking' application of the classical opinions of the founding jurists of Islamic Law. The 'evolutionists' are those who, while identifying with the classical jurisprudence and methods of Islamic Law, seek to make it relevant to contemporary times. They believe in the continual evolution of Islamic Law and argue that if *Shari'ah* must really cope meaningfully with modern developments and be applicable for all time, then such modern developments must be taken into consideration in the interpretation of *Shari'ah*. They are also referred to as Islamic liberals or moderates. They adopt a 'back and forward looking' approach in their interpretations of *Shari'ah* and a contextual application of classical Islamic jurisprudence. The scope of harmonization between Islamic Law and International Human Rights Law depends largely upon whether a hard-line or moderate approach is adopted in the interpretation of *Shari'ah* and the application of classical Islamic jurisprudence.

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<sup>117</sup>Q22:78.

#### 4.4. The Justificatory Principle

Despite the fact that human rights is now viewed more in the context of legal positivism due to the embodiment of its contents in Bills and Treaties for specificity, this does not displace morality and substantive justice as very important factors of human rights philosophy. The strongest arguments for the universality of human rights are still hinged on moral arguments and the need for substantive justice in human relationships. This involves the question of values and beliefs, which do change over time and space. This thesis examines the relevant justificatory or jurisprudential arguments in relation to the values attached to the Right to Freedom of Religion from both the International Human Rights and Islamic Law perspectives. This facilitates an in depth understanding of the areas of differences and provides a basis for the practical harmonization of the conceptual differences between International Human Rights and Islamic Law principles on the subject.

Generally, human rights is viewed in Western nations as a product of Western liberalism, which advocates values such as freedom, liberty, individualism, and tolerance. In many Muslim nations however, Western liberalism is considered as very permissive and capable of corrupting the moral values of society as prescribed by the *Shari'ah*. Conceiving liberalism and human rights as notions of total liberty and freedom of the individual to do whatever he pleases is however wrong because that will contradict the basic foundations of political and legal authority. By their nature, both law and political authority constitute some limitation upon the freedom and liberties of individuals. Perhaps, the correct perception is as stated by Locke that ‘...Liberty is to be free from restraint and violence from others, which cannot be, where there is no law: ...Freedom is not, as we are told, A Liberty for every Man to do what he lists’.<sup>118</sup> Under what has been described as the ‘fundamental liberal principle’ there only exists a kind of presumption in favour of liberty, which places the burden of proof on anyone who contends for any restriction on it.<sup>119</sup> Thus the power of the State to interfere in the actions of individuals is not completely ousted under liberal theory or within human rights but only curtailed to its legitimate necessity. The necessity of control by the political authority through law is recognised but any limitations they impose upon individual liberties and freedoms must be justifiable in accordance with the law and not be arbitrary. The justificatory principle thus establishes that restrictions upon the rights of individuals must be

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<sup>118</sup>J Locke, *Two Treatises of Government* (P Laslett ed, Cambridge University Press 1967) 324.

<sup>119</sup> GF Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996) 162-166; GF Gaus, *Value and Justification: The Foundations of Liberal Theory* (Cambridge University Press 1990).

clearly determinable and justifiable under the law in order not to violate their freedom, liberties and fundamental human rights.

Under Islamic Law the political authority owes a duty not only to the people but to God not to violate the freedom and liberties of the ruled without justification. The justificatory principle finds support from the fact that even in the Qur'an, a justifying clause usually accompanies nearly every prohibition concerning human relations. The parameter of justification within Islamic Law is thus often found within the Qur'an itself. While the text of the Qur'an is not subject to amendment, its provisions may thus be interpreted in the light of societal changes and the relevant justificatory principle within the holistic values of the *Shari'ah* in a manner that ensures that there is no deviation from its divine basis. It is with respect to this that an Islamic legal maxim states that '*tatagayyar al-ahkam bi tagayur al-zaman*' meaning that legal rulings may change with the change in time.<sup>120</sup> This applies mostly to matters concerning human interactions. It is this approach that Islamic evolutionists tend to adopt in their interpretations of Islamic legal texts. This facilitates the interpretation of the Islamic legal texts to accommodate the dynamic changes in human life. When the justifications attaching to certain legal provisions change then the legal rule may also change.

The same principle applies to the documented juristic views of the early Islamic jurists, which must be considered in the light of their justifications. An example may be cited on the northern Nigerian<sup>121</sup> case of *Tela Rijiyan Dorawa v. Hassan Daudu*<sup>122</sup> which involved a land dispute between one Dorawa, a Christian and one Daudu, a Muslim. The parties appeared before an Upper Area Court in Sokoto, each calling a witness in evidence. Dorawa called another Christian, John, as witness while Daudu called another Muslim, Hausa, as his own witness. The Upper Area Court after reviewing the evidence before it, rejected the testimony of John because he was a Christian on grounds that the evidence of a non-Muslim was not acceptable under Islamic Law. Judgment was thus entered in favour of Hasan Daudu. Dorawa appealed to the Sokoto High Court. The learned High Court judge, himself a Muslim, in consultation with the then Grand Kadi of Sokoto State,<sup>123</sup> allowed the appeal and

<sup>120</sup>MT Al-Ghunaimi, *Durus fi Usul al-Qanunal-Wadai* (Arabic) (1961) 150, cited in Al-Ghunaimi, M.T., *The Muslim Conception of International Law and the Western Approach* (Nijhoff 1968) 101.

<sup>121</sup>Nigeria has a multi-religious population with Muslims in the majority, and it operates a pluralised legal system consisting of English common law, Islamic law, and customary law.

<sup>122</sup>*Tela Rijiyan Dorawa v. Hassan Daudu* [1975] Northern Nigerian Law Report, 87.

<sup>123</sup>The Grand Kadi of a State in Nigeria is the most senior Islamic law judge within the state's judiciary. He is the head of the *Shari'ah* Court of Appeal of the State.

overturned the ruling of the Upper Area Court. The High Court relied on the Islamic legal principle of eclectic choice which allows reliance on the opinions of other Islamic schools of jurisprudence, and also cited Islamic legal literature to illustrate that the traditional reason for the disqualification of the testimony of non-Muslims by classical Islamic jurists was the fear of their being unjust due to their lack of Islamic belief, and that their evidence was acceptable when there is no such fear or in case of necessity. The Court was said to have ‘regarded the condition of Nigeria today being a country with large Muslims, Christian and animist communities, living side by side and transacting business with each other, as satisfying the necessity’ making the evidence of a non-Muslim admissible in Islamic Law.<sup>124</sup>

#### **4.5. Different Approaches to the Relationship between Human Rights and Islamic Jurisprudence**

In a world that has become increasingly interconnected due to economic and social globalisation and the migration of not only people but ideas, across countries and continents, it is no longer possible to talk of a ‘Muslim world’ as we have done in the past. With vast numbers of non-Muslims living in Muslim majority states and conversely, large numbers of Muslim minority communities living in non-Muslim states, it is not practical to isolate Muslims from non-Muslims.<sup>125</sup> In fact, barring a few exceptions, hardly any society can be classified as being ‘closed’ and the pre-modern Islamic concept of ‘*dar al-islam*’ (an area that accommodates only Muslims as citizens)<sup>126</sup> no longer exists. Even a nation-state like Saudi Arabia that claims to have a 100% Muslim population does not have only Muslims residing within its borders. More than 30% of Saudi Arabia’s population is made up of immigrants<sup>127</sup> who adhere to many different religions and faiths, therefore, to say that it is a ‘*dar al-islam*’ is inaccurate. Thus, rulings based on Islamic Law must take into account the diverse communities of different religious backgrounds sharing the same space in ‘Muslim’ countries.<sup>128</sup>

It is consequently natural that with such rapid increase in migration across the world, the proliferation of knowledge regarding human rights norms and International Human Rights Law has also become widespread. Therefore, to say that the concept of ‘human rights’

<sup>124</sup>Hon. Justice U Mohammad, ‘Shari‘ah and the Western Common Law: A Comparative Analysis’ in MO Abdul-Rahmon, *Thoughts in Islamic Law and Ethics* (University of Ibadan MGA 1992) 16, 25.

<sup>125</sup>Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Ashgate 2003)

<sup>126</sup>Ibid 169.

<sup>127</sup>The World Factbook, Central Intelligence Agency, <<https://www.cia.gov/the-world-factbook/countries/saudi-arabia/>> accessed 21 September 2021.

<sup>128</sup>Saeed and Saeed (n 125) 169

is an inherently ‘Western’ one (i.e. Christian) is not only outdated but, as Donna Arzt explains, also deeply patronising.<sup>129</sup> Elaborating on her point, Arzt elucidates that,

to insist – as Islam’s Western apologists often do – that international human rights norms do not apply to Muslims is to adopt a patronizing, racist stereotype that Muslims are barbaric and inferior to Westerners, ‘undeserving’ of international law’s protection or that Islam is monolithic and that repression is the Muslim norm.<sup>130</sup>

Therefore, just like in any other system (religious or otherwise), ‘unprecedented interaction and pluralism’<sup>131</sup> has brought about a need for Islamic scholars to reevaluate the way Muslims interpret religious principles, in particular, those concerning religious freedom ‘relevant to today’s multi-religious and multicultural world.’<sup>132</sup> As Saeed and Saeed rightly explain, ‘The reaffirmation of pre-modern laws developed for a different time, place and circumstance is not particularly helpful or practical.’<sup>133</sup>

#### ***4.5.1. Freedom of Religion and Rights of Minorities within Islamic Law***

Many modern Islamic scholars have intimated that the principles of religious liberty as espoused in the Qur’an share common foundations with Western conceptions of religious liberty (as illustrated in Article 18 of the ICCPR).<sup>134</sup> Hashim Kamali has gone on to stress that the Islamic context of freedom is like that in any other context, that it is inherently individualistic.<sup>135</sup> ‘Individualistic’ for Kamali means that the Islamic conception of freedom is designed first and foremost to defend and protect the basic dignity of a human being against society and state. According to Baderin,<sup>136</sup> the trend amongst contemporary Islamic scholars to reach such conclusions is based on the following Qur’anic provision found in Chapter 2 Verse 256 in *Surah Baqarah*;

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<sup>129</sup>Donna Arzt, ‘Heroes or Heretics: Religious Dissidents under Islamic Law’ (1996) 14 Wis. Int’l L.J. 349

<sup>130</sup>Ibid.

<sup>131</sup>Saeed and Saeed (n 125) 169

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

<sup>134</sup>Abdulaziz Sachedina, ‘Freedom of Conscience and Religion in the Qur’an’ in David Little, John Kelsay and Abdulaziz Sachedina (eds), *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (University of South Carolina Press 1988).

<sup>135</sup>MH Kamali, ‘Freedom of Religion in Islamic Law’ (1992) 21 Cap. U.L. Rev. 63

<sup>136</sup>MA Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003)

**There is no compulsion in religion:** truth stands out clear from error; whoever rejects evil and believes in God has grasped the most trustworthy handhold that will never break, and God hears and knows all things.<sup>137</sup>

Baderin goes on to state, in tandem with this Qur'anic principle of no compulsion, that although the Islamic state has a duty to promote Islam (as a religion), it is not allowed to force anyone to accept it. In fact, as per Baderin, an Islamic state has an obligation to prevent the denial of freedom of belief by those who wish to curtail it.<sup>138</sup> Ann Elizabeth Mayer, also citing the same Qur'anic provision, says that the principle of religious tolerance features prominently in Islamic tradition.<sup>139</sup> In fact, Kamali furthers his argument by stating that the creed of Islam 'must' uphold the freedom of belief in order to remain true to its own beginnings.<sup>140</sup> Ironically, this is the very argument presented by the representative of Pakistan during the drafting of the UDHR against objections of other Muslim states at the inclusion of the right to change ones religions or belief.<sup>141</sup> The irony, of course, being that the Pakistani representative to the United Nations at the time was Sir Muhammad Zafarullah Khan, an Ahmadi Muslim- he sadly lived long enough to see Pakistan declare Ahmadis to be non-Muslims in 1974 due to their heterodox Islamic beliefs.

A lot of the arguments presented hereinabove of different contemporary Islamic scholars reveal a leaning towards the idea that there is no tension between Islamic Law and human rights. A 'harmonistic' point of view might seem to be emerging. However, when we move away from discussing religious freedom in general terms as a principle enshrined in Islamic Law, towards more specific concerns such as rules regarding apostasy, heresy, and proselytization, we encounter certain problems. Throughout the Muslim world, people considered to have offended Islam or Muslim sensibilities are heavily persecuted. This persecution is not limited to non-Muslim religious minorities – minority Muslim faith communities are also persecuted thus. Whilst Muslim countries are repeatedly admonished for persecuting their non-Muslim populations, many times it is Muslims themselves who face dire consequences for their personal religious beliefs. Countries such as Malaysia have harsh and regressive laws regarding apostasy, heresy, and blasphemy which stipulate punishments for 'offences' ranging from declaring oneself non-Muslim (having been born Muslim) to

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<sup>137</sup> Q2:256, emphasis added.

<sup>138</sup> Kamali (n 135) 120.

<sup>139</sup> AE Mayer, *Islam and Human Rights: Tradition and Politics* (4th edn, Westview Press 2007)

<sup>140</sup> Kamali (n 135)

<sup>141</sup> Baderin (n 136) 119.

‘worshipping wrongfully’ and ‘teaching false doctrine’.<sup>142</sup> As Mayer puts it, such laws are ‘a curb on the religious freedom of Muslims- not only on their freedom to convert from Islam but also on their freedom to follow a particular version of Islamic teachings.’<sup>143</sup> The extreme consequences of such laws were seen when in 1985, Mahmoud Muhammad Taha, leader of the Sudanese Republican movement and Islamic reformer, was executed for being a heretic and apostate. Taha’s liberal and egalitarian interpretation of Islam did not sit well with the ruling (and religiously conservative) elite and he was soon declared an apostate. Taha’s execution did not generate enough discussion at the time, despite proving to be ‘an apostasy case that presaged others as Islamization increased the pressures for ideological conformity’<sup>144</sup> but it framed an entire generation of scholarly thinking, with An-Na’im’s works being the most informative.

As Abdullahi An-Na’im explores, when it comes to the concept of apostasy (i.e. formal disaffiliation from or renunciation of a religion – in this case, Islam), traditional Islamic Law ‘is inherently in contradiction with more universally accepted standards of constitutional civil liberties and international human rights.’<sup>145</sup> He explains this by examining the two primary sources of Islamic Law, the Qur’an and *Sunnah*. An-Na’im argues that although the Qur’an mentions apostasy in several verses, nowhere does it explicitly provide any earthly penalty for the crime. Even Mayer notes that no verse in the Qur’an stipulates any earthly penalty for apostasy and all verses categorically reveal punishment to be by God in the Hereafter.<sup>146</sup> An-Na’im then goes on to explain that the punishment for apostasy that jurists have concluded is unequivocally death, is actually derived from *Sunnah*. He bases this on two examples of prominent Traditions of the Prophet, often quoted by those in favour of death as a penalty for apostasy. The first example is of when the Prophet said, ‘The blood of a fellow Muslim should never be shed except in three cases: That of the adulterer, the murderer and whoever forsakes the religion of Islam.’ The second (and most popular) *Hadith* is when the Prophet was reported to have said, ‘Whosoever changes his religion, kill him.’ However, many scholars explain that these traditions are read out of context and must be examined for what they were meant to be – punishments for rebellion against the state or political treason. Baderin argues

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<sup>142</sup>Perry S Smith, ‘Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Syariah Law’ (2004) 10(2) U.C.Davis Journal of International Law & Policy 357.

<sup>143</sup>Mayer (n 139) 170.

<sup>144</sup>Ibid 185.

<sup>145</sup>AA An-Na’im, ‘The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan’ in M Baderin and AA An-Na’im (eds), *Islam and Human Rights: Selected Essays of Abdullahi An-Na’im*, (Ashgate 2010).

<sup>146</sup>Mayer (n 139) 168.



that ‘apostasy simpliciter’ (an individual denouncing Islam without any element of political rebellion) is only described as attracting severe punishment in the Hereafter and that there is no tradition of the Prophet that compelled sentencing anyone to death for ‘apostasy simpliciter’.<sup>147</sup> S.A. Rahman, former Chief Justice of Pakistan, has also contended that there is nothing in the Qur’an or *Sunnah* that makes apostasy against Islam an actionable offence in the absence of some positive rebellion against the Islamic state.<sup>148</sup> Furthermore, Mohammad Imam has gone on to state that the aforementioned controversial *Hadith* (i.e., those who disbelieve, kill them) should be viewed as furtherance of the administration and protection of the Islamic state in its embryonic stage due to its variance with Qur’anic verses.<sup>149</sup>

Other arguments put forward against taking the aforementioned *hadith* as definitive proof for the death penalty as punishment for apostasy are that the *hadith* in question is not reliable as it is a solitary tradition (*ahad*) or that there is weakness in its transmission (*isnad*).<sup>150</sup> (These are two of the standard methods of analysis in Islamic jurisprudence when assessing the validity or standing of a particular *Sunnah*.) More so, as argued by Baderin and Kamali (which is the most common argument taken by scholars against the death penalty for apostasy) is that ‘apostasy simpliciter’ is not a ‘*hadd*’ offence at all (i.e. one that has a prescribed punishment in the Qur’an)<sup>151</sup> and is instead a *tazir* offence (the punishment of which has been left to the discretion of the judge or *Qazi*).<sup>152</sup> Interesting to observe at this point is that almost all contemporary Islamic scholars (specifically those cited hereinabove) do not present any arguments for there being no punishment for apostasy at all. Perhaps this is because, as per traditional Islamic Law, apostasy does not only invoke punishment in the form of death but in instances where it is not carried out for some reason (if it is a female apostate, for example), the apostate suffers a ‘civil death’ (loses all property rights, marriage is dissolved, etc.).

However, by arguing along these lines, Islamic scholars such as Baderin and Kamali (amongst many others), are essentially arguing within an extremely ‘harmonistic’ perspective- one that views the misunderstanding between human rights and Islamic Law as

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<sup>147</sup>Baderin (n 136) 124.

<sup>148</sup>SA Rahman, *The Punishment of Apostasy in Islam* (Kitab Bhavan 1996).

<sup>149</sup>Mohammad Imam, ‘Freedom of Religion under Federal Constitution of Malaysia- A Reprisal’ (1994) 2 Malay. Current Law Journal lvii, lxxix.

<sup>150</sup>Baderin (n 136) 124.

<sup>151</sup>Kamali (n 135).

<sup>152</sup>Baderin (n 136) 124.

superficial and having been developed through misinterpretation of Islamic Law. They aim to resolve any perceived differences between the two regimes from within Islamic Law itself by citing verses from the Qur'an or Traditions of the Prophet that are in consonance with International Human Rights Law.

An-Na'im thinks otherwise. By referring to scholars prescribing to the harmonistic perspective, An-Na'im states that, 'With all due respect to the effort put into the argumentation of both positions, it is still inconsistent with religious freedom to maintain the negative civil law consequences of apostasy today.'<sup>153</sup> An-Na'im, following the teachings of his mentor, Mahmoud Muhammad Taha, holds the view that there needs to be an entirely new reading of the Qur'an, keeping in mind the radical transformation of today's world since the time of revelation. He proposes that the verses revealed during the Meccan stage of revelation (which were heavily based on principles of freedom, equality, and personal responsibility) which were subsequently abrogated from the legal point of view (or rather, as popularly believed to be by jurists) by the Medina verses focused on *jihad*, administration, and discrimination against non-Muslims and women, should be reinstated as the superior legal authority.<sup>154</sup> Therefore, An-Na'im essentially calls for the development of the original principles of Islam as found in the Qur'an (of which verse 2:256 as discussed hereinabove is a prime example) as the basis of modern day *Shari'ah*.

Some may argue that An-Na'im appears to represent an entirely different point of view from that of the scholars discussed under the harmonistic perspective and therefore follows a more adversarial perspective. There may be some merit to this considering that An-Na'im believes traditional Islamic Law as interpreted by pre-modern as well as modern jurists is inherently antithetical to International Human Rights Law. This is not only evident from his discussion on apostasy laws but also from his hypothesis regarding rights of religious minorities.<sup>155</sup> Unlike Baderin and Kamali, he does not contend that the disconnect between Islamic Law (as understood today) and human rights law is merely perceived and can be resolved through Islamic Law as it stands, from within the tradition, with tweaks to misconceived interpretations. He truly believes that the disconnect is real and exists and cannot be solved merely through the religion as it is (*status quo*), but that the religion can and should be re-evaluated in line with today's egalitarian norms.

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<sup>153</sup>An-Na'im (n 145) 216.

<sup>154</sup>Ibid 204.

<sup>155</sup>Abdullahi A. An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9(1) Human Rights Quarterly 1.

However, it is contended here that despite the variance in An-Na'im's approach to Islamic Law and human rights, he does not believe (as should be the case when the term 'adversarial' is used) that harmonisation of the two regimes is not possible. An-Na'im does not propose that Islam in itself is inherently anti-freedom of religion (or any other freedoms, for that matter). His approach may not prove to be popular amongst most Muslims around the world who view Islamic Law as divine and therefore untouchable, and therefore, may never be implemented (or at least not in the near future with the current socio-political climate around the world), but it is still employing religion as a tool for change. He is not proposing secularism as the answer (just as his mentor Mahmoud Taha had not). Therefore, it may be safe to conclude that An-Na'im sits on the same spectrum of the harmonistic perspective as do Baderin and Kamali, however, perhaps just a little farther away from them, and with a reconstructivist outlook.

Another scholar mentioned previously, Ann Mayer, although confirming that the Qur'an does not stipulate any earthly punishment *per se* for apostasy, takes a slightly different view than Baderin and Kamali when it comes to freedom of religion and Islam. In order to analyse the two and their relationship, she cites verse 109:6 of the Qur'an, from *Surah al-Kafirun* which she says can mean 'unbelievers', 'infidels', or 'atheists'. Either way, she believes the very word '*al-Kafirun*' has "strong negative connotations":<sup>156</sup>

Say: O disbelievers [al-Kafirun] I worship not that which ye worship; Nor worship ye that which I worship. And I shall not worship that which ye worship. Nor will ye worship that which I worship. Unto you your religion, and unto me my religion.

Mayer argues that *Surah al-Kafirun* 'contemplates a division between Islam and "unbelief".' She goes on to say that although the aforementioned verse does lay 'the groundwork for coexistence [it] does not attempt to establish any principle of freedom of religion comparable to that found in international human rights documents.'<sup>157</sup> Furthering this argument, Mayer says that in the event that we were to ascertain that a right was being implied in the aforementioned Qur'anic verse, 'it is the right to follow one's own religion, which in a *shari'a*-based system would be a right accorded only to Muslims.'

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<sup>156</sup>Mayer (n 139) 179

<sup>157</sup>Ibid.

However, Mayer's argument is not as simplistic as to only take one verse out of the Qur'an (that too a verse that does not expressly stipulate anything remotely discriminatory, only becoming so if interpreted the way Mayer does) and come to the conclusion that Islamic Law as a whole is incongruent to International Human Rights standards. Mayer is a vociferous critic of the human rights abuses committed by Muslim countries in the name of religion. She has repeatedly called out Muslim governments and regimes that use arguments of cultural relativism to suppress their Muslim and non-Muslim populations alike and deny them their rights by invoking Islam as the reason for doing so. In this situation as well, Mayer has done just that. Despite acknowledging the arguments of many progressive Islamic scholars that put forth a harmonistic point of view, and finding merit in them, she is wary of accepting them without qualifications (proven by the example of her synopsis and understanding of the verse from *Surah al-Kafirun*). However, Mayer is very clear about where she puts the blame. Believing that 'it would be simplistic to blame Islam *per se* for these outcomes' and that policies of such regressive regimes 'have little to do with mandates of Islamic law', Mayer states that it would be 'fairer to assess these serious violations of religious freedom as the result of official policies that have exacerbated religious tensions and polarized religious communities.'<sup>158</sup> Therefore, although Mayer can most certainly not be considered a proponent of the harmonistic perspective when it comes to the freedom of religion in Islamic Law and International Human Rights Law, it would not be fair to call her entirely adversarial either.

What starts to emerge at this point is a continuum of scholarly approaches towards Islam's compatibility with International Human Rights Law. On one end of the spectrum sits what one might call the 'harmonistic' school of thought – scholars like Kamali and Baderin whose scholarship is predicated on the notion that Islam has an inherent compatibility with Human Rights, which is based on interpretations of Qur'an and *Sunnah* that support human and religious freedoms that parallel fairly well to human rights as laid down in International Law. The second school of thought could be classed the 'adversarial' school, exemplified by scholars such as Mayer. Mayer's approach, as will be discussed below, is that Human Rights Law and Islamic Law are inherently incompatible, and though she acknowledges the core tenets are geared towards human freedoms and dignity, she considers them far too removed from modern conceptions of human rights. The discussion above on apostasy is a good

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<sup>158</sup>Ibid 192

example of the ways in which Mayer considers Islamic doctrines to be insurmountably incompatible with International Human Rights norms. An-Na'im sits somewhere in the middle of this spectrum, with his earlier work in which he is more critical of Islamic jurisprudence aligning him more with Mayer, and his later scholarship being more in line with a harmonistic understanding of Islamic jurisprudence.

Without detracting from the extremely valuable and influential scholarship of the abovenamed, the gap left by either approach – indeed, with this spectrum - is that both Islamic Law and International Human Rights Law are analysed in their current forms, as they stand, without much consideration given to whether the current *status quo* of the International Human Rights framework or Islamic jurisprudence have deviated from their original intent. This is the gap this thesis hopes to address, building on the work of the aforementioned scholars. This chapter outlines a third approach, which considers firstly whether the current state of Islamic jurisprudence is aligned with its foundational principles and ‘constitutional texts’, so to speak, before engaging with comparisons and comparative analyses with regards the legal systems.

Having discussed the various scholarly opinions on apostasy, it is important to consider the effects the laws on heresy and proselytization have on the right to freedom of thought, conscience and religion. However, this is where the inextricability of the rights of minorities (specifically religious minorities) from the said rights of freedom of religion et al. comes into play. Heresy, by definition, is the act of holding an opinion or following a doctrine that is at variance with the orthodox or accepted doctrine- just as Mahmoud Taha was declared a heretic for his unorthodox views on Islam and was executed for it. Proselytising is to induce someone to convert to one's own religious faith. Islam is itself an inherently proselytising religion as it heavily incorporates the concept of *Da'awah* or bringing non-believers within the fold of Islam. Where it becomes problematic, however, is when the rights of a non-Muslim to preach to a Muslim are in question. It becomes even more complicated when the rights to proselytise of those considered heretics are considered. As Mayer states, ‘the rules for the treatment of religious minorities are relevant not only for persons who are avowedly non-Muslim but also for persons within the Muslim community who may suffer discrimination and abuse due to their sectarian affiliations.’<sup>159</sup>

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<sup>159</sup>Ibid 150.

In explaining the compatibility of Islamic Law of minority rights with International Human Rights Law, Baderin explains that when we consider the three specific justifications for the protection of minority rights<sup>160</sup>, namely peace, human dignity, and culture, Islam acknowledges and gives importance to all three.<sup>161</sup> He goes on to state that Islamic Law recognises and fully appreciates the ethnic, linguistic, and religious rights of all people and cites as an example the important fact that none of the Muslim-majority state parties to the ICCPR have entered any reservations against Article 27.

An-Na'im, however, disagrees. He very categorically asserts that 'Non-Muslim minorities within an Islamic state do not enjoy rights equal to those of the Muslim majority.'<sup>162</sup> He goes on to say that those scholars who say otherwise, misrepresent the *Shari'ah* in order to minimise the seriousness of discrimination faced by non-Muslims (or heterodox Muslims). He relates this to traditional Islamic Law concerning the law of *dhimmi*- the special political status given only to 'People of The Book' or the *ahl al-kitab* (i.e. Christians and Jews). *Dhimmi*, An-Na'im contends, may practice their faith in private, according to *Shari'ah*. However, they are not allowed to proselytise their faith in public despite being actively encouraged to adopt Islam instead. Furthermore, according to An-Na'im, under traditional Islamic Law, unbelievers were to be killed on sight unless they officially took temporary refuge in a *dar al'islam*.<sup>163</sup>

An-Na'im does not claim that these principles govern non-Muslims in Muslim majority countries today. However, he does contend that Muslim majority states will continue to abuse the rights of religious minorities within their borders unless and until it is accepted that such principles do theoretically remain in place. He contends that Muslim-majority states will continue to use arguments of cultural relativism to suppress minority communities for as long as they believe traditional *Shari'ah* confers on them the right to do so. In this way, even in terms of rights of religious minorities, An-Na'im furthers the perspective he proposed for freedom of religion *vis-à-vis* apostasy.

Mayer is also wary of those who argue in favour of the 'natural affinity between Islam

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<sup>160</sup>Athansia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (Martinus Nijhoff, 1997).

<sup>161</sup> Mashood Baderin, 'Islamic Law and International Protection of Minority Rights in Context' in M Frick and ATh Müller (eds), *Islam and International Law: Engaging Self-Centricism from a Plurality of Perspectives* (Brill 2013).

<sup>162</sup>An-Na'im (n 155) 1.

<sup>163</sup>Ibid 12.

and the tenets of International Human Rights Law’ and the belief that ‘the principle that full equality for all citizens is compatible with Islam’.<sup>164</sup> Presenting examples of such scholars, she states that their arguments are ‘not always fully developed’ and in fact, appears to support An-Na’im’s point of view that calls for the rethinking of the applicability of certain legal rules, in this case, mandating ‘an end to all discrimination on a religious basis.’<sup>165</sup>

Therefore, both An-Na’im and Mayer, despite the moderately harmonistic tendencies of their work where it concerns the Right to Freedom of Religion, have a much more adversarial approach to Islamic Law concerning the rights of religious minorities. They do not believe that the rules are inherently compatible and have merely been lost in translation, so to speak. Both An-Na’im and Mayer acknowledge that there are serious and deep rooted flaws in the way *Shari’ah* approaches religious minorities and as long as there is denial about said flaws, flagrant abuses perpetrated by Muslim majority states against their minority populations will continue.

#### 4.6 Conclusion

If both the international system of human rights legislation, and *Shari’ah*’s current system of Islamic jurisprudence are so flawed, how can we drive towards a complementary understanding of the two approaches to human rights? This thesis suggests, perhaps somewhat counterintuitively, that the flaws and *lacunae* discussed above provide a pathway to that reconciliation.

The flaws in the International Human Rights regime have been acknowledged by legal scholars, as discussed in chapters 2 and 3. This is an inevitable result of the human rights legal framework being a product of its time, of the particular cultural and religious forces driving the codification of an ancient, pan-human urge towards tolerance and pluralism, as Section 1 of this thesis discussed.

Parallel to this state of affairs, in this chapter we have discussed the state of affairs in Islamic jurisprudence as regards human rights, and the stagnation of Islamic jurisprudence in this field generally. It has been shown that this stagnation is not Qur’anically-mandated, but in an interesting parallel to the UN system, it is rather a product of historical forces and political expediency – and in both cases these political expediencies are beginning to exceed

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<sup>164</sup>Mayer (n 139) 153.

<sup>165</sup>Ibid.

their use-by date as the world changes and politics evolve.

It is proposed in this thesis that, were these failings addressed, the dead wood pruned and new shoots brought forth, so to speak, we would find ourselves with two reformed conceptions of human rights systems that would be inherently much more compatible and much more receptive to each other. Such a root-and-branch reform of either system would not be easy, and one can imagine the significant pushback from those content with or benefiting from the *status quo*, but from a legal standpoint it is arguably necessary and certainly doable if enough backing and political weight were put behind the project.

An important aspect of this thesis is that such a re-evaluation of Islamic jurisprudence on religious minorities does not require any woolly, wishful-thinking reworkings of the Qur'an, nor ignoring uncomfortable parts of Scripture for the sake of concessionism. It is rather being put forward that the necessary foundational materials regarding religious minorities are already to be found in the Qur'an, and that a fresh approach to Islamic jurisprudence from a legal standpoint, with an eye to pluralism, inclusivity and justice, will bring this forth.

A note on the approaches discussed in this chapter – it is worthwhile highlighting what the difficulties are with the two different approaches to comparing Islam and Western human rights, as outlined in this chapter. To take the harmonist approach first: the issue with harmonists like Baderin, Kamali, et al is that their scholarship almost acts like apologia for everything that is wrong in Islam and in Muslim societies. This is not to say that they condone the human rights abuses in these societies – they absolutely don't; furthermore Mashood Baderin especially has been a part of the UN system for some time and is a champion of it. The difficulty rather lies with what appears to be a very uncritical way of thinking about the two systems. The harmonist school insists that both legal systems are essentially and inherently harmonious, and there is no deeper difficulty. They contend that it is politics and cultural misunderstandings that lead to Islam being applied and understood in a way that is contrary to human rights. But the contention that both systems are inherently fine is problematic, as analysed in this and the preceding two chapters. Furthermore, there appears to be an inherent bias in the harmonist approach towards the International Human Rights system – there is an assumption (challenged in Chapter 2 of this thesis) that it is a neutral system and a good system to aspire to; it assumes Islamic Law should *want* to harmonise with human rights. And much ink has been spilled attempting to prove it does.



On the other hand, antagonists like Mayer (and, safe to say, white non-Muslim scholars more generally) tend only to focus on the fact that there is a problem with Islam when it comes to human rights. They are not wrong when they point it out – there is indeed a problem, and Mayer herself has done vital work documenting human rights abuses and infringement of Ahmadi rights in Pakistan, for example, at great length. But the problem the antagonist school runs into is that it fixates on the fact that these systems are so inherently in opposition to each other that it's a futile exercise to try and see any common ground. What this misses out as an approach is the possibility that the common ground could be sought for any other purpose than validating Islam. To be sure, Islam doesn't need validation – it's an ancient, global institutionalised religion, and will not live or die on scholarly commentary! What this common ground is necessary for is for affecting change in the actual lived experiences and lives of religious minorities, both Muslim and not, in Muslim-majority countries, whose rights are violated using the *pretext* of Islam. So when this thesis suggests a rereading, it is not doing so for the glory of Islam or to pander to Human Rights, because as discussed in Section 1, the International Human Rights legal framework, and its interpretation of the Right to Freedom of Religion is incredibly flawed, and disadvantages those it sought to protect.

With this in mind, the point of this thesis is to find an approach that neither panders to the International Human Rights framework, nor to Islam. The point, in fact, is in the work chapter 5 undertakes, to provide a way forward, with a new approach to building an authentic Islamic jurisprudence on the question of Human Rights. This new approach is predicated on the ultimate authority of Qur'an and *Sunnah* in Islamic jurisprudence, but also taking historical context into account with the aim of making even difficult passages more intelligible for the modern world. In that respect this thesis isn't doing anything incredibly new or radical: it is merely doing for the Right to Freedom of Religion what Islamic feminists and Black Muslim Liberation theologians have been doing in other areas – rereading the Qur'an and prioritising it over existing *fiqh*. (There is a risk at this point that it may sound like this thesis is proselytising for the Qur'anists – it isn't!)<sup>166</sup>

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<sup>166</sup> Ahmed Subhy Mansour, 'Why The Qur'anists are the Solution: A Declaration' in Emran El-Badawi and Paula Sanders (eds), *Communities of the Qur'an: Dialogue, Debate and Diversity in the 21st Century* (Oneworld 2019).

## CHAPTER 5

### The Qur'an and the Other: Toward a New Understanding

#### 5.1 Introduction

This chapter further expands on the argument advanced in chapter 4 that Qur'anic interpretation and jurisprudence as it stands is not compatible with Western ideals of religious freedom. In order to provide a solution to this apparent disconnect, this thesis proposes a reinterpretation of the rights of religious minorities and their religious freedom as found in the Qur'an. This chapter will do this by going back to the source, i.e. the Qur'an itself, to provide context and a re-evaluation of the various Qur'anic edicts on the subject. This chapter will look at traditional exegesis in order to further expand this thesis. However it is important to point out that this examination is not meant to be a theological debate or a debate centred around Islamic studies – this thesis suggests a new way to read and understand an existing textual source, i.e. the Qur'an, for the purposes of proposing a new method of legal reasoning. This thesis does not position itself in a way as to provide legitimacy to one jurisprudential source or even one jurisprudential school of Islamic thought over another – as mentioned in chapter 4, that is part of the rationale of looking at the Qur'an and *Sunnah* as the basis for this reinterpretation, since all schools of thought equally accept these texts' validity. In the spirit of this thesis, that is a matter between a believer and their faith. This thesis confines itself to a legal analysis and hopes to provide a blueprint for the way Muslim-majority countries can use 'source material' to further advance and protect the rights to religious freedom of religious minorities within their borders.

The Qur'an presents a universal, inclusivist perspective of a divine being who responds to the sincerity and commitment of all His servants. From this, two questions arise. Firstly, how is it that traditional Qur'anic interpretation presents a parochial image of a deity that does not differ from that postulated by the Medinan Jews and Christians, a view denounced by the Qur'an itself? This is an image of a deity who belongs to a small group of people and who, having chosen His favourites, turns a blind eye to the sincere spiritual and social commitments of all others outside this circle. Secondly, how does the universality of the Qur'an's message relate to exclusivist readings of the Qur'an, which are positioned as being antagonistic and even hostile towards the Other – most evidently when the concept of *jihad* is being talked about.

It would be fair to think from the above paragraph that this thesis suggests the Qur'an has an inclusivist message, but its interpretations are exclusivist, and that the interpretations are what Otherise the Other. Whilst this is one element of the thesis statement, if we were to take this to be a blanket statement for the entirety of the Qur'an, this thesis would start aligning with the harmonistic approach taken by certain contemporary Islamic scholars, as expounded upon in the previous chapter. This thesis in fact proposes to go a step further in our understanding of the Qur'an and religious pluralism. It is important for the purposes of honesty, and for a proper understanding of the analysis below, to accept that certain Qur'anic verses do indeed exhort a hostile relationship with the religious Other and do seek to limit certain activities of religious minorities (and even of Muslims) that under modern human rights postulates we would consider necessary for the fulfilment of the right to freedom of religion in its entirety. This is where the other part of this thesis (as will be discussed in this chapter) becomes important: the historical and social context of the Qur'an must be taken into account. The fact is the Qur'an is very much a text of its time. This doesn't challenge the divinity of the Qur'an, or the Muslim belief that the Qur'an is for all time and will be valid throughout history. Rather, what this does suggest is that the Qur'an was revealed to a politically vulnerable community, at a certain point in time when armed struggle was considered necessary. (Frankly, the continued existence of war suggests that perhaps some aspects of life haven't changed all that much in the intervening centuries.)

Secondly, the Qur'an originates in a time before the concept of the modern nation-state, when relationships between people were not delineated on the basis of citizenship or residency, but rather accorded on lines of religious faith and familial or tribal affiliation. These are important contexts to consider – the interpretation that this thesis provides is not meant to excuse, ignore or even read away the difficult passages of the Qur'an, that don't sit comfortably with modern human rights ideals of pacifism and plurality. But it is proposed that these passages do not take away from the universalistic, inclusivist, and pluralistic message that is found in the Qur'an as a whole. Which is exactly why this thesis suggests going back to this foundational text and reading it with a new angle, considering its contexts and how that informs what the text tries to impart to the reader.

Much of the Qur'an's discussion of the religious Other is framed around several categories of non-Muslim that are laid out in the Qur'an, and verses regarding the Other are both framed by and understood through these categories. It is important at the outset then,

to recognise that these categories of the religious Other as discussed in the Qur'an (which are explained in great detail under section 5.2 later on in this chapter) are not necessarily fit for purpose in today's world. This is an essential acknowledgement for the reinterpretation proposed later in this chapter. One of the categories discussed later, in section 5.2.1, is the People of the Book. While that term will be explained in more detail, who the People of the Book are does not explain communities of atheists, or even agnostics for example. It also doesn't take into account the many different denominations of Christianity which are now recognised as valid religions, purely because they didn't exist in the 7th century CE at the time of revelation. It is indeed very possible that their teachings would not conform to conceptions of Christianity of that time. Judaism too exists in multiple formations today that bear little resemblance to Jewish communities during the life of Muhammad.

The other category that receives substantial reference in the Qur'an is the *mushrikun* (which will be discussed under section 5.2.2). This category doesn't fully capture the many nuances of the variety of polytheistic religions extant in the world. Idolatry is indeed forbidden in explicit terms in Islam, and so to try and align Islam with present-day Hinduism, for instance, is always going to be a task beyond the harmonistic approach. But as section 5.2.2 discusses, it might be fair to say that *mushrikun* too is now an outdated category. Not only does it not cover any possibilities of New Religious Movements, (many of which are monotheistic and in principle might actually conform with a lot of Islamic teaching – Baha'is for instance) but it also doesn't take into account more settled and accepted religions, like Sikhism, which are also monotheistic, and as many have argued, have a lot in common with Islam. So with non-Muslim religious communities in the modern world causing the Qur'anic categories of the other to strain at the seams, this Qur'anic ontology faces an entirely new challenge when considering minority Muslim communities, who are considered outside the fold of Islam by majority sectarian groups – Ahmadi or Ismaili Muslims, to name but two. Minority Muslim communities are some of the most marginalised groups in Muslim-majority countries at the present time, and Qur'anic edicts are always used to validate the perception of them as outcasts, heretics, and communities beyond the pale. This is a very real category of people whose existence is not acknowledged or understood by the aforementioned categories within contemporary interpretations of the Qur'an.

If, then, we accept that these categories have become outdated, but also wish to respect the Islamic belief that the Qur'an is valid for all time, we must find a new way of understanding these categories. This will be undertaken in section 5.2 as we consider these

categories in light of the social context of Mecca and Medina during the life of Muhammad, and consider them in terms of power and socio-political forces.

While the context of individual verses dealing with the religious Other is often carefully recorded by the earlier interpreters, they do not show any understanding of the overall historical context of a particular revelation.<sup>1</sup> The task of shedding historical light on various texts, has until recently, been primarily the domain of non-Muslim scholars. Muslim reluctance to deal with the question of contextualization beyond the search for an isolated occasion of revelation, has led to a generalized denunciation of the Other, irrespective of the socio-historical context of the texts used in support of such rejection and damnation.

The Qur'anic position towards the Other unfolded gradually in terms of the Other's varied responses to the message of Islam and to the prophetic presence. Any view to the contrary would invariably lead to the conclusion that the Qur'an presents a confused and contradictory view of the Other. For those unable or unwilling to see the gradualist and contextual nature of Qur'anic revelation, there have been two ways of dealing with the problem of 'contradictory texts' regarding the Other: liberal Muslim scholars (like Baderin and Kamali) have often just ignored the verses denouncing the Other, while traditionalist and conservative scholars have resorted to what can only be described as forced linguistic and exegetical exercises to compel inclusivist texts to produce exclusivist meanings, as will be discussed in section 5.4.

The idea of the gradual and contextual development of the Qur'anic position towards the religious Other has significant implications. Firstly, one cannot speak of a 'final Qur'anic position' towards the Other and, secondly, it is wrong to apply texts critical of non-Muslims in a universal manner to all those who one chooses to define as 'People of the Book' or 'disbelievers', in an ahistorical fashion. It is not that the traditional exegetes are incapable of examining the context of a particular verse and thereby limiting its application. The

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<sup>1</sup>In a study of al-Tabari's treatment of Christianity and Christians, Charfi, for example, laments the 'little sense that there is of any development or gradation in the Qur'anic position towards the Christians from the earliest Meccan verses to the final Medinan ones' (A Charfi, 'Christianity in the Qur'an Commentary of Tabari. (1980) 6 *Islamochristiana* 105, 145). Nor, indeed is there any sense of the context or social location of the exegete. 'Aside from the mention of the intellectual lineage to which an individual author pays respect', observed McAuliffe, 'it is frequently difficult to determine from internal evidence alone whether a commentary was written in Anatolia or Andalusia, whether its *mufassir* [commentator] had ever seen a Mongol or a Crusader or had ever conversed with a Christian, or ever conducted business with one' Jane Dammen McAuliffe, *Qur'anic Christians: An Analysis of Classical and Modern Exegesis* (Cambridge University Press 1991) 35.

problem is that this contextualization is only done when the Qur'an refers to the Other in positive terms. In such cases every attempt is made to limit its meaning and application. Most traditional scholars, for instance, insist on limiting the generosity of the more inclusivist texts to a particular individual such as the King of Abyssinia, who gave refuge to an early group of Muslims, or 'Abd Allah ibn Salam, a Jewish convert to Islam. (early childhood memories of watching this exact scene in the Hollywood film *The Message* (1976) come to mind!)

Beliefs and behaviour are not genetic elements, like the colour of one's eyes, in supposedly homogeneous and unchanging communities. It is to guard against the injustices of such generalizations that texts critical of other religious communities or the associationists are usually followed or preceded by exceptions (e.g., Qur'an 3:75). Furthermore, qualifying or exceptive expressions such as 'from among them',<sup>2</sup> 'many among them',<sup>3</sup> 'most of them',<sup>4</sup> 'some of them'<sup>5</sup> and 'a group among them',<sup>6</sup> are routinely used throughout the Qur'anic discourse on the Other.

The Qur'an provides only the basis for the attitude of Muslims towards the Other at any given time in history. The Qur'anic position, in turn, was largely shaped by the varying responses of the different components of the Other, to the struggle for the establishment of an order based on *tawhid* (justice) and *Islam*. More often than not, these responses assumed concrete political forms in decisions to side with or against the Muslim community. Much of the Qur'anic criticism is directed at the way doctrine was used to justify exploitative practices and tribal chauvinism. It is not as if the Qur'an avoided the discourse on power or denounced the exercise of political power; it was concerned about whom political power served and who suffered as a consequence of it. It follows then that legal readings of the Qur'an must take these power dynamics into account when formulating new jurisprudence that relates to topics of exploitation, Othering, and power based around in-group/out-group structures.

## 5.2 How does the Qur'an describe the Other?

The following are the most frequent of the expressions used in the Qur'an to refer to

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<sup>2</sup>Q3:75.

<sup>3</sup>Q2:109; 5:66; 22:17; 57:26.

<sup>4</sup>Q2:105; 7:102; 10:36.

<sup>5</sup>Q 2:145.

<sup>6</sup>Q3:78.

various types of people in general religious terms: *mu'minun*, 'righteous'; *muslimun*, 'People of the Book', 'Jews', 'Christians', 'associationists'; *kafirun/kuffar* and *munafiqun*.

1. The terms usually used in translation are often, at best, approximations of their Arabic meanings. The Qur'an, for example, does not use the equivalent of the words 'non-Muslim' or 'unbeliever'; yet these are the most common English renderings of *kafirun/kuffar* both in the process of translation and internal usage within the Arabic language.
2. Some of these terms, such as *mu'minun* (literally, 'the convinced ones') and *muslimun* (literally, 'submitters') or 'People of the Book' and 'Christians' or 'Jews' are frequently used interchangeably in the Qur'an. It is essential to maintain the Qur'anic distinction in their various uses in order to avoid a generalized and unjust condemnation of the Other.
3. In addition to these nouns, the Qur'an also employs descriptive phrases such as *alladhina amanu* (literally, 'those who are convinced') instead of *mu'minun* and *alladhina kaffaru* (literally, 'those who deny/ reject/ are ungrateful') instead of *kafirun* (literally, 'deniers'/'rejectors'/'ingrates'). These descriptive phrases express specific nuances in the text and indicate a particular level of faith conviction or of denial/rejection/ingratitude.
4. References to these groups are occasionally to a specific community within a historical setting and, at other times, to a community in a wider sense, transcending one specific situation.
5. Besides the terms of criticism such as *kafir*, *munafiq* (hypocrite)<sup>7</sup> and *mushrik* (which can be understood to mean 'polytheist' or one who attributes other gods to God), the other terms are rarely used in a negative or positive manner without exceptions. While praise or reproach are usually inherent in some of these terms, this is not without exception. Indeed, the Qur'an, at times, describes the reprehensible acts committed by some of those who are among the Muslim or believing community as *kufir* or *shirk*.<sup>8</sup>
6. These terms are often, but not always, used in the sense of a historico-religio-social group. The hypocrites and righteous were invariably referred to as individuals and

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<sup>7</sup>This term is mostly used in the Qur'an to describe those inhabitants of Medina who had outwardly accepted Islam, but were suspect for various reasons. They were unreliable during times of crises (Q 33:12-14), avoided participation, financial or physical, in *jihad* (Q 47:20-31) even looked forward to the time when the Prophet would be expelled from Medina (Q 63:8).

<sup>8</sup>Q 39:7.

the term *Muslim* and its various forms, for example, is also frequently invoked to refer to the characteristic of submission in an individual, group or even an inanimate object.

### 5.2.1 *The People of the Book: 7th-Century Politics and the Categories of the 'Other'*

As a result of the political situation in 7th century Arabia and the Qur'an's own internal objectives of affirming *tawhid* as part of the legacy of faith that includes Judaism and Christianity, the Qur'an devotes considerable attention to the *mushrikun* (a concept discussed fully in 5.2.2) and the People of the Book as two distinct categories. When Muhammed and his group of followers, the 'Emigrants' or 'Exiles', arrived in Medina in 622, they found its inhabitants comprised mainly of Arabs and Jews.<sup>9</sup> Aws and Khazraj, the two major Arab tribes, lived in the desert areas of Yathrib, later renamed Medina. Aws lived in the area of al-'Awali (the high places) alongside the Jewish tribes of Qurayzah and al-Nadir. The Khazraj lived in the lower and less fertile areas of Yathrib, where they were the neighbours of another prominent Jewish tribe, Banu Qaynuqa. The vast majority of Aws and Khazraj converted to Islam and key figures among them had, in fact, invited the Prophet to come to Medina to assume the leadership role over them after their intermittent tribal wars.

In Medina, where Muhammad became the leader of a cosmopolitan society, the Jewish communities played a significant economic, political and intellectual role. The Jews, frequently the power brokers of Arabian tribes, from whose regular intertribal wars many political gains were made, comprised twenty-odd tribes. The most prominent of these were Banu Qurayzah, al-Nadir, and Qaynuqa. Together with Banu Awf and Banu al-Najjar, both Jewish tribes, they owned some of the richest agricultural lands in the south of Medina. Khaybar, however, was the largest centre of Jewish concentration in the north of Hijaz, between Yathrib and Taymah. The strategic distribution of Jewish power centres ensured their control of large areas of fertile land for development. These centres were thus fortified and amply provided with weapons. Prior to the coming of Muhammad, as Ahmad notes, the Jews enjoyed complete liberty, 'concluded offensive and defensive alliances and carried on

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<sup>9</sup>The question of whether the Jewish communities were Arabized Jews or Judaized Arabs has not been resolved. These communities were possibly founded by refugees who fled from Palestine after Jerusalem was destroyed by Nebuchadnezzar in 586 BCE (JJ Saunders, *A History of Medieval Islam* (Routledge 1965, reprinted 1982) 11). 'They were Arabic in language, in many customs and in aspects of their social organization, and were clearly not subject to Talmudic discipline. And yet, if they were originally Arabs, any consciousness of such relationship had evaporated in consequence of their having absorbed a Jewish exclusivist outlook. They felt themselves quite different from the Arabs among whom they lived and had erected a self-sufficient barrier around themselves' (J Spencer-Trimingham, *Christianity among the Arabs in pre-Islamic Times* (Longman 1979) 249).



feuds'.<sup>10</sup> Narrow tribalism characterised intra-Jewish relations 'so much so that they could not live as one religious group [nor] close ranks even at the time of the Prophet when they faced banishment'.<sup>11</sup> On the whole, the Jewish tribes denied the veracity of Muhammad's mission and his claims to prophethood.

Soon after he entered Medina, Muhammad twinned all the Exiles with their hosts, known as the 'Helpers', in a formal relationship of fraternity. This reflected the basis of the new society: faith rather than tribe. The relationships between the Exiles and the Helpers and between the Muslims and Jews were formally outlined in a document 'forming all of them into a single community of believers but allowing for differences between the two religions'.<sup>12</sup> Also known as the Treaty of Medina, the authenticity of this document is widely acknowledged, although there is disagreement as to whether it is a single agreement or a combination of two or more agreements reached over a long period<sup>13</sup>. It is evident that at the initial stages of his stay in Mecca, Muhammad had no prejudices against the Jews. On the contrary, as Maxime Rodinson remarks 'he regarded the contents of the message he brought as substantially the same as that received years ago by the Jews on the Sinai'<sup>14</sup>. The following extract from the Treaty indicates how questions of freedom of belief, sanctity of religious and personal property and obligations of mutual defence and solidarity were dealt with: 'The Jews of Banu Awf will be a community with the *mu'minun*; the Jews shall have their religion and the Muslims theirs, their allies and their persons shall be safe except for those who behave unjustly, for they hurt but themselves and their families'<sup>15</sup>.

The fraternal relationship between Aws and Khazraj had made the old alliances between them and their former Jewish allies redundant. Despite the Treaty they had entered into with Muhammad, the Jews, nevertheless, longed for a return to their position of influence and authority. Muslim accounts suggest that this resentment was sufficient to lead many Jews, initially secretly and later openly, to identify with the Quraysh (the tribe of Arabs to which Muhammad belonged, and who were the political ascendancy at the time) in their desire to annihilate Muhammad and his followers. Subsequent Jewish breaches of the Treaty, usually on the eve of, or during a war with, the Quraysh, or alleged attempts on the life of

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<sup>10</sup>Barakat Ahmad, *Muhammad and the Jews: A Re-Examination* (Vikas Publishing House 1979) 27.

<sup>11</sup>Akram Diya al-Umari, *Madinan Society at the time of the Prophet* (Huda Khattab trans, Institute of Islamic Thought 1991, 2 vols) 44.

<sup>12</sup>Martin Lings, *Muhammad: His Life Based on the Earliest Sources* (Allen and Unwin 1983) 125.

<sup>13</sup>Maxime Rodinson, *Muhammad* (Pantheon Books 1980) 152; al-Umari (n 11) 99-102.

<sup>14</sup>Ibid Rodinson 158

<sup>15</sup>Cited in al-Umari (n 11) 107.

Muhammad, led to the expulsion of Banu Qaynuqa, Banu al-Nadir and Banu Qurayzah from Medina.<sup>16</sup>

Another religious community who were, in the main, physically absent from Medina but were, nevertheless, a significant part of the Muslim-Other Qur'anic discourse, were the Christians. Muhammad had encountered Christians as religious ascetics on his travels as a businessman,<sup>17</sup> as slaves and visiting traders in Mecca and even as neighbours in Medina. Prior to their presence in Medina, Muslims encountered and enjoyed the protection and hospitality of an established Christian state and found among them 'the best of neighbours'<sup>18</sup> during the first and second flights of exile in Abyssinia. All of these early Muslim encounters with the Christian Other were characterised by warmth towards and affirmation of the Muslims by the Christians. Much later, Christians were included in the Qur'anic injunction to 'fight against those who believe not in Allah, nor in his Last Day, nor forbid that which has been forbidden by Allah and His messenger and who do not acknowledge the *din* (faith) of truth among the People of the Book until they pay the tax with willing submission and feel themselves subdued'.<sup>19</sup> This contrasts remarkably with Christian understandings of themselves as seen in Islam: at best a tolerated minority in Muslim communities, at worst an antagonistic opponent.

Theologically though, much of the early Muslim understanding of Christianity and Christology seems to have filtered through to the Muslims in an indirect manner from the Jewish community, until much later, when a delegation of religious leaders from the Christians of Najran in southern Arabia, north-east of Yemen, came to Medina in 632 CE. According to Muslim accounts, most of the discussion centred around seemingly theological matters. These accounts also suggest that the major factor that prevented the Najran delegation from recognising Muhammad's prophethood was their indebtedness to their

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<sup>16</sup>Although tensions between the Jews and the Muslims were evident for some time before the Battle of Badr (624), the first time that Muhammad acted against the Jews was immediately after this battle when Banu Qaynuqa was expelled for allegedly plotting the assassination of Muhammad. Banu al-Nadir and Banu Qaynuqa were expelled subsequent to their alleged collaboration with the enemy at the Battle of Uhud (625) and the Trench (627) respectively. The last Jewish stronghold, Khaybar, fell to the Muslims in 628 after a long siege in response to their alleged incitement of the Meccans to restart hostilities against the Muslims. For two very different perspectives on the fate of Banu Qurayzah subsequent to the Battle of the Trench, see al-Umari (n 11) vol 1, 134-8; and Ahmad (n 10) 67-94.

<sup>17</sup>The most widely known of these encounters is with a Syrian monk whom Muslims have come to know as Bahira. He was supposed to have predicted that Muhammad was destined to become a Messenger of God. Muhammad Ibn Sa'd, *Ibn Sa'd's Kitab Al-Tabaqat Al-Kabir* (S Moinul Haq trans, Pakistan Historical Society 1967, 2 vols) vol 1, 146.

<sup>18</sup>Ibid 235-40.

<sup>19</sup>Q.9:29.

political masters, who opposed Muhammad. Explaining his refusal to acknowledge the Prophet, the bishop is reported to have told his companions: ‘The way these people have treated us! They have given us titles, paid us stipends and honoured us. But they are absolutely opposed to him [Muhammad], and if we were to accept him, they would take away from us all that you see’<sup>20</sup>. The delegation prayed in Muhammad’s mosque and entered into an agreement with him whereby he would send a capable Muslim to them to assist in the arbitration of some internal disputes. Furthermore, taxes would be exacted from them in return for receiving protection from the Muslim state.<sup>21</sup> It is interesting to note here the porousness between the two faith-based communities, as this has been subsequently lost in the jurisprudence that developed in the following centuries.

The tension in the religious-ideological relationship between the Muslims and the People of the Book was inevitable: The Qur’an claimed an affinity with scriptural tradition, and furthermore, claimed to be its guardian. An unwelcome response was inevitable on the part of those who claimed their scripture to be legitimate and final, in and of themselves. Much of the Qur’an’s attention to the Other in Medina is, therefore, devoted to this tension. The frequency of the Qur’anic references to the People of the Book and their shared scriptural history are among the reasons why most Muslim literature dealing with the Other focuses on the People of the Book. There are several other reasons for the preoccupation with this category. Since most of the *mushrikun* converted to Islam after the liberation of Mecca (630), at the earliest stages of its history, Jews and Christians were essentially the only communities that early Muslims and their jurisprudence had to deal with. The historical encounters over territory (both ideological and geographical) was also largely between Muslims and Christians. In the modern period, as Muslims are struggling to overcome the divisions of the past and to find avenues of coexistence and cooperation with those of other faiths, they find it theologically easier to focus on a category with which the Qur’an seems to have some sympathy. Finally, the present pre-eminence of the Western world – itself a product of predominantly Christian heritage – in the fields of technology, science and politics, requires some Muslim focus on relations with the People of the Book, even if only as one way of coming to terms with the fact of this pre-eminence and its roots in Imperialist colonialism – a colonialism that in fact encompassed most if not all of the modern Muslim-

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<sup>20</sup>Abu Muhammad Ali Ibn Hisham, *Sirah Rasul Allah*, as cited in F Esack, *Quran, Liberation & Pluralism: An Islamic Perspective of Interreligious Solidarity Against Oppression* (Oneworld 1997).

<sup>21</sup>The agreement, *inter alia*, stated that ‘no bishop will be displaced from his bishopric, no monk from his monastery and no testator from the property of his endowment’ - Ibn Sa’d (n 17) vol 1, 419. This community survived for at least two hundred years after the death of Muhammad – Spencer-Trimingham (n 9) 307.

majority nation-states, from Sudan to Saudi Arabia to Malaysia.

There are however, several problems in focusing on the People of the Book as a distinct contemporary religious group in the belief that this is the same referent as that in the Qur'an. The Qur'anic position towards the People of the Book and even its understanding as to who constitutes the People of the Book went through several phases. There is, however, agreement that the term has always applied to the Jews and Christians whom Muhammad encountered during his mission. The Qur'an naturally dealt only with the behaviour and beliefs of those of the People of the Book with whom the early Muslim community were in actual social contact.<sup>22</sup> To employ the Qur'anic category of People of the Book in a generalised manner of simplistic identification of all Jews and Christians in contemporary society is to avoid the historical realities of Medinan society, as well as the theological diversity among both earlier and contemporary Christians and Jews.<sup>23</sup> This also reveals an uncomfortably tenuous assumption in traditional jurisprudence on religious minorities which does treat the People of the Book as an abstract category, encompassing all Jews and Christians for all time, without regard to the social context. Even within that understanding, this category can no longer apply to Christians as a whole given the large number of denominations that have proliferated through the centuries. To avoid this unjust generalisation, therefore, requires a clear idea from their sources of their beliefs, as well as their many nuances, that characterised the various communities encountered by the early Muslims. Given the paucity of such extra-Qur'anic knowledge, one would either have to abandon the search for a group with a corresponding theology today or shift one's focus to

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<sup>22</sup>The history, stages and nature of this encounter have been dealt with extensively by both traditional and contemporary scholarship, Muslim as well as non-Muslim. Ahmad (n 10), WM Watt, *Muhammad at Mecca* (10th impr, Oxford University Press 2012), F Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (2002 repr, University of Chicago Press 1982) and GD Newby, *A history of the Jews of Arabia : from ancient times to their eclipse under Islam* (University of South Carolina Press 1988) are among the host of scholars who have dealt with the early Muslim-Jewish encounter. For the encounter between Muslims and Christians, see Ibn Taymiyyah as discussed NN Roberts, 'Reopening the Muslim-Christian Dialogue of the 13-14th Centuries: Critical Reflections on Ibn Taymiyyah's Response to Christianity in Al-Jawab al-Sahih li man baddala din al-Masih' (1996) 86(3/4) Muslim World 342; R Bell and WM Watt, *Bell's Introduction to the Qur'an* (Edinburgh University Press 1970); A Wijoyo, 'The Christians as religious community according to the Hadit.' (1982) 8 Islamochristiana 83; Kenneth Cragg, *The Pen and the Faith: Eight Modern Muslim Writers and the Quran* (Allen and Unwin 1985) and McAuliffe (n 1). The heresiographer, al-Shahrastani (d. 1153) devotes much attention to the category of People of the Book: MA Shahrastani, *Al-Milal wa al-Nihal* (Arabic) (MS Kailani ed, Dar al-Ma'rifah 1961). For Muslims' relations with Jews and Christians as *dhimmi*s, see Bat Ye'or, *The Dhimmi: Jews and Christians under Islam* (Pewsey Christian Trading 1985).

<sup>23</sup>The Qur'anic accusation of *shirk* against the Christians because of their alleged worshipping of three deities (4:171-3; 5:72-3) is a case in point: most Christians insist that the doctrine of the Trinity is not the same as Tritheism, the worship of three gods. See Hans Küng, *Islam* (Gütersloher Verl.-Haus Mohn 1987), 90; Watt (n 22) 21-2, 47-9; Giulio Basetti-Sani, *For a Dialogue between Christians and Muslims* (Hartford Seminary Foundation 1967) 188-93). More specifically, the Unitarians, who also regard themselves as Christians, even reject any notion of the Trinity.

an area of practice and attitudes rather than theological stance.

In practice, the latter option had always been exercised. In none of the disciplines of exegesis, Islamic history or legal scholarship have Muslims known anything approximating consensus about the identity of the People of the Book. There was even disagreement as to which specific groups of Christians and Jews comprised the People of the Book. At various times, Hindus, Buddhists, Zoroastrians, Magians and Sabaeans were included among or excluded from the People of the Book, depending on the theological predilections of Muslim scholars and, perhaps more importantly, the geo-political context wherein they lived.<sup>24</sup> In all of these attempts to extend the boundaries of the Qur'anic People of the Book, Muslim scholars implicitly acknowledged the situation-bound nature of the Qur'anic categories.

A recognition for the need for solidarity between all oppressed people in an unjust and exploitative society requires going beyond the situation-bound categories of the Qur'an. This is not as radical an idea as it may appear at first glance. The Qur'an, for example, makes frequent and lengthy references to the *munafiqun*. This category, admittedly not a definite socio-religious grouping in the prophetic era, was, however, subsequently used as a weapon by different Muslim communities against other communities along sectarian lines.<sup>25</sup> It remains, however, a Qur'anic category which has been dropped in Muslim scholarly discourse because it was so clearly situation-bound. Justice, however, requires that no-one be held captive to categories which applied to a community or individuals fourteen centuries ago, merely because they share a common descriptive term, a term that may even have been imposed on them by Muslims and rejected by them. This is echoed in the Qur'an: 'These are a people who have passed on. They have what they earned and you shall have what you have earned'.<sup>26</sup>

<sup>24</sup>According to al-Baladhuri, the Prophet accepted *jizyah*, a kind of tax from the People of the Book. This was an indication of the status of people of *dhimmah*, from the Magians of Hajr, Umar al-Khattab from the Persians, and Uthman ibn Affan from the Berbers of North Africa. AIY Al-Baladhuri, *The Origins of the Islamic State* (Philip K Hitti trans, Khayats 1966) 21. Subsequently in history, the *ulama* of some regions of the vastly enlarged Muslim domain further expanded the term 'people of *dhimmah*' to include the followers of other faiths not necessarily Semitic (Zain al-Abidin, 'Introduction' (1986) 7(2) Journal Institute of Muslim Minority Affairs 3, 4). The Shorter Encyclopedia of Islam states that 'in the 14th century a Muhammadan prince in India allowed the Chinese, against payment of *jizyah*, to keep up a pagoda on Muslim territory' and that 'the inner state of affairs in India brought it about that even veritable idolators were considered as "people of *dhimmah*" ('People of the Book' in *The Shorter Encyclopaedia of Islam* (3rd edn, Brill 1944) 17). Al-Tabataba'i regarded the Zoroastrians as People of the Book (MH Al-Tabataba'i, *Al-Mizan fi Tafsir Al-Qur'an Vol 14* (Urdu) (Hassan Raza Ghadeery trans, Al-Ghadeer Academy 2017) 538) and Abul Kalam Azad (d. 1858) considered the Hindus as such - M Hamidullah, *The Prophet's Establishing a State after his Succession* (Habib & Co 1986) 4.

<sup>25</sup>Abu Jafar Muhammad ibn Jarir Al-Tabari, *Annals of the Apostles and Kings: A Critical Edition* (MJ de Goeje ed, Brill 2006, 15 vols) 467.

<sup>26</sup>Q 2:141.

There is another significant reason why the category of People of the Book should be regarded as of dubious relevance in our world today. In the context of the political and technological power exercised by the Christian world, on the one hand, and Arab monetary wealth on the other, Muslim rapprochement with that world, based on the simplistic analogy that Jews and Christians are the contemporary People of the Book, could easily, and probably correctly, be construed as an alliance of the powerful. A Qur'anic hermeneutic concerned with interreligious solidarity against injustice would seek to avoid such alliances and would rather opt for more inclusive categories which would, for example, embrace the dispossessed of the Fourth World and other marginalised communities of the 'global majority'.<sup>27</sup>

### 5.2.2 *The Mushrikun – An Outdated Category?*

The preceding section has considered the Qur'anic stance on the People of the Book, with all its vaguenesses and dodgy jurisprudential interpretations. But a Qur'anic reinterpretation of the Right to Freedom of Religion must be more universal, so we turn to another Qur'anic category of Other: The *mushrikun*. Initially referring to the Meccans who revered physical objects such as sculptures or heavenly bodies as religiously sacred entities, the term *mushrikun* was also employed to refer to the People of the Book by some Muslim jurists. Two factors led to an early recognition that all *mushrikun* are not the same and were not to be treated equally:

1. the Qur'anic accusation of *shirk* against the People of the Book (for example 9:31), while simultaneously regarding them as distinct from the *mushrikun*, and
2. the subsequent wider Muslim contact with the world of non-Islam. Later, as the Shorter Encyclopaedia of Islam observes,

in the course of the dogmatic development of Islam, the conception of *shirk* received a considerable extension.... [because] the adherents of many sects had no compunction about reproaching their Muslim opponents with *shirk*, as soon as they saw in them any obscuring of monotheism, although only in some particular respect emphasised by themselves...*Shirk* has thus become, no longer simply a term for unbelief

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<sup>27</sup>The expression 'Fourth World' is increasingly used to refer to those indigenous communities marginalized and oppressed in their own countries of origin, irrespective of the economic status of that country. These communities are also called 'first peoples' in the sense of having inhabited their lands before other communities settled there (Julian Burger, *The Gaia Atlas of First Peoples* (Gaia Books 1990))

prevailing outside of Islam, but a reproach hurled by one Muslim against another inside of Islam.<sup>28</sup>

As with the category of the People of the Book, here, too, one finds that the actual application of the neat divisions has been far more problematic than most traditional scholars are willing to admit. There is evidently a need to rethink these categories and their contemporary applicability. It is now more apparent than ever that the religious situation of humankind and the socio-political ramifications thereof are far more complex than previously understood. The following are but a few indications of this complexity:

1. the emergence of New Religious Movements in Japan and India, for example, where, in some cases, people claim to be both Christians and pagans or Buddhist and Hindu Catholics respectively.
2. the situation in large parts of Asia, Australia, Latin America and Africa, where people combine a commitment to Islam, Christianity and even Judaism, with other traditional 'pagan' practices such as the veneration of graves, sacred relics and invoking deceased ancestors for spiritual blessings or material gain.
3. The systematic use of formal and institutional religion in the aforementioned areas to oppress, exploit, and even eliminate entire nations among the indigenous people.

In these situations, the marginalised and oppressed have often resorted to their ancient religions as a means of asserting their human dignity. Like *tawhid*, *shirk* had its implications in Meccan society and one needs to retain a sense of this in a contemporary consideration of the believers in *tawhid* as well as the *mushrikun*. Referring to the early Qur'anic texts, Rahman argues that they can only be understood against their Meccan background, 'as a reaction against Meccan pagan idol-worship and the great socio-economic disparity between the mercantile aristocracy of Mecca and a large body of its distressed and disenfranchised population'<sup>29</sup>. 'Both of these aspects', he says 'are so heavily emphasised in the Qur'an that they must have been organically connected with each other'.<sup>30</sup>

This relates back to the point made in section 5.1 regarding the categories of Other laid out in the Qur'an, and their being poorly-equipped to categorise the breadth and nature

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<sup>28</sup>'shirk' in The Shorter Encyclopaedia of Islam (3rd edn, Brill 1944)

<sup>29</sup>Fazlur Rahman, 'Islam's Attitudes Towards Judaism' (1982) 72(1) Muslim World 1-13.

<sup>30</sup>Ibid.

of religions globally in the 21st century. If, then, an attempt is to be made to re-analyse these categories so as to make sense of them in a modern context, the social, economic and political context of these categories at the time of their enunciation must be taken into account. Only then can these categories be understood as useful structures for modern society, when their original contexts and relationships to power or disenfranchisement are weighed against similar power dynamics and social injustices today.

### 5.3 The Religious Other in the Qur'an

What is the Qur'an's general attitude towards the religious Other, underpinning the more specific injunctions and doctrinal issues that it raises from time to time? Firstly, the Qur'an relates dogma to socio-economic exploitation. The Qur'an makes it clear that it was the rejection and ignorance of *tawhid* that had led to social and economic oppression in Meccan society. The shorter Meccan chapters are particularly poignant in the way this point is made:

Woe to those who defraud others; who, when they take measure from people, take it fully. And when they measure out to others or weigh out for them, they give less than is due. Do they not think that they will be raised again? To a mighty day. The day when people will stand before the Lord of the worlds... Woe on that day unto the rejectors who give a lie to the Day of Requital .<sup>31</sup>

Similarly, Chapter 102 insists that it is abundance of wealth which diverts people from belief in God and the Day of Judgement:

You are obsessed by greed for more and more until you go to your graves. Nay, in time you will come to understand... You would most surely behold the blazing fire [of hell]... And on that Day you will most surely be called to account for what you did with the boon of life!<sup>32</sup>

Chapter 104 links the illusionary power of amassed wealth with the attempts to defame and slander the early Muslims in Mecca:

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<sup>31</sup>Q 83:1-11.

<sup>32</sup>Q 102:1-8.



Woe unto every slanderer, fault finder! Who amasses wealth and counts it a safeguard, thinking that his [or her] wealth will make him [or her] live forever! Nay, but [in the life to come such as] he [or she] shall indeed be abandoned to crushing torment! <sup>33</sup>

Chapter 90 asserts that a denial of the presence of an all-powerful God causes people to squander their wealth: ‘Does he think that no one has power over him? He will say: I have spent abundant wealth’.<sup>34</sup> Furthermore, this chapter links faith to an active social conscience: ‘to free a slave’, ‘to feed on a day of hunger’ and ‘to exhort one another to perseverance and to compassion’.<sup>35</sup> By implication, it also links *kufir* to the refusal to display mercy towards others. In this text those who reject ‘the signs of Allah’ are those whose actions do not correspond with the actions of ones who have chosen to ‘ascend the steep path’. The rejectors of ‘the signs of Allah’ are, therefore, those who deny mercy and compassion. This linking of the rejection of God and *din* to the denial of mercy and compassion is even more explicit in chapter 107:

Have you observed the one who belies al-din? That is the one who is unkind to the orphan, And urges not the feeding of the needy. So, woe to the praying ones, Who are unmindful of their prayer. They do good to be seen, And refrain from acts of kindnesses. <sup>36</sup>

The texts of criticism revealed in Medina, which relate to the various Jewish and Christian communities and individuals encountered there by the Prophet and the early Muslims, reveal a similar relationship between ‘erroneous’ beliefs and the socio-economic exploitation of others. Equally significant is the fact that, although the Jews were closer to Muslims in creed, the Qur’an often reserves the severest denunciation for some of them. Similarly, the Sabaeans were widely believed to have worshipped stars, even angels, yet they were included among the People of the Book<sup>37</sup>. According to the Qur’an, the Jews and Christians justified their exploitation of their own people by claiming that their scriptures permitted such practices. The Qur’an denounced this exploitation of the ignorance of ordinary illiterate people who had no ‘real knowledge of the Scriptures’ by the priests of the

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<sup>33</sup>Q 104:1-4.

<sup>34</sup>Q 90:5-6.

<sup>35</sup>Q 90:13-15.

<sup>36</sup>Q 107:1-7.

<sup>37</sup>Fakhar al-Din al-Razi, *Tafsir al-Fakhar al-Razi* (32 volumes, al-Maktabah al-Tijariyah 1990) 112-113.

People of the Book.<sup>38</sup> The contempt for, and exploitation of, the marginalised by some of the People of the Book is further seen in their justification, that they had no moral obligation to be just towards the illiterate:

And among the People of the Book there is many a person who if you entrust him [or her] with something of value, will faithfully restore it to you; and there is among them many a person who, if you entrust him [or her] with a tiny gold coin, will not restore it to you unless you keep standing over him [or her]. This is because of their assertion, ‘No blame can attach to us [for anything that we may do] with regard to these unlettered folk and [so they lie about God], being well aware.’<sup>39</sup>

This text is immediately followed by a denunciation of those who ‘barter away their bond with God and their pledges for a trifling gain’<sup>40</sup> and of ‘a section among them who distort their Scripture with their tongues, so as to make you think that it is from the Scripture while it is not’.<sup>41</sup> Thus, we see that while their bond and their pledges were with a transcendent God, their crimes were very much about the exploitation of the people of God. The Qur’an’s insistence on the links between erroneous teaching of the People of the Book and their exploitative practices is also evident in the way these two accusations are fused in an interesting text from the chapter titled ‘Repentance’:

They have taken their rabbis and their monks- as well as Christ, son of Mary- for their lords beside God, although they have been bidden to worship none but the One God, save whom there is no deity: the one who is utterly remote, in His limitless glory, from anything to which they may ascribe a share in His divinity!

They want to extinguish God’s guiding light with their utterances: but God will not allow this [to pass] for He has willed to spread His light in all its fullness...

O you who have attained unto faith! Behold, many of the rabbis and monks do indeed wrongfully devour the possessions of others and turn away from the path of God. But as for all who lay up treasures of gold and silver and

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<sup>38</sup>Q 2:78.

<sup>39</sup>Q 3:75.

<sup>40</sup>Q 3:77.

<sup>41</sup>Q 3:79.

do not spend them for the sake of God- give unto them the tidings of grievous suffering: on the day when that [hoarded wealth] shall be heated in the fire of hell and the foreheads and their sides and their backs branded therewith, 'These are the treasures which you have laid up for yourselves! Taste, then [the evil] of your hoarded treasures!<sup>42</sup>

Secondly, the Qur'an explicitly and unequivocally denounces the narrow religious exclusivism which appears to have characterised the Jewish and the Christian communities encountered by Muhammad in Hijaz. The Qur'an is relentless in its denunciation of the arrogance of Jewish religious figures and scathing of the tribal exclusivism that enabled them to treat people outside their community, especially the weak and vulnerable, with contempt. This contempt for other people, the Qur'an suggests, was very much rooted in notions of being the chosen of God. According to the Qur'an, many among the Jews and the Christians believed that they were not like any other people whom God had created, that their covenant with God had elevated their status with Him and that they were now the 'friends of Allah to the exclusion of other people'.<sup>43</sup> The Qur'an alleges that they claimed to be 'the children of Allah and His beloved'<sup>44</sup> and 'considered themselves pure'.<sup>45</sup> In response to these notions of inherent 'purity', the Qur'an argues, 'Nay, but it is Allah who causes whomsoever He wills to grow in purity; and none shall be wronged by even a hair's breadth'.<sup>46</sup> The same text links these notions of being God's favourites to their socio-economic implications and suggests that this sense of having an exclusive share in God's dominion leads to greater unwillingness to share wealth with others: 'Have they perchance, a share in Allah's dominion?' the Qur'an asks, and then asserts: 'But [if they had] lo, they would not give to other people as much as (would fill) the groove of a date stone!'.<sup>47</sup> 'Do they perchance, envy other people for what Allah has granted them out of His bounty? And among them are such as believe in Him and among them are such as have turned away'.<sup>48</sup>

The Qur'an denounces the claims of some of the People of the Book that the afterlife was only for them and 'not for any other people',<sup>49</sup> that the fire (of hell) would only touch

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<sup>42</sup>Q 9:31-5.

<sup>43</sup>Q 62:6.

<sup>44</sup>Q 5:18.

<sup>45</sup>Q 4:48.

<sup>46</sup>Q 5:49.

<sup>47</sup>Q 4:53.

<sup>48</sup>Q 4:55.

<sup>49</sup>Q 2:94, 111.

them ‘for a limited number of days’<sup>50</sup> and that ‘clutching at the fleeting good of this world will be forgiven for us’.<sup>51</sup> The Qur’an, furthermore, takes a rather dim view of the boasts of the Jews and Christians that their creeds were the only ones of consequence. While the Qur’an does not accuse the Christians of claiming to be free of any moral accountability in their behaviour towards the non-Christians, they too, according to the Qur’an, held that they were the beloved of God:

And they say: ‘None shall enter paradise unless he [or she] be a Jew or a Christian’. Those are their vain desires. Say: ‘Produce your proof if you are truthful.’ Nay, whoever submits his [or her] whole self to Allah and is a doer of good, will get his [or her] reward with his [or her] Lord; On such shall be no fear nor shall they grieve.<sup>52</sup>

And the Jews say the Christians have nothing [credible] to stand on and the Christians say the Jews have nothing to stand on while both recite the Book. Even thus say those who have no knowledge. So Allah will judge between them on the Day of Resurrection in that wherein they differ.<sup>53</sup>

Attempts to appropriate the heritage of Abraham and make it the property of a particular socio-religious group are also denounced:<sup>54</sup> ‘It is not belonging to the community of Jews or Christians which leads to guidance, but the straight path of Abraham’.<sup>55</sup> Abraham ‘was neither a Jew nor a Christian, but an upright person who submitted to Allah’.<sup>56</sup>

Thirdly, the Qur’an is explicit in its acceptance of religious pluralism. Having derided the attempts of earlier communities to appropriate and exclusivise God, it is hard to accept that the Qur’an should itself engage in this practice. The notion that Abraham was not a Jew or a Christian, but ‘one of us’ (i.e. a Muslim) is at variance with the rejection of all exclusivist claims in these texts. For the Qur’anic message to be an alternative one, it had to offer the vision of a God who responds to all humankind and who acknowledges the sincerity and righteousness of all believers. The Qur’an, thus, makes it a condition of faith to believe in

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<sup>50</sup>Q 3:24.

<sup>51</sup>Q 7:169.

<sup>52</sup>Q 5:18.

<sup>53</sup>Q 2:111-13.

<sup>54</sup>Q 3:69.

<sup>55</sup>Q 2:135.

<sup>56</sup>Q 3:67.

the genuineness of all revealed religion.<sup>57</sup>

The Qur'an acknowledges the *de jure* legitimacy of all revealed religion in two respects: it takes into account the religious life of separate communities coexisting with Muslims, respecting their laws, social norms and religious practices and secondly, it accepts that the faithful adherents of these religions will also attain salvation and that 'no fear shall come upon them neither will they grieve'.<sup>58</sup> These two aspects of the Qur'an's attitude towards the Other may be described as the cornerstones of its acceptance of religious pluralism. Given the widespread acceptance, among the most conservative Muslims, of respect for the laws of the religious Other, even if only in theory, and the equally widespread rejection of their salvation, this chapter will focus on the latter.

The Qur'an specifically recognises the People of the Book as legitimate socio-religious communities. This recognition was later extended by Muslim scholars to various other religious communities living within the borders of the expanding Islamic domain. The explicit details, restrictions and applications of this recognition throughout the various stages of the prophetic era, and subsequently in Islamic history, point to a significant issue in dealing with the Other. The socio-religious requirements of the Muslim community, such as community building and security, rather than the faith convictions, or lack thereof in these other communities, shaped the Qur'an's attitude towards them.

There are a number of indications in the Qur'an of the essential legitimacy of the religious Other. Firstly, the People of the Book, as recipients of divine revelation, were recognised as part of the community. Addressing all the prophets, the Qur'an says, 'And surely this, your community (*ummah*), is a single community'.<sup>59</sup> The establishment of a single community with diverse religious expressions was explicit in the Charter of Medina. Secondly, in two of the most significant social areas, food and marriage, the spiritual openness of the Qur'an is evident: the food of 'those who were given the Book' was declared

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<sup>57</sup>Q 2:136; 2:285; 3:84.

<sup>58</sup>Q 2:62.

<sup>59</sup> Q 23:52. The term *ummah* occurs nine times in the Meccan context and forty-seven times in that understood to be Medinan. It is used to refer exclusively to the socio-historical community of Muslims (Q 2:143; 3:110), to a 'group of people' (from among the Muslims in 3:104 and from among the Christians in 5:66), community in the broad sense (6: 108; 7:34; 10:47), to an individual (16: 120-1). Qur'an 23:52 refers to the communities of all the prophets. For much of the Medinan period the term was used to describe 'the totality of individual bound to one another irrespective of their colour, race, or social status, by the doctrine of submission to one God' (Ahmad (n 10) 38-9). Looking at the way the term *ummah* has today acquired an exclusivist meaning, Ahmad says that 'the main difficulty in dealing with the history of ideas is that terms are more permanent than their definitions' (ibid 39).

lawful for the Muslim and the food of the Muslims lawful for them.<sup>60</sup> Likewise, Muslim men were permitted to marry ‘the chaste women of the People of the Book’.<sup>61</sup> If Muslims were to be allowed to coexist with others in a relationship as intimate as that of marriage, then this seems to indicate quite explicitly that enmity is not to be regarded as the norm in Muslim-Other relations. Interestingly, this text mentions believing women in the same manner as the women of the People of the Book: ‘[permissible in marriage] are the virtuous women of the believers and the virtuous women of those who received the Scripture before you’.<sup>62</sup>

The restriction of the permission to the women of the People of the Book indicates that this ruling related to the social dynamics of early Muslim society and the need for community cohesion. The fact that most jurists, while agreeing on marriage to women of the People of the Book, who are also the people of *Dhimmah*, differ as to whether it is permissible if they are from states hostile to Islam, also reflects this point<sup>63</sup>. Thirdly, in the area of religious law, the norms and regulations of the Jews and of the Christians were upheld<sup>64</sup> and even enforced by the Prophet when he was called upon to settle dispute among them.<sup>65</sup> Fourthly, the sanctity of the religious life of the adherents of other revealed religions is underlined by the fact that the first time permission for armed struggle was given, it was to ensure the preservation of this sanctity; ‘But for the fact that God continues to repel some people by means of others, cloisters, churches, synagogues and mosques, [all places] wherein the name of God is mentioned, would be razed to the ground’.<sup>66</sup>

The Qur’anic recognition of religious pluralism is evident not only from the acceptance of the Other as legitimate socio-religious communities but also from an acceptance of the spirituality of the Other and salvation through that Otherness – much like the underogable human right to belief as protected in International Human Rights Law, as the *forum internum* seen in Chapter 2. The preservation of the sanctity of places of worship was thus not merely in order to preserve the integrity of a multi-religious society, as contemporary states may want to protect places of worship because of the role they play in the culture of a particular people. Rather, it was because God, who represented the ultimate for many of these religions, and who is acknowledged to be above the diverse outward

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<sup>60</sup>Q .5:5.

<sup>61</sup>Ibid.

<sup>62</sup>Q 5:5.

<sup>63</sup>AJM Al- Tabari, *Jami al-Bayan an Tawil Ay al-Qur’an* (Mahmud Muhammad Shakir, Mustafa al-Babi al-Halabi eds, Dar al-Kutub, 1954, 12 vols) 212-14.

<sup>64</sup>Q 5:47.

<sup>65</sup>Q 5:42-3.

<sup>66</sup>Q 22:40.

expressions of that service, was being worshipped in them. That there were people in other faiths who sincerely recognised and served God is made even more explicit in Qur'an 4:113: 'Not all of them are alike; among them is a group who stand for the right and keep nights reciting the words of Allah and prostrate themselves in adoration before Him. They have faith in Allah and in the Last Day; they enjoin what is good and forbid what is wrong, and vie one with another in good deeds. And those are among the righteous'. If the Qur'an is to be the word of a just God, as Muslims sincerely believe, then there is no alternative to the recognition of the sincerity and righteous deeds of others, and their recompense on the Day of Judgment. Thus, the Qur'an says:

And of the People of the Book there are those who have faith in Allah and in that which has been revealed to you and in that which has been revealed to them, humbling themselves before Allah, they take not a small price for the messages of Allah. They have their reward with their Lord. Surely Allah is swift to take account.<sup>67</sup>

Also:

And whatever good they do, they will not be denied it. And Allah knows who keep their duty.<sup>68</sup>

#### **5.4 Exclusivist Interpretations of the *Qur'an* and *Sunnah***

Why did this inclusivism and, indeed, justice, not become the predominant trait of the Islamic theological appraisal of the Other and Otherness? The ideal answer to this question would require an examination of the historical development of Islamic theology and the history of Islam's encounter with the Other as a whole, which is beyond the ambit of this thesis. This chapter shall, however, confine itself to looking at the arguments that traditional exegesis employed to circumvent the obvious meaning of inclusiveness in Qur'anic texts, and to reflecting on the alternative opinions provided by some more contemporary exegetes. The following is one of the two texts that are most explicit about the legitimacy of religious diversity<sup>69</sup>:

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<sup>67</sup>Q 3:198.

<sup>68</sup>Q 3:112-14.

<sup>69</sup>The Other in Qur'an 5:69; 'Surely those who have faith and those who are Jews and the Sabaeans and the Christians, whoever has faith in Allah and the Last Day and does good, they shall have no fear nor shall

Surely those who have faith and those who are Jews and the Christians and the Sabaeans, whoever has faith in Allah and the Last Day and does good, they have their reward with their Lord, there is no fear for them, nor shall they grieve.<sup>70</sup>

Most of the exegetes go to great lengths to avoid the explicit meaning of these texts as established in the previous section, i.e. that anyone who has faith in God and the Last Day and who acts in a righteous manner will attain salvation. This refusal to recognise the efficacy of all religious paths to salvation after the coming of Muhammad is argued on the basis of the doctrine of supercessionism. According to this doctrine 'any given religious dispensation remains valid until the coming of the one to succeed it; then the new dispensation abrogates the previous one'<sup>71</sup>. Those who heard of the message of Moses were thus obliged to believe in it and to follow the Torah until the coming of Jesus, whose message superseded that of Moses until the coming of Muhammad, when the final form of faith was irrevocably determined.<sup>72</sup>

There are two ways in which the majority of scholars have approached this text in order to circumvent the more apparent meaning. It was argued that 2:62 had subsequently been abrogated by 3:85, 'Whosoever desires a *din* other than *islam* shall not have it accepted from him [or her].' This is a very significant opinion attributed to Ibn 'Abbas and a 'group among the exegetes' by al-Tabari.<sup>73</sup> Some of the exegetes whose works are under

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they grieve.' Since there is no significant difference in the exegetical treatment of these two texts, I have confined my reflections to interpretations of the first.

<sup>70</sup>Q 2:62.

<sup>71</sup>Mahmoud Ayoub, 'Roots of Muslim-Christian Conflict' 1989 79(1) Muslim World 25-45.

<sup>72</sup>This theory is neatly supported by a lengthy account regarding the spiritual search of Salman al-Farsi (d. 658) before he encountered the Prophet. Salman was grieved at the inability of his deeply pious friends to embrace Islam, as they had died before hearing about his new faith (M Ayoub, *The Qur'an and its Interpreters Vol 1* (State University of New York Press 1984) 110-12; McAuliffe (n 1) 105-9). According to several of the exegetes, this verse was occasioned by God's wish to console Salman. In one of the two narrations of this story, after informing Salman of the revelations of this verse, the Prophet is reported to have said: 'Whoever has died in the faith of Jesus and died in Islam before he heard of me, his lot shall be good. But whoever hears of me today and yet does not assent to me shall perish' (al-Tabari (n 63) 323). Al-Shahrastani (d. 1153) discusses this problem at some length and substantiates the supercessionist theory on rational grounds. 'Islam abrogates all previous codes of which it is the perfection... if contemporary law is subject to constant alteration to meet changing conditions why is it impossible that laws given to one people at one time should be abrogated elsewhere at another time? The law corresponds to actions, and the active change of death and life. Humankind's creation and annihilation, sometimes gradually, sometimes instantaneously, correspond to the legal changes of permitted and forbidden. If we consider the formation of man from his pre-embryonic beginning to his full statute we see that each progressed from code to code till the perfection of all codes was reached' (Al-Shahrastani (n 22) 158-9)

<sup>73</sup>Al-Tabari includes Mujahid and al-Suddi in this 'group among the exegetes' who believed that the three categories of the Other applied to those who actually encountered Muhammad. The fact of a group with



consideration here either rejected this opinion or ignored it. Those who rejected it argued that the idea of God abrogating a promise is incompatible with the idea of a just God, and that, being God, He will not fail to uphold a promise. The abrogation theory would have been the easiest avenue to obtain the much-desired exclusivist interpretation. However, with the case against it rather apparent (as God keeps His promises), the exegetes had little option but to resort to some creative and often contradictory exegetical devices to secure damnation for the Christians, Jews, and Sabaeans.

Given their assumption that salvation is confined to those who have faith in and follow Muhammad as a prophet, the text presented two significant problems to these exegetes. The first problem was the inclusion of ‘those who have faith’ alongside the Other and the second one was the qualifying phrase ‘whosoever have faith among them,’ which seemed to imply that ‘faith’ is used in a different sense from that employed in the first descriptive phrase, ‘those who have faith’. This also doesn’t account for new Muslim communities like Ahmadis, who do consider Muhammad a prophet.

Al-Zamakhshari, along with several others,<sup>74</sup> dealt with the first problem by redefining ‘those who have faith’ in a manner that equalises the four categories in ‘falsehood’. ‘They are the ones’, Al-Zamakhshari wrote, ‘who believe with their tongues without their hearts agreeing’, i.e., the hypocrites<sup>75</sup>. ‘Whosoever among these rejectors/deniers acquires a pure faith and genuinely enters into the community of Islam will have no fear come upon them, neither will they grieve’<sup>76</sup>. Al-Tabari defines ‘those who have faith’ in this text as ‘the ones who accept what the Messenger of Allah brought them of Allah’s truth’<sup>77</sup> and then proceed to distinguish between the application of the phrase ‘whoever among them who has faith’ to this category, and the following three. According to him, when the phrase ‘whoever among them has faith’ is applied to ‘those who have faith’ then it means ‘remaining committed to that faith and not changing’. In the case of the

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this opinion was, however, regarded as significant enough by al-Tabari for him to start his interpretation of this text with a refutation of those who argue that the verse relates to those who encountered Muhammad and for several others to devote attention to refuting it. (Al-Tabari (n 63) vol 1, 323).

<sup>74</sup>Abu al-Futuh al-Razi and Khazin are among those who hold this view while Al-Baidawi and al-Razi offer both committed followers of the Prophet and the hypocrites as possible meanings. Al-Razi cites two test in support of the view that those who have faith can also be interpreted as the hypocrites: Q 5:41, (‘those who say “we believe” with their mouths, but their hearts do not believe’) and Q 4:136 (‘O you who believe, believe in Allah’) which he interprets as ‘O you who believe with your tongues, believe with your hearts’ (cited in McAuliffe (n 1) 121).

<sup>75</sup>Abu al-Qayyim Mahmud ibn Umar al-Zamakhshari, *Al-Kashshaf an Haqiq Ghawamid al-Tanzil* (Dar al-Kutub al-Arabi 2003, 4 volumes) 146.

<sup>76</sup>Ibid.

<sup>77</sup>Al-Tabari (n 63) 317.

Christians, Jews and Sabaeans, however, he argues that it means ‘coming to belief, i.e. entering Islam’<sup>78</sup>. The view that the acceptable Other refers to converts from other religions, the most common view in Qur’anic exegesis, is regularly applied to virtually all of those texts that distinguish between the Others who remained rejected by God and those who were acceptable and to whom salvation was promised.<sup>79</sup>

#### 5.4.1 *Exegetical Difficulties*

Criticism of the abrogation theory, regarding God renegeing on a promise or causing a past generation to suffer for the intransigence or disbelief of a present generation, is clear. Furthermore, the following text (Qur’an 3:85), the supposedly abrogating text, is no less inclusive than Qur’an 2:62, which is supposed to have been abrogated. ‘If one goes in search of a religion other than self-surrender unto God<sup>80</sup> [Asad’s rendition of *islam*], it will never be accepted from him [or her] and in the life to come he [or she] shall be among the lost’.<sup>81</sup> What is significant about this opinion is that Ibn ‘Abbas and a ‘group among the exegetes’<sup>82</sup> actually held the opinion that this verse, at an earlier stage, did offer salvation to groups outside the community of Muslims. Ibn ‘Abbas is one of the earliest commentators of the Qur’an. It was only much later, when the exegetes had recourse to more sophisticated exegetical devices, that alternatives to this theory became possible in order to secure exclusion from salvation for the Other.

The interpretation offered by al-Zamakhshari that ‘those who have faith’ is actually a reference to the hypocrites, arbitrarily imputes an antithetical meaning to the phrase, without any theological or linguistic support. This is hardly conducive to understanding any text, and if accepted would open up a worrying line of thinking for jurists attempting to ascertain the intent behind any body of work. Whenever the Qur’an uses the word *iman* (belief) with reference to the hypocrites, it does so meaning that they only say or claim that they believe.<sup>83</sup> Finally, throughout the Qur’an the expression ‘those who have attained to faith/conviction’ is used 239 times explicitly in the sense of ‘those who have faith’. The case

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<sup>78</sup>Ibid 320-21.

<sup>79</sup>The exegetes did not hesitate to name the converted individuals who are supposedly referred to in this text and in others. Thus, 3:199 (‘Verily among the People of the Book are those who have faith....’) is viewed as alternatively referring to the Christian Negus of Abyssinia and his associates, who, it is claimed, embraced Islam; ‘Abd Allah ibn Salam, an early Jewish convert to Islam; and various groups such ‘forty people from Najran’, ‘thirty from Abyssinia’, ‘eighty Romans’ all of whom ‘were following the din of ‘Isa then they became Muslims’, (al-Tabari (n 63) vol 3, 173); al-Zamakhshari (n 75) vol 1, 459.

<sup>80</sup>See Muhammad Asad, *The Message of the Qur’an* (Dar al-Andalus 1980).

<sup>81</sup>Q 3:85.

<sup>82</sup>‘Abd Allah Ibn Abbas, *Majmu’ah min al-Tafasir* (Dar al-Ahya al-Turath al-Arab) as cited in Esack (n 20).

<sup>83</sup>See Q 2:8, 14, 86; 3:119; 5:41, 61.

for a single exception to all of these with the effect of rendering an opposite meaning, requires a more significant explanation than has been provided.

It is also necessary to address the theory that the Jews, Christians and Sabaeans mentioned in this verse are those who actually converted to Islam. In a sense, the entire early Muslim community were ‘converts’ to Islam, although the terms seems to be uncommon in early Islamic literature. It is, however, possible that, as the community acquired a settled character, new entrants were known or even referred to as ‘new Muslims’. Such a term was indeed in use, *maslamah*, and is employed by al-Tabari<sup>84</sup> and al-Zamakhshari<sup>85</sup> in this context (*maslamah ahl al-kitab*). There is, however, no indication that these converts existed as a socio-religious category distinct from the earlier Muslims, which would have warranted their exclusion from the category of ‘those who have faith,’ or that the terms ‘new Muslims’ or ‘converts’ were widely used.<sup>86</sup> On the contrary, the serious attempts to cement the Exile-Helper link as well as various other tribal links, would indicate that Muhammad would not have brooked the formation of yet another intra-Muslim category. In the very unlikely event that these new Muslims were regarded, even if only occasionally, as a sub-category of the ‘believers’, then it would have been far more plausible to refer to them as such in a text promising salvation.

More significant though is the fact that the converts are already included in the first category and there is no convincing need to single them out as Jews, Christians and Sabaeans. Nor could there have been any doubt regarding the salvation of these new Muslims who, as Christians or Jews before embracing Islam, were certainly closer in faith to ‘those who have faith’ than a *mushrik*. If the *mushrikun* were eligible for salvation upon embracing Islam, then there could have been no doubt about the salvation of the Jews or Christians who did so. The most reasonable interpretation of the text, therefore, is that of religious pluralism.

## 5.5 A New Critical Approach

Rashid Rida pays considerable attention to the inclusivist meaning of these texts, cites supportive texts, deals at length with the question of salvation for those who did not encounter a prophet, or receive his or her message, and even reflects on the necessity or otherwise of believing in the prophethood of Muhammad as a condition of salvation. Rida

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<sup>84</sup>Al-Tabari (n 63) 498.

<sup>85</sup>Al-Zamakhshari, (n 75) 459.

<sup>86</sup>See Esack (n 82) for a more complete historical analysis.

interprets ‘those who have faith’ as ‘those Muslims who followed Muhammad during his lifetime and all those who follow him until the Day of Resurrection’. He says that ‘whosoever among them who has faith’ is a specification of the other three groups mentioned, i.e., those among the Jews, Christians and Sabaeans who believe with a ‘correct faith’.<sup>87</sup>

Al-Tabataba’i recognises the idea of ‘those who have faith’ as a description of a socio-historico-religious group, like the other three categories, and not only of a group of people for whom faith is always a vibrant and growing personal quest. ‘The context of the phrase “whosoever believes in Allah”’, he says, ‘shows that it refers to genuine faith and that the phrase “those who have faith”, refers to those who call themselves Muslims’.<sup>88</sup>

Both conclude on a similar note: all those who have faith in God and act righteously, regardless of formal religious affiliation, will be saved ‘for Allah does not favour one group while mistreating another’<sup>89</sup>. ‘No name, no adjective’, says al-Tabataba’i, ‘can do any good unless it is backed by faith and righteous deeds. This rule is applicable to all human beings’<sup>90</sup>. Both Rida and al-Tabataba’i view these texts as a response to the exclusivism invoked by those, including Muslims, steeped in sectarianism and narrow religious chauvinism. ‘Salvation,’ Rida wrote, ‘is not to be found in religious sectarianism but in true belief and righteous conduct. Muslim, Jewish or Christian aspirations to religious importance are of no consequence to Allah, nor are they the basis upon which judgments are made’<sup>91</sup>.

In an interesting contextualising of Qur’an 2:62, Rida seems to acknowledge Jews, Christians and Sabaeans as ‘believers’. He views the message of this verse as a repetition of an earlier promise in this chapter (‘those who follow My guidance will have no fear neither shall they grieve’),<sup>92</sup> and an anticipation of a similar promise that follows in 4:123-4, which clearly refers to being a *mu’min* as a condition of salvation. ‘It will not be accordance with your vain desires nor the vain desires of the People of the Book. Whoever does evil, will be requited for it and he [or she] will not find for him[self or herself] besides Allah a friend or a helper. And whoever does good deeds whether male or female and he[or she] is a *mu’min*

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<sup>87</sup>Muhammad Rashid Rida, *Tafsir al-Manar* (Dar al-Marifah 1980, 12 volumes) 336.

<sup>88</sup>Al-Tabataba’i (n 24).

<sup>89</sup>Rida (n 87) 336.

<sup>90</sup>Al-Tabataba’i (n 24).

<sup>91</sup>Rida (n 87) 336.

<sup>92</sup> Q 2:38.

will enter the Garden and they shall not be dealt with unjustly'.<sup>93</sup>

Al-Tabataba'i refers to Qur'an 2:111, saying that 'the only criterion, the only standard, of honour, happiness is the real belief in Allah and the Day of Resurrection, accompanied by righteous conduct'<sup>94</sup>. The position taken by Rida and al-Tabataba'i regarding the validity of other religious paths is consistent with the universal ethos of the Qur'an and the meaning of the texts under discussion. This interpretation is borne out by reflections on the Qur'an's attitude towards the fact of religious diversity.

## 5.6 The Qur'anic Response to Religious Diversity

The Qur'an regards Muhammad as one of a galaxy of prophets, some of whom are mentioned specifically in the Qur'an while 'others you do not know'<sup>95</sup>. The same *din*, the Qur'an declares, 'was enjoined on Noah, Abraham, Moses and Jesus'.<sup>96</sup> 'You are but a warner', the Qur'an tells Muhammed, 'and every people has had its guide'.<sup>97</sup> The fact that the Qur'an incorporates accounts of the lives of these predecessors of Muhammad and makes it part of its own history is perhaps the most significant reflection of its emphasis on the unity of *din*. These prophets came with identical messages which they preached within the context of the various and different situations of their people. Basically, they came to reawaken the commitment of people to *tawhid*, to remind them about the ultimate accountability to God and to establish justice. 'And for every *ummah* there is a messenger. So when their messenger comes the matter is decided between them with justice, and they will not be wronged'.<sup>98</sup>

The Qur'an declares that 'unto every one of you have We appointed a [different] *shirah* (path) and *minhaj* (way)'.<sup>99</sup> In a similar vein, it says: 'To every community, We appointed acts of devotion which they observe; so let them not dispute with you in the matter

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<sup>93</sup>Q 4:123-4.

<sup>94</sup>Al-Tabataba'i (n 24).

<sup>95</sup>Q 40:78.

<sup>96</sup>Q 42:13

<sup>97</sup>Q 13:08. See also 16:36 and 35:24.

<sup>98</sup>Q 10:47.

<sup>99</sup>Qur'an 5:48. *Shari'ah* is a path with metaphysical implication while *Minhaj* implies a practical way in which things are done. This distinction is also evident from al-Tabari's explanation of this verse that 'for every people among you we have made a way to the truth to believe in and a clear path to act upon' (Tabari (n 63) vol 6, 269). Interestingly, most of the exegetes do not deal here with the possible differences between *shirah/Shari'ah* and *Minhaj*, but between *din* and *Shari'ah*. An exception is al-Razi who offers two opinion, including the following: '*shirah* refers to *shari'ah* in a general way, whereas *Minhaj* refers to a *shari'ah* of excellence; *shari'ah* is the origin of action while *minhaj* is a continuation on the path' (Al-Razi (n37) vol 12, 13).

and call to your Lord. Surely you are on a right guidance.<sup>100</sup> Since the views of the respective exegetes on 22:67 are likely to agree with their views on 5:48 on the principle issue of the validity of various religious forms both during and after the Prophet Muhammad's life, this discussion will be confined to 5:48. The interpretations of this text also contained fairly lengthy discussions on the differences between *din* and *Shari'ah*.

We have revealed to you the Book with the truth, verifying that which is before it of the Book and a guardian over it. So judge between them by what Allah has revealed and follow not their desires, [turning away] from the truth that has come unto you. For every one of you We have appointed a *shirah* and a *minhaj*. And if Allah had pleased, He would have made you a single ummah, but that He might try you in what He gave you. So vie with one another in virtuous deeds. To Allah you will all return, so that He will inform you of that wherein you differed.<sup>101</sup>

Most of the exegetes have interpreted *shirah* as *Shari'ah* and *minhaj* as 'a clear path'. Both al-Razi and Rida have elaborated on the etymological meaning of *shira* and *Shari'ah*: 'In the literal sense it is a path to the water or the source of water for the river or its like'. From the Qur'an itself and the various interpretations of *Shari'ah*, *din* and the differences between them, it is evident that the former is exclusive while the latter pertains to particular communities, as al-Tabataba'i's commentary on this verse makes clear: '*Shari'ah* is a path for a community among communities or a Prophet among Prophets who was sent with it....*din* is a pattern, a divine and general path for all communities. Thus, *shari'ah* is amenable to abrogation while this is not the case with *din* in its broad sense'<sup>102</sup>.

Rida compares the various *Shari'ahs* 'which can abrogate' one another to *din*, 'which is one'<sup>103</sup>. He then compares this relationship to that of the specific injunctions in the *shari'ah* of modern conceptions of Islam, 'where one finds the abrogating verse and abrogated ones, to reified Islam itself'<sup>104</sup>. This, he suggests, is because Allah does not wish to impose on His servants anything other than a single *din* which is [non-reified] Islam'<sup>105</sup>. 'In order for them to attain [this diversity in a single *din*]', Rida says, God 'has charted

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<sup>100</sup> Q 22:67.

<sup>101</sup> Q 5:48.

<sup>102</sup> Al-Tabataba'i, (n 24) 350.

<sup>103</sup> Rida (n 87) 351.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

different paths and ways depending on their different capacities... Thus, He says “if Allah had so willed, He would have made you a single community”(5:351)’.<sup>106</sup> This comparison of the intra-religious abrogation to interreligious supercessionism seemingly supports the view that the appearance of Islam nullifies the religious paths that preceded it, and now live alongside it. Yet this is not Rida’s opinion in his views on the question of whom this text addresses. This question is obviously significant in interpreting the text’s meaning: addressing a vague historical humankind, rather than a contemporary community sharing the same geographical space and time with the Muslims in Medina, would put an entirely different complexion on to it. Unsurprisingly, and despite the immense exegetical difficulties involved, most of the exegetes suggest that this verse addresses the communities of earlier prophets<sup>107</sup>. ‘The reference here’ (i.e., 5:48), al-Tabari says, ‘is to every Prophet who had actually passed away and their communities which preceded our Prophet, whereas he is the only person being addressed. Although the addressee is the Prophet, the intention is to convey an account of the Prophets who preceded him and their communities’<sup>108</sup>.

Aware that this contradicts the apparent meaning of the text, al-Tabari explains that ‘it was customary among the Arabs that when a person with an absentee attached to him was addressed with the intention of saying something about the absentee, then the addressee would be focused on. In this manner information about both is conveyed’<sup>109</sup>. Rida prefers the obvious meaning, i.e., that it refers to the Muslims, the People of the Book and to humankind in general<sup>110</sup>. This inclusivism is reflected in his interpretation of the text: ‘We have made for everyone a *shari‘ah*... and a path for guidance. We have imposed upon them its paths for the purification of their souls and their reformation, because the paths based on knowledge and the paths of spiritual cultivation vary with the differences in society and the human potential’<sup>111</sup>. Viewing the deceased adherents of supposedly abrogated *Shari‘ahs* as the addressees of this text dispensed with the need for any detailed discussion of the text itself or its implications for religious pluralism. The traditional interpretations of the text present several difficulties and are evidently inconsistent with both its context and apparent meaning. These difficulties require the consideration of an alternative, inclusive, interpretation, as follows.

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<sup>106</sup>Ibid.

<sup>107</sup>Al-Tabari (n 63) 272; Al-Razi (n 37) 14.

<sup>108</sup>Al-Tabari, *ibid*.

<sup>109</sup>Ibid.

<sup>110</sup>Rida (n 87) 413.

<sup>111</sup>Ibid.

The entire Qur'anic discussion, including the preceding sentences of 5:48 and the subsequent verse, refers to the role of the Prophet as arbitrator in an actual community. The context of this text makes it plain that other religious communities coexisting with the Muslims in Medina are addressed, not an ahistorical community existing in a non-physical world or in a different historical context.

The text under discussion, 5:48, says that, upon returning to God, 'He will inform you of that wherein you differed'. If one supposes that this text refers to the pre-Qur'anic communities whose paths are acknowledged as valid, pure and divinely ordained for a specified period, as the doctrine of supercessionism holds, then there is no question of the Muslim community during Muhammad's life differing with them, nor a need for information regarding the differences.

The text asks that the response to this diversity be to compete with each other in righteous deeds. Given that any kind of meaningful competition can only be engaged in by contemporaneous communities who share similar advantages or disadvantages, one can only assume that the partners of these Muslims were to be those Others who lived alongside them.

In the light of these points, the text can best be understood as follows. One observes that it comes towards the end of a fairly lengthy discourse on the significance of specific scriptures for specific communities. Qur'an 5:44-5 deals with the Torah, which has 'guidance and light', 'should not be sold for a trivial price', and those Jews who do not judge by its injunctions are denounced as 'ingrates' and 'wrongdoers/oppressors'.<sup>112</sup> This is followed by 5:46-7 which describes the revelations to Jesus Christ in similar terms ('a light and guidance and an admonition for those who keep their duty') and a denunciation of the followers of Christ who do not judge by their standards as 'transgressors'.<sup>113</sup> It is at the end of this chronological discourse on the significance and importance of adhering to revealed scripture that the text 'To each of you we have given a "path and a way"' appears. Given this context of recognising the authenticity of the scriptures of the Other, it follows that the text refers to the paths of the religious Other in a similar vein.

As for its meaning, the essence of this text is located in the words *shira* and *minhaj*;

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<sup>112</sup>The Qur'an postulates that all of these scriptures originate from the same source, the Mother of the Book (13:39, 43:4) and that separately each constitutes only a portion of the Qur'an (2:231; 18:28; 29:45; 35:31), the Torah and the Gospels (4:44; 4:51).

<sup>113</sup>Q 5:46-7. see also Q 7:170.



both relating to ‘a path’. The word *Shari‘ah* and its variants appear only three times in the Qur’an; the word *Allah* approximately 3000 times. Hasan Askari, referring to the question of religious pluralism, asks ‘How may it be that the One and Transcendent, the Creator and Almighty is equated with the form of one religious belief or practice? And if we equate thus, we make a God out of that religion, whereas we are all called upon to say: “There is no deity except God”’<sup>114</sup>. The text thus means that God has determined a path for all people, both as individuals and as religious communities; that one should be true to the path determined for one. Furthermore, should one of these paths have become too tortuous that it is no longer possible for one to move along it, then one is free to choose another of the paths determined by God. The purpose is to vie with one another in righteousness towards God. If we take Askari’s interpretation to its logical conclusion, we are conceding that Islam not only has room within it for people to change their religion (whether into or out of Islam) but also that such freedom is necessary to not let one organised religion attain the same status as that of One God. This is very important for the right to change one’s belief as it exists under the International Human Rights legal framework, because it proves that religious freedom and the right to change one’s religion is not antithetical to Islam, as both secular legal scholars and traditional Islamic jurists believe.

The text discussed here (5:48) is one of two that specifically employ the metaphor of competition. Both appear in a Medinan context of the Prophet engaging the People of the Book. The second, 2:148, reads as follows:

And each one has a goal towards which he [or she] strives/direction to which he [or she] turns [*li kulli wjrah huwa muwalliha*]; so compete with one another in righteous deeds. Wherever you are, Allah will bring you all together. Surely Allah is able to do all things.<sup>115</sup>

While this phrase *li kulli wjrah huwa muwalliha* is open to both the senses given in this translation, the context of this text would suggest that its focus is narrower than the advocates of religious pluralism may want to believe, i.e., the second translation ‘direction to which he turns’ is more appropriate. Commenting on this verse, al-Razi quotes Hasan al-Basri as saying that *wjrah* refers to *shirah* and *minhaj*. He adds that the verse would then

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<sup>114</sup>Hassan Askari, Christian Mission to Islam: A Muslim Response, (1986) 7(2) Journal of International Muslim Minority Affairs 314.

<sup>115</sup>Q 2:148.

mean that the phenomenon of a variety of *Shari'ahs* has its virtues. 'Undoubtedly *Shari'ahs* differ in terms of the varieties of people as they vary with the different personalities. It is thus not far-fetched that they should differ with the passing of time with reference to one person. This is why the idea of *naskh* (abrogation) and change is correct'<sup>116</sup>.

Al-Zamakhshari says that the phrase refers to the different directions a person faces to pray in the other religions and that the challenge to the Muslims is to compete with the Other<sup>117</sup>. Al-Tabataba'i says that since there is 'nothing inherently reverential about directions of prayer ... one should not waste one's time and energy in disputation and argumentation about it'<sup>118</sup>

Given that Qur'an 5:48 is explicit in its reference to various *Shari'ahs* and *minhaj*, it is worth briefly returning to some exegetical comments on this verse. The idea of competing in righteousness that it expresses is also evident in verse 2:148. Al-Tabari interprets this text to mean; 'Hasten, O people, to righteous deeds, and attachment to your Lord by fulfilling the duties in the Book revealed by Him unto your Prophet. He has revealed it in order to test you so that the virtuous may become obvious from the sinner'<sup>119</sup>.

Both al-Razi and al-Zamakhshari offer some brief comments, saying that the testing refers to the diverse *Shari'ahs*, i.e., 'whether we acted upon it obeying Allah or pursued doubts and half-hearted righteousness'<sup>120</sup>. Seemingly to counterbalance his ideas on the validity of religious pluralism, Rida introduces his views on competing in goodness with a lengthy discussion on the supposed unsuitability of both the 'stagnant legal severity of Judaism... [and] the legal leniency... spiritual excesses... and acquiescence to worldly power'<sup>121</sup> of Christianity. He then contrasts this with the supposed supremacy of a moderate and dynamic Islam. Finally, he says:

What is wrong with you... that you look at *din* in terms of what divides and disperses, ignoring the wisdom of diversity and the objectives of *din* and *shari'ah*. Isn't this a departure from guidance and pursuing your own fancy... You have to make the *shari'ahs* a cause of competition in

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<sup>116</sup>Al-Razi (n 37) 145

<sup>117</sup>Al-Zamakhshari (n 75) 205.

<sup>118</sup>Al-Tabataba'i (n 24) 327.

<sup>119</sup>Al-Tabari (n 63) 272.

<sup>120</sup>Al-Razi (n 37) 15; Al-Zamakhshari (n 75) 640.

<sup>121</sup>Rida (n 87) 418.

goodness not a cause for enmity and competing in prejudice.<sup>122</sup>

While al-Tabataba'i suggests that the challenge to compete in righteousness is directed to the Muslims, he nevertheless concludes that they should not occupy themselves with these differences.<sup>123</sup>

What is evident from these examples is that the metaphor of competition in righteousness is not regarded seriously in exegesis.<sup>124</sup> While none of the exegetes whose works are under perusal explicitly excludes the Other, it is only Rida and al-Tabataba'i (the latter by implication) who include the Other. The inclusion of the Other, in the context of the text, however, is evident. The challenge to competition is immediately preceded by a statement on the diversity of religious paths: 'And if God had pleased He would have made you a single *ummah*. However He desires to try you in what He gave you. So vie with one another in righteous deeds.'

Given that this competing in righteousness is between diverse communities, several implications follow. Firstly, righteous deeds that are recognised and rewarded, are not the monopoly of any single competitor, as the Qur'an says: 'O humankind, We have created you from one male and female. We have made of you tribes and nations so that you may know one another. In the eyes of God, the noblest among you is the one who is most virtuous'.<sup>125</sup> Secondly, God has to be above the narrow divisions believers impose on themselves. Thirdly, claims of unique closeness to God, or mere identification with any particular community will not avail the believers. Fourthly, the results of any just competition are never foregone conclusions.

The Qur'an makes several references to the theological difficulties of religious pluralism and of *kufir*. If God is One and if *din* originates with Him, why is it that humankind is not truly united in belief? Why do some people persist in rejection when 'the truth is clearly distinguished from falsehood'?<sup>126</sup> Why does God not 'will' faith for everyone? These were some of the questions that appear to have vexed Muhammad and the early Muslims. In response to these, several texts urge an attitude of patience and humility; These questions

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<sup>122</sup>Ibid.

<sup>123</sup>Al-Tabataba'i (n 24) 353.

<sup>124</sup>See Ernest Hamilton, The Olympics of Good Works: Exploitation of a Quranic Metaphor. (1991) 81(1) The Muslim World 72.

<sup>125</sup>Q 49:13.

<sup>126</sup>Q 2:256; 23:90.

are to be left to God who will inform humankind about them on the Day of Judgement. In addition to the text under discussion (5:48), which addresses the people who have a *shirah* and *minhaj*, saying ‘unto God you will return, so that He will inform you of that wherein you differed’, the following text also conveys the call to patience and humility:

Will you dispute with us about God, while He is our Lord and your Lord?  
And we are to be rewarded for our deeds and you for your deeds?<sup>127</sup>  
God is your Lord and our Lord: Unto us our works and unto you your works; let there be no dispute between you and us. God will bring us together and to Him we shall return.<sup>128</sup>

As for those who persist in *kufr*, the Qur’an says;

If your Lord had willed, all those on earth would have believed together.  
Would you then compel people to become believers?<sup>129</sup>  
If God had so wanted, He could have made them a single people. But He admits whom He wills to His grace and, for the wrongdoers there will be no protector nor helper. (42:8)

Revile not those unto whom they pray besides God, lest they wrongfully revile God through ignorance. Thus, unto every *ummah* have We made their deeds seem fair. Then unto their Lord is their return, and He will tell them what they used to do. (6:108)

An honest reading of the above text makes it clear that the Qur’an has an inherent bias towards religious tolerance and religious pluralism.

### 5.7 Evidence in the *Sunnah* for this new approach

In the context of the above, it is worth remembering that, as explained in chapter 4, a fundamental tenet of Islam is that the Qur’an is unchanging and infallible – therefore where the Qur’an and jurisprudence can be seen not to agree, we are forced to conclude that it is

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<sup>127</sup>Q 2:139.

<sup>128</sup>Q 42:15; 2:139.

<sup>129</sup>Q 10:99.

*fiqh* at fault and must be brought in line with the Qur'an.<sup>130</sup> If, as has been argued above, the Qur'an acknowledges the fact of religious diversity as the will of God, then a significant question that arises is that of Muhammad's responsibility to the adherents of other faiths. Rahman has correctly described the Qur'anic position regarding this relationship as 'somewhat ambiguous'<sup>131</sup>. From the Qur'an it would appear as if the fundamental prophetic responsibility was twofold. Firstly, with regard to those who viewed themselves as communities adhering to a divine scripture, it was to challenge them about their commitment to their own traditions and their deviation from them. Secondly, with regard to all of humankind, it was to present the Qur'an's own guidance for consideration and acceptance. There are two ways of approaching this ambiguity. One way is to relate the first responsibility to the second one, for they are not entirely divorced from each other, and the other is to understand the context of different responsibilities and their applicability to specific components of the Other, at specific junctures in the relationship with the Other.

The Qur'anic challenge to the exclusivist claims of the People of the Book has been discussed earlier. At other times, various groups and individuals, among the People of the Book in particular, were challenged by Muhammed regarding their rejection of the signs of God,<sup>132</sup> their discouraging of others to walk the path of God, and their knowingly covering the truth with falsehood.<sup>133</sup> Muhammad, as indicated earlier, was expected to challenge them regarding their commitment to their own scriptures,<sup>134</sup> their deviation from these, and their distortion thereof. Muslim scholarship has largely argued that, given this distortion, nothing in the scriptures has remained valid. In dealing with the Qur'anic references to the truth contained in the scriptures and exhortations to the People of the Book to uphold it, Muslim scholars have limited this obedience to the scripture to those texts which putatively predict Muhammad's prophethood. Notwithstanding this recognition of the legitimacy of the Other revealed scriptures, Muhammad is still asked to proclaim: 'O humankind! I am a Messenger of God unto all of you'.<sup>135</sup> Muhammad thus had a task of proclaiming and calling in addition to that of challenging.<sup>136</sup>

On the face of it, these seem to be a set of contradictory responsibilities for, if a text

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<sup>130</sup> See M Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003); and K Abou El Fadl, *Reasoning with God: Reclaiming Shariah in the Modern Age* (Rowman & Littlefield 2014).

<sup>131</sup> Rahman (n 29) 5.

<sup>132</sup> Q 3:70-1; 3:98.

<sup>133</sup> Q 3:70; 3:98-9.

<sup>134</sup> Q 5:68.

<sup>135</sup> Q 7:158.

<sup>136</sup> Q 16:125; 22:67

is distorted, how can one ask for adherence to it? In the second responsibility, that of inviting, the question arises regarding the purpose of inviting to one's own path if that of the Other is also authentic. Firstly, the problem of the authenticity of texts as against their being distorted and, therefore, invalid, only arises if one thinks in terms of a singularly homogeneous and unchanging entity called 'the People of the Book' and all Qur'anic references to it divested of contextuality. It has been shown above that this is not the case. The Qur'an itself is silent about the extent and nature of this distortion and castigates 'a section of the People of the Book'. The uniformity of praise or blame for a particular religious group is contrary to the pattern of the Qur'an. It is thus possible that the references to the authenticity of their scriptures refer to those held by the rest. Indeed, even the Qur'anic denunciation of particular doctrinal 'errors' is not uniform in tone, indicating thereby either a particular moment in the Muslim encounter with the Other, or different components of the Other with specific nuances to those 'errors'. Secondly, Muhammad's basic responsibility in inviting was to call to God. For some components of the Other, the response to this call was best fulfilled by a commitment to Islam. Thus they were also invited to become Muslims. For others, the call was limited to *Islam*. The invitation to the delegation of Najran is one such example when, after they declined to enter into Islam, they were invited to 'come to a word equal between us and you that we worship none but God, nor will we take from our ranks anyone as deities'.<sup>137</sup> The Qur'an, thus, is explicit only about inviting to God and to the 'path of God'. In the following text, for example, the instruction to invite people to God comes after an affirmation of the diversity of religious paths. Here again one sees the imperative of inviting to God, who is above the diverse paths emanating from Him.

Unto every community have we appointed [different] ways of worship, which they ought to observe. Hence, do not let those [who follow ways other than yours] draw you into disputes on this score, but summon [them all] unto your Sustainer: for, behold, you are indeed on the right way. And if they try to argue with you, say [only]: God knows best what you are doing.

[For, indeed,] God will judge between you [all] on Resurrection Day with regard to all on which you were wont to differ.<sup>138</sup>

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<sup>137</sup>Q 3:64.

<sup>138</sup>Q 22:67.

## 5.8 Conclusion

The basis for the recognition of the religious Other was clearly not the acceptance of Islam and Muhammad's prophethood with all its implications; nor was it the absence of any principles. The fact that it was Muhammad and the Muslims who defined the basis of coexistence, and who determined which form of submission was appropriate for which community, clearly implies a Qur'anic insistence on an ideological leadership role for itself. It was explicit in the Qur'anic approach to relationships with other religious groups. It is a significant departure from the harmonistic position, which equates coexistence and freedom with absolute equality for all. A fundamental question arises here: how is this Qur'anic position compatible with pluralism, justice, and human rights?

It has already been indicated that the particular spiritual status accorded to Muslims in the Qur'an does not mean a position of permanent socio-religious superiority for the Muslim community. The Muslims as a social entity were not superior to the Other, for such a position would have placed them and their parochial understanding of God in the same category as others who were denounced in the Qur'an for the crimes of arrogance and designing to appropriate God for a narrow community. The Qur'anic exhortation to other communities is that they cannot base their claims to superiority on the achievements of their ancestors: 'That is a community that is bygone; To them belongs what they earned and to you belong what you earn, and you will not be asked about what they had done'.<sup>139</sup> There is no reason to suppose that this should not be applied to the present-day Muslim community.

Furthermore, the Qur'an does not regard all people and their ideas as equal, but proceeds from the premise that the idea of inclusiveness is superior to that of exclusiveness, echoing the intentions of the *travaux préparatoires* which privilege pluralism over majoritarianism. In this sense, Islam's advocates of pluralism had to be 'above' those who insisted that the religious expressions of others counted for nothing and that theirs was the only way to attain salvation. The relationship between the inclusivist form of religion and the exclusivist form can be compared to that of a democratic state and fascist political parties, as Askari has cogently argued.<sup>140</sup> It is essential to note here that the International Human

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<sup>139</sup>Q 2:134.

<sup>140</sup>If a group or party arises which does not agree to the democratic rule and works to overthrow the government of the day by violent means in order to create a fascist social order wherein there is no room for democratic expression and exercise of opinion and power, that group cannot lay claim to those rights enjoined by a democracy ' (Askari (n 114) 328). Askari argues that the basis of this coexistence is a recognition of the superiority of pluralism and democracy. A group opposed to democracy and determined to violently overthrow a democratically elected government in order to create a fascist social order, he says, 'cannot lay claim to those rights enjoined by a democracy' (Ibid, 5). This analogy, extended to religious

Rights instruments that this thesis relies on – the UDHR, the ICCPR, and the ECHR – all came about as a result of great human and political upheaval following the Second World War and the rise of Fascism in Europe. These documents and the rights contained within them were meant to protect those who were marginalised and oppressed by this fascism, and were meant to be a means through which another human tragedy on that scale could not happen again.

Inclusivity as per the Qur'an was not merely a willingness to let every idea and practice exist. Instead it was geared towards specific objectives, such as freeing humankind from injustice and servitude to other human beings so that they might be free to worship God. As has been explained, according to the Qur'an, the belief that one is not accountable to God and *shirk* were intrinsically connected to the socio-economic practices of the Arabs. In order to ensure justice for all, it was important for Muhammad and his community to work actively against those beliefs and not accord them a position of equality.

No pre-modern religion is going to perfectly map onto modern conceptions of legality and human rights. But if we follow this train of thought and this mode of interpretation, which takes an honest, contextual reading of Scripture, it is not only possible but inevitable that a pluralistic understanding of 'freedom' and 'faith' emerges.

This section of the thesis (comprising this chapter and chapter 4) has proven the following. It has been established in chapter 4 that Islamic Law accepts that the Qur'an (and to a lesser extent *Sunnah*) is divine and immutable and applicable for all time. But, again as laid out in chapter 4, there is a difference between *Sunnah* and Qur'an on the one hand (i.e. the foundational texts, the constitution, if you will, of Islam), and then *fiqh* (jurisprudence), on the other hand – jurisprudence is manmade and fallible and can definitely change: all schools of Islamic jurisprudence accept this.

It was established as well that Islamic jurisprudence has stagnated since the 13th century – the so-called 'closing of the gates of *ijtihad*' was the product of a cultural decline, not a divinely-ordained move, and it is legitimate under Islam to ignore and move past the established jurisprudence if there's good reason to do so, and if the new approach is in

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communities, according to him, means that 'the rights which religious communities have *vis-à-vis* one another should derive from a shared theology which.....affirms religious diversity in order to give praise, in various ways and modes, to the One and the same Transcendent God' (ibid).



accordance with Islamic practice and the fundamental texts.

This chapter has re-evaluated some key verses of the Qur'an, looking at traditional sticking-point verses that have made an understanding of *fiqh* as it stands *vis-à-vis* human rights difficult. This chapter also proposed that the Qur'an's approach to religious pluralism was inherently inclusive and accepting from its inception, and that the traditional juridical interpretations were motivated by human exclusivist tendencies (tendencies, indeed, that the Qur'an explicitly denounces). As discussed above, verses that condemn religious chauvinism and exclusivist approaches to divinely-led religious living have been twisted in traditional jurisprudence to give an exclusionary reading that would justify a two-tier or discriminatory mode of Islamic Law as it pertains to religious tolerance and pluralism.

This chapter looked at these verses, and the traditional interpretations, and teased apart why those analyses are bad and/or dishonest – see section 5.4 where traditional jurisprudence makes a word in the verse mean the opposite of what it means, contradicting its meaning throughout the rest of the Qur'an, and uses the contradictions in these lines of reason to disprove their validity.

This chapter proposes that the reinterpretation given above is desirable, and that if so, we must accept that this results in an interpretation of Islam that is inherently pluralistic, inherently inclusivist, and inherently accepting of the validity of all religious traditions that are firmly-held and righteous. Not only is this a strong basis from which to develop Islamic jurisprudence in parallel with human rights law, but it also aligns better *per se* with the principles and limitations set out in the *travaux préparatoires*. And this lays the groundwork for a re-evaluation of jurisprudence and a ground-up reworking of *fiqh* in light of these reinterpretations. This proposed reassessment of Islamic jurisprudence would no doubt be politically unpopular as a result of the obvious and widespread appeal of exclusivism and chauvinism and religious nationalism. But the intent of this chapter is to show that this is a valid interpretation of the Qur'an, one that was passed over purely on the grounds of authority and political manoeuvring, designed to exercise authority over religious minorities. This thesis argues that this alternative interpretation is legally sound and could be a significant starting-point for an Islamically-sound, inclusive, pluralistic reimagining of *fiqh* around the Right to Freedom of Religion.

## CONCLUSION

This thesis started off on the basis of trying to answer a simple question, i.e. is there a way for us to change our understanding of the law on the Right to Freedom of Religion, in order to better protect religious minorities, and their right to religious freedom? The communities of religious minorities in question were Muslim minorities in the ‘West’ and non-Muslim and/or Muslim minorities in Muslim-majority countries. In order to answer the question for the first set of people (Muslims in the ‘West’) it was important to first analyse why and how these minorities’ Right to Freedom of Religion was being infringed, leading to their marginalisation. The thesis did so by examining the way the right is interpreted and adjudicated on by the European Court of Human Rights and the Human Rights Committee, and contextualised the current judicial treatment of Article 9 of the European Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights, respectively.

This thesis specifically focused on cases involving Muslim women and their right to veil, while using cases involving Sikh men and their right to wear turbans as a manifestation of their religion as comparators, due to the similar racialisation and the ‘othering’ the two communities face. This analysis led to the conclusion that the ‘secular’ system of rights is in fact, not so secular after all, because it’s conception of ‘religion’ is highly influenced and informed by liberal Protestant Christian understandings of ‘faith’ and its ‘appropriate’ manifestation, where overt expressions of faith are seen as unnecessary in some cases, and secondary to national narratives, in others. To address this problem, the thesis suggested undertaking a reinterpretative exercise of the Right to Freedom of Religion as found under International Human Rights Law, by going ‘back to the basics’ – the ‘intention’ behind the drafting of the international instruments in question, i.e., the *travaux préparatoires* of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

By examining the *travaux préparatoires*, it becomes clear that the drafters of these international legal instruments intended for an approach that follows a ‘good faith’ or *pacta sunt servanda* principle of interpretation in implementing the substantive rights in the documents. Through an analysis of the decisions on Article 18 of the ICCPR, the HRC’s jurisprudence (whether intentionally or unintentionally) appears to already employ such an

interpretation when deciding cases involving an infringement of the Right to Freedom of Religion; it does so by placing the interests of the claimant at the centre, in order to protect their religious freedom with all its many moving parts, no matter what. However, an analysis of the ECtHR's interpretation of Article 9 of the ECHR highlighted that the Court favours Member States' own national interests in furthering particular and exclusive interpretations of secularism. This way, the European Court ends up disadvantaging and further marginalising its minority populations, going directly against the intention of the original drafters of the ECHR, as evidenced from the *travaux préparatoires*. The thesis thereby suggests that in order to reach more pluralistic and equitable decisions, International Human Rights Law and its proponents need to go 'back to the source', and reassess how judgments and decisions are given with respect to a claimant-centred, pluralistic understanding of religions and their legitimate manifestation.

The next section of the thesis examined Islamic Law's position on the Right to Freedom of Religion. It explained what Islamic Law in general is, and discussed some of the contemporary understandings of religious freedom and the rights of religious minorities found under Islamic jurisprudence, and why those are problematic. It highlighted how Islamic Law is not – as it stands – particularly well-equipped to harmonise with International Human Rights Law in general, or on freedom of religion, in particular. The jurisprudential interpretations that are in use today do not align well with modern conceptions of equality, justice, and rights, and contribute to the very real oppression being faced by religious minorities in Muslim majority countries. (Moreover, this thesis contends that this is not, as some scholars claim, a matter of Western misunderstanding of Islamic jurisprudence, but rather an inherent difficulty.) In order to address this, the thesis provides that a reinterpretation is required of the Islamic jurisprudential texts, by once again, going 'back to the source' – the Qur'an, to provide context and a re-evaluation of the various Qur'anic edicts on religious freedom and the rights of religious minorities. By doing so, the thesis proves that such a re-reading puts what we popularly understand as 'Islamic Law' in line with modern postulates of plurality, justice, and equality, improving its compatibility with so-called secular systems of law, and thereby protecting the rights of religious minorities in Muslim majority countries by providing them unhindered access to Human Rights, if they so wish to employ that system for their benefit.

It is important to note that while apparently radical, this is by no means a novel approach. Islamic feminists have conducted similar reanalyses of Islamic jurisprudence, with

a textual analysis of the Qur'an at the heart of the methodology, in regards gender equality and women's rights under Islam. That is the model that this thesis follows as well. It extends the re-interpretive examination of *fiqh* that Islamic feminists have done for gender justice and equality to the rights of religious minorities for religious freedom. Chapter 4 of the thesis was explicitly critical of harmonists *and* cultural relativists alike, because it is not the intention of this thesis to bring Islamic precepts or understandings of religious freedom in line with human rights standards- it does not want to ape them because it recognises the shortcomings of the current human rights regime on the Right to Freedom of Religion, as well. However, this thesis also recognises that there is a very real problem in Muslim majority countries *vis-à-vis* the rights of religious minorities and religious freedom, and it seeks to use both Islamic Law and the human rights model in aid of those communities. That is the main purpose of this thesis and this research undertaking. If the best way to grant rights and protection in furtherance of a life of dignity to religious minorities, believers, and non-believers of all stripes in Muslim majority countries, is to reinterpret what Islam has to say about religious rights in a way that is acceptable to the Muslim majority as well, then that is the approach the global human rights system must follow. This kind of reinterpretation does not aim to alienate the Muslim majority- on the contrary, it uses texts they deem divinely-ordained as a source of increased rights and freedoms for religious minorities, to prove that such an approach is not antithetical to Islam, and that their hostility towards the International Human Rights system (perceived, rightly, as 'Western' by them) is unnecessary.

The thesis, therefore, concludes that neither is the international human rights system on the Right to Freedom of Religion perfect, nor is the one found under Islamic *fiqh*. Both systems are flawed, but both systems are also just different from one another and must be understood and interpreted on their own terms, first and foremost. The thesis proves that both systems are, by their own admissions, falling short of the protections they offer, and need significant reform for their own sakes and their own internal functioning in a modern world. And thus the thesis identifies a way of reform, which if done along particular lines, not only results in two more robust, healthy legal systems that adhere more honestly to the tenets of their foundational texts, but also results in systems that are suddenly better-equipped to cooperate. This cooperation would require significant political will but could in theory increase Muslim postcolonial peoples' trust of and active participation in a more equitable International Human Rights legal regime. This also would remove one big source of plausible deniability for Muslim majority States whose governments and leaders dishonestly use Islam and cultural relativism as an excuse for failing their citizens in regards

to their human rights.

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