Protection of Religious Minorities: Between Islamic Law and International Law

A Comparative Study of Scope and Freedom of Religion

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Declaration for SOAS PhD thesis

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Forward

The completion of this PhD thesis has been an extremely long and arduous process. It has taken a good part of eight years of my life, which I perhaps in hindsight should have (now) happily swapped for four full time (focused) years. But instead I, like many fools before me, chose a topic which was far too ambitious and beyond my skill-set as well as insisting on simultaneously working, in order to mutually enrich my academic and practical pursuits. Such idealism and naivety, unsurprisingly, was paid for in bucket loads of sweat and tears not to mention grief.

Most of those eight years and more specifically three periods of intense study took place after my marriage and continued over a period which saw the arrival of three priceless and adorable children. The necessary research and drafting would have been impossible to conceive and execute without the encouragement and determination of my beloved and cherished wife. It is an extremely tall order to ask a young, idealistic and still dreaming woman to have to partly forgo her most valued nascent years of marriage to a laptop and libraries. Despite suffering from trying and extensive periods without me, one of which involved me living on my own for two and half months at her suggestion, she continued to provide the necessary momentum and inertia, when I despaired of them.

It is for this reason, I dedicate this thesis to my intrinsically and extrinsically beautiful wife, with other-worldly forbearance even in the face of loneliness and distance. My very special companion, who pushed me even when she stood to suffer the most, only so I could gain and be elevated towards the goals that I held dear. She has shown and taught me the true spirit of altruistic love. She has humbled and grown me far more that a PhD ever could.

This is for and because of you Nawel.

Abstract

This thesis undertakes a critical comparative examination of the protection of religious minorities under Islamic law and international human rights law. Perhaps no subject epitomises the perceived incompatibility between Islamic law and human rights law than the protection of religious minorities. Often viewed through the lens of the classical notion of *ahl al-dhimma* (protected people), the treatment of religious minorities under Islamic law has been portrayed as oppressive, degrading and discriminatory. Scholarship thus far has sought either to affirm this negative perspective, convey only positive aspects or declare its inapplicability to the present context of international relations.

The relevance of the study goes beyond the conventional question of Muslim-majority States navigating between their international human rights obligations and their self-imposed commitment to Islamic law principles. Two important contemporary phenomena that take the question beyond that traditional premise are the emergence of Islamically inspired non-State actors seeking to apply rigid and literalist interpretations of Islamic law and the rapid rise of a wave of opinion attempting to portray Islam in a negative and retrograde light motivated by the far-right politics of xenophobia and Islamophobia. Ironically, the alleged intolerance within Islam is used as justification for the instigation of hateful sentiments against Muslim (immigrant) minorities in different parts of the world today.

Hitherto the topic has seldom been analysed by reference to the doctrinal frameworks that accompany international law and Islamic law, as undertaken in this study. Cognisant of contextual factors, the study demonstrates that the depth, flexibility and principles of Islamic law may be far more amenable to the protection of religious minorities than popularly thought and that, similarly, that religious minority rights under international law may be subject to a range of interpretations and not universally adhered to or agreed by States. The main purpose of the thesis is to derive and compare, what it calls the 'spectrums of validity' under both systems on two distinct issues, namely: (i) the concept of the scope of religious minorities and (ii) their right to freedom of religion.

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Chapter 1
Introduction

I. General Context of Study

A general motivation for undertaking this research is the post-September 11th context and the oft-cited thesis of "The Clash of Civilizations" first posited by Samuel Huntington in his seminal 1993 essay, which was later elaborated in a monologue by the same name.[1] Huntington's hypothesis was that:

> "[T]he fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future."[2]

He went on to specify religion and in particular Islam as the most important differentiator between civilisations as compared to history, language, culture or tradition: "people of different civilizations have different views on the relations between God and man, the individual and the group, the citizen and the state, parents and children, husband and wife, as well as differing views of the relative importance of rights and responsibilities, liberty and authority, equality and hierarchy."[3] Huntington observed and predicted a trend towards the local identity derived from the nation-State being eroded accompanied by an unsecularisation of the world: "In much of the world religion has moved in to fill this gap, often in the form of movements that are labelled 'fundamentalist'" and "provides a basis for identity and commitment that transcends national boundaries and unites civilisations."[4]

Certainly, Islam provides a source of identity, which is manifesting itself in a number of contemporary tensions and conflicts globally. Further still, along the lines Huntington described, the confrontation is increasingly between nations and groups as opposed to between nations. Such Islamically defined non-State actors include Al Qaeda, Taliban (Afghanistan and Pakistan), Al Shabab (Somalia), Boko Haram (Nigeria), ISIS (Iraq and Syria) and Ansar Dine (Mali). However, the nation-group conflict dynamic is also born out in

[1] Huntington, S., *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 1996).

[2] Huntington, S., "The Clash of Civilizations?" *Foreign Affairs*, Vol. 7, No. 3, (1993). (http://www.foreignaffairs.com/articles/48950/samuel-p-huntington/the-clash-of-civilizations), 22.

[3] Ibid. at p. 23.

[4] Ibid. at p. 24.

the tension and relations between the nation-State and (religious) minority groups and the extent to which their identity is tolerated and accommodated.

Religion may provide a source of identity and, for Huntington, also often violent conflict for some time still: "[Religious] differences do not necessarily mean conflict, and conflict does not necessarily mean violence. Over the centuries, however, differences among civilizations have generated the most prolonged and the most violent conflicts."[5] This thesis explores whether the content accompanying Islamic identity comparatively with the existing international mechanism of human rights can contribute to preventing identity-based conflicts by appropriately managing religious diversity. What does Islam tell us about how a non-dominant religious group should be dealt with and what should be the basis and ultimate aim of that interaction? This extraction of moral and legal substance from Islam rather than its framing as purely a marker of identity encompassing non-religious elements such as political grievances and cultural, ethnic and linguistic facets provides a counter-narrative to Huntington's thesis. It will do this by drawing out the common humanity, morals and ethics that, it is presumed, any compassionate socio-political system would engender when governing over diverse populations. As such, this thesis opts for a constructivist approach rather than the realism adopted by Huntington. A mere description of world affairs and predicting its trajectory makes one a mere spectator on the sidelines of historical and future events. Rather as an active and concerned participant in world events, it is the objective of this thesis to identify impasses and offer proactive solutions to the minimisation of conflict and the maximisation of the rights of religious minorities.

Huntington's lead has been followed by a number of academics, commentators and politicians[6] since, seeking to pit Western Christian civilization, values and beliefs against the 'other' of Islamic civilisation. There are, nonetheless, notable inconsistencies at inception, not least, as neither "the West" nor "Islam" represents well-defined monolithic entities, in terms of belief or geography. This research, from a general perspective, seeks to contribute to this debate about the perceived antithetical nature of Islam and the West. As such, given that one is principally a cultural identity, while the other a religious one, it is plausible, in theory and practice, that there is no *inherent* incompatibility. Both can and do coexist.

A striking feature in the concept of a clash of civilizations has been the deployment of emotive, polemic and subjective arguments working towards proving a predetermined conclusion. As such, neither what is attributed to the 'West' is grounded in any objective or normative basis, nor the full spectrum of views available within Islam acknowledged or proper attention given to their validity according to Islam's own exegetical framework. Instead, issues and facts are often presented selectively to illustrate and preempt a particular outcome. This thesis asserts that both systems of Islamic law and international law can be objectively defined by reference to their own accompanying explanatory literature.

[5] Ibid. at p. 23.

[6] E.g. Spencer, R. (ed.) *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (Prometheus Books, 2005); and Ali, A. H., *Infidel* (Simon and Schuster, 2008).

The values, beliefs and principles upheld in the 'West' cannot be left to the subjectivity of individuals with varying agendas.[7] If claims are posited as to Western society's unparalleled respect for minorities, women and the rights of all humans, then support must be drawn from objectively determined evidences. The current international human rights system can provide such a litmus test. It is where such claims can be tested in relation to legal rights as well as the practical granting of those rights by individual States. At this juncture, the complexity should be acknowledged that the United Nations (UN) system and its accompanying international human rights framework cannot be said to be wholly Western given that a number of non-Western States, including Muslim-majority States, were party to the development and formation of international law generally.[8] Despite this, the perception is held by commentators on both sides that the effect of the 'South' and developing world on the international law-making process was disproportionate to their number.[9]

For Islamic law too, it does not suffice for critics and proponents to selectively quote from an extremely expansive cornucopia of source material spanning over 1400 years of scholarship and juristic discussions. Islam too must be objectively defined in terms of the law that derives from it. For the sake of precision and unambiguity, we will be referring to *Sunni* classical Islamic law. *Sunni* Islam is the most predominant reading of Islam, in terms of proportion of followers globally, amounting to an estimated 90% of the Muslim population globally.[10] In most Muslim countries the *Shi'ah* sect form numerical minorities with the exception of Iran, Iraq, Bahrain and Azerbaijan. The prevailing trend is also for State authorities to be aligned with the majority sect apart from in Bahrain and Syria.[11]

We will be focusing on classical Islamic law as it exhibits a rigorous scientific methodology to interpretations and derived legal principles. Compilers such as Bukhari and Muslim went to extraordinary lengths to verify and authenticate *ahaadith* not to mention that each of the four schools of *Sunni* law (*madhahib or madhab*) had some diverging opinions on the reliability or interpretation of certain *ahaadith*, resulting, at times, in variant rulings and legal

[7] See e.g Haddad, "*Ahl al-dhimma* in an Islamic State: the teaching of Abu al-Hasan al Mawardi's *Al-ahkam al-sultaniyya*", *Islam and Christian-Muslim Relations,* Vol. 7, No. 2 (1996), 169-70: "A negative assessment of the *dhimmi* system was published in 1985 by the Jewish writer Bat Ye'or, in which she compared the *dhimmis* to European serfs of the Middle Ages in an effort to justify the Zionist insistence on establishing a Jewish state."

[8] E.g The Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), was passed with no dissenting votes but 8 abstentions from Saudi Arabia, South Africa and 6 communist countries.

[9] In 1948, there were a number of states yet to undergo decolonisation or were newly formed. Furthermore through the now defunct Commission on Human Rights, Security Council and the Permanent five, the balance of power was clearly weighted in favour of the West. Voices of Islamic countries were not as pronounced or coordinated as they are now vis-à-vis the 57 member-State Organisation of Islamic Cooperation.

[10] http://www.religionfacts.com/islam/comparison_charts/islamic_sects.htm.

[11] Bahrain is ruled by a monarchy that is linked to the Saudi Arabian monarchy as well as being politically and financially propped up by them. Saudi Arabia cannot tolerate for there to be *Shi'ah* majoritarian rule in Bahrain for fear of undue influence of Iran on its borders. For a detailed monologue on this dynamic vis-à-vis the Arab Spring, see Matthiesen, T., *Sectarian Gulf: Bahrain, Saudi Arabia and the Arab Spring that Wasn't* (Stanford University Press, 2013). Syria until the recent civil war was ruled by President Bashar al-Assad and prior to him Hafiz. They belong to the Alawite sect (10%) while the majority is Sunni (90%). For further reading see Landis, J., "The Syrian Uprising of 2011: Why the Assad Regime is Likely to Survive to 2013", Middle East Policy, Vol. 19, No. 1 (2012).

views. Furthermore these views were themselves looked at cumulatively by later jurists to conclude as a whole the strength of certain views. As such, a scale of strength and reliability developed encompassing unanimous consensus (*ijma'*), majority opinion, significantly prominent opinion, minority opinion, weak and finally aberrant (*shaad*) views. Hence contestations and differences of opinions will *only* be considered within this classical ambit. As the collective source of Islamic law is not merely textual but also temporal, that is, emanating in the past at the time of the Prophet, then we cannot seriously endeavour to understand or apply Islamic law to the present in a vacuum and divorced from that temporal and textual reality and how it was understood over time.

A further cardinal reason for opting to analyse classical *Sunni* Islamic law is that the vast majority of Muslims do not only ascribe to *Sunni* Islam, but further refer to and rely on classical views as a starting point to determine the position of the rulings of their religion on a whole range of issues. Granted those who are conveying such views and adapting them to present day realities are contemporary scholars and jurists. However, it is in the expression or at least acknowledgement of classical Islamic juristic views that the vast majority of Muslims seek to find their religious norms. Therefore following this methodology will result in the greatest level of legitimacy and credibility amongst Muslim masses worldwide. Contemporary views will only be mentioned to show how they comply, in process or substance, with classical views. As such the logical methodology to pursue would be to find solutions using existing juristic tools and sources from within Islamic law. When the solutions come from without, the Muslim audience ceases to be the target or beneficiary of such works. It becomes purely an academic and theoretical offering, read and aimed largely at non-Muslim intellectuals.[12] We want to tailor solutions to the present but stay true to the sources and methodology of classical Islamic law. Thus when contemporary views are disregarded or challenged, it is not on the basis of abstract philosophical or logical considerations, but rather that they are at odds with classical *Sunni* Islamic legal scholarship, thus untrue to original principles. Resultantly reform or development cannot be a realistic prospect. In summation there needs to be a fine balance between departing from the roots and early development of Islamic law and failing to explore in depth in accordance with those principles whether the same, different or new ruling is necessary for contemporary problems in contemporary contexts.

This is the reason that even unpalatable options, possibilities or interpretations should be highlighted and analysed. On the one hand, it may be possible to show how such views may not be the best way to proceed and that other valid options exist. It may also be that an uncomfortable view is the only valid and *bona fide* view in front of us. In this case we must challenge our own preconceptions and attempt to analyse and explain the reason for that

[12] Critiquing Abdullah An-Na'im's monologue, *Islam and the Secular State: Negotiating the Future of Shari`a'* (Harvard University Press, 2008), John Esposito states: "[t]his reliance on theory rather than on textual sources or theology is flawed, if one expects to foster broad-based reform rather than be read and celebrated by a small elite Muslim and non-Muslim readership", in '*Islam and the Secular State: The challenge of creating change'* The Immanent Frame: Secularism, religion and the public Sphere, SSRC Blogs, The Social Science Research Council (http://www.ssrc.org/blogs/immanent_frame/2008/08/25/the-challenge-of-creating-change).

difference as opposed to feeling the necessity to make value-laden judgements. This is the only way one may make a compelling case for being objective, comprehensive and even-handed. Such an analysis would also equip those actors who seek engagement with Islamically motivated entities to know more precisely the views they may be dealing with, their genuine parameters of engagement and the underlying reasoning. Such an approach is also necessary to avoid being perceived as patronising and telling adherents of a certain faith what their religion says and what they should believe.

As such, two fundamental principles are of paramount importance; that evidences or *adilla* (sing. *daleel*) from the Qur'an and *ahaadith* must be considered *holistically* after considering all the relevant information at hand and that *all divergent views* on a particular issue be recognised *before* any preference is stated. The two principles are interlinked: the former demands that no evidence be taken in isolation and at the exclusion of other evidences in arriving at a ruling, while the latter requires that if following this exercise there is a difference of opinion, then that should form a 'spectrum of validity', from which we may deduce if there is consensus (*ijma'*) on a particular issue or otherwise its relative strength. It goes without saying that this also applies to international human rights law but is less of a problem due to the existence of quasi-judicial bodies that oversee the observance and development of international human rights law. With Islamic law there is no authoritative body globally that has the final say on what is correct law. Instead, the jurisprudential principles are known to all and it is left to jurists to determine the legality and substance of certain rulings and pressing issues. In this regard, we could posit that the sources are finite but the derived rulings non-exhaustive. This would be in consonance with Qur'an 16:89 which states: "And We have sent down to you the Book as clarification for all things and as guidance and mercy and good tidings for those who submit."

It is expected that the above-stated approach of analysing both systems of law will render a spectrum of valid rulings or what will be referred to in this thesis as a 'spectrum of validity' to ascertain overlaps and divergences. The coinage of the term within Western academia may be novel but the idea within Islamic law is both fundamental and well established. It revolves around a nuanced understanding of *ijma'* or unanimous consensus of the jurists. Ordinarily, the term is only discussed in the context of the presence or absence of *ijma'* on a certain issue. In Islamic law, the use of the term of 'difference' (*ikhtilaf or khilaf*) rather than 'conflict' or 'disagreement' is important as it denotes that there may be differing, non-conflicting yet simultaneously valid views.[13] Secondly and most crucially while there is no *ijma'* on an issue, this does not automatically imply that it now becomes open to an infinite number of possible solutions based purely on independent reasoning. In fact the *ijma'* that is overlooked by academics and modernists is the implicit one, on the finiteness of views on a certain issue given the effective elements of the circumstances and context remain unchanged. It is this finite range of juristic views on issues of difference in light of specific contextual factors, that we will be referring to as the 'spectrum of validity'.

[13] See Kamali, M. H., "The Scope of Diversity and 'Ikhtilaf' (Juristic Disagreement) in the Shari'ah", *Islamic Studies*, Vol. 37, No. 3 (1998).

A spectrum of validity in international law may also arise when considering various regional systems alongside the international UN system of human rights, most notable among them the European Court of Human Rights, African Commission and Court of Peoples' and Human Rights and Inter-American Commission and Court of Human Rights. Relating to some areas of human rights law, States have been given considerable leeway relating to their cultural and historical context, known as the 'margin of appreciation' specifically under the ECtHR. Conversely areas of the law where no compromise may be made and allowances permitted due to there being consensus on their normative and underogable nature, such as torture or racism, no such margin is applicable. It will also be unavoidable, given the nature of International law, as source and product of national laws and State practices, to refer at times to the practice (and compliance) of international law by States.[14] It is a primary objective of the present thesis to ascertain the extent of the overlap between Islamic law and international law, as indeed it is one of the assertions of this research that the overlap may be far greater than imagined or claimed by most previously. This will be to counter those who limit their analysis to divergent views to show a clash and conversely those who seek to discuss only the compatible and agreeable issues - both give an inaccurate and unproductive picture of the objective reality. As to the divergent parts, we would need to asses if one offers a higher standard than the other and seek to explain the differences.

II. Specific Context of Study

The substantive specific point of focus for this research is the protection of religious minorities. There are a number of reasons for delving into this topic. Firstly it is where the supposed clash of civilizations is seen to be most acute. A number of books by protagonists[15] as well as some academics[16] have been penned attempting to show the prejudice and discrimination inflicted on religious minorities under Islamic law or in Islamic States often referred to as *dhimmis*. However their omission of any reference to the treatment of ethnic and linguistic minorities under Islamic law is quite telling of the true motivations of such critiques. An ostensible reason could be the absence of any discernible discrimination coupled with the celebration of such diversity.

Even in relation to how non-Muslim religious minorities are treated under Islamic law, the correct and fair way to frame the question would be to ask *how does a system of law and authority treat a group that stands in ideological opposition to the centre of that authority*? Similar questions could be for example how a democratic system takes to undemocratic forces[17] or how a communist system takes to anti-communist movements. This would be a

[14] See Art.38 of the ICJ Statute.

[15] E.g. Spencer (ed.) *The Myth of Islamic Tolerance*.

[16] E.g. Ye'or, B., *The Dhimmi: Jews and Christians under Islam* (Fairleigh Dickinson University Press, 1985).

[17] E.g. Arts. 9-11 of ECHR: "...necessary in a democratic society". See ECHR case of *Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 123, ECHR 2003-II,* where democracy could not be used to dismantle a democratic system. See also Shaikh, M., "Islam, Democracy and Dissolution of Political Parties at the ECtHR", *Journal of Law and Social Policy*, Vol. 1, No. 1 (2011).

fairer test for gauging tolerance and accommodation. This could arguably be the reason why *nation*-states have issues with ethnic minorities, that is other nations. Thus the antithesis to the identity that occupies the centre of the metropolitan authority is what is often differentiated and the group(s) that is sought to be assimilated or discriminated against.

From an international law and relations perspective, the issue of minorities has caused much consternation amongst policy makers, law makers and leaders throughout history. In fact the mismanagement of minorities and their needs and aspirations has often proven to be at the root of major upheavals throughout history[18], not least recent and ongoing ones.[19] Such a track record only shows essentially how we have failed to effectively address and manage religious, linguistic and ethnic differences and ultimately distinct cultural identities and fundamental beliefs that go to the core as to the purpose of our existence and our resulting response. Similarly in a number of situations the volatile consequences of stoking tensions between minority and majority have been manipulated and abused to consolidate and solidify power, and ultimately justify aggression.[20]

It would be an important contribution to knowledge to explore how both Islamic law and International human rights law seek to address this recurrent problem and what solutions are offered. A comparison between principles and practices can indicate what is agreed and thus possibly the ideal means by which to manage diversity as well as alternate models where there is disagreement. This can either cast doubt as to the absoluteness of a certain principle or show that one may offer a higher standard of protection. It is also noteworthy to elaborate on why the research chooses to focus on religious minorities rather than the treatment of minorities more broadly under Islamic law and international law. As far as Islamic law is concerned, it is by far the most contentious issue and under international law it has been and continues to be the most contentious issue when compared to other types of minorities; to the point that no binding instrument yet exists at the international level protecting against religious discrimination[21] or endows minority rights on to religious minorities.[22] Even, as far as the individual clauses in other instruments[23] and State practice are concerned, the definitions[24], meanings, recognition and resultant rights of religious minorities are unsettled.

[18] E.g. Bangladesh, Rwanda, Yugoslavia and Kosovo.

[19] Ongoing at the time of writing: Crimea, Burmese Rohingya and Central African Republic.

[20] Kosovo, Hitler in Sudetenland, South Ossetia and Abkhazia. See Voronkova, A., *Understanding Ethnopolitical Conflict: Karabakh, South Ossetia and Abkhazia Wars Reconsidered by Emil Souleimanov* (Palgrave Macmillan, 2015) and Tierney, S., "Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies", *German LJ*, Vol. 16 (2015).

[21] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

[22] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993) and Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157.

[23] Art. 27 of International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (ICCPR) and Art. 14 of

While this study seeks to establish the extent of compliance of Islamic law with international law on this specific subject matter, that is not the overall purpose of the research. Instead what is sought is an exercise to ascertain the existence and extent of common ground between the two systems. The logic states that if a principle is undisputed and agreed by two systems from different eras, geographies, cultures and arenas (religion v. post-WWII legal rights) then there must be some objective truth or the most proximate position to it thus far. This pre-necessitates that Islamic law be opened to reasoned criticism, while international human rights law not be upheld as sacrosanct. The fact that religious systems are considered divine by their adherents is the reason to stay within their self-defined bounds to propose effective solutions that have a realistic prospect of working. With international law, there is no immutable objective textual source, but rather textual codifications of recurring and common human experiences. As such it is problematic to also treat international human rights law as definite, static and in some extreme cases sacrosanct.

On the other hand, while the issue of minority rights broadly is a contested one in international law, in Islamic law, linguistic or ethnic minorities do not attract much attention due to the emphatic and unequivocal equality accorded to them.[25] They are not differentiated and are given room to express and have their culture respected. Religious minorities, on the other hand, need to be addressed as they often stand in theological opposition to the religious ethos of the Muslim-majority State. To explore too deeply the Islamic law position on linguistic and ethnic minorities would be to stress and elaborate on a point that is not contested. But for the sake of illustration a few examples are necessary.

Qur'an 30:22[26] states: "And of His signs is the creation of the heavens and the earth and the diversity of your languages and your colours. Indeed in that are signs for those of knowledge." In this verse, God is said to direct the reader to his signs to cause wonder and affirm that they could not have just come into existence randomly or by chance. As such 'heavens and earth' here refer to the entirety of the physical universe, what is within and beyond are knowledge and comprehension. Such an example of the power and creativity of God is followed by creation of countless languages and colours. In classical commentary it is understood when God mentions two things together, it is to compare them in importance and often to raise the status of something that would normally be disregarded. For example, in numerous places Muslims are enjoined to worship God *and* be kind to parents. Similarly the command for the prescribed prayer is often followed by the command to pay the *zakat*

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953 (ECHR).

[24] See Hannum, H., "The Concept and Definition of Minorities", in Weller, M. (ed.) *Universal Minority Rights, A Commentary on the Jurisprudence of the International Courts and Treaty Bodies* (Oxford University Press, 2007) and Packer, J. "Problems in Defining Minorities", in Fottrell, D. and Bowring, B. (ed.), *Minority and Group Rights in the New Millennium* (London, 1999).

[25] Baderin, M., "Islamic Law and International Protection of Minority Rights in Context" in Frick and Muller, (ed.) Islam and International Law: Engaging Self-Centricism from a Plurality of Perspectives (Brill, 2013), 320-3.

[26] The Qur'an is believed by Muslims to be a divine revelation containing the exact words of God and to be the principal source of Islamic law.

(obligatory charity for the poor).[27] In this way linguistic diversity should be marveled at and command similar respect, awe and admiration as the creation of the entire universe. It could then be said that both elements of human identity are examples of how God is able to combine diversity and unity. The reference to colours is not just the various races or ethnicities but even extends to the appearance of people. And according to commentators, humans who are essentially the same in terms of physiological make up as well as features, that is, two eyes, two eyebrows and one nose, but still each and every group, race, ethnicity and individual has been created differently with unique appearances.[28] Similarly the sheer, unfathomable and apparent infinite diversity of languages convey essentially the same meanings, emotions and thoughts.

This is in contrast to Christianity where the diversity of languages is explained in the Bible through the story of the Tower of Babel, where a fearful and jealous God seeks apparently to disunite and stem the progress of humanity.[29] Furthermore in both the Qur'anic and Biblical perspectives on linguistic diversity, it is seen as inextricably linked to ethnic identity. The Qur'an mentions language and colour, while the Bible refers to one people with one language, who were dispersed and confused. In relation to the management of minorities and their diversity, some nation-states have not had an issue with the linguistic identity of minorities per se, but rather that it indicated or was representative of a broader ethnic identity in opposition or outside the centrally defined dominant State identity.

Also Qur'an 49:13 states: "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of God is the most righteous of you. Indeed, God is Knowing and Acquainted." This verse gives the Islamic rationale for all diversity. As such, it emphasises the underlying commonality which encompasses everyone that the origin of all human life is from a male and a female. It then acknowledges and states the purpose of diversity in allegiances, affiliations and any grouping sharing a common defining factor. The purpose deduced from the verse could be the encouragement not to be in perpetual conflict but to perpetually engage in inter-cultural, inter-religious dialogue and exchange. Lastly in front of God, one will only be judged on their righteousness and not their tribal (group) affiliation. This was affirmed in the Prophet's last sermon before his demise where he stated: "All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab

[27] E.g. Qur'an 2:83 contains both injunctions: "And [recall] when We took the covenant from the Children of Israel, [enjoining upon them], 'Do not worship except Allah; and to parents do good and to relatives, orphans, and the needy. And speak to people good [words] and establish prayer and give zakah.' Then you turned away, except a few of you, and you were refusing." The thesis will henceforth utilise the following translation unless otherwise stated: *The Qur'an, English Meanings*, English Revised and Edited by Saheeh International (A-Muntada al-Islami, 2004).

[28] Mubarakpuri, S. R. (Abridged) *Tafsir Ibn Kathir* (Dar us-Salam, 2003), 3885.

[29] Bible, Genesis 11:5-8 (English Standard Version), "And the Lord came down to see the city and the tower, which the children of man had built. And the Lord said, 'Behold, they are one people, and they have all one language, and this is only the beginning of what they will do. And nothing that they propose to do will now be impossible for them. Come, let us go down and there confuse their language, so that they may not understand one another's speech.' So the Lord dispersed them from there over the face of all the earth, and they left off building the city."

has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety and good action."[30]

Logically and practically when discussing Islamic law in the context of a Muslim-majority State, the issue of religious minorities is the pertinent one as minority groups are in fact formed in opposition to the ideology at the centre of the State. As for the most part of the 20st century, we have seen the emergence of *nation*-States, ethnic identity has been the key defining element of belonging. Hence the most acute problems that arose were related to ethnic minorities and subsequently when the international human rights framework evolved; it did so to cater for this fundamental problem in Western societies. Religion was not an issue in Europe at the early stage. The purpose of looking at linguistic and ethnic minorities in brief is to briefly evaluate how Islam perceives of those who have a distinct culture generally. There are even hints of not just recognition but encouragement of celebration of linguistic, ethnic and cultural diversity as shown in the textual source of Islam above. So the question of how does Islam treat those who stand in ideological opposition to its tenets or its understanding of the ultimate truth, that is non-believers in that perspective, and believers in other systems of faith and belief, is the focus of the thesis.

Conceptually, Islamic law deals with religious minorities as group entities by entering into treaties with them. Haykal has noted in his account of the Prophet's life that in addressing the Jewish communities in Madinah after ratifying the Constitution of Madinah[31], the Prophet is recorded to have said: "your flesh is our flesh and your blood is our blood."[32] As such in Islamic law, collective group rights have always provided the point of departure for any rights regime for non-Muslim minorities.[33] Such group rights and treaty making capacity would today be construed as exercising autonomy. Ahmad Yousif has noted that: "[i]n the Islamic world-view…collective rights and freedoms are given priority over individual rights and freedoms."[34] Similarly some authors comment that the rights of the *dhimmi* were more

[30] The Final Sermon in Pooawala, *The History of al-Tabari*, 112-113.

[31] Legitimate questions have been raised regarding the authenticity of the Constitution of Madinah due to its principal sources being the accounts by Ibn Ishaaq and Abu Ubayd written two centuries after the Prophet's death. However as Emon points out: "Nearly unanimously, scholars have held that the document as presented by the later sources is in fact authentic. The methods by which they arrive at this conclusion, however, reveal less about the inherent authenticity of the document than the biases and methodological limitations that the authors bring to their historical evaluation of the Constitution." See Emon, A., "Reflections on the 'Constitution of Medina': An essay on methodology and ideology in Islamic Legal History", *UCLA J. Islamic & Near E.L.,* Vol. 1, No. 1 (2001-2002), 107.

[32] Haykal, M., *The Life of Muhammad*, trans. I. R. A. al-Faruqi (Islamic Publications Bureau, 1982), 183.

[33] Arzt, D., "The Role of Compulsion in Islamic Conversion - Jihad, Dhimma and Rida", *Buffalo Human Right Law Review*, Vol. 8, No. 15 (2002), 32: "One needs to stop thinking in twentieth century terms, that is, from an individualistic perspective, which tends to interpret religious creed as an entirely personal matter." This does not preclude the notion of individual rights under Islamic law for members of religious minorities, but is a point about approach.

[34] Yousif, A., "Islam, Minorities and Religious Freedom: A Challenge to Modern Theory of Pluralism", *Journal of Muslim Minority Affairs*, Vol. 20, No.1 (2000), 39.

generous in the early Islamic state[35] especially in the private religious sphere where a high degree of autonomy is provided for groups. Such underlying precepts of the management of religious minorities in the early unitary Islamic State is strikingly similar to recent normative developments of international law towards positive discrimination, group entitlement and the emerging right to autonomy in certain spheres.[36]

The contemporary general word in Arabic for minorities is said to be '*aqalliyat'*.[37] However nowhere can a reference be found where the classical Islamic scholars or jurists referred to non-Muslims as such. Instead they are referred to as *ahl al-dhimma*, which translates to 'protected people'. Hence they are seen as collective entities automatically entitled to the enjoyment of their culture and beliefs, which must be respected and recognised. This is remarkably similar to the concept and distinction in international human rights law between 'minorities' and 'peoples'. The former needs protection from aggression and imposition of the majority culture and identity, whereas the right to self-determination is artificially limited to the latter. Artificial because the reasoning of the UN Human Rights Committee (HRC) in making the distinction is more about safeguarding future perceived threats to state sovereignty and territorial integrity rather than coherent legal reasoning. The latter approach could only arrive at one conclusion that both terms are interchangeable but were conceived of with differing contextual backdrops, one in the face of assimilation and imposition of a national identity and other in response to rapid decolonisation of pre-existing nations, or the creation of completely new ones. However when petitioned, the HRC has held that Art. 1 of the International Covenant on Civil and Political Rights (ICCPR)[38] refers to the collective rights of peoples and not of minorities. The HRC seems to be of the opinion that individuals belonging to minorities may not lay claim to collective rights. As such, they have rendered complaints under Article 1 inadmissible on grounds that they lack the competency to hear collective complaints by means of an individual petition.[39] Such an either/or approach to the relationship between the rights of minorities and the self-determination of peoples is unnecessary and has proved counterproductive to the articulation of an effective and coherent international minority rights regime.[40]

We must also keep in mind that the term 'minority' across all discourses, but especially in legal and political discourse, has been riddled with controversy. States have sought to narrowly define or wholly reject the term in order to exclude some groups within their

[35] Hamidullah, M., *Muslim Conduct of State* (7th ed. Lahore, 1987), 112. While disagreement can be found in Khadduri, M., *War and Peace in The Law of Islam* (1955), 177 & 195-8. Both cited in Baderin, M., *International Human Rights Law and Islamic Law* (Oxford University Press, 2003), 166.

[36] See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res A/61/L.67, 7 September 2007.

[37] This is recent terminology used specifically to refer to Muslim minorities in the West. See below for further discussion.

[38] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[39] The HRC thus saw it fit in *Lubicon Lake Band v Canada* (Communication 167/1984) to deny the enforcement mechanism for common Article 1, instead opting to deal with the complaint under Article 27 of the ICCPR.

[40] Brownlie, I., "The Rights of Peoples in Modern International Law" in Crawford, J (eds.), *The Rights of Peoples* (Oxford University Press, 1988), 16.

jurisdiction.[41] While some groups have sought to seek recognition as minorities in the face of such resistance, others have actually seen such recognition as disadvantageous.[42] For example, those seeking secession have often rejected the label of minorities fearing that their right to external self-determination could be compromised. In other contexts when a group wishes to hold on to the idea of being a distinct nation, albeit with no State to call their own, they perceive the label of minorities as denoting and accepting a position of inferiority to the majority. However international lawyers see the indeterminacy of the definition which to this day is yet to be formally agreed and codified, as advantageous for advancing a broad range of rights subject to progressive interpretations.

The pertinent point to draw here is that the term 'minority' clearly carries a connotation of weakness and vulnerability as compared to 'people'. So Islam's categorisation of religious minorities as *ahl al-dhimma* or 'protected peoples' rather than *aqalliyat al-dhimma* or 'protected minorities' is significant for a number of reasons. Firstly, the starting point is not that of antagonism and opposition. Secondly and most significantly, it not only indicates prospective cultural and religious autonomy, but also potential territorial autonomy. Developing this further we observe the word '*aqalliyat'* is used particularly in relation to Muslim minorities living in non-Muslim-majority States.[43] Hence it is possible to deduce that Islam perceives that Muslims under the authority of others will be in an inferior position as opposed to the position accorded to non-Muslims if under Muslim rule. It could indicate that Islam's claim to being a religion of high morality by aspiring to treat divergent groups within its power in compassionately and leniently. It also shows that a tit for tat approach is not encouraged. Even in relation to the section on why the concept of *dhimma* is employed in the research below, the Qur'an notes that if Muslims were to be under the non-Muslims, that is, the enemies of the Muslims at the time, they would not be afforded protection as *dhimmis*, ensuring integrity of lives, property and religion.[44]

[41] Turkey and France are not members of the Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157; and have entered reservations to Art. 27 of ICCPR to the effect that they have no minority groups within their territory. The UK is a party to both, but with an interpretive declaration limits the scope of both Conventions to only 'ethnic groups' and 'racial discrimination', whereas both Conventions' scope explicitly encompasses ethnic, national, religious and linguistic minorities with associated rights extending far beyond just 'racial discrimination'. A number of signatories have sought through declarations or application to limit the FCNM to only 'old' minorities as opposed to 'new' minorities who originate from post-1945 immigration. See generally Shaikh, M., "Immigration to the UK from Commonwealth countries and the issue of 'New Minorities' defined by religion: between their group rights and integration," in Hoffman and Caruso (ed.), *Minority Rights in South Asia* (Peter Lang, 2011).

[42] E.g. Tamils, Tibetans and Basque. The discourse and narrative of 'minorities' is also perceived by some as promoting exceptionalism and a victim mentality. See Packer, J., "On the content of minority rights", *International Studies in Human Rights* (1996): and Goldmann, G., "Defining and observing minorities: An objective assessment", *Statistical Journal of the United Nations Economic Commission for Europe* (2001).

[43] See Al-Haddad, H., *A Critical Analysis of Selected Aspects of Sunni Muslim Minority Fiqh with Particular Reference to Contemporary Britain* (PhD Thesis, SOAS, 2010), 12; and March, A., "Sources of Moral Obligations to non-Muslims in the 'Jurisprudence of Muslim Minorities' (Fiqh al-Aqalliyyat)", *Islamic Law and Society,* Vol. 16, No. 1 (2009).

[44] Qur'an 9:8 & 10.

III. Utility of the Study

As to the academic utility of this study, the problem of minorities has been often been addressed from a linear Western historical, legal, political and social science perspective; seldom comparatively with a religious, in particular, Islamic perspective of management of diversity. It is expected that those entities, State or non-State, seeking to conceive of political or legal positions, while being Islamically motivated may draw on the thesis to gain a better understanding of the issues from a study that draws from classical Islamic sources but offers solutions which are relevant for the present context. This would not only include Muslim-majority States, who give Islamic law the constitutional status of being a source of national law,[45] but also non-State actors who may have formed a distorted view of how non-Muslims should be treated in a conflict aggravated by tensions originating from long standing socio-economic grievances.[46]

Furthermore, Islamically motivated political movements whose formation and emergence in the Middle East and North Africa following the so-called Arab Spring[47], appear to be a recurring trend.[48] It is also hoped that international and non-governmental organisations would benefit from the Islamic perspectives advanced herein when engaging Islamically motivated actors, whether they be political movements, governments or non-State actors in different parts of the Muslim world. Furthermore an Islamic perspective on the protection of religious minorities could contribute to the positive development of international law on the protection of minorities. In affirming some elements of minority rights, advancing higher standards in some and challenging others, international law stands to be enriched and reflected upon. It could even encourage some Muslim-majority States to support and further strengthen existing international law as well as offer paths of advancement for the international community.

IV. Conceptual Clarifications

There are a number of conceptual discussions around terminology relating to the present thesis that need to be elaborated and clarified. One of the central issues and problems is the

[45] E.g. The Islamic Republics of Pakistan, Afghanistan, Iran and Saudi Arabia.

[46] See Ansar Dine (Mali), ISIS (Syria and Iraq) and Al-Qaeda.

[47] Meaningful change and the people's aspirations have been stalled and in some cases regressed – Ekmeleddin Ihsanoglu, former Secretary-General of the Organisation of Islamic Cooperation stated: "'the Arab Spring' fails to reflect the reality that has swept over the Middle East and North Africa, and that a more accurate metaphore, in his view, should be: 'The Fall Season of the Despots'," speech delivered at the Brookings Institute in Doha, Dec 2011. Tariq Ramadan also takes issue with the term 'Arab Spring'; see his monologue, *Islam and the Arab Awakening* (OUP, 2012).

[48] *Islah* (Yemen), *Hizb al Adala wal Tanmiya* and *Hizb al Watan* (Libya), *Enhada* (Tunisia) and the Muslim Brotherhood (Egypt).

use of the terms 'Islamic State', 'Islamic law' and '*Shari'ah*'[49]. While the research began by seeking to establish how religious minorities would be treated in an Islamic State, the wide range of understandings of what the term 'Islamic State' means (or does not mean) poses considerable difficulties and distracts from the main objective of the research, namely what models of management, rights and treatment are offered to non-Muslim religious minorities under Islamic law.

It is arguable that as a minority can only come about when preceded by the existence of a State and a dominant majority, and further that a State which would seek to realise its political and legal system through its reading of Islam would be then an Islamic State. However, for some, the term itself is oxymoronic. How can a State have a religion, they argue. [50] Could merely the fact that a State self-identifies as an Islamic State be enough to be seen as such? No they argue, not if it does not implement Islam fully and in every sense and beyond that can we be sure that it is adhering to the correct interpretations of how a State should behave according to Islam. Then others note that the Islamic State can only be referred to with regards to the first and original entity established by the Prophet in Madinah and subsequently governed by his successive companions, Abu Bakr, Umar, Uthman and Ali. Once that preponderance of early Islamic rule ended (632-661)[51] there cannot be an Islamic State thereafter.[52] A parallel argument has also been that an Islamic State must be a unitary entity with one overarching leader, the Caliph (*khalifah*). A plurality of entities ascribing Islamic statehood to themselves cannot thus lay claim to such a description.[53] They are merely then 'would be Islamic States'.

However it should be mentioned in brief that this may be countered by the example of what took place with Abu Baseer in the period following the Treaty of Hudaibiya. One of the terms of that peace treaty between the Muslims and the Makkan Quraish, was that if any of the Quraish were to accept Islam and flee to the Prophet, they would have to be returned. However if any of the Muslims defected to the Quraish, they would not be returned. In the immediate aftermath of the Treaty, while the agreement was still being written, the term was tested with Abu Jandal, who arrived having escaped from Makkah. The Prophet however

[49] *Shari'ah* appears once at Qur'an 45:18 and as a derivative thrice at 42:13, 42:21 and 5:51.

[50] An-Na'im, A., *UKCLE Teaching and Learning Islamic Law Meeting,* Warwick University, July 2008.

[51] "The assassination of ʿUthman and the ineffectual caliphate of ʿAli that followed sparked the first sectarian split in the Muslim community. By 661 ʿAli's rival Mu'awiyah, a fellow member of ʿUthman's Umayyad clan, had wrested away the Caliphate, and his rule established the Umayyad Caliphate that lasted until 750", *Encyclopaedia Britannica* (http://www.britannica.com/place/Caliphate). See also Madelung, *The Succession to Muhammad: A Study of the Early Caliphate* (Cambridge, 1998).

[52] Hamza Yusuf stated: "The Prophet *sal allahu wa alaihi wasalam* stated very clearly that the political tradition of his faith would dissipate very rapidly after 30 years and I think Muslims tend to forget that this so-called Islamic State has not existed in the history of Islam and I think it's a political fantasy a lot of Muslims hold," *The Rethinking Islamic Reform Conference,* convened by Oxford University Islamic Society (May 2010).

[53] E.g. the *khilafa* movement in the Indian sub-continent in the pre-decolonisation period consisted of Muslims who were opposed to a homeland for the Muslims of India, but rather a *khilafa* or to become a part of a pan-Islamic entity. The recent in-fighting between rebel groups in Syria, Jahbat al-Nusra (the official al-Qaeda affiliate) and the Islamic State of Iraq in Syria (ISIS) is emblematic of al-Qaeda's desire for centralised authority the challenge to this by the lack of subservience by ISIS and their use of the term 'Islamic State'.

turned him away to honour the term of the treaty.[54] Later when the Muslims had returned to Madinah, they were met with the arrival of Abu Baseer, who had also fled Makkah after accepting Islam. When two men were sent by the Quraish for him, the Prophet once again in accordance with the agreement handed him over. While returning to Makkah, Abu Baseer managed to escape, killing one of his captors. When he returned to Madinah, he said to the Prophet: "Your obligation is over and Allah has freed you from it. You duly handed me over to the men, and Allah has rescued me from them."[55] According to Ibn Ishaaq, the Prophet responded: "Woe is his mother, he would have kindled a war had there been others with him" or "The firebrand! Would that others had been him!"[56] According to this translation, the response appears to be disapproving and Mubarakpuri in his contemporary *seerah*, notes also that owing to the negative response of the Prophet, Abu Baseer fled to a place called Saif al-Bahr.[57] The relevant excerpt from the lengthy *hadith* in Bukhari states the following:

> "When the Prophet returned to Medina, Abu Basir, a new Muslim convert from Quraish came to him. The Infidels sent in his pursuit two men who said (to the Prophet), 'Abide by the promise you gave us.' So, the Prophet handed him over to them. They took him out (of the City) till they reached Dhul-Hulaifa where they dismounted to eat some dates they had with them. Abu Basir said to one of them, 'By Allah, O so-and-so, I see you have a fine sword.' The other drew it out (of the scabbard) and said, "By Allah, it is very fine and I have tried it many times.' Abu Basir said, 'Let me have a look at it.' When the other gave it to him, he hit him with it till he died, and his companion ran away till he came to Medina and entered the Mosque running. When Allah's Messenge saw him he said, 'This man appears to have been frightened.' When he reached the Prophet he said, 'My companion has been murdered and I would have been murdered too.' Abu Basir came and said, 'O Allah's Messenger, by Allah, Allah has made you fulfill your obligations by your returning me to them (i.e. the Infidels), but Allah has saved me from them.' The Prophet said, 'Woe to his mother! What excellent war kindler he would be, should he only have supporters.' When Abu Basir heard that he understood that the Prophet would return him to them again, so he set off till he reached the seashore. Abu Jandal bin Suhail got himself released from them (i.e. infidels) and joined Abu Basir. So, whenever a man from Quraish embraced Islam he would follow Abu Basir till they formed a strong group. By Allah, whenever they heard about a caravan of Quraish heading towards Sham, they stopped it and attacked and killed them (i.e. infidels) and took their properties. The people of Quraish sent a message to the Prophet requesting him for the Sake of Allah and kith and kin to send for (i.e. Abu Basir and his companions) promising that whoever (amongst them) came to the Prophet would be secure. So the Prophet sent for them (i.e. Abu Basir's companions) and Allah revealed the following Divine Verses: 'And it is He Who Has withheld their hands from you and your hands from them in the midst of Mecca, After He made you the

[54] Ibn Ishaaq, *The Life of Muhammad*, 505; and Mubarakpuri, *The Sealed Nectar,* 343-4.

[55] Ibn Ishaaq, *The Life of Muhammad,* 507-8.

[56] Ibid, at p.507

[57] Mubarakpuri, *The Sealed Nectar*, 347.

> victorious over them. ... the unbelievers had pride and haughtiness, in their hearts ... the pride and haughtiness of the time of ignorance.' (48.24-26) And their pride and haughtiness was that they did not confess (write in the treaty) that he (i.e. Muhammad) was the Prophet of Allah and refused to write: 'In the Name of Allah, the most Beneficent, the Most Merciful,' and they (the mushriks) prevented them (the Muslims) from visiting the House (the Ka`bah)."[58]

It is not clear whether the Prophet's response was unequivocally negative or ambiguous in light of ensuing events. This is because firstly, Abu Baseer was able to flee, which could be because the Muslims did not have the chance to recapture him to be returned to the Quraish, or it was an implicit acceptance of his view that the Muslims were not bound to return him as they had already done so once. Secondly, Ibn Ishaq states: "The Muslims who were confined to Mecca heard what the apostle had said of Abu Basir so they went out to join him in al-'Is. About seventy men attached themselves to him".[59] What that initial group understood was that Prophet had implicitly permitted, through omission, the establishment of a second Muslim community by Abu Baseer not bound by the terms of Hudaibiya, which only the main body of the Muslims in Madinah were bound by. It also provided a safe haven for those who converted or wanted to flee, but were trapped due to the Treaty of Hudaibiya such as Abu Jandal. This also meant that there was no peace treaty between the new community and the Quraish, allowing them to utilise their strategic position to disrupt and sabotage the trade caravans of the Quraish heading towards Syria. So much was the Quraish's loss that eventually they begged the Prophet to cancel that term of the Treaty and ask the exiles to join the main body of Muslims in Madinah.[60] This in part supports, why jurists such as Ibn Taymiyyah had observed in the 14th century that although the caliphate was a single political entity at the time of the early ancestors, "it had become fragmented during the course of time into a number of independent states" and he thus concluded that it was not obligatory to insist on a single political authority within the Islamic polity.[61]

Such semantic and conceptual obstacles could be circumvented by defining more precisely that what is under discussion are State entities with Muslim majorities, which cite Islamic law or the *Shari'ah* as *a* or *the* source of law. However an attempt to draw lessons from Muslim-majority State practices relating to religious minorities and then ascribing such practices to or not to Islamic law, was too vast and imprecise an exercise of research. Therefore a conscious decision was made, in order to produce concrete conclusions and meaningfully contribute to the field, to limit the research purely to the doctrinal aspect of Islam rather than its various forms of (non-)implementation and manifestation in modern Muslim-majority States. Towards the end of the thesis certainly suggestions will be made as to how they *could* be implemented.

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[58] Saheeh al-Bukhari, Vol. 3, Book 50, Hadith 891.

[59] Ibn Ishaaq, *The Life of Muhammad,* 508.

[60] Ibid; and Mubarakpuri, 347.

[61] in Lambton, A., *State and Government in Medieval Islam*, (OUP, 1981), 146. See also Baderin, M., "The Evolution of Islamic Law of Nations and the Modern International Order: Universal Peace through Mutuality and Co-operation" (2000) *The American Journal of Islamic Social Sciences*, Vol. 12, No. 2, pp. 57-80.

When discussing the viability and meaning of the term 'Islamic law', there are once again a range of views available. On a literal reading of the term it would be assumed that it refers simply to law derived from Islam, which is textually sourced from the Qur'an and *ahaadith*. Schacht in his seminal work, 'An Introduction to Islamic Law', posits *sunnah* as a source of divine law associated purely with the Prophet expressed as *ahaadith* were a later 'innovation': "Hardly any of these traditions, as far as matters of religious law are concerned, can be considered authentic; they were put into circulation, no doubt from the loftiest of motives, by the Traditionists themselves from the first half of the second century onwards."[62] For him, the Prophet and early Islam only concerned themselves with religious matters and largely did not interfere with legal ones: "It was the first legal specialists themselves who created the system of Islamic law; they did not borrow it from the pre-Islamic sources which provided many of its material elements."[63] The notion of the four sources of law as Qur'an, *sunnah* (sayings and actions of the Prophet expressed as *ahaadith*), *qiyas* (analogy) and *ijma'* (unanimous scholarly consensus) were only created by al-Shafi'i.[64] Thus while Schacht disputes the order of the various elements of Islamic law and their authenticity as been divine due to their link to the Prophet, following the development of the law in the second and third centuries, he concurs that Islamic law began from that point to be drawn from these four principal sources and through the works of the four prominent schools of Islamic law.[65] Schacht's most robust criticism emanated from Coulson[66], who pointed to clear Qur'anic injunctions that had law making quality as well as evidence that *ahaadith* had been preserved and transmitted rigorously from the time of the Prophet.[67]

While one may think ostensibly that Islamic law and *Shari'ah* are synonymous, for some they are distinct and for others incompatible. An-Na'im following on from his views on the idea of the non-viability of an Islamic State lies at one end of the spectrum. He argues that the terms 'Islamic' and 'law' cannot coexist. Islam is from God, and law is man-made for specific contexts and times and actualised through the coercive State and its positivist legal framework.[68] He instead makes a case for replacing the term Islamic law with jurisprudence[69], as in his view, all pronouncements from classical Islamic jurists are examples of jurisprudence, that is, examples of how to deal with a particular situation that was and remains closely tied with the unique context and as such for him unbinding and thus

[62] Schacht, J., *An Introduction to Islamic Law* (OUP, 1964), 34 and Schacht, J., *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1959), 30.

[63] Schacht, *Introduction to Islamic Law,* 202.

[64] Schacht, *Origins of Muhammadan Law*, 1.

[65] Forte, D. F., "Islamic Law: The Impact of Joseph Schacht", *Loyola of Los Angeles International and Comparative Law Annual,* No. 1 (1978), 9.

[66] Coulson, N. J., *A History of Islamic Law* (Edinburgh University Press, 1978), 64-65.

[67] See Minhaji, H. A., *Islamic Law and Local Tradition: A Socio-Historic Approach* (Kurnia Kalam Semesta, 2008), 27-35.

[68] An-Na'im, A., *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, 1990), p. xiv. See An-Na`im, A., *Islam and the Secular State*; and Hashemi, K., *Religious Legal Traditions, International Human Rights Law and Muslim States* (Martin Nijhoff Publishers, 2008).

[69] An-Na'im, A., *UKCLE Teaching and Learning Islamic Law Meeting,* Warwick University, July 2008.

lacking a vital ingredient of law, its precedent-setting quality. Of course these suppositions are by no means novel. Vessey-Fitzgerald states that the Qur'an was not meant to be a law book and the Prophet not the law giver.[70] Hashemi states in a similar vein that the Prophet was adapting the divine.[71] There are clearly a number of counterarguments to this approach. We will mention a few of the main ones.

It is submitted that An-Na'im is correct, in part, up to the point he states that all 'rulings' from classical jurists and scholars are tied to context. However where he goes from there is problematic. It cannot be that merely due to this factor that such rulings become inapplicable to our present day context. Under classical Islamic law, the issue was already explored and a comprehensive framework formed to address the context of a ruling. Each ruling is said to have an effective cause or *illah*, if the context changes but the *illah* remains, then the ruling still applies, if conversely the *illah* is not present then the ruling does not apply. This juristic exercise of applying the effective causes of old rulings to new similar situations is what is referred to as *qiyas* or analogy. Hallaq notes that that the practice of analogous deduction was already widespread prior to it being given the label and formal ascription as '*qiyas'*. It was used most by the Kufans (in Iraq), but also extensively by the Medinese and Syrians during the second century AH.[72] He summarises the concept succinctly visavis al-Shafi'i's understanding and position on the matter:

> "Shafi'i appears to have been the first jurist consciously to articulate the notion that Islamic revelation provides a full and comprehensive evaluation of human acts. The admittance of *qiyas* (*ijtihad*) into his jurisprudence was due to his recognition of the fact that this divine intent is not completely fulfilled by the revealed texts themselves, since these latter do not afford a direct answer to every eventuality. But to Shafi'i, acknowledging the permissibility of *qiyas* does not bestow on it a status independent of revelation. If anything, without revelation's sanction of the use of this method it would not have been allowed, and when it is permitted to operate it is because *qiyas* is the only method that can bring out the meaning and intention of revelation regarding a particular eventuality. *Qiyas* does not itself generate rules or legal norms; it merely discovers them from, or brings them out of, the language of revealed texts."[73]

For example, recreational drugs do not feature in classical Islamic law, whereas alcohol does. The prohibition of alcohol has been deduced to have the effective cause of intoxicating and affecting human judgment.[74] As such, recreational drugs by way of *qiyas* are also forbidden.[75]

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[70] Vessey-Fitzgerald, "Nature and Sources of *Shariah*" in Khadduri & Liebesny, (ed.) *Law in the Middle East, Volume I, Origin and Development of Islamic Law* (The Middle East Institute, Washington, D.C., 1995), 87.

[71] Hashemi, *Religious Legal Traditions,* 10.

[72] Hallaq, *The Origins,* 113-6.

[73] Hallaq, *The Origins,* 117-8.

[74] Malik, *Muwatta',* 737-38, cited in Hallaq, W. B., *The Origins and Evolution of Islamic Law* (Cambridge, 2004), 115.

[75] Safian, Y. H. M., "An analysis on Islamic rules on drugs", *Journal of Education and Research,* Vol. 1, No. 9 (2013), 4-7; and Ibn Taymiyya, *Al-Fatawa al-kubra,* Vol. III, pp. 419-424, cited in Safian, "An analysis on Islamic rules on drugs", 7.

A counter example is where similar drugs and alcohol are used for medical purposes.[76] Furthermore the verse in question forbade *khamr* (wine) and not alcohol per se. So *qiyas* was made to extend the prohibition to alcohol generally and again to recreational drugs.[77] Also, when intoxicating agents are not present in quantities large enough to intoxicate, then they are not deemed to be forbidden.[78]

On the whole it appears that An-Na-im is against the law making quality of *Shari'ah*. This may be linked to his mentor Mahmood Taha, who posited that the Makkan verses from the Qur'an abrogated the Madinan verses.[79] This was a highly controversial claim, as the Makkan verses are principally concerned with belief, the hereafter and surviving as a minority under extreme pressure and oppression, whereas the Madinan verses, once the Muslims had assumed political authority, were mostly more specific and legal in nature, prohibiting and enjoining numerous fundamental aspects of what is today considered as the *Shari'ah* or Islamic law. By suggesting that the Makkan parts of the Qur'an should abrogate the Madinan verses, Taha was suggesting stripping Islam of all its legal rulings and starting from scratch in terms of law.[80] This understanding went against the notion that the Madinan period took place later than the Makkan period and that there was nothing necessarily contradictory in the verses – they went hand in hand and responded to different contexts.[81] To Western jurists too, it would make sense that firstly abrogation can only occur if there is a conflict, secondly where there is a conflict the common sense and logical legal principles of *lex posterior derogat priori*[82] and *lex specialis derogat legi generali*[83] would apply. Textual credence may be attached to the latter principle by reference to Qur'an 3:7, which states: "It is He who has sent down to you, [O Muhammad], the Book; in it are verses [that are] precise – they are the foundation of the Book – and others unspecific. As for those in whose hearts is deviation [from truth], they will follow that of it which is unspecific, seeking discord and seeking an interpretation [suitable to them]. And no one knows its [true] interpretation except Allah. But those firm in knowledge say, 'We believe in it. All [of it] is from our Lord.' And no one will be reminded except those of understanding."

Baderin offers a more nuanced view on this point, in that he defines the *Shari'ah* as the intended will of God and Islamic law its manifestation by jurists as law, noting specifically

[76] Safian, "An analysis on Islamic rules on drugs", 2-4.

[77] For further reading see Rosenthal, F., *The Herb-Hashish versus medieval Muslim Society* (Netherlands: E. J. Brill, 1971).

[78] Malik, *Muwatta', 737-39,* cited in Hallaq, *The Origins,* 116; and Safian, "An analysis on Islamic rules on drugs", 4-5.

[79] See Taha, M., *Second Message of Islam,* trans A. An-Na'im (Syracuse University Press, 1996).

[80] See e.g. Mahgoub el-Tigani, M., "Islamic Law, Human Rights and International Law, A Critique of Mahmoud, Taha and Abdullahi Ahmed An-Na'im", *Islamica: The Journal of the Islamic Society of the London School of Economics,* Vol. 2, No. 3 (1996).

[81] Denfer, A. V., *Ulum al Qur'an: An Introduction to the Sciences of the Qur'an* (Islamic Foundation, 2011), 64-8.

[82] The abrogation of an older with a newer law.

[83] The abrogation of a general with a specific law.

that the distinction is needed as the latter is prone to human error.[84] This differs from An-Na'im in allowing rulings of Islamic scholars to have binding effect, but desists from imbuing the sanctity of terming it God's law that the term '*Shari'ah*' denotes. To put it more practically, he only considers Qur'anic verses and *ahaadith* as representing *Shari'ah*. Anything derived from '*Shari'ah*' or interpreted by jurists, that is, *fiqh*, in terms of rulings he classifies as Islamic law. This is at odds with the linguistic understanding of *Shari'ah*. While the oft cited meaning is given as the well-trodden path, or the path that leads to water, practically in Islamic legal discourse the term refers to simply 'law'. While in Arabic and Islamic discourse its religious nature is implicitly understood, for our purposes the most accurate translation would be the 'law of Islam' or 'Islamic law'. '*Shari'ah'* framed as simple 'the law' allows us to see the sources themselves need human endeavor of interpretation, through classical Qur'anic commentaries (*tafsir*) and *ahaadith* explanations (*sharh*). Furthermore, according to the procedural sources of Islamic law of *qiyas* and *ijma'*, would inevibly include opinions and discussion by jurists on various matters. This is to say there is no distinction between *Shari'ah* as referred to by classical jurists and 'Islamic law' as referred to by Baderin. It is submitted that they are synonymous and translations of each other, with *fiqh* included in the meaning of *Shari'ah*. And the textual sources are given as evidences for a particular opinion.

Another crucial point relating to this issue is the role and importance of understanding *ijma'* or consensus. It is considered by classical scholars as one of, if not the most important source of Islamic law or *Shari'ah* and is procedural rather than substantive, that is to say it works with the textual sources rather than independently of them[85]. So for those who say it is the most important, even more so than the Qur'an and *ahaadith*, they mean in combination with the two textual sources.[86] The fourth source is *qiyas*, and that too like *ijma'*, is to be used alongside the two textual sources, and is critical to deriving rulings for our present day context. The use of consensus or *ijma'* to deduce which principles of rulings there is little doubt in is logical. The textual evidence advanced in support of *ijma'* has been the *hadith* of the Prophet, where he states "my Ummah will not unite upon error"[87] and "What Muslims consider to be good is good in the view of God."[88] Qur'an 4:115 is often given as support for the principle: "And whoever opposes the Messenger after guidance has become clear to him and follows other than the way of the believers – We will give him what he has taken and drive him into Hell, and evil it is as a destination." Al-Juwayni, who was a proponent of the

[84] See Baderin, M., *International Human Rights and Islamic Law*; and Baderin, M., "Islamic Legal Theory in Context" in Baderin (ed.), *Islamic Legal Theory*, Vol. 1, Ashgate Islamic Law Series (Ashgate, 2014), pp. xi-xxxvii.

[85] Hallaq, W. B., *The Origins,* 137.

[86] Hallaq. W. B., "On the Authoritativeness of Sunni Consensus", *International Journal of Middle East Studies*, Vol. 18, No. 4 (1986), 427.

[87] In Abu Dawud, Al-Tirmidhee and Haakim – Sahih. Also Anas bin Malik said: "I heard the Messenger of Allah say: 'My nation will not unite on misguidance, so if you see them differing, follow the great majority.'" In *Sunan Ibn Majah*,(weak), Vol. 1, Book 36, Hadith No. 3950.

[88] See Hallaq, *The Origins*, 110-2: he points out Sahybani was one of the first to justify *ijma'* textually and this *hadith* was later classified as week. This was not critical as other verses and *ahaadith* were cited in support of a commonsense and logical principle that had existed during the first two centuries AH.

idea of *ijma'*, found both the above verse and *hadith* inconclusive in their wording and interpretation as compelling and explicit textual bases for *ijma'*. For the *hadith*, he further raised questions about its authenticity noting its various wordings in different narrations and the fact that it was an uncorroborated tradition (*khabar wahid*), thus disqualifying it as an authoritative source of law.[89] Rather than undermine the immutable authority of *ijma'*, he sought to establish it by drawing on a definitive basis instead of a weak textual one:

> "His aim is merely to highlight that as a source of immutable Islamic teachings, if there is hope for Ijma' to have the compelling authoritativeness that scholars afford it, its legality must be justified by standards that are beyond reproach. For this reason, he argues that the source of the authority of consensus is empirical and experiential; not self-evidently scriptural."[90]

Similarly the principle can be extended to measure the level of agreement where there is no consensus amongst the scholars, and ruling and opinions graded as majority opinion, strong, valid, weak or odd, that is not considered and discarded. Other conditions of *ijma'* to be mentioned briefly – that they must be scholars (*mujtahid*), there may be *ijma'* not just on a certain view, but that the valid spectrum is limited to a number of views and no new ones may be introduced, new rulings may only be hazarded by contemporary scholars, if the set of circumstances is fundamentally different, that is, the *illah* is absent.

Discussion and disagreement over the precise conditions of *ijma'* have revolved around a number of technical questions such as: is it the consensus of *mujtahid* scholars alone or must it include *usūlis* (legal theorists)? Can it include lay scholars, *Shi'ah* scholars or experts in the relevant field? Must the consensus be unanimous, and if not how many disagreements, and by whom, negate *ijma'*? Can *ijma'* still be applied to the finiteness of the resulting differing opinions?[91] Subsequently while the conceptual essence of *ijma'* was unanimously agreed, its technicalities and their varied understanding and applications resulted in a number of scholars referring to *ijma'* by their own standards and criteria rather than a standardised set of conditions, many did not consider that all scholars had to be consulted and more than one type of *ijma'* emerged, most notable of which were *ijma' sukuti* (explicit) and *ijma' sarihi* (silent or implicit).[92]

It is not our purpose at this point to convincingly prove the above perspectives wrong – only to briefly note, elaborate and problematise them and show how and why the semantic and conceptual approach taken in this thesis is in line with classical Islamic law, *Sunni* orthodoxy,

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[89] Al-Juwayni, Abu al-Ma'ali 'Abd al-Malik., *Al-Burhan fi Usūl al-Fiqh* (Beirut: Dar al-Kutub al-'Ilmiya), 1418/1998, 262, cited in Ali, A. H., "Scholarly Consensus: Between Use and Misuse", *Journal of Islamic Law and Culture,* Vol. 12, No. 2, (2010), 6-7.

[90] Ibid. at p. 7. See also Hallaq, "On the Authoritativeness", 439.

[91] See e.g. Taj al-Din 'Abd al-Wahhab b. Al-Subki (711AH) in Al-Banani, M., *Hashiya al-'Allama al-Banani 'ala Sharh Matn Jam' al-Jawami'* (Beirut: Dar al-Fikr, 1415/1995, 2/178-179), cited in Ali, "Scholarly Consensus", 4-5.

[92] Ali, "Scholarly Consensus", 8.

owing to it having potentially the greatest level of credibility and legitimacy amongst the lay masses of Muslims and in turn to affect and benefit that target audience.

V. Why refer to the *Dhimma* model?

The present thesis spends considerable time exploring the notion of *dhimma* as found in classical Islamic law to better understand the status and rights to be attributed to non-Muslim minorities under Islamic law. This may attract criticism at the outset as the term *dhimma* for the most part has had attached to it highly negative connotations. Those seeking to paint Islam as a regressive, oppressive and violent religion have attempted to posit that the *dhimma* model represents an acutely prejudicial and discriminatory system that renders non-Muslims under Islamic rule second class citizens.[93] On the other hand academics in the field have argued that the system is outdated and inapplicable to the current system of nation-States and the accompanying international organisational infrastructure as well as being discriminatory in some respects.[94] We will leave the issue of whether certain differences in treatment can constitute *bona fide* cases of discrimination to the substantive sections of the thesis to follow. However conceptual flaws in the above two perspectives are identifiable at inception with the realisation of the following nuances.

Firstly at its origins, its initial context and its linguistic and theological meanings, the term *dhimma* may have positive connotations attached to it. Literally the term, *dhimma* has two meanings. The first is that of 'covenant' or 'pact'. The second is 'protection'.[95] With the appendage of *ahl* meaning 'people', the full term *ahl al-dhimma* can be understood as 'covenanted people' or 'protected people'. Both are relevant and explain each other in discussion of the intended status attributed to non-Muslims. The term covenant denotes an agreement or treaty reached amounting to a covenant. However the specific and explicit purpose of the covenant or pact was to offer and more so guarantee protection for religious minorities. This is supported and substantiated by the second meaning which is in fact 'protection'. As such the two meanings can be taken independently or as being interrelated. It could be said that *dhimma* is a covenant for the purpose of *or* one that results in protection. Alternatively it could also be said that it is an offer of protection, which must be formalised

[93] E.g. Ye'or, B., *The Dhimmi: Jews and Christians under Islam* (Fairleigh Dickinson University Press, 1985); Ye'or, B., *Islam and Dhimmitude: Where Civilizations Collide* (Fairleigh Dickinson University Press, 2002); and McKinney, S. J., "Echoes of the Dhimma: Discriminatory Vestiges of an Ancient Islamic Covenant", *Regent Journal of International Law,* Vol. 6 (2008).

[94] Nielsen, J. S., "Contemporary Discussions on Religious Minorities in Muslim Countries", Brigham Young University Law Review (2002), 331 & 363; and Ahmad, A., "Extension of Shari'ah in Northern Nigeria: Human Rights Implications for Non-Muslim Minorities", in Baderin, Welchman, Monshipouri & Mokhtari (eds.), 'Islam and Human Rights: Advocacy for Social Change in Local Contexts', (Delhi, Global Media Publications, 2006), 159. See also Saeed, A., "Rethinking Citizenship Rights of Non-Muslims in an Islamic State: Rashid al-Ghannushi's contribution to the evolving debate," *Islam and Christian-Muslim Relations*, Vol. 10, No. 3 (1999); and Khatab, S., "Citizenship Rights of Non-Muslims in the Islamic State of Hakimiyya Espoused by Sayyid Qutb", *Islam And Christian-Muslim Relations*, Vol. 13 (2002).

[95] Ungar, F., *Arabic-English Lexicon [Repr.]: In 8 Parts* (1956), 976.

through a covenant, with specific terms agreed. Consequently we can deduce that the end result is that it refers to a covenant for the purpose of and the guarantee of protection.

'Protection' has been at times negatively connoted as referring to protection of blood (life), property of the religious minority and associated rights such as the freedom of religion.[96] Hence the impression given has been that in the absence of a covenant and the recognition of a religious minority as *dhimma*, that the Muslims themselves would have the right to kill and appropriate from the non-Muslims in the territories controlled by them as opposed to protection from other aggressors. However this is a mischaracterisation of the context as during the initial period of Islam, the status quo was of a constant state of hostilities between competing tribes, factions and groups in the Arabian Peninsula. This default state of conflict could only be altered with the entering into of pacts and treaties of alliance as was the case against the Muslims during the early Madinan period and treaties of peace entered into by the Muslims with the Makkans. It can be said to be the opposite of the present contemporary situation where there are international and regional agreements of peace and non-aggression. Therefore protection was offered from the default situation of risk from attack and non-attribution of rights. Furthermore, the above accusation would only become a consideration in situations where the prospective *dhimma* surrendered or were defeated by the Muslims having only prior to that been engaged in direct hostilities. There are also examples of Muslims offering *dhimma* status when there were no direct hostilities against the Muslims, in which case the protection is from those who previously governed them or who could threaten them in the future.

Beyond this the term protection is not merely a reference to physical security but extends to the identity of the religious minority. In fact the term most commonly used in international law in relation to the rights of individuals belonging to minorities is 'protection' and in some aspirational documents is coupled with 'promotion'. The term 'protection' as employed in international law is quite positive, but its use is deemed necessary because the very existence of a minority is understood to attract an inherent threat or exposure to risk, carrying with it an equally inherent need for 'protection'. Thus it is completely logical for the Islamic framework to develop in the same manner and deliver the same results, that is, to consider religious minorities as 'protected people'. The question may arise as to if such protection was to be extended to all religious minorities under Islamic law. The issue of scope of included and excluded groups is central to the present research and will be discussed extensively in Chapter 2.

Another compelling argument for *dhimma* to have a positive connotation is the use of the term in the Qur'an itself. The common perception has been that Qur'an 9:29 carries the commandment that allows non-Muslims to exist in the territory of the Muslims on the condition of the payment of *jizya.* Such religious minorities are given the status of *dhimma*, although the term does not appear in the verse itself. However the term does appear twice in

[96] See e.g. Shah, N. H., "The concept of Al-Dhimmah and the rights and duties of Dhimmis in an Islamic state", *Journal of Muslim Minority Affairs*, Vol. 9, No. 2 (1988).

the same Surah (Tawbah, the ninth chapter), but in relation to Muslims rather than non-Muslims:

> "How [can there be a treaty] while, if they gain dominance over you, they do not observe concerning you any pact of kinship or covenant of protection (*dhimma*)? They satisfy you with their mouths, but their hearts refuse [compliance], and most of them are defiantly disobedient […] They do not observe toward a believer any pact of kinship or covenant of protection (*dhimma*). And it is they who are the transgressors."[97]

A cursory examination of the two verses reveals two crucial points. First that the term as used in the Qur'an is generic and secondly that the only time it appears in the Qur'an, it does so in relation to Muslims, further establishing its potential positive connotation. Moreover there is a strong indication of the elaboration of a general rule of how religious minorities should be treated, regardless of which is the majority and which the minority. In this vein, the verse conveys the unlikelihood of Muslims being recognised as protected people owing to repeated violation of pacts entered into by the polytheists of Makkah and the lack of precedence of them accepting the Muslims as a minority group, which could co-exist with precise terms defined in a covenant.

Two additional powerful points in favour of the positive nature of *dhimma* status worth mentioning in brief are some of the *ahaadith* extolling the value placed on observing the pact of protection by the Prophet and the difference of opinion that exists in relation to the meaning of Qur'an 9:29. One of the most striking and well known traditions is where the Prophet, states: "Whoever killed a person having a treaty with the Muslims, shall not smell the smell of Paradise though its smell is perceived from a distance of forty years."[98] Another tradition regarding Umar states "We said to 'Umar bin Al−Khattab, O Chief of the believers! Advise us.' He said, 'I advise you to fulfill Allah's Convention (made with the Dhimmis) as it is the convention of your Prophet and the source of the livelihood of your dependents' (i.e. the taxes from the Dhimmis)."[99]

In relation to Qur'an 9:29, the translation often referred to states "…until they give the *jizyah* willingly while they are humiliated."[100] However another translation of the final word has been instead 'humbled' referring to the fact they have suffered defeat in the conflict. The term '*saghiroon*' at the end of Qur'an 9:29 has been interpreted by some as denoting that non-Muslims should be "maltreated and humiliated in the course of receiving the capitation tax from them."[101] According to al-Suyuti, *saghar* referred to their submission to the rule of

[97] Qur'an 9:8 and 10.

[98] Bukhari, 4:391.

[99] Bukhari, 4:388.

[100] Friedmann, Y., *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge University Press, 2003), 77. He nonetheless acknowledges "This verse has been subject to numerous attempts at interpretation".

[101] Muhibbu-Din, M. A., "Ahl Al-Kitab and Religious Minorities in the Islamic State: Historical Context and Contemporary Challenges" *Journal of Muslim Minority Affairs*, Vol. 20, No.1 (2000), 120.

Islam.[102] Sayyid Qutb similarly understood sa*ghar* as "humbleness referred to their willingness to pay the *jizyah*, a practical sign of their submission to the rule of Islam and a token of loyalty to the Islamic state. By their submission, Muslims would be free from any attack, he opined."[103] Ibn Taimiyyah acknowledges the view of Iqrimah as "saying that the protected person should give it while standing and the collector receive it sitting; another group of commentators said that the *dhimmi* or protected person should bring the *jizyah* on foot, not riding; and then he should be dragged with harshness to the place of payment, and his hand should then be pulled and treated roughly."[104] Ibn Taimiyyah concludes:

> "there is no evidence whatsoever for such a meaning. It was never reported or related that the Prophet or his companions ever did that, and such a meaning was not the injunction contained in the verse; its right meaning is that humbleness is brought about by the undertaking to be ruled according to the prescription of Islam and their consent to pay the *jizyah*. Taking that upon themselves is the humility."[105]

Furthermore *ahl al-dhimma* are exempt from *zakat*[106] (obligatory charity of 2.5% per annum paid to the State). *Jizya*[107] is the only financial obligation imposed upon them. The amount was not fixed and thus at the discretion of the Imam. It was limited by a means-tested system exempting women, children, elderly, poor, disabled, priests and monks. This meant that only men who were physically capable of joining military were obliged to pay it.[108] Ibn Juzayy al-Kalbi opined similarly that only the Imam has the capacity to enter into contract with the *ahl al-dhimma*[109] and only the adult male *kafir* (non-believer) must pay. He must also be one 'whose confirmation of his debt is valid, who is not insane or overwhelmed in his intellect, nor a monk who is secluded in his dwelling. As for women, slaves and children, they are exempt as are the poor and the unemployed. Children are eligible once they reach puberty. For the people that it was charged, it was means-based and was high for the prosperous and low for the poor.[110] Maududi says *jizya* is only for those who have fought against the Muslims or are able bodied. He excludes all of the same categories as above. Umar fixed different amounts for the rich and the poor. [111] A second type of *jizya* is of a tenth of all trade

[102] A. U. al-Baidawi, *Anwar al-Tanzil* (Cairo: no publisher, 1902), 111. Read J. Mahalli Suyuti, *Tafsir al-Jalalain* in the margin, notes of Baidawi, 289, cited in Muhibbu-Din, M. A., "Ahl Al-Kitab", 120.

[103] Qutb, S., *Fi Zilal al-Qur'an*, Vol. IV (Beirut: no publisher), p. 167, cited in Muhibbu-Din, M. A., "Ahl Al-Kitab", 120.

[104] Ibn al-Qayyim, *Ahkam Ahl al-Dhimma*, 23, cited in Muhibbu-Din, M. A., "Ahl Al-Kitab", 121.

[105] Ibid.

[106] See Islahi, A. A., "Economic thought of Ibn al-Qayyim (1292–1350)" (1982).

[107] See e.g. Ziauddin, A., "The Concept of Jizya in Early Islam", *Islamic Studies*, Vol. 14, No. 4 (1975).

[108] Ibn al-Qayyim, *Ahkam Ahl Al-Dhimma,* 356, cited in Ahmad, A., "Extension of Shari'ah in Northern Nigeria", 15.

[109] Maududi, A. A., *The Islamic Law and Constitution* (Islamic Publications Ltd, 1960), 302.

[110] Ibn Juzayy al-Kalbi cited in Doi, A. R. I., revised by Clarke, A., *Shari'ah Islamic Law* (Ta-Ha Publishers Ltd, 2008), 649; and see Alshech, E., "Islamic Law. Ptactice, and Legal Doctrine: Exempting the Poor from the Jizya under the Ayyubids", *Islamic Law and Society,* Vol. 10, No. 3 (2003).

[111] Maududi, *The Islamic Law and Constitution,* 303.

outside the land in which they reside and the third is that by treaty in which case there are no prescribed limits.

Another strong argument against those who posit that the *dhimma* concept is outdated and thus redundant or lacks textual basis and hence is something appended by later generations of jurists, is that Islamically there is no other term to refer to non-Muslim religious minorities under the governance of Muslims. Notable potential exceptions to this general concept could be the Jewish tribes of Madinah and polytheists of Makkah. Neither had *jizya* imposed on them once the Muslims were the governing authorities. Ibn al-Qayyim explains this simply by the fact that both situations had pre-dated the revelation of Qur'an 9:29. Read and interpreted more broadly, it may be possible to show these relations to be akin to treaties of non-aggression rather than complete submission to the authority of the Muslims.

Furthermore a more convincing argument presented for the non-applicability of the *dhimma* system in relation to religious minorities is to posit that it was a specific system for a specific time. The context has transformed dramatically since and a new model is required which is relevant and meets the needs of the current context. Factors of differentiation that are pointed out include, the emergence of international organisations and international peace treaties, the emergence of nation-states, many of which are multi-ethnic, multi-linguistic and multi-religious and that religious minorities do not result from conquest or conflict, but rather often precede the existence of the State itself. Notwithstanding these salient points and proponents urging the consideration of the rights of religious minorities through the lens of the contemporary notion of citizenship, it remains of the utmost importance not to prematurely jump to preferable conclusions that appease all sides without thorough examination of the sources of Islamic law and the proper methodologies present within Islamic law to meet such challenges of shifting contexts.

Firstly such a perspective clearly accepts by implication that the original view is that the *dhimma* system is inherently Islamic and was the original model of treating non-Muslim religious minorities. Once this is established we may then work rigorously through the principles of *usūl al-fiqh* (principles or philosophy of deriving rulings) to assess if any of the *illal* (effective causes) that give rise to the need to consider non-Muslims as *dhimmi* have ceased to exist. If so, a case may be made for its complete or partial inapplicability grounded in and emanating from Islamic law itself. On the contrary the reverse may also be true, in that, we may deduce that though the context has altered substantially, the effective causes that gave rise to the need for the model are still present albeit in a different form and thus the *dhimma* model must be applied partially or in full to the present context.

A related point of note is also who is qualified to perform such an intricate exercise of extrapolating rulings for our present day reality from classical sources, which no doubt carry significant religious authority. Clearly classically and practically to have legitimacy, it must be a scholar or jurist of suitably high caliber with a grasp and specialisation of deriving rulings. Classical Islamic law lays out a number of criteria for who may engage in *ijtihad* (a *mujtahid*). We can nonetheless begin to look into the potential outcomes of such an exercise

for theoretical purposes of assessing the range of possibilities, while concurrently ascertaining preference of views by those who may be seen to qualify as *mujtahid.*

VI. Methodological Considerations

The principal methodological constraint applicable to the present research has been the author's lack of Arabic proficiency in order to access primary sources of Islamic law and classical texts of commentary and jurisprudence that accompany them. Foremost in importance to the study have been works of classic commentary and works of *ahaadith.* As such for these and the Qur'an[112], English translations were referred to. Where classical or contemporary treatises did not have English translations, then in the first instance an Arabic speaker was relied on to gain access to the most relevant sections of the text. In all other cases, English language journal articles and publications were relied on as secondary sources of those Arabic texts.

Therefore significant reliance on a limited number of texts in some parts of the research was unavoidable. Crucial texts in Arabic that the author was able to acquire limited indirect access to include Ibn al-Qayyim's *Ahkam Ahl al-Dhimma*[113], Zaydan's *Ahkam al-Dhimmiyun wa al-Must'aminun fi Dar al-Islam*[114], al-Tariqi's *al-T'aamul ma'a Ghayr Muslimeen*.[115] As for translations of *Tafaasir*, Mubarakpuri's abridged *Tafsir Ibn Kathir*; and for works of *Seerah*, Ibn Ishaaq[116] and al-Ghazali[117] were relied on extensively. Finally Friedmann's work[118], in particular on classification of non-believers with reference to classical Arabic texts is unparalleled and aided the research in Chapter 2 greatly.

VII. Structure of Thesis

The thesis will undertake analysis of two overarching themes relating to religious minorities: i) the scope of the concept of religious minorities and ii) the right to freedom of religion. Hence the next six chapters will be divided into two sections accordingly and followed by a concluding chapter.

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[112] The thesis will be utilising *The Qur'an, English Meanings, English revised and edited by Saheeh International* (al-Muntada al-Islami, 2004), unless otherwise stated.

[113] Ibn al-Qayyim, *Ahkam ahl al-dhimma* (Ramadi Publishing, 1997).

[114] Zaydan, A. K., *Ahkam al-Dhimmiyin wa al-Must'amin fi Dar al-Islam* (Beirut: Mu'assasat al-Risalah, 1982).

[115] Al-Tariqi, A., *Al-T'aamul ma'a Ghayr Muslimeen* (Dar al-Fadeelah, 2007)

[116] Ibn Ishaaq, *The Life of Muhammad: A Translation of Ishaaq's Sirat Rasul Allah,* with introduction and notes by A. Guillaume (OUP, 1955).

[117] Al-Ghazali, M., *Fiqh-us-Seerah*, *Understanding the Life of Prophet Muhammad* (International Islamic Publishing House, 1999).

[118] Friedmann, Y., *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (New York: Cambridge University Press, 2003).

Section I will begin with Chapter 2, examining the issue of scope by reference to the notion of *ahl al-dhimma* under Islamic law. Which types of or specific religious groups may be included within the scope of *ahl al-dhimma* and the bases and consequences of exclusion of others. It will be argued that the spectrum of validity under Islamic law offers three possible views on the issue of scope. The most restrictive only allowing for the inclusion of the People of the Book exclusively, the most expansive allowing for the inclusion of the People of the Book and all polytheists and finally a compromise view that allows the People of the Book and non-Arab polytheists. In depth discussion will ensue around the basis for the inclusion of the Magians within the scope of *ahl al-dhimma* and how it results in the three aforementioned views on scope under Islamic law.

Chapter 3 will delve into the scope of religious minorities under international law by asking similarly whether certain groups may be excluded. The notions of 'religion', 'minority' and 'national minority' will be taken separately and explored to identify limits of scope. The supplementary discussion around collective rights to self-determination (internal and external) and autonomy will also be touched on. Chapter 4 will compare the spectrums of validity under both systems of law identified in the previous two chapters in order to draw on whether they are comparable, compatible or even if one offer greater protection than the other. We will also elaborate on whether the Islamic framework, which appears limited to only three types of group: People of the Book, Arab polytheists and non-Arab polytheists, is comparable to an international system of minority rights, which caters for all religions *and* other beliefs such as atheism.

Section II will focus on the wider issue of the rights of religious minorities under both systems with special attention paid to freedom of religion. This comparison will be to an extent asymmetric, in that the depth of discussion on certain topics under each system of law will reflect their historical context and development. As such, Chapter 5 will begin with an assessment of whether Islamic law grants and guarantees the internal aspect of freedom of religion based on various interpretations of Qur'an 2:256: "There is no compulsion in religion". Numerous debates that take issue with whether forced conversion and other forms of coercion are permissible under Islamic law owing to a failure to disaggregate verses from the context of war and hostilities. Those claims, whether polemic or interpretative, must be examined and unpacked so as to understand within their proper contexts, claims of religious coercion pitted against the idea of non-compulsion in religion.

This will be followed by Chapter 6, which will explore generally the rights of religious minorities under international human rights law looking in particular religious non-discrimination, manifestation of religion with regards to preservation of the nature of the State and scope of permissible limitations. There will be a focus on the issue of non-discrimination under international law. This is because it has been a right that has been fundamental and a foundation of the international human rights system and one which always predicates any discussion on the rights of religious minorities or their freedom of religion. It has also been first and most basic rights relied on minorities gain equality under the law. Conversely it has also been minorities, who have been disproportionately and systematically been made targets of structural discrimination. Section II will be concluded with Chapter 7,

which will compare the two previous chapters but also venture further regarding the manifestation of religion. The final Chapter 8 will seek to provide a conclusion for the research as a whole by mainly drawing on the two comparative chapters.

Section I

Concept of Scope

Chapter 2:
Scope of the Concept of *Ahl al-Dhimma* (Protected Peoples) under Islamic Law

I. Introduction

Linguistically, the term *ahl al-dhimma* can literally be translated as 'people of protection' or 'people of covenant'. While *ahl* is easily translated as 'people', *dhimma* can also connote "a compact, a covenant, a contract, a league, a treaty, an engagement, a bond or an obligation; because the breaking thereof necessitates blame." As to its sacrosanctness it is "a thing that should be sacred, or inviolable; or which one is under an obligation to reverence, respect, or honour, and defend; everything that is entitled to reverence, respect, honour, or defence, in the character or the appertenances of a person." As for the purpose or aim of *dhimma* it signifies also *aman* meaning "security, or safety; security of life and property; protection, or safeguard; a promise or an assurance, of security, safety, protection, or safeguard."[119] Similarly according to Awang:

> "*Al-Dhimma* literally means *al-aman* (peace) and *al-ahd* (covenant/pact), thus *ahl al-dhimma*, in the legal sense, are those non-Muslims, normally Jews, Christians and others who have concluded a permanent agreement with a Muslim authority, They pledge loyalty to the State, pay *jizyah* and become subjects of the Islamic state. In return, the state, by virtue of the agreement, affords them positive protection and security as to their lives (and family), property, and religion. The beneficiaries of the *dhimma* are collectively called *dhimmis*, and are collectively referred to as *ahl al-dhimma* or simply *dhimma.*"[120]

Hence the elaborated meaning of the two words taken in conjunction with Awang's definition can said to be referring to a religious minority with whom an agreement or covenant has been entered for protection with associated rights, allowing them to remain and reside permanently in a territory controlled or ruled by Muslims[121] in exchange for a special tax called the *jizya.*

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[119] Ungar, F., *Arabic-English Lexicon [Repr.]: In 8 Parts* (1956), 976.

[120] Awang, A. R., *The Status of the Dhimmi in Islamic Law* (International Law Books, 1994), 16 cited in McKinney, S. J., "Echoes of the Dhimma: Discriminatory Vestiges of an Ancient Islamic Covenant", *Regent Journal of International Law,* Vol. 6 (2008), 239.

[121] Such a political scenario is often referred to as *dar al-Islam* literally translating as 'house/abode of Islam'. A term coined in the context of Muslim expansionism through military conquests following the death of Prophet Muhammad to refer to a region or territory where Islam has ascendance or more specifically where Islamic law is applied and Muslims are able to practice their religion. See *Encyclopaedia Britannica* (http://www.britannica.com/topic/Dar-al-Islam) and *Oxford Islamic Studies Online* (http://www.oxfordislamicstudies.com/article/opr/t125/e491#). Awang uses the term 'Islamic state' and 'Muslim authority' above instead. This usage is preferred by this author as the term *dar al-Islam* may distract and confuse in relation to the aim of the research, which is concerned more with Islamic law applied through a

They were protected minorities "allowed to follow their own laws and modes of worship, provided this would not impinge on the Muslim community. The term *dhimma* refers to a pact drawn up with the people of the book which the believer agrees to respect, the violation of which makes him liable to blame (*dhamm*).[122]

A critical analysis of the scope and definition of *ahl al-dhimma* is pivotal in discussing the protection of religious minorities in Islamic law for a number of reasons. There are other related categorisations such *ahl al-aman*, which referred to 'people guaranteed safety' and was specifically used for non-Muslim temporary residents in *Dar al-Islam* given the guarantee of safety for specific time-limited purposes to persons as merchants, refugees, envoys and any other form of visitor. Hence another term used for this category of people was *mustamin* which is derived from *aman* i.e. the person who has been given *aman*. Another term, *ahl al-hudna* meaning 'people of armistice', was used for non-Muslims who were not resident in *Dar al-Islam* but had entered a treaty of non-aggression with the Muslims. What these terms have in common with *ahl al-dhimma* is that they refer to non-Muslim groups at peace with the Muslims and fall under the more general category of *ahl al-ahd* (people with whom there is an agreement) in opposition to *ahl al-harb* (people with whom there are hostilities).[123] *Mustamin* and *ahl al-dhimma* are the only two groups over whom the Muslims exercise territorial jurisdiction and thus are obliged to provide protection.

However *ahl al-dhimma* were the only group that were required to pay the controversial poll tax for non-Muslims known as the *jizya*, whereas it was inapplicable for *mustamin* and *ahl al-hudna*. Thus it was the only general juristic categorisation possible for non-Muslim permanent residents under classical Islamic law. Whether this then meant their status was tantamount to that of citizens, in the modern or in any sense, is an ongoing and unresolved discussion. Qaradawi opines that "[*D*]*himma* means…a pledge to provide security for the People of the Book. It is the covenant of God, of the Prophet, and of the Muslims…[Like] citizenship in the modern state…People of the Book, in contemporary terms, carry an Islamic citizenship. This covenant is eternal in nature, affirming the non-Muslims in their religion while they abide under Islamic law except in matters pertaining to their faith."[124] Therefore it is clear that in drawing parallels and comparing with the notion of religious minorities under international law it would be the most relevant category non-Muslims that should be looked at. Nevertheless as minority rights under international law extend beyond citizens and accrue to the rights of religious identity and manifestation while within the jurisdiction of a State,[125]

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modern State-entity rather than issues of jurisdiction and territoriality. The term *dar al-Islam* was meant to reflect the realities of international relations rather than a theological categorisation sourced from primary textual sources. Its consideration would also then necessitate a survey of parallel categorisations such as *dar al-kufr, aman, hudna, bidah, harb, etc.*

[122] Takim, L., "Peace and War in the Qur'an and Juridical Literature: A Comparative Perspective", *Journal of Sociology & Social Welfare*, Vol. 38, No. 2 (2011), 143.

[123] See Ibn al-Qayyim's *Ahkam ahl al-dhimmah*, Vol. 2, p. 873. See also Mawardi, *al-Hawi al-Kabir,* Vol. 9, p. 306 and Ibn Qayyim, *Ahkam ahl al-dhimma,* p. 475-476, cited in Friedmann, *Tolerance and Coercion,* 55.

[124] Qaradawi, Y, *Al-Hall al-Islami: Faridatun wa Darura* (Cairo: Maktabat Wahba, 1977), cited in McKinney "Echoes of the Dhimma", 267.

[125] HRC GC 23, para. 5.1.

the category of *mustamin* will also have to be looked at as a corollary of the discussion around religious minority rights under Islamic law. *Ahl al-hudna* is of less relevance to the topic at hand but may provide a useful lens to analyse the status and relationship of certain Jewish tribes with the fledgling Madinan State.

Secondly there is a breadth of difference amongst Islamic jurists regarding which religious groups were entitled for *dhimma* status based on the textual sources and developing practice of Islamic law over time that accompanied the expansion of territories under Muslim rule. Consequently there should be clarity on the bases relied on for such distinctions allowing us to explore their application to the present context. It is necessary to address this issue from the beginning, particularly in relation to the potential exclusion of certain groups from the *ahl al-dhimma*, such as the *mushrikeen* (polytheists) and consequently their status being tantamount to that of unrecognised religious minorities, to avoid rendering the entire discussion of exploring rights and protections for religious minorities under Islamic law redundant.

Conversely, it would be counterproductive to overlook such classical Islamic juristic opinions on the subject due to their continued relevance to the discussion of the protection of minorities in most modern Muslim-majority states today and more topically to Islamically motivated non-State actors, most notably ISIS.[126] While the debates may be perceived as highly theological, it serves as an important foundation for the legal understanding of the issues and will be discussed in greater depth below. Muslims generally believe that such juristic opinions were derived by the classical jurists from sound bases. In-depth exploration also reveals that juristic consensus existed on some issues while on others there was a plurality of valid opinions, hence providing a *spectrum of validity*.[127] Furthermore, clarifying the scope of application of these juristic opinions and appreciation of the contexts from which they emerged adds much needed clarity to understanding the rationale behind the rulings. The final result is that we conclude at one end of the spectrum of validity lies the opinion that all non-Muslims have the right to exist under Islamic rule, while at the other that polytheists are to be excluded. In between these two, according to another strain of juristic reasoning, exclusion and non-recognition was specific to only Arab polytheists. We will also discuss briefly opinions other than these that were considered weak, fringe or aberrant.

It is noteworthy that the crux and the main point of divergence for the above views is the classical classification of the *Majus* (Magians or present day Zoroastrians). Their eligibility

[126] ISIS required Christians to pay *jizya* in Raqqa, Syria (https://www.youtube.com/watch?v=Wc8Ks0AiduQ) as compared to Jaysh al Fath who "announced that Christians will not be asked to pay Jizya (a tax that is paid by non Muslims just as Muslims pay Zakat), as Mujahideen leadership realizes that it is not suitable that the Jizya is paid to them while they cannot guarantee the security as of yet of their Christian residents", *3 Things we Learned from the Liberation of Idlib, Syria* (http://www.bilalabdulkareem.com/idlibrev/).

[127] This is an original term coined by this author. The closest comparator may be found in Emon's use of the notion of an Islamic 'rule of law', which rather than focusing on specific rulings attempts to derive the principles behind them and also to acknowledge a plurality of possible interpretations and rulings under Islamic law to any given issue: See Emon, *Religious Pluralism and Islamic law Dhimmis and Others in the Empire of Law* (Oxford Islamic Legal Studies, 2012), 16.

as *ahl al-dhimma* is undisputed owing to *ijma'*[128], yet their inclusion in the category of the People of the Book is only advocated by a minority of jurists, most notably al-Shafi'i and his subsequent school of Islamic law.[129] If they are classified as People of the Book,[130] then the opinion to limit *dhimma* status to only Jews, Christians and Magians is strengthened, whereas if they are classified as polytheists, it opens the door for rulings to be reached by way of *qiyas* (analogy) to include other types of polytheists, such as present day Hindus or Buddhists. The latter is the stronger opinion of the two due to a number of reasons elaborated below. However the exclusion and non-recognition of Arab polytheists is less easy to contend with, and while there are opinions against it, in favour of recognition of all religious groups as *ahl al-dhimma*, there are numerous reasons why a number of jurists came to the view that Arab polytheists were to be excluded from *dhimma* status. As a result, substantial time will be spent to decipher and understand the difference of opinion on either side of the fence on the important question of classifying Magians.

Notwithstanding this wide spectrum of validity, a constructive approach would be to tentatively suggest that at the very least, the right of all non-Muslim groups to exist as *dhimma* or religious minorities is one of the available valid opinions. Further still, examination of the rationale behind why some jurists found it difficult to accord *dhimma* status to the Arab polytheists or polytheists more generally as well as its practical significance should prove instructive. Finally in examining the rights of minorities, specifically religious minorities under international law, in a later chapter should show that the issues of scope and definition are not at all clear either under international law. Similar questions arise as to recognised minorities or religions before any rights can be ascribed in international human rights law.

II. Are *ahl al-dhimma* limited to only People of the Book (*ahl al-kitab*)?

On the issue of the scope of *dhimma* status or which religious groups can be included or excluded, there is consensus amongst classical jurists that the People of the Book are to be availed *dhimma* status.[131] This is based on Qur'an 9:29, which states:

> "Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture – until they give the jizyah willingly while they are humbled."

[128] Friedmann, *Tolerance and Coercion*, 55.

[129] Ibid. at p. 74.

[130] People of the Book or *ahl al-kitab* refers to those religious groups who had received messengers mentioned in the Qur'an. In practice, it clearly includes the Jews and Christians as followers of Moses and Jesus and adherents of the Torah and Bible respectively. In theory, it can include any group that may have been sent a heavenly book through a messenger mentioned in the Qur'an. Discussion around other groups possibly being included have centred around Magians (Qur'an 34:15) and the Sabians (Qur'an 2:62, 5:69, 22:17).

[131] Freidmann, *Tolerance and Coercion,* 55.

This famous verse has been at the centre of controversy generally and debates within Islamic scholarship as well as a cause of consternation amongst *dhimmis* themselves[132] around the issue of religious minorities or the treatment of non-Muslims. Among the debated issues are the command to 'fight' the People of the Book, the taking of *jizya* and the correct understanding of the last word of the verse: '*saghiroon'*, whose translation has ranged from 'humiliated'[133] to 'humbled'.[134] However for the immediate purposes of this section, that is, scope of inclusion, the crucial issue is the object of this command. The verse clearly and explicitly refers to "those who were given the Scripture". Here the word '*kitab*' has been translated as 'Scripture'[135], but is interchangeable and has the same meaning as 'Book'[136]. Nonetheless the reference is undoubtedly to the People of the Book. Furthermore while it is understood that the term practically refers to Jews and Christians, Qur'an 9:30-31 confirms this by referring to Jews and Christians specifically.

Beyond this common agreement, there are a range of valid opinions on whether religious groups other than the People of the Book can be given the *dhimma* contract or exist as recognised religious minorities under Islamic rule. These differences emanate from two possible interpretations of the verse owing to the treatment of Magians as *dhimma* by the Prophet.[137] This meant that while there was consensus that Jews, Christians and Magians were to be eligible for protection as *dhimma*,[138] the basis for the inclusion of the Magians was not ostensible. The majority opinion holds that they were not People of the Book while the minority opinion, most notably of al-Shafi'i and his subsequent school of thought, that they must be People of the Book chiefly due to the explicit and exhaustive nature of Qur'an 9:29. This interpretation held that the reference to the People of the Book meant that the taking of *jizya* and the offer of protection was exclusively for the People of the Book and no other groups. This line of reasoning then meant that the Magians had to be categorised as People of the Book to explain the Prophet's attribution of *dhimma* status to them. This was the view of al-Shafi'i and Ibn Juzay al-Kalbi, who noted that Ibn al-Majishun said there is no *dhimma* contract except for the People of the Book.[139]

An alternate interpretation sought to reconcile the inclusion of the Magians, by interpreting the mention of People of the Book as an example of a group to whom protection *may* be offered, as opposed to an exclusive category or an exhaustive list. Thus the Magians, while not being monotheistic nor having a heavenly text revealed to them, were offered protection and recognised as a religious minority. This was the view of the three other major schools of

[132] Haddad, "Ahl al-dhimma in an Islamic State", 173.

[133] Muhibbu-Din, M., "Ahl Al-Kitab and Religious Minorities", 120; and Friedmann, *Tolerance and Coercion*, 77.

[134] See Chapter 1 for discussion on this point.

[135] *The Qur'an, English Meanings, by Saheeh International.*

[136] E.g. as translated by Ali, Abdullah Yusuf., *The Meaning of the Glorious Quran* (Islamic Books, 1934)

[137] Discussed in detail below.

[138] See Ibn al-Qayyim, *Ahkam ahl al-dhimma*.

[139] Doi, A. R. I., revised by Clarke, A. *Shari'ah Islamic Law* (London, Ta-Ha Publishers Ltd, 2008), p. 649. Hashemi also notes that *only* the People of the Book were eligible for *dhimmi* status and were thus religious minorities recognised by the Islamic State in Hashemi, *Religious Legal Traditions*, 140.

Islamic law, *Hanbali*[140] , *Hanafi and Malaki*.[141] They did not consider the Magians as People of the Book but included them as recognised religious minorities. This is quite a crucial distinction because if the Magians are included within the scope of *ahl al-dhimma* without being recognised as People of the Book, then it raises the possibility of extending *dhimma* status beyond the People of the Book. However if they are included as People of the Book, then it would preclude the inclusion of any religious group that could not show itself to be a People of the Book. As to which groups may be considered *ahl al-dhimma* beyond these three groups, it is critical to the whole discussion if the Magians, in addition to being excluded from being People of the Book, are then classified as polytheistic and/or Arab. A related question then arises, in case the Magians are included as People of the Book, as to whether other religious groups may also fall into the category of People of the Book beyond just Jews and Christians.

As to the other end of the spectrum of religious groups that may be excluded from *dhimma* status, implicitly deduced from the above explicit inclusions, the opinions also logically vary. A number of classical scholars derived from the inclusion of the People of the Book that this then excluded polytheists from being recognised as religious minorities. This was only the view of those, such as al-Shafi'i, who considered that the Magians were to be included in *ahl al-dhimma* as People of the Book. Those who considered the Magians as non-People of the Book naturally categorised them as polytheists due to the centrality of worshiping fire in their religious belief as opposed to the idolatry of the polytheists of Makkah. They also took note that the Majus were different from the polytheistic Quraish of Makkah in that they were Persian in their ethno-linguistic identity as opposed to Arab. From this, two views emerged; one specifying their polytheistic belief *and* ethno-linguistic identity as the basis for inclusion, and a second relying on the Majus' polytheistic belief only, that is their religious identity as a basis for inclusion for eligibility as *ahl al-dhimma*. The first line of reasoning led to opening of the *ahl al-dhimma* eligibility to any polytheist group as long as they were not Arab. This was the most prominent view amongst classical scholars held by the Hanafis, Malikis[142] and attributed to Ibn Hanbal[143], while the Shafi'is and some Hanbalis were against it. The second line resulted in opening eligibility to all polytheistic religions or to rephrase it, not having it limited to just the People of the Book and the Magians. Thus the potential of extending the status of *dhimma* to all non-Muslims regardless of being Arab or polytheistic became a

[140] Khallal, *Ahl al-milal*, 468 (no. 1135); Ibn al-Qayyim, *Ahkam ahl al-dhimma*, 6; and Ibn Taymiyya, *Majmu fatawa,* Vol. 32, 186-188, all cited in Friedmann, *Tolerance and Coercion,* 76.

[141] Explicit views of Malik and Abu Hanifa that Magians were not People of the Book in Baji, *Muntaqa*, Vol. 2, 172; and Abu Yusuf, *Kitab al-kharaj,* 119, both cited in Friedmann, *Tolerance and Coercion,* 76.

[142] Tabari, *Ikhtilaf al-fuqaha*, 200; Abu Yusuf, *al-Radd ala siyar al-Awza'i,* , 131-2, Abu Yusuf, *Kitab al-kharaj,* 66-7; Sarakhsi, *Sharh kitab al-siyar al-kabır*, Vol. 1, 189 (no. 212); Ibn Abd al-Barr al-Namari, *Tamhid*, Vol. 2, 118; Qaffal, *Hilyat al-ulama*, Vol. 7, 695‑696; and Ibn Qudama, *al-Mughni*, Vol. 8, 363 & 501, all cited in Friedmann, *Tolerance and Coercion,* 80.

[143] Ibn Qudama, *al-Mughi*, Vol. 8, 500; and Zarkashı, *Sharh al-Zarkashi ala Mukhtasar al-Khiraqi*, Vol. 6, 449, both cited in Friedmann, *Tolerance and Coercion*, 80.

possibility. This was the view of al-Awza'i, Ibn Taymiyyah,[144] his student Ibn al-Qayyim and one of the views attributed to Malik.[145]

At this stage it is useful to highlight the depth of the discussion and the breadth of views around it, in particular related to definitions of certain terms. These include the meaning of 'Arab', whether it referred to ethnicity, language, geography or a combination of two or three. Another nuance to raise at this stage is that there is a separate but connected discussion on the ruling that there should be no non-Muslims permanently resident in the Arabian Peninsula imparted by the Prophet not long before he died. In a *hadith* narrated by Umar al-Kattab, the Prophet said: "I will expel the Jews and Christians from the Arabian Peninsula and will not leave any but Muslim".[146] According to another, the Prophet said: "Two deens shall not co-exist in the Arabian Peninsula."[147] What has been discussed in this regard are the exact bounds of the specified territory. These issues will be explored in greater depth below.

III. Can only the Children of Israel be considered as People of the Book?

We should begin by noting that the term *mushrik* (polytheist) and *kaafir* (disbeliever) are used interchangeably in the Qur'an. Thus linguistically they can refer to the same phenomenon. In relation to Islamic belief, *shirk* literally means 'association' of partners with God, the anti-thesis to Islam's core message of pure monotheism, while *kufr* literally means to cover or hide something[148] and refers to denial[149], rejection and disbelief in the Islamic message of pure monotheism. As such, the *ahl al-kitab* or People of the Book, by disbelieving in Islam, can be said to be both.[150] However given that the People of the Book are one sub-group of 'polytheists' who have some elements of monotheism in their religions, the term *mushrikeen*, especially when used with *ahl al-kitab*, is exclusive of them and may even be specific to idolaters. Idolatry in many ways epitomised *shirk* or polytheism due to the presence of multiple gods made of inanimate statues with a complete absence of any monotheistic elements. As per the broad meaning of *mushrik*, not for the purposes of categorising People of the Book, the implication clearly is that while the People of the Book are to be distinguished as a separate category with aspects of their belief commendable and in close proximity to Islam, they nonetheless have polytheistic elements in their belief systems. Accordingly some jurists raised questions as to the monotheistic credentials of certain groups of Christians and Jews who claimed to be People of the Book.[151] This could quite evidently

[144] Juburı, *Fiqh al-imam al-Awza'i*, 524‑525; Ibn al-Turkmani, *al-Jawhar al-naqı*, Vol. 9, 185; and Ibn Taymiyyah, *Majmu fatawa,* Vol. 19, 19.

[145] Qurtubi, *al-Jami li-ahkam al-Qur'an,* Vol. 8, 45.

[146] *Sahih Muslim* 32:75.

[147] *Muwatta Malik* 45:18.

[148] In Qur'an 57:20 it is used for farmers, who plant seeds and cover them with soil.

[149] Qur'an 60:4.

[150] See e.g. Qur'an 5:17 and Qur'an 9:30-31.

[151] See Qur'an 9:31.

be drawn from the concept of the Trinity in Christianity and the attribution of Uzair as the son of God in Judaism.[152]

From one perspective, all non-Muslims may be viewed as polytheistic, with the People of the Book as a special categorisation amongst polytheists entitled to *dhimmi* status. Two possible justifications arise here: i) People of the Book and other polytheistic beliefs should be distinguished based on their origins. The People of the Book according to Islam were clearly purely monotheistic in their original messages; or ii) to be considered as People of the Book, they should be on the religion of their forefathers who had received the divine message from their respective prophets (Moses or Jesus). Subsequently, those who had inherited or adopted these religions, but in a form different from its original and thus corrupted with polytheistic elements, should not be considered People of the Book.

Those who held the second opinion continued with their reasoning that the time of conversion of these groups would then inadvertently have a bearing on recognising genuine *Banu Israil* (Children of Israel). *Banu Israil* were the original people to whom both Moses and Jesus were sent. Hence if a group was deemed ethnically *Banu Israil*, it would be more likely that they were still adhering to the original unaltered message safe from change (*tabdil*) *or* distortion (*tahrim*). On this basis some scholars ruled that the categorisation of People of the Book could only be accorded to the descendents of *Banu Israil* and not to other ethnic groups who later converted to Judaism and Christianity.[153]

While it is possible to appreciate the reasoning employed to arrive at such a conclusion, there are a number of inconsistencies in the argument. The most glaring of these is that whenever the alteration is said to have taken place, it was clearly before the Messengership of Muhammad. As such, the Jews and Christians of his time were not on pure monotheism in line with their origins, as per Islam. The Qur'an refers to *these* Jews and Christians as People of the Book. In fact one of the purposes of Muhammad's Prophetic mission was to purify[154] the polytheistic and altered monotheistic messages of Christianity and Judaism. Furthermore the Qur'an states in Qur'an 98:1-2: "Those who disbelieved among the People of the Scripture and the polytheists were not to be parted [from misbelief] until there came to them clear evidence - A Messenger from Allah, reciting purified scriptures". As such the presumption is the impossibility of having truly monotheistic groups of Jews and Christians after the revelation of the Qur'an.

Hence it is also notable that it was never claimed or possible to identify Jews and Christians existing at the time of Muhammad, who ascribed to the original messages of their respective prophets. This would mean despite the Jews and Christians of the time being descendents of *Banu Israil,* they could not have been categorised as People of the Book. Interestingly the Qur'an does not just use the term *Banu Israil*[155] to describe Jews but also *yahud*[156] and

[152] See Qur'an 9:30.

[153] Friedmann, *Tolerance and Coercion,* 60.

[154] Qur'an 2:129.

[155] E.g., Qur'an 2:40.

haadu[157]. Linguistically the former indicates hereditary lineage and ethnicity while the latter two religious belief and identity. It has also been suggested that *Banu Israil* has been used in to refer to the historical original people to whom not just the Jewish message was conveyed but also the same people to whom the Christian message was delivered. As has already been highlighted, both Moses and Jesus were sent to the *Banu Israil.* Therefore in highlighting the religious identity by shifting to the use of *yahud* is indicative of the religious belief rather than an ethnic identity but more so also refers to the Jews at the time of the Prophet. Another irregularity with the opinion is that it precludes the possibility of the original Jewish and Christian beliefs being passed to other ethnicities. Similarly just the lineage in itself is not enough to insure that their religion has not undergone changes to corrupt it. Furthermore it was established that many of the Jewish and Christian groups in the Arabian Peninsula were of Arab ethnicity.

For these reasons, it was the opinion of a great majority of jurists that the time of conversion of one's ancestors and their ethnicity (affiliation to *Banu Israil*) should not be a factor in reaching a determination of whether or not certain Jews and Christians could be treated as People of the Book and thus *ahl-al-dhimma*.[158] It is based on the fact that the Prophet treated the following groups as People of the Book: Jews of Yemen, Tayma and Wadi al-Qura as well as Christians of Najran and Dumat al-Jandal. These tribes were wholly or partially of Arab lineage and further the Prophet did not pay any consideration to the time of conversion or their ethnicity.[159] Ibn al-Qayyim stated that the law here is rooted in religion and not genealogy[160], while his teacher Ibn Taymiyyah put it rather more starkly in that to bring genealogical considerations in the realm of religion would be contrary to the principles of Islam and a regression into *jahiliyyah*[161] (the era of ignorance and darkness prior to the coming of Islam – a reference to the morally corrupt state of the Arabs in the immediate period preceding the Message of Islam).

IV. Does *ahl al-kitab* only refer to the original Jews and Christians prior to the alteration of their beliefs?

Scholars such as al-Shafi'i were concerned primarily with establishing if the people referred to in the Qur'an as being given the Book were in fact the Jews and Christians of his time. While he and others sought to make this distinction by observing when their ancestors had converted and whether they were descendents of *Banu Israil*, others sought to examine the

[156] E.g., Qur'an 2:113.

[157] E.g., Qur'an 2:62.

[158] According to al-Tabari: al-Hasan al-Basri, Ikrima, al-Shabi, Said bin al-Musayyab, Ibn Shihab al-Zuhri, Qatada bin Diama and others. It is held by Abu Hanifa, Malik and Ibn Hanbal. Al-Shaybani also held it as did al-Sarakhsi in addition to Ibn Taymiyyah and his student Ibn al-Qayyim, cited in Friedmann, *Tolerance and Coercion,* 62.

[159] Ibn Taymiyyah, *Majmu Fatawa,* Vol. 35, 222.

[160] Ibn al-Qayyim, *Ahkam ahl al-dhimma,* Vol. 1, 65.

[161] Ibn Taymiyyah, *Majmu Fatawa,* Vol. 35, 229-230.

substance of their belief.[162] As such there is some confusion in the literature covering this issue about whether polytheistic elements had entered the religions of the People of the Book. If so, then which categorisation they should be given. This is important as it has a bearing on whether they can be eligible to *dhimmi* status or not.

Some have suggested that there is a discussion to be had around whether Christians and Jews are People of the Book or *mushrikeen* (polytheists), while maintaining there is no difference of opinion about whether they, even with their altered beliefs, can be considered *ahl al-dhimma*. The confusion around this matter apparently derives from a misunderstanding of linguistic and theological nuances relating to whether the term *mushrikeen* is inclusive or exclusive of the People of the Book. In fact the question itself is based on an unsound presumption that there is a conflict between the two categorisations. The answer simply is that the Jews and Christians are both polytheistic *and* People of the Book. Ibn Kathir, possibly the most renowned commentator of the Qur'an, explained the non-existence of an *apparent* conflict quite succinctly. In his commentary of Qur'an 5:5, which states the permissibility of marrying women from the People of the Book, he refers to Abdullah Ibn Umar's advice against marrying Christian women saying: "I do not know of a worse case of *shirk* than her saying that Isa is her lord, while Allah said, 'And do not marry idolatresses till they believe'."[163]

He goes on to cite Ibn Abbas's view that Muslims did not marry non-Muslim women until the revelation of Qur'an 5:5. Following this, they married women from the People of the Book including some of the companions. Thus he concludes that Qur'an 5:5 provides the specific exception to the general prohibition in Qur'an 2:221. The latter's reference to *mushrikeen*, by implication including the People of the Book. Ibn Kathir states: "there is no contradiction here, since the People of the Book were mentioned alone when mentioning the rest of the idolaters in Surah Bayyinah."[164] Al-Tabari supports this view in his commentary of Qur'an 2:221, where he includes idolators, Jews, Christians, Magians within the meaning of *mushrikeen* and any other type. He further also sees Qur'an 5:5 as providing an exception for a certain kind of polytheistic group(s), that is, the People of the Book.[165] Corroboration of the view can be found with Qatada, Umar bin Abd al-Aziz, al-Shafi'i and Mawardi.[166]

Qur'an 9:29, which is the basis for the unequivocal inclusion of the People of the Book in *ahl al-dhimma*, is followed in Qur'an 9:30 by specific reference to Jews and Christians' belief in Uzair (Ezra) and Jesus being sons of God. This establishes two facts. The first, that Jews and Christians are conclusively People of the Book as ostensibly 9:30 is an elaboration of the "those who were given the Book" in Qur'an 9:29. The second, that they are believers in

[162] Ibn al-Qayyim, *Ahkam ahl al-dhimma,* Vol. 1, p. 65-75.

[163] The term 'idolatress' is synonymous with female polytheist and is only used due to the translation referenced. 'idolatory' appears in some of the translated literature as connoting the specific type of polytheism that was practiced at the time. However the literal translation is 'polytheism'.

[164] Tafsir Ibn Kathir (English translation), 1271.

[165] Tafsir Al-Tabari.

[166] Mawardi, *al-Hawi al-kabir,* Vol. 9, pp. 220-224.

elements of *shirk*. Their polytheistic beliefs are further reinforced in Qur'an 9:31: "They have taken their rabbis and monks as their lords besides Allah, and [also] the Messiah, the son of Mary. And they were not commanded except to worship one God; there is no deity except Him. Exalted is He above whatever they associate with him."[167] While Qur'an 9:30 is self-explanatory in how the ascription of an offspring to God and an attribution of Godliness to the 'son' is a negation of monotheism, it may still be asked as to how the Christians and Jews took 'their scholars and rabbis as their lords besides Allah'. This is explained by Ibn Kathir in his commentary via the story of Adi bin Hatim who had converted to Christianity in the pre-Islamic period. When the Prophet met him with a view to invite him to Islam, he recited "they have taken their rabbis and monks as their lords besides Allah". Adi's response was that they were not worshipped by his fellow Christians. To this the Prophet responded: "Yes they did. They (rabbis and monks) prohibited the allowed for them (Christians and Jews) and allowed the prohibited, and they obeyed them. This is how they worshipped them."[168] Furthermore Umar in his treaty with the Christians of Al-Sham, stipulated that they refrain from inviting anyone to or publicising practices of *shirk*.[169]

In conclusion to this discussion, it can be observed that there is overwhelming consensus or *ijma'* that classical scholars understood the term *mushrikeen* as a general category to include the Christians and Jews, principally due to polytheistic elements that had altered their original belief systems, most notably attribution of a son to God or even more specifically in Christianity to conflate a messenger of God, Jesus, with God Himself. At the same time Christians and Jews are understood to be referred to in the Qur'an as "those who were given the Book" through their prophets, Moses and Jesus, at their respective times, the true monotheistic message from God. Thus the Christians and Jews can be legitimately referred to as *mushrikeen*, while at the same time as People of the Book. This is despite the alteration or polytheistic elements that have entered their belief systems. As such the differentiation between the People of the Book and the other *mushrikeen* is the presence of *some* monotheistic elements within their religions or that their religions are based on or are in their origin monotheistic or at their inception were in their entirety from God. This then implies that the belief of the People of the Book is an intermingling of both polytheistic and monotheistic elements. Ibn Taymiyyah's opinion then is the most precise and conveys the complexity of idea succinctly. He rules the *Shi'ah* are wrong to prohibit marriage to Christian and Jewish women as the basis of Christianity and Judaism is sound, but polytheism has been introduced thereafter. Hence their polytheism is not absolute or definitive (*shirk mutlaq*). Instead it is partial or limited (*shirk muqayyad)*.[170]

The depiction of this issue as an inconsistency within Islamic law, with at times Christians and Jews referred to as *mushrikeen* and at others as People of the Book, is rather misleading. This is due to the conflation of the differing meanings of *mushrik* when used independently

[167] Qur'an 9:31.

[168] Ibn Kathir (English trans.) Vol. 4, 409.

[169] Ibn Kathir (English trans.) Vol. 4, 407.

[170] Ibn Taymiyyah, *Majmu Fatawa,* Vol. 1, 179.

and when used in conjunction with *kufaar* or People of the Book. Furthermore for there to be any confusion on whether the Jews and Christians could be *mushrikeen*, in the same sense as the idolaters, is clearly not reflected in the coinciding opinions of the vast majority of classical jurists with the exception of Abdullah ibn Umar, who considered the women of the People of the Book as idolatresses and therefore not permissible for marriage.

V. Are the Magians People of the Book or polytheists?

The issue of whether Zoroastrians or Magians can be considered eligible for *dhimma* status and by implication its rationale is crucial to the present discussion of the scope of *ahl al-dhimma* and also the People of the Book. As a result it is central to this entire thesis as it ultimately determines the basis of *qiyas* (analogy) upon which we must depend to derive rulings for various groups of non-Muslims not referred to specifically in the sources of Islamic law on this subject. As discussed above, classically there is *ijma'* that the Magians can be given *dhimma* status.[171] However classical views diverge as to whether this was because they were to be included as People of the Book or instead as outright polytheists or to borrow from Ibn Taymiyyah, ascribers to *shirk mutlaq* (absolute polytheism) to be included within those eligible for *dhimma* status. If so, then was their meat permissible and could their women be married as per the exemption in Qur'an 5:5? The opinion that they were not People of the Book, but nevertheless were entitled to *dhimma* status seems to be the considerably stronger opinion, with al-Shafi'i being its principal opponent asserting that they were to be given *dhimma* status by virtue of being People of the Book. The Magians are referred to in the Qur'an only once as *Majus* at Qur'an 22:17: "...those who have believed and those who were Jews and the Sabeans and the Christians and the Magians and those who associated with Allah...", where they are mentioned as a distinct group from the polytheists. This could lend support to them being considered as People of the Book as they are mentioned with Jews and Christians as well as Sabeans. The Prophet and thus nascent Islam's exposure to them was minimal explaining the scarcity of *ahadith* concerning them. The legal problem of their classification and treatment became an increasingly prominent issue due to expanding boundaries of the Islamic empire, initially in relation to Oman and Bahrain and later especially when it encompassed Persia.[172] The predominantly Persian ethnicity of the Magians will also be analysed in terms of its role in their categorisation.

The pertinent tradition in this regard is that of Umar, who did not take *jizya* from the Magians until Abd al-Rahman ibn Awf testified that the Prophet had taken *jizya* from the Magians of Hajar and commanded the Muslims to treat them the same as they would treat the People of the Book.[173] This is further corroborated by a letter by the Prophet to Mundhir ibn Sawa, who

[171] Ibn al-Qayyim, *Ahkam ahl al-dhimma,* 79-80; and Friedmann, *Tolerance and Coercion,* 55.

[172] See generally Frye, R., *The Golden age of Persia: the Arabs in the East* (Sterling Publishing Company, 2000).

[173] Saheeh al-Bukhari, 4:384.

had authority over Hajar, offering them the retention of their religion and payment of *jizya*.[174] Friedmann points out the apparently conflicting tradition of Ibn Abbass that following a meeting of a Magian leader with the Prophet, the former informed Ibn Abbas that he had been given a choice between conversion or to be killed by the Prophet.[175] However Ibn Abbas himself retracted his report in light of the conflict with Ibn Awf's tradition as his own had originated from the Magian leader as opposed to a companion of the Prophet.[176] Therefore on the primary issue of whether Magians can be given *dhimma* status, there seems to be no discernible opposition and there is as we already mentioned *ijma'* on the matter according to Ibn Qayyim. Furthermore Umar's own hesitancy could possibly have been due to Ibn Abbas's report and according to some versions of the tradition above he expresses: "I do not know how to treat these people who are neither Arabs nor People of the Book."[177] This appended statement has significance, if considered as authentic, as it equates Arabs with Arab idolaters and is indicative that Umar did not consider them as People of the Book. This could weaken the position that they were People of the Book. Although we do not know whether after the testimony he considered them as *ahl al-dhimma* due to being People of the Book or not Arab polytheists.

On the secondary issue of whether the Magians can be considered as People of the Book, the views are more diverse. However the prevalent view appears to be that they were not. The main reasons advanced are that Umar hesitated before making his determination. The Prophet according to Ibn Awf said to treat them *like* or *as* the People of the Book as opposed to explicitly saying they were People of the Book.[178] Furthermore it is the *ijma'* amongst classical scholars that even as *dhimma*, their women cannot be married nor the meat slaughtered by them consumed[179] indicating the inapplicability of Qur'an 5:5 to them, which permits these from People of the Book.[180] Only *jizya* may be taken from them and they may retain their religion.

This could be said to be based on the content of their beliefs themselves as Ibn Hanbal called it foul and Ibn Abbas attributed its origins to Satan.[181] Such views were based on their practice of idolatry, worshipping fire and marrying their mothers and daughters. As already discussed above the presence of some elements of polytheism in their religion would not per se exclude them from being considered as People of the Book as the Christians and Jews can be accused of the same. However the Christians and Jews are not considered to be idolaters like the Magians. Additionally no particular book is mentioned in the Qur'an or any

[174] Muhibbu-Din, "Ahl Al-Kitab", 118: "In Uman (Oman), there was a tradition that the Prophet commanded Abu Zaid to take *Sadaqat* from the Muslims of Uman and the *jizyah* from the *Majus* of that country"; Abu Yusuf, *Kitab al-kharaj*, p. 131, cited in *Friedmann, Tolerance and Coercion*, 74.

[175] Bayhaqi, *Sunan*, Vol. 9, 190.

[176] Ibid.

[177] Abd al-Razzaq al-Sanani, *Musannaf*, Vol. 6, p. 69; Vol. 10, 325.

[178] Khallal, *Ahl al-milal*, 468 & 470 (nos. 1134 & 1139-1141).

[179] Ibn al-Qayyim, *Ahkam ahl al-dhimma,* Vol. 1, p.6; and Friedmann, *Tolerance and Coercion*, 74.

[180] With exception of Ibn Hazm's *shaad* opinion in *Muhalla*, Vol. 7, 365.

[181] Khallal, *Ahl al-milal*, p. 468-9 (nos. 1135-1136).

Prophetic tradition to have been given to the Magians. Furthermore Qur'an 6:156 refers to only two groups as People of the Book: "Lest you should say: 'The Book was sent down to only two sects before us'", who are axiomatically understood to be Jews and the Christians.[182] Nonetheless while this verse strengthens the view that the Magians were not People of the Book, at the same time it is not conclusive as God anticipates an excuse from the non-Muslims and so could be offering their perception of who were given the Book as opposed to a statement of fact. Furthermore there is strong basis to argue that the Sabians may have been from the People of the Book.[183]

Hence if Magians are not considered People of the Book but are eligible for *dhimma* status, the subsequent question that arises is as to the rationale for inclusion. Friedmann alludes on the basis of a version of a tradition attributed to Hasan al-Basri that they were only allowed to practice their *shirk* for the sake of *jizya.*[184] Another version of the same tradition mentions no particular reason why the Magians were allowed to keep their fire-temples, practice idolatry and indulge in incest, but only states the fact that it was the decision of al-Khadrami on assuming authority over Bahrain.[185] However this is based on one of the versions of a reported statement from one companion. If we solely follow the tradition of Ibn Awf as to the statement of the Prophet, we would only be able to deduce that the Magians are not People of the Book but can be considered *ahl al-dhimma*. It may also be that if we observe the statement of Umar in another version of the tradition, we would conclude their inclusion in *ahl al-dhimma* was owed to being non-Arab. Umar was reported to have said "I do not know how to treat these people who are neither Arabs nor People of the Book". It could also be said to be evident due to the resentment of the *munafiqeen* (hypocrites) in *Tafsir Muqatil* at the inclusion of the Magians and exclusion of their 'kith and kin'.[186] Furthermore the Prophet is reported to have said to his uncle Abu Talib, while he was ill, that if the Quraish would accept Islam, then God would give them charge over the non-Arabs and the receipt of *jizya* from them.[187] This confusion or uncertainty alone could have meant that the Magians were afforded more leniency than the Arab polytheists due to the doubts over their status.

The alternate view that Magians were eligible for *dhimma* status owing to being People of the Book was most notably held by al-Shafi'i. His underlying basis was that Qur'an 9:29 limited the taking of *jizya* to "those who were given the Book". As such relying on the principle that the *Sunnah* (prophetic traditions) cannot abrogate the Qur'an according to al-Shafi'i *usūl al-fiqh*, he dismissed the apparent evidences against his position. Following from this, al-Shafi'i deduced that the Magians must have had a revealed book in order to reconcile his interpretation of Qur'an 9:29 and the extension of *dhimma* status to the Magians. According to one tradition, Ali also held the view that they at one point had a revealed Book. However

[182] Tafsir Ibn Kathir (Eng. trans.), 1674.

[183] Qur'an 2:62, 5:69, 22:17 where the magians are also mentioned and 34:15.

[184] Shafi'i, *Kitab al-umm*, note by the editor quoted from Abd al-Razzaq.

[185] Shafi'i, *Kitab al-umm*, vol. 5, p. 10.

[186] Abd al-Razzaq al San'ani, *Musannaf,* Vol. 6, p. 69; Vol.10, p. 325.

[187] *Jami al-Tirmidhi*, Vol. 5, Book 44, Hadith 3232 narrated by Ibn Abbas (weak).

the reliability of this tradition attributed to Ali has been questioned and Ibn al-Qayyim noted that it was weak.[188] Even if it was taken as authentic, the Magians have lost any knowledge of that Book.[189] Friedmann also draws attention to al-Shafi'i's apparently contradictory positions in some places, categorising the Magians as People of the Book and in others with those who had a semblance of a Book.[190] However even if these differing views were expressed at different times by al-Shafi'i, they do not necessary imply a contradiction. For example he could have understood any semblance of a Book as enough to qualify a group as People of the Book. It would seem that even those about whom there is no doubt about being People of the Book, have lost some elements and retained others. As a result Christians and Jews can also be said to only have a semblance of their Book.

Another explanation could be that the mere possibility to at the least having a semblance of a Book introduced enough doubts about their potential credentials as People of the Book that they could not be conclusively classified as absolute polytheists. Furthermore it should be noted that al-Shafi'i's determination was not based on an apparent baseless presumption of a Book, but rather principally on the logical deduction emanating from his interpretation of Qur'an 9:29. Abu Thawr and Ibn Hazm seem to have held the same view.[191] Therefore if we applied the test developed above, drawing on Ibn Taymiyyah's understanding, if it could be shown that the Magians were monotheistic in the essence, origins or basis of their belief, we could consider them as People of the Book. However the only substantiation for such a view is an interpretation of Qur'an 9:29, which holds that *dhimma* status is strictly restricted to the People of the Book.

VI. Can polytheists be considered as *ahl al-dhimma?*

The inclusion of the polytheists other than the People of the Book amongst those eligible for *dhimma* status is a divisive issue and crucial to this study. At one end of the spectrum, polytheistic groups are not recognised under classical Islamic law as religious minorities or as *ahl al-dhimma*. Subsequently this must be reconciled with the fundamental Islamic principle that "there is no compulsion in faith"[192] and the equivalent in international law of freedom of religion, particularly the internal freedom to hold a belief. At the other end of the spectrum, all polytheists are entitled to *dhimma* status and freedom of religion with the payment of *jizya*. In between these two opinions is one which makes a distinction between polytheists who are Arab and those who are not – it not being clear whether 'Arab' should be understood to refer to ethnicity, language or geography. The core of this issue and its resultant range of

[188] Ibn al-Qayyim, *Ahkam ahl al-dhimma*, Sarakhsi, *Mabsut,* Vol*,* 5, 211, II, 2-4.

[189] Friedmann, *Tolerance and Coercion,* 75.

[190] Mawardi, *al-Hawi al-kabir*, vol. 9, 224.

[191] Khallal, *Ahl al-milal*, 470 (no. 1142); and Ibn Hazm, *al*-Muhalla, Vol. 7, 404-5.

[192] Qur'an 2:256; See Zaydan, A. K., *Ahkam al-Dhimmiyin wa al-Must'amin fi Dar al-Islam* (Beirut: Mu'assasat al-Risalah, 1982), for view that excluding polytheists, Arab or otherwise, is incompatible with Qur'an 2:256. Discussed in greater detail in Section 2.

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opinions revolve around the understanding of one crucial factor: that the Prophet mainly came into contact with Arab polytheists, specifically idolaters, and that these were ethno-linguistically Arab. They were also for most of his life engaged in perpetual armed hostilities against the Muslims. Furthermore the use of the term Arab polytheist only referred to the Arabs present in the Arabian Peninsula.

It is also important to state from the onset that all the opinions to be presented around this issue are theologically valid and based on interpretation of the authentic sources in Islamic law. However given that the Prophet's actions only related to this specific group and following his death Islam spread and thus the territory under its control expanded exponentially, the treatment of polytheists in other nations depended on the *qiyas* (analogy) extracted from the original treatment of the Arab polytheists of the Arabian Peninsula. Were those other polytheistic groups analogous to Arab polytheists or were they to be distinguished as being analogous to some other religious group from the lifetime of the Prophet such as the Magians? The variety of opinions here hence is due to what different jurists and rulers considered to be the *illah* or *ilal* (effective cause or causes) for the rulings of the Prophet. Was the harsh approach taken towards the polytheists of Makkah and the Arabian Peninsula down to them being Arab, existing within the territory of the Arabian Peninsula, speaking the Arabic language, being close to the Prophet in affinity, their idol worship – an antithesis to Islam - or their inherent enmity to the Prophet?

Let us begin with the most controversial opinion, which would be uncomfortable for international lawyers and something omitted by Muslim apologist writers: the blanket non-inclusion of all polytheists from *dhimma* status. As such they would have no right to be domiciled in Muslim lands, to practice their religion or to seek protection of the law for their personal security. As already stated, this is a *valid* opinion held by a number of prominent classical jurists over time. It was held by the majority of the al-Shafi'i[193] and Hanbali schools[194], as well as by Ibn Hazm.[195]

Before we proceed to explain this view, it is useful to reflect on the necessity of including it in the present study. If such a view is omitted or raised superficially but then dismissed, it would not be conducive to addressing the issue genuinely and frankly. Its omission invites those who seek to rely on it for their actions and policies to inadvertently promote it as the only correct or even the strongest view. Inevitably others may be accused of being apologists, thus gaining greater legitimacy and credibility amongst the Muslim mass laity. To not give it its proper value and to dismiss it in an unconvincing manner invites similar accusations of being dishonest and biased. The correct approach has to be to acknowledge the existence of the view and engage with it to determine its proper status, even if one does not agree with the opinion themselves. Other valid opinions must also be cited and then one can seek to analyse and understand the reasoning and context behind the various positions. As such, to be

[193] Shafi'i, *Kitab al-umm*, Vol. 4, 247.

[194] Ibn Qudama, *al-Mughnı*, Vol. 8, 362-363; and Zarkashi, *Sharh al-Zarkashi ala mukhtasar al-Khiraqi,* Vol. 6, 567, both cited in Friedmann, 77.

[195] Ibn Hazm, *al-Muhalla*, Vol. 7, 404-405.

systematic, impartial and methodological is the only way that one earns the right to then, as a conclusion, suggest why one of the numerous valid views should be given prominence given the prevalent and specific context under question.

Jurists who argued for taking *jizya* from only non-Arab polytheists thought that Arabs should have no option but to accept Islam in order to live under Islamic rule.[196] The rationale offered for the distinction is that the Qur'an is considered to be a literary miracle in itself. In light of the fact that it was revealed in Arabic, and as such its miraculous nature would be more evident to Arabs than any other group of people. Hence their rejection of Islam, despite probably appreciating its divinity was down to arrogance rather than ignorance. Given that the Arab polytheists of Makkah were the kith and kin of the Prophet, there was a greater expectation and obligation to accept the message akin to an extended family or tribe. At the same time it was thought that they would be more inclined for these two reasons (language and ethnicity) to accept Islam, so harshness would help them move closer to convert.[197]

This was the view of Abu Hanifa, his student Abu Yusuf, Qatada bin Di'ama[198] and one of the views attributed to Malik ibn Anas as well as to Ibn Hanbal. It can also be considered as the view of the Hanafi school of law[199] as a whole. Malik was said to be willing to accept *jizya* from various faithless Turks and Indians.[200] Ibn Abi Zayd al-Qayrawani said *jizya* cannot be taken from Arab polytheists because God knew that they would accept Islam.[201] Al-Jassas and Abd al-Razzaq al-San'ani, narrate a *hadith*, where the Prophet made peace with and took *jizya* from polytheists excluding those who were Arab.[202] It is not known who the non-Arab polytheists under question are. One possibility is that it refers to Magians, who were common at the time of Prophet. However, given that they were often referred to specifically as Magians, it may be possible that this refers to some other non-Arab polytheistic religious group. While this remains a possibility, it should also be kept in mind that the Prophet was not reported to have encountered non-Arab polytheists other than the Magians. This is further plausible as the term *mushrik* is even used at times to refer to a general category all inclusive of non-Muslims that include Christians and Jews. Such a use of the word would also of course include the Magians. In any case this tradition was used to support the inclusion of a number of non-Arab polytheistic groups, in particular the Hindus.[203]

[196] Tabari, *Jami' al-bayan,* Vol. 3, 16.

[197] Friedmann, *Tolerance and* Coercion, 79-80.

[198] Tabari, *Jami' al-bayan,* vol. 3, 16.

[199] Sanani, *Musannaf*, Vol. 10, 326 (no. 19259); and Jasas, *Ahkam al –Quran,* Vol. 3, 114.

[200] Tabarı, *Ikhtilaf al-fuqaha,* 200.

[201] Ibn Abi Zayd al-Qayrawani, *Kitab al-jihad*, 450.

[202] Jassas, *Ahkam al-Qur'an*, Vol. 3, 114 and San'ani, *Musannaf*, Vol. 10, 326 (no. 19259).

[203] Hashemi makes the pertinent observation that eventually that *dhimmi* status was extended to Hindus and other polytheists and subsequently even to Scandinavians and Berbers. Hashemi, *Religious Legal Traditions,* 145.

Malik's reading of the *hadith* of the Prophet commanding the Muslims to treat the Magians like the People of the Book was to make *qiyas* with all other religious groups ruling that all communities have the status of the Magians. According to a *hadith*, Malik considered it permissible to take *jizya* from various kinds of polytheists and deniers, Arabs and non-Arabs, Taghlibis and Quraishis[204] It is not clear however if the *qiyas* is with non-Arab polytheists generally or all polytheists. Nonetheless the examples given are all of non-Arabs, but this does not preclude the possibility that he was referring to all polytheists. Certainly the wording suggests this interpretation. He included Fazazina of Libya, the Slavs, the Abrar, the Turks and other non-Arabs who were not People of the Book. In a conflicting *hadith*, Malik[205]

The final view to consider is that all polytheists including Arab may be included in the *dhimma* category. The reasoning advanced rests on a number of factors, the most compelling we have already discussed: the inclusion of Magians in the category of *dhimma* and subsequently the determination that the situation of the Arab polytheists is analogous to them.

Additionally the *hadith* of Burayda[206] is central to this discussion, which contains guidance from the Prophet on what options a Muslim commander should offer on the battlefield to his enemies "from amongst the polytheists…". These include conversion to Islam or payment of *jizya.* The *hadith* per se does not conclusively support the inclusion of Arab polytheists, mainly because, as already discussed, the terms *mushrikeen* and *kuffaar* are used interchangeably in the Qur'an. While *mushrikeen* can be understood specifically to refer to polytheists, it is also used generally to refer to the wider category of non-Muslims, which include the People of the Book. As such, the *hadith* could be referring to Jews, Christians or even Magians. This view is supported by the assertion that the *hadith* of Buraydah specifically relates to the battle of Mu'ta. According to Waqidi's description of the battle, the enemy was predominantly constituted of Byzantine Christians along with Bedouins whose religious affiliation was not known.[207] Mention is also made of Christian Arabs. While Christians can be described as both People of the Book or *mushrikeen*, the former carries a positive connotation and the latter negative. As such, given that the Christians at Mu'ta had assumed the role of the enemy, it is understandable why they would be referred to more readily as *mushrikeen* in such a context. This is supported by Waqidi's description of the battle who often describes the enemy as *mushrikeen*.

The alternate view relies on the apparent wording of the *hadith*, which indicates *general* Prophetic advice and does not specify the 'enemy' as such. The implication is that it may only be directed at Arab polytheists on the basis, as Ibn al-Qayyim points out, that most battles were in fact against Arab polytheists or more specifically at first against the Quraish of Makkah.[208] Even if we take *mushrikeen* here to refer to the wider category of all disbelievers and thus inclusive of Christians and Jews, then still on the basis that this is

[204] Qurtubi, *al-Jami' li-ahkam al Qur'an,* Vol. 8, 45.

[205] Tabari, *Ikhtilaf al-fuqaha*, 200.

[206] Sahih Muslim, No. 1731.

[207] Waqidi, *Kitab al-Maghazi*, 757.

[208] Ibn al-Qayyim, *Ahkam ahl al-dhimma*, Vol. 1, 6-7.

general advice, it would include all polytheists, which would mean all non-Muslims and in turn Arab polytheists. Furthermore taking the *hadith* of Buraydah as specifically relating to the battle of Mu'ta, in itself does not negate the possibility that it was issued prior to that battle, but still served as a general instruction for subsequent battles. According to Waqidi's account, another aspect to consider is that even the enemy at Mu'ta was not homogenous in religion, ethnicity or geographical origin, and it remains likely that the Bedouins were Arab polytheists. In summation, such a reconciliation between Waqidi's description, the generality of the wording of the *hadith* and the prevailing context of perpetual conflict with Arab polytheists cannot all be negated without proving conclusively that the *hadith* of Buraydah was specifically *and* only intended for the battle of Mu'ta as well as showing the Bedouins mentioned in Waqidi's description were not Arab polytheists.

Ibn al-Qayyim reconciles his view regarding the eligibility of Arab polytheists for *dhimma* status with Qur'an 9:29 adducing that the Qur'an orders the *jizya* to be taken from the People of the Book, but that the *Sunnah* expanded that group to all other non-Muslims.[209] Another important factor is whether we see the applicability of *jizya* specifically to the People of the Book as a closed or open list. This may seem immediately inconsequential but it has some bearing on whether what is being suggested here is an abrogation or elaboration of the Qur'an through the *Sunnah* of the Prophet, especially when one considers that al-Shafi'i reads Qur'an 9:29 as a closed list and thus rejects the possibility of the *Sunnah* as an abrogation. Ibn al-Qayyim continues with his reasoning to connect his understanding of the *hadith* of Buraydah with his observation about the Magians, in that there was no difference between them and the Arab polytheists in the nature or category of belief.[210] Still for Ibn al-Qayyim's assertion to stand true, the Prophet's inclusion of the Magians should be on the basis of the polytheistic identity rather than that specifically relating to non-Arab polytheistic identity. Ibn al-Qayyim's view of the inclusion of all non-Muslims including Arab polytheists is supported by al-Awza'i and one of the views attributed to Malik, where he is reported to have said: "*jizya* is to be taken from all kinds of polytheists and deniers, Arabs and non-Arabs, Taghlibis or Qurashis, whoever they may be".[211]

To conclude the discussion on the inclusion of polytheists within the category *ahl al-dhimma*, it is pertinent to raise two additional points, which should give a more nuanced view to reconcile the wide range of views present on this issue.

The first; Ibn al-Qayyim notes that by the time Qur'an 9:29 was revealed in 9 A.H., there were no polytheists left on the Arabian Peninsula.[212] As such there was no need for their mention in the Qur'an and nor was any discussion around the inclusion of Arab polytheists of any consequence as none existed in the Arabian Peninsula. Ibn Abi Zayd al-Qayrawani held a similar view that the Arab polytheists were not included due to Allah knowing that all polytheists in the Peninsula would accept Islam, implying that according to him, this is

[209] Ibn al-Qayyim, *Ahkam ahl al-dhimma*, Vol. 1, 6-7.

[210] Ibid.

[211] Qurtubi, *al-Jami' li-ahkam al-Qur'an,* Vol. 8, p. 45.

[212] Ibn al-Qayyim, *Ahkam ahl al-dhimma,* Vol. 1, 6-7.

actually what happened.[213] Ibn al-Jahm also cited as one of the reasons for the Quraish to be the only group excluded as they had all accepted Islam following the conquest of Makkah.[214]

There may be a counter argument relating to the presence of polytheists in Arab nations in what is today considered the Middle East and North African region. Two points arise in response. The first and crucial, as already raised, is that references in the sources to 'Arab' are restricted to those residing in the Arabian Peninsula. Also it is problematic to define Arabs ethnically and in fact what constitutes the core of the Arab identity in the modern world is language and if we were to observe ethnicity as having a strong link with physical appearance, then the breadth of possibilities between the members of the Arab League[215] are extremely diverse. This point in itself is conclusive and definitive. However if we are to say it was not, then the second point relates to the precise definition of *mushrikeen*, the meaning of which might be clear but whether such groups existed in that region is far from certain. Therefore if we accept that the group that is being denied the right to *dhimma* status, the polytheists of the Arabian Peninsula ceased to exist after 9 A.H., then the discussions and conclusions arrived by, in particular the Hanafis and some Malikis become, to an extent, theoretical. The more practical discussion as a result, especially given the context of modern day societies, becomes that relating to non-Arab polytheists and whether they should be excluded or included amongst those eligible for *dhimma* status – the Hanbalis and Shafi'is being against it, while some Malikis and the opinions of Ibn Taymiyyah and his student Ibn al-Qayyim arguing in favour, breaking from the prominent view amongst their fellow Hanbalis.

The second; how to reconcile the view of only excluding Arab polytheists from *dhimma* status and that of excluding all polytheists with a core underlying principle of Islam expounded in Qur'an 2:256: "there is no compulsion in religion." Zaydan[216] and Kandhlawi[217] rely on this principle to argue that no non-Muslim should be forced to embrace Islam through their non-eligibility to pay *jizya.* The principle is key and fundamental to the Islamic creed as belief inherently emanates from and resides in the heart. So while having belief in Islam is not enough without the corresponding outward manifestation of that belief; at the same time, outward actions are rendered futile as a result of and become nullified if the internal element in one's heart is absent. Such a person is a *munafiq*, (hypocrite in the religious sense), who while seemingly Muslim to his fellow Muslims, inwardly lacks an iota of belief.

Within this framework, it is clearly not a productive or feasible exercise to coerce others to what one believes to be the ultimate truth – not for the imposee nor for the imposer. Such a

[213] Ibn Abi Zayd al-Qayrawani, *Kitab al-Jihad*, p. 450.

[214] Qurtubi, *al-Jami' li-Ahkam al-Qur'an*, Vol. 8, pp. 45-46.

[215] 22 Members: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

[216] Zaydan, A. K., *Ahkam al-Dhimmiyin wa al-Must'amin,* 25-30.

[217] Kandhlawi in Sharanpuri, *Badhl al-majhud fi hall Abi Dawud,* Vol. 12, p. 119.

spiritual transformation must happen naturally, genuinely and at one's own volition. Hence the idea that the exclusion of some groups from the right to recognition under Islamic law, whether Arab or non-Arab polytheists, is difficult to justify especially if the position of the *Shari'ah* is expressed in terms of compulsion and coercion. For example, Qatada ibn Di'ama stated "The Arabs had no (legitimate) religion and were, therefore, forced into embracing Islam by the sword".[218] Others understood it as acceptance of Islam being more incumbent and a greater obligation on Arab polytheists than on the non-Arab ones due to closer affinity to the Prophet. Ibn al-Jahm held the view that the Quraish should only be excluded, but also for the same reason of affinity, due to which their humiliation should be avoided.[219] To frame the acceptance of Islam in strong terms, which could be explicitly or implicitly perceived as compulsion, would appear to be difficult to reconcile with Qur'an 2:256.

However a possible explanation is feasible. The motivation behind the exclusion of any particular religious group from a territory under Islamic rule can never be to compel them to accept Islam, but rather to protect the Muslims from any threat from them. Such a risk to the personal safety and security of the subjects under Muslim rule would of course always trump the risk posed from those excluded. For such groups, they could only remain in the territory through either accepting Islam or entering into a peace accord agreeing to cease any hostilities and draw terms for mutual respect. As such the most plausible *illah* (effective cause) for not including polytheists of any or specific type could potentially hinge on the security threat they posed to the Muslims. If that threat desisted, they became eligible to exist in Muslim lands with associated rights. Ibn Taymiyyah attributes a view to Abu Hanifa at seeming odds with views in other sources[220], which states the acceptability of taking *jizya* from Arab polytheists on condition that they do not fight the Muslims.[221]

To continue this line of reasoning, it may be possible to hypothesise that the *illah* (or effective cause) for including some groups and excluding others, is based on if they are enemies engaged in active hostilities against Muslims. It may be as simple as the fact that at the time of the Prophet, those holding greatest enmity and in perpetual conflict with the Prophet and the Muslims were the Arab polytheists. So apart from the theological dimensions, in terms of political context, it was this particular group that was constantly pitted against the Muslims. The difference of views could then just reflect the range in opinions based on how the enemy was construed. It could be that being engaged in hostilities is required for some to exclude them from eligibility as *dhimma* and for others if too great a threat was posed by those within Muslim lands, who had the closest affinity to those that were being fought. As such the decisive issue could be that they are enemies engaged in hostilities or belong to a group with whom the Muslims are engaged in armed conflict.

In summation, the purpose of exclusion cannot be to compel anyone to accept Islam but rather possibly to defend Islam and Muslims from those determined to attack them. Where no

[218] Tabari, *Jami al-Bayan,* Vol. 3, p. 16.

[219] Qurtubi, al-Jami' li-Ahkam al-Qur'an, Vol. 8, pp. 45-46.

[220] Baji, *Muntaqa*, Vol. 2, 172, cited in Friedmann, *Tolerance and Coercion,* 76.

[221] Ibn Taymiyyah, *Majmu' fatawa*, Vol. 20, p. 101. Friedmann, 80

such threat exists then the bar on eligibility to *dhimma* status ceases to be a necessity. It was incidental that if they accepted Islam, they would cease to be enemies. The fact remains that "there is no compulsion in religion" is an absolute statement. This view could be corroborated by the fact that international humanitarian law in Islam makes no distinction on the basis of religion. Prisoners of war are all to be treated equally with the same rights.[222]

VII. Conclusion

This chapter provided an overview of the discussion around scope of *ahl al-dhimma*, by which some groups are included and others excluded. The aim of the chapter was to show the diversity, richness and plurality of opinions that populate the spectrum of validity on the issue of scope under Islamic law. Another underlying purpose was to lay the foundations for one of the most critiqued aspects of Islamic law relating to religious minorities to be relied on to frame the discussion of minority rights in a manner comparable to international law. The chapter illustrated the preponderance of three views on the topic. The first that held only the People of the Book to be eligible for *dhimma* status, the second the People of the Book and non-Arab polytheists and the third the People of the Book and all polytheists. We concluded that the first view was a minority view as the evidence for the Magians to be considered as People of the Book was scant. We unpacked the two remaining opinions to show that their practical effect would be the same in the present context. With regards to their reasoning, the view that Arab polytheists should be excluded was specific to the geographical and demographic context of the time. Clearly the view that made the most juristic sense and offered greatest practical applicability to the present context was the view that the People of the Book and *all* polytheists should be included within the scope of *dhimma*.

Two further views, which are weak opinions not be considered, were nonetheless discussed in brief to further broaden the variety of views offered on the issue. They were that the People of the Book may be limited to only the original Jews and Christian and that only the Children of Israel could be considered as People of the Book. In other words one view sought to limit the scope of the People of the Book temporally, while the other ethnically. We also touched upon the potential bases, implications and consequences of being excluded from *dhimma* status. In particular that the availability of two options for a group; to be fought or accept Islam, implied neither an attempt to forcibly convert nor the inflicting of harm owing to religious difference. It instead indicated the perpetual hostility with a group, namely the Arab polytheists of the time, which resulted in the mutual impossibility of coexistence. The reference to their religion was the principal element and means to identify them as a group.

[222] E.g. Ali, S., & Rehman, J., "The concept of Jihad in Islamic international law", *Journal of Conflict and Security Law,* Vol. 10, No. 3 (2005), 339-340.

Chapter 3:
Scope of the Concept of 'Religious Minorities' under International Law

I. Introduction

In the previous chapter, we engaged with the spectrum of validity within Islamic law in relation to the scope of *dhimma*. The research will now move on to engage with the corresponding concept of scope of 'religious minority' under international human rights law, so as to provide a basis for the comparison of the concept of scope under both systems of law in the following chapter, where areas of overlap, conflict and divergence will be assessed. It is hoped that the findings resulting from this analysis will form the foundation of asserting that the areas of overlap are greater than normally perceived or characterised by providing an objective point of comparison in the guise of international law on the protection of religious minorities. By subjecting international law to exhaustive analysis and critique, we may have a better idea as to its full breadth of virtues and flaws.

With regards to the possible interpretations as to the scope of *dhimma*, we found that some classical jurists exclude all groups from its scope except Christians, Jews and Magians; others allowed for Christians, Jews and any non-Arab polytheists; and a final group extended it to all including non-Arab polytheists. This variance in interpretation being dependent on how one perceived the inclusion of Magians within the scope of *dhimma*; as People of the Book, Arab or polytheists. Nonetheless these three prominent views provide a comparator with international law of included and excluded groups within the scope of *dhimma* or recognised religious minorities. Does international law provide an unequivocal and unified answer on bases for inclusion? Is a spectrum of validity under international law also discernible and if so what is the broadest interpretation and how does it juxtapose with the narrowest? What is the extent of State compliance and does the spectrum of interpretation and State practice differ greatly from that of Islamic law?

Before engaging with these definitional questions, which inevitably impact on scope, we will first seek to establish the scope of the term 'religion' itself, under international law, which appears in two main contexts; that relating to discrimination and that of freedom of religion. We will then look in detail at the highly contested definition of 'minority' and subsequently hone our analysis on the specific weaknesses in the protection of and problems faced by 'religious minorities' owing to the applicable scope under international law. Special attention will also be paid to the age-old intractable problem of acknowledgement of the very existence of minorities and their subsequent recognition. It is particularly noteworthy that the observable aversion amongst states, ostensibly owing to the advanced rights attached to minorities and specifically those to religious minorities, has been principally through these

two means of non-acknowledgement of existence and non-recognition. This at times has an objective basis derived from international law and at others from the context of specific States and their discretion. Of particular relevance are the emerging problems in State compliance on 'new' and 'old' minorities which can be and are used as a conduit for excluding religious minorities from recognition and protection.

II. Scope and Definition of 'Religion or Belief'

Religious groups may fall foul of the scope of 'religious minority' rights in a number of ways. If at inception what they subjectively identify as their religion is deemed not to be a sufficient religious belief and falls under some other category of belief or ideology. There is no legally agreed definition as to what precisely constitutes a 'religion', nor is a case being made that there should be one.[223] The question nonetheless is pertinent in light of understanding whether it can act as a means of excluding some groups through some objective basis from accessing the rights to religious freedom.

Most importantly, international law decides the scope of 'religion' differently depending on which body of rights is at stake. Similarly States take less interest in narrowing the scope when discrimination is being discussed. As such the scope and recognition of that identity is highly deferential to self-identification. States take far more interest in narrowing the scope, when addressing rights related to religious freedom and minority rights as they both concern the attribution of specific, special and culturally unique rights. Broadly speaking, the former deals with equality in the sense of a "difference in the treatment of persons in analogous, or relevantly similar, situations"[224] and the latter when "without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different".[225] The scope is narrowest in relation to minority rights as additionally group rights are made available to the religious minority, not just in relation to cultural and religious life but also potentially territorial, political, judicial and educational. In some cases this clearly entails an allocation of State funds. The attribution of specific rights related to freedom of religion, the group dimension to which States are averse and the framing of fiscal commitments as a right, all combine to make the scope of minority rights in relation to religious groups the narrowest and the realisation of associated rights an arduous practical challenge to overcome.

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[223] Wilson. B. C., "From the Lexical to the Polythetic: A Brief History of the Definition of Religion", in *What is Religion*?, 141–42 (Thomas A. Indinopulos & Brian C. Wilson eds., 1998): "dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way. Needless to say, no one definition of religion has garnered a consensus, and the definitional enterprise, as well as the debate over the very need for definitions, continues in full vigor.", cited in Gunn, *"*The Complexity of Religion and the Definition of 'Religion' in International Law", *Harvard Human Rights Journal*, Vol. 16 (2003), 191.

[224] *Burden v. the UK* [GC], no. 13378/05 (2008), para. 60; and *Church of Jesus Christ of Latter-Day Saints v. UK*, no. 7552/09 (2014), para. 27.

[225] Principle referred to in *Thlimmenos v. Greece* [GC], no. 34369/97 (2000), para. 44; see also *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 (2007), para. 175; *Runkee and White v. UK*, nos. 42949/98 and 53134/99 (2007), para. 35; *Eweida and Others v. The UK*, nos. 48420/10, 59842/10, 51671/10 & 36516/10 (2013), para. 87; and *Church of Jesus Christ of Latter-Day Saints,* para. 28.

In this regard the earliest and most established reference to 'religion' in international instruments was in the context of a head of potential discrimination. This was the case in the UN Charter[226] and was followed by, among others, the UDHR[227], ICCPR[228] and ICESCR[229]. The first instance where 'religion' was referred to in reference to religious freedom was in Article 18 of the UDHR:

> "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."

Article 18 of ICCPR elaborates further:

> "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."

[226] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, Article 1.3: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". See also similarly worded Articles 13.1, 55(c) and 76(c).

[227] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

[228] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Art 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also Article 2.

[229] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, Article 2.2: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See also Article 10.3.

However the discussion about what constitutes a religion is not straightforward. The main reason that it does not present a huge problem in the application of law, is that the religions commonly under discussion are well-known, established and often adhered to by millions, if not billions. To deny the validity of such systems of belief as religions would be untenable, in particular if our own sense of what religion is emanates from the major religions of the world such as Islam, Christianity, Judaism, Hinduism and Buddhism as opposed to these belief systems fitting into a preconceived definition of what a religion should be. Nonetheless it is useful to briefly explore this issue to understand all limits and parameters of international law, which may or may not be immediately apparent. Due to the lack of contention and the practicality that the same religions are under discussion, there is little elaboration or discussion as to the definition of religion.

The first step is to infer from the wording of the above provisions themselves and what may be derived as principal facets of a 'religion'.[230] With regards to the non-discrimination heads of which 'religion' is one, not much can be deduced as no particular content or substance is referred to. Instead it is referred to as a head of 'identity' emanating from a belief or way of life.[231] This is because when dealing with discrimination and identity, two elements are key, both being subjective. The first is the self-identification of the victim as belonging to a certain religious group and second the perception of the discriminator that the victim belongs to a certain group (other-perception as opposed to self-identification).

However when we come to the provisions relating to freedom of religion in common Article 18 of UDHR and ICCPR, we observe that they identify the following common facets of 'religion'. Firstly the rights to freedoms of 'thought, conscience and religion' are mentioned alongside each other. In subsequent references to the right, the phrase is replaced with 'religion and belief' implying that the term belief encompasses 'thought and conscience'. It also indicates that religion may be private or public and individual or in community with others. Furthermore the language shifts from the UDHR of allowing for the 'change' of religion to that of 'adopting' a religion in the ICCPR. It is also not stated explicitly in either of the provisions whether 'atheism' is included or not. However given that 'belief' is distinguished from 'religion' and is a very broad term, it could presumably encompass non-religious beliefs, of which atheism would be the most prominent.

Similarly it may be deemed useful to see how the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religious Discrimination) frames the scope of freedom of religion. It conceptualises 'religion or belief' to be "one of the fundamental elements in his conception of life".[232] It also states that the context which gave rise to the dire need for the right to be protected is the "disregard and infringement of human rights and fundamental freedoms, in particular of the right to

[230] This is in line with the 'polythetic' approach to defining concepts as opposed to the 'essentialist', in Gunn, "The Complexity of Religion", 194.

[231] Gunn as per the 'polythetic' approach identifies three particularly important facets of religion in lieu of a definition of 'religion as "religion as *belief*, religion as *identity*, religion as *way of life*", Ibid. at p. 200.

[232] Preamble of Declaration on Religious Discrimination.

freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations".[233] Like the UDHR and ICCPR, the Declaration makes no explicit mention of atheism, except for it to be implicitly included within the ambit of 'belief'.

While the right to freedom of religion was widely a matter of general consensus amongst States, its content, precise elaboration and scope were and remain highly contested. This is reflected not only in the fact that a Declaration is only that; an expression of international law with no legally binding force or enforcement mechanisms, but that even after its agreement, reservations were entered by numerous States. The former U.S.S.R., Romania, Czechoslovakia and Syria objected to the lack of attention paid to atheism. Romania, Syria, Czechoslovakia, and the U.S.S.R. also made a general reservation regarding incompatibility with national legislation. Iraq on behalf of the then 56 member-State Organisation of Islamic Cooperation (OIC) raised the issue of applicability of those provisions which may be contrary to *Shari'ah* or Islamic law.[234] This was, in part, due to the fear by some Muslim-majority states that it would extend the right to those who wished to change religion away from Islam.

Despite the OIC-bloc's reservation as well as the shift in language in the UDHR of changing religion to adopting religion in the ICCPR, the Human Rights Committee nonetheless affirmed that Article 18 includes the right to change and adopt a religion or belief. Its General Comment 22 also illuminates what the reference to 'thought or conscience' and 'belief' could be. In the absence of the elaboration one might be left with the idea that the terms would be too general and subjective and could potentially include almost any idea.

The UN Human Rights Committee in its commentary on ICCPR Art. 18 states:

> "Article 18 protects theistic, non-theistic 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. 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. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community."[235]

In terms of the applicable law then the result could be one of two, either the criteria is wholly subjective, that is to say at the complete discretion and self-identification of the concerned individual, or there is an objective criteria inferable but not yet fixed or crystallised into a formally agreed legal definition. The deployment of the word 'religion' as opposed to 'ideology' or 'identity' must carry an objective element closely associated with its commonly

[233] Preamble of Declaration on Religious Discrimination.

[234] http://www1.umn.edu/humanrts/edumat/studyguides/religion.html.

[235] HRC GC 22, para. 2.

understood linguistic meaning. Similarly the fact that it is mentioned as a sub-species of thought and conscience also denotes its overlap as well as its distinction from the former two. The indication nonetheless appears to be in Article 18 and the HRC GC 22 that 'belief' is interchangeable with 'thought and conscience' and that religion represents an example of 'belief', thus implying belief is a wider category. At the same time, it would seem that the broader non-religious terms are in turn limited by 'religion' in that they are in some way related to 'religion'. The mention of the terms 'theistic' (religious belief), 'non-theistic' (non-religious belief), 'atheistic' (belief against religion) and 'not to profess any religion or belief' (no belief) in the General Comment confirm this. Furthermore the rights related to manifestation are closely related to religious beliefs and a number are exclusively religious such as 'worship', 'observance' and 'practice.'

The context too plays a role in our understanding. In relation to the UDHR, the overarching background was the aftermath of the Second World War and the Holocaust was still fresh in the psyche of the victors and defeated as well as the drafters. The persecution and extermination of more than six million Jews, in part due to their religious identity must have informed the drafting process. This was certainly the case with the inclusion of religion as one of the protected indicators of identity in the Genocide Convention. Art. 2 begins "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[236] At the time, the Western World and in particular Western Europe held a pronounced Christian identity, while in the remainder of the East and South, Islam, Hinduism, Buddhism and Sikhism were the major religions. As such, few did or would now object to the classification of any of the above as religions. Thus we could deduce that a 'religion' as per its commonly occurring examples refers to a belief in one or more deities or gods. with a number of Godly attributes, chief amongst them, the creation, design and ordering of the universe, who convey to humanity a message to be followed and rules/laws to be obeyed and hence to be worshipped.

However applying Gunn's approach, such a definition would be highly essentialist and would inevitably exclude a number of other beliefs, religious or non-religious, ignore the idea of how a victim is perceived by the perpetrator, and be highly partial in some instances to the personal subjective beliefs of those adjudicating these matters whether at the UN Human Rights Committee, the European Court of Human Rights or consideration of refugee applications owing to religious persecution. A more inclusive approach adopting the polythetic approach would seek to identify the relevant facets of religion and these are readily observable in Art. 18 and the Declaration on Religious Discrimination, such as worship, community of adherents and leaders, places of worship and assembly, days of celebration, identity, way of life and freedom from discrimination. The polythetic approach would only require that the presence of even one of these facets could qualify a belief system as a religion. Such an understanding is in greater harmony with the view of the Human Rights Committee, which forewarns against limiting Article 18 "in its application to traditional

[236] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951.

religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions [...] including the fact that they are newly established."

As already stated, presence of a commonly understood meaning of religion which has not really been the subject of contention has resulted in no formally sanctioned definition of religion. As is often the case, a term understood by its common usage meaning is no guarantee or strong indication for its eventual legal meaning, though it may provide a start and have some link to the linguistic equivalent – at times loosely and at others strongly. Examples include terms such as 'consideration'[237], 'discrimination'[238] and 'minority'[239]. Regardless, what remains constant is that a legal term is given meaning by legal definition either entrenched in text or case-law, and may be related to a narrower specific meaning or completely removed from its parallel linguistic meaning. Commonly understood terms lacking legal definition are subject to challenge and modification through the same two means. For example the understanding of 'ethnicity' has undergone considerable evolution over time, from a trait inherent and objectively discernible to something quite subjective and related to cultural identity.[240] Hence why the meaning of 'race' now includes 'ethnicity' and in other instances even potentially 'religious identity'.[241]

The European Court of Human Rights has had to deal with the notion under Article 9 of the ECHR:

> "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."

In various cases brought to the Court, ideologies not conventionally conceived of as religions were tested such as environmentalism, magic and spirituality. In this regard, the Court has

[237] In English contract law, it refers to what is given exchange for the receipt of goods or services without which a contract may be void.

[238] Under international law, discrimination may only refer to a differentiation of treatment which objectively and reasonably justified.

[239] Under international law, there is yet to be an agreed definition. However it denotes more the non-dominance of a group which is culturally, religiously, linguistically or ethnically distinct, rather than merely numerical inferiority.

[240] See "Memorandum Regarding the Tabulation of Sikh Ethnicity in the United States Census", Minority Rights Group International, March 2010. (http://www.unitedsikhs.org/petitions/census.php & http://www.unitedsikhs.org/petitions/Memo%20re%20Sikh%20Ethnicity.pdf) and *Mandla v. Dowell-Lee* [1983] 2 AC 548 (House of Lords).

[241] See Shaikh, M., "Submission to the Committee on the Elimination of Racial Discrimination: Recognising Muslims as an Ethnic Group", Averroes, 2011.

affirmed that the scope or ambit of Article 9 is not completely subjective and there are objective criteria applicable. It has stated that Article 9 does not protect every act motivated or inspired by a religion or belief[242], elaborating further that the freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance[243] with practices such as assisted suicide falling outside its scope.[244] At the same time the Court has sought to balance this objective test and stressed that, in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[245] Hence:

> "Finally, in this connection, the Court recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.[246] The State therefore has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs."[247]

This is evidence of Courts having to implement this common sense or commonly understood definition and as such giving it some form of legal certainty, which may be emulated or even evolve in future case-law. With the shifting and ever changing societal attitudes and beliefs in the context of rapid technological advances and globalisation, these presumed bounds are being challenged and stretched. Nonetheless, the tendency remains that of recognising as legitimate religions that are established and have large bodies of followers despite the much broader view of the Human Rights Committee on ICCPR Art. 18 and specifically the scope of 'religion'. The tense boundaries of what constitutes religion was evident in the array of unconventional religious beliefs submitted to the UK Census in 2001 and 2011, with a substantial number of people self-identifying their religious belief/identity as Jedi Knights.[248] While this may have been in humour, the case of the Church of Scientology has presented some testing predicaments in recognising such a new and unconventional belief system as a religion. In particular, there are indications as to the dubious nature of the movement as a church or religion as it may have been initially motivated by an attempt to avert the payment of large tax arrears in the US. Other States too, including the UK, have tax breaks for some religious purposes.

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[242] *Kalaç v. Turkey*, no. 20704/92 (1997), para. 27.

[243] *Campbell and Cosans v. UK*, no. 7511/76, 7743/76 (1982), para. 36.

[244] *Pretty v. the United Kingdom*, no. 2346/02 (2002), para. 82.

[245] See *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, para. 54; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96 (2000), para. 78*; Manoussakis and Others v. Greece*, no. 18748/91 (1996), para. 47; and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99 (2001), para. 123.

[246] *Hasan and Chaush*, para. 78.

[247] *Church of Jesus Christ of Latter-Day Saints*, para 29. See also *Metropolitan Church of Bessarabia*, para. 116; *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98 (2008), para. 97; *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08 (2010).

[248] http://www.theguardian.com/uk/datablog/interactive/2012/dec/11/census-religion.

Another perceived exception or difficulty to this principle may arise when discussing the case of atheists, who have increasingly been explicitly protected from being forced to accept a religion or persecuted due to having no religion. The right of an atheist not to have a religion is included in the freedom of religion only so far as refraining from compelling him/her is concerned. However this does not automatically lead us to conclude that atheism is a religion. It has no belief in deities or invokes any acts of worship or rituals specifically associated with the belief. Rather it is an antithesis to religion and is in many ways an 'anti-theism' as opposed to merely apathy or indifference towards religion as 'atheism' would imply. A person with such a belief would likely cringe at the thought of being identified as a religionist when their primary aim is to show the concept of religion itself to be a fallacy, incoherent and beyond rationality or logic. Hence while such people's freedom to non-belief in religion is protected under Art. 18, they themselves often stand against the attribution of a freedom or a special status specifically for religious belief and practice. It may be countered, albeit not religious, theirs is nevertheless a 'belief' and if they are not covered under the notion of 'freedom of religion' they would be covered under the notion of "freedom of belief". However this would overlook that the principal premise of Art. 18 was to protect religious belief and practice and the insertion of 'belief' was a subsidiary corollary of the right meant specifically to cover non-religious beliefs and prevent persecution by religious States of non-religious beliefs and practices, arguably most notably atheism. It is also feasible that there would be an outcry from religious groups, were a right to be too general by focusing on belief and omit the specific reference to religion completely.

Atheists are not oblivious to this double edged sword either. However as legal and political subjects in liberal Western democracies, members of the atheist movement feel they have nothing to fear from the non-existence of Art. 18 as their beliefs and expression would be equally protected under Art. 19 with no added value from Art. 18. It is likely their approach would be different if they were subjects in a theocratic State, where a weak atheist minority would find Art. 18 invaluable in protecting their right not believe or adhere to any religion. Furthermore due to its reactionary nature, there is not much in terms of manifestation of religion that can be claimed, such as acts of worship, observance, rituals or a way of life. Comments made by outspoken atheist, Richard Dawkins, on the decision of a police commissioner in Northamptonshire (UK) to appoint a Faith Director are quite telling of the sentiment:

> "No doubt he'll also be liaising with leaders of the 'community' of stamp collectors, the 'community' of bird twitchers, and the 'community' of chub fuddlers (a fishing term)...Sarcasm aside, what is so special about religious 'communities' that they need, or deserve, a special liaison officer, any more than the rest of us?"[249]

Apart from the general sentiment, it could argued that Dawkins is perhaps misconstruing and conflating faith with religion, when they can be rather distinct despite obvious overlap. Faith is tantamount to strong conviction and can be employed for anything not necessarily being limited to a belief in God or other metaphysical phenomenon. Faith can be in people, ideas,

[249] http://www.bbc.co.uk/news/uk-england-northamptonshire-23604221.

emotions, oneself or the future, to name a few. In that sense, 'faith' is closer in meaning to 'belief' than religion, implying that should atheists have understood and interpreted the appointment of 'faith director' as distinct from a 'religious director' and as including relations and issues concerning atheists within his professional remit, they would have had a compelling case to do so. Further introspection would also be useful for ascertaining reasons for creating such a post. The underlying basis for having relations with religious or faith communities must be related to crime; its prevention, punishment and dealing with its victims. In that context, the necessity for reaching out to certain religious communities may arise such as certain religious adherent being targeted with religiously aggravated incitement or even violence. Other examples may also include the prevention of radicalisation and terrorism working from within certain communities. Lastly by dealing with certain community and religious leaders it may be possible to get a message to all adherents in a particular community with the view of the leader holding considerable sway over community members. By analogy then, if atheists were prone to attack or hatred, extremist and violent tendencies from certain elements within and were organised in communities and held the views of their leaders in high esteem giving them considerable sway, then there would be an even greater impetus for the Faith Director to include atheist organisations amongst the groups he engaged and liaised with.

Consequently in essence, atheists seek protection from coercion and discrimination in relation to their atheistic belief and identity. To conclude, there is no agreed legal definition for what constitutes a religion, though it is commonly understood and there is a body of case-law, which imbues the term with some legal certainty. Thus it is objective and seldom the subject of severe contention. However there have been occurrences of challenges in relation to unconventional belief systems or those that are perceived as evil or disruptive to society. These include Nazism, Fascism, Sadism, Masochism, Racism[250], Paedophilia and devil worship. While all of these ideologies with the exception of the last have used the basis of freedom of expression, to argue for the protection of their right of belief, they serve the purpose to show how certain *apparently* absolute rights are inevitably and inherently limited.[251] Such limits are inbuilt to all human rights treaties and exist on the basis of the protection of the rights of others[252] and under the ECHR system articulated often as 'necessary in a democratic society'.[253] Consequently even if we understand religion to be informally, linguistically and through common sense and experience loosely defined, there may still be instances where some religious beliefs are considered to be *a priore* excluded from the scope of the right as it could lead to the destruction of the rights of others, which

[250] *R. (on the application of E) v JFS Governing Body Court of Appeal* (Civil Division), 25 June 2009.

[251] See e.g. freedom of expression in the context of hate speech i.e. Arts. 19 and 20 of ICCPR read in conjunction.

[252] Art. 5 of ICCPR.

[253] Arts. 6, 8, 9, 10 and 11 of ECHR. With the exception of absolute rights such as Art. 3 of ICCPR on prohibition of torture. See also HRC GC 29 on "Derogations during a State of Emergency"; and Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, UN Economic and Social Council, U.N. Doc. E/CN.4/1985/4, Annex (1985). See also Shaikh, M., "Islam, Democracy and Dissolution of Political Parties at the ECtHR", *Journal of Law and Social Policy*, Vol. 1, No. 1 (2011).

includes activities that would be considered as criminal such as murder, rape or bodily harm or even contrary to the interests of the State.

III. Difficulties in defining 'Minority'

a. Definition – Points of Exclusion

We have examined above what the definition of 'religion' may be and thus which belief systems are included and which are excluded from protection under Art. 18 of the ICCPR. We have also touched on the bases upon which a belief system may be recognised as a 'religion or belief'. With this in mind, let us presume that the closest comparator in international law to non-Muslims under Islamic law would be that of the religious minority under international law as was stated in Chapter 2. While the legally indeterminate meaning of 'religion' has been nominally disputed, to the contrary the definition of 'minority' under international law has been intensely contested and protections offered under it remain weak and related instruments non-binding.[254] As such the aversion of States to group and collective rights[255] is reflected in the fact that all current binding international human rights treaties vest their rights in the individual as opposed to the group entity.[256]

The reason behind this current state of international human rights law is in part discernible through a historical perspective, which shows that minority rights were given greater prominence prior to the establishment of the United Nations. Evidence of treaties for the protection of minorities can be found as far back as the fourteenth and fifteenth centuries prior to the peace of Westphalia of 1648.[257] Reflection and introspection in the aftermath of the First World War left little doubt that the protection of minorities was essential to maintaining international peace and security. Nonetheless the subsequent treaties for the protection of minorities under the supervision of the League of Nations were flouted too often by the great powers. This undermined the centrality of minority rights to sustaining international peace and therefore eroded the already fragile legitimacy of the League. Furthermore Hitler's reliance on the purported mistreatment of the German-speaking minority in the Sudetenland to justify his initial act of aggression, accentuated the failings of the national minority discourse as fundamental to preventing the recurrence of conflict. In the minds of the bruised and battered victors of the Great War, the attempt, once again to bring sovereign States around one table, would this time focus firmly on individual rights.

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[254] See Hannum, H. "The Concept and Definition of Minorities", in Weller, M. (ed.), *Universal Minority Rights, A Commentary on the Jurisprudence of the International Courts and Treaty Bodies* (Oxford University Press, 2007) and Packer, J., "Problems in Defining Minorities", in Fottrell and Bowring (ed.), *Minority and Group Rights in the New Millennium* (The Hague, Boston, London, 1999).

[255] Group rights are used to refer to individual rights of persons belonging to minorities, whereas collective rights refer to those that attach to the group entity as a whole.

[256] UDHR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, migrant workers, enforced disappearances and disabilities.

[257] See Castellino, J. & Redondo, E. D., *Minority Rights in Asia* (Oxford University Press, 2006), 5.

In the absence of a legally binding instrument, the principal and only legally binding provision of international law specifically tailored to minorities since 1966 remains Art. 27 of the ICCPR[258]:

> "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 practise their own religion, or to use their own language."

The immediately ostensible points regarding scope are the limitation of minority rights to only three types of minorities 'ethnic', 'religious' and 'linguistic'. Each term's precise meaning and, in turn, scope may also be problematised and bounds tested. As we have already observed, while common sense and standard linguistic usage may point strongly in a certain direction, the term 'religious' may be understood differently by different people in different contexts. Similarly the term 'ethnic' is contested with regards to shifting from a trait visually discernible[259] and biological in nature to one that is more related to self-identification and culture.[260] Bengoa in his UN Working Paper states: "In anthropology, ethnic values come somewhere between purely racial and entirely cultural values, between the physical, genetic features of human populations and characteristics derived from cultural activity, history and the imaginative and constructive behaviour of human beings."[261] Likewise 'linguistic' may seem the least problematic, but there may also be situations where the line between dialects and language are highly blurred.

Where belonging to one of these three types of groups is established, the pertinent question may arise as to the exact meaning of 'minority' and whether it refers to purely a numerical minority in some other respect. The use of the word 'exist' rather than 'are recognised' is of significance. With regards to all these points, the common additional question also arises as to who holds the decisive authority to determine these matters, the individual belonging to the minority, the State or a third-party. Connected to this, and lastly, the right has a clear group dimension with the use of the words 'in community' and all three heads of identity requiring in large part a community of members or adherents. Despite this, the right is solely vested in individuals and not any group entities. The only examples of collective rights that we have are the right to self-determination found in common Article 1 of the ICCPR and ICESCR and those relating to indigenous people.[262]

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[258] Article 30 of CRC has almost identical wording and also incorporates the rights of indigenous children.

[259] Developing US law in employment equality – See MRG Memo re. Sikh Ethnicity, 5-6.

[260] MRG Memo re. Sikh Ethnicity, para. 22. See generally Shahabuddin, M., "Ethnicity' in the International Law of Minority Protection: The Post-Cold War Context in Perspective", *Leiden Journal of International Law*, Vol. 25, No. 4 (2012).

[261] Bengoa, J., *Existence and Recognition of Minorities*, UN Working Group on Minorities, 2000 (E/CN.4/Sub.2/AC.5/2000/WP.2), para. 45.

[262] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res A/61/L.67, 7 September 2007; ILO Conventions No. 169 and Bengoa, *Existence and Recognition of Minorities*, para. 3.

Despite 'religious groups' being referred to in the Genocide Convention[263] and the drafting of a number of minority specific instruments and institutions in the 1990s[264], which developed and built on Art. 27 of ICCPR, the term has evaded an internationally agreed legal definition. The closest we have is Capitorti's working definition:

> "a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[265]

Even though common reference to the aforementioned definition, a number of factors not mentioned by Capitorti bear significance if a group is to be recognised as any kind of minority, such as population, type, period of residence in the State, national/immigrant minority. This is to say that the issues that may arise with the above definition include the idea that the term refers not so much to numerical inferiority, albeit being a common indicator, but rather a position of relative weakness and non-dominance, which may occur when the concerned group is even a numerical majority. Examples include "Blacks in South Africa under the apartheid regime in South Africa"[266] and Shia Muslims (65-75%) in Bahrain currently and potentially also Shia Muslims (65-70%) in Iraq under Saddam Hussein.[267] The criteria requiring nationality or citizenship of a State is also disputed as being absolutely necessary[268] and continues to be debated between international lawyers, while HRC General Comment 23 considers it an invalid ground of excluding certain groups from minority recognition:

> "The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need

[263] Art. 2 of Genocide Convention: "...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...".

[264] FCNM, UN Dec. on Minorities and establishment of OSCE HCNM.

[265] Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, New York, United Nations, 1979 (E/CN.4/Sub.2/384/Rev.1.1979), 98.

[266] *Minority Rights: International Standards and Guidance for Implementation,* UN Office of the High Commissioner, 2010 (HR/PUB/10/3), pp. 2-3: "In most instances a minority group will be a numerical minority, but in others a numerical majority may also find itself in a minority-like or non-dominant position, such as Blacks under the apartheid regime in South Africa. In some situations, a group which constitutes a majority in a State as a whole may be in a non-dominant position within a particular region of the State in question."

[267] Pew Research Center, Religion and Public Life, Mapping the Global Muslim Population (http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/)

[268] " Eide, A.,Commentary on the UN Declaration on the Rights if Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Working Group on Minorities, 2005 (E/CN.4/Sub.2/AC.5/2005/2), para. 10 and Bengoa, *Existence and Recognition of Minorities*, paras. 71-75.

> not be citizens of the State party [...] A State party may not, therefore, restrict the rights under article 27 to its citizens alone."[269]

As we have already stated, minority rights are an expression of the rights of individuals belonging to a group, which allow for the enjoyment of one's culture, religion or language. Hence all three aspects are inherently social endeavours. In Art. 27 this is expressed as "... in community with the other members of their group" similar to the wording found in ICCPR Art. 18 and in Capitorti's definition as: "...if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language". Subsequently is there and should there be a threshold for the minimum number of people belonging to a certain group in order to be recognised as minorities? What if only one person remains of a culturally distinct group with their own religion, language or culture? If not, would it change if the total number was two? Would it matter if the single individual claims to share a common culture, religion or language with a group that does not exist at all in the State in question?[270]

The answers to these questions are not straightforward nor settled. However they do pose real problems for State-minority relations and management of difference with regards to the core issue of recognising identity and the rights that would flow from such recognition. It may be that the last remaining member of a minority group should attract more protection and promotion of their culture so as to prevent it from disappearing. Additionally in the absence of others to share her culture with, she may still be able to teach it or educate others willing to learn. She may also be able to continue to enjoy her culture by means of media, such as video and audio recordings as well as photographs. If it is her religious identity that is under question, then can we really impose such limitations, if part of her religion relates to the spiritual and metaphysical relationship between her and possibly a deity or deities and not just other adherents?

Similarly it cannot be said without doubt that two or more individuals belonging to a minority would be recognised as a minority just because they are now able to enjoy their culture in community with each other. States may and do in fact prescribe minimum numbers of members in order to impart recognition; in most situations owing to the practicality or financial feasibility of providing a certain service or specific positive right. The selection of the minimum threshold may appear arbitrary, but at other times may be an insidious attempt to exclude a certain minority that has a population just below the threshold. Nonetheless prescribing a minimum number of members for recognition is a legally unsound practice, as per the minority rights framework, but common. This is because the right to identity is fundamental and tied to the idea of the right to exist and dignity. Its determination is almost wholly subjective within broad objective boundaries. Thus while a State may rely on infeasibility to deny a certain right due to practical and financial considerations, it may not use non-recognition of existence as a means for avoiding the claim from inception.

[269] HRC GC 23, para. 5.1.

[270] See *The Bolzano Recommendation on National Minorities in Inter-State Relations,* Organization for Security and Co-operation in Europe (2008).

The types of groups that fall within the scope of minority rights may seem unequivocally clear in Art. 27 of ICCPR as ethnic, religious and linguistic. Nonetheless all post-1990 minority rights instruments (the UN Declaration, the FCNM and the HCNM Recommendations) introduce the idea of 'national' minorities. The notion will be discussed in detail below as it is of greater pertinence to the European regional organisations of the Council of Europe and the OSCE and relates to a potential narrowing of scope rather than broadening through the appendage of an additional type of minority. What becomes clear from these three core categories listed in the only internationally binding provision as opposed to Declarations or Council of Europe instruments, that they provide an objective basis for determining who may lay claim to being a minority or not.

As such, without delving into the internal tensions within the definitions of these terms as raised briefly above, externally other conceptualisations of minorities that may be referred to in Standard English use would be inapplicable. For example, oft-labelled 'sexual minorities' referring to the LGBT (Lesbian, Gay, Bisexual and Transexual) community cannot be seen as included within its scope by even an expansive interpretation of minority rights.[271] Similarly women, children and the disabled cannot be said to be included within the scope of minorities under international law. All have dedicated international legally binding instruments and provisions and none can be said to have a distinct culture, which they only enjoy with people from their group in clear unequivocal terms. The term minority also does not denote exclusively that the main element to recognition as such is a numerical inferiority. Thus a minority of the population holding fringe views such sadomasochism or belonging to a political movement are also excluded. In broaching the subject of excluded groups, the UN confirms implicitly rather than explicitly, perhaps out of sensitivity and acknowledgment of addressing victims of human rights violations albeit not minority rights. It does so by affirming they have a claim as victims of double discrimination:

> "The question often arises as to whether, for example, persons with disabilities, persons belonging to certain political groups or persons with a particular sexual orientation or identity (lesbian, gay, bisexual, transgender or intersexual persons) constitute minorities. While the United Nations Minorities Declaration is devoted to national, ethnic, religious and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as gender, disability or sexual orientation. Similarly, it is important to keep in mind that, in many countries, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases, such as HIV/AIDS, and in general have limited access to health services."[272]

[271] See Shaikh, M., "Hijras: Can Minorities be Sexual?", EURASIA-Net Focus Online by European Academy, Bolzano, 2010.

[272] *Minority Rights: International Standards and Guidance for Implementation* (HR/PUB/10/3), UN OHCHR, 2010, p. 3.

Subsequently it is expected that a further question may arise as to the core of minority rights and whether it can be expressed in vivid terms as to know with greater certainty which groups can and cannot be considered a minority under international law. There are two possible interpretations of Article 27 in this regard, one literal and rigid and the other taking account of its essence, object and purpose and dynamic. We have in part explained the literal and most commonly applied interpretation above. It requires that all types of groups except ethnic, religious and linguistic are excluded from minority rights. Furthermore we may correlate the types of minority and the related rights that follow respectively. As such by paraphrasing the text, we may deduce that Article 27 attributes, i) ethnic minorities with the right 'to enjoy their culture', ii) religious minorities with the right 'to profess and practise their own religion' and iii) linguistic minorities 'to use their own language'. The question that leads us to an alternative dynamic interpretation of Article 27 is if the three categories of minorities and the rights attributed to them are distinct categories or whether there is a relationship and overlap between them; hierarchical and/or sub-categorical. A connected question that we also attempted to elucidate on is whether the types of minorities are part of an exhaustive or non-exhaustive list.

As referred to already, the classical notion of 'ethnicity' was one related to visual observation and a biological facet commonly expressed as 'race'. However with the emerging development of the principle of self-identification[273] and a spectrum of observable shades of skin tone due to increasingly exogamous marriages owing to globalisation and mass migration flows as well as the absence of any precise and objective scientific method to determining race, the term remains practically and legally as a means to describe discrimination from the perspective of the perpetrator.[274] In areas of rights and identification, it has largely been replaced by the broader elastic and more neutral notion of 'ethnicity'. Even 'racism' or 'racial discrimination' has evolved to include a broad range of related heads of discrimination which include "race, colour, descent, or national or ethnic origin".[275]

In contemporary understanding 'ethnic' clearly has a number of facets of which 'race' can only be assumed to be one *potential* facet, but by no means the most prominent. If it were possible to condense an essential meaning at the heart of the notion of 'ethnic', which is often used interchangeably with 'foreign' or even 'different', would be a group having a culture different from the majority. As such, this is the right foreseeably attributed to them. It also remains the prevalent position of international law that religion and language are not included within the scope of race. However the same cannot be said as convincingly about ethnicity. An ethnic minority, in addition to having a distinct culture may also have their own religion and language.[276] It may also be reframed as saying both the religion and language were constituent parts of the culture of the minority. Thus religion and language could be seen as

[273] "Memo re. Sikh Ethnicity", pp. 4-5.

[274] See Gunn, "The Complexity of Religion", 198 and "Memo re. Sikh Ethnicity".

[275] Art. 1(1) of ICERD and Sec. 1(bii) of UK Race Relations Act 1976.

[276] Bengoa, *Existence and Recognition of Minorities*, para. 45: "Ethnic values, then, comprise a set of customs, traditions, cultural expressions and collective history that forms a network of links conferring a special identity on a particular human group. Usually those values are accompanied by a specific language and religion".

two examples of culture. Therefore the right could be interpreted and rephrased as '*ethnic minorities, including religious or linguistic minorities, shall not be denied the right to enjoy their own culture*'. Following this, specific profession and practice of religion and the use of language are given as specific examples of how two specific types of cultures may be enjoyed. In this sense the 'ethnic' head could be construed as a general head and religious and linguistic as two specific heads, which are in turn two particular examples of an ethnic minority. Alternatively ethnic could be seen to cover all minorities with a distinct culture not caught by the linguistic and religious heads.[277]

b. Self-identification

Above we have attempted to raise questions and contested issues as to definition and scope of minorities under international law. An aspect of this is not just the blurred lines between some categorisations but more so, who decides and determines these matters. Does the State have the final say or there is some discretion afforded to it? If so, then to what extent? Or is it completely down to the subjective self-perception of individuals belonging to a minority group? If it is left completely to the discretion of the State, abuse is likely and inevitable and accountability impossible. Conversely making it a wholly subjective matter for the concerned minority group, leaves a system with no legal certainty nor any ability on the part of the State to regulate and manage minorities in a manner in consonance with wider public interests and other competing priorities as a governing authority. In this regard, international law seeks to strike a balance between subjective and objective criteria.[278] We have discussed the objective criteria above in the guise of the types of minorities that may seek access to minority rights under principally ICCPR Art. 27. It should be acknowledged that the objective criteria are substantially wide. The subjective criteria may be condensed to the principle of self-identification.[279]

This is a crucial element of minority rights and at its core. This author has posited elsewhere that it, along with the idea of group cultural rights, embodies the object and purpose of minority rights[280] whether that be in the form of a provision or dedicated binding and non-binding instruments.[281] Furthermore it goes to the heart of a right to identity, which is inherently and inseparably tied to the notion of dignity, at the heart and origin of all human rights.[282] This must work both ways. On the one hand, individuals belonging to minorities must be able to self-identify as any minority group they wish or they feel an affinity to. It is not for official bodies or structures to impose or limit identity from without. On the other

[277] See Shaikh, M., "Submission to the Committee on the Elimination of Racial Discrimination: Recognising Muslims as an Ethnic Group", Averroes, 2011.

[278] See Commentary on Minorities' Declaration.

[279] See Explanatory Note on FCNM; Commentary on Minorities' Declaration; and HRC GC 23.

[280] Shaikh, M., "Shadow Report to the Advisory Committee of Experts for the Framework Convention on National Minorities", Averroes (2010).

[281] See Explanatory Note on FCNM and Commentary on Minorities' Declaration.

[282] Preamble of UN Charter: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

hand, those who may ostensibly appear to belong to a minority group cannot be identified as such, if they themselves reject such an identity.

Furthermore, in situations where a minority may have more than one facet to their identity and thus be potentially included under more than one category within the scope of 'minority', as per arguments made by the author elsewhere, due consideration be given to the dominant aspect and which they most identify with.[283] This has certainly been a problematic aspect of State practice in relation to Muslims in the UK, who may wish to identify primarily or exclusively by their religious identity and lay claim to resulting rights[284] and Sikh's in the US who are in a converse position seeking recognition as an ethnic minority rather than a religious one for the purposes of the US Census.[285] Thus including a group within the minority rights framework, may not be sufficient and in accordance with the principle of self-identification and the appropriate rights, if the minority is not able to self-identify as the particular type of minority that they feel is central to their identify.

c. Existence and Recognition

If a group self-identifies as a minority and does not fall foul of the objective criteria such as the type of minority, which are matters of fact, then the State has no discretion to deny recognition to that group as a minority. As already stated, the discretion in relation to recognition of minorities is highly restricted while the discretion to deny or grant certain rights as a result remains broad. However States continue to rely on non-recognition so as not to address the cultural needs of the minority at all. States such as Turkey and France justify their refusal to recognise minorities. This has lead to the development of principles and a body of academic literature and elaboration of international law around acknowledging the mere existence of a minority within the territory of a State.[286] It is assumed that once this is achieved, recognition must follow. It has been repeatedly stated that existence is a *matter of fact*. As such, Art. 27 of ICCPR states 'exist' rather than for example 'whomever the State wishes to recognise'.

Specifically in relation to religious minorities, States, while seemingly providing for the freedom of religion to all individuals who wish to claim it, exhibit an opposite aversion to recognising any groups, including religious ones, as religious minorities. To the laity, such contrasting attitudes towards potentially the same group of people may seem nonsensical. Nonetheless, recognition of a group as a minority brings with it an extra body of rights and competencies, which are "distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the

[283] Shaikh, "Immigration to UK and 'new' (religious) minorities".

[284] *Second Opinion on the United Kingdom* (adopted 6 June 2007), Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/OP/II(2007)003.

[285] *Mandla v. Dowell-Lee* [1983] 2 AC 548 (House of Lords) and "Memo re. Sikh Ethnicity".

[286] See Bengoa, *Existence and Recognition of Minorities*.

Covenant."[287] States are averse to this as they perceive them as a threat to the national identity, territorial integrity and potentially a drain on resources. As such enjoyment of a particular culture may entail a "way of life which is closely associated to territory and use of its resources".[288] Minority rights have inherent within them the rights relevant to individuals belonging to minority groups, including mainly the right to non-discrimination and religious freedom. In addition, a host of rights may become accessible following recognition, which include ensuring the enjoyment of culture and in relation specifically to religious minorities, the manifestation of religion, establishment of places of worship, schools, institutions, legal systems, reserved seats in parliament and access to public funds in pursuit of all of the above.

d. Do minorities have the right to self-determination?

Whether minorities have the right to self-determination is a pertinent question and deals specifically with the idea of going beyond purely individual rights for minorities as afforded in Art. 27 of ICCPR. Ironically, while its origins are in the recent past, it may be deemed a progressive approach to the rights of minorities and other group entities and still some time until it is realised. The problem of scope of the right to self-determination and the inclusion of minorities arises in relation to context and the subject group entity in whom the right is vested. The right to self-determination is found in the UN Charter[289] and in common Article 1 of the two International Covenants (ICCPR and ICESCR). It could be said to be the codification at the very onset of the UN system of Wilsonian self-determination. However the implementation and enforcement of this right proved elusive, for two reasons: its attempted confinement to the colonial context and the problems of defining 'peoples' and 'minorities'.

Firstly, while the UN Charter and ICCPR drafters' codification of the right of self-determination may have been aimed at subjugated colonial peoples, there is little reason to oppose its dynamic interpretation to contemporary contexts where its underlying principles remain highly relevant. Progressive academics and jurists have sought to interpret common Article 1 and other instruments intended for the colonial context[290], to show the right of self-determination may be activated when there is a severe lack of effective representation[291] and is in large part the rationale relied on for justification of the Responsibility to Protect (R2P) concept.[292] This garners further support for the contention that the terms, 'minorities' and 'peoples' may be interchangeable and fluid in nature and could attach to the same collectives depending on their treatment by the metropolitan power.

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[287] HRC GC 23, para. 1.

[288] HRC GC 23, para. 3.2.

[289] Arts. 1 and 55.

[290] See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961.

[291] See Wright, J., "Minority Groups, Autonomy, and Self-Determination", *Oxford Journal of Legal Studies,* Vol. 19 (1999).

[292] *Responsibility to Protect,* Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre, 2001).

However, historically and normatively, the right to self-determination has been denied to those belonging to a minority, not least as it attached to a 'people' and not a 'minority'. While this has been the *de jure* justification for denying the right to minorities relied on by States and endorsed by the HRC, it is not yet clear how much *de facto* credence such an assertion now holds, in light of the precedents of the Kosovan and Bangladeshi secessions. When petitioned, the HRC has held that common Article 1 refers to the collective rights of peoples and not of minorities. Ironically and surprisingly the HRC seems to be of the opinion that individuals belonging to minorities may not lay claim to collective rights. As such they have rendered complaints under Article 1 inadmissible on grounds that they lack the competency to hear collective complaints by means of an individual petition.[293] According to Brownlie, such an either/or approach to the relationship between the rights of minorities and the self-determination of peoples is unnecessary and has proved counterproductive to the articulation of an effective and coherent international minority rights regime.[294]

IV. 'National' Minorities and the Problem of 'New' Minorities in Europe

As has been stated, there are often subjective and objective criteria to determine whether a certain group comes within the scope of 'minority' as construed under international law. Once established, the existence of the minority becomes a matter of fact and the State holds no discretion to deny the existence nor refuse to recognise the minority. We noted in this regard that the main objective factor at play would be to establish whether a group constituted one of three types of minority: 'ethnic, religious or linguistic'. If this was the case, it would provide the necessary condition for a claim to minority rights to arise. However they would only be activated with the satisfaction of the subjective criteria of self-identification with the minority group in question. Of particular interest to the discussion is the addition of 'national minority' in the latter minority-rights specific instrument and developments post-1990 in the aftermath of the break-up of Yugoslavia. These were the Declaration on Minorities, FCNM and the HCNM Guidelines.

It is useful to differentiate between these three. The Declaration on Minorities is the only one of international application and is non-binding. The FCNM is only applicable to those members of the Council of Europe who have signed and ratified it numbering 39. Signatory States, who have not ratified it, are Belgium, Greece, Iceland and Luxemburg. France, Turkey, Andorra and Monaco are the only States who have neither signed nor ratified the Convention.[295] While it is legally-binding, the language is far from prescriptive (and is meant instead to be programmatic and achieve a dialogue with States to attain progressive

[293] The HRC thus saw it fit in *Lubicon Lake Band v Canada* (Communication 167/1984) to deny the enforcement mechanism for common Art. 1, instead opting to deal with the complaint under Art. 27 of ICCPR.

[294] Brownlie, "The Rights of Peoples", 16. See also Skurbaty, Z. (ed.) As If Peoples Mattered: Critical Appraisal of 'peoples' and 'minorities' from the International Human Rights Perspective and Beyond (Martinus Nijhoff Publishers, 2000).

[295] Geographical reach of the FCNM (http://www.coe.int/en/web/minorities/home).

realisation of rights. The OSCE HCNM is a mechanism to prevent conflicts through quiet diplomacy and the resolution of minority related problems. Its guidelines are specific ways to deal with such problems derived from existing international norms.

Employing the term 'national' in addition to the three existing categories of minorities would imply an additional objective criteria. However before discussing the specific effect on the application of each, let us begin by assessing its potential general meaning. The term 'national minority' was first used in the post-World War 1 League of Nations' international order and Bengoa refers to those groups that resulted from the break -up of empires as 'first generation minorities':

> "The nations that were emerging, especially in Europe, were ethnically, religiously and in most cases linguistically diversified. They were communities of people constituted centuries ago and recognized on the basis of empirical evidence in their places of origin and settlement. The break-up of the empires of Central Europe chiefly led to the appearance of a mosaic of peoples, ethnic groups, local societies, minorities, etc."[296]

The now defunct Working Group on Minorities also discussed the concept of 'national minorities' and suggested "a national minority was a minority in one country but which formed the majority in the mother country" and added:

> "a national minority might mean a particular group which had always been part of a nation but, owing to changing borders, had found themselves in a minority situation. Such national minorities were present in Europe, Africa and Asia where borders had been redrawn either as a result of peace treaties or of colonialism".[297]

We may deduce from this that 'national minority' may refer to a specific type of minority given a specific context. One facet of the phenomenon is the assumption of minority status due to redrawing or shifting State boundaries and borders. This could have been where the national minority exists wholly in a particular State or where it has ties to and common features with the majority population of a neighbouring State, often referred to as 'kin minorities'. Lastly a fundamental aspect of being considered a national minority appears to be that they were "constituted centuries ago and recognized on the basis of empirical evidence in their places of origin and settlement." In other words, the borders had shifted and multicultural empires had fragmented into a plethora of peoples, but the communities of people in question themselves had a historical connection to the places in which they were situated and thus were constituted in their places of origin and settlement. They had remained stationary while the borders had moved. They were not the result of recent mass-migration flows or the result of forced displacement. Furthermore the process had led to re-emergence of distinct nations. Some were able to become States while others became national minorities, that is, subsumed nations without formal Statehood: "Towards the end of the First World

[296] Bengoa, *Existence and Recognition of Minorities*, para. 10.

[297] *Report of the Working Group on Minorities at its fifth session*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999 (E/CN.4/Sub.2/1999/21), para. 19.

War, what differentiated a minority from a nation was the political capacity to set up as an independent State."[298]

The above does not provide an authoritative legal interpretation nor one that is subject to consensus. Rather it is a useful insight into the potential intended meaning when the term is used in legal instruments or provisions. This of course does not preclude interpretations that meet the needs of a contemporary context and so evolve over time from their intended and original meanings. This being the case, how is the term employed in the three instruments already mentioned, what is its effect and have specific and independent interpretations emerged?

The OSCE HCNM is a dedicated conflict prevention mechanism, which has developed its own body of best practice and guidelines on a number of specific substantive problems. Its main focus was intended and continues to be national minorities especially as its main geographical focus has been Eastern Europe and recently expanded to Central Asia. Nonetheless, due to developing practice, it has sought to address non-national minority-related issues, but from a human rights perspective, such as combating Islamophobia and xenophobia in the form of hate speech. As such, the scope of OSCE work on minorities remains limited to only national minorities. This is not to say that the term 'national minority' cannot be interpreted in an expansive manner so as to include work on 'new' minorities who may have resulted from migration. This is especially so as it is a political body as opposed to a legal body. Additionally the HCNM is a mediation mechanism, so may operate and exercise its discretion within the bounds of his broad mandate of conflict prevention through quiet diplomacy.

The UN Declaration on Minorities frames its rights along the same lines as Art. 27 of ICCPR, except it frames the enumerated categories of groups as 'National or Ethnic, Religious or Linguistic Minorities'. The addition of 'national' here neither seems to expand the types of minorities that may be included nor narrow them. This is because a link is implied between 'national' and 'ethnic' but at the same time they are distinguished to convey a nuance. This also means that religious and linguistic minorities are stated as distinct and separate groups and need not be national minorities to fall within the scope of the Declaration. This is in stark contrast to the FCNM that vests rights in 'national minorities', which in turn may be ethnic, religious or linguistic. In this way the use of 'national' in the FCNM works as a device that limits the scope of minority rights to a narrower ambit than purely ethnic, religious and linguistic minorities. In contrast, the use of 'national' in the UN Declaration on Minorities seems to point only to a specification of a new type of minority which is nonetheless already subsumed by the other three principal categories, in particular 'ethnic', but nonetheless has particular needs and rights in relation to being a national minority, just as being religious or linguistic minorities carries specific rights. These common sense observations are confirmed in the Explanatory Note to the Declaration:

[298] Bengoa, *Existence and Recognition of Minorities*, para 11.

> "The Declaration on Minorities adds the term 'national minorities'. That addition does not extend the overall scope of application beyond the groups already covered by article 27. There is hardly any national minority, however defined, that is not also an ethnic or linguistic minority. A relevant question, however, would be whether the title indicates that the Declaration covers four different categories of minorities, whose rights have somewhat different content and strength."[299]

While it may be axiomatic that the content of rights of religious minorities are that they be permitted to practice and profess their religion and those of linguistic minorities that they be allowed the use of their language, it may not be so when discussing 'ethnic or national' minorities. As already mentioned that while the 'ethnic' head is considerably more indeterminate than 'religious' and 'linguistic'[300], we may still accrue to it the rights of enjoyment of culture. What then of specific rights related to 'national minorities'? In this regard the Commentary on the UN Declaration elaborates that "The category of national minority would then have still stronger rights relating not only to their culture but to the preservation and development of their national identity."[301] The Commentary restricts its characterisation of 'national minorities' as only having a distinct national identity which should be allowed to be preserved and developed. However if we presume that the most common understanding of 'national minority' is of those groups who have fixed places of origin and settlement,[302] then it is likely that their rights will have a strong territorial dimension, where they are found to predominate. More so, where a national minority is understood to be a 'kin minority' where it shares national and cultural links with a neighbouring 'kin-state', it would be expected that the minority be allowed to have some form of cross-border communication and exchange.[303] Such a phenomenon continues to occupy the heart of recent seemingly intractable conflicts on the Russian border with Russian speaking minorities in Abkhazia and South Ossetia in relation to Georgia and the in Crimea in relation to Ukraine.

The FCNM is rather different from the Declaration on Minorities in relation to identifying its scope with respect to substantive categories of minorities. Instead of 'national minorities' constituting an additional type of minority albeit with overlap with the three traditional categories, it is here the principal subject of the treaty and in whom the minority rights are vested. As such, ethnic, religious and linguistic are seen as sub-categories of national minorities as opposed to co-categories in the Declaration on Minorities. Phrased differently 'national' acts as a qualifier or disqualifier criterion for the inclusion of ethnic, religious and linguistic minorities. Thus theoretically at least, minorities who fulfil the objective and subjective criteria to satisfy the scope of Art. 27 of ICCPR and the Declaration on Minorities could still be beyond the scope the FCNM, if they were not construed as national minorities.

[299] Commentary on Minorities' Declaration, para. 6.

[300] Bengoa, *Existence and Recognition of Minorities*, para. 45.

[301] Commentary on Minorities' Declaration, para. 6.

[302] Bengoa, *Existence and Recognition of Minorities*, para. 10.

[303] See OSCE Bolzano Recommendations.

The subsequent and natural question that arises is what then precisely is the legal definition and scope of the term 'national minority' as found in the FCNM?

As already discussed above, the commonly referred to understanding of national minority has been groups with a national identity[304] that finds itself in a minority situation with shifting borders following WWI and post-WWII post-colonial. Bengoa refers to these two minority situations given the circumstances that gave rise to them as, first and second generation minorities respectively.[305] Hence a national minority was said to have a connection to the territory in which it resided often stretching back centuries and also having cultural and/or national, religious or linguistic commonalities and links with a neighbouring state where their kin formed a majority or were predominant. Despite this backdrop and the context in which the term had been used by UN officiated bodies and most probably intended by State parties, the FCNM refrains from formally defining the term 'national minorities'. Its Explanatory Report clarifies the conscious omission:

> "It should also be pointed out that the framework Convention contains no definition of the notion of 'national minority'. It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."[306]

Undoubtedly this was in part due to the contested nature of the definition of 'minority' under international law and as such attempting a formal legally agreed definition for 'national minority' would have *a priore* necessitated an attempt to resolve that issue first. The explicit reason nonetheless given is the lack of consensus on the interpretation of the term 'national minorities'.[307] We may deduce from this the possibility that some States favoured a wider interpretation of the term, while others a narrower one. Even if this was the case, it is surprising that not even a minimalist or essentialist definition, which seeks to draw out the essence or common denominator of the various contested proposed interpretations, could be achieved. The absence of such a definition or the identification of *any* essential facets indicates that there was not only no consensus on the interpretation of the term but more so none on any particular aspect of it. This is the reverse for the Declaration on Minorities, which while not resolving the problem of defining 'minority' nonetheless does lay out a framework for existence and recognition based on objective and subjective criteria[308], which can be practically applied to test who may and may not fall within its scope.[309]

Alternatively from a political perspective, the absence of any elucidation on what or who may constitute a 'national minority' whatsoever also points towards a concerted effort by States to allow themselves maximum discretion in refusing to recognise the existence of minorities

[304] Commentary on Minorities' Declaration.

[305] See Bengoa, *Existence and Recognition of Minorities*.

[306] Exp. Note FCNM, para. 12.

[307] Exp. Note FCNM, para. 4.

[308] See Commentary on Minorities' Declaration.

[309] See also Bengoa, *Existence and Recognition of Minorities*, para. 41.

within their territory. It may be conceived that the elaboration of any form of definition no matter how narrow would lead to an objective means of challenging and holding to account States in relation to their refusal to recognise the existence of certain minorities. Likewise a minimalist or essential definition would also have led to an excessively broad scope as the agreed on characteristic would have been the only limiting factor. It should further be noted that legal scholars and those belonging to minority groups have sought to use the lack of a definition for the term as a means to interpret the term as expansively as feasible. Legally, they would have a favourable basis to make such arguments, especially as in the absence of explicitly stated objective criteria, reliance and deference would have to be give to the self-identification of the concerned minority, to the extent that if a minority self-identified as having a 'national' identity, then it would become difficult to argue that the denial of recognition based on a subjective and ad-hoc remit for 'national minority' by each State on a case by case basis.

However the political situation is rather different and the gap between it and the legal position quite vast. Politically, States have been allowed to avoid defining the term and the fact that enough support cannot be 'mustered' also implies that each State may do as it pleases to an extent, thus undermining the necessity and utility of a multilateral instrument. This tension between the political and legal dimensions of the FCNM is a prominent feature throughout the text and application of the instrument especially in relation to scope. The above is an example and a symptom of this underlying issue. In principle, it is a useful approach but in practice misapplied. The FCNM Explanatory Report states:

> "The framework Convention is the first legally binding multilateral instrument devoted to the protection of national minorities in general. Its aim is to specify the legal principles which States undertake to respect in order to ensure the protection of national minorities. The Council of Europe has thereby given effect to the Vienna Declaration's call (Appendix II) for the political commitments adopted by the Conference on Security and Co-operation in Europe (CSCE) to be transformed, to the greatest possible extent, into legal obligations."[310]

On the one hand, the FCNM purports to be the first legally binding and dedicated instrument to minority rights. It is also seen as transforming pre-existing CSCE (now OSCE) political commitments into binding legal obligations. Furthermore it is overseen by the monitoring mechanism, the Advisory Committee of Experts, whose recommendations are used as a basis for the Committee of Ministers to pass a resolution which is of legally and politically binding force. However this self-laudatory language is tempered by unavoidable dilution by political realities reflected in the necessary compromises necessary in order to arrive at a legally binding minority rights instrument. The text of the FCNM adds to the already wide discretion afforded to State parties through the indeterminacy of a definition for 'national minority'. It does so through the provisions being highly programmatic with statements encouraging

[310] Exp. Note FCNM, para. 10.

States to meet the obligations therein to the 'greatest extent possible'[311] and talks of the realisation of general overarching legal principles rather specific commitments.

> "In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account."[312]

We have established that the 'national minority' criterion is employed as a restrictive device for the recognition of minorities in the context of the European FCNM and thus has a narrower scope than under international law as per Art. 27 of ICCPR and the Declaration on Minorities, which include national minorities as an additional, but already included type of minority under existing heads, implicitly and explicitly respectively. We have also highlighted how the conscious lack of a definition in the FCNM itself for national minority and the pragmatic, programmatic and aspirational language of the provisions leaves States an excessively wide discretion. Therefore, logically the subsequent question that needs to be asked is how could and is the term 'national minority' interpreted in State practice.

A useful point to initiate such an analysis are the resolutions that proposed and resulted in the decision to adopt a framework convention. Deliberations and decisions pursuant to strengthening and developing a stand-alone minority rights instrument for the Council of Europe discussed a number of options including an additional protocol to the ECHR. Council of Europe, Parliamentary Assembly (PACE) Recommendation 1134 defined 'national' as requiring groups to be "established on the territory of a state"[313] while PACE Recommendation 1201 expressed it as "longstanding, firm and lasting ties with that state."[314] Kymlicka has referred to this additional quality as "historical settlement".[315] The final text of the FCNM desists from defining 'national minority' and lacks any such condition, let alone the explicit requirement of citizenship. Despite the exceptionally broad scope available, member States' interpretation of the FCNM has been closer to the restrictive definitions offered in PACE Recommendations 1134 and 1201.

Most States have entered interpretative declarations on ratifying the FCNM requiring not only citizenship but also the fulfilment of the more abstract notion of "historical settlement" as a precondition to recognition as national minorities. This has led to the exclusion of new

[311] Exp. Note FCNM, para. 10.

[312] Ibid. at para. 11.

[313] Recommendation 1134 (1990) on the Rights of Minorities, Parliamentary Assembly of the Council of Europe, 1 October 1990, paras. 10-11.

[314] Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, Parliamentary Assembly of the Council of Europe, 1 February 1993, para. 1(b).

[315] Kymlicka, W., "The Internationalisation of Minority Rights", *International Journal of Constitutional Law*, Vol. 6 (2008), 5.

minorities resulting from immigration, from the FCNM's scope.[316] The length of time persons belonging to immigrant groups must exist in the territory of a State to be considered old or national is difficult to pinpoint. Nonetheless Tanase has observed that States have normally excluded new minorities resulting from post-1945 immigration.[317] Kymlicka has added that such settlement would reach the threshold of 'national', if it dated back to a period prior to the formation of modern nation-States.[318]

Consequently there has been the emergence of the phenomenon of the discourse around 'new' minorities in the Council of Europe member States relating to compliance with the FCNM. Increasingly States have sought to distinguish between minorities indigenous to the territory of the State and those who have resulted from immigration. The former are recognised as national minorities under the FCNM, whereas the latter limited to rights of non-discrimination, as opposed to group and cultural rights found in the FCNM. Some have done so overtly, while others have interpreted the FCNM in a manner to exclude them from its scope of application. Another strain of reasoning presented related to the issue has been that the needs and nature of immigrant communities are different from those who are settled. Those who have migrated often wish to and indeed should integrate into their new home. However this may be the case most obviously for linguistic identity, which is often weak amongst immigrant communities, who only really wish to speak their language in private with each other and the demand to seek education or administration in their language is rare. Although in some instances due to lack of integration and ghettoisation, it has become necessary for non-English signs and material to cater for a first generation, whose English competency remains weak despite living in the UK for many years.[319]

Taking the example of the UK, it has sought to limit the application of the FCNM to such an extent almost rendering it redundant. This is peculiar as other States go as far as simply refusing the existence of minorities in their territory such as France and not becoming a party to the FCNM. The UK on the other hand has ratified the FCNM, but has conditioned its applicability by limiting the meaning of 'national minority' with the definition of 'racial group' as understood under the Race Relations Act 1976 of its national legal system.[320] This has a number of ramifications. First, in limiting the scope of 'national minority' and thus the rights found in the FCNM to 'racial groups' (extended to include ethnic groups through established case-law) means that the UK would inevitably then also limit the rights it would afford to such groups to those of racial groups and ethnic groups. Such groups are conventionally only able to and need protection from discrimination on grounds of their

[316] Hofmann, R., "Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities", *European Yearbook on Minority Issues*, Vol. 1 (2001/2), 447: "Given the absence of an internationally agreed definition, many States sought to exclude application to 'new minorities'."

[317] Tanase, I., "Defining National Minorities: Old Criteria and New Minorities", University of Oxford Seminar Series: *Citizenship and National Minorities in Europe*, January 2003 (http://www.sant.ox.ac.uk/esc/esc-lectures/Tanase.htm).

[318] Kymlicka, "The Internationalisation of Minority Rights", 6.

[319] Somali in Birmingham (Asda Supermarket car parks) and Bengali in Whitechapel (Royal London Hospital).

[320] See Shaikh, M., "Immigration to the UK from Commonwealth".

ethnic or racial identity. Their recognition as such does not entail the attribution of rights related to cultural expression as would recognition of religious or linguistic groups, which are excluded from the scope of the FCNM based on such an interpretation. In sum, they are not recognisable identities nor have associated rights granted, which are both explicitly specified in the FCNM.

This author has argued in a submission to the FCNM's Advisory Committee that such an interpretation is invalid owing to its incompatibility with well established principles of international law.[321] However the Advisory Committee has only gone as far as to say that the scope needs to be expanded and is inadequate in its current form. In its Third Opinion issued in 2011 it did not address the assertions made by this author.[322] Furthermore the absence of any observations related to scope from the Council of Foreign Minister's Resolution[323] are telling as to the priority and importance or lack thereof placed on this matter. The only engagement that took place with the Committee was through oral submission, where the response from one of the experts was that it is a matter at the member States' discretion to decide which minorities to recognise or not. The Committee's failure to properly consider the legal questions arising from the UK's interpretation and whether there are limits to the discretion available to States is indicative of the gap between international law and the practice of the Committee in an effort to engage in a dialogue and advance the position of member States.

Therefore it is notable that the spectrum of validity for international law is quite wide, especially when we take into account States' interpretation, regional organisational norms (in particular European standards) and application of international laws, which in itself plays a role in the entrenchment or erosion of certain principles and norms. While it is not intended to compare Islamic law to the current varying practices of a plethora of States with their own unique contexts and inclinations, it is inevitable that international law not be viewed in a sterile vacuum. After all States are responsible for reaching some level of consensus before international legal instruments can be drafted and opened for adoption. Furthermore their application depends wholly in most cases on their ratification. More importantly, laws must be accompanied by interpretation and application. The resultant State practice itself is essential and contributes to the development and elaboration of actual international law. Additionally it remains important to gauge the official response to interpretations and applications that test the boundaries or appear to depart altogether from the law's apparent intent by mechanisms or experts formally charged with oversight, observation, monitoring, adjudication and issuing formal recommendations related to compliance of those very instruments.

[321] See Shaikh, "FCNM Shadow Report".

[322] *Third Opinion on the United Kingdom* (adopted 30 June 2011), Advisory Committee on the Framework Convention for the Protection of National Minorities ACFC/OP/III(2011)006.

[323] Resolution on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom (adopted 12 December 2012), Committee of Ministers, 1158th meeting of the Ministers' Deputies, CM/ResCMN(2012)22 .

V. Conclusion

In this chapter, we surveyed three separate means to deducing scope of 'religious minority' under international law, thereby ascertaining who may be included and excluded. This commenced by an enquiry into the definition, scope and meaning of 'religion' so as to understand which beliefs could be protected under various instruments related to non-discrimination and freedom of religion. Specifically in relation to non-discrimination, we found that the essential element was perception of the victim and the perpetrator. As religious discrimination was related to the idea of intent and effect, these two factors were the main method of establishing scope of religious non-discrimination law. It was also critical to understand not only what beliefs were captured as religions but more so where the delimitation was for the broader scope of the right of 'freedom of religion and belief'. Hence what was meant by the appendage 'and belief'?

With regards to first point, while the scope of religion was expansive and highly deferential to self-identification and self-ascription, it did maintain some objective element. For example the belief in the legalisation of assisted suicide was considered to fall beyond its scope, while the relatively new religion of the Church of Scientology was seen to fall within it. With regards to the second issue of 'and belief', the inclusion of the right to no belief, that is atheism, is explicit and unequivocal. While the indication may be that admissible beliefs should be related to religion as is the case with atheism or agnostism, which are views *about* religion rather than *in* religion, the position of international law remains that the right covers all or any personal convictions. The precise meaning of the term itself and examples that go beyond religious and atheistic beliefs are seldom discernible.

The analysis proceeded to discuss in depth the scope of 'minority'. Unlike 'religion', we found the scope of 'minority' to be highly contested. The issue was delineated into discussions around the lack of agreement on a definition and the importance of the principles of self-identification, existence and recognition to the international law relating to the protection of minorities. We also expanded the discussion by highlighting entities and rights which conventionally are thought to be collective rights attaching to group entities such as self-determination and autonomy. We found that 'minorities' were excluded from the scope of self-determination as it was only applicable to 'peoples'. It was submitted that this was an artificial and legally unsound justification for such exclusion, better explained by political expediency.

Finally we discussed the limiting of scope of minority rights under the FCNM and HCNM to only 'national minorities'. Unlike the UN Declaration on Minorities which includes, 'national minorities' as one of the types of minorities under Art. 27 of ICCPR, the FCNM only vests rights in ethnic, religious and linguistic minorities, who are first and foremost national minorities. The precise meaning and definition of 'national' here remains vague. The interpretive trend however among State parties shows a practice which seeks to exclude minorities resulting from post-1945 immigration from the scope of the FCNM altogether. We

observed that this has the indirect effect of excluding mostly religious minorities as the national minorities happen to be predominantly of the ethno-linguistic variety.

Chapter 4
Comparison of the Concept of Scope

I. Introduction

In the last two chapters, we engaged with the spectrum of validity within Islamic law and international law in relation to the scope of *dhimma* and religious minorities. In the present chapter, we will assess the areas of overlap, conflict and divergences between the two systems. As noted in the introductory chapter, comparing both systems of law may lead to a finite number of possible outcomes depending on the specific issue in question. The first possible outcome is that both legal frameworks could carry similar protections; the second is that one legal framework could offer greater protection than the other and the third is that they could be in direct opposition to one another. In relation to all of these possible outcomes, in particular the latter, an analytical framework will be presented through which to understand the differences.

At the same time, the identified areas of overlap should serve to show that the two systems of law are not completely at odds as may be popularly perceived. This is partly because critiques of Islamic law either may not be derived from a thorough examination of the existing state of international law and/or overlook the full breadth of available valid Islamic legal opinions or delve deeper into the rationale (*usūl*) – implicit and explicit - underpinning rulings such as their effective causes (*illah*) and contexts.[324] At the same time, areas of conflict should not be overlooked or understated, where genuinely present. Only through an approach, where Islamic law is evaluated within its various contexts and objectively compared to the contemporary system of international human rights law, fully cognisant of their deeper frameworks and nuances, can the main objectives of the thesis be fulfilled. This is preferable to assessing Islamic law in a sterile vacuum or according to subjective notions of morality and tolerance devoid of context or the acknowledgement of multiple possibilities rather than being selective.

[324] E.g See Arzt, "The Role of Compulsion" and McKinney "Echoes of the *Dhimma*". Both seek conduct a stand-alone critique in isolation without comparison or reference to international or human rights law. Both also don't fully grasp the breadth of discussion on the issue of scope of *dhimma* in classical Islamic law, misunderstanding the crucial nature of the basis of the inclusion of Magians. Arzt considers *dhimma* to be applicable to only monotheistic scriptuaries, p. 25 and McKinney reproduces Elizabeth Mayer's view that *dhimmi* status was only for the "People of the Book", p. 240. Furthermore an oversight on drawing out *usūl* or underlying principles is evident in the constant references to the 'Pact of Umar' and drawing out general and fixed rules from it without asking whether it was intended to be generally applicable law or principle and its relationship with its specific context (Arzt, p. 27, McKinney, p. 239). There is also reference made my Arzt and in the case of McKinney heavy reliance on polemicists such as Bat Yo'er and Robert Spencer who have been accused of presenting biased and skewed perspectives *dhimmis* under Islamic law. Works that refer to both the Islamic law and international law perspective are rare and include Hashemi, *Religious Legal Traditions*; Baderin, "Islamic Law and International Protection of Minority Rights in Context" and Emon, *Religious Pluralism and Islamic Law*.

Firstly, the nature and extent of the common ground will be identified. We posit that it is far greater than assumed or portrayed, even by academics, who can criticise Islamic law in a vacuum of both a superficial understanding of Islamic law combined with lack of reference to international normative frameworks, which themselves can show greater flexibility and scope than their arguments capture. Second, the apparent conflicts, also less than normally presumed, will be identified and their rationale genuinely understood in order to propose solutions. Third, it will be ascertained and explored whether either can be enriched, informed or improved by the other. The last of these points may not be received well by either those who purport devout religiosity or those who hold international human rights law as the immutable panacea of morality and ethics; in extreme cases, with an evangelical zeal. Both would normally hold their own system as the ultimate and superior system of truth and as such immune from improvement and critique.

Nonetheless, such attitudes can only be based on a narrow and superficial reading of both legal systems. As for international law, the only parts which are sacrosanct are due to consensus over a considerable period of time in which they were not challenged or undermined. These are what are normally classified as *jus cogens* norms: "certain fundamental rules of customary law (rules of *jus cogens*) which cannot be altered by the express agreement of states, even if in treaty form."[325] The remainder, which accounts for the vast body of international law, remains subject to change and evolution based on fluid and dynamic international relations, State practice and judicial interpretation.[326] In theory, the sacrosanct may also be changed, if a consensus is then formed against it. Hence, as a system of law recognised by civilised nations,[327] there is nothing to prevent seeking answers from within Islamic law to long standing problems in international law or present a more progressive model on some issues leading to a change or improvement in international law.

The principal difference between international law and Islamic law is the nature of their sources. Islamic law's primary sources, the Qur'an and in principle authenticated Prophetic Traditions (*ahadeeth*), are immutable, sacrosanct and indisputable.[328] However the law itself derived from explicit text and implicitly through several juristic means[329] has over one and a half millennia been subject to *ijma'* (juristic consensus) and has also become sacrosanct.[330] Issues where there has been no consensus or discussion, as they have not occurred until the

[325] Dixon, M., *Textbook on International Law* (Oxford University Press, Seventh Edition 2013), 18. See also D'Amato, A., "It's a Bird, It's a Plane, It's Jus Cogens!", *Connecticut Journal of International Law*, Vol. 6, No. 1 (1999).

[326] Art. 38 (1) of the Statute of the International Court of Justice (1945).

[327] Art. 38(1)(c) of the Statute of the International Court of Justice (1945).

[328] Prophetic Traditions (*ahaadith*) are only immutable in principle as questions are and can be raised as to whether a report is authentic or not. Despite this there are collections of Traditions which are undisputed in this regard.

[329] Most notably, *ijma'* (consensus) and *qiyas* (analogy), which are often given as the third and fourth sources of Islamic law. See Chapter 1, for detailed discussion.

[330] On the differences about whether *ijma'* can change or not, see e.g. Hassan, A., *The Doctrine of Ijma' in Islam: A study of the Juridical Principle of Consensus* (Kitab Bahvan, 1992).

present day, are subject to be informed by the context of the world today, which includes aspects of the present reality of international relations and law. The sources of international law are most commonly cited as being international conventions, international custom, general principles of law and judicial decisions and the teachings of the most highly qualified publicists of the various nations.[331] They cannot be said to be immutable prior to or after their crystallisation and fundamentally arise as a reflection of developing practice and consensual agreements or treaties. While *jus cogens* may be considered immutable in some respects, it still emanates from State practice and forms a part of customary law. There are also questions around the hierarchy of these sources and in the event of a conflict which should prevail. Apart from the fourth and final source which explicitly denotes its own status "as a subsidiary means for the determination of rules of law,"[332] the current position of the Court is to consider all sources separately and simultaneously and only prioritise as a last resort when faced with an irreconcilable conflict between sources. In such instances, priority will be given in the order that they are listed in Art. 38(1) of the Statute of the ICJ.[333]

II. Favoured Religions v. State Neutrality

As we have already shown in Chapter 2, the often presumed scope of *dhimma* in Islamic law as including *only* Jews, Christians and Magians has been a misrepresentation of the actual breadth of valid juristic opinions on the subject. Consequently there has been a lack of appreciation of the rationales and attempts to reconcile in order to provide a perspective most relevant and analogous to the contemporary international context. Even established and oft-referenced academics have erred on this issue citing incorrect or too narrow a view on the Islamic law position. For example, Arzt in her well-known article on the subject states: "Non-Muslims in the *dar al-Islam* were treated differently depending on whether or not they were 'People of the Book,' those whose faith was based, like that of Muslims, on revealed scripture *(ahl al-kitab).* Islamic law granted the protected status of *dhimma* (contract or guarantee) to communities of the other scriptural monotheisms, Christianity, Judaism and Zoroastrianism."[334] This as we established in Chapter 2, is not the view of the majority of classical jurists nor the view of three of the four schools of Islamic law.[335] While it is undisputed that Zoroastrians or Magians are to be included as *dhimma*, the prevalent view is that they cannot be deemed to be People of the Book owing to their non-monotheistic beliefs. Such an insight is crucial as on it pivots whether *dhimma* status is limited to or can be extended beyond the People of the Book. Thus the three views on eligibility that in fact form the spectrum of validity under Islamic law are: i) only the People of the Book (inclusive of Magians), ii) People of the Book (exclusive of Magians) and non-Arab polytheists (such as

[331] Art. 38(1)(a-d) of the Statute of the International Court of Justice (1945).

[332] Art. 38(1)(d) of the Statute of the International Court of Justice (1945).

[333] Dixon, *The Sources of International Law*, 25.

[334] Arzt, "The Role of Compulsion in Islamic Conversion - Jihad, Dhimma and Rida", *Buffalo Human Right Law Review*, Vol. 8, No. 15 (2002), 21.

[335] See Chapter 2.

the Magians), and iii) all religious groups (People of the Book and polytheists). It may also be argued that the conventionally held view that the People of the Book are or should be treated more favourably than other religious minorities is open to challenge.

Similarly under international law, while it may be arguable that the scope of the concept of 'religious minority' is open to all religious groups who seek to be recognised as such, States cannot be ignored in contributing to accepted patterns of practice in compliance with international norms. Hence State practice contributes and affects the quality and strength of international law. Indeed State practice is indicative of a narrowing of scope through non-recognition via the contested nature of scope and definition, specifically of 'minority'. We have also seen how the definition of 'religion', albeit less so, may also be a means of exclusion of some groups. Thus under international law, the spectrum of validity is not merely a range of possibilities, but the broadest scope is available under UN instruments, most notably the UN Declaration on Minorities, constitute an aspirational rather than legally binding standard. The narrowest or most restrictive scope available is that which States seek to avail. It is also apparent that under the FCNM in Europe that the additional qualification of 'national' acts as a further constriction of the scope of minority rights that may only be afforded to 'traditional' and long established groups who are perceived as part of the national fabric rather than originating from immigration. They also seldom happen to be religious minorities hence acting as a means of indirect exclusion from religious minority rights under the FCNM.[336]

In this regard, comparing to the most restrictive view under Islamic law, we can observe the similarity in the underlying basis for exclusion. The presumption in much of the literature is that the People of the Book such as Jews and Christians are the most proximate religiously with the Muslims and so are treated more favourably than other religious groups. Thus they are given more and better rights, exemplified by their recognition as *dhimma*. Gunn offers a model for understanding State-religion relations by suggesting that States often have a hierarchy of "religions", which are favoured and disfavoured by the State to varying extents, ranging from State-endorsed religions, favoured religions to rejected religions.[337] As such, for Islamic law to generally offer recognition and include within the scope of *dhimma* potentially all religions is noteworthy. It is a main tenet of the present thesis that this dynamic in nation-States occurs as a result of commonality threat posed by a religious group or the substance of their belief and practices. For example, if a national identity has religiosity at its heart, then that will be manifested as preference towards that particular religion (State-endorsed religion), aversion to those that believe the opposite (rejected religions) and toleration for those that are similar (favoured religions). Conversely the State could have a militant secularism at its heart meaning its belief is one of anti-religiosity, so making all religions

[336] Shaikh, "Immigration to the UK".

[337] Gunn, "The Complexity of Religion", 197: "Thus 'religion' may be seen not simply as a neutral description of such things as theological beliefs or ritual practices, but as judgment on whether the particular beliefs or actions are acceptable to the society or the legal system. Thus, a definition of 'religion' may not simply be neutral, but may contain an inappropriate societal value judgment regarding particular beliefs or actions with 'good' beliefs being characterized as 'religions' and 'bad' beliefs being characterized as 'cults' or 'heresies.'"

disfavoured in the public realm such as France or in the case of Turkey anti-Islam owing to Atta Turk.

Temperman, on the other hand, has argued for an emerging right to State neutrality in matters of religion. In the specific context of public school education, he posits: "State neutrality in the field of Education is first and foremost mandatory because primary school education is compulsory."[338] In light of the ECtHR Chamber judgement in the case of *Lautsi v. Italy*[339], which concerned the display of Crucifixes in classrooms, he further notes that: "In sum the state has a compelling obligation to remain neutral when manifesting itself upon particularly impressionable youth who are compelled to spend time on public premises." The absence of such neutrality would stem critical thinking and could lead to state indoctrination. This would impact and impair the right to freedom to chose or adopt a religion of one's choice, which no doubt includes the right not to believe.[340]

However there may not necessarily be an inherent conflict between the two perspectives on State-religion relations. Temperman elaborates on what the relationship ought to be and its development in that direction, while Gunn elucidates the current state of affairs taking into regard the political and cultural contexts of various States. Merely by adducing the right to State neutrality in State education and its affirmation by the ECtHR does not ensure that it will be implemented by even those upon whom the Court has jurisdiction, let alone those beyond it. Indeed the implementation of a judgement will be tempered and influenced by where the State stands in relation to a particular religion along the lines theorised by Gunn. Even if a State rectifies its non-neutrality in certain respects such as public education, it does not mean that it would then assume a position of neutrality on all religious matters in every sphere of public life. For example, there is yet to be case-law on whether the State is barred from preferring or providing financial incentives or tax breaks to State-endorsed religions. In cases where such incentives are extended to all religions, additional difficult questions may arise as to who are and are not considered eligible religions[341], which would then again implicate Gunn's model, and why neutrality in such matters is limited to being between religions and not all organisations, whether political, idealistic, philosophical or encompassing any other form of personal conviction.

Ultimately not only are the multifarious attitudes of States towards various religions and their adherents coloured by the beliefs, identity and philosophy at the State's core, the dynamic is codified and entrenched within international law and particularly the ECtHR as the principle of 'margin of appreciation'.[342] If unconditional neutrality was to be applied even *de jure* by

[338] Temperman, "*State Neutrality in Public School Education",* 865. See also more generally on State neutrality, Temperman, *State-Religion Relationships and Human Rights Law.*

[339] *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (3 Nov. 2009) (determining a violation of Art. 2 of Protocol No. 1 (right to education) examined jointly with Article 9 (freedom of thought, conscience and religion) of the Convention for the Protection of Human Rights and Fundamental Freedoms).

[340] Temperman, "*State Neutrality in Public School Education",* 866.

[341] *Church of Jesus Christ of the Latter-Day Saints v. UK*, no. 7552/09 (2014).

[342] See Henrard, K., "A Crtical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church-State Relations" under the Jurisprudence of the European Court of Human Rights".

the Court, then it would not be possible for States such as France, Turkey and Switzerland to use their cultural, religious and historical contexts to have such an instrumental effect on the Court's deliberation. Even Temperman concedes, while arguing for the emerging right to neutrality, in relation to *Lautsi v. Italy* that "Although it is not unimaginable that the Grand Chamber (which has not yet reached a decision at the time of writing) may yield to political pressure to revise the Chamber's decision in the near future (by virtue of applying a wider margin of appreciation)".[343] The Grand Chamber did precisely this in ruling that displaying crucifixes in classrooms fell within the margin of appreciation afforded to Italy.[344] It decided to hinge its reasoning on there being no evidence that "the display of such a symbol might have an influence on pupils" and that in any case it was a "passive symbol", which did not have the same effect on pupils as proselytising or engaging in religious activities.[345] While it rendered Italy's majority religion visible in classrooms, it did not amount to indoctrination.[346] In summation, the Court's application of the principle of State neutrality is not absolute and is balanced against the applicable margin of appreciation based on the substance of a given case.

III. Implications of inclusion and exclusion

Nevertheless before continuing our discussion on the bounds of inclusion within both legal systems, it is essential to first highlight what exactly is meant by and the implications of inclusion. The classical *dhimma* system is often characterised by the idea of an Islamic political entity bent on offensive military expansionism offering each conquered people in its path three options: Islam, *jizya* or the sword.[347] The option of Islam is meant to signify the offer of conversion to Islam. The payment of *jizya* is the requirement to be treated as *dhimma*. The sword is clearly the reference to being fought and thus the permissibility of being killed. The fourth implicit option would appear to be to exile oneself or be expelled from the territory that the Muslims have gained control. This depiction of the options in the context of the scope of *dhimma* and recognition of certain groups gives the skewed impression that either a religious group falls within the scope of *dhimma* and if it does not, then they are subject to death or expulsion. However such mischaracterisations emanate from a context of enmity, hostilities and an international system of empires, where the default was a state of aggression and peace the exception as opposed to the present context, where peace is the default and aggression the exception. Even under Islamic law those not recognised as *dhimmis* were permitted to visit temporarily Muslim lands as *musta'min* for purposes such as trade. Some authors have mischaracterised this category as being only for polytheistic visitors. This technically incorrect characterisation may reflect the predominance of groups who were granted the status as opposed to an affirmation of the idea that polytheists were

[343] Temperman, "State Neutrality in Public School Education", 866.

[344] *Lautsi v. Italy*, App. No. 30814/06, Grand Chamber (18 March 2011)

[345] http://www.interights.org/lautsi/index.html.

[346] http://echrblog.blogspot.co.uk/2011/03/grand-chamber-judgment-in-lautsi-no.html.

[347] http://www.frontpagemag.com/fpm/234738/conversion-jizya-or-sword-raymond-ibrahim.

excluded from *dhimma*. Their *dhimma* status was in contrast to *musta'min* an indication of permanent or temporary residence. While approaching cautiously, the idea of permanent residence 1400 years ago being tantamount to the modern notion of citizenship, permanent residence is clearly an essential element of modern citizenship.[348]

As such, the discourse under Islamic law of scope and recognition should be framed as those excluded not being eligible for or having a right to modern citizenship, as there is seldom a situation possible where an individual has permanent residence, but cannot or will not have the right to apply for citizenship at some point. It is also worth mentioning briefly that purely by virtue of being considered *musta'min* does not mean that all rights attributable to *dhimma* are withheld. In fact the rights related to religious freedom available are discussed at length by some contemporary Arabic-language authors.[349] While this is not the focus of the present study, it is of note that a similar approach to international law, especially in light of the view of the HRC, is applied where religious minority rights cannot be denied owing only to non-citizenship. Hence if we perceive the positions under Islamic law of exclusion and inclusion as those being tantamount to being citizens or non-citizens owing to permanence and appropriate and relevant rights, then the comparison to international law and State-practice can be more readily made.

Firstly, while the HRC does not preclude non-citizens from the scope of Art. 27 of ICCPR[350], it still remains the case that the rights available to citizens belong to religious minorities may be different to those who do not hold citizenship or are visiting the territory temporarily. In other words the rights available have to match the needs of the individuals in question and where a minority right has no link to permanent residence it may not be granted. An example of this is the contrast between providing a place of religious worship, whether financially subsidised by the State or not. Permanent residents would certainly lay claim to such a right in order to collectively practice their faith with their co-adherents. However a temporary visitor could not lay claim to such a right or reasonably request for such a provision, especially if they adhered to a religion, which no one else prescribed to in that State. At the same time, the proper understanding of the HRC's view would be that States may not withhold rights from minorities that are of relevance to them, such as interference in their freedom to believe or to manifest that belief in private or public.

Secondly, the discussion of excluded groups from the scope of *dhimma*, as touched on above, is not where exclusion equates to expulsion or death just as in modern States non-recognition does not amount to non-citizenship, death or expulsion. It is not a statement of hostile relations and enmity to the individuals themselves but rather non-recognition of the religious element of their identity and the collective needs and aspiration of co-religionists. On the contrary, that is exactly how the scenario has been painted with regards to the classical

[348] This is not the focus of this research but for further reading see Warren, D. H. and Gilmore, C., "Rethinking neo-Salafism through an Emerging Fiqh of Citizenship: The Changing Status of Minorities in the Discourse of Yusuf al-Qaradawi and the 'School of the Middle Way'," *New Middle Eastern Studies*, Vol. 2 (2012) http://www.brismes.ac.uk/nmes/archives/809.

[349] Most notably Zaydan, *Al-Dhimmiyun wa al-Must'aminun*.

[350] HRC GC 22, para 5.1.

Islamic law position. This can only be alleged about the most restrictive interpretation of limiting inclusion to People of the Book. Even if we are to continue with the thought process with this one view, then the idea that exclusion meant death or expulsion has been problematised by the idea of the category of *mustamin*, which unequivocally included polytheists and has been characterised by some authors as being specific to polytheists. We also know that even *mustamin* were to be granted some of the rights of *dhimmi* albeit not all of them. Some complex issues around context here should inform our analysis.

IV. Contextual Factors

In the context of conquest and expansion of classical Islamic law, especially in the Arabian Peninsula, the encounter with religious minorities was limited to Christians, Jews, Magians and the polytheists. The problem in interpretation and comparison arise with this fourth category of polytheists. The use of the English translation 'polytheists' implies a generic term related to specifically religious belief or a type of religious belief. However the actual Arabic term used of *mushrikeen*, refers to and denotes a specific group who were also the Muslim's political and military enemy, the Quraish of Makkah, the tribe of the Prophet himself, and those who were allied to them. Hence the term is specific to an enemy alliance with whom a war was being fought and refers to and identifies them by their common coincidental religious beliefs and in this context referred to a finite number of known groups. Largely the expansion of Muslim rule took place in opposition to and in this context of the wider conflict with the *mushrikeen*, the principal connotation of which was 'the enemy'. Therefore the experience to other religious groupings was limited to mainly two specific religions, the Christians and the Jews and more nominally the Magians. With the fourth being that of the 'enemy' referred to as polytheists, in relation to their beliefs. In other words, the experience of polytheists in this early context was inseparable from enmity and hostility. Thus on conquest, the polytheists remained hostile to the Muslims and there was not really a question of them staying or even wanting to exist as permanent residents in the wider context of the conflict, nor as law abiding citizens. They were either held captive, used as leverage in relations with the enemy or retreated to their strongholds while they existed.

In the present international system, those belonging to religious minorities exist in predefined and fixed State boundaries, where the State is said to be sovereign and enjoying territorial integrity, which may only be compromised under some exceptional circumstances. The lands in which the religious minorities exist have done so for some time and are long established not only in the territory of the State but at times in a specific region where they happen to be predominant. They have not become subject to the authority of the governing power by way of conflict or conquest and there is no history of intrinsic or pre-existing enmity or resentment in most cases. This then offers a wholly different context to that described above in which the early discussion around Islamic law and *dhimmis* took place. The vast contextual gap may be bridged by posing questions such as how would Islamic law deal with polytheistic groups who were not hostile, did not engag in armed hostilities with a Muslim power and pre-existed in that territory? Would they not be eligible to the rights to *dhimma*? In

the early context, the question is an open one, depending on interpretation of the basis for exclusion of polytheists and whether it attached to a specific grouping or their generic religious belief or their conflict with the Muslims. However the hypothetical question became a real one historically as the Islamic empire continued to expand encompassing increasingly diverse subjects, including non-hostile polytheistic religions. In that emerging reality, *dhimma* protection was indeed extended to polytheists, drawing on the analogy of the Magians as polytheists rather than the tenuous position of considering them as People of the Book.[351] Crucially, the developing practice of including those beyond the restrictive interpretation of People of the Book and the Magians was not merely a pragmatic practice to deal with the complexity of increasing religious (and ethnic) plurality of subjects, but actually supported by a valid interpretation of Islamic law on the matter, that is the eligibility to *dhimma* of all religious minorities whether polytheistic or People of the Book.

We have touched on the two views at the two extremes of the spectrum of validity under Islamic law, from the most restrictive to the most expansive. There was however the view that sat in the middle of these two that Arab polytheists are the only type of religious group that cannot be eligible for *dhimma* implying that non-Arab polytheists are eligible. Once again this extrapolation emanates from the understanding the inclusion of the Magians as *ahl al-dhimma*. There may be a case for this to have been the most prominent view amongst classical jurists. This is because al-Shafi'i's view that the Magians had to be considered as People of the Book due to Qur'an 9:29 being explicit and exhaustive, is certainly the minority opinion and not held by the other three schools of Islamic law. As such, following the route of the strongest and most prevalent views, we would conclude that the Magians were and should be considered as polytheists based on their ostensible beliefs and practices. Therefore the next line of reasoning would have to explain the basis of the inclusion of the Magians, if Shafi'i's view is to be disfavoured. This indicated that it could not have been the Magian's polytheism per se that excluded them from *dhimma*. Either polytheism had no impact on the scope of *dhimma* or it had to be coupled with another trait. Jurists thus deduced that the difference between the polytheists, who were not offered the *dhimma* and the Magians, was that the former were Arab and the latter were not. As to the precise meaning of 'Arab' and whether it referred to language, ethnicity or geography that was discussed in Chapter 2.

How does this middle view compare with international law? We will take the heads of ethnic and linguistic together as they often coincide and treat the geographical head separately. Clearly under Art. 27 of ICCPR, the HRC or the Declaration on Minorities, it would not be justifiable to limit the scope of religious minority on an ethno-linguistic basis. To do so, would be arbitrary and discriminatory. It would also in no uncertain terms be contrary to minority rights principles of self-identity within the wide objective bounds in place. It is nonetheless interesting that the narrowest scope of minority rights protection potentially found in the interpretation of the FCNM by its member States of 'national minority' has some similarities, where it indirectly works along ethno-linguistic lines as it is normally applicable to long established minorities, which happen to be ethnically or linguistically distinct but not

[351] Hashemi, *Religious Legal Traditions.*

religiously as well as not being significantly ethnically different as in the case of immigration from the developing world. It is though noteworthy that we had established that considering the 'Arab' element as linguistic or ethnic was a weak understanding and it was in fact more likely to be a reference to geography or conversely to the Arab polytheists present in the Arabian Peninsula at the time. In sum not only was the exclusion of polytheists specific to that time, but also specific groups in that region.

The conclusion that Arab polytheists could not be eligible for *dhimma* was not only formed on the basis of the inclusion of Magians, but also the prevalent opinion that is sourced from the *hadith* of the Prophet, while on his death bed that there should be no non-Muslims in the Arabian Peninsula. It is also that *hadith* that is central to the difficulty that may arise even with the broadest scope found at the most lenient end of the spectrum of validity, that all non-Muslims regardless of being polytheistic or People of the Book were entitled to be given *dhimma* status. The difficulty is that even with this opinion the exceptional status given to the Arabian Peninsula as requiring a homogenously Muslim citizenry and that an individual did not actively belong and have allegiance to groups who were at war or were sworn enemies of the Muslims. This meant that there was an exclusion of recognition and existence from a given territory of all non-Muslim permanent residents, owing to it being the international religious epicentre of its believers.[352] The first point to note in this regard is that there may be analogous examples of this even in current State practice; such is the case with the Vatican or the Maldives. Both condition nationality on religious belief.

Before delving too deeply into these two opinions of excluding from *dhimma* status on the basis of Arab ethno-linguistic identity or by virtue of existing within the bounds of the Arabian Peninsula, which was perceived as the geographical territory where Arabs are indigenous, we should explore their relationship to each other and how they relate to our present context. It will be argued that discussion on both these matters is, to a large extent mute and of no practical consequence as it either dealt with a specific context in the past which is irrelevant today, or the basis for those stances would not bear the same results today. First it could be argued that they are similar legal concepts: one excludes on the basis of Arab ethnicity and the other owing to Arab territory. So it may be submitted that in essence the exclusion in both instance is aimed at Arabs. Although strictly speaking they are to be distinguished as the ethnic exclusion applies regardless of location and so would be applicable in any State around the world. The geographical exclusion is actually aimed at all religious minorities, Arab or non-Arab. It seeks to make the land of the Arabs, the Arabian Peninsula, a territory where only Muslims, Arab or non-Arab, are eligible for permanent residence. Therefore oversimplifying, it seeks to turn the Land of the Arabs into the Land of the Muslims.

The more salient point then regarding context and relevance is that the juristic view on scope and the policy of no *dhimma* in the Arabian Peninsula was implemented over 1400 years ago and with a backdrop of hostilities and enmity with certain religious groups. Presently, the situation does not exist in all its facets and dynamics. With regards to the view that Arab

[352] Friedmann, *Tolerance and Coercion,* 79.

polytheists were to be excluded from *dhimma* status on the basis that Magians were not Arabs was only applicable to Arabs in the Arabian Peninsula thus constituting a purely ethnic distinction to peoples only found in a limited geographical region. As such for clarification, while it was an ethnic distinction it was practically applicable to anyone outside the Arabian Peninsula as there was no coincidence of ethnic Arab migration to States where Islamic law was being implemented and hence the need to assess the applicability of *dhimma* by the governing authorities. Also for those who in being put into positions of governance as the Islamic empire expanded, while they may have been applying the more liberal view of including *all* polytheists within the scope of *dhimma*, they did not also fall foul of the middle opinion of if it being permissible to extend it to only non-Arab polytheists, as never was the religious minority that had to be given *dhimma* a group that had migrated or ethnically originated from the Arabian Peninsula.

With regards to the view of geographical exclusion, the converse is true. The Arabian Peninsula has experienced significant and consistent immigration from a number of ethno-national groups belonging to various States, in large part to being the epicentre of Islam. While this has resulted in an ethnically diverse population in the Arabian Peninsula today, immigration was for the sake of religion and by Muslims. Hence there is no case of anyone at present in one of the States of the Arabian Peninsula, who has a right to citizenship and been denied it by virtue of being a non-Muslim.[353] This is not to say that there are not significant numbers of non-Muslims in the Arabian Peninsula. However their residence and associated welfare is wholly dependent on their employment in the region. The treatment of non-Muslims in such a way is in fact more along ethno-national lines rather than religious. All non-Saudis, who come to Saudi Arabia for the purposes of work, are treated in the same manner. Regardless of how long they may reside and work in Saudi Arabia, they will not be eligible for citizenship, Muslim or non-Muslim. The same is true for the UAE, Qatar, Bahrain, Kuwait, Oman and Yemen. The only distinction on religious grounds between residents who are non-Saudi Muslims and non-Saudi non-Muslim in Saudi Arabia is access to the holy cities of Makkah and Madinah. The reason behind this is a completely separate principle to the exclusion of *dhimma* status from the Arabian Peninsula and is wholly owed to theological and ritualistic reasons related to worship, holy sites and pilgrimage. Even if *dhimma* status was possible in the Arabian Peninsula, those non-Muslims would still be excluded from certain parts of Makkah and Madinah.

The first issue we examined with regards to scope under international law was the meaning and definition of 'religion', and how it differed under the human rights to non-discrimination and freedom of religion. Under Islamic law, inherently there cannot be such a distinction between scope or substantial rights. This is because as a starting point, Islamic law recognises and treats religious groupings as collective entities, consisting of individuals with relevant rights, with a number of competencies. This recognition and resulting status precedes a discussion of rights. On the contrary international law as a starting point, recognises culturally unique individuals who happen to belong to a minority grouping and mainly vests

[353] Such a case may arise in relation to apostates, but this is beyond the scope of this research.

in them individual rights. As such, logically under Islamic law, scope in relation to rights of non-discrimination, freedom of religion and minority rights will all flow from recognition as a religious minority or as *dhimma*. Whereas under international law, the rights regimes are separate yet connected.

Hence it may indeed be possible to be extended rights of religious non-discrimination but not of religious freedom or religious minority rights or alternatively to be allowed the freedom of religion but be excluded from minority rights law. Therefore the causation and the flow of rights is quite the opposite as to Islamic law. Under international law, once the highest and most difficult set of rights is extended, that of religious minority rights, then it would not be possible to deny rights of non-discrimination. Furthermore, rights which are deemed to be collective rights accruing to the group entity rather than to individuals of the group are alluded to and their indirect realisation made possible at the most progressive extreme of minority rights. The more explicit set of rights in this realm found in the contested traditional notion of self-determination and the emerging right to autonomy are indicative of international law's aversion to collective rights of minorities. Islamic law however has little issue of adopting an approach that centres on collective rights and autonomy in a host of matters relating to religious minorities. This difference in approach to rights is quite crucial as it underpins and undercuts much of the comparative discussions and in turn affects the advantages and disadvantages of each system.

Returning to the issue of scope of 'religion' relating to discrimination under international law, we understood it to be dependent on two main factors, self-identification and the perception of the perpetrator. The former because there are a number potential and real scenarios where States seek to deny recognition of a certain religious identity by themselves defining what may constitute a religion and even more so, if someone is able to claim to belong or practice that religion. The perception of perpetrators becomes important in situations where people may be discriminated or persecuted against due to mistaken assumptions based on appearance or other ostensible factors. However as we already discussed, there are no substantive factors which explain beyond self or other-perception of essentially identity what 'religion' might or could be and in turn what it may exclude under non-discrimination norms. For example if someone perceives of themselves as a Jew and/or others perceive of them as such, it becomes inconsequential whether they may be deemed to be Jewish by some objective means set by society, State or religious institutions for the purposes of religious discrimination to be present.

The first point to note is one of context and relevance. At the time when discussions around *dhimma* took place the number of religious groups was finite and limited. The complex diversity and plurality that can be witnessed in some Western European States today resulting from globalisation, colonisation, mass migration and mass displacement, and near extinction of indigenous population was not the prevailing reality. Instead the ethnic, religious and linguistic identities of various groups were known and easily discernible as beyond common knowledge and ethnicities correlated with religion, with the exception of Islam. This is important as the idea that there could be those who self-identified as a certain religion to be denied that identity or were mistaken to be religion that they were not, were simply not likely

scenarios to take place in that context. Furthermore due to the nature of nation-States, diverse populations are required to share in the national identity and thus integrate socially and in terms of work.

Classical Islamic law and the concept of *dhimma* was formulated in a context, where religious minority entities lived their separate autonomous lives socially and officially and there was no need or requirement to integrate or live amongst the Muslims, thus reducing the occurrence of types of discrimination contemporous with the present context. However where questions of discrimination do arise in relation to *dhimma,* are areas such as *jizya*, military participation and political participation including serving in executive or governmental posts. As here we are concerned only with scope, we will leave discussion of these particular issues for later in the thesis. What can be said nonetheless is that the debate on this has never been one of denial of rights of non-discrimination due to certain religious discrimination falling outside the scope of 'religion' but rather whether certain differences of treatment constitute unreasonable and arbitrary differences in treatment as laid out under international law. It being paramount to keep in mind that not all differences of treatment constitute discrimination if they are shown to be reasonable and objective.

We have established that Islamic law for the purposes of scope treats all aspects of religious minority rights equally as it primarily concerns itself with whether it is dealing with a religious minority or not. This follows that instead of then looking at scope for non-discrimination, religious freedom and minority rights separately, the comparison to Islamic law must look at the definition of terms through the prism of *dhimma,* which we have used as the closest comparator to religious minorities. We noted that conventional binding instruments and provisions on non-discrimination provided no substantive insight into 'religion'. Using Gunn's polythetical approach to defining 'religion' we deduced from Art. 18 of the Declaration on Religious Discrimination that 'religion' could be defined, understood and identified through a number of facets which included worship, community of adherents and leaders, places of worship and assembly, days of celebration, identity and a way of life. The same approach to freedom of religion yields the following facets from Art. 18 of UDHR: manifestation of religion through "teaching, practice, worship and observance" and "either alone or in community with others and in public or private". Finally Art. 27 of ICCPR mentions "profess and practise their own religion."

All these similar and closely related facets are not that divergent from Islamic law's approach to understanding the nature and bounds of religion. It may not be an explicit discussion that took place amongst jurists chiefly due to the absence of the complex diversity and plurality already touched upon, meaning that it was never really disputed what was and was not a religion. Nonetheless under Islamic law, religion would have been understood in juxtaposition, similarity or opposition to Islam itself. Non-Muslims were either perceived as People of the Book or polytheists, with as we discussed at length earlier another perspective considering the People of the Book as a sub-category of polytheists. While there is seldom discussion of atheists, it may be asserted that they would also be subsumed under the category of polytheists, thus a highly essentialist view of the Islamic world view and thus its understanding of religion is that there is a binary division between those who are

monotheistic (Muslim) and those who are polytheistic (non-Muslim). The specific treatment and reference to the People of the Book becoming pertinent as to them exhibiting elements of monotheism *and* polytheism.

Therefore it is certainly a sound deduction to surmise that the Islamic view of religion cannot be disentangled from the notion of God as that is the common denominator in the possibilities that it considers when identifying others by their religion. Monotheism being the belief in one God, polytheism being the belief in more than one God but also being synonymous with disbelief in one God, thus incorporating the notion of atheism, which is the belief in no God. It is also the case that discussion about the nature of religion is always coupled with what follows it. Much along the same lines as international law, it is presumed that a belief in God or Gods brings with it specific acts of worship and ritual that provide a means establishing and maintaining a relationship with such deistic entities. Under Islamic law, all groups, Muslim, Christians, Jews and polytheists have specific and elaborated methods of worship, practice and manifestation, which include and encompass all elements specified under international law above.

The only exception to this is the atheist and atheism as it is a reaction and a rejection to religion. Its inclusion under international law is to protect the right not to believe in order to eliminate any possibility or hint of coercion. Under Islamic law, atheism would come under the rubric of polytheism (i.e. *shirk*) as it would be a rejection of monotheism (Islam) and an affirmation of the polytheistic belief that some other or no entity could be vested with Godly attributes. Alternatively essentially, atheism could be seen as polytheism as it is a belief in other than God, and so is an association (*shirk*) with the one God. It is evident also that the issue of atheism and its inclusion within the ambit of freedom of religion under international law posed some conceptual problems. It was not a religion per se as it was the belief and was not linked to the notion of God and exhibited no accompanying outwardly acts, practices or manifestations. However it stood in contradistinction to religion and while it was not a religious belief, for the purposes of international law was a 'religious' right as it was a belief *about* religion rather a belief *in* religion. It was also necessitated to prevent an abuse, misapplication or misinterpretation of the freedom of religion so as to only be extended to religious beliefs, thus potentially used as indirect justification for non-protection of the right to freedom of religion of atheists to not believe. Hence the inclusion of atheism within the scope of freedom of religion has been implicit from the inception of the right in the UDHR and became explicit in the elaboration provided by the HRC.

Coupled with this, we deduced that the appendage of 'and belief' to the 'freedom of religion' reflected the above intricacies in that such a 'belief' need not be religious but be *related* to religion and was likely inserted specifically with 'atheism' in mind. It clearly did not include any generic belief in anything as was evident in the example of assisted suicide under the ECtHR. Therefore if under international law, atheists are not considered religious minorities but included within the scope of freedom of religion, then under Islamic law they are potentially included within the scope of *dhimma* as polytheists. Polytheism would be applicable to the atheist's beliefs from a point of view of substantial belief, but also from another perspective being synonymous with disbelief (*kufr*). This is due to the fact that

Islamic law categorises its subjects primarily by their religious beliefs and furthermore in opposition or in relation to Islam. Thus the absence of religious belief is as much polytheistic and disbelief as idolatry and the allegedly altered Abrahamic faiths of Judaism and Christianity. As far as Islam is concerned, theologically all non-Muslims are to be considered *kuffaar* (disbelievers) as they disbelieve in Islam and *mushrikeen* (polytheists) as they attach Godly attributes to other than God or a plurality of Gods, hence associating others (literally *shirk*) with God.

Essentially then all non-Muslims for the purposes of scope of *dhimma* are polytheists and the discussion around its limitation to the People of the Book only arises to them being an exception to the exclusion of polytheists as a subcategory as opposed to their religious beliefs being considered anything but polytheistic. Pertinently though it appears that even under Islamic law that *dhimma* status may be extendable to atheists as polytheists and as such inclusion in scope would be of beliefs *about* religion as opposed to *in* religion. This is almost identical to the international law position as per our discussion above. Similarly also under Islamic law, not all generic beliefs would be included as they would have to relate to religion; a belief in a religion or about a religion. This would immediately neutralise a potential significant criticism of Islamic law, that while international law protects freedom of religion *and* belief, Islamic law only extends protection to at its most to those of religion. Despite this, it is worth keeping in mind that the means of arriving at the same conclusion under both systems of law was quite different yet the result strikingly similar

The discussion in terms of the availability of interpretive approaches under international law is strikingly similar to those relating to the scope of *dhimma* under Islamic Law. In Chapter 2, we noted that the crux of the issue around the scope of *dhimma* was the classification of the Magians. We observed that the Shafi'i School in contrast to the other schools of law held that the Magians *must* be from the People of the Book, as there is no dispute as to their eligibility to *dhimma* status. In his view, Qur'an 9:29 was exhaustive and restrictive in its reference to *jizya* being taken from only the People of the Book and no other groups. This was because Shafi'i and subsequently his school of law held firmly to the principle that the Qur'an could not be abrogated by *ahaadith*. On the contrary it was the view of the majority of jurists and the other three major schools of law, in light of the polytheistic beliefs of the Magians, that the verse had either to be interpreted as being abrogated by the *hadith* or as we sought to reconcile between the two by noting that the mention of the People of the Book was not abrogated but modified or supplemented by the *hadith*. As such the reference to the People of the Book was a non-exhaustive reference open to additions and expansion.[354]

We find here in the potential interpretations of Article 27 a similar discussion where we seek to come to terms in particular with the meaning, scope of 'ethnic' and its relationship with the other types of listed minorities. While the case for considering ethnic identity as being inclusive of religious and linguistic identity may be a more progressive, ambitious and contested position to adopt, the inclusion of 'religious' and 'linguistic' as types and examples included within the scope of culture is far more indisputable. The net result is that the ethnic

[354] This is summary of our findings from above, 56.

head allows for all matter of groups, not just religious or linguistic, to access minority rights as long as they have a distinct culture which they actively seek to identify with and enjoy aspects of. Given that the term 'ethnic' is included within the scope of ICERD, a number of groups have been recognised such as Dalits[355], Roma[356] and Indigenous People.[357]

V. Conclusion

When we then come to the recognition of religious minorities as compared to *dhimmis*, we observe some surprising results. The aversion in international law and subsequently amongst States to define 'minority', specifically of the religious variety, and to recognise them emanates from a fear of attributing the associated minority rights as expressed in the UN Declaration on Minorities and the FCNM. These fears include, among others, at one extreme, separation and secession of the group and the territory in which they are predominant. The most common and general reason however appears to be the maintenance of a monolithic national identity. There is a sentiment that political power should not be conceded and further that there be no positive obligations upon the State with financial implications. Most importantly though while individuals' religious identity may be readily recognised, the group of such individuals are not recognised as religious minorities and as such group rights associated to the manifestation of their religion are not acknowledged nor granted.

In Islamic law, the situation is rather different. Once a religious belief is considered as legitimate, then all adherents are in fact treated as a group or minority in the first instance. Thus rights related to manifesting their religion in private and public are issues that are broached at the inset of deciding the appropriate treatment to be meted out to them. Furthermore they may even be allowed internal autonomy in relation to judging by their own religious laws and having a specifically defined territory akin to contemporary notions of autonomy. In summation under Islamic law, once it has been established as a matter of fact that a minority may or does exist; they then automatically become entitled to the rights owed to *dhimmis*, including those of manifestation of religion and autonomy. To the contrary in international law, the term has evaded legal definition and States have sought to exploit this subjectivity and discretion by refusing to recognise, as a matter of law, minorities, which beyond any doubt exist as matter of fact. This has politicised the recognition and attribution of rights of minorities to a greater extent as compared to other areas of human rights law.

[355] CERD GR 29 on article 1, paragraph 1, of the Convention (Descent).

[356] CERD GR 27 on Discrimination against Roma.

[357] CERD GR 23 on the right of indigenous peoples.

Section II

Freedom of Religion

Chapter 5

The Internal Aspect of Freedom of Religion under Islamic Law

I. Introduction

In the first three chapters of Section 1 of the thesis, we elaborated and analysed the concept of the scope of religious minorities and *dhimma* to grasp if there are religious groups that may be excluded from the protections and rights afforded in each system of law and on what basis. In Section 2, our aim will be to explore the substance of the rights that may attach to religious minorities and *dhimma*, with a particular focus on the freedom of religion. The rationale for this is the assumption that the freedom of religion is the most vital right of religious minorities as it goes to the heart of and intersects their identity, convictions and way of life. The freedom of religion, philosophically, under international law and as we will illustrate under Islamic law entails two parts: the internal right to hold beliefs followed by the external right to manifest or practice those beliefs.[358] The present chapter will seek to address the internal aspect of this right from an Islamic law perspective. The decision to devote an entire chapter to the topic under Islamic law is owing to both the fundamentality of the principle to Islamic law as well as the extensive critique it receives across disciplines and spheres.

Therefore it is logical to begin the discussion relating to freedom of religion of non-Muslims under Islamic law, by a thorough analysis of the fundamental and crucial internal aspect of the right to freedom of religion. Despite the presumed association of Islam with violence, it has seldom been asserted as a means of religious coercion intended to induce forced conversion of non-Muslims to Islam. Rather the discourse around violence and Islam has been focused on the achievement of political ends, self-defence and grievances over disputed lands and interventionist foreign policies of Western Governments. This is not to say, however, that the claim of religious coercion has never been levelled against Islam and its presumed agents.[359]

[358] UDHR Art. 18, ICCPR Art. 18 and ECHR Art. 9. See specifically paras 3 and 4 of General Comment 22.

[359] The claim has been levelled against Muhammad ibn Qassim, who conquered Sindh Province in present-day Pakistan in 711 A.D., but this account is highly contested. The accounts that show him as a more tolerant and lenient ruler provide a valuable insight into how he sought to apply Islamic law relating to the treatment of non-Muslims to previously unencountered religious groups, the Hindus, Buddhists and Jain, by treating them as *ahl al-dhimma* despite them being polytheistic. E.g. see Gier, N. F., "From Mongols to Mughals: Religious Violence in India 9th-18th Centuries", Presented at the *Pacific Northwest Regional Meeting American Academy of Religion*, Gonzaga University, May 2006 (http://www.webpages.uidaho.edu/ngier/mm.htm). Gier misrepresents the views of the four schools of law but confirms the treatment of Hindus, Buddhists and Jains as *dhimmis*: "When deciding among the four schools of Islamic law, Qasim chose the Hanafi school, the most liberal of the four in terms of treatment of non-believers. The Maliki, Shafi'i, and Hanbali schools all believed

However from a doctrinal and legal perspective, the issue, on the one hand, could be perceived as simply not interfering at all with the internal aspect of an individual's thought, conscience or religion owing to the emphatic and oft cited verse beginning: "There is no compulsion in religion [...]".[360] On the other hand, another verse which states in part "...kill the polytheists wherever you find them...But if they should repent, establish prayer and give *zakah*, let them [go] on their way. Indeed Allah is Forgiving and Merciful",[361] leads some to a different understanding of freedom of religion in Islamic law. They argue that this verse abrogates the earlier conciliatory verse and gives the choice to the polytheists of either death or Islam, thus forcing them to convert.[362] As far as non-polytheists are concerned, namely the People of the Book (Jews and Christians), they have the third option of paying *jizya* and remaining in Muslim lands as discussed in Chapter 2. This would then in their eyes constitute a weaker, but nonetheless, a form of coercion relating to freedom of religion.

Neither approach bears fruit when attempting to answer the original question of whether Islam grants an absolute internal right of freedom to hold beliefs. An attempt will be made to read the Qur'an and indeed Islam as a whole and within its various contexts. Thus the above well-known Qur'anic verses will be discussed in detail, their specific and general meanings unravelled by reference to both classical commentaries and contemporary juristic scholarship. Most crucially, the overarching message of Islam will be overlaid on to any textual analysis prior to arriving at final conclusions. In this regard, there are three common oversights that, if addressed, could bridge and reconcile opposing views. The first is the failure to distinguish between verses and rulings relating to a time of war or active hostilities and that of peace/ceasefire. The second is the failure to distinguish motives related to religious coercion and preventing threats to Islam's political authority[363] and preserving the religious nature of the State. The third is the failure to distinguish between warnings relating to punishment after death and the rulings on the treatment of non-Muslims in the immediate material life.[364]

II. Does Islamic law encourage religious coercion?

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that non-believers in lands conquered by Muslim armies should be converted or be executed. The Hanafi interpretation of *shari'ah* permitted Qasim to treat Hindus, Buddhists, and Jains as *zhimmis*, as People of the Book, the same status accorded to Jews and Christians. That meant that they could continue to live under Islamic rule as long as they paid their religious tax (*jiyah*). Under some Islamic rulers, *jiyah* was not required, and even when it was, collection was not consistently enforced or Hindus simply refused to pay it, sometimes even killing revenue officials." See also Marty, M. E., and Appleby, R. S., *Fundamentalisms Comprehended*, Vol. 5 (University of Chicago Press, 2004), 291-2.

[360] Qur'an 2:256.

[361] Qur'an 9:5.

[362] See below for detailed discussion in Section VI.

[363] This was the case in Madinah with treatment of the Jewish tribes of Qaynuqa, Nadir and Quraizah (discussed in detail below).

[364] Maghen, Z., "Theme Issue: The Interaction between Islamic Law and Non-Muslims: Lakum Dinukum wa-li Dini", *Islamic Law and Society*, Vol. 10 (2003), 268.

The starting point for addressing the question of whether or not Islamic law encourages religious coercion is necessarily Qur'an 2:256, which translates as follows:

> "There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in *taghut* and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing".

This has always been presented as the single most compelling Qur'anic evidence against those who argue that Islam does not allow for the freedom to *hold* a different religious belief. The peculiarity of the word '*taghut*' not being translated directly is present in both the Saheeh International translation of the Qur'an as well as the abridged English translation of *Tafsir Ibn Kathir*. The former elaborates the potential meaning in a footnote as "False objects of worship, such as idols, heavenly bodies, spirits, human beings, etc."[365] The latter states the most probable meaning attributed by commentators here is 'Satan'.[366] It is noteworthy from the wording alone to deduce that with its most apparent meaning, it forbids compelling or adopting of a new religion by force. This is confirmed by Ibn Kathir's classical commentary, which explained the verse as follows:

> "Do not force anyone to become Muslim, for Islam is plain and clear, and its proofs and evidence are plain and clear. Therefore, there is no need to force anyone to embrace Islam. Rather, whoever Allah directs to Islam, opens his heart for it and enlightens his mind, will embrace Islam with certainty. Whoever blinds his heart and seals his hearing and sight, then he will not benefit from being forced to embrace Islam."[367]

Therefore what is meant by the verse is that religious truth has become clear from falsehood to such an extent, that for those who sincerely and genuinely seek the truth, they would have no inhibitions through their own internal reasoning to follow Islam as a religion. Whereas those who choose to reject Islam, do so for innumerable other reasons, but vitally, not owing to a lack of clarity on what the 'right course' is. They would have turned their backs on the 'right course' fully well knowing that it was the truth. This is followed by condoning those who disbelieve in the *Taghut* and believe in Allah. Here belief is not to be equated to the existence of belief but following and obeying God's commandments. The notion mentioned by Ibn Kathir relating to "whoever Allah directs to Islam, opens his heart for it and enlightens his mind..." refers to the Islamic concept of predestination/fate and its relationship with our actions. This will be discussed further below.

The final part of the verse, referring to two specific attributes of Allah being "all-Hearing" and "all-Knowing", is not lacking significance either. They serve as a device to remind the reader that Allah hears all what you may say – when it may differ from person to person and even if nothing is uttered, He is fully aware of what resides in the hearts of men. A belief

[365] *The Qur'an, English Meanings,* English revised and edited by Saheeh International (al-Muntada al-Islami, 2004), 38, fn. 88.

[366] Mubarakpuri, *Tafsir Ibn Kathir*, 2:31-32.

[367] Mubarakpuri, *Tafsir Ibn Kathir*, 2:31.

adhered to in front of some people but not others (religious hypocrisy or *nifaq*) will be exposed on the Day of Judgement and a belief that is kept completely within oneself would also be manifest to Allah, whether it is belief or disbelief in Islam. Lastly and more pertinently, an outwardly utterance of belief or disbelief is valueless without the internal and genuine belief of the heart, always discernible to the all-Knowing and omniscient God. Hence, it serves as a double-edged sword, on the one hand warning those Muslims who go against this commandment that forcible conversion is not to be accepted if the state of the heart remains on disbelief and on the other, it may also serve to warn the religious hypocrites (*munafiqeen*) that they may feign outwardly belief but God is all-Knowing of their true inner state.

Ibn Kathir goes on to elaborate the circumstances of revelation of this verse (*asbab al-nuzul*) as recorded in a *hadith* narrated by Ibn Abbas:

> "When (an Ansar) woman would not bear children who would live, she would vow that if she gives birth to a child who remains alive, she would raise him as a Jew. When Banu An-Nadir (the Jewish tribe) were evacuated [from Madinah], some of the children of the Ansar said, 'We will not abandon our children'."[368]

It was then that this verse was revealed by God to indicate that those children could not be forcibly returned to their biological parents, nor forcibly converted to Islam. There is an alternate account mentioned in the non-abridged Arabic *Tafsir Ibn Kathir* according to which Ibn Abbas said: "it was revealed with regard to a man from the tribe of Bani Salim whose two sons converted to Christianity but he was himself a Muslim. He told the Prophet: 'Shall I force them to embrace Islam? They insist on Christianity'." Both Traditions point to quite an advanced notion of the right to freedom of religion pertaining to the children themselves and those of the adopted Jewish parents in the first instance and foregoing of the rights of the Muslim father in the second instance.[369] Despite this specific context, the verse is to be applied generally according to Ibn Kathir.

He also goes on to explain the *hadith* recorded by Imam Ahmed in which the Prophet said to a man: "'Embrace Islam.' The man said, 'I dislike it.' The Prophet said, 'even if you dislike it.'"[370] He affirms the authenticity of the *hadith* and then explains: "The Prophet merely invited this man to become Muslim and he replied that he does not find himself eager to become Muslim. The Prophet said to the man that even though he dislikes embracing Islam, he should still embrace it, "for Allah will grant you sincerity and true intent."[371] The *hadith* could also be seen as the Prophet distinguishing between what one likes and what one considers the truth. In other words, desires need to be disaggregated from reason at times. The Prophet is reasoning with him to accept the truth, even if there be hardship and difficulty, for it will only be temporary for an initial phase and temporary in the sense of being the

[368] Mubarakpuri, *Tafsir Ibn Kathir*, 2:30; Ibn Jarir cited in Al-Tabari 5:407; and Abu Dawud 14:2676.

[369] According to Ibn Abbas in *Tafsir Ibn Kathir* (Arabic) and Ibn Ishaaq, *The Life of Muhammad*.

[370] Ahmad, *al-Musnad*, cited in Mubarakpuri, *Tafsir Ibn Kathir,* 2:31.

[371] Mubarakpuri, *Tafsir Ibn Kathir,* 2:31.

prelude to the eternal abode in paradise. Furthermore the fact that such a conversation is taking place implies that there must be some interest in Islam or that the man has come to the Prophet with some problem seeking its solution.

Some translate and seek to understand Qur'an 2:256 as a factual statement rather than a commandment or a law: "There is no compulsion in religion" or "no compulsion is there in religion". This then may leave the possibility to suggest that it refers only to the non-feasibility of compulsion in religion rather than an outright forbiddance, seeking to pave the way and strengthen subsequent claims for exceptions to the statement.[372] Ibn Kathir's commentary is lucid that the verse is to be understood as the commandment, "Do not force anyone to become Muslim." This is further corroborated by the *asbab al-nuzul*, which set out that the verse served as a commandment to the Prophet for the *Ansari* children not to be forcibly converted and returned to their biological Muslim parents or the sons who had converted to Christianity not to be forcibly converted back to Islam by their Muslim father. The Prophet could have forcibly returned the children to their Muslim parents without having to justify their conversion as the parents would exert their authority and influence to control them in any case.[373] According to one juristic understanding, children are to be considered as not belonging to any religion apart from Islam until they reach adulthood (post-puberty) and profess to whatever religion they wish. This could serve as an example of treating the guardianship of the children as a matter of religious freedom for the Jewish parents. What should also be kept in mind was that this allowance – extremely painful to the biological Muslim parents – was at the time of Banu Nadir's expulsion for severe treachery against the Muslims in Madinah (discussed in detail below).

In any event the distinction between the verse being a statement or commandment is ultimately an artificial one. Why would God make a factual statement about an outright impossibility or an absolute incompatibility and then consider it an acceptable or permissible action in certain circumstances? The answer is clearly in the negative. However even taken at face value as a statement of infeasibility, it serves two purposes. The first is that for Muslims, God's words are sacrosanct and are indisputably contained in the Qur'an. Thus an indication towards compulsion and religion being incompatible is inseparable from a Muslim understanding it as something they must exert effort towards actualising. As such for a Muslim to read these words implies not only that they should not force Islam upon anyone but that they should not allow other Muslims to either. The specificity of *Muslims* being ordered not to impose *Islam* upon others is supported by the *asbab al-nuzul*.[374] A combined meaning is also derivable in that Muslims must prevent the forcible conversion of anyone to any religion.

[372] Friedmann, *Tolerance and Coercion,* 94.

[373] This would depend on the range of ages of the children, which is not known. Although it could be that in the first account the children are younger as the issue revolves around the rights of the biological Muslim verses the rights of the adopted Jewish parents and in the second account the rights of the father verses the independent rights of the sons.

[374] Umar ibn al-Khattab confirmed this interpretation and application of the verse when his offer of higher office to someone on condition of acceptance of Islam was turned down and when an old Christian woman also refused to accept Islam, cited in Friedmann, *Tolerance and Coercion,* 101.

The second is that despite the specificity given to the verse above, it carries general wording. The reference made is to *religion* not *Islam* and is in the form of a general statement not a commandment to Muslims specifically. Ibn Kathir, too, above notes the verse, while having a specific context of revelation, is of general application. Hence the general meaning can indeed be that 'religion compelled' constitutes an oxymoron and the principle is universally applicable regardless of which religion is the subject or object of compulsion. To surmise, ***no-one*** *can compel* ***anyone*** *in or to* ***any*** *religion*. Interestingly, with regards to non-Muslims, it could not be any more than a statement of fact and could not be seen as a commandment as they lack belief in Islam and as such the Qur'an as God's word. The Qur'an can and would not command them to anything except belief in God and His Messenger. According to the principle of Qur'anic commentary, it is possible for Qur'anic verses to carry several concurrent but non-conflicting meanings as is the case here. It would evade common sense and plain rationality to assume that any of the above would render a conclusion that compulsion was not feasible in religion, but did not prohibit or even permitted Muslims to exercise force on non-Muslims so that they would become Muslims.

It is also noteworthy that opponents of the idea that Islam espouses freedom to hold a religious belief conflate two contradictory arguments. The first is discussed above and relates to the wording of Qur'an 2:256 as a commandment or a statement and what effect, if any, it has on the meaning. The second is that Qur'an 2:256 is abrogated by Qur'an 9:5 as it calls on the Muslims to "kill the *mushrikeen*". We have shown that the argument of the verse not being absolute and leaving some room for the permissibility of forced conversion lacks basis. Whereas the view that abrogation has taken place is one of the valid opinions on the issue. Although it must be added that there are numerous views with their own nuances and the associated question of partial abrogation arising is the more common one (discussed in detail below in Section VI). The relevant point at this juncture though is that the argument for the meaning allowing for compulsion and at the same time being abrogated cannot be made simultaneously as they contradict each other. No abrogation is needed of a principle, which was never absolutely stated. This further weakens the point of Qur'an 2:256 having any meaning apart from an absolute freedom to hold a belief.

III. Islamic Conception of the Purpose behind God's Creation of Man

The infeasibility of a commandment prohibiting compulsion in religion is not only explicitly stated in Qur'an 2:256 but supported by the underlying basis of Islam and its essential message. Simply put, compelling Islam upon someone would wholly defeat and negate Islam's purpose. The core of the Islamic creed is that Adam was created to worship the one true God and having been tempted by Satan was sent to the Earth along with Eve and Satan for a time in order to worship the one God and abide by his commandments.[375] Thereafter, subsequent messengers up until the Prophet Muhammad were sent to call people to true monotheism. For those who accept, adhere and apply all related teachings and live their life

[375] Qur'an 2:30-39 and 2:115-123.

in the prescribed manner, would be granted eternal paradise and those who reject it would be destined for eternal torment in the hellfire.[376] As such man's eternal salvation or incarceration lies in his *free choice* to follow the truth or to reject it. Even Satan himself, when asked to prostrate to Adam, refused out of arrogance and pledged to misguide man until the Day of Judgement.[377] Once again belief is not in merely the existence of God but adherence to His commandments. Satan not only believed but knew with surety of the existence of God and that He was his Creator, but still chose to go against His commandments because arrogance prevented him from prostrating to that which he was adamant was lesser than him (Adam).

In light of the above, man must make this choice *independently*. Otherwise the basis of reward and punishment, in particular after death, would be redundant. If God does not seek to force his subjects to believe in Him, how is it possible for men to force each other? To do so would be an exercise in futility and self-deception. The compeller would have gravely erred for believing he is able to do something that God has prevented Himself from and he would have likely pushed the compelled further from true salvation and belief in the Truth. In fact, according to the Qur'an, free will is what elevated the first man, Adam, above the angels in status as the latter are in perpetual obedience and glorification of their Lord, while the former must struggle against their ego to do so. Free will is also a cause for the humiliation of others to the lowest of depths. These are both evidenced in the Qur'anic narrative when God informed the angels of the creation of man on Earth:

> "And [mention, O Muhammad], when your Lord said to the angels, 'Indeed, I will make upon the earth a successive authority. They said, 'Will You place upon it one who causes corruption therein and sheds blood, while we declare Your praise and sanctify You?'[378]

The response from God was "Indeed, I know that which you do not know"[379] referring to their incredible potential to do good not just harm. This view is further strengthened by God favouring Adam over the angels in teaching him the names of all things and commanding all present, angels and Iblees, to prostrate to Adam:

> "And He taught Adam the names – all of them. Then He showed them to the angels and said, 'Inform Me of the names of these, if you are truthful.' They said, 'Exalted are You; we have no knowledge except what You have taught us. Indeed, it is You who is the Knowing, the Wise.' He said, 'O Adam, inform them of their names.' And when he

[376] E.g. Qur'an 2:1-8 and 18:28-30: 'And say, "The truth is from your Lord, so whoever wills – let him believe; and whoever wills – let him disbelieve." Indeed, We have prepared for the wrongdoers a fire whose walls will surround them. And if they call for relief, they will be relieved with water like murky oil, which scalds [their] faces. Wretched is the drink, and evil is the resting place. Indeed, those who have believed and done righteous deeds – indeed, We will not allow to be lost the reward of any who did well in deeds. Those will have gardens of perpetual residence; beneath them rivers will flow. They will be adorned therein with bracelets of gold and will wear green garments of fine silk and brocade, reclining therein on adorned couches. Excellent is the reward, and good is the resting place.'

[377] Qur'an 2:32 and 20:116.

[378] Qur'an, 2:30

[379] Ibid.

> had informed them of their names, He said, 'Did I not tell you that I know the unseen [aspects] of the heavens and the earth? And I know what you reveal and what you have concealed.' And [mention] when We said to the angels, 'Prostrate before Adam'; so they prostrated, except for Iblees. He refused and was arrogant and became of the disbelievers."[380]

The Qur'an and *ahaadith* are replete with emphasis on the true state of the heart and related notion of pure intentions (seeking success in the Hereafter and forsaking the material world). Simultaneously, the overall message of Islam points towards how belief in God works hand in hand with actions emanating from that belief. Both must coexist for Islam to be ideally practiced. Belief in itself without any actions leaves ones Islam lacking, as illustrated by the extreme example of Satan, who believed in God but disobeyed and refused to submit. Conversely Islamic actions without true belief in the heart also leaves one's Islam lacking. Based on this, the Qur'an begins by describing the three categories of people that may result. The first are the true Muslims (*mu'minoon*) who believe and do righteous actions enjoined upon them.[381] Islam resides in their hearts and is manifested on their limbs. The second are those who disbelieve (*kafiroon*) and reject the message of Islam, not just inwardly but also outwardly.[382] The third are the religious hypocrites (*munafiqoon*) or those who are outwardly Muslim but inwardly disbelieve. Disbelief (*kufr*) resides in their hearts, but Islam is fraudulently enacted on their limbs.[383]

Of the two groups of disbelievers, the punishment awaiting the *munafiqoon* is greater. They are said to be in the lowest depths of Hell[384] and they are warned of '*adhabun aleem*' (torturous punishment)[385] rather than an '*adhabun adheem*' (great punishment) reserved for the apparent disbelievers.[386] One of the reasons for this tougher line is that they intended to harm the Muslims from within and colluded with their enemies due to their hatred of Islam. Another telling facet of Islamic law is that regardless of how convinced one may be of someone's religious hypocrisy or suspect them, they would not qualify as a *munafiq* themselves. This is mainly because disbelief once known with certainty or expressed must then be considerer *kufr*. If it stays hidden or ambiguous only then can it be considered *nifaq*, which if died upon, is a matter for their judgement in front of God.

One of the main proofs for this position is that although God revealed to the Prophet the names of all the hypocrites, he did not share or announce this list. Instead he only disclosed the names to one companion, Hudhaifah ibn al-Yamaan, who was sworn to secrecy by the

[380] Qur'an. 2:31-4.

[381] Qur'an 2:1-5.

[382] Qur'an 2:6-7.

[383] Qur'an 2:8-16.

[384] Qur'an 4:145: "Indeed, the hypocrites will be in the lowest depths of the Fire – and never will you find for them a helper."

[385] Qur'an 2:10.

[386] Qur'an 2:7.

Prophet.[387] He was tasked with keeping track of their movements and plans so as to alert the Prophet of any threat or danger emanating from them. This is illustrative of the sheer importance Islam lends to what is in one's heart while also the inability of man to forcibly change what is in others' hearts but equally his inability to discern with any certainty what the heart conceals. As such the risk of mistaking a genuine Muslim who one believes is a *munafiq* is too great for it to be left as a possibility. The Prophet was aware as to the destructive discord that could result amongst his followers if the door was opened for one ostensible Muslim to pronounce another a *munafiq.* Even for himself, the source of his certain knowledge was said to be divine revelation rather than deduction, he refrained from exposing the identity of the *munafiqoon*. Hence, a *munafiq* in the present material life is always to be considered a Muslim, until the point where his disbelief becomes apparent through his own actions or by his own proclamation, at which point he becomes a disbeliever (*kaafir*). As such there can be no such thing as a publicly self-identifying *munafiq*.

Some useful insights may be drawn from the status of the *munafiq* for the present discussion of whether there can be compulsion in religion, in particular of forcing someone to become Muslim. The *munafiq* is worse in the Sight of God and will be judged more severely in the Hereafter than the standard *kaafir.* This is because he deceived, lied and violated the trust of the Muslims. The one forced to accept Islam only differs from a *munafiq* in that he did not *willingly* ascribe to Islam publicly. He also differs in that he may not hold the same enmity towards Islam and Muslims as the true *munafiq.* Nonetheless he may develop it out of resentment of being compelled and coerced. In any case, why would a Muslim who is aware of the critical nature of what is in the heart force only outwardly adherence to Islam? They will never be able to forcibly embed Islam in another's heart as well as know if it has entered or not. As such in the material life, the worst category of mankind, the wilful *munafiq*, is given the most lenient treatment and treated for all intents and purposes as a Muslim. Furthermore it would be nonsensical for Islam to permit or condone a practice which would likely increase *nifaq*, the most reprehensible state in Islam.

The final point to be made in this section is that of God's repeated assurances and consoling of the Prophet and many Messengers before him of the fundamental notion that they have been chosen to deliver the Message. This was most notably the case with Noah, Moses, Lot, Jesus and Muhammad. Noah preached monotheism and warned against idol worship to his people for 950 years.[388] Moses repeatedly found the Children of Israel transgressing despite innumerable signs, miracles and favours bestowed upon them.[389] Pharaoh (*Firaun*) was also unwilling to accept Moses' invitation to true monotheism.[390] Lot was unable to amend the

[387] See Sahih Bukhari, Hadith No. 3742: "Is there not among you the confidant/keeper of secrets of Nabi (sallallahu 'alayhi wa sallam), whom no one but he knows [i.e Hudhayfah radiyallahu 'anhu]?"; and Asqalani, *Fathul Bari*, under Hadith 3742/3: "Hafiz Ibn Hajar (rahimahullah) explains, 'secrets' refers to the information regarding the Munafiqun".

[388] Qur'an 71 and Qur'an 11:25-27: "And We had certainly sent Noah to his people, [saying], Indeed, I am to you a clear warner that you not worship except Allah. Indeed, I fear for you the punishment of a painful day."

[389] Most of Qur'an 2 is devoted to this topic.

[390] Qur'an 7:103: "Then We sent after them Moses with Our signs to Pharaoh and his establishment, but they were unjust toward them. So see how was the end of the corrupters."

corruption of his people and his wife is one of the few specified female *munafiqoon* in the Qur'an.[391] Jesus was rejected by the majority of Jews, even though they were the people to whom he was sent.[392] As for the Prophet he too, was consoled at being frustrated with people rejecting his message, which included his kith and kin in Makkah, the Quraish; the people of Taif, who stoned and ridiculed him; and to his grave dismay his uncle, Abu Taalib, who had protected him throughout his life. The Prophet is repeatedly informed that he is only sent as a warner and bringer of glad tidings.[393]

In Qur'an 2:6-7, the Prophet is told that "Indeed, those who disbelieve, it is the same for them whether you warn them or do not warn them - they will not believe. Allah has set upon their hearts and upon their hearing, and over their vision is a veil. And for them is a great punishment."[394] The first point to note is that the Message of monotheism transmitted by Messengers was always to be given to mankind through reasoned persuasion and not force. The second point, evident in the above verses, is that for some no matter how the truth is presented to them, the effort is futile. This served a number of purposes. The primary purpose was to convey to the Prophet that he was not blameworthy and should not take the rejection of the Message as his failure to fulfil his mission. This is reflected throughout the Qur'an in numerous verses. The first of two notable examples is Qur'an 3:20:

> "So if they dispute with thee, say: 'I have submitted my whole self to Allah and so have those who follow me.' And say to the People of the Book and to those who are unlearned: 'Do you (also) submit yourselves?' If they do, they are in right guidance, but if they turn back, your duty is to convey the Message; and in Allah's sight are (all) His servants."

And Qur'an 10:99-100:

> "And had your Lord willed, those on earth would have believed – all of them entirely. Then, [O Muhammad], would you compel the people in order that they become believers? And it is not for a soul [i.e., anyone] to believe except by permission of Allah, and He will place defilement upon those who will not use reason."

Qur'an 2:6-7 also touches on two deeply philosophical and complex theological concepts, that of predestination (*qadr*) and God's discretion on who may or may not be guided. Both are distinct and vast fields of study themselves, but we will only try to grasp the basic notions underpinning them, in brief, for the purposes of the present discussion on compulsion in religion. As for predestination, everything is said to be already 'written' or decreed. Thus

[391] Qur'an 7:80 & 83: "And [We had sent] Lot when he said to his people, 'Do you commit such immorality as no one has preceded you with from among the worlds [i.e., peoples]? [...] So We saved him and his family, except for his wife; she was of those who remained [with the evildoers]."

[392] Qur'an 19:30 & 37: "[Jesus] said, 'Indeed, I am the servant of Allah. He has given me the Scripture and made me a prophet [...] Then the factions differed [concerning Jesus] from among them, so woe to those who disbelieved – from the scene of a tremendous Day."

[393] The Prophet is referred to as a 'warner' 56 times, often coupled with 'bringer of glad tidings', e.g. Qur'an 7:188 and 17:105.

[394] Qur'an 2:6-7.

God is well aware of who will end up believing and disbelieving. Furthermore Islam holds that predestination can be affected by supplication (*dua*). The topic has been and continues to be some cause for consternation for those new to the faith or weak in it, and is considered one of the traps of the Satan. The thought may occur to some, how can everything be pre-decided but still be affected by free will of individual entities. The answer simply is that predestination is a result of free will. God in His omniscience is aware of all that will happen, as if it had already happened. This does not in any way absolve us of our ability given by Him to be free agents and affect change to what has been decreed. However the notion does serve to show to the Prophet that some people, God knows, will not accept Islam at any cost. The associated notion of God's power and ability to guide people, serves here to convey to the Prophet that if God wanted he could make everyone Muslim but this is not the purpose of creation.[395] Furthermore when the Qur'an mentions that their hearts were sealed, it is once again a fact but which is preceded with transgression and disobedience.[396]

IV. Utility of Surah al-Kafiroon[397] in relation to "Non-compulsion" in Religion

One of the main counter arguments employed against the principle of no compulsion in religion is that a number of conciliatory or 'tolerant' verses and *ahaadith* were from the time of early Islam in Makkah. Hence firstly it was a time when the Prophet was not in a position of authority to be able to exert political authority and secondly that any espoused notions of religious tolerance or freedom of expression were appeals from the Muslims not to be persecuted and left in peace to practice their religion. In this regard, it is essential to analyse Surah al-Kafiroon (Qur'an 109) from the Makkan context and compare it to the period after *Hijra* (migration) to Madinah, where the Prophet was the religious *and* political leader over Muslims and non-Muslims.

For the Makkan period of Islam, it is safe to say that there was little or no freedom of religion for the Muslims. The Prophet began by preaching to only friends and family, with his wife Khadija[398] and cousin Ali[399], the first to convert. Abu Bakr's conversion led a number of others accepting Islam, most notably, Uthman.[400] The new religion was practiced in secret as were meetings among the Muslims and the Prophet initially. Adherents did not proclaim their faith publicly either. After three years of secrecy in the practice of Islam in the nascent community of believers, the Prophet was ordered to publically proclaim, profess and indentify with the faith[401]: "Proclaim what you have been ordered and turn aside from the

[395] Qur'an 10:99-100.

[396] Qur'an 2:6-7.

[397] Qur'an 109, "The Disbelievers".

[398] Ibn Ishaaq, 155.

[399] Ibid, at p. 114-5.

[400] Ibid, at p. 115-7.

[401] Ibid, at p. 117.

polytheists", "warn thy family, thy nearest relations, and lower thy wing to the followers who follow thee", and "say, I am the one who warns plainly".[402]

Rather, with an increase in the number of followers, the stance of the Quraish towards Islam hardened and became more severe.[403] Thus the growing numbers accompanied by a boldness on the part of the new religious community drew the wry and wrath of the leaders of the Quraish. At this point, Muslims were tortured and attacked due to their belief and compelled to retract and reject their belief in Islam. Ironically that which Islam came to supersede and dismantle was a means of protection for some of the Muslims – the Arab tribal structure. The Prophet was protected by his uncle Abu Taalib.[404] His four main companions Abu Bakr, Umar, Uthman and Ali all came from established families and so were protected as blood ties were considered to be stronger than those of religion.

Of the unprotected and poor[405] to face the brunt of resentment towards the Muslims were the family of Ammar bin Yasir,[406] both of whose parents lost their life under torture, the first martyrs of Islam. Another case in point is that of Bilal, a slave who proclaimed faith resulting in public torture by his master Umayah bin Khalaf, so that he would renounce his faith. He was only saved because Abu Bakr bought him for an extortionate amount of money and then freed him.[407] In the case of Ammar bin Yasir himself, who caved in to the physical torture, a verse was revealed that his renunciation of faith under force was not to be taken against him and that God would judge him on what was in his heart even if he negated his belief outwardly due to fear of life.[408] If faith of a Muslim cannot be annulled through compulsion, then why would there be an acceptance of faith by God and the Muslims of a non-Muslim through force?

It could then be asserted that the Makkans sought to some extent limit or not avail the right of freedom to belief to the Muslims, when the Prophet "spoke disparagingly of their gods...they took great offence and resolved unanimously to treat him as an enemy...they [Muslims] were a despised minority"[409], as many were confronted with facing torture, being attacked, murdered or being driven out, for as much as merely publicly being identified as such and then being forced to revert to the polytheism of the Makkans. The situation reached such an acute level that the Prophet ordered a group of his followers to emigrate to the land ruled by Christian Negus, King of Abyssinia.[410] Even when the emigration to Madinah took place, the

[402] Qur'an 15:94, 26:214 & 15:8-9, cited and translated in Ibn Ishaaq, 117.

[403] Ibn Ishaaq, 118-121.

[404] Ibid, at p. 118.

[405] Ibid, at p. 143-5.

[406] Ibid, at p. 145.

[407] Ibid, at p. 143-4.

[408] Qur'an 16:106: "Whoever disbelieves in Allah after his belief except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment."

[409] Ibn Ishaaq, 118.

[410] Ibid, at p. 146-50.

Prophet sent others ahead and himself stayed in Makkah to continue preaching.[411] Most importantly the early Muslims were never allowed to freely profess their faith in public or to practice it or have meetings. In other words there was no official recognition of religion – it was tantamount to being illegal in fact - being impermissible to even hold these views.

Rather than a plea to be left alone or evidence of double standards, Surat al-Kafiroon is a bold statement from a position of weakness that we will not give into your coercion, that the freedom to believe is a sacrosanct right and that the Muslims will not be swayed or pressured into changing their belief, through force or otherwise. In fact force has the opposite of the desired effect. It makes ones aversion to that which one is being forced further entrenched. The *asbab ul-nuzul* frame the context as when the Quraish attempted to reason with the Muslims by proposing that the Prophet worship their gods for a year and then they would worship his God for year and so on hybrid religion as a means to resolve the tension.[412] It is a clear, strong and defiant message to the Muslims not to flinch or veer in their unbending belief no matter what is thrown at them, whether it be death, torture, ridicule or ploys to dilute belief. This was the message from the oppressed Muslims to the oppressing governing authorities that they will not give into any attempts of coercion but also that in corroboration of Qur'an 2:256 that compulsion in religion is an infeasibility. The Makkans should desist from their attempts and that the Muslims have sought to do no such thing to the Quraish.

It is in relation to this last point that it may be contended that it was a self-interested and temporary principle as it impacted on the religious freedom of the Muslims and that the Muslim conceptualisation of freedom of religion shifted considerably once they assumed power and become the governing authority in Madinah and the religious freedom under discussion was not of Muslims. Oft cited in its support are the expulsions of the two Jewish tribes of Madinah, the execution of the men of another and later the expulsion of all non-Muslims from the Arabian Peninsula.[413]

V. The Jewish Tribes of Madinah

An argument against the assertion that Surat al-Kafiroon was of a self-interested and temporary nature is the Constitution of Madinah[414] instituted by the Prophet. Here the context is completely distinguished from that of Makkah where the Muslims were weak in strength, small in number and persecuted with intensity. On the arrival of the Prophet to Madinah, many residents became Muslims. His status was now that of political and religious leader of

[411] Ibid, at p. 213.

[412] Tafsir Ibn Kathir, 5673.

[413] See Ye'or, B., *Islam and Dhimmitude: Where Civilizations Collide* (Fairleigh Dickinson University Press, 2002); and . McKinney, S. J., "Echoes of the Dhimma: Discriminatory Vestiges of an Ancient Islamic Covenant", *Regent Journal of International Law,* Vol. 6 (2008).

[414] See generally Berween, M., "Al-Wathiqa: The First Islamic State Constitution", *Journal of Muslim Minority Affairs,* Vol. 23, No. 1 (2003); and Hamidullah, M., *The First Written Constitution in the World : An Important Document of the Time of the Holy Prophet* (Lahore: S.M Ashraf, 1968). Reliance on the Constitution of Madinah must be caveated by the debate around its authenticity. See above, 15, fn.13.

Madinah. As such he could have imposed his political and religious will upon the population. Instead the Constitution of Madinah expounded the same freedom of religion as in Surat al-Kafiroon in relation to the Jews of Madinah: "to them their religion".[415] Thus the contention that Surat al-Kafiroon was of a temporary nature is negated by the above and in any case it has to be taken in its general meaning too, not limited by time, place or subject, as well as its specific context.

Opponents point out that despite Muslims having the position of the governing authority and power and hence superiority, it remained the early phase of such authority and it was in their interest to be tolerant at the very beginning to consolidate Islam's political authority. Secondly they note the expulsion and execution of the Jewish tribes.[416] In this regard the general point that needs to be made is that the expulsions and executions occurred as a direct result of going against the Constitution of Madinah and engaging in severe treason against the State and the Muslims. This decision was then as a result of serious concerns about state security, public good and responding to criminality. It had on the contrary nothing to do with the faith of the Jewish tribes or a shift in the attitude of the Muslims as to the freedom of religion that should be afforded to other religions. If this was the case, the Jewish communities would have been dealt with as a religious whole rather than as individual tribal entities. This is further substantiated by the *asbab ul-nuzul* of Qur'an 2:256, which note that it was in fact at the time of expulsion of one of these tribes that the verse was revealed in relation to the plea by the biological Muslim parents of children raised by Jewish families to be returned as discussed earlier above.

Despite this, it is of value to have some detailed overview of what exactly took place in relation to the effected tribes to make the point conclusive. However before beginning, it is vital to understand the context and relationship between the Jewish tribes and the tribes of Aws and Khazraj. The Jewish tribes were said to have fled from Christian lands, where they were acutely persecuted due to their views on Jesus and Mary. In Madinah, according to some historians[417], as they were unable to gain power and control due to numbers and weakness, they sought to cause infighting between the two main tribes, Aws and Khazraj. They succeeded and numerous armed confrontations ensued between the two tribes. This did not only serve to weaken the hold of the dominant tribes but also strengthen the Jewish tribes politically and financially.[418] Furthermore it was with this backdrop that a group of Khazraj from Madinah sought to meet the Prophet in Makkah. They were keen to learn and hear more about the message of Islam, in particular it's Messenger's ability to reconcile between the

[415] Berween, "Al-Wathiqa", 112: "The Jews of the Bani Awf are one community with the believers (the Jews have their religion and the Muslims have theirs), their freedmen and their persons, except those who behave unjustly and sinfully, for they hurt but themselves and their families."

[416] See Shahid, S., "Rights of Non-Muslims in an Islamic State", in Spencer (ed.) *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (Prometheus Books, 2005).

[417] Al-Ghazali, M., *Fiqh-us-Seerah*, *Understanding the Life of Prophet Muhammad* (International Islamic Publishing House, 1999), 166.

[418] Ibid.

tribes of Aws and Khazraj. On their first meeting with the Prophet, the group accepted Islam and stated:

> "We have left our people, for no tribe is so divided by hatred and rancour as they. Perhaps God will unite them through you. So let us for to them and invite them to this religion of yours; and if God unites them in it, then no man will be mightier than you."[419]

Even prior to the Prophet's own migration to Madinah, a huge number of Aws and Khazraj had accepted Islam. After the assumption of religious and political leadership in Madinah by the Prophet, the brotherhood offered by the new religion had by in large extinguished the previous tribal enmity.[420]

The first to be expelled from Madinah were Banu Qaynuqa. Some among them had attempted to stoke old rivalry between the now mostly Muslim Aws and Khazraj tribes. A man from Banu Qaynuqa reminded a group of Aws and Khazraj about their old rivalries and humiliation and harm suffered by each at the hands of the other. They succeeded and there was a stand-off amongst the group which soon spiralled and came close to the brink of violent conflict again. However the Prophet heard of this and is reported to have said:

> "O Muslims! By Allah! Have you entered the state of pre-Islamic ignorance while I am still among you, after Allah guided you to Islam, honoured you with it, by it He cut the fetters of ignorance from your necks, and delivered you from disbelief and united your hearts?"[421]

No action was taken by the Prophet against the Banu Qaynuqa. However it was notable that the attitude of all three Jewish tribes became more hostile and provocative and their enmity became publicly stated and known and more pronounced, particularly after the victory of the Battle of Badr against the Quraish of Makkah. In specific relation to Banu Qaynuqa, they began to mistreat Muslims, jeering at them and hurting those who visited their areas and even frightening women.[422] As such the Prophet in order to warn Banu Qayquna from escalating hostilities and a potential armed confrontation warned and threatened them: "O you Jews! Enter Islam before you suffer what happened to the Quraish."[423] The attempt to quell their growing enmity against the Muslims did not bear fruit and they responded boisterously:

[419] Ibn Ishaaq, 198; and al-Ghazali, *Fiqh-us-Seerah*, 167.

[420] al-Ghazali, *Fiqh-us-Seerah*, 167. See also Ibn Ishaaq, 230: all from the tribe of the Ansar accepted Islam except a few.

[421] Ibn Hisham 1/555-6 cited in Mubarakpuri, *The Sealed Nectar*, 213.

[422] Ibid. at p. 214.

[423] Ibid.

> "O Muhammad! Do not deceive yourself, you merely fought a party of the Quraish who were inexperienced at war. But if you want to fight us then know that we are an entire people! And indeed you have not met up with anyone like us before!"[424]

There was no response to this either by the Prophet. Not long after, a Muslim woman visited the market of Banu Qaynuqa and in an attempt to ridicule and humiliate the woman, a goldsmith fastened the border of her garment to the back of it, so when she stood to leave it uncovered her private area. Everyone began to laugh. She fixed herself and left. A Muslim man then came and killed the goldsmith. The crowd of local Jews then turned on the Muslim man and killed him.[425] When the family sought the help of the Muslims, it initiated a conflict between the Muslims and Banu Qaynuqa. The Muslims laid siege to their fort for fifteen days resulting in their surrender. Before the Prophet came to Madinah and made peace between the tribes, Khazraj were allied with Banu Qaynuqa. As such Abdullah ibn Ubayy, who was a prominent *munafiq* and of the Khazraj, pleaded: "O Prophet, be kind to my clients", while holding on to the Prophet's armour. The Prophet was visibly angry and demanded twice for him to let go. On this Abdullah replied: "No I shall not let you go till you show kindness to my clients. Four hundred without armour and three hundred with armour: They have protected me from all and sundry. Now you are going to slaughter them in one morning? I am a man who fears the consequences, by God". The Prophet responded "They are yours on condition that they leave Madinah and do not settle near us".[426] They were then expelled after handing over their arms.[427]

On an individual level, the most hostile and outspoken against the Muslims following the Battle of Badr was Ka'b bin al-Ashraf. His mother was from the Banu Nadir and he lived near them. He was wealthy, a poet and handsome. On hearing the news of Badr he exclaimed: "Is this true? Did Muhammad actually kill these whom these two mention [...] These are the nobles of the Arabs and kingly men; by God, if Muhammad has slain these people 'twere better to be dead than alive."[428] He wrote poems defaming and satirising the Prophet and praising the Quraish, enticing them to avenge the defeat at Badr.[429] He even travelled to Makkah in order to provoke the Makkans to avenge themselves. When he returned to Madinah, he first composed amorous poems about Muslim women[430] and later

[424] An alternate wording in Al-Ghazali, *Fiqh-us-Seerah,* 269: "Do not be deceived by the fact that you encountered a people who had no knowledge of warfare and thus you took advantage of them. By God, if we fought you, you would have known who were the real men". Also mentioned with separate wording in Ibn Ishaaq, *The Life of Muhammad: A Translation of Ishaaq's Sirat Rasul Allah,* with introduction and notes by A. Guillaume (Oxford University Press, 1955), 363.

[425] Al-Ghazali, *Fiqh-us-Seerah,* 269.

[426] Ibid. at p. 268-70; and Ibn Ishaaq, *The Life of Muhammad*, 363.

[427] Mubarakpuri, *The Sealed Nectar*, 214-5.

[428] Ibn Ishaaq, *The Life of Muhammad*, 365.

[429] Mubarakpuri, *The Sealed Nectar*, 216; and Al-Ghazali, *Fiqh-us-Seerah*, 272.

[430] Ibn Ishaaq, *The Life of Muhammad*, 365-7, e.g. a poem mentioning Ummu'l-Fadl and Umm Hakim by name; and al-Ghazali, *Fiqh-us-Seerah*, 273.

resorted to obscene poems and songs insulting and defaming Muslim women.[431] Consequently the Prophet ordered his assassination, which was carried out with intricate planning as he resided in a fortress on the outskirts of Madinah.[432]

Following this, Abu Sufyan prepared a force of 200 horsemen but was reluctant to attack Madinah in the day. He instead came to Madinah under cover of night and was hosted by Salam ibn Mishkam, Chief of the Jewish tribe of Banu Nadir on the outskirts of Madinah. He was given full account of the situation including information about the Muslims within Madinah. They discussed how best to hurt the Muslims. Abu Sufyan then raided the suburb of Al-Arid, cutting and setting ablaze palm trees and the fences and murdering two Muslims.[433] The Prophet took no action in response against Banu Nadir or Abu Sufyan's host, Salam ibn Mishkam.[434]

The failure of the Muslims to emerge victorious at the Battle of Uhud caused a further deterioration in the relation between them and the Jewish tribes. Whereas the success of Badr and emerging ascendency of the Muslims was a cause of resentment, the failure at Uhud presented an opportunity to capitalise on the perceived weakness of the Muslims. This anti-Muslim sentiment extended beyond the Jewish tribes to the hypocrites of Madinah, the Quraish and the Bedouin tribes in the vicinity of Madinah. They all saw this period as one to form an alliance with each other to stem the ascendency of the Muslims and Islam. As such, following the expulsion of Banu Qaynuqa and death of K'ab bin Al-Ashraf, the Jewish tribes continued and increased their contacts with the hypocrites and the Quraish. As they were inexperienced in war, they resorted instead to open hatred and enmity, but not conflict.

The Muslims suffered two painful and damaging ambushes. The first claiming the lives of up to ten companions[435] at Ar-Raji and 70 of the best reciters of Qur'an at the Well on Ma'unah by Arab tribes who feigned interest in Islam only to trap the Muslims.[436] When one of the few surviving Muslims from Ma'unah came across two members of one of the tribes that had laid the ambush, he killed both as revenge. He later found out that they had been allowed in to Madinah on the security of the Prophet. When the Prophet heard about this he said: "You have killed two men whose bloodwit I must pay."[437] He sought to raise blood money from the Muslims and its allies. When the Prophet went to Banu Nadir to request assistance in raising the money as per their treaty, they accepted but then on consulting each other attempted to try to kill him by dropping a rock on him, but their plan was unsuccessful.[438]

[431] Mubarakpuri, *The Sealed Nectar*, 217; Ibn Ishaaq, *The Life of Muhammad*, 367, mentions some verses to show how explicit they were.

[432] Ibn Ishaaq, *The Life of Muhammad*, 368; and al-Ghazali, *Fiqh-us-Seerah*, 274.

[433] Al-Ghazali, *Fiqh-us-Seerah*, 275; Mubarakpuri, *The Sealed Nectar*, 216; and Ibn Ishaaq, *The Life of Muhammad*, 361-2.

[434] Mubarakpuri, *The Sealed Nectar*, 216.

[435] Two accounts: one of 7 and another of 10.

[436] See Ibn Ishaaq, *The Life of Muhammad*, 434 for detailed account.

[437] Ibid. at p. 435.

[438] Ibid. at p. 437; and al-Ghazali, *Fiqh-us-Seerah*, 308.

According to another report by Abu Dawud and others, the Quraish threatened to enslave their women if they did not kill the Prophet. So the Banu Nadir sent a message to the Prophet requesting that he send thirty of his companions to meet thirty of their rabbis. If they were convinced with what they had to say, their people would follow suit. Then some of the Banu Nadir had doubts as being able to fight thirty of the Prophet's companions in order to kill the Prophet. So they sent another message asking for only three to meet from each side. However on their way, the Muslims learnt of their plans, to kill the Prophet. The Prophet surrounded them and asked for a treaty but they refused. He at the same time offered a treaty to Banu Quraizah who agreed.[439]

In either case there was an attempt at the Prophet's life. Consequently they were given ten days to leave Madinah.[440] The leader of the hypocrites, Abdullah ibn Ubayy, advised Banu Nadir to ignore the warning of the Prophet and assured the support of 2000 of his own followers and said he would convince Banu Quraizah and Banu Ghatafan to join them. Based on this, Banu Nadir took the decision to fight. The Muslims laid siege for 6 or 15 days. Banu Quraizah remained neutral and Ubayy and Banu Ghatafan failed to meet their promises.[441] They offered to surrender, asked the Prophet to spare their lives and deport them on condition that they could take as much of their property as their camels could take except the armour. The Prophet agreed.[442] He also allowed them to take all their belongings with the exception of weaponry evident in the fact that even beams and gates of houses were taken.[443] The caravan amounted to 600 camels.[444] According to Ibn Ishaaq, they went with such pomp and splendour as had never been seen in any tribe in their days...with women and children and property with tambourines and pipes and singing girls playing behind them.[445] Surah al-Hashr was revealed specifically relating to this incident of expelling the Banu Nadir.[446]

Of those expelled, a group headed for Khaiber led by their chiefs, Huyayy ibn Akhtab and Salam ibn Abul-Huqaiq, while another group headed for Syria. There remained severe resentment amongst those of Banu Nadir in Khaiber due to their expulsion. The resentment was fuelled further by the continued ascendency of the Muslims following the humiliating retreat of the Makkans to not even engage the Muslims at the second Battle of Badr.[447] Consequently they felt compelled to manifest their animosity and resentment by dislodging the Muslims from their growing dominance and control over the region and for them to be defeated. However not having the ability or the confidence for the military undertaking in light of being disarmed and already defeated by the Prophet, they sought to once again to

[439] Mubarakpuri, *The Sealed Nectar*, 268.

[440] Al-Ghazali, *Fiqh-us-Seerah*, 308.

[441] Ibn Ishaaq, *The Life of Muhammad*, 437; and Ibid. at p. 308-9.

[442] Ibn Ishaaq, *The Life of Muhammad*, 437.

[443] Al-Ghazali, *Fiqh-us-Seerah*, 309-10.

[444] Mubarakpuri, *The Sealed Nectar*, 267.

[445] Ibn Ishaaq, *The Life of Muhammad*, 438.

[446] Qur'an 59:1-24.

[447] Ibn Ishaaq, *The Life of Muhammad*, 447-8.

incite the Quraish to recover their lost honour and also to provoke the neighbouring Arab tribes and Bedouins against the Muslims. Their first step was to send twenty of their chiefs to Makkah itself and convince the Quraish to take on the Muslims with full backing from themselves. With the humiliation of the retreat from the second meeting at Badr fresh in the Makkan's mind, this seemed an opportunity to make up for that. Incitement, provocation and the backing of Banu Nadir bolstered their spirits. They then headed for Ghatafan and convinced them to also join the growing alliance of anti-Muslim forces.[448] The delegation continued to visit and advocate war against the Muslims as an alliance to other tribes in Arabia. Soon they had also convinced the Kinnah and allies from Tihamah, Banu Sulaim, Banu Murrah, Fazarah and Ashja, until they constituted an army of 10,000 men.[449]

This was the beginning of the Battle of al-Ahzab (Confederates) and it is where the Muslims frustrated the efforts of the alliance by digging trenches to prevent their entry into Madinah or head-on confrontation with the Muslims. What is pertinent regarding the battle here is the successful attempt of Huyayy ibn Akhtab to convince Banu Quraizah through their leader Ka'b ibn Asad to break their covenant with the Prophet and join the enemy in their fight against the Muslims.[450] This was highly problematic and of major significance as Banu Quraizah were within the Muslim-governed zone blocked off by trenches. They began by providing supplies to the Quraish[451] and also initiated armed hostilities from within. This posed a threat to the most vulnerable of the Muslims, the women and children at the rear of Madinah sandwiched between the Muslim men at the front lines and the dwellings of Banu Quraizah.[452] Hearing of the betrayal, the Prophet dispatched some men to protect the women and children while continuing the fight on the front line. The Muslims were on the verge of being overcome, with only 3000 men to fight the Quraish and their allies and now the betrayal of Banu Quraizah.

The Prophet sought the advice of his companions regarding attempting to break Ghatafan from the alliance by offering a third of Madinah's fruit crops. However he was advised against this by his companions.[453] At the same time, a man from Ghatafan, Nu'man ibn Mas'ud defected and accepted Islam secretly. He then was able to create discord and distrust between the Quraish, Jews and Ghatafan. He told Banu Quraizah they should not trust the Quraish as they would abandon them if defeat was imminent. As such Banu Quraizah should request hostages in order to safeguard against a revenge attack by the Muslims in the aftermath of a defeat. He told the Quraish and Ghatafan that Banu Quraizah regretted breaking their treaty with the Muslims and were in direct contact with the Muslims and sought to send them Quraysh hostages to show their allegiance. When the Quraysh and Ghatafan pressed Banu Quraizah to begin fighting the Muslims, they said they would not

[448] Al-Ghazali, *Fiqh-us-Seerah*, 323; and Ibid. at p. 451.

[449] Mubarakpuri, *The Sealed Nectar*, 271.

[450] Ibn Ishaaq, *The Life of Muhammad*, 453; and al-Ghazali, *Fiqh-us-Seerah*, 329-30.

[451] Mubarakpuri, *The Sealed Nectar*, 275.

[452] Ibn Ishaaq, *The Life of Muhammad*, 458.

[453] Ibid. at p. 454; and al-Ghazali, *Fiqh-us-Seerah*, 331.

fight on the Sabbath. The fate of their people, who had violated the Sabbath, was well-known. Furthermore they conditioned fighting on being given hostages as security from both tribes.[454] The Quraysh and Ghatafan became convinced of what Nu'man had told them and insisted that Banu Quraizah go to war without any condition of hostages.[455] Banu Quraizah in turn also became convinced of what Nu'man had warned them against and refused to fight. This along with sudden onset of severe adverse weather made the Quraish and their allies retreat disheartened and defeated.[456]

Immediately afterwards the Prophet laid siege to Banu Quraizah for twenty five days [457]and they duly surrendered without a fight,[458] although they did consider accepting Islam or killing their women and children before fighting the Muslims.[459] The Muslims of Aws tribe interceded for them asking the Prophet for leniency on account of being former allies especially as the Prophet had granted the Khazraj their wish regarding Banu Qaynuqa.[460] The Prophet appeased them by appointing Sa'd ibn Mu'adh from the Aws to deliberate and issue judgement against them. This was agreed by all parties including Banu Quraizah[461] on assumption that the punishment would be lessened.[462] Sa'd on account of being a former ally, knew them exceptionally well and what they were capable of. He was also very resentful against Banu Quraizah for bringing the Muslims so close to defeat by means of deceit, betrayal, violation of treaties and attacking the Muslims unaware, from behind and from inside Madinah. He had also suffered a severe injury during the battle. Despite pleading and begging on the part of Banu Quraizah, Sa'd ruled that all the fighting men should be executed and women and children taken prisoners.[463]

Huyayy of Banu Nadir who had been stranded with Banu Quraizah was executed.[464] Al-Khazraj sought the Prophet's permission to assassinate the other main protagonist leader of Banu Nadir, who plotted and schemed to get 10,000 men to go to war with the Muslims transpiring in the Battle of Al-Ahzab, Salam ibn Abu'l-Huqaiq. He had been chiefly responsible for gathering the troops and providing wealth and supplies.[465] The Prophet

[454] Ibn Ishaaq, *The Life of Muhammad*, 458-9.

[455] Mubarakpuri, *The Sealed Nectar*, 278; and Ibid. at p. 459.

[456] Ibn Ishaaq, *The Life of Muhammad*, 460; and al-Ghazali, *Fiqh-us-Seerah*, 335-8.

[457] Ibn Ishaaq, *The Life of Muhammad*, 461.

[458] Ibid, p. 463; and al-Ghazali, *Fiqh-us-Seerah*, 340.

[459] Ibn Ishaaq, *The Life of Muhammad*, 461; and al-Ghazali, *Fiqh-us-Seerah*, 344-5.

[460] Ibn Ishaaq, *The Life of Muhammad*, 463.

[461] Al-Ghazali, *Fiqh-us-Seerah*, 346.

[462] Ibn Ishaaq, *The Life of Muhammad*, 463; and Ibid. at p. 347.

[463] Mubarakpuri, *The Sealed Nectar*, 282; and Ibn Ishaaq, *The Life of Muhammad*, 464.

[464] Mubarakpuri, *The Sealed Nectar*, 283; Ibn Ishaaq, *The Life of Muhammad*, 464; and al-Ghazali, *Fiqh-us-Seerah*, 348.

[465] Mubarakpuri, *The Sealed Nectar*, 285; Ibn Ishaaq, *The Life of Muhammad*, 482; and al-Ghazali, *Fiqh-us-Seerah*, 349-50.

approved their proposal on the condition that women and children not be harmed. A group of five set out for Khaibar and were successful in killing Salam bin Abul-Huqaiq.[466]

This cursory historical restatement of the relations between the Prophet and the Jewish tribes of Madinah, which eventually led to the expulsion of two and the execution of most of the fighting men of one, point to a number of important conclusions. Firstly, the relationship began on the basis of an agreement of peace which stipulated that religiously the Jews were free to do as they pleased in all matters, most paramount of which was their religion much along the lines of the general meaning derived from Surah al-Kafiroon. Politically speaking the agreement(s) sought non-aggression by either side as well as mutual assistance in times of attack as well as the prohibition of any contact with the chief enemy, the Quraish let alone inciting war or providing material resources to the enemy.

Secondly the incidents took place at a time of war and constant battles between the Muslims and the Makkans. These battles also happened to be the formative ones which would determine the foreseeable future relating to the Muslims ability to hold their own or crumble very easily in the face of threats and challenges. This is important as it showed the critical nature of aiding the enemy when it can lead to defeat and destruction.

Thirdly, the Muslims and the Prophet knew for some time as to the feelings and sentiments of some of the Jewish tribes. In fact their secret scheming, such as that of Banu Qaynuqa of inciting Aws and Khazraj against each other based on their old enmity, was not the trigger for them to be expelled. The same is true for Banu Nadir, no action was taken while they were openly speaking against the Prophet, only when they attempted to assassinate him, was the final decision taken to expel them. Even the fact that all three tribes were amassing arms and weapons throughout their time in Madinah was not itself enough for the Prophet to take any punitive action against them.[467] As for execution of the Banu Quraizah men, it was not until they gave supplies to the enemy and considered fighting in violation of the agreement with the Muslims.

The point here is that much was tolerated especially when it related to secret scheming and plotting even to the extent of amassing arms, before the punitive decisions were taken. In all cases especially in the aftermath of the Uhud disappointment, it was a time of internal war and strife. It was only when the enmity became *public* and manifested in contact and actual readiness to help the Muslims' archenemy, were the drastic punitive measures adopted. As such, the Prophet laid siege to all three as opposed to fighting them. He treated them as tribes rather than as one religious community. They were all clearly in breach of the agreement and peace treaties with the Muslims. He expelled the first and second. However even though he was in some ways most lenient to Banu Nadir, in letting them leave with their lives even though they did not evacuate and took up arms against the Prophet and allowed them to take whatever they wished except their weaponry, they ended up holding the greatest enmity towards the Muslims and were near to causing the most damage through the rallying of a

[466] Ibn Ishaaq, *The Life of Muhammad*, 482-3.

[467] Mubarakpuri, *The Sealed Nectar*, 282-3.

great army that could have destroyed the Muslims once and for all. Banu Quraizah's crime was the worst of the three, as they not only betrayed the Muslims but sought to aid the enemy during conflict and led also to near defeat, if it was not for arguably the covert intervention from the convert Nu'man bin Mas'ud.

Of the utmost importance during this critical period is that none of these actions were taken due to religious differences, but rather concerned matters to do with political factors such as aiding and abetting the enemy, through deception and deceit. Any assertion that the expulsions and execution may have taken place owing to the religious affiliation of the three tribes is just not born out in the facts laid out above.

VI. Has the Freedom to Believe been abrogated by the verses enjoining Fighting?

Now that we have put forward the *primie facie* case for there being no compulsion in religion in Islam from both interpretative, creedal and historical perspectives, we must seek to address the verses, traditions and juristic opinions advanced in support of the counter-argument that Islam does permit coercion and compulsion in religion,[468] even to the extent of forced conversions and committing massacres owing to religious belief. They are few and notoriously well-known amongst polemicists and more generally those who aim to portray Islam as a religion of violence and intolerance.[469] As such we will have the opportunity to analyse and explore in some depth each one of them, so as to grasp the issue comprehensively.

Before we begin, it remains important to point out that in the current context of those who seek to portray Islam negatively and those groups who seek to rely on it as a basis for harming civilians or non-Muslims in conflicts, selectively rely and emphasise on the verses and *ahaadith* enjoining fighting. While, on the other hand, those studying the topic and Muslim apologists focus and selectively rely on the verses and traditions enjoining a peaceful and reconciliatory approach. This has often manifested itself in countless debates featuring prominent self-proclaimed experts on the subject on questions such as 'Is Islam a religion of peace'.[470] The central premises of such debates are pointless and farcical. How would a similar question of 'Is the West a culture of peace or war' be debated? While Islam is ultimately a religion that strives towards peace, clearly it cannot remain passive when engaged in hostilities against aggressors. In that sense it certainly cannot lay claim to being a pacifist religion. More reasonable and nuanced questions would be 'how does the Islamic ethos during armed conflict compare to that of modern international humanitarian law.'

[468] See Dennet, D., *Conversion and the Poll Tax in Early Islam* (Harvard Historic Monographs, 1950).

[469] Ye'or, B., *The Dhimmi: Jews and Christians under Islam* (Fairleigh Dickinson University Press, 1985); Spencer, R., *Onward Muslim Soldiers: How Jihad still threatens America and the West* (Regnery Publishing 2003); and Shahid, S., "Rights of Non-Muslims in an Islamic State", in Spencer (ed.) *The Myth of Islamic Tolerance.*

[470] 92Y Debate, C. Hitchens v. Tariq Ramadan, 2010 (https://www.youtube.com/watch?v=24J3Y0mtWZU); Intelligence Squared Debate, M. Nawaaz and Z. Khan v. D. Murray and A. Hirsi, 2013 (https://www.youtube.com/watch?v=kGxxbqPSLR8).

Unfortunately due to the insistence of Muslim apologists on the unconditional peacefulness of Islam and the denial of acknowledgement of its in-built mechanisms for the permissibility of force, if certain conditions are satisfied as in any other self-preserving political or governance system, the ones arguing it to be a violent religion often hold sway over those in the audience and likely public at large.

Thus from a juristic perspective it is not possible to ascribe to Islam any one of its facets without reference to or at the expense of another seemingly divergent or opposing aspects. The holistic Islamic perspective must be a culmination of those views rather than selective reference to one at the expense or deliberate ignorance of the other. As such the juristic tool that has been suggested is at play here is that of abrogation. With some contemporary academics[471] arguing that the verses enjoining fighting abrogate the verses relating to there being no compulsion in religion. However the view prevalent amongst classical jurists has been that there has been partial abrogation in relation to the polytheists. What needs to be established in this regard is whether 'polytheists' refers to a specific group such as the Quraish and their allies, whom the Muslims were at war with or generally all polytheists as well as knowing whether the abrogation was conditional and thus limited by certain circumstances like war or indefinite. Hence a the view may be taken that verses commanding there to be no compulsion in religion are general and default, while those relating to war, fighting are specific to time and place or a certain set of circumstances as well as limited in those who they are aimed at. It may also be possible to take a combined meaning of certain verses, if we do not limit them as exhaustive in their objects or aspects they are referring to.

Let us begin with the Qur'an itself. The most famous verse in this regard is Qur'an 9:5, which is often quoted out of context:

> "And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful."

At times the more truncated excerpt: "kill the polytheists wherever you find them" is presented out of context. If we are to read the Qur'an as a standalone book, without resorting to its explanatory material of *ahaadith* and exegeses (*tafaasir*), providing an excerpt without referring to its wider textual context is not an effective way to derive accurate meanings or interpretations. In particular, due to the style of the Qur'an, certainly parts of passages discussing a particular issue cannot be divorced from the rest of it. Furthermore in popular discourse, it goes without saying that parts of verses cannot be presented without the whole context of the verse. There are wider contexts like the overall message of the Qur'an and other apparently conflicting verses. However at first we will restrict ourselves to the context of the verses on either side of the said verse. It should also be noted that the style of the Qur'an is one that oscillates between positive and negative. When there is mention of hell, it is often followed by mention of paradise.

[471] McKinney, "Echoes of the Dhimma", 234.

The first and foremost aspect of this verse is that it was revealed with a backdrop of ongoing hostilities and armed conflict with the polytheistic Quraish and the specific event that triggered this verse is also related to the repeated violation of agreements and treaties by the polytheists with the Muslims. As such it is a re-initiation of hostilities after a lull due to the transgressions of others and also to seek to take control of Makkah for the sake of the Hajj pilgrimage rights to be done in accordance to Islam, meaning no polytheist would be allowed to perform pilgrimage or perform the rites of *tawaf*[472] naked. This is supported by the preceding verse which only declares treaties null and void with those who have "been deficient toward you in anything or supported anyone against you."[473] Furthermore, the understanding that the verse is giving a choice, albeit in a state of armed conflict, to either conversion or death is misfounded as the following verse, Qur'an 9:6 states: "And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah [i.e. the Qur'an]. Then deliver him to his place of safety. That is because they are a people who do not know."

Also, Qur'an 9:7 states: "How can there be for the polytheists a treaty in the sight of Allah and with His Messenger, except for those with whom you made a treaty at al-Masjid al-Haram? So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him]." This shows that not only were some groups of polytheists exempted from the renunciation of treaties but its basis was reciprocity and due to the honouring of treaties and agreements. Similarly Qur'an 9:8 and 9:10 emphasise the point of a non-viability of agreements owing to repeated violations and a breakdown of trust. Additionally they also show that if the polytheists were to gain dominance there is no expectation from them to show the Muslims any leniency or allow them to exist as religious minorities (*dhimma*): "How [can there be a treaty] while, if they gain dominance over you, they do not observe concerning you any pact of kinship or covenant of protection? They satisfy you with their mouths, but their hearts refuse [compliance], and most of them are defiantly disobedient...They do not observe toward a believer any pact of kinship or covenant of protection. And it is they who are the transgressors".

This is then followed by some examples of how some of the polytheists had violated their agreements and treaties with the Muslims and that such actions must no longer be tolerated: "And if they break their oaths after their treaty and defame your religion, then fight the leaders of disbelief, for indeed, there are no oaths [sacred] to them; [fight them that] they might cease."[474] Qur'an 9:13 further elaborates on the breaking of oaths but also that the Muslims are reacting in this way in retaliation for the aggression by the polytheists "Would you not fight a people who broke their oaths and determined to expel the Messenger, and they had begun [the attack upon] you the first time? Do you fear them? But Allah has more right that you should fear Him, if you are [truly] believers." Later in the *surah* the same point is repeated that the Muslims are reacting to the actions of the polytheists rather than acting as

[472] Circumambulation around the *Ka'ba* in the Haram Mosque in Makkah in an anti-clockwise direction is the main ritual act of worship of holy pilgrimage.

[473] Qur'an 9:4.

[474] Qur'an 9:12.

the aggressors: "And fight against the disbelievers collectively as they fight against you collectively. And know that Allah is with the righteous [who fear Him]."[475]

As can be seen when Qur'an 9:5, so often relied upon by protagonists and polemicists to justify their argument of Islam as a war-mongering and violent religion, is read in context of the broader passage of text in which it appears, a wholly separate understanding of the verse is discernible from that often attached to it. The verse is not a command to kill *all* polytheists; only combatants engaged in active hostilities.[476] Furthermore, it is an act of retaliation in the face of aggressions rather than an act of aggression on the part of the Muslims.[477] This is shown in the fact that it is repeatedly stated that the cause of the pronouncement of war by the Muslims is in the face of repeated violations of the treaty and aggressions perpetrated by the polytheists, which must be addressed. Furthermore if someone ceases to be a combatant, or was not one to begin with, the Muslims are not only to desist from harming them but they must escort them to a place of safety ensuring they are not harmed in the process. The renunciation of treaties and declaration of war excludes those groups of polytheists who honoured their treaties. In summation read in its proper context, we learn of the intense enmity held by the polytheists towards the Muslims, the importance of upholding treaties, agreements and oaths to the Muslims even with their most prominent enemies, the importance of maintaining the principle of reciprocity and the complete breakdown of trust and confidence owing to repeated violations of agreed terms.

The *hadith* that has been most referred to in these debates around the permissibility of coercion with similar wording to the above verse is narrated by Ibn `Umar who reported that the Prophet said:

> "I have been commanded to fight the people until they testify that there is no deity worthy of worship except Allah and that Muhammad is the messenger of Allah, establish the prayer and pay the *Zakah*."[478]

The critical point when analysing this *hadeeth* is that according to jurists who explained it in light of the principles of the Arabic language, the reference to 'the people' is not generally applicable to *all* people as it may appear in translation, but specific to the polytheists mentioned in Qur'an 9:5 above and thus in relation to a time of active hostilities with a specific group of polytheists, the Quraish. To begin with, the use of the definite article could be interpreted in a number of ways, including as referring to everybody, a particular group or to something known or in a particular context. In light of a study of the *Seerah* (the Prophet's

[475] Qur'an 9:36.

[476] Abu Hanifa and Shaybani "made no explicit declarations that the *jihad* was a war to be waged against non-Muslims solely on the grounds of disbelief", in Khadduri, M., *The Islamic Conception of Justice*, 1984, pp. 165-6, cited in Arzt, D., "The Role of Compulsion in Islamic Conversion - Jihad, Dhimma and Rida", *Buffalo Human Right Law Review*, Vol. 8, No. 15 (2002), 22-3.

[477] Qur'an 2:190: "Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors." Referred to by Arzt as expounding the principle of self-defence in "The Role of Compulsion", 21.

[478] Fath al-Bari 1:95; Muslim 1:53 cited in Mubarakpuri, *Tafsir Ibn* Kathir, 377; and Nawawi 1:8.

biography), actions of the following generations after the Prophet as well as the possible linguistic understandings, it was clear to all jurists and the four schools of *sunni* jurisprudence that the reference here was specific to a particular group at a particular time.

They stated that it came under the rubric of the principle of a general term used for something specific, there even being instances where 'the people' can refer to one person as well as a group of people. After all, throughout this period there were treaties, contracts and agreements of peace. Clearly People of the Book as well as polytheistic groups were given *dhimma* status. In light of this, Ibn Hajar Asqalani, the famous commentator of Sahih Bukhari, noted that the phrase 'the people' had eight potential meanings, all specific to a certain group that the Muslims were engaged in active hostilities with, including the polytheists of Makkah or broadly of the Arabian Peninsula.[479] Ibn Taymiyyah surmises it most succinctly: "It refers to fighting those who are waging war, whom Allah has permitted us to fight. It does not refer to those who have a covenant with us with whom Allah commands us to fulfil our covenant."[480]

The other aspect of the *hadeeth* that attracts controversy is that to "fight...until they testify" or paraphrased literally as 'fight them until they except Islam' where the intended conveyed meaning is that Islam allows for compelling others to become Muslim through violence leaving them essentially with a choice between death or Islam. The first and quite axiomatic point is that this is far from the actual meaning of the *hadeeth*. As already stated, interpretations cannot be derived divorced from contexts such as language, history and other primary source material. Of which, the most crucial is the Qur'an and its commentary as well as the overall thrust of the Qur'an derived from a holistic reading. We have already delved extensively in to the verse regarding there being no compulsion in religion. Thus the question that arises is whether it is contradicted by this *hadeeth*, abrogated by it or they are not in direct opposition and are reconcilable.

The immediate point to make in this regard is the difficulty in arguing that a *hadeeth* abrogates a Qur'anic verse. Classical *sunni* jurisprudence holds that the Qur'an and the vast body of authenticated *ahaadith* have equivalent law making force in terms of constituting the two primary textual sources of Islamic law. This is despite the fact that the *ahaadith* had to be filtered by means of a rigorous process of authentication to be able to be given the status of being a source of Islamic law. However this does not negate the primacy of the Qur'an as the dominant and core constitutional source because one of the main criteria for authentication of *ahaadith* was compatibility with the Qur'an. Hence *ahaadith* cannot be considered authentic if they, in the first place, contradict clear Qur'anic verses and injunctions. Thus when we come across an authentic *hadeeth*, which appears to contradict the Qur'an, it would not have been considered as such if according to its commonly understood meaning amongst jurists, it was not deemed to be compatible or reinforcing existing principles and themes. Hence we find amongst some jurists, most prominently Abu Hanifa, as mentioned in Chapter 2, the assertion of the principle that *hadith* cannot abrogate Qur'an.

[479] Asqalani, *Fath al-Bari*.

[480] Ibn Taymiyyah, Majmû` al-Fatâwâ (19/20).

Bearing this in mind, let us continue our elaboration on the proper understanding of the tradition. Interestingly it may be that the use of the word 'until' as a translation of the Arabic word '*hattaa*', while accurate in a number of situations, here may not be a wholly accurate translation given the possibility of other meanings being conveyed not reflected appropriately in the use of '*hattaa*'. The Arabic may be referring to a meaning that may be inclusive of 'except'. As such a potential meaning would be 'I have been ordered to fight the people *except* those who say there is no God but Allah...'. This would convey the fact that the Prophet was engaged in hostilities against a number of entities in particular the polytheists of the Arabian Peninsula owing to their enmity towards the emerging Islamic entity. Military confrontation following the defeat of the polytheists of the Arabian Peninsula against other competing neighbouring imperial entities became inevitable as they perceived the new religion and its growing political power as a direct threat. This is reflected in Qur'an 9:29, which follows the command in 9:5 to fight the polytheists with the command to fight the People of the Book. It is understood that the circumstances of revelation were that of having defeated the polytheists of the Arabian Peninsula and the mutually anticipated imminent confrontation with the Christian Romans, who were in control over the Levant (*al-Sham*). Thus the meaning includes the idea that this was a command to fight all groups deemed necessary while excluding those who were Muslim.

This is not to annul the meaning conveyed by the translation of 'until', but only to show that *hattaa* conveys a meaning broader than 'until' which may include 'except'. Beyond this, the *hadeeth* can be explained in a way which marries the two meanings of 'until' and 'except' and takes account of the historical context. The tradition is referring to a time of war and perpetual active hostilities between the Muslims and the polytheists of the Arabian Peninsula led and instigated by the polytheists of Makkah, who happen to be the kith and kin of the Prophet. As such it is highly likely to be from a time close or identical to that of the revelation of Qur'an 9:5, which also commands the Prophet to fight the polytheists and as we have established 'the people' in the tradition is also a reference to the same polytheists. Due to this open enmity and being sworn enemies, it is clear that there is no mutual peaceful coexistence possible between the two groups. Furthermore there is no expectation or request from the polytheists for peace or protection. From the Muslims' perspective even if something similar was offered from the polytheists on the back of repeated violations of agreements between the two, it would be perceived as an indication of weakness and an attempt to buy time to consolidate strength and build forces to launch an attack.

Therefore as discussed briefly in Chapter 2, there being only the two options of death or Islam, do not indicate that they are interdependent, that is, accepting Islam will avert death and the motivation for the violence is to convert.[481] Rather it is a practical fact applicable when engaged in a war that either one is fought for being the enemy or ceases to be an enemy when he forsakes the side he is on and joins the other. As long as one belongs and has allegiance to the enemy one cannot be accepted as a normalised subject with the political and social community of the group who he despises and seeks to destroy. Furthermore it also

[481] McKinney, S., "Echoes of the Dhimma", 237 & 240.

serves to show that "the Moslems do not fight them for worldly reasons, like subjecting them and taking their property, but that their motive is a religious one, the strengthening of Islam."[482] This by no means indicates that just by being aligned to the enemy that Islam allows for taking life. According to Arzt, "Even in the most militant versions of *jihad*, unbelievers were not be attacked outright without first receiving a summons (*da'wah*) either to convert or to submit to the *jizya* tax".[483] Clearly the command is to fight not kill here and must be understood in light of Qur'an 9:4-6 in that only combatants are to be fought and killed, not those who lay down their arms. Due to their enmity they cannot be accepted as subjects amongst the Muslims as *dhimma* but must still be escorted to a place of safety.

Furthermore a nuanced understanding of the Tradition also reveals that it clearly and unarguably refers to the legitimisation of *external* force against other military entities and not internally against its own individual non-Muslim subjects. Islam has never and cannot justifiably stipulate the waging of war and force against non-Muslim subjects under its control. Never were religious minorities, who were accorded *dhimma* status, forced or compelled to forsake their religion and outwardly accept Islam. Thus the engagement in military activities in defence or against regional rivals was a political endeavour which sought to gain control and govern over territories. It was aimed ultimately at consolidating the material strength and influence of the Muslims as opposed to compel the people into Islam. We can observe that in relation to the internal governance of non-Muslims who had been conquered or defeated or had been assumed under the control of the Muslims, clearly Qur'an 2:256 and 109:6 continue to be applicable and were discernible in the conduct of the Muslims and the Islamic law that was being applied to them based on these verses. It is also evident that the command to fight in Qur'an 9:29 desists on the submission of the enemy and their assumption of *dhimma* status, that is, they transitioned from being external foes to internal subjects. Even in relation to the polytheists as mentioned in Qur'an 9:5, the fighting must desist once any one surrenders and must then be escorted to a place of safety. With regards to neither the tradition nor Qur'an 9:5 mentioning an option where the polytheists were offered an option of becoming internal subjects as were the People of the Book, as discussed in Chapter 2, this was specific to this particular group of polytheists and not all non-People of the Book. It is undisputed that other polytheists, most notably the Magians, were accorded *dhimma* status. The hostility between the two camps of the Muslims and the polytheists of the Arab Peninsula was such that neither entertained the idea of any member of the other existing as a normalised subject while still holding allegiance to each others' arch enemy.

Despite the above facets of the tradition and verse in question, the aim is not to negate the most ostensible linguistic meaning derived from the wording of both the tradition and the verse, which clearly draw a causal link between the political (fight/kill) and the spiritual (accepting and becoming true Muslims). How is it possible to bridge this gap where the

[482] Peters, R., *Islam and Colonialism: The Doctrine of Jihad in Modern History* 18 (1979), cited in Arzt, D, "The Role of Compulsion", 21.

[483] Arzt, "The Role of Compulsion", 21.

former legitimises the use of force while the latter forbids it? The first point to reiterate is that the third option of being *dhimma* status is not mentioned as it was not feasible in relation to this particular group of polytheists due to intense ensuing hostilities which had in turn been the result of a complete breakdown of reciprocity on the part of the polytheists and repeated violations of agreements and treaties. Connected to this is also the point that even when two possibilities are foreseen that is that a foe must be fought or they accept Islam, there is no causal link necessary. Rather it is a logical outcome of anyone switching sides that hostilities against them cease as they have joined the other side. Furthermore it is also clear that these are not the only two options even if it may appear that way on a isolated reading of some verses or traditions. Instead it is only applicable to combatants and not those who do not switch allegiance but lay down their arms and assume the status of civilians. Another reason for mentioning the possibility of the enemy accepting Islam, even in times of conflict, is the emphasis on conveying the true message of Islam and inviting others to it, even one's enemy. Underpinning this is also the belief that Islam conveyed in its genuine form with emphasis on its core tenets cannot be refused by anyone who also seeks the truth earnestly.

How can Islam permit the compulsion of others to Islam, when even in the midst of violent conflict with its adversaries, it commands its adherents to "grant him protection so that he may hear the words of Allah [i.e., the Qur'an]. Then deliver him to his place of safety. That is because they are a people who do not know" Herein lies the answer and the point of departure for reconciling the tradition in question with Qur'an 2:256. Those who seek and are amenable to the truth but have not learned of the truth of Islam, can only be told it and be invited to it, if an opportunity to do so is availed. It is an opportunity which would not be possible if the enemy was not being fought and there were not those who then sought protection from the Muslims. The salient point here is that in territory controlled by those hostile to Muslims, no space was allowed to or could have existed for the message of Islam to spread and be argued by the word. Only when the Muslims controlled territory, it was evident to the Prophet that people would accept Islam in their droves as its teachings would not be hindered or twisted by its detractors. It was firm belief of the Muslims that not only would inviting non-Muslims to the message of true monotheism and Islamic creed be common sense and evidently the truth, but that on the social, legal and political level too, the justice of Islam and the Muslims would have a powerful effect and show the fairness and justice inherent Islam. In other words the political is needed to open the space for the spiritual. This is as such would be the polar opposite of how the verse and tradition justify forced conversions. There are a number of illustrative points in this regard. The Prophet waited for a woman by the name of Rayhana from the Jewish tribe of Banu Quraizah to accept Islam before marrying her.[484]

There are two further minor points that are worth also keeping in mind regarding this issue. The first is that the tradition clearly states 'I' and not 'you', which could imply that it was applicable only during the time of the Prophet. Secondly Abu Bakr during his *khilafah* went to war against a section of the Muslims immediately following the death of the Prophet. They

[484] Ibn Ishaaq, *The Life of Muhammad*, 466.

insisted that following the death of the Prophet, they were not obliged to pay the *zakat* (obligatory charity - 2.5% of total wealth). For Abu Bakr, this negated their faith and as such it was called the war against the *murtadeen* (apostates).[485] In support of his decision, he cited the above Prophetic tradition. Nonetheless it was disputed by Umar and a number of other companions, who argued that as long as they testified to the oneness of God, they were to be left alone and still considered Muslims. While Abu Bakr held that *zakat* was an essential part of being a Muslim. The dispute was also partially a result of varying narrations of the same *hadith*, which carried a longer or shorter list of conditions for Islam. The cogent point here is that politically this occurred in the immediate aftermath of the Prophet's death, so Abu Bakr had to make sure that the message of Islam and its political authority would continue despite the calamity, thus focusing on adherence to the message of the Messenger rather than purely the person of the Messenger. Also in terms of fiscal policy of the embryonic Islamic State, there could not be a violation of the laws of the new State's laws as they applied to Muslims, one of which was the payment of *zakat.*[486]

VII. Conclusion

The above analysis has attempted to present an analysis of the internal aspect of freedom of religion under Islamic law. The reason to dedicate an entire chapter to the topic was twofold. It is often an aspect of Islamic law most subjected to critique and it is essential to the discussion of the external element of manifestation of religion. To avoid to reactionary and defensive approach to the topic the chapter began and focused on initially compelling arguments for freedom of religion under Islamic law and then proceeded to the counterarguments, both polemic and juristic. We began our discussion with an indepth elaboration of the oft-cited excerpt of Qur'an 2:256: "there is no compulsion in religion". While the commandment ostensibly straightforward, it was interesting to note that while some argued that it was not commandment and merely a statement of infeasibility, others focused on the juristic argument of abrogation by later verses and commandments. It was suggested in relation to the first that the distinction between a statement of infeasibility and a commandment of a prohibition was an artificial one, especially when the source of the statement is said to be God.

In delving further into the circumstance of revelation surrounding Qur'an 2:256 some valuable insights were gathered. Among was the comparable aspect of freedom of religion under international law of parents in relation to their children. It was also deduced the scope of the verse may be far broader than apparent. It is commonly taken as a commandment towards Muslims to desist from compelling non-Muslims towards Islam. However it was argued that the implications of the verse may be to prohibit anyone compelling anyone towards any religion. The argument was made yet more compelling buttressed by the Islamic conception of the purpose behind the creation of humans and how it was incompatible with

[485] See Donner, F. M., *The History of al-Tabari Vol. 10: The Conquest of Arabia: The Riddah Wars A.D. 632-633/A.H. 11* (SUNY Press, 1993).

[486] Ibid.

the Islamic world view to force religion for it to be accepted disenguinisly. It was asserted that such an approach would not benefit the victim and be a sinful act by the perpetrator. Further corroboration was provided by the meaning and circumstances surrounding Surah al-Kafiroon, which emphasised the Islamic principle to interference in the religious beliefs of others.

The first counter argument discussed was regarding the status and treatment of three separate Jewish tribes of Madinah. A detailed study was conducted of the *seerah* (Prophetic biographical) literature to understand the context and sequence of events that led to two of the tribes being expelled and the fighting men of a third to be executed. The thorough analysis revealed that regardless of one perceives of the severity of the punishments metted out, what is unequivocal is that the facilitating factors were wholly unrelated to religious identity and belief of the tribes. It was in essence a political and military standoff which took place with each tribe separately over different circumstances. There was also the added factor of colluding with the Muslims' arch enemy, the Quraish. In the case of the tribe that received the severest punishment, they had to great extent instigated a battle which came close to overcoming the Muslims while they were still under their governance. The final section of the chapter surveyed the juristic opinions on the idea of abrogation of Qur'an 2:256. However by reference to linguistic insights as well as to a number of verses commanding the Muslim to 'fight', it was ascertained that most were in the context of conflict. As such they were inapplicable outside of such times and did not abrogate Qur'an 2:256 nor negate as a whole the arguments presented earlier in the chapter regarding Surah al-Kaafiroon and the said purpose behind human creation by God.

Chapter 6:
Non-Discrimination and Freedom of Religion under International Law

I. Introduction

Chapter 5 discussed the internal aspect of freedom of religion under Islamic law in the context of the competing principles of non-compulsion in religion and commandments to fight, in particular the polytheists. The implication of the former being the granting of an absolute right in relation to the internal aspect of freedom of religion, identical to as we will see below to international law. The implication of the latter being that non-Muslims especially polytheists may not be eligible to *dhimma*, thus leaving them with only two choices: Islam or death. In this chapter, we will elaborate the right to freedom of religion due to religious minorities under international law, once they are deemed to fall within the scope of minority rights protection. We will however precede this with a thorough analysis of religious non-discrimination in line with the asymmetrical comparative approach outlined earlier. Just as we opted to focus on the internal aspect of freedom of religion under Islamic law, here the discussion of non-discrimination is the first line of defence for members of religious minorities to attain equality under the law. Once this right is established and availed to those belonging to religious minorities, can the right to freedom of religion be meaningful by building on that equality by accommodating and non-interference with religious beliefs and their manifestation.

This must be qualified by restating that discussion around the absence of State discretion is specific and limited to the issue of recognition of existence rather than the rights that may result from such recognition, which is the focus of this chapter. While it may make it possible for such a recognised minority group to claim and attempt to access relevant rights, there is substantial discretion available to the State to grant or deny such rights depending on public policy grounds or financial limitations and other practical considerations, including the population of the minority. However, the issue of non-recognition of existence as a means to avoid even the discussion of applicable rights, where there is significant discretion for State manoeuvring, is indicative of a lack of understanding of this issue by States, an inherent hostility to the minority group, or an intrinsic aversion to minority rights owing to their perceived threat to the State endorsed national identity.

As already stated, international law requires that once the objective and subjective criteria are met, the minority group's existence becomes a matter of fact and it becomes incumbent upon the State to lend formal recognition to the group. Once this point is reached, then a host of rights must follow. Apart from the right of individuals within the group to enjoy all

recognised individual human rights, they are also entitled to specific rights to be exercised in community with other members of their group. The first of these relevant to religious minorities, which could be said to be the strongest and least subject to State discretion is the right to religious non-discrimination followed by the right to freedom of religion and finally minority rights. Religious minority rights include the aforementioned two sets of rights, but also add a third layer of specific religious rights with a group dimension albeit being vested solely in individuals.[487] This is worded in Art. 27 of ICCPR as the right to practice and profess their religion in community with others. The Declaration on Minorities expands on this and adds rights that go beyond merely those of religious practice. The final layer of rights is that of collective rights vested in group entities. This is not included within the scope of minority rights. However whether such progressive interpretations have become more plausible are worth discussing. Conversely collective rights do exist but only in relation to 'peoples' in the context of the right to self-determination and the nascent right of autonomy[488], while minorities are said to be excluded from the former on legally weak but politically expedient basis[489] and the beginnings of a similar trend may be observable in relation to the emerging rights and norms relating to indigenous peoples and autonomy.[490] Hence, I will be focusing mainly on the right of religious minorities under international law. This principally will be in relation to the right to non-discrimination and right to freedom of religion.

II. Religious Non-Discrimination

We discussed the scope of non-discrimination and the included heads in Chapter 3, noting that the right explicitly included religion as a head.[491] As such 'religion' is clearly included within the protections relating to non-discrimination. As to how one would determine if the said person's characteristic or an aspect of it fell within the scope of religious non-discrimination, no doubt self-identification plays a vital role and significant deference is given to the victim's own self-perception and self-identification. It may also be that in matters of discrimination equal or greater weight be given to the perception and intentions of the perpetrator.[492] This is because the perpetrator may discriminate or attack owing to *perceived* rather than the actual identity of a victim. A striking example is the murder of Sikh people and hostility towards ethnic minorities in the US in the immediate post 9/11 period on

[487] HRC GC 23, para. 3.1.

[488] See Skurbaty, Z. (ed.) *Beyond a One-dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers, 2005), p. 567 and Packer, J., "Autonomy and the Effective Participation of Minorities in Public Life: Developments in the OSCE" in Z. Skurbaty (ed.) *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers, 2005), 335 in Skurbaty (ed.) *Beyond a One-dimensional State*. See also Hannum, H and Lillich, R., "The Concept of Autonomy in International Law" in Dinstein, Y (ed.) *Models of Autonomy* (Transaction Books, 1981), 215; and Sohn, L., "Models of Autonomy Within the United Nations Framework" in Dinstein, Y (ed.) *Models of Autonomy*.

[489] *Lubicon Lake Band v Canada* (Communication 167/1984).

[490] Declaration on Indigenous Peoples and CERD GR 21.

[491] UN Charter, UDHR, ICCPR, ICESCR and ICERD.

[492] Gunn, "The Complexity of Religion", 198.

the perception that they were Muslims.[493] Another example is xenophobic and racist rhetoric and attacks against immigrant communities under the guise of animosity, hatred and hostility towards Muslims.[494] It is noteworthy that the right of non-discrimination is not restricted to minorities but applies to all under a number of heads, one of which is 'religion'. However minorities constituting a category of vulnerable individuals are especially at risk of being victims of non-discrimination, vertically from State institutions as well as horizontally by other individuals.

The commitment to non-discrimination and the inclusion of the religious head appears in the UN Charter, UDHR, ICCPR and ICESCR. Art. 26 of ICCPR states:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In addition to Art. 26, the more well-known and established non-discrimination provision is to be found in Article 2 and could be said to be stronger in that it obligates States to also provide remedies through legislative means[495] so as to address the structural problems as opposed to merely its symptoms. As such, remedies must be effective[496] and their enforcement ensured[497]. However Art. 26 focuses on the compatibility of domestic legislation with non-discrimination principles. Domestic legislation that does not comply with Art. 26 needs to be reviewed and it should be ensured that legislation being drafted is compatible with international law obligations. Nonetheless the most significant difference between the two provisions is that Art. 2 ensures non-discrimination in relation to the "rights recognized in the present Covenant"[498], whereas Art. 26 is a stand-alone right that can be drawn on to remedy any form of discrimination not enumerated as a right under the Convention, that is "equal protection of the law". As to the utility and necessity of Art. 2, the HRC offers the following explanation on the relationship between Arts. 2 and 26:

> "In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation

[493] "Memo on Sikh Ethnicity", para. 43.

[494] See Shaikh, "Recognising Muslims as an Ethnic Group".

[495] Art, 2(2) of ICCPR.

[496] Art. 2(3a) of ICCPR.

[497] Art. 2(3c) of ICCPR.

[498] Art 2(1) of ICCPR.

> is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant."[499]

It is submitted that this is not a convincing explanation of the necessity of Art. 2 protections when they may already be covered by the broader Art. 26. Reiterating that Art. 26 is an autonomous right does not shed any further light on what then is the utility of Art. 2. A more plausible answer may be found in the analysis above in the content and extent of the right. Art. 26 is autonomous and Art. 2 dependent on the violation of enumerated rights under the ICCPR with a stress on effective legislative remedies which are enforced. Another perspective could be that Art. 2 seeks to correct structural discrimination in relation to Convention rights as well as providing a remedy for the victim, while Art. 26 seeks to prevent discriminatory laws being passed or declaring existing laws discriminatory regardless of the right in question. The ECHR has seen a similar development recently by a shift towards having an autonomous right to non-discrimination not dependent on a violation of Convention rights already present under Art. 14. Additional Protocol 12 to the ECHR has attracted a weary response by States who have been reluctant to become parties. The case-law of the Court relating to the new autonomous right has also been limited.[500]

Furthermore, the fundamental and profound nature of the right to non-discrimination is evident in that it underlies most, if not all, human rights. The first reference to human rights in the UN Charter was in the context of non-discrimination.[501] The elaboration of non-discrimination beyond the rights in the ICCPR and ECHR is indicative of its independent importance as opposed to being attached to Convention rights. Furthermore, the list of heads of discrimination are not only extensive but non-exhaustive. Hence in relation to Art. 2, despite discrimination having had to occur in relation to a Convention right, the grounds of discrimination are open-ended and include those not explicitly listed. The HRC has stated:

> "Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates

[499] HRC GC 18, para. 12.

[500] See *Sejdic and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06).

[501] Art 1(3) of UN Charter: "...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

> States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination."[502]

As such, discrimination is defined not as a difference in treatment, but rather one that cannot be reasonably and objectively justified. Another way to conceptualise the right is to treat people in similar situations in the same way. Recently, case-law has developed in particular at the ECtHR, which has gone beyond this and accepted that at times people in different situations may need to be treated differently in order for equality to be realised especially in relation to religious minorities.[503] Despite little doubt as to the legal principle for religious non-discrimination being of a legally binding and central nature to the entire body of international human rights law, there is an inherent tension between the religious and ethnic/racial heads. In the above instruments no distinction is made between the various heads of non-discrimination and the order in which they appear is not indicative of importance or significance either. Nonetheless there is a stark contrast between racial and religious heads as indicators of self-presumed or other-perceived identity. Race remains an immutable characteristic despite its understanding transitioning considerably from a purely genealogical conceptualisation to one of ethnicity,[504] while religion is a choice of ideology and a way of life. Consequently religious identity will manifest in rituals, acts of worship, prohibition of certain actions, dress and other actions more readily than an ethnic identity. Subsequently there may arise far more potentially reasonable and objective differences in treatment when dealing with religious minorities than ethnic minorities. It would and does also result in a far more expansive right to criticise, ridicule and mock religious beliefs as opposed to ethnic identity or race. One is subject to and open for debate while the other is not.

The rights in the Declaration on Religious Discrimination are substantive and extensive. It affirms that there shall be no discrimination on the basis of religion or belief.[505] Along the same lines as ICERD defines 'racial discrimination'[506], it defines 'intolerance and discrimination based on religion or belief' as:

> "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."[507]

[502] HRC GC 18, para. 2.

[503] *Thlimmenos v. Greece* [GC], no. 34369/97 (2000), para. 44; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 (2007), para. 175; *Runkee and White v. UK*, nos. 42949/98 and 53134/99 (2007), para. 35; and *Eweida and Others*, cited above, para. 87.

[504] Shahabuddin, "'Ethnicity' in the International Law".

[505] Art. 2(1) of Declaration on Religious Discrimination.

[506] Art. 1(1) of ICERD.

[507] Art. 2(2) of Declaration on Religious Discrimination.

It also seeks to ensure "effective measures to prevent and eliminate discrimination on the grounds of religion or belief"[508] and that pursuant to this "All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter."[509] These detailed and elaborated measures in relation to non-discrimination and intolerance based on religion and belief attempt to bring religious non-discrimination to the same level as racial non-discrimination. However the weakness of religious non-discrimination is evident most notably in the high level of international consensus that brought about the creation of the legally binding and widely ratified ICERD[510], while in the realm of religious non-discrimination, we only have the non-legally binding Declaration on Religious Discrimination. Despite this weakness, States still saw fit to enter reservations.

Due to such an imbalance of non-discrimination protections, it has become necessary in some cases for religious groups to identify as ethnic minorities rather than religious minorities. One means to achieve this is to argue that those who constitute religious groups almost always simultaneously constitute ethnic groups often due to their national origin. This would provide a basis for alleging indirect discrimination, whether it was in intention or effect.[511] However we find that groups that are religiously distinct but also ethnically distinct and homogenous have claimed successfully to be recognised as ethnic minorities. The Jewish community constituting an ethnic and religious minority is an obvious case in point. Anti-Semitism is a criminal offence in a number of European States regardless if the discrimination is aimed at their ethnic or religious identity. Similarly holocaust denial is prohibited and a criminal offense in a number of European States.[512]

In the UK context, Jews[513] and Sikhs[514] have succeeded through case law to be recognised as racial groups due to their ethnic homogeneity even though they principally self-identify as a religious community. They were able to include themselves within the meaning of 'ethnic' which is subsumed in the classification of 'racial group' under the Race Relations Act 2000 and thus access rights to non-discrimination normally reserved for only racial or ethnic groups, but for their religious community. The Court's main grounds for granting recognition as ethnic minorities to the two religious groups, who were primarily and principally religious

[508] Art. 4(1) of Declaration on Religious Discrimination.

[509] Art. 4(2) of Declaration on Religious Discrimination.

[510] 177 State parties and 15 signatories.

[511] CERD, General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), para 5.

[512] See *Legislation against anti-Semitism and Holocaust denial,* The Coordination Forum for Countering Antisemitism website. (http://www.antisemitism.org.il/eng/Legislation%20Against%20Antisemitism%20and%20Denial%20of%20the%20Holocaust)

[513] *Mandla v. Dowell-Lee* [1983] 2 AC 548 (House of Lords).

[514] *Seide v Gillette Industries Ltd* [1980] IRLR 427, a decision of the Employment Appeal Tribunal and *R. (on the application of E) v JFS Governing Body Court of Appeal* (Civil Division), 25 June 2009.

minorities was the sharing of certain factors[515] and ethnic homogeneity. As such, all religious groups who were not ethnically homogenous in the UK were excluded from a similar stronger protection of racial non-discrimination. This included Muslims, Hindus and Buddhists. With regards to Muslims, there was a case which argued for their inclusion within the scope of 'racial group' for the purposes of the Race Relations Act 2000, but was unsuccessful on the basis ethnic heterogeneity, including people of many nations and colours, who speak many languages and whose only common denominator is religion and religious culture.[516]

There are two observations with regards to this judicial development of UK law. The first is that in having two regimes of non-discrimination of differing strengths for groups that may have an ethnic *and* religious identity prevents them from identifying uninfluenced and unpressured to the type of identity they feel the closest affinity with. This may constitute a form of subtle coercion and a compromising of the right to self-identify not just as a minority but the type of minority that one may strongly identify with as opposed to a weaker element of identity such as ethnicity or language.

The second is that the reasoning adopted by the British courts in itself appears to be sound, but its application to the case of Muslims and other minorities arbitrarily restrictive. The law accepts that the vast majority of people who identify as Muslims, Hindu or Buddhist, also constitute ethnic minorities based on national origin.[517] Hence what distinguishes these three religious minority groups from Sikhs and Jews is that while the former are made up of a number of nationalities, the latter are made up of only one. A more reasonable and justified manner to apply the law would be to say that while Jewish and Sikh communities are

[515] Lord Fraser of Tullybelton's leading opinion stated that an "ethnic group" must "regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:

1. a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive.

2. a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

In addition to those two essential characteristics the following characteristics are in my opinion, relevant;

3. either a common geographical origin, or descent from a small number of common ancestors

4. a common language, not necessarily peculiar to the group

5. a common literature peculiar to the group

6. a common religion different from that of neighbouring groups or from the general community surrounding it

7. being a minority or being oppressed or a dominant group within a larger community, for example a conquered people," in *Mandla v. Dowell-Lee* [1983] 2 AC 548 (House of Lords).

[516] *Nyazi v. Rymans Ltd* (1988) EAT/6/88 (unreported).

[517] *Second Opinion on the United Kingdom* (adopted 6 June 2007), Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/OP/II(2007)003. See also Shaikh, "FCNM Shadow Report".

ethnically homogenous, the Muslim, Hindu and Buddhist communities are homogenously constituted of ethnic minorities albeit multiple ones. Furthermore those who discriminate against all these groups often do so owing to the cumulative effect of all aspects of identity rather than any one aspect. As such discrimination is directed at the compound identity of an individual making it difficult to accurately decipher what the rationale behind the discrimination may be. For example being Muslim is often conflated with being of Pakistani origin. Hence those who discriminate against Muslims may take issue with the ethnic identity and cultural practices of a person but understanding that as being associated with Islamic beliefs and practices. Hence such discrimination should not be able to evade the stronger standards or protection for ethnic minorities. In other instances, especially with right wing commentators and political groupings, using the language of religion allows them to exploit the loopholes/weaknesses in the international and domestic European laws to express their pre-existing hostility towards those who they essentially believe to be foreign and thus concealing an undercurrent of xenophobia and racism.

At the international level, there has been a slow but gradual realisation of this wide gap between religious and ethnic non-discrimination especially in the context of the rise of xenophobia, intolerance and in particular Islamophobia. The strategies and avenues for advancing are finite and discernible. Either protection against religious discrimination is strengthened or the scope of ethnic discrimination is widened to become inclusive of religious discrimination. In between, we find a number of creative arguments for potential steps forward. They include giving greater attention to indirect discrimination and expanding its scope by looking at affect rather than the evidentially difficult test of intention[518] Another is to draw on the idea of intersectionality and the complex nature of discrimination aimed at the identity as a whole to argue that elements of identity cannot just be differentiated on apparent causes of discrimination. Both routes are problematic as attempts to strengthen the prohibition of religious discrimination stalled with the Declaration on Religious Discrimination. Likewise the scope of ethnic discrimination clearly and explicitly excludes religious discrimination.

Despite this there are pragmatic ways forward, which appear to be paying dividend such as arguing indirect discrimination and intersectionality as well as that Islamophobia presents a unique phenomenon with various elements. Islam by its adherents is seen as something beyond just a belief and so overlap is sought with elements of ethnic. In relation to the landmark UK case of *Mandla* relating to Sikhs, which held that Sikhs were an ethnic group thus included within the scope of the Race Relations Act 2000 identified the following two factors: "a long shared history" and "a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance." Following this five further *relevant* shared characteristics were listed: geographical origin, or descent from a small number of common ancestors; language, not necessarily peculiar to the group; literature peculiar to the group; a religion different from that of neighbouring groups or from the general community surrounding it; and being a minority or being oppressed or a

[518] CERD, General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), para 5.

dominant group within a larger community, for example a conquered people.[519] Bengoa in the same vein states: "Ethnic values, then, comprise a set of customs, traditions, cultural expressions and collective history that forms a network of links conferring a special identity on a particular human group. Usually those values are accompanied by a specific language and religion. Not infrequently there are also physical features, even if these are not merely racial. That is why this supposedly 'objective'."[520]

As such, the Ad Hoc Committee on the Elaboration of Complementary Standards has recognised that "religious intolerance often constitutes an essential part of contemporary manifestations of racism" and also recommended the drafting of a General Recommendation specifically focusing on race and religion.[521] In this regard the CERD after this author submitted a similar argument[522] affirmed the potential inclusion of Islamophobia within its scope:

> "In the light of the principle of intersectionality, and bearing in mind that 'criticism of religious leaders or commentary on religious doctrine or tenets of faith' should not be prohibited or punished, the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism."[523]

A related area is that of speech which may constitute incitement to hatred. ICCPR Article 20.2 states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." This provides one specific way that discrimination may manifest, in the expression of hateful and hostile speech targeted at a specific minority group, the most common form of which to date has been racism. Prejudices such as racism may be expressed overtly and expressive of hateful, derogatory and hostile attitudes and even threats or execution of violent acts towards individuals belonging to certain social group for no reason apart from ascribing to that identity. It provides for an elaboration of a limit to Art. 19 of ICCPR on the freedom of expression.

Once we have established that such hatred or violence against others ought to be prohibited or criminalised, and especially so, when aimed at vulnerable minority groups due to bigoted and prejudicial views, then we can also assess whether there is a difference and inequality between the different heads of prohibited hate speech. Article 20 lists the prohibition of hate speech on the basis of national, racial or religious. As such it is clear that the provision itself

[519] *Mandla v Dowell-Lee* [1983] 2 AC 548 (House of Lords).

[520] Bengoa, *Existence and Recognition of Minorities*, para. 45.

[521] Human Rights Council, Complementary International Standards, Compilation of Conclusions and Recommendations of the Study by the Five Experts on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism Racial Discrimination, Xenophobia and Related Intolerance, 18 February 2008, A/HRC/AC.1/1/ CRP.4 and 27 August 2007, A/HRC/4/WG.3/6.

[522] Shaikh, "Recognising Muslims as Ethnic Groups".

[523] CERD GR 35, para. 6.

does not differentiate between the three heads. However when Art. 20 is invoked in relation to the hostile and hateful speech directed at Muslims in the post-9/11 period, commonly and increasingly referred to as Islamophobia, extensive and detailed discussions and debates have been provoked on the balancing or conflict between Art. 19 and Art. 20. In other words how can one balance the competing requirements and reconcile between the freedom of expression and the prohibition of religious hatred? The first point to note in this regard is that the discussion is specific to religious hatred and not other forms of hatred. That is to say that debate is confined to the context of expression targeting Muslims and Islam as well as no comparative arguments being made relating to the need for greater freedom for criticisms based on racial or national basis. This is revealing of the fact that a conflict is not perceived or anticipated in relation to national or racial hatred as no issue is taken with such a prohibition and the laws in a number of States have strong legal frameworks in place against racism, which in most cases includes discrimination based on national origin within the meaning of racism. ICERD includes it explicitly in its Art. 1(1). The context and backdrop is one of not only growing Islamophobia but also the recent outrage and violence created in response to the attempt to depict the Prophet Muhammad in a derogatory manner.[524]

Furthermore a number of the debates and discussion occur in a polemic fashion carrying significant rhetoric, often presenting it as a battle between forces of freedom/liberalism and those who seek to deny us such freedom. In doing so, the explicit or implicit assumption is that ICCPR Article 19 is absolute and may not be restricted under any circumstances. While it may be true that amongst individual States, the extent to which freedom of expression is allowed varies greatly, it is wholly and legally incorrect to state that it is an absolute right lacking any grounds from limitations. Under international law, the freedom of expression is subject to limitations based on public policy grounds under Art. 19.3. As such it can be and is limited beyond certain permissible bounds. For example it is not permissible or acceptable to call openly for the murder and rape of other people. Indeed the lesson is stark from the Rwandan Genocide of the sheer carnage possible from unrestrained freedom of expression.[525] Where an honest mistake may be possible is in conflating the high and fundamental status of the principle with its perceived absoluteness. No doubt in light of this, States should desist from and only in special and pressing circumstances consider it appropriate to intervene in people's freedom of expression.[526] It is fundamental to the function of a vibrant democracy, were ideas are openly and readily exchanged and proliferated. Opposing views should have the opportunity to be aired and a healthy debate must always be in motion in a healthy democracy. At the same time such a democracy must prevent hostility and hatred and ultimately violence from becoming prevalent amongst its subjects. In this regard, harmonious relations and community cohesion should be safeguarded whenever possible and balanced

[524] Boyle, K. "The Danish Cartoons", *Netherlands Quarterly Human Rights*, Vol. 24 (2006). See also Langer, *Religious Offence and Human Rights: The Defamation of Religions* (Cambridge University Press, 2014).

[525] Radio Rwanda and Radio Television de Milles Collines (RTLM) are said to have played a role in encouraging and inciting the massacre of Tutsis and moderate Hutus. For transcripts see http://migs.concordia.ca/links/RwandaRadioTranscripts.htm.

[526] HRC GC 34, paras. 50-52.

against the fundamental and central nature of the right; for both are integral elements of a peaceful democratic society.

As for the view of the HRC on this apparent impasse, far from being in contention, Arts. 19 and 20 are in agreement with each other and the "acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3."[527] Art. 19 provides an essential right with inbuilt limitations and Art. 20 elaborates on one specific example of such limitation worthy of special attention owing to its deplorable nature and its common occurrence. In this regard the HRC stated that Article 20 should be read as indicating the "specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19."[528] The HRC goes on to say: "It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19."[529] Thus Art. 20 could be read alternatively as Art. 19(4). It could also be understood as providing a more specific limitation whereas generally speaking Article 19 while stipulating grounds of restriction/interference leaves it to States' discretion and their situation to define the scope for the right to be exercised. Some States, like the US, provide expansive room for freedom of expression while others, such as some Middle Eastern countries or eastern European countries perceive the right very narrowly.

As to where the threshold is drawn regarding what constitutes hate speech, Art. 20 defines incitement to hatred as incitement to discrimination, hostility or violence. These three subdivisions can also be perceived as three different consequences of hateful attitudes of varying and incremental severity. Clearly, discrimination being the least severe and violence the worst. It would then also be implicit that violence is the end result in an escalating spectrum of hatred and what will be inevitable, if left unchecked. Therefore what is important to note is that not only is there no distinction made between the three categories of protected people, that is, national, racial or religious, but the threshold for an act of expression to qualify as incitement to hatred need only be proven to be an incitement to discrimination. Discrimination is commonly understood as a difference in treatment that cannot be held to be reasonable or justified. Hence according to international law, any encouragement or expression of views that may result in attitudes or acts, which would constitute an unjustified difference of treatment, would be prohibited. For example statements alleging certain religious groups should not be employed would constitute incitement to hatred without having to show or prove the presence of hostile or violent behaviour.

With this in mind, it is useful at this juncture to briefly assess to what extent State practice reflects this international norm. It is certainly the case that there has been a concerted effort by States to bring their domestic laws in line with Art. 20 as far as incitement to racial or

[527] Ibid. at para. 50.

[528] Ibid. at para. 51.

[529] Ibid. at para. 52.

national hatred are concerned. Any racist speech is often promptly dealt with as constituting incitement to racial hatred. However the same is not apparent in the realm of incitement to religious hatred. Taking the example of the UK, the gap between laws on incitement to racial hatred and religious hatred is quite significant.[530] Any expression perceived to be of a racist nature is penalised if it is deemed to be "threatening, abusive or insulting"[531], but for incitement to religious hatred the threshold is excessively high requiring expressions deemed to be only "threatening" and thus imminent threat of violence.[532] Another significant difference is that intent must be proven for religious hatred but for racial hatred the lower threshold of "having regard to all the circumstances racial hatred is likely to be stirred up thereby."[533] Practically, this may mean that a prosecution for religious hatred only becomes possible once the threat has been carried out *and* intent proven. Even the existing weak protections against incitement to religious hatred in the UK took place owing to passage of EU Directives that required the strengthening of prohibition of religious discrimination.[534] Even with these developments, it is clear that the UK falls well short of the international standard that require the prohibition of incitement to religious hatred, which is understood as protected even against incitement to discrimination. It is hereby submitted that the UK fails to protect its religious minorities against incitement to discrimination and hostility, both of which constitute examples of hatred. It only protects against incitement to violence but its effectiveness is questionable in light of the introduction of the even more restrictive criteria or 'imminent' threat of violence.

When it comes to hate speech laws against religious minorities, the approach of the UK is by no means isolated, and is widespread in Western European States and other liberal democracies. In fact a Panel of Eminent Persons for combating discrimination against Muslims, convened by the OIC in January 2013, to identify ways to address the growing phenomenon of Islamophobia concluded that international law offered sufficiently strong protection and basis,[535] but there were gaps in "interpretation, implementation and enforcement" at the State level to address the issue of incitement of religious hatred.[536] Thus the question arises as to why the gap in protection exists despite clear international law against it and what could potentially be done to address it. As already discussed above, religion and ethnicity (inclusive of race), while both being considered examples of identity, are fundamentally different in one aspect, that is one is an ideology and the other an immutable trait.

[530] Shaikh, "FCNM Shadow Report".

[531] Sec. 18(1) of Public Order Act 1986, Part III.

[532] Sec. 29B(1), Racial and Religious Hatred Act 2006 Chapter 1.

[533] Sec. 18(1a) of Public Order Act 1986, Part III.

[534] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin and Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment and Occupation. See also ACFC 2nd Opinion on UK.

[535] The author has first-hand insight owing to a period as a Fellow at the OIC (2012-3).

[536] Sixth OIC Observatory Report on Islamophobia, October 2012 – September 2013, presented to the 40th Council of Foreign Ministers, Conakry, Republic of Guinea, 9-11 December 2013, p. 34. The legal experts of The Panel of Eminent Persons consisted of Cherif Bassiouni, Ahmar Bilal Soofi, Doudou Diène.

Ideologies and belief systems must be open to debate. Racial or ethnic identity, while potentially accompanied with common cultural traits, including religion and language is a matter of fact, and devoid of substance in terms of beliefs and choices. Therefore protections afforded it must inherently go beyond those afforded owing to religious identity. It is right that discrimination, abuse and insults on the basis of immutable differences tantamount to a notion of superiority of one race over another by virtue of only that differentiating factor should be prohibited. Similarly it would not make the same common sense to prohibit any discussion of claims to quality of the content of certain religions. As strengthening of protections against incitement to religious hatred[537] have been caveated with explicit exception that "criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished.[538]

Even religionists themselves would not support stems on limitations on freedom of expression to go to the extent where they themselves become unable to debate with other religionists, atheists and agnostics with regards to existential questions of existence and deities. At the same time a real effort is required by jurists and academics to identify the difference and attempt to draw a legally implementable line between maintaining and creating the conditions of open, frank and genuine discussion and debate on doctrinal, historical and theological issues, while at the same time giving the incitement to religious hatred the same level of protection as incitement to racial hatred, as, fundamentally, both are equally deplorable. The difficulty though is in being able to identify and differentiate between incitement to religious hatred and justified issues of debate. In other words, the extreme end of permissible free speech has often been characterised as the right to offend, mock and ridicule, in particular, relating to a free press. The HRC notes: "The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20."[539] Where then is the line between such a right and the prohibition to religious hatred to be drawn? Rephrased, when does mockery, offence and ridicule become incitement to hatred?

One potential and tentative proposal to reconcile this tension, pending a definitive answer following extensive discussions and deliberation by leading experts and policy makers, is to differentiate between criticism based on textual sources of a religion and criticism due to inherent hatred of the religion itself for no other discernible substantive reason. Such animosity when not based in religious text or beliefs is a cover for racist and religiously bigoted attitudes targeting ethno-religious minorities. Furthermore it should never be acceptable to make derogatory generalisations against an entire religious group and then

[537] CERD GR 35, para. 6.

[538] HRC GC 34, para. 48. See also Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add.119). See also concluding observations on Kuwait (CCPR/CO/69/KWT).

[539] HRC GC 34, para, 11. See also communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

attribute it to a dislike of the religion, for the reason that it requires an objective basis and more importantly that homogeneous belief on a number of matters in any one religion is rare.

III. Freedom of Religion (internal)

The previous section highlighted the fact that the development of the freedom of religion under international law can be traced to the notion of eliminating intolerance and religious discrimination. There are two ways to view this evolution and relationship. The first; that freedom from discrimination and intolerance on the basis of religion are *a priore* necessary and render the freedom of religion a meaningful right. Thus the former enables and forms the basis of the latter. The view could also be taken that the general concept of religious tolerance of others entails, once expanded, not just their identity but also their religious beliefs and practices. The second; that intolerance and discrimination are comparable and related to the internal freedom of religion, that of thought, conscience and religion[540] as well as possibly impairing the freedom to choose one's religion.[541] By this what is meant is that discrimination and intolerance place the victim at a disadvantage owing to their religion. This invariably has an indirect effect on the internal aspect of freedom of religion and potentially impairing the freedom to choose. Freedom of religion was discussed in Chapter 3, but in relation to analysing the scope of the concept of religious minorities under international law vis-à-vis Art.18 of ICCPR and UDHR. In this section, we will analyse freedom of religion as one of the substantive rights of religious minorities under international law.

The starting point for understanding freedom of religion is ICCPR Article 18, which has its beginnings in UDHR Article 18.

> "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."

[540] Art. 18(1) of ICCPR.

[541] Art. 18(2) of ICCPR.

The Human Rights Committee in its General Comment 22 recognises the importance and centrality of Article 18 to the wider human rights system by describing it as "far reaching and profound".[542] This fundamentality is observable in it being one of the few underogable rights in the ICCPR even in time of public emergency beyond the in-built limitations clauses.[543] While this suffices to explain its profundity, its far reaching aspect can be put down to the "fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief."[544] While asserting the equality between the three different types of belief, the terms used remain vague and ambivalent. A potential explanation follows that what may be alluded to is that "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."[545] In its profundity and fundamentality, Article 18 is similar to and related to the freedom of expression in Article 19. Along with the freedom of association, these three provisions can be considered core human rights on which a number of other rights depend and as such are integral to any framework of human rights protection. One must be endowed with the volition to think and believe as one wishes. Resultantly, there should be sufficient openness for those ideas and beliefs to be expressed freely and without fear. Thus, following that the ability of likeminded persons to congregate, coalesce, organise and mobilise to propagate or to bring common ideals or beliefs to fruition. All are fundamental to democratic society.

Furthermore, similar to Article 19, Article 18 has an internal absolute, uncompromisable aspect and an external aspect limited on the basis of public policy grounds. As already discussed in preceding chapters freedom of religion is often divided into two parts. The first is an absolute right, that of holding a religious belief and the second a limited right to manifest those beliefs conditioned on the necessity to be "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". These are often understood to be reflective of the internal and external aspects of the right. There is never any justification for interfering with the actual religious beliefs of a person or attempting to put them at a disadvantage in any way owing to that choice. According to the HRC:

> "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 adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief."[546]

[542] HRC GC 22, para. 1.

[543] Ibid., Art. 4(2) of ICCPR, , HRC GC 29 and Siracusa Principles.

[544] HRC GC 22, para. 1.

[545] Ibid. at para. 2.

[546] Ibid. at para. 3.

This absoluteness and unconditionality is supported by, buttressed and connected to Art. 18.2. As such it is infeasible to compel someone to give up or adopt a certain belief as they can always choose to conceal their genuine beliefs. It is also impermissible to compel them to reveal them, if they do not wish to. Hence this area of the law is most often concerned with those who wish to proclaim their faith despite negative repercussions. This could be the renouncement of faith in public owing to force or threat of force. It could be that owing to self-identifying as belonging to a certain religious group, a number of benefits and services are withheld. Also as stated earlier, while the right is divided in this way, there are matters that do not easily fall on either side. For example, if one adorns specific garments that one considers mandatory in ones religion, would this be seen as expressing one's religious identity or manifesting that belief? An associated question would be whether identification of a belief is only observable in speech or in other forms of expression too. As such, while manifestation always implies a certain belief, does belief necessary entail any form of manifestation?

IV. Freedom of religion (external)

The following section will delve and focus on the limited and outward aspect of the right, that of manifestation, in particular the type of acts or behaviour protected as well as the nature and scope of potential limit. Taking as our starting Art. 18 of ICCPR, we may observe that manifestation of religion may be in the form of "worship, observance, practice and teaching". While the framing of the sentence suggests an exhaustive list the expansive nature of the terms employed is indicative of an attempt to give examples of activities that may be considered to be manifestation of religious beliefs. As such it is difficult to imagine how any act of self-perceived manifestation could fall foul of the broad meanings possible of worship, practice and observance.[547] Although it may be that narrower meanings may be applicable dependent on the subjectivity of the individual or the doctrinal underpinnings of the religion in question. For example, worship may refer to ritual acts or to the entirety of the religion. Teaching nonetheless provides for a specific right that has clear limits of interpretation, but with the addition of three broad terms serves to highlight the importance of the teaching aspect through explicit enumeration. The Declaration on Religious Discrimination while non-binding elaborates further on potential examples of manifestation as a) worship, assembly and places of worship; b) charitable or humanitarian institutions; c) articles and materials related to the rites or customs of a religion or belief; d) writing, issuing and disseminating relevant publications; e) teaching religion in suitable places; f) receipt of voluntary financial and other contributions; g) selection of appropriate leaders; h) observing days of rest and celebration of holidays and ceremonies; i) communications with co-religionists at the national and international levels.[548] The HRC states the following regarding possible manifestations of religion in line with the Declaration:

[547] HRC GC 22, para. 4.

[548] Art. 6 of Declaration on Religious Discrimination.

> "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."[549]

Following the listing and elaboration of such varied and non-exhaustive examples of manifestation, it is axiomatic that the default position of the right is that once a religion or belief is recognised as such and falls within the scope of Art. 18, that it then automatically leads to the freedom to manifest that belief in *any* way an individual wishes unless it falls foul of the limitations prescribed in 18.3 in order to 'protect public safety, order, health, or morals or the fundamental rights and freedoms of other'. Unravelling the limitations to Article 18 is key to understanding the extent of the right, its permissible scope and whether States can in practice and subsequently do overstep the inbuilt discretion. The four permissible heads of limitations are 'public safety, order, health or morals, or the fundamental rights of others'. Of these, the broadest and potentially offering the most discretion to States is that of 'morals' followed by 'order'. Both are bound to be subjectively interpreted by the State in question and especially in relation to morals, the associated values are also bound to vary from State and region. Nonetheless to counter this, the HRC states that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."[550] 'Health' and 'safety' are far more objectively identifiable. The final condition too is objectively discernible given that it relates to the conflict and balance of rights belonging to different individuals.

In terms of how the scope of permissible limitations should be interpreted, the HRC notes that there should be no element of discrimination that is an unjustified and unreasonable difference in treatment. The limitation should also not be so far reaching that it encroaches or jeopardises the unconditional, absolute and internal aspect found in Art. 18.1.[551] Moreover, quite crucially the grounds of permissible limitations are exhaustive without any ambiguity or

[549] HRC GC 22, para. 4.

[550] Ibid. at para. 8.

[551] Ibid.

doubt. The HRC observes that Art. 18.3 "is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security."[552] This is a strong statement as it confines States to the explicitly stated permissible grounds for limiting Art. 18.3. Even though on initial analysis the stated grounds being substantially broad especially vis-a-vis public morals and public order, the oft cited ground cited in numerous other provisions of national security is explicitly omitted. This is also reflected in the nonderogability of the right in states of emergency under Art. 4.2.[553]

Regardless of this limiting of scope in relation to national security and the necessity that public morals be reflective of the society as a whole, the discretion available to States in application with regards to scope of permissible limitations still appears overly broad, seemingly placing already vulnerable religious minorities in a weak position with regards their rights to religious freedom. The element critical to the proper interpretation and application of this right is that of proportionality, without which a serious risk would be posed to most forms of manifestation, if not the freedom to hold beliefs, dependent on the sentiments of the State especially in relation to disfavoured religious minorities.

Proportionality forms the crux of the consideration of the merits of cases alleging a violation of freedom of religion. This is the situation under ICCPR as is under the ECHR. The exercise of determining whether an interference was proportionate hinges on the pursuit of a particular aim. Once that aim is held to be legitimate by virtue of falling within the ambit of the permissible grounds for restrictions, it may not be deemed to be permissible without first establishing that it was proportionate. The HRC points out that "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." Art. 9 of ECHR stipulates that any interference in the manifestation of religion must be deemed 'necessary in a democratic society'. A vital element of this balancing exercise, implicit in the principle of proportionality and in accordance with the profound and fundamental nature of Art. 18 but not yet established as a principle of interpretation under international law, is whether a prescribed legitimate aim can *only* be achieved through limiting a certain manifestation of religion. Furthermore, accommodation of certain manifestation of religions may be maximised through the provision of facilities, services or personnel that would avert the need for an infringement in the manifestation of religion. Such a simple exercise of first evaluating the dependence of the aim on the means employed, establish whether the stated means can be realised through a different means and whether accommodation can be made in some way and thus make the achievement of the aim feasible to avert the infringement of the right to manifest religion.

An example is the recent controversy in the UK over the permissibility of a witness to wear the face-veil (*niqab*) as a manifestation of Islamic belief in Court and while giving

[552] Ibid.

[553] Ibid. at para. 1.

evidence.[554] The judge ruled that it was a permissible manifestation of religion until and except when she was to give evidence, adducing that it was a critical function of the judge, lawyers and jury to be given the opportunity to observe her facial expressions in order to inform the veracity of her answers. As such she was permitted to be concealed from the public audience. However in reaching his decision, the judge failed to ask the more fundamental question of whether the prescribed aim of avoiding the witness's ability to deceive the jury by covering her face was in fact true from a scientific point of view. Although demeanour has traditionally been viewed as an important element of witness credibility, experimental results have indicated consistently that 'this legal premise is erroneous'.[555] Experts on the issue are of the converse opinion that it is a misperception that facial expressions expose the truthfulness of people.[556] In fact evidence shows that facial expressions are more often employed to mislead others. Furthermore there were serious questions as to whether the witness was being treated in a discriminatory manner, in light of the fact that all witnesses have the right not to give evidence and instructions are made to jurors of how to perceive such a decision by defendant, in particular not to take it as a certain or probable indicator of presumed guilt.[557]

V. Preservation of the nature of the State

We find that modern States in addition to individual human rights do not only seek to protect their own democratic nature, but also other historical and contextual aspects. For Britain there is a deliberate preservation of the monarchy similar to some other European States, while in France and Turkey, secularism is protected constitutionally and imposed through State coercion in various public spheres of life. It also goes without saying that any acts of treason or aiding and abetting the enemy are dealt with in the harshest possible manner. Hence it could be said that the recognition and accommodation offered to a particular religion in a State very much depends on the threat it poses to the existing nature of the State, from its cultural and historic experience to its existing political structure.[558]

The spectrum can be divided into three rough categories. The first is where the majority religion is often accepted as the official religion of the State and it is to that religion that most deference is given and in some instances preferential treatment. It may even have an official status enjoying the competency to act as an agent of the State - a simple example being the officiating of marriage and other religious ceremonies without having to undergo separate

[554] *The Queen v D(R),* Judgment of H.H. Judge Peter Murphy in Relation to Wearing of Niqaab by Defendant During Proceedings in Crown Court (Blackfriars Crown Court, 16 September 2013).

[555] Wellborn, O., "Demeanour", *Cornell Law Review* (1991), 1075.

[556] See Leslie, I., *Born Liars: Why We Can't Live Without Deceit* (House of Anasi Press, 2011). The author argues that veiling does not hinder justice as facial expressions either tell us little or are misleading indicators of truthfulness (http://www.newstatesman.com/politics/2013/09/why-everyone-should-wear-veil-court).

[557] Teli, S., "Report on The Face Veil in the Courtroom", Averroes, 2014 (http://averroes.org.uk/wp-content/uploads/The-niqab-in-the-courtroom.pdf).

[558] Gunn, "The Complexity of Religion", 197.

civil processes. However this point should be caveated by the fact that the historical and constitutional evolution of a State may have been such that the majority or predominant religion still does not assume an official or favourable status. Instead the ideology that occupies the core of the State is an aggressive and positive secularism. The examples often cited in this regard have been France and Turkey.

In relation to France, the specific type of secularism at play in the Constitution and in State policies is mainly due to historically negative experience with the monarchy and the reliance and abuse of that particular institution in legitimising unfettered powers through religion. The present day French State has, as a result, assumed an anti-religious identity and where secularism is not just the official ideology, but one which is promoted and proselytised as the correct and true system for all who are French. Most recently this anti-religious stance has been epitomised in their treatment of Islam and Muslims' belief and practice within their territory. The point pertinent to us here in relation to France is that, while in a number of States there is recognition imparted on some religions (usually mainstream) and not others, in the case of France the secular ideology at the core does not in fact recognise the overt *practice* of any religion in the public sphere. Turkey is a unique case and in many ways an anomaly compared to other States, in that it specifically seeks to limit the expression and practice of the majority religion, Islam. However it is similar to France in that this tendency towards secularism and aversion to overt religious practice in public or at play in the functioning of the State was entrenched in the Constitution by Atta Turk and mechanisms and safeguards were placed by him to safeguard that nature, namely through the Courts and the military as well as recently the media.

The second type is where religion is not endorsed or preferred by the State, but is nonetheless recognised, accepted and accommodated to varying extents. This normally relates to the religion of various minority groups. Legally speaking as a basic level of protection such groups are afforded rights of non-discrimination and in some cases specific and special rights related to the manifestation and practice of their religion. As such we find that Jewish, Muslim, Hindu, Sikh and Buddhist communities often fall into this category when discussing Western predominantly Christian-majority States. Policy-wise there may be an inclination towards multiculturalism, where cultural or religious practices are interfered with minimally. Such a policy accompanied by the theory that lies behind minority rights may result in the accommodation of structures for the settlement of disputes according to religious law such is the case with Beth Din Courts and Islamic Shari'ah Councils in the UK.

If we place this type of recognition into our framework of asserting a correlation between acceptability and accommodation to not just security of the State but in fact the preservation of its ideological core/nature. Therefore we observe that if a certain religion does not, within its own ideology or in its manifestation by its adherents, pose a threat to the ideological basis of the State or conversely if the ideology of the State is not itself aggressively opposed to the religion, then they take on this role of an accepted religion. This is the case when a religion is closely related to the mainstream religion and or is limited to worship and ritualistic aspects, that is, confined to the private sphere. When manifestation becomes overt, interferes with public spheres (education, health and employment) conflicts arise that need resolution.

Problems are also created when it is expressed or manifested politically and thus becomes perceived as a greater threat to the nature of the State.

Following on from this train of thought, logically the third kind of religion is then that is outrightly rejected by the State because it is averse or in opposition to the State ideology. Here by rejected, we do not mean that direct force is applied for people to give up their religious beliefs. However what is severely restricted is the expression or manifestation of that belief, even to the extent that by displaying corresponding religious symbols and other observable traits exclude them from access to education and employment. Hence the trend apparent in this regard is that those States, which have to some extent a religious identity. This is followed by religions which are similar and then religions generally. With regard to the former, it may be that Abrahamic faiths may perceive themselves as closer in proximity then other polytheistic faiths, such as Hinduism or Buddhism. The secular ideology rejects or limits manifestations of religion generally and in particular those that are overt and pervade all elements of adherents' lives – private and public. Hence, the decision taken by a State on which religions are accepted (accommodation maximised) and rejected (accommodation minimised) is inherently based on whether they constitute an acute and severe threat to the existing political and religious system. Prior to this we also established that another criterion would be whether belief was considered to be moral/ethically deplorable.

VI. Scope of permissible limitations on Freedom of Religion

What follows rights of religious non-discrimination conventionally in the international human rights framework are rights related to the freedom of religion. As already mentioned above, this right has two broad aspects, one related to the holding of a certain belief and the second to its manifestation. The former is said to be absolute while the latter is said to be limited by public policy grounds. Despite the freedom to hold a belief being absolute, it is only so once the State recognises the belief as a religion. The two bases that its classification is rejected is when it does not meet some objective criteria for being a religion or that it is a religion but at complete odds with the nature of the State or poses a risk to the security of the State. Consequently three types of religion were identified in any State: the official/majority religion, accepted religions and rejected religions.[559] As such, the freedom of religion often refers to the category of accepted religions which are attributable to various minority groups. It may also apply to the majority religion where it is not the official religion or secularism predominates the centre of the State.

When it comes to Islamic law, the position is strikingly similar, with one significant difference; that Islam occupies the role of official religion. In relation to the treatment of the religious minorities, as already discussed at one end of the spectrum, we find the opinion that all non-Muslim faith groups to be considered accepted religions, in that all of them are eligible for *dhimma* status (as per Ibn Taymiyyah and Ibn al-Qayyim). The opinion found at the most restrictive end of the spectrum of validity is the one where only People of the Book

[559] See Gunn, "The Complexity of Religion", 197.

interpreted as solely Jews and Christians are included. Hence we find that similar to the model set out above, this would follow logic and indeed correlate with contemporary State practice, where those religions most closely associated with the official or majority religion are given maximum accommodation, being monotheistic in their origins/essence and of the Abrahamic faiths. These are then followed on a sliding scale by those concerning whom there is disagreement, if they are or are not People of the Book: the Sabians and Zorostarians, but little dispute that they are accepted religions, adherents of which are eligible for protection on the payment of *jizya*. The last group would then be the idolaters, amongst whom the Arabs are viewed at more harshly.

In light of this range of opinions even if we took the one that causes the greatest discomfort from a human rights perspective, that of the non-permissibility of the existence of certain groups within an Islamic polity, we may understand such positions in the context of rejected religions due to not only their opposition but also their enmity to Islam and its teachings. This is clearly more acute when polytheism is under discussion as it is in fact the antithesis of Islam or conversely what Islam sought to eradicate and displace. In the case of Arab polytheists, a prominent reason, among others, has been the ease with which they are able to understand and comprehend the message of Islam as expressed through the Qur'an, yet they still reject the religion. It is important to keep in mind that even if the most lenient opinion is followed in relation to allowing all groups to exist and be recognised as a religious minority, that once we come to discuss the freedom to manifest ones religion, there could be varying accommodation allowed for different religious groups according to some opinions owing to the same concept of threat to the religious and political nature of the State as well as its security. In fact this is concurrent with modern State practice, where the freedom to hold a belief is not really interfered with, but when a religion takes on the label of rejected religion, its practice and manifestation is severely restricted.

This discretion given to States is inbuilt into international law to safeguard their security, constitutional nature or any other trait they wish to protect. In any freedom of religion provision of a human rights treaty, the practice of religions is always subject to restriction on a number of public policy grounds. This discretion varies from treaty to treaty and did not exist altogether in the articulation of the right in the UDHR. This was nonetheless a pattern with a number rights in the UDHR, which when they were later expressed through the ICCPR and ICESCR had accounted for States' concerns and fears. The ICCPR has arguably the widest discretion specifying the following grounds to limit the manifestation of religion: "public safety, order, health, or morals or the fundamental rights and freedoms of others." It is clear to see that such drafting is in favour of the State rather than religious groups. While it is plausible that all bar one are to an extent objective and the State can be challenged and held to account were it to abuse any of these grounds, their threshold and exact nature still remain reliant on the State's discretion.

The one that is most subject to abuse and would evade any objective definition or challenge is the ground of 'public morals'. Theoretically this means even if a religious practice does not pose a threat to safety of others, or their health, does not cause civil disorder nor infringes on others rights, it may still be deemed by the Government as contrary to subjectively defined

'public morals'. This once again is tantamount to the State reserving the right to veto the freedom of religion, and in particular its practice, when it is seen to threaten ideology at the centre of the State which would in turn determine what is and is not unconscionable to the morality of the public.

The ECHR requires that any restriction on the manifestation of religion be '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.' The ECHR's wording is almost identical to that found in the ICCPR with the addition of a further vague and legally indeterminate term, 'necessary in a democratic society'. Though it may seem as a result that the discretion afforded to member States may be wider than the ICCPR, the term has undergone extensive elaboration through a large body of case law and wide breadth of issues. Implicit within the tests for being necessary in a democratic society is proportionality of the interference with the intended legitimate aim. The Strasbourg Court has also developed now the well-known doctrine of margin of appreciation, which for States' progress in democratisation and other matters which relates to the specific context and experience of the State under question. The outcome is the Court allows a level discretion and deference on some issues as something to be left for the State itself, hence attending to procedural issues rather than those of substance.

From these clauses allowing for exceptions to the freedom to manifest ones religion the wording provides for an extraordinarily wide discretion for the State to limit the public aspect of religious belief suited to their wishes, especially with the inclusion under the ground of 'public morals'. Despite this apparently wide scope, the vast jurisprudence of the ECtHR helps to shape the precise bounds and limits of the applicable scope of these terms, in particular to the principle of proportionality. Despite this though, the ECtHR has reached far reaching rulings finding in favour of the State due to the remaining discretion and the margin of appreciation in light of historical and constitutional experience of particular States. This being the reason why the ECtHR ruled in favour of Turkey when forbidding the headscarf and the beard for men in universities.[560] This gave religiously observant youth in Turkey a stark choice between manifesting an aspect of their religion in public or acquiring further education. Similarly the Court held in favour of cases concerning the headscarf in France[561] and Switzerland[562] citing the secular nature of the State and its historical experience as well as the associated margin of appreciation that must be afforded in such instances.

The current face-veil ban in France, the most extreme of its kind in relation to restricting freedom of religion, mainly owing to its application to all public places, was decided against the claimant at the ECtHR recently.[563] It was to be a litmus test for how far State discretion and the margin of appreciation can be stretched to undermine and render Article 9's ability to ensure freedom of religion. Most commentators had anticipated and predicted that while the

[560] *Leyla Sahin v. Turkey*, no. 44774/98 (2004).

[561] *Dogru v. France*, no. 27058/05 (2009).

[562] *Dahlab v. Switzerland*, no. 42393/98 (2001).

[563] *S.A.S. v. France,* no. 43835/11 (2014).

Court had held the prohibition of religious symbols such as headscarves and crosses to be proportionate limitations in certain educational and employment contexts and thus within the permissible margin of appreciation in particular contexts such as employment and education, the general and blanket nature of the French ban would surely fall beyond the margin of appreciation. This would be down not to the legitimacy of the aim but in the lack of distinction applied to place and persons. A similar justification was given when deciding against the UK in relation to the blanket and general deprivation of the right to vote for prisoners.[564] Another perceived point in favour of the claimant was thought to be that the strength of a prescribed aim. As French authorities and proponents of the ban had always cited oppression of women and equality as grounds for the ban in public discourse. However as neither could be proved without the women themselves showing themselves to be coerced, the only remaining publicly stated ground was the vague concept of French values and the more specific idea of integration through interaction with others. Such arguments were easily countered from a feminist and religious freedom perspective.[565]

What is striking in relation to the decision is the reasoning given. The Court seems to have conceded and accepted the submission by the French Government relating to the policy having a legitimate aim even despite it not being explicitly stated as a permissible ground for limitation under Art. 9. The French Government submitted three aims underlying the law: gender equality, human dignity and "respect for the minimum requirements of life in society". The Court rejected the first two and accepted the third on the basis of the necessity of community and social cohesion. In this regards it stated:

> "The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier."[566]

While there may be no overt mention in relation to the ECHR regarding the list of permissible restrictions being exhaustive, we have shown that Art. 18.3 "is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security."[567] As such the Court also seems to have accepted the spurious claim that such an aim falls under scope of safeguarding the rights of others, without much explanation of how the right to be

[564] *Hirst v. UK (No. 2),* no. 74025/01 (2005).

[565] See Hunter-Henin, M., "Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom", *International Comparative and Law Quarterly,* Vol. 61 (2012).

[566] *S.A.S. v. France*, para. 122.

[567] HRC GC 22, para. 8.

interacted with is a right that can compete and override the profound nature of manifestation of religion while at the same ensuring the religious plurality obliged by minority rights, or the idea of women's right to choose their identity and clothing. Furthermore it remains to be seen whether the Court would treat differently a member-State that was not as preoccupied by the doctrine of secularity as others. Would the margin of appreciation afforded to such States be narrower than the aforementioned States?

VII. Conclusion

In this chapter, our main focus was the freedom of religion of religious minorities under international law. However prior to discussing the relevant substantive provisions, it was felt that a detailed elaboration of religious non-discrimination law was needed as non-discrimination is a pre-requisite to both freedom of religion and minority rights. We observed that in that regard instruments for the protection of religious discrimination are lagging far behind, for example, protections at the national and international level for racial or ethnic discrimination. We highlighted the two substantive aspects of freedom of religion, the internal and external. The internal, we established was absolute and may not be interfered with under any circumstances, even states of emergency where derogations are normally permissible. Manifestations of religion however could be limited but only based on pressing public policy grounds as opposed to animosity to the religion per se. We then proceeded to analyse the practice of States in granting or limiting certain manifestations of religion and the response of supranational bodies to those practices. It was noteworthy that under ECtHR through the principle of the margin or appreciation, State's could be held to varying standards depending on their historical, political and cultural context and development.

Chapter 7:
Comparison of the Right to Freedom of Religion

I. Introduction

This chapter will conduct an asymmetric comparison of the two previous chapters. They both had had a difference in focus to reflect the origins, development and evolution of freedom of religion of religious minorities under both systems of law. Chapter 5 was entirely devoted to addressing whether Islamic law granted the internal aspect of freedom of religion or what is referred to as the 'freedom to thought, conscience and religion' in Art. 18(1) of ICCPR. As much of debate around Islamic law is heavily influenced by the context of conflict and hostilities, the ideas of violence, coercion and force have been repeatedly visited when discussing the freedom of religion. That discussion was also specific to Islamic law in that it was a continuation of the issue of scope as a number of the claims and opinions about the absence of the freedom of religion within Islamic law related to the treatment of polytheists or non-People of the Book. Given that this was also the religious group that was most hostile and engaged in a prolonged military campaign against the Muslims added further complexity to the discussion. Nevertheless once we established the absolute nature of the internal right under Islamic law, it was also a logical progression to deduce that non-compulsion in religion necessitated the default granting of rights of religious practice and manifestation.

The development of international law on the freedom of religion began with articulation of the rights of non-discrimination of religious minorities, but even before that its spirit was articulated in the UN Charter: "to practice tolerance and live together in peace with one another as good neighbours".[568] As such, the Declaration on Religious Discrimination was in fact intended for religious minorities with its ultimate aim to ensure freedom of religion. However for that to be possible, intolerance, discrimination and hatred had to be eliminated. Hence why the Declaration was named as such and UNGA Resolution 48/128 was on "Elimination of All Forms of Religious Intolerance". We have already analysed in Chapter 6 that the freedom of religion under international law is broadly divided into two elements, that is, the right to hold beliefs followed by a right to manifest those beliefs. The former being absolute, with the prohibition of the use of force implicit, and the latter being subject to limitations on public policy grounds and the protection on individual rights of others. The enumerated public policy grounds for limitation are safety, health, morals and order. The final ground addresses the potential conflict of freedom of religion with another individual's fundamental rights or freedoms. These would be limited, in the case of the ICCPR, to the Convention rights themselves.

[568] Preamble of UN Charter.

Islam has within it also a similar notion of a symbiotic relationship between belief (*eeman*) and consequent actions (*a'mal*). Having earlier elaborated on the internal aspect of freedom of religion and the (im)permissibility of force or compulsion under Islamic law in Chapter 5, in the present chapter, we will explore the extent to which the right to manifest religion is granted under Islamic law and international law and the permissible scope and grounds for limitations under both. As indicated in our analysis on the freedom of religion of religious minorities under international law in Chapter 5, manifestation of religion may be actions that extend beyond rituals and acts of worship to other aspects of public and private life that may be affected by religious belief. In other words 'manifestation' covers all external aspects of faith and religious belief besides profession or self-identification to a religion.

II. Relationship between belief and manifestation

According to basic Islamic creed, notions of inwardly belief, while distinct, may not be easily separable from outwardly manifestation. Overstatement of the divide would be artificial and impractical. In this regard, an individual's Islamic belief is not discernible publically, if it is not acted upon or manifested, while similarly acts manifesting belief are negated, if they are not premised on genuine heartfelt belief. Islamically, the former is identified as a disbeliever (*kaafir*) and the latter as a religious hypocrite (*munafiq*), that is, a covert disbeliever. In other words, not only are both aspects two parts of a coherent whole that constitute adherence to Islam and being considered as Muslim, but that belief naturally and logically necessitates manifestation in the form of actions. Expanding such a view to other religions, but still perceiving them through the lens of Islamic thinking, a non-Muslim's belief cannot exist in isolation from the need to practice elements of it. It cannot be separated from his non-Muslim religious practices just as the Muslim's religious acts cannot be from his beliefs.

We have already delved into the Islamic law position on the internal aspect of freedom of religion in Chapter 5 of this thesis. It would seem from our findings that accommodation of religious practices would be implicit in the recognition of the legitimacy of certain non-Muslim beliefs. In other words, we cannot say that the freedom to hold beliefs is guaranteed absolutely and allow no form of manifestation whatsoever. This certainly does not appear to have been the approach of the Prophet Muhammad during his lifetime. The Prophet did not interfere with any aspect of the religious lives of the Jewish tribes of Madinah preceding or following their severe enmity and betrayal. The foundational document of the new Muslim State in Madinah, the Constitution of Madinah, elucidated the following principle: "Muslims have their faith, the Jews have theirs. The freedom of religion is recognized and the Jews of Banu Auf are declared as one community with the Believers."[569] It is worth noting that the Jewish tribes were not treated as conventional *dhimmis* nor referred to as such. They were also not made to pay the *jizya*, but there was agreement for them to militarily support the Muslims in case of hostilities. That dynamic was more akin to a loose federation with Jewish

[569] See e.g. Hamidullah, M., *The First Written Constitution in the World : An Important Document of the Time of the Holy Prophet* (Lahore : S.M Ashraf, 1968); Berween, "Al-Wathiqa"; and Muhibbu-Din, "Ahl Al-Kitab", 112. See above, 15, fn. 30 for discussion around authenticity.

tribes residing and conducting business in their own areas mostly on the outskirts of Madinah. The reason *jizya* was not taken from the Jewish tribes of Madinah was principally due to the revelation of Qur'an 9:29 to Prophet Muhammad at a later stage and has been discussed in detail elsewhere.[570] However the Prophet's tolerant attitude towards them and their religion is evident in the agreements he concluded and the wide berth he gave them despite their resentment leading to aiding and inciting the enemies of Islam, in particular the Quraish of Makkah, against the Muslims in Madinah.

With the Christians of Najran, the Prophet is reported to have said that *dhimma* or protection would be guaranteed by him in relation to their property and religion.[571] Zaydan derives from this that the freedom of belief is not only guaranteed to religious minorities but their status as *dhimma* is conditioned on their freedom of religion, which is implicit within it and includes manifestation. If the freedom of belief, including manifestation, is not allowed for, then such a *dhimma* contract would be invalid and thus illegal under Islamic law due to not satisfying the necessary conditions. In support, he cites the Islamic law principle regarding *dhimma* that "we leave them and what they believe alone."[572]

It is mentioned by Ibn Ishaaq that the Christians of Najran visited the Prophet inside his mosque after the *Asr* prayer. When the time for their prayer came, they started praying in his mosque. People wanted to stop them, but the Prophet said to leave them. They faced West of Madinah and performed their prayer.[573] Elsewhere, it is narrated:

> "[B]efore the battle of Badr in 624 CE, a Christian deputation comprising 60 members from Najran came to meet Muhammad in Madinah to know his views about the personality of Isa b. Maryam[574] (Jesus Christ) (AS)[575]. They met the Apostle[576] performing the afternoon [*Asr*] prayers. When the time of their own prayers came, the Prophet allowed the Byzantine Christians to have their service in his mosque in Madinah. The Prophet is stated to have told them: 'conduct your service here in the mosque. It is a place consecrated to God'."[577]

Ibn al-Qayyim takes the incident as laying the precedent for the permissibility of the People of the Book to enter the mosques of Muslims and pray therein while in the presence of Muslims.[578] The Prophet's treatment of the Christians exemplifies the principle of freedom of religion that is demanded by Islam for non-Muslim minorities. A notable example relates to

[570] See Ibn al-Qayyim, *Ahkam ahl al-dhimma.*

[571] Abu Yusuf, *Kitab al-Kharaj* (Cairo: Al-Salafiah, 1934).

[572] Zaydan, *Al-Dhimmiyun wa al-Must'aminun*, 95.

[573] Ibn Saad, *al-Tabaqaat al-Kubra* (Beirut: Dār Sādir, 1968), 1:357.

[574] This is the arabicised version of 'Jesus son of Mary'.

[575] The author uses 'AS' to connote *alayhi al-salam* meaning 'may upon him be peace'.

[576] 'Apostle' is synonymous with Prophet Muhammad.

[577] Muhibbu-Din, "Ahl Al-Kitab", 115.

[578] Ibn al-Qayyim, *Zaad al-Maad* (al-Risalah, 1983), 3:638.

the charter relating to the monks of the Monastery of St. Catherine, near Mount Sinai, and to all Christians in the sixth year of *hijrah*:

> "By it, the Prophet secured for the Christians important privileges and immunities, while the Muslims were prohibited under severe penalties from violating and abusing what was therein ordered. In the charter, the Prophet undertook himself, and enjoined on his followers, to protect the Christians, to guard them from all injuries, and to defend their churches and the houses of their priests. They were not to be unfairly taxed; no bishop was to be driven out of his bishopric; no Christian was to be forced to reject his religion; no monk was to be expelled from his pilgrimage; nor were the Christian churches to be pulled down for the sake of building mosques or houses for the Muslims. Christian women married to Muslims were allowed to practice their own religion; and not to be subjected to compulsion or annoyance of any kind on that account. If the Christians should stand in need of assistance for the repair of their churches or monasteries, or any other matter pertaining to religion, the Muslims were to assist them."[579]

It is useful to compare this treatment with the underlying basis and purpose of minority rights as stated in the Commentary on the UN Minorities Declaration, which points out five different forms of historic State-minority relationships: "elimination, assimilation, toleration, protection and promotion."[580] In response it deduces: "Minority protection is based on four requirements: protection of the existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned."[581] The other terms stipulated therein are also quite advanced and far-reaching, bearing resemblance to the examples of manifestation mentioned in the Declaration on Religious Discrimination[582] and HRC GC 22[583]. There is also significant overlap and agreement with the minority rights approach found in the Commentary on the Minorities Declaration, covering all aspects of the rights, from the minimum to the maximum. The minimum and most elementary right owed to minorities is that of protecting their physical existence. This is reflected in the warning to the Muslims from violating any of the terms and in the promise to "protect the Christians, to guard them from all injuries, and to defend their churches and the houses of their priests." There is also protection from non-discrimination in the assertion "They were not to be unfairly taxed". Furthermore there are guarantees against religious persecution in particular against religious leaders such as bishops and forced conversion. The latter is in line with Qur'an 2:256, which enjoins the principle of non-compulsion in religion and comparable to Art. 18.2 of ICCPR.

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[579] Haddad, A., *The Oath of the Prophet Mohammed to the Followers of the Nazarene* (Board of Counsel : New York, 1902); and *Muhibbu*-Din, "Ahl Al-Kitab ", 117. See also Ratliff, B., "The monastery of Saint Catherine at Mount Sinai and the Christian communities of the Caliphate", *Sinaiticus. The bulletin of the Saint Catherine Foundation* (2008).

[580] Commentary on Minorities' Declaration, para. 21.

[581] Ibid, at para. 23.

[582] Art. 6.

[583] Para. 4.

Furthermore the Commentary states that "protection of their existence goes beyond the duty not to destroy or deliberately weaken minority groups. It also requires respect for and protection of their religious and cultural heritage, essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues."[584] Therefore the Prophet's agreement on the treatment of the Monks of St. Catherine is in accordance with this contemporary principle of international law and perhaps even beyond as what is stipulated is not just a negative non-interference in the affairs and matters of the Christians, but a positive obligation to defend and assist in maintenance of religious buildings. Furthermore the order to assist is not limited to religious buildings but "any other matter pertaining to religion". Hence the treatment in this case of the non-Muslim Christian minority has met the highest level of potential minority protection, moving from mere tolerance to protection and promotion.

Above, we have tried to establish the underlying basis and justification for the presence of not just freedom of religious belief but also manifestation. This was derived from the fact that in Islamic thinking belief and actions are inter-twinned, interdependent and emanate from each other. This is comparable to the position under international law, which also extrapolates that granting the freedom to believe necessitates the right to manifest such beliefs. As such the right has two fundamental aspects, the internal and external. Thus, under Islamic law, accepting a religious minority group as eligible for recognition and existence under Islamic rule also entails tolerance and protection for the religious practices of that minority to the greatest extent possible. According to one view, the principle even extends to conditioning *dhimma* status on the granting of rights specifically of manifestation, hence making manifestation of religion the object and purpose of recognising the existence of a religious minority.[585] Put differently, it makes little sense to accept existence of a religious minority amongst the dominant majority group and then deny them the right to live their life according to the religious requirements to which they adhere and wish to practice.

With regards to international law and State practice, we observe a comparable dynamic. In order to deny rights that automatically arise following recognition as minorities, States seek to identify ways to exclude them from the scope of minority rights by denying them even recognition as such. This is most starkly observable in the reliance on the concept of 'national minority' to exclude religious minorities that have resulted from post-1945 immigration. An extreme approach is to be found in the conduct of States, who reject the entire notion of minorities and thus minority rights, is reflected not just in their domestic law, but also non-ratification and far reaching reservations to relevant instruments and provisions.[586] As has been shown, with regards to freedom of religion and the wider rights regime found under minority rights, limitations are inbuilt and a necessary tool for the State to safeguard public interest and the rights of others as well as factor in practical and financial considerations. Nonetheless many States continue to persevere in denying minorities the proper recognition,

[584] Commentary on Minorities' Declaration, para. 25.

[585] Zaydan, *Al-Dhimmiyun wa al-Must'aminun*, 95.

[586] E.g. France, Turkey and UK, see above n. 41.

which as a matter of international law, imbues no discretion on States owing to apprehension of having to deal with claims, a hostility and animosity towards the minority, or ignorance of the state of international law.

We have established that the right to manifestation of religious belief is implicit under Islamic law owing to the indisputable presence of freedom to hold beliefs derived from Qur'an 2:256. This is confirmed by the conduct of the Prophet and the examples above. Most notable among these is the invitation to a Christian delegation not just to practice and manifest their religion through worship but at the central place of worship of the Muslims, the mosque. Of course, we must keep in mind the motivation for allowing this as well as the fact that it was a delegation rather than a religious minority of permanent residents or citizens. Following that, under international law, a number of examples are discernible of manifestation of religion and thus the case for limiting them weak except with the provision of compelling reasons despite the seemingly wide scope of permissible limitations. They include the use of places of worship, their repair, maintenance and defence as prominent feature of the agreement relating to the Monastery of St. Catherine's.

Therefore we can see that both systems of law hold the freedom to hold beliefs and the right to manifest them as emanating from each other, in particular that the freedom to hold beliefs *must* give rise to the automatic right manifest such beliefs. Both reiterate the absoluteness and unconditional nature of the internal aspect of the right. In any case, such an infringement is simultaneously infeasible and what is prohibited are any discernible *attempts* at altering someone's beliefs through forced testimony for example. Both systems also explicitly warn against the use of force, compulsion or coercion in any shape or form and in relation to both belief and manifestation. Thus rights of manifestation which naturally arise from an absolute freedom to hold beliefs, unfettered by any form of force or disadvantage, are followed by the most common and integral examples in both systems of law and the discourse around them. The prominent overlaps are rights related to places of worship, religious education, days of rest and celebration. Finally both systems of law allow for limitations to be placed *only* on the manifestation of religion based on public policy grounds. The following section will look at some of these examples of manifestation and the nature and scope of permissible limitations.

III. Permissible Limitations to Manifestation of Religion

Islamic law holds that the default position is that *all* forms of manifestation and practice are permissible *except* those found, on balance, to be contrary to the public good or interest. Another way to understand this would be to assert that manifestation of religion may not be limited, for example, purely due to hostility or inamicability to the minority religion, which would constitute an arbitrary interference and an abuse of State discretion, which is not allowed by the law. As such, the injunction "there is no compulsion in religion" found in Qur'an 2:256 can be read in broader terms to be allowing freedom to manifest in addition to hold beliefs as opposed to merely the latter. To put it differently, the *dhimmi* has the right to remain on their belief and religion, which inherently includes outward manifestation. They

should not be compelled to enter Islam. Consequently the *dhimmi* is allowed to go about his worship and religious rituals whether in his house or place of worship and on days of religious festivities.[587]

Therefore strikingly, the overarching principle evident in Islamic law bears remarkable resemblance to that under Art. 18 of ICCPR and Art. 9 of ECHR. This is to say that in recognising a religion as legitimate and valid, the default would be that inherently *all* practice associated with it would be permitted except when there was overriding concern related to the public good/morals. In the case of Islamic system of governance would include and be predominantly focused around Islam itself. Furthermore by stipulating that worship and religious rituals can be carried out in 'his house' or 'place of worship' is reflecting the freedom of religion being made available in public and private as explicitly stated in Art. 18 of ICCPR and Art. 9 of ECHR. Art. 6 of the Declaration on Religious Discrimination elaborates on similar examples of permissible and common manifestation that should be protected as worship, assembly, maintenance of places of worship,[588] teaching religion,[589] observation of days of rest, celebration of religious holidays and ceremonies.[590] The presence of such principles and aspects of the life of religious minority that should be protected and promoted are encapsulated by Al-Tariqi writing in Arabic as well as indicating permissible grounds for limiting rights:

> "Regarding….them meeting each other, it is allowed whether it be in their houses, their schools or their places of worship and their days of celebrations according to their habits and traditions and they should not be stopped from such things unless there is a clear danger to the community."[591]

As already stated, there is much in common with the above description of the Islamic legal position on religious minorities and their freedom of religion as stated in ICCPR Art. 18 and ECHR Art. 9. The above principle even extends further than ICCPR Art. 18 and gives concrete examples of manifestation of religion almost identical to those found in the Declaration on Religious Discrimination.[592] Establishing the permissibility of all forms of manifestation as a *default* is evident while the only conditionality of "a clear danger to the community" is in principle similar to the public interest grounds enumerated in Art. 18 of ICCPR and Art. 9 of ECHR. If manifestation of religion may only be limited based on pressing public interest, then elements of manifestation such as worship, that had no public element would be immune from any limitation. The private sphere thus includes what takes place in people's houses, schools that cater specifically for that religious community or places of worship and areas where the religious minority is predominant. The effective concern in all these cases is to what extent the public activities of religious minorities may have an effect on

[587] Al-Tariqi, *Al-T'aamul ma'a Ghayr Muslimeen*, 177.

[588] Art. 6(a) of Declaration on Religious Discrimination.

[589] Art. 6(e) of Declaration on Religious Discrimination.

[590] Art. 6(h) of Declaration on Religious Discrimination.

[591] Al-Tariqi, *Al-T'aamul ma'a Ghayr Muslimeen*, 175.

[592] Art. 6 of Declaration on Religious Discrimination.

the religious beliefs of the Muslim majority. There is some similarity in the underlying thinking here to the notion of the destruction of the rights of others found in Art. 5(1) of ICCPR[593] and Art. 17 of ECHR.[594]

It is also notable that the framing of Art. 18(2) of ICCPR: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice" is almost identical to the said injunction found in Qur'an 2:256: "there is no compulsion in religion" and in line with its elaboration in *Tafsir ibn Kathir*. It adds further support to the notion in Art. 18(1) that the freedom to hold beliefs is an absolute right and not subject to limitation including being nonderogable under Art. 4. even in times of emergency.[595] Nonetheless Art. 18(1) should be taken along similar lines as Qur'an 2:256 as being applicable to internal belief *and* external practice due to the explicit reference "...to manifest his religion or belief in worship, observance, practice and teaching." A further parallel can be drawn to the Islamic position in that Art. 18(1) attributes rights to both internal (belief) and external aspects (manifestation). Art. 18(2) prohibits coercion in relation to *both* aspects. Art. 18(3) then provides for limitations with respect to manifestation but not belief. Hence the *default* here too is that all manifestations are to be permitted except those "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

We have identified that both systems of law allow for limitations on the manifestation of religion on broad public policy grounds. What is the nature of these grounds and can they be distinguished from each other? As we have already discussed in the previous chapter, under international law, the grounds for limiting the manifestation of religion are at the same time broad in their individual meanings as being limited and exhaustive in their enumeration. By this, it is meant that terms such as safety, order, health and morals lack specificity and seemingly allow the State a large space for manoeuvre and subjective application thus maximising State discretion. We will return to the generic nature of these terms and how their meanings have been elaborated in case law and by the HRC. However, at the same time it would be incorrect to assume that the discretion is unlimited given the profound and far-reaching nature of the right to freedom of religion. Additionally the HRC has gone to the extent of confirming unequivocally that the stated grounds are finite and exhaustive; no others may be added under any circumstances including that of 'national security' (as found *inter alia* under Art. 19), even in a state of emergency.[596]

With regards to Islamic law, what we may refer to is developing practice of rulers who sought to implement Islamic principles by reference to Islamic law. While the freedom of religion can be textually sourced, the need to limit specifically the manifestation of religion emerged from the necessities of governing a State and thus seeking to endow religious minority rights, while at the same time safeguarding the rights and sensibilities of the Muslim majority. Al-

[593] Also inbuilt into the limitations clauses of Arts. 12, 18, 19, 21 & 22.

[594] Also inbuilt into the limitations clauses of Arts. 8-11.

[595] HRC GC 22.

[596] Ibid.

Tariqi expresses such a limitation above as a "clear danger to the community". Thus it could be argued that the potential scope for limitations that could be imposed on the manifestation of religion under Islamic law is wider than international law as well as being non-exhaustive.

From a different perspective, it could be asserted that as the interrelation between the Islamic governing authority and the majority with the religious minority comes down to religion, that the nature of the limitations is also thus confined to religion. In other words, to what extent are the religiosity or religious sentiments of the majority affected or undermined by the practices of the religious minority? Consequently Islamic law finds itself most concerned with the public manifestation of religion and how it may impact on the convictions of the majority. This works both ways in terms of the State's desire to keep those who are Muslims Muslim, but also a wish by the majority themselves not to be exposed to displays of religiosity in public. This is why aspects of manifestation that have been subject to limitations have been the building of places of worship, public religious processions and sounding of church bells.

Common sense and logic would dictate that while a purely textual reading of international law allows for the limiting of manifestation even in private, the case for doing so would be very weak or non-existent as the grounds for limitations are inherently related to the rights of the public and other individuals. Interestingly, under international law the common strategy due to the broad nature of the permissible grounds as opposed to a non-exhaustive list of grounds has been to work within the broad discretion of the terms. The HRC has sought to counter the broad terms by elaborating some content and parameters. For example with regards to the ground of limitation of 'public morals', the HRC has stated that such morals be reflective of the society as a whole as opposed to the State's own subjective understanding of morality. However, it is not clear whether this elaboration of public morals or the lack of elaboration of the other heads of safety, health or order have done much in limiting their expansive and subjective nature.

Despite this, in relation to practice and resultant case law, there has been an aversion to argue the highly subjective and broad grounds of morals, health, order and safety. At times, such broadness and subjectivity may be counterproductive for the State in justifying certain practices and policies, especially if a case is being decided upon by a domestic or international court and the burden of proof placed on the State. For example if the test for the limitation based on public morals needs to show that they reflect the view of *all* or an overwhelming majority, it may indeed be difficult to show this. Hence the ground which is most often relied on is that of the 'protection of the fundamental rights and freedoms of others'. Such a limitation not only has a level of subjectivity and discretion in implementation on the part of the State, but is also not rebutted easily by the affected person nor supranational courts or bodies. Resultantly what follows is a balancing of competing rights.

The crucial problem with all grounds, in particular this one owing to related case law, is that they are deferential to the majority sentiment and as such to the historical and cultural nature of the State in question. Majority sentiments especially in relation to religion and its relationship with the State will vary between States considerably. In the application of laws,

this leads to a lack of legal certainty and an increased space for States to escape the finding of violations by supranational structures. The factoring in of the nature of the State and majority public sentiment in adjudicating such cases ironically undermines the precise aspect of majoritarian rule that minority rights aims to counter and protect against. Hence the contemporary notion of democracy implies the majority to be represented, while at the same time minorities' fundamental rights protected against excesses of the majority or the government.[597] This is further reflected in the requirement that limitations on a minority's right to manifest religion must be deemed 'necessary in a democratic society', implicit in which is the protection and granting of religious plurality.[598]

At the ECtHR, the deliberate indeterminacy in relation to the contents of certain rights owing to a lack of legal, political and public consensus on an issue is known as the principle of the 'margin of appreciation'. Conversely on matters on which there is European consensus such as the prohibition of torture or racial discrimination the Court allows for no margin or appreciation and the same stringent and high standards are applicable to all State parties. However with some other rights, significant attention and consideration is given to the development and nature of the State, such as Art. 3 of Additional Protocol 1 and the freedom to manifest religion under Art. 9. In relation to the former, while democracy is the system of governance in Europe, the exact nature and framework under which it is established is largely down to the discretion of States. With regards to the freedom of religion, where the ECtHR has held in favour of the State and finding no violation due to the interference falling within the ambit of permissible limitations, it most commonly does so with regards to the protection of the rights and fundamental freedom of others.

Most notably in the case of *Sahin v. Turkey*[599], the purported object of protection were those members of society who chose not to wear the headscarf and as such the threat to the secular nature of State and the secular sensibilities of the majority. In the case of *Refah Partisi v. Turkey*[600], an Islamic political party was thought to be motivated by dismantling democracy and implementing Islamic law as such their rights to exist as a political party and compete in the election was outweighed by the supposedly overwhelming interest of the rights of others. With regards to a case relating to the wearing of a head scarf in relation to a teacher, it was considered a valid concern that the children would be unduly influenced by the religious garment and so their rights to manifestation took priority over those of the teacher.[601] In the most recent of such cases and the furthest reaching precedent to date of legitimate

[597] See Daniel Ammann: "The Real Reasons Why the Swiss voted to Ban Minarets", The World Post, 25 May 2011 (http://www.huffingtonpost.com/daniel-ammann/the-real-reasons-why-the_b_373947.html). September 2011 and see Matthew Brown: "North Carolina becomes 7th state to ban Muslim Sharia law", Desert News, 28 August 2013 (http://www.deseretnews.com/article/865585340/North-Carolina-becomes-7th-state-to-ban-Muslim-Sharia-law.html?pg=all).

[598] Commentary on Minorities' Declaration.

[599] *Leyla Sahin v. Turkey*, 29 June 2004 (Application no. 44774/98).

[600] *Refah Partisi and Others v. Turkey,* nos. 41340/98, 41342/98 and 41344/98, 13 February 2003.

[601] *Dahlab v. Switzerland*, 15 February 2001 (Application no. 42393/98).

interference with the manifestation of religion, *SAS v. France*[602], the rights of others to be interacted with and feel comfortable was said to be a sufficient grounds to limit the freedom to manifest religion.

Islamic law has a similar approach in its reliance on the protection of the rights of others as the principal limiting factor of manifestation of minority religions. The focus is on protection of religious rights of the Muslim majority. This is also similar to State practice relating to international law as the majority of cases revolve around the tension between freedom *of* religion and the freedom *from* religion. Although to what extent one interprets these notions to set the threshold of when an act of manifestation encroaches on the freedom of thought, conscience or religion of others remains difficult to decipher. Under Islamic law, as already stated, the only concern is that of religious acts of manifestation that occur in the public realm and thus may affect the Muslim majority and as we will see below, even such restrictions are lifted in areas where the non-Muslims are predominant. Furthermore, while extreme secular States refuse to recognise religious minorities and seek to excessively limit the manifestation of religion owing to ideological opposition; Islamic law only requires the protection of the religious beliefs of the Muslim majority. Hence, the Islamic approach to limitation of rights is really not aimed at damaging or undermining the freedom of religion (internal and external) of religious minorities, but rather to prevent influencing the Muslim majority population to potentially leave Islam. Thus, it is clearly not aimed at damaging and eliminating the minority's ideology. Therefore we may adduce that the levels to which manifestation is permitted in the private realm, including institutions and areas of predominance is near unlimited. Restrictions on the face veil and head scarf under the jurisprudence of the ECtHR, seem to emanate from a difference of belief and opinion around modesty and the role of women in society. However disagreement with majority sentiments should never be sufficient to restrict such opposing views.

There may even be a case for such an extreme limitation, as observed in *SAS v. France*, as forbidding the face veil from *all* public places for to be contrary to the internal and absolute right of freedom to thought, conscience and religion and freedom from coercion[603]. International law is clear that "restrictions on the freedom to manifest religion or belief are permitted only if limitations...are applied in a manner that does not vitiate the right to freedom of thought, conscience and religion".[604] As the public policy grounds were stretched to such an extent, for some beyond the permissible scope of limitations under Art. 9, it is questionable which listed public interest head was engaged. For all intents and purposes, it seems that it was something along the lines of awkwardness and the right of others to communication – hardly a pressing social or public need necessary in a democratic society. The test is similar to Islamic law when applied to schools, where it is feared that children may be influenced. However it does not appear that France feared that veiling on the streets by a minority of people would likely influence and persuade members of a mostly hostile public to

[602] *S.A.S. v. France* (Application No. 43835/11).

[603] Art. 9(1-2) of ECHR and Art. 18(1-2) of ICCPR.

[604] UN GA Res. 50/183 on "Elimination of all forms of religious intolerance", 6 March 1996 (A/50/635/Add.2), para. 7. See also HRC GC 22, para. 3.

convert to Islam. It is in fact related to idea of instituting a homogenous French identity, which is scornful of religious belief and public manifestation. It is perceived as a departure from the culture and values embedded in presumed national identity contrary to religious pluralism and multiculturalism.

Islamic law, like the principles of international law rather than ECtHR's misapplication of the margin of appreciation to this case, supports and promotes religious pluralism and multiculturalism. Limitations only become engaged when there is an encroachment of the rights of others in relation to them leaving Islam or to security. Going further, we may ask if Islamic law has no issue with other religious beliefs being held and manifested per se except when they threaten the religiosity of the Muslims, then what is Islam's actual view of those religious beliefs intrinsically even if politically and legally there is no interference. Does it view them positively, negatively or neutrally? Conversely we may ask why does Islam not have any issues with other religions when it holds them to be fallacious - distorted in the case of the People of the Book and antithetical in relation to polytheism. The starting point is to affirm this ideological dichotomy, which is in common with other religions. That being, it considers itself to be the only correct religion and that those who believe and do righteous deeds will enter paradise after death and those who disbelieve upon death will enter hell. However if we posit that the reason for interference in the manifestation of religion is to prevent Muslims from converting away, then we can hypothesize that the ultimate aim is the attainment and maintenance of Islamic faith. But we also know that Islam is not specific to any particular ethnic or religious group; it is in fact aimed at humanity.[605] The only distinction between Muslims and non-Muslims being acceptance or rejection of Islam.

Thus Islamic legal policy must be motivated as much by the preventing the movement of Muslims away from Islam, as the bringing of non-Muslims closer to Islam. In line with previous chapters, it must be done genuinely so that Islamic belief is present in the heart rather than just uttered; it must be devoid of coercion or compulsion or even disadvantage. Hence there could even be a positive duty under Islamic law, beyond the negative duty of non-interference, of ensuring the enjoyment of their culture and profession and practice of their religion, so that they may have a favorable impression as to the tolerance, compassion and mercy of Islam and become open to dialogue and debate as to the substance of Islamic belief.

As a related point, it is also worth unpacking the philosophical and theoretical complexity that arises when one asks a number of questions. How can internal beliefs be safeguarded, if they are never expressed and hence indiscernible? Can beliefs be forcibly changed? If a person indicates a change of belief, can the compeller ever know what is inwardly believed by those he is compelling? Surely the law only relates to what is discernible and apparent in public and thus cannot and does not concern itself with what takes place in the minds and hearts of individuals. In fact, the law here is not seeking to regulate what takes place in the inwardly thoughts, consciousness or religious beliefs of individuals, but rather to prevent

[605] Qur'an 2:29: "O mankind, worship your Lord, who created you and those before you, that you may become righteous."

attempts at *interference* with them. In relation to the idea that true inner beliefs can never be interfered with, it remains practically the case that beliefs may only be forced upon others and thus protected, once they are manifested. As such the most basic form of manifestation of belief is expressing ones ascription to a certain religion, that is, to self-identify oneself as belonging to certain religious community or holding certain beliefs.

It follows then that belief must be discerned in order to be coerced or protected, and it is only discernible explicitly through public profession/proclamation/self-identification or implicitly through what is conventionally considered manifestation, that is, practice of religion most often associated with ritual acts of worship. Self-identification would not have to be uttered either as it could be manifested in religious symbols, such as outwardly appearance and other aspects of the associated culture. If there is then an attempt to compel someone to alter a belief, it takes place on a level of what is publicly professed. The aim of the compeller would be to either seek that the compelled expresses or makes known in any way their religious belief rather than actually seeking or being able to attain any form of guarantee that the internal state of the compelled has altered. In the event that such a policy fails, the compeller may seek to disadvantage the compelled as long as they persist in expressing the disfavoured religious identity.

A comparable notion found in Islam that may inform these discussions has been in the role and notion of speech in relation to belief and action. We discussed above the idea of belief and action in Islamic theology and how they together determine whether someone is a Muslim. Belief must manifest in actions and actions must be predicated by beliefs. The absence of either means one's Islam falls short of the ideal standard. A different approach adds the intermediate element of speech to the concept. While belief is carried in the heart and actions on the limbs, what bridges them is speech conveyed by the tongue. Speech results from belief but also shows intention and promise for actions. In the absence of speech, belief is inferred through actions. In the absence of actions, speech indicates ones belief, but still need to ideally manifest as actions.

This is useful in getting to grips with the complexity and uncertainty of international law discussed above regarding how to identify belief and subsequently when it is under threat or being infringed. Furthermore where does belief end and manifestation begin? This stems from the train of thought and dilemma above that freedom to believe, while an internal aspect of an individual, can only be protected if it is first expressed and then potentially violated. As such belief to be interfered with must be manifested in some form. What then is the difference between this action which is considered the right to hold beliefs as absolute while other actions which constitute manifestation subject to limitations? Islamic thinking offers one solution here, which is that those matters that relate in interference with the absolute of belief are those that are expressed through speech and statements. Therefore we note while international law does not refer to such a conceptualisation, it is implicit in its application and practice. For example adoption or changing religions cannot be interfered with, professing to a certain religion cannot result in disadvantage, force cannot be employed to make someone

utter adherence to a belief or a religion and force likewise cannot be used to make some reveal their religious beliefs.[606]

A crucial problem arises in relation to identifying the line between those actions which interfere with an individual's freedom of belief under Art. 18(1) and which with their right manifestation subject to limits under Art. 18(3). Where a certain manifestation of religion is limited but the ascription, profession and identification is not interfered with then it would seem that the freedom to hold beliefs is not affected. However can we not also say that *any* manifestation of religion implicitly carries as its purpose or effect an indication or expression of belief? Does that mean that by interfering with that act of manifestation we have interfered with the belief, which is absolute and unconditionally protected? The HRC has also said that limitations on manifestation may not be so extensive as to encroach on the absolute right to hold a belief.[607] A simple way to circumvent the problem posed by such a question is to point out that that belief in itself may be held, kept secret, expressed and if so without fear of negative effect, despite a particular manifestation being limited due to public policy grounds. If an individual refuses to use other means to identify themselves as holding certain beliefs and insists on that form of manifestation being the only means of conveying a certain belief, then no blame can be apportioned on the said State, for an alternate means was provided for expression of belief but was not taken advantage of. However even such an assertion may prove problematic for while using the idea of speech as bridge between belief and action, it remains the case that proclamation, profession or self-identification may not be done only through speech. For example many express their affinity to a religion through clothing or the display of symbols. Would these be expressions of belief or manifestation of belief? Moreover when any form of manifestation is limited without any public interest grounds, its violation spills into a simultaneous violation of the freedom to hold beliefs.

IV. Application of Public Interest

Having affirmed that, similar to international law, Islamic law seeks in essence to only limit the freedom of religion, in the public sphere based on compelling public interest grounds, some marked differences in the application of the principle need to be set out. The specific approach of Islam, as has already been mentioned, is similar to International law in the aspects related to the public policy grounds. However public interest in an Islamic polity would have to cater for and safeguard the religious sensibilities of the Muslim majority, which would most likely be comparable to the highly subjective and contextual notion of public morals under ICCPR Art. 18 and ECHR Art. 9. Additionally while a State seeking to apply Islamic law would also be distinct to the areligious/irreligious/religiously neutral/secular State, that is the presumed subject, of international human rights law, such an Islamic State identity would be most comparable to countries, which implement a strict

[606] HRC GC 22, para. 3: "In accordance with articles 18 (2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief."

[607] HRC GC 22, para. 8: "Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18".

understanding of secularism, where religion is excluded aggressively from all aspects of public life as it is seen as contrary to and a threat to the historical context and the nature of the State constitution.[608]

Due to the perceived harm that could be caused by certain elements of public manifestation of the religion of a religious minority to the religious sensibility of its Muslim subjects, classical scholars have varied their rulings in relation to manifestation of religion in the public sphere on basis of the regional (intra-State) concentration of Muslims in any given population centre. On a sliding scale, the public manifestation of a minority religion is at its maximum when the proportion of Muslim inhabitants is at its lowest and at its minimum when the proportion of Muslims is high. Areas, which were predominantly Muslim, or considered Muslim strongholds, are referred to in classical literature as *amsar al-Muslimeen.* The term connoted a place which is to exhibit the positive facets of the Islamic way of life. Other potential indicators articulated for towns to be classified as such were those where *Eid* and Friday congregational prayers were convened.[609] Historically, in *amsar al-Muslimeen*, restrictions on the public manifestation of religious belief were applied, such as the selling of wine and pork, processions of the cross and blowing conches. These practices with processions of idols were seen as objectionable by the majority religious community owing to their public nature.[610] Doi states that a result of the *dhimma* contract would be that "we do not lay a hand on their churches, their wine, their pigs as long as they do not make a public display of them."[611] Muhibbu-Din points out:

> "Admittedly, things that were likely to disturb public peace were forbidden by the Muslim rulers. For instance, it was forbidden to carry the cross in a procession through Muslim crowds, to blow the church bugle at prayer hour of Muslims, to carry pigs towards Muslim quarters and so on. Nor can the attitude of the caliph al-Mutawakkil of the Abbasid era who made Christians and Jews dress differently from Muslims be cited as a model and a pattern of Muslim virtue. Besides, al-Mutawakkil did flout most cherished principles of Islam."[612]

These restrictions on these practices were lifted where the number of Muslims was small.[613] Non-Muslims are not to be restricted from any practice which is within the places designated as their own, whether it is their residences, places of worship or cities and towns where they form an overwhelming majority.[614] As such the practice or manifestation of the minority religion in relation to communal festivals and performance of religious rites was allowed

[608] *SAS v. France*.

[609] *Badai,* Vol. VII, p. 114 & *Sharah al-Siyar al-Kabir,* Vol. VIII, 257, cited in Maududi, *The Islamic Law and Constitution*, 308.

[610] Ibid.

[611] Doi, *Shari'ah Islamic Law*, 650.

[612] Muhibbu-Din, "Ahl Al-Kitab ", 125.

[613] *Badai,* Vol. VII, p. 114 & *Sharah al-Siyar al-Kabir,* Vol. VIII, 257, cited in Maududi, *The Islamic Law and Constitution*, 308.

[614] *Sharah al-Siyar al-Kabir,* Vol. VIII, 251, cited in Maududi, *The Islamic Law and Constitution*, 309.

without any restraints in their own towns and cities. The ringing of church bells was permitted in some situations except during the time of the five daily prayers so as not to interfere with the Islamic call to prayer. Processions with a cross were also permitted.[615] The *Millet* system was based on this approach. For example the Armenians of New Julfa, a suburb of the Safavid capital of Isfahan in the 17th century enjoyed religious autonomy in private and public spheres: "they elected their own mayor, or *kalantar*, rang church bells, had public religious processions, established their own courts, and had no restrictions on clothing or the production of wine."[616] However they are to be forbidden from committing actions in the private sphere which are prohibited by their codes too like adultery, even if the town has an overwhelming majority of them.[617]

A similar concept can be found under international law in relation to the rights and protection of minorities. The strength and nature of rights of a minority may depend on their situations. Practically we see the categorisation of minorities in sub-sets such as 'new' minorities or 'national' minorities. However there may also be minorities which are predominant in a particular region. This entails then the availability of rights directly related to political autonomy or access to resources in that region. Tensions and indeed a number of conflicts have emerged from such scenarios. The tensions in the sharing of revenue from oil production in Iraqi Kurdistan and natural gas in Pakistani Baluchistan are two pertinent examples. With regards to international law, the idea of predominance in a particular area or region of a territory of a State is present with regards to the nature and strength of certain rights. However the rights that related to resources are in most cases intended for the minority situation of indigenous peoples[618] and other rights that may stronger related to the use of the minority language.[619] No such rights related to religious minorities are enumerated under international law specifically. Although they may be inferred indirectly through general rights such as those relating to education.

V. Places of Worship

The most common and principal aspect of a religion, which requires preservation and protection often relates to non-interference in acts of ritual worship. This in turn necessitates places of worship. Hence there is extensive discussion amongst Islamic scholars on how to deal with the issue of whether to allow for places of worship to exist, be maintained or be built at all. However the issue is by no means a simple one. Instead it appears that there may be a number of potential rulings based on the circumstances and contexts. Cities or territories are split into three types. The first relates to those settlements that were built up by the

[615] Berween, M., "Non-Muslims in the Islamic State: Majority Rule and Minority Rights", *The International Journal of Human Rights*, Vol. 10, No.2 (2006), 97.

[616] Parstimes (www.parstimes.com) cited in Hashemi, *Religious Legal Traditions*, 143.

[617] Alauddin Abu Bakr, *Badai al- Sanai,* Vol. VII, 113, cited in Maududi, *The Islamic Law and Constitution*, 308.

[618] HRC GC 23, paras. 3.2 & 7.

[619] Art. 10(2) of FCNM.

Muslims, and thus have a Muslim history and heritage (*amsar al-muslimeen*). The second are those that that are conquered by force or a result of conflict. The third are those that the Muslims begin to govern/administer through an agreement. There is furthermore the special case of the Arabian Peninsula which has its own ruling requiring it to be homogeneously Muslim in terms of citizenship or permanent residence.[620] Owing to *ijma'* on the general issue, consequently, there is *ijma'* on the non-permissibility of any non-Muslim place of worship in the Arabian Peninsula.[621]

According to classical opinions, towns or cities such as Baghdad, Kufa and Basra are given as examples of the first category, that is, towns built up by and thus historically Muslim. Such Muslim strongholds, where there is a preponderance and/or predomination of Muslims (*amsar al-Muslimeen*). Ordinarily the town would also have been built up by Muslims (*ikhtata*). In such areas, according to one opinion, non-Muslims may not initiate the building of places of religious worship.[622] However according to the Zaidiya it is permissible if the Imam allows it for a benefit he sees in it.[623] Maududi and al-Kalbi concur that the *dhimmis* do not have the right to build new churches in areas said to be *amsar al-Muslimeen.* In other places there is no restriction on them. This also includes cities which used to be *amsar al-Muslimeen*. If they have ceased to be so, the restrictions on religious rites and processions are also lifted. Maududi bases this on Ibn Abbas who said:

> "[i]n towns founded by Muslims, the Zimmis have no right to build new places of worship or to blow conches in the market or on roads or to sell wine or pork openly. But in cities originally established by non-Muslims and only subsequently conquered by the Muslim, the rights of the non-Muslims will be decided in accordance with the treaty and it is obligatory on the Muslims to abide by it."[624]

In relation to the second category of a town conquered through conflict, similarly there is a view that no churches or places of worship may be built.[625] Others have supported this view by stating that whatever town Muslims open by force, it is not allowed to build any non-Muslim places of religious worship therein.[626] This is the view of Ibn Juzayy al-Kalbi, who notes of the *conquered* category that "they should not build a church nor leave one built in a township which the Muslims have built or conquered by force."[627] Agreement can be found

[620] The Prophet said: "Two religions cannot coexist in the Arabian Peninsula", Ibn Qudama, *al-Mughni* (Egypt: Darul Manar, 1983) 9:285-6.

[621] Ibn Hamaam, *Sharh Fath al-Qadeer* (Dar al-Fikr, 1977), 6:95 & al-Tabari, *Ikhtilaf al-Fuqaha* (Leiden, 1933), 236.

[622] Shams al-Din Dasuqi, *Hashiyat al-Dasuqi* (Dar al-Fikr) 4:203-4, and Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[623] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[624] Abu Yousaf, *Kitab al-Kharaj,* 88, cited in Maududi, *The Islamic Law and Constitution*, 309.

[625] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[626] Ibn Hamaam, Sharh Fath al-Qadeer.

[627] Doi, *Shari'ah Islamic Law*, 650.

with Doi, who says they should not build places of worship where the town has been taken by force.[628] However Ibn al-Qasim al-Maliki said it is allowed if the Imam has allowed it.[629]

In relation to the third category what was conquered by agreement, which refers to agreement or negotiation giving rise to a ceasefire or a peace treaty, then largely what is stipulated within it will prevail. The majority of jurists agree that if the agreement states that the land belongs to the Muslims and they pay the *kharaj* (land tax), then it is permissible.[630] Similarly if the agreement stipulates that they may build their places of worship then this would also be permissible, while its absence would mean a reversion to the default position of no building of places of worship.[631] However the Malikis state that whatever is overcome with agreement, it is allowed for them to build whether it has been conditioned or not, as long as there are no Muslims living with them.[632] In such a situation where the land is appropriated by the Muslims then the *jizya* would also be due.[633] Regarding the villages and areas that are not predominantly Muslim, the Hanafis have disagreed. Al-Kasani has said they should not be disallowed from building in these places.[634] Imam Sarkhi said they should not be disallowed in villages where the majority of inhabitants are people of *dhimma*.[635] Regarding the villages that are inhabited by Muslims, some Hanafis have disagreed on not allowing the building of anything in *dar al-Islam*, even if it be a village.[636] The Shafi'is stated that it is allowed for them to build in villages and those cities which were built by Muslims or those that accepted Islam have a different ruling from those villages that become merged into the city due to expansion.[637]

If however it is agreed for the land to remain in the hands of the non-Muslim inhabitants and *kharaj* is paid to the Muslims, then churches and places of worship may be built,[638] whether explicitly stipulated in the agreement or not.[639] As such it cannot be considered *dar al-Islam* (Abode of Islam/Islamic land) and its people thus are not considered *ahl al-dhimma* not being in need of protection and *jizya* is not taken from them. Instead they are *ahl al-sulh* (people of agreement).[640]

In relation to pre-existing places of worship, the Hanafis have said while the structures may continue to exist, they may only be used as residences and not as places of worship. The

[628] Ibid.

[629] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[630] Doi, *Shari'ah Islamic Law,* 650.

[631] Shams al-Din Dasuqi, *Hashiyat al-Dasuqi*, 3:204.

[632] Al-Maqdasi, *Al-Mughni* (Idaarah al-Manaar, 1948), 526-7.

[633] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[634] Al-Kasani, *Bada'i al-Sana'i* (Egypt, Matba'a Jimaliyah, 1909) 88:113.

[635] Al-Sarkhasi, *Sharh Sayr al-Kabeer* (Hyderabad: Daeera al-Ma'rif Nidhamiyah, 1917) 3:253.

[636] Al-Haskafi, *Dar al-Mukhtar*, 3:374, cited in Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 97.

[637] Al-Ramli, Nihayat al-Muhtaaj ila Sharh al-Minhaaj (Egypt: Poolaaq Print) 7:239

[638] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 96.

[639] Al-Mawaq, *Al-Taj wa al-Iklil li Mukhtasar Khalil* (1995) 3:148.

[640] Al-Tariqi, *Al-T'aamul ma'a Ghayr Muslimeen*.

reasoning presented by them is that if the Muslims acquire the land through force then they reserve the right to build their own symbols so it is not allowed for the *dhimmis* as places of worship.[641] The Shafi'is have said that they should not keep such places of worship while a second opinion in the *madhab* states that it is permissible if there is foreseeable benefit.[642] The Hanbalis have two opinions. The first requires the destruction of old places of worship if the Muslims come to own the land and have conquered it through force as such a place is treated no differently than one that was built up by the Muslims, that is, *amsar al-Muslimeen.* Al-Kalbi's statement above seems to imply that once conquered, the non-Muslims should dismantle their places of worship. Maududi adds that Muslims may confiscate places of worship if they storm a town.[643] However Abu Yusuf writes that Umar never once did this.[644]

While there is no conclusive *ijma'*, the majority of scholars nonetheless agree pre-existing places of worship can remain and should not be destroyed. They may also be repaired and otherwise maintained as well as rebuilding destroyed parts.[645] This principle extends also to old churches and places of religious worship in areas which were taken by force with no interference with or destruction of such places.[646] This view is preferred by Doi, who states that *dhimmis* have the right to retain their places of worship whether it is after conquest or treaty, and have the right to repair them if they are damaged or destroyed.[647] The second Hanbali opinion holds that such places should be left alone on the basis that the companions of the Prophet conquered many countries through conflict and they did not destroy the churches or places of worship. Umar ibn Abdul Aziz wrote to his representatives to not destroy synagogues, churches or houses of fire, owing to *ijma'* on these matters. They are present in the countries of the Muslims without a denial by anyone.[648] In line with the second Hanbali opinion, if all places of worship are left to remain then they can serve the purpose they were made for, that is, as places of worship for *ahl al-dhimma*. This is because the Hanbalis have not said it is disallowed to keep that as places of worship, if left alone and not destroyed like the Hanafis have said.[649]

According to Zaydan, the stronger opinion (*qawl rajih*) is what Zaydiya and Ibn al-Qasim went towards; it is allowed to build churches and other places of worship in Muslim strongholds (*amsar al-Muslimeen*) and the lands in which Muslims have taken through force, if the Imam has allowed them to do so. This is because Islam affirms that *ahl al-dhimma* have their beliefs and from the obligations of this affirmation is allowing them to build their places of worship, if there is nothing to stop them doing so. He states his support for the second

[641] Al-Kasani, *Bada'i al-Sana'i,* 7:114 & Ibn Hamaam, *Sharh Fath al-Qadeer,* 4:378.

[642] Yahyah al-Nawawi & Sharbini, *Matan al-Manhaj wa Mugnhi al-Muhtaaj* (Egypt: Matba'a Mustafa Muhammad) 4:254.

[643] Maududi, A. A. (1960), 303.

[644] Ibid.

[645] Sharbini, *Mughni al-Muhtaaj*, 4:254.

[646] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 98.

[647] Maududi, A. A. (1960), 303.

[648] Ibn Qudama, a*l-Mughni,* 8:257.

[649] Zaydan, *Al-Dhimmiyun wa al-Must'aminun,* 98.

Hanbali opinion to leave the old churches in the *amsar al-Muslimeen* that have been opened by force as a result of the strong evidences they have given for leaving these places of worship along with the affirmation of Islam that freedom of religion of *ahl al-dhimma* should be guaranteed and there should be no unwarranted interference with it. However building in the land of Hijaz like all the jurists have agreed is impermissible.[650]

In this way the issue of places of worship is based on the same underlying principles as those of public manifestation of religion. They both concern safeguarding the religious sensibilities of the Muslim majority, by restricting religion in the public sphere. The interferences are unrelated to the content/substance of the belief system of the minority religion. Furthermore it becomes difficult to advocate a progressive approach of minority rights where the State is expected to provide public funds for the protection and promotion of the minority religion, for example the construction of religious buildings. However there is ample leeway given for religious minorities to enjoy extended autonomy even on a territorial basis, where they happen to constitute substantial regional majorities or predominance in a particular area. Thus we can infer that though Islamic law has no problem with the existence of rival belief systems, it is averse to its open propagation in the public sphere where all Muslim's are susceptible to it.

Islam is a proselytising religion and the underlying notion of *da'wah*[651] is central to it: "the Prophet had underscored the need for Islamic *da'wah* at all levels and in all climes. He has also shown that there was no compulsion in matters of faith."[652] Nonetheless the proselytising that we know of today does not necessarily fit in to the traditional Islamic notion of *da'wah* which is much wider and includes persuading through actions of justice and kindness. It is reported that when a coat of mail was stolen from Ali, and he could not provide a witness to confirm that the item in question was his, the accused Christian was allowed to keep the coat for lack of sufficient evidence. Consequently awed by the justice of Islam, which ruled in his favour against the Caliph, even though he was lying, caused him to confess and convert to Islam. Ali allowed him to keep the stolen object.[653] There is also the story of the conversion of the Negus of Abyssinia owing to being impressed by the conduct and etiquettes of the Muslims who emigrated to his kingdom.[654] Hence "it is obvious that the kind and sympathetic attitude of Prophet Muhammad (saw) towards *ahl al-kitab*, rather than high-handedness, hostility and cruelty encouraged their conversion to Islam. Indeed, it is the

[650] Ibid.

[651] It does not mean 'Islamic indoctrination' as mistranslated with negative connotations by Furman, 'Minorities in Contemporary Islamist Discourse', in *Middle Eastern Studies,* Vol. 36, No. 4 (Oct., 2000), 1, but rather inviting (literally) to Islamic monotheism or calling others to Islam through persuasion and reason as enjoined in Qur'an 16:125 – "Invite to the Way of your Lord with wisdom and good preaching...".

[652] Muhibbu-Din, "Ahl Al-Kitab", 117.

[653] Al-Qaradawi, Y., *Non-Muslims in the Islamic society*, Translated by Khalil Muhammad Hamad and Sayed M. Ali Shah (Indianapolis: American Trust, 1985), 17.

[654] Muhibbu-Din, "Ahl Al-Kitab", 117.

practical examples set by the Prophet and his companions of benevolence, love and service that have attracted peoples of other faiths to Islam through history."[655]

Therefore Islamic law seeks to maintain a fine balance of exhibiting its tolerance and justice without any discrimination as a way of extolling the Islamic way of life, while at the same time being weary of supporting the propagation of competing belief systems. As a result it would be reasonable to deduce that a State seeking to apply Islamic law would be willing to do whatever was necessary to keep its inhabitants fulfilled, but was not prepared to facilitate conversions away from Islam. Therefore as far as public funds go, it would be reasonable to assume that they could be made available for maintenance of religious buildings of the existent community, but restricted if it was deemed that it could result in the spread of that faith, in particular amongst the Muslim majority.

VI. Conclusion

We saw in this chapter that the notions of freedom of religion, in particular the right to manifest belief under Islamic law was not only more expansive than popularly perceived and even conveyed by some established academics, but that the similarities in the philosophy and principles comparable to that found under international law. So what can we say has attracted such negative views on Islamic law and caused its positive aspects to be overlooked, which could inform and improve international law? One answer may be the nature of Islamic law, especially when one comes to the fine details of public law which are derived through text and the necessities of effective governance. We are not able to refer to documents such as treaties or other instruments akin to statute law, which are representative of an international consensus of legally binding force. Instead we have examples from the classical tradition of interpretation and application by jurists and political rulers. So it must not come to us as a surprise that we are confronted with a range of potential modes of treating religious minorities in accordance with Islamic law as well as the needs of the Muslim majority and the Islamic State.

Consequently, a number of different situations were dealt with in different ways by different executive powers. The problem arises when in our hunt for normative laws, we identify one such example and present it as *the* Islamic law position on a certain issue. A pertinent example would be the harsh terms of the 'Pact of Umar'.[656] Secondly we must keep in mind and attempt to deduce the underlying principle behind various scenarios rather than read them superficially as outcomes in a vacuum lacking context. We see that in our examination of the freedom of religion pertaining to places of religious worship, the range of opinions varied

[655] Ibid. at p. 118.

[656] McKinney, "Echoes of Dhimma", 239-40; and Emon, A. M., *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (Oxford Islamic Legal Studies, 2012), 71: "There is intense discussion in the secondary literature about the Pact's authenticity, With scholars disagreeing on whether it might have originated during the reign of Umar b. al-Khattab or was a later invention retroactively associated with Umar -- the caliph who famously led the initial imperial expansion -- to endow the contract of dhimma with greater normative weight?". *See* also Coffman, E., "Secrets of Islam's Success"*, Christian History***,** No. 74 (2002), 16**.**

depending on the situation and relationship of the parties preceding a conflict. Clearly the limitations on places of worship are harshest against those who had not long before been engaged in direct hostilities with the Muslims, less so for those who submit and even better for those who did not engage the Muslims in hostilities. Similarly the limitations on manifestation of religion are relaxed or lifted completely in areas where the religious minority is predominant, that is, they are not *amsar al-Muslimeen*. Elaboration of such a complex matrix that incorporates different factors, contexts and situations is indicative of a system of law that is dealing with each situation according to its merits and in line with overarching goals and principles. We could frame such a principle as the attempt to *manage difference as well as balance accommodation and pluralism with threats, internal and external, physical and ideological.* This also goes hand in hand, according to a strong opinion above, to the deference to the leader (*imam*) in a number of matters. On the controversial issue of the building of *new* places of worship, the said opinion holds that it is permissible if the *imam* sees a benefit in it.

In terms of application of the law, two issues arise. The first relates to whether a number of examples given on treatment of religious minorities constitute precedences. To dismiss them as mere examples of the rights of *dhimma*, we give ourselves greater space to offer better and stronger rights. However it would also deprive us of the opportunity to refer to the highly positive and progressive examples of treatment and their bases. It is of greater utility to focus on the underlying principles as precedental rather than a specific practice. Secondly and regardless of the first point, the crux of the matter for application of law to the present context is whether any situations described in classical Islamic law are comparable and analogous. This should be in light of the fact that the era of conquest and empire where the absence of a treaty indicated a default position of hostilities to one where the default position in the absence of a declaration of war is that of peace and good neighbourliness. If it is not then do we abandon the *dhimma* model completely or refer to aspects of it? In the same vein would the duty to take the *jizya* fall away also? Is it in any case only incumbent as a result of fighting as framed in Qur'an 9:29 or paid in lieu of abstaining from military service? These are open questions and some diverge from classical Islamic law and can be found in the reform proposals of modernist writers.[657]

While attempting to philosophise on such issues may be intriguing, ultimately it may not be of much utility. We have discovered above, much like international law, there will always be scope and discretion available to limit the manifestation of religion provided compelling public policy grounds. Further still comparable to international law is the idea that such limitations under Islamic law would centre on the rights and sensibilities of the majority Muslim population. While this may seem a point of divergence from international law on a superficial reading, a deeper analysis shows that the underlying principles are similar and would be compliant with international law. A balancing of the freedom of religion and those of the majority or their right to live in an Islamic society would qualify under Art. 18(3) as protection of the rights and fundamental freedoms of others. Furthermore this is similar to the

[657] Hashemi, *Religious Legal Traditions*, 143.

practice of secular States who seek to limit manifestation of religion to purportedly protect the secular views and ideology of the majority. The most far reaching precedent to date in this regards has been the banning of the face veil in France, which was held to be a permissible limitation on manifestation of religion on the specific grounds of being in contravention of community cohesion and integration as an example of rights and fundamental freedom of others.

However it should be pointed out that it is not envisaged that contemporary Islamic law would treat its religious minorities with the same distain as extremely secular States deal with theirs. Under Islamic law minorities would have to be formally recognised, they could have extensive rights in relation to places of worship, choosing their leaders, establishing schools and even autonomy of their own legal systems to apply their religious laws. In the public sphere, applicable limitations would be those relating to proselytisation and processions, which would be inapplicable in areas where the religious minority is predominant and form a regional majority. What is evident as to the difference between the core principles motivating and determining treatment of religious minorities under Islamic law and in a secular State, is that while the former seeks to protect the majority Muslims, the latter seeks to weaken the religious minority's manifestation in all forms due to an inherent ideological hostility to all religions generally.

An intriguing point is however that on a theological level, the opposition of Islam to other belief systems especially polytheistic ones is vast. This is supported by repeated warning in the Qur'an of non-acceptance and non-adherence to Islam resulting in being destined for the hellfire. Those who accept Islam as their religion and act by it are promised paradise. Hence in the Islamic worldview the theological opposition to other belief systems is great, but the crucial point to note is that warnings of punishments and perceived misguided nature of other belief systems is relegated to the relationship between an individual and God and the punishments and rewards specific to the life after death. A number of authors have made this mistake of conflating this aspect with the attitude and treatment that should be directed towards non-Muslim religious minorities in the present world. Both the Qur'an and the Prophetic Traditions make a clear distinction between what awaits believers and non-believers after death and how all manner of individuals and Muslims should be treated benevolently while alive, that is, in the worldly life.

How can Islam on the one hand invite all humans to salvation in the hereafter with warnings of hellfire for those who refuse, while at the same time permit non-Muslims to practice religions that are according to Islam false and misguided? The answer, which international law and international relations has learned recently, is that most effective and genuine way to come to common terms with those who we differ with, even bringing them over to our way of thinking, is through accommodation of their existence, beliefs, practices and other matters pertaining to their way of life except when it encroaches on the majority's way of life. Furthermore when a dominant power allots freedoms to a non-dominant minority within its control, freedoms and rights that it is under no obligation or compulsion to provide, it leaves a positive effect with that non-dominant entity. Force, oppression and persecution only reinforce a minority's identity and distances its identity, ideology and affinity from the

governing authority until it reaches the extremity of armed secession. Islam has sought to exhibit a high level of tolerance to those it is at theological odds with in order to show the compassion and mercy of the religion while at the same opening the way for exposure to the real content and substance of the religion free of negative biases.

Similarly in international law, the protection of minorities has emerged from sobering lessons of mass loss of life owing to conflicts and genocides emerging from mismanagement of minorities. At its centre is the notion that restriction of minority identity and denial of the right to enjoy their culture, namely religion and language, leads to greater divergences and tensions to develop. When a minority is allowed to live by its own values and principles and beliefs, it is likely to feel a greater sense of solidarity with the State and the chances of a common identity developing become more plausible. Nation states have and some continue to force a singular and homogenous national identity at the expense of minority identities. Only through measures of accommodation and autonomy can genuine national unity be achieved. In its absence there can only be resentment and fragmentation.

Chapter 8:
Conclusion

I. Introduction

The thesis has provided a doctrinal comparative analysis of Islamic law and international law on the protection of religious minorities, with the main objective of contributing to a better understanding of the perceived conflicts and impasses between the two systems of law and their associated world views. This, it is submitted, is of practical utility in a number of scenarios that go beyond the traditional discussion of Muslim-majority States navigating between their international human rights obligations and their self-imposed constitutional commitment to *Shari'ah* or Islamic law.[658] Most notably, these scenarios would include the emergence of Islamically motivated political parties[659] and non-State armed groups[660] in the aftermath of the 'Arab Spring'. Schematically, there could only be a finite number of outcomes to a comparison between the two systems of law. There could be compatibility and two types of incompatibility, where either Islamic law or international law offered the higher level of protection to religious minorities.

Before a comparative analytic exercise could begin, a complex set of contextual obstacles had to be addressed. These included the differing natures of the two systems of 'laws' in question. One is a system based primarily on religious sources, while the other is based primary on the practices of States. They also emanate from two vastly contrasting eras separated by over a millennium. Within each system, it is difficult to ascertain which law or view should be relied on as representative of the legal system as a whole. At the international level, there is not just the law that emanates from relevant UN instruments and oversight bodies but also from regional systems, in particular Europe. Under Islamic law, it is also apparent that on a number of pivotal questions there is a plurality of jurisprudential views. Even where a juristic view is deemed to be strong or attributed to the majority of jurists, it is often the case that by the jurisprudential methodologies of Islamic law, other opposing and differing views could not simply be easily discarded. Once we had attempted to resolve some of these conceptual issues, we sought to compare the rights of *dhimma* under Islamic law to those of religious minorities under international law, with particular attention to scope of inclusion, non discrimination, freedom of religion and religious minority rights.

In this concluding Chapter we will collate the main findings from previous chapters on these issues and draw out the overarching themes that connect and help us make sense of the findings. Finally, we will ask pertinent questions as to the direction our analysis points us, so

[658] E.g. Haddad, "Ahl al-dhimma in an Islamic State", 169 and McKinney, "Echoes of Dhimma", 235.

[659] E.g. Muslim Brotherhood in Egypt and Enhada in Tunisia.

[660] E.g. ISIS, Jahbat al-Nusra & Ahr al-Sham in Syria and Ansar Dine in Mali.

as to suggest and offer some insight into future areas of research that may build on and expand on the findings of this thesis.

II. Nature of the two systems of 'Laws'

The differences between Islamic law and international law may be obvious, but the similarities may not. Islamic law is derived from a religious text and is applicable to Muslims through their own volition and self-imposition. As an inspiration for State legislation or policy, the governing authority requires a mandate either constitutionally or via popular democracy. Being a religious law for a religious community, the assumption may be that it treats non-believers with contempt and in terms of law and policy, discriminates against them and favours Muslims. International law on the other hand is the law of States formed in part through consensual processes and codified as treaties. As a corollary of international law, international human rights law provides a means of limiting the excesses of States with regards to the individual freedoms and liberties of their subjects. Much of international law is codified in various instruments and some adjudicated over by designated international and regional courts and tribunals. Conversely, Islamic law has not and cannot be codified into a formal singular view. Instead jurists issue legal views, which are then agreed or disagreed with by others relying on the same primary textual sources. The strength, authority and legitimacy of an Islamic legal opinion depends on the consensus of a community of juristic peers that extends not just in space but also back in time.

However in terms of similarities, both do not fit the traditional paradigm of what 'law' should be through the prism of domestic law, which has the ability to compel and coerce compliance as well as to punish. Both international and Islamic law are in some aspects consensual, although the origins of their sources differ considerably. Islamic law has as its starting point sacred text that Muslims believe to have been revealed to Prophet Muhammad, and later compiled as the Qur'an in addition to the collection of authenticated *ahaadith.* In principle, the preserved, authentic and agreed upon Arabic text for these two primary textual sources is fixed, while their interpretation and application may be contextual. They cannot be disputed nor amended. This does not mean that their interpretation and agreement are not open to debate and discussion amongst jurists depending on factors such as context and language. It is these juristic opinions that undergo a consensual process to determine strength. Alternatively, international law is sourced from consensus. Following the end of World War II, the adoption of the UN Charter, the UDHR and followed, in particular, by the two International Covenants[661], form the foundational basis of international human rights law. Once the consensus of States is entrenched in treaty text, it then may act in the same way as the textual sources from which all Islamic law must emanate. In other words while both differ in their sources and their nature, they, to a large extent, do apply in a similar way. While Islamic law is thought to originate and derive from the word of God, international law originates in an initial act of consensual treaty making, which then legally acts in the same

[661] ICCPR and ICESCR.

way as a religious text. This means once it is entrenched it is not the text itself that is disputed but its interpretations.

International law exhibits tensions in interpretive approaches when there is conflict between treaty and customary law much in the same way that Islamic law grapples with issues of authenticity of Prophetic Traditions and conflicts in interpretations between Traditions and the Qur'an. This was evident in the debate and reasoning adopted by al-Shafi'i regarding whether the Magians should be considered as People of the Book or not, based on his interpretation of Qur'an 9:29. However that discussion was not easily separable from his view that reference to the People of the Book in the verse was a closed and exhaustive list. In that regard, a potential contribution of this thesis was to offer a reconciliation of al-Shafi'i's interpretation, which was at odds with the other three prominent schools of Islamic law. It was suggested that al-Shafi'i's interpretative methodology need not be compromised, if only he were to consider Qur'an 9:29 as non-exhaustive and the reference to the People of the Book as an example of groups to be afforded *dhimma* status. This may have been more feasible than having to deduce that the Magians must be People of the Book, when ostensibly and substantially there was little to support such a presumption.

Similarly, such a minute technicality of exhaustive or non-exhaustive lists often plays a role in determining interpretation in international law also. For example, a parallel was drawn with the discussion of the above verse with Art. 27 of ICCPR and how it was possible to apply a dynamic interpretative approach by asserting the subject groups to be a non-exhaustive list. Doing so would enable the inclusion of minority groups beyond just 'religious' and 'linguistic' to be included within the scope of minority rights as long as they could be deemed to be 'ethnic' demonstrating a distinct culture. Such an interpretation is absent in the literature or the jurisprudence on the topic and may be used in submissions to international oversight bodies to assess its traction. Other examples with the same technical nuances include the ICERD's heads of 'racial discrimination',[662] which is meant to be a non-exhaustive list and the sources of international law[663] which are also said to be open to additions and non-exhaustive. The list of sources for Islamic law though is an exhaustive list and is limited to Qur'an, Traditions, *ijma'* (absolute consensus) and *qiyas* (analogy). In terms of elaborations and explanations, Islamic law seeks to expand on overarching legal commandments and principles in the Qur'an and Prophetic Traditions through classical works of commentary (*tafsir*) on the Qur'an and explanations (*sharh*) of Traditions. Similarly international law has in-built within it General Recommendations and Comments by Committees that oversee the implementation and compliance to international human rights instruments. These offer much needed clarification and add detail in the face of context and developing practices.

The significance of State practice in the context of this discussion is worth elaborating. While State practice and agreements involving States both emanate from the State entity, they must

[662] Under ICERD, Art. 1.1 "racial discrimination' includes any discrimination on grounds of 'race, colour, descent, or national or ethnic origin'."

[663] Art. 38(1) of the Statute of the International Court of Justice (1945).

be distinguished. The State's participation in consensus building and negotiations with peer States is pursuant to the aim of drafting a treaty that all agree to and thus render themselves subjects of and to. International law and the process that accompanies it do not negate State sovereignty but develop it and position it at the centre of the authority and legitimacy of international law. States by collectively drafting and subsequently ratifying treaties are made subject to those principles via their sovereign power rather than in contravention of it. This makes State practice all the more essential in the formation of international law prior to formal agreement in the form of a treaty and after in affirming its status as 'law' that is being complied with. In other words, international treaty law is often a reflection of common State practices and following the adoption of the treaty, its ratification, implementation and compliance with the requirements of oversight bodies also constitute State practice that contributes to the strengthening of a said norm. In the absence of a treaty on a particular matter, patterns in State practice determine implicitly what is international law through the formation of informal international customary law. Therefore when comparing international law to Islamic law, it is instructive and unavoidable to refer to State practice as well as to international treaty law, not to mention varying standards and norms in regional systems. As already mentioned it is not just that State practice is an essential element in the formation and discernment of international law but is often justified by reference to the State's international obligations relating in that sphere. As such, it is indicative of permissible interpretations of international law depending on how oversight bodies respond to them and non-enforceability by international bodies of decisions and rulings, even in the case of the strongest enforcement mechanism of the ECtHR.

In the formation and articulation of classical Islamic law, it would not be wholly appropriate to talk of 'State' practice. The world order prevalent at the time was not one of sovereign nation-States or where boundaries and borders were fixed or sacrosanct. It was an age of military aggression, expansionism and empire, where the implicit default was war and the explicit exception peace. Therefore what did exist were disparate and varied political entities or polities that vied and jostled as well as formed alliances with each other for dominance vis-à-vis territory and resources. Islamic law was also dissimilar in that it was not the law that governed the conduct of these entities from above nor was it formed or interpreted by them. It was derived from the deduced will of God through Islam's textual sources to be applied to all aspects of life by independent jurists and legal scholars. It sought to deal with how a governing authority should behave towards and manage its subjects, whether Muslim or non-Muslim.

Hence both Islamic law and international law effected and influenced how States or such entities behaved. International law was implemented from above, once agreements were reached as a way to check compliance. Islamic law was interpreted and implemented from within the State entity with no supranational oversight. The poignant point here is that international law originates and heavily influences the interpretation and strength of certain norms that may be soft or hard and absolute or aspirational. The practice of Islamic State entities may be sourced from Islamic law and they may provide elaborations of certain precepts of Islamic law by applying them to specific contexts but they cannot amend

unequivocally the primary elements of Islamic law. Islamic law is wholly the arena of the jurist, while Islamic State entities may seek to apply aspects of those interpretations. But in other cases, States completely departing from those valid views with clear textual basis or formulating policies that may be explicitly forbidden under Islamic law, do not affect the concrete nature of those principles and laws, even if they are widespread and common. However it would be important to keep in mind that given how international law is formed, it was unlikely that law would be formed around a matter, which all States acted divergently in. In other words, Islamic law is informed and enriched by practice, while international law is dependent and altered by practice.

III. Spectrum of Validity Theory

A contribution of this study has been a model of analysing Islamic law and comparing it to international law by reference to a plurality of possible views on any one given issue. This is an inadvertent facet of Islamic law given that it is interpreted by jurists and their views never have the ability to attain the status of formally applicable law at the official level. It is neither statute law nor international treaty law. It is informal and seeks to map all possible interpretations and rule out impossible ones. As such, the variance emanates from interpretative approaches, context and assessment of the authenticity of *ahaadith*. Rather than textual law, it is simply a huge body of legal views and opinions of what the law is and should be. The contributory utility of this spectrum of validity theory is unique in that it unearthed views that are largely absent in the English language literature. Additionally, much of this literature only refers to one view as being representative of Islamic law. That could in some cases be from other English language authors. In others it is by reference to now much discredited polemicist writers, who are selective in their representation of Islamic law and in their explanations of it.[664] Furthermore even classical and contemporary Arabic writers will often present the view that they preference rather than the full range of views. In their case, it is not to discount other possible interpretations but to indicate which they feel to be strongest view. Therefore the issue with contemporary authors is not that they quote a liberal or restrictive interpretation of Islamic law, but that there is little cognisance of other equally valid possibilities in the classical literature. This may be done out of convenience or an insidious and biased agenda, but it is common amongst those seeking to vilify Islamic law and Muslims as well as those hoping to portray Islam and Muslims in a positive and peaceful light. However both approaches fail the academic endeavour of elucidating the nature and substance of Islamic law and comparing it to international law.

As already stated, beyond the theory, the general approach of the thesis is to be found in much of the scholarship on the topic, that of comparing international law and Islamic law, with the exception of Hashemi[665] and Baderin.[666] Hashemi devotes a third of a monologue to

[664] See Yo'er, "The Dhimmi, Jews and Christians".

[665] See Hashemi, *Religious Legal Tradition.*

[666] See Baderin, "Minority Rights in Context".

dhimma while Baderin has authored a Chapter on the topic. The only monologue dedicated to a similar comparison has been Emon, who refers to a similar and connected idea but refers to it as the idea of 'rule of law' under Islam. The substance of his theoretical comparative approach is similar in that it proposes and seeks to compare Islamic law by reference to the range of interpretations available rather than selecting one or limiting himself to one.[667] Nevertheless in the progression of the present thesis, it was evident that international law was similarly also not a monolithic system of law with singular legal views on various matters pertaining especially to the right of religious minorities. There appeared to be a plurality of not only interpretations but also laws themselves ranging from regions, international organisations and of course national laws of States. Others when discussing the issue of religious minorities in isolation have taken the position of international law by reference to a particular instrument or provision, rather than ask the question of what international law states as an entity. International law, thus is perceived by this author as not merely a law that governs *all* States as could be argued by those who resort to UN instruments as their reference point, but rather the law that governs inter-State relation and of supra-national affect.[668]

Further still, given the unconventional nature of international law that in large part requires voluntary State compliance, it does not just exhibit a spectrum of validity in its potential laws, but demonstrates a parallel 'spectrum of legality', in which laws or principles may be legally binding or not. Even of those legally binding, there may those that have oversight mechanism and bodies and others that do not.[669] Lastly there are those that are legally enforceable[670] or may even be directly applicable in the national law of the State.[671] It may also be there is always a disparity between the extent of the same protections in various regional jurisdictions given the context and experience of those regions.[672] A difficult and pertinent question that could follow is whether UN standards of human rights protection or regional systems offer higher levels of protection. From one perspective, the UN system should offer the minimum possible protection in a particular area and regional systems may then go beyond but not below it.[673] From another perspective, as UN standards may be less enforceable than European ones, States may be less reluctant to make themselves subject to a system that is more likely to require stringent compliance.[674] In this study, focus was maintained on European institutions and instruments.

The subsequent question that arises is the relevance of State practice under international law and whether it should have been taken as being part of this spectrum of validity of

[667] Emon, *Religious Pluralism and Islamic Law*, 16.

[668] This may be critiqued by the fact that not all States are members of the UN i.e. Vatican and North Korea.

[669] E.g. The Genocide Convention.

[670] E.g. ECHR and the Council of Europe Parliamentary Assembly.

[671] E.g. European Union (EU) Directives.

[672] ACPHR overseas peoples' *and* human rights. IACHR has developed jurisprudence on the right to know in the context of historic disappearances as well as the rights of indigenous peoples.

[673] E.g. Abolition of the death penalty is specific to Europe.

[674] E.g. Additional Protocol 12 of the ECHR as opposed to Art. 26 of the ICCPR.

international law or beyond its scope. The elaboration in the above section about the relationship between State practice and international law contrasted with that under Islamic law indicated that it should be included under international law and not so under Islamic law to the same extent. This is the reason that in our preceding analyses, we referred readily to the practice of certain States, in particular France and Turkey. The assertion made above was in regards to understanding the relevance and role of State practice in the formation and strengthening/weakening of international norms. Nonetheless international law displays a spectrum of permissibility with regards to the conduct of State under the same human rights principles and norms under the concept of the margin or appreciation, best illustrated in the jurisprudence of the ECtHR. The margin of appreciation shows for our purposes that the spectrum of validity is applicable not just across regions but also in a said regional system, such as the ECtHR, in its determination on the lawfulness of legislation or policies taking into account the political, cultural and historical contexts of States.[675] To surmise, State practice under international law definitively forms part of the spectrum of validity of the legally permissible and the legally binding. If an international law is sufficiently general and vague, State practice contributes to populating the elaborated legal space. If it is fixed and legally binding and States flout it or comply by it, then their practice erodes or strengthens that norm, respectively. Finally at times, the application of a certain norm is dependent on the context of the State in question whether political or cultural. The ECtHR in such instance applies a margin of appreciation.

If we are then arguing for the inclusion of State practice under international law in our comparable spectrum of validity, then why seek to exclude for the most part the practice of Islamic polities in the past and present from the spectrum of validity of Islamic law. In the discussion above the question has at least been partially answered. The distinction between the nature of the two 'laws' and the role of State practice in the formation of law is significant aspect of better understanding the issue. Although it is not to say that we completely discount State practice as informing our view of the spectrum of validity for Islamic law. As already stated we certainly referred to certain State practices such as those of modern Muslim-majority States and a number of authors have pointed out the practises of Islamic polities in the past, such as the Ottoman Empire and other modern States embodying elements of repressive classical Islamic law of *dhimma*.[676] The crucial divergence to grasp though is that State practice in the past and present may be resorted to as an *example of interpretation* of Islamic law rather than as *contribution to its formation.* As such, it does not contribute to its negation or weakening. If it does affirm *one* of the valid opinions, it similarly does not negate the existence of others in the spectrum of validity.

The distinction may from one perspective seem an arbitrary one as examples of interpretation may contribute to understanding a law. What is meant however by the proposed distinction is that those examples of interpretations have no effect on the textual sources and the range of available interpretations of classical jurists especially in relation to their meaning. State

[675] See e.g. *Sejdic and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06 (2009); *S.A.S. v. France,* no. 43835/11 (2014); and *Leyla Sahin v. Turkey*, no. 44774/98 (2004).

[676] McKinney, "Echoes of *Dhimma*" notes this has been the case in Egypt.

practice can draw on the textual sources and the associated bank of juristic views and seek to apply one to its context. While State practice may refer to and draw upon Islamic law, both exist in parallel yet separate autopoietic systems.[677] In clearer terms, Muslim-majority State practice or alternatively States that call themselves Islamic do not contribute to the formation of Islamic law even though they may draw inspiration from it. When they claim to be manifesting Islamic law through State structures, that also does not necessarily mean that it falls within the pre-existing spectrum of validity. Two points emerge from this: the first as to the relevance of this discussion around State practice to the present study and the second how one should go about comparing the spectrum of validity of the two systems of law and its results. We will address the first in the next section and the second later.

IV. Contextual Flexibility

The relevance of the above is born out in fact, a number of authors refer to State practice and the views of certain classical jurists interchangeably and without distinction.[678] This means they overlook a number of considerations. Do the rules regarding *dhimma* constitute laws and if they do, are they for that specific context? If they are related to context, then can such a context be discerned today? Are certain State practices justified by reference to Islamic law that can be situated within the spectrum of validity? The most notable example in this regard is the 'Pact of Umar'[679], which is constantly quoted throughout the literature as being indicative of the rules that all *dhimma* must be subjected to. This is especially the case when the rights of religious minorities were discussed as opposed to scope. Two elements seem to have been overlooked which are of absolute necessity when comparing two such situations. The first of context and the second of the principles and underlying philosophy behind such rules. Apart from this, the views of Mawardi and other classical jurists[680] are of great utility emphasising the nature of *dhimma* as essentially an agreement, pact or treaty between a State and non-State entity, which may be in compliance to regulations associated with *dhimma* or may negate them: "If not explicitly stated in the treaty, the 'recommended conditions' for *dhimmi* behaviour in Muslim society are not obligatory on them. Even when prescribed, the infringement of these conditions does not constitute a breach of contract. Nevertheless, they are to be forced to comply and are to be reprimanded."[681]

In terms of textual sources, the reference to *dhimma* and the substance of their rights is indeed scant. The concept is deduced and elaborated from a single verse of the Qur'an (9:29) and a number of Traditions address the scope of inclusion. With regards to freedom of religion also, the central element is derived from Qur'an 2:256. Thus rules that range

[677] See generally Fuchs & Hofkirchner, "Autopoiesis and Critical Social Systems Theory", in Magalhaes and Sanchez (ed.) *Autopoiesis in Organization Theory and Practice* (2009).

[678] For e.g. McKinney, "Echoes of *Dhimma*".

[679] See above for questions of authenticity, 179, fn. 642.

[680] Zaydan, *Al-Dhimmiyun wa al-Must'aminun* and Al-Tariqi, A., *Al-T'aamul ma'a Ghayr Muslimeen*.

[681] Haddad, "Ahl al-dhimma in an Islamic State", 172.

according to context such as conquest, political leadership and can be negated or supplemented by express agreement can embody harshness or leniency, can such rules be attributed the quality of law sufficiently enough to draw comparison with international law or other systems? And if so can they be seen as *binding* law? The answer is resoundingly no to the idea that a number of harsh rules could be seen being representative of Islamic law or that they were binding on others who followed. What must be extracted from all scenarios present where Islamic law had to deal with religious minorities is the essence or fundamental principles at play, so as to extract them and assess them disconnected from context so as to be universally adaptable to all contexts.

Haddad in reference to Mawardi's famous text, *Ahkam al-Sultaniyah* provides some valuable insight in to this contextual flexibility and ad hoc nature based on the discretion of the political leadership at a given time playing a part in addition to the context he is responding to.[682] As such the political leadership's decision constitutes an example of practice rather than affirmative law binding all those who follow. For example we know that the amount of *jizya* was never fixed and instead determined by the political leader.[683] Mawardi also gives two rulings on each issue, which is alleged by some to be contradictory but in the analytic framework relying on the spectrum of validity shows it be a more cogent elaboration of Islamic law for State entities than offering a singular view. This would also go hand in hand in explaining the required differing policy response for drastically different situations. This is epitomised by the repeated reference to how *dhimma* should be treated dependent on whether they are conquered or not, fought or submitted peacefully.[684] Thus as already stated generalisations from the very specific 'Pact of Umar' with the Syrians are not helpful. However it does assist us in understanding that the harshness in that treaty whose terms were a result of an agreement between Umar and defeated Syrians. Albeit it was between a dominant victor and over-powered defeated party, nonetheless it was agreed by the parties in the aftermath of defeat and more crucially was specific to that situation and was not intended to have binding effect at all. The harshness is also related to the fact that it was the result of a conflict and armed hostilities. Thus the precautions and punitive measures to ensure passivity were more severe.[685]

Likewise the discussion around *jizya* which is legislated in Qur'an 9:29 is surrounded by a mosaic of differing views around context, conditions and objective. It has been argued that the verse specifically commands Muslims to "fight...those who were given the Scripture until they give the *jizya* willingly while they are humbled". One interpretation offered has been that the *jizya* is applicable to only a situation where there is fighting followed by submission. If no fighting took place as in the religious minority finds itself in the territory of the State due to being established there for hundreds of years or in the classical context conquest has occurred as a result of fighting but not with the minority, then does the requirement of *jizya*

[682] Ibid.

[683] Ibid. at p. 171.

[684] Ibid. at p. 172.

[685] Ibid.

still apply. Furthermore some have also argued that *jizya* is paid in lieu of not serving in the Muslim military, thus raising the question of inapplicability if they join the army.[686] Similar connected discussions in the classical texts also take place regarding *kharaj* and how the rules concerning may differ on the basis of the religious group being conquered or not.[687] Thus it is far from clear whether *jizya* would be applicable today if it was related to and conditioned to being conquered, there being hostility and enmity between it and the Muslims, it being related to participation in the armed forces and there being no international norm of expansion amongst powers as well as conquest in the present world order being unlawful and there being fixed borders, international law and pre-existing minorities in nation-States.

Two connected discussions that take place around *jizya* and its basis is that it was an oppressive policy that sought to degrade, humiliate and demean the *dhimma* and even in the event that it was not, it still constituted a discriminatory fiscal and taxation policy based on religious belief and identity. With regards to the view that it was a means by which to humiliate the *dhimma*, the view is certainly espoused by some classical jurists, who saw that the dominance of Islam had to be made clear to the *dhimma* and their subservience affirmed. This essentially political discussion of how to treat religious minorities is informed and fuelled by the debate around the interpretation of Qur'an 9:29 in particular the final word, which according to lenient translations has been 'humbled' and by harsher ones 'humiliated'. It is then difficult to reconcile with international law if we were to entertain the possibility of the harsher interpretation as even being one of the possibilities on the spectrum of validity. Nonetheless as already stated, the context must be unpacked to see what may be going on below the superficiality of certain laws or policy. Also reference to contextual facilitators should not be used as a means to escape acknowledging unsavoury or unfavourable views that may nonetheless have legitimacy and authority.

However reference to context coupled with reference to other precepts within the same system as well as the overarching purpose of the system (*maqaasid*) can prove an instructive and compelling evidence to decipher the purpose of a law from its apparent intent. Hence it would be appropriate to assert that both the purposes above of degradation and fiscal penalisation, beyond discrimination, could constitute forms of indirect coercion which would more fundamentally encroach the internal and absolute aspect of freedom of religion. This is because it would put religious minorities in an unfavourable position vis-à-vis their dignity and wealth. This could lead them to consider claiming substantial equality by at the very least feigning conversion to Islam. However as we have already noted the context was often one of conquest following armed hostilities, so in part the harshness can be attributed to that as opposed to the purpose of converting them. With regards to the overarching *maqsad* (purpose), any form of coercion with the aim of infringing the internal aspect of freedom of religion would be irreconcilable with Islamic law. In this sense, harsh treatment would be so that they are subdued and accept being subjects to an Islamic State entity as well as dissuasion to threaten the entity from within. In relation to the varied interpretations of

[686] Ibid.

[687] Ibid. at p. 175.

Qur'an 9:29 and the views on the purpose of *jizya*, it may also be possible to reconcile between the many views without having to necessarily discount a substantial number of them by asserting that the interpretation and thus translation of the verse was flexible and depended on context. What was required in essence was that there subservience to the law and authority of the Islamic State entity. What specifically was required to attain that clearly depended on the relationship and interaction between two parties prior to the assumption of *dhimma* status. Submission to the authority of the State is a basic ingredient of citizenship or permanent residence even in modern States.

In relation to the second possible point about it being a discriminatory fiscal policy, the idea often becomes strengthened when connected to the above said harsh interpretation of Qur'an 9:29. However when looked at in isolation, the *jizya* as mode of taxation need not be discriminatory or implemented with view to disadvantage and coerce the *dhimma.* In its apparent mechanics, it could have been considered in lieu of *zakat* which was only collected from Muslims and was fixed at two and a half percent of unspent savings over year. *Jizya* on the hand was at the discretion of the political authority and more often than not was of a small amount and was largely as symbolic. It was also means and capacity dependent so that many were excluded from it and so was applied to men of fighting age, hence why it was linked by some to exemption from military service. Given its amount and the fact that it excluded those unable to pay it, goes against the idea that it was meant to disadvantage religious minorities so as to make them outwardly at least more amenable to Islam. The contextual dynamic of conquest is also applicable to the discussion around the places of worship, where jurists developed different limits of rights dependent on whether the religious group had been the result of conquest or not. Once again this directly related to what relationship preceded it and the presumed level of threat from within. Where there is trust, the enmity shown prior to and during assumption of authority, the rights given are greater.

Therefore a vital question results: if conquest is what in a number of situations determine treatment to *dhimma*, then what does that tell us about the basis of *dhimma* treatment in relation to the external element of freedom of religion, that of manifestation? Beyond that what is the discernible basis for the granting of minority rights and more so the more advanced notion of collective rights? The first crucial point to begin with is that the notion of conquest no longer exists and is forbidden under international law. The prevalent context is one of friendly neighbourly relations and non-aggression with the basis of international law and relations State sovereignty and its associated responsibilities relating to human rights to those within its jurisdiction. As such boundaries and border are fixed and with the exception of (religious) minorities resulting from mass (economic) migration flows in the post-WWII period, religious minorities are to be found to pre-exist in the territories of the States in which they reside. Those who have resulted from migration have been for the most part economic migrant, and regardless have in most cases become citizens of those States. Of course there is serious concern which we looked at in detail regarding the exclusion of such groups the scope of religious minority rights in Europe, which we will return to later. The relevant point being that notwithstanding how a religious minority has come to be within the jurisdiction of the State, there has been no preceding enmity or hostility (armed or not).

Thus once these political contextual factors are lifted, then it seems that the same approach cannot be the proper one. In that where *jizya* is taken with the purpose of humiliation and penalisation of past enmity or where restrictions are placed on place of worship due to fears of a threat from within. Such an approach also makes sense of the confusion in the view of verses that relate to conflict and those that do not such as Qur'an 5:5 and more importantly around the internal aspect of freedom of religion. The specification and deciphering of these political factors shows that religion may have little to do with the policies that affected religious minorities or in other words it was not the principle overarching concern in the treatment of *dhimma*. Instead what seems to be at stake is the context and security threat posed in relation to applicable harshness or leniency. Apart from the fact that the context that gave rise to some these modes of harsh treatment are no longer present, it is also important to remain cognisant that the simplistic model hitherto presented where the religious identity or belief per se determined the treatment and rights attributed to them may be flawed.

For example we conducted an extensive discussion on scope of the concept of the *dhimma* in which we found three prominent views existed as to who could be included in addition to the People of the Book and Magians: no others, only non-Arab polytheists or all polytheists. If we assume that all polytheists may be included and thus by analogy all non-Muslim groups, the conventional view of a special status being attached to the People of the Book would no longer be applicable as far as the status of *dhimma* was concerned. This is because if all groups were to be included there would also then be no distinction as to the content of their rights. All religious minorities would be equal in a sense and there would logically have to be a form of neutrality and impartiality practiced under Islamic law towards those groups as in a sense of public law there would be no distinction between them. Instead of just arguing against the position of Islam's favourability to the People of the Book as *dhimma*, it would be more instructive to pin point the misunderstanding that may led to such a oft cited yet mistaken position. Islam clearly views People of the Book in mixed sense. It appreciates their commonalities in belief and origin to Islam, but views negatively their perceived alteration of original monotheistic religions. As we asserted they are often referred to as People of the Book when the connotation is positive and as disbelievers (*kafireen*) and polytheists (*mushrikeen*) when a negative connotation is intended. In Ibn Taymiyah's terminology they are not viewed as absolute polytheists but polytheists nonetheless.

However the crucial distinction is that this was how Islam viewed the People of the Book in religious terms. The *dhimma* system was essentially a political system aimed at managing religious diversity and plurality, keeping in mind the security and religious nature of the Islamic State entity. Even the original context of Qur'an 9:29 is that of fighting. As such from a religious perspective the People of the Book were seen as closer to the Muslims and furthermore also more likely to incline towards Islam.[688] However they were still disbelievers and polytheists from another perspective and as such had the same freedom of religion in the legal and political sense as other religious minorities. The only element of Islamic law that

[688] Qur'an 3:64: "Say, 'O People of the Scripture, come to a word that is equitable between us and you – that we will not worship except Allah and not associate anything with Him and not take one another as lords instead of Allah.' But if they turn away, then say, 'Bear witness that we are Muslims [submitting to Him]'."

directly relates to a difference of treatment to the People of the Book and polytheistic religious groups is the permission to marry from them and eat their food.[689] This again purely in a religious sense as it addresses private relations between individuals rather than public law. The assertion is made yet more conclusive by the inclusion of the Magians even in the most restrictive interpretations favoured by al-Shafi'i as People of the Book. The Magians even it is argued that they at some point indiscernible in history may be People of the Book, clearly practiced polytheism and monotheistic elements were not be seen at all. However their inclusion in the scope of *dhimma* is undisputed. What is even more noteworthy for those who do include them as People of the Book, do not hold Qur'an 5:5 to be applicable to them, that is, the permissibility of marriage or the consumption of their food. Once again showing that Islamic law on *dhimma* was one related to political and public considerations rather than those of religious belief or ritual or inter-religious relations.

Ultimately the *dhimma* system was a political one with a religious basis rather explicitly defined religious principle or set of rules. So to use it as a guide on how to treat non-Muslims generally regardless of context would prove a futile exercise if to begin with the political scenario of a governing authority who sought to apply Islamic law and subject non-Muslim religious minority was absent.[690] Furthermore to not revisit the examples of practice as jurisprudence rather than law or even ad hoc political decisions is lacking in any such analysis. As such it does not suffice to hand pick the examples of practice that most suit a pre-determined conclusion in order to provide an authoritative analytic framework. Rather than merely look at such practices in isolation of their contexts hundreds of years in the past; what is clearly missing from a number of studies is an effort to uncover the principles underpinning the law so as to question the extent and nature of their applicability to the present world's context.[691] Of these unprecedented facets is an international order of nation-States, international law and UN treaties and fundamentally a paradigmatic shift from default enmity to default non-aggression: "For the modern Muslim jurist, those conditions have changed as political communities have shifted from imperial models to state-based ones, and to complex modes of domestic and international regulation"[692]

Conversely for Islamic law to be a system of public law, which distinguished purely on the basis of religious belief per se, would mean that it was antagonistic towards other religions and their adherents. Thus it was against the religious identity itself and showed a preference for its co-religionists, followed by those who were closest to them, such as the People of the Book, and ending with those who were furthest away from them. To put it slightly different, it was disdainful to those beliefs and in terms of policy sought to weaken and alter their religious identity so as to create a homogenous national religious identity. However we have begun to see that religious identity did not play such a role nor was it the target of Islamic

[689] Qur'an 5:5: "This day [all] good foods have been made lawful, and the food of those who were given the Scripture is lawful for you and your food is lawful for them. And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you".

[690] Emon, *Religious Pluralism and Islamic Law*, 2.

[691] Ibid. at p. 17.

[692] Ibid.

public law. Islamic law once *dhimma* status was given, never sought to interfere with religious identity nor the internal element of freedom of religion. In fact it dealt with them as collective group entities allowing them various layers autonomous spaces/competencies to not only hold beliefs and identities in line with their religions but also to practice and manifest them as a collective. The only point at which Islamic law sought to interfere with the religious life of *dhimma* was when it encroached the sensibilities or threatened the religiosity of the Muslim population. Hence there are appropriate limitations of public expressions of religion and even more so manifestation that could lead to direct or indirect proselytisation.

V. Scope of Religious Minority

We found under Islamic law that the scope of *dhimma* could be interpreted in three ways, but also that under international law there was spectrum of validity deduced from a complex web of legality in relation to regions and institutions. This spectrum under international law was also accompanied with the complicating factors of a number of instruments being non-binding soft laws. Those that were legally binding had an in-built element of discretion and incremental realisation.[693] Resultantly there were also three main approaches observable under international law with a particular focus on Europe on the scope of 'religion and belief', 'religious minority' and 'national minority'. Similarly to Islamic law, the category of 'national minority' as agreed and interpreted by States under the FCNM was the most restrictive as it potentially excluded all religious minorities from its scope indirectly by virtue of defining 'national' as exclusive of minorities resulting from immigration. This did not automatically mean those individuals belonging to religious minorities were denied the rights to non-discrimination or religious freedom granted under the ECHR. International law dealt with the issue of scope separately and independently when determining religious freedom and minority rights. Islamic law however has its starting rather than end point as recognition of group entities and collective rights. It does not distinguish its approach to scope between freedom of religion and minority rights.

On the issue of scope of 'religion' under both systems, there was remarkable similarity with regards to the applicable principles. These included non-interference in the internal legitimacy or content of others' religion. The scope of freedom of religion was to be limited to beliefs *about* religion so as to cover atheism but not all beliefs in the generic sense. We deduced this through the polythetic approach to the definitional question as opposed to an essentialist approach as outlined by Gunn.[694] While it was established and known that international law explicitly included atheists within its scope, it was also clear that not all beliefs were to be included despite the generic wording of the HRC. Under the ECtHR, there are clear examples of exclusion such as assisted suicide and that the beliefs must attain a level of cogency, seriousness, cohesion and importance.[695] Hence there was utility in applying the

[693] E.g. FCNM.

[694] Gunn, "The Complexity of Religion".

[695] *Campbell and Cosans v. UK*, no. 7511/76, 7743/76 (1982), para. 36.

polythetic approach to the open ended wording of the HRC that the right should not be limited to traditional religions and the ECHR outlined general principles of what can and cannot be a religion, in line with facets or manifestations of religion, chief amongst them being worship.

It may be commonly presumed that as atheism is antithetical to Islam, it would be viewed disfavourably or excluded from the scope of *dhimma* under Islamic law. To the contrary, we found that theologically, atheism could not be disaggregated from and should be included within the rubric of polytheism. Thus if we followed the view that all polytheists should be included then atheist would be included. The polythetic approach rendered a similar conclusion that what is or is not a religion may be ascertained through its various facets. It seemed that as long as what is being dealt with is a belief in God and has connected to it acts of worship may be included. Clearly the problem arises with regards to atheists not having any acts of worship. Given they are captured by the facet of it being a belief *about* the existence of God, it would not be necessary to also satisfy the second condition. Furthermore it would appear at least under Islamic law that were they to be given *dhimma* status, then there would be no impediment to laying claim to any of the rights permitted to religious minorities. Despite lacking acts of worship, others would be applicable. Whether they would avail such religious minority rights when they are naturally likely to be against the notion itself would remain to be seen.

With regards to definition of 'minority' it was established that it remains highly contested and unsettled under international law. Islamic law as already stated does not address the scope or definition of what groups may or may not constitute minorities separately from the discussion around the scope of 'religion'. It addresses the issue as a whole relating to a religious group entity with all other rights subsequently following. With regards to definition, international law has been held back by States' reluctance to give the concept any fixed meaning, owing largely to an aversion to group rights due to perceived threats to national identity and ultimately territorial integrity. Nonetheless despite there being no agreed definition of 'minority' under international law, reference is often made to the Capitorti's working definition. Developing practice and evolution of international law on minorities however has since advanced. A first aspect of that definition related to the conventional idea that minority be "a group numerically inferior to the rest of the population of a State, in a non-dominant position". While non-dominance is likely to be essential when characterising and identifying minorities, it may occur in a context where they in fact form a numerical majority. Examples of this were given of South Africa and Bahrain. This dynamic prioritising dominance rather than numbers, is evident under the practice of Islamic law as well. It would likely be in increasing cases, especially as the Islamic empire expanded to non-Arab lands that the Muslim, at least at first, would constitute dominant numerical minorities governing over non-Muslim numerical majorities.

We also established that the requirement of "being nationals of the state" to access minority rights was one that international law, even in the absence of universal State compliance, was not to be used as a basis to exclude groups from the scope of 'minority'. However international law dealt with this element with nuance when addressing the precise content of

rights. As such not all rights attributable to minorities need be availed to non-national minorities such as for example of political participation, whether it be standing for office or participating in elections. Islamic law, too we found to did not exclude from the scope of religious minority rights non-Muslim subjects just by virtue on non-permanent status as our closest comparator to citizenship. Although the term *dhimma* was not attributed to this category of religious minority, who were resident on a temporary basis. They were instead referred to as *mustamin* and were vested with rights, but similarly to international law, the extent or nature of certain rights was tailored to the fact that they were not permanent residents or citizens. What is certain though on a basic level strikingly similarly to international law, their freedom of religion was not to be interfered with or restricted except under appropriate public policy grounds.

Capitorti continues to mention the types of minorities who may included, those who "possess ethnic, religious or linguistic characteristics differing from those of the rest of the population". Capitorti's limiting of the definition to these three groups is echoed in Art. 27 of the ICCPR. Islamic law is dissimilar to international law in this as *dhimma* is only applicable to religious minorities. This does not mean that Islamic law thus excludes recognition or the attribution of rights to other forms of minorities such as linguistic or ethnic. Given that it is derived in origin from a religious text, it is of paramount importance to it and us, as to how it views and seeks to treat those who disagree and differ from its adherents, when in a position of dominance and holding political authority. That group of differing people would be assumed under the wide berth of those who disbelieve Islam and hence the extended discussion of specifically non-Muslim minorities under Islamic State entities. In principle though as Islam and Islamic law do not differentiate on the basis of ethnicity, race or language there is no principle identifiable under Islamic law that would hinder a political authority from availing non-religious minorities rights derived from minority rights principles. From one perspective the treatment of ethnic or linguistic minorities is a matter that Islamic law would not be concerned with as it is an areligious matter. An Islamic State entity or Islamic law itself is devoid of ethnicity or language and as such matters would render wholly political in nature and at the discretion of the political authority. From another perspective, if liberal interpretations regarding how to deal with non-Muslim religious minorities, those who would arguably be most naturally inclined to be antagonistic to an Islamic authority, are used as an inspiration or guidelines, then the attitude or treatment of non-religious minorities under Islamic authorities should be one that is highly enlightened and progressive, where appropriate importance is given to group and collective rights and offering a space for such pluralisms to be expressed as freely as possible.

A similar appreciation of the underlying basis of international law also reveals why it would seek to protect and attribute rights to these three types of minorities specifically. Apart from Art. 27 of ICCPR, minority rights have developed at a purposeful pace as a post-1990s phenomenon. The contextual circumstances were the grim realities of the Yugoslav breakup and later Kosovo. Thus just as genocide had to take place for there to be a law against it, crimes against humanity and war crimes for there to be ad-hoc tribunals, likewise massacres and ethnic cleansing of whole groups of people owing to their distinct identities, comprising

ethnic, linguistic, religious and cultural facets for there to be impetus behind the development of minority rights. In part what such drastic and brutal situations could be traced backed to appeared to be the attempt of one nation of people to impose their dominance politically and territorially by force on dissimilar to them, thus manifesting in murder, massacre, genocide or forced displacement of all those who belonged a group other than theirs, irrespective of if they posed a political threat, or were combatants, women or children.

Furthermore it was also apparent that in a number of such situations the use of force and violence could also be adopted as a means of self-defence and political and territorial separation, thus leading to armed or political struggles for secession. What was at the heart and origin of these intractable situations was the attempt of a nation-State to impose a national identity on minorities who were unique and distinct or in extreme case seek the elimination of the whole other group. In other words what was being sought was not the aversion of threats to its own identity but rather an interference with all identities difference from itself. Therefore religious, ethnic and linguistic elements were seen as constituting a national identity. A nation-State with a certain predefined identity at its centre of power may be inclined to behave negatively towards groups that are furthest from that identity. Its aversion and hostility would be dependent of which elements dominate its centre. To surmise, just as nation States may hold to be most different to themselves who don't share the dominant national identity, which may comprise of one or a combination of ethnic, religious or linguistic identities, Islamic State entities hold to be most different from its dominant identity all non-Muslim subjects who may or may not be numerically inferior.

International law seeks to limit the nation-State's excesses in this realm just as Islamic law can be drawn on to limit and hold to account similar excesses by Islamic State entities against its non-Muslim subjects. This is why exclusion from scope under international law occurs of groups who are seen not to have a cultural identity and so beyond ethnic, religious or linguistic. Under Islamic law, the discussion around exclusion is around which specific religions or types of religious beliefs are included or excluded. Hence while the focus of comparison is limited to religious minorities, it is notable that minority rights of ethnic, linguistic and religious minorities has developed in the same way under international law as the discussion of *dhimma* and how to deal with them has developed under Islamic law. Both are perceived as constituting the greatest threat to the identity at the heart of emanating of authority, power and dominance. For Islamic law, it is in theory fixed and so the ideological threat is always perceived to be from non-Muslim groups. However for nation-States it can vary between different sorts of identity, and as such the State's attitude towards specifically its religious minorities will depend to what extent religion contributes to its own constructed national identity. In most States of Western Europe religion plays a minimal role in the construction of the national identity. Where it does, it does not necessary do so to work against other religions. For example in the UK, the relationship between the Church and the State manifests itself in general tolerance and the availing of religious freedom rights for all religions. On the other hand the secular nature of some other States, such as France are more likely to see minority religions as a threat to their essentially anti-religious national identity in light of their own political historical context.

We also saw how the interpretive approach to debates around scope were similar in both systems of law. The issue of scope in reference to Qur'an 9:29 like Art. 27 of the ICCPR could be condensed to the use of exhaustive and non-exhaustive clauses. Both provision carry explicit mention to certain groups, but the real debate is whether this means no other groups can be brought within their scope. Qur'an 9:29 refers to the People of the Book, which included Jews and Christians as well other religions who could lay claim to monotheistic elements in their belief or a revealed text. Art. 27 of ICCPR included within its scope religious, ethnic and linguistic groups. However both could be interpreted dynamically as non-exhaustive and open to all other similar groups. Qur'an 2:29 according to prevalent view under Islamic law shared by three of the major schools of Islamic law, could include other religious groups beyond the People of the Book, but differed as to whether this was all other polytheists or only Arab polytheists. Art. 27 of the ICCPR could also include within its scope groups that went beyond what was conventionally under the 'ethnic' head. From it being originally intended to be reference to 'race' to now include various groups who satisfy the essence of the provision and are included under the developed wide scope of 'ethnic' which has come to signify more the idea of 'culture'. The Roma, certain indigenous people and the Dalit have been included as a result.

The culmination of our findings regarding definition of 'minority' under international law and subsequent discussions that arise around self-identification, existence and recognition are largely absent from Islamic law as it does have an issue with group or cultural rights. In that sense similar to international law, the idea of the existence of a minority being a matter of *fact* is shared. Denial of recognition under Islamic law may not take place because there is non-acknowledgment of existence or a denial of the right to self-identify. Rather it takes place in the content of the beliefs itself. Furthermore as Islamic treats scope and recognition of religion, minority cumulatively, it is simply not possible deny recognition on basis of non-acknowledgement of existence, as it would mean no other rights could be attributable to such groups. Under international law as the scope and rights associated with non-discrimination, freedom of religion and religious minority rights can differ, the first regimes will be unaffected by the denial of the third.

For similar reasons related to approach and scope, Islamic law also does not differentiate between scope of collective rights and minority rights. Under International law however, they are once again distinct because minority rights are said to be vested in individuals and the right to self-determination and autonomy in group entities. Under Islamic law, *dhimma* would subsume both religious 'peoples' and religious 'minority' as understood under international law. Under international law it seems groups cannot both be identified as 'peoples' and 'minority' in light of the jurisprudence of the HRC. Furthermore it also seems increasingly clear that the notion of classical self-determination was one associated and tethered/tied to the colonial context as well as being status post-colonial era acquired through force and secession.[696] However there has been a lively discussion and the idea of the emergence of a contemporary right to autonomy. This has also been expressed differently as the idea of

[696] Exception South Sudan and Scotland.

internal self-determination rather than external self-determination. Internal meaning the inhabitants of a given territory or a religious group have a say in matters that concern them as well as the State in which they reside. Thus autonomy need not only be political, but also religious, legal or linguistic. This approach is principally how Islam deals with its *dhimma* in that they may avail territorial autonomy, but also in matters of religious life, personal/private law and education be put in charge of their own private matters. In matters and institutions of the State, according to Mawardi, there is no impediment legally or anecdotally to them occupying high positions in government and according to Maududi, any executive posts that are not related to the religious nature of the State.

When we discussed the notion 'national minority' as interpreted under the FCNM, it came to light that the scope of the FCNM was considerably limited to only those minorities who were long established and traditional minorities. The practical effect of this exclusion was that minorities resulting from immigration post-1945 were in essence excluded from the scope of the FCNM and denied access to the associated rights. The indirect effect of this was that the majority of religious minorities were the result of the immigration. Therefore even though the inclusion was intended for national minorities and the exclusion for non-national minorities as in those who arrived recently or 'new' minorities the practical effect was the inclusion of specifically religious minorities, who also happened to be in most cases ethnic and linguistic minorities. However it was the religious aspect of their identities that carried with it the most cultural substance to be expressed through the regime of minority rights.

Under international law, we found that the scope for 'religious minorities' was broadest when looking at the definition of 'religion' for the purposes of non-discrimination and to an extent religious freedom. However it was narrowed with regards to 'religious minority' and the narrowest in relation to 'national minority' under the FCNM. Even narrower perhaps would be the scope of collective rights such as self-determination and autonomy beyond the scope of minorities and not even within the jurisdiction of any judicial mechanism.[697] Under Islamic law we found three possible interpretations. However while we know that the spectrum of validity under international law is across regions, institutions and instruments, it is more difficult to get to grips with the spectrum of validity under Islamic law. Are all equally legitimate? On what basis can one decide to opt for one and discard the other opinions? Can they be used interchangeably given the context in which they are to be applied?

What they have in common in light of the spectrum of validity theory would be that they are equally valid, and thus reference to any one of them is sufficient for it be considered to be a tangible expression of Islamic law. We have discussed at length the known explicit inclusion of the Magians and the disputed implicit basis for that inclusion. The view attributed to al-Shafi'i regarding restricting *dhimma* solely and stringently to People of the Book is at odds with the majority of the views of other classical jurists. This is down to his reading of Qur'an 9:29 closing the door for others to be included even though the verse does not explicitly by its wording exclude others. Coupled with this was the idea that the Magians religious beliefs were known and to consider them as People of the Book was a stretch of the imagination,

[697] With the exception of other regional systems i.e. IACHR.

when their ostensible beliefs and practices were axiomatically polytheistic. Therefore it would be reasonable to classify the view that the Magians were People of the Book and *dhimma* was limited to the People of the Book is weak in the context of classical discussions around the classical context. This means that the two views which are prominent and have sufficiently significant authority and legitimacy are that that Arab polytheists should be excluded or no one should be excluded, that is all polytheists should be included regardless of being Arab or not. Although the former view may be the slightly stronger in classical literature, a contextual approach and unpacking the bases rendered the latter the more relevant to our present day context.

This is because we know the reason for this opinion emerged from the context of the Magians who were by in large considered polytheistic being considered as *dhimma* while other polytheistic groups in particular the Quraish were not. Thus the simple comparison between the Magians and these other groups who were both polytheistic showed that the apparent and most obvious difference between these two groups was the excluded groups being Arabs ethno-linguistically and the Magians were of a Persian ethno-linguistic identity. Thus it did not seem possible to deduce from this difference of treatment that it must mean that only the People of the Book and Persian polytheists should be included as *dhimma*. Hence some decided to adduce the reverse that it was specifically Arab polytheists that were excluded from *dhimma*. However the circumstances along with the context could be read in a number of other ways. For example the exclusion was purely against this particular group of Arab polytheists who were engaged in armed hostilities against Muslims and the deep seated enmity towards them.

Alternatively it could have been not the polytheism itself or their Arab identity but rather that were pitted against each other. As such if peace was achieved between the two groups, the exclusion would be lifted. Such possibilities were supported by the view of classical jurists that 'Arab' in this exclusion referred to only those in the Arabian Peninsula. In summation the view that the inclusion of Magians necessitated the inclusion of all polytheists is the strongest and most prevalent for our context. As such the exclusion of Arab polytheists is a reference to the exclusion of the specific historic group of people who were at war with the Muslims in its nascent period, who also happened to be the kith and kin of the very first Makkan Muslims. In any case even if the opinion was sought to be applied to the present context, there are no applicable circumstances as there are no polytheists in the Arabian Peninsula or ethno-linguistically Arab and indigenous to the region, nor are their Arab polytheists who have emigrated to other Muslim non-Arab States.

We also found even if we were to favour the most liberal interpretation being the most relevant to our context, then there was still the issue of it being agreed amongst classical jurists that there be no non-Muslims in the Arabian Peninsula. This geographical area that is meant to be in a sense free of non-Muslims causes problems in justifying such policies under international law norms. It appears to suggest that the population of a certain State must be religiously homogenous thus not accommodating religious diversity or plurality in the slightest. However we learnt that this was not the position of Islamic law to be generally applied but specific to a particular geographical region which was home to its two holiest

sites. In other words the opposition was not to diversity per se but in a particular region which was seen as the home/epicentre of the religion. We discussed that there was comparative modern States which conditioned nationality on the basis of religion. This could be countered with the idea that even so, non-nationals are not barred from visiting the countries. However we noted that the assumption that the population be homogenous religiously did not imply that non-Muslim could not enter the territory under any circumstances and those present within the territory were to be expelled or killed. Rather what became forbidden was akin to nationality in the form of permanent residence.

This was supported by the fact that *mustamin* were allowed to enter the territory of the Arabian Peninsula on a temporary basis for a number of reasons as well as being availed some of the rights due to *dhimma*. The example of Saudi Arabia was given where it has interpreted this exclusion in this manner, while also stretching it to allow non-Muslims to reside on the basis of work for as long as their employment persists. Thus the issue is not the physical presence of non-Muslims but their access to nationality and hence to have a say in the matters of governance or have the right permanent residence and the rights owed to citizens. Interestingly though it was pointed out that the Saudi nationals themselves are not able to practice political rights of standing for office nor taking part in elections due to the monarchical system. Additionally all non-Saudi nationals are treated as non-Muslim *mustamin* by linking their temporary residence to their employability. Hence it is not just a monarchy but one that is based on a ethno-religious identity rather than a purely religious one. It was also mentioned in brief that from a religious perspective two areas considered to be Holy and the main destination for pilgrims, Makkah and Madinah were not open to non-Muslims under any circumstances.

VI. The Right to Freedom of Religion of Religious Minorities

We discussed at length the areas of non-discrimination, freedom of religion (belief and manifestation), minority rights and collective rights. Special attention was paid to the freedom of religion. Due to relevance of certain areas to one system of law, they were discussed more in depth. For example non-discrimination was discussed at length under international law as given its focus on individual rights and it being one of if not the most fundamental human rights. Similarly a whole chapter was devoted to the internal aspect of freedom of religion under international and the (im)permissibility of compulsion or coercion under Islamic law due to assertion and repetition of numerous critiques to the contrary.

With regards to the internal aspect of freedom of religion, that is of holding a religious belief, we found both systems of law to be unequivocal in it being an *absolute* right that may not be interfered with at all under any circumstances. Central to this under Islamic law was the two fold reason of the explicit commandment found in Qur'an 9:29: "There is no compulsion in religion" and the overarching general thrust of Islam or *maqsad* of free will being a means to Paradise or Hell. With regards to the verse, extensive reference was made to classical commentaries and linguistic and syntax analysis to settle any ambivalence there might be

about the meaning of the verse. This led us to even possibly deduce that the meaning of the verse may even be more far reaching than the most favourable interpretation, in that it implied the compulsion was forbidden in changing anyone's religion to any other rather than being specific to Islam. It was suggested by Friedman that the verse may not be a commandment as much as statement of infeasibility or fact. However we found this to not be the case and even if so, it was asserted that the distinction may ultimately be an artificial one. The statement of infeasibility by in this case God would be tantamount to a commandment to desist from something.

Under international law, the absolute nature of the right to hold beliefs was to be found in Art. 18(1) of UDHR, Art. 18(1) of ICCPR and Art. 9(1) of ECHR. It does not provide a clawback by which the right may be limited and also has at its heart the idea of the infeasibility of interfering in the internal convictions of humans. Practically, we discussed that were certain impermissible beliefs to be concealed, then no compulsion could be practiced. However such concealment constitutes the result of compulsion as does the forced utterance of belief other than in ones heart or the punitive measures as a result of proclaiming one's true belief.[698] Interestingly under international law too there is a relationship and inter-reliance between the infeasibility of actually affecting internal beliefs through force and the illegality of attempting to do so. We also saw that the association of compulsion, violence, force and coercion that we unpicked in relation to Islamic law was also present under international law as found in Art. 18(2) of UDHR and ICCPR, prohibiting the use coercion.

Both systems of law proceeded from this absolute internal right to the right of outward manifestation limited on public policy grounds. However under Islamic law, it was a natural progression and implicit consequence of the idea that "there is no compulsion in religion". For if there is no compulsion in religion, the converse 'freedom' in religion had to extend to practice and manifestation for that is how ones freedom to believe is given life and articulate expression. While the logic under international law was identical, it was stipulated in separate part of Art. 18(3), which specified four public policy grounds for the limiting of manifestation of religion. It was noted that the grounds of 'safety' and 'health' were to an extent objective, thus the discretion of States narrow. On the contrary those of 'morals' and 'order' were far more subjective and thus the discretion afforded to States greater. With regards to the interpretation of morals and order significant deference was given to the historical, cultural and political context of the State in question to the extent under the ECtHR a margin of appreciation was often attached to matters especially of manifestation of religion. Thus it was established practice to seek to preserve the nature of the State when applying such limitations on the manifestation of religion. If such manifestation was seen contrary to the nature of the State then the scope to limit was sizeable. Under Islamic law, also it seemed that the Islamic nature of the State could also be preserved when ascertaining where to draw the line in relation to manifestation of religion. Of paramount concern when surveying situations where manifestation was limited was when it was likely that the Muslim population would be exposed to it and maximised when it took place in territories where the religious

[698] HRC GC 22, para. 3.

minority were predominant and exercised autonomy to a certain extent as opposed to *amsar al-muslimeen* (Muslim strongholds).

VII. Conclusion

In summation, the thesis began with the aim of finding common (and uncommon) ground between Islamic law and international law in relation to the protection of religious minorities. However for the comparative analysis to be feasible and of practical utility, a number of contextual obstacles and appreciation of the complex natures of the laws were to be overcome. Overarchingly one was a law of States, while the other thought to be the law of God. States determined the content of one through treaty texts and custom, while jurists opined as to the interpretation of the other by reference to religious texts including Prophetic Traditions. Despite this, the legal reasoning and philosophy underlying both were remarkably similar. With regards to context, classical Islamic law was formulated in an imperial era where expansion and conquest were norms and the prevailing force was of might rather than law. It was not the aim of this thesis to argue or seek to justify an aggressive imperial approach to relations between sovereign entities. It was simply the reality of international relations at that time. Conversely, the current system of international relations is one that is inseparable and punctuated with a living, breathing and evolving international law and morality with non-aggression, friendly relations and default peace at its heart. Special attention to the drastically different contexts of each legal system can provide a poignant insight into the bases of actions of entities that exist operate within them. Pursuing a policy of aggression and appropriation of territory through conquest in the present international order would be impossible to pursue as it would lead to being fought by coalitions, subdued and neutralised. Likewise a policy of non-aggression would have been impossible in the classical context as it would have led to being overcome and invaded.

The weaknesses and strengths of the legal systems were unavoidably reflective of the contextual milieus from which they emerged. The post-WWII and later the post-colonial context predictably gave rise to an international system of nation-States underpinned by the philosophy of individual rights and preoccupied with safeguarding territorial integrity, constructing national identity and preserving sovereignty. Hence the rights of minorities suffered and were neglected. Beyond this, minorities as group entities with their distinct identity were seen as a threat to a unified, centralised, monolithic State-endorsed national identity, with the ultimate fear that such deviation from the constructed national identity would pave the way to secessionist tendencies, thus undermining the territorial integrity of the State. Also owing to the sanctity of State sovereignty and the principle of non-interference, traditionally mistreatment or even ethnic-cleansing of minority groups was very reluctantly interfered with by other States.

The emergence of minority rights and its development with the background of the cases of Yugoslavia, Kosovo and Rwanda, was in part out of admittance of the failings of the individualistic international human rights system and its inherent blind spot with regards to the rights of minorities. In that sense, the UN Declaration on Minorities, OSCE HCNM and

the FCNM were positive developments elaborating in some detail the content of the general and brief Art. 27 of the ICCPR in relation "to the enjoyment of their culture." However weakness remained in the international minority rights protection owing to both the content of the rights and their strengths as laws (binding force). All minority rights protection fell short of ascribing collective rights to group entities. This meant that international law became tangled and confused internally and reached a conclusion as non-sensical as denying the rights of self-determination to minorities as they were not to be deemed as 'peoples'. Out of the two most detailed instruments, one remains a non-binding declaration while the FCNM, though legally binding was only agreed by rendering that binding nature excessively discretionary by the language being programmatic and aspirational rather than definitive and unambiguous. Hence Art. 27 of the ICCPR remains the only legally binding provision at the international level, but lacks detail, still suffers from the ambivalent wording "shall not deny", and is restricted to individual rights only.

The context that classical Islamic law emerged from was one where Muslim power expanded exponentially in the post-Makkah conquest period and Islamic law expressed through Islamic State-entities was an example of God's presumed will in the realm of politics being expressed and manifested by a governing authority over its subjects. Islamic law did not create the international order of the time but found itself interacting with the existing order of aggression, pre-emptive force and conquest and empire. An Islamic State-entity thus existed is a situation that was underpinned by the philosophy of collective group entities, whether as minorities, foes or allies. The individualistic basis of international law was wholly absent. Territorial integrity was not sacrosanct and boundaries and borders constantly shifted, were violated and redrawn. Any national identity that did existed was based on Islam. There was similarity to international law in that the State was inclined to a tendency of safeguarding its Islamic national identity. Therefore unlike in international law of nation-States where the threat or fear to identity and territory comes from any alternative national (ethnic, linguistic or religious) identity, under Islamic law relating to an Islamic State it comes from non-Muslim subjects.

In contemporary State-minority relations, there is a tendency to work against opposing identities to the constructed national one. Within an Islamically inspired State, there is a tendency to counter the threat to the Islamic national identity by non-Muslim minorities. However both laws try to counter governmental excesses by their developments in the realm of minority rights and *ahl al-dhimma*. While the State was inclined against minorities and more so where there was a direct conflict with the national identity, it is also to distinguish the religious head from the others in its unique status. It was said that it was the only identity ostensibly that has substance and ideology behind it as well as being accompanied by a manifestation of that belief through a way of life that may include among other things acts of worship and association with certain religious symbols. Thus we found that non-discrimination protections under international law stalled at the Declaration of Religious Discrimination and could not be elevated to the adoption of a treaty for State ratification. Furthermore where the national identity is said to exist in contradistinction to any or a specific religious identity, religious minority rights especially in relation to the manifestation

of religion are subjected to the most limitations. Hence minority rights sought to instil the necessity for minorities to enjoy their culture and in particular in relation to religious minorities to profess and practice their religion. This was not merely established as a legal right as a check against the excess of a majority backed State. It was also advanced as an evolved model for a nation-State to manage diversity. Plurality needed to be encouraged and minority identities allowed to co-exist and flourish in parallel to or as part of an inclusive national identity. To do so was the route to preventing conflict and eventual threats to territorial integrity and State sovereignty, rather than assimilation and disadvantaging minorities.

Under Islamic law, difference and diversity amongst humans are seen as factual and positive facets of life[699] with the commonality of all as humans being also affirmed. This shows that Islam's purpose is not to eliminate difference by force, compulsion or coercion, but to manage it with the underlying principles of peaceful relations, co-existence, dialogue and exchange of ideas. Moving from the macro to the micro, we noted that there were spectrums of validities for both systems of law. The reasons behind the discernment of a spectrum were however different. Under international law they were across regions, institutions and instruments. They also signified a spectrum of legality. With Islamic law, due to the lack of formal structures, understanding and choosing between the spectrums was more difficult to grasp. It could be argued that the spectrum was actually in fact a linear development of law or alternatively different solutions for different contextual settings. It was the preferred argument of the present thesis that the scope of *dhimma* was applicable to all non-Muslims in the present context. The debate and discussion of classical scholars is symptomatic of a gradual process of grasping the source material and the appropriate analogies to be drawn. Sincere assessment and appreciation of both contexts past and present can only render one conclusion that the scope of *dhimma* may not be limited based on belonging to a specific or type of religious group. The discussion around scope and resulting rights ultimately was a political discussion aimed at preserving the nature of the Islamic State and the religious sensibilities of the Muslim-majority. Thus this also goes against the conventional idea that the People of the Book held a special status as far as *dhimma* rights were concerned.

Under international law, the spectrum of validity and legality provided a space in which a State may manoeuvre and avail discretion or in some respects have none. In relation to the fundamental right to non-discrimination, certainly States have almost no leeway to pursue discriminatory policies against minorities. With regards to freedom of religion, while the internal aspect is absolute and underogable, manifestation may be subject to limitations subjective to the nature of the State. In relation to minority rights only one brief and vague provision is on offer, that of Art. 27 of ICCPR. The enforcement mechanism of the UN being far weaker than that of the ECHR or EU. The two most elaborate and similar in content articulations on the topic are non-binding and highly discretional, and so provide aspirational standards as opposed to inviolable legal maxims.

[699] Qur'an 49:13: "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."

The thesis has attempted to show that reference to the classical Islamic law notion of *ahl al-dhimma* is far from irrelevant and inapplicable in the present context. Certainly much of the consternation and confusion emanates from not comprehending that the rules associated with the notion are neither immutable[700] nor limited to examples of negative treatment. On the contrary it can offer a route to deriving equivalent and progressive solutions to the problem of religious minority management. This can only be achieved if the correct methodology is employed by extracting the underlying principles (*usūl*) for understanding and application to the present. Clearly Islamic law may have much to contribute to international law, in particular in the realms of religious freedom, minority recognition and religious autonomy. It is also argued as a result pursuant to such a methodology that Islamic law in this area is far from a 'mess' but carefully structured with overarching objectives and contextual application born in mind.[701]

What is of paramount importance is to come to grips with what ultimately is the attitude of each system of law towards religious diversity and religious minorities so as to understand the essence of the laws and more so the *illah* or effective cause of each system. We established under Islamic law that freedom of religion was not to be interfered with in the internal aspect. Interference could only take place in relation to manifestation of religion. The basis of this was given as preservation of the religious sensibilities of the Muslims. In other words Islamic law only seeks to step in when it perceives that the religiosity of the Muslims might be under threat. However it is also important to establish how Islam views other religions were they to pose no threat to the religious beliefs of the Muslims. Clearly they have the right to exist but should they be advantaged or disadvantaged? Does Islam not hold itself to be the ultimate and only correct religion?

The issue has been that there has often been conflation of this desire to convert others to Islam and the treatment of religious minorities or *dhimma*. As we already established any difference of treatment that may affect or constitute interference with the internal aspect of the freedom of religion or seek to affect negatively or punitively non-Muslim beliefs would be contrary to Islam. Islam holds the right to freedom to believe as fundamental and unequivocal. The driving reason behind this is that Islam does in fact seek to spread itself across the whole of humanity. This is to be coupled with two conditions. It can only be a genuine belief if it resides in one's heart and secondly that Islam itself repeatedly affirms that religious homogeneity can and will never be achieved. Thus if we presume that the overriding thrust of Islamic law in relation to non-Muslims must be their conversion to Islam and through a genuine heartfelt will and desire, then it would also follow that the treatment of religious minorities should be as favourable as possible, so as to allow them to see the positivity of the religion, in its tolerance and mercy towards members of other religions. In simple terms, happier religious minorities are more likely to be open to listening to the message of Islam and eventually accepting it.

[700] Baderin, "Islamic Law and International Protection of Minority Rights in Context", 319.

[701] Emon, *Religious Pluralism and Islamic Law*, 3: "Far from being constitutive of an Islamic ethos, the *dhimmī* rules are symptomatic of the messy business of ordering and regulating a diverse society. This understanding of the *dhimmī* rules allows us to view the *dhimmī* rules in the larger context of law and pluralism."

Under international law, minority rights essentially emerged from the need to prevent the reoccurrence of violent conflict as well as the most heinous crimes known to humanity such as genocide and ethnic cleansing. It was thought that what lay at the root of such problems was an inability to manage difference. Minorities who were culturally distinct in their identity, beliefs and ethnicity were oppressed and sought to be assimilated or worse driven out or killed in the pursuit of a constructed national identity. However repeated conflicts and atrocities indicated that in order to prevent conflict and threats to national identity, minorities had to be allowed ample space to express and live by their distinct religious beliefs and cultures. Only when such policies were pursued did the minority have no resentment or grievance towards the State for being allowed to live in the manner they wished and have a say in matters that concerned them. This would in turn lead to better relations and an expanded idea of national identity that accommodates and is inclusive of difference. In simple terms happier minorities are the best route to the prevention of conflict, atrocities and territorial integrity.

There is no doubt that both systems of law are drastically different in many respects however what lies at their hearts is compassion and love towards humanity as a whole. What differentiates them are the specifics and inner mechanics. The love and compassion towards humanity under Islam is owed to it being a message to all humans to accept its message as a means of entering paradise after death. Thus all invitations and persuasive efforts to convert a non-Muslim to Islam must be inadvertently motivated by this altruistic desire for them to be rewarded rather than punished after death. International human rights law on the other hand out of the experience of war, conflict and suffering, seeks to endow individual human beings with the virtues of dignity and resulting rights. Thus it affirms that it is in cherishing and valuing all individuals' common and intrinsic humanity through human and minority rights that we can avert similar wars, injustice and suffering in the future

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