
Submitted by

Ali Ahmari-Moghaddam

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University of Toronto

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Ali Ahmari-Moghaddam
Faculty of Law, University of Toronto
Master of Laws
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Abstract: Islamic law, also known as Shari’ah law, is one of the most complex and multifaceted, yet easily misunderstood areas of law. It is complex because its subjects, but not limited to, human rights, politics, religion, economics, and criminal. Islamic law is also misunderstood because it is greatly understudied and grossly over-generalized. This regrettfully has lead to a situation where Islamic law is often characterized as an inhumane and discriminatory set of laws which have no respect for human rights. The questions that remain to be answered are whether or not there is a human rights discourse in Islamic law, and is Islamic law compatible with the Universal Declaration of Human Rights and its two subsequent International Covenants? The aim of this paper is to ascertain whether or not Shari’ah law, as it has been reflected in the Islamic human rights documents discussed, is compatible with universal human rights standards.
Acknowledgement:

This thesis is dedicated to my fiancé Melissa, to my mother Vajieh and of course to Tom, whose constant support and encouragement have enabled me to continue my studies and bring this work to fruition.
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Foreword:

The Universal Declaration of Human Rights (UDHR) (1948) and its subsequent human rights instruments have generally been recognized as foundational in modern international human rights law because they do not belong to a particular ethnic, racial, religious or political group. However, despite its general acceptance outside the Muslim world, the UDHR’s scope and relevance has been fiercely contested in the Muslim world. This paper is written with the aim to pave the way for a free and open discourse between proponents of international human rights law and Shari’ah law (Islamic Law) and to promote and the realization of international human rights within the context of Shari’ah law. With that in mind, this paper offers an in-depth analysis of modern Islamic human rights documents and considers their effectiveness in the context of the application of international human rights mechanisms for the protection of human rights. In this light an attempt will be made to ascertain whether or not the general principles of Shari’ah are compatible with Western universal human rights.¹ For greater certainty this paper affirms the primacy of international human rights laws as the source of the appropriate underlying universal rights and values. This of course, should not be interpreted to mean that all human rights guaranteed by the UDHR are unqualified rights. However, since the UDHR and the covenants, established the realization of all human beings and their inherent dignity and equality and recognizes their economical, social, cultural, civil and political rights, it can offer a unique opportunity to strengthen the indivisibility of all human rights.

It is noteworthy to mention that although we are currently living in an era where the discourse of human rights is often universal and individual rights are considered self-evident, the discourse of human rights is not a recent phenomenon. Recent histories, notably Lynn Hunt in his book entitled, “Inventing Human Rights”², traces the foundation of human rights to the rise of qualities such as being natural, equal and universal, to the end of the eighteenth century, or, at the latest, the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and Citizen of 1789 which, according to her, provided the basis for the 1948

¹ For greater certainty I am equating the Western human rights standard to the universal human rights norms as established in the by the United Nations (UN) and its subsequent treaties
UDHR\(^3\). On the other hand, Samuel Moyn’s recent work, *The Last Utopia: A History of Human Right* argues that contemporary human rights discourse originated in the 1970s; in so doing, he challenges the notion of human rights as we understand them today. According to Moyn the notion of modern human rights has developed over the failure of past such as anticolonialist nationalism to communism to humanism have died\(^4\). For Moyn, the notion of modern human rights has emerged since the “last utopia” and so it has contemporary prominence. Consecutively, for Moyn, the UDHR is now considered a landmark human rights document, however, “one day another may appear\(^5\)” instead.

As it can be seen, both Hunt and Moyn have drawn our attention, though in different ways, to the importance of human rights and the origins of contemporary human rights. However, human rights are not just a recent phenomenon that has emerged since the “last utopia”, but rather the notion of rights, freedom and human dignity has existed for centuries. The notion of human rights has also been central to the writings of many famous Western philosophers and humanists such as Jean Jacques Rousseau, Hugo Grotius, Thomas Hobbes, Hugo Grotius, John Locke, and many others, which addressed the notion of natural law, natural justice, and the rights of man. However, now the language of natural law, natural justice, and rights of man has been replaced with the notion of human rights. This of course is not because of the failure of the “last utopia”, but rather due to the adoption of the UDHR which contains more ascertainable and specific rights within it.

At the same time, this paper also acknowledges and will discuss the opposing standpoints, which are predominantly put forward by Muslim scholars that have argued that the UDHR and other UN documents should not be deemed as the only plausible way in determining which rights are universal. However, this body of research disagrees with those Muslim scholars that are of the belief that the UDHR lacks the element of universality based on their predetermined notion that it solely reflects a secular understanding of the Judeo-Christian tradition and so it should not be adopted by Muslims unless the UDHR recognizes the authority


\(^4\) Ibid., (p.9)

\(^5\) Ibid., (p.10)
or power of Shari’ah law. There is no doubt that there are many theoretical differences between Shari’ah law and international human rights law concerning the conceptual foundations of human rights, but this does not mean that the observance of international human rights law is impossible to reconcile with Islamic legal jurisprudence. Though some of the general principles of Shari’ah law are subject to critique, this however cannot be deemed as a ground for believing that Islam as a whole is inherently unfair, discriminatory and violent. Instead, reconciliation and harmonisation between Shari’ah and international human rights is possible through liberal re-interpretations of traditional Islamic laws and an adoption of a more culturally sensitive definition of human rights.

1. Introduction

One of the challenges of our time is the ongoing discourse of the “clash of civilizations,” which was first hypothesized by Bernard Lewis in his 1990 essay, *The Roots of Muslim Rage* and by Samuel Huntington in his very interesting and often cited article entitled, “The Clash of Civilizations: Remaking of World Order”. According to the “clash of civilizations” theory the cultural and religious identities of people will become the dominant cause of conflicts and wars among mankind. Two decades since the “clash of civilizations” theory was first formulated it can certainly be argued that the theory is still relevant; it continues to be the central discourse of our international politics. As Huntington predicted, clashes of civilizations will be the greatest threat to world peace and security; examples of such conflicts have already been witnessed, including the September 11, 2001 terrorist attacks against New York and Washington which killed almost three thousand people, the 2001 U.S invasion of Afghanistan, followed by the 2003 invasion of Iraq, the 2005 London bombing, the 2005 Danish cartoon crisis, and of course the ongoing Israel and Palestine conflict. Considering the historical backgrounds of these recent conflicts, one can plausibly argue that there is indeed a colossal political, cultural, and more specifically religious gap between Muslims and Western states. As Kelsay and Twiss eloquently asserted, the connection between religion and conflict appears as such an integral part of the current world scene to the extent that in most reports of violence, religion can be presumed to be factor.

One of the areas in which this gap has been evident is the concern about human rights within the religion of Islam. This concern over the compatibility of Islam with the Western standard of human rights has further intensified since September 11, 2001. This is mainly due to the fact that Islam suddenly, more than ever, became synonymous with terrorism and violence, and thus became a new enemy to Western democracy, freedom and human rights.

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8 Ibid.,
Historically speaking, the issue of human rights in Muslim world and its compatibility with Western standards of human rights has predominantly been dominated by two opposing views. On one hand it has been articulated by Muslim scholars, such as Abul Ala Mawdudi\(^\text{10}\), that Islamic teaching is in perfect harmony with democratic principles and has nothing to do with aggression and belligerence. On the other hand, arguments have been put forward, mainly by Western governments\(^\text{11}\) and scholars, that there is an inherent incompatibility between the basic tenets of Islam and western notions of human rights. They perceive Shari’ah law as the main cause of much injustice, violence and human rights violations in Islamic states. To prove their point, they often refer to Shari’ah law and its harsh punishments, such as *Hadd*\(^\text{12}\), which refers to those serious categories of crimes that a fixed punishment has explicitly mentioned in the Quran and other discriminatory principles such as the law of inheritance\(^\text{13}\), which principally discriminates against women and non-Muslims. There is of course an emerging third view that is based on the notion of compatibility of Islam and international human rights. The enthusiasts of this view are of opinion that although some of the traditional extremist of interpretations of Shari’ah law can deemed contrary to the accepted international human rights laws, reconciliation and harmonisations between the two principles are possible through liberal re-interpretations of traditional Islamic laws and an adoption of a more culturally sensitive definition of human rights.

With that in mind, this paper offers an in-depth analysis on Islamic human rights documents and considers their potential effectiveness in the context of the application of international human rights mechanisms for the protection of human rights. This paper also aims to find ways to reconcile the tension between the competing claims of international human rights law and Shari’ah law. In order to achieve this aim the author will embrace the definition of human rights as established by the United Nations (UN) in the International Bill of Human Rights.

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\(^{10}\) Mawdudi is one of the most prominent Sunni Islamic scholars. One of his more famous works entitled “*Human Rights in Islam*” which will be discussed in details in section 6, “Islamic Human Rights Documents”.

\(^{11}\) Most notably by the United States Government and British Government.

\(^{12}\) *Hadd* literally means restrictions. It also refers to fixed punishments for certain crimes which have explicitly mentioned in the Quran, such as: drinking alcohol, theft, illegal sexual intercourse.

\(^{13}\) Generally, woman’s share of the inherence is half of the share of a man. This issue will be discussed in further details in section 5.3.
Rights and other UN Treaties\textsuperscript{14} as a basis for comparison with the Islamic approach of human rights.

Chapter two presents a comprehensive discussion of the concept of cultural relativism in relation to the claim of universal human rights. The purpose of this discussion is to present the Muslim claim for an adoption of a more culturally sensitive definition of human rights, which also addresses the basic tenets of Islamic human rights discourses and Islamic identity.

Chapter three analyzes the historical and ideological roots of Islamic identity with special reference to the concept of Islamic religious doctrine and Shari’ah Law in order to gain a better understanding of Islam as a religion and as a legal system.

Chapter four addresses a number of areas of conflict between Islamic tradition and human rights, which are almost impossible to compromise based on international standards of human rights. For the purpose of this paper, an emphasis has been made on the right of non-Muslims, restriction of religious liberty and beliefs, and inequality between men and women under Shari’ah law.

Chapter five presents a critical review of a number of Islamic documents on human rights which proclaim a universal standard of human rights is in accordance with Islamic law. The section will commence by analyzing two Islamic documents which have been produced by two of the most prominent 20\textsuperscript{th} century Islamic scholars from the Sunni and Shi’i traditions. First, Abul Ala Mawdudi’s document, titled “\textit{Human Rights in Islam}”\textsuperscript{15} will be discussed. Mawdudi has been referred to as one of the most influential Islamic Sunni scholars in the 20th century by many Islamic and non-Islamic scholars\textsuperscript{16} for his major works in Islam, specifically this human rights document. Therefore the main focus will be placed only on this particular document, which according to Dalacoura has “inspired an opposing movement in the Middle East and

\textsuperscript{15} Mawdudi, Abul Ala, \textit{Human Rights in Islam}, Online: http://www.witness-pioneer.org/vil/Books/M_hri/index.htm
\textsuperscript{16} Heiner Bielefeldt has made numerous references to Abul Ala Mawdudi’s works, although Bielefeldt himself is a major critique of Abul Ala Mawdudi. Bielefeldt, Heiner, \textit{Western versus Islamic Human Rights Conceptions? : A critique of Cultural Essentialism in the Discussion on Human Rights}. (University of Bielefeld, 2000).
This will be followed by Sultanhussein Tabandeh’s document entitled “A Muslim Commentary on the Universal Declaration of Human Rights.” The main reason for selecting Tabandeh’s Commentary, who is relatively a minor religious figure in comparison with Mawdudi, is twofold. First, Tabandeh, as a Shi’i scholar, was one of the few Muslim religious scholars who have actually drafted a complete and very detailed book-length commentary on each of the 30 Articles of UDHR from an Islamic perspective. Secondly, his critical views in respect to certain provisions of UDHR, most notably concerning the right of religious minorities, equality between men and women and of course, in respect to religious freedom, formed or at least had a enormous impact on, Iran’s foreign policy and its ideological approach in criticizing the international human rights laws and Western powers.

The discussion will then continue by analyzing three major regional documents from the Islamic world, The Universal Islamic Declaration of Human Rights (UIDHR), The Cairo Declaration of Human Rights in Islam (CDHRI), and lastly the Arab Charter on Human Rights. Each of these documents will be analyzed in terms of their potential difficulties with international human rights standards. An emphasis will be placed on equality provisions – particularly gender equality - as well as the rights of religious minorities, freedom of religion and the right to freedom of belief, thought and speech.

In order to provide a coherent assessment of each of these documents, a brief history of each will be presented, followed by a critical analysis of each Islamic document. As will be made evident, all of these documents (UIDHR, CDHRI and the Arab Charter on Human Rights) have been produced mainly at the governmental level by many Muslim countries, so they have had an enormous impact on the national laws of many Islamic countries and various regions of the Middle East.

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18 Sultanhussein Tabandeh has also been referred as “Sultan Hussein Tabandeh”.
20 Cairo Declaration on Human Rights in Islam, Aug. 5, 1990. The Cairo Declaration can be visited at the following website: http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm
This paper concludes that the best course of reconciliation and harmonisation between Shari’ah and international human rights would be achievable through a dialogue between Muslims and the West and through liberal re-interpretations of traditional Islamic laws with the aim of embracing modern values while acknowledging a more culturally sensitive definition of human rights. It should be noted that the goal of this paper is not to reject the fundamental beliefs of Islam or to promote the abandonment of Islamic heritage but rather to educate Muslims and to promote general awareness in the hope that all Muslims reject fundamentalism and advocate for a more authentic interpretation of Islamic law as it was once a mighty religion and the base for all greatness during the Golden Age of Islam.

For the sake of clarity it is essential to define the notion of Muslims and Western States. The Muslim States or Muslim world has several meanings. Muslim world can be referred to those States that have been specifically declared themselves as an Islamic Republic\textsuperscript{22}, such as Islamic Republic of Iran or Islamic Republic of Afghanistan; or have in their State Constitution declared that Islam is the religion of the State\textsuperscript{23}, such as Malaysia, Arab Republic of Egypt and People's Democratic Republic of Algeria.\textsuperscript{24} However, the vast majority of Muslim States are predominantly identified based on their Muslim population.\textsuperscript{25} As Baderin rightfully indicated, the main criterion for identifying a Muslim State would be the State’s membership in the Organization of the Islamic Conference (OIC).\textsuperscript{26} The OIC currently has 57 members, in which they are collectively identified as Muslim States, and have objective to “enhance and consolidate the bonds of fraternity and solidarity among the Member States”\textsuperscript{27}.

\textsuperscript{22} Currently, 7 Muslim States have specifically declared themselves as Islamic Republic.
\textsuperscript{23} Currently, 16 Muslim States have declared Islam as the religion of the State.
\textsuperscript{24} Baderin, Mashood, \textit{International Human Rights and Islamic Law}. (Oxford University Press, 2003) at 8.
\textsuperscript{25} \textit{Ibid.},
\textsuperscript{26} \textit{Ibid.},
\textsuperscript{27} The Organization of the Islamic Conference has 57 member states: Republic Of Azerbaijan, Hashemite Kingdom Of Jordan, Islamic Republic Of Afghanistan, Republic Of Albania, State Of The United Arab Emirates, Republic Of Indonesia, Republic Of Uzbekistan, Republic Of Uganda, Islamic Republic Of Iran, Islamic Republic Of Pakistan, Kingdom Of Bahrain, Brunei-Darussalam, People’s Republic Of Bangladesh, Republic Of Benin, Burkina-Faso (Then Upper Volta), Republic Of Tajikistan, Republic Of Turkey, Republic Of Turkmenistan, Republic Of Chad, Republic Of Togo, Republic Of Tunisia, People’s Democratic Republic Of Algeria, Republic Of Djibouti, Kingdom Of Saudi Arabia, Republic Of Senegal, Republic Of The Sudan, Syrian Arab Republic, Republic Of Suriname, Republic Of Sierra Leone, Republic Of Somalia, Republic Of Iraq, Sultanate Of Oman, Republic Of Gabon, Republic Of The Gambia, Republic Of Guyana, Republic Of Guinea, Republic Of Guinea-Bissau, State Of Palestine, Union Of The Comoros, Kyrgyz Republic, State Of Qatar, Republic Of Kazakhstan, Republic Of
West, or Western world can also have multiple meanings. However, since this paper is primarily concerned with the compatibility of international human rights within the application of Shari’ah law, the emphasis will be made on the notion of “the West” within the International Relations (IR) field, which connotes a generic reference to those countries such as Western European nations, as well as the United States of America and Canada which enjoy a strong economy, a strong military and political alliance among the North Atlantic Treaty Organization.


2.1 The Paradox of Universalism and Cultural Relativism

A huge corpus of literature on the topic of human rights has discussed, at some length, cultural relativism in relation to the purported universality of human rights, but some of this literature has overlooked the full complexity of the underlying principles of Shari’ah law. It seems, however, that the bulk of the literature on universalism and cultural relativism has mainly been reduced to favouring one over the other, without offering an answer as to whether or not the idea of the universality of human rights and Islamic cultural sensitiveness can ever be reconciled in a realistic and effective way. For the purpose of the present section we shall therefore focus our attention on the following issues. First, this section outlines a contextual framework for understanding cultural relativism and the universality of human rights doctrines. In developing this contextual framework, the section will consider the various arguments commonly put forward by Islamic scholars and endeavour to examine Shari’ah law as an alternative to the UDHR. This is followed by an examination of whether or not the idea of universality of human rights...
rights and cultural rights can ever coexist. In other words, we shall examine whether there is a middle ground that promotes the ideal of universality of human rights while upholding the inclusiveness of the cultural elements. For greater clarity, I will generally use the term cultural relativism because it has been broadly used in the field of human rights and has specifically been used to lay “stress on the dignity inherent in every body of custom, and on the need for tolerance of convictions though they may differ from one’s own.”

The final section seeks to identify the common grounds between the two doctrines and to promote the idea of universality of human rights while upholding the inclusiveness of cultural elements. For the sake of clarity, it is equally important to mention that, although the focus of this section is mainly based on the issue of cultural relativism and universality of human rights in relation to Islamic States, this should not be interpreted to mean that the author assumes that non-Islamic traditions are in complete agreement with the idea that human rights are universal. On the contrary, it will be evident, the author is of the belief that no culture or religion has offered comparable human rights as those envisioned in the UDHR.

Since the adoption of the UDHR as the foundation of modern human rights the concept of the universality of human rights has been strongly challenged by governmental delegations from Muslim States, most notably Iran, Syria and Saudi Arabia. The argument has been put forward by Muslim States that human rights are fully guaranteed and protected within the legal framework of Shari’ah law, and so the UDHR has no relevancy and should be binding to the Islamic States. This has of course contributed to an ongoing debate on the issue of universality of human rights versus the cultural relativity of human rights. It is therefore vital before we proceed any further, that we first define the basic tenets of cultural relativism and the universalism.

To start, it is worth noting that the Charter of United Nations\(^\text{30}\), UDHR and the subsequent human rights instruments have boldly asserted the universality of human rights. The notion of universality is mainly based on the concept of human rights embodied in the UDHR and other

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\(^{30}\) The Charter of the United Nations was signed on June 26, 1945.
international documents, such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).  

In other words, the universality of human rights affirms “incorporating the inherent dignity of all inhabitants of the planet, independent of their culture, religion, social status, ethnic origin, gender or traditions.” According to this doctrine, any cultural differences should not be permitted to justify and limit the scope of human rights that are recognized in the UDHR, as well as the rest of the conventions promote a universal system for the promotion and protection of human rights. Human rights therefore, according to this doctrine, cannot be seen valid in certain contexts, but rather, “their validity is derived from the very source of their existence”, which is the very nature of human beings. Consequently, the States by their agreement to the UDHR and the subsequent human rights instruments have collectively attested to and recognized the universality of human rights.

On 25 June 1993, the representatives of 171 States adopted by consensus the *Vienna Declaration and Programme of Action* (VDPA) at the World Conference on Human Rights, which outlined the framework for the strengthening of human rights work around the globe. The VDPA marked the culmination of a long process of review and debate over the human rights struggles around the world; but it also marked the beginning of a renewed effort to strengthen the body of human rights instruments that have been painstakingly constructed on the foundation of the UDHR. In other words, the VDPA was a historic step in reaffirming the universality of the UDHR and the subsequent human rights instruments such as the International Bill of Human Rights. The VDPA’s preamble states that, “The World Conference on Human Rights,

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33 Ibid.,  
35 Ibid.,  
36 Vienna Declaration and Programme of Action, (1993), please refer to the following web link to view the full text: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/a.conf.157.23.en  
considering that the promotion and protection of human rights is a matter of priority for the international community, and that the Conference affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights, in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner”. The preamble also states that, “Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards”. The preamble of VDPA also called “upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights.”

It should however be noted that the concept of universality of human rights does not disregard the reality of varied cultures and religions in different societies, but rather it supports the view that human rights are not static and therefore they relate to all people and situations regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status such as economical, social, political, and cultural backgrounds. In other words, the universality of human rights acknowledges the inclusiveness of diverse cultural elements. The UDHR also according to Ignatieff, defines “a limited range of universal values from different religious, political, ethics and philosophic backgrounds” which not only covers some aspects of Western traditions, but it also covers Chinese, Middle Eastern, Christian, Marxist, Hindu, Latin American, and of course Islamic tradition. Bielefeldt also argues, “The universality of human rights does not mean the global imposition of a particular set of Western values, but instead, aims at the universal recognition of pluralism and difference -

38 Supra note 36.
39 Supra note 36.
40 Supra note 36.
41 Osaka, Supra note 34.
43 Ibid., (p.149).
different religions, cultures, political convictions, ways of life - insofar as such difference expresses unfathomable potential of human existence and the dignity of the persons. To be sure, pluralism and difference apply also to the concept of human rights which itself remains open - and must be open - to different and conflicting interpretations in our pluralistic and multicultural political world. Without the recognition of such difference within the human rights debate, the discourse would amount to cultural imperialism. Nevertheless, it seems clear that the very idea of human rights precludes some political practices, such as oppression of dissidents, discrimination against minorities, slavery and apartheid.ÔÔÔ

2.2 Islamic Critique of Universalism

It has long been the tradition of Islamic States, most notably the Islamic Republic of Pakistan and of course The Kingdom of Saudi Arabia to dispute the universality of the UDHR and the subsequent human rights instruments and their unwillingness to accept the full scope of their obligations in the name of cultural diversity. The underlying argument for this resentment from the Islamic States towards the universality of international human rights debate has predominantly been limited to a form of cultural relativism argument, in which it has been argued by the Islamic States that human rights are relative and due to their religious obligations they can only be bound by those rights that correspond to Islamic law, which is believed to be derived from divine authority. In other words, the Islamic States argue that the UDHR does not fully correspond with Islamic traditions, particularly Shari’ah law values.

As Halliday rightfully identifies, the Islamic response to the universality of international human rights can be generally categorized in four distinct categoriesÔÔÔ. The first category is what Halliday called “assimilation”, which holds that Islam is fully compatible or reconcilable with

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international human rights. This category of response has predominantly overshadowed Islamic literature on the issue of human rights. This position is evident in the Foreword of the Universal Islamic Declaration of Human Rights (UIDHR) which states: “human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.”

The second category is “appropriation”. Under this view, Islam and international human rights cannot be compatible since it is only under the ambit of Islam that true human rights can be fully realized. Some Islamic literature also makes an attempt to engage in listing the human rights in the UDHR and then to trace those rights back to Islamic scriptures mainly in the Quran. The third category is “confrontation”. Those in favour of this view are of the belief that international human rights should be fully rejected as they are nothing but an objective of imperialism, and so they should be replaced by Shari’ah law values. The forth category is “incompatibility”. This view holds that Islam itself is irreconcilable or incompatible with human rights. At the present time, a vast majority of the literature in the forth category attempts to present a distorted view of the universality of human rights, so that it appears that the universality of human rights is more or less a well disguised version of the Western attempt to impose Western values and culture upon the rest of the world.

Baderin, however, points out a fifth category which has been omitted by Halliday. The fifth category suggests that international human rights have a hidden anti-religious agenda. This category reflects the policy of double standard that has always played a big role by the West in dealing with the human rights crisis in Islamic states. For instance, it has long been the policy of the West, mainly the United States (US), to arbitrarily pick and choose the countries they want to blame for their human rights records. The Bush administration in their US-led “war on terror”

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46 Ibid.,
47 Universal Islamic Declaration of Human Rights (UIDHR) online: http://www.alhewar.com/ISLAMDECL.html
48 Universal Islamic Declaration of Human Rights – Foreword.
49 Halliday, Supra note 45
51 Halliday, Supra note 45
52 Halliday, Supra note 45
54 Baderin, Supra note 24 at 13.
vigorously blamed countries such as, Iran, Iraq, Syria and many other Islamic countries for their human rights records. At the same time his administration reluctantly omitted to fully engage in projecting the same robust voice in respect to human rights violations against States such as Saudi Arabia or Pakistan, in which they have been branded as “America's ally against terror” or “America's closest ally in the region”. It should however be noted that the policy of double standard is not solely limited to the West but also all other States including the Muslim States are likely to engage as well. However, as Eltayeb rightfully noted, the policy of double standard is more visible by Western governments because of “the extent of their international activities” and their “history of colonialization and post-colonial hegemony”.55 The adverse effect of this double standard has been twofold. It has not only undermined the integrity of international human rights and the idea of the universality of it, it has also led to a situation in which Muslims in the region are generally not only reluctant to resist the restrictive and discriminatory rules of Shari’ah law imposed upon them, but in reality perceive it as a means to retaliate against the West. As Baderin eloquently states, the policy of double standard will not only cause disappointment with, and protest against the West, but will also cause the rejection of any ideology that is championed by Western nations.56 Huntington also draws attention to the policy of double standard of the West by observing that “hypocrisy, double standard, and ‘but nots’ are the price of Universalist pretensions”.57 According to Huntington, the nuclear non-proliferation is breached for Iran and Iraq, but not for Israel, or human rights are an issue with China but not with Saudi Arabia.58

The cultural relativity of the human rights doctrine, unlike the universality of human rights, asserts that cultural morality varies from place to place.59 It also asserts that culture is the sole source of validity of moral right or rule.60 In other words, cultural relativity holds that culture is the sole determinate base for moral rights and not the international human rights norms. Furthermore, according to these opponent states, the UDHR, due to its Western origin, “is

56 Baderin, Supra note 24 at 15.
57 Huntington, Supra note 7 at p. 184
58 Huntington, Supra note 7 at p. 84.
59 Vincent, Supra note 53 at 37-8.
60 Donally, Supra note 50 at 50.
inapplicable and irrelevant to contemporary Third World problems and needs”.  

For instance, in 1981, the Iranian representative to the UN, Mr. Rajaie-Khorassani, in his statement to the UN General Assembly, articulated the position of Iran on the UDHR, by stating that the “UDHR which represented a secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran.”

Also, at the time of the drafting of the UDHR, Saudi Arabia declined to agree with Articles 16 and 18 which deal with issues of marital freedom and freedom of religion, respectively. The argument was put forward that the UDHR had failed to take into account the cultural and traditional tenets of Shari’ah law.

The question that has remained is whether or not the idea of universality of human rights and cultural sensitivity can coexist. In other words, is there a middle ground that promotes the ideal of universality of human rights while being sufficiently sensitive to cultural differences?

According to Osaka, the idea of human rights is not exclusive to one culture as it comes from both West and East as they share basic elements in understanding human rights and human existence. Donnelly also argues that “all societies cross-culturally and historically manifest conceptions of human rights.” He concedes that while all major cultures have had some form of legal duty with regard to human rights in their systems, which govern their social recognition of human dignity, these systems are alternatives to, rather than synonymous with human rights. According to Donnelly open negotiations through meaningful dialogue between and amongst cultures can lead to the realization of the UDHR model. An-Na’im also argues that the “cultural legitimacy of the full range of human rights standards must be developed- that is the

61 Donally, *Supra note 50* at 60.
62 Littman, *Supra note 6.*
64 Osaka Susan, *Supra note 35.*
66 Ibid., (p. 88)
concern for human rights as they figure in the standards of many different cultures should be enhanced.”

2.3 Culture Relativism and Human Rights Violations

The idea of the coexistence of the universality of human rights and cultural differences is quite appealing; however, a critical evaluation of the cultural relativism argument by the States that promote it reveals that it has been extensively used to vindicate their human rights violations. As Baderin also noted, the notion of cultural relativism has been prone to abuse and can simply debase the efficacy of human rights. Therefore, the cultural relativism argument has been used in such a way that rather than discussing the merits of the criticized action, states re-frame the argument in such a way that it correlates with cultural relativism so the discussion about the criticized action will be avoided. In other words, the cultural relativism argument in State practice is normatively vacuous and without content; it is used merely as a shield to deflect legitimate criticism and avoid tackling practices such as torture, which is almost universally condemned. Most of the States invoking the language of culture relativism over the universality of international human rights laws usually do not have a democratic representative government, and are very authoritarian with very poor human rights records. For instance, it has long been the position of Islamic States, most notably Saudi Arabia, to criticise international human rights for its emphases on the concept of individual human rights, since under the ambit of Shari’ah there is no clear reference to the concept of individual human rights, but rather an individual is

68 Baderin, Supra note 24 at 27.
69 It should be noted that the same criticism can be in occasions levelled against those States which been deemed to be the champion of human rights protection. For instance, the United States of America (US), while claiming to be one of the most proponent of international women’s rights, has adopted the CEDAW in 1980, however, to date , has failed to ratify it. It can be argued that one of the main reasons that US has refrained from ratifying CEDAW rooted in the Cultural Relativism argument. The opponent of CEDAW, which mostly comprise of those conservative Republicans and some Conservative Democrats are of believe that the adoption of CEDAW will vastly challenge the supremacy of American law and Culture. Should CEDAW will be ratified in US, it will result in, among other things, equal pay for equal work will be law; it will ensure access to abortion, it will also pave the way to challenge the tradition view of family, based on the view of same same-sex marriage.
seen as “a limb of a collectivity”\textsuperscript{70} which is the Islamic community. This has led to numerous practices by the Islamic States which according to international human rights laws are deemed direct violations of human rights, but are justified under the applications of Shari’ah law. Some of the most notable human rights violations which are particularly prominent within the Islamic states are, among other things, discrimination against women, discrimination against non-Muslims and lack of religious freedom.

Furthermore, it should be noted that Islam is an extremely complex religion to comprehend. As An-Na’im eloquently points out, “Shari’ah law is a system of complex codes from subjects ranging from religious dogmas to ethical norms to detailed rules of private and public law.”\textsuperscript{71} Perhaps one of the main difficulties with Shari’ah law is the fact that there is not a uniform and homogenous model of governance in the Muslim world.\textsuperscript{72} The Shari’ah has played a crucial rule in the formulation of the constitutions of Islamic States, but the way Shari’ah law has been applied both domestically and internationally varies from State to State, since each of these Islamic States have their own unique legal and political system. For instance in Saudi Arabia, Shari’ah law plays a crucial role in its domestic and international relations. Article 1 of “The Basic Law of Governance”\textsuperscript{73} (1992) of Saudi Arabia, which serves as the constitution of Saudi Arabia, asserts that the “Holy Quran and the Prophet’s Sunnah [Prophet Muhammad]”\textsuperscript{74}, are its constitution. Article 7 further states that “the authority of the regime is derived from the Holy Quran and the Prophet’s Sunnah which rule over this and all states laws”\textsuperscript{75} and Article 8 emphasizes that the “Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality according to the Islamic Shari’ah.”\textsuperscript{76}

\textsuperscript{71} Rehman, *Supra* note 63 at 142
\textsuperscript{72} Rehman, *Supra* note 63 at 128.
\textsuperscript{73} The Basic Law of Governance, online: http://www.mofa.gov.sa/Detail.asp?InNewsItemID=35297
\textsuperscript{74} The Basic Law of Governance – Article 1.
\textsuperscript{75} The Basic Law of Governance – Article 7.
\textsuperscript{76} The Basic Law of Governance – Article 8.
A careful examination of the Basic Law of Governance reveals that it has omitted any direct reference to international human rights documents as all the basic rights within this Constitution are qualified and restricted under the mandate of Shari’ah law. The only reference to international human rights documents that has been mentioned is in Articles 70 and 80. Article 70 states that “International treaties, agreements, regulations and concessions are approved and amended by Royal decree”. Article 80 specifically indicates that the implementation of the Basic Law of Governance “will not prejudice the treaties and agreements signed by the Kingdom of Saudi Arabia with international bodies and organizations”.

However, examining Article 70 and 80 in light of Articles 1 and 7, reveals that Shari’ah law will ultimately mandate Saudi Arabia’s obligations in relation to its International human rights commitments. According to Article 70, all forms of the international treaties have to receive the Royal decree. However, it should be noted that the Royal decree will be issued only when the international human rights law is deemed to be in harmony with Shari’ah law under the ambit of Article 1 and 7 of the Basic Law. This has led to occasions where Saudi Arabia has entered reservations with respect to international human rights documents and has refused to obligate itself to observe its provisions. For example, as it will be explained further in the proceeding chapters, Saudi Arabia has consistently refused to obligate itself to conform to a number of provisions under the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) on the basis that there is a contradiction between the CEDAW and the norms of Shari’ah law.

Unlike Saudi Arabia, Islamic countries such as Pakistan and Yemen whose domestic legal system is predominately based on Shari’ah law, adheres to secular standards in its international relations with other States.” In the case of Yemen, for instance, despite the fact that Article 2 and 3 of the “Constitution of the Republic of Yemen” (1994) states that “Islam is the religion

77 Chapter 3 and 4.
79 Rehman, Javaid and Breau, Susan, Supra note 55 at p. 116.
of the state, and Arabic is its official language”\(^{81}\) and “Islamic Shari'ah is the source of all legislation”\(^{82}\). Article 6 of the Constitution specifically makes it clear that the Republic of Yemen adheres “to the UN Charter, the International Declaration of Human Rights, the Charter of the Arab League, and norms of international law which are generally recognized.”\(^{83}\)

Aside from its complexity, Shari’ah law also suffers from controversies in its interpretations which are of course the product of human interpretation of those codes.\(^{84}\) Furthermore, as Halliday rightfully identifies, there is currently no single body, political, or religious institution that can speak for the Muslim world as a whole.\(^{85}\) This has led to a situation in which Shari’ah law varies in its interpretations and applications from Islamic State to Islamic State, based on their religious denomination.\(^{86}\) This is mainly due to the fact that Islam in contrast to Christianity operates without a “purported theological and legal central authority”; instead, there are “a range of bodies, some political, some judicial, some academic such as the al-Azhar University in Cairo, which interpret law and tradition as they see fit and which appeal to all Muslims to follow them.”\(^{87}\) This has often led to contradictory, ambiguous and controversial religious practices and interpretations. According to An Na’im, Shari’ah law also suffers from many controversial interpretations of Islamic jurisprudence and scriptures which are contrary to international human rights standards.\(^{88}\) Some of the most controversial interpretations of Islamic jurisprudence deal with the standards of equality between the sexes and of course the concept of “Jihad”, which is predominantly translated in Western societies as “Holy War”.

\(^{81}\) Constitution of the Republic of Yemen – Article 2.
\(^{82}\) Constitution of the Republic of Yemen – Article 3.
\(^{83}\) Constitution of the Republic of Yemen – Article 6.
\(^{84}\) An-Na’im, Abdullahi Ahmed and Francis M. Deng, eds., Supra note 60 at 358.
\(^{85}\) Halliday, Supra note 41 at p. 155.
\(^{86}\) Muslims are generally divided in five main denominations: 1) Sunni 2) Shia 3) Kharijite 4) Sufism and 5) Ahmadiyya. Sunni Muslims is the largest denomination of Muslims comprising around 90% of all Muslims, followed by Shia Muslims, in which the majority of Shia Muslims are located in Iran and Iraq, Yemen, Bahrain, Syria, and Lebanon.
\(^{87}\) Halliday, Supra note 45 at p. 155.
\(^{88}\) An-Na’im, Abdullahi Ahmed and Francis M. Deng, eds., Supra note 67 at 359.
2.4 Towards A Strategy For Enhancing The Islamic Cultural legitimacy

Despite all of the controversies surrounding the political and legal philosophy of Shari’ah law, there is no doubt that Islam can be a code of life for its adherents. Shari’ah law certainly disagrees and differs on many aspects from the secular international human rights laws, but at the same time it can be argued that these disagreements should not be interpreted in a way that Islam is in complete denial of international human rights.

First and foremost, there are many classes of rights which are of universal validity and by the same token, each culture or religion is comprised of many of those diverse universally accepted rights. The same principle also applies to Islam as well. For instance, human rights such as the right to life, the right to be free from slavery, and the right to be free from torture are not only universal they are part of the corpus of both the international human rights law and Shari’ah law. Despite all this, it is still hard to envision a single culture that has fully guaranteed human dignity and human equality similar to universal human rights norms and standards. As Halliday rightfully asserts, all cultures to some degree have “a common ethical universe, in which an absolute ‘cultural relativist’ position is untenable and unheld.”

Secondly, almost all the States with a strong affiliation with Islamic tradition have accepted and ratified the United Nations Charter and the UDHR. Furthermore, Muslim States have, like other nations, “contributed to the formulation of public international law through their active participation in the United Nations and its affiliated organizations including the drafting of legal instruments relating to human rights.” For instance, according to Mayer, the Islamic States generally supported the consensus behind the UDHR and were fully engaged in drafting the finalized version of the UDHR.

89 Halliday, Supra note 45 at 163.
91 Ibid.,
Third, since the adoption of the UDHR, there were always Muslims, both within or outside the Islamic States, who vigorously supported the notion of universality of international human rights laws. Muslim human rights activists such as Shirin Ebadi\(^92\) from Iran, Shaikh Mihklif bin Dahham al-Shammari\(^93\) and Mohammad Salih al-Bajadi\(^94\) from Saudi Arabia and Tahira Abdullah\(^95\) from Pakistan represent a few among many notable activists who vigorously oppose the exploitation of Islam as a tool to suppress and deny some of the basic human rights, such as freedom of religion, freedom of speech, and free election within the Islamic States. Ms. Shrin Ebadi, an Iranian Nobel Peace Prize winner in 2003, and a believer of the compatibility of Islam and international human rights, once succinctly stated that “those governments that violate the rights of people by invoking the name of Islam have been misusing Islam. They violate those rights and then seek refuge behind the argument that Islam is not compatible with freedom and democracy. But this is basically to save the face.”\(^96\) Another good example of support for the universality of human rights can be witnessed in light of the 2010–2011 Middle East and North Africa protests. While the revolutions in Egypt and Tunisia have been successful, the protests in other Islamic States such as Libya, Bahrain, Iran, Oman, Yemen, Kuwait and Saudi Arabia are still ongoing. Numerous factors have led to these protests, including both socio-economic and religions corruption; however, the major issue that has led to the current escalation of protests is a demand for a greater respect for human rights, in particular political freedom, and freedom of speech.

Fourth, since the adoption of the UDHR, it has been widely cited and interpreted as a source of authority. The UDHR has been generally viewed to be entirely or at least substantially as

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\(^92\) Shirin Ebadi, an Iranian human rights activist, she is a 2003 Nobel Peace Prize winner for her human rights activities in Iran. For further information on Ebadi please refer to the following web link, online: http://en.wikipedia.org/wiki/Shirin_Ebadi

\(^93\) For further information please read the following article on Human rights in Saudi Arabia, online: http://www.hrw.org/en/news/2010/06/16/saudi-arabia-release-rights-activist


\(^95\) Tahira Abdullah is a prominent Pakistani human rights activist. She is also a member with both Women's Action Forum (WAF) and the Human Rights Commission of Pakistan (HRCP). For further information please refer to the following link, online: http://en.wikipedia.org/wiki/Women_in_Pakistan

representing customary international law. Customary international laws are those aspects of international law that drives from consistent conduct of States while believing that they are obligated to act that way. However, at the same time, it can be argued that the UDHR has been the biggest source of expansion and adoption of the _jus cogens_ or preemptory norms, since it has, reflected and defined the obligations of the State members of the United Nations under the U.N. Charter. A rule of _jus cogens_, or a preemptory norm of general international law, has been described by the 1969 Vienna Convention on the Law of Treaties (VCLT) a rule “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

In other words, derogation from these norms is not permitted under any circumstances, even in cases of emergency. Although there is no single comprehensive list that outlines what norms are regarded as peremptory norms of international law or _jus cogens_, the rules that prohibit slavery, torture, genocide, maritime piracy, international crimes, crimes against humanity and violations of human rights are generally defined as _jus cogens_. At the same time, the UDHR has also been said to reflect norms regarded as _erga omnes_ obligations, meaning that some measure have horizontal enforcement between and by states because of its universal interest in those rights.

It is therefore crucial that in a world that is filled with competing worldviews, values and ideologies that we strive to understand and to accept diverse world cultures, religions and traditions while promoting a common set of human rights standards in order to properly deal with the ongoing struggle for human rights around the world. The Universal Declaration of Human Rights, the ICCPR and the ICESCR, as well as the rest of the conventions have been recognized as a common standard as they offer a full range of human rights without being limited to a specific class of race, colour, sex, language, religion, social, political, and cultural backgrounds of individuals. As An-Na’im has asserted, “no society regardless of material development, has yet been able to demonstrate that it is capable of sustaining the full range of

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*97 The Vienna Convention on the Law of Treaties (1969)*
human rights envisaged by the United Nations’ Institutional Bill of Human Rights.” However, the UDHR is fully capable of being utilized as the source of authority for dealing with issues of human rights, as they offer a full range of human rights which extends beyond barriers of sex, race, religion, and so on. Therefore, one way to resolve the conflict between Shari’ah law and universality of human rights is through separation of adherents of traditional Islamic values with new liberal interpretations of Shari’ah law which are genuinely in line with the current international human rights standards. Therefore, despite all the difficulties between cultures and religions with universal human rights standards, it can be argued that these cultural and religious differences can be mediated within the framework of universality of human rights and Shari’ah law is not an exception to this rule either.

As alluded to earlier, the UDHR and its subsequent human rights instruments not only acknowledge the inclusiveness of all cultures, it also presents a rather “flexible framework for their full implication in all religions and countries in the world, provided that the political will exists.” This is evident from Article 29 of UDHR, which affirms:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Equally the VDPA preamble emphasizes that “the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source

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of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”

A logical conclusion to be drawn from this section is that all humans should have inalienable and universal human rights. The idea of universality of human rights does not mean the imposition of Western values, but rather aims at universal recognition of all diverse cultural, religious and political difference in a way that this difference expresses our deep potential of human existence and dignity of all persons.

3. Development of Islamic Law (Shari’ah)

3.1 Historical Background and Ideological roots of Islam.

The Shari’ah is central to understanding Islam and its political, economical, social and philosophical ideology. More importantly, the Shari’ah is also central to understanding the Islamic legal system. This chapter therefore attempts to provide a brief overview of Shari’ah law and highlight the ways in which Shari’ah developed and currently functions as a law for Muslims. An attempt will be made to provide a brief history of Islam and its core beliefs. Further, an attempt will be made to identify the major Islamic principles, both within the Sunni and Shia branches of Islam, and of course some of the Islamic concepts and practices within the application of Shari’ah law. This chapter aims to provide a foundation for later discussion,

100 Vienna Declaration and Programme of Action, Supra note 36.
especially Chapter 5 titled, the “International Islamic Human Rights Documents”, in which some of the major Islamic documents on human rights will be discussed and analyzed.

Islam is the second most practiced religion in the world after Christianity. It is a religion which originated from the Prophet Muhammad around 570 AD. The word “Islam” means total submission to God (Arabic: Allah) and so a Muslim is one who submits to God. Muslims believe the Prophet Muhammad is chosen as God’s final prophet and that God revealed the Quran to him to be the core text of Islam\textsuperscript{102}. Islam is a monotheistic religion, which is the belief in the existence of one God.

There are many references in the Quran to both Muslims and non-Muslims. The Quran refers to non-Muslims such as Jews, Sabians and Christians as the “People of the Book” (Ahl al-kitab). The People of the Book are those non-Muslims who have their own religious holy book. Muslims believe that God has dictated a number of religious books to a number of prophets through the history of mankind. According to the Quran, the Torah was revealed to Prophet Moses, the Gospel was revealed to the prophet Jesus, and the Psalms (Zabur) were revealed to David. It is noteworthy to mention that all these religious scriptures, according to Muslims, are promulgating the law of Islam; however, they also believe that the Quran, which was revealed to Prophet Muhammad is the complete and final holy scripture. Despite all these differences, Jews, Sabians, Christians, the "People of the Book", who are living within an Islamic State are permitted to practice the religious beliefs and are protected under Islamic law. This is mainly due to the fact that according to the Quran, the "People of the Book" just like Islam, also recognize the Abrahamic (Ibrahim) religious tradition which refers to one god only. There are many references in the Quran that promote tolerance towards the “People of The Book”, for instance: "Say: 'O People of the Book [i.e., Jews and Christians] come to common terms as between us and you: That we worship none but Allah; that we associate no partners with Him; that we erect

\textsuperscript{102} Islam (2011), online: http://en.wikipedia.org/wiki/Islam
not, from among ourselves, Lords and patrons other than Allah.' If then they turn back, say ye: 'Bear witness that we are Muslims bowing to Allah's Will.'

Furthermore, Islam is “not simply just a legal system but rather a composite system of law and morality which aspires to regulate all aspects of human activities, not only those that may entail legal consequences”\(^{104}\). In Islam, there is no separation between religion and politics. According to Vincent, the main reason “for the close link between Islam and politics are to be found in the early days of Islam in which the Prophet Muhammad was considered to be both a political and religious leader”\(^{105}\). During his life, the Prophet Muhammad acted as the “supreme authority in matters of religious duties as well as a Statesman whose political leadership played a key role in shaping the nascent Muslim nations”\(^{106}\). This method of governing for the most part is still the most common method of governing in the majority of Islamic counties. For instance, in Iran, Ali Khamene is currently the Supreme Leader in both the political and religious realms.

Another important issue to bear in mind is that in Shari’ah there is no clear reference to the concept of individual human rights, since individuals are seen as “a limb of a collectivity”\(^{107}\) which is the Islamic community. Therefore in Islam, “Muslims have duties \textit{vis-a-vis} the community, but possess no individual rights in the sense of entitlement”\(^{108}\). In other words, in Islam the idea of human rights is understood with the concept of duty to God rather than individual entitlement of rights. Therefore, whatever rights that exist are the consequence of the individual’s relationship with God, and “on his behaviour and faithfulness and not on his mere being”\(^{109}\). In the Quran, submission to God is repeatedly stressed at all times. Consequently the “essential characteristic of human rights in Islam is that they constitute obligation connected with

\(^{103}\) Quran, 3:64, online: http://quran.com/
\(^{105}\) Dalacoura, \textit{Supra} note 17 at 42.
\(^{107}\) Tibi, \textit{Supra} note 70 at 285.
\(^{108}\) \textit{Ibid.}, (p.97).
\(^{109}\) Dalacoura, \textit{Supra} note 17 at 44.
the Divine, and derive their force from this connection". Thus, for Muslims, “an Islamic society should be governed with the laws instituted by God rather than by laws created by men”.

### 3.2 Major Legal Schools in Islam

Another important issue relating to Islam is that, similar to other mainstream religions, there are number of major legal schools which have shaped and developed the legal jurisprudence in Islam. Muslims are generally divided into three main branches: 1) Sunni, 2) Shia, and 3) Sufism.

For the sake of clarity it is vital to observe it is outside the purview of this section to examine the validity and fundamentals of any of these legal jurisprudence, but rather the aim of this chapter is to provide a general background of the main Islamic legal jurisprudence to assist the readers to fully engage with Chapter 5 of this paper, titled “International Islamic Human Rights Documents”, in which the work of two the most prominent Islamic scholars will be assesses, one by Abul Ala Mawdudi’s document, titled “Human Rights in Islam” followed by Sultanhussein Tabandeh’s document entitled “A Muslim Commentary on the Universal Declaration of Human Rights.” As it will be noted in details, Abul Ala Mawdudi belongs to Sunni traditions and Sultanhussein Tabandeh belongs to Shi’i traditions.

Sunni Muslims are the largest branch in Islam. They comprise around 80% of all Muslims, followed by Shia Muslims. The word Sunni comes from the word Sunna, which is oral traditions of the words and deeds of the Prophet Muhammad written down in the so called Hadith. For the Sunni Muslims, the Sunna and Hadith are the important pillars of their beliefs and crucial tools in any interpretations of Shari’ah law. There are four main legal schools of thought within Sunni branches: Hanafi, Maliki, Shafi’i, and Hanbali.

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Hanafi school of thought comprises the largest branch among Muslims. Hanafi School heavily emphasizes the use of reason and logic. The Hanafi School therefore permits reason and logic in examining the Quran (which is the central religious text of Islam) and Sunna (which are oral traditions of the words and deeds of the Prophet Muhammad written down in the so called Hadith), to identify new rules that are similar to the particular situation at hand, while resorting to Ijma, which offers consensus among jurists, Qiyas which is the science of analogical reasoning and Urf, which is the local customs of an area. However, Urf will be given legal weight so as long as the local custom is not prohibited in Islam. The Maliki School comprises the second largest branch in Sunni Muslims. Methodologically, the Maliki School differs from other three schools of law since its legal doctrine is not only derived from the Quran and Hadith, but is also the well-established legal rulings of the first four caliphs. The Shafi'i School in many aspects is similar with both legal doctrines of Hanafi and Maliki schools of thought. It recognizes the authority of the Quran, Sunna, Ijma and Qiyas and at the same time recognizes the well-established legal rulings of the first four caliphs. The Hanbali School, which is known to be the most conservative legal school among the above schools of thought derives its decrees and its legal doctrine from strict interpretations of the Quran and Sunna. The school also recognizes the authoritativeness of Prophet Muhammad’s Companions which is also called Umma.

Shia Muslims are the second largest branch in Islam. They comprise around 15% of all Muslims. In short, Shia Muslims believe that the forth Caliph, Ali ibn Abi Talib, who also was the Prophet Muhammad's cousin and son-in-law should have been the rightful successor to Prophet Muhammad and so, unlike Sunni Muslims, the Shia rejected the legitimacy of Abu Bakr, Umar, Usman who served as the first three Caliphs.

There are two main legal schools of thought within Shia branches: Twelver Imami (also known as Ja’faris and Ismaili). The Twelver Imami, which is the larger branch between all Shia Muslims, drives its name from the belief in The Twelve Imams as the spiritual and political

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112 After the death of Prophet Muhammad, his successors who were deemed as the first leaders were called Caliphs (also spelled Khalifs). The first four Caliphs were: Abu Bakr, Umar, Usman and Ali ibn Abi Talib.

113 It should be noted that according to Shia, Imams unlike Prophets were not the recipient of a Divine revelations, but were chosen by God as the spiritual and political of the Muslim communities.
successors to Prophet Muhammad. According to Shia, the Imams are chosen by God as the leader of the Muslim communities, starting with Ali ibn Abi Talib as the first Imam and continued with his direct male descendant or brother. The Twelver Imami, further believe that the twelfth Imam, Muhammad al-Mahdi, is currently alive and in hiding and will return peace and justice to the world. The legal doctrine of the Twelver Imami is based on the Quran and Sunna. However, they also recognize the Imams, but not the Caliphs, as the source of authority and emulation in interpreting Islamic Laws. The Twelver Imami also recognizes human reason as an equally decisive basis in determining the scope of divine purpose for humanity, however, reason can only be offered by the religious authority who can base his reason on Prophet Muhammad and Imams’s Sunna.\footnote{Khare, R.S, \textit{Perspective on Islamic Law, Justice and Society}. (Rowman & Littlefield Publishers, Inc., 1999) at 18.}

The Ismaili branch is the second largest branch of Shia Muslims after the Twelver Imami. The Ismaili for the most part share the same history and beliefs as the Twelver Imami, however, they branch off with the Twelver Imami as they believe that the leadership has passed to Isma’il ibn Ja’far who was the eldest son of the sixth Imam Ja’far al-Sadiq and not his younger brother Musa al-kazim, where the Twelver Imami believe to be the true Imam. Furthermore, the Ismaili believes that the Quran contains several meanings and interpretations. These meanings and interpretations are both inner or hidden meanings and apparent meanings. For Ismaili, the focus should be on those inner meanings. However, for the followers to gain access to this the inner interpretation is “only through a guarded and secret teaching and through careful initiation process.”\footnote{Lippman, Matthew, McConville, Sean, & Yerushalmi, Mordechai, \textit{Islamic Criminal Law and Procedure: An Introduction}. (New York: Praeger, 1988) at 18.}

It is therefore, for the religious Muslim leader, also known as the Imam at the time, to interpret the Quran to withdraw new interpretations.

Sufism is perhaps the third largest and most liberal branch of Muslims. Sufism has commonly been recognized as the mystical dimension of Islam which seeks to have direct personal experience and unification with God. According to Sufism, this direct connection can only be possible through meditation, reflection and self-disciple.\footnote{Ibid., (p. 18-19)} Sufis also believe that this
mystical knowledge of god and communion with God can be attained by intuition, emotional expression and piety.\textsuperscript{117} Therefore, unlike any other branch of Islam, Sufism makes it possible for the individual to understand God rather than studying the tradition, while it also eliminates the need for the acquisition of religious scholars to interpret the divine law or to guide the people to God. This should not be interpreted that Sufism is against the traditional Islamic beliefs, but rather it should be viewed as complementary, as it is very easy for non-Muslims to comprehend since many of its rituals and practices are rooted in the diverse cultures of the people who convert to Islam.\textsuperscript{118}

3.3 The Islamic Sources

Decades after the death of the Prophet Muhammad\textsuperscript{119}, a set of laws was developed which are collectively referred to as Islamic or Shari’ah law. The Shari’ah which literally means “the right way”, is the body of Islamic religious legal framework which dominates all aspects of day to day life of Muslims\textsuperscript{120}. In short, Shari’ah plays a crucial role in shaping all the legal spheres of Islamic jurisprudence such as dealing with issues that fall under the ambit of family law such as marriage and divorce; also regulating the economic matters such as banking and business practice; also prescribing acceptable religious practices and regulating behaviours that deem to be contrary to Islam, such as consuming alcohol; providing rules for criminal actions and punishments and lastly Shari’ah provides the basic rule of governance.\textsuperscript{121} It is noteworthy to mention that there is no such thing as a codified set of laws of Shari’ah, but it is rather apparent that the fundamental tenets are based on a number of sources that have been used by Islamic legal scholars as sources of Islamic law. The two major sources of Islamic law are the Quran and Sunna. These two sources have been widely characterized as the most fundamental principles of

\textsuperscript{117} Ibid., (p. 19)
\textsuperscript{118} Ibid., (p.19)
\textsuperscript{119} Prophet Muhammad died on June 8, 632.
\textsuperscript{120} Sharia(January 2012), online: http://en.wikipedia.org/wiki/Sharia
\textsuperscript{121} Akbarzadeh, Shahram, Islam and Globalization: critical concepts in Islamic studies. (Routledge Press, 2006) at 232.
Islamic law. Of course, the nature of the Quran and Sunna’ emanates the fact that they are divine and quasi-divine revelations respectively, in which they are obligatory for Muslims to obey and follow.\textsuperscript{122} Furthermore, their nature as a formal source of Islamic law also follows from the fact that they contain the corpus of the revealed law.\textsuperscript{123}

Quran literally means “recitation” and is the first and most fundamental and authoritative source of Shari’a law and it is believed by Muslims to be the exact words of God that were gradually revealed to Prophet Muhammad through the angel Jibrail\textsuperscript{124}. The Qur’an consists of 114 unequal length chapters, also known as a sura, and about 6,236 verses, which is also known as ayat.\textsuperscript{125} The Quran covers virtually every aspect of Muslim life and society, encompassing subjects such as social, political, moral, economic, and legal basis in which an Islamic society should be constructed. Muslim scholars have estimated that out of 6,236 verses about 350\textsuperscript{126} of those verses contain legal components, in which most of those verses were “revealed in response to a problem that were actually encountered”, or have been “revealed with the aim of repealing objectionable customs” which were practiced in the pre-Islamic area, such as infanticide, usury and gambling.\textsuperscript{127} According to Kamali, there are an estimated 140 verses in the Quran devoted to issues such as prayers, legal alms, fasting, the Pilgrimage to Mecca (also known as Hajj), jihad (both in the context of “greater jihad meaning to worship of God” and “lesser jihad meaning to fight against the enemies of Islam”), charities, taking of oath, and compensation for damages.\textsuperscript{128} Another seventy verses are devoted to legal issues such as marriage, divorce, the waiting period of Iddah (which is a period of four months and ten days in which a woman must not marry subsequent to her divorce or the death of her husband; of course,\textsuperscript{122} Baderin, \textit{Supra} note 28 at 34.

\textsuperscript{123} Baderin, \textit{Supra} note 28 at 34.

\textsuperscript{124} Jibrail is also spelled Gabriel.

\textsuperscript{125} It should be noted that there are disagreements among Muslim scholars about the exact number of ayat. The numbers varies, however, most literatures on the subject seems to have agreed on 6,236 while in all cases all the literatures are citing the same Quran.

\textsuperscript{126} There is a minor disagreement Islamic jurist on the exact number of legal verses. Some have argued that there is between 200 and some argued that the number is between 350 to 500. Please see, Baderin, \textit{Supra} note 24 at p. 35, also, Hashim Kamali, Mohammad, \textit{Principles of Islamic Jurisprudence}. (Islamic Texts Society, 2005) at 19), and, Lippman, \textit{Supra} note 115 at 29.


\textsuperscript{128} \textit{Ibid.}, (p.20)
the chief reason behind *Iddah* is to ascertain whether the woman is pregnant or not and to ensure that the male parent of the child is known), revocation, dower, maintenance, custody of children, fosterage, paternity, inheritance, and bequest.\textsuperscript{129} Another seventy verses are devoted to legal issues concerning commercial transactions, lease, loan and mortgage.\textsuperscript{130} There are also thirty verses speaking about justice, equality, evidence, consultation, and the rights and obligations of citizens. Legal issues relating to economical matters and right of workers constitutes the subject of another thirty verses of the Quran.\textsuperscript{131} Lastly, there are about thirty verses devoted to crimes and penalties, highway robbery, adultery, and false accusations.\textsuperscript{132}

It is essential however, that for the sake of clarity in comprehending the controversial issues discussed in proceeding chapters, to briefly expound on the criminal offences under Islamic criminal law that “mostly concerns issues relating to: 1) a private individual, 2) property, 3) honors, 4) the State, 5) religion, 6) public peace and tranquility, and 7) decency and morals.”\textsuperscript{133}

In order to be held liable under Islamic criminal law, the court should consider the nature of the activity and the extent of the person’s responsibility for the offence committed. Strictly speaking, Islamic law has divided human activity into five categories:

1) Activities that are ‘mandatory or obligatory’, also known as ‘*Wajib*’. A mandatory act is an act that Quranic verses commands or praises. Failure to observe the mandatory act is punishable.

2) Activities that are ‘recommended’, also known as ‘*Mustahabb*’. A recommended act is an act that the performance of it will be rewarded but negligence to observe it is not punishable.

3) Activities that are ‘optional’, also known as ‘*Mobah*’. An optional act is one that is neither mandatory nor recommended. In other words, the action is permitted by silence.

\textsuperscript{129} Ibid., (p.20)
\textsuperscript{130} Ibid., (p.20)
\textsuperscript{131} Ibid., (p.20)
\textsuperscript{132} Ibid., (p.20)
4) Actions that are ‘disliked or disapproved’, also known as ‘Makruh’. A disapproved act is one that might be offensive or disliked, yet the action is not punishable, however, Muslims are encouraged to abstain from this action as much as possible.

5) Lastly, actions that are ‘forbidden’, also known as ‘Haram’. A forbidden act is one that is not acceptable and is punishable. Acts such as adultery\textsuperscript{134} and Idolatry\textsuperscript{135} are deemed to be Haram.\textsuperscript{136}

These forbidden acts, under Islamic law, are punishable under one of the following four categories, 1) Hadd 2) Quesas 3) Ta’azir and 4) Diya. Hadd refers to those serious categories of crimes that the actual offence and its specified punishment have been specified in the Quran. Therefore, when determined by the judge that the crime is within the ambit of Hadd then it is the duty of an Islamic State to observe and enforce the punishment as required in the Quran. Some of the Hadd offences include murder, theft, highway robbery, illegal sexual intercourse, drinking alcohol, and *hirabah* which refer to public terrorism in a war against society and civilization and apostasy. Quesas, which means retaliation, is equivalent to the maxim of the Mosaic Law, based on the principle of "an eye for an eye."\textsuperscript{137} Ta’azir, which in many ways is equivalent to the Common Law offence of misdemeanour are those discretionary punishments that there is no actual punishment specified in the Quran. The punishment can therefore range from fines and corporal punishment to imprisonment as the judge deems appropriate. Lastly, Diya, also known as ‘blood money or ransom’ is a fine or compensation for blood in the cases of homicide by the offender to the heir of a victim.\textsuperscript{138}

The second source of Islamic law is *Sunna* which means ‘clear path’. *Sunna* as a source of law consists of oral traditions of the words and deeds of the Prophet Muhammad written down in

\textsuperscript{134} Quran 17.032: Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).
\textsuperscript{135} Quran 6.056: Say: "I am forbidden to worship those - others than Allah - whom ye call upon." Say: "I will not follow your wain desires: If I did, I would stray from the path, and be not of the company of those who receive guidance."
\textsuperscript{136} Lampe, *Supra* note 133 at 79.
\textsuperscript{137} *Ibid.*, (p. 86)
\textsuperscript{138} *Ibid.*, (p. 88)
the so called *Hadith. Sunna* mainly developed from the need for clarification and explanation of some of the Quranic verses, by the Prophet Muhammad, to expand and offer details to some of the general provisions of the Quran and instructions on some other aspects of life that were not expressly illustrated in the Quran.¹³⁹ Muslims commonly held that the Prophet Muhammad, as a receiver of Quran, was obviously the best person to expand and interpret and to shed light on the general provisions of the Quran, therefore, his elucidation of those Quranic verses should form the base of the *Sunna*.¹⁴⁰ It should also be noted that that the *Sunna* as a source of law has been supported in the Quran itself, as the Quran has made reference to *Sunna* on a number of occasions (16 times to be precise).¹⁴¹ However, in the event that there is “any irresolvable conflict between a verse of the Quran and reported *Sunna* the former prevails, because of its indubitable authority in Islamic law.”¹⁴²

Although Muslims refer to the Quran and *Hadith* to acquire guidance, however, after Muhammad’s death it was collectively held that neither of these sources could offer detailed and comprehensive guidance on a various range of practical, social and political issues¹⁴³. Therefore, an emphasis was placed on *Figh* which is a science of interpretation of the Quran, *Ijma*, which offers consensus among jurists, and *Ijtehad¹⁴⁴*, which is independent legal reasoning¹⁴⁵. It should however be noted that, *Ijtehad* can only be applied by a person who is a religious scholar, also known as Mujtahid, who is well versed in Islamic jurisprudence and can make independent legal decisions, which nevertheless are compatible with the Quran and *Hadith*. *Ijtehad* was widely practiced in the early days of Islam, however as it will be discussed in the proceeding section¹⁴⁶, the *Ijtehad* was progressively discouraged in the 10th and 11th century especially with the Sunni branch of Islam, and instead the emphasis was made on the

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¹⁴⁰ Ibid.,
¹⁴¹ Hashim Kamali, *Supra* note 127 at 46.
¹⁴³ Dalacoura *Supra* note 17 at 42.
¹⁴⁴ *Ijtehad* is the practice of interpretation and reasoning based on the sacred texts (Quran and Hadith). This practice is highly specialized and reserved for those whom have religious knowledge of those sacred texts.
¹⁴⁵ Dalacoura, *Supra* note 17 at 43.
¹⁴⁶ Section 3.4, Titled: The Politics of Islamic Law: From the Golden Age to Colonial Authority and Muslim Response.
institutionalized notion of “imitation”, also known as Taglid. As a result, Muslims became obligated to conform or to follow the verdict of religious scholars of any of the schools of jurisprudence without questioning the process that they have formed their verdict.\textsuperscript{147} In other words, the Muslims were prohibited to exercise independent legal reasoning or to interpret the Islamic legal sources, the Quran and the Sunna.

Furthermore, while Ijma has clearly been legalized and promoted in the Quran and Hadith, its ambit has been greatly restricted both within Shia and Sunni branches of Islam. The Quran clearly promotes consensus among all Muslims as it indicates that: “(O Community of Muhammad!) You are the best community ever brought forth for (the good of) humankind, enjoining and promoting what is right and good, and forbidding and trying to prevent evil, and (this you do because) you believe in God.”\textsuperscript{148} The Ijma, according to Lippman, could have been a very useful source of law that could have paved the way to apply Islamic law in contemporary situations, but light of all the restrictions, it can be argued that Islamic jurisprudence has became stagnant and sterile since Ijam as a very useful avenue to develop new laws based on scholarly consensuses has been ceased.\textsuperscript{149}

\section*{3.4 The Politics of Islamic Law: From the Golden Age to Colonial Authority and Muslim Response}

A period between 750 to the 12 century has been commonly referred to as the Golden Age of Islam. In popular discourse, the Golden Age of Islam has frequently been used by historians to refer to the period in which the Islamic civilization was affluent, prosperous, progressive and flourished in many aspects such as philosophy, science medicine, literature, poetry, and the arts. As Lewis eloquently described it, for centuries the world views of Muslims seemed to be that they are well-grounded as they were not only the greatest military power but for the most part

\begin{footnotes}
\item[147] Baderin, \textit{Supra} note 28 at 38.
\item[148] Quran 3.110.
\item[149] Lippman, \textit{Supra} note 115 at 32.
\end{footnotes}
they were the economic power in the world.\textsuperscript{150} Although Muslims greatly inherited from the ancient Middle East, such as Greece and of Persia (present day of Iran), this contributed several important innovations, especially in the field of medicine, science and astronomy to the extent that it has been argued that it would be difficult to imagine modern literature or science without those contributions.\textsuperscript{151}

Moreover, the Golden Age of Islam also brought into its orbit an open and unrestricted independent legal reasoning, known as \textit{ijtihad}, which lasted for centuries. After the death of Prophet Muhammad it was apparent that neither the Prophet in his life time nor the Quran offered detailed guidance on a range of practical, social and political issues.\textsuperscript{152} Therefore, in order to expand the legal doctrine, an independent legal reasoning was permitted while a great emphasis was still made on the Quran and \textit{Hadith}. Consequently, religious scholars could appeal to the tradition of the Quran and \textit{Sunna} and independent legal reasoning in order to construct a workable law that would address modern issues.\textsuperscript{153} However, by the tenth century, it was thought, mainly by Sunni Muslims jurists, “that all the necessary interpretations of the Koran had been completed,”\textsuperscript{154} and “had fully exhausted all the possible questions of law and that the necessary material sources of Islamic law were fully formed.”\textsuperscript{155} This ultimately resulted in dismantling the doctrine of independent reasoning, by the thirteenth century, to what is now commonly referred to as ‘closing the gate of \textit{Ijtehad}’ and the opening of the doctrine of confirmation or imitation, also known as \textit{Taqlid}. Through \textit{Taqlid}, Muslims are encouraged to follow the religious scholars, also known as \textit{Mujtahid}, without contesting or disagreeing with the decision and the process in which that have arrived to that decision. As Baderin rightfully asserted, as the result of ‘closing the gate of legal reasoning’ the Muslims progressively “became restricted to conform to or follow the ruling of any one of the schools of jurisprudence but were

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\footnotetext[150]{Lewis, Bernard, \textit{What Went Wrong?: Western Impact and Middle Eastern Response}. (Oxford University Press, 2001) at 6.}
\footnotetext[151]{\textit{Ibid.},}
\footnotetext[152]{Dalacoura, \textit{Supra note} 17 at 43.}
\footnotetext[153]{\textit{Ibid.},}
\footnotetext[154]{Dalacoura, \textit{Supra note} 17 at 43.}
\footnotetext[155]{Baderin, \textit{Supra note} 28 at 39.}
\end{footnotes}
not generally allowed to exercise independent legal reasoning on any matter.”

It is noteworthy to mention, that the Shia branch of Islam unlike the Sunni branch have maintained the Ijtehad, however, as Katerina rightfully identified, in practice the Ijtehad has historically been equality limited as the Shia Muslims have been required “not to stray from the example of the sinless and infallible imam.”

Despite all this achievement, the Golden Age of Islam further declined, starting in the 12th century, due to new challenges such as war, the European Renaissance, colonisations and of course the rise of religious fundamentalism.

One of the great challenges was imposed by the Mongol Empire invasion in the thirteenth century which caused wholesale destruction. It has certainly been argued that after the Mongol invasion the Islamic world never regained their previous greatness, due to the fact that its six centuries of Islamic scholarship, its rich culture, arts and infrastructures and its one of a kind libraries were destroyed to its foundations or heavily damaged. Perhaps some of the most devastating damage was inflicted by destroying cities such as the Persian city of Isfahan and the city of Baghdad which was at the center of the Islamic world. Although the Mongol invaders eventually converted to Islam, nevertheless the extent of destruction on Islamic civilization was so deep that it marked a major change of direction for the Islamic world, to the extent that the subsequent Islamic powers could never regain their old glory.

The second wave of challenges came from the West, during the 19th century, starting with the European Renaissance and the colonial intervention in the Islamic territories. The colonial intervention in the Islamic territories, heavily contributed to the decline and stagnation of Islamic culture, law and jurisprudence. The Western economical domination over the Islamic territories on one hand and political and cultural hegemony on the other caused Islamic civilization to regress and flounder with modernity. This is best illustrated when an evaluation of Islam legal

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156 Ibid., (p.38).
157 Imam is an Islamic religious position.
158 Dalacoura, Supra note 17 at 43.
jurisprudence reveals, that Shari’ah law under the pressure of colonial forces, notably the British, was transformed in a way that it was reduced as a part of political enterprise to dominate the Islamic territories during the colonial period. For instance, as Professor Emon describes that the “colonists used a reductive but determinate notion of Islamic law to bolster their legitimacy and ensure administrative efficiency, while also marginalizing the tradition when necessary to attain colonial goals.”  

The colonial power, with the dismantling of institutions of training and adjudication of Islam, caused the Sharia to be reduced to an abstract body of doctrines, which limited its scope to specific texts and denied affirmations of contingencies and discretion disconnected from a historical or institutional context. This colonial treatment of Islamic law of course ultimately rendered Shari’ah law to be reified and static in application and in conceptual coherence. This reductive reading of Islamic law by colonial administrators, according to Emon, has certainly affected the way in which Muslims in the twenty and twenty-first century understood, responded to the pressures of colonialism and conceptualize the tradition. Because of the impact of colonialism, the Muslims in post-colonial nation-building a huge emphasis was made on Islamization of laws as a step towards Islamizing societies and to codifying the Islamic laws after its exposure to the influence of Western colonizers. Therefore, the vast majority of the Muslim States, in the post-colonial nation-building, “viewed the Islamic legal doctrine (whether positively or negatively) often in light of political ideologies of identity, rather than as part of a rule of law system. As such, changing Islamic rules of law is viewed as an attack on the political identity and ideology they are made to reflect and represent.”

Towards the end of the nineteenth and early twentieth century the Islamic territories regained their independence but certainly not their former greatness. The Islamic civilization, which was once a mighty civilization has fallen short in respecting the standards that are of importance in the modern world, such as economic development, literacy, scientific

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161 Ibid., (p. 331-355).
162 Ibid., (p. 349).
163 Ibid., (p. 350).
164 Ibid., (p. 339).
achievement, political and religious freedom and of course respect for human rights.\(^{165}\) Now, more than ever the Islamic territories embraced Islamization and fundamentalism as a political statement to regain their pre-colonialism identity. As Professor Emon illustrates, the Islamic States are now faced with the challenges of modernity and globalization, while Muslims are asking “themselves how far they could modernize without compromising their Islamic commitments.”\(^{166}\) Furthermore, Muslims are now more and more became restricted from the use of an independent legal reasoning and are obligated to follow the religious leaders, such as Mujtahed or Imams, without any objection to their rulings. This of course has brought a further halt, or at least a slowdown, to the realization of modernity within Islam, and that, according to Igbal, “reduced the law of Islam practically to state of immobility.”\(^{167}\)

4. Controversies Within Islamic Human Rights Documents

As already noted, most of the human rights related documents that have been produced by Arab literature are motivated by a desire to engage in listing the rights in the UDHR, and then to attempt to “trace those rights back to Islamic religious texts, mainly the Quran”\(^{168}\). For instance, Abul Ala Mawdudi, who was one of the most influential Islamic scholars in the 20th century, and the author of a number of influential documents on Islam and human rights has enunciated that “human rights has always been enshrined in Shari’ah law and indeed the roots of those rights are to be found in Islamic doctrine”.\(^ {169}\) Similarly, Sultan Hussein Tabendeh, another influential Islamic scholar, in his book titled, *Commentary on the Universal Declaration of Human Rights*,

\(^{168}\) Donally, *Supra* note 50 at 50.
\(^{169}\) Mawdudi, Abul Ala, *Supra* note 15.
also projected the same voice by affirming that “contemporary human rights doctrines merely replicate 1400 year old Islamic ideas”\textsuperscript{170}.

This being said, there is no doubt that Islam over the centuries has formulated a comprehensive legal system. However, despite all of its achievements, there are however, many areas of conflict between Islamic tradition and human rights, which are almost impossible to compromise based on international standards of human rights. For instance, Islamic law has traditionally imposed unequal rights both between sexes and intolerable discrimination between Muslims and members of other religious communities, and imposes pre-modern corporal punishment prescribed by the Shari’ah such as Hadd\textsuperscript{171} and has maintained these traditions to the present time. As already noted in the preceding section three, entitled “The Islamic Sources”, the Shari’ah is based on the Quran and the Sunna. The collection and creation of both the Quran and the Hadith took place years after the death of Muhammad during the first two or three centuries of Islamic history. Therefore, due to the timing of its development it is not surprising to realize that some of the basic tenets of Islam are at odds with universal human rights.

As it will be evident in the proceeding chapters, there is a dire need for rejuvenation of the Shari’ah law’s application in the hope to meet the challenges of international human rights standards. This cannot be possible unless liberal movements are permitted and a cohesive re-evaluation of Islamic law and methodology in accordance with the international human rights laws are developed.

A number of important issues must however be considered here. First, it is important to bear in mind that cultural traditions certainly are not the only impediment to the adoption and implementation of human rights in Islamic countries. As Bielefeldt rightfully asserted, “one should take into consideration the causes, features, and justifications of human rights

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\textsuperscript{171} Hadd means restrictions. In legal terms it refers to fixed punishments for certain crimes which have explicitly mentioned in the Quran, such as: drinking alcohol, theft, illegal sexual intercourse.
violations”172. Secondly, as Bielefeldt argues, the emancipatory principle173 of human rights also presents a challenge to the Islamic tradition, because “the emancipatory principle has been articulated only in the modern era, whereas Islamic laws by comparison are much older”174. 

Furthermore, the traditional understanding of Shari’ah law does not embrace or advocate the notion of human rights since “the notion of right is not at the center of Islamic justice. Rather, submission to God and duty are emphasized.”175 Donnelly however, claims that Islam protects human rights but it just provides different way of protection. While the concept of human rights in the west has essentially been understood as individual rights in Islam the emphasis has been made on the collective right and so the right to justice is protected through the performance of duties and obligation of the rulers to establish justice.176 This being said, it can be argued that Muslims in most Islamic States are suffering from poor human rights practices. This is of course due to the fact that the majority of Islamic States tend to justify their human rights violations by resorting to the principles of Islam and applications of Shari’ah law country to the universal human rights standards.

4.1 Non-Muslim Minorities In Islam

The protection of the human rights of all individuals without discrimination on the basis of their religious beliefs and the protection of religious minorities are indeed well-established norms of international human rights laws based on the premise that States should not be neutral to minority discrimination within their territories. In this regard, Article 27 of the International

173 Emancipatory principle: Bielefeldt argues that “all human beings should be entitled to equal respect, and equal rights of freedom. Therefore, Freedom and equality thus constitute the emancipatory content of human rights”. Further, according to Bielefeldt, emancipatory demand finds expression in the UDHR which states in Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.
174 Bielefeldt, Supra note at 172 and 589.
175 Dalacoura, Supra note 17 at 48.
Covenant on Civil and Political Rights (ICCPR) is the most widely accepted legally binding provision which guarantees the rights of minorities. Article 27 reads: “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.” Also the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities defines and guarantees the minorities by asserting that, “persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.” This Declaration also called for the States to provide the necessary protection and to “encourage conditions for the promotion of that identity” via “appropriate legislative and other measures.”

The vast majority of Islamic States have ratified and adopted their international legal commitments with regards to the international human rights obligations in respect to minority rights protection. Aside from the international human rights protection on minority rights, the principles of equality and minority rights have also been recognized in both the Quran and Sunna, although with some limitation. For the sake of clarity, it should be noted that the definition of minority within the context of Shari’ah law, used in this section, solely refers to all non-Muslims who are living in an Islamic territory.

The Shari’ah law, for the most part sympathizes with religious minorities who are living within Islamic territory. Quranic verses have also commanded Muslims to show tolerance toward religious minorities. For instance, the verse 2:256 stating “there shall be no compulsion in

178 The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Article 1.1.
179 Ibid, Article 1.2
180 As of May 7, 2011 the following 5 Islamic States have neither signed nor ratified the ICCPR: Malaysia, Oman, Qatar, Saudi Arabia and United Arab Emirate
religion”\textsuperscript{181}. Notwithstanding, the religious minorities in Islam have commonly been divided in two main categories. The first category is called \textit{Dhimmi}. The \textit{Dhimmis} are those non-Muslims who are mentioned in Quran; they are Jews, Sabians and Christians, and the second category contains all other non-Muslims.

However, it has been argued that traditionally Islam has failed to confer full religious liberty and equality to all. This is mainly due to the fact that Shari’ah, religious liberty only favours the monotheistic religions and so it discriminates against polytheistic religions such as Hinduism and Buddhism. As Buck asserted, this methodology is very problematic since Shari’ah law “accommodates non-Muslim minorities with some degree of egalitarianism, if not quasi-equality, but only if they fit within a prescribed religious framework.”\textsuperscript{182} According to Buck, a religious minority that fits within that framework, those that fell under the ambit of “Peoples of the Book”, have historically been able to gain a certain measure of toleration within Islamic States.\textsuperscript{183} However, those religious minorities that did not fit within that framework have suffered from the most dramatic forms of discrimination.\textsuperscript{184} Prime examples of this include the Baha’is\textsuperscript{185} community in Iran\textsuperscript{186} and the Ahmadis in Pakistan. Of course here lies the real tension between the traditional Islamic norms and the universal human rights values which are based on human dignity and equality regardless of once race, colour or religion.

\section*{4.1.1 Jews, Sabians and Christians Minority In Islam}

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\textsuperscript{181} Quran: Verse 2:225. \\
\textsuperscript{182} Buck, Christopher. \textit{Religious Minority Rights.} cited in Rippin, Andrew (ed) \textit{The Islamic World.} (London: Routledge, 2000) at 644.  \\
\textsuperscript{183} \textit{Ibid.},  \\
\textsuperscript{184} \textit{Ibid.},  \\
\textsuperscript{185} Iranian Shari’ah based law recognizes the existence of God and the prophet-hood of Muhammad as God’s final messenger. Baha’i is also accept both of these two fundamentals, however Baha’i is also recognize the Bahauullah as the additional messenger that appeared after Muhammad.  \\
\textsuperscript{186} This will be expanded upon religious minorities, specifically Baha’i, in greater detail in the final section of this paper which mainly deals with current human rights movements in Iran and the obstacles human rights activists face in their activities.
\end{flushright}
As alluded to in previous chapters, Shari’ah law distinguishes between monotheism which is the belief in the existence of one god, and polytheism which is the belief in or worship of multiple gods. The Quran refers to the Jews, Sabians and Christians as “People of the Book” (Ahl al-kitab) which are based on the monotheistic religious view and so it distinguishes them from other religions that have a polytheistic understanding of God. For instance, the verse 2:256 states: “Indeed, those who believed and those who were Jews or Christians or Sabeans [before Prophet Muhammad] - those [among them] who believed in Allah and the Last Day and did righteousness - will have their reward with their Lord, and no fear will there be concerning them, nor will they grieve.”

This view has led to religious tolerance towards Jews, Sabians and Christian minorities within Islamic society, while the same courtesy has not been extended to other religious minorities. For instance, historic evidence indicates that many Christian minorities have preferred living under Islamic rule to being persecuted by their fellow Christians in the Byzantine and Habsburg empires. Jews traditionally used to live in Muslim lands and rarely faced any sort of discrimination or forced compulsion to change their religion. Thus, the “People of the Book” were mostly free to practice their own religion, follow their own religious law, establish their own religious institutions, and own property while enjoy the same degree of safety and security.

However careful observation indicates, traditional Islam discriminated against “People of the Book” Jews, Christians, and Zoroastrians since they never received full citizenship within Islamic society. This method of discrimination was institutionalized in traditional Islamic society as a way to deal with non-Muslims. Historically, by the fourteen century the Islamic empire expanded through the Middle East to North Africa and to East Europe, which was traditionally a Christian or Jewish territory. As a consequence the world, according to Muslims was divided in either an Islamic territory or “Dar al-Islam” or non-Muslim territory or “Dar al-Harb”. Broadly

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187 Quran: verse 2:62
188 Bielefeldt, Supra note 172 at 598.
speaking the “Dar al-Islam”\textsuperscript{189} therefore, is comprised of Islamic States or “an Islamic polity ruled by Muslims in accordance with Islamic law, where the sovereignty and primacy of Muslim power is to remain undisputed, and the protected peoples live under this arrangement in a state of mutual agreement, with certain advantages given.”\textsuperscript{190} It should however be noted that, an Islamic State, unlike the conventional understanding of the nation-state which is based on the notion of sovereign political and legal entity, is an ideological state, manifested in the relationship of Islam and religious government in which the non-Muslim subjects are not viewed as the citizens but merely live in an Islamic State while being subject to certain limitations imposed by the State under the application of Shari’ah law. The “Dar al-Harb” on the other hand referred to those non-Islamic territories in which Islamic law is not enforced and “are not bound by a peace treaty or covenant”\textsuperscript{191} Both the terms Dar al-Islam and Dar al-Harb are not indicated in the Quran or Sunna, but rather have been invented by the Islamic religious scholars with the aim to lay, among other things, the basic foundation of the ideological system of an Islamic State in dealing with those non-Muslim subjects who are within the Islamic territories.

Of course, the question for Muslims was how to deal with the non-Muslims of the conquered territories. As a consequence, number treaties were reached between Muslims and those conquered non-Muslims which defined the right and obligation of the parties towards each other in accordance with the application of Shari’ah law. The concept of Dhimmi, therefore, refers to such an agreement between Muslims and those non-Muslims which are the “People of the Book”. According to Al-Ghunaimi, Muhammad Tal'at “the system of Dhimmi, provided the solution to the problem, which was essentially a legal rather than a religious concept.” \textsuperscript{192} In other words, the concept of Dhimmi has not been indicated in the Quran, but rather it is an innovation of Islamic religious scholars in dealing with non-Muslims which has become the accepted norm. However it seems that the justification for the concept of Dhimmi has been

\textsuperscript{189} “Dar al-Islam” also known as “Dar al-Salam”
\textsuperscript{192} Al-Ghunaimi, Muhammad Tal'at, cited in: Lampe, Gerald (ed), Justice and Human Rights in Islamic Law. (International Law Institute, 1997) at 10.
based on the Quranic verse which states, “Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.”\textsuperscript{193} Based on the concept of \textit{Dhimmi} the religious minorities, “People of the Book”, would be entitled to enjoy rights and freedoms within an Islamic State such as, to be able to practice their own religion, establish their own religious institutions, and to be guaranteed their safety and security. It has, therefore, been argued that \textit{dhimmis} also has an advantage over Muslims, since Muslims had to “guarantee their protection without any responsibility to actively engage in that protection themselves.”\textsuperscript{194} However, traditionally certain restrictions have also been imposed upon \textit{Dhimmis}. For instance, the ”People of the Book” have traditionally been excluded from political participation and political office, they are excluded from military service, they are prohibited to carry arms, they are also restricted to openly practice their religion, and to advertise and to promote their religion and were subject to a poll-tax or \textit{Jizyah}. In other words, under the Dhimmi arrangement “a protected people is subjected to Muslim power in terms of political power only, while their identity, their language, their culture, and most importantly their religion remain intact and under their control. This means that aside from paying the \textit{Jizyah} and obeying the overarching laws applying to people living in \textit{Dar al-Islam}, the protected people are left alone to live their lives as they see fit.”\textsuperscript{195} The \textit{Jizyah} is mainly enforced against male non-Muslims, and in return the state obligated itself to protect them. As a result, non-Muslim citizens were permitted to practice their faith freely.\textsuperscript{196} The payment of \textit{Jizyah} has been stipulated in the Quran as a condition for peace and protection of \textit{Dhimmis}. The Quran 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 - [fight] until they give the \textit{Jizyah} willingly while they are humbled.”\textsuperscript{197} It is important to bear in mind an important distinction between \textit{Jizyah} and \textit{Zakat}. While \textit{Jizyah} is a per capita tax which is levied on non-Muslims who are living in an Islamic territory in return for

\textsuperscript{193} Quran: verse 60:8.
\textsuperscript{194} \textit{Jihad and the Islamic Law of War. Supra} note 186.
\textsuperscript{195} \textit{Ibid.},
\textsuperscript{196} Louis Esposito, John, \textit{Islam the Straight Path}. (Oxford University Press, 1998) at 34.
\textsuperscript{197} Quran: verse 9:29.
security and protection, the Zakat is a mandatory Islamic tax in which Muslims are obligated to pay, usually 2.5% of their annual income and possession for the purpose of charity given to poor and needy individuals.\textsuperscript{198}

The whole institution of Jizyah has been heavily criticized, by many leading scholars such as YeOor and Goiten, as being discriminatory and suppressive. According to Goiten the idea behind Jizyah taxes is not to offer security and protection to non-Muslims living in an Islamic territory, but rather it represented discrimination towards non-Muslims as it “was intended to emphasize the inferior status of the non-believers.”\textsuperscript{199} YeOor also by appealing to historical events illustrates that the Jizyah taxes were mainly based on “the laws of wars and warrior caste which assumed its defence in return for a payment” in which in practice the Jizyah taxes was imposed from all non-Muslim subjects, including children and women.\textsuperscript{200} As for the amount of Jizyah taxes, it was never a fixed amount and there is no guidance in the Quran as how the Jizyah taxes should be levied. Furthermore, the historical evidence also indicates that for the most part the non-Muslim citizens were subjected to a higher amount than what was paid by the Muslims toward Zakat. Shahid, also noted that the Jizyah taxes is in no way comparable to Western tax systems, since unlike Western taxes the Jizyah taxes is not based on the notion of equality and liberty “but rather merely a permission for another tax period to live” in an Islamic territory.\textsuperscript{201} Perhaps most importantly, the institution of Jizyah has been criticised for being an instrument of humiliation and punishment of non-Muslims.\textsuperscript{202} For instance, according to Burhanud-din al-Marghinani, an Islamic religious scholar of the Hanafi school of thought, who did extensive judicial work on Islamic law, has characterized Jizyah in its nature to be punitive in nature. Al-Marghinani in his work, Al-Hedaya, also known as (Hanafi Manual), has asserted that the “capitation-tax is sort of punishment inflicted upon infidels for their obstinacy and

\textsuperscript{198} It should be noted that in Shia branch of Islam, the Shia Muslims are obligated to pay 1/5 of their total earning income must be paid as Islamic Tax which also called Khums.
\textsuperscript{199} Goiten, S.D. "Evidence on the Muslim Poll Tax from Non-Muslim Sources" (1963) Journal of the Economic and Social History of the Orient, Vol. 6, at 278-279.
\textsuperscript{200} Ye’or, Bat. Islam and Dhimmitude: Where Civilizations Collide. (Fairleigh Dickinson University Press, 2001) at 69.
\textsuperscript{201} Shahid, Supra note 191 at p. 78-9.
\textsuperscript{202} Lal, Kishori Saran. Theory and Practice of Muslim State in India, New Delhi, (1999), online: http://voiceofdharma.org/books/tpmsi/
infidelity”. Also, according to Lal, Jizyah in its essence should not be categorized just a tax, but rather as “an instrument of humiliation of the non-Muslims” since the spirit of Jizyah was to keep reminding the non-Muslims that they are inferior citizens in an Islamic State”. Lal also argues that the institution of Jizyah has also been utilized as an instrument to impose the burden on non-Muslims to convert to Islam since by converting to Islam one could escape the Jizyah.

4.1.2 Other Religious Minority Faiths In Islam

As made reference earlier, Shari’ah law for the most part recognized the status of non-Muslim religious minorities that fit within that framework Dhimmi, and those are that fall under the ambit of “Peoples of the Book”, as they have been categorized as monotheistic religions. However, with the expansions of Islamic territories, especially towards the East, a new set of religious minorities emerged which would not fit within the view of Shari’ah law. Therefore, the question was how to deal with polytheistic religious minorities such as Hinduism and Buddhism. Traditionally, the Dhimmis have enjoyed greater rights and freedoms than other non-Muslims. Hindus were among the least acceptable religions since they were viewed as the idol-worshiping polytheistic religion. Although, currently religious tolerance towards polytheistic religions has been extended and has placed them on equal footing with "People of the Book", while still being subject to Jizyah taxes.

4.1.3 Contemporary treatment of non-Muslims

Non-Muslims minorities, both Dhimmis or not, continue to be a significant part of Islamic societies. For instance, in Syria there are more two million Christians which comprise

204 Lal Supra note 202 at IV. Inorge of the State.
205 Ibid.,
about 10 to 12% of the total population, with majority being Antiochian Orthodox and other Christian denominations including Greek Catholic, Assyrian Church of the East, Armenian Orthodox, Protestants etc.\textsuperscript{206} Also in Indonesia while 86.1% of the population are Muslims, about 9% of the population is Christian, 3% Hindu, and 2% Buddhist or other.\textsuperscript{207}

The majority of modern Islamic States have granted a wide range of rights, which include some religious liberty, and equal rights to their non-Muslim population. However, it would be very hard to generalize a set of treatment towards all non-Muslim minorities within all Islamic States, but rather a case-by-case examination would be more appropriate. It is mainly due to the fact that certain Islamic States, such as Syria and Indonesia have observed the freedom of religion and tolerance toward non-Muslim religious minorities by the State law, where other Muslim States have granted limited religious freedom. This being said, it can be argued that the religious minorities are generally respected in Islamic States, so as long as those minorities are not deemed to be posing any threats, either real or merely perceived to be a threat to Islam.\textsuperscript{208} In other words, according to Buck, the way religious “minorities are treated within the Islamic world depends, to a large degree, on how the religious identities of those minorities are defined by the Islamic States in which they live.”\textsuperscript{209} For instance, while Article 29.2 of the Constitution of the Republic of Indonesia (1945), guarantees religious freedom for all by recognizing Protestantism, Roman Catholicism, Hinduism, Buddhism, and Confucianism as State official religions along with Islam, the Basic Law of Saudi Arabia (1992) which is a constitution-like document of Saudi Arabia, heavily restricts any religious practices by non-Muslims. Article 1 of the Basic Law of Saudi Arabia states that, “The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion.” The government of Saudi Arabia also does not recognize any religious minorities and religious freedom. According to an annual survey by the United States Department of States, concerning the “Report on International Religious Freedom”, Saudi Arabia, has constantly failed to provide basic freedom, protection and security for religious

\textsuperscript{207} Indonesia, (1 January 2012), online: http://en.wikipedia.org/wiki/Indonesia#Culture
\textsuperscript{208} Buck, \textit{Supra note} 182 at 645.
\textsuperscript{209} \textit{Ibid.},
According to the United States Department of States, the government of Saudi Arabia does not provide the necessary laws to guarantee and protect the right to private worship for religious minorities, even if the religious services been held in private homes.\footnote{210} 

Also in practice there are other discriminatory laws still enforced in a vast majority of Islamic States against religious minorities in general. For the most part, the religious minorities are obligated to “show respect for Islam and deference to Muslims”.\footnote{211} For instance, the non-Muslim religious minorities are not generally permitted to conduct their religious rituals and ceremonies and to advertise their religion in any shape or form. Non-Muslims are also generally barred from holding high political office. Perhaps, the most discriminatory practice of \textit{Jizyah} are still imposed on non-Muslims, both Dhimmis or not, who live within Islamic territories. For the most part, the \textit{Jizyah} has been eliminated or is not enforced. In Tunisia and Algeria the \textit{Jizyah} practice was eliminated during the 19th century, however Moroccan Jewry still paid \textit{Jizyah} taxes as late as the first decade of the twentieth century.\footnote{213} \textit{Jizyah} was also generally imposed through the Islamic world up until the Ottoman Empire collapsed in 1923. However, currently, \textit{Jizyah} seems to be enforced in a number of Islamic States, although has not directly been enforced or supported by those governments. For instance, \textit{Jizyah} has been enforced against non-Muslims by the Taliban in Pakistan against Sikh and Christian communities.\footnote{214} Catholics in Philippines\footnote{215} and Jews in Yemen\footnote{216} have reportedly been subject to \textit{Jizyah}. 

\begin{itemize}
\item \footnote{210} U.S. Department of State, 2010 Report on International Religious Freedom. online: http://www.state.gov/g/drl/rls/irf/2010/index.htm
\item \footnote{211} \textit{Ibid.},
\end{itemize}
4.2 Restrictions on Religious Liberty and beliefs

4.2.1 Religious Freedom and International Law

All human beings are born free and should be treated equal in dignity\(^\text{217}\) and to enjoy rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status as it is expressed in UDHR.\(^\text{218}\) However, Rehman and Breau asserted these categories of rights have been a constant source of ideological disputes since the adoption of USHR.\(^\text{219}\) Perhaps one of the most controversial categories of rights is the right to religious freedom. The right to freedom of religion has been a constant source of controversy as it had been challenged by several Islamic States.

A brief review of international human right laws reveals that while they are respectful of all religious beliefs they are also collectively upholding the concept of religious freedom. For instance, Article 2 of the UDHR forbids discrimination without distinction of any kind, including religion and Article 18\(^\text{220}\) of the UDHR states, “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.” Similar voices were also projected in the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) and also Article 18 (2) the International Covenant on Civil and Political Rights (ICCPR) (1996) which states, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”.

The UDHR proclaims to be the “common standard of achievement for all peoples and all nations”. It is now been over 63 years since the adoption of UDHR and its two subsequent International Covenants, the freedom of religion has now commonly accepted and guaranteed

\(^{217}\) UDHR: Article 1  
\(^{218}\) UDHR: Article 2  
\(^{219}\) Rehman, Supra note 63 at 26.  
\(^{220}\) By 1981 several Islamic states, including Iran, Iraq, Jordan, Libya, Morocco, Syria, and Tunisia, had already ratified the covenant without any reservation to Article 18.
through national, regional and international laws. However, the challenge is far from being met and a great deal of work lies ahead. The freedom of religion, whether it is right to practice one’s religion or abandon or convert to other religions, has been heavily challenged and criticized by Islamic States. Eltayeb explains that when the United Nations General Assembly adopted the UDHR, there were eight Muslim countries among the members of the UN and voted in favour of the UDHR, however, the inclusion of right to one’s religion or belief in Article 18 of ICCPR met the challenge of a coalition led by Saudi Arabia, along with South Africa and six other socialist countries abstained, based on the second paragraph of Article 18 which affirms the right to change one’s religion or belief.\(^{221}\) The reason for Saudi Arabia to abstain was of course based on the belief that freedom to change one’s religion is in contradiction with the principles of Islam. As a result a compromise was reached, after long discussions, with the wording of “to have or to adopt a religion or belief of his choice”.

The Article 18 of ICCPR now reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

\(^{221}\) Eltayeb, \textit{Supra} note 55 at 14 and 15.
One can certainly argue that this compromise, in response to the resistance of Islamic States, has resulted in a contradiction between Article 18 of ICCPR and Article 18 of UDHR. As indicated earlier, the religious protection under Article 18 of UDHR includes “freedom to change” one’s religion or belief, whereas Article 18 of ICCPR only refers to “freedom to have or to adopt a religion or belief of his choice” and omits to expressly declare or assert any right of adopting or converting to another religion. Should this be case, it will result in a discrepancy in the Articles, as one offers less protection than the other. One way to rectify this problem is to argue that the religious protection under Article 18 of ICCPR which “freedom to have or to adopt a religion or belief of his choice” also comprises the concept of “freedom to change” of one’s religion or belief within it. This argument has been supported by the Human Rights Committee in their 1993 General Comment, which they expressly claimed that:

The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.\(^\text{222}\)

and,

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.\(^\text{223}\)

This position has not been formally recognized by any Islamic States since it is contrary with the traditional belief of Shari’ah law which prohibits right to change religion under any circumstance. This being said, it should be noted that Article 2 of the ICCPR calls on each State Party to the Covenant to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\(^\text{224}\) In other words, the States parties to this Covenant should not

\(^{222}\) General Comment on Article 18 adopted by Human Rights Committee under Article 40 of ICCPR, CCPR/C/21/Rev.1/Add.4; Sep 1993, para. 5. online: http://www.ccprcentre.org/doc/ICCPR/General%20Comments(CCPR.C.21.Rev1.Add4_(GC22)_En.pdf

\(^{223}\) Ibid., at para. 3.

\(^{224}\) ICCPR, Article 2.
only respect the “freedom to have or to adopt a religion or belief of his choice” which also includes the right to change the religion, they should also take all measures to protect this right.

With respect to Article 18, it should be noted the wording in Article 18 (1) only mentions “manifest his religion or belief in worship, observance, practice and teaching”. However the terms “belief” encompasses “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief in worship.”225 The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private”.226 Furthermore, the Human Rights Committee also observes that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts which encompasses the “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.”227 The Human Rights Committee also has produced General Comments on the observance and practice of religion or belief. Based on the General Comments, the observance and practice of religion or belief “may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head-coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, 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.”228

Article 18 (2), also reflects on the notion of religious freedom by calling that no one should be subject to coercion to have to adopt a religious view or belief. Article 18 (3), however,

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226 Ibid., at para. 4.
227 Ibid., at para. 4.
228 Ibid., at para. 4.
asserts that “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.”

The wording of “only to such limitations as are prescribed by law” in this Article seems to permit certain limitations in reference to the right to manifest religion. As Eltayeb has observed, the international human rights laws in describing the nature of freedom of thought, conscious and religion or belief, have made distinctions between freedom of thought, conscious and religion or belief, on one hand, and freedom to manifest one’s religion or belief on the other hand. The former according to Eltayeb is “conceived as admitting no restriction, while the latter is assumed to be subject to limitations by the state for certain defined purposes.”

Kishnaswami has explained the rationale behind this distinction originates from the distinction between the *forum internum* and the *forum externum*: “freedom to maintain or change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible". In other words, the freedom to maintain or change religion or belief should not be subject to any restraint so as long as it does not manifest itself. Further it can be argued that the freedom to maintain or change religion or belief, as Kishnaswami asserted are the domain of the inner faith and cannot be considered as manifestation. Therefore, the freedom to maintain or change religion or belief cannot simply interfered under the ambit of Article 18 (3) since it may never interfere with public safety, order, health, or morals or the fundamental rights and freedoms of others. General Comment on Article 22 also asserts that Article 18 “does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, 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

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229 Eltayeb, *Supra* note 55 at 11.
or belief.”\textsuperscript{232} It should however be noted that in order to understand this apparent contradiction, it must be recollected that the right to freedom of thought, conscience and religion “encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”\textsuperscript{233} In this regard, the Committee on General Comment on Article 22 also asserts that “States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant.”\textsuperscript{234}

The freedom to manifest one's religion or beliefs also encompasses within itself the freedom of expression (Article 19 of ICCPR), assembly (Article 21 of ICCPR) and association (Article 22 of ICCPR). As Kishnaswami asserted, the wording in Article 18 of UDHR which states “Everyone has the right [....] to manifest his religion or belief in teaching, practice, worship and observance”, also embrace all possible manifestations of religion or belief within its terms.\textsuperscript{235} The reason is because, according to Kishnaswami the UDHR “on the one hand was prepared with a view to bringing all religions or beliefs within its compass, and on the other hand that the forms of manifestation, and the weight attached to each of them, vary considerably from one religion or belief to another.”\textsuperscript{236} It can therefore, be safely concluded that the enjoyment and guarantee of the freedom of religion cannot be feasible without full realization and respect for other freedom such as, among other things, freedom of expression, assembly and association. It is for this reason that the international human rights laws defend the freedom of religion, because it is the right of an individual to hold and practice their religion. In this respect, Rehman and Breau argued that in order “to advance religious freedom and to end religious persecution an

\textsuperscript{233} Ibid., at para. 1.
\textsuperscript{234} Ibid.,
\textsuperscript{236} Ibid.,
understanding of that freedom that is inclusive of all religions is urgently needed.” The former President of Iran, Mr. Mohammed Khatami, also famously has introduced the idea of “Dialogue Among Civilizations” as a response to the theory of “Clash of Civilizations”, in which he argued that:

Dialogue among civilizations, viewed from an ethical perspective, is in fact an invitation to discard what might be termed the power oriented will, in favour of a love oriented one. In this case, the result of dialogue will be empathy and compassion. And the interlocutors will primarily be thinkers, leaders, artists and all benevolent intellectuals who are the true representatives of their respective cultures and civilizations.

Relying on shared principles, objectives, and threats in order to find shared solutions is a major step towards changing the existing situation and isolating the extremists who, by sanctifying violence and force, have spoilt the world for all its inhabitants regardless of their culture or civilization.

Article 18 (3), however, seem to impose a number of limitations on the right to manifest religion. The Article states that, “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.” Therefore, in order to justify the limitations on a number of provisions indicated in this Article should as the limitation should be "prescribed by law", directed at one or more of the “legitimate aims” and "necessary in a democratic society" must be fulfilled. First, freedom to manifest one's religion or beliefs may be subject to limitation if such a limitation is prescribed by law. A number of judgments from the European Court of Human Rights have held that any limitation on freedom to manifest one's religion or beliefs must be based on pre-existing law and must be sufficiently clear, so it will not be subject to abuse or arbitrary decisions. For instance in the case of Kokkinakis v. Greece which concerns the compatibility of religious limitations for proselytism for Jehovah's Witnesses under Greek’s domestic laws with Articles 7 and 9 of the European Convention on Human

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237 Rehman and Breau, Supra note 64 at 28.
Also:
Rights, and *Larissis and Others v. Greece*\(^{240}\) which concerns three Greek air force officers who were convicted of proselytising airmen in their command, the courts required, *inter alia*, “that the law in question must be both adequately accessible to the individual and formulated with sufficient precision to enable him to regulate his conduct.”\(^{241}\)

Secondly, any limitation on freedom to manifest one's religion or beliefs must be necessary. The concern is therefore, whether the limitations is actually necessary or the States have an alternative goal in mind. As Rehman and Breau asserted the restrictions on freedom to manifest one's religion or beliefs must be necessary for the public reason and must be “justified in terms of the values of domestic society and be proportionate to the goals sought to be achieved.”\(^{242}\) For instance, in the case of *Manoussakis and Others v. Greece*\(^{243}\) which concerns a number of Greek Jehovah's Witnesses who had rented a hall to serve as a temple for worship, while under the Greek Constitution, proselytism is forbidden. Furthermore, Greek Constitution forbids, setting up any religious cite without written authorization from the government. The individuals were subsequently arrested and convicted for establishing and operating a place of worship for religious meetings and ceremonies for the Jehovah's Witnesses without authorisation from the recognised ecclesiastical authorities. In this case, the applicant individuals argued the Greek Government effectively prevented them from exercising their right to freedom of religion. The applicants were subsequently arrested. The court held that “their conviction had been persecutory, unjustified and not necessary in a democratic society as it had been "manufactured" by the State.”\(^{244}\)

Thirdly, the freedom to manifest one's religion or beliefs may be limited on the grounds of public safety, order, health, or morals or the fundamental rights and freedoms of others. The Human Rights Committee has observed that Article 18(3) offers an exhaustive list and should be strictly interpreted. Therefore, according to The Human Rights Committee’s General Comments, the restrictions in Article 18(3) are not allowed on grounds not specified in this Article, “even if

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\(^{240}\) *Larissis and Others v. Greece*, (140/1996/759/958–960)  
\(^{241}\) *Ibid.*, at para. 40  
\(^{242}\) Rehman, *Supra* note 63 at 43.  
\(^{243}\) *Manoussakis and Others v. Greece* (18748/91) [1996] ECHR 41  
\(^{244}\) *Ibid.*, at para. 41
they would be allowed as restrictions to other rights protected in the Covenant, such as national security.” Limitations in Article 18(3) “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.” Furthermore, the “restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” In this respect, in interpreting the scope of permissible limitation grounds specified in Article 18(3), the States parties have been encouraged to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 and must not be applied in a manner that would vitiate the rights guaranteed in article 18.

4.2.2 Religious Freedom and Shari’ah Law

Since the adoption of UDHR and its two subsequent International Covenants, the idea of religious freedom, whether it is right to practice one’s religion or abandon or convert to other religions has been a source of ideological dispute. This ideological dispute mainly stems from the fact that the idea of religious freedom has been heavily challenged and criticized by the majority of the Islamic States. The underlining argument made by the Islamic States is based on a notion that right to one’s religion – converting from Islam to any other religion – is in contradiction with the principles of Shari’ah Law.

245 General Comment on Article 22 (Article 18), Supra note 232 at para. 8.
246 Ibid.,
247 Ibid.,
248 Ibid.,
As alluded earlier, religious pluralism always existed under the legal framework of Shari’ah Law, however non-Muslim minorities have never achieved full religious liberty, they are relatively free in their choice of religion. For these religious minorities living in Islamic States there is no prohibition or punishment should they decide to convert to any religion. The non-Muslim minorities are also free to convert to Islam. Islamic States for the most part highly encourage those non-Muslim minorities to convert to Islam. However, the most problematic issue is when a Muslim wishes to convert to any other religion. This act then will be viewed as if he or she has revolted against God and so he or she will, as an apostate, encounter severe social and legal sanctions in many Islamic states. The term apostasy (In Arabic: *ridda*) means abandonment or renunciation of a religious faith. While the religious principle in Islam holds that “there shall be no compulsion in religion”, yet the Quran is silent on the punishment for apostasy. However, for the most part, the traditional Islamic law enforces harsh penalties for apostasy under the rules of Islamic criminal law; these include the death penalty for men and life imprisonment for women. This attitude is of course influenced by Shari’ah view that conversion from Islam is an action that is forbidden, also known as Haram, and it should be the duty of every Islamic States to enforce the punishment as required under Islamic criminal law.

It should however be noted that such a model confinement on religious freedom to change or abandon one’s religion has also been imposed in many other religions. The idea of religious freedom in terms of freedom of conscience and the right of individuals to challenge the religious teachings or religious authorities or to choose religious convictions other than Christianity or any form of non-religious convictions was strongly denied and prohibited, especially in its Orthodox and Catholic religious traditions. It was actually in 1965 that the Declaration on Religious Freedom of Vatican II that the Roman Catholic Church - Vatican Council - under the leadership of Pope Paul VI, declared that”

> the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is

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250 Quran: Verse 2:225.
251 Rehman, *Supra* note 63 at 36.
to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.”

The Vatican Council further declared:

The freedom or immunity from coercion in matters religious which is the endowment of persons as individuals is also to be recognized as their right when they act in community. Religious communities are a requirement of the social nature both of man and of religion itself. Religious communities also have the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferral of their own ministers, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties. In addition, it comes within the meaning of religious freedom that religious communities should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity. Finally, the social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable and social organizations, under the impulse of their own religious sense.

It is one of the major tenets of Catholic doctrine that man’s response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his own will.

It should be noted that the Vatican Council on Declaration on Religious Freedom acknowledged that religious freedom is “necessary to fulfill their duty to worship God”, it however did not aim to make drastic changes to Roman Catholic religious teachings, since, it left the traditional Catholic doctrine untouched on the moral duty of men and societies toward the true religion and toward the one Church of Christ. In other words, the Vatican Council on Declaration on Religious Freedom, while upholding the earlier Catholic tradition, affirmed the right of religious freedom to be recognized and made effective in practice.

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253 Ibid., at para. 4.
254 Ibid., at para. 10.
255 Ibid., at para. 1.
256 Ibid., at para. 6.
Unlike Christianity, the freedom of changing religion in Islam is heavily restricted and is still an evolving issue. For the most part, it can be argued that the discourse on freedom of religion in Islam has evolved based on the two potentially opposing religious doctrines, namely those that believe that traditional Islamic law strictly forbids Muslims to convert to any other religion and any deviation from this rule should be punishable under the realm of “apostasy”. For instance Abul Ala Maududi, a prominent religious and political figure in Pakistan in his famous book titled “The Punishment of the Apostate According to Islamic Law”\(^{257}\) defends the traditional Islamic views on apostasy and states that:

In any case the heart of the matter is that children born of Muslim lineage will be considered Muslims and according to Islamic law the door of apostasy will never be opened to them. If anyone of them renounces Islam, he will be as deserving of execution as the person who has renounced \textit{kufr} to become a Muslim and again has chosen the way of \textit{kufr}. All the jurists of Islam agree with this decision. On this topic absolutely no difference exists among the experts of \textit{shari’ah}.\(^{258}\)

According to Abul Ala Maududi, if we deem Islam as a religion in the way that religion is understood at our modern time, then one can argue that it would be unjust to prescribe the penalty of execution for those people who wish to leave Islam because of their dissatisfaction with its principles.\(^{259}\) However Maududi argues that Islam is “not only a religion in the modern technical sense of that term but a complete order of life.”\(^{260}\) Furthermore, according to Maududi, Islam “not only to the metaphysical but also to nature and everything in nature; it discourses not only on the salvation of life after death but also on the questions of prosperity, improvement and the true ordering of life before death.\(^{261}\) In other words, Maududi believes that Islam “is not a belief which is concerned only with some remote phase of life”, but “rather, it is that belief on whose foundation a plan for the whole of life rests.”\(^{262}\) Therefore, no one person “may choose with only the concern of the individual in mind”, but rather “it is that faith on the basis of which

\(^{257}\) Mawdudi, Abul Ala. \textit{The Punishment of the Apostate According to Islamic Law}, trans. by Syed Silas Husain and Ernest Hahn, 1994, online: http://answering-islam.org/Hahn/Mawdudi/

\(^{258}\) \textit{Ibid.},

\(^{259}\) \textit{Ibid.},

\(^{260}\) \textit{Ibid.},

\(^{261}\) \textit{Ibid.},

\(^{262}\) \textit{Ibid.},
a society of people establishes a complete order of a civilization in a particular form and brings into existence a state to operate it.”

However, no individual nor can the society have the authority or permission to enter or go at will. For Maududi those who object to the punishment of the apostate, they make their argument while “bearing in mind only a single "religion", in contrast, those who argue for the support and validity of apostasy punishment, they rightfully “view no mere religion but a state which is constructed on a religion and the authority of its principles rather than on the authority of a family, clan or people.”

It is for this reason that Maududi believes that none of Islam's penal laws should be applied when the Islamic state does not exist. However, according to Maududi “where religion itself is the ruler, where religious law is state law, where religion has taken into its own hands the responsibility of maintaining peace and order”, the ruling religion has the “right to punish those who have promised loyalty and obedience to it and then turn away.”

Similar arguments have been voiced by other Islamic scholars such as Mohammad al-Ghazali, in which he believes that death penalty of an apostasy is a “protective and preventive measure for an Islamic State” against its “stands towards external enemies.” For this reason, the crime of apostasy in Ghazali’s view is synonymous with the crime of high treason and punishable by death. Sayyid Muhammad Rizvi also equates the crime of apostasy “equal to treason” since the conversion is not merely matter of exercising the freedom of faith but rather it is viewed as jeopardizing the establishment of Islamic State.

There are however many oppositions who are of the belief that the death penalty for apostasy is not only in conflict with current international human rights norms but it is in conflict with the basic principles of Islam. To briefly elaborate on the reasoning of the disagreement on

263 Ibid.,
264 Ibid.,
265 Ibid.,
the death penalty for apostasy, it has been argued that while the early Muslim community, established by Prophet Muhammad and his subsequent successors, were in constant war with non-Muslim enemies, any conversion from Islam to other religions, in particular those of the enemies were deemed not only submission to enemies of Islam but also equated to the crime of “treason” since they would jeopardize the establishment of Islamic State. It is therefore been argued that we should now “distinguish between passive apostasy and apostasy accompanied by a threat to Islamic State.” Based on this argument, an apostate should not be simply put to death merely on the ground of his apostasy, but where apostasy has been accompanied with the crime of treason which aims to endanger the establishments of the State it is punishable, but not on the grounds of apostasy but rather on the ground of treason or any serious offence against the establishment of the State.

4.2.3 Apostasy Cases

For the most part it can be argued that the crime of apostasy in Islam has served as a religio-political tool to protect the establishment of the Islamic State by which it closed the door on freedom of conversation from Islam to any other religion on Muslims. As it will be made evident in the following cases Islamic jurisprudence has failed to address the underlying problem with a key contextual definition and the nature of apostasy. More importantly, it seems there has been much negligence by Islamic religious scholars in contemplating, deliberating and perhaps reinterpreting a vast amount of Quranic versus and Hadith which deals with apostasy and religious freedom in Islam.

It seems, however, that the vast majority of Islamic religious scholars have placed a huge emphasis on the death penalty for apostasy. For instance, there a number of Hadith which have been largely quoted as a justification for the death penalty for apostasy and they have been collected.

268 Eltayeb, Supra note 55 at 192.
269 Eltayeb, Supra note 55 at 192.
Allah's Apostle said, "The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims." ²⁷⁰

Ali burnt some people and this news reached Ibn 'Abbas, who said, "Had I been in his place I would not have burnt them, as the Prophet said, 'Don't punish (anybody) with Allah's Punishment.' No doubt, I would have killed them, for the Prophet said, 'If somebody (a Muslim) discards his religion, kill him.' " ²⁷¹

A man embraced Islam and then reverted back to Judaism. Mu'adh bin Jabal came and saw the man with Abu Musa. Mu'adh asked, "What is wrong with this (man)?" Abu Musa replied, "He embraced Islam and then reverted back to Judaism." Mu'adh said, "I will not sit down unless you kill him (as it is) the verdict of Allah and His Apostle. ²⁷²

It should be noted that all the above mentioned Hadiths were transmitted by Prophet Mohammed by one individual and not by two or more people. For this reason such a hadiths are commonly been referred as “‘ahaad” hadith meaning that a particular hadith has been narrated by one individual and so according to Islamic law a “‘ahaad” hadith cannot fulfill the threshold of mutawatir. A mutawatir, or a 'successive' narration “is one that has been reported by a significant, though unspecified, number of narrators at each level in the chain of narration, thus reaching the succeeding generation through multiple chains of narration leading back to its source.” ²⁷³ Therefore, according to Islamic law, mutawatir “provides confirmation that the hadith is authentically attributed to its source at a level above reasonable doubt” and it is mainly due to the fact that “it’s being beyond historical possibility that narrators could have conspired to forge a narration”. ²⁷⁴ Unlike mutawatir the “‘ahaad” hadiths have not satisfied the chain of narration to qualify as mutawatir. ²⁷⁵ Although the authority of the “‘ahaad” hadiths has not been disputed, but it can certainly be argued that using “‘ahaad” hadiths as a sole justification to bring

²⁷⁰ Sahih al-Bukhari: Volume 9, Book 83, Number 18, online: http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/083.sbt.html
²⁷¹ Sahih al-Bukhari: Volume 4, Book 52, Number 260, online: http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/052.sbt.html
²⁷² Sahih al-Bukhari: Volume 9, Book 89, Number 271, online: http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/089.sbt.html
²⁷⁴ Ibid.,
²⁷⁵ Ibid.,
the death penalty for apostasy is at least problematic due to its nature as it failed to satisfy the threshold of *mutawatir*.

Furthermore there are many versus in the Quran which deals with the issues of apostasy while they do not indicate that the Quran promotes the death penalty for apostasy, but rather it promotes freedom of faith. For instance the Quran says that:

> There shall be no compulsion in [acceptance of] the religion.  
> 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?

Perhaps those who disbelieve will wish that they had been Muslims.

Let them eat and enjoy themselves and be diverted by [false] hope, for they are going to know.

And say, "The truth is from your Lord, so whoever wills - let him believe; and whoever wills - let him disbelieve."

There are also indications in the Quran that one can convert from Islam and then convert to Islam and then again convert to other religions time and time again without being subject to the death penalty for apostasy.

Indeed, those who have believed then disbelieved, then believed, then disbelieved, and then increased in disbelief - never will Allah forgive them, nor will He guide them to a way.

Perhaps one of the most notable cases on apostasy is a Sudanese case about a controversial political dissident and Islamic reformist Mahmoud Mohammed Taha who was convicted by a Sudanese court of the crime of apostasy and executed on 18 January 1985. Taha and a number of other intellectuals formed the Republican Party in the October of 1945 which later became known as the “Republican Brothers”. Taha’s goal was to promote a new conception of Islam which reflects a modern ideology based on the notion of equality of all people.

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276 Quran 2:256.
277 Quran 10:99.
278 Quran 15.2
279 Quran 15.3
280 Quran 18.29
281 Quran 4: 137
irrelevant of their sex or religious belief. According to Taha “Islam must be introduced and discussed, not simply as a faith or an historical body of jurisprudence, but as a modern and living ideology capable of convincing Moslems [Muslims] and non-Moslems [non-Muslims] alike. It must also be available for immediate and effective implementation in the technologically developed and politically conscious but thoroughly unstable world of today.” Taha therefore, opposed the Islamic fundamentalism and implementation of traditional Shari’ah law as they deemed traditional interpretation of Shari’ah law a “distortion of real Islam” as Taha understood. In his book titled “Towards the Second Message of Islam” Taha asserts that the religion of Islam embraces “other religions and secular socio-political theories in that it accepts and provides for realisation of the essence of the entire body of religious and human thinking.”

According to Taha, the Meccan verses, which chronologically are the earlier verses of the Quran (revealed to the Prophet Muhammad in the city of Mecca), are remarkably tolerant of non-Muslim while promoting the monotheistic way of worshiping god, where as the Medinan Quranic verses (revealed to the Prophet Muhammad in the city of Medina) mainly concern “social legislation and the political and moral principles” while setting a new standard in dealing with non-Muslims and freedom of religion. O’Sullivan in his article titled “The Death Sentence for Mahmoud Muhammad Taha: Misuse of the Sudanese Legal System and Islamic Shari’a law?” argues that any laws from Meccan verses that appeared to be inconsistent with those in Medinan verses have commonly been held by Islamic scholars if they have “been repealed or abrogated to the latter in the legal definitions and interpretations.”

The Meccan verses, while still valid, have no weight or legal binding, since the majority of Muslim religious scholars have commonly held that this is the situation to be maintained in Shari’a law.
However, for Taha, the abrogation of the original Meccan versus, although repealed by Medinan versus should be deemed as a necessity by the Prophet Muhammad to address the issues related with the establishment of the Islamic State. Therefore, Taha believed that the repeal of the Meccan versus “was purely a temporary suspension until the appropriate context in the future would allow them to be clearly valid for implementation and enforcement.” Taha believed that through time the conditions of societies change and develop; thus should change the Shari’a in a way that it will address the needs of modern days while upholding the freedom of choice and equality for all the individuals despite their sex or religious belief.

During 1956, as Sudan established its independence, the Republican Party with the leadership of Taha actively opposed the incorporation and adoption of the Islamic Constitution. By 1964 during the October revolution and the adoption of the Transitional Constitution the Republican activity campaigned against the so-called “Islamic Constitution” because they believed that an Islamic Constitution derived from traditional Shari’ah law would be contrary to the real teaching of Islam as it violated the women’s and non Muslims’ rights.

In 1968, a number of religious scholars who were sympathisers with Sudanese Muslim Brotherhood organization (a branch of the Muslim Brotherhood in Egypt with the main objective of Islamizing the Sudanese society by institutionalizing Islamic law based on traditional Shari’ah law), brought a case against Taha. The plaintiffs in this case accuse Taha of apostasy which according to traditional interpretations of Shari’ah law is punishable by death. The plaintiffs therefore requested for the declaration of apostasy of Taha, dismantling the Republican Party and movement, and confiscation of their belongings and books. The plaintiffs put evidence forward from Taha’s published books, most notably from, “Treaties on Praying” and “The second message of Islam.” It was argued by the plaintiffs that Taha in his book “Treaties on Praying” had promoted an alternative method of prayer than the conventional prescribed Islamic prayers based on the “practice of constant remembrance of God (dhikr) and deep contemplation (fikr)” in

287 Ibid.,
288 Ibid.,
289 Eltayeb, Supra note 55 at 168.
an attempt to reach “a level of authentic communication with God”\textsuperscript{290} Also evidence was put forward from Taha’s book “The second message of Islam” in which he was accused of promoting a concept of Islam which is alien from the original message of Islam\textsuperscript{291}

Subsequently, in 1968 the Shari’ah High Court of Khartoum held that Taha was an apostate. This judgement was upheld in 1985 by the Special Court of Appeal which confirmed the High Court of Khartoum finding and sentenced Taha and five other accused to death for apostasy. The Special Court of Appeal also held that since Taha was persistent in his apostasy he should be denied the “opportunity to have his death sentence reprieved through repentance and recanting his views.”\textsuperscript{292}

It should be noted that in contemporary Islamic States, those that have maintained or adopted a dual system of secular courts and Islamic courts, such as Nigeria and Libya, the traditional death penalty for apostasy does not exist in their criminal codes; however, the traditional death penalty for apostasy does exist in most Islamic states such as Saudi Arabia and Iran. Moreover, apart from criminal law, apostasy also carries harsh consequences in civil law, which indicates among other things, a convert's marriage automatically becomes null and void, and he or she loses all claims to inheritance as well as the custody of his or her children\textsuperscript{293}. This obviously is contrary to international human rights documents which allow no constraints on persons’ religious beliefs since this is an unqualified freedom.

However, as it has already been noted countries such as Iran and Saudi Arabia are the major opponents of such freedoms. They argue that according to Shari’ah law, Muslims are not allowed to convert from their religion, and if they do they will be executed\textsuperscript{294}. It is noteworthy

\textsuperscript{290} Ibid., at 166
\textsuperscript{291} Ibid., at 169
\textsuperscript{292} The Republican Thought (2011), online: http://www.alfikra.org/index_e.php - Also: Eltayeb, Supra note 55 at 173-181.
\textsuperscript{293} Bielefeldt, Supra note 172 at 587-617.
\textsuperscript{294} Mayer, Supra note 90, at169.
to mention that currently Iran has ratified the ICCPR but is “reserving the right not to apply any provisions incompatible with Islamic Laws”. 295

Blasphemy under Shari’ah law is also punishable. Blasphemy in Islam constitutes speaking in a degrading way about the Prophet Mohammed or the Quran. Although there is no specific punishment mentioned for blasphemy in the Quran, traditionally under Shari’ah law, blasphemy is punishable by death particularly in Afghanistan, Iran and Saudi Arabia. In a recent case in 2006 in Afghanistan, a man was arrested after he converted to Christianity and made degrading remarks about Islam. He was charged with both apostasy and blasphemy and could have faced the death penalty under Afghanistan’s criminal law, but ultimately he was able to flee Afghanistan to Italy 296. Perhaps, the most prominent case on this issue is the case of Ahmed Salman Rushdie the author of “The Satanic Verses” (1988), which caused immediate controversies in Islamic countries, most notably in Iran where the previous Iranian religious leader Ayotollah Khomeini issued a religious edict (Fatwa) calling the work blasphemous against Islam and called for his death. The religious edict (Fatwa) has been renewed by the current religious leader of Iran.

In short it can be argued that while the Quranic verses plea for religious toleration and freedom of religion, yet the crime of apostasy for the most part is punishable by death. Furthermore, it can be argued that the Shari’ah death penalty on apostasy and blasphemy, whether actually proved or not is a direct restriction on both freedom of religion and the freedom of expression which have been enshrined in the UDHR, and other international documents on human rights. As the case on Taha demonstrates, the death penalty for apostasy under traditional Shari’ah law can be easily “susceptible to abuse” 297 and also be used as a tool to eliminate and suppress any moderate or alternative voices in favor of the “freedom of thought, conscious, and

296 BBC News: Afghan convert ‘arrives in Italy., online: http://news.bbc.co.uk/2/hi/south_asia/4856748.stm
297 Eltayeb, Supra note 55 at 182-3.
religion” and of course to “oppress any political opponents” against the religious establishments.\textsuperscript{298}

\section*{4.3 Women, Islam and Equality}

Perhaps one of the most striking and controversial aspects of Islam is the issue of inequality between the sexes which is particularly apparent in traditional Islamic law and even in modern law doctrine. This has contributed to the fact that Islamic societies have been under constant scrutiny particularly by many secular movements both within Islamic societies and Western feminist scholars for constant violation of the rights of women such as women’s restriction to higher education or even basic education, being subject to discrimination to their respective shares in inheritance\textsuperscript{299}, or prohibition from occupying positions in the judiciary such as becoming an adjudicator, and for the most part women in many Islamic countries are subject to the discriminatory practice of polygamy.

As made reference to in Section 2.1, the Paradox of Universalism and Cultural Relativism, one has to bear in mind that Islamic law should be understood in light of the fact that it is the product of social, political and historical factors. As already noted, the Shari’ah is mainly based on the Quran and the Hadith which are oral traditions of the words of the Prophet Muhammad written down by his followers many years after his death. Now it is these interpretations of the traditional practices of 7\textsuperscript{th} and 8\textsuperscript{th} century which have shaped the current social, political and religious practices of the Muslim world. As Dalacoura rightfully asserts, there is nowhere in the Quran that clearly commends women to wear a veil; or to be stoned for adultery; or that women must be secluded or circumcised\textsuperscript{300}. Therefore, one can logically

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\textsuperscript{298} Ibid., at 182.  \\
\textsuperscript{299} Quran (4:11) generally a woman’s share of the inheritance is half of the share of a man. Moreover, Quran (4:12) a widow can inherit a maximum of one-quarter of her husband’s estate if there are no children and a maximum of one-eighth of the estate if there are children.  \\
\textsuperscript{300} Dalacoura, Supra note 17 at 46.
\end{flushright}

conclude that either the Quran was conveniently misinterpreted or completely ignored, to fit the needs of the society.\footnote{Khadduri, Majied, War and Peace in Law of Islam. (Johns Hopkins Press, 1955) at 3.}

It should be also mentioned however, that feminist thinkers, both Western and non-western, strongly agree that the “Spirit of the Quran points toward ultimate equality between the sexes [this is] partly on the grounds that the Quran has indeed improved the position of women in many ways, compared to pre-Islamic Arabia.”\footnote{Dalacoura, Supra note 17 at 47.} For instance with the advent of Islam, the Quran rejected the traditional practice of killing unwanted female infants soon after birth, women also gained the right to inheritance and to own property, and to perform the same religious duties as their male counterparts. Furthermore, the rights Islam conferred to women in the 7\textsuperscript{th} century were more or less the same as the rights that women have obtained in the 17\textsuperscript{th} and 18\textsuperscript{th} centuries in the West.\footnote{For instance: The Married Women's Property Act 1870 was an act of the Parliament of the United Kingdom that allowed women to legally be the rightful owners of the money they earned and to inherit property.} For instance, Islam conferred women with the right to fully attain and dispose her own property such as her dower at her own discretion. The Quran in the An-Nisa (The Women) verse stipulates that, “And give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease.”\footnote{Quran, (4:4). The dower in Islam has been viewed as a symbol of financial independence for women. The dower is to be given to women for her own use with her full right to despise it at her own discretion.}

Nevertheless, despite all the advantages that were granted, there are very limited rights that are acceptable according to internationally accepted standards. As noted above, women in contemporary Islamic states are more or less subject to the same traditional Islamic law and doctrine. In light of this brief exposition, some of the most controversial areas concerning the women in Islam and equality, such as women as an eyewitness, women and Qisas, women and Inheritance in Islam, women and right to divorce, women and polygamy, and women and right to work can now discussed.
4.3.1 Women As An Eyewitness

Women in contemporary Islamic states are still subject to discrimination when it comes to giving legal testimony. Although, different schools of law within Sunni and Shia sects in Islam disagree on the rules concerning serious criminal cases or financial cases, they generally agree that in cases concerning financial transactions the testimony of two adult women is equal to one adult man, and in the case of serious crimes, the testimony of women may not even be accepted. As already noted in section 3.3 entitled “The Islamic Sources”, Hadd refers to those serious categories of crimes that the actual offence and its specified punishment have been specified in the Quran.

For the most part, Islamic law required four male witnesses for crimes such as adultery or chastity\(^{305}\) while it only requires two male witnesses for other criminal offences. The Quran has also instructed that “if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her.”\(^{306}\) Also in the At-Talaq (Divorce) verse the Quran stipulates “And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah.”\(^{307}\) Generally, it has been argued that the women should be disqualified due to their mental nature. For instance, according to Siddiqi women should be disqualified due to their “weaknesses of understanding want of memory and incapacity of governing.”\(^{308}\) It should however be noted that the Quran, in some situations, such as an accusation of adultery or chastity against the wife by the husband, has given equal weight to a women’s testimony. In fact in an occasion that the husband cannot produce four witnesses but instead solemnly swears five times before the judge as evidence for

\(^{305}\) Quran, (24:2).
\(^{306}\) Quran, (2:282).
\(^{307}\) Quran (65:2)
his wife's guilt, the wife who has been accused of chastity can in return invalidate his testimony by equally solemnly swearing five times.  

4.3.2 Women and Qisas (retaliation)

Qisas meaning retaliation is a Hadd punishment prescribed under Shari’ah law. Under Qisas the aggravated party or the immediate family (the heirs) in the case of murder can demand the right of retaliation which is based on the maxim of “an eye for an eye”. For the most part under Qisas the injured party can demand to inflict a similar harm or injury against the aggressor as it was the case in the recent Iranian case in which a young woman was blinded by a man who she rejected to marry. The young woman was blinded by an acid attack in her face. In return she demanded that the attacker be similarly blinded by dropping acid drops in his eyes as well. The Quran has instructed that “And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him.” The Quran further stipulates that “O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female.” It should however be noted that although the Quran takes the crime of murder very seriously as it equates intentional murdering of a person like murdering the whole of mankind, however, under the ambit of Shari’ah law, unlike other systems of law, the claimant in the case is not the Islamic government, but the family of the murdered person. It is therefore up to the family of the murdered person to demand Qisas from the court and then the Islamic government implements the Qisas.

Both the Quran and Hadith, call for forgiveness and pardon, however, on certain occasions the aggravated party or the immediate family of the murdered person can demand

309 Quran (24: 2 to 24:9)
310 Eye for an eye: Iranian man sentenced to be blinded for acid attack, online: http://www.guardian.co.uk/world/2008/nov/28/iran-acid-attack-sharia-law
311 Quran, (5:45).
312 Quran, (2:178).
313 Quran, (32:5).
“blood money”. The blood money has commonly been used in murder cases in where the murderer is obligated to pay to the family (the heirs) of the deceased. The Quran also stipulates that, “but whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct.”\textsuperscript{314}

The problematic point with blood money is it is often deemed to be discriminatory towards women. Under the ambit of Shari’ah law the blood money of a woman is almost half of a man regardless of the social status the woman. For instance, if the murderer is a woman the family of murdered person can demand Qisas for the killing regardless of whether the murdered person is a man or woman. However if the murderer is a man and the murdered person is a woman, the family of the murdered woman can only demand Qisas for killing him, when they pay half of the value of blood money for a man stipulated by the court to the family of the man.

\subsection*{4.3.3 Women and Inheritance in Islam}

The Quran has clearly provided the set of rules for inheritance. There is also a difference between a man’s and a woman’s shares of inheritance. Generally, a woman’s share of the inheritance is half of the share of a man\textsuperscript{315}. Therefore, if a deceased person has a son and a daughter, the son’s share of the inheritance will be twice as much as his sister. This, of course has been justified by arguing that men are the breadwinners of the family, whereas women are not. It has also been argued that women will ultimately get married, and so their husbands will be in charge of their financial welfare.

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\textsuperscript{314} Quran, (2:178).
\textsuperscript{315} Quran (4:11): “Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.”
\end{flushright}
4.3.4 Women and Right To Divorce

The basic rules of divorce have been stipulated in Shari’ah, however there is a strong divergence between major Islamic jurisprudence. Generally, termination of a marriage can be realized through one of three means. One, a marriage can be terminated at the husband’s request through *Talag* (Repudiation) which is an Arabic term for divorce. According to Shari’ah based Islamic marital laws, in general circumstances, the right to divorce has primarily been granted to men. Two: there are occasions that divorce can be initiated at a wife’s request. The process under this category is called Khul. The legal base of Khul is based on the two verses which the Quran has stipulated, “Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers.”

Further, the Quran has indicted that, “And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah - then indeed Allah is ever, with what you do, Acquainted.” However, the extent and strictness of the rules which govern the circumstances where women can dissolve the marriage vary among Islamic States. Over all, there are very limited circumstances where a woman can seek divorce, and they mainly are limited to situations where her husband refuses to satisfy her financial need or in a situation where there is a serious death threat or physical injury from her husband. For

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316 Quran, (2:229).
instance in the case of *Khurshid Bibi v. Muhammad Amin*\(^{318}\) the Supreme Court of Pakistan citing the Quran verse of 2:229 conferred the right to seek *Khul* divorce to women in situations of irretrievable breakdown of the marriage without requiring the consent of the husband. The third way of termination of marriage would be through the court order for termination of marriage which also is called *Faskh* (Judicial Termination). The court order of *Faskh* can be rendered in occasions such as when the husband converts (apostasy) from Islam.\(^{319}\)

### 4.3.5 Women and Polygamy

Lastly, and perhaps one of the most striking and controversial discriminations towards women is that they are subject to polygamy under the rules of Shari’ah law. Many justifications for legitimizing this discriminatory practice have been put forward by many Muslim religious scholars (*Ulema*). They predominantly base their justification on the argument that polygamy has been established to preserve the woman’s respect, honour and dignity. They argue that even in modern societies, females are outnumbered by males and this is mainly due to wars, therefore, in such a situation, by allowing polygamy “some of the ills of modern society”\(^ {320}\), [prostitution] will be solved in a noble way. This is exactly the reason Muhammad married his wives; many of those women were war widows.

It is important to bear in mind an important distinction that although, the practice of polygamy legally permitted and to the lesser extent is a socially accepted phenomenon within Islam, the practice of polygamy as Pohl rightfully arrested, is nether mandatory nor has it ever been encouraged, but rather has been permitted under the ambit of Shari’ah law.\(^ {321}\)

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\(^{318}\) *Khurshid Bibi v. Muhammad Amin* (1967) PLD SC 97.

\(^{319}\) Shari law enforced civil death penalty for men who converts, meaning, among other things, the apostate’s marriage will be dissolved.


Currently however, a number of Islamic States have banned or have limited the scope of polygamy, yet traditional Islamic Law is still practiced all throughout the Islamic world. For instance in Turkey, polygamy is banned and is punishable. This practice was restricted in 1917 and subsequently banned with the adoption of the *Turkish Civil Code* in 1926. The most famous robust and daring reform in rejecting polygamy was made in Tunis. In 1956, soon after the proclamation of independence from French colonial rule, the Republic of Tunisia promulgated the Code of Personal Status (CPS) which aimed to regulate family and inheritance law. The CPS for the first time in the Arab world, outlawed polygamy and abolished gender inequality while relying on Islamic religious sources and Islamic jurisprudence. As previously noted, Islamic law permits polygamy, though the maximum number of wives a man can marry is limited to four. Thus the Tunisian government ban on polygamy was viewed as a contradiction to Shari’ah law, however, as Emon rightfully asserted, Tunisia by relying on Quranic versus which provides, “and you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]”, were able to accommodate and balance between liberal values and Islamic values.

Therefore, the rational was made on principle of justice that although polygamy is permitted under the rules of Shari’ah law, yet “no man could possibly be just to more than one wife under modern conditions of life”. In this respect the Quran stipulates that, “[...] if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those right hand possesses. That is more suitable that you may not incline [to injustice].”

Despite all the justification presented, one can certainly make a compelling argument that polygamy is an absolute violation of the human rights of women as it is in contradiction with the basic principle of equal rights between men and women. It is not only easy to manipulate and to

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322 In Turkey and Tunis polygamy is banned and punishable. This practice was restricted in 1917 and subsequently banned with adoption of *Turkish Civil Code* in 1926.
323 In Iran the scope of polygamy has been restricted in a way that the consent of first wife is required for the second marriage.
324 Quran, (4:129).
325 Emon, *Supra* note 160 at 419.
327 Quran, (4:3).
abuse, it also violates the honour and dignity of women, and subordinates them as second class citizens. Further, with the exception of a number of Islamic countries\textsuperscript{328}, the majority of Islamic States have not regulated the practice and so the practice of polygamy has been widely abused.

4.3.6 Women and the Right to Work

Although, women for the most part are free to attain higher education and to work in their own choice of field, however, for the most part they are restricted from involvement in politics and political office and prohibited from judicial decision making appointments such as being magistrates or judges. A religious opinion (fatwa) by the Al-Azhar University, concerning the 1952 women’s movement and demand for the right to vote and political appointment for the parliament can shed light on such restrictions for women\textsuperscript{329}. According to this religious opinion, women should not be permitted entry into the legislative sphere for the following reasons:

- The mental power of women is insufficient;
- The femininity of a women makes her irrational;
- The testimony of one man is equal to the testimony of two women;
- Islam gives the role of management to men and the role of implementation to women;
- Public functions were assigned to men who posses certain characteristics.\textsuperscript{330}

Women are also prohibited from judicial decision making appointments such as being magistrates or judges, by the reason of their weak and sympathetic natures. For instance women in the Islamic Republic of Iran are excluded from magistracy since women are considered to be

\textsuperscript{328} Currently in Iran, the consent of first wife required for the second marriage. Turkey on the other hand has prohibited the practice of polygamy.
\textsuperscript{330} Ibid.,
unsuitable for the position.331 The prime example of this is Ms. Shirin Ebadi, who was the first female judge in Iran and was forced to relinquish her position as a judge and so she was demoted by the Minister of Justice of the Islamic Republic of Iran after the 1979 Iranian revolution based on the belief that women are not suitable for such positions.

While most of the Islamic States support the view that women should be excluded from the political sphere and a magistrate’s position, there is however a very limited number of Islamic States that support the view that woman should not be prohibited to choose their profession including magistrate’s positions. For instance, in the Islamic Republic of Pakistan women are allowed to run for political office and are appointed as judges. In a famous Pakistani case, *Ansar Burney v. Federation of Pakistan*332 that was decided by Pakistan’s Federal Shariah Court, it was held that it is not possible to infer from either the Quran or the Sunnah that women are barred from being appointed as judges under Shari’ah law. The petitioner in this case, Ansar Burney challenged the appointment of women as judges or magistrates on the grounds that women could not fulfill their duties as judges according to the established Shari’ah law principles; that because at the time of Prophet Muhammad and his successors (also known as Caliphs) the duties of judges were never entrusted to a women, and because according to Ansar Burney, there is evidence under Shari’ah law that the testimony of a woman was half that of a man and a sister’s share in inheritance is equal to half of her brother, and the judgment of two women can only be equivalent to a single man.333

The Court dismissed the petition arguing that “there is no law or custom or usage having the force of law for or against the seclusion of women”.334 The Court further argued that the rules of evidence cited by the petitioner, concerning the rules of testimony and inheritance of women cannot be interpreted that two women judges should be in place of a single male judge.335

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mean that no single male judge sitting alone can decide a civil or criminal case involving Qisas or Hadd punishments because according to Islamic jurisprudence (fiqh) in cases other than that of adultery in which four eye witnesses are required to prove the offence, at least two male witness is required. With respect to the petitioners’ argument concerning the different inheritance rules for males and females, the Court opined that this had no bearing on women being appointed as judges, since the differential shares can be explained by the reason that Islam deems men as “provider and protector”. In other words, according to the Court, it can be argued that the higher portion of inheritance to a male is due to its “liability to maintain” and support “his wife and children and to look after the latter's training and education” and “not due to any superiority over the female.” Similarly, the Court also disagreed with the petitioner argument for excluding women from appointment as judges, solely by relying on the fact that the Prophet Muhammad and his successors (caliphs) did not entrusted the duties of a judge to women. According to the Court, this cannot be interpreted as grounds for denying women for such judgeship positions. Lastly, the Court by citing a substantial amount of evidences from both the Quran and Sunnah, concluded that there is no specific or direct injunctions in the Quran or the Sunnah against the prohibition of women to participate in the political sphere or to be barred from being appointed as judges. Therefore, the only area of contention, according to the Court, are the conflicting opinions of Islamic jurists on the suitability of women for the position and that cannot be used a ground for the petition.

5. International Islamic Human Rights Documents

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336 Ibid.,
337 Ibid., at paras 29, 30 and 31.
338 Ibid., at paras 30.
339 Ibid., at para 37.
340 Ibid., at para 77.
341 Ibid., at para 4.
342 Ibid.,
Since the formation of the United Nations (UN) in 1945, there has been unprecedented expansion in the promotion and protection of human rights though international human rights laws, both internationally and regionally. At the international level instruments such as the Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (ICCPR) (1976) and its First Optional Protocol to the International Covenant on Civil and Political Rights (1976); The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976); The International Convention on the Elimination of All Forms of Racial Discrimination which was ratified by the General Assembly resolution 2106 (XX) on 21 December 1965. The regional intergovernmental organizations have also been promoted by the UN to play a major role in human rights protection. Regional arrangements have thus far been established within the three existing regional intergovernmental organizations in Africa, Europe, Inter-America,\(^{343}\) In the case of Africa, the relevant arrangement is located within the African Union (AU)\(^{344}\), formerly the Organization of African Unity (OAU). The founding instrument is the *African Charter on Human and Peoples’ Rights* signed in 1981 which seeks to promote and protect Human rights and basic freedoms in the Africa\(^{345}\). The regional human rights mechanism for the Americas is located within the Organization of American States (OAS), and is based on the *American Convention on Human Rights* which was adopted by the nations of the Americas in Costa Rica\(^ {346}\), and lastly, the European human rights system which its founding instrument is the *European Convention on Human Rights*\(^ {347}\) signed in 1950.\(^ {348}\)

Similarly, the Islamic States have also formulated a number of regional documents in an attempt to justify their perspective and their stance on the issue of human rights in Islam. The most notable document on Islamic human rights are: “Human Rights in Islam”, by: Allamah Abu al-'A'la Mawdudi, “A Muslim Commentary on the Universal Declaration of Human Rights” by:

\(^{344}\) United Nations Treaty Series. online:  http://www.africa-union.org/
\(^{345}\) United Nations Treaty Series. online:  http://www.achpr.org/english/_info/charter_en.html
Sultanhussein Tabandeh, The Universal Islamic Declaration of Human Rights (UIDHR), The Cairo Declaration of Human Rights in Islam (CDHRI) and, Arab Charter on Human Rights. 

As it will be evident in the proceeding discussions, all these documents not only hold Shari’ah Law supreme but they also created a united legal framework through which they enjoy the popular support among both Sunni and Shi’i Muslims. As pointed out in Chapters three and Four, that there are many different and sometimes contradictory interpretations of Islamic primary sources, the Quran and Sunnah and despite all the divergence in interpretation of the Quran and the Sunnah, which has developed by major Islamic legal schools, such as Sunni, Shia, and Sufism Muslims, those interpretations have shaped and developed the legal jurisprudence in Islam.

The proceeding analysis offers a critical evaluation of the above mentioned Islamic human rights documents which have been wildly recognized among Islamic States. As it will be noted, all these documents in their totality are based on the principle of Shari’ah Law. The aims of these documents are to demonstrate the compatibility and perhaps the superiority of Islamic law over international human rights documents. In other words, this is an attempt by the participating Islamic States to present an Islamic human rights perspective as an alternative to the international human rights laws. It will be made evident, there is a general theme in all these Islamic human rights documents and that is to justify their rejection and hostility towards the international human rights norms by arguing that Islamic States can only be bound to international human rights laws to the extent they are in accord with Shari’ah law.

The aim of this chapter is to offer a careful evaluation of the above mentioned documents in order to assess the extent of their conformity with international human right documents with a great emphasis on the controversial issues such as non-Muslim minorities in Islam, religious liberty and beliefs in Islam and the equality between the sexes in Islam that have already been discussed in the previous chapter.

It is vitally important to bear in mind, that since any critical analysis of the Islamic legal system should be considered in the context of its traditional understanding of Shari’ah law,
therefore, the previous overview in chapter two and three were deemed necessary for the purpose of the evaluation of the following Islamic human rights documents in an attempt to assess their compatibility with universal human rights norms.

5.1 “Human Rights in Islam", by: Allamah Abu al-'A'la Mawdudi (1976)\textsuperscript{349}

Mawdudi is one of the most prominent Sunni Islamic scholars. He was born in India into a Sunni Muslim family later moving to Pakistan where he organized a political group called, \textit{Jama'at-e-Islami}. The aim of this political group was to reinstate Shari’ah law and establish a “true” Islamic state in Pakistan. Mawdudi strongly believed that without Shari’ah law no Muslim society can be truly be called Islamic, because if an Islamic society “decides to enact its own constitution and laws or borrow them from any other source in disregard of the Sharia, such a society breaks its contract with God and forfeits its right to be called ‘Islamic’”.\textsuperscript{350}

Mawdudi, has also published hundreds of books and pamphlets on Islam and human rights. Some other of his works on Islam include, \textit{Islamic Way of Life} (1948), \textit{Khutabat: Fundamentals of Islam} (1988), and \textit{Towards Understanding Islam} (1979).\textsuperscript{351} His books have not only been widely read and translated into several languages including English and Arabic, but also have earned him a reputation as an excellent scholar on Islamic discourse. There is no doubt that his works will always remain influential and his beliefs will be followed for generations as they are holy writ.

\textsuperscript{349} Mawdudi, \textit{Supra} note 15.
\textsuperscript{350} Mawdudi, Abul Ala, \textit{Islamic Law and Its Introduction}. (Islamic Publications, LTD, 1955) at13-4; and Mayer, \textit{Supra} note 84 at 67.
\textsuperscript{351} Towards Understanding Islam has been has been translated into 13 languages.
Perhaps, one of his most prominent works is entitled “Human Rights in Islam” which is mainly a collection of his speeches, was later complied and drafted with the aim to become a legal document for all Islamic countries.

This book, “Human Rights in Islam” is divided into four main chapters. The first chapter demonstrates a comparative analysis of both Western and Islamic human rights approaches. The aim in this section is to establish that Islamic Shari’ah based human rights are an ideal system while immensely criticizing the Western approach. In the second section, Mawdudi outlines a number of the “Basic Human Rights” such as the “right to life” and the “right to the safety of life”, and “respect for the chastity of women”. The third chapter deals with the “Rights of Citizens in an Islamic State”. In this last chapter, Mawdudi describes the “Rights of Enemies at War”, such as protection of torture, protection of the wounded and protection of prisoners not to be slain. It is important to note that, the rights mentioned in the final chapters were not discussed under the heading of “Basic Human Rights”, which make it questionable if these categories of rights should nevertheless to be considered as human rights.

In the proceeding paragraphs, the first three chapters will be discussed with the exclusion of the final chapter since the issues discussed in that mainly fall under the remit of International law.

Mawdudi begins the first chapter, titled “Human Rights, The West and Islam” by presenting his readers with four rather short paragraphs to distinguish the Islamic approach from the Western approach. He distinguishes the two approaches by stating that “Islamic human rights have been conferred by God and so no legislative assembly in the world, or any government or authority can make any amendment, change or abrogate them”\(^{352}\). Western human rights he claims “were given on paper” and have no sanctions, no force, physical or moral behind them to enforce them\(^{353}\). To prove his point, he refers to a number of human rights violations in the Middle East and in India, and argues the lack of any positive action by the UN except being a

\(^{352}\) Mawdudi, Supra note 15, (1976: Chap. 1).

\(^{353}\) Ibid,
“helpless spectator”\textsuperscript{354}. He further claims that human rights in the West are mainly conferred by kings and legislative assemblies and so those rights can be simply withdrawn when the kings and legislative assemblies wish.\textsuperscript{355} However, for Mawdudi the human rights in Islam have always been enshrined in Shari’ah law and indeed the roots of these rights are to be found in Islamic doctrine, and since they are part of the Islamic faith every Muslim has to accept them, recognize them and enforce them\textsuperscript{356}.

From this short evaluation of the first chapter, it seems that for Mawdudi the concern is to convince his readers to accept the traditional Islamic law of human rights and “abandon all references to the allegedly derivative Western concept of human rights”\textsuperscript{357} rather than trying to present any sort of argument that would resolve the inconsistency between Shari’ah law and the international human rights model.

Having said this, Mawdudi proceeds to the second chapter of his book and outlines eight basic human rights, which according to him “Islam has laid down for men as a human being”\textsuperscript{358}. The right to life is enshrined in Article 3 of the UDHR and Article 6 of the International Covenant on Civil and Political Rights, however, for Mawdudi the right to life has only been truly enshrined in Islam\textsuperscript{359}. According to Mawdudi, Western human rights “have no respect for human life and are only valid on the basis of nationality, colour or race”\textsuperscript{360}. In order to prove his point, Mawdudi lists a number of historical human rights violations in the West, among them the killing of Aboriginals in America and Australia. Although there is no dispute with respect to the historical evidence that he presents, he fails to accurately describe the superiority of Islamic human rights, since similar human rights violations can also be found in Islamic countries as well, most notably the persecuting of non-Muslim minorities for practicing their own religion. Furthermore, under the mandate of Shari’ah law, the right to life does not apply to crimes such as murder, or spreading mischief and apostasy. Although the Quran is silent on the punishment for

\textsuperscript{354} Ibid.,
\textsuperscript{355} Ibid.,
\textsuperscript{356} Ibid.,
\textsuperscript{357} Mayer, \textit{Supra} note 90 at 73.
\textsuperscript{358} Mawdudi, \textit{Supra} note 15, (1976: Chap. 2).
\textsuperscript{359} Ibid., “The right to life”
\textsuperscript{360} Ibid.,
apostasy, Shari law enforces the civil death penalty for men, meaning the apostate’s marriage will be first dissolved and then under the mandate of Shari law he will be punished by death for the crime of blasphemy.

For Mawdudi, other important human rights granted by Islam include the “Right for the Chastity of Women” which he argues has to be “respected and protected under all circumstances”\(^\text{361}\). According to Mawdudi, there is no difference whether she is Muslim or not, lives in an Islamic State or not, because under no circumstances she can be outraged\(^\text{362}\). He further argues that this “concept of sanctity of chastity and other rights of the protection of women cannot be found anywhere else except in Islam”\(^\text{363}\).

Although the right of chastity of women has not been mentioned exactly under the same heading elsewhere in international human rights documents, one can certainly make a compelling argument that the right has been understood and inherited within the body of those international documents. Moreover, as previously indicated in section 4.3\(^\text{364}\), there are far more complicated issues with respect to the rights of women which he fails to address. For instance, women are generally subject to the law which discriminates against them in their respective shares in inheritance, women are still prohibited from occupying positions in the judiciary, and the fact that in the majority of modern Islamic societies polygamy is a legal practice under Islamic marital jurisprudence and women in majority of cases, regardless of their wishes, are forced into marriage. Nonetheless, Mawdudi has clearly failed to present any justification for upholding and safeguarding these inequalities or even to provide any minimal rights for women in that respect.

One other problematic area in the second chapter of his book is where he discusses the “Equality of Human Beings”. He argues that “Islam not only recognizes absolute equality between men irrespective of any distinction of colour, race or nationality, but makes it an

\(^{361}\) Ibid.,
\(^{362}\) Ibid., “Respect for the Chastity of Women”.
\(^{363}\) Ibid., “Respect for the Chastity of Women”.
\(^{364}\) Please refer to section 4.3 “Women, Islam and Equality”.

important and significant principle, a reality". The equality of human rights has also been
enshrined in the UDHR Article.2 which asserts, “everyone is entitled to all the rights and
freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex,
language, religion, political or other opinion, national or social origin, property, birth or other
status.”

However, comparing Mawdudi’s “Equality of Human Beings” with Article 2 of the
UDHR, reveals that Mawdudi has failed to make any indication of the freedom of religion. As it
has already been noted above, under the mandate of Shari’ah law, Muslims are not granted any
sort of religious freedom and Mawdudi fails to address this issue at any length. He then proceeds
by arguing that the “superiority of one man over another is only on the basis of God-
consciousness” which is of course, a direct reference to Muslims and excludes non-Muslims.
He again neglects to offer some sort of religious equality between Muslims and non-Muslims
since he believes Shari’ah dictates “the creation of a state [which] Muslims [are] as a sole
citizens, with non-Muslims having no political rights”. As Mayer rightfully asserted, it seems
for Mawdudi, “the Shari’ah based discrimination is compatible with his principle of equality”.

In the third chapter of his human rights book, Mawdudi introduces fifteen articles under
the heading of “Rights of Citizens in Islamic State”. He believes these fifteen articles of rights
“are more extensive than the general human rights” which he has in the second chapter. For
this reason, he believes these fifteen articles of rights should be articulated separately within
separate chapters. In other words, it appears the rights Mawdudi introduced in the second chapter
apply only to Muslims, whereas the rights he introduces in the third chapter apply to all citizens
in Islamic states, regardless of being Muslim or not.

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365 Mawdudi, Supra note 15, (1976: Chap. 2).
366 “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind,
such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or
other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international
status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or
under any other limitation of sovereignty”.
367 Mawdudi, Supra note 15, Chap. 2.
368 An-Na’im, Supra note 67 at 38.
369 Mayer, Supra note 90 at p.100.
370 Mawdudi, Supra note 15, Chap. 3.
The first section of this chapter starts with the right to “The Security of Life and Property” which seems that he merely replicates what he has already argued under the “right of life” in the second chapter. However, he attempts to reemphasize that Shari’ah law prohibits Muslims from killing other persons and in doing so he merely refers to a number of Quraic verses and the Hadith.

He then expounds on the right of “Freedom of Expression” and the “Freedom of Associations”. Mawdudi believes that Islam has granted the rights of freedom of thought and expression to all citizens of the Islamic State; however, “on the condition that it should be used for the propagation of virtue and truth and not for spreading evil and wickedness”[^371]. In an attempt to convince his readers, he bases his argument on a Quranic verse which reads, “let there be a community among you who will invite (people) to (do) good, command what is proper and forbid what is improper, those will be prosperous”[^372]. Therefore, it can be argued that although he believes in freedom of expression, his view is not comparable with the freedom of expression which has been enshrined in international human rights documents, since he has actually limited those rights by “imposing the condition that such freedoms must conform to the Quranic command”[^373]. He also subjects non-Muslims to certain degrees of limitations in practicing their religion as well; he believes the excessive freedom of non-Muslims to express their religion would amount to “spreading evil and wickedness”[^374]. At no time does Mawdudi devote any space in his work “Human Rights in Islam” to define what he actually perceives as “spreading evil and weakness”.

Furthermore, according to Mawdudi, Islam has also given the “Freedom of Conscience and Conviction” and “Protection of Religious Sentiments”.[^375] Mawdudi explains that Islam has given “the right to freedom of conscience and conviction to its citizens in an Islamic State”.[^376]

[^371]: Mawdudi, Supra note 15, Chap. 3.
[^372]: Quran, (3:104). This verse refers to the principle of *ijtihad* in Islam which refers to (independent legal reasoning).
[^373]: Mayer, Supra note 90 at 94.
[^374]: Mawdudi, Supra note 15, Chap. 3.
[^375]: Mawdudi, Supra note 15, Chap. 3.
[^376]: Mawdudi, Supra note 15, Chap. 3.
As the Quran clearly indicates “there should be no coercion in the matter of faith”. Therefore, Mawdudi claims that there should be no compulsion to oblige non-Muslims to convert to Islam, but rather they should be invited to embrace Islam. In the event that non-Muslims refused to convert, Mawdudi argues that, no force should be applied in order to compel non-Muslims to accept Islam. Further, Muslims, according to Mawdudi should “recognize and respect his decision, and no moral, social or political pressure will be put on him to change his mind.” With respect to the “Protection of Religious Sentiments”, Mawdudi asserts that “Islam has given the right to the individual that his religious sentiments will be given due respect and nothing will be said or done which may encroach upon this right.” For Mawdudi, regardless of the nature of other people’s religions, and deities such as being idol worshipers, it is not justified in Islam that Muslims use abusive language towards those religious groups and thus injure their feelings. In this respect, Mawdudi demonstrates that “Islam does not prohibit people from holding debate and discussion on religious matters, but it wants that these discussions should be conducted in decency.”

Although Mawdudi has correctly characterized and described the Quranic approach towards the treatment of non-Muslimism, his discussion has reluctantly evaded any discussion on the Islamic view on the issues of Apostasy and the treatment of non-Muslims which are outside the ambit of “People of the book”. As Indicated earlier the traditional Shari’ah law enforces harsh penalties for apostasy; these include the death penalty for men and life imprisonment for women who have converted from Islam to any other religion. This attitude is of course influenced by the Shari’ah principle that strictly prohibits conversion from Islam to any other religion. Mawdudi also evades the fact that the death penalty for religious converting is not only in conflict with current international human rights norms, but it is in conflict with the basic

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377 Quran (2:256)
378 Mawdudi, Supra note 15, Chap. 3.
379 Mawdudi, Supra note 15, Chap. 3.
380 Mawdudi, Supra note 15, Chap. 3.
381 Mawdudi, Supra note 15, Chap. 3.
382 Mawdudi, Supra note 15, Chap. 3.
383 Mawdudi, Supra note 15, Chap. 3.
384 4.2.2 Religious Freedom and Shari’ah Law.
principles of Islam since the Quran is also silent on the punishment for apostasy. Furthermore, knowing that the religious minorities, such as the Admadis in Pakistan which historically have been subject to systematic oppression, among other things, limitation of religious freedom, severe persecution, and being subject to constant hate-related treatments, Mawdudi carefully evades of any discussion of a true religious freedom which offers any guarantee of freedom of religion.

Mawdudi also introduces the “Equality Before the Law” and argues that Islam “gives its citizens the right to absolute and complete equality in the eyes of the law”\textsuperscript{385}. According to Mawdudi, all Muslims are all equal in their rights and obligations and this is the “foundation of equality in Islamic society, in which the rights and obligations of any person are neither greater nor lesser in any way than the rights and obligations of other people.”\textsuperscript{386} As for the non-Muslim citizens of the Islamic State, Mawdudi believes that their lives and properties should be as sacred as the lives and properties of the Muslims.\textsuperscript{387}

Mawdudi has been generally reluctant to make note of two very important issues. First, despite the claim that Islam recognizes the equality of all human beings, under the mandate of Shari’ah laws, both non-Muslims and women have been systematically discriminated against and have been viewed as second class citizens.

Secondly, in respect to the rights of non-Muslims in Islamic society, Mawdudi fails to provide any solution or rights for non-Muslims in the event that they have to take their disputes before Islamic courts. As previously discussed in Chapter 4\textsuperscript{388}, there are only a number of modern Islamic states that have maintained or adopted a dual system of secular courts, whereas the majority of the Islamic states only have Islamic courts\textsuperscript{389}. This of course can be detrimental to the position of a non-Muslim in a dispute.

\textsuperscript{385} Mawdudi, Supra note 15, Chap. 3.
\textsuperscript{386} Mawdudi, Supra note 15, Chap. 3.
\textsuperscript{387} Mawdudi, Supra note 15, Chap. 3.
\textsuperscript{388} Section 4.2.3: Apostasy Cases.
\textsuperscript{389} Saudi Arabia, Yemen, Iran and Sudan.
Mawdudi argues that all Muslims have the “The Right to Participate in the Affairs of State”, since the right to participate in government and its “responsibility is not entrusted to any individual or family or a particular class or group of people but to the entire Muslim nation.”\textsuperscript{390} Mawdudi, also maintains that “it is the right of every Muslim that either he should have a direct say in the affairs of the state or a representative chosen by him and other Muslims should participate in the consultation of the state.”\textsuperscript{391} However, Mawdudi ignores the fact that women in Islamic States are generally restricted from involvement in politics and political office and prohibited from judicial decision making appointments such as being magistrates or judges. Currently there is only a very limited number of Islamic States, such as in Pakistan, Indonesia, Bangladesh, Turkey, Kosova, Kyrgyzstan, Egypt and Senegal that have positively paved the way for women to have an active role in their country’s political affairs\textsuperscript{392}.

As for the rest of the articles in chapter three, it appears that a number of these articles are lacking in corresponding rights in any other international human rights, rights such as “The Right to Protest Against Tyranny”, and “The Right to Avoid Sin”. The rest of the articles, such as “The Protection of Honour”, “Protection from Arbitrary Imprisonment”, and “Equality Before Law”. However, it can certainly be argued that they appear to be more in conformity with international human rights norms.

Even though Mawdudi outlined and identified some of the most important human rights principles, such as the right to life, respect for women, and the freedom of expression, which suggests Shari’ah law does offer some sort of human rights provisions, however he regretfully tried to establish those rights by resorting to 7th century Shari’ah standards and values which can hardly be as effective as the international human rights standards. As Mayer rightfully asserted, it would be very disingenuous to talk about equality before the law without addressing the

\textsuperscript{390} Mawdudi, Supra note 15, Chap. 3.
\textsuperscript{391} Mawdudi, Supra note 15, Chap. 3.
\textsuperscript{392} Wikipedia, Female political leaders in Islam and in Muslim-majority countries, (2011), online: http://en.wikipedia.org/wiki/Female_political_leaders_in_Islam_and_in_Muslim-majority_countries
problems posed by discriminatory Shari’ah rule denying women, and non-Muslims the rights and freedoms enjoyed by Muslim men.”


Sultanhussein Tabandeh’s human rights document is also a very important human rights document in Islam due to his candour and detailed Commentary he presented on each Articles of UDHR. As indicated earlier, Tabandeh is relatively a minor religious figure in comparison with Mawdudi, however his writings has an enormous impact on Iran’s foreign policy and its ideological approach in criticizing the international human rights laws and Western powers.

Tabandeh’s method of assessment of the UHRD involves him trying to make comments on every single article followed by an attempt to corroborate on the superiority of Islamic human rights. Although, it appears that he is not discrediting the authority of the UDHR, however, he attempts to establish and demonstrate to his readers that there are many irreconcilable contradictions between the UDHR and Shari’ah based human rights law. It can be argued that the Tabandeh human rights document is progressive in comparison with Mawdudi. It should however be pointed out that, despite the fact he demonstrates the contradictions, he makes no attempts to provide any solutions or remedies to bridge the gaps.

Tabandeh was the leader of the Islamic Ne'ematullahi Sultanishahi which was a Sufi Order in Iran which is the mystical or spiritual dimension of Islam, mainly Shi'i Islam. Tabandeh’s human rights document was originally presented to the representatives of Islamic countries who attended the 1968 Tehran International Conference on Human Rights. Tabandeh’s aim with this document was to advise the Islamic countries on the “position they have to adopt

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393 Mayer, Supra note 90 at 101.
394 Sufism, (7 January 2012), online: http://en.wikipedia.org/wiki/Sufi - Sufism is generally to be the inner, mystical, or psycho-spiritual dimension of Islam [mainly Twelver Shi’i Islam].
vis-a-vis various provisions in the UDHR which he believed to be the requirement of Islamic human rights law"; he believed the UDHR has to be revised in a way that it will reflect the core beliefs of Shari’ah law.

Tabandeh, similarly to Mawdudi starts by focusing on the “prior claim to human rights” in Islam, by claiming that “most of the its [UDHR] provisions were already inherent in Islam, and were proclaimed by Islam’s lawgivers and preceptors.” In his opinion, “the Universal Declaration of Human Rights has not promulgated anything that was new nor inaugurated” since “every clause of it already existed in a better and more perfect form in Islam.” In short, in his work, one finds that Tabandeh takes the position that Islamic law is a much more superior code of rights vis-a-vis all international human rights laws and so it should be replaced with the current universal rights set forth in UDHR. In his words, Tabandeh asserts that:

Why we do not simply put into practice our own Islamic laws? Indeed, why do we not put them forward at the United Nations Assembly and at its various Commissions and Conferences? Why do we not orientate the compasses of the nations of the world by the pole-star of Islam, and publicly glory in our possession of laws that so exactly fit the human condition? Why do we not demonstrate the value of these laws, and illustrate their excellence in our words and in our practice? Why do we not invite the United Nations to express their Conventions in the terms already laid down in the Islamic Canon?  

In his commentary on the UDHR Article 1, which states, “all human beings are born free and equal in dignity and rights”, he starts by asserting that Islam has also excluded all the barriers based on class or race and colour; however he admits that the only difference between Islam and the UDHR is that Islam does not base equality on “religion, faith and convictions”.

He then proceeded with his commentary on the UDHR Article 2, which states:

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395 Mayer, Supra note 90 at 29.
397 Tabandeh, Supra note 18.
398 Tabandeh, Supra note 18 at 85.
399 Tabandeh, Supra note 18 at 57.
400 Tabandeh, Supra note 18 at 15.
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Tabandeh, argues that Islam has a high respect for Jews, Christians and Zoroastrians and so they should be respected by all Muslims. He argues that, non-Muslims of the People of the Book are worthy of respect, but because of their faith they have “not reached the highest level of spirituality”, therefore it is justified by Shari’ah law to “make certain differences between them [non-Muslims] and Muslims, treating them as not on the same level. His views towards non-Muslims who are not “People of the Book” are however very controversial. He believes those “who have not put their reliance in conviction and faith, nor has that basic abiding-place nor believed in the One Invisible God, are reckoned as outside the pale of humanity.” Tabandeh views, while appealing to strict interpretations of Shari’ah law, are certainly in contradiction with the international human rights standard, such as, the Article 16 of ICCPR which clearly states that, “everyone shall have the right to recognition everywhere as a person before the law.” According to Article 16 of ICCPR all State parties have to recognize “everyone” as a person before the law, and no one can be denied of legal personality based on his or her religion or belief.

On his commentary on the UDHR Article 3, which guarantees “the right to life, liberty and security of person”, he believes that those rights should be qualified. Tabandeh believes that the right to life, liberty and security of person are acceptable under the ambit of Shari’ah law, however, so as long as they are “not contrary to the regulations of Islam” and do “not molest the peace of others.” This is of course contrary to international human rights standard, such as, Article 6 of ICCPR which clearly indicates that, “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

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401 Tabandeh, Supra note 18 at 18.
402 Tabandeh, Supra note 18 at 18.
403 Tabandeh, Supra note 18 at 17.
404 Tabandeh, Supra note 18 at 20.
In his commentary on Article 16, which among other things deals with the “right to marry and to found a family” he explicitly argues that certain provisions of this Article cannot be accepted in Islam.\textsuperscript{405} For instance, he argues that unlike what Article 16 seeks to achieve, a total freedom on marriage should be rejected. According to Tabandeh, Shari’ah law absolutely prohibits polytheistic practice\textsuperscript{406}. Polytheism refers to the idea that a Muslim women is not allowed to marry a non-Muslim, since according to Tabandeh, “it means that she as a Muslim subordinates herself and Islam to an infidel”\textsuperscript{407}. Therefore, according to Tabandeh, if a Muslim woman marries a non-Muslim, her marriage is deemed void and invalid and any child from such a union is illegitimate in the eyes of Shari’ah law.\textsuperscript{408} Furthermore, he believes that if a woman enters in marriage knowing that that man is no Muslim, she must be punished.\textsuperscript{409} On the contrary, he believes that it is legitimate for a Muslim man to marry a non-Muslim woman of the “People of the Book”\textsuperscript{410}. For Tabandeh, in order to substantiate his arguments in response to Article 16 he appeals to the Quran and Shari’ah law and argues that:

“The scripture says: “Men are guardians of women and guarantors of their right.” (Sura “Nissa” (“Women” IV v.34). The wife must obey her husband. But if she weds a non-Muslim husband it means that she as a Muslim is subordinating herself: and Islam never allows a Muslim to come under the authority of a non-Muslim in any circumstances at all, as it made perfectly plain in the Sura “Nissa” (“Women” IV v. 141): “God will never make a way for infidels (to exercise lordship) over believers”: and therefore he never granted permission that Muslims should by marriage voluntarily subordinate themselves to non-Muslims.”\textsuperscript{411}

He further argues that women should not be given the right to initiate divorce. Shari’ah law, according to Tabandeh, confines the right to the divorce proceedings to men for a number of reasons. Among other things, one of the reasons that women should not be granted the right is that “women are touchy and hasty, volatile, and imprudent.”\textsuperscript{412} Therefore, if a woman be given

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405 Tabandeh, \textit{Supra} note 18 at 41.
406 Tabandeh, \textit{Supra} note 18 at 37.
407 Tabandeh, \textit{Supra} note 18 at 37.
408 Tabandeh, \textit{Supra} note 18 at 26 - 37.
409 Tabandeh, \textit{Supra} note 18 at 37.
410 Tabandeh, \textit{Supra} note 18 at 36.
411 Tabandeh, \textit{Supra} note 18 at 37.
412 Tabandeh, \textit{Supra} note 18 at 39.
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an equal right to initiate a divorce proceeding, then some women “might be prone to rush precipitately into such action for the smallest offence or the tiniest of displeasures.”\textsuperscript{413} The second reason for denying women this right, according to Tabandeh, is because women are “more gullible and credulous” and so they are “easy prey for the blandishments of salacious individuals who trap her into divorcing her husband merely in order to fulfil their own lust.”\textsuperscript{414}

Tabandeh is also of the belief that “Islam has granted to women the fullest possible measure of freedom”\textsuperscript{415}, however, in his commentary on Article 16 (2), he argues that there are certain positions and tasks that women are not suitable as it does not “confirm to her nature”.\textsuperscript{416} According to Tabandeh, Islam forbids women to participate in politics for a number of reasons:

“1) her intelligence and mentality frequently are not up to tackling big and important matters, and
2) that she soon falls into mistakes, and
3) that she is influenced by the immediate situation without the perspective of a larger future.”\textsuperscript{417}

In his commentary on Article 16 (3), which states, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”, he argues that there are certain rights in Islam that are assigned to a husband in which the wife must confirm. Among other things, she must:

1) Obey her husband,
2) Consult his wishes,
3) Not go out of the house without permission,
4) Invite a guest only with her husband’s agreement,
5) Maintain her husband’s good standing when he is present or absent.

\textsuperscript{413} Tabandeh, \textit{Supra} note 18 at 39.  
\textsuperscript{414} Tabandeh, \textit{Supra} note 18 at 39.  
\textsuperscript{415} Tabandeh, \textit{Supra} note 18 at 51.  
\textsuperscript{416} Tabandeh, \textit{Supra} note 18 at 51.  
\textsuperscript{417} Tabandeh, \textit{Supra} note 18 at 51.
He further argues that, Article 16 should be deemed null and void, if the Article attempts to promote the idea that “a natural equality exists between men and women” in a way that men and women can “undertake identical tasks and to make equal decisions.”\footnote{Tabandeh, Supra note 18 at 40} This natural equality, according to Tabandeh is in violation of Shari’ah law. For Tabandeh, certain tasks such as cooking, laundering, shopping, washing up, nursing the children, giving the breast and so on, by nature should be assigned to women and tasks such as heavy labour such as field work, warfare, earning a living fits men’s make-up better.\footnote{Tabandeh, Supra note 18 at 40-11}

One can certainly point out that his position on women is in sharp conflict with international human rights laws which, contrary to Tabandeh’s views, hold that “everyone, men and women without any limitation, should have the right to marry and found a family”\footnote{UDHR., Art. 16.}.

On his commentary on the UDHR Article 18\footnote{Article 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”}, which states, “everyone has the right to freedom of thought, conscience and religion”, he declares that freedom of thought, conscience and belief should only be allowable so as long as it does not undermine the Quran and Shari’ah\footnote{Tabandeh, Supra note 19 at 70.}. As discussed in Chapter 4, Shari’ah law traditionally imposes restrictions upon Dhimmis. Aside from their exclusion from political participation and political office, they are also restricted to openly practice their religion, and any advertisement to promote their religion is generally prohibited. Tabandeh also believes that “followers of a religion of which the basis is contrary to Islam [....should] have no official rights to freedom of religion in Islamic countries or under an Islam government, nor [they should be able to] claim respect for their religion.”\footnote{Tabandeh, Supra note 19 at 70.} Tabandeh further argues that any position within the Judiciary, Legislature and Cabinet must be occupied by a Muslim. He further promotes the exclusion and involvement of non-Muslims with the Judiciary, Legislature and Cabinet as well.

\begin{footnotes}
\item[418] Tabandeh, Supra note 18 at 40
\item[419] Tabandeh, Supra note 18 at 40-11
\item[420] UDHR., Art. 16.
\item[421] Article 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.
\item[422] Tabandeh, Supra note 19 at 70.
\item[423] Tabandeh, Supra note 19 at 70.
\end{footnotes}
With respect to religious freedom, he is of the belief that, “any propaganda for another religion must be prohibited as being contrary both to Canon Law and State Law.”

He further argues that the government of an Islamic country must be “officially Islamic”, meaning that it must be “set up on an Islamic basis” and all of its members must be Muslim. Therefore, in the event that if even “one of the members of such a government is not a Muslim” then “his cabinet position is illegal.” Tabandeh also believes that all members of the judiciary, legislature and of the Cabinet must be Muslims as well. Tabandeh strongly advocates that, in Islam, there is no separation between religion and politics, and so he argues that the Islamic government cannot divorce itself from the official Islamic religion.

As Mayer also noted, it can argued that Tabandeh’s position on non-Muslims only corresponds with radical interpretations of Shari’ah laws which as a result is in direct infringement of international human rights. Since International laws, contrary to Tabandeh’s view do not recognize a situation where a person is denied of legal personality because of his or her religious views. Further, in accordance with Article 16 of the ICCPR, “everyone shall have the right to recognition everywhere as a person before the law”, and also article 27 of the ICCPR which states, that “everyone should be able to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

Tabandeh also qualifies the religious liberty of Muslims based on the remit of Shari’ah law. Contrary to the standards of the UDHR Article 18, Tabandeh strongly insists on preserving Shari’ah rules which absolutely prohibit apostasy. Tabandeh, further on his commentary on this Article, asserts that a person who is born a Muslim and then converts from Islam “is guilty of apostasy”. He then argues that an apostate is like a “diseased member of the body politic”

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424 Tabandeh, Supra note 19 at 71.
425 Tabandeh, Supra note 19 at 70.
426 Tabandeh, Supra note 19 at 70.
427 Tabandeh, Supra note 19 at 71.
428 Mayer, Supra note 90 at 154).
429 Tabandeh, Supra note 19 at 72.
430 Tabandeh, Supra note 19 at 72.
and “must be executed”\textsuperscript{431}. His justification for upholding apostasy and objection to the freedom to change religion is based on the belief that, no man of common sense, “will ever turn down the better in favour of the inferior.”\textsuperscript{432} He further argues that, “anyone who penetrates beneath the surface to the inner essence of Islam is bound to recognise its superiority over the other religions. A man, therefore, who deserts Islam, by that act betrays the fact that he must have played truant to its moral and spiritual truths in his heart earlier.”\textsuperscript{433}

In respect to non-Muslims, he believes if they convert to Islam and then backslides (convert) he must be given a reason (advised) and given opportunity for three days to return, and if he is obdurate and refuses to convert he then must also be executed\textsuperscript{434}. One can certainly point out that his position on religious freedom only corresponds with a radical interpretation of Shari’ah laws which are in sharp contradiction with international human rights law\textsuperscript{435}.

Similarly, on his commentary on the UDHR Article 19\textsuperscript{436}, which states, “everyone has the right to freedom of opinion and expression”, Tabandeh believes that those rights should be qualified too. He argues that freedom of opinion and expression should be allowed unless it “threatens public order or grows contumacious against government and religion.”\textsuperscript{437}

It can certainly be contended that Tabandeh’s rendition of human rights is in direct divergence from the UDHR, since it has clearly failed to establish comparable rights for women and non-Muslims as it has been enshrined in international human rights documents. As discussed above, Tabandeh has stopped painfully short of substantiating many key controversial issues such as freedom of religion and polygamy and only recognises\textsuperscript{438} those human rights which are in accordance with traditional human rights. It can also be argued that Tabandeh falls short in

\textsuperscript{431} Tabandeh, \textit{Supra} note 19 at 72.
\textsuperscript{432} Tabandeh, \textit{Supra} note 19 at 71.
\textsuperscript{433} Tabandeh, \textit{Supra} note 19 at 71.
\textsuperscript{434} Tabandeh, \textit{Supra} note 19 at 73.
\textsuperscript{435} UDHR., Art. 18.
\textsuperscript{436} Article 18. “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
\textsuperscript{437} Tabandeh, \textit{Supra} note 19 at 73).
\textsuperscript{438} He believes Islam in similar to UDHR has abolished any distinctions based on class, race, and colour.
developing and protecting women’s rights in a way to recognize them as individual persons with equal rights as their male counterparts, without being forced to obey their husbands or to be confined to the home and to be given equal right to participate in political affairs of society.

Furthermore, his lack of political knowledge\textsuperscript{439} of the world affairs and universal implications of the UDHR, has made his version of Islamic human rights so vulnerable as it has limited his scope to religious perspective only. As Mayer also pointed out, Tabandeh’s lack of knowledge of international human rights norms, has made Tabandeh to believe that “it is feasible to project the Islamic principles into international law to the extent that Tabandeh imagines that “once those who make international law are made to understand the reasons why Islam forbids conversion, international law will likewise decree that conversions from Islam should be banned”.\textsuperscript{440} It is for this reason that Tabandeh strongly endorses the cultural relativity of human rights in a way in which the universal human rights documents reflect the Islamic law and culture.

5.3 “A Muslim Commentary on the Universal Declaration of Human Rights” by: Sultanhussein Tabandeh. (1981)\textsuperscript{441}.

5.3.1 History.

The UIDHR is a collective effort of a number of Islamic countries, most notably, Pakistan, Egypt, and Saudi-Arabia, and the Islamic Council (which is a London-based organization affiliated with the Muslim World League (MWL))\textsuperscript{442} which is an international non-

\textsuperscript{439} Tabandeh, \textit{Supra} note 19 at 1.
\textsuperscript{440} Mayer, \textit{Supra} note 90 at 154).
\textsuperscript{441} The Universal Islamic Declaration of Human Rights, online: http://www.alhewar.com/ISLAMDECL.html
\textsuperscript{442} The Muslim World League, Muslim religious figures from 22 countries founded it in Mecca, Saudi-Arabia in 1962. The League states its functions and objectives, among other things, as advocating the application of the rules of the Shari’ah either by individuals, groups or states. Their duties include: coordinating the efforts of Islamic preachers the world over; developing methods of the propagation of Islam in accord with the dictate of the Quran and the Sunnah; upgrading the productivity of the Mass-Media, education and culture; extending urgent relief to Muslims affected by war and natural disasters; making the activities and construction of mosques more effective. The Muslim World League, online: http://en.wikipedia.org/wiki/Muslim_World_League
governmental Islamic organization based in the City of Makkah in Saudi Arabia, and an international non-governmental organization\(^4^4^3\). The UIDHR has generally been viewed as the first official political statement of Muslims concerning the ambit human rights under Islam.

The UIDHR was presented to the United Nations Educational, Scientific and Cultural Organization (UNESCO)\(^4^4^4\) while a number of the heads of government, such as Ahmad Ben Bella of Algeria, Mukhtar Ould Daddah of Mauretania, Saudi Arabia's Prince Muhammad al-Faisal, and Pakistan president Zia al-Haq's advisor were present. It should be noted, however, that despite the governmental involvements in drafting the UIDHR, it has generally been deemed to be a non-Governmental Muslim States document.

5.3.2 A Brief Commentary.

The UIDHR exists in two official languages, English and Arabic. However, as it will become evident, there is a significant discrepancy between the two versions. The English version of the UIDHR appears to be very neutral and secular, whereas the Arabic version of the UIDHR according to Mayer conveys a very different message because it relies on strict Shari’ah law criteria to justify itself\(^4^4^5\).

It is however, very easy to detect the tone of the language of the UIDHR which is set by the very first sentence of the Foreword, which reads:

> Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice.

> Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights.

\(^{4^4^3}\) Mayer, *Supra* note 90 at 30.
\(^{4^4^5}\) Mayer, *Supra* note 90 at 178.
Human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.446

The foreword also explicitly declares that the “Declaration of Human Rights is the second fundamental document proclaimed by the Islamic Council to mark the beginning of the 15th Century of the Islamic era, the first being the Universal Islamic Declaration announced at the International Conference on The Prophet Muhammad (peace and blessings be upon him) and his Message, held in London from 12 to 15 April 1980.”

Also in the Preamble (section F) it states that “by the terms of our primeval covenant with God our duties and obligations have priority over our rights.”447 This indicates that the UIDHR rejects any independent, secular knowledge and also that there is no separation between religion and human rights.

Throughout the body of the English version of the UIDHR the word “Shari’ah” has been mentioned twice, however every article has accommodated with the term “the law”. The term “the law” has been clarified in the Explanatory Notes (1b) which states, the term “Law” denotes the Shari’ah:

The term 'Law' denotes the Shari'ah, i.e. the totality of ordinances derived from the Qur'an and the Sunnah and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.448

It is however, very interesting to note that almost all the articles in the UIDHR have direct reference to at least one or a number of Quranic verses or the Hadith449. In the basis of these short examination, one can certainly make a compelling argument that the models endorsed by the UIDHR fail to fully and unequivocally endorse a similar secular attitudes that governs the international human rights documents.

446 The Universal Islamic Declaration of Human Rights – Foreword.
447 The Universal Islamic Declaration of Human Rights – Preamble.
448 The Universal Islamic Declaration of Human Rights - Explanatory Notes (1b).
449 Hadith: It is the oral traditions of the words and deeds the Prophet Muhammad which are written down by his followers.
5.3.3 Critical Evaluation.

The UIDHR starts by stating that “human life is sacred and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law”\(^{450}\). The right to life in Islam, also known as *haqq al haya*, is one of the most basic rights protected under Islamic law as it is the responsibility of every human being to recognize it. Killing an innocent human being is strictly prohibited in Islam. Furthermore, killing a human being in Islam is considered as one of the biggest sins that a human being can commit. In this respect the Quran clearly indicates that, “whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely.”\(^{451}\)

However, as it is mentioned above, the term law denotes the Shari’ah and this can be potentially the source of difficulties for the compatibility of this document with international human rights documents. This is because under the remit of Shari’ah Law there are many circumstances that one can be prosecuted and sentenced to death, for crimes such as apostasy, rape, and blasphemy. As indicated previously, although the Quran is silent on the punishment for apostasy, the traditional Islamic law enforces death penalties for apostasy. Apostasy in Islam, generally means that a person who was a previous follower of Islam, converts to another religion and so denies or renounces the existence of Allah, and the Prophet Muhammad. Also Blasphemy is also punishable by death under the ambit of under Shari’ah law since this act of blasphemy is understood as aiming to insult and to degrade Islam, Allah, Prophet Mohammed and the Quran.

The right to freedom\(^{452}\), right to justice\(^{453}\), right to protection against abuse of power\(^{454}\), protection against torture\(^{455}\), and the right to asylum\(^{456}\) are affirmed and are more or less compatible with international norms.

\(^{450}\) UIDHR, Article 1(a).
\(^{451}\) Quran 5:32.
\(^{452}\) The Universal Islamic Declaration of Human Rights, Article 2.
Article 3 entitled the “Right to Equality and Prohibition Against Impermissible Discrimination.” This Article provides that:

a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

b) All persons shall be entitled to equal wage for equal work.

c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.457

Article 3 (a), (b) and (c) guarantees non-discrimination as it provides equal protection, equal wages and opportunity to work without being discriminated, *inter alia*, by the reason of religious belief. However, considering the fact that the term “Law” is actually defined as Shari’ah law, pursuant to Explanatory Notes (1b), it can be argued that the Article fell short in providing and guaranteeing equal opportunity for women and non-Muslims residing in Islamic States, since under the ambit of Shari’ah law, non-Muslims have been traditionally discriminated from political participation and political office. As indicted previously, non-Muslims who reside in Islamic States are generally excluded from military service, prohibited to carry arms, restricted to openly practice their religion, and to advertise and to promote their religion and are subject to a poll-tax or *Jizyah*. Mayer also points out that there is a significant discrepancy between the English and Arabic version of this Article.458 For instance, according to Mayer, the Arabic version of the Article 3 (a) states that, “people are equal before the Shari’ah and no distinction is made in its application to them or in their protection under it.”459 This again affirms the argument made earlier, in which the Article making an attempt to disguise its nonconformity with international human rights norms as it violates the principles of equal protection for women and non-Muslims based on sex and religion.

453 The Universal Islamic Declaration of Human Rights, Article 4.
454 The Universal Islamic Declaration of Human Rights, Article 6.
455 The Universal Islamic Declaration of Human Rights, Article 7.
456 The Universal Islamic Declaration of Human Rights, Article 9.
457 The Universal Islamic Declaration of Human Rights, Article 3.
458 Mayer, *Supra* note 90 at 105.
459 Mayer, *Supra* note 90 at 105.
Article 5 affirms the right to a fair trial; however it failed to address the right of non-Muslims in religious Islamic courts.

a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.

b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him.

c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.

d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.460

e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

Currently there are only a few Islamic states that have maintained or adopted a dual system which comprise of both secular courts and Islamic or Shari’ah courts, in which the Shari’ah courts mainly have competency over issues relating to family law, finance, and inheritance. However, Islamic States such as Saudi Arabia, have maintained its Islamic courts for all aspects of legal jurisprudence which can be potentially discriminatory towards non-Muslims since they are judged according to Islamic law.

Article 10 deals with the rights of minorities. According to this Article, religious minorities should have “the choice to be governed in respect to their civil and personal matters either by Islamic laws or by their own laws.”461 The Article also makes reference to the Quranic verse which reads “There is no compulsion in religion.”462 A similar voice also projected from Article 13 which primarily deals with the freedom of religion and states that, “every person has

460 The Universal Islamic Declaration of Human Rights, Article 5.
461 The Universal Islamic Declaration of Human Rights, Article 10.
462 Quran 2:256.
the right to freedom of conscience and worship in accordance with his religious beliefs.” Both Articles appear to be in conformity with the UDHR standard. However, both Article 10 and 13 fall short in substantiating full rights to all non-Muslim citizens. As already noted, Shari’ah law distinguishes between non-Muslims as individuals who are “People of the book” and Jews, Christians, Zoroastrians, and non-Muslims who are affiliated with other religions, such as the Baha’is community in Iran and the Ahmadis in Pakistan. So the UIDHR has clearly failed to establish a comparable freedom of religion which is enshrined in international human rights documents.

Article 11 recognises the “Right and Obligation to Participate in the Conduct and Management of Public Affairs”, by stating the following:

a) Subject to the Law, every individual in the community (Ummah) is entitled to assume public office.

b) Process of free consultation (Shura) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

A quick read of this Article leaves the impression that this Article wanted to end the inequality between the sexes which is quite particularly apparent in traditional Islamic law and even in modern law doctrine in the vast majority of Islamic States. As already discussed in chapter 4.3 the vast majority of Islamic States prohibit women - whether Muslims or not - from involvement in politics and political office and prohibit them from judicial decision making appointments such as being magistrates or judges. The most notable example, as made reference earlier, is Ms. Shirin Ebadi, who was the first female judge in Iran and was forced to relinquish her position as a judge subsequent to the Iranian revolution based on the Islamic belief that women are not suitable for such positions as magistrates or judges under the rules of Shari’ah.

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463 The Universal Islamic Declaration of Human Rights, Article 13.
464 Baha’is primarily believes in existence of single God (Allah) and the Prophet Muhammad, however, they also believe in Prophet Bahaullah as the final prophet. Ahmadiyya also affirm the existence of single God (Allah) and the Prophet Muhammad. They also accept the authority of Quran and Hadith and Sunnah, however, they also believe that Mirza Ghulam Ahmad is the Promised Messiah.
465 The Universal Islamic Declaration of Human Rights, Article 11.
The same rule also applies to non-Muslim members of Islamic States. All non-Muslim minorities, whether “People of the Book” or not, have been traditionally excluded from political participation and political office. One can therefore make an argument that Article 11 by making reference to law, which again, pursuant to Explanatory Notes (1b), the law is defined as Islamic Law or Shari’ah law and so it can be argued that the Article 11 has fall short in providing an equal participation for all members of society contrary to international human rights law.

Article 12 recognises the “Right to Freedom of Belief, Thought and Speech”. Article 12 conveys the followings:

a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.

c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state.

d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.

e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims. 466

Again, considering the fact that the term “Law” is actually defined as Shari’ah law, the obvious difficulty with this article arises when Shari’ah rules place an absolute prohibition on apostasy and blasphemy which are punishable by death. It is noticeable that Article 12(XII a) offers a list of criterion in which a religious freedom can be curtailed, such as an expression that “may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons”. The Article does not make any attempts to define the meaning and

466 The Universal Islamic Declaration of Human Rights, Article 12.
jurisdictions of any of those criterions. This of course will enable the governing religious authorities to interpret and implement as they please, and to suppress any moderate or alternative voices in favor of religious freedom. To illustrate the issue, from the preceding analysis in section 4.2.3 the following points may be recalled in respect to the case of Mahmoud Mohammed Taha. Mahmoud Mohammed Taha is an apostasy case who was a controversial political dissident and Islamic reformist who was convicted by a Sudanese court of the crime of apostasy for his writings in his book titled “Towards the Second Message of Islam.” Subsequently, the Sudanese Muslim Brotherhood organization brought a case against Taha arguing that he had not only promoted an alternative method of prayer than the conventional prescribed Islamic prayers, they also put evidence forward from Taha’s book “The second message of Islam” in which he was accused of promoting a concept of Islam which is alien from the original message of Islam. Taha’s argument in his book, “The second message of Islam” was based on the belief that through time the conditions of societies change and develop; thus should change the Shari’ah in a way that it will address the needs of the modern day while upholding the freedom of choice and equality for all the individuals despite their sex or religious belief. His view was however deemed to be defamatory and outrage public decency.

Mayer also refers to the Arabic version of Article 12 (XII a) which conveys a very different message from that of the English version. The Arabic version states “Everyone may think, believe and express his ideas and beliefs without interference or opposition from anyone as long as he obeys the limits set by the Shari’ah; it is not permitted to spread falsehood or disseminate that which involves encouraging abomination or forsaking the Islamic community.” Thus, according to Mayer, it can be concluded that the” Shari’ah not only sets limits on freedom of expression, but also on the freedom of thought and belief as well”.

Article 14 affirms the right to “Free Association”, by stating that:

467 Eltayeb, Supra note 55 at 168.
468 O'Sullivan, Supra note 285.
469 Mayer, Supra note 90 at 178.
470 Mayer, Supra note 90 at 178.
471 Mayer, Supra note 90 at 178.
a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (ma'roof) and to prevent what is wrong (munkar).

b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities. 472

Article 14 seems to be promoting the right to free association for all members of society despite their religious and cultural background. A careful examination of the Article reveals that while it is promoting the freedom of association and participate individually in the religious, social, cultural and political life in community, however, this freedom is qualified to “enjoin what is right (ma'roof) and to prevent what is wrong (munkar).” It should be noted that Article 14, resembles the Quran (3:104) which states: “And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful.” The “enjoining what is right and forbidding what is wrong”, mainly refers to the responsibility of every Muslim, as it was the Prophet Muhammad’s mission, to invite people to Islam. It is the belief of Muslims that Islam is not merely a religion but rather a complete way of life. The Quran also praises Muslim nations as “the best nation produced [as an example] for mankind” since they enjoin what is right and forbid what is wrong and believe in Allah. 473 Although, the Quran does not refer to the right to freedom of association in verses 3.104 or 3:110, however applying these verses to affirmation of Article 14 reveals that the right to freedom of association is only connected with spreading and inviting people to Islam and not otherwise. In this light it would be hard to imagine a true freedom of association which enables non-Muslims to enjoy such a right.

Article 20, “Rights of Married Women”, is the only Article in the UIDHR which explicitly deals with the rights of women. As the title communicates, the article mainly deals with the rights of married women only and not rights of women as a whole.

472 The Universal Islamic Declaration of Human Rights, Article 14.
473 Quran (3:110)
Article 20 states that: “Every married woman is entitled to:

a) live in the house in which her husband lives;

b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (iddah) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own rights;

c) seek and obtain dissolution of marriage (Khul’a) in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts.

d) inherit from her husband, her parents, her children and other relatives according to the Law;

e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.\footnote{474}

This Article, however fails to elucidate why it is that married women should be entitled to certain protections that unmarried women are not. Article 20, aside from the “right to have to live in a house”\footnote{475}, and “receive the means necessary for maintenance of standard of living”\footnote{476} which logically can be applied to unmarried women, this Article seems to be promoting the idea that a married women should be able “to obtain dissolution of marriage”\footnote{477} and “to inherit from her husband”\footnote{478}. As previously stated\footnote{479}, Shari’ah law grants extensive rights for the dissolution of marriage to the husband and only in a very few circumstance to the wife. According to Mayer, when one consults with the Arabic version of this article, one realises that no such a right as the dissolution of marriage is granted to women at all; instead the Arabic version conveys “that a

\footnote{474}{The Universal Islamic Declaration of Human Rights, Article 20}
\footnote{475}{The Universal Islamic Declaration of Human Rights, Article 20(a).}
\footnote{476}{The Universal Islamic Declaration of Human Rights, Article 20(b).}
\footnote{477}{The Universal Islamic Declaration of Human Rights, Article 20(c).}
\footnote{478}{The Universal Islamic Declaration of Human Rights, Article 20(d).}
\footnote{479}{Sec 5.3, Women, Islam and Equality.}
woman may ask her husband to agree to dissolve the marriage". With respect to the problem of inequality between the sexes, it seems that the UIDHR has reluctantly failed to address the issue in Article 20 the “Rights of Married Women”, since it has simply rehearsed the rules of Shari’ah instead of promoting positive and genuine human rights for all women. Further, in respect to the problem of inequality in inheritance against women, the Article has also failed to tender a solution to the inequitable rules of Shari’ah. Under Shari’ah, a woman’s share of the bequest is generally half of the share of a man and if she is a widow with children then she is only entitled to one-eighth of her husband’s bequeath.

Over all the UIDHR appears to be very ambiguous, vague in its positions and standards and very arbitrary, since there is a significant discrepancy between the two versions of the document. Furthermore, the Arabic version of the document, as reflected above, conveys a very conservative and traditional view of Shari’ah law. The UIDHR has also failed to fully and unequivocally endorse and ascertain comparable rights for women and all religious minorities as mandated in international human rights norms and standards.

\[480\] Mayer, Supra note 90 at 128.
\[481\] The Universal Islamic Declaration of Human Rights, Article 20.
\[482\] Quran (4:11) GOD decrees a will for the benefit of your children; the male gets twice the share of the female. If the inheritors are only women, more than two, they get two-thirds of what is bequeathed. If only one daughter is left, she gets one-half. The parents of the deceased get one-sixth of the inheritance each, if the deceased has left any children. If he left no children, and his parents are the only inheritors, the mother gets one-third. If he has siblings, then the mother gets one-sixth. All this, after fulfilling any will the deceased has left, and after paying off all debts. Also: [4:12] You get half of what your wives leave behind, if they had no children. If they had children, you get one-fourth of what they leave. They get one-fourth of what you leave behind, if you had no children. If you had children, they get one-eighth of what you bequeath.
5.4 The Cairo Declaration of Human Rights in Islam (CDHRI) – (1990) \(^{483}\)

5.4.1 History

The Cairo Declaration of Human Rights in Islam (hereafter: CDHRI) was adopted in Cairo in August 1990 by the Nineteenth Islamic Conference of Foreign Ministers of the forty-five Member States of the Organization of the Islamic Conference (OIC) \(^{484}\) subsequent to the Conference meeting which was held in Teheran in December 1989. The CDHRI has been deemed as an attempt to formulate a human rights model based on Islamic religious citations. The CDHRI unlike the UIDHR is the first official attempt by the Islamic States vis-a-vis the OIC in the realm of human rights in Islam. For instance, the Article 25 of the CDHRI conveys that, “the Islamic Shari’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration”. The CDHRI, however, has heavily used the language and the Islamic conservative moralists of the UIDHR. The CDHRI is affirmed by all the 57 OIC nation members.

The central argument at this Tehran Conference was to criticize the UDHR for its perceived failure to consider the importance of religious and cultural relativism. The argument was made that the Islamic States due to the nature of their religious obligation can only be bound by Islamic law which is believed to be derived from divine authority. Furthermore, the argument was made in this Conference, most notably by Iran and Sudan that the Western UDHR model “is inapplicable and irrelevant to contemporary Third World problems and needs” \(^{485}\). A similar voice has been projected from the Iranian president, Mr. Rajaie-Khorassani, many years prior to this meeting, in his statement to the UN General Assembly's Third Committee, articulated the


\(^{484}\) The Organization of the Islamic Conference (OIC). It groups 57 nations, most of which are Islamic. It is the second largest international organization after the United Nations. The primary goals of the OIC are, according to its Status, "to promote solidarity among all Islamic member states." Please refer to the following website for further information, online: http://en.wikipedia.org/wiki/OIC

\(^{485}\) Donally, Supra note 50 at 60.
position of Iran on the UDHR, by saying that the “UDHR which represented a secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran.”\textsuperscript{486}

It is worth mentioning that the CDHRI, in comparison with the previous document, the UIDHR, enjoys a broader regional collaboration among Islamic countries, since it also has the support of both Shi‘i countries, such as Iran, and Sunni’s countries, most notably Saudi Arabia and Iraq. However, despite the widespread support of many Islamic countries, the CDHRI was rejected by the seventh UN Secretary General Kofi Annan, who vigorously insisted on the universality of human rights.\textsuperscript{487}

5.4.2 A Brief Commentary.

Article 25 of the CDHRI reveals the tone of the language adopted in this Declaration which is substantially similar in context to the language adopted in the UIDHR. Article 25 of the CDHRI conveys that, “the Islamic Shari’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration”. Article 24 of the CDHRI also makes it clear that, “all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah.”\textsuperscript{488} A quick evaluation of Article 24 and 25 leave one to wonder, if the CDHRI due to its Shari’ah Law approach can ever be deemed compatible with the secular attitudes that govern international human rights documents. As explained further in the details in chapter 3.3, there is no such thing as a codified set of laws of Shari’ah, except the fact that its fundamental tenets are based on two major sources of the Quran and Sunna, which has been used by Islamic legal scholars as sources of Islamic law. Therefore, since all rights in the CDHRI, pursuant to Article 24 are “subject to the Islamic Shari’ah” then it permits the member States to define the scope of the rights in accordance to their own understandings of the Shari’ah. As Behdad and Nomani

\textsuperscript{486} Donally, \textit{Supra} note 50 at 60.
\textsuperscript{487} Mayer, \textit{Supra} note 90 at 32.
\textsuperscript{488} Cairo Declaration on Human Rights in Islam, Article 24.
also asserted, since no attempt has been made to define the scope of the Islamic limitations, the CDHRI allows the States to freely interpret the limits the Islamic Law imposes as broadly as they please.\textsuperscript{489}

Since the CDHRI has been approved by a large number of Islamic states, and knowing the fact that the CDHRI is the more recent Islamic human rights document in comparison to the UIDHR, it can be argued that it is indeed worth one’s further careful evaluation in order to assess the extent of its conformity with international human right documents.

### 5.4.3 Critical Evaluation.

The CDHRI starts by stating in Article 1(a) that “all men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.”\textsuperscript{490} This appears to be in conformity with the UDHR, since it also affirms equality between the sexes and religion. However, a close examination reveals that this article only recognises equality in “human dignity and basic obligations” and carefully avoids granting equal rights to each individual. As mentioned above, according to Article 25, the Shari’ah is the only source of reference in each of the Articles. Therefore, it can be argued that Article 1(a) in fact has been unsuccessful in upholding positive and genuine equal rights for women and for non-Muslim minorities in comparison to Muslims, since the extent of equality granted under this Article falls under the remit of Shari’ah law.


\textsuperscript{490} Cairo Declaration on Human Rights in Islam, Article1A.
The right to the “presentation of human life”\(^{491}\), “non-belligerents such as old men, women and children...wounded and the sick”\(^{492}\) and “human sanctity and protections of one’s good name”\(^{493}\) are affirmed, but according to mandated rules, are prescribed by Shari’ah law.

Article 2(a) deals with the right to life however it is subject to exceptions prescribed under the remit of Shari’ah. Article 2(a) asserts that, “life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason.”\(^{494}\) Article 19(d) also affirms that, “there shall be no crime or punishment except as provided for in the Shari’ah.”\(^{495}\) Therefore, in the light of the both Articles 2(a) and 19 (d), it can be argued that the exceptions in Article 2(a) refers to circumstances in which one can be legally punished by death for committing certain crimes. These crimes are generally referred to as Hadd punishments. The Hadd applies to those serious categories of crimes that the Quran has made reference and has specified a fixed punishment for. Some of the Hadd offences include murder, adultery, highway robbery, illegal sexual intercourse, and apostasy which are all punishable by death.

Article 5 deals with the right to marriage. This article conveys that “men and women have the right to marriage, and offers that no restrictions stemming from race, colour or nationality shall prevent them from exercising this right.”\(^{496}\) At first glance this article also appears to be in harmony with international human right standards. However, since each article should be examined under the mandate of Shari’ah law, based on Article 25, one can realize that Article 5 has failed to establish a genuine right for all since it imposes restrictions on the basis of religion. This is mainly due to the fact that traditional Shari’ah law strongly prohibits polytheists. In Islam, Polytheism refers to the idea that a Muslim women should not be allowed to marry a

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\(^{491}\) Cairo Declaration on Human Rights in Islam, Article 2.
\(^{492}\) Cairo Declaration on Human Rights in Islam, Article 3.
\(^{493}\) Cairo Declaration on Human Rights in Islam, Article 4.
\(^{494}\) Cairo Declaration on Human Rights in Islam, Article 2(a)
\(^{495}\) Cairo Declaration on Human Rights in Islam, Article 19(d).
\(^{496}\) Cairo Declaration on Human Rights in Islam, Article 5.
non-Muslim. Article 5 also appears to be assenting with Tabandeh\(^{497}\) which believed “polytheists amount to subordination of Islam to other religions”\(^{498}\). Furthermore, both Article 5 and 6 have also failed to make reference to the issue of polygamy in Islam, which affirms the CDHRI support for legitimizations for polygamy. This of course a direct violation of the human rights of women as it is in contradiction with the basic principle of equal rights between men and women. The practice of polygamy not only violates the honour and dignity of women, it also subordinates them as second class citizens. In this regard, paragraph 14 of the 21st General Recommendation of CEDAW, on Equality in Marriage and Family Relations states that “polygamous marriages contravene a woman's right to equality with men and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited”.\(^{499}\)

Article 6 (a)\(^{500}\) of the Declaration deals with the rights of women, and it conveys that “women are equal to men in human dignity”, and also that “women have their own civil entity and financial independence”. However, the article clearly fails to establish genuine comparable rights as men under Islamic laws. It appears that the CDHRI has simply reproduced the flaws of Article 20\(^{501}\) of the UIDHR in this respect since there is nothing in Article 6 that indicates that women have equal rights in society and that they can receive equal shares in inheritance. It can, therefore, be argued that Article 6 falls short of the guarantee of equality for men and women in their enjoyment of all civil and political rights pursuant to the \textit{International Covenant on Civil and Political Rights}. In this regard, paragraph 25 of the General Comment No. 28 the Human Rights Committee under Article 40, of the ICCPR states that “equality during marriage implies

\(^{497}\) Please refer to Section 6.2.
\(^{498}\) Tabandeh, \textit{Supra} note 18 at 33-4.
\(^{500}\) Cairo Declaration on Human Rights in Islam, Article 6: (a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.
\(^{501}\) Cairo Declaration on Human Rights in Islam, Article 20. “Rights of Minorities”
\(a\) The Qur'anic principle "There is no compulsion in religion" shall govern the religious rights of non-Muslim minorities.
\(b\) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.
that husband and wife should participate equally in responsibility and authority within the family.” 502

Article 6 (b) of the Declaration also states that, “The husband is responsible for the maintenance and welfare of the family.” 503 This Article seems to be in direct contradiction with Article 6 (a) since it confers the responsibility of support and welfare of the family on the husband only, thereby, it restricts women of establishing their own “civil entity and financial independence.” 504

Article 10 can be seen as a direct infringement on the freedom of religion since it explicitly prohibits Muslims from converting. Article 10 asserts that, “Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.” 505 As previously discussed, the traditional death penalty for apostasy does exist in most Islamic states such as Saudi Arabia, Yemen, Iran and Sudan and none of the documents we have discussed so far were willing to disallow or eliminate this very harsh and strict pre-modern tradition of Shari’ah law. Article 18(a) however, contrary to Article 10, asserts that “everyone shall have the right to his religion.” 506 This indicates the extent of discrepancy between these two articles since one grant the right and the other restricts it. However, examining both Articles in light of Article 25 indicates that Article 18 only applies to Muslims and non-Muslims who are only “People of the Book”. This view is of course contrary to paragraph 21 of the General Comment No. 28 of the Human Rights Committee under Article 3, of the ICCPR which states that “State parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one’s choice - including the freedom to change

502 General Comment No. 28: Equality of rights between men and women (article 3), 03/29/2000, CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments), online: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d48388025668b900360e80?Opendocument
503 Cairo Declaration on Human Rights in Islam, Article 6(b).
504 Cairo Declaration on Human Rights in Islam, Article 6(a).
505 Cairo Declaration on Human Rights in Islam, Article 10.
506 Cairo Declaration on Human Rights in Islam, Article 18(a): Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.
religion or belief and to express one’s religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination.”

Article 13 deals with the right to work under Islamic law, by asserting that “work is a right guaranteed by the State and the Society for each person with capability to work” and that “everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the society.” Equality and non-discrimination in choosing the desired work is a fundamental principle of human rights. However, examining this Article under the mandate of Shari’ah law, based on Article 25, one can realize that Article 13 has failed to establish a genuine right for all women to “freely choose” the work that suits them since women are generally prohibited to occupy certain professions including being prohibited from judicial decision making appointments such as being magistrates or judges or any political appointment such as being the head of State in an Islamic territory.

Furthermore, Article 22(a) asserts that “everyone shall have the right to express his opinion freely in such a manner as would not be contrary to the principles of the Shari’ah.” This Article is very broad in scope, and potentially any critical speech or expression depending on how it is interpreted and conceived can potentially fall within the scope of this Article. The worst case scenario would be when those critical speeches are to be interpreted as blasphemy. The prime example of this would be the case of Mahmoud Mohammed Taha an Islamic reformist in Sudan was convicted by a Sudanese court of the crime of apostasy and executed in 1985. As indicated in the case of Mahmoud Mohammed Taha, simply believed that through time the conditions of societies change and develop; this should change the Shari’ah in a way that it will address the needs of modern days while upholding the freedom of choice and equality for all the individuals despite their sex or religious belief. However, his stand on the issue was deemed as apostasy by the Shari’ah High Court of Khartoum as the court was of opinion that

507 General Comment No. 28: Equality of rights between men and women (article 3), 03/29/2000, CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments), Online: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d48388025688b900360e80?Opendocument
508 Cairo Declaration on Human Rights in Islam, Article 13.
509 Cairo Declaration on Human Rights in Islam, Article 22(a).
510 O’Sullivan, Supra note 285.
Mahmoud Mohammed Taha persistently was trying to promote a concept of Islam which is alien from the original message of Islam.\footnote{Eltayeb, \textit{Supra note 55} at 169.}

Article 23 deals with right to serve in public office. Article 23 (b) asserts that “Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari’ah.”\footnote{Cairo Declaration on Human Rights in Islam, Article 23.} As indicated previously non-Muslims and religious minorities are generally excluded from political participation, therefore, it can be argued that this Article by qualifying the right to public office in accordance with the provisions of Shari’ah, it fails to recognize a true equality which extends to all religious minorities and non-Muslims pursuant to Article 16 of ICCPR.

Over all, it can be argued the CDHRI has failed to address a number of key provisions which are fundamental for its compliance with international human rights standards. One explanation for this omission might be that because the CDHRI has placed a great emphasis on religious and cultural relativism. This is of course most notable from its Preamble which states, “Reaffirming the civilizing and historical role of the Islamic Ummah which Allah made as the best community”\footnote{Cairo Declaration on Human Rights in Islam – Preamble.}, and Article 10 which also states, “Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.”

Perhaps, most importantly, the CDHRI has “not been subject to any judicial or \textit{quasi-judicia} interpretation to ascertain the scope of its provisions.”\footnote{Baderin, \textit{Supra note 24} at 60.} Although Article 24 asserts that, “All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah”\footnote{Cairo Declaration on Human Rights in Islam, Article 24.}, and Article 25 of the CDHRI conveys that, “the Islamic Shari’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration”\footnote{Cairo Declaration on Human Rights in Islam, Article 25.}, yet it is not clear from these Articles whether the Decorations appeals to a certain unified version of Shari’ah law
or is it that the member States are left alone to define the scope of the rights provided in this Declaration according to their own understandings of the Shari’ah. In this regard, Behdad and Nomani argue that the CDHRI has failed to deal with the theoretical problem, most notably, “on what base a group of nation states could control Islamic doctrine.” Behdad and Nomani also pointed out to the drafters of the CDHRI have also failed to “contemplate today’s reality, where Muslims may simultaneously subject to two or more different competing systems of legality, such as Islamic laws, national laws, and international principles grounded in the consensus of nation states. Similarly, they also did not envisage the possibility that individual Muslims might opt to be guided by secular norms on rights issues, so that the binding force of Islamic law could be challenged by Muslims appealing to international human rights law.”

The CDHRI has also failed to acknowledge, among other things, the freedom of thought, expression, granting full and genuine equality between the sexes, and the rights of minorities (non-Muslims who are not “People of the Book”) to their own religion and culture. It is also worth mentioning that Adama Dieng, the former Registrar of the International Criminal Tribunal for Rwanda has also strongly criticized the CDHRI on a number of issues. According to Dieng, in a joint statement with the United Nations Commission on Human Rights (UNCHR) speaking for the Geneva-based International Commission of Jurists (ICJ) and for the Paris-based International Federation for Human Rights in February 1992, has declared, inter alia, that:

1. It gravely threatens the inter-cultural consensus on which the international human rights instruments are based;

2. It introduces, in the name of the defence of human rights an intolerable discrimination against both non-Muslims and women;

3. It reveals a deliberately restrictive character in regard to certain fundamental rights and freedoms, to the point that certain essential provisions are below the legal standards in effect in a number of Muslim countries;

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517 Behdad, Supra note 489 at 61).
518 Behdad, Supra note 489 at 61).
519 He is the former Board Member of International IDEA and former Registrar of the International Criminal Tribunal for Rwanda.
4. It confirms, under cover of the "Islamic Shari'a (Law)", the legitimacy of practices, such as corporal punishment, which attack the integrity and dignity of the human being.  

It can certainly be argued that the CDHRI in many ways duplicates the same vulnerabilities of its precursors and so it logically cannot have the significance that international human rights documents do.

### 5.5 Arab Charter on Human Rights (2004)

#### 5.5.1 History.

The *Arab Charter on Human Rights* ("The Charter") was first drafted by the Member States of the League of Arab States (Arab League) and adopted in September 1994. Ten years later, in May 2004 the modernized version of the Charter was adopted. The Charter has currently been ratified by Jordan, Bahrain, Libya, Algeria, the United Arab Emirates, Palestine, and Yemen. The main reason for the modernization of the Charter is due to the widespread criticism it received by many human rights organizations, the Office of the High Commissioner for Human Rights (OHCHR), academics and NGOs for failing to meet the similar standards as International human rights laws. This pressured the Arab League to adopt a resolution in 2002

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521 Arab Charter on Human Rights, The documents can be visited in the following website, online: http://www1.umn.edu/humanrts/instree/loas2005.html?msource=UNWDEC19001&tr=y&uid=3337655
522 Arab League: is a regional organization of Arab States in the Middle East and North Africa. It currently has 22 members. Article 2 of the Pact of the League of Arab States (1945), “states the purpose of the League as the following: to draw closer the relations between member States and co-ordinate their political activities with the aim of realizing a close collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries”. The document can be visited in the following website: http://www.yale.edu/lawweb/avalon/mideast/arableag.htm
523 The Charter has already entered into force on March 15, 2008.
which paved the way to modernise the Charter to comply and correspond with the international human rights standards. In doing so the Arab League agreed to allow independent Arab experts, which was an independent body of human rights experts to review and to prepare a new draft with the goal to bring the Charter into line with international human rights standards. In this important, a number of organizations, including a number of Islamic and international organizations were consulted. The final draft of the revised version of the 1994 Charter was adopted by the Arab League in May 2004 and received a warm welcome from the UN High Commissioner for Human Rights Louise Arbour.

5.5.2 A Brief Commentary.

The 1994 Charter consisted of 43 Articles following a Preamble, whereas the revised version of the Charter is comprised of a Preamble and 53 Articles. The increase in the Articles was mainly due to enhancement and developments of new rights. The majority of Articles from the 1994 document have been significantly revised in order to meet the international human rights standards.

One of the major achievements of the Charter, according to Rishmawi is the fact the Charter has created “a new formula”\(^{525}\) to address the cultural relativism argument which has been put forward by Islamic countries \(vis-a-vis\) the UDHR\(^{526}\). The new formula primarily serves as a bridge to fill the gap between the Islamic and Western approach of human rights, in a way that the Charter on one hand recognised the international human rights documents\(^{527}\), and on the

\(^{525}\) *Ibid.*, at 490.

\(^{526}\) As discussed in second section of this paper the “cultural relativism arguments” argument been put forward by Muslim scholars, most notably, Mawdudi, Tabandeh, and Islamic states, most notably, Iran and Saudi Arabia, to legitimize their ultimate obedience to Shari’ah laws \(vis-à-vis\) human rights.

\(^{527}\) UN Charter, the UDHR 1948, the ICCPR 1966 and ICESCR 1966.
other hand it recognized the Cairo Declaration. The revised version of the Charter has made great progress in recognizing, *inter alia*, freedom from torture or to cruel, degrading, humiliating or inhuman treatment, the independence of the judiciary and protect magistrates against any interference, pressure or threats, the right to liberty and security of person, the right to free basic health-care services and to have access to medical facilities without discrimination of any kind, right to education. Despite all the progress the revised version continued to place a great emphasis in promoting the positions of some Islamic States with respect to the reservations they have made with one or more international human rights documents in which they refused to obligate themselves to observe one or more of the major international human rights covenants based on the cultural relativism argument. For instance Saudi Arabia has consistently refused to obligate itself to conform to a number of provisions under the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) on the basis that there is a contradiction between the CEDAW and the norms of Shari’ah law. This line of argument has recently gain some fanfare, by the section 5 of VDPA which advices that while all human rights are universal, yet in treating human rights we can to be mindful of the religious backgrounds of the States.

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

As a consequence, the final revised version of the Charter has generally failed to recognize many important rights that are consistent with international human rights law. For instance, the Charter allows death penalty for “most serious crimes in accordance with the

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528 Rishmawi, *Supra* note 524.
533 The Arab Charter on Human Rights: Article 41.
535 The Vienna Declaration and Programme of Action, Article 5.
even if the offender is a juvenile given if the national law of the member States allows it. Moreover, the Charter extended very limited rights for non-citizens and religious minorities. At the same time, the Charter does not prohibit restrictions on the exercise of freedom of thought, conscience, and religion. The restrictions imposed in the Charter are deemed to be far beyond international human rights law, since the Charter allows restrictions on “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.”

The international human rights law however do 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. Perhaps most importantly, the Charter also failed to provide equal rights and responsibilities for men and women as the Charter leaves the national legislation to ensure, regulate and protect the rights and duties of women and “prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children.”

One of the reasons which might have contributed to such a failure, according to Rishmawi, might lie in “a compromised document, where the experts were given permission to omit some rights, such as the absolute prohibition of minors and restrictions on religion and belief, because they questioned the applicability of those human rights standards of the [Islamic] regions”.

Nevertheless, it can be argued that the new Charter was a significant achievement in upholding respect for human rights unlike any other of its predecessor Islamic documents. Also, unlike its predecessor Islamic document the Charter affirms the ‘principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the
International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”

Equally, the Charter, unlike any other Islamic documents discussed thus far, enjoys a monitoring mechanism. The monitoring mechanism involves a committee, established by the Charter, is very similar in nature to UN treaty bodies, that examine the periodic reports submitted by State Parties and they make necessary recommendations in accordance with Section 48 of the Charter. However, this mechanism has been argued to be one of the major weaknesses of the Charter since it lacks a complaint mechanism as it fails to provide “effective access to justice for victims”, as this monitoring mechanism has established in each of the other regional systems. Article 45 of the Charter created the Arab Human Rights Committee ("the Committee") which consists of “seven members who shall be elected by secret ballot by the states parties to this Charter.” Pursuant to Article 25(2) the Committee should “consist of nationals of the state parties to the present Charter, who must be highly experienced and competent in the Committee's field of work.” Pursuant to Article 47(2) of the Charter the States parties were obligated to submit an initial report to the Committee within one year from the date on which the Charter entered into force and a periodic report every three years thereafter. Pursuant to Article 47 (3) to (6) the Committee will be considering the reports submitted by the State parties and make the necessary recommendations in accordance with the aims of the Charter. The Committee will also submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General. Again as it will be noticed, the Charter does not encourage any complain mechanism for petitioning by the states parties or an individual to this Committee for violations of the Charter. Furthermore, the Committee aside from annual report which contains its comments and

541 Arab Charter on Human Rights
542 Article 48 (2) Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter
543 Rishmawi, Supra note 524.
545 The Arab Charter on Human Rights: Article 25(2).
547 The Arab Charter on Human Rights: Article 47(3) to (6).
recommendations is not equipped with any enforcement mechanism. It noteworthy to mention
that in the adopted 2002 resolution by the Arab League an overall monitoring package was
suggested which included the adoption of an “Arab Parliament, which would have competence to
further human rights, as well as to review legislation in Arab countries; and a Regional Security
Council that would promote conflict prevention and resolution between Arab countries, as well
as develop a strategy to maintain peace”548; and establishment of an Arab Court of Justice which
would have competence regarding human rights issues, as well as in disputes related to
principles of international law.549 However, the proposed package did not receive any
collaboration for adoption of any of those proposals and so the 2004 version of the Charter failed
to adopt any of proposed measures.

5.5.3 Critical Evaluation.

Article one of the Charter seems to be a major step towards the idea of universalism of
human rights and not relativism unlike its predecessor. Article 1 states that, “Charter seeks [t]o
place human rights at the centre of the key national concerns of Arab States, […] and enable him
to improve his life in accordance with noble human values, and [t]o entrench the principle that
all human rights are universal, indivisible, interdependent and interrelated. A similar voice has
also been projected in the Preamble the Charter also which rejects, “all forms of racism and
Zionism, which constitute a violation of human rights”.550

As it appears, the aim of the Charter is to place human rights at the center of key national
concerns of Arab States551, however contrary to what it states in the Preamble and Article 1,
Article 2 (3) of the Charter proceeds by condemning “all forms of racism, Zionism and foreign

548 Rishmawi, Supra note 524.
549 Rishmawi, Supra note 524.
551 The Arab Charter on Human, Article 1(1).
occupations” which according to this article “are the major barriers to the implementation of fundamental rights”. One can certainly make a compelling argument that the Charter, by equating Zionism with racism and foreign occupation, attempts to make a political statement which most likely reflects on the current political conflicts in the Middle East rather than focusing on international human rights issues.

With regards to women’s rights, the Charter unlike any of its predecessor documents has made an attempt to offer equality between the sexes, by asserting that “men and women are equal with respect to human dignity, rights and obligations.” The Article also obligating the “State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.” However, it appears that the Article has carefully restricted those equalities within the “framework of the positive discrimination established in favour of women by the Islamic Shari’ah, other divine laws and by applicable laws and legal instruments.” It can be argued that, although the Charter obligated its Member States to take measures in favour of women, yet it has not overruled the Shari’ah law position in respect to the status of women in Islamic society.

Article 33(1) recognises the family as the “fundamental group unit of society” and that “it is based on marriage between a man and a woman.” It appears that the Article defining marriage as only a union of a man and a woman prohibits any other arrangements, including polygamy. However, the last sentence of the Article asserts that “the laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.

552 The Arab Charter on Human, Article 2(3). All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
553 The Arab-Israeli conflict: it mainly refers to the establishment and creation of Israel. Also it refers to the Israeli and Palestine conflict.
554 The Arab Charter on Human, Article 3(3).
555 The Arab Charter on Human, Article 3(3).
556 The Arab Charter on Human, Article 3(3).
557 The Arab Charter on Human, Article 33(1) - The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.
This leaves the door open to discriminatory laws of the Member States to define and enforce the scope of the rights provided in this Charter to regulate marriage in accordance to their own understandings of the Shari’ah which may result in two discriminatory situations against women. Firstly, a woman will be prohibited under the remit of Shari’ah law to marry a non-Muslim. Secondly, women will remain to be subject to widespread polygamy. This is of course contrary to the level of equality between men and women as that is required by Article 23 (4) of the ICCPR which states “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” Furthermore, Article 16 (1) of the Convention on Elimination of All Forms of Discrimination against Women (the Women Convention) states “[p]arties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.” In this regard, the Human Rights Committee has stated in its General Comment on this provision that “during marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.”

Article 33 (2) prohibits all forms of violence or abuse in relation particularly towards women and children by stating that, “The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children.” However Article 33 (2) restricts the scope of prohibition to the practice of such violence.

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558 The Arab Charter on Human, Article 33(1).
559 ICCPR, Article 4.
560 CEDAW, Article 16 (1).
562 Article 33 (2) - The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.
violence in family and not to the whole of society. It can certainly be argued that although the
Charter has taken positive steps to protect women, however, it falls short of granting full
protection as offered by the CEDAW, which prohibits “gender-based violence as a form of
discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of
equality with men”\textsuperscript{563}. It includes “any acts that inflict physical, mental or sexual harm or
suffering, threats of such acts, coercion and other deprivations of liberty”\textsuperscript{564}.

Article 22 of the Charter asserts that “everyone shall have the right to recognition as a
person before the law”\textsuperscript{565}, and Article 25 asserts that “minorities shall not be denied the right to
enjoy their own culture, to use their own language and to practice their own religion.”\textsuperscript{566}
However, the exercise of these rights under both articles is governed by “law” which potentially
targets non-Muslims who are not “People of the Book”. As already established, those non-
Muslim groups are generally discriminated harshly in many Islamic countries, which is contrary
to the universal protection offered by Articles 16 of ICCPR, which states, “everyone shall have
the right to recognition everywhere as a person before the law”\textsuperscript{567}; Article 21 of ICCPR which
states, “the right of peaceful assembly shall be recognized. No restrictions may be placed on the
exercise of this right other than those imposed in conformity with the law and which are
necessary in a democratic society in the interests of national security or public safety, public
order, the protection of public health or morals or the protection of the rights and freedoms of
others”\textsuperscript{568}; Article 22 (1)\textsuperscript{569} of ICCPR which states, “everyone shall have the right to freedom
of association with others”; Article 27\textsuperscript{570} of the ICCPR which states, “minorities shall not be
denied the right, in community with the other members of their group, to enjoy their own culture,

\begin{itemize}
\item \textsuperscript{563} CEDAW, Article 1.
\item \textsuperscript{564} CEDAW, Article 6.
\item \textsuperscript{565} The Arab Charter on Human, Article 22.
\item \textsuperscript{566} The Arab Charter on Human, Article 25.
\item \textsuperscript{567} ICCPR, Article 16.
\item \textsuperscript{568} ICCPR, Article 21.
\item \textsuperscript{569} Everyone shall have the right to freedom of association with others, including the right to form and join trade
unions for the protection of his interests.
\item \textsuperscript{570} 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.
\end{itemize}
to profess and practise their own religion, or to use their own language\textsuperscript{571}; and Article 8(3)\textsuperscript{572} of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which states, “Nothing in this article shall authorize States Parties [...] to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."\textsuperscript{573}

Article 24 outlines a series of general rights for the citizens. The Article asserts that “every citizen has the right” to:

1. To freely pursue a political activity.
2. To take part in the conduct of public affairs, directly or through freely chosen representatives.
3. To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will.
4. To the opportunity to gain access, on an equal footing with others, to public office in his country in accordance with the principle of equality of opportunity.
5. To freely form and join associations with others.
6. To freedom of association and peaceful assembly.
7. No restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.\textsuperscript{574}

As the title of this Article indicates “every citizen has the right” to participation in political office, political affairs, joining associations and freedom of associations, however those

\textsuperscript{571} ICCPR, Article 27.
\textsuperscript{572} Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.
\textsuperscript{573} ICESCR, Article 8(3).
\textsuperscript{574} The Arab Charter on Human, Article 24.
rights are only limited to the citizen and so the Article has restricted the non-citizen. Moreover the charter also falls short of providing a specific provision that guarantees an effective remedy for non-Muslim citizens in an Islamic State. As alluded previously, under the ambit of Shari’ah law, in an Islamic State, non-Muslims have been traditionally discriminated from political participation and political office. This is of course contrary to the Article 2(1) of the ICCPR which states, “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In this regard, the Human Rights Committee, in its General Comment 3 on Article 2 of the Covenant has also asserted that “the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction...[i]n principle this undertaking relates to all rights set forth in the Covenant.”

The Charter also failed to establish a similar protection as the international human rights law offers for all women which is to “freely pursue” work in politics since women, under the ambit of Shari’ah law, are generally prohibited to occupy certain professions such as being magistrates or judges.

Article 32 of the Charter also concerns the right to freedom of opinion and expression, by stating that:

1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

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575 ICCPR, Article 2(1)
576 Human Rights Committee General Comment 3: Implementation at the national level, paragraph 1.
2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.  

Although, Article 32 seems to be in line with international human rights norms, specifically with Article 19 (1) of the ICCPR and the restrictions permitted, however, it appears that the Article 19 (1) of the ICCPR also guarantees the right to hold opinions without interference. In this regard, the Human Rights Committee stated in General Comment 10 that “[t]his is a right to which the Covenant permits no exception or restriction.”

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.

2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

As it is evident, both Article 30 (1 & 2) impose certain restrictions on rights to freedom of thought, conscience and religion. Article 30 (1) allows restrictions to be imposed on the basis that it is provided by law and Article 30 (2) imposes certain restrictions on right to freedom of thought, conscience and religion provided that it is “necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.” On its face it seems the restrictions are in compliance with the Article 18 (2) of the ICCPR which states, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”. However, the restrictions imposed in the Charter are deemed to be far beyond international

577 The Arab Charter on Human, Article 32.
578 ICCPR, Article 19 (1): The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.
579 Human Rights Committee General Comment 10: Freedom of Expression, paragraph 1.
580 The Arab Charter on Human, Article 30(2).
human rights law, since it allows restrictions on manifesting of one's religion or beliefs or to perform religious and not the freedom to hold a belief. However, the Human Rights Committee has emphasized in General Comment 22, concerning the Article 18 of ICCPR that “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.”

Article 4(2) of the ICCPR also makes it clear that pursuant to Article 18 which states, “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,” are the rights that cannot be subject to derogations during states of emergency contrary to Article 4(1) of the Covenant.

Moreover it should also be noted that the restrictions imposed on manifesting of one's religion or beliefs, can be a grounds for concern since under Article 30 (2) since any strong opinion about the religion of Islam can potentially fall under the ambit of blasphemy. The restriction also can be interpreted to the effect that the Article 30 (2) upholds the traditional view of freedom of religion under Shari’ah law in which no Muslim can ever convert to any other religion due to the fact that this act will fall under the ambit of apostasy. In this regard the Charter can be deemed in violation the Article 18 of the ICCPR which states:

1. The right to freedom of religion 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.

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581 Human Rights Committee General Comment 22: The Right to freedom of thought, conscience and religion, paragraph 3.
582 ICCPR, Article 4(2).
583 ICCPR, Article 4(1): In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
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.\textsuperscript{584}

It should be noted that Article 6 of the Charter calls for the death sentence; however it “may be imposed only for the most serious crimes in accordance with the laws enforced at the time of commission of the crime and pursuant to a final judgment rendered by a competent court.” The Article however does not offer any clarification as what are the categories of “serious crimes”. This can potentially be very problematic since this Article obliquely allows for a restriction on the right to freedom of association, freedom of thought, conscience and religion since both apostasy and blasphemy under Shari’ah law are both categorized as serious crimes and punishable by death under the ambit of \textit{Hadd}. Furthermore, this Article also enables the state parties to categorise the categories of serious crimes as they please contrary to international norms, and to suppress any moderate or alternative voices in favor of religious freedom. This approach is even more troublesome when one notes that Article 7(1) if the Charter allows the death sentence on persons less than 18 years of age, so as long as the crime and death sentence has been stipulated in the laws enforced at the time of the commission of the crime.\textsuperscript{585} These Articles are in clear violation of Article 6(5) of the ICCPR which states, “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant”\textsuperscript{586} and Article 37 of the Convention on the Rights of the Child (CRC) (1989) which clearly states that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”\textsuperscript{587}

It is noteworthy to mention that with the exception of Palestine, all other state parties to the Charter, such as Jordan, Bahrain, Libya, Algeria, the United Arab Emirates, Palestine, and Yemen are also currently parties to the Convention on the Rights of the Child without entering any reservation. Therefore, it seems their provision of Article 6 and 7 is an attempt to appeal to

\textsuperscript{584} ICCPR, Article 18.
\textsuperscript{585} The Arab Charter on Human, Article 7(1).
\textsuperscript{586} ICCPR, Article 6(5).
\textsuperscript{587} CRC, Article 37.
the strict interpretations of Shari’ah law and the practice of some Islamic states which still execute persons under the age of 18 contrary to international human rights laws. Furthermore, Article 7 (2) of the charter, which prohibits the death penalty against “on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery”\textsuperscript{588}; can also be derogated at the time of “emergency which threatens the life of the nation and the existence of which is officially proclaimed”\textsuperscript{589} pursuant to Article 4 of the Charter.

In short it can be argued that the Charter falls short in addressing a number of key human rights which are fundamental. The Charter has mainly failed to acknowledge, among other things, a genuine freedom of thought and religion for all individuals as it promotes racial and religious hatred specifically towards Zionism. The Charter fails to provide genuine equality between the sexes and denies freedom of all religious minorities to their own religion and culture.

Therefore, although the Charter as a whole successfully acknowledges much of the weaknesses of the 1994 version and makes several positive steps toward the “modernization of the Charter to correspond with international human rights standards”\textsuperscript{590}, yet, there is more to be done to entrench the positive development in developing further commitment and positive development and respect for human rights in this Charter. In this regard, Article 52 of the charter seems to be an encouraging point since it allows any State parties to “propose additional optional protocols to the present Charter and they shall be adopted in accordance with the procedures used for the adoption of amendments to the Charter.”

6. Conclusion

As made evident throughout this paper, Islamic human rights documents have generally failed to accommodate human rights since many key provisions which are fundamental for their

\begin{itemize}
\item [588] The Arab Charter on Human, Article 7(2).
\item [589] The Arab Charter on Human, Article 4.
\item [590] Rishmawi, Supra note 424.
\end{itemize}
compliance with international human rights standards are omitted. As Delacourt emphasised, it
seems that the authors of these documents were defending their own version of Islamic rights
rather than human rights. Some of the main areas which have sparked controversy in Islamic
documents include the intolerable discrimination that Islam imposes on women and non-
Muslims in general. Furthermore, the documents collectively neglected to acknowledge certain
key fundamental rights and freedoms including, inter alia, freedom of thought, religion and
expression.

It should be noted that the Shari’ah based rights which were promoted in these documents
are not representative of the beliefs of all Muslims. There are many Muslim scholars within or
outside Islamic societies which have openly questioned, and challenged the principles of
Shari’ah law. Activists such as Shirin Ebadi, a prominent Iranian human rights activist who
has openly challenged the mandate of Shari’ah law in respect to women's rights, and Mr. Shehu
Sani, a Nigerian Muslim human rights activist, who was recently on trial for his writings
against the double standards of Shari’ah law in Nigeria, and many others have inspired
movements seeking to promote equality and justice and at the same time challenge the strict
interpretation of the Quran and Hadith. Despite the popular support for rectification and
reformation of Shari’ah law by many Islamic and non-Islamic scholars so far, it has proven to be
a very formidable task. One of the main dilemmas for reforming Shari’ah law lies in the fact that
Shari’ah law is not a codified law. The Shari’ah was actually expounded centuries after the
invention of Islam in Saudi Arabia, and it is very hard of not impossible to classify its tenants.
This has resulted in further ambiguity of its principles. The ambiguity is also evident in the fact
that Shari’ah law principles do not have unified implications among the Islamic countries.

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Several footnotes are noted:

591 Dalacoura, Supra note 17 at 58.
592 Ebadi is an Iranian Lawyer and a human right activist. She is also the founder of Children's Rights Support
Association. She was awarded the Nobel Peace Prize for her significant and pioneering efforts for democracy and
human rights, especially women's and children's rights. Please See the following website for further information:
593 Igwe, Leo. Shari'ah and Human Rights in Nigeria, (2007), online:
http://www.ocnus.net/artman2/publish/Africa_8/Shari’ah_and_Human_Rights_in_Nigeria.shtml
594 As already noted, countries such as Iran and Saudi Arabia are currently imposing Shari’eh based punishment of
Hadd for blasphemy and apostasy where others such as Turkey, and Egypt and Kuwait for the most part have taken
many positive in reducing or eliminating the strictness of the Shari’eh.
Unfortunately, these ambiguities have rendered Shari’ah law vulnerable to many radical interpretations, and act as a means in the hands of individuals or states to advance their political aims.

Equally it should be noted that Shari’ah law is in many aspects as currently practiced is at odds with universal human rights norms; however this does not mean that Islam itself is inconsistent with universal standards. As An-Na’im asserted, “Islam itself can be consistent with and conducive to the achievement of not only the present universal standards, but also the ultimate human rights, namely the realisations of the originality and individuality of each and every person”. The best example for this argument is the Constitution of Medina, established by the Prophet Muhammad, after his emigration from Mecca, which constitutes the establishment of the first Islamic state. The Constitution of Medina, which has been considered by many as the first constitution in history, was drawn up with the concern to “regulate a multicultural, multi-religious society and included the Jews and others within the Muslim community and thus they enjoyed the same rights” and responsibilities.

Therefore, the answer lies in a reform movement by Muslims with the aim to rediscover the true meaning of Islamic principles through liberal interpretation with a genuine intention to develop equivalent principles as to what has been enshrined in the UDHR and other international human rights standards. It is only through liberal interpretation that Islamic law can meet the traditional challenges which have been a great barrier to the enhancement of human rights in all Islamic states. It is merely through liberal interpretation that Islam can universally reinstate its legitimacy as a true source of law. This of course does not mean that Islamic traditions should be abandoned but rather it should be embraced and reinterpreted based on the Muslims’ modern needs in according to the practice of Ijtehad. New interpretations of the sacred texts (Quran and Hadith) are particularly essential to achieve a genuine respect for women and a true equality

595 Most notably: Talibans (Al-Qaida).
596 Dalacoura, Supra note 17 at 61.
597 Lawyers Committee for Human Rights, Supra note 329 at92.
598 Please refer to section 3.3, The Islamic Sources.
between Muslims and non-Muslims within the Islamic societies. As the Lawyers Committee for Human Rights eloquently states, “the Quranaic text is scared but its interpretation is human and subject to the interpreter’s constitution and social position.” An-Na’im also propounds “the Ijtehad should be applied even to matters governed by clear and categorical texts of the Quran”. The best example for this argument is the reinterpretation that was carried by Tunisian law that prohibited polygamy altogether on the grounds that it “was no longer acceptable and that the Quranic requirement of justice among co-wives is impossible for any man, except the Prophet, to achieve in practice”.

Therefore Muslims must lead the way and discover the true meaning of Quranic versus while resorting to doctrine of Ijma, which offers consensus among jurists, Qiyyas which is the science of analogical reasoning, to discover the philosophical implications of the Quranic verses. In other words, For Muslims the focus should shift of “what has Islam done to the Muslims?” to, what Muslims should do for Islam?. Muslims should realize that Islam, by its nature, is not an obstacle to a true equality between men and women or true religious equality. A careful study of past Muslim civilizations, through the Golden Age of Islam, can attest to this. However, regrettably, Islam has now changed and Islamic civilizations have lost their former greatness which lasted for centuries. Now, for the most part, as we witness in Middle East, fundamentalists define the scope of Islam. This is rather evident as, more and more, open and independent legal reasoning, known as ijtihad, has been progressively restricted and instead the doctrine of confirmation or imitation, also known as Taqlid, has been highly promoted. In other words, while fundamentalists call for the supremacy of Islamic law, yet the argument has been made that, Islam should be observed as the religious scholars sees it and not through independent reasoning. Perhaps one of the saddest examples of these misrepresentations of Islamic principles can be observed in the Islamic Republic of Mauritania located in West-Africa. Currently, in the

600 Lawyers Committee for Human Rights, Supra note 329 at 192.
602 An-Na’im, Supra note 67at 45.
603 Bernard, Supra note 150 at 3.
Islamic Republic of Mauritania the blacks are not only prevented from attaining a higher level education and employment on the base of their color, they are subject to slavery. The black in the Islamic Republic of Mauritania comprise one-third of the countries’ population. Although slavery has been illegal for the past three decades, the practice is still ongoing. The primary contributing factors for this practice are associated with illiteracy and a general lack of education, but the main reason is the fact that the Islamic principles as interpreted have been manipulated by the local religious authorities for their own benefit. As indicated previously, the right to be free from slavery, and the right to be free from torture are recognized, guaranteed and protected within the legal framework of both international human rights laws and Shari’ah law. However, the current governing religious fanatics, by adopting and incorporating their interpretation of Islamic principles, manipulate the nature and teaching of the Quran so that it has direct reference to the Islamic sources such as the hadith and Sunna.

It is time for the Muslims to engage in self-criticism, re-evaluation and revitalisation of authentic Islamic principles. The burden is now on Muslims to reject the religious fanaticism and to advocate an authentic Islam as it was once a mighty religion during the Golden Age of Islam. Furthermore, for Muslims to develop a positive and harmonized relationship between Islamic law and international human rights norms and principles they would require the international cooperation especially at the UN to recognize the Islamic culture and belief. They also require “education, information, orientation and empowerment of populace though the promotion of a local understanding of international human rights and norms and principles”, as many Muslims are still alien to the true meaning of human rights. In addition to this, they require a non-violent, non-coercive, non-domineering dialog, while consistency on western policy, especially US policy on human rights issues towards all Islamic states.

605 Ibid.,
606 As indicated earlier, The Arab Charter of Human Rights was revised significantly in order to meet the international human rights standards, due to tremendous pressure and co-operations it received by many human rights organizations, such as, the Office of the High Commissioner for Human Rights (OHCHR), academics and NGOs. Although, The Charter, failed to observe all the recommendations, nevertheless, it can was a significant success by international organizations.
The revised version of The Arab Charter on Human Rights, which was adopted in May 2004, was of course a historic achievement for Islamic States and a significant step toward the promotion of the UDHR as the foundation of human rights and adoption of the concept of the universality of human rights. As indicated elsewhere, the concept of the universality of human rights has historically been challenged by delegations from Muslim States, most notably Saudi Arabia; however the revised version of the Arab Charter on Human Rights, has proved that the coexistence of the universality of human rights and cultural rights within the framework of Shari’ah law is attainable. It should be noted that the Arab Charter on Human Rights is far from being in full compliance with international human rights standards, especially in the areas of freedom of thought, gender equality, and freedom of religion and prohibition of religious minorities to profess their own cultures and religion. In other words, as Rishmawi asserted, the Arab Charter on Human Rights “remains a missed opportunity” but should nevertheless be considered an opportunity for the generation to come to take this opportunity to advance protection and religious freedom.

608 Chapter 2.
609 Rishmawi, Supra note 424 at 376.
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