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ESTABLISHING AND INTERPRETING INTERNATIONAL HUMAN RIGHTS STANDARDS: A UNIVERSAL IDEA IN A PLURAL SOCIETY

BY

MOHAMMED HASSAN AL-QASIMI
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Department of Law
University of Durham
1998

16 APR 1999

O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honoured of you in the sight of God is (he who is) the most righteous of you.
Qur'an XLIX:13.

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.
UDHR, Article 1.

ABSTRACT

This study is concerned with analysing the modern concept of human rights, discussing the progress made in the universalization of the idea of human rights, explaining the difficulties involved in such a process, and explaining the methods by which such difficulties can be minimized.

In the first part of the study, a discussion of the concept of human rights will be undertaken. This will explain the origins of the idea of human rights and the stages it went through, from its origins in the idea of natural law to its codification in international instruments as well as in national constitutions. This will be followed by the presentation of a theoretical view regarding the concept of human rights in Islamic law in order to examine the likelihood, in theory and practice, of Islamic law absorbing and encompassing international human rights norms. This part of the study provides an introductory account of what the concept of human rights means, and the areas of conflict relating to it. By examining the two separate, but somewhat similar, perspectives of "rights" in both modern international law and the Islamic system, I set out the way in which each tackles the questions relating to the differences between them and the quest for accommodation.

The main part of this study will be concerned with the quest for universality as regards the idea of human rights, and the difficulties involved. It will treat first the emergence of international concern with human rights and the progress made in this regard. A discussion of the sources of states' obligations in relation to human rights documents will be presented in order to show how these sources might equip the central machinery for providing the idea of human rights with effective legal measures necessary for the quest of universality.

An explanation of the difficulties involved in the quest for universality in human rights will be offered, which will present the areas of conflict which impede granting those rights legal force. Religious freedom will be discussed as an example of how some human rights involve uncertainty and ambiguity due to their relation with matters which are in themselves replete with controversy and difference. This will be followed by a discussion of the practice of different states, particularly Muslim states, which aims to demonstrate how their different understandings and interpretations of religious freedom affect their obligations to provide that right with effective protection.

The last part of the study will be concerned with the means of accommodating these differences and conflicts. The principle of the margin of appreciation will be discussed via an examination of the European Convention on Human Rights. The discussion will include the scope of the margin of appreciation. Attention is also paid to the question of proportionality. Finally, the issue of reservations to human rights treaties will be discussed since this represents another means of accommodating the differences involved in understanding the human rights and freedoms provided for by international instruments. The discussion assesses the scope for entering reservations to human rights treaties. It also deals with the question of universality versus integrity with regard to human rights treaties.

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DEDICATION

To my parents for their constant encouragement and patience. To my wife for her patience and support. To my children Nora, Sara and Bader and all the members of my family.

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The copyright of this thesis rests with the author. No quotations from it should be published without Mohammed Al-Qasimi's prior consent in writing and information from it should be acknowledged.

DECLARATION

This thesis results from my own work and has not been previously offered in candidature for any other degree or diploma.

ACKNOWLEDGEMENTS

I would like to express my sincerest gratitude and deepest appreciation to my supervisor, Professor Colin J. Warbrick, for his constant help and guidance, invaluable instruction, during the writing of this thesis. I am deeply greatful for him for his patience, his generousity with time and his devotion to my work.

I wish also to thank the secretaries Sheila Jobling and Joanne Emerson at the Department of Law, and Alisoun Roberts and Carol Simmons at the Law Library.

I would like to thank Mr Abdul Raheem Al-Meri, Cultural Attaché at the UAE Embassy in London, and the other staff members at the Cultural Office.

Thanks also to my friends Dr Abdul Aziz Al-Hor, Dr Fahad Al-Malik, Dr Abdullah Al-Suwaiji, Ali Omran, Mansour Al-Mansour, Omar Al-Sudais, Esam Gareeb, Talal Al-Azma' and Fahad Al-Liheibi, for their support and help. And to Michael Ayton, who offered help with matters of style and sense.

TABLE OF ABBREVIATIONS

AM. J. COMP. L.	*American Journal of Comparative Law*
AM. J. INT'L L.	*American Journal of International Law*
AM. J. ISLAM. SOC. SCIEN.	*American Journal of Islamic Social Sciences*
AM. U.L. REV.	*American University Law Review*
AUST. Y.B. INT'L L.	*Australian Yearbook of International Law*
BRIT. Y.B. INT'L L.	*British Yearbook of International Law*
BROOK. L. REV.	*Brooklyn Law Review*
CAL. W. INT'L L.J.	*California Western International Law Journal*
CAN. Y.B. INT'L L.	*Canadian Yearbook of International Law*
CEDW	Convention on the Elimination of all Forms of Racial Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CORNELL INT'L L.J.	*Cornell International Law Journal*
Eur. Comm'n of H.R.	European Commission of Human Rights
ECHR	European Convention of Human Rights
Eur. Ct. H.R.	European Court of Human Rights
ECOSOC	Economic and Social Council
EUR. HUM. RTS. L. REV.	*European Human Rights Law Review*
Eur. H. R. Rep.	European Human Rights Reports
GA. J. INT'L & COMP. L.	*Georgia Journal of International& Comparative Law*
HARV. INT'L L.J.	*Harvard International Law Journal*
HRC	Human Rights Committee
HUM. RTS. L.J.	*Human Rights Law Journal*
HUM. RTS. Q.	*Human Rights Quarterly*
HUM. RTS. REV.	*Human Rights Review*
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IGO	Inter-governmental Organization

INDIAN J. INT'L L.	*Indian Journal of International Law*
ILC	International Law Commission
ILM	International Law Materials
INT'L & COMP. L.Q.	*International & Comparative Law Quarterly*
INTRIGHTS BULL.	*Interights Bulletin*
LCHR	Lawyers Committee for Human Rights
MICH. J. INT'L L.	*Michigan Journal of International Law*
MICH. L. REV.	*Michigan Law Review*
NETH. Q. HUM. RTS.	*Netherlands Quarterly of Human Rights*
NETH. Y.B INT'L L.	*Netherlands Yearbook of International Law*
NGO	Non-governmental Organizations
N.Y.U.J. INT'L L. & POL.	*New York University Journal of International Law and Politics*
RUT-CAM. L.J.	*Rutgers-Camden Law Journal*
TEX. INT'L L.J.	*Texas International Law Journal*
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration on Human Rights
U. ILL. L. REV.	*University of Illinois Law Review*
UNCHR	United Nations Commission on Human Rights
UNTS	United Nations Treaty Series
VAND. L. REV.	*Vanderbilt Law Review*
VA. J. INT'L L.	*Verging Journal of International Law*
VCLT	Vienna Convention on the Law of Treaties
WASH. L. REV.	*Washington Law Review*
YALE L.J.	*Yale Law Journal*
Y.B. EUR. L.	*Yearbook of European Law*
Y.B. Eur. Conv. on H.R.	*Yearbook of the European Convention on Human Rights*

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CHAPTER 1

INTRODUCTION

1.1 Background to the Study

The current century has witnessed unprecedented violations of human rights, especially during the two World Wars. The desire of various states, whether racially or religiously motivated, to aggrandize themselves or dominate others has kindled wide-scale atrocities along with the entire absence of any regard for human dignity or respect. This "disregard and contempt for human rights" has "resulted in barbarous acts which have outraged the conscience of mankind".[1] Such experiences have, twice in this century, forced the world to set an end to such violations of human rights in order to prevent their reoccurrence. In 1919, the League of Nations was created in the face of the terrible atrocities that occurred during the First World War. However, disregard for the dignity of individuals and respect for human rights continued, culminating in the cruelties and atrocities committed against humanity before and during World War II. For this reason, and because too of the failure of the system set up by the League of Nations to restore respect and dignity for human rights, the UN was established in 1945 with one of its purposes being to provide a more effective and efficient machinery for the protection of human rights. The United Nations Organization was established to "save succeeding generations from the scourge of war, which twice in our time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".[2] Article 1 of the UN Charter sets out the purposes of the UN which, *inter alia*, include the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

There is no disagreement over the vital role of such an issue in the formulation of relationships among the UN member states or over the notion of the universality of human rights, in the sense of every individual having certain fundamental and inalienable rights. Disagreements arise, however, where different understandings and interpretations are held regarding the human rights and freedoms which are enumerated in the international human

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[1] Preamble of the UDHR.

[2] Preamble of the UN Charter.

rights instruments. In other words, the challenge which faces the effective protection of human rights today is not related to the importance of the idea itself. Rather, the challenge is to apply the universal concept of human rights to different traditions and cultures, while giving due regard to the different understandings and peculiarities of each culture and tradition. All "member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms".[3] However, "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge".[4]

Thus conceived, the concept of human rights forces academics, as well as politicians and law-makers, to examine more deeply the roots of the concept in the different major traditions, in an attempt to establish more culturally-rooted standards which will be acceptable to different traditions. It cannot be said that the UDHR, which sets "a common standard of achievement for all peoples and all nations", has yet been implemented, but perhaps a beginning has been made in this formidable task.

1.2 The Significance of the Study

Although there exists a vast and growing body of literature on the subject of human rights, particularly from the years following World War II up until today, violations of human rights and fundamental freedoms continue to occur all over the globe. The barbarous cruelties committed in the territories of the former Yugoslavia are in no way less horrible and horrifying than those which occurred before and after World War II. Mass killings, ethnic cleansing, rape, genocide and other forms of crimes against humanity experienced in the former Yugoslavia bear witness that much remains to be done regarding the effectiveness of the international system for the protection of human rights. These crimes occurred despite the strenuous efforts that have been dedicated to the establishment of a universal system for the protection of human rights and freedoms for all peoples and groups around the world. Moreover, the establishment of *ad hoc* war-crimes tribunals to prosecute the perpetrators of atrocities in the former Yugoslavia and Rwanda has not deterred those who fuelled or participated in the atrocities committed in the former Yugoslavia from repeating the same barbarous acts in Kosovo or from continuing the genocide in Rwanda. These events obviously force those who are concerned with the promotion and protection of human rights – international lawyers, in particular, as well as politicians, NGOs and IGOs – to dig deeper and search for better and more effective

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[3]Preamble of the UDHR.

[4]*Id.*

solutions to the problems encountered in laying down an effective universal machinery for the protection of human rights. Religiously motivated hatreds, claims of racial supremacy and other culturally-rooted motivations had triggered the inhuman acts committed in the former Yugoslavia. After nearly half a century following the adoption of the UN Charter, the UDHR and other international human rights instruments, one has to stop for a moment and ask: what are the problems and difficulties which have contributed to the difficulties in ensuring an effective international machinery for the protection of human rights?

There is a pressing need for studies explaining the difficulties encountered where the issue of human rights is involved, in order to eliminate the obstacles which might hinder attempts to lay down a firm system of human rights acceptable to all nations and traditions. Obviously, the quest for a universal system of human rights requires assessment of the progress made towards that end and, more importantly, definition of the obstacles to that progress which experience and practice may reveal, obstacles which may impede the development of international human rights machinery for the provision and protection of human rights in a pluralist world. This study is largely concerned with the second issue, that is, the quest for universality and the difficulties encountered.

It should be borne in mind that the claim that an international system of human rights could be in total conformity with all traditions and cultures is impossible to maintain. Thus, all endeavours in this field aim to minimize the conflict between the ideas expressed by the world's different cultures and traditions, on the one hand, and international human rights norms on the other.

1.3 Objectives of the Study

It is not claimed that this study can solve the problems relating to the issue of universality versus relativity in the field of human rights. Differences and disagreement on matters relating to human rights will continue to exist as long as there exist notions such as morality, values, religion, politics and justice. Societies may agree that the preservation of human rights leads to the preservation of human dignity and, ultimately, establishes social justice. However, the implications of social justice may differ from one culture to another. Every culture or system has its own and distinctive vision of what constitutes social justice for its people. Consequently, human rights may differ in content and context according to what a society considers necessary for the preservation of human dignity.

One of the main difficulties connected with the issue of human rights is the quest for universality regarding international norms of human rights. The aim is to render the UN

machinery for the protection of human rights more effective and to create the possibility of it being applicable to different cultures. The vast body of literature that exists on this subject reveals that one of the main obstacles facing the effective implementation of international human rights standards has been the claim of cultural relativity. Therefore, this study aims to contribute to the subject by examining how the elaboration and interpretation of human rights standards can accommodate these differences without leaving the universal core devoid of content. This necessitates that those standards be formulated in and based on a somewhat legal, rather than political, form. However, if such an attempt is to endure controversies and challenges, such legal standards for human rights will not necessarily be able to reflect exactly the philosophical ideas on which they are founded, neither in terms of their status nor in terms of content. Moreover, such international standards will not necessarily reflect exactly those of any single state or group of states (e.g. economic and social human rights).

This means that, as exercises in positive law, the creation of international legal standards for human rights and the practice of those bodies charged with their interpretation may make accommodation to the plural nature of the international state system. Human rights obligations for states are intended to bring about results. The aim to achieve compliance with them; *how* this is done is secondary. It is not necessarily true, therefore, that a state which does not embrace exactly the Western idea of individual, fundamental rights, subject to judicial protection, will not be able to accommodate or adopt an international human rights regime. Furthermore, human rights standards can be and routinely are constructed to allow for differences in their application in different states. International human rights standards are "subsidiary" to national mechanisms for the protection of human rights and are dependent on co-operation with the national legal order for their operation. There will, however, be irreconcilable differences where the nature of the state is built on an ideology which, like human rights, postulates some notion of fundamental law, as would be the case with a religiously-based state. No amount of subtle drafting or interpretation can resolve the basic question of which should be preferred – the law of God or the law of human rights. Even here, however, states have developed means of accommodating this prospect – human rights treaties on separate topics, human rights treaties in separate regions and allowing for reservations, so that the actual space for irreconcilability is diminished, or at least, considerably minimized.

The study also examines the techniques of accommodation, both in general and with respect to particular situations – Islamic legal theory and the idea of rights and the protection of religious rights, both as a human right and a cause of plural conflict. However, it does not

aim to provide a comprehensive explanation of the idea of human rights in the Islamic legal system. Only a general description of this notion within the Islamic legal system will be provided, which will attempt to evaluate the human rights situation in Muslim countries and examine the legitimacy of the claims made by such states that, in dealing with the issue of human rights, they are governed by the precepts of Islamic law.

1.4 The Methodology Employed

The methodology employed in this study ranges from theoretical analysis of the idea of human rights in both international and Islamic legal systems to practical examination and assessment of both systems, culminating in suggestions for accommodating and reconciling the differences between different interpretations and understandings of international human rights standards.

The study is divided into three main parts. In the first, because the quest for universality involves accommodating diametrically different understandings and interpretations of human rights, the concept of "rights" is clarified, so as to show the areas in which these disagreements reside. Thus, a general introduction treating the historical and philosophical foundations of the notion of "rights", as well as the status of human rights in international law and Islamic law, will be presented.

Furthermore, in order to decide whether or not international human rights standards are or can be universal, one has to examine the premises upon which such an assertion may be based. In this connection, an explanation will be provided of how the issue of human rights has transferred from the domestic level to the international scale. (This transfer involves a struggle between the notions of state sovereignty and the question of intervention, on the one hand, and the quest for universality on the other.) This explanation should serve to illustrate why the international community decided to treat the individual as a subject of international law instead of a mere object.

The second part of the study deals with its main topic, states' obligations under international human rights instruments and the difficulties involved. It examines the theoretical basis of such obligations as well as the practice of the UN organs and UN member states. This will reveal the difficulties states encounter when observing their obligations and, more importantly, the means contained within the machineries provided by human rights law itself by which these difficulties can be overcome.

Next, freedom of religion, as a human right, will be discussed to show how the word "religion" allows for different interpretations, how the terms included in the articles which provide for religious freedom are interpreted in different ways, and how the protection of such a right is affected by such differences in understanding and interpretation. The examination of such a right, including of pronounced disagreements regarding its definition, should illustrate the nature of the difficulties encountered when an attempt is made to apply rights of a like nature in a plural world. This will be obvious from the investigation of states', particularly Muslim states', behaviour in relation to this right. A number of initial reports submitted to the HRC by certain Muslim states will be examined. This investigation will show that different states are prone to different interpretations and understandings of human rights. Furthermore, it shows that a right such as religious freedom, being vulnerable to different interpretations, allows some states to misuse it in order to justify violations of human rights in the name of religion.

The last part of the study discusses the means by which different interpretations and understandings of international human rights standards can be accommodated. The principle of the margin of appreciation, as a means by which a state can use its discretion (even though not unlimited) to interpret some of the human rights provided for by international documents, will be treated via an examination of the European Convention and the European Court's jurisdiction. The issue of reservations, as a means by which a state can exempt itself from the application of some provisions of a human rights treaty which it regards as beyond its capabilities to abide by or impossible to accommodate, will also be discussed.

Throughout this study, particular issues are dealt with in footnotes. These footnotes are intended to serve a double purpose: to furnish bibliographical and other data for more extended study or investigation of particular topics, and to provide discussion of those issues additional to that in the text.

PART I

THEORETICAL BACKGROUND

CHAPTER 2

THE CONCEPT OF RIGHTS

2.1 Introductory Remarks

The notion of human rights is not of recent origin. On the contrary, it has been in existence for hundreds of years. Human rights were formerly known as natural rights or the rights of man. It was not until the twentieth century that such rights became known as "human rights". The field of human rights is not an unexplored one. Many works have been, and continue to be, made to unfold the ambiguity that shapes the notion of human rights. However, there still exists uncertainty and vagueness with regard to what human rights are, what precisely they mean, what their nature is, and what they consist of. Much of this ambiguity can be attributed to the origins of the idea of human rights.

Many attempts have been made by philosophers to articulate a precise and unambiguous definition of the concept of human rights. The nature of the concept has proved to be highly controversial. Differences in attitudes towards the concept of human rights can be traced to the different perspectives from which philosophers have tended to articulate their conceptualization of the norm of human rights. However, all definitions of the concept of human rights "include all, and only, human persons and [are] linked in a very basic way to being human".[1] What distinguishes human rights from other types of rights is that the former are principles "of justification with respect to what is due each person, and which each person must dutifully respect in others, in virtue of being human".[2]

What makes the notion of human rights so controversial, Rosenbaum maintains, is that it is so complex. First, the notion of human rights has a philosophical character, as well as encompassing political considerations which, in turn, are the subject of considerable disagreement. Secondly, the notion of human rights "combines some terminological distinctions in a confusing manner". It is commonly accepted that "human rights" connotes different types of rights, such as "natural, individual, social, or community rights".[3] Each of these categories has its distinctive nature and meaning, and the combining of them into

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[1]Alan S. Rosenbaum, *Introduction: The Editor's Perspective on the Philosophy of Human Rights, in* THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES 3, 25–6 (Alan S. Rosenbaum ed., 1980).

[2]*Id.*

[3]*Id.* at 4.

one category would lead to confusion about the precise meaning of human rights.[4] In addition, the origins from which the notion of human rights is derived may well contribute to the difficulty of identifying them or determining their content, scope and nature. This must not be taken to mean that the concept of human rights is totally unclear or not susceptible to at least some agreement. The materials relating to human rights are extensive, and only a small fraction of the literature can be covered here. In the following sections, an attempt will be made to focus on some of the areas relating to the idea of human rights which make it controversial. In selecting the areas to be examined, I have emphasized the origins of the idea of rights. This will have some implications for our examination of other legal systems, particularly the Islamic legal system, which will be conducted at a later stage in this study. It is indeed the origins of the idea of rights which determine the nature, scope and content of the rights. This must be borne in mind if one wants to understand the specific character and nature of human rights in a legal system.

2.2 The Nature of Rights

There has been, and still is, significant disagreement about whether human rights are restricted to a certain type of rights, or whether other rights, such as legal, moral, ethical or natural rights, should be included in the notion of human rights. Each of these types of rights has different characteristics and involves different consequences. Thus, including all of them in one category will lead to difficulties in regulating and systematizing the doctrine of human rights. The source of the confusion seems to lie in the fact that while all these rights share a common terminology, at the same time, each of them has a special character.

The social changes that occurred during the seventeenth and eighteenth centuries had a perceptible impact on the forms of human rights instruments and on the rights these instruments embodied. These changes have led to new forms of such instruments. The rights that were entrenched in the eighteenth-century instruments took the form of protective rights. They have taken another form in recent instruments, due to the changes societies have experienced. Rights in these contemporary instruments are more welfare-oriented than protective. The shift that has taken place in the formulation of rights in these instruments is due to the emergence of new purposes for having such instruments. During the eighteenth century, the main purpose of declaring human rights instruments was a political one. They were laid down in order to confront the totalitarian regimes that existed at that time. These instruments were safeguards against regimes that did not pay appropriate attention to the rights of individuals, whereas contemporary human rights documents are more concerned

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[4] *Id.*

with the individual's welfare and happiness.[5] Put another way, the rights embodied in these modern instruments "are no longer confined to 'freedom' from State intervention, but include many rights that can only be realized through positive action by the State".[6]

The right to life, for instance, was dealt with in the eighteenth century under "the right of personal security", namely the individual's enjoyment of his right not to be killed and the safety of his "limbs". In contemporary human rights documents, by contrast, "the right to life" is an inalienable and fundamental right, and covers, besides the right not to be killed, "psychological suffering and apprehension of injury, offensive noises and odours, and invasions of privacy". Thus, "the focus has shifted from quantity to quality of life".[7]

In safeguarding man's human rights, an important role is played by government and its institutions. Human rights require that these institutions act in a way that recognizes and protects these rights, which have been established to preserve and protect man's humanity and dignity.[8] Therefore, one seeks human rights, according to Donnelly, "principally when they are not effectively guaranteed by national law and practice". The call for human rights involves, Donnelly continues, a "challenge ... to alter national legal or political practices. ... To assert one's human rights is to attempt to change political structures and practices in ways that will make it no longer necessary to claim those rights (as human rights)."[9]

Let us turn now to the question of defining the content of a right. In this regard, Carl Wellman suggests that in order to understand what a person's claim to a right means, it is necessary to articulate the way in which we can define or illustrate the content of rights, rather than defining the content of each right independently. Having devised an ideal method for defining rights in general, we can easily employ this method to define any right of any kind. It is only after defining the content of a right that we can decide whether the right exists or not and, consequently, we can decide what type of evidence is required to sustain such a claim. Wellman goes on to argue that it is much easier to define the content of a legal right than it is that of a human right. For legal rights are created by legal institutions, namely legislatures and courts, and are enacted to fulfil the needs of a given society in given circumstances. Once those circumstances have changed and, accordingly,

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[5]John Kleinig, *Human Rights, Legal Rights and Social Change, in* HUMAN RIGHTS 36, 36–7 (Eugene Kamenka and Alice Erh-Soon Tay eds., 1978).

[6]PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 9 (1990).

[7]Kleinig, *supra* note 5, at 37.

[8]SIEGHART, *supra* note 6, at 18.

[9]JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 20–1 (1993).

the needs are changed, it is within the legislature's power to change these rights in a way that fits the new needs. This characteristic does not exist in the case of human rights. Because these rights exist prior to and independent of any state or legal institution, they cannot be deemed unfit to certain circumstances. Furthermore, many legal analyses have been presented to create and advance practical and efficient ways by which legal rights can be defined. Hohfeld's approach is the most famous, and represents the most efficient way of defining the content of any legal right. Hohfeld suggested that certain "legal conceptions" can be "used to define the content of any legal right. These legal conceptions are legal liberty, legal claim, legal power and legal immunity."[10]

Generally speaking, two distinctive meanings can be drawn from the word "right". First, it can be said that "right" connotes "moral righteousness": that is to say, it is right for X to do Y. It is morally accepted that X performs Y. Secondly, "right" might imply "entitlement": that is to say, it is X's right to have or to do Y, i.e. X is entitled to, or entitled to do, Y. In this sufficient context, it is of no significance whether Y is "good or bad". *Having* Y is in itself a justification for "having, doing or enjoying" Y. Thus, it is not intended that Y will be "right" in both senses. Nevertheless, it is possible to have a right that includes both senses.[11] The second sense of the word "right" entails some kind of relationship between the right-holder and the duty-bearer. This relationship to some extent limits the freedom of the latter, and specifies the way that "he should act". This relationship is justified by having the "right".[12] In other words, the existence of a right justifies the correlative relationship between the right-holder and the duty-bearer.

It is this relationship which determines the possibility or the extent to which the right-holder could exercise his right and, more importantly, the extent to which the duty-bearer, especially if it is the state, is allowed to interfere with that right or perform its duty, in case such a relationship requires so. This will be dealt with in the following section.

2.2.1 Legal rights

Hohfeld begins his analysis of rights by drawing our attention to the need not to confuse rights with other legal conceptions. He suggests that a person can be regarded as a right-

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[10]Carl Wellman, *A New Conception of Human Rights, in* HUMAN RIGHTS 48, 49–51 (Eugene Kamenka and Alice Erh-Soon Tay eds., 1978).

[11]DONNELLY, *supra* note 9, at 19–20.

[12]H. L. A. Hart, *Are There Any Natural Rights, in* THEORIES OF RIGHTS 77, 83 (Jeremy Waldron ed., 1985).

holder in four cases. This can be contemplated in the following legal relations which he believes ensue from legal rules. These legal relations are as follows:

Jural opposite

right	privilege	power	immunity
non-right	duty	disability	liability

Jural correlatives

right	privilege	power	immunity
duty	non-right	liability	disability

It is clear from this classification that Hohfeld intends "right" as a term that can be employed in describing more than one legal relation. The four cases are as follows.

(1) *Claim-rights*. In this case, if Y has a right to be repaid by X, then X has a duty to repay Y. This kind of relation, as Hohfeld sees it, is the most common meaning of "right" and one in which the correlative relation between rights and duties, in the sense that every right implies a correlative duty, is apparent.[13] Thus, the existence of a right in this case is justified by the existence of a duty. That is, it is because X has a duty towards Y that Y can claim his or her right against X.

(2) *Liberty-rights*. If Y claims that he has a right to dress as he likes, there is no correlative duty imposed upon other parties to ensure that Y enjoys his right. Y's assertion implies that it is not in violation of any legal rule to dress in a certain way: that is, there is no obligation on him, or on others, to dress in a certain way. Y is at liberty to choose the way in which he likes to dress.[14] A liberty, or, as Dias terms it, a privilege can be distinguished, according to Dias, from a right as not implying a correlative duty, while "right" does imply a correlative duty.[15] As such, Y's right does not imply a direct relationship between his/her enjoyment of the right and others'. The only type of relationship that can be contemplated is non-interference on the part of other parties with Y's exercise of his/her right. Such

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[13]WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 38 (Walter Wheeler Cook ed., 3rd ed., 1964); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913); GEORGE WHITECROSS PATON, A TEXT-BOOK OF JURISPRUDENCE 225 (1951); R. W. M. DIAS, JURISPRUDENCE 231 (1964). *See also* S. I. BENN AND R. S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 88–9 (1963), in which the authors argue that, in this context, the correlative relation between rights and duties is logical rather than legal or moral. In the absence of such a correlative relation, any claim for the existence of a right is unsound.

[14]WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 38–9 (Walter Wheeler Cook ed., 3rd ed., 1964).

[15]DIAS, *supra* note 13, at 232.

interference can be performed by both individuals and, more frequently, the state.

(3) *Powers*.[16] A power may be distinguished from a right, in that a right requires conformity on the part of others with the conduct of the right-holder, whereas a power does not imply this.[17] Y has the power to make a will because others are under an obligation not to interfere with his right. This right obviously involves a change in others' legal status, that is, it implies a direct relationship between the right-holder and others' who might be either beneficiaries or disadvantaged, i.e. having a liability to have their legal status changed.[18]

(4) *Immunities*.[19] In this case, Y is immune from X's power to bring about a certain consequence for him. That is, X does not have the power to effect the legal condition of Y.[20] Thus, the relationship between X and Y is defined or restricted in the sense that certain actions, on the part of X, cannot affect the legal status of Y.

Hohfeld's approach has been challenged in a number of different ways. First, it is concerned only with legal rights, and it is questionable whether this approach can be employed to talk about other types of rights.[21] Second, if Y claims that he has a right to X, that does not necessarily mean that Y's assertion implies only one of the four meanings that Hohfeld set down. It could imply one, or more than one, of those meanings.[22] For instance, the right to "freedom of expression" implies more than one of the legal conceptions that Hohfeld described. It may imply that X has the liberty to speak freely in public; or that he or she has the "power" to exercise his or her right to free speech; or that he or she has a "claim-right" upon others not to violate his or her right to free speech.

2.2.1.1 The relationship between the right-holder and the duty-bearer

Hohfeld's schema, moreover, Finnis indicates, fails to define the relationship between a "right-holder" and the "correlative duties". If, for instance, we maintain that X is under a duty, according to a certain rule, to act in a specific way, when and to whom can we claim that there is a correlative claim-right? This unresolved issue can be addressed, according to

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[16]"A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." PATON, *supra* note 13, at 226.

[17]DIAS, *supra* note 13, at 237.

[18]PATON, *supra* note 13, at 226.

[19]"An immunity is a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person." *Id.*

[20]HILLEL STEINER, AN ESSAY ON RIGHTS 59–60 (1994); DIAS, *supra* note 13, at 227–46.

[21]L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 20 (1989).

[22]PETER JONES, RIGHTS 14 (1994).

Finnis, from two perspectives. First, it can be said that there is a legitimate "claim-right" only if there exists a person to whom the benefit should accrue by the "correlative duty" being carried out. Secondly, the person who is said to be advantaged by the performance of the duty should be capable of taking any "remedial" measure should the duty-bearer fail to carry out his duty.[23] Both perspectives produce some difficulties when applied to legal discourse. For example, if there was a contract between X and Z according to which Z shall pay Y a sum of money, Y has no legal power to enforce Z's compliance with the terms of the contract. According to the first approach, it is true that Y, as a recipient of the benefit of the contract, has a claim-right to that benefit. But he/she has no power to demand such benefit from Z. Because of that, according to the second approach, Y has no claim-right against Z.[24]

Likewise, Jeremy Waldron also criticizes Hohfeld's notion of rights for its failure to explicate the relationship between right-holders and correlative duties, but from a different perspective. In order to understand the notion of the rights of the individual clearly, it is important, Waldron asserts, to explain the nature of the relationship between the right-holder and the duty-bearer. If, for instance, we suggest that Y has a right to free speech, this statement implies that people have a duty not to interfere with Y's right to free speech. Here, we must understand the nature of the duty people undertake towards Y's exercise of his right to free speech. We have to distinguish between the idea of duty in its generality and the concept of duty in a particular case in relation to a particular individual, such as the case at hand. Moreover, an explanation should be provided in such instances of the consequences of violating Y's right. Admittedly, Y ought to be in a special relation to both a correlative duty and to a case of a violation of his right.[25]

2.2.1.2 The choice theory and the interest theory

Waldron presents two distinct theories that can be adopted to define the nature of duties and their relations to right-holders: first, the "choice theory", which provides that X can be said to have a duty towards Y when Y is in a position which enables him to have X carry out his duty; secondly, the "interest theory", which provides that Y can be said to be a right-holder only if he would gain a benefit from X's execution of his duty. Waldron goes on to assert that since all duties are expected to confer benefits, it is imperative, in order to claim that a duty is correlative to a right, to define the person who is going to benefit from that duty

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[23]JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 202–3 (1992).

[24]*Id.* at 203.

[25]Jeremy Waldron, *Introduction, in* THEORIES OF RIGHTS 1, 8 (Jeremy Waldron ed., 1985).

being carried out. Waldron then presents an account which some philosophers have seen as preferable.[26] It can be said that Y has a right not only when he is the recipient of the benefit of X's performance of his duty, but if the benefit sought from the duty is "recognized as a reason for imposing duties or obligations on others". Waldron prefers this approach, since it deals with each right individually rather than dealing with rights as aggregations of the several conceptions Hohfeld talked about. It further defines the person who has the right and the person who has the correlative duty.[27] But is explaining the nature of the relationship between the right-holder and correlative duties the only concern which arises from claims of rights? Wellman suggests that any claim, liberty, power or immunity right implies some sort of freedom or control for its holder to the effect that he or she would be able to benefit from the core of his or her right.[28] For instance, Y's right to free speech implies that he or she has the freedom to choose to speak or otherwise. Y is not bound by any rule to exercise his or her right. Thus, Y has control over the exercising of this right.

Hart, the leading proponent of the choice theory of rights, also, contends that "to be capable of benefiting by the performance of a 'duty' ... is not a sufficient condition (and probably not a necessary condition) of having a right".[29] Rather, having a right means that the person who claims that right is in a position that enables him to exercise some control over another person's freedom and choice. It is he who decides how that person should act.[30] For instance, if A promised B to look after her child, the beneficiary party here is the child, not B, who is only the promisee. Since A has made the promise to B, she has a moral obligation in relation to B, but not to the child. B also benefits from A's performance of her obligation, since her child will be looked after. So, if A fails to fulfil her obligation, it is B who will be affected by her breaking the promise. Further, B, as a promisee, would be morally responsible for releasing A from her moral obligation.

Nevertheless, if we concede that rights are correlative with duties, it should be explained that these duties might be "active or passive" ones. For instance, if we say that someone

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[26]*See, e.g.*, Wellman, *supra* note 10, at 53, where he argues that "[w]hat unifies any right is its core. At the centre of any legal right stand one or more legal advantages that define the essential content of the rights. ... When we classify rights as claims-, power- or immunity-rights, it is to their defining cores that we refer."

[27]Waldron, *supra* note 25, at 11.

[28]Wellman, *supra* note 10, at 53.

[29]H. L. A. Hart, *Are There Any Natural Rights, in* POLITICAL PHILOSOPHY 53, 57 (Anthony Quinton ed., 1967).

[30]*Id.* at 57–8. *See also* Christopher Arnold, *Analysis of Right, in* HUMAN RIGHTS 74, 80 (Eugene Kamenka and Alice Erh-Soon Tay eds., 1978).

has a right to A, this means that other parties have a "duty of permitting" A, in the case of A being an action; alternatively, if A is "a good or a benefit", the other parties have a duty to provide the right-holder with, or not deprive him of, A.[31] According to the first sense, duties correlative to the rights concerned are negative in the sense that they require the duty-bearer not to interfere with the right-holder's exercise or choice of his right. This conception is referred to more frequently where the duty-bearer is the state. In such a case, the idea of the limited power of the state against the rights of individuals is related to the principle of *laissez-faire*.[32]

Donnelly disputes whether enforcement is essential in having a right, but this is not the sole criterion for determining whether a right exists or not. "Having, enjoying, and enforcing a right" are essential elements for claiming a right, but the absence of enforcement, for instance, does not mean that a person ceases to possess that right. The same can be said about the enjoyment of a right. If Y has a right to X, and he does not enjoy his right to X for some reason, that does not mean that he does not have that right. Donnelly goes on to talk about "the possession paradox", that is, "having and not having a right at the same time", as a distinctive characteristic of human rights. For instance, if the constitution of a given country guarantees its citizens freedom of expression, we can say that the citizens of that country have the right to free speech. However, when in practice they claim that right publicly and are countered by force and oppression, we can say that they are denied free speech and, consequently, do not have the right to it.[33] This, we may suggest, is the difference between the formal and the effective possession of rights. It is the difference between a situation where an individual is said to have a right to X without being provided with the means for effectively possessing and enjoying that right and a situation where an individual is provided with all the means necessary for effectively possessing and enjoying his rights.

What constitutes a right is a very complex question. Bentham's definition is perhaps the most straightforward one. Bentham suggests that rights "are merely beneficial obligations". It is true that among individuals moral obligations have a special status, but unless these obligations are supported by some material sanctions, no consequences would accrue from their not being fulfilled. On the other hand, the mere beneficiary character of rights does not

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[31]CARLOS SANTIAGO NINO, THE ETHICS OF HUMAN RIGHTS 26–7 (1991).

[32]Waldron, *supra* note 10, at 11.

[33]JACK DONNELLY, THE CONCEPT OF HUMAN RIGHTS 15–17 (1985).

confer on these rights any strength: there needs to be some basis for a person to claim a right upon.[34]

2.2.2 Moral rights

Macdonald indicates that the term "right" is usually used to distinguish between "legal" and "moral" rights. She distinguishes between these two types of rights in arguing that the former means an entitlement to something, which imposes duties upon others sanctioned by law, whereas the latter entitlement also requires actions on the part of others, but ones which carry no sanctions in law should they not be performed.[35] Thus, no claim to legal rights can be maintained unless it is prescribed by law in the sense that the law provides the claimant with protection and enforces the rights by rules. The existence of moral rights, by contrast, is not predicated upon sanctions by positive law. "X has a legal right against Y" implies that Y has a duty towards X and is accountable by law for his failure to perform his duty. "X has a moral right towards Y" connotes that Y has a duty towards X but is not, legally, accountable for not performing his duty.[36]

Since the idea of rights emerged mainly in order, first, to define the function of government in protecting the rights and freedoms of the individual and, secondly, to limit the authority of government, political thinking has been more concerned with moral than with legal rights. This is so because, had the concern been for legal rights, which are enacted by and predicated upon the will of government, effective protection for individual rights would have been difficult to maintain. Those rights can be regarded as legal rights in the sense that law recognizes and acknowledges them rather than creates them. Such rights ought to be grounded on other than legal rules.[37] Thus both natural and human rights are moral rights.[38]

Peter Jones asserts that a claim to a moral right might take two forms:

(1) *A weak sense*. This occurs when one claims a moral right to do something in the sense that it is morally accepted that one do that thing.

(2) *A strong sense*. Here when one claims a moral right to something one is implying more

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[34]*Id.* at 11–12.

[35]Margaret Macdonald, *Natural Rights, in* THEORIES OF RIGHTS 21, 31 (Jeremy Waldron ed., 1985).

[36]*Id.* at 31–2.

[37]JONES, *supra* note 22, at 45.

[38]*Id.* at 45–6. Even legal rights, which are derived from positive law, are somehow rooted in some moral and natural beliefs or ideas. Charles Taylor, *Human Rights: The Legal Culture, in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 49, 53 (UNESCO, 1986).

than a mere entitlement to that thing. One is implying that others have a moral duty to respect that right. Human rights fall into this latter category.[39]

2.3 Sources of Rights

In the modern Western legal tradition, it is accepted that the according to the individual specific rights place certain limits on a state's power in relation to those rights. It is not enough that others refrain from violating a particular personal right of an individual; the system, besides that, provides the individual with the power to claim and invoke a rule which guarantees that right.[40] This is the result of the theory of natural law developed during the seventeenth century, which paid greater heed than before to personal rights *vis-à-vis* the threats of tyrannical governments of the time. Two results stem from this new angle on human or personal rights. First, "it places limits on the actions of governments and on collective decisions by offering a measure of protection to individuals and specific groups"; secondly, "it offers individuals and specific groups the right to seek redress and gives them a margin of liberty in the imposition of these limits".[41] Obviously, it is these features which characterize the modern, or Western, notion of human rights. According to this conception, individual rights are to be given complete priority over communal or collective rights. In other words, it is this conception which gives the modern notion of human rights its individualistic character.

It has been accepted in the West that human rights can, as Waldron indicates, be a basis for "political morality and social choice". This idea has proven acceptable in both theory and practice. Several Western philosophers and politicians have talked about such rights. John Locke, Thomas Paine and Immanuel Kant are among those who have contributed to this field. The idea was accepted and invoked by the American and the French constitutions, which attached very great importance to the "rights of man". However, Waldron goes on, the idea that "political morality" and "social choice" are dependent on the "rights of man" has been highly controversial. Some philosophers have suggested that, in some circumstances, only where rights are "based on a prior theory of social and political morality such as the theory of utilitarianism" can they be "taken seriously". Furthermore, the utilitarians, led by Jeremy Bentham, argued that rights cannot determine political and social morality, and that no claim of that kind should go unchallenged.[42]

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[39]JONES, *supra* note 22, at 48–50.

[40]Taylor, *supra* note 38, at 49.

[41]*Id.* at 50.

[42]Waldron, *supra* note 25, at 1.

Hobbes maintains that "the right of Nature ... is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own life; and consequently, of doing anything, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto".[43] Drawing upon this conception, Michael Freeden makes some significant remarks which describe the nature of rights. First, rights are designed to serve one fundamental and particular end, that is, self-preservation. Secondly, "the right of nature is attached to individuals", who are not restricted in terms of the methods by which they can ensure their self-preservation. Thirdly, and as a consequence, the individual has the right to do anything which ensures his ultimate goal of self-preservation. Finally, the individual has the choice of waiving his right, since he is the one who decides whether to exercise his right or not.[44] However, the natural right of self-preservation that Hobbes talks about is not a claim-right, that is, it does not impose any correlative duties upon any other parties. This right is merely a liberty.[45]

2.4 What Are Human Rights?

Enough has been said about the term "right". However, the absence of a clear-cut definition of rights, their nature and content calls for further investigation. It is true that human rights are influenced by social changes and by changes in the status of individuals. Accordingly, the nature and content of such rights will, to a large extent, depend on the circumstances and conditions applying during the period in which these rights are formulated. Thus, social change and changes in the status of individual necessitate changes in the nature and the content of rights. New roles for the individual *qua* citizen, and the new role governments are expected to play in relation to their citizens, call for a new concept of human rights. It is open to question whether the ancient concepts of human rights match the contemporary idea of human rights in the light of new perspectives on and attitudes towards individuals and their relationships with their governments.

Some argue that human needs ought to define human rights. It is his needs that give an individual a reason to claim certain rights. However, those needs themselves are not so clear that they can be always invoked to define human rights. Thus, human rights should be defined according to "man's moral nature", which provides that human rights are those rights which are necessary to maintain man's humanity and therefore the preservation of his

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[43]MICHAEL FREEDEN, RIGHTS 12 (1991).

[44]*Id.* at 13–14.

[45]JONES, *supra* note 22, at 73.

"life of dignity".[46] Human rights cannot be grounded solely on needs, because, since needs differ in their nature and weight, such an attempt would restrict rights to a particular group of needs only.[47]

The presumption that human rights are to be defined by human needs might be plausible if we conceded that all human rights reflect associated needs. A need, however, does not necessarily generate a right. I might, for instance, *need* a holiday, but I do not have a *right* to one. On the other hand, some needs *might* generate rights. The fact that I need food to live, for instance, generates certain rights. This inevitably leads us to draw a firm line between rights that generate needs and those that do not. This is a distinction which leads us to search for the special characteristics of each right. In this connection, Hegel maintains that the kinds of needs man has and the means by which he satisfies them make him superior to other creatures, "by the multiplication of needs and means of satisfying them, and ... by the differentiation and division of concrete need into single parts and aspects which in turn become different needs, particularized and so more abstract".[48] On the basis of this account, it can be argued that human rights are not absolute, in the sense that they are not determined by an individual's needs – because if they were viewed as dependent on needs, this would result in different rights, or types of rights, emerging in accordance with the different needs from which they are derived. This would eventually lead to an abuse of rights, since man, as Hobbes points out, is an "appetitive, passionate creature, bent upon the preservation of *his* life and the satisfaction of the desires which continually arise within *him*.[49] Thus, each person's needs and desires are necessarily different from those of others, as every person would determine his needs and desires according to his own judgement. Therefore, conflicts between these different needs and desires are very likely to occur.[50]

2.5 Origins of Rights

The word "human" has, according to Jack Donnelly, some implications regarding the definition of the source or the origins of human rights. Donnelly indicates that the term "human" connotes that individuals enjoy their human rights simply because they are

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[46]JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 16–17 (1989).

[47]ALAN R. WHITE, RIGHTS 105 (1984).

[48]T. M. KNOX, HEGEL'S PHILOSOPHY OF RIGHT 127 (1977).

[49]A. J. M. MILNE, FREEDOM AND RIGHTS 37 (1968). Emphasis added.

[50]*Id.* at 37–8.

human.[51] Thus, human rights' sources go back to "humanity, human nature, being a person or human being".[52]

Human rights are those rights that are "retained by people", and because people existed prior to states or law, it cannot be said that these rights are the outcome of any law or constitution. Thus, any legal right is grounded in human rights.[53] Therefore, because the idea precedes all codes of positive law, enquiry should be directed towards the law of nature, or natural law, which similarly is prior to positive law, and in which many philosophers, as well as legal theorists, locate the origin of the idea of human rights. However, it is to be borne in mind that the development of the idea of human rights has gone through different stages, ranging from philosophical identification, political adaptation, constitutional implementation and legal interpretation to international standards.

2.5.1 Natural law

It is true that human rights were neither articulated nor promoted as such before the seventeenth century. Nevertheless, it is unjust to regard the notion of human rights as a novel idea. The idea of human rights, even though articulated in a different terminology, has its roots in ancient Greek times and before. Some specific rights were enjoyed by the citizens of the Greek cities. These included "*isogoria*, or equal freedom of speech, *isonomia*, or equality before the law, *isotimia*, or equal respect for all citizens, *isokratia*, or equality in political power, and in suffrage, *isopsephia*, and *isopoliteia*, or equality of civil rights".[54] These were familiar concepts of equality at the time and constituted a basis for the modern notion of human rights.[55] After the Greek cities declined the doctrine of natural rights emerged, and the idea that these rights are to be enjoyed by "all men at all times". No distinctions of place or time should be made regarding the enjoyment of such rights. All people are entitled to enjoy them, for the simple reason that they all are human beings.[56]

The Stoics, the main proponents of the natural law doctrine, represented their doctrine as an aggregation of "universal values both physical and ethical". In terms of ethical rules, this doctrine focused on "moral" values rather than "physical " enactments. These rules are to be

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[51] DONNELLY, *supra* note 46, at 16.

[52] *Id.*

[53] Wellman, *supra* note 10, at 49; M. SEARLE BATES, RELIGIOUS LIBERTY: AN INQUIRY 378 (1947).

[54] Rosenbaum, *supra* note 1, at 9–10.

[55] *Id.*

[56] MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 2 (1973).

located in, and are determined by, moral values and considerations accepted by all the members of a society.[57]

Thus, the idea of the rights of man can be traced back to the laws of nature or natural law. In turn, "nature" was considered as "the objective standard for the instruction of human social conduct".[58] This view was "the first major formulation in the history of human rights".[59] Moreover, Davidson, explaining the origin of the law of nature, argues that it is not possible to deny that "the basis of early natural law was entirely theistic, that is, it required belief in the Deity to render it coherent. The next stage in the development of natural law, however, was to sever it from its theistic origins and to make it a product of enlightened secular rational thought. This task was undertaken by the Dutch jurist Hugo de Groot."[60] In this connection, d'entreves argues that although Grotius has attempted to present his theory of natural law independent of any reference to divine law, he was still "imbued with the spirit of Christianity". Moreover, "he would never have conceded that God did not take any part in the affairs of men". Then d'entreves maintains that the law of nature is of divine origin. He further indicates that although the "doctrine of natural law which is set forth in the great treatises of the seventeenth and eighteenth centuries – from Pufendorf's De Iure Naturae et Gentium (1672) to Burlamaqui's Principles du Droit Naturel (1747), and Vattel's Droit des Gens ou Principles de la loi Naturelle (1758) – has nothing to do with theology. It is a purely rational construction, [nevertheless] it does not refuse to pay homage to some remote notion of God".[61]

The idea of natural law,[62] which according to Hume preceded government and positive law,[63] was thought of as a superior set of rules on which other positive laws were to be based. Furthermore, the idea was more powerfully embraced by the Christian Fathers, who traced its origins to the divine law of God. Natural law was a check on the arbitrary conduct

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[57]Rosenbaum, *supra* note 1, at 10.

[58]*Id.* at 9.

[59]*Id.*

[60]SCOTT DAVIDSON, HUMAN RIGHTS 27 (1993).

[61]A. P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 52 (1964).

[62]For a detailed history of natural law *see* DIAS, *supra* note 13, at 494–533; PATON, *supra* note 13, at 225 (1951); PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 1–97 (1971); FREDERICK POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS 124–56 (1961); GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 129–43 (1960); ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY (Dennis J. Schmidt trans., 1988).

[63]DUNCAN FORBES, HUME'S PHILOSOPHICAL POLITICS 70 (1985).

of sovereigns in relation to their subjects. It served as a law superior to those laws enacted by the sovereign, who had sole power to enact such laws, enforce them and change them at will.[64] The idea of the law of nature played a significant role in the development of the concept of the "rights of man". It functioned as a constraint on the power of the state over individuals. It was invoked in order to invalidate or condemn any arbitrary acts that could interfere with the dignity and humanity of the individual.[65] Natural law theory served, among other things, as the basis of the emancipation of the individual and the protection of his freedoms against the state within the realm of law.[66] In general, in the words of Strauss, "the classic natural right doctrine in its original form ... is identical with the doctrine of the best regime".[67]

That the idea of human rights is based on natural law which is, in turn, grounded in religious basis is, then, well established. To this fact there can be no reasonable objection. Two points arise concerning this fact. First, the modern idea of human rights is of Western provenance. Secondly, the idea derives its basis and legitimacy from religious roots. The relevance of this to our study will become apparent when we consider the idea of human rights in Islamic law.

As regards the impact the theory of natural law had on the idea of human rights, and the way in which legal theorists used its principles to support their different theories of rights throughout most of its history, "rights-theorists tried to construct as invulnerable a case as possible for the existence and protection of fundamental human rights. They devised philosophical arguments and theories aimed at establishing beyond all doubt the nature of those rights. They then grounded that nature on unassailable or, at least, rationally unquestionable truths."[68] To do this they invoked the doctrine of natural law, as "a paradigm for a theory of rights, a test case through which to explore its advantages and disadvantages, precisely because the doctrine posits a comparatively pure and simple case for the existence of fundamental rights and a radical and very strong notion of what a right is".[69] In the words of Dias, natural law is "a compendious term for the ideal element of

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[64]PATON, *supra* note 13, at 81–6.

[65]*Id.* at 95–6.

[66]DIAS, *supra* note 13, at 523; *see also* POLLOCK, *supra* note 62, at 134–5.

[67]LEO STRAUSS, NATURAL RIGHT AND HISTORY 144 (1953).

[68]FREEDEN, *supra* note 43, at 24.

[69]*Id.* at 25.

law ... which serves as a fixed point of reference and comparison".[70] Furthermore, natural rights and the law of nature are essential components in justifying many rules of positive law and in ensuring their conformity with the general principles of justice and morality that are common among peoples. They are an indispensable reference for positive law to invoke at all times; nevertheless, "the moral claims of today are often the legal rights of tomorrow".[71]

2.5.2 Natural rights

The idea of natural rights, which was the outcome of the doctrine of natural law, is not of recent origin. It goes back two thousand years, and thus pre-dates the laws of states. It has been invoked by many European political philosophers. Unlike the idea of natural law, natural rights doctrine, although it preceded the idea of positive law, has only comparatively recently been invoked in practice. To evaluate the doctrine of natural rights, we need to focus on its substance. The doctrine of natural rights has been invoked to counter the arbitrariness of governments and their tyrannical treatment of their citizens. The doctrine called for limits on governmental powers and denied the absolutism of such powers; it also called for respect for the individual and the preservation of his or her dignity *vis-à-vis* the state. These characteristics are of ancient origin and go back to Greek and Roman times.[72] Natural rights, as conceived by Roman lawyers, are "an ideal of standards, not yet completely exemplified in any existing legal code, but also ... a standard fixed by nature to be discovered and gradually applied by men".[73] These lawyers did not relate the idea of natural rights to any "legal or political authority".[74]

During the seventeenth and eighteenth centuries, the natural rights doctrine received considerable attention, and won acceptance, from lawyers as well as philosophers. This was due to the popular acceptance of the doctrine of natural law. Subsequently, the doctrine of natural law met with resistance. This, however, did not completely diminish the doctrine – it survived, though in a limited form.[75] The idea has lost some of the robustness it had in the nineteenth century with the emergence of the legal positivist movement. However, the

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[70]DIAS, *supra* note 13, at 495. "[T]he Law of Nature represented the first systematic attempt to conceive a rational system of law based on universal obligations, and claiming a higher authority than any institutions of State". L. T. HOBHOUSE, THE ELEMENTS OF SOCIAL JUSTICE 33–4 (1930).

[71]H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 74–5 (1968).

[72]*Id.* at 80–1.

[73]Macdonald, *supra* note 35, at 24.

[74]*Id.*

[75]Kleinig, *supra* note 5, at 38.

idea of natural law surfaced again during the Nuremberg trials following World War II. Thus, natural law cannot be totally ignored when we talk about law or rights.

The claim of natural law to be considered as a branch of law proper has been often disputed. Although the natural rights doctrine has been much debated and challenged from the outset, it possesses characteristics which render it viable. First, people have such rights, or are entitled to have them, by birth, that is, they are not granted by any legal or political authority or institution, but instead constitute part of what it is to be a human being. Secondly, these rights are independent of any organ of society and have emerged independently from any political or social development, even though organs of society bear the responsibility for protecting these rights. Third, they are absolute, in the sense that no other consideration can render them invalid or inadequate under any circumstances. Finally, natural rights are universal, for they are possessed by all people at all places and at all times.[76]

Some of these features, however, impose rigidity on the doctrine of natural rights. Since they are not capable of conforming to new circumstances, it is hard to conceive of them as responsive to all social change.[77] Jeremy Bentham, the leading opponent of the idea of natural and imprescriptible rights, asserts that rights cannot exist independently from government, and that some of the characteristics of these rights, such as absolutism and imprescriptibility, render them contradictory and "non-sense".[78] Bentham maintains that "[r]ight, the substantive *right*, is the child of law; from *real* laws come *real* rights, but from *imaginary* laws, from laws of nature ... come *imaginary* rights".[79]

2.5.3 The social contract

During the seventeenth century, the doctrine of the social contract emerged as a new means of defining and monitoring the relationships between society and individuals. The social contract is that contract which imposed on society a duty to provide individual citizens with certain rights and carry out its role in protecting these rights.[80]

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[76]FREEDEN, *supra* note 43, at 27.

[77]*Id.*

[78]*Id.* at 18.

[79]*Id. See also* MILNE, *supra* note 49, at 47–51; SUMNER, *supra* note 21, at 112; David Lyons, *Utility and Rights, in* THEORIES OF RIGHTS 110, 113–4 (Jeremy Waldron ed., 1985).

[80]Macdonald, *supra* note 35, at 26–7. For a detailed conception of the doctrine of social contract *see* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSE (G. D. H. Cole, trans., 1983); JEAN-JACQUES ROUSSEAU, ROUSSEAU'S SOCIAL CONTRACT (H. J. Tozer, trans. & ed., 2nd ed., 1898); ERNEST

The idea of the social contract, which has contributed to the revival of the doctrine of natural rights, provides that men have certain natural and inalienable rights prior to their affiliation to a society, which must provide for and protect such rights. This idea was emphasized by Locke, who had recognized the influence of the doctrine of the social contract on many national constitutions such as the American and the French constitutions, and who had elaborated the doctrine to the extent of arguing that the primary reason for the existence of any society is to provide for and protect the individual's inalienable rights.[81]

2.5.4 Constitutionalsation of rights

During the eighteenth and nineteenth centuries many human rights documents and instruments were written and certain rights were enumerated and entrenched in them. The English Parliament, after the "Glorious Revolution" of 1688, enacted a Bill of Rights, which discussed particular rights such as the "right to trial by jury, and prescribed that in all courts of law excessive bail should not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted".[82] Similar statements were also entrenched in the American instruments and declarations. The American Declaration of Independence of 12 June 1776 proclaimed that "all men are by *nature* equally free and independent, and have certain *inherent* rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety".[83] It also proclaimed, in the Declaration of 4 July 1776, that "We hold these truths to be *self-evident*: that all men are *created* equal; that they are endowed by their *Creator* with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness".[84] These rights were defined and illustrated in greater detail in the United States Constitution of 1789 and subsequent Amendments.[85]

The French Declaration of the Rights of Man and the Citizen, in proclaiming similar principles concerning human rights, was not far from the English and the American instruments. It proclaimed that the representatives of the people, "considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes

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BARKER, ESSAYS ON GOVERNMENT 86–119 (1960).

[81]LAUTERPACHT, *supra* note 71, at 86–8.

[82]Eugene Kamenka, *The Anatomy of an Idea, in* HUMAN RIGHTS 1, 1–2 (Eugene Kamenka and Alice Erh-Soon Tay eds., 1978).

[83]*Id.* Emphasis added.

[84]Emphasis added.

[85]CRANSTON, *supra* note 56, at 1. Kamenka, *supra* note 82, at 2.

and corruptions of Government, have resolved to set forth in a solemn declaration, these *natural*, imprescriptible, and inalienable rights". Further, it proclaimed that "men are *born* and remain free and equal in rights", and that "the purpose of all political association is the conservation of the *natural* and inalienable rights of man: these rights are liberty, property, security, and resistance to oppression".

It is clear that all these human rights documents have invoked natural law principles to extract and present some inalienable rights that people should, or should be entitled to, enjoy. "All men are by nature equally free ...", they "have certain inherent rights ...", "all men are created ...", "they are endowed by their Creator ...", "men are born and remain free ...", "these truths to be self-evident ...", "... have resolved to set in a solemn declaration these natural ... rights": these statements exemplify clearly the notion that men by nature (or, in other words, by the law of nature, which, as we indicated earlier, is traceable to religious teachings and myths) possess inherent rights that should be recognized and preserved for their happiness. No other sources have been invoked to establish these rights and declare them fundamental and inalienable. The chief reason for this approach is not at all hard to understand. In the face of the growing opposition of tyrannical governments to the idea of providing for and protecting the rights and freedoms of their citizens, it was necessary to invoke a law that was beyond the influence of, and immune from, the authority of such governments. It would have been useless to resort to laws which the violating governments themselves enacted. Thus, it would seem impossible to maintain effective and dynamic law unless it retains superiority over other types of rules.

2.6 Concluding Remarks

As the above discussion has shown, it is difficult to avoid the conclusion that there is still ambiguity and uncertainty about the notion of human rights. This ambiguity remains, precisely because the key questions (concerning the nature and content of such rights) of philosophical and juridical significance alike continue to be asked. Nevertheless, Bentham's notion of natural rights may be employed in practice to translate some (theoretical) moral rights into legal rights such that rights come to possess some significant characteristics (better definition, better interpretative machinery, greater possibilities of enforcement) that render them more enforceable and applicable. Positive law, it is true, cannot make such rights inalienable and imprescriptible, but it can recognize and institutionalize them in such a way (by constitutional entrenchment) as to give those rights greater protection and enforcement.

It cannot be denied that the idea of human or personal rights is of Western origin. This origin goes back to the idea of the law of nature, or natural law, which, in turn, was influenced greatly by the notion of divine laws operating at the time of its emergence. Thus, "the concept of human rights is a historical product which evolves in Europe, out of foundations in Christianity, Stoicism and Roman law with its *ius gentium*, but which gains force and direction only with the contractual and pluralist nature of European feudalism, church struggles and the rise of Protestantism and of cities".[86] However, it should be borne in mind that, although the origins of the modern idea of human rights rooted, as has been shown in this chapter, in the religiously-based idea of natural rights, nevertheless the idea has been subject to transference to a secular, positive law within an international legal framework. This will be discussed later.

The modern idea of human rights rests wholly on the maxim that priority should be given to individuals over society. According to this idea, society must direct its efforts to "arrive at a state where the freedom of the individual is fully respected, where society exists to promote the well-being and freedom of the individual and where the individual therefore enjoys moral priority".[87]

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[86]Kamenka, *supra* note 82, at 6.

[87]Taylor, *supra* note 38, at 51. *See also* Kamenka, *supra* note 82, at 6.

CHAPTER 3

HUMAN RIGHTS IN ISLAMIC LAW

3.1 Introductory Remarks

The nature, content and origins of the word "right" have, all throughout its history, contributed to the continuing difficulty that faces scholars, in every legal system, in their endeavours to articulate a precise definition of the term "right". Islamic legal tradition is not exempt from this presumption. This issue is subject to continuing debate, and will probably remain so as long as there exist contending approaches to justice. All legal systems, we should emphasize, seek justice. They each, however, conceive of justice in different ways.[1] Several factors, such as tradition, social structure, values, morals, politics, religion, etc., influence or determine how justice is sought in every legal system. Obviously the same pattern of ideas cannot be valid for all societies. What is regarded as just by one system or society may not be considered so by another. It might be true that there are certain general principles of law and justice recognized by all legal systems, yet this fact does not eliminate the differences between those different systems or the controversies that arise in practice.

Hence it is important, if we examine or study any legal system, to pay appropriate attention to its structural elements and to examine the fundamentals of that system. According to Maududi, one cannot appreciate the real significance of the term "law" if it is looked at only in term of its technical meaning, which is "rules as are applicable by the coercive power of the State".[2] To understand a legal system or a law properly, he writes, one "must take into consideration the entire scheme of moral and social guidance prescribed by a particular ideology, because it is only then that [one] will be able to appreciate the spirit and objectives of the 'Law' and to form a critical opinion about its merits and demerits".[3] Maududi further

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[1] *See* in this regard Rohda E. Howard, *Dignity, Community, and Human Rights, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81, 85 (Abdullahi Ahmed An-Na'im ed., 1992).

[2] S. ABUL A'LA MAUDUDI, ISLAMIC LAW AND CONSTITUTION 45 (11th ed., 1992).

[3] *Id. Compare* Maududi's account with an interesting assertion made by Hart in his *The Concept of Law*, where he deals with the relationship between law and morals, argues that "it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted. ... [A] legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it." H. L. A. HART, THE CONCEPT OF LAW 185

suggests that

> our assessment of a system is mainly based on and affected by our perception of the ends of human life and by our notions of right and wrong, good and evil and justice and injustice. Consequently, the nature of a legal system depends entirely upon the source or sources from which it is derived. Thus, the differences discernible in the legal and social systems of different societies are mainly due to the differences of their sources of guidance and aspiration.[4]

It seems from the outset, particularly for those who are not familiar with the Islamic system as a whole, that individual rights have no significance in the Islamic legal system.[5] It is true that "rights" are not treated as a separate subject in Islamic law and, therefore, there is no articulated or precise definition for the term "right" in the Islamic legal system, nor is there in Islamic law a list that enumerates "human rights".[6] However, being only a part of Islam which is, in turn, a system that is designed to deal with all aspects of life, the Islamic legal system cannot be viewed from a single angle, but rather should be studied as part of an integrated system, each part of which is indispensable.[7]

To study and understand the Islamic legal system properly, one has to study the system as a whole. For Islam arose as a social revolution and brought with it, among other things, a number of moral principles that were not known previously. In this system, the individual has always been the cornerstone of any legislation or regulations that affect society. The individual has been granted certain rights or privileges which, in turn, are predicated upon the individual's fulfilment of his obligations and duties towards the community.[8] Thus, what distinguishes the Islamic legal system (*Shari'a*) from that of the Western conception of law is that the former is not a separate body of rules that are sanctioned by an authority which has prescribed them. It is, rather, a system which reaches into all areas, including

(1994).

[4]MAUDUDI, *supra* note 2, at 45.

[5]Watt, for instance, discussing the individual's status within an Islamic community, presents some points which, as he conceives, suggest that there is no such explicit mention of "right" or "freedom" within the Islamic political thought. He then concludes that "it seems likely that there is a combination of ideas somewhere in Islamic thought, which performs much the same function as the concept of freedom does in the West". W. MONTGOMERY WATT, ISLAMIC POLITICAL THOUGHT 97 (1987). To the same effect, *see also* N. J. Coulson, *The State and the Individual in Islamic Law*, 6 IN'L & COMP. L.Q. 49, 50 (1957).

[6]It is extremely significant here to bear in mind that "the vast body of Islamic legal learning consists entirely ... of works by jurists, not of government codes and statutes. However, it includes varying styles of exposition – sometimes a compact codified summary, sometimes a collection of legal opinions (*fatawa*), sometimes a philosophical or analytical treatise, and sometimes a commentary". Salah-Eldin Abdel-Wahab, *Meaning and Structure of Law in Islam*, 16 VAND. L. REV. 115, 119–20 (1962).

[7]*See* Richard W. Bulliet, *The Individual in Islamic Society, in* RELIGIOUS DIVERSITY AND HUMAN RIGHTS 175, 177 (Irene Bloom et al. eds., 1996).

[8]MUNA MAHMOOD MUSTAFA, AL-QANOON AL-DAWLI LI HUQOOQ AL-INSAN 29 (1989); FATHI AL-DARINI, AL-HAQQ WA MADA' SULTAN AL-DAWLAH FI TAQEIDEH 83 (1984).

legal aspects, of people's lives. Viewed as such, Islamic law can be regarded as wider in scope than Western law.

In our attempt to study the concept of "human rights" in the Islamic legal system, it is essential that our quest should be directed to some preliminary fundamentals with regard to the concept. Thus, in the following sections of this chapter, I will sketch some of the main elements of the Islamic system. I shall begin by describing the nature of Islamic law and its conception of justice. I then present the sources of Islamic law, an analysis of Islamic political theory, and a discussion of the status of the individual in Islam, and finally I present the main idea of rights in Islamic law. In doing so, I shall compare some general ideas and thoughts from within the Islamic system with those expressed by Western lawyers and philosophers. My intention here is not to work over the question of which system or ideology is superior,[9] but to explore and present some aspects of Islam's understanding of the individual, of rights, and of collectivity in order to indicate how the status possessed both by the state and the individual might influence and form the notion of human rights. In addition, this method of presentation will vindicate the presumption that the Islamic theory of justice is not a mere set of metaphysical or supernaturally-sanctioned ideas that do not tolerate or allow human reasoning or rational thoughts. This is demonstrated by the fact that there are many areas pertaining to the notion of justice in which the philosophical and legal writings of prominent Western authors, who have worked out their ideas by exploring rational and logical relations between different ideas of justice, are congruous with those of Islamic writers.

In conducting this inquiry, I aim ultimately to answer the question of whether the idea of fundamental human rights is alien to Islamic law and its notion of right, or whether there is a possibility that Islamic law can absorb modern human rights norms and, if so, to what extent. If it can do so, what are the means by which such adaptation can be carried out?

3.2 Justice and the Nature of Islamic Law (*Shari'a*)

It is accepted that religions differ in their nature, their origins, and the ways in which they are followed. Nevertheless, they all are based on the assumption that everything that

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[9]Although, as a Muslim, I have no doubt about the justice of the Islamic system and its ability to provide human rights with the appropriate protection granted that the system is applied in its entirety and properly, to demonstrate this would, I believe, require an extensive analysis of the theory of justice, rights, government, religion, morals, the individual and the community in accordance with Islamic thought. This is beyond the scope of this study.

happens in the universe is in accordance with the will of God.[10] Furthermore, this assumption dictates that the acts of the followers of a religion be in conformity with God's will. Moreover, it is this conformity which gives individuals the ability to distinguish what is good and what is bad.[11] For it is not conceivable, in the absence of the recognition of such a will, that we can morally adjudge the righteousness of our acts, be they good or evil. In other words, it is the existence of such a religious motive that makes man possess some degree of morality in his relation to the outside world. In the absence of such a morality, the only criterion for assessing matters of any kind would be whether or not they accord with one's personal interests and needs.[12] In this connection, one can argue that law cannot be examined or evaluated in vacuum. That is to say, law cannot be studied in isolation from morals, politics, values, philosophy, religion, etc. Any system of law is affected in one way or another by at least some of these notions; moreover, its nature, content and scope are largely defined by them. In this regard, Austin indicates that

> positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or remote analogy, to the following objects.– 1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.[13]

Without delving too deeply into the origins and historical development of Islamic law – because such an attempt would require an enormous volume of literature – I shall emphasize some of the fundamental characteristics of Islamic law in the following sections. This should suffice to explicate the nature of such a law and to explain the framework in which any analysis of human rights should be conducted.

3.2.1 Islamic law and natural law

Islamic law (*Shari'a*), as a divine law, has, according to Kamali, some similarities with natural law, but at the same time exhibits some dissimilarities. Both kinds of law agree in that "both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard which is ultimately independent of

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[10]MOHAMMED ASAD, MENHAJ AL-ISLAM FI AL-HUKM 25–6 (Mansoor Mohammed Madhi trans., 1983).

[11]*Id.* For Muslims, "the divine law represents an effort to rationalize a world in which the Prophet Muhammed found chaos and conflict while his aspiration was order. The law provided guidance not only in establishing an ordered society, but also in distinguishing what is called ... in Western terminology, "good" and "evil". MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 25 (1955).

[12]ASAD, *supra* note 10, at 25–6; ANWAR AL-JUNDI, AL-ISLAMIYYA: NIDHAM MUJTAMA' WA MANHAJ HAYYAH 162 (1983).

[13]JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 164 (Wilfred E. Rumble ed., 1995).

human cognizance and adherence".[14] On the other hand, "natural law differs with [*sic*] the divine law in its assumption that right and wrong are inherent in nature. From an Islamic perspective, right and wrong are determined, not by reference to the 'nature of things', but because God has determined them as such."[15] In this connection, Austin claims that the term "law" encompasses, besides positive law (that is, law created by man), the law of God, which he describes as follows: "the whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly". Austin, denying the ambiguous or mysterious nature of natural law, goes on to present an interesting account of such a law: "I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God.*"[16]

Khadduri remarks that the Muslim conception of *Shari'a*, as opposed to natural law, is that

> the divine law, originally embodied in the Qur'an ... from the Orthodox Muslim viewpoint, may be called the law of nature. In the same way as natural law was regarded in the West as the ideal legal order consisting of the general maxims of right and justice, so Islamic Law was in the eyes of the Muslims the ideal legal system. As a divine law it was regarded as the perfect, eternal and just law, designed for all time and characterized by universal application to all men. The ideal life was the life in strict conformity with this law.[17]

Based as they are on this conception of justice, both Islamic law and natural law claim universal validity. As for Islamic law, that claim does not suggest that its rules should be enforced arbitrarily or coercively. It rather implies that such a law, being of divine origin, and also consonant, or in conformity with, human nature and reasoning and tolerant of adapting and changing in a way that can meet people's changing needs and interests, is applicable to all human kind. Likewise, it is asserted that the validity of natural law can be traced to religious origins that "made it easier to pour practical doctrines into the mould of natural law, for the truths of revealed religion could now be drawn upon. Hence it is not surprising that a theory of natural law should have great practical effect, since the element of reasonableness was interpreted in the light of Roman law ... and the truths of Christianity."[18]

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[14]MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 245 (1991).

[15]*Id.* Footnote omitted.

[16]AUSTIN, *supra* note 13, at 18–19.

[17]KHADDURI, *supra* note 11, at 23.

[18]GEORGE WHITECROSS PATON, A TEXT-BOOK OF JURISPRUDENCE 81 (1951).

Furthermore, the presumption that Islamic law is of divine origin is not alien to the nature of modern international law, which owes much to the contribution of natural law which is, in turn, based to a considerable extent on religious mandates. In this context, Maine remarks that, although it is a habit of contemporary writers to attribute most parts of modern international law to the writings of Hugo Grotius, Puffendorf, Leibnitz, Zouch, Selden, Wolf, Bynkershoek and Vattel, "this list does not absolutely begin with Grotius, nor does it exactly end with Vattel".[19] He then suggests, since he is referring to the origins of international law, that "it is further to be noted that before international law fell into the hands of these writers it had like most other subjects of thought attracted the attention of the Church. There is a whole chapter of the law of nations which is treated of by Roman Catholic theological writers."[20] He further remarks that "the Roman element in international law belonged, however, to one special province of the Roman system, that which the Roman themselves called Natural Law or, by an alternative name, Jus Gentium".[21] The moral and religious bases of international law can be noticed, Maine argues, even in the early writings of the father of international law, that is Grotius, in his *De Jure Belli et Pacis*. This work is, for Maine, indicative that "the Law of Nations is essentially a moral, and to some extent a religious, system. The appeal of Grotius is almost as frequent to morals and religion as to precedent, and no doubt it is these portions of the book, which to us have become almost commonplace or which seem irrelevant, which gained for it much of the authority which it ultimately obtained."[22] Thus, although it might be argued that contemporary international law has been subject to attempts to separate it from its religious origins and, at the same time, to render it of a secular nature, the influence of religion on it during its initial stages nevertheless cannot be denied. Therefore, merely because the Islamic system is based on religious sources, this does not necessarily render it irrelevant to the modern idea of human rights or render it incapable of absorbing the idea of individual rights.

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[19]HENRY SUMNER MAINE, INTERNATIONAL LAW 14 (1894).

[20]*Id.*

[21]*Id.* at 20.

[22]*Id.* at 47. In this connection, Mark Janis contends that Grotius's writings were secular. Although his intention was to formulate a body of law "that could appeal to and bind Catholics, various Protestants and even non-Christians alike", he failed to do so. Janis grounds his dispute on the argument that "[t]hroughout *De Jure Belli et Pacis,* Grotious relied heavily on proofs and evidences from the Bible to demonstrate the truth of his propositions. Only citations from classical Greek and Roman authors had greater play in the book. Religious sources were very much more important to Grotius than any of the evidences of treaties, diplomatic history, state practice, or judicial decisions which predominate in the ordinary literature of international law today." Mark W. Janis, *Religion and the Literature of International Law: Some Standards Textes, in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW, 61, 63 (Mark W. Janis ed., 1991).

3.2.2 Is Shari'a a pure religious law?

Islamic law (*Shari'a*) is not to be considered wholly a religious law because it does not deal only with rituals and worship, that is, man's relationship with his creator. In addition, it regulates the relationships between man and his fellow men.[23] In this respect, Moinudin contends:

> It would be a mistake to assume that the *Shari'ah* (Islamic law) is a purely 'religious' law such as Canon Law... pertaining to Church matters, priesthood, and spiritual affairs. The *Shari'ah* encompasses not only religious duties and obligations but also secular aspects of law (substantive and procedural) regulating human acts; the first class called *ibadat* (ritual) deals with purely religious matters and the second class called *mu'amalat* (transactions) deals with subjects which normally form the substance of legal systems such as Common Law.[24]

To make the point more explicitly: the Qur'an, being the main source of Islamic law, can by no means be regarded as a code of law. It is to be considered as a constitution containing general principles that must be taken into consideration when establishing rules dealing with particular circumstances and conditions. Viewed as such, it comprises a small portion of Islamic law, since the legal matters it deals with, which are expressed in general terms, do not take up more than 13 per cent of the entire text.[25] Thus, most parts of Islamic law, or more precisely, most of the legal rules that comprise Islamic law, have been formulated via other sources of Islamic law, which are dependent to a large extent on human efforts in extracting rules and principles (albiet within the general framework of *Shari'a*), which can be applied to different sets of societal conditions and circumstances.

It might appear from the consideration that the Islamic legal system derives its principles from religious sources, namely the Qur'an and *Sunna*, that this system is shaped with a rigidity which hinders it from adapting to new conditions. This argument rests on the assumption that such religious sources contain only commands and prohibitions and do not allow for interpretation of the principles mentioned therein in accordance with the demands of changing circumstances.[26] This is not the case. In the Islamic legal system, several

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[23]Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 188 (1978).

[24]HASAN MOINUDDIN, THE CHARTER OF THE ISLAMIC CONFERENCE AND LEGAL FRAMEWORK OF ECONOMIC CO-OPERATION AMONG ITS MEMBER STATES 6 (1987).

[25]MIR WALIULLAH, MUSLIM JURISPRUDENCE AND THE QURANIC LAW OF CRIMES 6 (1990).

[26]Some commentators go even further where they suggest that Islamic law, being of a divine origin, necessitates that the society must change its attitudes and conditions in order to conform with the demands of such a law, instead of Islamic law being flexible and adaptable to changing circumstances. K. ZWEIGERT AND H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 329–30 (Tony Weir, trans., 1992). A general claim of unalterability of Islamic law is also made by another commentator. Clemens Amelunxen, *Marriage and Women in Islamic Countries (Henrietta Guenther trans.), in* CASE STUDIES ON HUMAN RIGHTS AND

factors contribute to the flexibility of its mandates. These include the following.

(1) The many matters which have deliberately been left undecided by the Qur'an and *Sunna* and left to the discretion of Muslim scholars to determine in ways appropriate for their respective generations and times. This means that such scholars have a degree of latitude to interpret the main sources of Islamic law as circumstances require, provided that these interpretations are in conformity with the general principles of Islamic law. The methods used for extracting new rulings from such sources include *qias*, *istihsan*, *istislah*, *maslaha mursalah* and *urf*.[27]

(2) Most of the provisions in the Qur'an and the Sunna which deal with the details of some subjects are articulated in a way which tolerates the different application of different interpretations to such provisions. This ultimately led to the emergence of more than one school of law within the Islamic legal system, and so, an insistence on one rigid interpretation is invalid.

(3) The consideration of exceptions to the general principles of the legal system. This implies that a person would be exempted from applying or abiding by a *Shari'a* rule if he or she were in a coercive situation or if particular unusual circumstances applied,[28] such as in the case of eating some prohibited foods in time of hunger.

(4) Changes in some *fatwas* (legal rulings) according to changing place and time.[29]

Thus, Coulson's account of Islamic law, which states that "there can be no change in the existing law, since that law is divinely ordained and for all times",[30] is not authentic. It is rather more accurate, as Watt states, to consider *Shari'a* rules as being *based* on the Qur'an and *Sunna*. Therefore, alteration of the general principles of Islamic law is not permissible. The principles can be interpreted in order for them to keep pace with new circumstances, provided that such interpretations do not actually contradict the principles.[31]

3.2.3 Individual and communal interests

Shari'a rulings encompass both rights and duties. The two concepts are related to each

FUNDAMENTAL FREEDOMS: A WORLD SURVEY VOL2. 85, 86 (Willem A. Veenhoven et al. eds., 1975).

[27]These will be discussed in some detail below when considering the different sources of Islamic law.

[28]*See* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 199–200 (1964), wherein he indicates that penalties are suspended in case of duress and necessity.

[29]Yusuf al-Qaradhawi, *Wujoob Tatbeeq al-Shari'a al-Islamiyya, in* WUJOOB TATBEEQ AL-SHARI'A AL-ISLAMIYYA WA AL-SHUBUHAT ALATI TUTHAR HAWLA TATBEEQEHA, Jami'at al-Imam Mohammed bin Suad al-Islamiyya 67–140 (1981); *see also* Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317, 334 (1987); AMIN AHSAN ISLAHI, ISLAMIC LAW: CONCEPT AND CODIFICATION 18–22 (1979).

[30]Coulson, *supra* note 5, at 50.

[31]WATT, *supra* note 5, at 94.

other in that no real distinction is made between them. "In the Qur'an, right and duty merge into justice so much so that they become, in principle, an extension of one another."[32] Admittedly, justice requires that neither rights nor duties be omitted or subordinated to the other. Rather, there must be a balance between the two notions. According to Islamic law,

> the relationship between ruling and justice is also one of means and ends: a ruling is the means towards justice, while the fulfillment and realization of haqq [right] in its dual conceptions of right and obligation is predicated upon justice. Islam thus seeks to establish justice by enforcing Shariah's rulings which, in turn, is expected simultaneously to mean the proper fulfillment of rights and duties.[33]

Shari'a considers that individual and communal rights are both so significant that neither of them should be disregarded. However, in the nature of things, the occurrence of conflict between the two sets of rights is very possible, at least in some cases. Therefore, as Paton puts it, since "not all interests can be satisfied", we must "make a choice".[34] This task involves, according to Paton, the utilizing of values as a parameter according to which conflicting interests can be weighed. This task may involve controversy. This is so because, as Paton says, "no agreed scale of values has ever been reached". "Indeed", he goes on "it is only in religion that we can find a basis, and the truths of religion must be accepted by faith or intuition and not purely as the result of logical argument."[35]

Thus, in such situations, *Shari'a* rules tend to strike a balance between these two categories of rights, taking into consideration the significance of each one of them, the benefits each one of them might produce, or which conduce to the greater harm. Such a balance ought to result in justice that is based on the consideration of all rights involved.[36]

It must be pointed out in this connection that an individual does not live in isolation from other people; rather, he lives in a community whose sustenance and existence depend on welfare and order. Therefore it is vital, in order for an individual to enjoy his rights and freedoms, that he or she live in a community whose interests and well-being are preserved. Otherwise, the environment in which an individual can freely practise his rights would be

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[32]Mohammad H. Kamali, *Fundamental Rights of the Individual: An Analysis of Haqq (Right) in Islamic Law*, 10/3 AM. J. ISLAM. SOC. SCIEN. 340, 356–7 (1993).

[33]*Id.* at 357.

[34]PATON, *supra* note 18, at 104.

[35]*Id.* at 108.

[36]FATHI AL-DARINI, KHASA'IS AL-TASHRI' AL-ISLAMI FI AL-SIYYASSAH WA AL-HUKM 274 n.2, 277 (1987).

absent.[37] This correlation between private rights and public or communal rights necessitates the prevalence of the latter over the former. And this correlation is to be kept in mind when explaining why *Shari'a* has dealt with rights, be they individual or communal, under the heading of rulings, which are mainly articulated in the form of duties.[38] It is hard to deny the existence of interdependence between the two sets of rights. Moreover, McDonald's account of this correlation or interdependence illustrates the importance of collective rights for the maintenance of individual rights in the context of the preservation of the well-being of a given society. To this effect, he argues that "to pretend that individual rights without the addition of powerful collective rights and powers would preserve the social goods in question would ... be disingenuous".[39] Thus, recognition of the supremacy of public rights or community rights over individual rights is a far more effective way of protecting the rights of the individual than the other way round.

3.2.4 Crimes in Islamic law

Shari'a places considerable emphasis on moral and ethical values, and, unlike Western legal systems, in which the law classes a person's actions as being valid or invalid (lawful or unlawful), it classifies those actions as falling into five categories, namely, mandatory, prohibited, recommended, permissible and reprehensible.[40] This classification illustrates the belief that an individual, when practising his rights and freedoms, especially in public, has to respect the rights and freedoms of other members of society not to be injured, insulted or even offended by his enjoyment of his own rights. In doing so, he has to act in conformity with legal, as well as moral or religious, obligations.

In this connection, it is relevant to present Hume's conception of justice, where he asserts that justice is a value towards which we are not naturally disposed, and that our sense of justice is influenced by external factors which motivate us. For such an assertion, Hume provides the explanation that

> all virtuous actions derive their merit only from virtuous motives, and are considered merely as signs of those motives. From this principle I conclude that the first virtuous motive which bestows a merit on any action can never be a regard to the virtue of that action, but must be some other natural motive or principle. ... A virtuous motive is

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[37] *See* M. ZAFRULLAH KHAN, ISLAM AND HUMAN RIGHTS 13 (1989).

[38] AL-DARINI, *supra* note 36, at 274–6, 309.

[39] Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 133, 147 (Abdullahi Ahmed An-Na'im ed., 1992). *But see* JOHN RAWLS, A THEORY OF JUSTICE 3–4 (1988).

[40] Abdel-Wahab, *supra* note 6, at 119; Badr, *supra* note 23, at 189; ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 50–1 (1984).

> requisite to render an action virtuous. An action must be virtuous before we can have a regard to its virtue.[41]

Then he concludes by what he termed "an undoubted maxim, that no action can be virtuous, or morally good, unless there be in human nature some motive to produce it, distinct from the sense of its morality".[42]

The way to justice does not involve only punishing the offender. Rather, and most importantly, it calls for a search for the causes that led the offender to commit an offence. Our question must be, how can we treat the moral, social and economic problems that conduce to the committing of crime? These problems are the concern of Islamic law, the provisions of which are designed to address them effectively. Thus, a failure to preserve any one of these elements would involve withholding the application of the rules of *Shari'a,* because the system of justice according to which such rules are to be applied would be absent.

Crime, sin, or any other religious wrongdoing have the same meaning and implications in Islam. They occur when a person commits what is forbidden or abstains from doing what he is commanded to do. These acts are punishable either by the Islamic government or in the hereafter.[43] Crimes that are punishable by an Islamic state fall into one of the following three categories:

1. *Hudud*. These are crimes committed against the public interest (*huqooq Allah*) and for which punishments are prescribed.
2. *Qisas*. These include murder and the removal of some parts of the body. *Qisas* is often translated as the law of retaliation. However, this is an inaccurate definition of the term if

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[41]THE PHILOSOPHY OF DAVID HUME 254–5 (V. C. Chappell ed., 1963); DAVID HUME, A TREATISE OF HUMAN NATURE 478–9 (1978); DAVID HUME, POLITICAL WRITINGS 1–3 (Stuart D. Warner and Donald W. Livingston eds., 1994).

[42]*Id.*

[43]*Compare* this with PAUL SIEGHART, THE LAWFUL RIGHTS OF MANKIND: AN INTRODUCTION TO THE INTERNATIONAL LEGAL CODE OF HUMAN RIGHTS 13 (1986), in which the author indicates that "the origins of laws in primitive communities seem to have been associated far more closely with systems of magical or religious belief than with any logical reasoning or public debate. Laws were declared by the gods, or a single God, and applied and interpreted by their priest. A breach of the law was not just a transgression against a socially accepted code of conduct: it was blasphemous, an affront to the sacred deity. Crime and sin were largely synonymous." In this connection, Austin's observation, relating to the different types of actions exercised by individuals and the different types of rules laid down by Divine law, which regulates these actions, is very interesting. He suggests that, "as distinguished from duties imposed by human laws, duties imposed by the Divine laws may be called *religious duties*. As distinguished from violations of duties imposed by human laws, violations of religious duties are styled *sins*. As distinguished from sanctions annexed to human laws, the sanctions annexed to the Divine laws may be called *religious sanctions*. They consist of the evils, or pains, which we may suffer here or hereafter." AUSTIN, *supra* note 13, at 38.

the purpose of prescribing such a punishment is taken into account. The aim of *qisas* is to ensure parity between the crime and the punishment, whereas the word "retaliate" means "to hurt someone or do something harmful to them because they have done or said something harmful to you".[44] In other words, "retaliation" implies inflicting harm on somebody, for the purpose of revenge or the causing of harm, and this is not, of course, the case with crimes that are punishable by *qisas*. Thus, it is more appropriate to translate the word *qisas* as the law of parity or equality, as does Faruqi.[45]

3. *Ta'zeer* (chastisement or discipline). This includes those crimes which are not prescribed and it is for the ruler or the judge to decide the appropriate punishments according to the circumstances and facts of each case.[46]

This categorization of crimes and punishments in Islamic law should serve to explain that there are, within the Islamic criminal system, certain crimes (*hudud* crimes) for which the punishments are prescribed and, therefore, there is no room to contemplate altering or changing them in case of conflict between these punishments and some international human rights standards.[47]

3.3 Sources of Islamic Law

As was indicated earlier, when we talk about Islamic law as a religious law, we must not construe it, as is the case with the Western concept of religion, as being as a law that consists only of a set of beliefs and morals. For Islam is not, in fact, a mere belief. It is, rather, a religion of action which regulates people's conduct and actions towards both God and their fellow human beings. When we refer to Islam as a religious law, we are clearly implying that such a law is derived from and based on a divine will and source.[48] This by no means implies that Islamic law is remote from human reasoning and rational thinking. There are many parts of Islamic law that have been formulated from sources other than the *Qur'an*, and these will be discussed below.

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[44]CAMBRIDGE INTERNATIONAL DICTIONARY OF ENGLISH 1215 (1996).

[45]FARUQI'S LAW DICTIONARY: ARABIC–ENGLISH 270 (1986).

[46]ABDUL HALEEM OWAIS, TATBEEQ AL-SHARI'A AL-ISLAMIYYA 33–5 (1986).

[47]*See infra* Chapter 9.

[48]M. KHALID MASOOD, ISLAMIC LEGAL PHILOSOPHY 6 (1989); MANFRED HALPERN, THE POLITICS OF SOCIAL CHANGE IN THE MIDDLE EAST AND NORTH AFRICA 5 (1965). "The sacred Law of Islam [footnote omitted] is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and ... legal rules." SCHACHT, *supra* note 28, at 1. *See also* TREASURY OF LAW 47 (Richard W. Nice ed., 1964).

Generally speaking, Islamic jurisprudence is based on religion and morality, though rationality is not debarred as a source for validating some of the values prescribed by *Shari'a*. This is done through the device of *ijtihad* (exertion), which is the "effort a jurist makes in order to deduce the law, which is not self-evident, from its sources".[49] Yet, there are some instances where such values cannot be defended on grounds of rationality alone.[50]

Both the primary and secondary sources of *Shari'a* are so clearly defined that no rule can be derived or laid down on the basis of any other source. That is to say, a rule cannot be legitimate if it is grounded only in rationality. Nor can rationality be used to alter a rule based on an explicit text from the Qur'an or *Sunna*. However, this does not imply that flexibility is entirely absent.[51] Jurists are permitted to alter some of the rules of *Shari'a*, especially those which are based on *maslaha* (consideration of public interest), so that they meet changing circumstances and interests.

In the following paragraphs, a brief discussion of the sources of Islamic law will be provided. It is not my intention here to present a detailed analysis of such sources. Instead, only an outline of these sources will be presented, for the purpose of explaining the meaning of each of these sources, its nature, its status among other sources, and its authoritative power and role in forming the body of Islamic law.

Since Islamic international law (*Siyar*) is part of Islamic law as a whole, the sources of human rights in Islam are the same as the sources of general Islamic law.[52] Therefore, an

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[49]KAMALI, *supra* note 14, at 403.

[50]*Id.* at XVI (1991).

[51]In this connection, Schacht notes that Muslim jurists have used "legal reasoning" in numerous instances where they were able to arrive at some general "maxims" which were largely the result of rational thinking. J. SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 269 (1950).

[52]Karima Bennoune, *As-salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 612–3 (1994). *See also* Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358, 359 (1956). Khadduri further observes that although, from a theoretical point of view, sources of Islamic law of nations are the same sources of *Shari'a*, "in practice ... if the term 'law of nations' is taken to mean the sum total of the rules and practices of Islam's intercourse with other peoples, one should look further for evidences of the Muslim law of nations than to the conventional roots (usul) or sources of the shari'a. Some of the rules are to be found in the treaties which the Muslims concluded with non-Muslims, others in public utterances and official instructions of the caliphs to commanders in the field, which the jurists later incorporated in their canons; still others, the opinions and interpretations of the Muslim jurists on matters of foreign relations. Analyzed in terms of the modern law of nations, the sources of the Muslim law of nations conform to the same categories defined by modern jurists and the Statute of the International Court of Justice, namely, agreement, custom, reason, and authority. The Qur'an and the true Muhammadan hadiths represent authority; the sunna, embodying the Arabian *jus gentium*, is equivalent to custom; rules expressed in treaties with non-Muslims fall into the category of agreement; and the fatwas and juristic

outline of the sources of *Shari'a* (Islamic law) will be provided in the following paragraphs in order to define the sources of "rights" in Islamic law.

Generally speaking, sources of *Shari'a* (Islamic law) can be divided into two main categories: primary sources, which include the Qur'an, the *Sunna* (traditions of the Prophet), *ijma'* (the consensus of the learned), and *qias* (analogy); and secondary or supplementary sources, which include *istihsan* (juristic preference), *istislah* (consideration of public interest), *urf* (custom) and *ijtihad*.[53]

As regards the primary sources of *Shari'a*, there is no disagreement among Muslim scholars concerning their authoritative power and authenticity as sources of *Shari'a*. By contrast, some of the secondary sources are not regarded by some scholars as being sources of *Shari'a*.[54] In addition to the two above-mentioned categories, there are some other sources of *Shari'a* that are the subject of disagreement among Muslim scholars regarding their validity and authenticity. These fall into the category of secondary sources, and include the *fatwa* (legal ruling) of a companion, *istishab* (presumption of continuity), *sadd al-dhara'i* (blocking the means), and *ijtihad* (personal reasoning).[55]

3.3.1 Primary sources

3.3.1.1 The Qur'an

The Qur'an is defined by Muslim scholars as "the book containing the speech of God revealed to the Prophet Muhammed in Arabic and transmitted to us by continuous testimony, or *tawatur*".[56] It is to be kept in mind that the Qur'an lays down only those general principles and standards that are related to people's conduct and behaviour in their relations with God and their fellow men. These standards deal with different forms of a

commentaries of text-writers as well as the utterances and opinions of the caliphs in the interpretation and the application of the law, based on analogy and logical deduction from authoritative sources, may be said to form reason." KHADDURI, *supra* note 11, at 47.

53For sources of Islamic law, *see* M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights, in the Islamic Criminal Justice System, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 3, 9 (M. Cherif Bassiouni ed., 1982); ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 19–26 (1990); Heiner Bielefeldt, *Muslim Voices in the Human Rights debate*, 17 HUM. RTS. Q. 587, 595 (1995); J. N. D. Anderson, *The Significance of Islamic Law in the World Today*, 9 AM. J. COMP. L. 187, 188 (1960); Theodore P. Ion, *Roman Law and Mohammedan Jurisprudence*, 6 MICH. L. REV. 44, 46 (1907); MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 29–33 (1988); S. MAHMASSANI, FALSAFAT AL-TASHRI' FI AL-ISLAM (THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM) 62–102 (Farhat J. Ziadeh trans., 1987).

54YUSUF HAMID AL-'ALIM, AL-MAQASID AL-AMMAH LIL SHARI'AH AL-ISLAMIYYA 51 (1991).

55*See* in this regard KAMALI, *supra* note 14.

56*Id.* at 17.

person's life, ranging from commercial transactions to family affairs, friendship, fairness, justice, etc. Detailed rulings on such matters are left to other sources of *Shari'a* to deal with, since if such details had been defined in the Qur'an, which is not subject to alteration or change, that would have inflicted hardship on people as circumstances and social attitudes changed with time.

Generally speaking, the affairs that the Qur'an deals with can be divided into two main categories: first, the relationship between God and His people, an area which is mainly concerned with worship and religious obligations and rituals; and secondly, the relationships between individuals. This latter category can be subdivided into the following categories: matters relating to the propagation of the religion; matters relating to the family, that is, marriage, divorce, lineage and inheritance; matters relating to people's commercial transactions; and finally, matters relating to the criminal justice system in which punishments for certain crimes are prescribed.[57] In other words, Qur'anic rulings and injunctions, which are cast in general language, are designed to preserve the three main objectives of *Shari'a*, that is, *dhruriat* (essentials), *hajiyat* (complementary interests), and *tahsiniyat* (desirable interests).[58]

The authenticity of the Qur'an as the first, and the principal, source of Islamic law (*Shari'a*) is not subject to any dispute or doubt. Its authority as the main source from which the principles of *Shari'a* must be derived is, to use Kamali's expression, "decisive". Therefore, priority must be given to the Qur'an where a clear ruling or text regarding a particular matter can be found in it.[59]

3.3.1.2 The Sunna

The term *Sunna*[60] can be defined as "the statements and actions of Prophet Muhammad, as well as the statements and actions of others done in his presence which did not meet his disapproval".[61] In this connection, Kamali observes that a distinction should be made here between the actions or sayings of the Prophet that constitute "legal Sunna", that is, rulings

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[57]MOHAMMAD KHUDDURI BEK, TAREEKH AL-TASHRI' AL-ISLAMI 27–8 (1994).

[58]AL-'ALIM, *supra* note 54, at 56.

[59]KAMALI, *supra* note 14, at 59.

[60]Literally, *Sunnah* means "a clear path or a beaten track", but it has "also been used to imply normative practice, or an established course of conduct". *Id.* at 44.

[61]ABU AMEENAH BILAL PHILIPS, THE EVOLUTION OF FIQH: ISLAMIC LAW AND THE MADH-HABS 29 (1995).

that Muslims have to follow, and "non-legal Sunna". This means not all the actions or sayings of the Prophet are conducive to the forming of rules and commands for Muslims. Kamali goes on to describe non-legal *Sunna* as the actions that were performed by the Prophet as a human being, which do not relate primarily to the principles of *Shari'a*. Into this category fall the manner in which he ate and slept, and his opinions pertaining to human affairs such as agriculture, medicine, etc. "Legal Sunna", by contrast, produces rulings that constitute parts of Islamic law and which thus have binding force on Muslims. This category of *Sunna* is, according to Kamali, that which "the Prophet laid down in his capacities as Messenger of God, as the Head of State or Imam, or in his capacity as a judge".[62]

The *Sunna* of the Prophet is a supplementary source to the Qur'an. It may provide an explanation or interpretation for what was revealed in the Qur'an. In addition, and in most cases, the *Sunna* provides detailed instructions in regard to those general principles laid down in the Qur'an. For instance, with regard to a number of injunctions or commands in the Qur'an that prescribe obligations, the *Sunna* describes the conditions and the means for fulfiling such obligations.[63]

Thus, the *Sunna's* authority is derived from its main source, that is the Qur'an, which is the principle source of all *Shari'a* rules. The *Sunna*, therefore, follows the Qur'an in being the second source of Islamic law, and its rulings have the same binding power as has the Qur'an.

3.3.1.3 Ijma'

The term *ijma'* can be defined as "the unanimous agreement of the *mujtahidun*[64] of the Muslim community of any period following the demise of the Prophet Muhammad on any matter".[65]

This source of Islamic law derives its authority from the fact that the consensus of all the learned people, that is, Muslim scholars, regarding a ruling on a particular matter is not prone to be erroneous. This authenticity can be inferred from an authoritative *haddith* of the

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[62]KAMALI, *supra* note 14, at 50–2.

[63]BEK, *supra* note 57, at 28–9.

[64]Plural of *mujtahid* which means a scholar or a person who is qualified to extract rulings from other sources of the *Shari'a*, mainly from the Qur'an and *Sunna*.

[65]KAMALI, *supra* note 14, at 169.

prophet in which he states: "my people would not all agree to something which is wrong".[66]

The rulings derived from the consensus of the scholars (*ijma'*) within the Muslim community constitute one of the primary sources of *Shari'a* that have binding effect. But for *ijma'* to be regarded as such, the agreement of the scholars on a particular issue must be unanimous. This unanimous agreement is the characteristic which renders *ijma'*, as a source which is not directly dependent on revelation but, rather, based on rational proof, a primary source of Islamic law.[67]

3.3.1.4 Qias

Qias , or analogy, means "the extension of a *Shari'ah* value from an original case, or *asl*, to a new case, because the latter has the same effective cause as the former".[68] This method of deducing a ruling in a given situation is resorted to if, and only if, no basis for it can be found in the Qur'an, *Sunna* or *ijma'*. Since the latter three sources are textual, or based on textual proofs, *qias*, positing as it does the existence of a common cause or rationale shared by the original case and the new one, is also based on textual proof.[69] Viewed as such, *qias* is "a means of discovering, and perhaps of developing, the existing law".[70] Furthermore, *qias* "is admittedly a rationalist doctrine, but it is one in which the use of personal opinion ... is subservient to the terms of the divine revelation. The main sphere for the operation of human judgement in *qiyas* is the identification of a common *illah*[71] between the original and the new case."[72]

Islamic law (*Shari'a*) has been always criticized for being incompatible with the notion of the evolutionary nature of societies and their ways of life and the idea that, as a consequence, new rules should be established that can govern such new patterns of disputes or transactions that may emerge from these changes. This criticism is based on the assumption that *Shari'a* is a set of rigid rules that is to be implemented in a given society at

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[66]M. Cherif Bassiouni, *Introduction, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM XIII, XVI (M. Cherif Bassiouni ed., 1982).

[67]KAMALI, *supra* note 14, at 168.

[68]*Id.* at 197.

[69]*Id.*

[70]*Id.* at 198.

[71]Effective cause.

[72]KAMALI, *supra* note 14, at 198.

a given time. Analogy, or *qias*, is one of the sources of Islamic law that prove the invalidity of such a claim. *Qias* is a method of bringing *Shari'a* rules, which are susceptible to interpretation and alteration, to meet new circumstances that might emerge from time to time. *Qias* "has become a vehicle for maintaining the modern relevancy of *Shari'a*".[73]

This method of interpreting the Qur'an and *Sunna* employs two methods for deducing rules and principles, namely, *maslaha* (public interest) and *illa* (effective cause). In utilizing the first method, Muslim scholars base their derivations of new rules on a consideration of "public interest". Therefore, their analogy, which might be based on other Islamic sources or even other non-Islamic sources provided that these latter are in conformity with the former, does not contradict the general principles of the Qur'an. The second method of using *qias*, by contrast, involves examining the real cause which led to the institution of the existing legal rule. By identifying such a cause, it can, by way of analogy, be used to construct another rule where new circumstances demand one. Therefore, the use of *illa* helps *Shari'a* rules to be adapted to new social needs and necessities.[74]

3.3.2 Secondary sources

3.3.2.1 Istihsan

Istihsan, or "juristic preference", involves the preference of one rule over another and the application of it in a way that seems appropriate for preserving justice and equity.[75] This process can be carried out when the application of a law in certain circumstances and a certain time would lead to hardship and, consequently, would not meet the objectives of *Shari'a*. Consideration should be given to the potential for avoiding such hardship by the application of the law in a way that preserves the spirit and objectives of the *Shari'a* in safeguarding people's interests and ensuring their welfare. In this connection, a well-known incident occurred when the second *khalifa* Umar suspended the implementation of the *hadd* punishment for theft, which is the amputation of the hand, due to a widespread famine because he realized that inflicting such a penalty in such circumstances was not proper and even in conflict with the "public interest, equity and justice".[76]

3.3.2.2 Istislah or maslahah mursalah

The term *istislah* can be defined as "a consideration which is proper and harmonious with

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[73]James Dudley, *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*, 12 GA. J. INT'L & COMP. L. 55, 65 (1982).

[74]*Id.*

[75]KAMALI, *supra* note 14, at 246–7.

[76]*Id.* at 247.

the objectives of the Lawgiver; it secures a benefit or prevents a harm".[77]

Istislah, as its definition implies, is a mechanism that works to safeguard the community's interests and prevent it from experiencing any harm or hardship. *Shari'a* has defined certain interests, which vary according to their importance, and its rules and regulations are all aimed at the safeguarding of those interests. These interests are not reached by a particular and definite set of rules or machineries, since they vary according to time and place. Thus, it is imperative, in order for the objectives of *Shari'a* to be fulfilled, that a flexibility in the means by which such objectives can be attained should be inherent in the rules and sources of Islamic law. This source of *Shari'a*, namely *istislah* (consideration of public interest), represents a method whereby such flexibility can be imported to the rules of *Shari'a*.[78]

3.3.2.3 Urf

In its technical meaning, *urf* (custom) can be defined as "recurring practices which are acceptable to people of sound nature".[79] According to this definition *urf* or custom, in order to be regarded an authoritative source of Islamic law, must be "sound and reasonable" in the sense that bad practices or practices which are not in accordance with the principles of *Shari'a* are not regarded as valid and, therefore, do not form an acceptable basis for Islamic law.[80]

Kamali presents certain conditions that must be present in that custom in order for it to be valid. He defines these conditions as follows:

> 1) Urf must represent a common and recurrent phenomenon. 2) Custom must also be in existence at the time a transaction is concluded. 3) Custom must not contravene the clear stipulation of an agreement. 4) Lastly, custom must not violate the *nass*, that is, the definitive principle of the law.[81]

3.3.2.4 Ijtihad

The term *ijtihad* may be defined as "a creative but disciplined intellectual effort to derive legal rulings from those sources while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society".[82]

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[77] *Id.* at 267.

[78] *Id.* at 267–8. For more information about public considerations, *see infra* pp. 64–5.

[79] *Id.* at 283.

[80] *Id.* at 283–4.

[81] *Id.* at 286–7.

[82] TAHA JABIR AL-'ALWANI, IJTIHAD 4 (1993).

Islamic scholars have relied heavily on this method of deducing rules in situations where the main sources, particularly the Qur'an and *Sunna*, have not explicitly specified. Continuous use of *ijtihad* led to the construction of a set of doctrines and rules which were primarily based on legal reasoning and, therefore, adaptable according to changing social needs.[83] As a result, some scholars deal with *ijtihad* as encompassing *qias*, *istihsan* and *istislah*.[84]

Weiss, describing the theory behind *ijtihad*, writes that "the Muslim jurist never invents rules; he formulates, or attempts to formulate, rules which God has already decreed and which are concealed in the sources".[85] This observation, which suggests the absence of any potential for accommodating *Shari'a* rules to new conditions and circumstances, undoubtedly assigns rigidity to such rules, in clear contradiction with the purpose for which they were created. Given that the principles of Islamic law are not confined to the Qur'an and *Sunna*, and bearing in mind that *ijtihad* has been utilized heavily by Muslim scholars throughout Islamic history, Weiss's argument is deficient in that it unfortunately fails to appreciate the eloquent contribution that *ijtihad*, as well as other secondary sources of *Shari'a*, has made to the entire corpus of Islamic law.[86]

Given the rapid development and change that societies experience, and given that their needs and values, as a consequence, change as well, it is imperative that the laws and regulations that govern such needs must adapt to such changes. To make this happen, flexible means of legislating and enacting such rules and regulations are indeed imperative. *Ijtihad*, as a source of Islamic law, is intended by Islamic scholars to play such a role. In this regard, Kamali observes that

> the quest for better solutions and more refined alternatives lies at the very heart of *ijtihad*, which must according to the classical formulations of *usul al-fiqf* [jurisprudence] never be allowed to discontinue. For the traditional Muslim scholars, *ijtihad* should be utilized

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[83]Muhammad Salim al-Awwa, *The Basis of Islamic Penal Legislation, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 127, 129 (M. Cherif Bassiouni ed., 1982). For an analysis of *ijtihad*, *see* ISLAHI, *supra* note 29, at 51–84, in which the author argues that *ijtihad* plays so vital a role in keeping the rules of Islamic law apace with the continuing emergence of issues that are not directly dealt with in the Qur'an and *Sunna* that it should be classified as a third source of Islamic law following the first two main sources.

[84]Abdel-Wahab, *supra* note 6, at 121.

[85]Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 200 (1978).

[86]In this connection, Islahi maintains that if the rules of Islamic law were only based on revelation, *i.e.* the Qur'an, it would have ceased from growing upon the death of the Prophet. This was not the case, because a large portion of the Islamic law has been formulated by Muslim jurists after the death of the Prophet through other sources of *Shari'a* including *ijtihad*. ISLAHI, *supra* note 29, at 22–3.

to "find solutions to new problems and to provide the necessary guidance in matters of law and religion".[87]

3.4 Islamic Political Philosophy

The starting point for understanding the Islamic political system should be the fact that, unlike in a Western democracy, in which sovereignty is for the people, absolute sovereignty is for God.[88] "Islam ... altogether repudiates the philosophy of popular sovereignty and rears its polity on the foundations of the sovereignty of God and the vicegerency (khilafat) of man."[89] In this connection, the Qur'an clearly states: "It is not fitting for a believer, man or woman, when a matter has been decided by God and His Apostle, to have any option about their decision. If anyone disobeys God and His Apostle, he is indeed on a clearly wrong path."[90]

Further analysis of Islamic political theory should not depart from the premise that the whole Islamic system is "based on the three principles of *tawhid* (oneness of God), *risala* (prophethood) and *khilafa* (caliphate)".[91] The notion "oneness of God" implies that everything in the universe is attributed to that God, who is the "Creator", the "sustainer" and, accordingly, the only one who has the right to legislate. "Hence, it is not for us to decide the aim and purpose of our existence or to set the limits of our worldly authority; nor does anyone else have the right to make these decisions for us. This right rests only with God. ... God alone is the Ruler and His commandments constitute the law of Islam."[92] In this respect, the Qur'an states: "We have sent down to thee the Book in truth, that thou mightest judge between men, as guided by God; so be not used as an advocate by those

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[87] KAMALI, *supra* note 14, at XIX.

[88] For the issue of sovereignty of God in Islamic law, *see* MAUDUDI, *supra* note 2, at 166–78; ABDUL KAREEM ZAIDAN, HUQOOQ AL-AFRAD FI DAR AL-ISLAM 9–10 (1988); Javid Iqbal, *The Concept of State in Islam, in* STATE, POLITICS AND ISLAM 37–50 (Mumtaz Ahmad ed., 1986); SAYYED QUTB, AL-ADALAH AL-IJTIMA'IYYA FI AL-ISLAM 98 (1980); M. Cherif Bassiuoni, *Islam: Concept, Law and World Habeas Corpus*, 1 RUT.-CAM. L.J. 160, 167 (1969); OMAR SOLAIMAN AL-ASHQAR, AL-SHARI'A AL-ISLAMIYYA LA AL-QWANEEN AL-WADH'IYYA 164–5 (1986); M. MUSLEHUDDIN, ISLAMIC JURISPRUDENCE AND THE RULE OF NECESSITY AND NEED 13 (1982); MOHAMMAD A. ABU FARIS, AL-NIDHAM AL-SIYYASI FI AL-ISLAM 17–39 (1986).

[89] MAUDUDI, *supra* note 2, at 139. Maududi distinguishes here between sovereignty and vicegerency. He maintains that the Qur'an, when expressing its commands to the people, always uses the vicegerency instead of sovereignty, which implies that the absolute sovereignty is for God and people, all people, are vicegerents of God who bear a responsibility to implement his religion and law on earth. ABU 'ALA AL-MAUDUDI, NADHARIYYAT AL-ISLAM WA HADIUH FI AL-SIYASSAH WA AL-QANOON WA AL-HUKM 49–50 (1985).

[90] QUR'AN XXXIII:36.

[91] ABUL A'LA MAWDUDI, HUMAN RIGHTS IN ISLAM 9 (1980).

[92] *Id.*

who betray their trust."[93] This fundamental faith is significant for any attempt to elucidate why the whole of Islamic political theory and government rests upon the sole sovereignty of God. This Islamic conception of sovereignty is not alien to that which has been presented by some Western legal theorists with regard to determining the status of the sovereign *vis-à-vis* his subjects. It can be compared with the account of sovereignty given by Austin:

> the superiority which styled sovereignty, and the independent political society, which sovereignty implies, is distinguished from other superiority ... by the following marks of characters. – 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior.[94]

In exactly the same vein, Hart argues that the doctrine of sovereignty is exclusively concerned with regulating the relationship between the sovereign and his subjects. In explaining this "simple" (as he describes it) relationship, he argues that "in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one".[95]

Elsewhere, Austin indicates that the sovereign is:

> (1) *not subordinate*, that is (a) sovereign legislative power cannot be conferred by a law; and (b) this legislative power cannot be revoked by law;
> (2) *illimitable*, that is (a) the sovereign legislative power is legally illimitable, it is the power to legislate any law whatsoever; and (b) the sovereign cannot be made subject to legal duties in the exercise of his legislative power;
> (3) *unique*; for every legal system there is (a) one and (b) only one non-subordinate and illimitable legislative power;
> (4) *united*: this legislative power is in the hands of one person or one body of persons.[96]

However, when we suggest that, according to Islamic thought, the absolute sovereignty is for God, this has a number of implications. It means that God is the sole source of authority and man is His viceregent on earth who He has vested with the authority and

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[93]QUR'AN IV:105.

[94]AUSTIN, *supra* note 13, at 166.

[95]HART, *supra* note 3, at 50. For more details about the notion of "habitual obedience" *see id* at 51–61; HAROLD J. LASKI, A GRAMMAR OF POLITICS 50 (1931).

[96]JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF A LEGAL SYSTEM 8 (1978).

power to implement His law. As a consequence, this implies that man possesses the ability and the authority to enact whatever laws and regulations are required in order to implement the commands of God. Moreover, bearing in mind that the commands laid down in the Qur'an and *Sunna* are general, and that social circumstances and needs are in a process of continual change, man ought to have the power to interpret such general principles and implement them in such a way that the ultimate ends of such rules may be achieved, that is, the welfare and happiness of mankind. Thus there is a relationship, as Bassiouni indicates, between the "Lawgiver" and the "lawmaker".[97] Bassiouni further observes that maintaining that there is a flexibility in Islamic law which makes it applicable to all circumstances does not mean that it is "evolutionary", but rather that it is "a religion and legal system which applies to all times. It is therefore the application that is susceptible to evolution."[98]

Prophethood is the channel through which God has sent His commands, that is, His law. This He did through the revelation of the Qur'an, which consists of the general principles of such law, and which, at the same time, leaves much leeway for the textual interpretation of some of its rules in accordance with the needs of society.[99]

Khilafa means "representation" or vicegerency, in the sense that the *khalifa*, when administering the affairs of an Islamic state, must do so as a representative of God. He must, therefore, abide by the will of God in applying His law within the limits prescribed for him. He is not entitled to legislate or propose laws that are contrary to the will of God.[100]

3.4.1 Separation between religion and state

Watt's account of the relationship between religion and politics is of particular relevance to our discussion. Watt explicates this relationship by explaining the role a religion plays in a person's life. For him, religion institutes a set of guidelines for a person, who evaluates and judges his conduct in accordance with those guidelines. Eventually, that person's activities and actions are motivated, governed and evaluated by his religion. In other words, religion ought to play a role in directing one's conduct and behaviour, whether towards

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[97]Bassiouni, *supra* note 88, at 169.

[98]Bassiouni, *supra* note 66, at XIV.

[99]MAWDUDI, *supra* note 91, at 9.

[100]*Id.* In this regard *see also* ASAD, *supra* note 10, at 77–81; MAHMOOD AL-KHALEDI, AL-DEEMOQRATIYYA AL-GHRBIYYA FI DHAW' AL-SHARI'A AL-ISLAMIYYA 68 (1986); ABDUL HAMEED AL-OMRANI, AL-HUKM AL-ISLAMI 49–52 (n.d).

other individuals or towards the state itself, to particular ends, which in turn, are to a large extent defined by religion. This is a general conception of religion. However, if religion is looked at from a very narrow perspective, that is, if we regard religion as merely formulating a set of moral values, then no relationship between religion and politics is conceivable.[101]

The Islamic political system differs from the system of Western democracy in that it does not recognize the separation between religion[102] and the state which is the foundation of modern political democracy.[103]

The idea of human rights in its Western context depends largely on the view that priority is to be given to individual rights rather than to the collective rights of society. That is, "rights", in a Western democracy, have an individualistic nature.[104] This originates from the age-old struggle between the Church and the king, where each party claimed to be applying laws which God has revealed and which only He could question.[105] Thus, since they were purportedly grounded on the Divine will of God, the practices of those who possessed power were exempt from being questioned, even if they were detrimental to the interests of individuals. This struggle ended with the civil government prevailing and, more importantly, a separation between the Church, or religion, and politics was initiated as the foundation of modern democracy. This was done in order to prevent an abuse of power where it was wielded in the name of religion. This struggle does not exist in the Islamic system, where there is no separation between religion and government or politics. In such a system, the ruler is subject to a twofold system of accountability or control.[106] On the one hand, and so far as legislation is concerned, he is not entitled to pass any legislation which

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[101]WATT, *supra* note 5, at 28.

[102]Sayyed Qutb indicates that, according to the Islamic conception, "religion" is synonymous with the term "system" in its modern usage. QUTB, *supra* note 88, at 102.

[103]AL-KHALEDI, *supra* note 100, at 111–6. *See also* ALI ISSA OTHMAN, ISLAM AND THE FUTURE OF MANKIND 19 (1993).

[104]Individualism means that "the individual person as the subject of rights comes to be regarded as the irreducible atom or element of society, the only ultimate political 'real' – all constitutional constructions being no more than devices for rendering the rights of the individual effective and their enjoyment certain". A. R. LORD, THE PRINCIPLES OF POLITICS: AN INTRODUCTION TO THE STUDY OF THE EVOLUTION OF POLITICAL IDEAS 203 (1921).

[105]*Id.* at 25. *See also* AL-JUNDI, *supra* note 12, at 156, where the author argues that such a claim on the part of the rulers led the British people to revolt against George II and, eventually, to the enactment of Magna Carta in 1215. This followed by the emergence of the idea of the separation of powers as a means by which the abuse of power on the part of the king could be prevented.

[106]RASHID AL-GHANNUSHI, AL-HURIYYAT AL-'AMMAH FI AL-DAWLAH AL-ISLAMIYYA 39 (1993).

is contrary to the rules of *Shari'a*. Thus, his power to legislate is not unlimited. On the other hand, as regards taxation, specific quotas of *zakat* (charity) are laid down to be paid by financially capable people.[107] The head of an Islamic state is not, therefore, immune from accountability to *Shari'a* rules as a result of the role played by the people in ensuring his compliance with the general principles of *Shari'a*.

Here, there is a similarity between the claims made by kings in Western countries and the characteristics of an Islamic state, more specifically the fact that the laws which they apply are the laws of God. However, there is also a difference between the two cases, in that the former claim that, in applying the law of God, they are not accountable for their actions except to God. This means that people had to display, to use Sabine's words, "passive obedience" towards their rulers. In other words, all the ruler's actions must be accepted without their validity being questioned.[108] In the Islamic system, by contrast, the *khalifa*, although he is applying the law of God, and although he is considered the representative of God in applying His will by implementing His law, cannot claim divine authority.[109] Rather, he is restricted to applying the system which all people understand and absorb, because this is not something that is peculiar to the head of state alone.[110] In addition, Islamic law does not accept the maxim "that the King can do no wrong".[111] Therefore, the competence of a person to remain *khalifa* is dependent on how consistently he abides by *Shari'a* laws, and the people are entitled to overthrow him should he depart from the system laid down by *Shari'a*.[112] It is imperative for any system, in order to prevent any abuse of power, to incorporate a system of accountability. In this connection, where powers of divine origins are concerned, Sabine correctly argues that "though power as such was

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[107] *Id. See also* OTHMAN, *supra* note 103, at 19.

[108] GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 333 (1960).

[109] Even the Prophet "made no claim to be divine, nor did his followers make such a claim on his behalf". BERTRAND RUSSELL, HISTORY OF WESTERN PHILOSOPHY AND ITS CONNECTION WITH POLITICAL AND SOCIAL CIRCUMSTANCES FROM THE EARLIEST TIMES TO THE PRESENT DAY 441 (1957).

[110] "There is no theocracy in the Islamic State. God is God and man is man. The Prophet was a bearer of Revelations. ... The *Shari'ah* laws which he left behind are the laws of Allah. They are not God. In contrast to the Western concept of "theocracy" Islam is a revolt against all anthropomorphic implications in the realm of faith. With the Muslim concept, religion is not entirely a private affair between man and God. Nevertheless, with privacy, the individual is ruled by a code of law which is binding on all, without establishing any kind of sanctity in a man or a class of men." ANWAR A. QADRI, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD 271 (1986).

[111] Joseph Schacht, *Islamic Law in Contemporary States*, 8 AM. J. COMP. L. 133, 134 (1959).

[112] *See* in this regard Bulliet, *supra* note 7, at 182, in which he disputes that "since government were [according to *Shari'a*] bound by the law, they depended upon the religious specialists for a measure of their legitimacy".

divine, it might still be right, under proper circumstances, to resist an unlawful exercise of power". Thus, he continues, "no incompatibility was felt ... between the theories that power comes from God and that it comes from people".[113]

3.4.2 Is the Islamic state a religious state?

It is of paramount importance to stress that, contrary to the perspectives of many Western writers, the term "Islamic government" does not imply that there is a group of religious people who are in charge of running such a government. Rather, it means, first of all, that sovereignty is for Allah, that is, He is the legislator, and then that *Shari'a* (Islamic law) is to be applied by the *khalifa*.

Therefore, it cannot rightly be claimed that an Islamic state is a religious or a theocratic state in its purist form, since if we considered it as such, this would mean that it is governed by religious people or by a king who would derive their authority directly from God and who, therefore, would not be susceptible to committing mistakes, and thus not accountable for their actions.[114] An Islamic state might be considered as a mixture of religious and civil state. It is religious in the sense that it is subject to the rules of the Qur'an and other sources recognized by Islamic law and that the sole legislator is God through His book. It is a civil state in the sense that those who possess authority in it are people who can make mistakes, and who therefore are accountable for their actions.[115] This is why Maududi describes the Islamic state as representing a "theo-democracy" system of government.[116]

3.4.3 Form of government

Islam does not specify a particular system of government. Rather, it has laid down some general principles, such as *shura*, justice, freedom, equality, as the underpinnings of any Islamic government. An Islamic government must not depart from these principles.[117]

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[113] SABINE, *supra* note 108, at 333.

[114] *See* Sir Zafrulla Khan (a Judge of the International Court of Justice), *forward* to M. Cherif Bassiuoni, *Islam: Concept, Law and World Habeas Corpus*, 1 RUT.-CAM. L.J. 160, 160 (1969).

[115] SAEED A. H. AL-MEHERI, AL-ILAQAT AL-KHAREJIYYA LIL DAWLAH AL-ISLAMIYYA: DIRASAH MUQARANAH 489 (1995); MAUDUDI, *supra* note 2, at 139–40.

[116] MAUDUDI, *supra* note 2, at 139–40. *See also* DHAFIR AL-QASIMI, NEDHAM AL-HUKM FI AL-SHARI'A WA AL-TAREEKH AL-ISLAMI VOL.1 388 (1990); GHAZI HASSAN SABARINI, AL-WAJEEZ FI HUQOOQ AL-INSAN WA HURIYATUH AL-ASASSIYYA 17–9 (1995).

[117] ADNAN AL-KHATEEB, HUQOOQ AL-INSAN FI AL-ISLAM 38–9 (1992). "To exercise the caliphate [khilafa] means to cause the masses to act as required by religious insight into their interests in the other world as well as in this world". IBN KHALDUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY 155 (Franz Rosenthal trans. & N. J. Dawood ed., 1987). Khilafa, or Imamate, "is prescribed to succeed prophethood as a means of protecting the deen [religion] and of managing the affairs of this world". ABU'L

In the Islamic system, all people are representative of God on this earth, and they bear the main responsibility for applying the rules of *Shari'a* properly and in their entirety. Since it is not conceivable that all the people can do this acting in concert, the people are vested with the right to choose a ruler by a contract entitled *baiy'a*, according to which they can subject the ruler to the supervision of both *Shari'a* rules (*nass*) and their direct supervision through *shura,* or consultation, which is carried out by people elected for this purpose (known in modern systems as the "parliament").[118]

Khilafa[119] does not imply that there has been a particular form of government throughout Islamic history. It indicates only that any Islamic government should abide by the general principles laid down by the *Shari'a* with regard to affairs of state, the government's responsibilities, the laws it ought to apply, and all other matters relating to the welfare of the Islamic state. Thus, the word *khilafa* indicates that government must have two underpinnings. First, the *khalifa* (the head of state) must be elected through *shura* (consultation). Secondly, this election of a person as *khalifa* must be concluded by *baiy'a*.[120] The term "*baiy'a*" can also be translated to mean 'pledge of allegiance'. In this context, it means a pledge of allegiance expressed by, on the one hand, the *khalifa* in meeting his commitment to apply and respect the rules of *Shari'a* and, on the other hand, by the people in promising obedience to the *khalifa* as long as he does not transgress his commitment to work for the welfare of the people by applying the rules of *Shari'a*.[121]

3.5 The Individual

The Qur'an describes the individual as the most dignified and respected creature that exists: "Surely We have accorded dignity to the sons of Adam."[122] Islam views the individual as

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HASAN AL-MAWARDI, AL-AHKAM AS-SULTANIYYAH: THE LAWS OF ISLAMIC GOVERNANCE 10 (Asadullah Yate trans., 1996).

[118]AL-GHANNUSHI, *supra* note 106, at 322–3.

[119]An excellent treatment of the issue of *Khilafa* is the massive study of AL-QASIMI, *supra* note 116, at 117–408.

[120]al-Qasimi describes *baiy'a* as being a contract between the *khalifa* and the people of the Islamic state. He further suggests that, in order for this contract to be legitimate, certain conditions must be met. First of all, the *khalifa* must express his commitment to abide by, and apply, *Shari'a* rules in the state. Secondly, the people of the Islamic state, when making such a contract, must enjoy the full freedom to express their consent to the *khalifa*. There must be no any form of coercion or duress. Thirdly, and finally, as a result of the free will of the people, it is very probable that there might exist opposition to such a contract. *Id.* at 273–5. For more details concerning the issue of *baiy'a*, *see* ABU FARIS, *supra* note 88, at 279–313.

[121]MOHAMMED SALIM AL-'AWWA, FI AL-NIDHAM AL-SIYASI LIL AL-DAWLAH AL-ISLAMIYYA 117–8 (1989). *See also* MUHAMMED ASAD, THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM 75–7 (1985).

[122]QURA'N XVII:7.

its fundamental component. Many passages of the Qur'an illustrate the significance the individual has and the common ancestry of all mankind. For instance, the verse "O men revere your Lord who created you from a single soul and made out of it a peer and therefore brought multitudes of men and women" highlights this significance and, at the same time, indicates that all people, Muslims and non-Muslims, belong to one broad category, that is, mankind. This undoubtedly signifies the unity of mankind irrespective of differences of national origins, race, colour, religion or other characteristics. It is this unity of mankind, and the mutual responsibility of both the individual and society, which has been discussed earlier in this chapter,[123] which go to form the system of justice in Islam.

Human beings have this status, according to Islam, on account of the significant role they ought to play: that is, to worship God and to convey His message to all mankind, which has the freedom and the capability to choose the right way. Hence, "[t]he individual is viewed by Islam both as a single and unique unit and also as part and parcel of a composite unit, *i.e.*, Mankind. The individualistic feature of Islamic law rests in part in the fact that Islamic law generally aims at the public good which does not detract from its fundamental and individualistic character."[124] Furthermore, given that Islamic international law is derived from the same sources of the *Shari'a*, which deals with individuals, the family, the community and the state alike, the individual has been regarded as a subject of Islamic international law ever since the advent of Islam. This status of the individual doubtless certifies that the rights provided for individuals under Islamic international law are sanctioned or guaranteed by the rules of *Shari'a*.

Islam views every act of the individual as worship in the sense that his actions, whatever their nature, be it ritual or other acts, are rewarded. It is this incentive, and not only laws enforced by the state, that makes the individual comply with the rules and regulations of *Shari'a*.[125]

The individual, as *Shari'a* views him, has complete freedom and liberty to enjoy his rights. However, this freedom is not absolute but is restricted to the extent that individuals, in exercising their rights, must take into account the limits laid down by the law to protect certain greater interests necessary for the welfare of the community. An individual can enjoy his rights and freedoms so long as this enjoyment does not harm or affect others'

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[123]*See supra* pp. 36–8.

[124]Bassiouni, *supra* note 88, at 160.

[125]OWAIS, *supra* note 46, at 10.

rights, or does not affect the maintenance of "public order".[126] Thus, an individual's rights are restricted whenever communal rights or the rights of others are involved.

It is clear that a party's call for human-rights guarantees does not arise unless an oppressing party threatens such rights or intervenes to diminish those rights if it sees that its interests require this intervention. Thus, given the existence of such two separate entities – the state and the individual – it is only to be expected that individual or human rights are subject to the power of the state to legislate and to change the legislation, according to its will, and therefore to its capability to interfere in, and limit, the rights of individuals: hence the need for those rights to be guaranteed against any unwanted or unjustified intervention on the part of the state. This need, however, does not exist in the Islamic system, since there is no such separation between the individual and the state. Both state and the individual compose a unified entity. "The individual does not stand in an adversary position *vis-à-vis* the state but is an integral part thereof."[127] As Coulson puts it,

> the stress ... throughout the entire *Shari'a* lies upon the duty of the individual to act in accordance with the divine injunctions; and since the conscientious application of the divine injunctions is the declared purpose of the political authority, the jurists did not visualize any such conflict between the interests of the ruler and the ruled as would necessitate the existence of defined liberties of the subject.[128]

So far as the relationship between the individual and state is concerned, Schacht indicates that there are numerous cases in Islamic law where decisive and definite rules have been laid down which uphold the concerns of the individual *vis-à-vis* the state. This emphasis on individual interest can be clearly noticed in cases including contracts and private property.[129] Schacht explains how, in these two cases, Islamic law carefully preserves the rights of the individual. The sanctity of contracts is grounded on what is known in Western legal terms as *pacta sunt servanda*, a principle referred to and underlined in various places in the Qur'an. Moreover, in Islamic law there is no distinction, so far as their validity and sanctity are concerned, between treaties concluded by the Islamic state or contracts between the state and an individual. With regard to an individual's private property, Islamic law preserves this right by, first, prohibiting "unjust enrichment" and, secondly, by not

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[126]AL-DARINI, *supra* note 36, at 273. It is always necessary to bear in mind that "if everyone were free to pursue his own interests without regard to the interests of others, then some would be able to subdue others and so use their freedom as a means of oppression". PETER STEIN AND JOHN SHAND, LEGAL VALUES IN WESTERN SOCIETY 142 (1974).

[127]Bassiouni, *supra* note 53, at 23. *See also* MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 17–18 (1997).

[128]Coulson, *supra* note 5, at 50–1. *See also* LIPPMAN et al., *supra* note 53, at 120.

[129]Schacht, *supra* note 111, at 138.

recognizing "confiscation of private property". In these cases, Schacht goes on, where "expropriation" of private property occurs, it is performed in a very small number of cases and only out of a consideration for the public interest.[130]

It is true that the principles of Islamic law are aimed mainly at preserving the public interest and the welfare of society as a whole. However, this must not be construed to mean that the individual has no significance in Islamic law. In other words, the above proposition does not affect the "fundamental individualistic character" of Islamic law.[131] In numerous cases within *Shari'a* the highly privileged status of the individual can easily be discerned. For instance, Islamic law vests in the individual the right to challenge an act of the head of state if he or she sees that act as incorrect or in violation of a *Shari'a* rule.[132] One incident illustrating this, which took place in the time of the second *khalifa*, Omar, is of relevance here. As head of an Islamic state whose sole responsibility was to apply properly the rules of *Shari'a*,

> Omar was sitting judge when an inheritance case came up before him. Two full-blooded brothers asked for their shares in their brother's estate. Omar, after reciting the Koranic verse which expressly gives a share in the estate to a half-blooded brother from the mother's side, moved to dismiss the case. A woman from the audience stepped out and said: "Omar, before you dismiss the case, think that probably the plaintiff's father was only a piece of stone thrown in the sea, aren't they, then, half-blooded brothers?" Omar said his famous sentence: "Omar is wrong and a woman corrected him." He gave the plaintiffs their shares considering them, a fortiori, half-blooded brothers from the mother's side.[133]

3.6 Rights

It is true that there is no such thing as a list of "human rights" or the rights of the individual in Islamic law. But does this mean that individual rights in Islamic law have no significance? In other words, does this imply that the individual has certain obligations towards his Creator and his society without enjoying some basic and fundamental rights? In the following paragraphs I shall be dealing with these questions by explaining, from within the Islamic legal tradition, some of the notions relating to the concept "rights". This inquiry requires an explanation of the term "right", the nature of rights, and the sources and types of "rights" in Islamic law. The results of such an investigation should expand our understanding of human rights in the Islamic legal system.

130*Id.* at 140–4.

131Abdel-Wahab, *supra* note 6, at 122–3.

132*Id.* at 123.

133*Id.*

3.6.1 Definition of "rights"

Classical Muslim jurists thought of the term *haqq,* or "right", as a precise term that does not require any further illustration or explanation. According to context it may mean "a name of God (*Allah*) or one of His attributes, the Qura'n, an injunction of the Prophet, death, reward, definitely established fact, obligation, certainty, truth, ownership and properties".[134]

Contemporary Islamic scholars, like traditional Islamic jurists, deal with "rights" under the same heading of Islamic law, that is *ahkam* (rulings). However, different scholars have adopted different perspectives from which to articulate their definitions of the term "right". Some scholars have attempted to define the term in respect of its objective; a second group of scholars have focused on the effects a "right" might imply; a third group has based its definition on the origins of "rights"; and finally, some scholars have considered the subject of the "right".[135]

Some contemporary scholars disagree with the argument that traditional scholars have presented in their attempt to define the term "right". The traditional Islamic jurists who defined the term "right" as being a ruling itself have been criticized for defining rights according to their source, for a ruling, according to Islamic law, is "a communication from the Lawgiver concerning the conduct of the *Mukallaf* (legally competent person) and consisting of a demand, an option, or an enactment".[136] This definition makes clear that a ruling is the source of all Islamic law, including rights. Rights therefore cannot be the ruling itself, for rights are not the basis for other rulings. Their validity and legitimacy rather depend on whether *Shari'a* rulings consider them as such or not. In other words, rights are derived from rulings, but not vice versa.[137]

Other jurists have defined *haqq* (right) as the conduct or act of the person, but some contemporary scholars have criticized this definition, arguing that the conduct is not the right itself, but the effect or outcome of that right.[138] Tammom suggests that rights cannot be viewed from a single perspective. According to him, the term involves more than one

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[134]MOHAMMED TAMMOM, AL-HAQQ FI AL-SHARI'A AL-ISLAMIYYA 12 (1978).

[135]*Id.* at 17–18.

[136]Kamali, *supra* note 32, at 347.

[137]AL-DARINI, *supra* note 8, at 186; AL-QUTB MOHAMMAD TABLIYYA, AL-ISLAM WA HUQOOQ AL-INSAN: DIRASSAH MUQARANAH 32–3 n. 4 (1984).

[138]TAMMOM, *supra* note 134, at 24–32.

factor, understanding each of which is essential in our quest for an articulated definition of the term *haqq*. Rights, according to Tammom, "cannot be defined as a *hukm* (ruling) alone nor can it be defined as a *fe'el* or an act of the person alone. Rights rather involve *hukm* (ruling), *mahkoom fih* (the act), *mahkoom alaih* (the duty-bearer) and *Hakem* (Allah who is the right-bearer and the right-giver)."[139]

Fathi al-Darini, in his invaluable book *al-Haqq wa Mada Sultan al-Dawlah fi Taqeideh*, suggests that even contemporary Islamic scholars have failed to present a comprehensive definition of the term "right", since some of them have restricted their focus to the objective of a "right", and have defined it as an interest or an advantage for both the individual and society. "Right" itself is not, according to al-Darini, an end. Rather, it is a means towards obtaining certain ends that have been legitimized by the law. al-Darini then presents a more comprehensive and articulated definition of the term "right", in which he attempts to expose all the elements that are related to, and might affect, a right or the definition of right. A right, for al-Darini, "is an exclusively assigned privilege a person possesses, granted by the law, whereby that person possesses a power over something, or demands an act from another person for the fulfilment of a particular interest".[140]

3.6.2 The nature of "rights"

As was noted earlier, rights are derived from and based on *Shari'a* rulings. This presumption implies that the Lawgiver intended, in providing such rights, to fulfil certain public interests and advantages. Rights therefore must be restricted, to the extent that those intended interests should be met. A "right" is a means to an end which the Lawgiver intended to pursue. Therefore, rights cannot be considered as ends. They are divided into the rights of individuals and those of society. Both the individual and a society are regarded as independent entities with their own set of rights, but these rights at the same time are interrelated, in the sense that they all tend towards the ultimate goal of preserving the individual's as well as society's integrity and welfare. Thus, according to Islamic law the state stands on an equal footing with individuals in receiving "rights" from the Lawgiver. This suggests that the state does not have any power to remove any of the individual's rights except in cases where there is an abuse, on the part of the individual, in practising those rights.[141] In general, a person's enjoyment of his rights is conducive to the abuse of

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[139] *Id.*

[140] AL-DARINI, *supra* note 8, at 193.

[141] *Id.* at 71–3. It is due to their Divine source that human rights "can neither be curtailed, abrogated nor disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated ...". Preamble of the Universal Islamic Declaration of Human Rights (UIDHR) of 19 September 1981.

his rights if one of the following cases has occurred:

1.If he exercises his right with the intention of inflicting harm on others.

2.If the interest sought from the enjoyment of a right is so trivial that there is no proportionality between it and the harm or injury which might result from such enjoyment.

3.If the interest sought by practising a right is unlawful.

4.If there is a conflict between a personal or private interest, resulting from such a right, and a fundamental public interest. The priority in this case is for the public interest, even if the private interest is legitimate in itself.[142]

The *maqasid* (objectives and goals) of *Shari'a*, which have been laid down in order to preserve the interests of the people, are the general framework of human rights. This theory of the objectives and purposes of *Shari'a* is the criterion on which jurists should base their judgement as to where to strike a balance between conflicting interests.[143]

Shari'a rulings, including commands, obligations and duties, were not laid down merely for the sake of inflicting such obligations and duties on individuals. They all are means to realize certain individual and communal interests and welfare. Since rights in Islamic law are based on *ahkam* (legal rulings), they are mostly phrased in the form of obligations, injunctions or prohibitions. These forms of rulings have been designed for the fulfilment of particular interests regarding both individuals and society. In other words, there is a correlation between duties and rights.[144] Furthermore, it is true that most of the Islamic injunctions are couched in the form of obligations, prohibitions and commands. Nevertheless, this does not imply that there are no "rights" designed by Islamic law. This is only a matter of terminology. The fact that, according to *Shari'a* rules, a person has only obligations and responsibilities does not mean that he is not entitled to any rights, because a duty implies that there is a corresponding right which must be recognized. For instance, the duty a person has not to inflict mortal injuries on another means that others have the right to life.[145] It is the existence of such a right to life that necessitated the existence of the obligation not to deprive people of their right to life.[146] Thus, the form in which these injunctions are conveyed should not divert our attention from the contents they imply. In

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[142]AL-DARINI, *supra* note 36, at 201–3.

[143]AL-GHANNUSHI, *supra* note 106, at 39, 43.

[144]OTHMAN, *supra* note 103, at 60; KAMALI, *supra* note 127, at 17.

[145]In this context, the Qur'an clearly and decisively states: "Take not life, which God Hath made sacred, except by way of justice and law." QUR'AN VI:151.

[146]AL-DARINI, *supra* note 8, at 210–11.

this regard, Coulson suggests that "Islamic religious law sees as its essential function the portrayal of an ideal relationship of man to his Creator: the regulation of all relationships, those of man with his neighbor or with state, is subsidiary to, and designed to serve, this one ultimate purpose".[147] He goes on to suggest that "a distinction is indeed drawn between the rights of God (*Allah*) and the rights of man (*huqooq ibad*), but most authorities would regard only property rights as belonging essentially to the latter class".[148] What has determined Coulson's conclusion (and this is the case with most Western authors) is that the Qura'n conveys its injunctions in obligatory or prohibitive forms. Thus, it appears from the outset that the Qur'an contains only commands, obligations and prohibitions.

Muslim scholars regard rights not as individualistic, but rather as communal rights. This is because every individual right must take into consideration the public interest or public right.[149]

Shari'a is of a teleological nature. That is to say, its rulings are designed to fulfil certain interests of the community, and of individuals as well. Certainly, there are some cases in which these two sets of interests might conflict. Therefore *Shari'a* aims to strike a balance between these two interests, to the effect that neither of them is totally discarded. This process of balancing between the two interests rests upon the general principle that preference should be given to the more significant interest, that is the public interest, or also to discarding the one which leads to greater harm. And because "rights" in Islamic law are derived from *Shari'a* rulings, these rights must not be in conflict with such rulings or with the fulfilment of the interests they ought to serve. Therefore, it is not acceptable that a person should have absolute freedom to exercise his rights regardless of the consequences that might ensue. His enjoyment of his rights is restricted by the consideration of public interest or, in other words, others' rights and freedoms.[150]

Unlike the modern legal conception of "rights", *Shari'a* makes no distinction regarding who is going to benefit from a right. It might be an individual, a family, a public authority or society as a whole. Some modern legal theorists maintain that for a right to be considered as

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[147]Coulson, *supra* note 5, at 49.

[148]*Id.*

[149]AL-DARINI, *supra* note 8, at 76.

[150]*Id.* at 4–5, 148.

such it must confer a personal benefit on the person possessing it. Others, on the other hand, agree with the Islamic conception of "rights".[151]

It is important to keep in mind that any attempt to analyse the concept of "right" in Islamic law must begin with the premise that "rights" and "freedoms" in *Shari'a* are granted to individuals in order to achieve a twofold objective: that is, the individual's interest and society's interest. An individual is a communal creature. That is to say, his nature dictates that he lives in a community. Thus *Shari'a*, when it provided him with certain rights and freedoms, sought to realize a twofold objective, namely, private interest for individuals and public interest for the community as a whole. It is this which has given to *Shari'a* law its collective nature, because it ensures both personal and collective interests.[152] According to this proposition, social justice cannot be contemplated unless there is a correlation between the two interests involved in practising rights and freedoms. For if the rights are practised for the achievement of only one of the two interests without paying any regard to the other, it is hard to maintain that social justice is fulfilled.[153] Thus there is no such a conflict between the two considerations, provided that they are regulated by the principles laid down by *Shari'a* whereby a compromise can be effected on the basis of *nadhariyyat almaqasid*.

When Islamic law classified rights into two main categories, that is, *huqooq Allah* (public rights or community rights) and *huqooq alibad* (individual rights), and deemed the former to be, in most cases, superior to the latter, it intended public rights to serve as "the checks and balances placed upon man in his endeavors to afford maximum personal freedom and to tolerate only those limited restrictions which distinguish anarchism from organized society".[154] Public interests, moreover, are "placed on freedom [*i.e.* a check] to secure 'a scheme of ordered liberty' and to prevent arbitrary and despotic limitations on human freedom".[155]

3.6.3 Sources of rights

Since rights, according to *Shari'a*, are derived from legal rulings which, in turn, are based on sources of *Shari'a*, it can be maintained that the sources of Islamic law (*Shari'a*) are the

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[151] *Id.* at 75–7.

[152] AL-DARINI, *supra* note 36, at 395.

[153] *Id.* at 400.

[154] Bassiouni, *supra* note 88, at 172.

[155] *Id.*

sources of rights as well.

Shari'a does not separate, or completely distinguish between, individual rights and God's rights or the community's rights, because the former, according to Islamic law, are not automatically conferred on the individual by birth. That is to say, individual rights are those rights that have been laid down by *Shari'a* rulings and are dependent for their validity on whether the law gives them such a characteristic or not. Furthermore, those rights are not conceived to be of a kind that would enable them to determine other *Shari'a* rulings. Rather, they are predicated upon *Shari'a* rulings and objectives. *Shari'a,* then, is the source of individual rights.

Given the fact that rights, according to Islamic law, are designed as a means to certain ends sought by the law, rights are thus dealt with within the general rulings of Islamic law. Muslim scholars have dealt with rights under the heading of *ahkam,* or rulings. Thus, *ahkam* are the source of all Islamic rules, including rights.[156] *Shari'a* rulings, under which rights are dealt with, are instruments by which the objectives of Islamic law can be met. "Rights", therefore, ought not to deviate from this general course. They must, to be legally valid, serve the same function.

3.6.4 Types of rights

It is important to note that "rights" in Islamic law are not of an absolute individualistic nature. This means that they are based on religious principles, moral values, and the public interest. Thus, individual rights are to be analysed within this framework. From such a standpoint, therefore, "rights", in Islamic law, are divided into the rights of God (*huqooq Allah*) and the rights of people (*huqooq al-ibad*).[157] Rights of God are those which relate to the community and involve the public interest and welfare. They have been termed such because of the vital interests they preserve. Individual rights, or "human rights", on the other hand, are those which are enjoyed by people for the purpose of their own welfare and interests.[158] Nevertheless, each of these individual rights must be in conformity with, and

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[156]Kamali, *supra* note 32, at 347.

[157]Iqbal, *supra* note 90, at 48; Coulson, *supra* note 5, at 50. Some authors divide "rights" in Islamic law into three categories, rights of God, rights of man, and common or mixed rights. The third category includes those rights which involve both private and public interests. In some cases, public interest pervades over private interest, such as in the case of a false accusation of fornication, whereas in other cases private interest prevails, such as in the case of the rights to claim or waive the death penalty against a murderer. Abdel-Wahab, *supra* note 6, at 127–8.

[158]AL-DARINI, *supra* note 36, at 70.

consider, the public interest. Thus, every individual right has a twofold function. It provides for and protects the interests of both the individual and society.

Muslim scholars have divided public interests into three groups. These are "essential (*daruryat*), complementary (*hajiyat*), and desirable (*tahsiniyat*) interests".[159] The first category, that is, essential interests, consists of those without which stability and normal life in a given society would not be attainable.[160] They include "life, religion, intellect, property, and lineage".[161] "Complementary" interests are those the non-preservation of which would introduce a kind of "hardship" to the society. However, this would not cause any serious harm to that society's order or to people's normal lives.[162] Finally, "desirable" interests are those which might lead to the achievement of some desired ends, such as moral values.[163] Thus, interests are divided into three categories according to their importance. This categorization must be taken into account when different "rights" or interests are in conflict and, at the same time, the preservation of all these conflicting interests is unattainable. Logically, in cases of conflict, preference would be given to those rights which protect the most vital interests. In this connection, Kamali presents what is considered to be the general principle regarding how to reconcile conflicting interests, the *hadith* which states that "no harm shall be inflicted or reciprocated in Islam".[164] This *hadith* indicates that, when a right is exercised, all interests of different weights must be taken into consideration. In other words, rights are not absolute so long as other interests are involved or so long as the enjoyment of such "rights" may involve harm to others. Therefore rights are restricted, to the extent that the enjoyment of them must not cause any harm to others.

3.6.5 Guarantees of rights

As regards the legal guarantees a person can invoke in order to enjoy his rights and freedoms, there is a defined machinery whereby such guarantees can be provided. In this system, three branches of judicial bodies serve to ensure justice among people. First, there are ordinary judicial bodies or courts which are responsible for applying the rules of *Shari'a*. Second, there is *welayat al-madhalim*, which differs from the ordinary courts in that its jurisdiction includes those disputes which arise between individuals or between

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[159]Kamali, *supra* note 32, at 347; AL-DARINI, *supra* note 36, at 203–8.

[160]Kamali, *supra* note 32, at 362.

[161]*Id.* at 347.

[162]KAMALI, *supra* note 14, at 272.

[163]*Id.*

[164]*Id.* at 269.

individuals and a state official or ruler. The head of this branch of the judiciary has, besides his judicial powers, powers to execute the decisions made in such cases. Third, there exists the institution of *hisba,* which is responsible for maintaining public order, that is, public security, public health and public tranquility. The *muhtaseb* has some judicial powers in cases which are so clear that there is no need for evidences to be presented.[165]

3.7 Concluding Remarks

In this chapter, an attempt has been made to illuminate some of the ideas relating to the notion of human rights in Islam. This is so broad a topic that we cannot expect to cover it comprehensively. In selecting the material which has been studied, I have emphasized the theoretical aspect of the topic. As is pointed out elsewhere in this study, when examining a legal system a distinction should be made between the ideal principles of such a system and the real-life practice of those who claim to adopt that system. Thus, this chapter is essentially an explanation of theory rather than of practice, although it might have some significant effects on the evaluation of the human rights practices of Muslim states which claim that their practices are based on the rules of Islamic law.

This chapter has examined the status of human rights and freedoms in Islamic law in the context of the significance of both the individual and community, which represent the components of an Islamic state. It has illustrated some of the peculiarities of the Islamic system in dealing with individuals and their relationships with the community. What distinguishes the Islamic legal system from other legal systems is that it is an amalgam of legal and moral principles. Islamic law is not a system that has been designed merely to punish those who do not adhere to its commands. Rather, it was originated for social, economic and moral reasons and, moreover, for the reform and regulation of relationships between individuals on the basis of mutual respect and dignity.

Furthermore, in this connection, it is important to realize that the Islamic legal system, unlike modern legal systems, seeks justice in a way that combines rights and obligations in one body of rules, instead of distinguishing and separating each from the other. The Islamic legal system looks at both rights and obligations with a single gaze that renders them interdependent. According to the Islamic legal system, real justice cannot be contemplated in the absence of either rights or obligations.

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[165]AHMAD HAFEZ NAJM, HUQOOQ AL-INSAN BAYN AL-QUR'AN WA AL-'ILAN 63 (n. d.)

Thus, the Islamic legal system is a twofold system consisting of rights and obligations. It cannot obviate one of these on the expense of the other, for justice, according to the general principles of the Islamic legal system, is not conceivable unless both rights and obligations are met. Bearing this conception in mind, any attempt to analyse human rights in Islam should also be founded on the Islamic political theory of sovereignty and government and its relation to individuals.

My aim in this chapter has been to show that Islamic law has much in common with modern international law, and thus to increase the possibility of it making a meaningful contribution to human rights legislation. In addition, I have tried to indicate that there are some features of Islamic law the existence of which means that it should be possible to reconcile differences and conflicts between the two systems. My study of the sources of Islamic law has also explained the nature of Islamic law and its sources, and its readiness to adapt to new conditions and circumstances except with regard to the general principles laid down in the Qur'an and *Sunna*. The discussion I have provided of the secondary sources of *Shari'a*, especially *ijtihad* and *qias*, would suggest that Islamic law has the potential to adopt international human rights standards. Thus, the possibility of accommodation and reconciliation exists, not necessarily in all cases, but in most.

However, this task of reconciliation or accommodation places a great obligation on, first of all, Muslim authors, and secondly on Western authors who are concerned with studying the Islamic tradition, to make extensive efforts to explore the elements of such a system and formulate them in such a way that they can be used by modern authors in various legal systems. This will, eventually, make it possible for the Islamic system to be taken fully into account, along with other legal systems, when formulating or reformulating human rights instruments in an attempt to reconcile differences between these instruments and the different legal traditions. Such a task would not be hindered by any lack of material for formulating a scheme of human rights from within Islamic law, because, in the words of Mayer, "the Islamic heritage is replete with principles and values like justice, tolerance, and egalitarianism that could be used to develop human rights principles".[166] And, as was pointed out earlier, the differences between Islamic law and international human rights law are differences of terminology rather than of substance. This suggests an examination of how international human rights law itself has provisions and machineries which accommodate the differences and peculiarities of different systems.

166ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 168 (1991).

PART II

THE QUEST FOR UNIVERSALITY AND THE DIFFICULTIES INVOLVED

CHAPTER 4

THE INTERNATIONALIZATION OF HUMAN RIGHTS

4.1 Introductory Remarks

Traditional international law has been invoked, throughout its history, as a means of governing the relations between sovereign states, which have been the sole subjects of that branch of law. Therefore there was no place for entities other than states, such as individuals, in the realm of international law. It was the exclusive jurisdiction of states alone that governed their relations with their own citizens, or rather their subjects at that time. International law had no any say in such relations. "Human rights" were exclusively matters of domestic jurisdiction.

During the twentieth century, international law has undergone substantial development. Many aspects of international law have changed to adjust to new functions of international law which have come into being in the light of the new relations among post-war polities. The new political entities that have emerged during the twentieth century, and the new types of relations between them, have involved a greater role for individuals, and have in turn called for new functions of international law in order to meet these changes.

One dramatic change that international law has experienced is the incorporation of the idea of international protection for human rights: a matter which, following this change, has no longer been left exclusively to the jurisdiction of sovereign states. People all around the world have expressed their desire to pay appropriate attention to the suffering of their fellow human beings everywhere. This concern, which might be rooted in morality but which cannot be separated from other considerations such as political interests,[1] had an impact on lifting the idea of human rights from the domestic plane to the international level. In the words of John Donne: "... any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee".[2]

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[1]In this context, Buergenthal correctly asserts that "as governments come to realize that they must pay a higher political price for violating their international human rights obligations, the world's human rights situation cannot but improve". Thomas Buergenthal, *International Human Rights law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2 (1988).

[2]John Donne, quoted in Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 575–91 (1990).

This lifting of the protection of human rights from the domestic to the international level has gone through different stages, from the eighteenth century up to the years following World War II. In the following sections, we shall discuss the most significant events that have taken place and have contributed to the internationalization of the issue of human rights. It should be borne in mind that, from its earliest stages, the attempt to provide human rights with international protection was hindered by two distinct things: namely, the sovereignty of individual states and the argument that only states, not individuals, could be the subjects of international law.[3] These two issues will be discussed in turn.

4.2 State Sovereignty

At the heart of the issue of the equality of states, which is postulated in the UN Charter,[4] lies the issue of state sovereignty.[5] The preservation of state sovereignty has been the main concern of the principles of international law because relationships between sovereign powers – initially princes and later nation states – were the sole subject of international law.[6] As a result, the doctrine of national sovereignty or domestic jurisdiction has been the main obstacle to providing human rights with international recognition and protection.

The doctrine of sovereignty implied that it was only the sovereign state which had exclusive power and jurisdiction over its citizens. Furthermore, it dictated that an infringement of that sovereignty would occur if another entity claimed jurisdiction or interfered to challenge the state's absolute jurisdiction over its citizens. This rigid doctrine of national sovereignty remained viable until the Second World War, when the legitimate government of Germany, which had a legal justification according to the doctrine of sovereignty to treat its own citizens in such a way as it saw appropriate, carried out the atrocities that forced world opinion not to tolerate such actions and, therefore, to reject the doctrine as such.[7] Instead, the claim was made that a state's treatment of its citizens could not be left completely to the

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[3]J. G. Strake, *Human Rights and International Law*, *in* HUMAN RIGHTS 113, 114 (Eugene Kamenka and Alice Erh-Soon Tay eds., 1978).

[4]Article 2(1) of the UN Charter states that "the Organization is based on the principle of the sovereign equality of all its Members".

[5]S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 867 (1961). For further details concerning the historical development of, and various conceptions about, the principle of sovereignty *see* Aleksandar Magarasevic, *The Sovereign Equality of States, in* PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 171–218 (Milan Sahovic ed., 1972).

[6]Paul Sieghart, *International Human Rights Law: Some Current Problems, in* HUMAN RIGHTS FOR THE 1990'S: LEGAL, POLITICAL AND ETHICAL ISSUES 24, 24 (Robert Blackburn and John Taylor eds., 1991).

[7]PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 14 (1983).

jurisdiction of that state. Thus the doctrine of national sovereignty has lost its absolute character and rigidity by lifting the matter of human rights from the national to the international level. The doctrine had also been affected by the emergence of the international regulation of human rights, which has become a norm subject to certain international standards.[8]

4.3 The Process of Internationalization

The internationalizing of the idea of human rights has had previous examples in earlier practice, ranging from the abolition of slavery, and the protection of minorities through peace treaties, to humanitarian intervention. The events after World War II marked the start of a process of the internationalization of the idea of human rights on a general level, a milestone in which has been the confirmation of universal concern about the issue of human rights exemplified by the adoption of the Vienna Declaration in 1993.

4.3.1 The abolition of slavery

The first step international law took in the process of recognizing and protecting human rights was the abolition of slavery. This was during the nineteenth century, when the international community expressed its concern about the growing number of slaves all over the globe, particularly in Africa and the Americas. This was first condemned at international level in the Paris Peace Treaty of 1814 between Britain and France. Subsequently, in 1926, the League of Nations adopted the Convention to suppress the slave trade and slavery. This Convention, in turn, was followed by subsequent amendments which offered more detail pertaining to the practice of slavery in the contemporary world.[9] The concern of the international community was to prevent such practices and to prohibit this form of trade via the rules of international law, for slavery involves clear affront to people's dignity and humanity.

4.3.2 Minority clauses

In the aftermath of the First World War, several peace treaties were concluded in order to provide minorities with effective respect and protection for their human rights. Certain "minority clauses" were included in those treaties concerning Austria, Bulgaria, Hungary and Turkey. They also have been included in special treaties with Czechoslovakia, Greece, Poland, Romania and Yugoslavia, and in declarations with Albania, Estonia, Finland,

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[8] *Id.* at 15.

[9] SCOTT DAVIDSON, HUMAN RIGHTS 8–9 (1993); Strake, *supra* note 3, at 113, 114; Richard B. Bilder, *An Overview of International Human Rights Law, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 4–5 (Hurst Hannum ed., 1992).

Latvia and Lithuania. These minority clauses have produced protection not only for the rights of nationals of a state, but also for all individuals who are under the jurisdiction of those states that have concluded the peace treaties.[10] The guarantee provided by the League of Nations under these clauses required the states concerned to regard such treaties as superior to their domestic laws in cases of conflict. At the international level, these clauses were limited in scope. That was because they have been concerned only with racial, religious or linguistic minorities.[11] Again, the governments which signed these treaties claimed that their sovereignty was being infringed since the application of such clauses would have amounted to interference with the affairs of the minorities residing within their boundaries.[12]

4.3.3 Humanitarian intervention

The most significant, and perhaps the most controversial, machinery that international law has used to provide international protection for human rights is humanitarian intervention. In the early days of international law, where there has been a recognition of the "just war", besides the principle of self-defence, it was acceptable for a state to wage war against another state in order to protect the citizens of that state against violations perpetrated by its authorities.[13] This principle was abandoned by the League of Nations, which recognized the principle of self-defence as the only justification for entering war. The UN Charter, in Article 2(4), reaffirmed this approach and outlawed all forms of war, with the exception, made in Article 51,[14] of self-defensive war.[15]

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[10]Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 449–50 (1992); WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 47 (1983).

[11]PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 44 (1992).

[12]GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 188 (1970).

[13]Lloyd Cutler, *The Internationalization of Human Rights*, 1990 U. ILL L. REV. 575, 575–6 (1990); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 9 (1982); Strake, *supra* note 3, at 113–14.

[14]"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[15]Cutler, *supra* note 13, at 576.

International law has not been concerned with individual rights except in the case of injuries inflicted on aliens in a foreign country. However, in view of the succession of atrocities that have occurred during the past two centuries, particularly during the Second World War, it has become an acceptable principle of international law that the international community should intervene "in the name of humanity" to deal with such violations of fundamental human rights.[16]

But what do we mean when we talk about "intervention"? The term "humanitarian intervention" is commonly taken to mean armed intervention for humanitarian purposes. However, "intervention" is also used to denote lesser forms of involvement by political, legal or economic means. Even though one could put forward a legal argument for armed humanitarian intervention, it is quite controversial, to say the least. On the other hand, as Cutler argues, the use of economic and trade sanctions against a state accused of violating the human rights of its people, as a punishment or as an incentive for that state to respect and promote the status of human rights within its territory, is not provided for by the words of Article 2(4) of the Charter.[17] The Article, Cutler continues, dictates that what is prohibited is only the threat or use of force against a sovereign state, and that economic measures, though they have a substantial impact on the violating state, do not embody, in his words, a "lethal sense".[18] This, according to Cutler, is because there is no legal obligation for a state to provide another state with economic or financial aid. A state has the right to choose whether to provide or withhold aid to another state according to whether the latter respects the human rights of its citizens or not.[19]

Lauterpacht, however, defines the term "intervention" as

> a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the state. It implies a peremptory demand for positive conduct or abstention – a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.[20]

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[16]Sohn, *supra* note 13, at 4–5.

[17]"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

[18]Cutler, *supra* note 13, at 577–8.

[19]*Id.* at 578–9.

[20]H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1968).

Thus, what counts here is the term "compulsion", which has the effect of forcing a state to act in such a way as to ensure the protection of human rights for its people. This, according to Lauterpacht, can be achieved by a number of different means, including political or economic ones.[21]

4.4 The Changing Status of the Individual

Human rights are those rights that are enjoyed by individuals. This fact necessitates that the law which confers and protects such rights must consider those who are entitled to them as its legitimate subjects, bound by its rules and entitled to its protection and remedies should their rights be violated. Therefore, one of the changes that international law had to go through, in the process of providing international protection for human rights, was to recognize individuals as the subjects of its rules.

Until 1945, individuals were not regarded as the subjects of international law: that is, they were not entitled to benefit from the rights it conferred nor were they subject to the duties it imposed. Rather, they were objects who indirectly benefitted from that branch of law. However, individuals were able to invoke the rules of international law in one exceptional case, the case of aliens. International law has been concerned with how an alien is treated in a foreign state. The individual was perceived as an element of the state – as an "object", like territory. Thus, any injury inflicted on him was regarded as an act perpetrated against his sovereign government. International law had to govern such situations, which in some cases would have led to disputes between different sovereign states.[22]

If, for instance, an individual were injured by a foreign government, he was not able to invoke the rules of international law in order to demand redress for his injury. Instead, the state of which the person was a national had to claim redress for the injury inflicted on its citizen. But that state was under no international obligation to transfer any compensation resulting from that claim to its citizen. Thus, there was no guarantee that an injured person

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[21] *But cf.* Louis Henkin, *Human Rights and "Domestic Jurisdiction"*, *in* HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 22–5 (Thomas Buergenthal ed., 1977), in which Henkin uses the same words in describing "intervention", in its strict meaning, as connoting "dictatorial interference" which implies the use or threat of force. Henkin then asserts that, contrary to Lauterpacht's account, modifying trade or economic relations with a violating state does not amount to intervention. For a discussion of a new trend in justifications used by the Security Council for humanitarian intervention, and for information about the impact of economic relations between states on the preservation of human rights in the post Cold War era *see* Anne Oxford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J 443 (1997).

[22] Sieghart, *supra* note 6, at 25; D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 499 (1979).

would be granted redress for any violation of his rights, even if his state demanded compensation from the violating state. Protection of individuals' rights was apparently predicated upon the conduct of the state of which he or she was a national.[23]

Although it is plausible to suggest that the atrocities committed during World War II had an undeniable effect on the process of internationalizing concern for individual rights, they were not the first, or the only, elements in that process. Prior to World War II, several pronouncements initiated the call for the internationalization of human rights. In 1941, for instance, before the United States became involved in the Second World War, President Roosevelt, in his famous State of Union Address before Congress, conveyed a message to the American people in which he enumerated four fundamental freedoms to which all people are entitled. In his words: "... freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain these rights or keep them."[24] Roosevelt defined these freedoms as "freedom of speech, the freedom of worship, the freedom from want, and the freedom from fear".[25] Moreover, the Allied countries, on their involvement in the War, declared that they were aiming, in conducting the War, "to preserve human rights and justice in their lands as well as in other lands".[26]

Nevertheless, despite the fact that international concern with human rights pre-dated the Second World War, it cannot be argued that these rights received systematic protection and concern before the Second World War. Following World War II, two interrelated decisions have, according to Sohn, brought about the new status individuals have come to possess under international law and, as a consequence, the systematic protection their rights have come to receive by international law. These two decisions were, Sohn maintains, closely connected with the atrocities committed before and during the War. There was, first, the decision taken by the international community that those who committed the atrocities must not be left unpunished. War crimes tribunals, the Nuremberg and Tokyo tribunals, were created for the purpose of prosecuting those war criminals. The second was the international community's determination not to allow such atrocities to occur again, leading

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[23]Sohn, *supra* note 13, at 9; Tom J. Farer and Felice Gaer, *The UN and Human Rights: At the End of the Beginning, in* UNITED NATIONS, DIVIDED NATIONS: THE UN'S ROLE IN INTERNATIONAL RELATIONS 240, 240–1 (Adam Roberts and Kingsbury eds., 1995); Matthew A. Ritter, *Human Rights: Would You Recognize One If You Saw One? A Philosophical Hearing of International Rights Talk*, 27 CAL. W. INT'L L.J. 265, 268 (1997).

[24]Burgers, *supra* note 10, at 448.

[25]*Id.* at 469.

[26]*Id.* at 448.

to the establishing of a new machinery which would prevent such occurrences.[27] This has been done through the adoption of the UN Charter, which marked, in the words of Buergenthal, "the normative foundation" of modern international human rights law.[28]

4.5 Why Should International Law Be Concerned with Human Rights?

International law, since the end of the Second World War, has undergone dramatic structural change. As a result, the issue of human rights has shifted from being one that falls within the domestic jurisdiction of sovereign states to one which international law has come to regard as its central concern and subject to its jurisdiction. However, the internationalization of human rights has necessitated a search for a legitimate justification for such a transfer. Why *should* human rights matters not be left to the jurisdictions of sovereign states? Why should international law or the international community be concerned with how a sovereign state treats its own citizens? Why should a particular state be entitled to demand that another state treat its own citizens differently from the way which it treats its citizens?

Contemporary international concern with the issue of human rights, or, in other words, the quest for universality in human rights, might be traced to two distinct considerations, namely: providing human rights with more effective protection; and the preservation of international peace and security. These are discussed in turn.

4.5.1 More effective protection for human rights

In the aftermath of the Second World War, the Allied powers determined that human rights needed to be given international protection in order to avoid the occurrence of the atrocities witnessed during the War. They conceived a new machinery which could ensure such protection. They laid the foundations of the United Nations Organization as the legitimate protector of international human rights. Subsequent intergovernmental organizations, such as the Council of Europe and the Organization of American States, have been established to promote respect for human rights in their respective regions.[29]

The international community has expressed its desire to pay human rights international attention. When they convened in San Francisco in 1945, the peoples of the United Nations

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[27]Sohn, *supra* note 13, at 10–11.

[28]Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703, 705 (1997).

[29]SIEGHART, *supra* note 7, at 14; *see also* Sean MacBride, *The Enforcement of the International Law of Human Rights*, 1981 U. ILL. L. REV. 385, 385 (1981); Cutler, *supra* note 13, at 579–80.

declared that the objectives of establishing the Organization were, *inter alia*, "to save succeeding generations from the scourge of war, which twice in our time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".[30] This marks a departure from the system that existed previously, in which protection has been granted only to minorities. The words of the Charter explain very clearly that the focus has shifted to individuals, rather than groups.[31] This, however, should not be taken to mean that minorities have been neglected by the Charter. A special commission was established to deal with the issue of minorities.[32]

Article 1(3) of the Charter provides that the UN has been established "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

The Charter declares, moreover, that it is the responsibility of the international community to provide protection for human rights; and that it has become an international obligation that "all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55",[33] which include, among other things, human rights and fundamental freedoms. Furthermore, to ensure that human rights receive effective protection, the UN specialized agencies bear similar responsibilities with regard to human rights. They are required to take certain measures in order to assure "respect for, and observance of, human rights and fundamental freedoms". The General Assembly[34] and the Economic and Social Council[35] are the main

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[30]Preamble of the UN Charter.

[31]MCKEAN, *supra* note 10, at 53 (1983); HARRIS, *supra* note 22, at 499; VON GLAHN, *supra* note 12, at 188–9.

[32]MCKEAN, *id.* at 59–60.

[33]UN Charter art. 56.

[34]Article 13 of the UN Charter reads as follows:

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

...

b. Promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[35]Article 62 of the UN Charter states that "the Economic and Social Council ... may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all".

organs entrusted with enhancing the protection of human rights. Since these Charter provisions produce general obligations[36] upon States members of the UN, they demonstrate that human rights "had ... been internationalized and removed from the protective domain of a subject that previously was essentially within their domestic jurisdiction".[37] The quest for universality in human rights and the need to overcome claims of domestic jurisdiction require that such rights and freedoms contemplated by the Charter be specified and that states' obligations regarding these rights and freedoms be legal rather than political. This latter issue will be discussed in the next chapter.

Therefore, the international community has tended to elaborate provisions of the Charter and specify in more detail the rights that are granted to individuals. This, however, would have caused disagreement and controversy regarding the definition of such rights, particularly with regard to the major powers at that time, which themselves had some institutionalized human rights violations in their countries.[38] Therefore, the international community sought to lay down a declaration of human rights in general terms as a first step, so that subsequently, other conventions could articulate more specific rights.[39] This process was initiated by the adoption of the Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948, which sets minimum common standards and, at the same time, interprets the human rights provisions of the UN Charter.[40] This was followed by the adoption in 1966 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which entered into force in 1976.[41] Together, all these documents comprise the International Bill of Rights and bear witness to the internationalization of the issue of human rights. Moreover, specific treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[42] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[43] had contributed to the process of

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[36]For a discussion concerning a stat's obligation under international human rights instruments, *see infra* Chapter 5.

[37]Buergenthal, *supra* note 28, at 705–6.

[38]*Id.* at 706.

[39]Buergenthal, *supra* note 1, at 5.

[40]For discussion of the nature of the Declaration and its legal effect, *see infra* pp. 95–100.

[41]Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 132–6 (1977).

[42]Adopted and opened for signature and ratification by General Assembly Resolution 2106 A (XX)). Entry into force: 4 January 1969, in accordance with Article 19.

[43]Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984. Entry into force: 26 June 1987, in accordance with Article 27.

standard-setting of international human rights norms. Therefore, the widespread participation to these and other human rights instruments demonstrates the universal acceptance of the fact that people have human rights and that there is universal agreement as to what some, at least, of these rights are.[44]

International protection of human rights ought to mean that domestic remedies for human rights violations are adequate and effective. It provides a stronger incentive for individual states to respect and protect the human rights of their citizens. Thus, international law does not typically deal with the matter of human rights until domestic protection for these rights proves to be ineffective or inadequate. National and international protection of human rights, taken together, constitute a unified and effective expression of respect for and observance of human rights.[45] As such, international human rights norms constitute minimum standards with which domestic laws should be in conformity in order to rule out any mistreatment or mishandling of the protection of human rights by some states. Those minimum standards are of significant importance for the protection of human rights in today's world. This is so because agreement on such standards would overcome the difficulties that might arise from the absence of either consensus about values (e.g. in theocratic states, socialist systems, etc.) or centralized means of enforcement. In this connection, the UN practice shows that these standards have been the subject of disagreement depending on the nature of the rights involved. Some standards, such as those related to torture, disappearances, racial discrimination and apartheid, have enjoyed universal acceptance, whereas other standards, such as those related to women's rights, minority rights, religious tolerance and economic and social rights, have been subject to increasing claims of differences and relativity.[46] Thus, one of the most important aims of the Vienna Conference of 1993, which will be discussed later,[47] was to reaffirm that "all human rights are universal, indivisible and interdependent and interrelated".[48]

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[44]*See* Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461, 485 (1997).

[45]DAVIDSON, *supra* note 9, at 1.

[46]Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond*, 16 HUM. RTS. Q. 375, 379 (1994).

[47]*See infra* pp. 103–105.

[48]Article 5, United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, Adopted June 25, 1993. 32 I.L.M. 1661 (1993).

4.5.2 International peace and security

The UN Charter in its Article 55 declares that it is essential, for "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples", that the UN "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[49] So far as the relationship between human rights and international peace and security is concerned, in cases where the Security Council acts under Chapter VII in internal conflicts or situations of grave breaches of human rights, it does so after having determined the situation as one representing a threat to international peace and security.

In this connection, Cassese indicates that the General Assembly had a difficulty in defining how Article 2(7) should be applied. The difficulty was due to the principle of state sovereignty and domestic jurisdiction, which is heavily involved in cases of human rights. Therefore, the Assembly had to make a choice between limiting the scope of the protection it provides for human rights and, consequently, limiting the possibilities of intervention on the part of the UN or, alternatively, limiting the scope of the principle of domestic jurisdiction. To justify intervention under the provision of Article 2(7), the Assembly relied heavily on the fact that its intervention to protect human rights is a necessary means of safeguarding international peace and security.[50] This task is dedicated, by Article 24(1) of the Charter, to the Security Council.[51] Furthermore, in order to carry out this task, Article 39 declares that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

The crucial word, however, is not "peace" but "threat". The general line of reasoning has been as follows:

1.The Security Council's role is to uphold international peace and security.

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[49]MacBride, *supra* note 29, at 386; Sohn, *supra* note 41, at 130.

[50]Antonio Cassese, *The General Assembly: Historical Perspective 1945–1989, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 25, 32 (Philip Alston ed., 1992).

[51]"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

2.Gross and flagrant breaches of human rights typically lead to internal unrest, which typically may lead to an internal armed conflict. Internal armed conflicts, in turn, may spread to other states and thereby cause breaches of international peace and security.
3.Therefore, since gross and flagrant infringements of human rights may, eventually, lead to breaches of international peace and security, it is within the powers of the Security Council to take whatever measures are necessary to stop them.

Thus, it can be noticed that the competence of the UN in dealing with human rights issues is originally founded on threats to international peace and security. But later, gross and flagrant violations of human rights were sufficient justifications for UN intervention.

So stated the issue is unduly simplified. The argument is modified for each particular situation, but nevertheless this logical reasoning underlies many of the legal justifications for the Security Council's decisions. The argument seems to have a rational plausibility, but that, of course, does not mean that it is correct in all cases.

The compelling question must be: when might violations of human rights reach the point of being either legally or militarily actionable? To take the example of the UN Charter, human rights violations will be liable to Security Council action when they reach the level of being threats to international peace and security. Whether this threshold depends on the numbers of people involved or on the type of situation encountered (e.g. the historic tendency for conflict in the former Yugoslavia to spill over into the surrounding region; the Kurds in Northern Iraq) is unclear. However, many recent examples (the former Yugoslavia, Northern Iraq, Rwanda) have all had a cross-border element – often relating to refugee flows into neighbouring countries.

4.6 Concluding Remarks

Human rights, it is true, are as ancient as mankind itself. They have been a central focus of philosophers as well as jurists. However, it cannot be argued that human rights received appropriate systematic international attention prior to the end of the Second World War. It was only in the aftermath of World War II that the international community expressed its desire to provide human rights with international protection, to the extent that these rights could be based on more solid standards than were domestic ones.

The provisions of the UN Charter marked a change in the nature of international law and the status of human rights as well. They have become concerned with individuals and their relationships with their governments, not only with states. This has been achieved through

a process that, in the words of Buergenthal, has "gradually internationalized human rights and humanized international law".[52]

It is true that on occasion some forms of intervention may be morally suspect, but we have to concede that in many other instances we cannot leave the protection of human rights to the individual state. Are not morality, philosophy and politics the very basis of law? Law is not, as has been argued many times, a science and it does not exist in a vacuum. The fact is that morality, politics and law are inseparable and together produce positive law. The UN Charter clearly encompasses the issue of human rights. It does so in order to obviate the possibility of states claiming that, because human rights is a political issue, the UN's concern with the issue amounts to interference with their own domestic jurisdiction. Clearly, if we treated human rights simply as a political issue, they would be prone to influence by various political considerations and interests, which would make them vulnerable to undefined standards and obligations. Thus, universality would be difficult to achieve, and so legal obligations on states to respect and protect human rights are essential in order to specify states' obligations in defined terms and render these obligations binding in some way, so that resort to claims of domestic jurisdiction will not stand unchallenged. But we are forced here to question how such legal obligations can be created in a world of plural, sovereign states. This is the dilemma which is at the core of the quest for universality in human rights. In the next chapter, a discussion will be undertaken of the sources of international human rights legislation, as being the possible source of the legal obligations on States parties to human rights documents, and their contribution to the quest for universality in human rights.

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[52]Buergenthal, *supra* note 1, at 4.

CHAPTER 5

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW AND THE QUEST FOR UNIVERSALITY

5.1 Introductory Remarks

The human rights issue has always involved controversy and disagreement. Controversy has raged surrounding the origins, the nature and the meaning of human rights. One controversial issue has been a state's obligations under human rights instruments. A number of questions are involved here. What are the sources of human rights law? What is the legal status of the instrument which contains the statement of the right, especially if it is a treaty, for a state party to it? If the state is bound by a legal standard, what are its general obligations under the treaty? What is the content of the specific obligation? As was indicated earlier, the quest for universality regarding the issue of human rights requires some kind of legal obligation upon states to ensure compliance with international human rights documents. However, such an attempt involves difficulties because we are dealing here with a plural world, which in turn involves different variables related to issues such as culture, tradition, morals, religion and so on.

In order to determine a state's obligation under human rights instruments, attention should be paid to a number of related issues, such as the sources of international human rights law and the power of United Nations General Assembly resolutions, since the Universal Declaration of Human Rights (hereinafter the Declaration) falls into this category. By examining these two important issues we might reach the heart of the matter, and find answers to the questions mentioned above. Only by keeping in mind that the binding effect of a human rights instrument is exclusively dependent on the status of the authority by which it has been laid down can we hope to understand the real status of that instrument and to appreciate the effect of the individual rights enumerated therein.

Discussion of a state's obligations under international law in general, and international human rights law in particular, cannot be undertaken without paying considerable attention to the notion of state sovereignty and its implications for domestic jurisdiction claims of States parties to international human rights instruments[1] – a notion which, as was indicated

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[1]Even in the case of states' obligations under international treaties concluded by their own consent, a distinction should be made between, on the one hand, treaties in general and, on the other, human rights treaties. The claim of state sovereignty and domestic jurisdiction arises more frequently with regard to the

earlier,[2] has been and in some cases still is an obstacle to achieving a definite and precise enforcement machinery for human rights instruments. This is so because, as Hart puts it, "if ... we find that there exists among states a given form of international authority, the sovereignty of states is to that extent limited, and it has just that extent which the rules allow. Hence we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are."[3] MacIver, however, points out that this doctrine

> is false to the facts. It rests on the wrong view that there is no society except within the limits of each state. But the existence of international society is beyond dispute. Now, so far as society extends so far must some form of order extend. No one state can assure that order. States do in part recognize their function within a common system, and international law is the result.[4]

MacIver asserts that what justifies the existence of an international society is the need for such an entity, capable of regulating the external relationships among various states. However, although there have been numerous cases where resort has been made to the principles of international human rights law, we cannot claim that there has been, or is, "habitual obedience" to such principles, which, according to Hart, is necessary for the effectiveness of any legal system, especially a domestic system.[5] Moreover, Hart asserts that "in any society, whether composed of individuals or states, what is necessary and sufficient, in order that the words of a promise, agreement, or treaty should give rise to obligations, is that rules providing for this and specifying a procedure for these self-binding operations should be generally, though they need not be universally, acknowledged".[6]

Initially, international concern with human rights issues was expressed by the UN and its organs via recommendatory measures only. This was because of political tensions between different nation states as exemplified by those operating during the Cold War. At the heart of such tensions was the principle of domestic jurisdiction or state sovereignty since the issue of human rights relates entirely to a state's treatment of its own citizens. Thus, politicizing the issue of human rights has been the main obstacle to providing human rights with universal protection. However, a number of factors have forced those states which

latter, which are exclusively concerned with a state's treatment of its own people. Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82, 83 (1992).

[2]*See supra* pp. 70–1.

[3]H. L. A. HART, THE CONCEPT OF LAW 223 (1994).

[4]R. M. MACIVER, THE MODERN STATE 285 (1947).

[5]HART, *supra* note 3, at 50.

[6]*Id.* at 225.

have resorted to the claim of sovereignty to lessen their insistence on it, and call for or allow a more effective system for the protection of human rights. These factors have included the desire of the colonized territories to seek liberation, and the issue of self-determination. Thus, human rights changed from being a political issue, and came to require effective legal protection provided by bodies other than the states themselves. This tendency led states to accept a more effective role for the UN and its organs which are concerned with human rights. This they have done by their active participation in the processes of setting human rights standards and, later, developing implementation machineries.

5.2 Sources of International Human Rights Law

Most writers suggest that the sources of obligation for the rules of international law are to be found in natural law and in agreements between states.[7] The former tends to assert certain fundamental rights for states as sovereign entities.[8] The latter, however, depends on states' consenting to initiate agreements, which in turn create certain rights and obligations. This latter source is derived from the general principle *pacta sunt servanda*.[9] A firm distinction must of course be made between, on the one hand, those obligations which emanate from natural law and, on the other, those which emanate from agreements between states. Enough has been said so far to suggest that natural law does not produce such powerfully binding legal obligations upon states as a treaty does. Instead it merely imposes moral obligations upon states, and it is difficult to subscribe to the view that it can impose more. For this reason the other source, that is, treaties, constitutes the greater part of international law in general, and international human rights law in particular. However, it cannot be said that simply because natural law doctrine produces only moral obligations, it has no part to play in constructing the international legal system. It has, particularly with regard to human rights law. The doctrine has, in fact, produced some "general principles" and led to the creation of "inalienable" rights and obligations.[10]

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[7]*See, e.g.*, P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 57–8 (1966); J. L. BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 3–4, 9–10 (1959).

[8]Brierly identifies these fundamental rights, as generally claimed, as including "self-preservation, independence, equality, respect, and intercourse". J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 49 (Sir Humphrey Waldock ed., 6th ed., 1963).

[9]It is this principle which, according to Lukashuk, confirms "the character of international law as *law*". I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 513 (1989).

[10]*See supra* pp. 21–5, where it is shown that natural law is the source of the idea of human rights.

The question of a state's obligations, important though it is, is indivisible from the question of the sources of human rights law. International human rights law constitutes part of public international law. Therefore, the sources of the former are the same as those of the latter. These will in most, though by no means in all, cases[11] include the sources enumerated in Article 38 of the Statute of the International Court of Justice,[12] which states that the Court applies:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The following sections offer a discussion of these sources, namely custom, "general principles of law", and treaties or conventions.

5.2.1 Custom

Traditionally, states were the sole powerful entities existing on the international scale. They were the sole entities from whose actions customs were derived. This situation has changed, because other factors have come to influence states' actions. Custom, therefore, has come to emanate from two different sources: first, "inter-governmental organizations" (IGOs), in which states, as constituencies of such organizations, fulfil the function of creating customary international law; and second, "non-governmental" organizations (NGOs), which due to their influential role on the international stage played a role in creating customary international law.[13]

5.2.2 General principles of law

The question of how one can determine whether a particular rule is part of the general principles of law recognized by civilized nations comes to the surface when discussing the

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[11]"[T]he sources of international law listed in Article 38 of the ICJ's Statute are [not] comprehensive and immutable. It may well be that these sources will be expanded by, for example, attributing a more direct law-making role to normative resolutions of the General Assembly." THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 88 (1989).

[12]D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 22 (1979); Michel Virally, *The Sources of International Law, in* MANUAL OF PUBLIC INTERNATIONAL LAW 116, 121 (Max Sørensen ed., 1968); R. P. ANAND, INTERNATIONAL COURTS AND CONTEMPORARY CONFLICTS 349 (1974); PUBLIC INTERNATIONAL LAW 16 (Robert M. Maclean ed., 3rd ed., 1994).

[13]Isabell R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 221–2 (1991).

issue of the "general principles of law".[14] According to Schlesinger, although the "general principles of law" have been invoked by international tribunals in numerous cases, it is still difficult to give a definite answer to the question. It is possible to reach some degree of illumination only through a comparative study of the subject.[15]

Generally speaking, "general principles of law", as a source of international law, may function in different ways. They might assist in interpreting existing treaties; they might provide solutions to questions of procedure and evidence; or they might help in resolving the disputes that might arise as a result of the growing number of international organizations and their increased contact with each other.[16]

5.2.3 Treaties

However much other sources may have contributed to the creation of international human rights law, treaties have undoubtedly played a leading role in constituting the body of that legal system. What distinguishes treaties from other sources is that they are laid down in clear terms and provisions, so that they can readily be referred to, and so long as it is agreed that the instrument is a treaty, there is no dispute about its legally binding effect. They consist of "Conventions, Charters, Covenants, Protocols and so on".[17]

International human rights instruments are concluded in the form of multilateral treaties. These specify individual rights and, most importantly, the obligations on states with respect to protecting those rights. States have the right, however, to make reservations regarding some provisions of multilateral treaties. These reservations should not impair the effectiveness of such treaties or alter their purpose.[18] Moreover, treaties related to human rights embody rules with qualifications to take into account plural interests and also embody

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[14]Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 734 (1957).

[15]*Id.* at 734–5. In this connection, Friedmann indicates that "the 'general principles of law recognized by civilized nations' have in fact a very different basis: an examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement on the principles relevant to the case at hand". Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 284 (1963).

[16]Schlesinger, *supra* note 14, at 735–7.

[17]SCOTT DAVIDSON, HUMAN RIGHTS 53 (1993).

[18]*See infra* Chapter 8.

rules of implementation. Human rights treaties are distinguished from other international treaties in that they lack the principle of reciprocity.[19]

Although there is disagreement on the question of whether treaties become effective simply because they have been signed, most commentators nevertheless distinguish here between the existence of human rights obligations upon States parties to the UN and the question of implementation. They suggest that there is no dispute regarding the existence of legal obligations, albeit in general terms, imposed by the human rights provisions of the Charter on States parties. They also suggest that, given that the Charter is in fact a treaty under which all States parties have legal obligations, failure to meet these obligations, or the breach of them, should be met by the ordinary rules governing breaches of treaties.[20]

5.2.3.1 The United Nations Charter

The UN Charter, which was adopted in 1945, is the most prominent multilateral treaty that has been adopted to date. The UN was conceived as providing a more effective machinery than did the League of Nations for the protection of human rights and fundamental freedoms, albeit in general terms, and for the eventual maintenance of international peace and security. It is true that nowhere in the UN Charter is there an enumeration of such human rights. But it can be asserted that the adoption of the Charter was the starting-point for the establishment of the international law of human rights. It certainly provided the foundation for subsequent measures concerning the issue of human rights, since the Preamble of the Charter declares that the purpose of the UN is, among other things, "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

As a multilateral treaty, the Charter imposes certain general obligations upon all its member states with regard to human rights and fundamental freedoms, as well as to other provisions. The formulation of human rights provisions in general terms, as conceived by Ganji, resulted in a weakening of the status of the obligations designated by those provisions.[21] However, it is understandable that such a course was taken in order to avoid disagreements and to ensure the enlisting of as many members as possible in such a system.

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[19]For a discussion of the absence of the principle of reciprocity from human rights treaties, *see infra* pp. 220–1.

[20]Milan Markovic, *Implementation of Human Rights and the Domestic Jurisdiction of States, in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS 47, 50–1 (Asbjörn Eide and August Schou eds., 1968).

[21]MANOUCHEHR GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 123 (1962).

Undoubtedly, the provisions of the UN Charter, including those concerning human rights, have been the subject of prolonged discussions that have been driven by the desire to remove as quickly as possible the defects of the old international system. This led to the idea of creating a document which would lay down the basis for future advancement. Respect for and observance of human rights and fundamental freedoms were among the fundamental purposes for which the UN Charter was established. Whatever has been said about the effect of the absence of specific obligatory provisions in the Charter with regard to human rights and fundamental freedoms, one cannot disregard the various provisions in the Charter which illustrate the obligations on states as well as on the UN's organs to respect and observe human rights. The Charter, in Article 1(3), proclaims that the purposes of the UN are, *inter alia*, the achievement of "international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...". Article 55 paragraph (c) of the Charter declares that "the United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Although these general provisions do not specify or enumerate the rights that ought to be respected, nor define the obligations of States parties in order to fulfil that purpose, they do confer upon the members of the UN a legal obligation to honour the purposes for which the United Nations was established, chief among which is respect for and observance of human rights and fundamental freedoms as a means of establishing mutual respect among different nations and, eventually, maintaining international peace and security. It is true that the words of Article 55, in particular, are so general and so vague that they cannot answer the question of whether there were any specific violations of human rights that states had to stop at the time of the ratification of the Charter. However, the continuous practice of the UN organs regarding the issue of human rights shows that the words of the Article are sufficient to condemn the policy of apartheid; for instance, as a flagrant violation of human rights and thus to regard a state practising such a policy as not observing its obligation "to promote ... universal respect for, and observance of, human rights and fundamental freedoms".[22] Most importantly, Article 56 states that "all members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55". All these provisions bear witness to the existence of legal obligations with regard to the human rights provisions of the Charter.

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[22]Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703, 709 (1997).

The content of a particular obligation is a relevant concern here. This depends on all the circumstances and, in particular, on the nature and context of the obligation itself. The content of a state's obligations with regard to the human rights provisions outlined in the Charter has been the subject of prolonged debate. Some commentators tend to deal with these obligations as part of the general commitment the UN member states have accepted, when they signed the Charter, to meet the purposes of the United Nations,[23] whereas others suggest that violations of certain fundamental human rights, such as the policy of apartheid or patterns of gross and flagrant violations, can be regarded as violations of Articles 55 and 56 of the Charter.[24] This was the verdict of the International Court of Justice in its Advisory Opinion regarding South Africa's policy of apartheid in Namibia, in which it deemed such a policy to be "a flagrant violation of the purposes and principles of the Charter".[25]

The generality of the human rights clauses of the Charter and the absence of an authoritative enforcement machinery has led to the claim that there is uncertainty regarding what human rights are and what the obligations of members of the UN are. However, the power of the General Assembly to determine its own competence and the general character of the language in the Charter have enabled a UN law of human rights to develop. Of itself, the Charter regime is far from complete, and has been supplemented by General Assembly (GA) resolutions, decisions of bodies like ECOSOC, and the drafting of treaties creating specific obligations for states which become parties to them. Thus, the rights included in the UN Charter are "only imperfectly enforceable, and, in so far as the availability of a remedy is the hall-mark of legal right, they are imperfect legal rights".[26] Therefore, because the UN Charter is still vulnerable to criticism as providing only general obligations and failing to specify the rights intended to be protected, recourse to GA resolutions may well help to eliminate the uncertainties involved. These resolutions, since they have only recommendatory effect, might obviate the possibility of objection by states, which might resent any legally binding obligations imposed on them, particularly regarding the human rights issue. In what follows, an explanation of the nature of GA resolutions will be

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[23]Richard B. Bilder, *An Overview of International Human Rights Law, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 6 (Hurst Hannum ed., 1992).

[24]Louis Henkin, *Human Rights and "Domestic Jurisdiction", in* HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 26 (Thomas Buergenthal ed., 1977); Bilder, *supra* note 23, at 10; Antonio Cassese, *The General Assembly: Historical Perspective 1945–1989, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 25, 37–8 (Philip Alston ed., 1992).

[25]HARRIS, *supra* note 12, at 130.

[26]H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 34, 147–8, 152 (1968).

presented in order to clarify the status of the different human rights documents adopted by resolutions of the GA in the process of either standards-setting or of implementing the human rights documents. Then, a discussion of the UDHR, as a resolution of the GA, will be undertaken in order to define more accurately what international human rights are in the eyes of those drafting the Charter. Finally, I shall discuss some other resolutions of the GA, which provide for specific obligations by which States parties are bound.

5.3 General Assembly Resolutions

The prolonged debates concerning a state's obligations under the UDHR necessitate some clarification of the nature of GA resolutions and the power they impose upon member states of the UN.[27] Resolving the question of the power of GA resolutions is a prerequisite for determining the power of the Declaration. The power of GA resolutions has been the subject of much debate. Thus, the widespread public scepticism about the Declaration is understandable. In this connection, it can be argued that even recommendations which are not legally binding may have a strong political effect (and cannot simply be ignored). Equally, just because they are not legally binding does not mean that they are entirely without implications for what the law is. In other cases they may be evidence that a treaty may influence the development of the law.

According to Cassese, the practice of the GA concerning the issue of human rights reveals that the Assembly has had two bases for justifying states' obligations regarding human rights instruments. The first is the consideration that all States which are members of the UN are under a general obligation to observe international peace and security so that, as a consequence, there exist friendly relations among States parties. Thus, compliance with human rights standards is binding because non-compliance may lead to a violation of international peace and security. The second is the existence of treaty obligations incumbent upon States parties to the UN Charter and other human rights instruments.[28]

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[27]Generally, "lawyers have argued that resolutions and various other declarations may be authoritative evidence of binding international law [and, therefore, fall within the ambit of Article 38 of the ICJ], on one or more of the following grounds: (a) as 'authentic' interpretations of the UN Charter agreed by *all* the parties; (b) as affirmations of recognized customary law; and (c) as expressions of general principles of law accepted by states". Oscar Schachter, *The UN Legal Order: An Overview, in* THE UNITED NATIONS AND INTERNATIONAL LAW 3, 5 (Christopher C. Joyner ed., 1997).

[28]Cassese, *supra* note 24, at 32–3.

Sloan suggests that GA resolutions may acquire legal power in certain cases. Treaties, custom and "general principles of law" are the possible sources of obligation for GA resolutions.[29]

5.3.1 Treaties

5.3.1.1 The United Nations Charter

The origin of states' consent to be bound by GA resolutions is to be found, according to Sloan, in the UN Charter if anywhere. The GA is authorized by the Charter, expressly or implicitly, to issue resolutions which might, in the words of Sloan, have "binding, operative or other effects". Moreover, the Assembly also has the power to make decisions or issue resolutions to interpret the Charter itself.[30]

The Charter gives the GA two distinct powers. First, it gives the Assembly the authority to issue resolutions for specific functions such as establishing subsidiary organs.[31] The Assembly is also authorized[32] to administer the finances of the UN, and moreover it possesses the power, should any member state fail to meet its financial duties towards the Organization, to prevent such a member from voting in the Assembly.[33] Under the second category of the resolutions, the GA is authorized to issue binding resolutions towards the organs it initially created.[34]

5.3.1.2 Special agreements

General Assembly resolutions might also derive their binding power from treaties other than the Charter. The States parties to an agreement express their consent to be bound by its

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[29]F. Blaine Sloan, *The Binding Force of A "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 3–23 (1948).

[30]Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39, 46 (1987).

[31]Sloan, *supra* note 29, at 5. Article 22 states: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

[32]Article 17 reads as follows:

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

[33]Though, according to Sloan, it is hard for the General Assembly to take this measure in cases where great powers are involved. Sloan, *supra* note 30, at 105–6.

[34]*Id.* at 105.

terms. In this case, no doubt may arise as to whether GA resolutions have binding power. This is so because the binding force of such resolutions does not emanate from their being resolutions of the GA, which have only recommendatory force, but rather from the consent of the States parties themselves.[35]

5.3.2 Customary international law

General Assembly resolutions may become part of customary international law and, accordingly, possess legal force. However, for recommendations to become binding by custom, "it would be necessary (1) that they be generally observed, and (2) that eventually they be observed from a sense of duty" (or the *opinio juris*).[36]

Humphrey maintains that resolutions adopted by the different UN organs are evidence of state practice and, therefore, constitute part of international law. Opinions expressed by States parties through their casting of their votes in the GA are also a clear demonstration of these states' attitudes towards disputes or other matters. Thus, the practice of a particular state can be inferred from its participation in the activities of the GA.[37] The voting of states on the resolutions of the GA, and of other international organizations in general, in matters related to human rights produces evidence of state practice,[38] and therefore forms *opinio juris*, which might have a special significance for determining the negative obligations of states. This is evident from the ICJ's judgment in the *Nicaragua* case,[39] where it based its judgment on rules of customary international law derived from resolutions of the GA and other international organizations.[40]

However, in order for a state's voting on such resolutions to form part of customary international law, it has to be ascertained whether that state intended, when casting its vote on such resolutions, that these resolutions declare principles of international law: that is, are of a legal nature and thus form *opinio juris*. If this was the state's intention, its practice

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[35]*Id.* at 16.

[36]Sloan, *supra* note 29, at 19. *See also* Bilder, *supra* note 23, at 10; Simma and Alston, *supra* note 1, at 88; Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 177 (1995), where he terms the first condition the "material element" and the second the "subjective element".

[37]John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 31–2 (B. G. Ramcharan ed., 1979).

[38]Michael Akehurst, *Nicaragua v. United States of America*, 27 INDIAN J. INT'L L. 357, 358 n.4 (1987).

[39]Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

[40]Akehurst, *supra* note 38, at 358.

contributes to the formation of customary law. If the state intended otherwise – that is, that the resolutions declare only political statements – these resolutions then, according to the Court, do not form customary international law.[41] This might produce special difficulties with regard to human rights issues. The possibility that states might participate in the activities of the UN organs and might become parties to various human rights instruments which were adopted by resolutions, but, at the same time, accept such resolutions as only containing political, rather than legally binding, principles in order to escape criticism or to acquire support, may contribute to the difficulties in improving protection for human rights.

General Assembly resolutions may be regarded as evidence for the existence of customary international law in that they declare existing law, crystallize emerging law, constitute a basis for the future development of a customary rule, and create and develop law.[42] According to the ICJ, customary law does not necessarily require universal recognition. In other words, it is not only those customs which prevail among the majority of states that are considered part of customary international law: in addition, those emanating from GA resolutions which are adopted by a particular group of states contribute to the creation of customary international law.[43]

5.3.3 General principles of law

This source of obligation regarding GA resolutions has, according to Sloan, a weaker standing than treaties and custom. This is because "general principles of law" raise many questions relating to their nature and origin.[44] Nevertheless they have been invoked in various cases by GA resolutions, such as resolutions on the Nuremberg Principles, racial discrimination, genocide and other cases.[45]

If, however, we suggest that "general principles of law" are derived only from some common principles recognized by domestic law, what role is left for the GA to play in contributing to the formation of "general principles of law" as a source of law? How can the Assembly's resolutions be considered part of such general principles of law? Sloan maintains that such a role for these resolutions can be contemplated if we keep in mind that the members of the GA are representatives of different countries with different legal

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[41] *Id.* at 359.

[42] Sloan, *supra* note 30, at 68.

[43] *Id.* at 76.

[44] *Id.* at 78.

[45] *Id.* at 78–9.

systems. Thus, their views as expressed in the Assembly reflect the principles recognized by their respective systems.[46]

General Assembly resolutions contribute to the formation of "general principles of law" in the same way as they contribute to the forming of customary international law.[47]

Having discussed the nature of GA resolutions and their potential for providing human rights with more precision, in what follows I shall treat the UDHR as the first document to have enumerated the rights that are to be protected.

5.4 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted by the GA on 10 December 1948,[48] contributed to the formation of the body of international human rights law, and is, therefore, a source of the obligation states have with regard to human rights. However, the obligations emanating from the Declaration are of a controversial nature. One significant obstacle on the path to a true bill of rights was the different attitudes that prevailed among member states with regard to the enforceability of such a bill. The Soviet delegate to the UN Commission on Human Rights (UNCHR) argued that the absence from that bill of any enforcement measure would constitute a material defect. He was nevertheless suggesting that such enforcement should be carried out by the states themselves, since according to the Soviet view, any measure taken by an international organ, such as an international judicial body or committee, should be regarded as an interference in matters which states considered exclusively within the domestic domain. Moreover, any interference of such a kind would be contrary to the provisions of the UN Charter, particularly Article 2(7).[49]

Such an attitude, which was not confined to the Russians, led those drafting the Declaration to reconsider the nature of the obligations involved in such an instrument. The general feeling was that it would be inappropriate at that stage, when there was no agreement regarding the binding nature of the obligations contained in the Declaration, to include within its ambit provisions of binding power. The general tendency was to see such an

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[46]*Id.* at 79.

[47]*Id.* at 80.

[48]Adopted by the General Assembly of the United Nations, UN Doc. A/811. The vote on the Declaration was forty-eight for, none against and eight abstentions. The abstaining countries were "Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., U.S.S.R., Union of South Africa, and Yugoslavia". BASIC DOCUMENTS IN INTERNATIONAL LAW 235 (Ian Brownlie ed., 1995).

[49]LAUTERPACHT, *supra* note 26, at 273–5.

instrument as the starting-point of a journey towards a more comprehensive bill of rights, an aim which would have been jeopardized if the Declaration had been cast in binding terms.[50]

Nevertheless, the Declaration, as Humphrey describes it, is, with the exception of the UN Charter, an unprecedented international instrument, which possesses considerable moral and political authority. It lays down general standards by which sovereign states can organize their relationships with each other without causing any harm or damage to the well-being of one another. It establishes a framework for such relationships, to the effect that the solidarity and dignity of the international community may be preserved.[51]

In the realm of international law, the source of authority, according to Humphrey, is the will of the international community. This will might be expressed either in the form of customary law or in the form of treaties. The Statute of the ICJ, Humphrey continues, adds to these two sources "the general principles of law recognized by civilized nations". The Declaration, not being a treaty, does not cease to be binding law if it is considered part of "general principles of law recognized by civilized nations". This latter source of international law is, according to Humphrey, the source of the legal authority of the Declaration.[52] Thus, Humphrey suggests that we can speak of the Declaration in different senses. In one sense, it can be regarded as "general principles of law recognized by civilized nations". In another sense, we can speak of the Declaration as part of customary international law.[53]

Hannum suggests that the UDHR falls into the category of the resolutions that "are adopted by consensus, provide additional content or more specific definition to already accepted rights, and are widely seen as constituting a step in a process which will lead to the adoption of a binding convention on the topic".[54] As such, this type of resolution on the part of the GA "at the very least legitimizes continuing interest by the United Nations in the subject and identifies areas in which new law is likely to be developed".[55] This conception

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[50] *Id.*

[51] Humphrey, *supra* note 37, at 28–9.

[52] *Id.* at 29–30. *See also* Simma and Alston, *supra* note 1, at 85.

[53] Humphrey, *supra* note 37, at 28–9.

[54] Hurst Hannum, *Human Rights, in* THE UNITED NATIONS AND INTERNATIONAL LAW 131, 145–6 (Christopher C. Joyner ed., 1997).

[55] *Id.* at 146.

is sounder to maintain against claims that the UN Charter, although it calls for the protection of human rights and fundamental freedoms, still produces uncertainty regarding what those rights and freedoms are.

5.4.1 The UDHR as customary international law

Unlike obligations emanating from treaties, which bind only those states which signed and ratified them, obligations derived from customary rules have a legal effect on all the member states of the UN regardless of whether they have expressed their consent to be bound by such rules.[56] This is at least true in cases of gross and flagrant violations of human rights, such as slavery, genocide, mass killing, prolonged arbitrary detention or other forms.[57] This observation, according to Meron, has an impact on states', even non-parties', attitudes towards the acceptance of international human rights instruments as a part of international law, so that they would not make any claim of domestic jurisdiction in such cases.[58] Imposing obligations based on customary international norms on states has a special significance regarding human rights norms (with the exception of some GA resolutions discussed earlier in this chapter[59]) since there are numerous human rights instruments, which are formulated as treaties, declarations or resolutions, which a number of countries have not ratified.[60]

So far as the Declaration's constituting part of international customary law is concerned, "there is growing support for the proposition that the collective acts of international organizations are evidence in themselves of the development of customary rules".[61] But how can the actions of states contribute to the formulation of customary rules? Is recognition and acceptance, but not practising, on the part of states, enough to give that action the character of customary law? The Declaration was adopted without one dissenting vote; and it has been invoked, by individuals as well as by international organizations, in various places and at various times. This fact would suggest that it has met the conditions required for an act to become part of customary international law.[62] However, although the

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[56]Paul C. Szasz, *General Law-Making Processes, in* THE UNITED NATIONS AND INTERNATIONAL LAW 27, 30 (Christopher C. Joyner ed., 1997); Bilder, *supra* note 23, at 10; MERON, *supra* note 11, at 79–80.

[57]Simma and Alston, *supra* note 1, at 87.

[58] MERON, *supra* note 11, at 80.

[59]*See supra* pp. 91–5.

[60]*Id.* at 81. For a full list of the classification and status of ratifications of international instruments relating to human rights as of 1 January 1997, *see* 18/1-4 HUM. RTS. L.J 79–95 (1997).

[61]Humphrey, *supra* note 37, at 31.

[62]*Id.* at 32; PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 53 (1990).

ICJ, in the *Nicaragua* case, adopted the view that "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States", and although it stressed the fact that the existence of a customary rule cannot be satisfied only by *opinio juris*, but rather that "the existence of the rule in the *opinio juris* of States [must be] confirmed by practice", it nevertheless did not examine the contending parties' actual practice. This position can be justified on the grounds that the Court regarded accepting the resolutions and treaties in question as fulfilling the two elements required for the creation of a customary rule, namely, "the psychological element (*opinio juris*) and the factual element (actual practice)".[63]

Since there exists a plurality of different approaches to the establishing of human rights obligations based on the rules of customary international law, which might hinder the quest for the creation of universal standards of human rights and rules of obligations, some commentators suggest that more solid and well-grounded legal obligations might be found in considering the Declaration either as an authoritative interpretation of the human rights provisions of the Charter or as a general principle of law.[64] This will be discussed below.

5.4.2 The UDHR as an interpretation of the Charter

By virtue of their acceptance of the general obligations of the human rights provisions of the Charter, States parties are bound to accept the definition of such rights provided by way of interpretation by various UN organs through their continuous practice with regard to these rights.[65] This argument is used where difficulties arise in assuming that even non-parties to human rights instruments are bound by the norms embodied in such instruments, on the grounds that such norms constitute part of customary law. In such cases, difficulties arise because two issues are involved: that is, a quest to establish the universality of those instruments, by ensuring that the practices of States non-parties are in conformity with the norms enshrined in such instruments, and, on the other hand, the issue of the sovereignty of non-parties.[66]

However, it is right to enquire whether all the articles, or the rights, embodied in the Declaration have their basis in the Charter. In other words, can we consider all the rights embodied in the Declaration as interpretations of the human rights provisions in the

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[63]Akehurst, *supra* note 38, at 361–2.

[64]Simma and Alston, *supra* note 1, at 98–103.

[65]*Id.* at 100.

[66]MERON, *supra* note 11, at 81–2.

Charter? This might lead us to deal with every article individually. The interpretative approach may be limited in scope, but nevertheless ought not to be ignored.[67]

Lauterpacht, however, criticizes the suggestion that the Declaration can be conceived as being an interpretation of the human rights provisions of the Charter. The Declaration has, he argues, only moral force for the member states of the UN, which is in turn predicated upon some degree of sacrifice of sovereignty on the part of governments. It therefore cannot be used to interpret the Charter in order to give human rights provisions the meaning that was contemplated by the voting parties. Interpretation, according to Lauterpacht, would depend on circumstances and on states' interests. It will vary from one state to another. "It may be idle to interpret shades of meaning of an article when the article as a whole is not binding, when its application is subject to 'just requirements of morality, public order and the general welfare in democratic society', and when every state is the exclusive judge of these requirements".[68] Moreover, Lauterpacht argues that, since the Declaration itself is not a legally binding instrument,

> to maintain that a document contains an authoritative interpretation of a legally binding instrument is to assert that the former document itself is as legally binding and as important as the instrument which it is supposed to interpret. ... To say, therefore, that a document is not legally binding and that it embodies, nevertheless, an authoritative interpretation of a legally binding instrument is to make a statement the first part of which contradicts the second. The contradiction can be removed only by dint of the further explanation that 'authoritative' means morally, and not legally, authoritative – an explanation which amounts to an abandonment of the view that the Declaration is legally relevant.[69]

The Declaration was the result of prolonged discussion taking into account different considerations. This generated a great deal of doubt as to whether such an instrument could be adopted. Thus, it was appropriate for those drafting the Declaration to avoid any obstacle that would impede the adoption of such an instrument. Chief among these controversial considerations was the form of the Declaration. "A declaration, a convention or an amendment"[70] – these were the forms considered at that time. There was a common belief that having the instrument in a form which, in itself, implied legal obligations would render agreement about its adoption less likely. Such an instrument, it was thought, would have led nowhere. So it was better to forge a milder instrument, one which could ultimately achieve the goal but which would have a better chance of approval. The Declaration was a

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[67]Simma and Alston, *supra* note 1, at 101.

[68]H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 370 (1948).

[69]*Id.* at 365–6.

[70]Humphrey, *supra* note 37, at 21–8.

sort of compromise between, on the one hand, those who thought that it was imperative to lay down an instrument, of whatever kind, as part of an international bill of rights and, on the other, those who did not conceive of an instrument that would impose legal obligations upon them to observe and respect human rights.[71]

Thus, the view that some of the Assembly's resolutions should be considered as interpretations of the Charter has, according to Sloan, gained general acceptance.[72] According to this conception, the UDHR, being an interpretation of the Charter, which is in itself a treaty that has a binding effect on its signatories, should have some effect so far as the Charter's human rights provisions are concerned. The San Francisco Conference, although it did not accept that a specific organ would be authorized to exercise an "authentic interpretation" of the provisions of the Charter, nevertheless recognized that interpretation of the UN Charter would be undertaken by different organs of the UN, including the General Assembly.[73] Since it is accepted that the GA is authorized to issue interpretative resolutions, it is reasonable to enquire whether all interpretations of the Charter's provisions are acceptable. Is there a criterion for determining the acceptability of an interpretation? Sloan argues that, following the San Francisco Conference, at which it was suggested that an interpretation should have binding force only if it is "generally acceptable", the answer to this question is still unclear because the term "generally acceptable" in itself is prone to different interpretations.[74]

5.4.3 The UDHR in terms of general principles of law

It is important to remember that, as Lauterpacht says, the Declaration "does not purport to embody what civilized nations generally recognize as law. It embodies, in the words of its Preamble, 'a common standard of achievement for all peoples and all nations' who bear the responsibility, individually and collectively, 'to secure their universal and effective recognition and observance'."[75] Conceived as such, the Declaration "gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by states Members of the United Nations".[76]

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[71] *Id.*

[72] Sloan, *supra* note 30, at 57.

[73] *Id.*

[74] *Id.* at 58.

[75] Lauterpacht, *supra* note 68, at 366.

[76] *Id.*

5.5 General Assembly Resolutions and States' Specific Obligations

Since uncertainty as to what states' obligations under the UN Charter continues, there are numerous GA resolutions which offer answers related to this uncertainty. These resolutions deal with different issues relating to different rights and freedoms provided for by numerous human rights documents.

As was indicated earlier, the first step in the process of providing human rights with international protection commenced with standard-setting of the norms of human rights, though only with political effect. Since this procedure failed to achieve its objective, that is universality, it was necessary to move to the next step – that is, the possibility of implementing the standards set by the UN. This step involves conferring more legal power on the standards, first by defining the qualifications of each right, and then by determining what states' obligations are.

However, in the face of the argument that the UN standards are not sufficiently precise and, therefore, insufficient, treaties, as well as some specific covenants such as CERD and the Torture Convention, have been concluded in the quest for universality, in order to provide more precision and definition for human rights standards. These documents give human rights a universal character by rendering them more specific, and outlines states' obligations in more specific terms. Moreover, treaties have been concluded to counter the argument that implementation measures contained in the Charter are not sufficient to provide those rights with effective machinery whereby they can be implemented in practice. Also bodies such as the HRC have been created in order to monitor the implementation of the rights provided for by the human rights documents.

In spite of the absence of coercive powers (except in some cases where the Security Council deals with violations of human rights that might constitute a threat to international peace and security) or enforcement machinery within the UN Charter, Buergenthal maintains that the adoption of ECOSOC Resolution 1235 (XLII) of 6 June 1967,[77] which authorizes the Human Rights Commission to "make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid", and that of Resolution 1503,[78] which authorizes the UN Sub-Commission on

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[77]E.S.C. Res. 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967). FRANK NEWMAN AND DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 111 (1990).

[78]E.S.C. Res. 1503 (XLVIII), 48 U.N. ESCOR Supp. (No. 1A) at 17, U.N. Doc. E/4832/Add. 1 (1970). *Id.* at 113.

the Prevention of Discrimination and Protection of Minorities to deal with communications relating to violations of human rights and fundamental freedoms,

> serve as the foundation of the UN Charter-based system for the protection of human rights. They have given birth to an ever expanding institutional mechanism with the UN framework for dealing with large-scale human rights violations that embrace the mushrooming rapporteur and special missions system as well as the UN High Commissioner for Human Rights. These institutions have their juridical basis in the Charter, complemented by the Universal Declaration of Human Rights.[79]

It should be borne in mind, however, that the quest for universality in human rights standards cannot be fulfilled only by specifying the obligations of States parties. Rather, States parties to international human rights documents must observe their undertakings under such documents to implement those standards by taking measures to effectuate them at the domestic level. It is, no doubt, States parties which bear the greatest responsibility in the process of the universalization of the issue of human rights. This is because, in the first place, they make the establishment of such documents possible by participating in, and contributing to the formation and adoption of, such instruments – in other words, they contribute to the process of standard-setting. Secondly, because it is their treatment of their own citizens which is involved, they are thus directly involved in implementing the standards which govern such treatment.

So far as the respective status of domestic and international law in the process of providing human rights with adequate protection is concerned, it should be borne in mind that each system is supplementary to the other. Generally, it is for each State party to provide for and guarantee the rights and freedoms recognized by international instruments for its people, by establishing these rights in its own constitutions and laws. In cases where remedies within the domestic jurisdiction fail to provide such guarantees, it is for international law to play its part in supplementing the domestic law with such guarantees, bearing in mind the instances which constitute interference with the domestic jurisdiction of States parties. However, in such a process, we are inevitably confronted with the question of determining the scope of the domestic jurisdiction of States parties. In other words, we must first determine what areas fall under the domestic jurisdiction of States parties and thus do not allow for interference on the part of international law. According to Markovic, Article 2(7) of the Charter, which deals with this matter, does not determine the scope of the domestic jurisdiction of States parties, but leaves this matter to the states themselves.[80] Markovic

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[79]Buergenthal, *supra* note 22, at 709–10.

[80]Markovic, *supra* note 20, at 53–4.

suggests that this defect in the Charter can be removed by interpreting Article 2(7) in a way that excludes matters of human rights from the application of the notion of domestic jurisdiction. He argues that since the human rights issue constitutes one of the pillars of the UN Charter, violations of such rights, or, at least, those fundamental rights violations which might result in threats to peace and security, cannot be left to the discretionary powers of States parties to deal with via domestic jurisdiction. Rather, it is the main function of the Charter to confront such a situation, given that the preservation of peace and security was the rational basis on which the Organization as a whole was created.[81]

In spite of the long process of standard-setting and defining states' obligations under human rights instruments, disputes continue about the unity of human rights. Are the rights to be protected related only to civil and political rights, or might they include social, cultural and economic rights as well? Do the two categories of rights require the same level of protection and therefore the same measures of implementation ? Claims about domestic jurisdiction also continue to be made. The Vienna Declaration of 1993 attempted to resolve such disputes by reaffirming international concern with human rights, the universality of human rights, the unity of human rights, and the need to minimize the limitations imposed on those rights.

5.6 The Vienna Declaration on Human Rights

One of the distinguishing features of the Vienna Declaration is that it encompasses most of the human rights recognized by international instruments and asserts the universality of such rights. The adoption of such a document was possible, according to Buergenthal, because of the absence of the legal and political obstacles that existed at the time of the adoption of the UN Charter and the Universal Declaration.[82] The ending of the Cold War eliminated many of the ideological and political differences between the West and those countries which were dominated by the Communist ideology in particular.[83] Thus, although we should beware over-optimism, we can nevertheless acknowledge that the quest for the universality of human rights has been able to proceed and to concentrate on implementation machineries.

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[81] *Id.* at 54–5.

[82] Buergenthal, *supra* note 22, at 712–13.

[83] *Id. See also* Adamantia Pollis, *Towards A New Universalism: Reconstruction and Dialogue*, 16/1 NETH. Q. HUM. RTS. 5, 6 (1998).

The Vienna Declaration emphasizes the universality of human rights, and their being the subject of international concern, by reaffirming the principles and standards laid down in the UN Charter and the UDHR. It also reiterates states' obligations, provided for by the Charter, to protect and promote those rights. It declares, in its preamble, that "the promotion and protection of human rights is a matter of *priority* for the *international community*"; that it is the "*responsibilities* of *all States*, in conformity with the Charter of the United Nations, to develop and encourage respect for human rights and fundamental freedoms for all"; and that all peoples and States members of the United Nations alike should "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".[84] These provisions reaffirm also the obligations of States parties under the UN Charter regarding the promotion and protection of human rights.

Articles 4 and 5 of the Vienna Declaration confirm the internationalization of the concern for human rights and call for the elimination of all obstacles that might hinder the universal recognition and implementation of those rights. Article 4 states that

> the promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a *legitimate concern* of the international community [emphasis added].

Article 5 of the Vienna Declaration states that

> 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 [emphasis added].

The above two Articles of the Vienna Declaration develop some ideas and principles which, according to Buergenthal, reflect the world's concern about a number of obstacles that have prevented the protection and promotion of the international human rights standards that have been adopted by the international community since the adoption of the UN Charter. These obstacles have been the distinction between national and international concern with

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[84]United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, Adopted June 25, 1993. 32 I.L.M. 1661 (1993). Emphasis added.

the issue of human rights, and the issue of cultural relativity.[85] Moreover, the Articles re-emphasize states' obligations regarding the effective implementation of human rights and the need to remove those obstacles which might impede such implementation.

5.7 Concluding Remarks

Undoubtedly, reliance on the human rights provisions of the UN Charter is more legitimate in terms of justifying the obligations a State party has regarding human rights norms than reliance on any other instrument, such as the Declaration. The latter, as a resolution of the GA, has, generally speaking, only recommendatory power. Thus, reliance on it is apt to involve controversy. It is sounder for individuals to refer to the provisions of the UN Charter, as a basis for their claims of violations of their rights, than it is for them to refer to other human rights instrument because the Charter, as a multilateral treaty, has a binding power for all member states of the UN.

Whatever has been said about the efficacy of international law in general, and international human rights law in particular, one has to bear in mind that "mere force creates no rights and acknowledges none".[86] Undoubtedly, the UDHR, as well as other international human rights instruments, has won general acceptance, albeit with considerable disagreement regarding the instruments' nature and the obligations mentioned in them, by the international community as embodying general standards necessary for the accomplishment of the general purposes of the UN. This might lead us to accept the proposition that "[t]he sanction of all law goes back to public opinion. If we consider political law, we shall see that there are certain agencies of definition and enforcement which are absent in the case of constitutional law. Hitherto international law has lacked not only these agencies but also the unity of opinion. Were the latter achieved, the former, in so far as they might be necessary, would follow."[87]

The quest for the universality of human rights has encountered various obstacles. States must accept obligations or contribute to the generation of customary law. Many states may accept general obligations. Either way, obligations must be interpreted, so that the possibility of states' rejecting the human rights documents, claiming that they impose rigid legal obligations which involve the issue of sovereignty, will be reduced. However, states

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[85]Buergenthal, *supra* note 22, at 714.
[86]MACIVER, *supra* note 4, at 283.
[87]*Id.* at 284.

must specifically accept supervision machinery, in order that their meeting of their obligations can be monitored.

The UDHR, the ICESCR and the ICCPR constitute, as was indicated earlier, the International Bill of Human Rights. They elaborate on the human rights provisions of the UN Charter and specify the measures which should be taken by States parties in order to meet the obligations they assumed in signing the Charter. For instance, Articles 18 of both the UDHR and the ICCPR declare that religious freedom is one of the fundamental rights that States parties undertake to protect and respect. Meeting obligations under this provision involves a number of problems relating to the meaning of such a right, and consequently such obligations might vary according to the meaning given to it. Thus, states should be granted leeway to interpret these issues. However, because such matters cannot be left exclusively to States parties, they must be subject to some kind of supervision. Article 40 of the ICCPR establishes one of the obligations for States parties. According to this Article, States parties undertake to submit reports to the HRC explaining the status of human rights in their respective countries. The following two chapters will discuss the issue of religious freedom and states' obligations in relation to this right.

CHAPTER 6

FREEDOM OF RELIGION

6.1 Introductory Remarks

It was indicated earlier in this study that the human rights provisions of the UN Charter affirm faith in human rights and fundamental freedoms. However, the Charter does not mention those rights or freedoms which are to be protected. As a consequence, subsequent human rights instruments have been adopted in order to afford such provisions more precision and to enumerate such rights and freedoms as those drafting the Charter thought are necessary to preserve people's dignity and respect. Religious freedom was one of those rights which were enumerated in human rights instruments. Nevertheless, the articles which provided for the protection and respect for such a right are couched in general terms and include some words and phrases, besides the word "religion" itself, that are vulnerable to different understandings and interpretations. Consequently, the obligations states have in relation to religious freedom may vary according to the meaning and definition given to such terms and phrases.

This chapter deals with these issues. It explains how the word "religion" allows for different interpretations, how the terms included in the articles which provided for religious freedom are interpreted in different ways, and how the protection of such a right is affected by such differences in understanding and interpretation. These issues must be kept in mind when the quest for universality of human rights is examined. This is so because the difficulties regarding attempts to ensure universality stem from the fact that we are dealing with plural, sovereign states. Differences cannot be entirely eliminated among those states. Therefore, a quest for universality paradoxically requires that means of accommodating such differences are to be given scope to operate. Among these means is the possibility of interpreting some of the human rights provided for by various human rights documents to take into account matters connected with states' cultures and traditions.

However, for a lawyer, striking a fair balance between, on the one hand, guaranteeing freedom of religion or thought or religious practices for a particular group of people and, on the other, protecting the rights of other religious groups or of atheists represents a challenge. "Problems relating to religion are almost as ubiquitous as problems relating to

language."[1] This has been emphasized by Krishnaswami, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study of the status of religious freedoms in different parts of the world:

> ... the prohibition of discrimination and the guarantee of equal protection of the law raise special problems in the case of freedom of thought, conscience and religion; since each religion or belief makes different demands on its followers, a mechanical application of the principle of equality which does not take into account these various demands will often lead to injustice and in some cases even to discrimination.[2]

Dickson maintains that it is commonly accepted that religion is not confined to any geo-political boundaries. Religion is universal, and devotees can be found in many different territories and systems. Therefore, he argues, it is clear why international law should have a part to play in dealing with disputes arising from religious differences.[3] Bearing in mind this assertion, it can be maintained that religion, is not always, as van Boven suggests, "a component part of nationalism".[4] It is true that, in some cases, nationality determines the relationship between a person practising a particular religion and the state, but it cannot be asserted that nationality *determines* a person's religion. By this nothing more is meant than that nationality is not indicative of a person's religion: a change in a person's nationality by no means necessitates a change in his/her religion.

It is commonly accepted that religion, especially Christianity, has played a salient role in formulating the principles of modern international law.[5] A detailed and comprehensive study of the relationship between religion and international law in general, and international human rights law in particular, is beyond the scope of this study.[6]

Mrs Benito, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, points out that, in the case of some public

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[1]VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION 53 (1985).

[2]ARCOT KRISHNASWAMI, STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, UN Doc. E/CN.4/Sub.2/200/Rev.1., at 15 (1960). Hereinafter Krishnaswami Study.

[3]Brice Dickson, *The United Nations and Freedom of Religion* , 44 INT'L & COMP. L.Q. 327, 329 (1995).

[4]Theo van Boven, *Advances and Obstacles in Building Understanding and Respect Between People of Diverse Religions and Beliefs*, 13 HUM. RTS. Q. 437, 441 (1991).

[5]John E. Noyes, *Christianity and Late Nineteenth-Century British Theories of International Law*, *in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 85, 85–7 (Mark W. Janis ed., 1991); James A. R. Nefziger, *The Functions of Religion in the International Legal System*, *in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 147 (Mark W. Janis ed., 1991).

[6]For some ideas concerning the influence of religious based ideas of the law of nature on international law, *see supra* pp. 22–3.

manifestations of religion, and the way religion is misused by its followers, it can be maintained that

> piety is a 'mask' for prejudices which intrinsically have nothing to do with religion. Instead it is historical, socio-cultural or physical factors that have provoked the dislike and hostility. Hence religion is not the cornerstone of the discrimination. Rather, the conceptions of the teachings of a religion have been twisted and construed to condone the prejudice. This is seen in the racial discrimination existing in South Africa ... . The white South Africans claim that their Christian principles and doctrines justify the cruel and brutal institution of *apartheid*. This excuse is also employed to sustain and perpetuate religious discrimination.[7]

From the information she had gathered, Mrs Benito concluded that the existence in today's world of intolerance and discrimination based on religion or belief can mainly be attributed to "ignorance and lack of understanding, conflicts in religiosity, exploitation or abuse of religion or belief for questionable ends, developments of history, social tensions, government bureaucracy and the absence of dialogue between those holding different religions or beliefs".[8]

6.2 Church and State

Throughout history, although the two entities have formed a unified institution with power over individuals, the struggle between Church and State has been the source of many conflicts.[9] Such conflicts can be attributed to the fact that religious beliefs, by their nature, embrace the idea that there is always a higher authority than that of the state and, therefore, that all policies of the state must be judged in accordance with that authority.[10] At different stages of history, each of the two entities has claimed superiority over the other, and at the end of each stage prevailed. However, "[i]n most of these medieval Church-State 'conflicts', neither party had the slightest notion of separating the Church and State or of

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[7]Elimination of all forms of intolerance and discrimination based on religion or belief, by Elizabeth Odio Benito, Special Rapporteur of the Sub-Commission on Prevention on Prevention of Discrimination and Protection of Minorities 40, para. 163 (1989). Hereinafter Benito Report.

[8]*Id.* at 40, para. 164.

[9]*See* Stephen C. Neff, *An Evolving International Legal Norm of Religious Freedom: Problems and Prospects*, 7 CAL. W. INT'L L.J. 543, 546 (1977).

[10]NINAN KOSHY, RELIGIOUS FREEDOM IN A CHANGING WORLD 41 (1992). This assertion was apparent in the pre-Middle-Ages period where churches claimed the supremacy of ecclesiastical law over other human laws. In this connection, Archbishop Hincmar of Rheims, expressing his discomfort with the changing status of divine law *vis-à-vis* positive law, says: "... let them defend themselves, if they will, by earthly laws or by human customs, but let them know, if they are Christians, that at the day of judgement they will be judged not by Roman or Salic or Gundobadian law but by divine apostolic law. In a Christian Kingdom even the laws of the state ought to be Christian, that is, in accord with and suitable to Christianity." GEORGE H. SABINE, A HISTORY OF POLITICAL THOUGHT 201 (1960).

allowing freedom of worship to the individual Christian".[11] As a result, these conflicts conduced to oppression in the name of religion and to religious intolerance. During the Middle Ages, when the power of the Christian Church was strong, the authority to regulate religious practices and the expression of religious beliefs and ideas belonged to the Church. This authority was recognized by the State, which in turn, at the request of the Church, imposed penalties on those violating the regulations regarding religious practices.[12]

For example, in England, when the ordinary courts intervened in a religious matter for the first time, in 1618, the state justified its control over religious freedom by arguing that it viewed violations of its rulings as amounting to an act of "sedition" whereby public order and safety would have been threatened. Thus, in subsequent centuries, the courts in England deemed Christianity to be part of the Law of the Land. Thus, any breach of the principles of Christianity, such as blasphemy, which was the most common offence against religion at that time, was not conceived as demonstrating contempt to Christianity, but rather as a breach of the rules of the Law of the Land.[13]

During the late Middle Ages, particularly following the Reformation, secular authority – the king – triumphed over the Church. The religious authority of the king to rule was grounded in a number of political justifications. The law took its authority from the legitimacy of the legislator, not from any divine source. The process was neither universal – some states continued to preserve a close relationship between King and Church – nor uniform: in some states there was a separation of State and Church, whilst in others the Church was established but subject to secular law. None of this necessarily involved the *de facto* separation of religious influence and the content of law. The state sometimes disguised its intervention as the protection of moral standards, the content of which was highly influenced by religious traditions. Breaches of these standards were treated as breaches of the secular law, subject to secular procedures and penalties, however closely such standards might have been related to the protection of religious values, such as the blasphemy law in England.[14]

Where the separation of Church and State was required by law, limitations were placed on the direct protection of religion by the ordinary law, though the adoption of religious values

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[11]Neff, *supra* note 9, at 547.

[12]HARRY STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 191 (1983).

[13]*Id.* at 91–2.

[14]SABINE, *supra* note 10, at 198–214.

as moral values was not precluded. Later, political systems developed which were atheistic in their foundation and hostile to religious belief, to the extent not only of excluding the Church from political influence but also of persecuting priests and believers as representing sources of opposition to the government.

6.3 Definition of Religion

Why ought words like "religion" and "belief" to be defined? Does defining such words impact in any way on the quality of the right to freedom of religion or on a state's obligation to secure and protect the enjoyment of such a right? What if these words were left undefined and were vulnerable to interpretation by different persons or groups? What if a state left to the people the authority to decide whether a creed or any kind of thought, of whatever nature, represented a religion or belief? These are some of the concerns that must be faced when dealing with the matter of freedom of religion, which is largely dependent on the conception of the term "religion". If the right to religious belief is to be privileged as a human right, it is important that we know what "religious" belief is, because there will be limits on how the state may react against those claiming to exercise the right.

One of the controversial terms that can be regarded as the source of misunderstandings or misinterpretations of international human rights instruments is "religion". Such a term has different meanings for different groups of people. It might connote one thing for a particular group of people and quite a different thing for another. Differences are conceivable even within one country. For example, the Iranian government claims that the Baha'is are not, according to Islam, a religious sect, and the Indonesian government claims that the teachings of Jehovah's Witnesses "are contrary to the true Christian faith".[15] These differences no doubt have an impact on the understanding and interpretation of the provisions of the rights relating to freedom of religion in various international human rights instruments.

The nature of religion might contribute to the difficulty one encounters in defining "religion". Whether religion is of a "sacred" nature or not is a significant question in assessing the extent to which a state can limit the individual's religious involvement. The "sacred" nature of a religion raises problems for the State in providing protection for the rights relating to religious freedom. It is a fundamental quality of religious belief which may put the individual in conflict with the law where the law is not based exactly on the standards of the religion. An example is the imposition of compulsory military service

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[15]KOSHY, *supra* note 10, at 46–7.

obligations, or where religious observance may severely disadvantage an individual, for instance where employment opportunities are restricted because of the need to carry out religious duties (e.g. Friday prayers). It is one thing for a State to tolerate and protect the "quiet enjoyment" of religious belief; it is quite another for a State to tolerate and facilitate the manifestation of whatever is required by religious belief, if the religious practice violates the human rights of others, such as would human sacrifice.

There is nowhere in the UDHR, nor in the International Covenant on Civil and Political Rights of 1966 (Covenant), nor in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 25 November 1981[16] (the Declaration on Religion), such a definition of the term "religion". Sullivan claims that this lack of definition may enhance the probability of religious freedom being accorded effective protection, since where there exists a definition of religion, there would be a difficulty, first, in encompassing all the religions and beliefs of different regions and, secondly, in providing those religions or faiths which were excluded from the definition with effective protection. Sullivan goes on to assert that where definitions are provided for religion or belief, some states might argue that these exclude some religions or beliefs that are practised within their boundaries. This would ultimately affect the protection enunciated in the Declaration on Religion as well as in other human rights instruments.[17] On the other hand, leaving terms such as "religion" and "belief" undefined might allow governments to claim that individuals or groups upon which they intend to impose certain restrictions are not religious or, as happens more commonly, that their practices are "political" and detrimental to public order and safety.[18]

Many attempts have been made to offer a definition of "religion" or "belief". These attempts have revealed obvious disagreements among commentators. Dickson, for instance, maintains that a religion "first and foremost, is a collection of beliefs. As such it is an intensely personal matter, every individual being able to decide for him- or herself which set of beliefs to adopt."[19] He further argues that "obviously the law cannot tolerate all manner of behavior simply because it occurs in the name of a religion".[20] This definition

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[16]G.A. Res. 36/55, 36UN. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981).

[17]Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 490–2 (1988).

[18]*Id.*

[19]Dickson, *supra* note 3, at 327.

[20]*Id.*

obviously raises the question of how a state may strike a fair balance between preserving personal freedom of religion or belief, on the one hand, and imposing limits on that freedom out of certain public considerations, on the other.

Another commentator, Malcolm Shaw, attempts to define religion by comparing the underpinnings of religion, thought and conscience:

> ... thought denotes the exercises of human reason, while conscience suggests the application of a moral sense to characterization of behavior. Both concepts, amorphous as they are, centre upon subjective patterns. In the case of religion, however, a strong element of external formulation and direction clearly exists. It is difficult to regulate thought and hard to dictate conscience, but religion as a system of external criteria and ritual manifestations is easier to detect and thus control. This is not to say that religion itself can be defined with facility. In fact, the opposite has proved to be the case.[21]

Other commentators have suggested that "the religious beliefs and expressions that are commonly the ground for discrimination include all of the traditional faiths and justifications from which norms of responsible conduct – that is, judgements about right and wrong – are derived".[22] This definition obviously excludes any non-traditional faiths that have emerged in recent centuries or decades. There are, no doubt, numerous faiths or beliefs which claim to be religions and which call for religious freedom and protection under national and international law. In this regard, the HRC, in its General Comment 22(48) on Article 18 of the Covenant, maintained that religion or belief should be broadly interpreted as encompassing theistic, non-theistic and atheistic beliefs. Article 18, according to the Committee, is not "limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".[23] Furthermore, we are again faced with the problem of determining the nature of religion and the status it possesses under a particular state's law. Is everything which a religion considers to be right to be also so regarded by positive law, or there is an area to which religious mandates must be confined? Is everything which a religion considers wrong to be regarded so by positive law? These are some of the considerations which must be taken into account in any attempt to define a religion and its relationship to positive law.

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[21]Malcolm N. Shaw, *Freedom of Thought, Conscience and Religion, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 445, 447 (R. St J. Macdonald et al. eds., 1993).

[22]McDougal, Lasswell and Chen, *The Right To Religious Freedom and World Public Order: The Emerging Norm of Non Discrimination*, 74 MICH. L. REV. 865, 865 (1976).

[23]Human Rights Committee General Comment No. 22(48) on Article 18/ Freedom of Thought, adopted by the Committee at its 1247th meeting (forty-eight session) on 20 July 1993. Doc. CCPR/C/21/Rev.1/Add.4. Hereinafter General Comment No. 22(48). Reprinted in 15/4-6 HUM. RTS. L.J. 233 (1994).

Because there exist many differences concerning the definition of religion or belief, it might be asserted that no definition need be attempted, because one's concern should not exclusively be with the problem of defining fringe religions but with working out how human rights enterprises can accommodate mainstream religions. What is important is that religious belief requires that adherents behave according to religious precepts – matters not determined by the State – except in the case of a theocratic State involving priests in its law-making processes. It is the strength and authority of any religious belief which is important, but the impact of religious belief on society as a whole will depend on the militancy and evangelical mission of the religion. It is the general character of religion, rather than exhaustive definitions, which is important.

6.4 Constituents of Religious Freedom

Once an understanding of the concept "religion" has been reached, it is then necessary to consider the constituents of the right to religious freedom – or put another way, to examine the extent of a state's obligations regarding the enjoyment of this right. Unless the constituents of the right are defined, it is hard to judge whether or not a government is meeting its obligations to respect and protect the religious freedoms of its people.

Religious freedom is protected and guaranteed by Article 18 of the UDHR, Article 18 of the Covenant and the Declaration on Religion. The constituents of this right are partially defined in these provisions, which speak of everyone's "right to freedom of thought, conscience and religion". There were no differences among States parties regarding this formula of the content of the right. Article 18 of the Covenant articulates a further agreed definition of the content of the right. It states that "this right shall include freedom to have or to adopt a religion or belief of [one's] choice, and freedom, either individually or in community with others and in public or private, ... to manifest [one's] religion or belief in worship, observance, practice and teaching". The Declaration on Religion, in Article 1(1), uses almost the same words as Article 18 of the Covenant.

6.4.1 The right to change one's religion

Nevertheless, controversy ensued when a provision providing for everyone's right to change their religion or belief was included in the matter on religious freedom. Some delegates argued that the inclusion of such a phrase in the UDHR would encourage proselytizing, which is in itself controversial.[24] Also, since this right may be implicitly

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[24]Roger S. Clark, *The United Nations and Religious Freedom,* 11 N.Y.U. J. INT'L L. & POL. 197, 200 (1978).

understood from other provisions that guarantee everyone's "right to have or to adopt a religion or belief of his choice",[25] and since "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice",[26] there was, it was maintained, no need for this right to be expressly mentioned in the UDHR.[27] Other delegates, on the other hand, maintained that it was necessary, for the full enjoyment of this right, for the constituents of the right be as clear-cut and uncontroversial as possible. Following prolonged discussions on the issue, this phrase was included in Article 18 of the UDHR, which provides that an individual's right to religious freedom includes, *inter alia*, "freedom to change ... religion or belief".[28]

As for the Covenant, the explicit mention of the right to change religion was also the subject of prolonged debate. Some delegates sought the deletion of such a clause because they thought that its inclusion in the Covenant would have permitted, or even legally protected, "missionary activities" and other activities directed towards affecting people's beliefs in certain faiths and religions.[29] Thus, a suggestion that the phrase "and endeavor to persuade other persons of full age and sound mind of the truth of his beliefs" should be deleted from the draft Article 18 was accepted in order to prevent activities such as proselytization.[30] Other delegates, however, argued that the inclusion of such a phrase would give the right to religious freedom legal force.[31] A proposal presented by Saudi Arabia seeking to delete the phrase from the Article was rejected, and other proposals, put forward by Brazil and the

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[25]Article 18(1), ICCPR.

[26]Article 18(2), ICCPR.

[27]The inclusion of such a phrase had affected the adoption of the Instrument as a whole. The Saudi delegation to the General Assembly abstained from voting on the UDHR claiming that such a provision was in clear contradiction to the principles of Islam and that therefore his country was unable to adopt such a Declaration. Besides Saudi Arabia, there were seven delegates who abstained from voting on the Declaration for other considerations.

[28]Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 210–12 (Louis Henkin ed., 1981). *See also* Sullivan, *supra* note 17, at 487.

[29]MARC J. BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 357 (1987).

[30]*Id.* at 352. The draft Article 18 (2) reads: "Every person of full age and sound mind should be free, either alone or in community with other persons of like mind, to give and receive any form of religious teaching and to endeavor to persuade other persons of full age and sound mind of the truth of his beliefs...". According to Koshy, it is an integral part of some religions, for instance Christianity, to propagate the message to non-Christians. The disciples of Jesus Christ are required by their scripture to carry out this mission. This task cannot be conceived should religious liberty, including the right to propagate a religion, not be guaranteed. KOSHY, *supra* note 10, at 24.

[31]BOSSUYT, *supra* note 29, at 358.

Philippines, were favoured. These latter proposals called for the replacement of the words "freedom to maintain or to change his religion or belief" with the words "freedom to have a religion or belief of his choice". At a later meeting of the Committee, the UK representative, in an attempt to avoid misinterpretation of the words "to have a religion" as implying that a person ceases to have the freedom to change his religion after having chosen one, suggested that the words "to adopt" be included in the Article as giving a person the right to change his religion if he chooses to.[32]

This argument about the right to change one's religion is not without practical significance. It forces us to attend to some practical questions relating to the scope and nature of religious freedom. Is freedom of religion a birthright – does it require that parents must or should refrain from exposing their children to their own religion or to any other religion? If a person is born to Muslim parents, does this mean that this person is a Muslim by birth and must remain Muslim? And what if that person, when he becomes able to decide for himself, that is, when he reaches the legal age, chooses to change his religion? – is he considered, by Islamic law, an apostate?

According to Islamic law, two conditions must exist if we are to consider an act to be apostasy.[33] The first of these is "turning from Islam after being a Muslim".[34] According to the majority opinion of Muslim scholars, a minor of Muslim parents is not legally considered to be a Muslim, although he is considered to be so according to his parents' religion, because he is, intellectually speaking, not capable of deciding for himself which religion to follow until he becomes mature.[35] To put it other way, a minor is regarded by Islamic law as not competent to decide for him- or herself which religion to follow. Therefore, if such a person, when he reaches the legal age, chooses to adopt a religion other than Islam, he is not considered an apostate.[36] The second condition is intention, which it is inconceivable that a minor can possess. In the case of a legally competent person, an act cannot be regarded as apostasy unless it is congruent with intention. For instance, an act of apostasy may not be attributed to an insane or drunk person because the

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[32]*Id.*

[33]ABDUL-QADIR ODEH, AL-TASHRI' AL-JINA'I AL-ISLAMI VOL.2, 706–20 (1985).

[34]MUHAMMAD HAMIDULLAH, THE MUSLIM CONDUCT OF STATE 174 (1977).

[35]According to the majority view of Islamic scholars, a person becomes legally competent when he or she reaches fifteen years of age, whereas there are some other scholars who have determined the age of maturity to be eighteen. ODEH, *supra* note 33, at 602–4.

[36]AHMAD AL-HOSARY, NADHARYAT AL-HUKM WA MASADER AL-TASHRI' FI USUL AL-FIQH AL-ISLAMI 220–8 (1986).

person in such cases is not mentally capable of distinguishing and appreciating the consequences and effects of his acts.[37] The same can be said in the case of the minor, whose action in choosing or adopting a religion other than Islam cannot be considered apostasy because of his legal incompetence, that is, his unaccountability under Islamic law to carry out such acts.[38]

6.4.2 The rights of parents to choose their children's religion

Article 18(4) of the Covenant restricts parents' liberty to choose their children's religion to the provision of "religious and moral education of their children in conformity with their own convictions". Does this imply that parents are restricted, in teaching their children, to those teachings which do not contradict their own beliefs and faiths, or does it indicate only that parents are not liable should they choose to import their own beliefs to their children?

It can be inferred from Paragraph 2 of the Draft Article 18, which states, *inter alia,* that "in the case of a minor the parent or guardian shall be free to determine what religious teaching he shall receive", that the language of this phrase is so general that it gives the parent greater liberty than does the Article in its final form to determine the type of religious teaching that his children are to acquire.[39] Thus, Article 18 of the Covenant imposes a restriction of a kind upon the parents' freedom to choose their children's religious education.

In countries where there are constitutional restrictions on religious teachings, a claim by these countries that there is no such restriction on the right of parents to provide their children with religious education is not sufficient to meet the requirements of Article 18 with regard to the manifestation, "in public or private", of religious freedom. A state is not only obliged not to interfere with parents' liberty to provide their children with religious education; it should also observe the requirements of the Article in providing recognized access to public religious education, by, for instance, permitting public officials, rather than parents, to take whatever measures might be effective for the provision of public religious education.[40]

6.4.3 Freedom to manifest religious belief

Sullivan correctly calls for a clear distinction to be made here between freedom of thought,

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[37]*See* generally ODEH, *supra* note 33, at 706–20 (1985); AL-HOSARY, *supra* note 36, at 220–8.

[38]ODEH, *supra* note 33, at 706–20. For a discussion of the issue of apostasy, *see infra* pp. 148–53.

[39]BOSSUYT, *supra* note 29, at 352.

[40]PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 193–4 (1992).

conscience and religion, on the one hand, and freedom to manifest a religion or belief, on the other. The former, described by Sullivan as "underrogable", does not allow any limitations, whereas the latter is subject to certain limitations pertaining to public order and safety as well as the consideration of others' rights.[41] Krishnaswami, on the other hand, distinguishes between "freedom to maintain or to change a religion or belief" and "freedom to manifest that religion or belief" and suggests that "the former is conceived as admitting of no restriction, [whereas] the latter is assumed to be subject to limitation by the State for certain defined purposes".[42] Of particular interest here are the different terminologies used by Sullivan and Krishnaswami. While the former adopts the distinction between freedom of "thought, conscience and religion" and freedom to "manifest" that religion or belief, the latter speaks of a distinction between the freedom to "maintain or to change" a religion or belief and the freedom to "manifest" a religion or belief. This different use of terminologies in describing freedom of religion arose because Krishnaswami, in his study,[43] referred to the Draft Covenant on Civil and Political Rights which reads in its Article 18 (2): "No one shall be subject to coercion which would impair his freedom to *maintain* or to *change* his religion or belief."[44] The same Article of the Covenant, which was adopted in 1966 and entered into force in 1976, was subject to modifications and employs different words; in it, no mention is made of the freedom to "maintain" or to "change" one's religion or belief. It states in its paragraph (2) that "no one shall be subject to coercion which would impair his freedom to *have* or to *adopt* a religion or belief of his choice".[45]

6.4.4 Religious freedom and other freedoms

Analysing the phrase "in community with others" mentioned in Article 18 of the UDHR, Krishnaswami takes the Article to imply other freedoms, such as "freedom of assembly and freedom of association and to organize". Experience has shown that such freedoms have received different treatments where "religion" has been involved from those they have in cases relating to matters other than religion. Krishnaswami suggests that, where religion is involved, since freedom of assembly – which here means gathering for the purpose of conducting religious rituals and teachings – does not conduce to any harm to public security and order, it has been more acceptable to governments than "freedom of association and the right to organize". Conversely, in matters other than religion, governments have been more

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[41] Sullivan, *supra* note 17, at 492–6.

[42] Krishnaswami Study at 16, 20–1.

[43] Krishnaswami's Study was published in 1960, i.e. before the adoption of the Covenant in its final form.

[44] Emphasis added.

[45] Emphasis added.

tolerant towards "freedom of association and the right to organize" than they have towards "freedom of assembly", because they have regarded the former as not involving any activities harmful to the well-being of the government.[46]

Similarly, Mrs Benito claims that the right to religious freedom involves freedom of expression as well as freedom of assembly. A guarantee of the right to religious expression would guarantee other related rights. By contrast, she suggests, any policy of intolerance and discrimination based on religion or belief may violate people's rights to certain freedoms.[47]

van Boven goes even further, linking the guarantee of religious freedom to that of other, related human rights. He asserts that religious freedom cannot be fully protected should the right to freedom of expression or to freedom of assembly be violated.[48]

Thus, what makes the nature of religious freedom complex is that it involves more than one actor and more than one freedom. It involves individuals, religious organs and states. It also involves freedom of expression and freedom of assembly. The enjoyment of religious freedom requires that each of these actors meet certain considerations, be it obligations or respect for others' related rights.[49] In other words, religious freedoms involve the protection of more than one right, and more than one party whose rights are involved.

It is this complex nature of religious freedom which raises some controversial questions, including those relating to a state's obligations. One of these questions relates to whether the right to freedom of religion requires only negative actions on the part of the state (by refraining from any action which would affect a person's religious freedom), or whether a state's duty extends to the enacting of any positive act which would guarantee his right to choose a religion or belief, or which would guarantee the full enjoyment of his right to religious freedom. Another question is, how can a state arbitrate between the different interests involved in such cases, to the effect that none of the interests is preferred over the others?

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[46]Krishnaswami Study at 20–1.

[47]*See* Benito Report at 9, para. 42.

[48]van Boven, *supra* note 4, at 446.

[49]KOSHY, *supra* note 10, at 22.

In order to define a state's obligation (which will be discussed in the next section), it has been necessary to determine the constituents of religious freedom. Although it is generally accepted that the content of the right is, to a large extent, defined in various international human rights instruments, there nevertheless remain some areas of controversy regarding the compatibility of the relevant provisions with some of the world's major legal traditions.

6.5 Religious Freedom and the Obligations on States

In the previous section, an attempt was made to find out what the right to freedom of religion means, or, in other words, what the precise provisions of the right to religious freedom are. It was obvious from the discussion that a state's obligation to protect religious freedom is largely predicated upon the content of that right. The link between these two things is important, and by no means artificial. For unless the content of the right is known, it cannot confidently be asserted that a state has failed to provide its people with guarantees of such a right or protection from violations of it.

It is unfortunately still maintained that the content of the right to freedom of religion is controversial. This question has led to controversy regarding many actions carried out, in the name of religion, by different states and by individuals. Whether these actions on the part of governments or individuals constitute violations of people's rights to religious freedom is still a controversial matter. It is true that both governments and individuals, whether individually or in groups, are held responsible for acts of religious intolerance or discrimination; but by the same token, it can be asserted that governments have a greater responsibility to prevent any policies of intolerance or discrimination, not only because they represent their societies, but also because their influence over educational, religious and other social institutions is greater than individuals'. They can use the influence they have over these institutions, and direct their activities and policies towards eliminating any policy of hatred or religious intolerance and discrimination.

van Boven, however, calls for departure from the traditional or the commonly adopted mechanism with regard to the protection of religious freedom, that is, a state's responsibility for providing such protection. He urges a broader approach, in which non-state actors, such as individuals or groups, would be accountable for any acts of religious intolerance or discrimination. For him, policies of religious discrimination or intolerance are not always enacted by *governments*. They might be enacted by individuals, as well as by other societal organs which might use religion as a means to achieve certain goals.[50]

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[50]van Boven, *supra* note 4, at 446–7.

Article 2 of the Covenant reads as follows:

> 1. 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.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant ...

According the provisions of this Article, States parties are under a general obligation to observe the requirements mentioned therein once this instrument has come into force for them. These obligations are not dependent upon any preconditions, such as the availability of resources.[51]

The obligations a state has "to respect ..." and "to ensure ...", as Article 2 of the Covenant describes it, suggest that a state, besides its obligation not to interfere with people's rights, is under an obligation to take whatever measures are necessary and effective to "ensure" people's enjoyment of their prescribed rights. This it can do by enacting laws and regulations which would prevent any interference on the part of public officials or private individuals with people's manifestation of their rights. In other words, a state is under a positive obligation to take actions to "ensure" the protection and enjoyment of people's rights, including their religious rights.[52]

Protection against violations on the part of private individuals is also provided for by the Declaration on Religion. This is clearly stated in Article 2(1) of the Declaration on Religion, which reads as follows: "... no one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief". Article 2(2) of the Declaration on Religion, which reads as follows – "for the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis" –

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[51]PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 57 (1990); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 72–5 (Louis Henkin ed., 1981).

[52]Buergenthal, *supra* note 51, at 77–8. *See also* FREDE CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 148 (1974).

prohibits any action on the part of the government that amounts to discrimination, irrespective of its "purpose". Thus, even if a government claims that it did not intend to discriminate against a group, the purpose of the government's action can be deduced from the "effect" of such an action.[53]

Article 4 of the Declaration on Religion provides that

> (1) all States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. (2) all States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

A state's obligations, according to this Article, includes, besides the prohibiting of acts of discrimination, the taking of any "preventive measures" necessary to that effect.[54]

Article 7, which states that "the rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice", indicates that states shall give the rights enumerated in the Declaration on Religion domestic legal safeguards by providing them with legislative protection.[55] Such positive action towards a particular religion or religions might result in a problem of excluding other religions from these actions. This problem can be attributed to the impracticality of accommodating conflicting religious demands (e.g. for separate schools or different holidays).[56]

Taken together, these obligations require a state to establish a legal regime which will protect believers from discrimination, including the granting to them of a right to legal action against other individuals who violate their rights. This is a clear indication that a state's obligations with regard to religious freedom are not wholly negative. That is to say, its obligations do not only require that it refrains from any interference with the free exercise of such a right; but also, a state is under an obligation to take positive measures to allow its people to exercise their religious freedoms without any interference, or curtailment.

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[53]Sullivan, *supra* note 17, at 502.

[54]*Id.* at 506.

[55]*Id.* at 488–9.

[56]A. BRADNEY, RELIGIONS, RIGHTS AND LAWS 160 (1993).

6.5.1 The rights of others

Account must be taken of the fact that, when a state takes any positive action to protect the right of an individual to religious freedom, the right of others must be protected and not interfered with. The difficulties emerge where a state needs to meet its conflicting obligations of protecting the religious freedoms of Group A while controlling the religious intolerance of Group B. However the state strikes the balance, it should not violate the other human rights of other group.

6.5.2. The issue of state religion

In discussing the issue of the establishment of a state church or religion, Mrs Benito raised the question of whether the establishment[57] by the state of a state religion amounts to intolerance and discrimination based on religion or belief. She argued that two different views can be discerned. First, the establishment of a state religion will inevitably entail intolerance since one religion or faith would receive official recognition by the state. The other view suggests that the existence of an official state religion does not necessarily lead to intolerance. Tolerance can be guaranteed, her argument goes on, by providing legal safeguards and constitutional protection against any intolerance or discrimination based on religion or belief. It is hard, she asserts, from the data she has collected, to arrive at a sound conclusion on this issue. Nevertheless, she concludes,

> it would appear from these data that practices such as the establishment of a religion or belief by the State in fact amount to certain preferences and privileges being given to the followers of that religion or belief, and, therefore, are discriminatory. While such practices may not *per se* constitute intolerance, they tend to lead various authorities, organizations or groups to claim rights or to take other action which may indeed amount to further and more accentuated discrimination against particular religions or beliefs.[58]

Subscribing to the same view, Krishnaswami argues that the establishment of a state religion does not necessarily lead to discrimination. Looking at the world today, one can point to many countries in which a state religion is established but in which other religions or faiths are still practised and possess equal status. The establishment of a state religion, Krishnaswami maintains, "may today be no more than a mere historic relic".[59] He goes on to assert that even in states where state and religion are separate, the state cannot completely

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[57]The term "establishment" has more than one meaning. In America, at the time the Bill of Rights was being framed, the "establishment" of a religion indicted that there was a policy, on part of the government, of preference or aid giving to a particular religion, whereas in Europe the term"establishment" devoted the establishment of a single religion as the religion of the state. DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 100 (1993).

[58]Benito Report at 20-1, para. 88.

[59]Krishnaswami Study at 46, 47.

isolate itself from the religious affairs of its people. There are some areas in which a state's intervention is needed, especially in cases where the different protected interests of different religions conflict.[60] This latter is very likely to occur, since different religions have different claims to the free exercise of their religious precepts. This adds more difficulty to a government's task in meeting its responsibility to accord equal treatment to these different claims, for merely staying neutral regarding these different religions is not sufficient to avoid discrimination.[61] Thus, the extent to which a state guarantees religious freedom to churches or religions other than the state church is the determining factor regarding whether there is any kind of discrimination or intolerance based on religion or belief.[62]

Problems arise, however, where a state religion exists and, at the same time, no guarantees or protection are provided for the followers of other religions or beliefs. In this case, a state would be performing acts of discrimination against the followers of religions other than the state religion. The same can be said if a state declared itself to be a religious state. If the state required its people to follow the religion of the state and did not guarantee their freedom to choose whatever religion they liked, it would clearly be failing to meet its obligations under international human rights instruments. "Only when public authorities refrain from making any adverse distinctions against, or giving undue preferences to, individuals or groups, will they comply with their duty as concerns non-discrimination."[63]

By contrast, where a government has to exempt, out of religious considerations, a person or a group of persons from a rule of law (e.g. paying tax), its act then undoubtedly amounts to tolerance. But it might amount to discrimination if the government failed to exempt that person or group of persons from other rules of law on other occasions, for instance military service. The same might be said if, for instance, the government did not ensure that a religious group was exempted from a rule of law on the grounds that such an exemption would lead to public disorder.[64]

It is true that "the absence of religious intolerance is conducive to religious liberty but it does not guarantee it".[65] For where discriminatory legislative acts exist, it cannot be taken

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[60] *Id.* at 50.

[61] *Id.* at 48.

[62] KOSHY, *supra* note 10, at 37.

[63] Krishnaswami Study at 20.

[64] BRADNEY, *supra* note 56, at 6–7.

[65] KOSHY, *supra* note 10, at 27.

for granted that the right to religious freedom will not be interfered with. Nevertheless, it cannot be claimed, Krishnaswami asserts, that religious intolerance is always caused by governmental action. It sometimes stems from "social pressures". In this case, government intervention, with the government taking whatever legislative measures are necessary, would be needed to prevent such "pressures" from limiting others' enjoyment of their religious freedoms.[66] In numerous cases, religious intolerance might be caused by the intervention of entities other than governments. Historical and social considerations might account for a government's maltreatment of religious groups within its territories, especially minority religious groups. The government might be forced by such considerations to treat such groups in certain ways, to protect either the interest of the majority of its people or even its own interest in winning the majority's support.

6.6 Permissible Limitations on Religious Freedom

A distinction should be kept in mind between the right to freedom of thought, conscience and religion, on the one hand, and the right to manifest religious freedom, on the other. Throughout all the debates in the Commission on Human Rights concerning Article 18 of the Covenant, it was accepted that the former is "absolute" and "sacred" and should not be subject to limitations of any type. For the right is a personal and internal affair, and, moreover, does not impact on others, and so no interference with it may be justified. The manifesting of religious belief, however, since it involves the external expression of religion or belief, which is commonly understood to be the meaning of religious freedom,[67] should be subject to certain limitations.[68] Thus, unlike the right to freedom of thought, conscience and religion, the right to manifest religious freedom is a "limited" one.[69]

6.6.1 Limitations that are prescribed by law or necessary

Paragraph 3 of Article 18 of the Covenant reads: "Freedom to *manifest*[70] one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to

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[66]Krishnaswami Study at 22.

[67]KOSHY, *supra* note 10, at 100; FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 144 (1975).

[68]BOSSUYT, *supra* note 29, at 355; Partsch, *supra* note 28, at 212; Clark, *supra* note 24, at 215.

[69]THORNBERRY, *supra* note 40, at 161. In this connection, Krishnaswami maintains that "dissemination" is one of the ways in which a religion is manifested. This, he argues, involves two elements, the "substance" of the religion intended to be conveyed and the "method" by which the religion is conveyed. The abuse of each of these two elements, especially the latter one, might lead to public disorder. Thus, laws of blasphemy are generally laid down to counter such unacceptable methods of "disseminating" religions. Krishnaswami Study at 41.

[70]Emphasis added.

protect public safety, order, health, or morals or the fundamental rights and freedoms of others." No mention is made here of any limitations regarding the right to freedom of thought, conscience and religion.[71]

Article 18(3) of the Covenant sets out the areas in which limitations are permissible. A state can impose limitations on a person's freedom to manifest his religion or belief through the process of law and, more importantly, can limit these freedoms where such limitations are necessary to protect "public safety", for example through planning restraints on the building of churches in order to protect the environment. Partsch emphasizes that the "rights of others" that are to be considered in imposing any limitations must be "fundamental", as Article 18(3) makes clear.[72] Koshy, however, draws attention to the fact that the terms "fundamental rights and freedoms of others" and "human rights" may be used interchangeably in both international and regional human rights instruments.[73]

There are limits, however, regarding the state's regulation of, or interference, with religion. The first of these is that the state must not act to violate the human rights, including the religious rights, of others; secondly, that where it has a positive duty, the state must act to prevent interference with religious belief by non-state actors; and third, that it must act without discrimination. For each of these limitations are formal requirements – interferences must be prescribed by law and must be proportionate to the importance of the identified public interest.

According to Krishnaswami, in order to judge correctly whether a restriction imposed by a government upon an individual's freedom to manifest his religion is permissible or not, several considerations must be taken into account:

> ... one has always to consider the particular nature of the manifestation in question, and the number of ways in which faiths may be manifested is particularly limitless. One also has to consider the variety of interpretations which may be given to such terms as those

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[71]Article 29 of the UDHR states in paragraph (2) that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing 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". This, Krishnaswami argues, establishes two conditions which a state must consider in imposing any limitations on the rights mentioned therein. The first of these conditions is that any such limitations should be prescribed by law. The second is that those limitations must serve to safeguard the considerations mentioned in the Article. Krishnaswami Study at 17–18, 29.

[72]Partsch, *supra* note 28, at 212–13.

[73]KOSHY, *supra* note 10, at 101.

> used in article 29 of the Declaration, the just requirements of morality, public order and the general welfare in a democratic society.[74]

6.6.2 *Different interpretations of "public order" and"public morals", and other considerations*

Article 18(3) of the Covenant presents some general considerations upon which such restrictions can be based. It is, however, suspect to different interpretations. "Public order", for instance, is by no means a self-explanatory phrase. For if we look at its counterpart in the French text, that is "la protection de l'ordre", we find it does not have the same meaning. "Public order", if literally translated into French, would be "ordre public," not "la protection de l'ordre". The latter phrase implies that a state can impose limitations on people's rights if this is necessary to prevent "public disorder".[75] Thus, "public order" is broader than "public disorder", and this was a matter for debate among the delegates drafting the provision. While some regarded the phrase "public order" as being so generalized that it would allow for different interpretations and so justify a wider range of restrictions, others preferred a broad phrase, because they thought it might encompass other stipulations such as "public safety".[76]

The term "ordre public" means that all the organs of a state are involved in a general policy whereby, over and above the maintenance of "public order" and "public safety", public welfare is protected through a preserving of the "collective needs" of the society. Such a policy no doubt requires that some restrictions be imposed on the rights of individuals within that society.[77] But it is equally important to assert that the preservation of the individual's human rights is a significant element in the maintenance of public welfare and order. Accordingly, neither human rights nor limitations on them are absolute: that is to say, they cannot be determined in absolute terms, except in cases of flagrant violation such as slavery and genocide where changing times, circumstances or other considerations would not affect the seriousness of the violation.[78]

Like the relevant provisions of the UDHR and the Covenant, Article 1 of the Declaration on Religion contains some broad and elastic terms and phrases, such as "public morals",

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[74]Krishnaswami Study at 29.

[75]Alexander Charles Kiss, *Permissible Limitations on Rights, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290, 299–302 (Louis Henkin ed., 1981).

[76]*Id.*

[77]*Id.*

[78]*Id.*

"public protection" and "fundamental rights and freedoms of others", that are vulnerable to different interpretations and understandings. "Public morals", for instance, is by no means an agreed-upon concept. Thus the stipulation might be abused by some countries, or by a majority in a country, to justify their malpractice with regard to the protection of religious freedom, or human rights in general, out of a pretence that these expressions are contrary to public morals. This eventually might lead to violations of other rights as well, such as freedom of expression and opinion. This situation forces us to consider the important question of who is to decide in such matters. Who should we look to if it comes to defining "morals", for instance, in a given country, and who in that country is to decide whether or not an action is contrary to "public morals"? States, individuals and religious groups are all involved. In states where there is an established church the issue might be somewhat less problematic. In such states, where there exists a fixed relationship between the government and the church, the authorities possess some power to decide on certain matters, including some religious matters.[79]

The loose usage of the terms and phrases mentioned in the international human rights instruments is more than a mere matter of terminology; it leads to a loose understanding of the real meaning of such terms and phrases, but one which is pursuant to the general purposes and objectives of such instruments. This, it can be argued, can seriously weaken the practical force of such instruments when applied in the domestic sphere. However, the language of human rights instruments is necessarily general, and considerable powers are vested in the bodies charged with interpreting them. Furthermore, the ways in which the standards are expressed are not uniform. There is more scope in some provisions than in others for the interpreter to accommodate different approaches by states.

However, even if international understanding of human rights standards is limited, there are other agreements which attempt to supply some of the missing detail in the general standards, for example the Conventions on Racial Discrimination and on Women and the Torture Convention. The more precise the standard, the more difficult it is to allow cultural differences to be accommodated to it. In some cases, specific, strongly-felt positions may be protected by making reservations to the treaties. Beyond this, we must be prepared for some incompatibility between two *a priori* systems: international human rights and regional or national religious or cultural beliefs.

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[79]Krishnaswami Study at 49.

6.7 Principles of Interpretation

Because the principles of human rights are "themselves embedded in a particular cultural tradition – that of Western natural law and of secular liberalism" – they are *"unintelligible* unless they are interpreted in terms of the different cultures that are the sources of social meaning for the diverse peoples of the world".[80] Therefore, different interpretations of universal human rights in general, and of more specific rights such as religion in particular, are inevitable. As Freeman says, it is "[t]he cultural variability of human nature [that] not only permits, but requires significant allowance for cross-cultural variations of human rights".[81] The universality of the principles of international human rights, which the Vienna Conference of 1993 reaffirmed, is not seriously disputed. Rather, what has been challenged is the construing of such principles as universal and applicable to different cultures and traditions. That the same human rights norms may have different meanings is only to be expected, even in one region or in one country at different times. Therefore, as Freeman indicates, it is "a logical case that the meaning of universal human rights principles can be determined only by their interpretation, and that interpretation is a cultural practice".[82]

According to Jacobs, there are three basic approaches to the interpretation of international instruments. These are the subjective approach, the textual approach and the teleological approach. According to the subjective approach, interpretation of a treaty should be undertaken by reference to the intention of the States parties to a treaty at the time of its conclusion. Interpretation of the provisions of the treaty should be in accordance with this intention. By contrast, the textual approach dictates that a treaty should be interpreted by explaining the meaning of the words in it. Finally, the teleological approach to interpretation requires that, first of all, the general purpose and objects of the treaty should be defined, and then that the particular provision of the treaty should be interpreted so that these

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[80]Michael Freeman, *Human Rights and Real Cultures: Towards A Dialogue on 'Asian Values'*, 16 NETH. Q. HUM. RTS. 25, 27 (1998).

[81]*Id.*

[82]*Id.* Freeman argues however, that, although it is logical to accept different interpretations of human rights principles in accordance with different cultural values, the question of who is to determine or interpret these values is at stake. It is difficult, he maintains, to determine who is competent to interpret the different cultural values of the world. Governments are not morally competent to carry out this task because they do not in reality represent the cultures of their people. This argument is based on a definition of culture as "the beliefs, values, norms, sentiments, and practices that give meaning and ... value to human lives". As such, culture can be interpreted by those who "believe the beliefs, value the values, feel the sentiments and practise the norms, and who must live the consequences of their interpretations". This, Freeman argues, is the "real culture", which must be distinguished from the culture which governments *represent* to outsiders. *Id.* at 29–30.

purposes and objectives are met. This approach represents, according to Jacobs, a combination of the first two approaches.[83]

However general the terms mentioned in the limitation clauses of the human rights instruments, and to whatever extent they are vulnerable to different interpretations, one must, so Kiss suggests, consider certain factors in interpreting such terms. First, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[84] treaties should in general be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[85] Secondly, "preparatory work" might be referred to to arrive at the "ordinary meaning" of certain terms. Finally, recourse might be made to other instruments, which contain similar terms, with like objectives. This is so because there are other international, and also regional, human rights instruments within which similar terms and phrases to those of the Covenant may be found. Thus it is relevant to refer to those instruments in order to determine the meaning of terms such as "public order", "public safety", etc.[86]

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[83]Francis G. Jacobs, *Varieties of Approaches to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q 318, 318–20 (1969).

[84]Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969), entered into force 27 January 1980. Article 31 of the Convention reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties ...

4. A special meaning shall be given to a term if it is established that the parties so intended.

[85]Paragraphs 2 and 3 of the Article include "six matters which either are included in the context or are to be considered together with the context, namely (i) the preamble and the annexes; (ii) an agreement made in connection with the conclusion of the treaty; (iii) an instrument made by one or more parties and accepted by the others as related to the treaty; (iv) a subsequent agreement regarding the interpretation of the treaty or its application; (v) subsequent practice; and (vi) rules of international law". C. F. Amerasinghe, *Interpretation of Text in Open International Organizations*, 65 BRIT. Y.B. Int'l L. 175, 191 (1994).

[86]Kiss, *supra* note 75, at 294.

Kiss stresses that it should be borne in mind, when interpreting the "public morals" phrases in the Covenant, that the issue cannot be decided only by legal acts, for it is predicated on the opinion of the majority of the people in a given state. Thus, it is each state's responsibility to ensure the protection of the rights mentioned therein for its people and, accordingly, issues such as "public morals" are within that state's authority to determine.[87] In general, it is for each State party to decide for itself what a particular provision of the Covenant means, how such a provision should be interpreted, and what limitations should be placed on a right. These, of course, cannot be said to be absolute. They must be in conformity with the Covenant, that is, they must not contradict the general purposes and objects of the Covenant. Thus it is important, in order to secure such conformity, to subject such states' powers to international "supervisory organs".[88]

6.8 Concluding Remarks

Commenting on the provisions of the Declaration on Religion, Sullivan argues that the document, in dealing with freedom of religion, takes into consideration only religion in its Western context, of which the main characteristic is the separation of Church and State. This doctrine, she argues, although it is widely accepted in Western societies, might be the cause of many conflicts.[89] This is not an academic statement devoid of any practical significance. The purpose of the statement is to make explicit the fact that agreement cannot be achieved in the matter of religion unless real consideration is given to all the different major religions and faiths in any endeavour to reduce conflicts arising therefrom. Unless it is realized that there are cultural differences with regard to the context and concept of religion, conflicts relating to religious freedom will be insoluble.

It is not irrelevant here to consider the interpretations given to those terms, especially the term "morals", by States parties to international human rights instruments. As is frequently argued, differences in such matters are very likely. The general language in which these instruments are phrased might well serve to accommodate those differences, in such a way

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[87] *Id* at 304. For a discussion of the remedial measures (legal and non-legal) to be taken in order to encounter practices of intolerance or religious discrimination *see* BAHYYIH TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION (1996). As far as non-legal remedies are concerned, Tahzib argues that, since the problem of religious intolerance cannot be resolved only by legal measures, efforts should be directed towards educational systems by which more understanding of human rights and fundamental freedoms can be developed. In addition, dialogue between different religions and faiths may well contribute to the elimination of misunderstanding among those different religions. *Id.* at 34–49.

[88] Kiss, *supra* note 75, at 294.

[89] Sullivan, *supra* note 17, at 490.

that the purpose of having such instruments is preserved. In this connection, Evans argues that, so far as Article 18 of the UDHR is concerned, which deals with the right to religious freedom, "[i]f the adoption of the text proved to be comparatively unproblematic, this reflected a willingness to compromise, rather than a common understanding of what was embraced by such a right".[90]

As was indicated earlier in this chapter, cultural differences and religious rationales might be abused by some States parties in order to justify some human rights violations committed in their territories. Thus it is important, before judging in such cases, to first examine whether the actions of a government carried out in the name of religion, but considered to represent violations of human rights, are in fact required by the teachings of religion, and then to examine whether these actions are in violation of human rights standards. In the next chapter, an examination of some of the initial reports submitted by some Muslim countries to the HRC will be undertaken, in order to examine these states' practices regarding the interpretation of international human rights standards.

90MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 183 (1997).

CHAPTER 7

RELIGIOUS FREEDOM AND STATES' OBLIGATIONS UNDER ARTICLE 40 OF THE COVENANT

7.1 Introductory Remarks

As was shown in the two preceding chapters, States parties to the UN have accepted a general set of obligations by signing the Charter of the UN, as well as the obligations specified by other international human rights instruments, which themselves may be regarded either as interpretations of the Charter or as elaborations or explanations of the human rights provisions of the Charter. However, it is wrong to assert that there could be a definite interpretation of the human rights provisions of the UN Charter or other international human rights instruments. It is questionable, at least in theory, to conclude that some phrases or words, such as public order, public safety, morals, etc., have definite interpretations for different member states of the United Nations.

The most commonly asked questions in this context are what phrases such as "public order", "public safety", "public morals", "respect for the liberty of parents", etc. mean, whether there is an authority which is competent to decide what they imply and to what extent can it impose limitations on states in their endeavour to interpret such phrases or provisions. We are chiefly concerned in the present analysis with the impact of cultural differences on the interpretation of such phrases, and with the extent to which these interpretations can proceed in this context. In other words, is there any limit for such interpretations to be confined within? Before engaging in any discussion relating to these inquiries, it is of the utmost importance to note that there is inevitably a challenge involved in striking a fair balance between international human rights provisions on the one hand and, on the other, all the different cultures. The increase in the number of nation-states has brought a concomitant increase in cultures and legal systems. Of course, deciding how to measure the differences is half the battle.

If it is the case that Articles 55 and 56 of the Charter have been interpreted, in the practice of the UN, to establish that states have an obligation not to engage in gross and flagrant violations of human rights and that the organs of the UN are competent to investigate whether there is evidence of such a practice in a state and to make appropriate

recommendations if there is, then it is necessary to look at the practice of the UN organs,[1] particularly the Human Rights Committee (hereinafter the Committee), to ascertain what kinds of situation have been regarded as violations of these standards, and to examine the explanations provided by States parties in justifying their actions regarding human rights. As was explained earlier, States parties to the UN are under an obligation to respect human rights by virtue of their signing the UN Charter or ratifying human rights instruments. In this chapter, a discussion will be presented of the obligations the States parties to the ICCPR have under Article 40 of the Covenant in the process of implementing or observing their obligations in relation to the rights enumerated in the Covenant. Religious freedom will be discussed in this chapter as an example of a right which is interpreted differently so that, as a consequence, the obligations assumed by such a right varies in accordance with the interpretation given of it.

Two different, though often concurrent, explanations may account for violations of human rights. The first occurs at the level of principle. Here the state adopts a policy which is seriously incompatible with its human rights obligations under the Charter. Examples would be apartheid or genocide. No matter how the policies are implemented, or how acquiescent the population may be to having them imposed upon it, a state which engaged in such a policy would violate its obligations under the Charter. One question to be considered here is whether any "cultural" policy would be similarly vulnerable: are there any systems of religious belief or traditional practices which are inherently incompatible with certain obligations imposed by the Charter?

The second explanation is that occurring at the level of practice. Here the regime is keeping itself in power by systematic practices which violate the Charter obligations. This may or may not be related to the implementation of a policy which is itself incompatible with human rights, such as apartheid, though the policy may be, as was the case with South Africa's internal security policies, directed against those who are opposed to apartheid. In the following pages an investigation will be made of the initial reports submitted by a

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[1]With regard to the practice of the UN Human Rights Commission, "[u]ntil 1974 only the policy of apartheid and human rights violations in the Israeli occupied Arab territories were considered as gross violations, whereas references to other situations were regarded as interference with internal affairs in contravention of Article 2(7) of the Charter. With the 1974 decision to send a telegram to the Pincochet Government and the appointment, in 1975, of an Ad Hoc Working Group to study human rights violations in Chile [footnote omitted] the [UN Human Rights] Commission for the first time targeted a country where human rights violations, although of an extremely serious nature, obviously did not endanger international peace and security." M. Nowak, *Country-Oriented Human Rights Protection by the UN Commission on Human Rights and Its Sub-Commission*, 22 NETH. Y.B. INT'L L. 39, 40 (1991).

number of Muslim countries[2] to the Committee. We shall be concerned mainly with the right to freedom of religion, with which the Committee has been concerned and which it believed has not been properly protected and recognized by those states. More importantly, the study will present the justifications these states have given in reply to the Committee's expressions of concern regarding the status of the above-mentioned right in these countries. This it will do by, first, presenting the Islamic viewpoint regarding the right to religious freedom and, secondly, by examining whether or not such justifications are in conformity with Islamic law. A firm distinction must, of course, be made between what Islamic law in fact conceives as a right and what these states claim is in accordance with Islamic law. Many of the human rights violations committed in Muslim states are due to political, traditional, tribal and cultural considerations and factors rather than due to Islamic precepts. This must be kept in mind if we are correctly to appraise the implementation of human rights standards in Muslim countries.

7.2 States' Obligations under Article 40 of the Covenant

In examining the functions of the Committee, because of the lack of any enforcement measures by any of the UN organs with regard to human rights issues (except in some cases where the Security Council operates to protect international peace and security) Opsahl prefers to describe the functions of the Committee as "monitoring" rather than as "enforcing", "supervising" or "protecting" the implementation of the rights provided for by the Covenant.[3] Since the purpose of the Covenant is to promote and protect the rights it embodies, and because the first step in that process is national implementation, the role envisaged for the Committee in this respect is "a central one in so far as one accepts the assumption that effective national implementation requires a degree of international accountability".[4]

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[2]Of particular importance here is the distinction made by Professor Bassiouni between "Muslim State" and "Islamic State". Bassiouni suggests that "Muslim state means a state in which there is a Muslim majority or a government representing a Muslim majority. Islamic state refers to a form of government wherein the conduct of all aspects of human endeavor and law is subject to Islamic law, *i.e Shari'a.*" M. C. Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 3, 3 n.3 (M. Cherif Bassiouni ed., 1982).

[3]Torkel Opsahl, *The Human Rights Committee, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 367, 370 (Philip Alston ed., 1992).

[4]*Id.* at 370–1. *See also* A. H. ROBERTSON AND J. G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 41 (1993).

In accordance with Article 40(1) of the International Covenant on Civil and Political Rights of 1966,[5] "States parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights ...". This undertaking is seen as "the first test of the State Party's commitment" to observe its obligations under the Covenant.[6] Article 40(2) illustrates further the content of the States parties' undertakings under the Covenant. It dictates that the reports "shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant".[7]

The Committee, pursuant to the same Article, "shall study the reports submitted by the states parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the states parties ... ."[8] This measure serves to grant the States parties to the Covenant an opportunity to study and reply to the concerns and comments expressed by the Committee in relation to the human rights situation in their respective countries and, more importantly, to justify any practices of theirs that are deemed by the Committee to be in violation of their undertakings under the Covenant.[9]

7.3 Justifications under Article 4 of the Covenant

Article 4 of the Covenant allows States parties, under certain circumstances and subject to certain conditions, to derogate from some of the obligations they have accepted by ratifying or acceding to the Covenant. The Article reads:

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[5]The International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976. Hereinafter the Covenant.

[6]Opsahl, *supra* note 3, at 398. In this connection, *see* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1996), where the author envisages submitting the reports to the HRC as "the only obligation which States parties to the ICCPR assume, *ipso facto*, on ratification or accession". *Id.* at 62. *See also* Kamleshwar Das, *United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms, in* THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS VOL.1 303, 331 (Karl Vasak and Philip Alston eds., 1982).

[7]Opsahl, *supra* note 3, at 400; B. G. Ramcharan, *Implementing the International Covenants on Human Rights, in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 159, 177–8 (B. G. Ramcharan ed., 1979).

[8]Article 40(4), ICCPR. For a more detailed history and functions of the Human Rights Committee, *see* MCGOLDRICK, *supra* note 6; Opsahl, *supra* note 3.

[9]Generally speaking, States parties' responses to allegations of human rights violations, particularly where they deny such violations, might be in one of the following forms: "literal denial (nothing happened); interpretive denial (what happened is really something else); and implicatory denial (what happened is justified)". Stanley Cohen, *Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims*, 18 HUM. RTS. Q. 517, 522 (1996).

> 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 derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

The key issue in this Article is "public emergency", upon which States parties must base any derogation of any of the rights provided for by the Covenant except those mentioned in paragraph 2 of the Article. The Committee has not provided a definition of "public emergency", nor has it set out criteria for determining the existence of a state of public emergency or situations which might justify the proclamation of a public emergency.[10] On a number of occasions, some members of the Committee have suggested that this attitude has given the States parties leeway to determine what situations allow for derogations justifiable under Article 4, and that this practice by the parties amounts to an act of sovereignty.[11] However, the focus has been on "attempting to determine the precise legal effect of the different forms and degrees of public emergency encountered by the HRC, for example, state of siege, state of alarm, economic state of emergency, state of war, state of national necessity".[12]

One common justification some Muslim countries included in their reports to the Committee is that the country had been affected by the political situation in the region and by aggressive "policies of world zionism and imperialism". This situation necessitated, according to the Syrian delegate to the Committee who presented this argument, certain counter-policies to be adopted in order to face outside threats. This ultimately led the

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[10]MCGOLDRICK, *supra* note 6, at 302–3; JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 100 (1994). Generally, public emergency might be caused by the case of under-development, "earthquakes, famines, fires, floods and other 'natural' catastrophes ... internal disturbances and armed conflicts". Stephen P. Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts, in* THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS VOL.1 175, 176 (Karl Vasak and Philip Alston eds., 1982).

[11]MCGOLDRICK, *supra* note 6, at 305.

[12]*Id.* at 303. Footnotes omitted.

country to impose some internal social and economic limitations on some of the rights of its own people.[13]

Using the same justification, the Jordanian delegate to the Committee stated that the creation of Israel in the region has negatively affected the natural development of the countries of the region in general. Their economic, political and social development had been hindered by the state of war which followed the creation of Israel. This situation had led his government to curtail its people's enjoyment of some of their human rights.[14]

These two arguments are to be viewed within the context of Article 4 of the Covenant. It should be borne in mind that a state of public disorder caused by acts of internal violence carried out by individuals or groups does not necessitate military action on the part of the public authorities: that is, such acts do not threaten the life of the nation, and so do not fall within the permissible justification for derogation under the Article.[15] However, the general criterion which justifies derogations from applicable rules is whether the internal disorder or disturbance constitutes a real threat to the life of the nation. In such cases, the rules governing the international instruments concerned provide for exceptional measures to be taken by the state concerned.[16] Thus, if the states concerned could justify their belief that the creation of Israel has generated internal disturbance which, in turn, has threatened the life of those nations, then it is a legitimate justification for those states to resort to derogations from some of the rights provided for by the Covenant.

On the other hand, religious considerations have always been a significant factor in the observation and implementation of the provisions of the Covenant, especially with regard to articles such as Article 3. The Committee has to take this factor into consideration when examining the reports of Muslim countries.[17]

In some cases, however, Islam may be used improperly to justify political actions. In this connection, Mr Dieye, a Committee member, has commented:

> ... in Iran Islam was invoked to justify the revolutionary situation and said that as a practicing Muslim he believed that religion should not enter into the application of the

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[13]Miss. Fadli, Syria, CCPR/C/SR.26.

[14]CCPR/C/1/Add.55.

[15]Marks, *supra* note 10, at 192.

[16]*Id.*

[17]Mr Prado Vallejo, CCPR/C/SR.103.

> Covenant. Islam was undoubtedly a comprehensive religion governing all human activities but religion had to be set aside when a country acceded to an international instrument. He regretted that a religion as pure as Islam was being misrepresented and that the impression was being given that Islam was not adapted to the twentieth century.[18]

Another popular argument is that presented by Mr Abdel Samie, the Sudanese delegate to the Committee, when he maintained that the Government of his country admited to inefficiency and ineffectiveness with regard to some human rights regulations. He noted, however, that some governments and international organizations had focused on the issue of human rights in determining their relations with the Sudanese government. It was inappropriate, he argues, to involve such an issue in inter-state relations. Moreover, he went on, it was contrary to the principle of free choice which states possess in order to define their own way of life according to their own customs and traditions, which they deem to be the core justification for their existence, to impose upon them values and precepts that are in apparent contradiction to their fundamental principles and values. It is idle to request that changes be made to the penal code of a country merely because others consider that such a code contains some cruel or inhuman punishments, for the provisions of the penal code constitute an integral part of a whole system which the people of Sudan adhere to, that is, the Islamic system. It is worth noting here that non-Muslims are not subject to the Islamic criminal system.[19]

Let us now turn to the right we are concerned with here, namely the right to freedom of religion, and focus more attention on the expressions of the Committee in this regard while at the same time presenting the justifications the Muslim States parties concerned have offered for their behaviour in this area.

7.4 Particular States' Practices Regarding Freedom of Religion

The previous chapter demonstrated how the right to freedom of religion involves a number of issues that render the right a complex one. The difficulties involved in such an issue relate, first of all, to "religion" itself and, further, to the provisions, embodied in international documents, which provide for such a right, which are vulnerable to different interpretations and understandings. Such differences reflect different possible understandings of phrases such as "public order", "morals" and so on, different attitudes

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[18]CCPR/C/SR.365. *See also* Abdullahi A. An-Na'im, *Islamic Law and Human Rights Today*, 10 INTERIGHTS BULL. 3 (1996), where the author opines that "it is the revolutionary more than the Islamic nature of the regime that better explains the type and degree of human rights violations in Iran since 1979". *Id.* at 6, n.2.

[19]CCPR/C/SR.1067.

towards the concept of rights, or different feelings regarding individual freedom and the public interest in the society in question. It is impossible or, to say the least, very difficult to determine with absolute certainty the meaning of such phrases. Therefore, examination of states' practice and the Committee's attitude towards such differences is particularly helpful in solving some of the problems involved aiming eventually at minimizing these differences.

It is, therefore, relevant to note that, in the initial reports submitted to the Committee, such phrases are frequently used by States parties to justify the status of particular human rights in their countries. For instance, Mr Rashid, the Iraqi delegate, in reply to questions presented by the Committee, maintained that religious freedom, like other freedoms, should be subject to certain limitations which are necessary in order to preserve public order. It was not conceivable that such a right should be unregulated to the extent that enjoyment of it, without restrictions, might lead to disturbance and to public disorder. Religious freedom is guaranteed under the Iraqi constitution, Article 25 of which provides that "freedom of conscience, belief and religious observance shall be guaranteed, subject to the provisions of the Constitution and the law and the requirements of public order and morality". Rashid argued, however, that as a country based on ancient civilization and culture Iraqi society possesses distinguishing characteristics such that the meaning of "public order" in Iraq may differ from the meaning it has for other societies. As a result an individual who exercises this right should take into account the social considerations prevailing in this country so that public order will not be disturbed.[20]

According to another argument, presented by the Jordanian delegate, under Article 15(1) of the Jordanian constitution religious freedom is guaranteed for all people, who have the right to manifest their beliefs but only in accordance with the "law of the land".[21] Article 14 of the Constitution provides that the state shall ensure the free exercise of all forms of worship and religious rites in accordance with the custom observed in the Kingdom, subject only to the maintenance of public order and morality.[22] Mr Tomuschat, commenting on the report (CCPR/C/1/Add.24) submitted by Jordan, stated that the report contained several limitations with regard to particular rights enumerated in the Constitution. We need to ascertain to what extent these restrictions curtail religious rights, and whether the

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[20]CCPR/C/SR.748.

[21]CCPR/C/1/Add.55.

[22]CCPR/C/1/Add.24.

restrictions are justified in the sense that they are essential for the maintenance of public order and morality.[23]

Mr Tarnopolsky, a Committee member, referred to a number of exceptions that the Covenant presented regarding certain rights and suggested that it is appropriate to ascertain the extent to which each country has applied these exceptions. Since these exceptions are nowhere precisely defined in the Covenant it is vital, in order to inspect the degree to which a state confers the rights on its citizens, to look at that state's application of those exceptions. Restrictions such as those imposed by a State party on certain rights, on the basis of "public order" and "national security" are, in fact, subject to different interpretations depending on the general situation applying in the country. They may have a particular meaning for one country and a quite different meaning for another.[24]

In some instances, it is alleged that interpretation by the Committee of a protected right may be wrong. For instance, Mr Khosroshahi, the Iranian delegate to the Committee, in clarifying his government's position regarding religious freedom, states that most of the accusations of the Committee members are groundless. With regard to the situation of the Baha'is, all allegations that the Baha'is are being persecuted and denied their religious rights are baseless. The small number of Baha'is who have been persecuted indicates that they are not being treated in a different way from other religious groups. Moreover, those Baha'is who have been executed were not punished for their religious beliefs. Rather, they were punished for their destructive political activities and their affiliation to prohibited political movements. There are about 70,000 Baha'is in Iran, who possess rights to practise their religion without any interference on the part of the government.[25] Obviously, this is a claim made on the basis of facts not of the law: facts which, according to the Iranian delegate, bear witness that the Committee's assessment of the Baha'is' status in Iran was incorrect.

Thus the attitude of Muslim states towards the concerns expressed by the Committee has ranged from admitting the existence of violations of religious freedom, but arguing that these violations are grounded in the preservation of public order and public morality, to denying the existence of such violations and arguing that the Committee's assessment of the situation was incorrect or misconceived. Again, we face here the question of who decides

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[23]CCPR/C/SR.103.

[24]*Id.*

[25]CCPR/C/SR.368.

whether these justifications are legitimate under the Covenant and what the effect is of the Committee's conclusions about the reports submitted. In the following section, a discussion of the right to freedom of religious expression in accordance with Islamic law will be presented in order to explain the nature of the right in Islamic law and to examine the legitimacy of the claims made by many Muslim countries that their practices are required by, or in conformity with, the rules of Islamic law. This discussion, in treating the issue of apostasy in Islamic law, will offer a clear conception of religious freedom, one involving the right of everyone to change his religion, which is provided for by Article 18 of the UDHR.

7.5 Islam and Freedom of Religion

The right to freedom of religion is protected by Islamic law in three ways: the prohibition of compulsion in the matter of religion; the requirement that a person uses his or her intellect and thought in choosing a religion; and the requirement that a Muslim must refrain from aggressive means when he or she is involved in discussion with the followers of other religions.[26]

As regards the first of these, in total conformity with Article 18 of the Covenant, freedom of religion is protected and guaranteed in numerous places in the Qur'an. Article 18(2) of the Covenant states that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice". Similarly, the Qur'an clearly declares: "Let there be no *compulsion* in religion: truth stands out clear from error: whoever rejects evil and believes in God hath grasped the most trustworthy hand-hold, that never breaks. And God heareth and knoweth all things."[27] Moreover, it states: "Say, The truth is from your Lord": *Let him* who will, believe, and *let him* who will, reject it."[28] "If it had been thy Lord's Will, they would all have believed – all who are on earth! Wilt thou then compel mankind, against their will, to believe? No soul can believe, except by the Will of

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[26]A. M. al-Far, *lamahat 'an Huqooq al-Insan fi al-Islam, in* HUQOOQ AL-INSAN 59-60 (M. Cherif Bassiouni et al. eds., 1989). *See also* ABD AL-QADIR ODEA, AL-TASHRI' AL-JINA'I AL-ISLAMI VOL.1, 31–3 (1985); RASHID AL-GHANNOSHI, AL-HURIYYAT AL-'AMMAH FI AL-DAWLAH AL-ISLAMIYYA 44–8 (1993); MOHAMMED ABU ZAHRA, AL-ILAQAT AL-DAWLIYYA FI AL-ISLAM 28 (n.d.); MOHAMMED AL-GHAZALI, HUQOOQ AL-INSAN BAYN TA'ALIM AL-ISLAM WA I'ILAN AL-UMAM AL-MUTTAHIDDAH 84–7 (1984).

[27]QUR'AN II:256. Similarly, Article XIII of the Universal Islamic Declaration of Human Rights (UIDHR) of 19 September 1981 provides for the right to freedom of religion. It reads as follows: "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs".

[28]QUR'AN XVIII:29.

God, and He will place doubt (or obscurity) on those who will not understand."[29] This latter verse indicates that conscience is a matter of personal disposition. That is, it is not for any human authority to compel any person to believe in or adopt a faith contrary to his own conscience and conviction. It is only for God, as the provider of universal guidance (parallel with conscience in Western thought) to determine how people, who are given by God the ability to distinguish between good and evil, should choose their religions or faiths. In other words, it is only God who "grants or withholds the gift of faith, either making the heart (or 'conscience') receptive, or hardening it".[30] Thus the argument that the above-quoted passages from the Qur'an suggest that there is only one true religion does not hold firm. For it is true that they make such an affirmation, but nevertheless they do not suggest that people are or should be compelled to adopt or follow such a religion. Rather, people, being intellectually capable, are free to chose between this religion, which is conceived of by the Qur'an as the true religion, and other religions. It is entirely a matter of personal choice, which must not be affected by any compulsory measures, such as the threat of violence or persecution.

The second means by which religious freedom is protected is that, according to Islam, a person is instructed to use his mind and intellect in choosing a religion or faith and not to imitate others. The Qur'an clearly states:

> Behold! In the creation of the heavens and the earth; in the creation of the night and the day; in the sailing of the ships through the ocean for the profit of mankind; in the rain which God sends down from the skies; and the life which He gives therewith to an earth that is dead; in the beasts of all kinds that He scatters through the earth; in the change of the winds, and the clouds which they trail like their slaves between the sky and the earth; here indeed are signs for a people that are wise.[31]

And again:

> When it is said to them: follow what God hath revealed: they say: nay! we shall follow the ways of our fathers. What! even though their fathers were void of wisdom and guidance? The parable of those who reject the faith is as if one were to shout like a goat-herd to things that listen to nothing but calls and cries: deaf, dumb, and blind, they are void of wisdom.[32]

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[29]QUR'AN X:99–100.

[30]David Little et al., *Human Rights and the World's Religions: Christianity, Islam, and Religious Liberty, in* RELIGIOUS DIVERSITY AND HUMAN RIGHTS 213, 232–3 (Irene Bloom et al. eds., 1996).

[31]QUR'AN II:164.

[32]QUR'AN II:170–1.

Finally, religious freedom is guaranteed in Islam through the fact that any argumentation or dialogue regarding religion should be conducted via intellectual discussion in which each party can present its facts such that the other party or parties must be completely at liberty to accept them or otherwise. Islam is a system of belief that rests upon complete conviction and coherency of intellectual thinking concerning its teachings and creeds. Such conviction and satisfaction must willingly and intentionally lead to the embracing of Islam. Throughout its history, Islam has not departed from this theory. Its methodology has been intellectual argument and peaceful presentation to all mankind.[33] Compulsion and violence have never been its way.[34] In this regard, the Qur'an states:

> Now then call them to the faith, And stand steadfast as thou art commanded, Nor follow thou their vain Desires; but say: I believe in the Book which God has sent down; And I am commanded to judge justly between you. God is our Lord and your Lord: for us our deeds, and for you your deeds. There is no contention between us and you. God will bring us together, and to Him is our final goal.[35]

The Qur'an also specifies the way in which Muslims should respond to any dispute or dialogue regarding their religion, in stating:

> So if they dispute with thee, say: I have submitted my whole self to God and so have those who follow me. And say to the people of the Book and to those who are unlearned: Do ye also submit yourselves? If they do, they are in right guidance. But if they turn back, thy duty is to convey the message; and in God's sight are all His servants.[36]

To the same effect the Qur'an also states:

> And dispute ye not with the People of the Book, except with means better than mere disputation, unless it be with those of them who inflict wrong and injury: But say, We believe in the revelation which has come down to us and in that which came down to you, our God and your God is one; and it is to Him we bow in Islam.[37]

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[33]AL-GHAZALI, *supra* note 26, at 80–3.

[34]Much disparity might be noticed between this tolerant view of religious freedom and the concept of *jihad*. This confusion might be caused by the misconceptions or misunderstanding expressed by some commentators regarding *jihad*. *See, e.g.*, Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 210 (1990). An authentic interpretation of *jihad*, in which all the different interpretations and viewpoints are taken into consideration, is presented by Mahmassani when he concludes that, according to Islamic law, *jihad* has always been resorted to as a defensive or a protective measure in one of the following cases: the protection of religious freedom; the protection of public order; defence against external aggression; and prevention of injustice. SOBHI MAHMASSANI, AL-QANOON WA AL-ILAQAT AL-DAWLIYYA FI AL-ISLAM 180 (1982). For a detailed conception of *jihad*, *see* MOHAMMED ELLAFI, NADHARAT FI AHKAM AL-HARB WA AL-SELM: DIRASAH MOQARANNAH 53–79 (1989).

[35]QUR'AN XLII:15.

[36]QUR'AN III:20.

[37]QUR'AN XXIX:46.

Furthermore, Islam orders its followers to respect other religions and to believe in the religions that have been revealed to Moses and Jesus. For it is an essential part of a Muslim's faith to believe in other Messengers of Allah. The Qur'an states: "Say ye: We believe in God, and the revelation given to us, and to Abraham, Isma'il, Isaac, Jacob, and the Tribes, and that given to Moses and Jesus, and that given to all Prophets from their Lord: We make no difference between one and another of them: and we bow to God in Islam."[38]

In this connection, Miss Fadli, the Syrian delegate to the Committee, points out that Syria and the Middle East region in general have been the place from which the three major religions have emerged. Islam, Christianity and Judaism have been, and still are being, practised freely and possess the respect of all peoples.[39]

Article 35 of the Syrian Constitution makes the following provisions:

> 1. Freedom of belief is inviolable. The State respects all religions.
> 2. The State guarantees freedom to engage in all forms of worship provided they do not disturb the public order.[40]

The Syrian delegate also argues that his government "distinguishes between religion and political movements and racist ideologies which had nothing to do with religion".[41] This statement invites some legitimate questions. Is Islam viewed as a religion that is concerned only with the relationship between the individual and his creator? Is it a religion that has nothing to do with political or public affairs? Does the Islamic state separate religion and government affairs?

It has been demonstrated earlier in this study that Islam makes no separation between religion and the state.[42] "Islam is not only a faith or worshipping, nor is it only a set of moral values, nor a set of rules and regulations. It is a combination of all of these elements."[43] Viewed from this perspective, it is clear that such a statement as that made by

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[38]QUR'AN II:136. "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". Article XII(e), UIDHR.

[39]CCPR/C/SR.26.

[40]CCPR/C/1/Add.1/Rev.1.

[41]CCPR/C/SR.26.

[42]*See supra* pp. 51–4.

[43]ISMA'IL AL-KILANI, FASL AL-DEEN 'AN AL-DAWLAH 56 (1987).

the Syrian delegate does not correctly reflect the Islamic viewpoint regarding the relation between religion and politics. Her statement certainly allows two different interpretations. First, there could be misunderstanding on the part of the Syrian government as to what constitutes the Islamic perspective with regard to the relationship between religion and the government. The specification of such a relationship is, no doubt, significant for the recognition of the status of a right such as freedom of religion and the protection provided for that right. Secondly, it may be that the Syrian government resorted to such a policy in order to justify some of its practices concerning particular groups – religious or political – and the protection of their human rights in the country.

So far as the relationship of the Islamic state to other religions or religious groups is concerned, the Islamic state is obliged to respect all religions without discrimination. The followers of any religion, particularly the People of the Book, that is, Christians and Jews, are entitled to possess their own schools and places of worship. They have the right to practise their rites freely, to worship in their churches and temples, and to express their beliefs publicly.[44] All these rights, however, are subject to considerations of public order and safety.[45] Al-Ghannoshi presents a legitimate response to those who do not subscribe to the view that non-Muslims in the Islamic state have the right to talk publicly and write about their religion because their activities might affect the faith of some Muslims. He argues that Muslims cannot deprive others of their rights for this reason. They can counter the consequences of such activities on the part of non-Muslims by improving their faith in and understanding of Islam so that no such activities will affect their conviction, so long as all these activities come within the confines of public order and safety.[46]

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[44]In this connection the Qur'an states: "They are those who have been expelled from their homes in defiance of right, – (for no cause) except that they say, our Lord is God. Did not God check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of God is commemorated in abundant measure. God will certainly aid those who aid His (cause); – for verily God is full of Strength, Exalted in Might, able to enforce His Will." QUR'AN XXII:40.

[45]al-Far, *supra* note 26, at 60.

[46]AL-GHANNOSHI, *supra* note 26, at 47–8. al-Mawdudi goes further in presenting some of the rights that non-Muslims possess in the Islamic state. He maintains: "Non-Muslims have the right to free speech and publishing, freedom of thought and expression, and freedom to assembly and celebration equally as Muslims do. And they have the obligations and duties as Muslims have in these matters. They have the right to criticize the government and the head of the government within the limits of public order. They even have the right to criticize Islam within the confines of law and Muslims should respect their expressions and respond to them, if they wish, in a decent way." ABU AL-A'LA AL-MAWDUDI, NADHARIYYAT AL-ISLAM WA HADYUH FI AL-SIYASSAH WA AL-QANOON WA AL-DUSTOR 299 (1985).

In this respect, Mr Opsahl, commenting on the report presented by the Iraqi government, stated that "Islam was the state religion", as demonstrated by Article 4 of the Constitution. He asked whether this statement implies any superiority of Islam over other religions or whether it leads to any curtailment of the rights of the followers of other religions.[47] Mr Rashid, in reply to this question, said that the Constitution, in Article 4, proclaims that Islam is "the religion of the State" due to the fact that about 90 per cent of the Iraqi people are Muslims, that is, the great majority of the Iraqi people are Muslims. This, however, by no means implies that Muslims are superior to non-Muslims, for Article 19(1) of the Constitution states that "citizens are equal before the law, without discrimination as to ... religion".[48] Thus Article 4 of the constitution should be read in conjunction with Article 19. However, the crucial question here is whether the individual's right to practise his or her religion involves obligations for other people – the right of the religious to enjoy their religion undisturbed by others, the right for them to enforce their beliefs on the irreligious. The attitude of Islamic law towards such issues has been explained above, and it is for those states which claim that they invoke the principles of Islamic law in their constitutions to provide solutions to such practical problems.

In this connection, a legitimate expression of the actual status of Islamic law within Muslim states is that of An-Na'im where he maintains that, even in Muslim states whose constitutions include a provision declaring that *Shari'a* is the main source of their law, and that Islam is the official religion of the state, there is still in practice a separation between Islam as a religion and the state, in the sense that the conduct of the authorities in such states does not reflect the Islamic view or Islamic precepts. The inclusion of such provisions, he argues, is sought in order to "legitimize authoritarian policies and conservative social relations in ways that violate the human rights of women and religious minorities in particular".[49] The removal of such a deep-rooted justification for such governments would threaten their existence and their legitimacy in the eyes of their peoples.

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[47]CCPR/C/SR.200.

[48]CCPR/C/SR.203.

[49]An-Na'im, *supra* note 18, at 4. *See also*, MICHAEL C. HUDSON, ARAB POLITICS: THE SEARCH FOR LEGITIMACY 25–7 (1977). This is, in fact, what led to the emergence of opposition groups in some Muslim countries, the aim of which was to criticize their governments for their misconduct and illegitimacy which they believe are in contradiction of the precepts of Islam. For instance, the Committee for Defense of Legitimate Rights, founded in Saudi Arabia, is, without delving too much into the credibility of such a group, a religiously motivated group whose goal was to dispute the actions of the Saudi government which, it believed, amounted to violations of human rights committed in the name of Islam. This event was preceded by an incident that occurred in November 1979, when a group of Saudis who challenged the legitimacy of the royal family to rule the Kingdom attempted to occupy the Grand Mosque in Mecca as a sign of their antagonism to the policies of the government.

Thus, the fear of loss of power and authority has been the impetus that has led the traditional and culturally based systems in most Müslim states not to countenance any changes towards tolerating more political or public participation by the people of those countries, and has led also towards their not establishing a codified system in which people's rights and freedoms would be specified and accorded with legal protection. In this connection, Aba-Namay indicates that, in Saudi Arabia, so far as laying down a written constitution for the Kingdom was concerned, apart from the traditional opposition to such a measure on the part of "orthodox Islamists", the main obstacle to such an attempt (which delayed the drafting of such a document until 1992) was the opposition of some members of the royal family. They felt that accepting a constitutional framework would mean that the monarch and other members of the family "would have to subject themselves to the uncertainty of the process of transition from one system to another. The introduction of any political institution was feared as the springboard for future political demands, and might deprive their family of power in the long run, for it could lead to a system based on elections."[50]

7.6 The Issue of Apostasy

Apostasy, or *riddah,* can be defined, in Islamic law, as "turning from Islam after being a Muslim".[51] But what does it mean to say that a person is a Muslim or has embraced Islam? According to al-Ghazali, Islam is a faith and a system. Whoever embraces Islam intentionally and willingly is, in fact, announcing his complete adherence to the rights and duties it upholds.[52] As was indicated earlier, Islam is not a faith that deals only with the conscience and heart. It is, rather, a system that regulates people's lives in all areas, from personal thought to the social, administrative and governmental. Islam is, then, a complete system the existence of which depends on its integrity and solidarity. Like any other system that does not allow for any infringements of its rules, Islam does not permit an individual who initially agreed to be bound by its instructions and regulations to renounce these commitments by renouncing Islam. Al-Ghazali maintains that the right to change one's religion simply means the freedom to show contempt for and affront Islam. He further argues that apostasy is an excuse for a person to rebel against the laws which amounts to

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[50]Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMP. L.Q. 295, 300–1 (1993).

[51]MOHAMMAD IQBAL SIDDIQI, THE PENAL LAW OF ISLAM 95 (1991). For details regarding the meaning of apostasy in Islamic law and what constitutes apostasy, *see* ABD AL-QADIR ODEH, AL-TASHRI' AL-JINA'I AL-ISLAMI VOL.2 706–31 (1985).

[52]AL-GHAZALI, *supra* note 26, at 87.

treason.[53] El-Awa suggests that loyalty to the law of a community and its authorities is a prerequisite for enjoying of the protection of law and the enjoyment of the rights prescribed therein. Thus, "disloyalty" is a legitimate reason for the state not to provide individuals who are accused of it with this protection. Further, the state has a right to punish such a person for his disloyalty.[54] El-Awa presents two examples of how disloyalty to Islam, via the act of apostasy, has caused harm or disturbance to Islamic society. The first is the case of some Jews in Medina, who at the beginning of the day claimed that they had embraced Islam but then at the end of the day renounced it. They intended by this act to weaken the faith of new Muslims in their new religion and encourage them to rebel against Islam, which constitutes the ideology of the state. The second case is that in which some people renounce Islam and form an anti-government group to fight the existence of the state, in a clear declaration of war.[55]

Islam guarantees everyone's right to freedom of religion. However, this right, like any other right, is not absolute, seeing that any abuse of it might lead to contempt for religion and, eventually, to public disturbance and disorder. Thus apostasy was considered as an act which threatens the solidarity of the society and hence was punishable by the death penalty.[56] In other words, apostasy is not conceived by Islamic law as a purely personal matter, but rather, as an act whose effects on some members of society might threaten the stability and order of that society.

In this connection, Mr Mullerson, of the HRC, has asked how Article 126 of the Sudanese Penal Code, which provides that a Muslim who abandons his religion is regarded as an apostate, is in harmony with Article 18 of the Covenant.[57] Article 126 of the Sudanese Penal Code provides that:

> (1) There shall be deemed to commit the offence of apostasy every Muslim who propagates [*sic*] for the renunciation of the creed of Islam or publicly declares its renouncement thereof by his statements or conduct;

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[53]*Id.* at 87–90.

[54]MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 63 (1982).

[55]*Id. See also* ABDULHAMID A. ABUSULAYMAN, THE ISLAMIC THEORY OF INTERNATIONAL RELATIONS: NEW DIRECTIONS FOR ISLAMIC METHODOLOGY AND THOUGHT 102–103 (1987).

[56]al-Far, *supra* note 26, at 60; AHMAD FATHI BAHNASI, AL-MAS'ULIYYA AL-JIN'AIYYA FI AL-FIQH AL-ISLAMI 115 (1984). The apostate should, however, according to Islamic law, be questioned regarding why he has renounced Islam. If this was due to an injustice done to him, it should be redressed. If he harboured some misunderstanding of Islamic precepts, they should be clarified. Then, if he still insisted on renouncing Islam he should be punished. al-Far, *supra* note 26, at 60 n.69.

[57]CCPR/C/SR.1065.

> (2) Whoever commits apostasy shall be given a chance to repent for a period to be determined by the court. Where he insists upon apostasy and he is not a recent convert to Islam, he shall be punished with death;
> (3) the penalty provided for apostasy shall be remitted whenever the apostate recants apostasy before execution.[58]

A punishment such as this one, the Sudanese delegate explains, should be viewed within the whole context of the Islamic system. Muslims do not look on Islam merely as a religion. Rather, they consider it as a way of life that concerns itself with all aspects of people's lives and thus which preserves public order in society. Thus apostasy – that is, a person's renouncing the way he has chosen for his entire life – constitutes an act which undoubtedly leads to public disorder. Once a person has accepted identifying himself by, and adhering to, Islam, he needs to preserve that identity and dignity by applying the principles which govern such adherence.[59]

Similarly, Mr Tarnopolsky has questioned whether a Muslim is permitted, according to the Iranian Constitution, to convert to another religion or discard any faith.[60] Mr Khosroshahi, the Iranian delegate, in replying to this question maintained that, according to Article 18 of the Covenant, people have the right to freely choose their faith. And since the people of Iran have chosen Islam, which is a complete system of life, a system which is concerned with the political, social, economic and spiritual aspects of life, it is senseless to ask them to follow Islam in their spiritual life and disregard it in other areas.[61]

Both the Sudanese and the Iranian delegates focused on the fact, which is provided for by many Muslim scholars, traditional as well as contemporary, that apostasy should not be looked at as falling entirely within the sphere of religion. This is because, as we have seen, Islam itself amounts, for Muslims, to more than a mere religion. Thus any act relating to it should be examined bearing in mind this fact. It is commonly accepted that every society or state adheres to some kind of ideology or faith upon which its existence and its flourishing largely depend. An ideology or faith can be defined as "the true interpretation and justification of the origin of the Universe, life and mankind. This ideology determines, to a large extent, the objectives of people's life and their fate after this life."[62]

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[58]CCPR/C/SR.1067.

[59]*Id.*

[60]CCPR/C/SR.365.

[61]CCPR/C/SR.368.

[62]FAROOQ AL-DUSOOQI, MUQAWEMAT AL-MUJTAMA'A AL-MUSLIM 62 (1986).

However, societies differ in that they adopt the ideology that reflects the conviction of their majorities. Their perspectives range from the political to the economic, social or religious. Each of these elements constitutes the source from which different societies derive their differing ideologies. Capitalism, socialism and democratic systems are the prominent ideologies that prevail in the contemporary world. In countries which adopt capitalism as an ideology, the economic system would be deemed the focal point according to which all other aspects – social, political, etc. – are defined.[63]

The quest for an accurate analysis of the Islamic view of apostasy calls for a comparison between Islam in an Islamic state and what could be considered a faith in a modern state – that is, its ideology. No modern state, either democratic or socialist, would allow an individual to rebel against the ideology of the state. Changing one's religion is not viewed only as a personal matter or personal right in Islamic law, because it involves also the relationship between the individual and the state and affects his loyalty to his government and its ideology, as well as the solidarity of the society, which are the fundamental objectives and priorities of any legitimate government.[64] There is agreement between the Islamic legal system and other systems regarding the need to outlaw any act that conduces to social disturbance and, eventually, to a total collapse of the system. The Islamic system differs from other legal systems, however, in that it regards the religion of Islam as the ideology upon which its existence and order depend. Thus, apostasy is regarded as an act counter to the well-being of the Islamic state and a threat to its stability.[65]

The Islamic view of apostasy and the punishment prescribed for it can be summed up in the following paragraph:

> To wage war against apostates [sc. apostasy] is justified on the same principle as that on which the punishment of a solitary apostate is based. The basis of Muslim polity being religious and not ethnological or linguistic, it is not difficult to appreciate the reason for penalizing this act of apostasy. For it constitutes a politico-religious rebellion. The greater the harm of a given rebellion to a polity, the greater is the severity of repression. Ever civilization, not the least the modern Western one – both in the communistic and capitalistic manifestations – has provided capital punishment against violating the integrity of what it considers its very *raison d'etre*; and one cannot deny that right to Islam.[66]

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[63]*Id.* at 164–72.

[64]MOHAMMED FATHI OTHMAN, HUQOOQ AL-INSAN BAYN AL-SHARI'A AL-ISLAMIYYA WA AL-FIKR AL-QANOONI AL-GHARBI 103–4 (1982).

[65]ODEH, *supra* note 26, at 536.

[66]MUHAMMAD HAMIDDULLAH, THE MUSLIM CONDUCT OF STATE 174 (1977).

The nature of the act of apostasy has led to differences regarding the punishment justly applicable to it. While the vast majority of jurists regard apostasy as a *hadd* crime, punishable by the death penalty, there are some who suggest that it is a crime which is punishable by *ta'zir*.[67] The difference among Muslim jurists regarding what punishment should be inflicted on an apostate stems from their different views regarding the nature of the act of apostasy. Is the act of apostasy a political crime (i.e. rebellion against public order and stability) for which there is no determined punishment in *Shari'a* law, but rather a discretionary power for a ruler or judge to define the punishment? Or it is merely a religious offence with, therefore, a prescribed punishment in *Shari'a*? Al-Ghannoshi suggests that apostasy should not be dealt with under freedom of religion because it is not essentially related to religion, being rather a political offence. This would entail the punishment for apostasy in Islamic law falling within the category of *ta'azir* crimes, whose punishments are left to the discretionary power of the ruler or judge, so that each case must be dealt with *pro re nata,* depending on the harm caused in each case to the well-being of society. The traditions of the Prophet and his actions in this regard, al-Ghannoshi maintains, should be looked upon as actions of a head of state, not of a religious leader. The Prophet, as the head of the Islamic state, conceived of apostasy as a crime that entails great harm to public order and safety. Therefore he on some occasions ordered the execution of the apostate.[68] Similarly, Mahmassani maintains that it is only when there exists a threat to public order and stability that the *hadd*, that is the death penalty, should be inflicted upon an apostate. Otherwise, this punishment should not be carried out.[69]

El-Awa, in his *Punishment in Islamic Law,* concludes that apostasy is punished, under Islamic law, by *ta'zir*. In other words, there is no prescribed or specific punishment for apostasy in Islamic law. There is nowhere in the Qur'an, he argues, any mention of a

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[67]EL-AWA, *supra* note 54, at 50; AL-GHANNOSHI, *supra* note 26, at 48–50; JABR M. AL-FUDHAILAT, AHKAM AL-RIDDAH WA AL-MURTADDEEN 286 (1987). A *hadd* is an act which is "prohibited by God and punished by defined mandatory [penalty] because [it] violate[s] a right protected by the Qur'an". What distinguishes this category of punishments is that they are prescribed for the protection of the public interest. The category includes "theft, highway robbery, adultery, defamation (false accusation of adultery), wine drinking, apostasy and rebellion". There is, however, some difference among Muslim jurists regarding the crimes of rebellion, wine drinking and apostasy; some exclude rebellion from this category and others exclude the two latter crimes. Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 227, 227 (M. Cherif Bassiouni ed., 1982). For information regarding other categories of crimes and punishments in Islamic law, *see supra* pp. 38–40.

[68]AL-GHANNOSHI, *supra* note 26, at 48–50.

[69]MAHMASSani, *supra* note 34, at 202; SOBHI MAHMASANI, ARKAN HUGOOQ AL-INSAN: BAHTH MUQARAN FI AL-SHARI'A AL-ISLAMIYYA WA AL-QWANEEN AL-HADEETHAH 124–5 (1979).

worldly punishment for apostasy. All the Qur'anic verses[70] that deal with apostasy describe it only as a great sin that is punishable in the Hereafter.[71] Furthermore, most of the *hadiths* (reports of the Prophet) that prescribe the death penalty for an apostate relate to those whose apostasy was accompanied by rebellion against the Islamic state involving actions designed to cause public disturbance and disorder. Thus, apostasy *per se* is not a reason for inflicting the death penalty. What corroborates this viewpoint is that the *Hanafi* school[72] does not inflict the death penalty on a female apostate, because she may not, according to this view, be regarded as constituting a real threat to the society.[73]

This treatment of apostasy, then, interpreting it in a way that views it not as a purely religious matter but one which has to do more with political considerations, that is the stability and solidarity of a society, than with personal religious freedom does not violate the right of a person to change his religion provided for by Article 18 of the UDHR. Obviously, it is differing conceptions of "religion" which have contributed to the different attitudes taken by international human rights standards on the one hand and Islamic law on the other towards the right to change one's religion. According to the former, issues relating to religion fall exclusively within the domain of personal choice and freedom, whereas the latter conceives of Islam as constituting more than a religion based on personal choice: it involves, besides being a faith, regulation of relationships both between individuals and between individuals and the state.

7.7 Concluding Remarks

The preceding discussion has shown that, while some Muslim states claim that their practices in relation to their undertakings under international human rights documents should be viewed according to the principles of Islamic law, these states do not always

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[70]"And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the hereafter. They will be companions of the Fire and will abide therein", QUR'AN II:217; "But those who reject faith after they accepted it, and then go on adding to their defiance of faith, never will their repentance be accepted; for they are those who have gone astray", QUR'AN III:90; "Anyone who, after accepting faith in God, utters unbelief, except under compulsion, his heart remaining firm in faith – but such as open their breast to unbelief – on them is Wrath from God, and theirs will be a dreadful penalty. This because they love the life of this world better than the Hereafter: and God will not guide those who reject faith", QUR'AN XVI:106–7.

[71]EL-AWA, *supra* note 54, at 53–5. Adlabi subscribes to this view and suggests that there are in the Qur'an specified penalties and remedies for some minor matters less important than apostasy. Thus, if such an act as apostasy, which relates to religion and people's lives, is to be punished by the death penalty, it should be mentioned in the Qur'an *a fortiori*. MOHAMMED MUNEER ADLABI, QATL AL-MURTAD: AL-JAREEMAH ALLATI HARRAMAHA AL-ISLAM 90 (1993).

[72]One the four major schools of Islamic Sunni law, the *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* schools.

[73]EL-AWA, *supra* note 54, at 63.

reflect the real precepts of Islamic law. As was indicated earlier, some of these states claim that their human rights violations are necessitated by religious dictates as a means of, first, maintaining their own legitimacy and, secondly, of justifying their actions in the face of questioning from UN bodies, notably the HRC, which are responsible for implementing the standards provided for by international human rights documents.

In some instances, different interpretations and conceptions of a right, religious freedom in the current discussion, might lead to different obligations being placed upon the States parties. The conception by a State party of a particular right, such as the right to change one's religion, might lead to an apparent violation of such a right according to the terms of the document provided for it. This violation is justified, on the grounds that such a right is understood differently, and has a different meaning for Muslim states than it does for other states, particularly Western ones.

This is only one example of how some human rights produce difficulties regarding states' obligations. As was indicated earlier, a quest for universality requires that those obligations be clearly defined and be provided with legal effects. However, as the discussion in this chapter and the preceding chapter show, there are certain human rights which involve areas of controversy and differences and, therefore, call for the creation of means of accommodation. One means, that is, interpretation, has been discussed in the previous chapter and in this chapter as well. In the following two chapters, a discussion of other means, namely the principle of the margin of appreciation (which involves a state's interpretation of the provisions of human rights) and reservations, will be undertaken in order to pave the way for our examination of the universality of human rights.

PART III

METHODS OF ACCOMMODATION

CHAPTER 8

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

8.1 Introductory Remarks

The European Convention on Human Rights[1] is treated here as an example of how human rights standards are interpreted to take into account religious and moral pluralism. It is chosen because of the extent of its case-law, not because the regional model is necessarily translatable to the universal level. Although there is considerable religious and moral diversity among the parties to the European Convention, the States have committed themselves to the protection of human rights in the Convention as interpreted by the European Court.[2] It is to be borne in mind that what makes the possibility of reconciling and accommodating differences among European states is largely due to some peculiarities the European system possesses, such as the power vested in the European Court and Commission as the bodies empowered to implement the Convention, which, at the same time, are absent in the international system of human rights. It is, in fact, to this issue that most of the obstacles that might hinder the quest for universality in the idea of human rights can be attributed.

At the outset of our enquiry an attempt should be made to define the nature of the problem which confronts us. The question of diversity among the different legal systems of the States parties to the Convention arises in two ways: first, in the definition of rights (e.g. what constitutes "private life" and "family life", what is required by "respect for private life", what constitutes "public morals", etc.); and second, in justifying interferences with protected rights, especially limitation clauses under paragraph (2) of Articles 8 to 11, as part of states' obligations to respect and protect human rights.

Before proceeding to the study of the European Convention, I wish to illustrate further how the second difficulty mentioned above produces differences among different states. Among the circumstances, set out by Articles 8–11, in which a state may justifiably interfere with the rights defined therein are the necessity to protect "morals" and to protect the "rights of

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[1]The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950 and entered into force on 3 September 1953, in accordance with Article 66, 312 U. N. T. S. 222. Hereinafter the Convention.

[2]*See* Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 1 (1980).

others". Morals, certainly, and the rights of others sometimes include considerations of a cultural and/or religious kind, and allow for different approaches to interference among different states. How are "morals" to be determined? What are the "rights of others", especially fundamental rights, including the right to religious belief? Who decides when there is a conflict between two fundamental rights? These are questions which we inevitably confront in our attempt to deal with such issues. The present study will endeavour to examine those questions within its own limits.

The nature of my project in this chapter is to explain how the opportunity for accommodating different conceptions arises – by using the text of the Convention — and to explain how that opportunity has been used – by examining the process of interpretation. An attempt, therefore, will be made to examine some cases from the jurisdiction of the European Court of Human Rights relating to the issues of "public morals" and the protection of the "rights of others" and to extract a framework whereby, by way of analogy, a method for interpreting similar "general" words in the international human rights instruments can be found. Thus, no attempt is made in this study to provide a detailed and comprehensive analysis of the jurisdiction of the European Court with regard to other limitation clauses.

8.2 European Protection of Human Rights

The task of ensuring protection for the rights enumerated in the Convention is undertaken, according to Articles 19 and 45 of the Convention itself, by the European Court of Human Rights (hereinafter the Court) and the European Commission of Human Rights (hereinafter the Commission). This task, which includes interpretation of the provisions of the Convention, is rooted in the appropriate application of such provisions to particular cases, especially those which involve areas of dispute concerning issues relating to culturally rooted norms such as morals and ethics. Thus the Court and Commission are responsible, albeit in somewhat general terms, for accommodating these differences to the maximum possible degree, and for ensuring the compatibility of domestic legislation (especially those which affect the full enjoyment of the rights enshrined in the Convention) with the general purposes and objectives of the Convention.

Article 19 of the Convention reads as follows:

> To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:
> a. a European Commission of Human Rights, hereinafter referred to as "the Commission";
> b. a European Court of Human Rights, hereinafter referred to as "the Court".

Article 45 of the Convention states that "the jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48".

The States parties to the Convention expressed their aim of having such an instrument by declaring in the Convention's Preamble that by "considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948", and by "considering that this declaration aims at securing the universal and effective recognition and observance of the rights therein derived", they proclaim the Convention to represent "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".[3]

The words of the Preamble of the Convention are obviously indicative of the existence of a common understanding emanating from some common ingredients of the political, social and economic regimes among European nations. It was this incentive that paved the way for "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law"[4] confidently to proceed and to lay down an instrument whereby their "common heritage" would be protected.

8.3 The Status of the Convention in European Countries

In order to assess the impact of the Convention on domestic legal systems of the Council of Europe, it is important to make explicit the status the Convention possesses in those legal systems and the role it ought to play accordingly.[5] Generally speaking, the States parties to the Convention are under an obligation to ensure that their respective legislation are in conformity with the provisions of the Convention, and therefore, as that obligation requires, they have to take whatever steps are necessary towards this end.[6] However, these steps are nowhere specified in the Convention. It is left to the States parties to the

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[3]Preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[4]*Id.*

[5]For a comprehensive survey regarding the status of the Convention among European States parties, *see* ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY 57–192 (1983).

[6]Article 13 of the Convention places a general obligation on the States parties to the Convention to ensure that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". In this regard, Article 57 of the Convention states that "on receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law insures the effective implementation of any of the provisions of this Convention".

Convention to determine which method to follow to ensure the conformity of domestic legal systems with the Convention.[7] As a consequence, these States differ in the methods they adopt for giving effect to the provisions of the Convention in their respective domestic legal systems.[8]

In general, two distinctive methods are common in practice. First, the provisions of the Convention, as with any other treaty, are incorporated into the domestic legal system. In the countries where this method is adopted, a treaty does not become effective unless such a treaty is incorporated into the domestic legal system. In other countries,[9] however, treaties, once ratified, must become an integral part of domestic law, so that they have effect in the domestic legal system.[10]

8.4 States' Obligations under the Convention

States parties to the Convention are placed under both positive and negative obligations by the *proviso* of Article 1 in general[11] of the said Convention. So far as the negative obligation is concerned, it is obvious from the words of Articles 8 to 11, in particular, that States parties are under an obligation to refrain from any "unjustified" interference in the "private sphere" of the individual[12] as well as with the individuals' rights to freedom of

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[7]FREDE CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13 (1974); Ulrich Scheuner, *An Investigation of the Influence of the European Convention on Human Rights and Fundamental Freedoms on National Legislation and Practice, in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS 193, 201 (Asbjörneide and August Schou eds., 1968).

[8]Verdross, on the other hand, suggests that Article 13 of the Convention, by stating the general obligation of the States parties to ensure their peoples the rights enumerated therein, requires by way of implication that the provisions of the Convention be incorporated into the domestic legal systems of the States parties so that they will be rendered effective. Alfred Verdross, *Status of the European Convention in the Hierarchy of Rules of Law, in* HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 47, 51 (A. H. Robertson ed., 1970).

[9]Such as Belgium and The Netherlands.

[10]CASTBERG, *supra* note 7, at 13–14; A. H. ROBERTSON AND J. G. MERRILLS, HUMAN RIGHTS IN EUROPE 26 (1996). For more detail concerning the issue of the methods of incorporating international treaties into domestic legal systems *see* Max Sørensen, *Obligations of a State Party to a Treaty as Regards its Municipal Law, in* HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 11, 13–22 (A. H. Robertson ed., 1970); Roger Pinto, *Consequences of the Application of the Convention in Municipal and International Law, in* HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 275, 276–80 (A. H. Robertson ed., 1970).

[11]Article 1 of the Convention states that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[12]Article 8.

religion,[13] freedom of expression[14] and freedom of assembly.[15] To put it another way, the Articles specify, in their second paragraphs, some circumstances in which state interference would be justified. Thus, if a state interferes with an individual's rights unjustifiably, that is, in circumstances other than those mentioned in the Articles, the state has not complied with its obligations under the Articles. As regards a state's positive obligation[16] under the Articles, the Court maintains that the Articles imply that states are under an obligation to ensure their citizens the "effective enjoyment" of their prescribed rights. This obligation requires a state to take whatever action may be necessary for the enjoyment of individuals' protected rights mentioned in the Convention.[17] In this connection, the Court, in *Airey v. Ireland*, maintained that the Government, with regard to Airey's right to access to the courts, did not discharge its duty merely by not interfering with her entitlement to this right. The Court stressed, however, that "it must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily".[18] By ascertaining this, a state discharges its undertakings even if the individual does not acquire the benefits of his/her prescribed rights (i. e. the full enjoyment of the rights), since the state, by taking positive action, complies with its obligations under the Articles.[19]

8.5 The European Court's Jurisdiction

In my attempt to study, examine and extract an interpretative approach from European case-law as it is applicable (though not without some difficulties) to international human rights instruments, I will confine myself to dealing with some "general" or "non-self-explanatory" words or phrases that are heavily laden with uncertainty and call for considerable

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[13]Article 9.

[14]Article 10.

[15]Article 11.

[16]Judge Matscher, in his Partly Dissenting Opinion in the *Marckx v. Belgium* case, opines that fundamental human rights, such as family life, require not only non-interference or, in other words, inaction on the part of the government with the enjoyment of such rights, but also "positive" actions which ensure the enjoyment of such rights.

[17]A. M. Connelly, *Problems of Interpretation of Article 8 of the European Convention on Human Rights*, 35 INT'L & COMP. L. Q. 567, 572 (1986); D. J. HARRIS, M. O'BOYLE AND C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 19–21 (1996).

[18]Airey v. Ireland, 2 Eur. H.R. Rep. 305, 314, para. 24 (1979).

[19]Account must be taken here of the fact that "it is a characteristic of positive obligations that the duties they impose are seldom absolute. What is required of the state will vary according to the importance of the right and the resources required to be disbursed to meet any positive obligation. While the Strasbourg authorities have interpreted some positive obligations strictly, notably some of the state's obligations under Article 6, more generally, they have considered only whether the state has taken reasonable measures to safeguard the individual's enjoyment of his right." HARRIS et al., *supra* note 17, at 284–5.

investigation and enquiry. "Public morals", "private life" and protection of "the rights of others" are among these vague expressions included in the Convention, and in international human rights instruments as well, that are very possibly vulnerable to various interpretations and understandings.

Among the factors affecting the different methods of treaty interpretation, two in particular have a powerful effect on any interpretative attempt. These are the *place factor* (the *Handyside* case) and the *time factor* (the *Dudgeon* case). I shall consider these factors in some detail by recalling some principles and landmarks produced by the Court in the two cases involved. The doctrine of the margin of appreciation, which is the focal point in the process of interpreting the Convention, and by which the whole machinery of European protection is distinguished as effective, will also be discussed in some detail. The factors affecting and determining the scope of a state's power regarding the margin of appreciation will also be examined.

What contributes to the difficulties in restricting the term "morals", for instance, to a particular meaning is, Dworkin suggests, that there are no criteria whereby such a term can be defined. Different considerations, he argues, are involved in such a task, ranging from "public condemnation" to the causal relationship between the continuing practice of certain actions and the increase in the crime rate. Is it sufficient, in regarding an act as immoral, that there exists "public condemnation" of such actions? And is the consideration that such allegedly "immoral" acts or behaviour might result, at some time in the future, in an increase in crime in a given society sufficient to criminalize such acts as being contrary to "public morals"?[20] These are some of the considerations on which there exists disagreement.

From the jurisdiction of the Court, it can be inferred that the Court has dealt with cases involving moral issues in the context of the "protection machinery established by the Convention" being "subsidiary to the national systems in safeguarding human rights". In other words, the Court has emphasized that national legal systems are more appropriately

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[20]RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 240 (1987). Jacques Velu, illustrating on the difficulties encountered when an attempt is made to define the scope of the "right to private life", and the same , I think, applies to other general notions such as "morals", points out that "the scope of the right to respect for private life depends on current manners and custom and varies from place to place, ... The relative nature of the concept appears not only in reference to time and space but also in relation to individuals. For, ... [he continues] the wall around a person's private life is not identically situated with everyone". Jacques Velu, *The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communication, in* PRIVACY AND HUMAN RIGHTS 12, 34 (A. H. Robertson ed., 1973).

placed to determine "moral" issues in their respective countries. It is difficult for an international judge, who is considered a layman so far as "moral" issues are concerned, to decide whether an act is contrary to or in conformity with the "public morals" of a given country. For in order for a judge to understand the meaning of "morals" in a given society, he needs to know something of the social and cultural context and the issues the specific morals were designed to meet. Thus, "the Court found that it was not possible to find a uniform European concept of morals in the domestic law of the various European States". Nor is it the function of the Court, Drzemczewski points out, to "unify interpretations given to the European Convention's provisions by domestic tribunals".[21] It is, no doubt, the elusive nature of the notion of "morals" which leads to such differences of opinion about it. Explaining the concept "morals" is usually held to be a difficult task because, no doubt, it would be overwhelmed with questions of different interpretations; there is, however, general agreement that a satisfactory definition is likely to be attainable only within the framework of a comparative approach within which consideration of public or general attitudes would be taken into account.

8.5.1 Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737 (1976)

8.5.1.1 Facts and judgment

In this case, a publishing company, based in London, was subject to search and seizure in respect of having published a book, entitled *The Little Red Schoolbook*, which contained some sexual material that was in violation of the Obscene Publications Acts of 1959 and 1964.[22] The claimant contended that the actions carried out against the company were in violation of Article 10 of the Convention, which guarantees the right to freedom of expression, and Article 1§1 of Protocol No. 1 to the Convention, which guarantees his right "to the peaceful enjoyment of [one's] possessions".[23] The Court, ruling on the case, was of the opinion that the actions taken against the company did not contradict the provisions of the Convention, maintaining that the State's actions were within the State's margin of appreciation and were such as were "prescribed by law" and "necessary in a democratic society" to protect "public morals". Therefore, no violation of Article 10 of the Convention had occurred. The Court further maintained that, under the Convention, it is the responsibility of each Member State to offer machinery for protecting the rights enumerated

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[21] DRZEMCZEWSKI, *supra* note 5, at 6.

[22] For the relevant sections of the Acts, *see* the *Handyside* case at 743–4 para. 25.

[23] Renée Koering-Joulin, *Public Morals, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 83, 44 (Mireille Delmas Marty ed., 1992).

therein, and that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights".[24]

8.5.1.2 Principles and landmarks

In this connection, the Court explains that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals". It goes on to affirm that, as a matter of a significant importance for our purpose, "the view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject". Having paid considerable attention to such variable factors as time and place, and keeping in mind states' "direct and continuous contact with the vital forces of their countries", the Court, admitting the fact that "it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation",[25] asserts that "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them".[26] No doubt, the quest for universality in human rights requires that domestic interpretation and understanding of such rights, particularly those which have specific relevance to States parties, be taken into account in the process of implementing such rights in practice. However, international supervision would be inevitable to prevent any abuse of such a power on the part of states.

Therefore, Article 10§2 of the Convention gives the Member States a "margin of appreciation" in the matter of morals in each of these States. This authority vested in the Member States does not, however, affect the Court's authority to review and examine the decisions taken by domestic courts, nor does it affect its ultimate power to issue the final judgments in determining whether or not the restrictions imposed by the States parties on the rights of its people protected are in conformity with the provisions of the Convention.[27] Thus, "the domestic margin of appreciation goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its

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[24]*Handyside* case at 753, para. 48.

[25]*Id.* at 755, para. 50.

[26]*Id.* at 753–4, para. 48.

[27]MARK JANIS & RICHARD KAY AND ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 163–5 (1995).

'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court ... . "[28]

In order to examine the degree of protection needed for a protected right, and therefore to examine the legitimacy of the restrictions imposed on that right, it is important to determine whether or not there is, in fact, a necessity for the restrictions imposed. This involves two related factors. In the first place, what might be necessary for one state might not be so for another; and secondly, what is, or might be, considered necessary by individual Member States might not be considered so by an international court.[29]

In the *Schoolbook* case, the Court apparently left a "margin of appreciation", which is more flexible or wider in the matter of morals,[30] for Member States to examine whether restrictions on rights protected by the Convention were "necessary in a democratic society" in order to achieve certain specified interests or considerations. Needless to say, the interest a state intends to protect by its interference must be a "pressing interest" which would be vital for the preservation of the considerations mentioned in the Convention.[31] The Court further draws attention to the meaning of the word "necessary" by observing that

> whilst the adjective 'necessary', within the meaning of Article 10 (2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[32]

Here, there exists another argument which seems to have special relevance to our present undertaking and which therefore cannot be lightly dismissed. This is the question of confining the meaning of "pressing interest" to particular implications, so that resort to it does not undermine the enjoyment of the rights mentioned in the Convention. Undoubtedly, each Member State is in a better place than the Court and the Commission to determine what constitutes "pressing interest" and to take measures necessary to safeguard

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[28]*Handyside* case at 754, para. 49.

[29]Janis et al., *supra* note 27, at 167.

[30]*Id*; Susan Marks, *The European Convention on Human Rights and its 'Democratic Society'*, 66 BRIT. Y.B. INT'L L. 209, 221 (1995); LOUKIS G. LOUCAIDES, ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS 193 (1995); L. H. Leigh, *United Kingdom, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 259, 271 (Mireille Delmas-Marty ed., 1992). *See also* The Sunday Times v. The United Kingdom, 2 Eur. H.R. Rep. 245 (1979).

[31]Janis et al., *supra* note 27, at 163-262.

[32]*Handyside* case at 754, para. 48; *see also The Sunday Times* case at 275, para. 59.

this interest. However, this power should be subject to review by a European supervisory entity so as to ensure that the exercise of that state's power does not clash with its other undertakings under the Convention.

In this case, the Court took into consideration some particular factors which affected its judgment. "Regional diversity", "local and regional consensus" and "the notion of a changed or evolved European consensus" are the factors which must, in the Court's opinion, be taken into account when reviewing such cases.[33]

8.5.1.3 The place factor

In the present case, the Court's attention was drawn to the fact that the *Schoolbook* had been distributed in other parts of the United Kingdom[34] without being subject to any obstacle.[35] The Court, however, taking account of the difficulties of applying one definition of "morals" to different localities, was of the opinion that

> the competent authorities in Northern Ireland, the Isle of Man and the Channel Islands may, in the light of local conditions, have had plausible reasons for not taking action against the book and its publisher, as may the Scottish Procurator-Fiscal for not summoning Mr. Handyside to appear in person in Edinburgh after the dismissal of the complaint under Scottish law against stage I in respect of the revised edition. Their failure to act – into which the Court does not have to enquire and which did not prevent the measures taken in England from leading to revision of the *Schoolbook* – does not prove that the judgment of 29 October 1971 was not a response to a real necessity, bearing in mind the national authorities' margin of appreciation.[36]

Thus, the Court's decision in this case was not influenced by the fact that other parts of the United Kingdom, or other parts of the Council of Europe[37] adhering to the provisions of the Convention, did not prohibit the publication of such a book. It recognizes and indeed asserts that an issue such as morality is, without doubt, affected by the place where the case is being examined. To put it another way, it is conceivable that the "necessity" for interference for the protection of "public morality" exists in one place and not in others. In this connection, the Court in this case declared that

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[33]HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 88 (1996).

[34]It was distributed in Northern Ireland, the Isle of Man and the Channel Islands.

[35]J. E. S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 255 (1987).

[36]*Handyside* case at 757–8, para. 54.

[37]The book had been published in Denmark, Belgium, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, The Netherlands, Norway, Sweden, Switzerland, Austria and Luxembourg. Janis et al., *supra* note 27, at 160.

> the Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, *inter alia*, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions was a breach of Article 10.[38]

It is to be noted here that, when considering the different viewpoints concerning the issue of "morality", differences fall into three categories. An action might be regarded as "immoral" in one place but might not necessarily be so regarded in another place; an action might be regarded as "immoral" but there might exist no "necessity" (i.e. pressing social need) for state interference to protect "public morals"; and an action might be regarded as "immoral" and there might exist a "necessity" for state interference for the protection of "public morals". In all these circumstances differences are permissible, or conceivable, within a state. *A fortiori*, differences between states as to what a justifiable interference to protect morals may be should be permissible.

Furthermore, the case-law of the European Court shows that the Court has adopted a criterion whereby a balance would be drawn between the right protected and the interest a state intends to protect by placing limitations on that right. In other words, the restriction imposed must be "proportionate" to the public interest the state intends to protect. In this connection, an examination of the degree of injury caused to the public interest by not restricting the right concerned must be taken into account.[39]

8.5.2 Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981)

8.5.2.1 Facts and judgment

The claimant, whose homosexual acts were prohibited by the criminal law in Northern Ireland, contended that such a prohibition was in violation of his protected right to private life under Article 8 of the Convention. He also claimed that there was discriminatory treatment under Northern Ireland law concerning homosexuals, in comparison with the laws of other parts of the United Kingdom. The Court, emphasizing the impact that change occurring over "time" has on issues such as "morals", and considering that it was accepted, at the time the law in question was enacted, that homosexual acts were contrary to public morals and thus had justifiably been prohibited, maintained that

> there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member states of the

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[38] *Handyside* case at 760, para. 57.

[39] Janis et al., *supra* note 27, at 163–262; *see also* CASTBREG, *supra* note 7, at 162–3. For a discussion regarding the principle of proportionality, *see infra* pp. 186–8.

> Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.[40]

It went on to stress the point – more precisely, the determinative point in cases relating to "morals" – in stating that "the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states".[41] The Court therefore ruled that the law in question amounted to violation of the applicant's right to private life guaranteed under Article 8 of the Convention.

8.5.2.2 Principles and landmarks

The Court, assessing the criminal law in Northern Ireland prohibiting some sexual activities, namely sections 61 and 62 of the Offences against the Person Act 1861[42] and section 11 of the Criminal Law Amendment Act 1885,[43] and explaining the status the aforementioned Acts enjoy in Northern Ireland long after being enacted, as well as the people's attitudes towards their subject matters, pointed out the following:

> In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent ... . No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.[44]

These remarks, in the last two paragraphs, show that the Court, in considering the issue of morals in this case *vis-à-vis* the protection of the right to private life of individuals, examined the "necessity" for interference on the part of Northern Ireland within the framework of a developing conception of the issue of "morals". The Court also attributed considerable importance to the "European consensus" concerning the issue of "morals". The latter approach, no doubt, will narrow the scope for differences among Member States of the Council of Europe with regard to their conceptions of "morals".

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[40]Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, 167, para. 60 (1981).

[41]*Id.*

[42]Under these sections, "committing and attempting to commit buggery are made offences punishable with maximum sentences of life imprisonment and 10 years' imprisonment, respectively. Buggery consists of sexual intercourse *per anum* by a man with a man or a woman, or *per anum* or *per vaginam* by a man or a woman with an animal."

[43]According to this section, "it is an offence, punishable with a maximum of two years' imprisonment, for any male person, in public or in private, to commit an act of 'gross indecency' with another male. 'Gross indecency' is not statutorily defined but relates to any act involving sexual indecency between male persons; ... it usually takes the form of mutual masturbation, inter-crural contact or oral–genital contact."

[44]*Dudgeon* case at 167, para. 60.

In addition, the Court calls here for the interpretation of the protected right in order to examine the importance of that right, and consequently, to determine whether or not there was a "necessity" for the state's interference with that right. In this case, the meaning of "private life" was not defined, nor was it clear which private actions were included and which were not included within the scope of the phrase.[45] However, the Court's emphasis was to reaffirm the "propriety of legislation against homosexual conduct insofar as is necessary to protect against exploitation of vulnerable people — those 'young, weak in body or mind, inexperienced, or in a state of physical, official, or economic dependence'".[46]

The Court further maintains that,

> it being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims ...[47]

Also, bearing in mind that "according to the Court's case-law, a restriction on a Convention right cannot be regarded as 'necessary in a democratic society' ... unless, amongst other things, it is proportionate to the legitimate aim pursued",[48] the Court is of the opinion that the justifications the Government provided for "retaining the law in force unamended" are "outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant".[49] Thus the Court ruled that, although it was "in accordance with the law" and although it aimed at the "protection of public morals" and the protection of "the rights and freedoms of others", "the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved", and ruled therefore that a violation of Article 8 of the Convention had occurred.[50]

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[45]Janis et al., *supra* note 27, at 269–70.

[46]*Id.*

[47]*Dudgeon* case at 165, para. 49.

[48]*Id.* at 165, para. 53.

[49]*Id.* at 167, para. 60.

[50]*Id.* at 168, paras. 61–62; *See also* James Kingston, *Sex and Sexuality under the European Convention on Human Rights, in* HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 179, 182 (Liz Heffernan ed., 1994).

8.5.2.3 The time factor

In this case, the Court took into consideration the "time factor" as affecting the issue of "morals". It maintained in its judgment that, without any doubt, the elapse of time entailed change in people's attitudes towards certain moral issues. What was considered to be immoral some time ago might very possibly not be regarded so now.[51]

The Court's decision in this case, as well as in the *Handyside* case, shows the flexibility it expresses in some matters, especially those related to people's actions and behaviour. This flexibility adds to the difficulty lawmakers have to face when they intend to establish specific rules to control the conduct of a community, particularly when the situation concerns a community with as many variables (such as traditions, customs, religions, ideologies, morals, etc.) as the international community. Even within a small community, people are not confined to a certain rigid set of behaviours or morals. These are, in the nature of things, dependent on the way in which people react to and express their feelings towards the outside world, which in turn is in continuous evolution. All of this poses a rather basic question: can there be a universal moral standard acceptable to all traditions and cultures? The answer to this question is best given in the words of W. T. Stace in his *The Concept of Morals*, where he writes that

> one of the main obstacles to the recognition of the existence of a universal morality is the indiscriminate inclusion within the sphere of morality of every possible precept or rule of human conduct. From the chaotic mass of human customs and habits we have to isolate out what is genuinely moral. Only then can we hope to discover a universal morality — if such a morality exists.[52]

These are, I think, obviously the kind of obstacles that the quest for the universality of human rights counters and which involve the more problematic issues, especially those related to morals and values.

8.5.3 Observations

The Court, in both the *Handyside* and the *Dudgeon* cases, gave the Member States a "margin of appreciation" within which they could use their discretion to examine such cases

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[51]The Court in the *Handyside* case, besides illuminating the significance of the "place factor" in examining "moral" issues, has also drawn our attention to the fact that "despite the variety and the constant evolution in the United Kingdom of views in ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the *Schoolbook* would have pernicious effects on the morals of many of the children and adolescents who would read it". *Handyside* case at 756, para. 52.

In this regard, an interesting contrast between how "ethical absolutists" and "ethical relativists" conceive of "morals" has been drawn by Stace and Graham. *See* W. T. STACE, THE CONCEPT OF MORALS 2-3, 6, 8 (1962); A. G. GRAHAM, THE PROBLEM OF VALUE 67-84 (1961).

[52]STACE, *supra* note 51, at 92.

as are vulnerable to, and dependent on, domestic considerations and circumstances. However, the extent of this "margin of appreciation" is determined by the "nature of the right" in dispute. Where the case concerns the right to "freedom of expression", a state has a broad "margin of appreciation" in examining the case. But where the case involves the "private life" of an individual or a group, a state's discretionary power is more restricted.[53] It is to be kept in mind that in cases where "freedom of expression" is involved, it is the kind of speech which is to be examined and, therefore, even with regard to a single protected "right" the state's margin of appreciation might vary depending on the kind and the content of the speech.[54]

To give another example of the difficulties encountered when interpreting such broad terms, mention will be made, very briefly, of the phrase "measures necessary in a democratic society". The Court, in its judgment of 7 December 1976 in *Handyside*, laid down an essential characteristic of such a society by considering freedom of expression to be "one of the essential foundations of such a society [and] one of the basic conditions of its progress and for the development of every man".[55] The Court then proceeded to illustrate further the nature of such a freedom by stating that, being subject to the restrictions laid down in Article 10(2) of the Convention, it is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[56] The Court went further, to stress that "such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[57]

The phrase is, no doubt, vulnerable to different, and even contradictory, interpretations. This is true even within a particular community like the Council of Europe where the Member States have much in common. This is explicable if we notice that any attempt to clarify the phrase clearly involves two notions, namely "necessity" and "democratic society". As a solution to this natural kind of difficulty, Bernardi and Palazzo suggest that

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[53]Koering-Joulin, *supra* note 23, at 89; P. VAN DIJK AND G. J. H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 592–3 (1990).

[54]For a valuable analysis of the issue of the content of "freedom of speech", *see* Christian Jacq and Francis Teitgen, *The Press, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 65 (Mireille Delmas-Marty ed., 1992) and for a prolonged discussion of Article 10 "freedom of expression", *see* CLOVIS C. MORRISON, JR., THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM 77–114 (1981).

[55]*Handyside* case at 754, para. 49.

[56]*Id.*

[57]*Id.*

"it is only by examining the content and the limits of human rights in each of the Contracting States that the framework for the achievement of democracy can be found".[58]

To sum up, it can be asserted that the Court set out in strong terms what Article 10(1), for instance, protected. In particular, it protected expression which shocked or disturbed some of the book's potential readership or others who might have access to it. The legitimacy of the justification provided by the government for its interference with Article 10 "rights" and the ability of the government to show the existence of such a justification would determine the Court's decisions in such cases. Thus, the government was successful in *Handyside*, but the applicant prevailed in, for instance, the *Sunday Times* case. In the latter case, an injunction against *The Sunday Times* was issued to prevent it from publishing an article, containing information[59] regarding drugs manufactured and marketed by the Distillers Company which had resulted in some abnormal births to those women who had used the drug, that was considered by the courts to be detrimental to the "authority of the judiciary". *The Sunday Times* maintained that the injunction interfered with its freedom of expression and, therefore, that a violation of Article 10 had occurred. The Court decided that a legitimate justification, in accordance with Article 10(2) of the Convention, for the government's interference was not found and, therefore, a violation of Article 10 had occurred. The Court in this case had to weigh and reconcile two conflicting aims. On the one hand, it had to guarantee the right of the claimant to "freedom of expression", but on the other, it had to preserve the "impartiality of the judiciary" and to prevent contempt of court. Since, in the Court's opinion, the significance of "freedom of expression", as a foundation of a democratic society, which in this case involves the right of the public to be informed about the issue so vital to its being, outweighs the preservation of the "authority of the judiciary", the Court ruled that the Government's interference did not meet the prerequisites laid down in paragraph (2) of Article 10 and, therefore, was not justified.

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[58]Alessandro Bernardi and Francesco Palazzo, *Italy, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 195, 204 (Mireille Delamas-Marty ed., 1992). For more details concerning the implications of the phrases "public necessity" and "democratic society" in relation to the rights and freedoms protected by the Convention, *see* generally Marks, *supra* note 30, at 209–38.

[59]The article, which was entitled 'Our Thalidomide Children: A Cause for National Shame', was to produce the following:

"the thalidomide children shame Distillers ... there are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is to be £3.25 million, spread over 10 years. This does not shine as a beacon against pre-tax profits last year of £64.8 million and company assets worth £421 million. Without in any way surrendering on negligence, Distillers could and should think again." *The Sunday Times* case at 251, para. 11.

What the two cases show primarily is that there are several factors which are to be taken into account in assessing the justification for any interference. First, there is the importance attached by the Court to the actual exercise of the right in question. Then there is the ground on which the state claims to interfere: in *Handyside* "for the protection of ... morals and ... the rights of others", in *Sunday Times* "for maintaining the authority and impartiality of the judiciary". There were two significant conclusions: first, that the Court regarded some aims as being more objective than others (the more objective the aim the less the margin of appreciation); and secondly, that the existence of a climate more respectful of the enjoyment of the right in another state or even elsewhere within the same state did not in itself mean that the margin of appreciation had been exceeded where the more restrictive regime had been adopted (*Handyside*).

There is an obvious tension between these two tests. On the one hand, practice elsewhere is called on to show that interference is not required for a "pressing social need". On the other, contrary practice does not show that the pressing social need is absent. Nevertheless, the concession of a wider margin of appreciation in respect of some interests has allowed some states to act in response to local values and interfere with human rights to a more substantial degree than others. This has been particularly true where the state claims to act "for the protection of morals" – the Court holding "morals" to be particularly susceptible to national assessment (e.g. *Muller*[60]). There is, then, power vested in the state to take into account national or even local moral and cultural traditions. In this regard, Paul Mahoney, in a paper dedicated to the discussion of the issue of universality versus subsidiarity in the European Court's case-law, disputes the supposition that there is inconsistency in the case-law of the Strasbourg organs where, in some cases, a wide margin of appreciation is left to the Member States while, in others, only a limited margin of appreciation is vested in the Member States. Taking the right to "free speech" as an example of how the contents of some rights, more than others, are to be left to local governments to define and determine, Mahoney maintains that

> through its very general language Article 10 lays down an abstract principle, not a detailed code of conduct. Neither does it impose total legislative uniformity on all the participating States – which now stretch from the Protestant North to the Catholic South and on to the Orthodox and Islamic East. In the vast sphere of activity covered by speech it is inevitable that, because of varying local cultures and traditions, different communities

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[60]Where the interference is for the protection of the "rights of others" and the right here is the right of the parent to protect the child from "immoral" paintings, a wide margin of appreciation is vested to the government to respect the parents' rights. In such cases, attention should be made to the fact that "there is a natural link between protection of morals and protection of the rights of others". Müller v. Switzerland, 13 Eur. H.R. Rep. 212, 226–7, para. 30 (1988).

> will choose different approaches, so that a form of expression that is restricted in some countries may well be permitted in others.[61]

8.6 Interpretation of the Convention

Although the case-law of the Court contains a vast amount of interpretation of the provisions of the Convention, a unified procedure of interpretation is nevertheless absent in the jurisprudence of the Convention's organs.[62] This is because of (and the same is true for other international instruments) the absence of unified perspectives and conceptions regarding the issues dealt with in the case-law of the Court, especially those related to justifiably undefined terms such as "morals".

The ambiguity of the rights enumerated in the Convention was one of the issues in dispute among the representatives of the European parties to the Convention. It was suggested by the British representative that the inclusion of precise definitions of the rights for which protection was being sought is a necessary measure to render those rights effective, whereas the French representative opined that the mere enumeration of such rights in the instrument would be sufficient to render them flexible and, therefore, more applicable.[63]

Both the Court and the Commission have avoided any attempt to define the rights mentioned in Article 8 because both have regarded the Convention as an instrument in a continuous development whose provisions need not to be confined to particular interpretations or meanings. Rather, its provisions would render, and in fact have rendered, different interpretations.[64] Thus, the provisions embodied in the Convention represent minimum standards for States parties and, as such, tolerate different interpretations and eventually might lead to a wider acceptance of such provisions by as many states as possible. This must also be taken into account at the international level where universality is sought.

A comparative law approach to the interpretation of the Convention's provisions undoubtedly provides a machinery whereby some common legal principles regarding some

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[61]Paul Mahoney, *Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments*, 4 EUR. HUM. RTS. L. REV. 364, 369 (1997).

[62]Sørensen, *supra* note 10, at 28.

[63]GORDON L. WEIL, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28 (1963); DRZEMCZEWSKI, *supra* note 5, at 8.

[64]P. J. Duffy, *The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights*, 2 Y.B. EUR. L. 191, 193 (1983).

notions mentioned therein (family life and private life (Article 8), freedom of expression (Article 10)) can be extracted, and a relatively uniform method of interpretation found.[65]

8.6.1 Different approaches

Generally speaking, the Court, in interpreting the provisions of the Convention, has not departed from the general principles of treaty interpretation laid down in the Vienna Convention on the Law of Treaties, which sets a general framework for treaty interpretation. The main approach of this framework requires that any treaty interpretation should be conducted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The case-law of the Court shows that the "purpose" of the provisions of the Convention has been subject to, or, in other words, defined within, "the values of Western liberal democracy, shared by the Contracting States".[66] Besides this method of interpretation, the Court has also utilized the "preparatory work" of the Convention as a secondary means of extracting the ordinary meaning and purposes of the provisions of the Convention.[67]

Is there a consensual European approach towards interpreting the provisions of the Convention? Or do the Strasbourg organs rather follow the case-by-case method of interpretation, which involves the difficulty of constructing a uniform or even a minimum standard framework within which a state's margin of appreciation is to operate? The latter method, namely the case-by-case method, allows states to interpret the provisions of the Convention according to the factual circumstances of each case depending on the time and place of its occurrence. This therefore grants States parties a wider margin of appreciation with regard to the interpretation of the Convention's provisions.[68]

There is nowhere in the Convention a specified interpretative approach which a state can adopt to fulfil its undertakings under the Convention. Therefore, the Court observes "that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation", and, therefore, it is understandable why "there

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[65]Ulrich Scheuner, *Comparison of the Jurisprudence of National Courts with that of the Organs of the Convention as Regards Other Rights, in* HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 214, 224 (A. H. ROBERTSON ed., 1970).

[66]Connelly, *supra* note 17, at 568.

[67]*Id.* at 568–9; HARRIS, et al., *supra* note 17, at 5–6.

[68]*Cf. Handyside* case and *Belgian Linguistic* case.

are different ways of ensuring 'respect for private life', and [why] the nature of the State's obligation will depend on the particular aspect of private life that is at issue".[69]

In this connection, the Court's reference to domestic legislation serves to find a common practice among Member States. Therefore, "whilst the Court sometimes relies on national laws it does so only to the extent that there exists a consensus in the legislation of Contracting States, thereby establishing ... a sort of 'common law' shared by those States".[70] It is by engaging in this process that "the sum of these national laws constitutes a 'common law' which forms for the Contracting States and their nationals a true European public policy ... to a large extent expressed in the Convention and ... founded on that 'common heritage ... of freedom' prevailing in the member States of the Council of Europe".[71]

It is of particular relevance to note here that "recourse to comparative law by reference to domestic law provides useful assistance in a field, like that of human rights, where the principles of general international law provide little material to guide the Court or tribunal in the solution of the problem before it".[72] Article 8 of the Convention, for instance, allows two interpretations. One of these, in which the meaning of the provision is limited to a narrow interpretation, provides that the Article guarantees the individual only the right to "respect" for the right mentioned therein, but it does not safeguard those rights *(Bruggeman and Seheuten v. Germany)*. In other words, this interpretation indicates that there is a negative obligation on state authorities not to interfere. The other interpretation, on the other hand, widens the scope of the meaning of the Article to include, besides a government's negative obligation under the Article, its obligation to take positive measures to guarantee the enjoyment of the rights mentioned therein.[73] Furthermore, besides its obligation to facilitate enjoyment, the state is under an obligation to prevent "private" interferences. Since violations of individual's rights might, Duffy argues, in some cases be caused by individuals, government intervention (i.e the taking of positive actions) to protect or remedy such violations is required – since, he argues, in the absence of a state's positive

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[69]X and Y v. The Netherlands, 8 Eur. H.R. Rep. 235, 250, para. 24 (1985).

[70]W. J. Ganshof van der Meersch, *Reliance in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States* , 1 HUM. RTS. L.J. 13, 24–5 (1980).

[71]*Id.* at 15. Footnotes omitted.

[72]*Id.* at 19.

[73]The Court in the *Marckx* case, interpreting the meaning of Article 8 (1), specifically with regard to "the right to family life", maintains that the Article "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life". Marckx v. Belgium, 2 Eur. H.R. Rep. 330, 342, para. 31 (1979).

obligation, and because the Convention does not bind individuals, it is inconceivable that a state can be held responsible for violations of protected rights perpetrated by private individuals.[74] In such cases, where there are different interpretations for a protected "right", reference to the domestic law of the States Members in order to find out their practices in relation to that right will assist in establishing a satisfactory interpretation for the "right".

The different approaches to interpreting the Convention may be attributed, according to Waldock, to two elements. The first is the extent to which legal or social considerations may change with the passage of time as regards understanding and interpreting the rights and freedoms mentioned in the Convention. The second is whether the scope of the rights expressly mentioned in the Convention are so limited that they do not tolerate any inclusion of other "secondary" rights or freedoms within their limits. The differing points of view regarding these two matters have, Waldock argues, not surprisingly led to different methods of interpretation of the provisions of the Convention.[75] It is at this point that we are forcibly reminded of the connection between developing approaches – society's views concerning particular issues, technological change – on the one hand, and the "cultural" values of religions or cultures on the other. These must be not forgotten when examining the issue of human rights as it is applied to different places and different times. Obviously the issue has proved to be vulnerable, as the European Court's jurisdiction shows, to the impact of different cultures and different times, even within a community with some common standards like that of the European community.

8.6.2 A uniform approach or minimum standards

Although there exist different methods of interpretation used by different States parties to the Convention, it is nevertheless not the Convention's aim to

> seek directly to promote the unification or harmonization of European law. ... In this respect, the role of the Commission and the Court is quite different from that of the Court of Justice of the European Communities, which has the task of securing the uniform interpretation and application of Community Law. The Human Rights Convention requires only that the Contracting States give effect in their own law to the obligations they have accepted.[76]

However, besides this task, Jacobs asserts that the Convention would have an "indirect" effect on some areas of the domestic laws of the States parties to it. This occurs when a

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[74]Duffy, *supra* note 64, at 199–200.

[75]Waldock, *supra* note 2, at 3.

[76]FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 276–7 (1975).

state intends to enact new legislative acts or to interpret them. The recourse should be to the Convention in drawing up the framework to ensure the conformity of such acts with the general obligations that the state has to observe under the Convention.[77] This leads us to assume that there would be a point at which all, or most, of the European States would agree in observing their obligations under the Convention.[78]

The European machinery for the protection of human rights, Pinto argues, is directed to a large extent towards the achievement of a uniform interpretation of the provisions of the Convention. The main characteristic of such machinery is, he argues, that it allows any Contracting State to refer any violation of any of the Convention's provision, committed by any other Contracting State, and most likely occurring due to misinterpretation of the Convention, to the organs of the Convention where a judgment would be made as to whether or not such an interpretation is in conformity with the principles of the Convention. This machinery, he concludes, eventually leads to the construction of a set of uniform interpretations of certain provisions of the Convention, and thus, a set of interpretative standards would be created.[79] In some ways this argument is persuasive but there are, of course, problems. For once a uniform method of interpretation is laid down, it will consequently become difficult to tolerate any attempt to interpret the provisions of the Convention as the circumstances require. A rigid method of interpretation will be contrary to the characteristic the Convention possesses as a continuous instrument which allows different traditions a margin of appreciation to interpret the Convention according to their understandings within specified limits. Thus, it is more appropriate to put the proposition in the way suggested by Mahoney, who writes that "the Convention norm sets a *universal*[80] minimum standard which nonetheless incorporates recourse to a principle of *subsidiarity*,[81] in that it allows some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies".[82]

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[77]*Id.*

[78]*Id.*

[79]Pinto, *supra* note 10, at 281–2.

[80]He defines *universality* as follows: "insisting on the same standard of European protection for everyone, whatever the national community in question".

[81]He defines subsidiarity to mean "letting each community decide democratically at local level what is appropriate for its members".

[82]Mahoney, *supra* note 61, at 369.

8.6.3 The Convention as a living instrument

The jurisprudence of the Strasbourg organs, that is, the Court and the Commission, shows that the Convention has been regarded as a living instrument which has to meet changing social and legal circumstances and that these organs have therefore sought an approach whereby individuals who were in many cases (such as with homosexuals) outside the ambit of the protection of the Convention, and who were not conceived of by the drafters of the Conventions, might come to benefit from its protection. This led the Court and the Commission also to adopt the "rights-enhancing" method of interpretation, by which the scope of the rights mentioned in the Convention would be enlarged to encompass more individuals and cases as a consequence of noticeable changes in social attitudes throughout Europe.[83]

The Convention is regarded as a living instrument which has to meet the requirements of changing circumstances. This, in the nature of things, permits a dynamic method of interpretation.[84] Matscher further suggests that, taking the words of the Preamble of the Convention, which is an integral part of the Convention,[85] into consideration, the Convention will not pursue its purposes and objectives unless it is given an "evolutive" interpretative method of interpretation whereby at least most novel circumstances would be encompassed by the protection of the "human rights and fundamental freedoms" mentioned therein.[86] It is not out of place to emphasize here the point made by Jacobs that resort to the preparatory work of the Convention should be undertaken cautiously because, as a secondary means of interpretation it is, according to the Vienna Convention, not to be

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[83]Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 135–6 (1993).

[84]Matscher suggests that the Convention, being regarded as a living instrument, which should be interpreted and adapted to changing circumstances, is to find a very slim chance of benefiting from the preparatory works of the Convention. F. Matscher, *Methods of Interpretation of the Convention, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 63, 68 n.23 (R. St. J. Macdonald et al. eds.,1993).

[85]The Preamble of the Convention declares that the "aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and *further* realisation of human rights and fundamental freedoms". Emphasis added.

[86]Matscher, *supra* note 84, at 68. *See also* Heribert Golsong, *Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 147–62 (R. St. J. Macdonald et al. eds., 1993); Francois Ost, *The Original Canons of Interpretation of the European Court of Human Rights, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 283, 292–3 (M. Delmas-Marty ed., 1992); Mireille Delmas-Marty, *The Richness of Underlying Legal Reasoning, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 319, 337 (Mireille Delmas-Marty ed., 1992); J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 78–81 (1993).

overvalued. The resort to such a method of interpretation, that is to the *travaux préparatoires*, Jacobs goes on, might constitute an obstacle in the way of applying a dynamic approach which takes into consideration changing attitudes and circumstances.[87]

The interpretation of the Convention's provisions has not been restricted to what the drafters of the Convention intended. It is inconceivable that the drafters could have envisaged every new situation to be encompassed within the confines of the protection provided by the Convention. On the contrary: the provisions of the Convention must be interpreted in accordance with changing circumstances and exigencies that require new machinery for an effective protection of those provisions. In this regard, Jacobs points out that this method of interpretation would render the obligations States parties have under the Convention more effective and viable, since such obligations would not be restricted to only what the drafters sought.[88]

In trying to reach a common understanding and, at the same time, an acceptable interpretation of the general terms used in the Convention, we therefore, Matscher points out, "are ... in reality in the territory of the first hypothesis, that is to say, the interpretation of undefined terms of law; this territory ought therefore to be subject to a complete review by the Convention institutions".[89]

8.6.4 The interpretation process and the difficulties involved in it

What contributes to the difficulties an attempt to interpret a treaty faces is not only differing points of view regarding the meaning of a term or terms. There is in the case-law of the Court, and of the Commission as well, confusion over interpretation of, for instance, the words of Article 8 of the Convention. The cause of this confusion is mainly the considerations involved in defining the words and phrases used in the Article. Paragraph (1) of the Article pertains to the "private sphere" (e.g. private and family life, home and correspondence) of the individual's rights. Interpreting or defining "private sphere" involves, Connelly asserts, two difficulties. First, can "private sphere" be defined and determined so that it can be applied to everyone, or does it vary from one person to another depending on considerations such as an individual's personality or social status, etc? It seems that the Court's approach towards this question has been to examine issues pertaining to the person's "private sphere" regardless of any other considerations.

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[87]JACOBS, *supra* note 76, at 18–19.

[88]*Id.* at 18.

[89]Matscher, *supra* note 84, at 77.

Secondly, another difficulty might arise, according to Connelly, regarding whether public considerations can restrict the "private sphere" of the individual. The wording of Article 8(2) gives the States parties to the Convention the authority (not unlimited) to restrict the individual's "private sphere" out of some specified public interest considerations.[90]

What makes the parties to a particular treaty differ in their interpretation of that treaty is that, in the words of Judge Sir Gerald Fitzmaurice,

> they will be travelling along parallel tracks that never meet – at least in Euclidean space or outside the geometries of a Lobachevsky, a Riemann or a Bolyai; or ... they are speaking on different wavelengths – with the result that they do not so much fail to understand each other, as fail to hear each other at all. Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct – or rather acceptable – frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either.[91]

Having conceded that there exist different approaches concerning interpretation of the provisions of the Convention, and having admitted that different understandings and interpretations are inevitable, we must conclude that a somewhat general approach to accommodate and reconcile these differences is needed if the Convention is to remain effective. This approach is based on the doctrine of the "margin of appreciation". What the doctrine of margin of appreciation means, what the nature of such a doctrine is, and how significantly this doctrine is utilized in the process of interpreting the Convention's provisions will be discussed in the following section.

8.7 The Margin of Appreciation[92]

8.7.1 Origins of the doctrine

In the preceding section we were concerned with the issue of interpretation of the Convention's different provisions, and concluded that different understandings and

[90]Connelly, *supra* note 17, at 578–80.

[91]Separate Opinion of Judge Sir Gerald Fitzmaurice, Golder v. United Kingdom, 1 Eur. H.R. Rep. 524, 557–8, para. 23 (1975).

[92]"The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom to act; maneuvering, breathing or "elbow" room; or the latitude of difference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws." YOUROW, *supra* note 33, at 13.

conceptions of those provisions are inevitable owing to the considerations mentioned above. Having considered these differences, it was necessary for the Convention's organs, in order to give effect to the provisions of the Convention, to establish machinery whereby, on the one hand, differences of conception and understanding would be accommodated and, on the other, the purposes and objectives of the Convention would be achieved. The doctrine of the "margin of appreciation" is the focal point of such machinery. It should not be taken for granted, however, that the doctrine will function without difficulties. The most commonly asked question in this context is how and where a balance is to be struck between, on the one hand, a state's power to apply the "margin of appreciation", and, on the other, its different undertakings under the Convention.

Before engaging in any discussion relating to the doctrine of the "margin of appreciation", it is appropriate briefly to present some ideas about the origin of the doctrine. It is not our purpose to provide an exhaustive history of the doctrine, only a general background. The doctrine of the margin of appreciation has its roots in a number of constitutional institutions in Europe, such as the French *Counseil d'Etat*, which have utilized this doctrine to review acts carried out by administrative authorities and to examine their compatibility with the general principles of the constitution. In addition, martial law has been another source from which the doctrine has been derived, and this element leads us to treat the doctrine as a technique operative in times of emergency when states had to derogate from some provisions of the human rights instruments. In its early stages, the doctrine arose in connection with cases of emergency and states' powers in such cases. It then evolved, and became associated with cases in which states, out of some specified public considerations, placed limitations and restrictions on the rights enumerated in the human rights instruments.[93]

The doctrine of the margin of appreciation was first resorted to in the Cyprus case,[94] in which allegations were made against the British government of violations of some of the provisions of the Convention. The British government argued that the Convention authorises it, under Article 15, to derogate from some of the provisions enshrined in the Convention and to take "strictly required" measures to ensure the safety of the nation.[95]

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[93]*Id.* at 14–15; *see also* JACOBS, *supra* note 76, at 201; John Kelly, *The European Convention on Human Rights and States Parties: International Control of Restrictions and Limitations, in* PROTECTION OF HUMAN RIGHTS IN EUROPE 163, 167–8 (Irene Maier ed., 1982). For provisions containing some permissible limitations and their acceptable justifications *see* Articles 8–11 of the Convention.

[94]Greece v. United Kingdom, 2 Y.B. Eur. Conv. on H.R. (1958–1959).

[95]YOUROW, *supra* note 33, at 15–16.

In the case of the Council of Europe, several elements contributed to the creation of national differences among Member States of the Council: the different legal traditions adopted by the United Kingdom, on the one hand, and other European states on the other; the form of government adopted by various European states; different attitudes towards the system of judicial review; the difference between Member States as regards incorporating the Convention into their respective domestic law; and the already existing legal and constitutional safeguards for the protection of human rights within the domestic systems of Member States.[96] All these factors led to diversity among European states regarding their conception of the norms enshrined in the Convention. It has therefore been necessary, in order to accommodate those differences, and to render the Convention a living instrument, to provide Member States with a "margin of appreciation" whereby these differences could be reconciled and an assurance of the rights guaranteed by the provisions of the Convention found.[97]

Generally speaking, there is nowhere in European jurisprudence a precise standard regarding the doctrine of margin of appreciation. Nor is it possible to draw a firm line between a state's power of discretion in interpreting the Convention's provisions in different situations, on the one hand, and the fulfilment of the purposes and objects laid down in the Convention on the other. Nevertheless, from the case-law of the Convention's organs, such a standard can to some extent be deduced, by examining two interrelated elements: first, the nature of the violation, which includes the restriction a State party to the Convention resorted to (*the Sunday Times* case) and the right or freedom it interfered with (the *Handyside* case); and secondly whether or not, and if so to what extent, such a standard can be constructed from the internal jurisdictions of the European Member States of the Convention.[98]

8.7.2 How does the doctrine work?

The doctrine of the margin of appreciation varies with the nature of the restriction asserted and the nature of the goal pursued by the Contracting States.[99] In cases where the preservation of "national security" is involved, the Court has left a wide margin of appreciation to the states in assessing the need to impose limitations on some of the rights

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[96]*Id.* at 5–6.

[97]*Id.*

[98]VAN DIJK & VAN HOOF, *supra* note 53, at 592–3.

[99]Leander v. Sweden, 9 Eur. H.R. Rep. 433, 452, para. 59 (1987); *see also* Gillow v. United Kingdom, 11 Eur. H.R. Rep. 335 (1986).

conferred on individuals.[100] The doctrine of the margin of appreciation was invoked more deliberately in the *Lawless* case, where the "life of the nation" was at stake.[101]

States, without any doubt, rely on the doctrine of the margin of appreciation as a basis for their policies which restrict and limit the individual's rights and freedoms. The Court has pronounced, in numerous cases, that states are in a better position to decide for themselves where to draw a line between the limits within which people's rights must be exercised, on the one hand, and the acts which threaten the life of the nation, on the other.

However, in cases where the Court gives a state a margin of appreciation, the task of the Court is not confined, Waldock maintains, to limiting this state's power and examining the appropriateness of the restrictions it imposes on the individual's rights or freedoms; rather, its main task is to stress the "compatibility" of the state's measures with the general purposes and objectives of the Convention. Thus the Court, in the *Handyside* case, maintained that the act of the House of Lords in imposing restrictions on freedom of expression was not compatible with the purposes and objectives of the Convention.[102]

8.7.3 Clashes between different "rights", and the "margin of appreciation"

There is a particularly difficult problem for states and the Court where the rights protected by the Convention clash. "Protection of the rights of others" includes, of course, the protection of fundamental rights. It is necessary first to determine that there is such a clash, that is, that the state's claim that another fundamental right is at issue is properly made, but, if it is, the Court leaves a very wide margin of appreciation to the state as regards how the conflict is to be resolved. This can be seen most clearly where the state claims to be protecting the rights of others to religious belief. In *Kokkinakis v. Greece*,[103] the Court held that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are

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[100]*Leander* case at 453, para.59.

[101]" ... without being released from all its undertakings assumed under the Convention, the Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15 (2), provided that such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law." Lawless v. Ireland, No. 3, 1 Eur. H.R. Rep. 15, 30 para. 22 (1961).

[102]Waldock, *supra* note 2, at 7–8.

[103]Kokkinakis v. Greece, 17 Eur. H.R. Rep. 397 (1993).

respected".[104] In addition, it reiterated that "it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic laws".[105]

Although the Court has said, in *Kokkinakis*, that Article 9 does not require a state to protect a religious believer from views which challenge his religious belief,[106] it concluded that since the Government, which had been granted a margin of appreciation in the first place to reconcile the applicant's religious freedom with the protection of the rights of others, had not shown the existence of a "necessity" for its interference in order to pursue a legitimate aim, there occurred a violation of the applicant's rights under Article 9 of the Convention.[107] In *Otto-Preminger Institute v. Austria*, on the other hand, the Court upheld the Government's measures as being necessary to protect a legitimate aim, that is, to protect "the rights of others".[108] On each occasion, the Court said that there was no "European" standard to provide objective guidance about what was necessary to protect the right to religious belief. In this regard, the Court in *Otto-Preminger* maintains that, where the case concerns "the rights of others",

> it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.[109]

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[104]*Id.* at 419, para. 33.

[105]*Id.* at 420, para. 40.

[106]The Court, in *Kokkinakis*, held that "as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned." *Id.* at 418, para. 31. In addition, the Court, in *Otto-Preminger*, goes further and asserts that "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith." Otto-Preminger Institute v. Austria, 19 Eur. H.R. Rep. 34, 56, para. 47 (1994).

[107]The Court, in its *Otto-Preminger* judgment, ruled that any interferences "will entail violation of Article 10 if they do not satisfy the requirements of paragraph 2. The Court must therefore examine in turn whether the interferences were 'prescribed by law', whether they pursued an aim that was legitimate under that paragraph [e.g. the protection of the rights of others] and whether they were 'necessary in a democratic society' for the achievement of that aim." *Otto-Preminger* case at 55, para. 43.

[108]*Id.* at 57, para. 48.

[109]*Otto-Preminger* case at 57–58, para. 50. Footnote omitted.

Accordingly, although it upheld the national measures as being within the margin of appreciation, it stressed the point that it was for the Court to determine whether the measures taken by Member States were "justified in principle and proportionate".[110]

Where there exist clashes of rights of individuals or groups, a wide margin of appreciation for a state is required to reconcile or accommodate these clashes. The right to freedom to manifest religious belief, for instance, is a significant foundation of a democratic society, and this includes the right to proselytize for one's religion and the right to criticise other religions. Therefore, a state's interference is required here for the protection of the "rights of others" to their religious beliefs, which might be affected by the exercise by others of *their* right to manifest their religious beliefs.[111]

In such cases, a government's function should be exercised within its power of margin of appreciation and for the purpose of accommodating clashes of different claims. This entails that its actions in this regard should not amount to preference for a particular religion or religions. For any policy of preference would inevitably lead to discrimination and curtailment of the rights of the followers of religions other than those protected by law. In *Choudhury v. United Kingdom*, for instance, an application initiated by Choudhury contending that the book *The Satanic Verses*, written by Salman Rushdie and published by Viking Penguin, amounted to blasphemy against Islam was rejected on the ground that the law in England does not regard issuing such materials, which include attacks on religious symbols and belief, as blasphemy except in cases where they are directed against Christianity.[112] The Commission said that there was no unlawful discrimination under Article 14 in differentiating between which religions are to be protected by a blasphemy law.[113] In the light of judgments of the Court in cases like *Otto-Preminger*,[114] this is a conclusion which will bear re-examination. For this policy of providing protection only for a particular religion would no doubt leave religions other than Christianity unprotected, and

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[110]*Kokkinakis* case at 422 para.47.

[111]*Otto-Preminger* case at 56, para. 47.

[112]Choudhury v. United Kingdom, App. No. 17439/90, Eur. Comm'n H.R. Dec. of 5 March 1991. Reprinted in 12 HUM. RTS. L.J. 172, 172 (1991).

[113]*Id.* at 173.

[114]Where the Court concluded that "the measures complained of were based on section 188 of the Austrian Penal Code, which is intended to suppress behaviour directed against objects of religious veneration that is likely to cause 'justified indignation'. It follows that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons." It therefore "accepts that the impugned measures pursued a legitimate aim under Article 10(2), namely the protection of the rights of others". *Otto-Preminger* case at 57, para. 48.

consequently, owing to the lack of legal protection, the rights of the followers of these religions would be vulnerable to violation.

In *Wingrove v. United Kingdom*,[115] where a film named *Visions of Ecstasy*, written and directed by Mr Wingrove, was refused a certificate by the British Board of Film Classification on the basis that it was in violation of the criminal law of blasphemy, the Court again faced the issue of clashes between the different claims of the applicant and the government. The former contended that, by refusing his film a certificate, the British Board of Film Classification had violated his right to freedom of expression guaranteed by Article 10 of the Convention, whereas the latter argued that it has acted within the power of the margin of appreciation given to it by the Convention to pursue a legitimate aim, namely the protection of "the rights of others".

The Court in this case puts a special emphasis on the fact that in cases which involve personal beliefs and convictions, clashes of different claims are more conceivable and, in the absence of a European conception of such issues as morals or blasphemy, States parties, "by reason of their direct and continuous contact with the vital forces of their countries" are "in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended".[116] To put it another way, the Court, in cases where different rights clash, leaves a wider margin of appreciation for a state to resolve such clashes.

8.7.4 Cultural factors and the principle of "proportionality"

In the *Dudgeon* case, the Court took into account to some degree the argument of Northern Ireland which centred on the assumption that public opinion in Northern Ireland regarding the issue of "morals" differs considerably from that of Great Britain. It further treated this peculiarity as "a relevant factor", and therefore, in evaluating the measures taken by the government in Northern Ireland, made its judgment of the case on the basis of what

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115Wingrove v. The United Kingdom, Eur. Ct. H.R. Judgment of 25 November 1996 (19/ 1995/ 525/ 611).

116*Id.* at 22 para. 58.

"morals" connotes in Northern Ireland society.[117] In the same direction, Judge Walsh, in his Partially Dissenting Opinion, writes that

> religious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and in particular sodomy, this attitude to sexual morality may appear to set people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable. Such views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.[118]

The Court, furthermore, stressed the fact that "where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities".[119]

The Court accepts that there is considerable opposition, among an important sector of the population in Northern Ireland, to any statutory change in the laws regulating moral issues. The Court does not underestimate this factor, and maintains that "whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Ireland society is certainly relevant for the purposes of Article 8(2)".[120] Nevertheless, the Court decided that

> the reasons given by the government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. ... The restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.[121]

The Court's emphasis here was on the fact that interference with the individual's homosexual acts cannot be criminalized on the basis of what public opinion had in mind at the time the law was enacted. Furthermore, the nature and scope of the law, being so broad

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[117]Caution is certainly required when considering the notion of "morals" since, as Flugel points out, "moral action is action in accordance with values". J. C. FLUGEL, MAN, MORALS AND SOCIETY 23 (1955).

[118]Partially Dissenting Opinion of Judge Walsh in *Dudgeon* case at 185, para. 16.

[119]*Dudgeon* case at 165–6, para. 56.

[120]*Id.* at 166, para. 57.

[121]*Id* at 167–8, para. 61.

that no individual, even those who are over the age of consent, is exempt from its application, makes it very hard for such a law to be defended and justified under any of the cases provided for in Article 8(2) of the Convention.[122] In other words, what is examined here is the proportionality of the law in question with the right involved in the case.

The Commission also stressed beforehand its awareness that

> in the religious and political situation prevailing in Northern Ireland the respondent Government may have had strong reasons for their decision not now to change the law. Nevertheless it must consider whether the reasons given for maintaining the law are relevant and sufficient in the context of Article 8 of the Convention. Whilst the views of local politicians, church leaders and other members of the community may provide a valuable indication of the requirements of "protection of morals" in the particular community and be entitled to considerable respect, they cannot of themselves be decisive. The Commission must address itself to the question whether it is *necessary* in order to protect the moral standards of the community to interfere with the fundamental right to respect for the private life of persons who, almost by definition, form part of a minority. The criterion to be applied is not whether the prevailing attitude in the community is one of moral disapproval of homosexuality, of tolerance or intolerance, but whether in order to preserve moral standards it is necessary to maintain criminal legislation.[123]

The practical difficulties regarding the issue of "proportionality", where cultural and religious considerations *vis-à-vis* a state's interference are involved, remain, of course. The question "In what circumstances might the cultural factors justify interference with, for instance, the rights of homosexuals?" is unavoidable. There is no reliable method of estimating the differentials that follow from the application of the principle of the proportionality of states' actions to the aims they seek in such cases. This is because there is an underlying difficulty arising from a lack of clarity regarding the place of moral values, as an issue that necessitates a state's acting for its preservation, in a given society and its judicial system; and also because, in matters so controversial and so subject to religious and social cross-currents, the various trends of opinion are difficult to evaluate.

8.7.5 Scope of the "margin of appreciation"

In order for the doctrine of the "margin of appreciation", being a mechanism which was adopted to accommodate differences among different States Members of the Convention, not to exceed its function and objectives, its scope should be defined or, in other words, its limits should be prescribed. Failure to do this would eventually lead to the utilization, by States Members, of the doctrine in justifying policies violative of the provisions of the Convention. It is true that differences in conceptions and interpretations of the

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[122]L. J. CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 161 (1994).

[123]*Dudgeon* case at 58, para. 114.

Convention's provisions require a different – narrow or wide – scope of the margin of appreciation. A strictly defined or rigidly limited scope of the doctrine cannot be applied to different cultures or traditions which have different understandings and conceptions; nor can it practically be conceivable that it would be applied to different rights in different situations and circumstances. As we have shown earlier in this chapter, the scope of the doctrine varies, depending on the nature of the rights involved and the aim pursued in each case. These latter criteria in turn are far from being identical or similar in different traditions and cultures. That is to say, the nature of the right involved and the importance of the aim pursued in protecting that right are predicated upon some variables which might, in some cases, be peculiar to some societies but not to others.

Throughout its case-law, it seems that the European Court has treated the doctrine of the "margin of appreciation", or its scope (the issue of our concern here) as being dependent upon, affected and determined by the "circumstances", the rights involved and the "context" of the case.[124] These factors are of particular importance here because of their saliency in determining the scope of the margin of appreciation.

Having conceded that granting Member States the power of the "margin of appreciation" is one significant way of accommodating differences among them, and having accepted that the utilization of such a machinery involves various considerations, such as degree, scope, purpose, etc., which eventually lead to different understandings and degree of protection of the rights mentioned in the Convention, it is of utmost importance in such cases to find out whether a state's practice of the "margin of appreciation" was within the limits that are necessary to preserve the aims and objectives sought by the Convention. The main characteristic of such an approach was to find out a common trend of practices among the Member States in cases where they utilized the doctrine to compromise between different interests.[125]

European national consensus was a determining factor in some of the Court's decisions when it considered cases which involved the doctrine of the margin of appreciation. The Court utilized this factor in, for instance, the *Handyside*, *Sunday Times* and *Dudgeon* cases. In the first case, a European national consensus concerning the issue of "public morality" was not found. Thus the Court granted the State party a wide margin of appreciation and therefore upheld its action for the preservation of public morals as not

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[124]Delmas-Marty, *supra* note 86, at 333.

[125]*Id.*

being violative of the Convention. In the second and third cases, the Court found that there existed a European national consensus with regard to "judicial impartiality and authority" in the *Sunday Times* case, and tolerance of private homosexual activities between consenting adults in the *Dudgeon* case. It therefore narrowed the states' margin of appreciation in these cases and ruled in favour of the applicants.[126] What these three cases suggest, besides the issue of "European consensus", as being determinative of the scope of the "margin of appreciation", is that the nature and significance of the aim of the governments in these cases undeniably influences the scope of a state's "margin of appreciation". In this context, the Court, in the *Sunday Times* case, clearly states that "the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10(2)".[127]

The Court, in assessing the actions taken by States parties to the Convention, takes into account, as a method whereby the scope of a state's margin of appreciation could be defined, the states' practice regarding a particular right.

If the meaning and content of the phrase "private life", for instance, are clearly defined, it is easier for the Court to determine the scope of a state's margin of appreciation with respect to this right. The Court has dealt with such occasions on a "case-by-case" approach in examining the compatibility of a state's treatment of the "private life" of its people with the purposes and objectives of the Convention.[128]

Where there exists a unified European conception of terms or phrases such as "morals", "national security", etc., the Court limits the states' margin of appreciation and allows its supervisory function more leeway for adjudicating cases involving such issues. For where a European consensus with regard to these issues is absent, it will be difficult for the Court to adjudicate such issues, which involve substantial differences of opinion according to the attitude of the people in those territories towards such issues.[129] The Court in the *Dudgeon* case set out in strong terms the significance of the existence of a European "general" attitude towards homosexual activities in limiting each Member State's power of the "margin of appreciation" in such cases. Therefore, it had to exercise a wider supervisory function *vis-*

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[126]YOUROW, *supra* note 33, at 194.

[127]*The Sunday Times* case at 276, para. 59.

[128]*Id.* at 103.

[129]*The Sunday Times* case at 276, para. 59.

à-vis the national "margin of appreciation", which has been narrowed in the presence of a European perspective on homosexual activities.[130]

It is an accepted proposition that notions such as "morals" have undergone drastic changes. Nevertheless, there is still argument as to whether any uniform European conception of, for instance, the notion "morals" exists. In the *Handyside* case (1976), the Court held that although "morals" had been subject to change over the preceding years, morality still remained a controversial issue subject to different definitions and conceptions, even within the Member States of the Council of Europe. After over a decade, in 1988 the Court, in its judgment in the *Müller* case, again stressed the same point, saying that there cannot be found in the legal systems of the European Member States a uniform conception of the notion "morals".

While the power to determine a national notion of "morals" is very wide, the Court is nevertheless prepared to review the proportionality of the measures taken by the states to protect morals. Although the Court in the *Open Door* case ruled that the injunction imposed by Irish law prohibiting the imparting of information related to the issue of abortion to pregnant women who seek the termination of their pregnancies abroad is entirely grounded in the opinion of the majority of the Irish people regarding the issue of abortion, and although it "acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life", it nevertheless "cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable".[131]

Assessing the doctrine of margin of appreciation, Judge Spielmann, in his Dissenting Opinion in the *Müller* case, writes: "I believe however that there are limits to this concept. Otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice."[132] The scope of the doctrine of the margin of appreciation is not an open-ended one. It "may expand or contract on a case-by-case basis, depending upon which Article, and which limitations upon rights and upon State power to restrict them, are involved. This is a dilemma, signifying the tension between a set of guidelines and a flexible judicial attitude tailored to the vicissitudes of individual

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[130]*See Dudgeon* case at 167, para.60.

[131]Open Door Counselling and Dublin Well Woman v. Ireland, 15 Eur. H.R. Rep. 244, 264–5, paras. 65, 68 (1992).

[132]Dissenting Opinion of Judge Spielman in *Müller* case at 234, para. 10.

circumstances."[133] If the Strasbourg organs are to pave the way towards a consensual European standard for interpreting the Convention, a state's margin of appreciation has to be limited or subject to certain "supervisory" approval from these organs. For if the margin of appreciation remains unlimited, it is hard to predict or conceive a gradual construction of any consensual European approach regarding the interpretation of the Convention.[134]

The matter is of a particular complexity. What makes the matter so complex is, Macdonald writes, the fact that "variations in the width of the margin of appreciation are inevitable: [therefore] the Court must deal with different rights, [whith] different claims in respect of the same right by applicants in different situations, and with different justifications advanced by States at different times".[135]

8.8 Interference

The Court and the Commission found that not all the regulations which involve people's private lives amount to interference.[136] Two main considerations, Connelly maintains, should be taken into account in considering whether an act amounts to an interference in people's private lives. First, a person cannot claim that a legislative act interferes with his private life unless such an act has a real effect on his private life. Secondly, public interests should be considered *vis-à-vis* the effects on the private life of individuals: "If the scales come down on the side of the effects on the applicant, there is an interference in his private sphere. If the scales come down on the side of the public interest, there is no interference."[137]

Generally speaking, a state's interference with an individual's rights or freedoms might occur, Paul Mahoney asserts, in one of two ways. In some cases, a government might exceed its power with regard to regulating the protection of a right. In other cases, the

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[133]YOUROW, *supra* note 33, at 179.

[134]*Id.* at 48.

[135]R. St. J. Macdonald, *The Margin of Appreciation, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 84 (R. St. J. Macdonald et al. eds., 1993).

[136]The Commission in the *Brüggeman and Scheuten* case expresses its view with regard to the mother's right to terminate her pregnancy and the interference on the part of a state to regulate such a right by suggesting that "not every regulation of the termination of unwanted pregnancies constitutes an interference with the *right of respect* for the private life of the mother. Article 8 (1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother." Brüggeman and Scheuten v. Germany, 3 Eur. H.R. Rep. 244, 252–3, para. 61 (1977) (Commission report).

[137]Connelly, *supra* note 17, at 583.

government's interference with a protected right, although carried out in "good-faith", might not, it seems, be "necessary" for the protection of particular public interests.[138]

8.9 Limitations

From the jurisdiction of the Strasbourg organs, it can be asserted that for any restriction to be justified under the Convention, it must meet three distinct conditions. Such a restriction must be prescribed by law;[139] it must be "necessary in a democratic society";[140] and it must serve to effectuate the purposes and objectives[141] prescribed in the Convention.[142]

In this respect, Judge Fitzmaurice, in his Separate Opinion in the *Golder* case, opined that interference with an individual's right in a particular case, in order to be justified, that is to say held necessary for the prevention of public disorder or crime, must be considered as such in that particular case.[143]

The Court in the *Sunday Times* case was of the opinion that the requirement that a state's restriction on an individual's right be "necessary" does not mean that such a restriction must be "necessary" in other legal systems as well. It suffices that the restriction be regarded so in that state.[144]

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[138]Mahoney, *supra* note 61, at 368.

[139]Article 8 of the Convention, guaranteeing everyone's right "to respect for his private and family life, his home and his correspondence", reads, in its second paragraph: "there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law ... ".

[140]Article 8(2) of the Convention reads: "and is necessary in a democratic society ..."; Article 9 of the Convention, which deals with everyone's "right to freedom of thought, conscience and religion", states in paragraph (2) that any limitation on this right has to be, amongst other things, "necessary in a democratic society... "; Article 10(2) of the Convention states that the restrictions on an individual's freedom of expression must, *inter alia*, be "necessary in a democratic society ..."; and Article 11 of the Convention, dealing with "the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests", states in its second paragraph that the restrictions on these rights must be "necessary in a democratic society...".

[141]Article 18 of the Convention clearly illustrates this by stating that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".

[142]CLEMENTS, *supra* note 122, at 157; LOUCAIDES, *supra* note 30, at 183–85; VAN DIJK & VAN HOOF, *supra* note 53, at 578; Marc-André, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125–46 (R. St. J. Macdonald et al. eds., 1993); Müller v. Switzerland, 13 Eur. H.R. Rep. 212, 225–9, paras. 28–37 (1988); The Sunday Times v. The United Kingdom, 2 Eur. H.R. Rep. 245, 269–76, paras. 45-59 (1979); Klass and Others v. Federal Republic of Germany, 2 Eur. H.R. Rep. 214, 231, paras. 43–46 (1978).

[143]*Golder* case at 552, para. 10.

[144]*The Sunday Times* case at 277, para. 61. *See also* LOUCAIDES, *supra* note 30, at 189–95.

It can be deduced, from the case–law of the Court, that the phrase "prescribed by law"[145] requires the fulfillment of two conditions. First, "the law must be adequately accessible", that is to say the law must be understandable to the citizen so that he can foresee its applicability to a particular case. Secondly, an act, in order to be considered a law, should be drawn up precisely enough so that a citizen would have no difficulty in predicting the outcomes of conducting a particular action.[146] The Court, notwithstanding, accepts that it is inconceivable to have such all-inclusive and all–exclusive law. It further stresses that "the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague".[147]

8.10 The Council of Europe and International Society

The Council of Europe, as conceived by Yourow as a "group of nations [which] fundamentally shares the Judaeo-Christian tradition, democracy, and mixed-market economies, with highly integrated technological infrastructures",[148] is an entity which is no doubt more tolerant (though, in the nature of things, not unreservedly so) of being regulated and ruled by a regional Convention than any other community. The position was clearly stated by Jacobs where he wrote:

> The standards adopted for interpreting the European Convention may sometimes differ from those applicable to other international instruments. This is because the interpretation of the European Convention may legitimately be based on a common tradition of constitutional law and a large measure of legal tradition common to the Member States of the Council of Europe. Thus the Commission has relied as a guide to the scope of the rights guaranteed by the Convention, on comparative surveys of the laws of the Member States: the laws relating to vagrancy, for example, or legislation on the right to respect for family life, or on various aspects of criminal procedure. Again to decide what is "reasonable" or what is "necessary" – two terms which occur frequently in the Convention – or what constitutes "normal" civic obligations, reference may be made to the general practice of the Member States of the Council of Europe.[149]

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[145]The phrase connotes that "the defendant State must point to some specific legal rule or regime which authorises the interfering act it seeks to justify [Footnote omitted] ... The rule need not be a rule of domestic law but may be a rule of international law or Community law so long as it purports to authorise the interference [footnote omitted] ... If a State does indicate the legal basis for its action, the Court is reluctant in the extreme to accede to arguments that the national law has not been properly interpreted or applied by the national courts." HARRIS et al., *supra* note 17, at 286.

[146]*The Sunday Times* case at 271, para. 49; *see also* HARRIS et al., *supra* note 17, at 287 and FAWCETT, *supra* note 35, at 271–2; LOUCAIDES, *supra* note 30, at 186–8.

[147]*Müller* case at 226, para. 29; *See also The Sunday Times* case at 271, para. 49.

[148]YOUROW, *supra* note 33, at 3.

[149]JACOBS, *supra* note 76, at 19–20. Footnotes omitted.

On the other side of the scale, "the history of the UN Covenants exemplifies the difficulties of negotiating detailed human rights provisions that will be acceptable to the governments of States of widely differing cultures, traditions, ideologies, and stages of economic and social development".[150] It cannot be maintained that these differences have no significance for the effectiveness of international human rights instruments and the quest for universality for such instruments. It has been shown earlier in this chapter how these variables restrict, or at least influence, the application of such general treaties to parties with obviously different conceptions and attitudes regarding such variables, even within a single community which shares some traditional and historical backgrounds. Certainly, "agreement on such matters is easier to achieve among governments within the same geographical region, sharing a common history and cultural tradition ... This is well illustrated by the case of Europe. Less than two years after the adoption of the *UDHR*, and inspired by that instrument, the West European Member States of the Council of Europe (CE) had drafted *EHR* ."[151]

It is important also to note, regarding the international human rights documents which have been concluded, that

> it was a reasonable simplifying assumption historically when international society consisted of Western States that shared not only a common cosmopolitan culture but more or less the same levels of development which enabled them to reciprocate without undue difficulty. It is more problematic nowadays in a global international society because States are more varied culturally and unequal economically, technologically, and militarily than they have ever been.[152]

Thus, what made the adoption of international human rights instruments possible was that they were proposed and formulated at a time when the international community consisted of a number of states which, as in the case of the European Convention, shared some common characteristics. However, with the growth of nation states and the inclusion of new states with different cultures and traditions, the effectiveness and the universality of the idea of human rights have been subject to continuous debate.

8.11 Concluding Remarks

The Convention does not set out uniform standards for the ratifying states. It is a "subsidiary" system for the protection of human rights. The European Court acknowledges

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150PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 26 (1983).

151*Id.*

152ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 28 (1994); *see also* Scheuner, *supra* note 65, at 214–74.

the superiority of national institutions in making some of the judgments required to interpret and apply the Convention. Even though there is a considerable degree of cohesion among the European States and an agreement about basic rights, detailed understandings differ quite widely. While retaining the ultimate right to assess the decisions of national authorities, the Court allows a "margin of appreciation" to them in exercising their responsibilities. Though it operates practically throughout the Convention, the margin of appreciation is not a uniform doctrine. It has been invoked most frequently in the application of Articles 8 to 11 of the Convention, which have a similar structure in that each Article sets out a right or rights in paragraph 1 and provides the conditions upon which a state may justifiably interfere with the right in paragraph 2. The margin of appreciation has been used both in defining what the rights are and in deciding whether interference with rights is justified.

The need to interfere with rights set out in Articles 8 to 11 arises because of the very width of interest which they protect. The Convention States have decided that there are some circumstances when it would be proper for a state to interfere with the exercise of a right to protect some other public interests. Within this category, a state may be faced with the task of reconciling clashes of rights – for instance, between the right to respect for private life and the right to freedom of expression. While the language of "balance" is frequently used to describe the task of the Convention organs, it is not simply a matter of weighing equal considerations. The rights are fundamental and the recognition of this quality requires that the margin of appreciation be applied to provide the greatest protection when rights are being defined and to place on the state special burdens of justification for interference so that only truly necessary and minimum interferences are found to be permissible.

Thus, even in the relatively coherent traditions of the European States, the Court has found that the protection of human rights allows for a measure of difference in the application of those standards to take into account moral and religious differences between states. It is unwilling to impose upon states with different approaches one solution or the other. This is why, as indicated earlier, States parties were allowed the power of the margin of appreciation to accommodate and reconcile these differences.

If it is the case with one part, and only one part, of the international community that there is an agreement to leave a considerable "margin of appreciation" to the European States to produce their own understanding and interpretations of broad terms such as morality (though there are some cases in which the European Court has revised the judgments of domestic courts), we can predict the difficulties which are very likely to occur if, by

analogy, we apply this method to the international instruments. It is thus inevitable, at the international level, where there exists a wider range of differences and even clashes between different cultures and traditions, that states be granted a wider margin of appreciation in order to accommodate some, at least, of the differences between national traditions. The analogy is often drawn between regional human rights treaties and international human rights treaties. It is, therefore, all the more important that there should be no confusion of thought regarding the position occupied by international treaties in the regional systems. It is clear that failure to appreciate the true position may lead to the application to the international system of erroneous principles.

Despite what has been said about the European Convention in this regard, the jurisdiction of the European Court of Human Rights is of particular significance here as regards the construction of a framework within which similar phrases in the international instruments can be interpreted. European case-law undoubtedly offers guidelines that should be taken into account when considering and applying the general terms enunciated in the international instruments on practical cases.

A more useful element of any attempt to accommodate the different understandings and interpretations of the international human rights instruments – and more precisely, those relatively broad terms and phrases – is to be found in the creation of machinery suitable for interpreting those instruments and in the provision of more detailed, though of course not unlimited, state powers for providing effective protection for the rights enumerated therein. This approach should not interfere with the freedom of individual states to use their discretionary powers to define the relevance of such provisions, terms and phrases to their respective traditions. This is a presumption which would resolve conflicting interpretations of the provisions of international human rights instruments in favour of that which gives efficacy to the provisions. This is so because it cannot be assumed at the outset that the present structure of the international human rights law must be the permanent framework of action, for it may well be that the objectives cannot be reached within such a framework. Changes in the structure may thus appear necessary. The establishment of the human rights machinery through a process of accommodating different legal and cultural systems, culminating eventually in an act of voluntary assent, may be more difficult to achieve than a policy of imposing a set of rules applicable to various traditions, but its permanence will be assured. It will rest upon the solid foundation of world opinion, which will have been formed out of the general practice of member states of the United Nations. However, because of the difficulties involved in obtaining a universal consensus regarding human rights treaties, and because states' acceptance of human rights treaties involves uncertainty

regarding their future obligations under such treaties, and moreover because there exist some areas in which reconciliation is not possible, reservations, as another means of accommodating differences, will help in enhancing the possibility of universal participation in human rights treaties. This will be dealt with in the next chapter.

CHAPTER 9

RESERVATIONS

9.1 Introductory Remarks

As was pointed out in the previous chapter, differences concerning the interpretation and understanding of human rights treaties are inevitable. This conclusion was reached following an examination of the European Convention for the Protection of Human Rights and Fundamental Freedoms as it is applied to countries with different cultures and traditions. This European system is mainly based on the principle of the "margin of appreciation" as the core element of the European machinery for the implementation of the Convention and, more importantly, it serves as a means of accommodating such differences among different states in their expression of their interpretations and understandings of the provisions of the Convention.

In this chapter, we are concerned with another means of accommodating differences that, as we concluded in the previous chapter, are wider in scope at the international level than at the regional level. Unlike the accommodating machinery discussed in the previous chapter, namely, the principle of the "margin of appreciation", which allows to States parties to a treaty leeway to interpret and understand the provisions of that treaty without modifying or excluding the legal effect of any of those provisions, reservations are utilized by States parties in order to modify, or exclude themselves from applying, some of the treaty's provisions, for reasons which are discussed below. Thus, reservations and the principle of the "margin of appreciation" have different effects on human rights treaties and they function within different frameworks, though they serve the same end, that is, accommodating differences which exist among States parties to human rights treaties. Throughout this chapter, "reservations" will be discussed in the context of their meaning, the applicability of the Vienna Convention on the Law of Treaties (VCLT) to reservations to human rights treaties, the reasons that induce states to resort to reservations, the validity of reservations, and their legal effect so far as the treaty relations between the reserving State and other States parties are concerned.

Although it is the intention of those drafting any treaty or convention to ensure the acceptance of all the provisions of that treaty or convention by all parties, reservations allow a party the flexibility to adopt such an instrument in its general requirements and make reservations concerning the provisions that it considers incompatible with its domestic law.

Thus, reservations serve as an incentive for states not to discard human rights treaties as a whole.[1]

As regards the issue of reservations to a particular treaty, two considerations are at the heart of the matter. On the one hand, there is the object of as wide participation by as many States as possible in the ratification of a treaty. This can be achieved by providing those States with the flexibility to adopt the treaty but to except those provisions which they deem it beyond their ability or against their interest to comply with.[2] The second consideration relates to the issue of the preservation of the integrity of the treaty, which dictates that no such exception be granted to any of the States considering ratifying the treaty.[3] It is obvious that there is some conflict between the two issues. As was mentioned in the previous chapter, the aim of the principle of the "margin of appreciation" was to strike a balance between two conflicting considerations, namely, different interpretations and understandings, on the one hand, and the objectives and purposes of a treaty or convention, on the other. Likewise, it is the function of the rules governing the issue of reservations to strike a balance between them, and "it is this conflict between universality and integrity which gives rise to all reservations regimes, be they general ... or particular".[4] The conflict, of course, is between those who see the regime of reservations undermining the human rights established by the various treaties and those who see reservations as a way of enlisting States into human rights systems to the extent they are willing to be enlisted.

Alain Pellet, the Special Rapporteur, presents in his Second Report the dilemma faced by human rights legislatures by reiterating the words of Judge Rosalyn Higgins who stated that "the matter is extremely complex. At the heart of it is the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the

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[1]General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declaration under article 41 of the Covenant, CCPR/C/21/Rev.1/add.6, adopted by the Committee at its 1382nd meeting (fifty-second session) on 2 November 1994. (Hereinafter General Comment No. 24(52), para. 4, reprinted in 15/11-12 HUM. RTS. L.J. 464–7 (1994).

[2]In this connection, the policy of the United States in relation to human rights instruments has been unclear or unstable. Although the United States has been, since the emergence of international concern for human rights issue, particularly in the aftermath of World War II, advocating the promotion of human rights status around the globe, its attitude towards adopting and ratifying international human rights treaties demonstrates that its policies in this regard have been, to use Buergenthal's language, "a bundle of contradictions". Thomas Buergenthal, *The US and International Human Rights*, 9/2-3 HUM. RTS. L.J 141, 141 (1988).

[3]ILC 48th Session 6 May–26 July 1996, Second Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, 16, para. 90.

[4]*Id.* Footnote omitted.

treaty bodies to promote the effective guarantee of human rights."[5] Thus, it was imperative to find out the least detrimental machinery for each of the two considerations at issue. It has already been pointed out that accommodating both these two concerns is very difficult.

Pellet asserts that, generally speaking, no State is bound by the rules of international law, including those rules applicable to the law of treaties, and, more specifically, the rules applicable to reservations, without its consent.[6] "By its very definition", he continues,

> the law of treaties is consensual. ... Treaties are binding on States because States have wished to be bound by them. A treaty is thus a legal instrument which implements human wishes. States are bound by treaties because they have undertaken – because they have consented – so to be bound. They are free to make this commitment or not, and they are bound only by obligations which they have accepted freely, with full knowledge of the consequences.[7]

Taking into account the considerations mentioned above, any rules of reservations have to strike "a dual balance", between, on the one hand, the opposing issues of the universality and integrity of a treaty and, on the other hand, the requirement of consent of the reserving State and other States parties.[8]

9.2 Vienna Convention or a Special Regime

Human rights treaties are mainly formulated for the purpose of providing individuals, not states, with some rights and freedoms that those drafting them consider are not guaranteed sufficient protection and respect at the domestic level. Thus, the drafters of human rights instruments envisaged that providing such rights and freedoms under international supervision would render them more effective and allow greater protection. Such a purpose is different from that of other multilateral treaties, in that they do not involve any direct mutual relations between States parties to them. In other words, the principle of reciprocity[9] cannot be operative in such treaties, in the sense that the conduct of one State party does not necessarily affect treaty relations with other States parties.[10] The absence of the principle of

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[5]*Id.* at 17, para. 91.

[6]*Id.* at 18, para. 96.

[7]*Id.* at 17–18, para. 95. Footnote omitted.

[8]*Id.* at 19, para. 97.

[9]"Reciprocity is a mechanism that creates a balance of rights and duties [footnote omitted]. Whether or not the balance struck is a good one from the point of view of morality is irrelevant in this respect. ... It is the mechanism of give and take, that plays a role in many spheres of life." LIESBETH LIJNZAAD, RESERVATIONS TO UN–HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 68 (1995).

[10]General Comment No. 24(52), para. 17; P. H. Imbert, *Reservations and Human Rights Conventions*, 6 HUM. RTS. REV. 28, 33 (1981).

reciprocity from human rights treaties led some commentators to argue that the VCLT, and in particular Articles 19–23[11] which regulate the issue of reservations, is inapplicable to such treaties and, therefore, they argue that a special reservations regime should be designated to deal with the peculiarity of human rights instruments.[12]

Most of the criticisms of the Vienna Convention's reservations regime rest on a rejection of the proposition that each State party to a treaty should play a part in determining the validity of a reservation by accepting or rejecting it. That is to say, the criterion laid down by the Vienna Convention, which grants the States parties the authority to decide on the compatibility of a reservation with the object and purpose of the treaty, cannot work properly.[13] For this regime will give each State party the power to decide for itself whether to accept the reservation made or object to it and, consequently, its act of acceptance or objection results in its formulating its treaty relations with the reserving State. Such a result can by no means be the same for all parties, as each State party will deal with the matter as it sees right and appropriate given its own understanding.[14] In addition, when States parties intend to evaluate, in accordance with the Vienna Convention's reservations regime, a reservation entered by a State party, they do so on the basis of their assessment, first of all, of the statement made by that State.[15] This assessment might result in some of the States parties regarding such a statement as being a reservation and other States parties regarding it as a mere declaration of understanding or interpretation.[16] Thus, different treaty relations are most likely to occur among States parties as a consequence of their applying such a regime.[17]

This argument can be disputed on the grounds that the States parties are not entitled to make arbitrary decisions concerning the validity of a reservation made by a State party.[18] Their

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[11]"Article 19 governs when reservations may be formulated. ... Article 20 determines when they may be accepted or objected to ... and Article 21 describes their legal effects. ... In addition, Article 22 describes when reservations may be withdrawn ... and Article 23 outlines the procedures regarding reservations, acceptances, objections and withdrawal." Massimo Coccia, *Reservations to Multilateral Treaties on Human rights*, 15 CAL. W. INT'L L.J. 1, 7–8 (1985).

[12]*Id.*

[13]Imbert, *supra* note 10, at 35.

[14]*Id.*

[15]Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L.Q. 390, 397 (1997).

[16]*Id.*

[17]Imbert, *supra* note 10, at 35.

[18]William A. Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, VVVIII CAN. Y.B. INT'L L. 39, 64 (1993).

evaluation must be within the framework set by the VCLT and must be based on a lawful ground, such as the compatibility of the reservation with the object and purpose test.[19]

In reply to the same criticism, Pellet maintains that when a State party uses its authority to determine the admissibility of a reservation to a treaty, it does not do so for its own benefit. Rather, it does so for the interest of all other parties.[20] He further disputes the criticism presented above on the grounds that it does not advance a legitimate argument. "Neither the allegedly 'objective' character of human rights treaties", he argues,

> nor the absence of reciprocity characterizing most of their substantive provisions, constitute convincing reasons for a regime departing from the ordinary law. This might at most be a ground for saying that it might be *desirable* for the permissibility of reservations to those instruments to be determined by an independent and technically qualified body, but that would not result in the existing machinery being vested with such competence if it was not provided for in the treaties by which the bodies were established.[21]

The International Law Commission presents the overall conception of the Special Rapporteur with regard to the flexibility of the VCLT on the issue of reservations. The Special Rapporteur states that

> three mechanisms ... ensured such flexibility and adaptability, namely (a) the prohibition (article 19(c) of the Convention) of formulating a reservation *incompatible with the object and purpose of the treaty*, a general rule that precluded any rigidity by referring to the very essence of the treaty; (b) the system of *freedom* instituted under article 20 (4) and (5) and articles 21 and 22 enabling States parties not to be affected by the reservation, since they could decide to object to it, and lastly; (c) the *residual* character of the system, a fundamental feature which enabled the Vienna regime to operate not as a yoke but as a safety net. This feature meant that the system could be set aside if States so wished.[22]

In relation to the arguments presented regarding the inappropriateness of the reactions of States parties to a reservation, Pellet disputes the argument that all judgments in this regard must remain speculative or, at least, controversial. "The fact that the existing mechanism may be questionable", he argues, "does not mean that the alternative system would be legally acceptable. In particular, the criticisms of the effectiveness of the 'Vienna regime' are, in fact, tantamount to a challenging of the very bases of contemporary international law."[23]

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[19]*Id.*

[20]Pellet, *supra* note 3, at 55, para. 184.

[21]*Id.* at 65, para. 204. Italics added.

[22]Report of the International Law Commission on the Work of its Forty–Ninth Session 12 May–18 July 1997 (A/52/10)102, para. 72. Hereinafter ILC Report. Italics added.

[23]Pellet, *supra* note 3, at 65, para. 205.

Coccia presents another criticism of the Vienna regime, in presenting what appears, to some commentators, to be a contradiction between some of the provisions of the Vienna Convention related to reservations. She argues that, according to Article 19(c) of the Convention, States parties are not permitted to enter reservations which are not compatible with the object and purpose of the treaty. This implies that a reservation would be impermissible only if it failed to meet the requirement of compatibility. On the other hand, Article 20(4) states that a State which enters reservations to a treaty would be regarded as a party to that treaty only if one or more of the States parties accepted that reservation, regardless of whether it is compatible with the object and purpose of the treaty. In other words, the permissibility of reservations is determined by the way in which other States parties react to such reservations.[24] Coccia goes on to dispute this interpretation, and argues that the two Articles should be read separately: that is, each of the two Articles deals with a separate issue. "Permissibility", as the subject of Article 19, is to be determined only by the compatibility test irrespective of the other States' attitudes. "Opposability", on the other hand, is the subject of Article 20(4) which is to be considered only after deciding on the permissibility of a reservation.[25] Thus, viewed from this perspective, there is no contradiction in the Vienna Convention between the validity of reservations and their legal effects.

Mr Pellet commenting on the different approaches of the two Articles in dealing with the issue of reservations, states that

> apart from any uncertainties which may exist regarding the link between articles 19 and 20 of the Vienna Conventions, there is general agreement that the reservations regime which they establish "is based on the consensual character of treaties" [Footnote omitted]. This view constitutes the fundamental "*creed*" of the "opposability" school, which is based on the idea that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State". It is not rejected, however, by the supporters of "admissibility.[26]

The International Law Commission was of the view that, because there are no such pressing reasons which call for a special reservations regime for human rights treaties, the VCLT is applicable to all treaties irrespective of their subject, object or nature.[27] To the same effect, Pellet, in his Second Report on Reservations to Treaties, concludes that "as far as their content is concerned, the human rights treaties are not of such a special nature as to

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[24]Coccia, *supra* note 11, at 23–4.

[25]*Id.*

[26]Pellet, *supra* note 3, at 53, para. 180.

[27]*Id.* at 24–5, para. 111.

justify applying to them a different reservations regime ... the establishment, by most of these treaties, of monitoring bodies influences the modalities of determination of the permissibility of reservations".[28] In this context, the United Kingdom expresses its observation that even the contemporary law of treaties, which is mainly based on the VCLT, owes much to the Genocide Convention case of 1951, which is in turn a human rights treaty.[29] Thus, human rights treaties cannot be regarded as a category that cannot be governed by the Vienna reservations regime.

9.3 Definition

There is no more authentic way of defining "reservations" than to refer to the text of the Vienna Convention on the Law of Treaties itself, which provides in its Article 2(1)(d) that "reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

It is apparent from the words of the Article that what distinguishes a "reservation" from other statements made by a State party is the State's intention and purpose in making that statement. If a State "purports to exclude or modify the legal effect of certain provisions of the treaty in their application" to it, then its statement constitutes a reservation. But if the State expresses the statement solely for the purpose of presenting its own understanding or interpretation of a provision without excluding or modifying the legal effect of such a provision, then its statement amounts only to a statement of understanding or interpretation.[30] This criterion is easy to apply where the intentions of the States parties in making such statements are clear. However, as Coccia points out, "discerning the real substance of the often complex statements made by States upon ratification of, or accession to a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation".[31] Thus, Coccia suggests that, besides the criterion mentioned

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[28] *Id.* at 83, para. 252. *See also* Observations by the Governments of the United States and the United Kingdom on General Comment No. 24(52) relating to reservations, 16/10-12 HUM. RTS. L.J. 424 (1995) (Hereinafter US & UK Observations); Markus G. Schmidt, *Reservations to United Nations Human Rights Treaties – The Case of the Two Covenants, in* HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 20, 33 (J. P. Gardner ed., 1997).

[29] US & UK Observations, *supra* note 28, at 424.

[30] General Comment No. 24(52), para. 3; John King Gamble, Jr., *Reservations to Multilateral Treaties: A Microscopic View of State Practice*, 74 AM. J. INT'L L. 370, 371–2 (1980).

[31] Coccia, *supra* note 11, at 10–11.

above, a statement made by a State party to a provision of a treaty would be considered a reservation if it "purports to be a condition set forth by the State for its acceptance of the treaty".[32]

9.4 Why States Make Reservations

It is indeed possible that reservations to human rights treaties have negative effects on the full implementation of such treaties. However, by the same token, and using arguments no less powerful than were presented to advance the first proposition, it can be asserted that, in view of the conclusion reached earlier that differences among States parties are inevitable, unless there is machinery whereby these differences can be accommodated many states will reconsider signing, ratifying or acceding to human rights treaties. This is because states vary in their political, cultural, economic and religious traditions. And it must always be kept in mind that international human rights instruments are not contemplated as forming uniform standards applicable to all but, rather, they set minimum standards to absorb differences and discrepancies. However, we need to examine the question of what makes those states resort to reservations and whether the reasons that make states enter reservations are so compelling that those states cannot disregard them. These questions will be dealt with in this section, and an explanation for the reasons behind the making of reservations will be provided.

Redgwell suggests that, simply because there are several reasons which induce states to resort to reservations regarding some of the provisions of a treaty, it should not be assumed "that the mere fact of making a reservation is evidence of unwillingness to comply with human rights principles".[33] It should be noted here that a state is under no obligation to ratify or accede to a human rights instrument. Thus, its desire to ratify or accede to a human rights treaty, even with some reservations, is an indication of its willingness to accept and respect the rest of the rights and freedoms articulated in such a treaty.

Generally speaking, States parties to multilateral treaties resort to reservations, according to Coccia, for two reasons. First, there might exist in the domestic law or the constitution of a State party some provisions which are not in conformity with the provisions to which that State intends to make reservations and, at the same time, the State finds some difficulties in

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[32]*Id.*

[33]Redgwell, *supra* note 15, at 399.

bringing its domestic law into conformity with the provisions of the treaty.[34] This is especially the case where States derive their laws from divine sources or religion, such as is the case with Muslim countries, where a compromise cannot be achieved so far as the legal principles relating to some fundamental components of Islamic law are concerned. It is of particular interest to note here that reservations made by some Muslim countries to the Convention on the Elimination of all Forms of Discrimination Against Women[35] merit consideration of two important issues. First, most of these reservations are cast in a very general language without specifying the particular areas of conflict between the provisions subject to reservations and the related rules of Islamic law. Secondly, and more importantly, an investigation as to whether, in fact, such reservations are truly required by Islamic law must be carried out to ensure that such a justification has not been sought as a pretext to escape accountability, or at least criticism, for practices relating to the rights of women.[36]

Into this category also fall those states that regard their constitutions as paramount. The United States is the most obvious example. The unchallengeable supremacy of the US constitution over international human rights treaties can be clearly noticed in the US reservations 1, 2 and 3 made to Articles 20, 6(5) and 7 of the ICCPR respectively.[37] The

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[34]Coccia, *supra* note 11, at 21; *see also* LIJNZAAD, *supra* note 9, at 77. Consider the reservations entered by the Government of the Republic of Maldives to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDW). Jane Connors, *The Women's Convention in the Muslim World, in* HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 85, 91 (J. P. Gardner ed., 1997).

[35]Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981, in accordance with Article 27. Hereinafter Women's Convention.

[36]For a general discussion of the issue of reservations entered by some Muslim states to the Women's Convention, *see* Christine Chinkin, *Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women, in* HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 64–84 (J. P. Gardner ed., 1997); Connors, *supra* note 34, at 85–103. In this context, McBride indicates that it is not only religious traditions, particularly Islamic traditions, which have been in conflict with different international human rights standards. There rather have been various considerations which led States parties to different international instruments to enter reservations to such instruments. "Traditional customs ... the headship of families for men ... succession rules for monarchy ... the transmission of the patronmic name ... the prohibition of abortion and divorce ... homosexual activity and the status of illegitimate children ... the participation of women in the armed forces and the church" are among those considerations which States have sought to preserve when entering reservations. Jeremy McBride, *Reservations and the Capacity to Implement Human Rights Treaties, in* HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 120, 150–3 (J. P. Gardner ed., 1997).

[37]For a full text of the US statements, *see* Text of U.S. Reservations, Understanding and Declarations, 14/3-4 HUM. RTS. L.J. 123–4 (1993).

said reservations have been justified on the ground that the related Articles embody provisions which are contrary to the mandates of the US constitution and that the protection provided by the US constitution for the rights involved are more effective than those that would be provided by the ICCPR. Furthermore, some of the Articles of the Convention call for a change in the criminal justice system of the constituent states, which is beyond the powers of the Federal government. In the following paragraphs, we shall explain in more detail each of these cases.

As regards the contradiction between some provisions of the ICCPR and the constitution, the US government attached a reservation to Article 20 of the ICCPR[38] to the effect that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States". This reservation was justified by the US government on the grounds that the Article was in conflict with the First Amendment to the US constitution, which guarantees and protects freedom of speech and prohibits the Congress from enacting any law that might infringe this right. Thus, it sees that its constitution provides a more extensive and wider protection for such a right than the Covenant does.[39]

So far as Article 6(5) of the ICCPR[40] is concerned, the US government made the following, the first ever, reservation to Article 6:[41] "The United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[42]

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[38]Article 20 of the ICCPR reads as follows:

1. Any propaganda for war shall be prohibited by law.

2 Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

[39]David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14/3-4 HUM. RTS. L.J 77, 79–80 (1993). *See also* Coccia, *supra* note 11, at 41; Schmidt, *supra* note 28, at 28.

[40]It reads that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

[41]William Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21/2 BROOK. J. INT'L L. 277, 289 (1995).

[42]*See* 14/3-4 HUM. RTS. L.J 123 (1993).

This reservation has been justified by the US government on the grounds that such a penalty is accepted by the majority of the people in the constituent states, and thus such a will is included in the laws of those states, as a punishment for certain serious crimes committed by persons even though they may be aged 16 or 17. Therefore, the acceptance of Article 6(5) of the ICCPR might require a change in the criminal justice system of the United States or the constituent States.[43]

Finally, the United States' reservation to Article 7 of the ICCPR,[44] which reads "the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eight and/or Fourteenth Amendments to the Constitution of the United States", was sought because the United States believed that there existed disharmony between the language of the Article and the related provisions of the US constitution, particularly where the length of judicial proceedings – length of post-sentence detention in capital cases, the "death row" phenomenon – in such cases were concerned.[45]

Secondly, states resort to reservations where there may be uncertainty regarding the future consequences of the obligations assumed by human rights treaties, on account of their "dynamic" nature.[46] Imbert, further, explains the peculiarity of human rights treaties as follows:

> When it comes to treaties on human rights, the uncertainty is aggravated by the dynamic force inherent in such texts. While it is true that rights and freedoms ... are always desirable aims, however many years may have elapsed since they were first stated, the way in which they are interpreted and applied is bound to be influenced by developments in society. ... The temptation for a State about to become Party to a treaty is therefore to make reservations as a means of guarding against an interpretation that is foreseeable but not yet established or simply of ruling out an interpretation recently given. The States that are already Parties to that treaty may then find themselves in difficulties.[47]

States which ratify human rights treaties are always cautious concerning the unpredictable nature of their future obligations when they ratify such treaties. Therefore, resorting to reservations might serve as a safeguard against any unwanted consequences that might

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[43]Stewart, *supra* note 39, at 81.

[44]"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[45]Stewart, *supra* note 39, at 81. *See also* Schmidt, *supra* note 28, at 26.

[46]Coccia, *supra* note 11, at 21; P. H. Imbert, *Reservations and Human Rights Conventions, in* PROTECTION OF HUMAN RIGHTS IN EUROPE: LIMITS AND EFFECTS 87, 90–2 (Irene Maier ed., 1982).

[47]Imbert, *supra* note 46, at 90–2.

befall in the future.[48] Thus, reservations are seen by a reserving State as a safeguard against the unpredictable outcomes of the interpretation of such treaties. For instance, the US Senate, considering the Genocide Convention, eventually consented to it with a reservation attached to it to the effect that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States".[49] Admittedly, the Senate Foreign Relations Committee explains that the attachment of such a reservation to the Convention "was to anticipate the possibility that the International Court of Justice at some future time interpret the Genocide Convention to require the U.S. to adopt measures that would be unconstitutional".[50]

Lijnzaad suggests that political considerations might be the reason for a State's entering reservations to some treaties ratified by some other States with which it does not wish to have treaty relations.[51] In other cases, domestic political considerations might also lead to the making of reservations. In the United States, for instance, the reservations, understandings and declarations which "have been attached to human rights treaties" were "to accomplish one of two purposes: to deal with those provisions of a human rights treaty that are thought to conflict with U.S. constitution or to anticipate and overcome the legal and political objections likely to be advanced by Senate opponents of the treaty".[52]

In addition, the issue of the sovereignty of States is always present in those treaties which intend to regulate the relationships between a State and its citizens, a relationship which has been solely regulated by the States themselves.[53] It must be pointed out in this connection that "the fact that treaties on human rights are among those most likely to jeopardize the sovereignty of the Contracting Parties requires no emphasis".[54]

In viewing the reasons which lead states to make reservations to multilateral treaties in general, and human rights treaties in particular, it is clear that states do not resort to reservations except in cases where they have no other alternative but not to become a party

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[48]LIJNZAAD, *supra* note 9, at 77; Imbert, *supra* note 10, at 30.

[49]Buergenthal, *supra* note 2, at 149.

[50]*Id.* at 149–50.

[51]LIJNZAAD, *supra* note 9, at 77.

[52]Buergenthal, *supra* note 2, at 150.

[53]LIJNZAAD, *supra* note 9, at 78.

[54]Imbert, *supra* note 10, at 30.

at all. This shows that, from a practical point of view, reservations serve as a legitimate means for accommodating the differences between states, since it is difficult to deny that they differ substantially in their economic, social and cultural traditions and attitudes. Bearing in mind the existence of these differences, Lijnzaad asserts that, if a human rights treaty is to acquire a universal acceptance, it is important to ensure that as many states as possible sign and ratify it, even with some reservations. The mere inclusion of a state within the scope of a treaty would help that state to come under international supervision and induce it to reconsider the reservations it had made and try to modify or withdraw them at some future point.[55]

9.5 Validity of Reservations

The general claim of the invalidity of reservations to multilateral treaties is ruled out in the International Court's Advisory Opinion in the Genocide Case. The Court, in reply to Question 1, referred to it by the General Assembly, which reads "Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?", observes that "this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention".[56] This implies that the mere making of reservations to treaties by a State does not necessarily preclude that State from becoming a party but, rather, leads to redefinition of the treaty relations among the States parties. Thus, the Court defined its function as being to "determine what kind of reservations may be made and what kind of objections may be taken to them".[57]

The VCLT does not exclude special provisions in treaties on reservations (e.g. Article 64 of the European Convention on Human Rights). But if there is no such provision the VCLT applies, certainly between the States parties to it and probably, more widely, as customary international law.[58] Generally speaking, in the case of the absence of a reservations clause in a treaty, the Court suggests that the "character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in

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[55]LIJNZAAD, *supra* note 9, at 105.

[56]Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. 28 May 1951 (hereinafter ICJ Genocide Case) at 21.

[57]*Id.* at 23.

[58]Schmidt, *supra* note 28, at 20.

determining ... the possibility of making reservations, as well as their validity and effect".[59]

According to the Committee's General Comment, in which the Committee lays down a rule which primarily applies to the ICCPR, owing to the special nature of human rights treaties which are concluded mainly for the benefit of individuals rather than states, reservations to such treaties are not unlimited. There are some norms within those treaties that are not subject to reservations. Such norms include customary international law and "peremptory norms".[60]

The United States observes in this connection that, so far as the "peremptory" norms are concerned, a distinction should be made between seeking to depart from a peremptory norm of international law and excluding "one means of enforcement of particular norms by reserving against inclusion of those norms in ... Covenant obligations".[61] For the United States, it is in the former case that States would in effect make a reservation while, on the contrary, there is no explicit rule which precludes States from reserving against the latter.[62] Thus, a distinction should be made, when adjudging the question of the preservation of the object and purpose of a treaty, between reservations to substantive provisions and procedural provisions.[63] The case-law of the European Court of Human Rights emphasizes this point. In the *Loizidou* case,[64] the Court stressed the point that provisions that are connected with the effective implementation of a treaty are not subject to reservations. In that case, the declarations made by the Turkish government[65] had the effect of recognizing only the partial competence of the Convention's institutions, namely, that of the Commission and the Court. The Court examined the validity of the declarations by defining the meaning of Articles 25 and 46 in the light of their purposes and objectives as well as the States' practices in connections with the Articles.[66] The Court observed that these provisions allow only temporary restrictions to be made by Contracting States.[67]

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[59]ICJ Genocide Case at 22.

[60]*See* General Comment No. 24(52), para. 8.

[61]US & UK Observations, *supra* note 28, at 422.

[62]*Id.*

[63]*Id.*

[64]Loizidou v. Turkey, 20 Eur. H.R. Rep. 99 (1995).

[65]For Turkey's declarations to Articles 25 and 46 of the ECHR, *see Loizidou* case at 107–11, paras. 15–27.

[66]*Loizidou* case at 134, para. 73.

[67]*Id.* at 134, para. 74.

Otherwise, if the States parties were allowed to make unconditional restrictions to the Articles,[68] it would have resulted in different forms of enforcement of the provisions of the Covenant emerging. This, eventually, would diminish the effectiveness of the Convention as an instrument which seeks to preserve European public order.[69]

So far as customary norms of international law are concerned, the United States observes that there are several concerns which ought to be taken into account when adjudging such issues. This is because, in its eyes, no specific scope or content for each customary norm have been specified. Nor is there a precise criterion according to which such a norm can be defined.[70]

The HRC sets out a number of conditions which a State has to take into account when it intends to make a reservation or reservations to a human rights treaty. It stipulates, with regard to the ICCPR – and the same is true with respect to other human rights instruments – that "reservations must be specific and transparent".[71] Thus "reservations may ... not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto".[72] Moreover, "when considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration".[73] In this connection, the United States' practice with regard to the ICCPR is of particular relevance. The Lawyers Committee for Human Rights (LCHR), in its statements on U.S. ratification of the ICCPR, asserts that the reservations, understandings and declarations

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[68]Which are conceived by the Court to be "essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties", by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention." *Id.* at 133, para. 70.

[69]*Id.* at 134, para. 75.

[70]US & UK Observations, *supra* note 28, at 423.

[71]General Comment No. 24(52), para. 21. *Cf* ECHR Article 64 which reads as follows:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

[72]*Id.*

[73]*Id. Cf.* reservations made by Iraq, the Maldives, Egypt, Tunisia, Bangladesh, Libya and Morocco to the Women's Convention. Chinkin, *supra* note 36, at 64–84.

made by the US government "reflect three basic principles that we believe are undesirable, if not improper in principle".[74] This is because such statements made by the United States, would result in it not committing itself

> ... to do anything that would require change in present U.S. law or practice; ... the treaty should not be self-executing but should require implementation by legislation; and ... subjects within the jurisdiction of the states might be excluded from the obligation of the treaty or left exclusively to implementation by legislation by the states.[75]

The U.S. statements with regard to the ICCPR are, according to LCHR, clearly general and, therefore, have effect on the legal status of the Covenant as a whole. Therefore, the LCHR asserts, "a particular reservation should be added if a particular treaty provision is found to be unacceptable. But there ought not to be a wholesale rejection of change".[76]

The invalidity of general reservations to human rights treaties is also ascertainable from the practice of the European human rights institutions. The European Court of Human Rights in the *Belilos* case[77] ruled, in conformity with the European Commission's opinion beforehand, that the wording used by the Swiss government in its interpretative declaration[78] of Article 6(1) of the ECHR[79] was of a general character. For instance, the phrase "ultimate control by the judiciary" was not clear enough and was susceptible to different understandings and interpretations. The Court further noted that

> while the preparatory work and the Government's explanations clearly show what the respondent State's concern was at the time of ratification, they cannot obscure the objective reality of the actual wording of the declaration. The words 'ultimate control by

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[74]Lawyers Committee for Human Rights (LCHR): Statements on U.S. Ratification of the ICCPR, 14/3-4 HUM. RTS. L.J. 125, 125 (1993).

[75]*Id.*

[76]*Id.*

[77]Belilos v. Switzerland, 10 Eur. H.R. Rep. 466 (1988).

[78]The interpretative declaration made by the Swiss government reads: "The Swiss Federal Council considers that the guarantee of fair trial in Article 6(1) of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure the ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge". *Belilos* case at 475, para. 29.

[79]Article 6(1) of the ECHR states that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice".

> the judiciary over the acts or decisions of the public authorities relating to [civil] rights or obligations or the determination of [a criminal] charge' do not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the 'ultimate control by the judiciary' takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64(1) requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character.[80]

Therefore, the Court decided that the declaration made by Switzerland was not valid, for it failed to meet the requirement of Article 64 of the Convention. Since the declaration was cast in general terms, it was not compatible with Article 64. In addition, it did not meet the requirements of paragraph 2 of the Article as it failed to provide "a brief statement of the law concerned".[81]

The HRC further stipulates that, where a State makes a reservation because of the incompatibility of some of the provisions of the Covenant with its domestic law, "it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant".[82]

It is particularly relevant to note that the Committee's stipulation that a reserving State should "explain the time period it requires to render its own laws and practices compatible with the Covenant" is inapplicable to some states, particularly Muslim states. In these states, laws and rules are mainly derived from the Qur'an, which is in turn, according to Islamic law, not subject to any change or alteration so far as the general principles of such law are concerned. For instance, Muslim states cannot, theoretically speaking, ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty,[83] nor can they consider changing or modifying their domestic laws in connection with the death penalty to bring them into conformity with the Optional Protocol. This is because there are, according to Islamic law, certain crimes carrying the death penalty which are punishable by *hudud*, or prescribed punishments that are not subject to the discretionary power of the judge. The most obvious

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[80]*Belilos* case at 485, para. 4, 55.

[81]*Id.* at 487, para. 60.

[82]General Comment No. 24(52), para. 22.

[83]Adopted and opened for signature, ratification and acceptance by General Assembly Resolution 44/128 of 15 December 1989.

of these crimes is murder, the punishment for which is prescribed in the Qur'an and is therefore not subject to any modification or change.

Let us now turn to our main concern here, that is the issue of the validity of reservations. The ICJ, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case of 28 May 1951, departed from the traditional regime with regard to the rules governing the admissibility of reservations to multilateral treaties. In such a regime, the unanimous acceptance, and therefore the "absolute integrity", of a treaty had to prevail. The Court, in this case, called instead for "universal participation", which is not compatible with the requirement of unanimous acceptance. It put forward as justification for such a departure the fact that the international community had undergone dramatic change in the preceding decades and, consequently, the rules of international law governing the relationships of its members had to adapt to such changes.[84] Reiteration of the Court's words might be of special relevance here. The Court opined, regarding the Genocide Convention, that various considerations lead us to reconsider the adaptability of the traditional regime of reservations to the current status of the international community. It cited

> the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive conventions of this type has [*sic*] already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations – all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.[85]

9.5.1 Object and purpose test

The Court, in its Advisory Opinion, sets out in clear terms the criterion according to which States can make admissible reservations to the Genocide Convention and other multilateral treaties, and presents at the same time guidelines which other States parties may use in determining whether to accept such reservations or not, that is, the criterion for determining the validity and the legal effects of reservations. This scheme has been adopted by the VCLT in its Article 19(c).[86] In discussing that criterion, the Court states:

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[84]Coccia, *supra* note 11, at 6.

[85]ICJ Genocide Case at 21–2.

[86]Coccia, *supra* note 11, at 6; Chinkin, *supra* note 36, at 67–8; Rosalyn Higgins, *Introduction*, *in* HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS XV, XXIII (J. P. Gardner ed., 1997); Catherine Redgwell, *The Law of*

> The object and purpose of the Convention thus limits both the freedom of making reservations and that of objecting to them. It follows that it is the *compatibility of a reservation with the object and purpose of the Convention* that must furnish the criterion for the attitude of a State in making the reservation on accession, as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[87]

The "object and purpose" test requires that a distinction be made between different treaty obligations and provisions. A distinction between the "core" obligations of the treaty, which constitute the *raison d'être* of the treaty, and other obligations would be necessary. This task, however, is by no means a simple one, because it would be conducted by way of ordinary means of interpretation.[88]

Lijnzaad suggests that if we mean, in applying the "object and purpose" test, to achieve the ultimate goal sought by the treaty, then our attention should not be focused on the means by which States are to seek that goal, because States differ regarding the means whereby they can achieve the goal. "States may make reservations and indicate that they still intend to realize the treaty's object and purpose albeit by other means."[89] "It would seem to serve no purpose at all", Lijnzaad argues, "to condemn reservations in cases in which States claim to achieve the same end by other means."[90] Further, "it may be that emphasizing the obligation of result and thereby perhaps being flexible with the explicit obligations of means ... may contribute to universality, as a difference of opinion on the ways to achieve a goal does not necessarily conflict with the integrity of the treaty".[91]

In general, States parties to human rights conventions are permitted to make some reservations, but not unconditional ones. These reservations have to be made under certain circumstances and are subject to certain conditions. For instance, Article 4 of the ICCPR stipulates that States parties are allowed to derogate from some of the rights enshrined in the Covenant and, at the same time, prohibits derogations from some of the Covenant rights. In this connection, Imbert suggests that what determines whether a right or an article is subject

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Reservations in Respect of Multilateral Conventions, in HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 3, 5 (J. P. Gardner ed., 1997).

[87]ICJ Genocide Case at 24.

[88]LIJNZAAD, *supra* note 9, at 83.

[89]*Id.* at 93.

[90]*Id.*

[91]*Id.*

to reservations is not whether it is derogable or not; it is rather whether such a reservation is compatible with the object and purpose of the Convention itself.[92]

So far as the determination of the validity of reservations to multilateral treaties is concerned, there seem to be two main views, arising from different perspectives. One school of thought bases its assessment of the validity of a reservation on the "opposability" of such a reservation: that is, the reaction of other States parties is the criterion for determining the validity of a reservation. The second point of view considers that whether a reservation is compatible with the object and purpose of the treaty or not, regardless of how other States parties react to such a reservation, determines the validity and admissibility of that reservation.[93] Redgwell maintains that the first point of view depends on the traditional view which calls for unanimity in the adoption of multilateral treaties where each State's sovereignty is preserved by the counting of its voice in the process of ratifying and codifying such treaties, whereas the second point of view depends on the Advisory Opinion of the International Court of Justice in the Genocide Case which produced the compatibility test.[94]

The Special Rapporteur suggests that there is a dual control machinery for evaluating the validity of reservations made to multilateral treaties. On the one hand, the HRC, as a monitoring body, has the responsibility, though not an exclusive one, for examining the permissibility of reservations made to human rights instruments. This has obviously to be conducted within the context of the object and purpose test. On the other hand, the States parties to a treaty carry out the other part of permissibility control in reacting to the reservations made by the reserving state.[95]

However, the ILC expresses a different point of view regarding the control machinery from that conceived by the Special Rapporteur. It asserts that, at the international level, the monitoring bodies cannot be, or more accurately are not, vested with adequate powers to function as effectively as those operating at the regional level. Therefore, only the States parties to a treaty can "proceed to determine the permissibility of reservations, their consent

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[92]Imbert, *supra* note 46, at 93–4.

[93]ILC Report, *supra* note 22, at 97 n.186; Catherine Redgwell, *Universality or Integrity: Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y.B. INT'L L. 245, 263 (1993).

[94]Redgwell, *supra* note 93, at 263.

[95]ILC Report, *supra* note 22, at 107–8, para. 87.

being the linchpin of the law of treaties and the foundation of the principle pacta sunt servanda".[96] In the same context, Mr Pellet states that

> from the standpoint of the reservations regime, the truly special nature of the 1966 Covenant on Civil and Political Rights and the European and Inter American Conventions on human rights, as well as many instruments of more limited scope, is not that they are human rights treaties, but that they establish bodies for monitoring their implementation. Once such bodies are established, they have, in accordance with a general legal principle that is well established and recognized in general international law, the competence that is vested in them by their own powers. This is the only genuinely convincing argument in favour of determination of the permissibility of reservations: these bodies could not perform the functions vested in them if they could not determine the exact extent of their competence vis-à-vis the States concerned, whether in examining applications by States or by individuals or periodic reports or in exercising consultative competence.[97]

Although the advent of the "object and purpose" test by the Court constituted a landmark for some commentators, since it serves as a criterion for determining the validity of a reservation made to a treaty, nevertheless there are some who have criticized it, on several accounts. Koh, for instance, writes that

> the International Court did not elaborate on the object and purpose test, and in particular, failed to resolve three fundamental issues: first, the proof of the existence of an object and purpose to the treaty; second, the identity of the party or arbiter who determines the object and purpose; and third, the related question of the compatibility of any given reservation with the object and purpose of the treaty.[98]

These, however are questions to which very comprehensive answers might be given. All that needs to be said is that some degree of flexibility and leeway is a necessary condition of the optimum working of any reservation regime. This reflects, and is a result of, the very fact that multilateral treaties, and in particular human rights treaties, are subject to different interpretations and understandings.

9.6 Effects of Reservations

What effects might reservations have on other states' obligations? Can other states modify their obligations simply because the reserving state had modified its attitude towards certain obligations? What effects do reservations have in shaping the treaty relations between States parties to a treaty? What if the reservations were incompatible? Apparently, because of the absence of the principle of reciprocity in human rights instruments, and because individuals, not states, are to be affected by any change of states' obligations, states cannot

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[96] *Id.* at 119–20, para. 135.

[97] Pellet, *supra* note 3, at 65–6, para. 206.

[98] Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71, 85 (1982).

modify their own obligations under human rights treaties simply because one or more of the States parties have made reservations to some provisions of a human rights treaty.[99]

9.6.1 The principle of reciprocity

Lijnzaad expresses a somewhat different point of view with regard to the absence of reciprocity in human rights treaties. She suggests that, bearing the words of Article 21.1 of the VCLT in mind, reservations would entail changes in treaty relations between the reserving State and other States parties by creating reciprocal acts and counter-acts between them.[100] When a State expresses its reaction, whether of acceptance or objection, to a reservation made by another State party, it is, in fact, doing so by way of reciprocation of the act performed by the reserving State. As a consequence, the treaty relations between the reserving State and other States parties are clearly affected and modified by reservations and acts subsequent to them. This implication has an effect on the claim that reservations to human rights treaties entail inequality between the reserving States and other States parties, which we discuss below.

The HRC, in its General Comment, concluded that although the VCLT lays down the definition for reservations and explains the object and purpose test, "its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservation on human rights treaties".[101] The Committee establishes this account on the basis that human rights treaties "are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41."[102] In this connection, the United Kingdom criticizes the Committee's account about the applicability of the Vienna reservations regime to human rights treaties and describes it as inadequate. It suggests that the Committee's account was based on inaccurate assumptions and failed to consider the following facts. First, the reservations regime set by the ICJ in the Genocide Convention case was not grounded on the reciprocity notion. Second, other international human rights bodies do not share Committee's view. For instance, the European Court of Human Rights, in relation to the ECHR, ruled that this Convention "comprises *more than* mere reciprocal engagements between Contracting States. It creates *over and above a network of*

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[99]Imbert, *supra* note 10, at 33.

[100]LIJNZAAD, *supra* note 9, at 66.

[101]General Comment No. 24(52), para.17.

[102]*Id.*

mutual bilateral understandings, objective obligations which in the words of the preamble benefit from a collective enforcement." Third, even under the provision of Article 41 of the Covenant, States parties are entitled to evoke the Covenant and bring complaints against violating states regarding their practice relating to individual human rights. This obviously demonstrates that "in a very real and practical sense even the substantive provisions of the Covenant are indeed regarded as creating 'a network of mutual bilateral undertakings.'" Finally, given that the Committee recognizes the rights vested by the Vienna Convention, in States parties to the Covenant in relation to the reservations which are compatible with the object and purpose of the Covenant, there is no reason to deny these rights to the States parties with regard to what might be considered incompatible reservations. Therefore,

> given ... that the bilateral rights and general interests of other parties are ... directly affected, the United Kingdom regards it as a self-evident proposition that the reaction of those parties to a reservation formulated by one of them is of direct significance both in law and practice. In short, the legal effect of any particular reservation to a human rights treaty is an amalgam of the terms of the treaty and the terms and import of the reservation, in the light of the reactions to it by the other treaty parties and in the light of course of any authoritative third-party procedure that may be applicable.[103]

9.6.2 The issue of inequality

So far as the issue of inequality between the reserving State and other States parties is concerned, Imbert suggests that the absence of reciprocity in human rights treaties might lead to inequality between the reserving State and other States parties to that treaty. This, he argues, occurs where States that do not enter reservations to a treaty are under an obligation to comply with their undertakings under the provisions of the treaty, including those provisions which were subject to reservations by another State party.[104] This argument, however, can be contested. First, a State party, when making reservations, does not do so merely because it wishes to derogate or exclude itself from some provisions of the treaty, but rather, it resorts to reservations as a consequence of the existence of some difficulties that might hinder it from adopting and applying the treaty in full. Thus, it prefers to ratify or accede to a treaty and make some reservations to some of its provisions that it cannot apply in the future. Secondly, although it appears at first glance that this proposition might constitute a counter-act to the reserving State's act of reservations, and might lead to the undermining of the treaty as a whole, a State party which conceives the reservations made by another State party as detrimental to its commitments to the provisions of that treaty can resort to reservations to the same provisions. However, it is hardly conceivable, practically speaking, that a State party to a human rights treaty will be affected by reservations made

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[103]US & UK Observations, *supra* note 28, at 424–5.

[104]Imbert, *supra* note 10, at 34.

by another State party because, admittedly, the latter's compliance or non-compliance with its undertakings under the treaty would affect only those individuals under its jurisdiction. It is true that treaty relations might be reformulated between the reserving State and other States parties, especially objecting States,[105] but only with respect to the provisions to which reservations have been made.[106] Apart from that, States' undertakings towards individuals and towards other non-reserving States would not be affected in any way by such reservations.[107] Therefore, Pellet asserts that "it is illogical to suggest that each contracting party should consent to be bound only because the others will do likewise, since its obligations are not the counterpart of those assumed by the others".[108] In this connection, Mr Pellet, in his Second Report, puts forward the suggestion that

> once the reservation [footnote omitted] has been made, article 19 and subsequent articles of the Vienna Conventions guarantee the equality of the contracting parties in that:
> – The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se* [109]... and,
> – These other parties may formulate an objection and draw whatever inferences they see fit.
> However, by virtue of article 20, paragraph 4, the objecting State may restore the equality which it considers threatened by the reservation by preventing the entry into force of the treaty as between itself and the reserving State. This puts the two States in the same position as if the reserving State had not expressed its consent to be bound by the treaty.[110]

The Court, in its Advisory Opinion in the Genocide Case, dismissed any claim of inequality should a State party to a treaty enter reservations. It stated that "in such a convention the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention". Consequently – and more importantly – "in a convention of this

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[105]*See* Coccia, *supra* note 11, at 26.

[106]In this regard, Sieghart states that "where one State makes a reservation, it is open to other States to say that, to that extent, they will not be bound *vis-à-vis* the reserving State by that part of the treaty by which the reserving State itself will not consent to be bound, but none of this affects the obligations of non-reserving States towards each other". PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 37 (1990).

[107]*See* ILC Report, *supra* note 22, at 103, para. 74.

[108]Pellet, *supra* note 3, at 43–4, para. 162.

[109]Italics added.

[110]Pellet, *supra* note 3, at 43, para. 161. In the same direction, according to the Committee's General Comment, the International Court of Justice ruled in its Advisory Opinion in the Genocide Case that "a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State". General Comment No. 24(52), para. 16.

type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties".[111]

Mr Pellet, the Special Rapporteur, went even further, in the International Law Commission's Forty-Ninth Session, in effectively dismissing the argument of inequality by stating that "the argument about a break in equality between the parties to normative treaties, a break allegedly caused by the fact that reservations could be entered, was just as specious: the inequality would be much more flagrant between a State party and a State which was not at all a party to a normative treaty".[112] Pellet looks at reservations from a different angle. He puts forward the view that "the formulation of reservations would seem to constitute proof that States take their treaty obligations seriously; and gives them an opportunity to harmonize their domestic law with the requirements of the convention while obligating them to abide by the most important provisions".[113]

In this respect, the practice of the European Commission of Human Rights with regard to the admissibility of the *pfunders/* Fundres case: *Austria v. Italy* illustrates the nature of the obligations as well as the treaty relations among States parties produced by human rights treaties. In that case, Italy had disputed Austria's right to "initiate any allegation before the Commission against her on any grounds or events" before the former's acceptance of the Convention. Furthermore, Italy

> based her contention on two grounds: first, "that in the intervening period there was no mutuality of obligation between her and Austria under the Convention; and second, that it would be inequitable to admit the Austrian application, since Italy would be precluded from bringing any counterclaim against Austria in respect of facts or events in the intervening period, when Austria was not yet bound by the Convention.[114]

The Commission, in reply to Italy's contention, asserted that

> since the purpose of the contracting States was not to establish a collective guarantee, an applicant State under Article 24 is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe; therefore neither reciprocity, nor equivalence of rights, was a condition of application.[115]

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[111]ICJ Genocide Case at 23.

[112]ILC Report, *supra* note 22, at 103, para. 74.

[113]Pellet, *supra* note 3, at 29, para. 120. *See also* Connors, *supra* note 34, at 90; McBride, *supra* note 36, at 124.

[114]J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 341–3 (1987).

[115]*Id.*

9.6.3 Effects of compatible reservations

The Court further maintains that it is for each State party to evaluate, within the framework of the object and purpose test, the validity of a reservation made by another State party and, therefore, its attitude towards that reservation would determine the legal effect of such a reservation between itself and the reserving party. Furthermore, the Court notes that

> as no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State.[116]

Clearly, the effect of compatible reservations are mainly determined by the reactions of States parties to a treaty against those reservations by one of them. Articles 20(4) and 21 of the VCLT explain the consequences of accepting or objecting to reservations made by a State party to a treaty. Where a State party accepts a reservation entered by another State party, the treaty, including the provision to which the reservation was made, would be in effect between the two parties. If the reservation was objected to, the treaty would be in effect between the reserving State and the objecting State save in the case of the provision to which reservation was made.[117]

9.6.4 Effects of incompatible reservations

The question of the effects of impermissible or incompatible reservations perhaps demands more explanation and reflection than that of compatible reservations. For this question involves a variety of possibilities and implications required to define the status of the State party which makes this type of reservations. To discuss these effects, we might begin with Bowett's assertion that the act of ratification of a treaty by a State party which, at the same time, attaches some reservations to such an act involves some sort of contradiction. On the one hand, the State, by conducting the act of ratification, expresses its will to be bound by the treaty. On the other hand, by attaching some reservations to some provisions of the treaty, it expresses its will not to be bound by some of the treaty's provisions.[118] To deal with this contradiction, Bowett suggests that one should investigate the intention of the State concerned. For him, because the State intended to become a Party to a treaty, the

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[116]ICJ Genocide case at 26.

[117]In this context, consider the objections made by States parties to the Women's Convention to reservations made by other States parties. Chinkin, *supra* note 36, at 75–6; Connors, *supra* note 34, at 96.

[118]D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67, 75–6 (1977).

former should prevail and the act of reservation has no effect on the State's undertakings under the treaty: that is, the act of reservation is severable from the act of ratification.[119] Furthermore, Bowett explains that

> it is essentially a question of construction as to what the State really intended. If it can be objectively, and preferably judicially, determined that the State's paramount intention was to accept the treaty, as evidence by the ratification or accession, then an impermissible reservation which is not fundamentally opposed to the object and purpose of the treaty can be struck out and disregarded as a nullity. Conversely, if the State's acceptance of the treaty is clearly dependent upon an impressible condition of which the terms are such that the two are not severable and the reservation is in fundamental contradiction with the object and purpose of the treaty, then the effect of that impermissible and invalid reservation is to invalidate the act of ratification or accession, nullifying the State's participation in the treaty.[120]

This involves two main concerns that must be examined carefully. First, the question of who is to determine whether a reservation is impermissible or not and, second, what effect such a view has on States which consider becoming parties to treaties, particularly human rights treaties. The first concern has been dealt with above in the discussion of the validity of reservations. The second will be examined below when we consider the HRC's perspective in this regard and the reactions of some States parties to its General Comment. But let us now elaborate further on Bowett's account by examining the European case-law dealing with the effects of impermissible reservations. In the *Belilos* case, the Court considered the Swiss Government's intention to be bound by the provisions of the ECHR as prevailing over its interpretative declaration, or as the Court viewed it, its reservation, to Article 6 of the Convention.[121] The Court concluded that the declaration made by Switzerland "must be held invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."[122] It is to be noted here that this judgment by the European Court marks a precedent in this respect and was grounded in the words of the European Convention rather than principles of treaty law.[123]

The HRC indicates in its General Comment that "the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant

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[119]*Id.*

[120]*Id.* at 77.

[121]Redgwell, *supra* note 93, at 266.

[122]*Belilos* case at 487, para. 60.

[123]Redgwell, *supra* note 93, at 266.

will be operative for the reserving party without benefit of the reservation."[124] In this regard, the United Kingdom, although agreeing with the Committee that this severability might work properly in some cases, contemplates that subjecting states to obligations which they have explicitly expressed their unwillingness to observe may discourage them from ratifying these treaties.[125] Likewise, the United States observes that the position taken by the Committee in this regard is regrettable because it is clearly in contradiction with the "legal practice and principles". The United States envisages that if such a policy had been applied to the reservations made by the US government to some provisions of the ICCPR, it would have resulted in nullification of the ratification from the outset. Furthermore, even in the Vienna reservations regime there can be found no basis for the Committee's conclusion. According to that regime, particularly Articles 20 and 21, reservations made by a State party and the objections to them made by other States parties might result either in the treaty being applied between the reserving State and the objecting State except for the provisions to which the reservations were made, or in the treaty as a whole being ineffective between these States.[126] No other consequence can be contemplated as a result of a State party entering reservations to a human rights treaty and objecting to such reservations made by other States parties.[127] In accordance with Article 20(4)(c) of the VCLT, it is for the objecting State or States to determine which of the consequences should ensue. This is all based on the fundamental principle that no state can be bound by a treaty without its consent.[128]

9.7 Concluding Remarks

It must be admitted that the nature of treaties on human rights are such that, practically speaking, it is very difficult to eradicate completely the conflict between the two notions involved, namely, universality and the integrity of the treaty. This dilemma is obviously appreciated by Lijnzaad when she states that "universality and integrity are important goals, but seem to be interrelated in a unfriendly balance, in which achieving the one is necessarily at the expense of the other. Taking universality and integrity to be abstract values will not lead to greater insight into ways in which the problems concerning incompatible reservations may be solved."[129]

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[124]General Comment No. 24(52), para.18.

[125]US & UK Observations, *supra* note 28, at 426.

[126]*Id.* at 423–4.

[127]*Id.* at 424.

[128]*Id.*

[129]LIJNZAAD, *supra* note 9, at 398.

The reason for this is that the issue of reservations involves two different fields of law, the international law of treaties on the one hand and international human rights law on the other, each of them possessing "different orientations, and a different structure".[130] Thus, the ILC in its 49th Session, in connection with the possibility of applying the Vienna regime on reservations to human rights treaties, concludes that "because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty".[131]

The ILC itself stresses its conviction that reservations clauses in the Vienna Convention are applicable to all treaties and, at same time, reconfirms the legitimacy of the "object and purpose" test for determining the validity of reservations.[132] From both a theoretical and a strict legal view, treaties are formulated to be respected in their entirety. However, although reservations are a "necessary evil resulting from the current state of international society", they "reflect a fact, namely that there are minorities whose interests are as respectable as those of majorities ... . More positively, they are an essential condition of life, of the dynamics of treaties that promotes [*sic*] the development of international law in the process."[133]

As was mentioned above, human rights instruments are concluded mainly in order to safeguard certain rights and freedoms for individuals *vis-à-vis* their governments. Thus, the notion of maintaining those instruments involves regulating the relationship between individuals and their governments, a task which has been exclusively carried out by the states themselves. It has customarily been a component of a state's sovereignty to treat its citizens in the way it considers appropriate. Thus, the transfer of such a power to international bodies had to be balanced by a machinery whereby the sovereignty of states would be to some extent preserved. Also, the power to make reservations represented a means whereby a state could avoid abiding those provisions of a human rights treaty which infringed its sovereignty.[134]

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[130]*Id.*

[131]ILC 49th Session 12 May–18 July 1997, A/CN.4/L.540, 4 July 1997, Draft Resolution of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, 2, para. 2.

[132]Report of the International Law Commission on the Work of its Forty-Ninth Session 12 May–18 July 1997, (A/52/10), 126, Preliminary Conclusions of the International Law Commission on Reservations to Normative treaties Including Human Rights Treaties, 126, para. 1.

[133]Pellet, *supra* note 3, at 28, para. 119. Footnotes omitted.

[134]LIJNZAAD, *supra* note 9, at 402.

It is important always to bear in mind that human rights treaties have to deal with different social, political and economic traditions. Thus, as Redgwell points out, "one legislative approach to reconciling such diversity is not to require uniformity of approach but to set minimum standards which must be adhered to by all States, with provision for upward derogation in prescribed circumstances".[135] Redgwell also draws our attention to the problem we might encounter in defining those "minimum standards" which would be acceptable to all States parties. As a solution, she adopts a system proposed by Cassese with regard to the Convention on the Elimination of All Forms of Racial Discrimination of 1966, where he states that "the best system is undoubtedly one where the provisions of the Convention to which reservations may not be made are appended to the Convention, thereby indicating the irreducible minimum for participation in the treaty regime".[136] "Where it is possible", Redgwell notes, "to identify the essential provisions, or package of provisions, necessary to be accepted to preserve the integrity of the treaty, this is clearly an attractive solution."[137]

In conclusion: consideration of the reservations regime addressed in this chapter is extremely useful as regards the rest of the study, since it provides a useful means of accommodating the different points of view regarding the interpretation or understanding of human rights treaties. This reservations regime, along with the other machinery discussed in the previous chapter, represents a successful means of minimizing the possibility of disagreement or disinterest on the part of some states in ratifying or acceding to human rights treaties. Again, it must be admitted that some degree of sacrifice of one of the two considerations, that is, universality and integrity, must be expected. Hence Redgwell's assertion that "it was the reconciliation of competing objectives, namely, maximizing treaty participation by States with diverse cultural, economic and political conditions without sacrificing the integrity of the treaty, which led the ICJ to devise the object and purpose test in the first place. The ambiguity of the test may engender the flexibility necessary to enable States party to a convention to adjust gradually and progressively to rules which may not be precise in their application nor interpreted consistently over time."[138]

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[135]Redgwell, *supra* note 93, at 280.

[136]*Id.* at 282.

[137]*Id.*

[138]*Id.* at 279. *See also* Redgwell, *supra* note 86, at 3.

CHAPTER 10

CONCLUSION

There is no dispute regarding the fact that contemporary international law is, as this study has shown, based mainly on Western values and conceptions. But a question might arise: why have non-Western countries, with different cultures and traditions, ratified or acceded to the instruments that embody such Western values and conceptions, which are to a large extent in conflict with their own values? At the time of the formation and ratification of such instruments, political considerations played an important role in influencing the attitude of states towards the issue of human rights. As time progressed, the newly independent countries, in order to acquire international recognition and legitimacy, had to follow the general current of international policy and not depart from the guidelines set down by the superpowers which govern their relations with different parts of the world. Another reason for influencing a state's attitude in the direction of accepting human rights instruments has been financial and trade factors, which powerful states have used as a weapon in order to force other states to sign human rights treaties. Nevertheless, at the Vienna Conference in 1993, the convening states expressed their acceptance of the idea of universal human rights and consented to accept the political, and even legal, implications of such an idea, though they re-emphasized the existence of cultural specifity.

Therefore, even those states which claim relativity may accept international human rights treaties in theory, for the reasons stated above. But problems emerge where these treaties come to be applied in practice. Also, as was shown earlier in this study, those states cannot disregard the domestic considerations which sometimes constitute the *raison d 'être* for their governments. Thus, the quest for universality might overcome obstacles relating to acceptance or recognition by different states. In other words, states might not dispute the acceptance of international human rights documents. Nevertheless the implementation of human rights standards might run up against problems. Thus, Falk states, "it will be impossible for human rights norms and practices to take deep hold in non-Western societies except to the partial, and often distorting, degree that these societies – or, more likely, their governing elites – have been to some extent Westernized".[1]

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[1]Richard Falk, *Cultural Foundations for the International Protection of Human Rights, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44, 45 (Abdullahi Ahmed An-Na'im ed., 1992).

As is often argued, differences of opinions are inevitable regarding an issue such as human rights because it involves notions which, in themselves, are vulnerable to different interpretations even within one society. Notions such as morals, values, religion and even politics have a powerful impact on defining human rights and establishing the context in which they can operate. Differences will exist so long as such notions are held. Therefore, it is unthinkable that a universal set of human rights could be adopted applicable in its entirety to all traditions and cultures. The only possibility for such an approach would be in a world void of all values, morality, religion or culture. This is impossible to conceive. This is not an academic statement devoid of practical significance. Rather, it makes explicit the fact that agreement cannot be achieved in the matter of human rights unless real consideration is given to all the different major cultures and traditions in an endeavour to resolve the conflicts emerging therefrom. Unless it is realized that cultural differences exist with regard to the context and concept of human rights, conflicts relating to the idea of human rights will be unresolvable.

It has been argued in this thesis that the Islamic legal system, in particular, does not deal with the issue of human rights in the same context as does the international, or rather the Western, system. This, however, by no means implies that provision and respect for human rights is absent from Islamic law. It has been shown that the issue is provided for in a different context due to the different philosophy of justice that applies in such a system. This by no means implies that it is impossible to reconcile the differences and to reform the Islamic system. But such a reformation must, of course, occur within the Islamic system, in the sense that it must not detract from the general principles or underpinnings of such a system. This is a question of methodology and of willingness on the part of both sides – that is, international lawyers and those concerned with the reformation of the Islamic system from within. As Rentlen says, that "other societies do not utilize a rights framework does not mean prima facie lack of respect for what Westerners express as rights".[2] Therefore, it is possible that "in depth inquiry into non-Western societies would reveal the existence of identifiable, parallel notions of rights, even in the absence of the language of rights".[3]

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[2]Alison Dundes Rentlen, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUM. RTS. Q. 514, 517 (1985).

[3]Adamantia Pollis, *Towards A New Universalism: Reconstruction and Dialogue*, 16/1 NETH. Q. HUM. RTS. 5, 14 (1998).

The absence from the Islamic legal system of a codified system of human rights was caused by the fact that, throughout its history, there has been no separation between religion and state. The entire conduct of the head of state has been in conformity with the principles of Islamic law. Further, this conformity has been determinative of the legitimacy of the Islamic government. Since there were guarantees within Islamic law of personal freedoms and rights, and because the conduct of the government had to be in conformity with those principles, no attempt was made by Muslim jurists and scholars to codify or deal with these freedoms and rights as a separate issue. Thus, *Shari'a* rules constituted a check on a state's conduct in its relation to the people. However, looking at the contemporary situation of most Muslim states, one sees that a separation exists in practical terms between religion and state, though this is not officially admitted. This state of affairs, in the absence of a check on these states' treatment of their peoples which the Islamic legal system provides, necessitates that an international system of supervision be established regarding their conduct. Thus, although there are guarantees of human rights within the Islamic system, provided that the system is applied in its entirety and properly, non-compliance with the rules of the system, and misuse on the part of Muslim governments of Islamic principles, may justify calls for international supervision of the practices of such governments. However, such supervision must take into consideration the principles of Islamic law and its conception of human rights.

It is regrettable that some Muslim governments pretend to be applying *Shari'a* rules in their countries. What is being applied is, in fact, only part of Islamic law, that is, corporal punishment and the death penalty. Islamic law is concerned with far more than amputation and beheading. Islamic law must be applied in its entirety, since social justice is its main objective. Securing and providing social justice is the *raison d 'être* of the Islamic criminal justice system. This system, in order to attain its ultimate objective, must be applied in its entirety. We do injustice to the Islamic system if we apply only one part of it and ignore others. The rules of the Islamic criminal system are designed to be applied in a society in which the government discharges its duty of securing the ingredients of social justice – economic, political, social and moral.

As this study has shown, the Islamic legal system accommodates most international human rights standards, and these standards are not alien to the principles of Islamic law. This accommodation can be carried out by interpreting those standards via the flexible sources of Islamic law, particularly those which have as their sole objectives changing circumstances and the consideration of people's interests. This process requires that both Muslim jurists and those who are concerned with international human rights law take part in such an

endeavour. This study has shown that in many cases, conflict between international organizations or bodies and Muslim states is caused by ignorance on the part of the former of the real attitude of Islamic law towards certain human rights. Therefore, it is only through mutual and trust-based dialogue that can we develop a better understanding, whereby conflicts and differences can be minimized and, eventually, the quest for universality can progress. The impact which dialogue between different cultures and systems can have must not be underestimated. This has been shown even with regard to the Republic of Iran, which is considered by international human rights organizations to be a frequent violator of human rights and which declared, in its Second Report to the Human Rights Committee,[4] that "the Laws and regulations of the Islamic Republic of Iran generally remain consistent with the rights set forth in the International Covenant on Civil and Political Rights". This, according the Lawyers Committee for Human Rights, which maintained that "[t]he major achievement of the Special Representative's visit to Iran and his dialogue with government officials has been the Iranian government's public acknowledgement of the relevance of international standards to the human rights situation in Iran", indicates that the Iranian authorities "have abandoned publicly their resort to the claim that international human rights standards have no relevance in the Islamic Republic. This is an important affirmation of the principle of the universality of human rights standards."[5]

Thus, the quest for universality in human rights dictates that different cultures and systems have a role to play in the formulation of the documents containing those rights. What impedes such a quest is the language and context within which Samuel Huntington, for instance, treats the differences between civilizations and traditions. No wonder that he entitled his book the *Clash of Civilizations*. In this book, Huntington treats Western and non-Western civilizations as diametrically opposed and impossible to reconcile. He maintains, regarding the issue of human rights, that imposing the notion of human rights on non-Western countries amounts to a victory for Western civilization. Thus, he argues, because it allows consideration of cultural relativity, the Vienna Declaration of 1993 is "in many respects weaker than the Universal Declaration of Human Rights". Further, because the Western nations "were ill prepared for Vienna" they "made more concessions than their opponents". In conclusion, he describes such an event as constituting a "decline in the

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[4]CCPR/C/28/Add. 15.

[5]THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, LITTLE DISCERNIBLE PROGRESS IN RESPECT FOR HUMAN RIGHTS IN IRAN DESPITE EIGHT YEARS OF INTERNATIONAL SCRUTINY 3–4 (1992).

power in the West".[6] A perspective such as this impedes rather than assists the quest for universality in human rights.

Such a quest demands that the rights provided by various international human rights documents have legal rather than merely political force. There is no doubt that treating human rights as a political issue would adversely affect their universal acceptance and implementation. Treating human rights politically would render them vulnerable to different political interests, and thus the call for the application of human rights would be dependent on a state's own desires and interests. As has been argued throughout this study, the generality of human rights treaties allows for different understandings and interpretations. This characteristic of human rights treaties, however, has been misused by certain states, particularly those who claim to be the protectors and advocates of human rights and freedoms all over the globe. Regrettably, human rights have been used by, for instance, the United States in different situations in different, even contradictory, directions. Where upholding human rights might lead to the attainment of its interests, the issue is raised and acted upon accordingly, even if the actions taken in this regard result in the deprivation of the people of a particular country, such as Iraq, Libya or Sudan, of their basic rights such as the right to life or to freedom from want and from hunger. An expression of this philosophy was offered by Richard Nixon, the former US president, when he stated that "[o]ur values, derived from our religious tradition, demand public as well as private virtue. This does not imply an unlimited commitment to right every wrong, but does involve a moral imperative to use our awesome capabilities as the world's only superpower to promote freedom and justice in areas where our interests and our ideals coincide."[7] Such a philosophy has been very evident in relation to the USA's uncertain and unstable policy towards China.

However, the process of legally enshrining human rights must take into consideration the difficulty involved in dealing with a multiplicity of sovereign states. It is possible to hold states legally responsible for violations of human rights in certain cases relating to gross and flagrant violations of human rights which are in breach of Articles 55 and 56 of the UN Charter. But not in every case can it be maintained that states are legally bound by international human rights documents. This difficulty stems from the frequently adopted argument of a plural world, in which differences and conflicts inevitably exist. Therefore,

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[6]SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 196 (1996).

[7]RICHARD NIXON, SEIZE THE MOMENT: AMERICA'S CHALLENGE IN A ONE-SUPERPOWER WORLD 33 (1992).

the quest for universality must seek means of accommodating these *differences.* Interpretation, through the principle of the margin of appreciation, and reservations should be given considerable thought if an honest and serious call for universality is being made. Affording human rights legal protection, however, always involves reconciling two issues, namely, the quest for universality and the integrity of human rights treaties. There is inevitably a challenge involved in striking a fair balance between international human rights provisions on the one hand and, on the other, different cultures. The increase in the number of nation-states has brought with it a concomitant increase in cultures and legal systems. Deciding how to define the differences between these is half the battle. Therefore, it is argued that although conferring upon international human rights standards a legal power would render them more effective and powerful, it must not be forgotten that there are some areas of conflict between those standards and domestic laws that are irreconcilable. Thus, providing for methods of accommodation by legal provisions is equally important. This can be done by recognizing a more effective role for both the principle of the margin of appreciation and the issue of reservation. In this connection, the jurisdiction of the European Court of Human Rights is of particular significance as regards the construction of a framework within which similar phrases in the international instruments can be interpreted. European case-law undoubtedly offers guidelines that should be taken into account when considering and applying the general terms enunciated in the international instruments on practical cases.

The European Convention does not set out uniform standards for the ratifying states. It is a "subsidiary" system for the protection of human rights. The European Court acknowledges the superiority of national institutions in making some of the judgments required to interpret and apply the Convention. Even though there is a considerable degree of cohesion among the European States and an agreement about basic rights, detailed understandings differ quite widely. While retaining the ultimate right to assess the decisions of national authorities, the Court allows a "margin of appreciation" to them in exercising their responsibilities. Though it operates practically throughout the Convention, the margin of appreciation is not a uniform doctrine. It has been invoked most frequently in the application of Articles 8 to 11 of the Convention, which have a similar structure in that each Article sets out a right or rights in paragraph 1 and provides the conditions upon which a state may justifiably interfere with the right in paragraph 2. The margin of appreciation has been used both in defining what the rights are and in deciding whether interference with rights is justified.

The need to interfere with rights set out in Articles 8 to 11 arises because of the very width of the interest which they protect. The Convention States have decided that there are some circumstances in which it would be proper for a state to interfere with the exercising of a right to protect some other public interests. Within this category, a state may be faced with the task of reconciling clashes of rights – for instance, the right to respect for private life and the right to freedom of expression. While the language of "balance" is frequently used to describe the task of the Convention organs, it is not simply a matter of weighing equal considerations. The rights are fundamental and the recognition of this quality requires that the margin of appreciation be applied to provide the greatest protection when rights are being defined and to place on the state special burdens of justification for interference so that only truly necessary and minimum interferences are found to be permissible.

Thus, even in respect to the relatively coherent traditions of the European states, the Court has found that the protection of human rights allows for a measure of difference in the application of those standards to take into account moral and religious differences between states. It is unwilling to impose upon states with different approaches one solution or the other. This is why, as was indicated earlier, States parties were allowed the power of the margin of appreciation to accommodate and reconcile these differences.

If it is the case with one part, and only one part, of the international community that there is an agreement to leave a considerable "margin of appreciation" to the European states to develop their own understanding and interpretations of broad terms such as morality (though there are some cases in which the European Court has revised the judgments of domestic courts), we can predict the difficulties which are likely to occur if, by analogy, we apply this method to the international instruments. It is thus inevitable that, at the international level, where there exist a wider range of differences and even clashes between different cultures and traditions, states be granted a wider margin of appreciation in order to accommodate some, at least, of the differences between national traditions. The analogy is often drawn between regional human rights treaties and international human rights treaties. It is therefore all the more important that there should be no confusion of thought regarding the position occupied by international treaties in the regional systems. It is clear that failure to appreciate the true position may lead to the application to the international system of erroneous principles.

A more useful element of any attempt to accommodate the different understandings and interpretations of the international human rights instruments – more precisely, the relatively broad terms and phrases contained in them – is the creation of machinery suitable for

interpreting those instruments and the provision of more detailed, though of course not unlimited, state powers for providing effective protection for the rights enumerated therein. This approach should not interfere with the freedom of individual states to use their discretionary powers to define the relevance of such provisions, terms and phrases to their respective traditions. This is a presumption which would resolve conflicting interpretations of the provisions of international human rights instruments in favour of that which gives efficacy to the provisions. This is so because it cannot be assumed at the outset that the present structure of international human rights law must be the permanent framework of action, for it may well be that the objectives cannot be realized within such a framework. Changes in the structure may thus appear necessary. The establishment of human rights machinery via a process of accommodating different legal and cultural systems, culminating eventually in an act of voluntary assent, may be more difficult to achieve than a policy of imposing a set of rules applicable to various traditions, but its permanence will be assured. It will rest upon the solid foundation of world opinion, which will have been formed out of the general practice of Member States of the United Nations. This is due to the fact that what the UN Charter has provided for in Article 1 is "international co-operation" rather than a compulsory regime for "promoting and encouraging respect for human rights and fundamental freedoms". It is the diversity and plurality of international society which requires such a co-operative, rather than compulsory, approach to an effective universal system of human rights.

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